2022

My Body, My Choice?: Criminal Abortion Law in a Post Roe-World

Bree McKenna

MY BODY, MY CHOICE?: CRIMINAL ABORTION LAW IN A POST *ROE*-WORLD

Briana McKenna

Intro

Roe v. Wade[1] is the single most important case in American abortion law jurisprudence. The case is widely known for holding that the United States Constitution recognizes an individual right to have an abortion, at least in some circumstances.[2] The impact that *Roe* and its progeny had on constitutional law is obvious, but these cases had major implications on criminal law as well. Prior to the decision, abortion was regulated through criminal laws enacted by the states.[3] While states still regulate abortion today, they must do so within constitutional bounds. However, Roe is currently at risk of being overturned or modified;[4] states may soon be free to regulate abortion as they please, without regard to constitutional rights.

The purpose of this paper is to describe what the state criminal abortion law landscape would look like in a post-Roe world. In the absence of Roe, the criminal abortion landscape is complex. At first glance, it may be difficult for a lay person to determine what the law is, when it becomes enforceable, who can be charged, and the associated penalties for a violation. Two types of criminal abortion laws that are worth focusing on are zombie laws[5] and trigger laws,[6] as these laws may become enforceable immediately after Roe is overturned or modified. While there is variation in the precise language and form of these laws, the substantive components are

---

[1] Roe v. Wade, 410 U.S. 113 (1973).
[2] Id. at 155.
[3] See Julia Jacobs, Remembering an Era Before Roe, When New York Had the 'Most Liberal' Abortion Law, N.Y. Times, July 19, 2018.
[4] Dobbs v. Jackson Women's Health Org., 209 L.Ed.2d 748 (U.S. 2021).
[5] Pre-*Roe* laws that were found to be unconstitutional but remain on the books. See Howard M. Wasserman, Zombie Laws, 25 Lewis & Clark L. Rev. ___, 10 (forthcoming 2022).
[6] Post-Roe laws that are set to become enforceable upon the overturning or modification of Roe. Daniela Santamarina, What Abortion Laws Would Look Like If Roe v. Wade Were Overturned, The Washington Post, Sept. 2, 2021.

quite similar: these laws each create near complete abortion bans with limited exceptions. In making this argument, my paper is structured as follows. Part I discusses the current constitutional abortion law landscape. Part II explores the looming threat to Roe. Part III provides an overview of what criminal abortion laws would be enforceable if Roe falls; this includes a look at federal abortion laws, zombie laws, and trigger laws that will take effect for the first time.

Part I: Current Constitutional Abortion Law Landscape

In order to understand where abortion law is headed, it is paramount to first understand the scope of abortion law as it stands today. *Roe v. Wade* was decided in 1973, nearly 50 years ago. Numerous Supreme Court decisions have since modified the abortion law framework, at times chipping away at the promised protections. An absolute right to abortion under all circumstances has never existed in this country, and it does not exist today.

The Supreme Court recognized a constitutional right to abortion in Roe.[7] In that case, a single pregnant woman and an intervening physician who had state abortion prosecutions pending against him brought a class action lawsuit challenging the constitutionality of Texas criminal abortion laws (Tex. Code Crim. Proc. Ann. arts. 1191-1194, and 1196) which prevented individuals from procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life.[8] The Court held that the choice to have an abortion was within the scope of the right to privacy guaranteed by the Fourteenth Amendment.[9]

However, despite the way the case is discussed in popular media, the Court did not recognize an absolute right to abortion. The Court acknowledged that a State could regulate

[7] Roe, 410 U.S at 155
[8] Id. at 117-121.
[9] Id. at 153.

abortion through narrowly drawn legislation aimed at vindicating legitimate, compelling state interests in the mother's health and safety and the potentiality of human life.[10] The Court recognized that the State has two "separate and distinct" interests: an interest in "preserving and protecting the health of the pregnant woman" and another in "protecting the potentiality of human life."[11] Each of these interests become compelling at a certain point during the pregnancy, and what is considered a constitutionally valid regulation on abortion differs depending upon the stage of the pregnancy.[12]

The state's interest in the mother's wellbeing becomes compelling after the end of the first trimester because up until that point, a woman is less likely to die from an abortion than she[13] is from a natural birth.[14] Prior to the compelling point, the decision to terminate is considered primarily medical, meaning that the attending physician and patient can determine that the pregnancy should be terminated without State regulation. After the first trimester, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[15] Examples of permissible state regulations include requirements as to the qualifications of the person performing the abortion and the facility in which the procedure can be performed.[16] The State's interest in potential life becomes compelling at viability[17] because that is the point at which the fetus could live a meaningful life

---

[10] Id. at 155.
[11] Id. at 162.
[12] Id. at 162-63
[6] In this case and other cases to be discussed in this paper, the Court discusses abortion as it relates to women and it uses she/her pronouns throughout its opinions. For convenience, I will follow the Court's lead here. However, it is important to note that nonbinary and female to male transgender men are also capable of becoming pregnant, and abortion laws impact them as well.
[14] Roe, 410 U.S. at 163.
[15] Id.
[16] Id.
[17] The point at which the fetus can live a meaningful life outside of the womb. Id.

outside of the womb. After this point, the State can regulate-- and even ban-- abortion except where it is medically necessary for the preservation of the life of the mother.

After applying the trimester approach to the facts of the case, the Court held that Art. 1196 of the Texas Penal Code was deemed unconstitutional as it swept too broadly: it did not draw a distinction between early and late term abortions, and it only allows a single reason for an abortion (for the purpose of saving the life of the mother). While the Texas law at issue was held to be unconstitutional, the trimester framework laid out in *Roe* left the door open for abortion regulations by states so long as the laws are within the constitutional parameters.

Post-*Roe*, states continued to make laws that toed the constitutional line, and these laws were routinely challenged through the courts. Twenty years later, the Supreme Court considered another abortion law challenge. Planned Parenthood v. Casey[18] involved a challenge to a Pennsylvania law that placed various limits on the availability of abortions; more specifically, the law required that a person seeking an abortion be provided with certain educational material and then wait 24-hour waiting before undergoing the procedure; created a mandatory spousal notification requirement; required minors to get informed consent from a parent before getting an abortion; and required Pennsylvania facilities that perform abortions to file detailed reports on the circumstances of all abortions.[19] The law included a medical emergency exception.[20] The Court expressly reaffirmed the core holding of Roe, which it explained has three parts:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the

[18] Planned Parenthood v. Casey, 505 U.S. 833 (1992)
[19] Id. at 843.
[20] Id.

> pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[21]

The Court decided to reaffirm these principles based on *stare decisis*; Roe still provided a workable framework, the factual underpinnings that supported the decision have not changed, and generations of women have come to rely on the promised protections.[22]

Despite the high praises the Court apparently gave to the Roe decision, the Court completely alters the test for the constitutionality of abortion laws. The Casey Court rejects the trimester framework, finding that it is not essential to the holding in Roe.[23] Instead, the Court holds that "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision [to have an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[24] The Court explains that an undue burden exists where a state regulation has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[25] The Court clarifies that the State is still allowed to make regulations that "express profound respect for the life of the unborn," meaning that regulations which try to persuade a woman seeking an abortion to rethink her decision are permissible.[26] The new test proves to be a high hurdle, as most of the challenged provisions survive constitutional scrutiny. The Court upholds the 24-hour waiting period, the reporting requirement, and the parental consent requirement (provided there is a judicial bypass procedure for the parental consent requirement, which there is under this statute).[27] The only provision that is struck down is the spousal notification requirement because it would prevent women who are

---

[21] Casey, 505 U.S. at 846.
[22] Id. at 854-861
[23] Id. at 873
[24] Id. at 874
[25] Id. at 877
[26] Id. at 877-78.
[27] Id. at 880-900

in abusive marriages from getting abortions.[28] Furthermore, the Court makes clear that it is the pregnant individual—not the husband nor the married couple as an entity—who has the right to have an abortion.[29]

The undue burden test significantly chips away at the protections promised by *Roe*. Whereas *Roe* seemed to provide near complete protection to a woman's choice to abort during the first trimester (States could only restrict abortions insofar as they put the health of the mother at risk), the undue burden test does not offer the same broad protections. Further, the Court in *Casey* fails to provide meaningful guidance as to what qualifies as an "undue burden," as what is considered a "substantial obstacle" may differ drastically depending on the composition of the Court. Constitutional law scholar Gillian Metzger explains the difference between the two tests:

> The *Casey* undue burden standard marked a shift from a bright-line test to a more subjective exercise in which judges determine the weight of a regulatory burden. Rather than simply striking down any regulations that impose more than a de minimis burden on first trimester abortions, judges must now examine the burden imposed by a regulation and determine if this burden is too heavy.[30]

Three out of the four provisions challenged in *Casey* survived the application of the undue burden test, sending the message to States that the new test had more bark than bite. Similar restrictions on abortion had been struck down under the *Roe* trimester approach.[31] After analyzing the way lower courts have applied the undue burden test, scholars Wharton, Frietsche, and Kolbert concluded that the test often fails to meaningfully protect the right to abortion that the Court claimed to reaffirm.[32] The scholars point out several mistakes routinely made by the lower courts in their application of the test: imposing unattainable evidentiary burdens on

---

[28] Id. at 894
[29] Id. at 896-98
[30] Gillian E. Metzger, Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence, 94 Colum. L. Rev. 2025, 2031 (1994).
[31] Id. at 2030.
[32] Linda J. Wharton, Susan Frietsche, and Kathryn Kolbert, Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey, 18 Yale J.L. & Feminism 317 (2006).

plaintiffs; upholding restrictions that are similar to the ones upheld in *Casey*, even if the record establishes a more burdensome effect; considering the restrictions from a privileged perspective instead of from the point of view of the affected women; viewing the abortion restriction in isolation from other compounding restrictions; and requiring that defendants admit an improper purpose.[33]

The Court has taken up abortion regulations on numerous occasions post-Casey, providing guidance as to the scope of protections and, at times, chipping away at those protections. Gonzales v. Carhart involved a challenge to a law that banned a type of abortion called intact dilation and evacuation, a method under which a doctor extracts the fetus in a way that is like pulling out the whole body.[34] Respondents presented evidence that intact D&E may be the safest method of abortion, as it decreases the risk of cervical laceration or uterine perforation, as well as reduces the risk that fetal parts will remain in the uterus; however, there is disagreement within the medical community.[35] The Court upheld the ban, reasoning that that since the law only applies to a specific method of abortion and medical uncertainty exists over whether the Act's prohibition creates significant health risks, it does not put an undue burden on a woman's decision to obtain an abortion.[36] The major takeaway from this case is that full bans on certain types of abortions are constitutionally permissible. Throughout the opinion, the Court uses a paternalistic tone, plainly stating, among other things, that "it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life they once created and sustained."[37] In other words, the restriction should be upheld because women are incapable

[33] Id. at 385
[34] Gonzales v. Carhart, 550 U.S. 124, 135-36 (2007)
[35] Id. at 161-63
[36] Id. at 163-64.
[37] Id. at 159.

of making their own educated decisions regarding their bodies and lifestyles. Note also the Court's strategic use of words like "kill"[38] and "infant"[39] throughout the opinion, in an attempt to humanize the fetus. It is plain from this language employed by the Court that it is hostile to abortions, and the inclusion of this language in the majority opinion sends a message to States that their abortion legislation has a good chance of withstanding constitutional challenge.

On the other hand, Whole Woman's Health v. Hellerstedt[40] was a perceived win for abortion advocates, as the Court struck down provisions of a Texas statute which (1) required a physician who is performing an abortion to have active admitting privileges at a nearby hospital, and (2) required abortion facilities to meet the same standards as ambulatory surgical centers.[41] The Court concluded that the provisions do not confer medical benefits sufficient to justify the burdens.[42] The holding seems to slightly modify the *Casey* holding, creating a balancing test. At first glance, this heightened standard seems to provide courts with concrete guidance as to how the *Casey* standard should be applied. However, the balancing test still leaves a lot open to judicial discretion. In *June Medical,* the Court struck down a law that was almost word-for-word the same as the one struck down in *Whole Woman's Health*.[43]

Part II: *Roe* at Risk

After assessing the abortion law cases the Court has considered post-*Roe*, it is questionable as to whether *Roe* is really still the applicable law in practice. *Casey* claimed to affirm *Roe*'s core holdings, but simultaneously created an entirely new constitutional test that arguably offers less protections. While some recent cases like *Whole Woman's Health* and *June*

[38] Id. at 157, 159
[39] Id. at 158-160
[40] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)
[41] Id. at 2300
[42] Id.
[43] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2112-13 (2020)

Medical seem promising, there is reason to believe that Roe is at serious risk of being overturned or modified by the Court in the near future. June Medical was decided just last year, and it was a 5-4 decision with Chief Justice Roberts as the deciding vote.[44] Although he voted to strike down the restriction, he made clear that he agreed with the majority in conclusion only. Chief Justice Roberts dissented in Whole Woman's Health, and he believes it was wrongly decided.[45] However, stare decisis requires the Court to treat like cases alike, and thus forced him to side with the majority.[46]

The composition of the Supreme Court has changed in recent years, solidifying a conservative majority and thus increasing the likelihood of Roe being overturned or modified if another abortion law challenge reaches the Court. There are six conservative-leaning Justices currently sitting on the Court: Chief Justice Roberts, J. Kavanaugh, J. Gorsuch, J. Alito, J. Thomas, and J. Barrett.[47] J. Thomas,[48] J. Alito,[49] J. Gorsuch,[50] and J. Kavanaugh[51] dissented in June Medical. Justice Thomas makes his stance on the Court's abortion jurisprudence abundantly clear in his dissent, stating: "Our abortion precedents are grievously wrong and should be overruled."[52] He explains that the text of the Constitution itself does not provide a protection for abortion, but rather the right is something that was wholly (and wrongly) created by the Court.[53] As discussed above, Chief Justice Roberts sided with the majority only because of stare decisis.

---

[44] Id. at 2133 (Roberts, J., concurring)
[45] Id. (Roberts, J., concurring).
[46] Id. at 2134 (Roberts, J., concurring).
[47] Laura Bronner and Elena Mejia, The Supreme Court's Conservative Supermajority is Just Beginning to Flex its Muscles, FiveThirtyEight, July 2, 2021.
[48] June Med. Servs. L.L.C., 140 S. Ct. at 2142 (Thomas, J., dissenting)
[49] Id. at 2153 (Alito, J., dissenting)
[50] Id. at 2171 (Gorsuch, J., dissenting)
[51] Id. at 2182. (Kavanuagh, J., dissenting)
[52] Id. at 2142 (Thomas, J., dissenting)
[53] Id. at 2149 (Thomas, J., dissenting).

Prior to serving on the Court, Kavanuagh ruled against abortion protections while sitting as a D.C. Circuit Court Judge. In Garza v. Hargan, a pregnant immigrant minor was detained and placed in a shelter when she entered the country.[54] She wanted an abortion, but she was prevented from traveling to get one. Kavanuagh, sitting on a 3 judge panel, voted to block her abortion for 11+ days, issuing an order asserting that the federal government would not impose undue burden on her right to abortion if it could find a sponsor who would remove her from custody expeditiously.[55] In doing so, he ignored evidence that: she had already been blocked from obtaining an abortion for 4 weeks; finding a sponsor was a lengthy and difficult process; she had already gone through the Texas state bypass process and been deemed able to consent to the abortion herself; and the government would play no role in facilitating the abortion.[56] The case was then heard by the full Court, which reversed and ordered she be permitted to obtain abortion without additional delay.[57]

Barrett was not on the Court for Whole Woman's Health or June Medical, but an assessment of her background sheds light on how she would likely rule on an abortion case. Barrett was appointed to the Court by Trump, who vowed to overturn Roe and stated that he would put anti-abortion Justices on the Court.[58] How a particular Justice votes on abortion cases may be linked to whom appointed the Justice to the Court. Thomas, Alito, and Roberts dissented in Whole Woman's Health. Thomas, Alito, Gorsuch, and Kavanaugh dissented in June Medical. J. Alito and Chief Justice Roberts were appointed by Republican George W. Bush; J. Thomas was appointed by George H.W. Bush; and J. Kavanaugh and J. Gorsuch were appointed by

---

[54] Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc).
[55] Id.
[56] Id.
[57] Id.
[58] *https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights*

Trump.[59] However, this may not be a very strong indicator, as J. O'Connor,[60] J. Kennedy,[61] J. Stevens,[62] J. Blackmun,[63] and J. Souter[64] were in the majority in Casey and all of them were appointed by Republican presidents.

J. Barrett has also been open about her Christian faith.[65] When she was asked about Roe during an appearance prior to her appointment to the Court, J. Barrett said "I think don't think the core case – Roe's core holding that, you know, women have a right to an abortion – I don't think that would change. But I think the question of whether people can get very late-term abortions, how many restrictions can be put on clinics – I think that would change."[66] While this statement seems to indicate Barrett does not support overturning Roe completely, she seems to be onboard with modifying the constitutional test in a way that would make it more difficult for women to get abortions. While serving as a federal appeals court judge, Barrett heard two cases where a lower court ruled to block Indiana laws imposing limits on abortion.[67] She voted to hear arguments that could've potentially overruled the lower court. However, in a third case, she voted to uphold precedent.[68] Taken together, Barrett's opinion on abortion is not entirely clear.

The Supreme Court is set to hear an abortion law challenge in December 2021. Dobbs v. Jackson Women's Health Organization involves a challenge to a Mississippi law that prohibits

---

[59] About the Court: Current Members, (DEC. 3, 2021, 9:33 P.M.), https://www.supremecourt.gov/about/biographies.aspx
[60] Visiting the Court: Current Exhibitions, (DEC. 3, 2021, 9:39 P.M.), https://www.supremecourt.gov/visiting/sandradayoconnor.aspx
[61] Hon. Anthony M. Kennedy, WORLD JUSTICE PROJECT (DEC. 3, 2021 9:37 P.M.), https://worldjusticeproject.org/about-us/who-we-are/honorary-chairs/anthony-m_kennedy.
[62] Erin Blakemore, How John Paul Stevens' Views Evolved Over 34 Years on the Supreme Court, HISTORY, (DEC. 3, 2021, 9:32 P.M.), https://www.history.com/news/john-paul-stevens-supreme-court-justice-shift.
[63] Harry A. Blackmun, SUPREME COURT HISTORY, (DEC. 3, 2021, 9:27 P.M), https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-harry-a-blackmun-1970-1994/
[64] Jeff Greenfield, The Justice Who Built the Trump Court, Politico, July 9, 2018.
[65] Sarah McCammon, A Look at Amy Coney Barrett's Record on Abortion Rights, NPR, Sept. 28, 2020.
[66] Id.
[67] Id.
[68] Id.

abortions after 15 weeks' gestational age, with limited exceptions. The Fifth Circuit held that the law was unconstitutional reasoning that "States may *regulate* abortion procedures prior to viability so long as they do not impose an undue burden on the woman's right, but they may not ban abortions. The law at issue is a ban."[69] The Supreme Court granted certiorari.[70] This is the first time the Court will rule on the constitutionality of a pre-viability abortion ban since Roe.[71] Thirteen states other than Mississippi have passed abortion bans since 2019, perhaps in an attempt to force the Court to reconsider Roe.[72] The Supreme Court began to hear oral arguments on this case on December 1, 2021.[73]

Part III: Criminal Abortion Law in a Post-*Roe* World

With Dobbs looming on the Supreme Court's calendar, many are left wondering: what exactly will happen if Roe is overturned or substantially modified? Without Roe's constitutional restraints, abortion law becomes whatever the federal government and States decide it to be. To assess what the post-Roe criminal law landscape could look like, this paper considers existing and potential federal laws regulating abortion; pre-Roe state laws that will re-emerge; and post-Roe laws that will take effect for the first time.

A. Existing and Potential Federal Criminal Abortion Laws

Without Roe, Congress may try to pass federal laws regulating abortion. Depending on the political leanings of Congress, the content of the law could go either way: Congress could pass a law that protects abortion in all states across the board, or it could do the opposite and

---

[69] Jackson Women's Health Org. v. Dobbs , 945 F.3d 265, 269 (5th Cir. 2019)
[70] Dobbs v. Jackson Women's Health Org., 209 L.Ed.2d 748 (U.S. 2021)
[71] Roe at Risk: U.S. Supreme Court to Review Mississippi's Abortion Ban, a Direct Challenge to Roe v. Wade , CENTER FOR REPRODUCTIVE RIGHTS (DEC. 3, 2021, 9:56 P.M.) https://reproductiverights.org/roe-at-risk-u-s-supreme-court-to-review-mississippis-abortion-ban-a-direct-challenge-to-roe-v-wade/
[72] Id.
[73] READ: Transcript of Supreme Court Oral Arguments in Dobbs v. Jackson Women's Health , CNN, Dec. 1, 2021.

restrict abortions nationwide. It is first worth considering whether, constitutionally speaking, Congress has the authority to regulate abortion at all. Under federalism, the federal government is one of enumerated powers.[74] The Constitution gives Congress the right to create criminal laws only in very narrow circumstances: Congress can enact criminal laws relating to counterfeiting,[75] piracy and crimes on the high seas,[76] and offenses against the Law of Nations,[77] and it may determine the punishment for treason.[78] However, Congress also has the power to pass any laws that are necessary and proper for it to execute its other powers.[79]

Congress frequently roots its legislation, including public health legislation, in the Commerce Clause.[80] The Commerce Clause gives Congress the power to "regulate commerce…among the several States."[81] To find that this gives Congress power to restrict an abortion procedure done at a local clinic seems like a stretch, but may not be so far-fetched when some of the Supreme Court's other Commerce Clause cases are taken into consideration.[82] In *Gonzales v. Carhart,* the Court upheld a federal abortion law--the Partial-Birth Abortion Ban Act of 2003—without explicitly deciding whether Congress had the right to pass the law under the Commerce Clause.[83] In 2015, Congress considered Pain Capable Unborn Child Protection Act, which would prohibit most abortions performed after 20 weeks from conception.[84] The proposed law would establish a criminal offense for performing or attempting to perform an abortion if the

---

[74] U.S. Const. Art. I §8.
[75] U.S. Const. Art. I, §8, cl. 6
[76] U.S. Const. Art. I, §8, cl. 10
[77] Id.
[78] U.S. Const. Art. III, §3, cl. 2
[79] U.S. Const. Art. I, §8, cl. 18
[80] Lainie Rutkow and Jon S. Vernick, The U.S. Constitution's Commerce Clause, the Supreme Court, and Public Health, Public Health Rep (2011).
[81] U.S. Const. Art. I, §8, cl. 3
[82] Glenn Harlan Reynolds, Can Government Reach the Womb?, USA Today, May 10, 2015.
[83] Gonzales, 550 U.S. at 166.
[84] Jonathan Adler, What Gives Congress the Authority to Regulate Abortion?, The Washington Post, May 11, 2015.

probable post-fertilization age of the fetus is 20 weeks or more; individuals who violate the law could be punished with a fine or a five year prison sentence.[85] In the Act's findings, the authors claimed that this law would fall under Congress's Commerce Clause Powers.[86] However, it is unclear if this justification would hold up. Jonathan Adler compares the law to other laws that the Court has found valid under the Commerce Clause:

> Unlike the prohibition on the possession and use of marijuana upheld in *Gonzales v. Raich*, PUCPA is not part of a broader economic regulatory scheme, nor is it "necessary and proper" to facilitate the execution of other, economically oriented regulations. Further, unlike the federal partial-birth ban, PUCPA lacks a jurisdictional element that would confine its reach to those instances of abortion clearly within the scope of the Commerce Power.[87]

While the Commerce Clause is broad, it has limits. Commerce Clause authorization aside, the law failed to pass in 2015; it was reintroduced to Congress for the fifth time in 2021, and only time will tell whether the bill will ever become law.

Assuming that Congress does have the power to pass federal criminal abortion laws under the Commerce Clause or another enumerated power, both houses of Congress need to agree upon a proposed bill in order for it to become enforceable law.[88] With the current composition of Congress, it is unlikely that Congress would be able to pass any kind of abortion legislation. The number of women in Congress is currently at an all-time high, with 123 women serving in the House of Representatives (including 3 Delegates and the Resident Commissioner) and 24 women in the Senate.[89] Since access to abortion is an issue that directly affects the lives of many women, one might expect that more women in Congress would lead to the passage of

---

[85] Id.
[86] Id.
[87] Id.
[88] How Laws are Made and How to Research Them, USA.GOV, (DEC. 3, 2021, 9:43 P.M.), https://www.usa.gov/how-laws-are-made
[89] Katherine Schaeffer, The Changing Face of Congress in 7 Charts, PEW RESEARCH CENTER, (DEC. 3, 2021, 9:44 P.M.), https://www.pewresearch.org/fact-tank/2021/03/10/the-changing-face-of-congress/; Membership of the 117th Congress: A Profile, CONGRESSIONAL RESEARCH SERVICE, (DEC. 3, 2021, 9:45), https://crsreports.congress.gov/product/pdf/R/R46705

more federal legislation that protects abortion. At the same time, 88% of Congress members are Christians.[90] Many Christians do not support abortion, as they consider it to be murder and thus against their religious beliefs. The clearest indicator of one's views regarding abortion may be one's political affiliation. Republicans tend to oppose abortion protections. Of the 435 representatives, 214 are Republicans (including 1 Delegate and the Resident Commissioner of Puerto Rico).[91] In other words, Democrats have a narrow majority. However, the Senate is nearly split down the middle, with 50 Republicans, 48 Democrats, and 2 Independents (who caucus with the Democrats). In September of this year, the House passed Women's Health Protection Act.[92] The Act:

> would protect a person's ability to decide to continue or end a pregnancy and would enshrine into law health care providers' ability to offer abortion services "prior to fetal viability" without restrictions imposed by individual states, like requiring special admitting privileges for providers or imposing waiting periods. It also would prohibit restrictions on abortion after fetal viability "when, in the good-faith medical judgment of the treating health care provider, continuation of the pregnancy would pose a risk to the pregnant patient's life or health."[93]

As expected, the bill passed along party lines.[94] However, the passage of this proposed bill was largely symbolic, as it has little chance of passing through the Senate; all Democrats and two Republicans would need to back the bill in order to beat a filibuster.

One existing federal abortion law worth mentioning is the Hyde Amendment. The Hyde Amendment, first passed in 1977, bars the use of Medicaid funds for abortion except to protect

---

[90] Katherine Schaeffer, The Changing Face of Congress in 7 Charts, PEW RESEARCH CENTER, (DEC. 3, 2021, 9:44 P.M.), https://www.pewresearch.org/fact-tank/2021/03/10/the-changing-face-of-congress/;
[91] Membership of the 117th Congress: A Profile, CONGRESSIONAL RESEARCH SERVICE, (DEC. 3, 2021, 9:45), https://crsreports.congress.gov/product/pdf/R/R46705
[92] Barbara Sprunt, The House Passes a Bill Meant to Counter Texas-Style Abortion Bans, NPR, Sept. 24, 21.
[93] Id.
[94] Id.

the life of the woman.[95] The Supreme Court upheld the constitutionality of the Hyde Amendment.[96]

B. Zombie Laws: State Criminal Abortion Laws Passed Pre-*Roe* May Re-Emerge if *Roe* is Overturned or Modified

In the absence of federal abortion laws, States have complete control over abortion laws. Powers that are not delegated to the federal government are reserved to the States.[97] These plenary powers allow states to pass laws regulating public health and safety;[98] abortion laws presumably fall under this broad banner. At the time Roe was decided, abortion was criminalized in the vast majority of states.[99] In 1970, New York was the first state to legalize abortion.[100] Between 1970 and the Roe decision in 1973, Hawaii, Washington, and Alaska also legalized abortion.[101]

Roe made many of the remaining criminal laws unconstitutional, but this does not mean the laws disappeared completely; rather, they just went dormant, waiting for a critical moment in history—such as the one we are currently in—to rear their heads again. If a law is found unconstitutional, it is not erased from the statute books.[102] A state can choose to repeal it, but it is not required to do so.[103] If it chooses not to, the law is just not enforced.[104] The federal judiciary

---

[95] Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion, American Civil Liberties Union (DEC. 3, 2021, 10:03 P.M.), https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion.
[96] Harris v. McRae, 448 U.S. 297, 326 (1980).
[97] U.S. Const. Amend. X
[98] Ilya Shapiro, State Police Powers and the Constitution, CATO INSTITUTE, (DEC. 3, 2021, 9:48 P.M.), https://www.cato.org/pandemics-policy/state-police-powers-constitution
[99] The Right to Choose at 25: Looking Back and Ahead, American Civil Liberties Union (DEC. 3, 2021, 9:50), https://www.aclu.org/other/right-choose-25-looking-back-and-ahead
[100] Julia Jacobs, Remembering an Era Before Roe, When New York Had the "Most Liberal" Abortion Law, New York Times (2018)
[101] Id.
[102] Michael C. Dorf, Would Overruling *Roe v. Wade* Retroactively Reanimate "Zombie" Abortion Laws?, Verdict, Sept. 13, 2021.
[103] Id.
[104] Id.

has no authority to alter or annul a statute; the power of judicial review is limited.[105] The possibility that a case which made a statute unenforceable (in the abortion context, Roe) could be overturned, allowing the executive to resume enforcement.[106] In other words, a ruling that a law is unconstitutional is nothing more than a "judicially imposed non-enforcement policy that lasts only as long as the courts adhere to the constitutional objections that persuaded them to thwart the statute's enforcement."[107]

These laws are sometimes referred to as zombie laws,[108] as they are not quite alive (they are not currently enforceable), but not quite dead, either (they *could* become enforceable again in the future). Zombie laws arise in three ways: (1) when the Supreme Court invalidates a similar law from a different jurisdiction;[109] (2) when a court invalidates a State's law and enjoins the State's officials from enforcing it;[110] and (3) when the law has similar constitutional defects to a law that was deemed unconstitutional by a court.[111] This means that all the laws the Supreme Court held to be invalid in Roe and its progeny can potentially be a zombie law, unless the legislature takes affirmative action to repeal them. Criminal abortion laws that were not directly challenged are also zombie laws if they are similar to the ones the Court struck down. The legislature can repeal a zombie law by passing a new law, assuming it can get one passed through both houses.[112] After a Supreme Court decision in Webster v. Reproductive Health Services,[113] Louisiana officials claimed that Roe had effectively been overturned and sought to enforce an old Louisiana law

---

[105] Jonathan F. Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933 (2018)
[106] Id.
[107] Id.
[108] See Pool v. City of Houston, 978 F.3d 307, 309 (2020).
[109] Howard M. Wasserman, Zombie Laws, 25 Lewis & Clark L. Rev. ___, 10 (forthcoming 2022).
[110] Id. at 11.
[111] Id. at 12.
[112] Heather Brown, Good Question: How is a Law Repealed?, CBS Minnesota, Nov. 9, 2016.
[113] Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (Supreme Court upheld a Missouri statute that included a preamble stating that human life begins at conception and a provision prohibiting the use of public employees and facilities to perform non-medically necessary abortions)

criminalizing abortion which had been found unconstitutional under Roe.[114] The Court avoided the revival issue and found that the statute had been implicitly repealed.[115] After the criminal abortion statute was enjoined, the Louisiana legislature passed a series of statutes regulating abortion.[116]

One may ask: does it really matter if zombie laws may become enforceable again post-Roe? After all, there are other ways states can criminalize abortions. Without the constitutional restraints imposed by *Roe,* states would be free to pass regulations and even bans on abortion. Post-Roe, 12 states have passed trigger laws[117] that are set to ban abortions completely upon the fall of Roe.[118] However, whether zombie laws re-emerge is still important in the abortion context because federal courts may lack authority to confer immunity *pendente lite*[119] if their decisions are overturned.[120] Some attorneys in conservative states may argue that overruling *Roe* exposes women and providers to penalties for abortions that were performed while the laws were enjoined.[121] There are also democratic concerns associated with enforcing zombie laws that should be considered. Some scholars argue that statutes that were found unconstitutional should not be revived (in other words, zombie laws shouldn't be enforced) because the judicial decision that made them unconstitutional appeased the opponents of the law.[122] These opponents think the law is gone for good.[123] Even if they realize the law could be enforced again if the ruling was

---

[114] Weeks v. Connick, 733 F. Supp. 1036 (E.D. La. 1990); William Michael Treanor, Prospective Overruling and the Revival of 'Unconstitutional' Statutes, 93 Colum. L. Rev. 1902 (1993)
[115] Id.
[116] Id.
[117] Which states have trigger laws, and how these interact with zombie laws, will be discussed later in this paper.
[118] Daniela Santamarina, What Abortion Laws Would Look Like If Roe v. Wade Were Overturned, The Washington Post, Sept. 2, 2021.
[119] "during the litigation"
[120] https://verdict.justia.com/2021/09/13/would-overruling-roe-v-wade-retroactively-reanimate-zombie-abortion-laws
[121] Id.
[122] William Michael Treanor & Gene B. Sperling, Prospective Overruling and the the Revival of 'Unconstitutional' Statutes 93 Colum. L. Rev. 1902-1955, 1906 (1993).
[123] Id.

overturned, they don't want to waste time and resources on appealing a law that is a nullity.[124] Thus, "[r]evival in such circumstances can produce a result contrary to what the political process would have produced in the absence of the initial judicial decision.[125]

Pre-*Roe* abortion laws differed greatly by State; some States completely banned abortions, while others allowed abortions in certain circumstances.[126] Today, nine states have zombie laws still on the books: Alabama, Arizona, Arkansas, Michigan, Mississippi, Oklahoma, Texas, West Virginia, and Wisconsin.[127] Massachusetts had a pre-*Roe* ban on the books until 2018, when it passed the NASTY (Negating Archaic Statutes Targeting Young) Women Act.[128] Abortion prior to 24-weeks (third trimester) was already legal in Massachusetts under another state statute.[129] Despite this, the Massachusetts legislature passed the NASTY Women Act to get rid of the possibility that the pre-*Roe* ban could be enforced if *Roe* is overturned or modified.[130] New Mexico had a zombie law on the books until 2021, when it was repealed by the state legislature.[131] All of the zombie laws criminalize providers, but some of them criminalize other actors as well. The laws of each state will be considered in turn. The zombie laws of Arkansas, Mississippi, Oklahoma, and Texas will not be considered, as these states also have trigger laws. The trigger abortion laws of these four states will be considered in the next section.

---

[124] Id.
[125] Id.
[126] Jason Swindle, Chipping Away at Roe v. Wade, The LaGrange Daily News, Mar. 16, 2020.
[127] Daniela Santamarina, What Abortion Laws Would Look Like If Roe v. Wade Were Overturned, The Washington Post, Sept. 2, 2021.
[128] Samantha Cooney, Massachusetts Passes Repeal of 173-Year-Old Abortion Ban Amid Fears for Future of Roe v. Wade, Time Magazine (2018).
[129] Mass. Gen. Laws c.112 § 12L; Mass. Gen. Laws c. 112 §12M
[130] Samantha Cooney, Massachusetts Passes Repeal of 173-Year-Old Abortion Ban Amid Fears for Future of Roe v. Wade, Time Magazine (2018).
[131] Daniela Santamarina, What Abortion Laws Would Look Like If Roe v. Wade Were Overturned, The Washington Post, Sept. 2, 2021.

Alabama

Alabama has a pre-Roe law[132] on the books that is a near-total abortion ban.[133] The law was first passed in 1852, and it was last amended in 1975.[134] In its current form, the law makes it a crime to "willfully administer[] to any pregnant woman any drug or substance or use[] or employ[] any instrument or other means to induce an abortion, miscarriage or premature delivery." The law also criminalizes prescribing such medication to a pregnant woman, or otherwise aiding or abetting an abortion. There is an exception: the above is not a criminal act so long as it is done to preserve the "life or health" of the pregnant woman. The law targets abortion providers as well as any third parties who help the woman procure an abortion. The act of having an abortion is not itself criminalized; women who have abortions will not be punished under this law. What behavior constitutes "aiding and abetting" is not explicitly defined in the statute. The punishment for the crime includes a fine ranging from $100 to $1,000. Someone who violates the law may also be imprisoned in county jail or sentenced to hard labor for a maximum of 12 months. There is a strong likelihood that this law would be enforced post-*Roe* based on more recent anti-abortion legislation[135] and the fact that Alabama's governor, House and Senate are anti-choice.[136]

Arizona

In 1901, Arizona passed a regime of abortion laws, consisting of A.R.S. §§ 13-211, 13-212, and 13-213.[137] In 1977, these statutes were renumbered as §§ 13-3603, 13-3604, and 13-

---

[132] Ala. Code §13A-13-8
[133] State Laws: Alabama, NARAL Pro Choice America (DEC. 3, 2021, 10:15 P.M), https://www.prochoiceamerica.org/state-law/alabama/
[134] Id.
[135] Debbie Elliot, Alabama Governor Signs Abortion Ban Into Law, NPR,2019).
[136] State Laws: Alabama, NARAL Pro Choice America (DEC. 3, 2021, 10:15 P.M), https://www.prochoiceamerica.org/state-law/alabama/
[137] State Laws: Arizona, NARAL Pro Choice America (DEC. 3, 2021, 10:15 P.M), https://www.prochoiceamerica.org/state-law/arizona/

3605.[138] §13-3603 makes it a crime to "provide[], suppl[y], or administer[] to a pregnant woman, or procure[] such woman to take any medicine, drugs or substance, or use[] or employ[] any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life."[139] The crime is punishable by incarceration in the state prison for 2-5 years.[140] §13-3604 made it a crime for women to solicit abortion, but this law was repealed earlier this year.[141] The Senate Bill also made some changes to §13-3603.02, adding language specifically targeting abortions due to genetic abnormality.[142] §13-3605 states:

> A person who wilfully writes, composes or publishes a notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for prevention of conception, or who offers his services by a notice, advertisement or otherwise, to assist in the accomplishment of any such purposes, is guilty of a misdemeanor.[143]

This law specifically criminalizes advertisers, and can potentially have First Amendment implications.

These laws were directly challenged in post-Roe cases. In Nelson v. Planned Parenthood *Ctr. of Tucson, Inc*, physicians, corporations, and a public health association challenged Arizona's abortion laws.[144] The case was originally heard by the Court of Appeals of Arizona in January of 1973, prior to Roe.[145] The appellate court reversed and remanded the judgment of the trial court, which granted declaratory and injunctive relief to the challengers.[146] However, the Supreme Court decided Roe during the period for rehearing.[147] On rehearing, the appellate court

---

[138] Id
[139] A.R.S. §13-3603
[140] Id.
[141] 2021 Ariz. SB 1457
[142] Id.
[143] A.R.S. §13-3605
[144] Nelson v. Planned Parenthood Ctr. , 505 P.2d 580 (Ariz. Ct. App. Jan. 3, 1973)
[145] Id.
[146] Id.
[147] Id.

held that the Arizona laws were unconstitutional.[148] In State v. New Times, a newspaper challenged the trial court's judgment which found the newspaper guilty of violating §13-213.[149] The Court held that the conviction could not stand based on the decision in *Nelson* and *Roe*.[150] While these laws were deemed unconstitutional and thus unenforceable under *Roe*, §§13-3603 and 13-3605 remain on the books today as zombie laws.

If given the chance, there is a strong likelihood that Arizona would seek to enforce these zombie laws. Senate Bill 1457 was passed earlier this year, which repealed §13-3604 and added specific language to §13-3603.02. If Arizona no longer supported §13-3603 and §13-3605, it would have removed them from the books as well. Further, Arizona's governor, House, and Senate are all anti-choice.[151]

Michigan

Michigan's zombie law[152] was originally passed in 1931. The law criminalizes "[a]ny person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman."[153] The last sentence of the statute states that the prosecution does not need to prove that there was no such necessity.[154] This portion of the law was held to be unconstitutional as it impermissibly shifted the burden from the prosecution to the defense.[155] The law includes an exception for actions that are "necessary to preserve the life of

---

[148] Id.
[149] State v. New Times , 511 P.2d 196, 197 (Ariz. Ct. App. 1973)
[150] Id.
[151] State Laws: Arizona, NARAL Pro Choice America (DEC. 3, 2021, 10:15 P.M), https://www.prochoiceamerica.org/state-law/arizona/
[152] Mich. Comp. Laws Serv. § 750.14; Mich. Comp. Laws Serv. §750.15.
[153] Mich. Comp. Laws Serv. §750.14.
[154] Id.
[155] People v. Nixon , 201 N.W.2d 635, 642 (Mich. Ct. App. 1972).

such woman."[156] Those who engage in the prohibited actions are guilty of a felony.[157] If the pregnant person is to die during the abortion, "the offense shall be deemed manslaughter."[158] The punishment for manslaughter is up to 15 years in prison, a $7,500 fine, or both.[159] This law was limited in its application by *People v. Bricker.*[160] In that case, the Michigan Supreme Court held that, under *Roe*, the statute "cannot stand as relating to abortions in the first trimester of pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment."[161]

Although the law remains on the books, Michigan may not be willing to enforce this law post-*Roe.* Michigan's Congress is anti-choice, but its governor is pro-choice.[162] Further, Michigan's State Attorney General, Dana Nessel, has stated she will not enforce Michigan's abortion ban in the absence of *Roe.*[163] A local prosecutor, Eli Savit, tweeted "we will never, ever prosecute any person for exercising reproductive freedom."[164]

West Virginia

West Virginia's zombie law[165] was enacted in 1882.[166] The law states: “Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and shall thereby

---

[156] Mich. Comp. Laws Serv. § 750.14.
[157] Id.
[158] Id.
[159] Mich. Comp. Laws Serv. §750.321
[160] People v. Bricker , 208 N.W.2d 172 (Mich. 1973)
[161] Id.
[162] State Laws: Michigan, NARAL Pro Choice America (DEC. 3, 2021, 10:15 P.M), https://www.prochoiceamerica.org/state-law/michigan/
[163] David Eggert, If Roe is Overturned, Michigan Has Abortion Ban on the Books, The Detroit News, Sept. 2, 2021.
[164] Id.
[165] W. Va. Code Ann. §61-2-8
[166] State Laws: West Virginia, NARAL Pro Choice America (DEC. 3, 2021, 10:15 P.M), https://www.prochoiceamerica.org/state-law/west-virginia/

destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony."[167] The punishment for this violation is confinement in a penitentiary for 3 to 10 years.[168] The law further provides that, if the woman dies from the abortion, the provider is guilty of murder.[169] West Virginia law recognizes two kinds of murder: first and second degree.[170] First degree murder is defined as:

> Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code.[171]

Everything else is second degree murder.[172] Based on this definition, murder via abortion qualifies as second degree murder. The penalty for second degree murder is 10 to 40 years.[173] The law includes an exception: "No person, by reason of any act in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child."[174] There are no exceptions for the health of the mother, rape, or incest.

After *Roe,* The law was directly challenged and struck down as unconstitutional.[175] In Doe v. Charleston Area Medical Ctr., plaintiff sued under 42 U.S.C. §1983, alleging that the defendant hospital's abortion policy (prohibiting abortions except for those done to save the life of the mother) was unconstitutional. Plaintiff sought injunctive relief, and to qualify the case as a class action suit. The district court held that the plaintiff failed to show irreparable injury and deprivation of rights under the color of state law, and failed to satisfy the pre-requisites for class

---

[167] W. Va. Code Ann. §61-2-8
[168] Id.
[169] Id.
[170] W. Va. Code Ann. §61-2-1
[171] Id.
[172] Id.
[173] W. Va. Code Ann. §61-2-3
[174] W. Va. Code An.. §61-2-8
[175] Doe v. Charleston Area Medical Ctr., 529 F.2d 638.

action. The 4th Circuit reversed, finding that the hospital acted under color of state law because it received state and federal funding, was regulated by the state, and its policy was based on a state statute criminalizing abortions other than those necessary to save the life of the mother. The policy, and the underlying statute, were both unconstitutional.

Wisconsin

Wisconsin's zombie law[176] was first enacted in 1849.[177] The statute previously included language that indicated potential prison terms and fine amounts, but it was amended in 2002 to the current "felony level" language.[178] In 2012, sections (3) and (4) were removed from the statute; these two subsections criminalized women who had abortions.[179] In its current form, Wis. Stat. §940.04 makes it a Class H felony to "intentionally destroy the life of an unborn child"[180] and a Class E felony to either (1) intentionally destroy the life of an unborn quick child or (2) to cause the death of the mother through an action intended to kill the child.[181] "Quickening" of a child occurs when the mother first feels the fetus move in the womb, usually around the middle of the pregnancy.[182] The law essentially amounts to a ban, as it prohibits abortion during all phases of pregnancy. As punishment for a Class H felony under Wisconsin law, an individual can be fined up to $50,000, incarcerated for up to 15 years, or both.[183] The sentence for a Class H felony is lighter; an individual convicted of a Class H felony may be fined up to $10,000, incarcerated for up to 6 years, or both.[184]

---

[176] Wis. Stat. §940.04
[177] **https://www.nirhealth.org/wisconsin/**
[178] 2001 Wis. AB 1.
[179] 2011 Wis. SB 306
[180] Wis. Stat §940.04(1)
[181] Wis. Stat §940.04(2)
[182] Quickening Definition, Black's Law Dictionary (9th ed. 2009), available at Westlaw.
[183] Wis. Stat. §939.50(3)(e)
[184] Wis. Stat. §939.50(3)(h)

However, there are some exceptions to the ban. The language of the statute now expressly excludes the mother from criminal responsibility.[185] Additionally, the law does not apply to "therapeutic abortion," which "(a) [i]s performed by a physician; and (b) [i]s necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and (c) [u]nless an emergency prevents, is performed in a licensed maternity hospital."[186] Under the statute, an abortion may only be performed to protect the life of the mother; an abortion cannot be performed to advance the health of the mother.[187] Notably, the law does not include an exception for individuals who become pregnant as the product of rape or incest.[188]

If *Roe* is overturned, it is unclear whether Wisconsin would enforce its zombie abortion law. Wisconsin's Senate and House are both anti-choice, while its governor is pro-choice.[189] State Senator Kelda Roys and Representative Lisa Subeck introduced the Abortion Rights Preservation Act in January 2021 in an attempt to remove §940.04 from the books.[190] However, this Act has already been introduced and rejected several times.[191]

C. Trigger Laws: Numerous States Have Enacted Post-*Roe* Laws Banning Abortion That are Set to Become Enforceable When the Case is Overturned

In the abortion context, a trigger law is a state law that will almost immediately ban abortion when Roe is overturned.[192] Unlike zombie laws, trigger laws have not yet been enforced; they are only contingently enacted. State legislatures know that these laws do not operate within the

---

[185] Wis. Stat. §940.04(1); Wis. Stat. §940.04(2)
[186] Wis. Stat. §940.04(5)
[187] Abortion Policy in the Absence of Roe, GUTTMACHER INSTITUTE (DEC. 1, 2021), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe.
[188] Id.
[189] State Laws: Wisconsin, NARAL Pro Choice America (DEC. 3, 2021, 10:15 P.M), https://www.prochoiceamerica.org/state-law/wisconsin/
[190] Melanie Conklin, Making Abortion a Felony in Wisconsin, Wisconsin Examiner, May 17, 2021.
[191] Id.
[192] Daniela Santamarina, What Abortion Laws Would Look Like If Roe v. Wade Were Overturned, The Washington Post, Sept. 2, 2021.

constitutional bounds of Roe, so, to avoid constitutional scrutiny, they are not activated until they would be deemed constitutional. Even if these laws are never triggered, their existence still has the negative consequence of creating a "climate of confusion": individuals who are not familiar with the details of the laws may interpret them as a currently enforceable abortion ban, and this may prevent such individuals from seeking an abortion in their state.[193]

Twelve states currently have trigger laws: Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and Utah.[194] Four of these states—Arkansas, Mississippi, Oklahoma, and Texas—also have zombie laws.[195] However, the existence of trigger laws make the zombie laws in these states less important; the passage of recent trigger laws show that these states still support criminalizing abortion and avoids the democratic issues that emerge with the enforcement of zombie laws.[196] Some of these laws were enacted in the early 2000s[197], but most were enacted in the last three years in the anticipation of a Roe challenge.[198] The 12 trigger laws are substantially similar, each including several components: the trigger, a description of what is being criminalized, penalties, and exceptions (or defenses).

---

[193] Madeleine Aggeler, These States Could Lose the Right to Abortion Overnight, The Cut, Oct. 27, 2020.
[194] Id.
[195] Id.
[196] See William Michael Treanor & Gene B. Sperling, Prospective Overruling and the the Revival of 'Unconstitutional' Statutes 93 Colum. L. Rev. 1902-1955 (1993).
[197] La. Rev. Stat. Ann. § 40:1061 (2006); Miss. Code. Ann. §41-41-45 (2007); N.D. Cent. Code, § 12.1-31-12 (2007); S.D. Codified Laws § 22-17-5.1 (2005)
[198] Ark. Code Ann. §5-61-304 (2019); Idaho Code §18-622 (2020); Ky. Rev. Stat. § 311.772 (2019); Mo. Rev. Stat. §188.017 (2019); 2021 OK. SB 918 (2021); Tenn. Code Ann. § 39-15-213 (2019); Tex. Health & Safety Code § 170A.002 (2021); Utah Code § 76-7a-201 (2020)

The Trigger

The trigger is the portion of the law that explains what must occur for the law to become enforceable. The laws in Idaho, Kentucky, Louisiana, and Mississippi include the trigger in the statute itself.[199] The Mississippi trigger law includes a introductory paragraph, stating:

> From and after ten days following the date of publication by the Attorney General of Mississippi that the Attorney General has determined that the United States Supreme Court has overruled the decision of Roe v. Wade, and that it is reasonably probable that this section would be upheld by the Court as constitutional, this section will read as follows.[200]

The Idaho law does not require a determination by the Attorney General or any other actor; the law is set to become effective 30 days after (1) the Supreme Court issues a judgment that restores state authority to prohibit abortion, or (2) the United States adopts a constitutional amendment that restores state authority.[201] Roe is not expressly mentioned in Idaho's statute, but it is clear the judgment that the statute refers to is one that overturns Roe. Louisiana[202] and Kentucky[203] both have trigger provisions that are substantially similar to Idaho's, but the Kentucky and Louisiana laws specifically mentions that they become effective when the Supreme Court reverses Roe. Also unlike the Idaho law, the Louisiana[204] and Kentucky[205] laws do not have the 30 day delay; they are both set to become effective immediately upon the occurrence of the event.

The other eight states do not include the trigger provision in the laws themselves; the triggers exist only in the bill that created the law. The House Bill that created the Texas trigger laws[206] states the laws become effective 30 days (1) the Supreme Court overruling Roe, (2) the

---

[199] Idaho Code §18-622; Ky. Rev. Stat. § 311.772; Miss. Code Ann. § 41-41-45
[200] Miss. Code Ann. § 41-41-45
[201] Idaho Code § 18-622(1)
[202] La. Rev. Stat. Ann. §40:1061
[203] Ky. Rev. Stat. § 311.772
[204] La. Rev. Stat. Ann. §40:1061
[205] Ky. Rev. Stat. § 311.772
[206] Tex. Health & Safety Code § 170A.001 et. seq.

Supreme Court issues a judgment that recognizes state authority to prohibit abortion, or (3) the United States adopts a constitutional amendment that restores state authority to prohibit abortion.[207] The Tennessee Senate Bill's trigger provision is substantially similar, also including a 30 day delay in effectiveness.[208] The trigger provision in Oklahoma's Senate Bill states the trigger law takes effect after the Attorney General certifies that Roe has been overruled or the United States has adopted a constitutional amendment recognizing state authority to prohibit abortion.[209] The trigger provision in Arkansas' Senate Bill is nearly identical to Oklahoma's trigger.[210] The North Dakota law likewise requires a constitutional amendment or a determination by the Attorney General that Roe has been overturned and state authority to prohibit abortion has been restored.[211] Utah's trigger provision requires substantially the same thing in slightly different language, stating that the law becomes effective when "the legislative general counsel certifies to the Legislative Management Committee that a court of binding authority has held that a state may prohibit the abortion of an unborn child at any time during the gestational period."[212] The South Dakota House Bill includes a trigger provision that does not explicitly mention a court judgment or constitutional amendment; rather, it simply states "[t]his Act is effective on the date that the states are recognized by the United States Supreme Court to have the authority to regulate or prohibit abortion at all stages of pregnancy."[213] The Missouri House Bill states that the trigger law becomes effective when Missouri's Attorney General, the governor, or the state assembly determines that (1) Roe was overturned, a constitutional

[207] 2021 Tex. HB 1280 §3
[208] 2019 Tenn. SB 1257 §3
[209] 2021 OK. SB §18
[210] 2019 Ark. SB 149 §2.
[211] 2007 N.D. HB 1466 §2.
[212] 2020 Ut . SB 174
[213] 2005 S.D. HB 1249

amendment was adopted, or Congress enacted a law restoring state authority to prohibit abortion; it is the only trigger provision to reference Congress.[214]

Criminalized Actions and Exceptions

All of the laws amount to near complete bans on abortion, and they all target abortion providers.[215] Some of the statutes include a definition of abortion in the text,[216] others directly refer to another state law where a definition can be found,[217] and others are part of a larger statutory scheme in which the definition can be found.[218] What is considered to be an abortion may depend on the intent of the provider.[219] The Mississippi trigger law, serves as an illuminating example, defining abortion as:

> the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth or to remove a dead fetus.[220]

After defining abortion, several of the laws expressly ban abortion under almost all circumstances; the limited exceptions are to be discussed in the next subsection. For example, Mississippi law plainly states "[n]o abortion shall be performed or induced in the State of Mississippi."[221] Other trigger laws do the same, but the level of culpability that is required to

---

[214] 2019 Mo. HB 126 Sec. B
[215] Ark. Code Ann. §5-61-304 (2019); Idaho Code §18-622 (2020); Ky. Rev. Stat. § 311.772 (2019); La. Rev. Stat. Ann. § 40:1061 (2006); Miss. Code. Ann. §41-41-45 (2007); Mo. Rev. Stat. §188.017 (2019); N.D. Cent. Code, § 12.1-31-12 (2007); S.D. Codified Laws § 22-17-5.1 (2005); Tenn. Code Ann. § 39-15-213 (2019); Tex. Health & Safety Code § 170A.002 (2021); Utah Code § 76-7a-201 (2020).
[216] Miss. Code. Ann. §41-41-45(1); N.D. Cent. Code §12.1-31-12(1)(a); Utah Code Ann. § 76-7a-101; S.D. Codified Laws § 22-17-5.1; Ky. Rev. Stat. § 311.772(3)(a)
[217] Tex. Health & Safety Code § 170A.001; Tex. Health & Safety Code § 245.002
[218] Mo. Rev. Stat. § 188.015; Mo. Rev. Stat. §188.017
[219] [219] Miss. Code. Ann. §41-41-45(1).
[220] Miss. Code. Ann. §41-41-45(1).
[221] Miss. Code. Ann. §41-41-45(2).

convict under the statute varies by state. Interestingly, Mississippi law criminalizes such an act whether it is done purposely, knowingly, or even recklessly.[222] The Texas trigger law, on the other hand, states "[a] person may not knowingly perform, induce, or attempt an abortion."[223] Like the Mississippi law, the Texas law is creating an express ban. However, it requires more culpability in order to convict; under the Texas law, recklessly performing or attempting an abortion is not enough. The Arkansas statute states that "[a] person shall not purposely perform or attempt to perform an abortion." The Idaho trigger law likewise criminalizes performing or attempting an abortion, but it does not include mens rea language.[224] However, abortion under Idaho law is defined as "intentionally" ending a pregnancy, which seems to indicate the required level of culpability.[225]

Note that these statutes do not specifically mention physicians—they criminalize any person who engages in this behavior with the mens rea (unless they fall under an exception as discussed in the following subsection). Some statutes also criminalize aiding and abetting an abortion,[226] while others criminalize selling materials that could be used in an abortion.[227] The latter could potentially have implications for pharmacists and other retail sellers.

The Oklahoma law is unique in that it defines what is criminalized not by creating a new substantive statute, but by repealing other statutes; these statutes allowed abortion under certain circumstances to align with the constitutional framework set up by *Roe*.[228] According to Rabia

[222] Miss. Code Ann. §41-41-45(4)
[223] Tex. Health & Safety Code § 170A.002(a)
[224]; Idaho Code §18-622
[225] Idaho Code §18-604(1)
[226] Ky. Rev. Stat. § 311.772(3)(A); La. Rev. Stat. Ann. § 40:1061(C)
[227] Ark. Code Ann. § 5-61-303(1)(A); La. Rev. Stat. Ann. § 40:1061(C)
[228] 2021 OK. SB 918 §1 et. seq.

Muqaddam, attorney for the Center of Reproductive Rights, the repealing of these statutes through Senate Bill 918 restores Oklahoma's prohibition on abortion.[229]

Felony Classifications and Penalties

The laws then provide a felony classification for the violation and define the associated penalty. There are three types of penalties that can be incurred by violating a trigger law: fines, incarceration, and loss of professional license. Many of the states allow both a fine and a term of incarceration, but the precise amount of the fine and length of the prison term varies widely.

In Texas, performing a "prohibited abortion"[230] is a felony of the second degree.[231] If the unborn child dies as a result of the offense, it becomes a first degree felony.[232] A second degree felony shall receive a prison sentence between 2 and 20 years and may also receive a fine of up to $10,000.[233] A first degree felony shall receive a prison sentence of life or 5 to 99 years and may also receive a fine of up to $10,000.[234] The Mississippi trigger law states that an individual convicted under the statute shall be incarcerated for 1 to 10 years.[235] Under the Arkansas trigger law, an individual who violates the provision is guilty of an unclassified felony; the punishment is a fine not to exceed $100,000, a term of up to 10 years imprisonment, or both.[236] A violation of the Idaho trigger law results in a term of imprisonment of 2 to 5 years.[237] Violating the Utah trigger law is a second degree felony,[238] which carries a prison term of 1 to 15 years.[239] North

---

[229] Jamison Keefover, New Oklahoma Laws Effective Nov. 1 Challenged by Advocates, OKLAHOMA CITY FOX, Sept. 20,2021.
[230] Under Tex. Health & Safety Code § 170A.002, it is defined as any abortion that does not fall within one of the listed exceptions, to be explored in the following subsection.
[231] Tex. Health & Safety Code § 170A.004
[232] Id.
[233] Tex. Penal Code § 12.33
[234] Tex. Penal Code § 12.32
[235] Miss. Code. Ann. §41-41-45(4)
[236] Ark. Code Ann. §5-61-304
[237] Idaho Code §18-622
[238] Utah Code § 76-7a-201(3)
[239] Utah Code §76-3-203(2)

Dakota's trigger law makes it a class C felony to perform an abortion;[240] the maximum penalty for such a felony is five years in prison, $10,000, or both.[241] In South Dakota, a violation of the trigger law constitutes a class 6 felony,[242] which carries a penalty of up to 2 years imprisonment and a fine of up to $4,000.[243] A violation of Missouri's trigger law is a class B felony,[244] which can result in up to $1,000 fine[245] and imprisonment of 5 to 15 years.[246] In Kentucky, a violation is a class D felony,[247] which carries a sentence of 1 to 5 years imprisonment.[248] In Tennessee, a violation is a class C felony,[249] which carries a sentence of 3 to 15 years.[250] Additionally, a jury can impose a fine of up to $10,000.[251] In Louisiana, an individual who violates the trigger law may be sentenced to up to $1,000 per incidence, imprisoned for up to two years, or both.[252] Several of the trigger laws also provide that the provider can lose his professional license if he is convicted.[253] These penalties are harsh, which makes sense; these states view abortion as a form of murder, and murder is often the crime that receives the harshest punishment under the law.

Exceptions and Defenses

These laws are not absolute, as they include several exceptions. Nearly all of the trigger laws expressly state that a woman who has or seeks an abortion is not criminally liable under the statute. For example, a subsection in one of Texas's trigger laws states "[t]his chapter may not be

---

[240] N.D. Cent. Code § 12.1-31-12(2).
[241] N.D. Cent. Code § 12.1-32-01(4)
[242] S.D. Codified Laws § 22-17-5.1
[243] S.D. Codified Laws § 22-6-1(9).
[244] Mo. Rev. Stat. §188.017
[245] Mo. Rev. Stat. §558.002(3)
[246] Mo. Rev. Stat §558.011(2)
[247] Ky. Rev. Stat. § 311.772(3)(b).
[248] Ky. Rev. Stat. § 532.060
[249] Tenn. Code Ann. § 39-15-213(b).
[250] Tenn. Code Ann §40-35-111(b)(3)
[251] Id.
[252] La. Rev. Stat. Ann. § 40:1061.29(a)-(b)
[253] Idaho Code §18-622(2); La. Rev. Stat. Ann. § 40:1061.29(c); Mo. Rev. Stat. §188.017; Utah Code Ann. § 76-7a-201(5)

construed to authorize the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted."[254] In Mississippi, the trigger law states "[a]ny person, except the pregnant woman, who purposefully, knowingly, or recklessly performs or attempts to perform or induce an abortion" is guilty of a crime.[255] The Arkansas law does not "[a]uthorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child."[256] The Idaho trigger law states "[n]othing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction or penalty."[257] North Dakota makes performing an abortion a class C felony for anyone "other than the pregnant female" to perform an abortion.[258] Missouri's trigger law provides "[a] woman upon whom an abortion is performed or induced in violation of this subsection shall not be prosecuted for a conspiracy to violate the provisions of this subsection."[259] A pregnant woman is also not criminally liable under the trigger laws of Kentucky,[260] Tennessee,[261] or Louisiana.[262]

These states clearly think abortion is morally wrong, so why are women excluded from punishment? The decision not to charge women shows these states do not view women as people capable of making their own decisions; instead, they view women as victims of the abortion providers who surely must have forced the women into it. Notably, the trigger law in Utah, which provides several exceptions, makes no mention of women seeking an abortion;[263] This

---

[254] Tex. Health & Safety Code § 170A.003
[255] Miss. Code. Ann. §41-41-45(4)
[256] Ark. Code Ann. §5-61-304(c)(2)
[257] Idaho Code §18-622(5)
[258] N.D. Cent. Code §12.1-31-12(2)
[259] Mo. Rev. Stat. §188.017.
[260] Ky. Rev. Stat. § 311.772(5).
[261] Tenn. Code Ann. § 39-15-213(e)
[262] La. Rev. Stat. Ann. § 40:1061(H).
[263] Utah Code Ann. § 76-7a-201

implies that women could potentially be charged and convicted under the Utah statute. The South Dakota law also does not mention whether pregnant women are chargeable.[264]

Other exceptions exist, as well. Numerous trigger laws allow abortions that are done to preserve the life of the mother.[265] Some laws are more specific, requiring that (1) the abortion be done by a physician, (2) the pregnancy is creating a life threatening risk to the mother, and (3) the abortion is performed in a way that provides the unborn child with the best possible chance of survival.[266] In Arkansas, an abortion may be done to save the mother's life in case of a medical emergency,[267] which is defined as "a condition in which an abortion is necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[268] The Missouri trigger law also allows abortions in the case of a medical emergency,[269] defining medical emergency as

> a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman.[270]

Some trigger laws allow abortions for the health of the mother.[271] Texas's law does not allow an abortion to be done if the pregnant woman claims she will hurt herself if she is unable to have the procedure.[272] Some trigger laws allow abortions if the woman became pregnant as a result of

---

[264] S.D. Codified Laws § 22-17-5.1.
[265] Idaho Code § 18-622(3); Miss. Code. Ann. §41-41-45(4); N.D. Cent. Code § 12.1-31-12(3)(a) Utah Code § 76-7a-201(1); S.D. Codified Laws § 22-17-5.1
[266] Idaho Code § 18-622(3); Ky. Rev. Stat. § 311.772(4)(a); La. Rev. Stat. Ann. § 40:1061(F); Tenn. Code Ann. § 39-15-213(c); Tex. Health & Safety Code § 170A.002(b)
[267] Ark. Code Ann. §5-61-304
[268] Ark. Code Ann. § 5-61-303(3)
[269] Mo. Rev. Stat. § 188.017
[270] Mo. Rev. Stat. § 188.015(7)
[271] Ky. Rev. Stat. § 311.772(4)(a); La. Rev. Stat. Ann. § 40:1061(F); Tenn. Code Ann. § 39-15-213(c); Utah Code § 76-7a-201(1); Tex. Health & Safety Code § 170A.002(b)
[272] Tex. Health & Safety Code § 170A.002(c)

rape, but they require that the woman made a formal rape charge.[273] North Dakota allows an abortion if the pregnancy resulted from gross sexual imposition, sexual imposition, or sexual abuse of a ward, and it does not require that these instances were reported.[274] Some trigger laws allow abortions if the pregnancy was a result of incest.[275]

D. Conclusion and Areas for Further Research

In the absence of *Roe*'s constitutional constraints, there is a complex web of criminal state abortion laws. Zombie laws and trigger laws are worthy of study as they could potentially be enforced from the moment *Roe* is overturned. While this paper focused on these two types of law, there are other abortion laws that fall somewhere in between. Five states—Georgia, Iowa, Ohio South Carolina, and Alabama--have post-*Roe* laws that would ban or restrict some or all abortions in the absence of *Roe*.[276] These statutes warrant exploration. On the other hand, there are thirteen states that have passed laws explicitly protecting abortion access.[277] This warrants exploration as well.

[273] Idaho Code §18-622(b); Miss. Code. Ann. §41-41-45(2); Utah Code § 76-7a-201(c)
[274] N.D. Cent. Code. 12.1-31-12(3)(b).
[275] Idaho Code §18-622(b); N.D. Cent. Code. 12.1-31-12(3)(c); Utah Code § 76-7a-201(c)
[276] https://www.washingtonpost.com/politics/2021/06/11/abortion-rights-roe-v-wade/
[277] Id.