Thurgood Marshall Law Review

Pages 1-134

Vol. 47, No. 1 Fall 2022

EST. 1970

Thurgood Marshall Law Review

VOLUME 47 FALL 2022 NUMBER 1

Celebrating 53 Years of Publication Since 1970

A Publication of
Thurgood Marshall School of Law

THURGOOD MARSHALL LAW REVIEW

LIFE, DEATH, AND LIBERTY: EXISTENTIAL QUESTIONS IN OUR MODERN LEGAL SYSTEM

VOLUME 47 FALL 2022 NUMBER 1

Published Twice Annually by Students of the
Thurgood Marshall School of Law
Texas Southern University
Houston, Texas 77004
Second Class Postage paid at Houston, Texas and
additional offices

ANNUAL SUBSCRIPTION (NON-STUDENT) $25.00
STUDENTS $15.00
CANADIAN $34.84
FOREIGN $32.50

Unsolicited manuscripts for publication are welcomed but can be returned only if accompanied by postage. Manuscripts should be sent to Lead Articles Editor, Thurgood Marshall Law Review, 3100 Cleburne Street, Houston, Texas 77004. Electronic submissions are also welcomed and are to be sent to tmlawreview@gmail.com.

Address all correspondence regarding subscriptions to: Business Editor, Thurgood Marshall Law Review, 3100 Cleburne Street, Houston, Texas 77004.

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Cite as 47 T. MARSHALL L. REV.

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TEXAS, WE HAVE A PROBLEM: THE UNRAVELING OF THE CONSTITUTIONAL RIGHT TO AN ABORTION, CHAOS IN TEXAS STATE ABORTION LAW, AND SENATE BILL 8

Lillie Graham*

I. Introduction

Texas has a long, storied history with abortion law and has gained an infamous reputation for manipulating the law to serve its political purposes.[1] Like a test kitchen, Texas has tried many different recipes to understand what mixture would withstand a constitutional challenge.[2] In another attempt to overturn *Roe v. Wade*, Texas passed

* Juris Doctor Candidate, Texas Southern University Thurgood Marshall School of Law, May 2023.

I would like to thank the Law Review Editorial Board for their kindness as I essentially rewrote my paper in response to the Dobbs decision and their diligence throughout the editing process. I would also like to thank my family, my partner, and my professors for encouraging me and believing in me so that I might achieve this amazing goal of being published by such a prestigious law review.

[1] *See generally* Roe v. Wade, 410 U.S. 113 (1973) (The original Texas case involving abortion law that established the federal constitutional right to an abortion in which Texas argued that it had a state interest in protecting fetal life); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016) (This was Texas' attempt to restrict abortion by mandating that physicians performing abortions have admitting privileges at a hospital no more than thirty miles away); Whole Women's Health v. Jackson, 141 S. Ct. 2494 (2021) (An unsuccessful application for pre-enforcement injunctive relief against Texas's Senate Bill 8 that prohibited abortions after a fetal heartbeat is detected and implemented the now infamous private civil enforcement mechanism to avoid judicial review); Whole Women's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022) (A Texas Supreme Court case that allowed Senate Bill 8 and its unusual private enforcement mechanism to go into law).

[2] *See id.*

Senate Bill 8 "The Texas Heartbeat Act" (S.B. 8) on May 19, 2021.[3] This unstoppable statute went into effect September 1, 2021, withstood a pre-enforcement challenge that went to the Supreme Court, and finally survived the Texas Supreme Court's chopping block on March 11, 2022.[4] Then, in a ruling that shocked the nation, a sympathetic, conservative majority on the United States Supreme Court defied *stare decisis* and overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* in the *Dobbs v. Jackson Women's Health Organization* case on June 24, 2022.[5]

Texas is only just beginning to understand the legal chaos the decision to eliminate the federal, constitutional right to an abortion has created. In an effort to return the decision to the states and in turn reject its adopted role of "super-legislature," the Supreme Court has created a monster.[6] Like the three-headed hound of Hades, "Cerberus," Texas now has three abortion statutes operating simultaneously and in direct conflict with one another: (1) the above-mentioned S.B. 8, (2) House Bill 1280 "Human Life Protection Act of 2021" ("Trigger Law"), and (3) Texas's resurrected 1925 Penal Code pertaining to abortion ("Pre-*Roe* Statutes").[7] Through all of the chaos and uncertainty, seemingly one thing has prevailed: S.B. 8's perverse enforcement mechanism. Like a juggernaut, S.B. 8's private enforcement mechanism has emerged unscathed after several federal and state battles ready to wreak havoc on our legal landscape for years to come.

In this Note, Part II provides a much-needed background to a few landmark abortion cases to show the calculated strategy that led to the *Dobbs* decision. Part III will examine information about Texas' three state laws that now control women's destinies. Finally, Part IV will discuss the court challenges to S.B. 8, the dangers of S.B. 8's enforcement mechanism, the chaos created by S.B. 8 operating simultaneously with the Trigger Law and the Pre-*Roe* Statues, and

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[3] Tex. H.B. 8, 87th Leg., 2d R.S. (2021).

[4] *See* Tex. Health & Safety Code Ann. § 171.201-212; *Whole Women's Health*, 141 S. Ct. at 2495; *Whole Women's Health*, 642 S.W.3d at 583.

[5] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[6] David J. Zampa, Note, *Supreme Court's Abortion Jurisprudence: Will the Supreme Court Pass the Albatross back to the States*, 65 NOTRE DAME L. REV. 731, 760 (1990).

[7] *Interim Update: Abortion Related Crimes after Dobbs*, TEX. DIST. & CNTY. ATTORNEYS ASS'N (June 24, 2022), https://www.tdcaa.com/legislative/dobbs-abortion-related-crimes/.

finally S.B. 8's enforcement mechanism and Texas's statutorily-conferred standing laws.

II. Background: Evolution of Abortion Law and Strategic Incrementalism

The evolution of federal, constitutional law regarding abortion is marked by strategic incrementalism.[8] This is a tactic employed by some in the political process to affect large-scale change by the accumulation of smaller, incremental steps achieved through time and different political and legislative policy cycles.[9] The undue-burden test, among many other concessions and alterations to *Roe's* original legal pronouncement, was achieved by pro-life advocates after this legislative and legal strategy of incrementalism was effectively pursued.[10] The end goal of this calculated scheme of incrementalism as it relates to abortion law was (1) concrete victories that energized pro-life supporters, and (2) the ultimate target of completely overruling *Roe* and its progeny.[11] One can see this incremental weakening while looking at the evolution of abortion cases over the fifty years after *Roe's* landmark decision in 1973. These cases show a strategic, constant, and purposeful erosion of a constitutional right which culminated in the overturning of *Roe* by the Supreme Court in the recent *Dobbs* case.

Roe came out of a building movement in support of a constitutional right to privacy, especially concerning family, home, and personal decisions.[12] It was thus natural that the Court found that the right to privacy was broad enough to cover a woman's decision on whether to terminate her pregnancy.[13] More specifically, *Roe* set up a strict standard against State involvement in abortion law with a trimester framework that would be the law of the land until *Casey* was decided

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[8] SCOTT H. AINSWORTH & THAD E. HALL, ABORTION POLITICS IN CONGRESS: STRATEGIC INCREMENTALISM AND POLICY CHANGE 8 (2011).

[9] Michael T. Hayes, *Incrementalism*, BRITANNICA, https://www.britannica.com/topic/incrementalism (last updated June 3, 2013).

[10] *See* AINSWORTH, *supra* note 8.

[11] Mary Ziegler, *After Life: Governmental Interests and the New Antiabortion Incrementalism*, 73 U. MIAMI L. REV. 78, 87 (2018).

[12] MARY ZIEGLER, BEYOND ABORTION: ROE V. WADE AND THE BATTLE FOR PRIVACY 27 (2018).

[13] *Id.*; *see also Roe*, 410 U.S. at 153.

almost twenty years later.[14] *Roe* stated that Texas may not totally override the rights of a pregnant woman seeking an abortion, but the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman and the potentiality of human life at the point in which each becomes compelling. [15] The Supreme Court determined that the point in which the State's important and legitimate interest in the health of the mother was compelling was at the end of the first trimester, thus setting up the trimester framework that would control abortion law until 1992.[16] In the evolution of abortion law, this time period immediately after *Roe* turned out to be the most permissive point before strategic incrementalism was soon employed to slowly undercut women's access to abortion. The trimester framework allowed a physician freedom to determine without regulation from the State that a patient's pregnancy should be or could be terminated during the first trimester, and that the State may regulate abortion after the end of the first trimester onward to preserve and protect maternal health.[17] The compelling point relating to the State's important and legitimate interest in potential life was viability of the fetus. [18] *Roe* established that the State may forbid abortion as soon as the fetus is viable outside the womb, except when it is necessary to preserve the life or health of the mother.[19] This viability standard was central to modern abortion law, and as commentators fortuitously predicted at the time, promised to remain a legal nightmare for years to come.[20]

Webster v. Reproductive Health Services started the legitimization of state restrictions on the use of public medical facilities, conscience clauses, and counseling requirements, but *Casey* truly began a real change in abortion law.[21] *Casey* upended *Roe* in many ways while also still preserving the essential holding recognizing the right of a woman to choose to have an abortion before viability and to do so without

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[14] *Roe*, 410 U.S. at 163; Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 876-77 (1992).
[15] *Roe*, 410 U.S. at 162-63.
[16] *Id.* at 163.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 163-64.
[20] JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 249 (1978).
[21] MELISSA HAUSSMAN, ABORTION POLITICS IN NORTH AMERICA 179 (2005).

undue interference from the State.[22] However, the right of the State's power to restrict abortions to supposedly protect the health of the woman and the life of the fetus was strongly reinforced in *Casey* and given a certain emphasis that emboldened states to enact more stringent abortion laws.[23] *Casey* most famously undid the trimester framework of *Roe*, because it was too rigid and not part of the essential holding of *Roe* in the later, more conservative Supreme Court's view.[24] The Supreme Court declared that the trimester framework "undervalues the State's interest in potential life," and therefore it should be abandoned as a "prohibition on all pre-viability regulation aimed at the protection of fetal life." [25] *Casey* established the undue-burden standard in response to the removal of the rigid trimester framework, because in the Court's view the State had a substantial interest in life and hence some regulation was justified during the period of pre-viability.[26] In conclusion, the Supreme Court noted that not all burdens on the right to terminate pregnancy were undue.[27] Thus, the undue-burden standard was formulated to resolve the conflict between the State's interest in fetal life and the woman's constitutionally protected choice to terminate her pregnancy.[28]

Casey set out an exact definition of an undue burden, stating that it occurred when a state regulation "ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[29] A statute with the distinct purpose of simply placing a substantial obstacle before a woman seeking an abortion was unlawful, because "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[30] Stated directly, "an undue burden is an unconstitutional burden." [31] Under the now-defunct undue-burden test of *Casey*, a law that furthered the State's legitimate interest in fetal life but instead actually imposed an undue burden on a

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[22] *Casey*, 505 U.S. at 846.
[23] *Id.*
[24] *Id.* at 872-73.
[25] *Id.* at 873.
[26] *See id.* at 876.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 877.
[30] *Casey*, 505 U.S. at 877.
[31] *Id.*

pregnant woman's decision to have an abortion before fetal viability would have, without question, been unconstitutional.[32]

In *Gonzales v. Carhart*, which the Supreme Court decided in 2007, the Court further modified the undue-burden test allowing for the implementation of harsher abortion restrictions.[33] It did so by blurring *Casey's* rigid lines between viability and pre-viability abortions.[34] *Casey* states clearly that if the "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability*," the act or statute is unconstitutional.[35] In *Gonzales,* the abortions affected by the Partial-Birth Abortion Ban Act of 2003 took place during pre-viability as well as post-viability, thus the question became whether the Act imposed a substantial obstacle to late-term, pre-viability abortions.[36] The answer was no.[37] A ban on partial-birth abortions did not place a substantial obstacle in front of a woman seeking a late-term, pre-viability abortion.[38] This was because the ban restricted one type of abortion, and the Court determined that there were alternate methods available other than a partial-birth abortion, such as a procedure called intact dilation and evacuation (D&E).[39] Indirect burdens on choice have been upheld, and the Supreme Court understood the Partial Birth Abortion Ban Act to be an indirect burden on choice with narrow language that did not foreclose abortion access entirely.[40] The Supreme Court also meekly chose to assume *Casey's* principles rather than reaffirm them, which signaled the Court's growing hostility towards abortion as a constitutional right.[41] Strict heartbeat bans began gaining in popularity after the *Gonzales* decision as a result.[42]

One of the more recent cases is *Whole Women's Health v. Hellerstedt*, another quite infamous Texas case. This case was Texas's

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[32] *See id.*
[33] Jordan Dahme, Note, *Heartbeat Bans and Gonzales: How the Door Was Opened for a New Era of Anti-Abortion Legislation*, 25 TEMP. POL. & CIV. RTS. L. REV. 51, 52 (2016).
[34] *Id.*
[35] Gonzales v. Carhart, 550 U.S. 124, 156 (2007) (quoting *Casey*, 505 U.S. at 877).
[36] *Gonzales*, 550 U.S. at 156.
[37] *Id*.
[38] *Id.*
[39] *Id.* at 164.
[40] Jessica Arden Ettinger, *Seeking Common Ground in the Abortion Regulation Debate*, 90 NOTRE DAME L. REV. 875, 888 (2014).
[41] *See* MKB Mgmt. Corp v. Stenehjem, 795 F.3d 768, 772 (8th Cir. 2015).
[42] Dahme, *supra* note 33, at 59.

thinly veiled attempt to restrict abortion under the guise of protecting maternal health.[43] It did so by making minimum standards of abortion facilities equivalent to those adopted by ambulatory surgical centers and requiring abortion doctors to have admitting privileges at a hospital not further than thirty miles from where the abortion is performed or induced.[44] The Court concluded that neither of these provisions conferred medical benefits to justify the burdens placed upon pregnant women seeking a pre-viability abortion.[45] Thus, each provision placed an undue burden on abortion access and was unconstitutional as a result.[46] Supreme Court Justice Breyer emphasized that the undue-burden standard required courts to acknowledge and examine "the burdens a law imposes on abortion access together with the benefits those laws confer."[47] This case hinged on the fact that the State offered no concrete evidence demonstrating how these regulations would benefit women.[48] This focus on striking a balance between the burdens imposed by a regulation and its benefits in *Hellerstedt* is notable and provides more clarification on the undue burden standard.[49] Finally, the Supreme Court's decision in *Hellerstedt* expanded *Casey* "to conclude individual restrictions on abortion procedures must effectively satisfy heightened review under the undue-burden standard."[50] This case was the last Supreme Court case concerning abortion to keep the status quo and reinforce the undue-burden standard before *Dobbs* was unleashed on the country.

The final case in the progression of strategic incrementalism that accomplished the long-held goal of overruling fifty years of caselaw and ending the constitutional right to obtain an abortion is the now infamous *Dobbs* case.[51] Supreme Court Justice Alito, speaking for the majority, rocked the status quo by declaring, "*Roe* and *Casey*

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[43] *See Whole Woman's Health*, 579 U.S. at 591.
[44] *Id.* (citing Tex. Health & Safety Code Ann. § 245.010(a)).
[45] *Whole Woman's Health*, 579 U.S. at 591.
[46] *Id.*
[47] *Id.* at 607.
[48] Melissa Kraus, *Supreme Court Strikes Down Abortion Regulations: Texas Bill Found Unconstitutional*, 42 AM. J. L. & MED. 859, 860 (2016).
[49] *See* Jon O. Shimabukuro, *Abortion: Judicial History and Legislative Response*, CONG. RSCH. SERV. REPS. 1, 13 (2015).
[50] M. Akram Faizer, Discourse, *Federal Abortion Rights Under a Conservative United States Supreme Court*, 69 DRAKE L. REV. 101, 105-06 (2020).
[51] *Dobbs*, 142 S. Ct. at 2303 (Thomas, J., concurring).

must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by a constitutional provision, including…The Due Process Clause of the Fourteenth Amendment."[52] Justice Alito expounds that some rights do not need to be explicitly mentioned in the Constitution "but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[53] The majority reasoned that contrarily, there is a supposed "unbroken tradition of prohibiting abortion on pain of criminal punishment persist[ing] from the earliest days of the common law until 1973."[54] The Court went on to state that the viability line "makes no sense" and the undue-burden test has "proved to be unworkable."[55] Justice Alito proclaimed that it was time to return the issue of abortion to the people and therefore to their duly elected representatives.[56] The majority might have thought that they were simplifying this contentious issue of abortion by removing it from the control of the Supreme Court and returning it back to the hands of state legislatures and citizens, but instead they have opened a new Pandora's box of legal problems that will further complicate an intensely complex and fraught issue.

III. Cerberus: Texas's Three Problematic Abortion Laws

A. Resurrected 1925 Penal Code "Pre-*Roe* Statutes"

After the *Dobbs* decision overruling the federal constitutional right to obtain an abortion was released in June 2022, Texas had a firm plan.[57] Years of planning and testing the legal system through strategic incrementalism had paid off.[58] The end goal of overruling *Roe* had finally been achieved.[59] Now, abortion law is in the hands of Texas under three separate, distinct, and simultaneously operating statutes.[60] Texas purposefully kept the pre-*Roe* statutes found within the 1925

[52] *Id.* at 2242.
[53] *Id.*
[54] *Id.* at 2253-54.
[55] *Id.* at 2261, 2275.
[56] *See id.* at 2243.
[57] *Id.* at 2242.
[58] *See* Ziegler, *supra* note 11, at 87.
[59] *Id.*; *see also Dobbs*, 142 S. Ct. at 2242.
[60] *Interim Update: Abortion Related Crimes after Dobbs, supra* note 8.

Penal Code that were never explicitly repealed by the legislature.[61] These statutes differ in significant ways from the Texas Health and Safety Code §170A.001, *et seq* "Trigger Law" or S.B. 8.[62]

The Texas pre-*Roe* laws against abortion were formerly found in Chapter 9 of the Penal Code, Articles 1191 to 1196.[63] Texas Penal Code Articles 1191-6 (now Vernon's Texas Revised Civil Statutes Annotated Articles 4512.1-6) were moved to Chapter 6 of Vernon's Texas Civil Statutes as "leftover" crimes after *Roe* was decided in 1973.[64] Article 4512.1 begins,

> [i]f any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years.[65]

Article 4512.2 threatens accomplice liability for those who furnish the means for procuring an abortion with full knowledge of that purpose.[66] Article 4512.6 stipulates that abortion is allowed for the purpose of saving the mother's life.[67]

There have already been cases in the courts regarding the pre-*Roe* statutes.[68] Almost immediately after the *Dobbs* decision, Texas Attorney General Ken Paxton issued an advisory opinion indicating the State's willingness to file charges against abortion providers.[69] The

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[61] Tex. Rev. Civ. Stat. Ann. art. 4512.1-6, §2.
[62] *Interim Update: Abortion Related Crimes after Dobbs, supra* note 8.
[63] *Id.*
[64] *Id.*
[65] Tex. Rev. Civ. Stat. Ann. art. 4512.1, §2.
[66] Tex. Rev. Civ. Stat. Ann. art. 4512.2, §2.
[67] Tex. Rev. Civ. Stat. Ann. art. 4512.6, §2.
[68] Reply in Support of Relators' Emergency Motion for Temporary Relief at 1, In re Paxton, No. 22-0527 (Tex. June 29, 2022), https://www.aclu.org/whole-womans-health-v-paxton-reply-support-motion-temp-relief.
[69] Letter from Ken Paxton, Atty. Gen. of Tex. to the Pub. (July 27, 2022) (on file with author), https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20(07.27.202

providers then filed a lawsuit to enjoin Attorney General Paxton and Texas from enforcing the law.[70] Attorney General Paxton then asked the Supreme Court of Texas to vacate a temporary restraining order issued by the 269th Judicial District Court in Harris County blocking the enforcement of Texas's pre-*Roe* Penal Code statutes prohibiting abortion.[71] On July 1, 2022, the Texas Supreme Court ruled that Texas may enforce the resurrected penal codes.[72] This decision did not allow prosecutors to begin criminal indictments or prosecutions against providers, but it permitted civil lawsuits and financial penalties if abortion providers continued to perform the procedure in the interim period before the Trigger Law went into effect on September 25, 2022.[73]

B. The Texas Trigger Law

Another building block in Texas's tactical legislative and legal strategy to impose its vision of the state on its citizens is the state's Trigger Law passed by the 87th Texas Legislature under House Bill 1280, which created the Health and Safety Code Chapter 170A (Performance of an Abortion).[74] It went into effect thirty days after *Roe* was overturned either wholly or partly by the Supreme Court of the United States.[75]

Starting on August 25, 2022, Chapter 170A of the Health and Safety Code of Texas prohibits "knowingly performing, inducing, or attempt[ing] an abortion" at any time after fertilization, which is defined as "the point in time when a human sperm penetrates the zona

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2).pdf; *see also* Press Release, Att'y Gen. of Tex., AG Paxton Publishes New Guidance Upon Issuance of SCOTUS's Dobbs Judgment (July 27, 2022) (on file with author), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-publishes-new-guidance-upon-issuance-scotuss-dobbs-judgment.

[70] Kirk McDaniel, *Texas abortion providers sue to block enforcement of pre-Roe ban*, COURTHOUSE NEWS SERV. (June 27, 2022), https://www.courthousenews.com/texas-abortion-providers-sue-to-block-enforcement-of-pre-roe-ban/.

[71] Zach Despart, *Texas can enforce 1925 abortion ban, state Supreme Court says*, THE TEX. TRIB. (July 2, 2022, 10:00 AM), https://www.texastribune.org/2022/07/02/texas-abortion-1925-ban-supreme-court/.

[72] *Id.*

[73] *Id.*

[74] Tex. Health & Safety Code Ann. § 170A.001-7.

[75] Tex. H.B. 1280, 87th Leg., R.S. (2021).

pellucida of a female human ovum."[76] The only exception is that a physician may perform an abortion if under the physician's "reasonable medical judgment" there is a "greater risk of the pregnant female's death or a serious risk of substantial impairment of major bodily function of the pregnant female."[77] The inevitable result of such a statute is that absolutely no abortions are legal in Texas at even the earliest stages of pregnancy, unless the woman is close to death. As this particular law intended, the process of proving that a woman justifiably needs this emergency medical care will become treacherous for providers.[78] Providers will have to figure out what they can and cannot do and guess as to whether a prosecutor is going to disagree with them. This will lead to inadequate medical care for women and put women at a greater risk of harm and death[79]

Abortion within the Trigger Law is defined as including surgical and non-surgical means, such as drugs, medicines, or any other substances or devices.[80] Within Texas's definition of abortion, the law specifically excludes birth control devices or oral contraceptives, removal of a dead fetus caused by a so-called "spontaneous abortion," and removal of ectopic pregnancies as acts of abortion.[81] However, it seems to encompass selective reductions, which is the practice of eliminating multiple pregnancies that can result from invitro fertilization treatments, as this can occur after the embryo is implanted inside the woman.[82] The Trigger Law currently does not seem to be applicable to invitro fertilization and reproductive medicine services prior to implantation of an embryo, but Texas Health and Safety Code §245.002 does not explicitly address either in the

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[76] Tex. Health & Safety Code Ann. § 170A.001-002; *see also* Eleanor Klibanoff, *New Texas law increasing penalties for abortion providers goes into effect Aug. 25*, THE TEX. TRIB. (July 27, 2022), https://www.texastribune.org/2022/07/26/texas-abortion-ban-dobbs/.

[77] Tex. Health & Safety Code Ann. § 170A.002.

[78] Julián Aguilar & Joseph Leahy, *Texas Republicans' long-sought 'trigger law' on abortion now in effect*, HOUS. PUB. MEDIA (Aug. 25, 2022, 11:56 AM), https://www.houstonpublicmedia.org/articles/news/texas/2022/08/25/431599/texas-republicans-long-sought-trigger-law-on-abortion-now-in-effect/.

[79] *Id.*

[80] Tex. Health & Safety Code Ann. § 245.002.

[81] *Id.*

[82] Seema Mathur, *Texas' Anti-Abortion Trigger Law Worries Fertility Doctors and Patients*, KUT 90.5 (July 18, 2022, 9:09 AM), https://www.kut.org/health/2022-07-18/texas-anti-abortion-trigger-law-worries-fertility-doctors-and-patients.

affirmative or the negative if the disposal of embryos in cryo-storage is considered a form of abortion.[83] This again leaves physicians in a perilous position as they figure out how to navigate the legal boundaries within which they must practice.

Finally, Texas's Trigger Law imposes criminal and civil liability on those performing abortions, but not specifically the pregnant woman herself.[84] This, of course, did not stop the Starr County District Attorney from charging a woman, Lizelle Herrera, for the "murder" of her fetus for a supposed self-induced abortion.[85] In April 2022, the district attorney had to walk back their indictment and pronounced that "in reviewing applicable Texas law, it is clear that Ms. Herrera cannot and should not be prosecuted for the allegations against her."[86] Under Section 170A.004, a court can charge a provider with the criminal offense of a first-degree felony if the fetus dies as a result of the abortion.[87] It is a second-degree felony if the fetus survives.[88] A person who violates this section is also subject to a civil penalty of $100,000 or more for each violation and is on the hook for the other side's attorney fees.[89] This is similar to the infamous S.B. 8 discussed next.

C. "The Texas Heartbeat Act" Senate Bill 8 (S.B. 8)

Texas has the notorious and much-maligned S.B. 8 in place. It continues to be effective and has not in any way been repealed or altered due to the *Dobbs* decision.[90] On September 1, 2021, S.B. 8 went into effect, dictating that a doctor may not knowingly perform or induce an abortion if that doctor detects a so-called "fetal heartbeat."[91]

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[83] *Id.*
[84] Tex. Health & Safety Code Ann. § 170A.003.
[85] Julianne McShane, *Texas District Attorney Drops Case Against Woman Charged With Murder for Self-Induced Abortion*, NBC NEWS (Apr. 11, 2022, 2:26 PM), https://www.nbcnews.com/news/texas-district-attorney-says-indictment-woman-charged-murder-self-indu-rcna23782.
[86] *Id.*
[87] Tex. Health & Safety Code Ann. § 170A.004.
[88] *Id.*
[89] Tex. Health & Safety Code Ann. § 170A.005.
[90] Scott Simon, *New Texas trigger law makes abortion a felony*, NPR (Aug. 27, 2022, 8:33 AM), https://www.npr.org/2022/08/27/1119795665/new-texas-trigger-law-makes-abortion-a-felony.
[91] Tex. Health & Safety Code Ann. §171.204(a).

Texas defines a fetal heartbeat as a "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac."[92] There are no exceptions for rape, incest, or nonviable pregnancies where the fetus still has a detectable heartbeat.[93] The only way that a woman seeking an abortion can legally obtain one after a fetal heartbeat is detected is if she has a medical emergency that the doctor believes necessitates inducing or performing an abortion.[94] Even then, a physician's certainty that a woman has a medical emergency that warrants pursuing an abortion is tricky.[95] An ectopic pregnancy where the fertilized egg implants outside of the uterus or pre-eclampsia, which is a form of extremely high blood pressure during pregnancy, are both obvious cases of a clear emergency.[96] The problem arises when a patient has cancer while pregnant and cannot receive chemotherapy, a heart condition that can possibly lead to sudden cardiac arrest, or any number of medical problems that ride the line of what is an immediate medical emergency.[97] In these somewhat questionable emergencies, Texas's S.B. 8 statute leaves the decision to the doctor about whether the patient should have an abortion to save her life.[98] The doctor is forced to make this decision knowing that they could possibly be sued civilly by zealots who may disagree and seek to punish the doctor financially.

Texas's most recently implemented Health and Safety Code surrounding abortion includes a novel and problematic enforcement mechanism.[99] Texas's new abortion statute is to be enforced exclusively through private civil actions by "[a]ny person, other than an officer or employee of a state or local government entity in [the state of Texas]."[100] No enforcement of this statute may be taken or even threatened by the State of Texas, a political subdivision, a district or county attorney, or an executive or administrative officer or employee

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[92] Tex. Health & Safety Code Ann. §171.201.
[93] Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html; *see* Tex. Health & Safety Code Ann. §171.205.
[94] Tex. Health & Safety Code Ann. §171.205.
[95] Astor, *supra* note 93.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Tex. Health & Safety Code Ann. § 171.208.
[100] Tex. Health & Safety Code Ann. § 171.208(a).

of Texas.[101] What is unique about S.B. 8's enforcement mechanism is that private citizens are the only enforcers, excluding state actors entirely.[102] This unusual enforcement mechanism prevents people from suing state officials for violating constitutional rights because they are not responsible for the law's administration.[103] Texas employed this strategy in order to shield this statute from judicial review.[104]

A person may also bring a civil action against an individual who "knowingly engages in conduct that aids and abets the performance or inducement of an abortion… [or simply] intends to engage in the conduct."[105] Someone who "aids or abets" is an intentionally vague and general statement that might encompass clinic employees, receptionists, friends, or relatives that help a person pay for their abortion or take them to the clinic.[106] It could even include rideshare drivers who drive a patient to a physician's office, and any person who might share information about abortion options with a pregnant woman seeking the procedure.[107]

Another unique and problematic aspect of the new law's enforcement mechanism is that the statute gives private parties the right to sue without having to prove any connection to the individual they are suing or the state of Texas.[108] An out-of-state individual may sue someone who facilitates a Texan to get an abortion in multiple counties in Texas.[109] This is because the statute allows multiple venues for a plaintiff to bring an action: (1) the county in which all or part of the events took place; (2) the county of residence for the defendant at the time the cause of action was brought if they are a

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[101] Tex. Health & Safety Code Ann. § 171.207(a).
[102] Cathy Zhang, *Beyond Abortion: The Far- Reaching Implications of SB8's Enforcement Mechanism*, BILL OF HEALTH (Sept. 28, 2021), https://blog.petrieflom.law.harvard.edu/2021/09/28/tx-sb8-abortion-enforcement-mechanism/.
[103] *Id.*
[104] *Jackson*, 142 S. Ct. at 543 (Sotomayor, J., dissenting).
[105] Tex. Health & Safety Code Ann. § 171.208(a).
[106] Astor, *supra* note 93.
[107] Astor, *supra* note 93.
[108] *Jackson*, 142 S. Ct. at 546 (Sotomayor, J., dissenting); *see also* Kari White et al., *Texas Senate Bill 8: Medical and Legal Implications,* THE UNIV. OF TEX. AT AUSTIN TEX. POL'Y EVALUATION PROJECT 1 (July 2021), https://sites.utexas.edu/txpep/files/2021/07/TxPEP-research-brief-senate-bill-8.pdf.
[109] Astor, *supra* note 93.

natural person; (3) the county of the principal office of the defendant that is not a natural person; and (4) the claimant's county of residence if they are a natural person residing in the state of Texas.[110] It also, in a sense, gives the plaintiff venue veto over the defendant by stating that the "action may not be transferred to a different venue without the written consent of all parties."[111] It also prevents defendants of these civil lawsuits from "invoking nonmutual issue or claim preclusion" which means they would have continued exposure to future lawsuits in the state of Texas for the exact same conduct.[112] These alterations to the state court procedure make litigation purposefully cruel and punitive to defendants as a chilling mechanism.[113]

If the claimant succeeds in the civil action against the individual who violates this statute, the court will award what has been called a bounty.[114] This bounty is statutory damages of no less than $10,000 plus cost and fees for each abortion that the defendant performed or induced in violation of the statute or each abortion that was aided and abetted by a person.[115] In essence, it allows a private individual to sue a provider and any person who facilitates a patient to obtain an abortion after a doctor detects a fetal heartbeat and receive at least $10,000 plus attorney fees.[116] However, a court may not award costs or attorney fees to a defendant in an action.[117] Thus, there is a double standard that punishes the abortion provider financially and rewards the individual bringing the suit.

A defendant in a civil action may assert an affirmative defense to liability after violating this statute if the defendant: (1) "has standing to assert the third-party rights of a woman or group of women seeking an abortion"; and (2) "demonstrates that the relief sought by the claimant will impose an undue burden on the woman or group of women."[118] Since S.B. 8 was enacted before the *Dobbs* decision, it

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[110] Tex. Health & Safety Code Ann. § 171.210(a).
[111] Tex. Health & Safety Code Ann. § 171.210(b).
[112] *Jackson*, 142 S. Ct. at 546 (Sotomayor, J., dissenting); Tex. Health & Safety Code Ann. § 171.208(e)(5).
[113] *See Jackson*, 142 S. Ct. at 546 (Sotomayor, J., dissenting).
[114] Dan Solomon, *Texas's Abortion "Bounty" Law Just Lost Its First Test. Here's What That Means*., TEX. MONTHLY (Dec. 9, 2022), https://www.texasmonthly.com/news-politics/texas-abortion-bounty-law-just-lost-first-test/.
[115] Tex. Health & Safety Code Ann. § 171.208(b).
[116] *Id.*
[117] Tex. Health & Safety Code Ann. § 171.208(i).
[118] Tex. Health & Safety Code Ann. § 171.209(b).

rigidly defines an undue burden and states that judges may not find an undue burden unless the defendant demonstrates exact and definite caveats outlined in S.B. 8.[119] The caveats that must be met to prove an undue burden under the Texas statute are that: "(1) an award of relief will prevent a woman or a group of women from obtaining an abortion; or (2) an award of relief will place a substantial obstacle in the path of a woman or a group of women who are seeking an abortion."[120] This is not totally dissimilar from the statements in *Casey* except that they have left out the key phrase included in the Supreme Court judgment: "before the fetus attains viability."[121] However, the statute continues further in stating that a defendant cannot establish an undue burden by simply demonstrating that "an award of relief will prevent women from obtaining support or assistance, financial or otherwise, from others in their effort to obtain an abortion or arguing . . . that an award of relief against other defendants . . . will impose an undue burden on women seeking an abortion."[122] Texas has statutorily set the interpretation of an undue burden in an attempt to constrain judges and place limits on the definition of an undue burden.[123]

Justice Sotomayor, writing for the dissent in *Whole Woman's Health v. Jackson*, stated that S.B. 8's statutorily defined undue-burden test "redefines that standard to be a shell of what the Constitution requires . . . . Rather than considering the law's cumulative effect on abortion access, it instructs state courts to focus narrowly on the effect on the parties."[124] This aspect of the statute no longer truly matters in a legal sense, as the federal undue burden standard no longer exists after *Dobbs*, but it shows the lengths that Texas was willing to go to defy constitutional law.

Furthermore, the statute is severable.[125] So, if any court finds a part to be invalid or unconstitutional, the remaining sections shall be severed and unaffected.[126] However, if S.B. 8's enforcement mechanism was to be found unconstitutional, which at this point seems extremely unlikely, it would by effect bring down the statute since

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[119] *See* Astor, *supra* note 93; *see also* Tex. Health & Safety Code Ann. § 171.209(c).
[120] Tex. Health & Safety Code Ann. § 171.209(c).
[121] *Casey*, 505 U.S. at 878; *see also* Tex. Health & Safety Code Ann. § 171.209(c).
[122] Tex. Health & Safety Code Ann. § 171.209(d).
[123] Astor, *supra* note 93.
[124] *Jackson*, 142 S. Ct. at 546-47 (Sotomayor, J., dissenting).
[125] Tex. Health & Safety Code Ann. § 171.212(a).
[126] Tex. Health & Safety Code Ann. § 171.212(b).

there would be no civil or penal enforcement of Texas Health & Safety Code §§171.201-212.

IV. Problems with S.B. 8

A. History of Challenges to S.B. 8

At the end of 2021, *Jackson* and *United States v. Texas* sought review by the Supreme Court before the Fifth Circuit could reach a judgment.[127] Both were an attempt by abortion providers to confront S.B. 8 through a pre-enforcement challenge.[128] The Court held that the plaintiffs could not bring suit against the state judges or clerks because no case or controversy between adverse litigants exists.[129] The Supreme Court also ruled that because S.B. 8's enforcement mechanism was through private parties and civil lawsuits, the attorney general could not be enjoined since he had no enforcement authority.[130] The Court allowed a narrow portion of the case to proceed against the Texas Medical Board and other licensing authorities because sovereign immunity does not bar a pre-enforcement challenge.[131]

The scathing dissent, which comprised Justices Roberts, Breyer, Sotomayor, and Kagan, strongly disagreed with the majority and advised that the District Court should resolve this litigation without delay.[132] Justice Sotomayor detailed how S.B. 8's outsourcing enforcement of the law to private individuals is structured to thwart and frustrate pre-enforcement review, and the Supreme Court's majority is allowing Texas's challenge to federal supremacy by blessing its blatant attempt to avoid judicial review.[133] She stated that it is "a brazen challenge to our federal structure" that brings back old, Civil War, states' rights, slave-holding, southern thinking.[134] She

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[127] Joanne R. Lampe, *Texas Heartbeat Act (S.B. 8) Litigation: Supreme Court Identifies Narrow Path for Challenges to Texas Abortion Law*, CONG. RSCH. SERV. 3 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10668.
[128] *Id.*; *Jackson*, 142 S. Ct. at 530.
[129] *Jackson*, 142 S. Ct. at 532.
[130] *Id.* at 534.
[131] *Id.* at 528.
[132] *Id.* at 543 (Sotomayor, J., dissenting).
[133] *Id.* at 548.
[134] *Id.* at 550.

lamented the chilling effect it would have and angrily stated that the Court should have put a stop to the "madness" before it went into effect.[135] The loss for abortion providers in this case demonstrated the conservative shift of the Supreme Court and foreshadowed the resounding defeat providers received in *Dobbs*.

On March 11, 2022, Texas courts, emboldened by the Supreme Court's lack of action on S.B. 8, issued another decision that effectively ended the question of who may enforce S.B. 8.[136] On remand to the Fifth Circuit from the United States Supreme Court, the Texas Supreme Court answered the Fifth Circuit's certified question in *Jackson*: "whether Texas law authorizes certain state officials to directly or indirectly enforce the state's new abortion restriction requirements."[137] It answered the question in the negative in a final blow to abortion providers.[138] S.B. 8 is enforced by private civil action, and it is thus clear that public officials cannot enforce it directly.[139] The issue then became whether it could be enforced by a state-agency executive such as the Texas Medical Board indirectly through the sanctioning and disciplining of professional licensees like Texas nurses, physicians, and pharmacists.[140] The Texas Supreme Court determined that other Texas state laws like the Texas Medical Practice Act granted state agencies executives broad authority to enforce state laws through the professional disciplinary process.[141] This "broad authority to enforce other state laws – including abortion restriction laws- through the professional disciplinary process" was contingent on the fact that the other laws did not specify otherwise.[142] However, S.B. 8 expressly states otherwise and maintains that civil action is the exclusive method for enforcement.[143] The Texas Supreme Court concluded that the statute has no mention of the language "directly" or "indirectly" and unambiguously declares that civil action is the one and only mode of enforcement.[144] Therefore,

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[135] *Id.* at 543-44.
[136] *Whole Women's Health*, 642 S.W.3d at 572.
[137] *Id.*
[138] *Id.*
[139] *Id.* at 575.
[140] *Id.* at 575-76.
[141] *Id.* at 575.
[142] *Id.* at 576.
[143] *Id.*
[144] *Whole Women's Health*, 642 S.W.3d at 577.

the state agency executives designated as defendants in the case could not enforce the statute directly or indirectly, and Texas's scheme to evade judicial review was complete.[145]

B. Conflicts Between All Three Laws

Having three different abortion laws in place at the same time has created serious legal confusion and produced a possible opening for those who wish to challenge Texas's state law. Beginning with the pre-*Roe* statutes, Attorney General Paxton issued an advisory opinion on July 27, 2022, stating that "local prosecutors may choose to immediately pursue criminal prosecutions based on violations of Texas abortion prohibitions predating *Roe* that were never repealed by the Texas Legislature."[146] This issue is debatable and causes several conflicts in the law. Attorney General Paxton argues that the statutes stayed on the books but were simply unenforceable by prosecuting attorneys.[147] However, in a 1974 letter to the district attorney of Bexar County, the Texas Attorney General at the time, John L. Hill, stated that current Texas Vernon's Civil Statutes 4512.1-6, formerly:

> [a]rticles 1191, 1192, 1193, 1194 and 1196 [of the] Texas Penal Code, have been held unconstitutional and are no longer of any effect. Article 1195 is still a valid statute but applies only to those situations in which the victim is in the process of being born. Therefore, there are now no laws in this State regulating abortion, per se.[148]

A 2004 United States Fifth Circuit Court of Appeals case, *McCorvey v. Hill*, adds more confusion and complication into the mix by indicating that statutes can be repealed by implication.[149] The Fifth Circuit stated, "Under Texas law, statutes may be repealed expressly or by implication. The Texas statutes that criminalized abortion (former Penal Code Articles 1191, 1192, 1193, 1194, and 1196) and

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[145] *See id.*
[146] Letter from Ken Paxton, Att'y Gen. of Tex. to the Pub., *supra* note 70.
[147] *Id.*
[148] Tex. Att'y Gen. Op. No. JH-369 (1974).
[149] McCorvey v. Hill, 385 F.3d 846, 849 (5th Cir. 2004).

were at issue in *Roe*, have at least been repealed by implication."[150] Vernon's Civil Statutes even conclude each article with the statement, "The following article was held to have been impliedly repealed in McCorvey v. Hill, 385 F. 3d 646 (5th Cir. 2014)."[151] Though the Texas Supreme Court ruled that Attorney General Paxton could enforce the pre-*Roe* statutes, the fact that *McCorvey* states clearly that Texas's pre-*Roe* statutes were impliedly repealed ultimately created a potential for confusion as Texas pursued prosecutions during the interim period before the Trigger Law went into place.[152]

The Trigger Law states, "The legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger."[153] The legislature obviously hoped to clear up potential confusion by legislatively mandating that the laws were never repealed. However, it is strongly debatable whether it actually did. Rather, it appears the legislature has further clouded an already intensely complex subject and perhaps the legislators have instead provided an opening for those who desire to challenge the law. The failure to repeal Articles 4512.1-6 is one of the focuses of a case, *Fund Texas Choice v. Paxton*, most recently filed in the United States District Court for the Western District of Texas, Austin Division.[154] The plaintiffs sought to enjoin the Texas Attorney General from "enforcing the statutes against activity related to out-of-state abortions and to declare the enforcement of the pre-*Roe* statutes, Trigger Ban, and fee-shifting provisions of S.B. 8 unconstitutional."[155]

Fund Texas Choice specifically highlights the confusion that all three laws operating together have created for providers. The plaintiffs have resorted to calling Texas Attorney General Paxton to testify in this very case, because of his "unique, first-hand knowledge

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[150] *Id.*
[151] Tex. Rev. Civ. Stat. Ann. art. 4512.1-6, §2.
[152] *McCorvey*, 385 F.3d at 849.
[153] Tex. H.B. 1280, 87th Leg., R.S. (2021).
[154] Plaintiffs' Original Class Action Complaint for Declaratory and Injunctive Relief, Plaintiffs Fund Tex. Choice v. Paxton, (No. 22-cv-859), 2022 U.S. Dist. LEXIS 234367, (W.D. Tex. filed Aug. 23, 2022).
[155] Plaintiffs Fund Tex. Choice v. Paxton, No. 22-cv-859, 2022 U.S. Dist. LEXIS 234367, at *7 (W.D. Tex. Feb. 24, 2023).

of the issues at hand and how he will enforce the Trigger Ban."[156] Paxton has maintained that out-of-state abortion care violates the Trigger Law, but then simultaneously claims within the confines of this lawsuit that there is not a likely threat that he would pursue civil penalties.[157] However, the district court stated that they would not "sanction a scheme where Paxton repeatedly labels his threats of prosecution as real for the purpose of deterrence and as hypothetical for the purposes of judicial review."[158] He will thus be forced to clarify to providers if their fears of future prosecutions are unfounded or warranted.[159]

Adding to the confusion, S.B. 8 ups the ante by adding section 311.036 to the Texas Chapter 311 Code Construction Act that states, "A statute that regulates or prohibits abortion may not be construed to repeal any other statute that regulates or prohibits abortion, either wholly or partly, unless the repealing statute explicitly states that it is repealing the other statute."[160] Thus, all three abortion statutes stand alone and in direct conflict with one another. As mentioned previously, Texas's Trigger Law stipulates that a person who knowingly performs, induces, or attempts an abortion could be subject to a first or second-degree felony depending on various factors.[161] First-degree felonies in Texas come with a maximum life sentence (not more than ninety-nine years) to a minimum of five years.[162] On top of imprisonment, an individual who has been found guilty can be assessed a fine not to exceed $10,000.[163] Second-degree felonies come with a maximum of twenty years and a minimum of two years imprisonment, with a similar fine not to exceed $10,000.[164]

On the other hand, the pre-*Roe* statutes have totally different criminal penalties that state:

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[156] Plaintiffs Fund Tex. Choice v. Paxton, No. 22-cv-859, 2022 U.S. Dist. LEXIS 234367, at *16 (W.D. Tex. Feb. 24, 2023).
[157] *Id*. at *18-19.
[158] *Id*. at *19.
[159] *Id.*
[160] Tex. Gov. Code Ann. §311.036.
[161] Tex. Health & Safety Code Ann. §170A.004.
[162] Tex. Penal Code Ann. § 12.32(a).
[163] Tex. Penal Code Ann. § 12.32(b).
[164] Tex. Penal Code Ann. § 12.33.

> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary *not less than two years nor more than five years*; if it be done without her consent, the punishment shall be doubled.[165]

The pre-*Roe* statutes conflict directly by stipulating that an individual who violates the act may receive two to ten years in prison as opposed to the Trigger Law's two years to ninety-nine years in prison. These are vastly different prison sentences for the same act. One must ask: which one applies? Does this make the statutes irreparably ambiguous? At the very least it makes Texas laws regarding abortion confusing and stupidly chaotic.

Also, Article 4512.2 of the pre-*Roe* statutes titled "Furnishing The Means" determines that whoever facilitates a person in procuring an abortion knowingly is guilty as an accomplice.[166] This imposition of criminal accomplice liability conflicts with S.B. 8, which dictates that violations of its aiding and abetting statute shall be enforced exclusively through private civil actions.[167] Texas Health & Safety Code §171.207 expressly states, "No enforcement of this subchapter and no enforcement of Chapter 19 and 22 Penal Code, in response to violations of this subchapter, may be taken or threatened by this state…"[168] Thus, S.B. 8 and the pre-*Roe* statutes simultaneously state that those who aid and abet a woman in the performance of an abortion *may be penalized* under the Texas Penal Code and also *may not be penalized* under the Texas Penal Code.

C. S.B. 8 and State Statutory Standing

Many who wish to challenge S.B. 8 seem to latch onto the idea that perhaps the enforcement mechanism's kryptonite is the law on standing and the constitutionally mandated need to satisfy a call for

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[165] Tex. Rev. Civ. Stat. Ann. art. 4512.1, §2 (emphasis added).
[166] Tex. Rev. Civ. Stat. Ann. art. 4512.2, §2.
[167] Tex. Health & Safety Code Ann. §171.207.
[168] *Id.*

injury.[169] They pontificate: how can a statute be allowed to go unimpeded through the court system with such an obviously ambiguous grant of standing to "any person…"?[170] Where is the particularized harm?[171] What about the Article III Cases and Controversies Clause and the holding of *Lujan v. Defenders of Wildlife*?[172] Perhaps this statute and its strange enforcement mechanism should not stand based on purely moral and ethical grounds. However, after the decision in *Dobbs* the reality is that federal law is no longer applicable, and this law stands pretty firmly on over one hundred years of Texas caselaw.[173] There are points of weakness which could translate into glimmers of hope on this particular argument, which will be discussed shortly, but these weaknesses are not fatal flaws that will bring the downfall of this dangerous enforcement mechanism.

Statutes that empower private individuals to compel enforcement of specific provisions are not entirely curious or noteworthy.[174] The United States permits private enforcement of the law in contexts such as employment wages and hours, antitrust, environmental pollution, securities fraud, the Civil Rights Act.[175] In *Lujan*, an environmental law case, the United States Supreme Court determined that federal standing under the Article III Cases and Controversies clause requires more than a speculative, hypothetical injury but rather actual harm that is fairly traceable to the defendant.[176] Thus, even though 16 U.S.C.S. § 1540 states, "*any person* may commence a civil suit on his own behalf to enjoin any person . . . who

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[169] Howard Wasserman & Charles Rhodes, *The Procedural Puzzles of SB8 part IV: test Cases for Defensive State Court Litigation*, REASON: THE VOLOKH CONSPIRACY, (Sept. 14, 2021, 12:24 PM), https://reason.com/volokh/2021/09/14/the-procedural-puzzles-of-sb8-part-iv-test-cases-for-defensive-state-court-litigation/; *see also* Sharon Driscoll, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on Texas Abortion Law*, STAN. L. SCH., (Sept. 8, 2021), https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law/.

[170] Wasserman, *supra* note 169; Driscoll, *supra* note 169.

[171] Wasserman, *supra* note 169; Driscoll, *supra* note 169.

[172] Driscoll, *supra* note 169.

[173] *See Dobbs*, 142 S. Ct. at 2242; *see also* Spence v. Fenchler, 180 S.W. 597, 609 (Tex. 1915); Scott v. Bd. of Adjustment, 405 S.W.2d 55, 56 (Tex. 1966).

[174] Driscoll, *supra* note 169.

[175] Driscoll, *supra* note 169; Zhang, *supra* note 102.

[176] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

is alleged to be in violation of any provision of this Act . . . .", the U.S. Supreme Court determined that this statutorily conferred standing still required a particularized injury.[177] If a case based on a violation of S.B. 8 was brought to court, jurisdictionally it would no longer be able to be brought to a federal court or would not likely be removed to a federal court.[178] Accordingly, this Note turns to Texas state law that shares similarities with federal standing and one major difference.

Standing is a prerequisite for any suit.[179] Stated plainly, a court has no jurisdiction over a plaintiff's claim who does not have standing, and thus is obligated to dismiss that claim.[180] If none of the plaintiff's claims fulfills the required standing, it then becomes mandatory for the court to dismiss the entire action because of lack of jurisdiction.[181] Texas has incorporated many of the principles of *Lujan* into its state case law regarding standing.[182] The Texas Supreme Court case *Heckman v. Williams* states the standard, common law standing requirements:

> In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court. This parallels the federal test for Article III standing: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." . . . . Under Texas law, as under federal law, the standing inquiry begins with the plaintiff's alleged injury.[183]

Standing to sue may either be based on common law or statutory law.[184] Under the common law standing requirement, plaintiffs would need to have a concrete injury to establish standing and would als need to make clear their interest in bringing the suit

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[177] *Id.*; Endangered Species Act, 16 U.S.C. § 1540 (emphasis added).
[178] Wasserman, *supra* note 169.
[179] Heckman v. Williamson Cnty., 369 S.W.3d 137, 150 (Tex. 2012).
[180] *Id.*
[181] *Id.*
[182] *Id.* at 154.
[183] *Id.*
[184] *See* Bickman v. Dallas, 612 S.W.3d 663, 669 (Tex. App.—Dallas 2020, pet. denied); In re Kherkher, 604 S.W.3d 548, 551 (Tex. App.—Houston 2020, no pet.).

under the statute was particular to them individually not simply as a member of the general public.[185] The Texas Supreme Court reiterated this principal as recently as 2018 stating specifically that "[g]enerally, unless standing is conferred by statute, 'a plaintiff must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury.'"[186]

However, there are exceptions to this common law standing. The common law or general rule of standing is only applied in cases "absent a statutory exception to the contrary."[187] As mentioned briefly above, Texas courts have said, "judge-made criteria regarding standing do not apply when the Texas Legislature has conferred standing through a statute."[188] Standing for a private individual to sue can also be statutorily conferred by the Texas legislature, exempting litigants from the traditionally required proof of a so-called "special injury."[189] The Texas legislature "may grant private standing to bring such actions [private causes of action], *but it must do so clearly*."[190] The language of the statute itself would serve as the proper framework for an analysis of statutorily conferred standing.[191] The court would assume that the Texas legislature chose the statutory language carefully, and that the legislature purposefully omitted all other unnecessary language to prevent rewriting the statute under the judicial cloak of interpreting it.[192] The statutory analysis would be a "straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing and whether the claimant in question falls in that category."[193]

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[185] *See* Jefferson Cnty. v. Jefferson Cnty. Constables Ass'n, 546 S.W.3d 661, 666 (Tex. 2018); *Bickham*, 612 S.W.3d at 669.

[186] *Jefferson Cnty.*, 546 S.W.3d at 666 (quoting Williams v. Huff, 52 S.W.3d 171,178-79 (Tex. 2001)).

[187] Hunt v. Bass, 664 S.W.2d 323, 324 (Tex. 1984); *see Scott*, 405 S.W.2d at 56.

[188] *In re Kherkher*, 604 S.W.3d at 551-2 (quoting *In re* Sullivan, 157 S.W.3d 911, 915 (Tex. App.—Houston 2005, no pet.)).

[189] *Scott*, 405 S.W.2d at 56; *see also* Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 472 (Tex. 1993) (Doggett, J., concurring and dissenting); *Bickham*, 612 S.W.3d at 670.

[190] Brown v. De La Cruz, 156 S.W.3d 560, 566 (Tex. 2004) (emphasis added).

[191] Everett v. TK- Taito L.L.C., 178 S.W.3d 844, 851 (Tex. App.—Fort Worth 2005, no pet.).

[192] *In re Kherkher*, 604 S.W.3d at 552.

[193] *In re* Sullivan, 157 S.W.3d at 915.

There are two building block cases in Texas's interpretation of statutorily conferred standing. The first is the genesis of all Texas statutory standing arguments, *Spence v. Fenchler*. In *Spence*, an oft cited 1915 case, the Texas Supreme Court originally recognized the right of citizens to statutorily created standing under state law.[194] The statute allowed a suit by "either the State or any citizen" to enjoin the use of a premises as a so-called "bawdy house" or brothel.[195] The court stated:

> [W]e think it is sufficient to say that, inasmuch as we hold herein that articles 4689-90 extend to every citizen of Texas a clear, broad and effectual remedy by injunction against "bawdy houses" and against all "disorderly houses" it become unnecessary for us… to go further and determine whether plaintiffs in error have or have not shown themselves entitled, otherwise, and under the general principles of equity jurisdiction, to all or any of that relief.[196]

In this case, the Texas Supreme Court concluded that the plaintiff did not have a particular interest or damages.[197] However, one point of interest is that the statute in *Spence* explicitly states, "and such citizen shall not be required to show that he is personally injured by the acts complained of . . . ."[198]

The second case in Texas's seemingly ironclad, statutorily conferred standing progression is *Scott v. Board of Adjustment*, which concludes, "[w]ithin constitutional bounds, the [l]egislature may grant a right to a citizen or to a taxpayer to bring an action against a public body or a right of review on behalf of the public without proof of particular or pecuniary damage peculiar to the person bringing the suit."[199] The court concluded that the legislature authorized the suit by a taxpayer on behalf of the public with the language "or any taxpayer," and it was not necessary for the taxpayer to prove particular

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[194] *Spence*, 180 S.W. at 609; *see also* Grossman v. Wolfe, 578 S.W.3d 250, 256 (Tex. App. — Austin 2019, pet. denied).
[195] *Spence*, 180 S.W. at 602.
[196] *Id.* at 609.
[197] *Id*. at 603.
[198] *Id*.
[199] *Scott*, 405 S.W.2d at 56.

damages.[200] *Scott* again emphasized that the "courts have recognized the rights of individuals to challenge *governmental action* without showing any particular damage."[201]

In some ways *Spence* is distinguishable from a case that would involve standing under S.B. 8. As it was previously discussed, § 171 of the Texas Health and Safety Code is a statute that confers standing, stating, "[a]ny person, other than an officer or employee of a state or local government entity in [the state of Texas]" is empowered to enforce the statute by civil suit.[202] Currently, this means that a person need not have a connection to a particular woman who sought an abortion, and they need not have experienced any physical, financial or any sort of personal injury in order to file suit and obtain the statutory relief to which they are supposedly entitled. [203] The statute that S.B. 8 created, § 171 of the Texas Health and Safety Code, does not contain any such language deliberately indicating in the statute itself that particularized injury is precluded.[204] However, *Spence* includes specific language that a citizen will not be required to show injury.[205] By doing this, *Spence* prevents any misinterpretation or inappropriate inclusion of judge-made criteria.[206] If Texas legislators wanted S.B. 8 to be extremely clear, knowing the courts would be bound by strict statutory construction rules, the architects of the bill could have easily precluded specific injury for standing through additional language that would have made the statute irrefutably unambiguous as the statute discussed in *Spence* did. In the end, over a hundred years of Texas caselaw has relied on *Spence* and *Scott* to argue that particularized injury is unnecessary when standing is statutorily conferred.[207]

Scott, as a basis for understanding Texas statutorily granted standing, has some weaknesses. *Scott* specifically mentions that the

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[200] *Id*.
[201] *Id.* (emphasis added).
[202] Tex. Health & Safety Code Ann. §171.20.
[203] Wasserman, *supra* note 170.
[204] Tex. Health & Safety Code Ann. §171.201-§171.212.
[205] *Spence*, 180 S.W. at 603.
[206] *Id.*
[207] *See, e.g. Spence*, 180 S.W. at 603; *Scott*, 405 S.W.2d at 56; *Grossman*, 578 S.W.3d at 256; *see generally* Texas Assoc'n of Bus. v. Texas Air Control Bd., 852 S.W. 2d 440, 472 (Tex. 1993) (Doggett, J. dissenting) (citing *Scott*, 405 S.W.2d at 56 for the proposition that "On several occasions, [the Texas courts] have recognized the power of the Legislature to exempt litigants from proof of 'special injury.'").

courts across the United States have pinpointed in caselaw a right for individuals, be that a private citizen or a taxpayer, to challenge "governmental action" and "bring an action against a public body."[208] Texas Health and Safety Code § 171 does not grant a right for a private citizen to challenge government action or a public body, but rather makes private individuals the sole enforcement mechanism against other private individuals, companies, or organizations, and not against state action as *Scott* suggests.[209] However, *Scott* does mention that the legislature may concede a right to a citizen or taxpayer of a "right of review on behalf of the public" without the traditionally necessary demonstration of a particular damage to the person bringing the civil suit.[210] This language is vague and broad enough that those who would argue against abortion providers could stipulate that a civil lawsuit filed against an abortion provider would be a so-called "right of review on behalf of the public." With the Supreme Court representing the direction the law is going generally, some may argue that abortion is of public interest and thus the civil lawsuits as an enforcement mechanism are done on behalf of the public.

Another point of weakness within the *Scott* case is that the Harvard Law Review article that *Scott* mentions to bolster its arguments on standing is problematic as it was written in the 1960s before *Lujan* changed the Article III Case and Controversies meaning.[211] It also focuses on federal administrative law and not once mentions Texas state law.[212] The article states:

> [it] is not a necessary element of the constitutional requirement of case or controversy that the plaintiff have an interest. It is enough that the statute authorizes him to represent the public interest as a "private Attorney General." We have seen that the common law permits any citizen to enforce public rights.[213]

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[208] *Scott*, 405 S.W.2d at 56.
[209] Tex. Health & Safety Code Ann. §171.207.
[210] *Scott*, 405 S.W.2d at 56.
[211] Louis L. Jaffe, *Standing to Secure Judicial Review: Private Action*s, 75 HARV. L. REV. 255 (1961).
[212] *Id.*
[213] *Id*. at 274.

Scott's statutorily conferred standing decision that still holds today is supported by an out-of-date Harvard Law Review article based on law that has long since changed. The article is also based on the understanding that the case was referring to challenging a government action or a public body. In conclusion, *Scott*, as a foundation of Texas caselaw, has a variety of weaknesses from which to attack it from legally.

Finally, and perhaps most importantly, state laws in Texas are not only subject to interpretation by the Texas Supreme Court, but additionally the Texas Constitution. It is arguable that the state legislature is not actually "within [its] constitutional bounds . . . [to] grant a right to a citizen or to a taxpayer to bring a . . . right of review on behalf of the public without proof of . . . damage peculiar to the person bringing the suit," as *Scott* and the many Court of Appeals cases that cite *Scott* state in their arguments.[214] In Article I, Section 13, the Texas Constitution mentions injury as imperative, asserting, "[a]ll Courts shall be open, and *every person for an injury done him*, in his lands, goods, person or reputation, shall have remedy by due course of law."[215] The Texas Constitution is a "foundational governing document of the State of Texas, second only to the U.S. Constitution."[216] Simply put, all state laws and regulations must accord with and defer to the Texas Constitution or be in danger of invalidation by state courts.[217] This begs the question of whether a concrete injury would be required under the Texas Constitution rather than a mere suggestion. Especially, because in 1993, former Texas Supreme Court Judge John Cornyn, now Texas Senator, in *Texas Association of Business v. Texas Air Control Board* stated, "Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury."[218]

The Texas Constitution's unambiguous stipulations mentioned above provide the clearest opening for those seeking to challenge S.B. 8 and for judges ruling on this particular matter. In *Gomez v. Braid*, a

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[214] *Scott*, 405 S.W.2d at 56.
[215] Tex. Const. art.1, § 13.
[216] *Researching Texas Law: Constitution & Statutes*, TEX. A&M UNIV. SCH. OF L. DEE J. KELLY L. LIB., https://law.tamu.libguides.com/c.php?g=513877&p=3511046.
[217] *Id.*; *see* Oakley v. State, 830 S.W.2d 107, 109 (Tex. Crim. App. 1992); Mears v. State, 520 S.W.2d 380, 382 (Tex. Crim. App. 1975).
[218] Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993).

recent case that touched on this exact issue, Bexar County Judge Haas dismissed an attempt by a Chicago-based individual to sue a Texas abortion provider for violating S.B. 8.[219] Judge Haas determined that the Texas Constitution demands a different standard, requiring a plaintiff to assert a direct impact and particularized harm from the abortion performed in order that they may be able to sue.[220] This, of course, will not stop future filings under S.B. 8, but perhaps provides a template for state judges to reject and dismiss civil lawsuits against abortion providers if they so choose from here on out.[221]

Morally and ethically, S.B. 8's enforcement mechanism is a tragedy. It encourages vigilantism by enlisting private citizens to enforce laws through harassing and purposefully chilling civil lawsuits. It allows a highly questionable statute to stay on the books, simply because it has successfully evaded judicial review. It is frankly undemocratic in how it eschews the checks and balances aspect of our beloved separation of powers between the three branches by creating something legislatively that cannot be balanced by the judicial system. This is all to say: at the moment, S.B. 8's enforcement mechanism is legal, at least if you are trying to attack it through Texas's standing laws. There are weak spots in Texas's statutorily-conferred standing law that might offer some a semblance of an argument as was discussed above. There is also an already proven opportunity to attack S.B. 8 civil lawsuits through the unambiguous standing demands of the Texas Constitution. Though the *Gomez* case offers a glimmer of hope to abortion providers faced with these burdensome and punishing civil lawsuits, it has not invalidated S.B. 8. S.B. 8 still exists and the enforcement mechanism is still in place. Abortion providers can still be sued, will be forced to hire a team of lawyers, and will be required to go through the legal process in order to have their case potentially dismissed. The chilling effect is still in place. Simply put, this novel enforcement mechanism will not be so novel anymore. This type of private enforcement structure is destined to become the norm in the next few decades and will become an instrument for legislators of both

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[219] Lydia O'Connor, *Judge Dismisses First Attempt to Sue Over Texas' Citizen-Enforced Abortion Ban*, YAHOO NEWS (Dec. 8, 2022), https://news.yahoo.com/judge-dismisses-first-attempt-sue-011543005.html

[220] *Id.*

[221] Eleanor Klibanoff, *Texas state court throws out lawsuit against doctor who violated abortion law*, THE TEX. TRIBUNE (Dec. 8, 2022), https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit/.

political persuasions to avoid judicial review for legally dubious statutes.

D. Dangers of The Enforcement Mechanism

One can already witness the benefits, at least for the authors of S.B. 8, of the enforcement mechanism through the successful frustrating of the courts in *Whole Woman's Health v. Jackson*.[222] However, there are also dangers of this mechanism essentially backfiring for the conservative agenda as well as sullying the legal landscape. As with the liberal debate about abolishing the filibuster that was raging throughout 2021, the question becomes: what would stop those on the opposite end of the spectrum from co-opting this strategy and using it for their agenda? Jonathan F. Mitchell, the architect of S.B. 8's enforcement mechanism, foreshadowed how it could be used by legislators who are concerned a court may block a law's enforcement.[223] In 2018, Mitchell foretold the possibility of using the now infamous enforcement mechanism when legislators want the statute to remain in effect, despite the judiciary's hostility.[224] For example, Mitchell suggested that it could be used for things like "campaign-finance law, a gun-control measure, a civil-rights act, a child-labor law in the 1920s, an abortion regulation, a prohibition on virtual child pornography, or a state-law prohibition on sanctuary cities."[225]

As a result of seeing the success of S.B. 8 in 2021 and 2022, the enforcement mechanism was being contemplated by California.[226] Governor Gavin Newsom:

> directed [his] staff to work with the Legislature and the Attorney General on a bill that would create a right of action allowing private citizens to seek injunctive relief, and statutory damages of at least $10,000 per violation plus costs and attorney fees, against anyone

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[222] *Whole Women's Health*, 642 S.W.3d at 572.
[223] Jonathan F. Mitchell, *The Writ of Erasure Fallacy,* 104 VA. L. REV. 933, 1000-1001 (2018).
[224] *Id.* at 1000.
[225] *Id.*
[226] Press Release, Off. of Governor Gavin Newsom, Governor Newsom Statement on Sup. Ct. Decision (Dec. 11, 2021).

> who manufactures, distributes, or sells an assault weapon or ghost gun kit or parts in the State of California.[227]

This law came to fruition on July 22, 2022.[228] S.B. 1327 permits Californians to sue individuals or companies "making, selling, transporting or distributing illegal assault weapons and ghost guns . . for damages of at least $10,000 per weapon involved."[229] These aforementioned damages would also pertain to gun dealers who sell firearms illegally to individuals under twenty-one.[230]

Some warn that the current conservative leaning judiciary will not allow laws like Gavin Newsom's gun control scheme to succeed and forewarn of privately enforced voter suppression as well as the policing of undocumented immigrants by individuals as far more likely possibilities.[231] On the opposite spectrum, the seeming success of S.B. 8's construction has already spun off many copycat bills in Alabama, Arizona, Arkansas, Florida, Missouri, Ohio, and Oklahoma.[232]

Jonathan Mitchell elucidated that the goal of the unique enforcement mechanism was not to promote vigilantism, stating: "[w]e didn't want bounty hunters filing lawsuits under SB 8 . . . [t]he entire point of SB 8 . . . was to prevent the judiciary from ruling on the constitutionality of the statute."[233] As opposed to what some might think, S.B. 8 is not effective because it leads individuals to file

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[227] *Id.*

[228] *Californians Will Be Able to Sue Those Responsible for Illegal Assault Weapons and Ghost Guns*, OFF. OF GOVERNOR GAVIN NEWSOM (July 22, 2022), https://www.gov.ca.gov/2022/07/22/californians-will-be-able-to-sue-those-responsible-for-illegal-assault-weapons-and-ghost-guns/.

[229] *Id.*

[230] *Id.*

[231] Zhang, *supra* note 102.

[232] Ellen Loanes, *How California Plans to Copy Texas Abortion Tactics for Gun Control*, VOX (Dec. 12, 2021, 5:18 PM), https://www.vox.com/2021/12/12/22830625/newsom-california-guns-texas-abortion-law-supreme-court.; NARAL, PRO-CHOICE AM., MEMO: FIFTEEN STATES AND COUNTING POISED TO COPY TEXAS' ABORTION BAN, https://www.prochoiceamerica.org/report/memo-fifteen-states-and-counting-poised-to-copy-texas-abortion-ban/

[233] Stephen Paulsen, *The Legal Loophole that Helped End Abortion Rights*, COURTHOUSE NEWS SERV. (Sept. 12, 2022, 1:47 PM), https://www.courthousenews.com/the-legal-loophole-that-helped-end-abortion-rights/.

lawsuits.[234] Mitchell openly admits that it is effective because it creates an extreme chilling effect.[235] It dangles the Sword of Damocles over providers' heads and creates a risk that not many are willing to take. He brazenly concludes, "[t]here is nothing wrong with a state enacting a law to evade judicial review."[236] The general success of this kind of enforcement mechanism seems to suggest that legislators from both sides of the political spectrum will begin to use private parties and civil lawsuits, rather than the traditional legal framework, to carry out their laws and to ultimately avoid judicial review.

V. Conclusion

Things have changed. The *Dobbs* decision signaled an end of the status quo, and the beginning of a new era in our judicial system. It has ushered in true chaos in Texas with its triad of competing and conflicting state laws. Texas is once again the wild west through its encouragement of legal vigilantism. Forty or so years of strategic incrementalism has brought us to this point. It has created absurd laws that are now perfectly legal with no real chance of judicial review. Lawyers are often confronted with this legal dichotomy: a law might be morally or ethically suspect, but is it legal? S.B. 8's enforcement mechanism is one such law. Texas state law supports S.B. 8 and its enforcement mechanism for the most part. It *should not*, though it seems apparent that it can. This enforcement mechanism will only be a scourge on our judicial system that will blight it for years to come. The Texas Constitution's interpretation of standing provides a level of hope to abortion providers that not all is lost and at the very least their case might be dismissed early on. However, S.B. 8 is still viewed as constitutional and many states have used its enforcement mechanism as a template for themselves. This is indeed our future. However, this is not the end.

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[234] *Id.*
[235] *Id.*
[236] *Id.*

THURGOOD MARSHALL
LAW REVIEW

VOLUME 47 FALL 2022 NUMBER 1

BEING PROACTIVE INSTEAD OF REACTIVE TO SCHOOL SHOOTING THREATS: HOW SOCIAL MEDIA PLAYS A ROLE IN IT ALL

Adriana Galindo*

I. Introduction

Technology has made great advancements in the last twenty years. In this day and age of modern technology, social media is one of those advancements. Social media plays a big role in our everyday lives. Social media is generally used to connect with family, friends, and even strangers.[1] Social media is also used to share information and effectively spread news around the world with just a tap on the phone. We use social media to share details—big or small—of our lives via pictures and videos.[2] Hence, social media can be a great tool for society. Although social media is useful to share special and positive moments in a person's life, it can also be used to make harmful threats. Because "billions of people have flocked to social media, the amount of threatening and hateful speech to be found there has grown

* Juris Doctor Candidate, Thurgood Marshall School of Law, May 2023. I would like to take this opportunity to thank my parents, Arturo and Isabel, and my brother, Eddie, for their endless love and support throughout my law school career. I am also grateful to the rest of my family and friends for their constant encouragement. To my dogs, Scrappy and Rex, I love you both. Forever from the 915.

[1] Susan Saurel, *The Impact of Social Media On Our Society*, MEDIA UPDATE (Feb. 10, 2020, 11:30 AM), https://www.mediaupdate.co.za/social/147946/the-impact-of-social-media-on-our society#:~:text=It%20has%20made%20it%20easy,not%20possible%20%20%20in%20the%20past.

[2] *Id.*

'massively.'"[3] Social media has thus made it easier for individuals to make threats—whether those threats are jokes or they are credible.[4]

In recent years, social media platforms have developed at a rapid pace and it is hard to keep up with all the new trends. Social media trends surge in popularity very quickly among teens and other minors.[5] Since 2018, at least 90% of minors aged thirteen to seventeen are users of social media.[6] With the increasing presence of minors on social media and viral social media trends, threats of school shootings are an ever-growing problem.[7] Social media is now being used by minors to post "threats of violence against local schools."[8]

In 2021, on the social media platform TikTok, there were threats of mass school shootings circulating.[9] The viral threats were deemed "National School Shooter Day" and were described as possible threats to American schools that would take place on December 17, 2021.[10] There were over four million posts shared about this subject matter.[11] Although the threats were ultimately deemed "not credible," many schools still increased law enforcement presence.[12] School shootings and threats of them are no longer rare and shocking; they are trending topics on social media platforms that are unfortunately common to see.

A school shooting that made national headlines and caused multiple deaths occurred at Oxford High School in Michigan on

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[3] Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1886, 1890 (2018).

[4] *Id.*

[5] *Social Media and Teens*, AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY (Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/ Facts_for_Families/ FFF-Guide/ Social-Media-and-Teens-100.aspx.

[6] *Id.*

[7] David Meyer, *Students Across the US Arrested For Viral School Threats 'Challenge'*, N.Y. POST (Dec. 19, 2021 1:28 PM), https://nypost.com/2021/12/19/ students-across-us-arrested-for-school-shooting-social-media-trend/.

[8] *Id.*

[9] Nicholas Huba, *Area School Districts, Police Continue Investigating TikTok Trend Threatening Gun Violence at Schools*, THE PRESS OF ATLANTIC CITY (Dec. 17, 2021), https://pressofatlanticcity.com/news/local/education/area-school-districts-police-continue-investigating-tiktok-trend-threatening-gun-violence-at-schools/article_03462f74-5e8f-11ec-b1a9-2fbac01651fa.html.

[10] *Id.*

[11] *Id.*

[12] *Id.*

November 30, 2021.[13] A fifteen-year-old student opened fire, resulting in four deaths and other individuals seriously injured.[14] The minor was arrested.[15] The minor posted a photo of the pistol that was allegedly used in the shooting to his Instagram account days before the shooting took place.[16] Other evidence, such as a journal describing how the minor wanted to murder other students, was discovered before the incident.[17] The school then asked to meet with the minor's parents the day that the shooting happened.[18] A major aspect of this school shooting is the "rare" arrest and criminal charges of involuntary manslaughter against the minor shooter's parents.[19] This incident will be discussed in further detail in Part II of this Note.

In 2021, there were 9 school shootings and over 200 nonactive shooter incidents compared to the year 2002, where there were 4 school shootings and 15 nonactive shooter incidents.[20] School shootings have been a problem since before social media was common practice, but such incidents have increased due to our technology.[21] Some research has shown that the increase in violence can be related to social media coverage.[22] There are many ways in which social media has essentially encouraged mass shooting threats.[23]

This problem begs the question of what schools can legally do to better prevent school shootings based on social media threats. This leads to the issue of the extent to which off-campus, online student speech should be monitored, and what schools can do to take action

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[13] Livia Albeck-Ripka & Sophie Kasakove, *What We Know About the Michigan High School Shooting*, N.Y. Times (Dec. 9, 2021), https://www.nytimes.com/article/oxford-school-shooting-michigan.html.
[14] *Id.*
[15] *Id.*
[16] Jason Hanna et al., *Investigators Reveal Concerns About Behavior of Michigan High School Shooting Suspect Leading Up To The Tragedy*, CNN (Dec. 2, 2021, 11:53 PM), https://www.cnn.com/2021/12/02/us/michigan-oxford-high-school-shooting-thursday/index.html.
[17] *Id.*
[18] *Id.*
[19] Albeck-Ripka & Kasakove, *supra* note 13.
[20] *Shooting Incidents at K-12 Schools (Jan 1970-Jun 2022)*, CTR. FOR HOMELAND DEF. AND SEC., https://www.chds.us/ssdb/charts-graphs/ (last visited Oct. 11, 2022).
[21] Kristina J. Lee, *Mass Shootings and Media Contagion Theory: Social Media's Influence on Frequency of Incidents*, 9 ELON J. UNDERGRADUATE RSCH. COMMC'N 27, 28 (2018).
[22] *Id.*
[23] *Id.*

before a shooting occurs. This Note will analyze the following: (1) the evolution of school shootings, (2) how technology and social media have increased school shooting threats, (3) the way the law is currently handling this issue, and (4) what can be done further to help solve this problem.

II. History and Evolution of School Shootings

A. Famous for All the Wrong Reasons: Columbine High School and Traditional News Coverage

One of the most infamous school shootings within the past twenty-five years is that of Columbine High School on April 20, 1999.[24] Social media did not exist in 1999, but this shooting began the debate on school safety and what motivated the shooters.[25] Eric Harris and Dylan Klebold committed a mass murder at their Colorado high school that lasted around forty-five minutes.[26] This shooting "was unprecedented in its magnitude, body count, and viciousness."[27] Harris and Klebold wanted to start a revolt of bullied and humiliated students.[28] Several incidents did in fact occur after the Columbine shooting, and several security measures in schools followed, such as increased security, metal detectors, and mandating zero tolerance antiviolence policies. [29]

This shooting was covered through traditional news sources such as Denver outlets and CNN.[30] Mainstream media aired 911 calls made during the incident and had news crews on the scene before noon on the day of the shooting.[31] While Harris and Klebold could not post threats on social media because it did not yet exist, they made

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[24] History.com Editors, *Columbine Shooting*, HIST. (May 25, 2022), https://www.history.com/topics/1990s/columbine-high-school-shootings.
[25] *Id.*
[26] RALPH W. LARKIN, COMPREHENDING COLUMBINE 8 (Temple Univ. Press ed., 2007).
[27] *Id.*
[28] *Id.* at 9.
[29] *Id.*
[30] Jack Holmes, *'We Really Botched Columbine': How The Media Has Erred On School Shootings*, ESQUIRE (Apr. 20, 2019), https://www.esquire.com/news-politics/a27184614/columbine-20-year-anniversary-media-coverage/.
[31] LARKIN, *supra* note 26, at 11.

"basement videotapes" that insulted their victims.[32] A transcript of the videotapes also shows that the two made threats to their school.[33] Klebold is quoted saying, "We're hoping. We're hoping. I hope we kill 250 of you. It will be the most nerve-racking 15 minutes of my life, after the bombs are set and we're waiting to charge through the school. Seconds will be like hours. I can't wait. I'll be shaking like a leaf."[34] Following the Columbine shootings, students, absent social media, began the "Columbine effect."[35] This effect showed an increase of students notifying authorities of rumored threats of violence by other students.[36]

B. Developing the Commonality of School Shootings: Virginia Tech in the Middle

On April 16, 2007, Seung-Hui Cho opened fire on the Virginia Tech campus.[37] Thirty-three students and faculty died before the gunman killed himself.[38] Two years before the shooting, Cho had already developed a history with the university.[39] Cho had been given treatment by mental-health professionals via a court order for causing disturbances in one of his classes in 2005.[40] However, this problem did not suggest that Cho would commit the mass murder two years later.[41] This shooting occurred during a time when social media was still a new concept, but news had already begun to travel fast through mainstream media.

When reports of the Virginia Tech shooting spread, news outlets quickly made their way to the campus to report live.[42] CNN's

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[32] LARKIN, *supra* note 26, at 39.
[33] Peter Langman, *Transcript of the Columbine "Basement Tapes*," SCHOOL SHOOTERS 1, 4 (Jul. 29, 2014), https://schoolshooters.info/sites/default/files/columbine_basement_tapes_1.0.pdf.
[34] *Id.*
[35] LARKIN, *supra* note 26, at 10.
[36] *Id.*
[37] BEN AGGER & TIMOTHY W. LUKE, THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH (2008).
[38] *Id.*
[39] *Id.*
[40] *Id.* at 7.
[41] *Id.*
[42] Mark Keierleber, How Columbine Went Viral, THE74, (Apr. 18, 2019), https://www.the74million.org/article/how-columbine-went-viral/

high-definition camera and equipment essentially captured real-time video during the incident.[43] Because of developing technology and the speed with which information traveled, the shooting was sent, recorded, and published on the web within the first three days.[44] In mainstream media, "school shootings in fast capitalist conditions of production have become a very valuable commodity to be delivered in a time-urgent 'live' and 'on-the-scene' manner."[45]

Cho's behavior was different than that of the gunmen in the Columbine shooting. Not only was the media coverage of school shootings changing, but Cho himself had recorded evidence of the event and sent it to the news.[46] Two days after the shooting, NBC News received mail from Cho that he had sent in between two of his attacks.[47] The package contained pictures of Cho holding a gun, and a video of Cho "rant[ing] about wealthy 'brats.'"[48] Previously, information did not travel as fast, and the gunmen did not have outlets to publish recordings of the premediated murders. However, in the Virginia Tech incident, news traveled a lot faster, and the gunman had the ability to send recordings and photos of himself to media outlets—hence the evolving way school shootings and threats are shared.[49]

C. Where the Shooter Was Not a Student: Sandy Hook and Advancing Technology

On December 14, 2012, Adam Lanza, a twenty-year-old man first shot and killed his mother before going to Sandy Hook Elementary School to take the lives of twenty-six children and adults.[50] The first 911 call resulted in law enforcement responding before 10

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[43] AGGER & LUKE, *supra* note 37, at 7.
[44] *Id.* at 8.
[45] *Id.*
[46] History.com Editors, *Virginia Tech Shooting Leaves 32 Dead*, HIST., (Apr. 14, 2021), https://www.history.com/this-day-in-history/massacre-at-virginia-tech-leaves-32-dead.
[47] *Id.*
[48] *Id.*
[49] M. Alex Johnson, Gunman sent package to NBC News, NBC NEWS, (Apr. 19, 2007, 6:41 AM), https://www.nbcnews.com/id/wbna18195423
[50] *Sandy Hook shooting: What happened?*, CNN (Aug. 12, 2022), https://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/index.html (last visited Oct. 11, 2022).

a.m.[51] Although this shooting was not carried out by a fellow student posting to social media, Lanza still used technology to plan out his attack.[52] He visited the school's website and studied the school's security procedures.[53]

The following shooting incidents expand on the trend of shooters posting to social media.

D. Comment of Violence: Parkland Shooting and Modern Media

In 2018, Nikolas Cruz, a former student of Marjory Douglas High School in Florida, killed seventeen people and wounded fourteen in a mass shooting at the school.[54] This shooting is a more modern example of social media's role in school threats and actual shooting incidents. Upon investigation, there was a comment made on YouTube by a user of the same name as Nikolas Cruz that said, "I'm going to be a professional school shooter."[55] There were also other social media posts that investigators "described as 'very disturbing.'"[56]

There were several videos taken by students at the school during the shooting. The videos show a classroom of students sitting on the floor and saying "oh my God" as several shots are heard outside the classroom.[57] While with previous school shootings, the coverage of incidents was left to mainstream news media, now, victims are recording the events while they are happening.[58] School shooters now post about their intentions on the internet for virtually anyone in the world can see.[59]

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[51] *Id.*
[52] Rick Rojas & Kristin Hussey, *Newly Released Documents Detail Sandy Hook Shooter's Troubled State of Mind*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/2018/12/10/nyregion/documents-sandy-hook-shooter.html.
[53] *Id.*
[54] John McCall, *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC NEWS (Feb. 15, 2018, 8:20 AM), https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Kristen Jordan Shamus, *Chilling Video Shows Pandemonium Inside Oxford High School Classroom During Shooting*, DETROIT FREE PRESS (Dec. 1, 2021, 12:09 PM), https://www.freep.com/story/news/local/michigan/oakland/2021/12/01/oxford-high-school-shooting-video-classroom/8820367002/.
[59] *Id.*

In December 2021, there was another threat of a school shooting at Marjory Stoneman Douglas High School.[60] A junior posted a threat against the school on a social media chat room: "I feel like school shooting tmrw [tomorrow]. When I sneeze it's a signal to go to the bathroom OK. I hope y'all aren't snitches."[61] The student was arrested.[62]

E. Fast Forward to 2021: Oxford High School and the Unfortunate Familiarity of Online Threats

In December 2021, Ethan Crumbley, a fifteen-year-old student at Oxford High School in Michigan, killed four students.[63] The shooting came after Crumbley posted a picture of a handgun on social media showing off the weapon and captioning the photo "[j]ust got my new beauty today."[64] In addition to the social media posts made by the shooter himself, there was also video footage captured by students during the shooting showing the events unfold.[65] The students can be seen hiding in a dark classroom, hearing gun shots, and running outside to safety.[66]

Social media now has the potential to both foreshadow school shooting incidents and capture the unfortunate series of events—such as when victims record the shooting as it is happening. This 2021 school shooting is an example of social media's expanding potential. Before the shooting, Crumbley's parents were called in by the school to discuss Crumbley's "disturbing drawings" of a gun, blood, and a person being shot.[67] His parents were also told that the minor had been

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[60] The Associated Press, *Parkland, Florida Student Arrested in School Shooting Threat*, ABC NEWS (Dec. 3, 2021), https://apnews.com/article/shootings-education-arrests-florida-school-shootings-0806eb0517ba84fd098fe2036e49e11c.
[61] *Id.*
[62] *Id.*
[63] Lee Brown & Ben Kesslen, *Parents of Oxford School Shooting Suspect Ethan Crumbley Charged With Involuntary Manslaughter*, N.Y. POST (Dec. 3, 2021, 12:00 PM), https://nypost.com/2021/12/03/parents-of-oxford-school-shooting-suspect-ethan-crumbley-to-be-charged/.
[64] *Id.*
[65] Shamus, *supra* note 58.
[66] *Id.*
[67] Brown & Kesslen, *supra* note 63.

looking at ammunition photos, in response to which the minor's mother texted him that he needed to "learn not to get caught."[68]

Crumbley has been charged as an adult, and his parents have also been criminally charged for their involvement.[69] Although school shootings are no longer shocking, criminally charging the shooter's parents is noteworthy. The parents in this case are being charged because of the facts specific to this case. The prosecution claims that the parents bought the gun for Crumbley and failed to take action to thwart Crumbley's problematic behavior.[70] When news spread about the shooting, the mother texted Crumbley, "Ethan, don't do it" and the father went to check the guns at home.[71] Further, the posts online about the gun seemed to imply that the gun was "freely available" in the home, and Crumbley's mother was using the gun with him to "test out" the weapon.[72] The parents also failed to check their son's backpack, speak with him, or take him back home after the meeting with the school regarding the disturbing drawings.[73] It remains to be seen whether imposing criminal charges against the parents of school shooters can make any progress towards impeding school shootings.

III. The Components of Social Media: Threats of School Shootings

As previously mentioned, it has become increasingly common to make threats of school shootings on social media. Before social media was so prominent, it was the mainstream media that influenced or showcased school shootings.[74] Today, it is the shooters themselves that post about their future plans and premeditation.[75] It is said that:

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[68] Aya Elamroussi & Artemis Moshtaghian, *School District Releases Details of Key Events Leading Up To Michigan Shooting*, CNN (Dec. 5, 2021, 1:41 PM), https://www.cnn.com/2021/12/05/us/michigan-oxford-high-school-shooting-sunday/index.html.
[69] *Id.*
[70] Brown & Kesslen, *supra* note 63.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Lee, *supra* note 21.
[75] GLENN W. MUSCHERT & JOHANNA SUMIALA, SCHOOL SHOOTINGS: MEDIATIZED VIOLENCE IN A GLOBAL AGE 206 (2012).

> A small proportion of the offenders use media in a communicative strategy, taking advantage of participatory media to figure their acts via self-produced videos. They post them online for potentially interested consumers or address them to media outlets. In doing so, they not only instrumentalize traditional media through self-staged performances in the midst of an already co-produced global media event, they also ensure their views are aired and their identity recognized. This becomes possible in an era in which such material can circulate on the web. The reconfiguration of the public sphere with the introduction of internet implies less censorship. Media thereby facilitates the airing of the shooters' views, allowing scholars to now access the offenders' interpretation of their offense.[76]

Because mass shootings are common by today's standards, the media attention that such crimes receive can lead to copycat crimes.[77] Copycat behavior is heavily influenced through social media.[78] "Copycats" is a term used when online behavior is trending.[79] When a certain action or challenge is trending, it is essentially copycat behavior that makes it a trend to follow.[80] Since 2011's social media publications of school shootings, there has been a large increase in the number of mass shootings.[81] School shooters now "advertise" on social media that they are going to commit such crimes.[82] Many times, potential shooters will post on social media about their planned criminal activity, and such threats should be taken seriously.[83] These posts are oftentimes "hints" that a tragedy might occur.

One iteration of this trend was recently found on TikTok. There were trending posts and videos on TikTok about many threats of

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[76] *Id.* at 205.
[77] Lee, *supra* note 21, at 28.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at 33.
[82] AJ Agrawal, *What Role is Social Media Playing in School Shootings?*, HUFF POST (Jan. 20, 2017), https://www.huffpost.com/entry/what-role-is-social-media_b_9033612.
[83] *Id.*

school shootings on December 17, 2021, throughout the country.[84] Although most posts did not mention specific schools that were being targeted, many schools closed on December 17 and/or increased police presence on campus.[85] The threats made on TikTok lacked credibility due to the absence of specific information in the threats.[86] Officials claim that this trend began "as a way for students to skip school."[87] Officials also believe that the threats made on TikTok evolved from other social media platforms like Facebook and Instagram and that the current trend is "much more disturbing."[88]

Social media trends are very influential among minors. TikTok itself has over one billion users.[89] Multiple social media companies have been under scrutiny for allowing harmful videos to be spread, especially among minors.[90] The trend of threatening to cause a school shooting is also "not the first disturbing 'challenge' targeting students, educators, and their public schools" to circulate social media.[91] Fortunately, law enforcement has been looking into the threats and taking them seriously.[92] The next issue that social media threats create is how and if the threats are criminally prosecuted and what impact those prosecutions have.

IV. How Some States Handle Online Threats

A. An Illinois Example of Prosecution in the Form of a Disorderly Conduct Charge

In *People v. Khan*, Khan posted to Facebook: "I bring a gun to school every day. Someday someone is going to p*** me off and end up in a bag."[93] The threat was directed to persons at North Central

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[84] Nic Querolo, *School-Shooting Threats on TikTok Prompt Closures in US*, ALJAZEERA (Dec. 17, 2021), https://www.aljazeera.com/economy/2021/12/17/school-shooting-threats-on-tiktok-promote-closures-in-us.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Querolo, *supra* note 84.
[91] *Id.*
[92] *Id.*
[93] People v. Khan, 127 N.E.3d 592, 594 (Ill. App. Ct. 2018).

College.[94] Khan was then charged with disorderly conduct.[95] Khan committed disorderly conduct by "knowingly transmitting a threat of violence directed against persons at a school…whether or not school is in session."[96] The Dean of Students saw Khan's Facebook post, took it as a serious threat, and notified campus safety.[97] Campus safety then contacted the police, who confirmed that Khan had made the threatening post.[98] Khan claimed it was a joke, that he was venting, and that the post was a result of his immaturity and bad social skills.[99] Khan was ultimately convicted on the disorderly conduct charge.[100] Specifically, the Court used the Illinois Criminal Code to criminally charge Khan for his online threat.[101] This case is an example of how states criminally prosecute online threats via state statutes through disorderly conduct charges.[102]

B. Florida Imposes a Higher Burden to Show Credible Threats Through Plain Language Statutes

J.A.W. v. State demonstrates a scenario in which online threats cannot always be successfully prosecuted.[103] A minor student at Sarasota High School sent a series of tweets via Twitter stating:

> "can't WAIT to shoot up my school;" "it's time (this tweet accompanied a photo of a gun in a backpack);" "My mom and dad think I'm serious about shooting up my school I'm dying;" "school getting shot up on a Tuesday;" and "night f[***]ing sucked can't wait to shoot up my school soon."[104]

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 595-96.
[98] *Id*. at 596.
[99] *Id.*
[100] *Id.* at 604.
[101] 720 ILL. COMP. STAT. ANN. 5/26-1 (LexisNexis 2022).
[102] *Khan*, 127 N.E.3d at 604.
[103] J.A.W. v. State, 210 So. 3d 142, 146 (Fla. Dist. Ct. App. 2016).
[104] *Id.* at 143.

However, the Florida appellate court found that the minor's guilty verdict of sending threats to kill or harm under the Florida statute was improper.[105] The court ruled that it was improper because the plain language of the statute required the threat to be sent directly to a specific person.[106] Accordingly, tweets posted on Twitter did not count as a form of delivery of a threat to a specific person.[107] Thus, Florida and Illinois tend to handle online threats of school shootings differently based on how state statutes are interpreted.

C. Colorado Clarifies When Online Speech is a True Threat Not Protected by the First Amendment

People ex rel. R.D. addresses online threats in the context of the First Amendment's protection of speech.[108] Although the First Amendment generally protects freedom of speech, "true threats" are not protected.[109] This case applies this concept to statements that are communicated online.[110] The Supreme Court of Colorado ruled that a true threat occurs when a statement, under the totality of the circumstances, that was intended for a foreseeable recipient, causes the recipient to reasonably believe that the statement is a serious expression of an intent to commit "an act of unlawful violence."[111] Specifically, the Court stated:

> Particularly where the alleged threat is communicated online, the contextual factors courts should consider include, but are not limited to (1) the statement's role in a broader exchange, if any, including surrounding events; (2) the medium or platform through which the statement was communicated, including any distinctive conventions or architectural features; (3) the manner in which the statement was conveyed (e.g., anonymously or not, privately or publicly); (4) the relationship between the speaker and recipient; and (5) the

[105] *Id.* at 146.
[106] *Id.* at 144.
[107] *Id.*
[108] People *ex rel.* R.D., 464 P.3d 717, 717 (Colo. 2020).
[109] *Id.* at 721.
[110] *Id.*
[111] *Id.*

> subjective reaction of the statement's intended or foreseeable recipient(s).[112]

This case resulted from a shooting at Arapahoe High School in which two people were killed.[113] A couple of days later, a student from the neighboring school district tweeted a photo in support of Arapahoe High School.[114] However, an argument among many students broke out because a student from Arapahoe stated that the student from the neighboring school district did not care about the shooting. [115] The friends of the student from the neighboring school district then proceeded to tell the Arapahoe student that he was disrespecting his friend. [116] Due to the exchange, one minor, R.D., started tweeting at another minor, A.C., the following statements:

> "you a bitch, ill come to Tgay [sic] and kill you [N-word];" "I don't [sic] people who aren't worth my time. If I see your bitch ass outside of school you catching a bullet bitch;" "[N-word]you don't even know me. Mf I don't even know were tf [sic] your lame bitch ass school is. You a bitch talking shit on here."[117]

R.D. then posted a picture of a handgun next to about fifty cartridges that contained the message, "this all I'm saying[.] We don't want another incident like Arapahoe. My 9 never on vacation."[118]

From these Twitter statements, R.D. was charged with harassment through certain forms of digital communication under Colorado law.[119] However, R.D. claimed that his statements were protected under the First Amendment.[120] Thus, the issue on appeal was whether the statements R.D. had made were considered true threats not protected by the First Amendment.[121] The Court ultimately gave the

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[112] *Id.* at 721-22.
[113] *Id.* at 722.
[114] People *ex rel*. R.D., 464 P.3d at 722.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] People *ex rel.* R.D., 464 P.3d at 723.
[121] *Id.*

five factors mentioned above to determine what makes statements true threats and remanded the case to be tried under the given guidance.[122]

As illustrated by *People v. Khan*, *J.A.W. v. State*, and People *ex rel.* R.D., states have different ways of prosecuting threats of school shootings made online through various legal principles. People *ex rel.* R.D. shows that certain speech can be regulated. The next section considers the extent and guidelines for which off-campus online student speech is interpreted under the law according to the United States Supreme Court.

V. The Basics: The Supreme Court Opinions Laying Out the Main Points for Online Student Speech and Federal Interpretation of Regulation

Tinker v. Des Moines Independent Community School District is the foundation for understanding student speech.[123] In this case, three students from a public school in Des Moines, Iowa, were suspended for protesting the U.S. government's policy in Vietnam in the form of wearing black armbands.[124] The issue was whether schools could regulate free speech of students on campus.[125] The Court ultimately ruled that the speech the school sought to regulate was not a substantial disruption—explained below—and could therefore not be regulated by the school.[126] This case serves as the basis for how the law and schools handle free speech issues under the First Amendment for students.[127] Through this case, a "substantial disruption" test was adopted.[128] Ultimately, schools may restrict free speech only if the restriction is "necessary to avoid material and substantial interference with schoolwork or discipline."[129]

In *Mahanoy Area School District v. B.L.*, the Supreme Court imposed serious protections on a student's freedom of speech

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[122] *Id.* at 734-35.
[123] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).
[124] *Id.*
[125] *Id.* at 505-06.
[126] *Id*.
[127] Catherine E. Mendola, *Big Brother as Parent: Using Surveillance To Patrol Students' Internet Speech*, 35 B.C. J. L. & SOC. JUST. 153, 159 (2014).
[128] *Id.*
[129] *Id.*

regarding off-campus online behavior.[130] B.L. posted photos on Snapchat, another social media platform, in which the minor essentially voiced her frustration with her high school's cheerleading squad.[131] School administrators became aware of B.L.'s posts and ultimately suspended the minor from the team for the following school year.[132] The Court made clear that regulation of off-campus speech by a student is to be viewed as skeptical because "America's public schools are the nurseries of democracy," and the school has an interest in protecting the student's unpopular opinion.[133] However, the Court did specify that student speech that takes place off campus may be regulated by schools under limited circumstances.[134] The Court gave guidance for regulating student speech by stating:

> The special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus. Circumstances that may implicate a school's regulatory interests include: serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices.[135]

Ultimately, the Court reasoned that public schools may have special interests in regulating some off-campus student speech, such as harassment that targets individuals or threats aimed at teachers or students.[136] The school's special interest to regulate off-campus student speech must overcome a student's interest in free expression.[137] However, the facts of this case determined that B.L.'s interest in free expression outweighed the school's special interest in

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[130] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).
[131] *Id.* at 2042.
[132] *Id.* at 2043.
[133] *Id.* at 2046.
[134] *Id.* at 2045.
[135] *Id.*
[136] *Id.* at 2047.
[137] *Id.*

regulating her off-campus speech.[138] Although this case did not deal with a threat of a school shooting, the Supreme Court's opinion can be used to push for regulation of off-campus online student behavior to help prevent threats and school shootings. This next case shows how regulation is feasible.

McNeil v. Sherwood School District 88J showcases how online threats can be regulated and monitored through a test adopted by a federal circuit court.[139] The biggest component of regulating off-campus speech of a student is whether the speech bears a sufficient nexus to the school.[140] The Ninth Circuit has adopted a workable test that could be applied to the rest of the country:

> Courts considering whether a school district may constitutionally regulate off-campus speech must determine, based on the totality of the circumstances, whether the speech bears a sufficient nexus to the school. This test is flexible and fact-specific, but the relevant considerations will include (1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school. There is always a sufficient nexus between the speech and the school when the school district reasonably concludes that it faces a credible, identifiable threat of school violence[141]

Additionally, the court further explains that once schools have determined that they face a credible and identifiable threat, schools may seek to take appropriate disciplinary action to respond to the threat.[142] This test was developed when a high school student created a hit list in his personal journal of fellow students who "must die."[143] The school disciplined the student by suspending him for his journal

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[138] *Mahanoy Area Sch. Dist*., 141 S. Ct. at 2040.
[139] McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 700 (9th Cir. 2019).
[140] *Id.* at 707.
[141] *Id.* at 707-08.
[142] *Id.* at 708.
[143] *Id.* at 703.

entry.[144] No criminal charges were filed.[145] Hence, regulating off-campus student speech is more widely accepted by courts if the speech contains threats of violence that have a sufficient nexus to the school—and a nexus always exists when schools are faced with a credible threat of school violence.[146] Although this case deals with a journal entry and not a post on a social media platform, this type of regulation and allowance of schools to discipline their students should also be applied to off-campus online student behavior.

VI. Suggestions to Deter School Shootings and Threats

A. Discipline: A Helpful and Practicable Solution

It is still unclear to what extent schools may discipline their students for off-campus speech.[147] This is especially alarming given the way social media is used in modern times, and the sudden trend to post about school shooting threats. The battle centers on "the difficulty surrounding balancing two compelling interests—students' rights and school authority."[148] This issue of online off-campus student speech is a growing concern due to more minors being present on the internet and trends like the TikTok one previously mentioned. However, it can generally be agreed that a true threat approach is the better route for regulating off-campus student speech.[149] In order for a school to regulate a student's off-campus speech, it must fall under a narrow category not protected by the First Amendment.[150] One of those unprotected categories is a true threat.[151]

A true threat consists of: how others react to the threat; if there was a condition on the threat; who the threat was directly communicated to; whether the person making the threat had made similar threats in the past; if the recipients of the threat had reason to

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[144] *Id.*
[145] *Id.*
[146] *McNeil,* 918 F.3d at 708.
[147] JESUS S. R. GIBBS, STUDENT SPEECH ON THE INTERNET: THE ROLE OF FIRST AMENDMENT PROTECTIONS 42 (Melvin I. Urofsky ed., 2010).
[148] *Id.* at 44.
[149] *Id.*
[150] Michael K. Park, *Restricting Anonymous "Yik Yak": The Constitutionality of Regulating Students' Off-Campus Online Speech in the Age of Social Media*, 52 WILLAMETTE L. REV. 405, 417 (2016).
[151] *Id.* at 419.

believe that the threat was credible; and other non-exhaustive factors.[152] Generally, if a person's speech is a true threat, then the speech is not protected, and the person may be criminally punished.[153] Schools should be allowed to have greater authority over true threats versus other types of student speech.[154] Additionally, schools have an interest in preserving school safety and should be afforded authority to discipline students to preserve such an interest.[155] This means that:

> Students can be subject to criminal penalties for making "fake threats," or threatening statements without the intent to actually carry out the threat, as long as they intend to make others believe the threat is serious. Therefore, the true threat doctrine would apply if a student, who had no intention whatsoever of following through on it, made a false bomb threat or said he or she was going to go on a shooting rampage at school simply hoping that classes would be cancelled or disrupted (it would also apply if he or she was only hoping to laugh about it with his or her friends) as long as the student intended that the threat sound believable to others.[156]

As such, schools should opt to discipline students for school shooting threats, fake or credible. Threats of a school shooting may also materially disrupt classwork or involve substantial classroom disorder, which could then result in a school taking disciplinary action against the student.[157] Disciplinary measures by schools could help to deter such threats from being made and stop the trend of encouraging violent acts and posts on social media. The issue of increased school shootings and threats can be minimized by allowing schools to implement disciplinary measures along with implementing state laws that can criminally charge juveniles for making threatening social media posts.

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[152] Steve Varel, *Limits on School Disciplinary Authority Over Online Student Speech*, 33 N. ILL. U. L. REV. 1, 12 (2013).
[153] *Id.*
[154] *Id.* at 21.
[155] *Id.*
[156] *Id.* at 22.
[157] Park, *supra* note 150, at 426.

B. Better Monitoring of Social Media

According to many studies, technology such as social media can be used to predict criminal events.[158] Heavy monitoring of social media platforms adds to the debate about violations of constitutional rights of privacy, but better monitoring can still be legally implemented to help prevent school shootings and threats.[159] The government's interest in preserving school safety could act as justification for increased monitoring of student threats posted on social media. This argument is not to say that students' social media should be monitored heavily and scrutinized at times, but rather only when there are signs of danger. Signs of danger that could call for increased social media monitoring could come from fellow students speaking out to adults about possible threats they may have heard about or seen—the "Columbine effect."[160] Once information about a possible threat posted on social media has reached the appropriate authorities, law enforcement should take the necessary steps to investigate and neutralize such threats.[161]

A different approach to monitoring students' online speech that is not through social media platforms themselves would be for schools to seek out better training on technology and social media and engage school counselors to help students.[162] Schools should take time to inform students about technology and how social media can be used in a negative way. In doing so, schools can also encourage students to be aware and report social media posts that may be threatening. It is also important to prioritize training for counselors to deal with social media and technology to better guide students.[163] Counselors can explain to students that online threats are a serious matter and should not be confused with simple participation in online trends. When threats are made, such threats may be a substantial risk and may therefore require timely responses and result in serious consequences.[164] Taking this approach to better monitor students' online speech helps to distinguish

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[158] Vanessa Terrades & Shahabudeen K. Khan, *Will It EVER End? Preventing Mass Shootings in Florida & the U.S.*, 51 SUFFOLK U. L. REV. 505, 531 (2018).
[159] *Id.*
[160] LARKIN, *supra* note 26, at 10.
[161] Terrades & Khan, *supra* note 158, at 532.
[162] Mendola, *supra* note 127, at 181.
[163] *Id.* at 188-89.
[164] *Id.* at 186.

when threats are being made. This distinction will discern threats that require action from other student speech that, if not threatening, should not be subject to monitoring.

C. Following States' Leads and Being More Definitive in What Comes After a Threat is Made

True threats are speeches not protected by the First Amendment and therefore are subject to regulation.[165] This ultimately means that a true threat can be criminalized "because it causes fear, social disruption, and heightens the risk of future violence."[166] Since true threats can be criminalized, states should enact local laws that are specific to social media threats about school shootings. Of course, states need some guidance when deciding how to use laws to deter such threats. The baseline consideration in regard to imposing criminal liability should be whether there is reasonable proof that a person's speech was made with the purpose or substantial certainty to make the intended victim(s) "reasonably fear violence."[167] Additionally, threats should be viewed under the totality of the circumstances.[168]

This approach can include weighing whether the person making the threat has had any prior issues, made similar statements in the past, or demonstrated noticeably threatening behavior. There can also be welfare checks on students who have made potentially threatening posts online to see if there are any guns accessible to them at their home. As previously explained, there are many ways in which states are already prosecuting online threats, such as through disorderly conduct charges as evidenced by the Illinois case above. States may also pass laws to deter online threats and fine offenders who posted the threats as a "joke" so as not to mass incarcerate based on every little incident. Another factor to consider is timeliness. If online threats are deemed to be credible, then law enforcement should act promptly to prevent any harm.

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[165] Virginia v. Black, 538 U.S. 343, 359 (2003).
[166] Lidsky, *supra* note 3, at 1889.
[167] *Id.* at 1918.
[168] *Id.* at 1919.

D. Being Proactive, Not Reactive: Playing Defense Without Waiting for the Law

It is a common practice to be defensive in serious situations. Thus, school administrators should heavily consider budgeting for items like increased security and professional training.[169] The issue that is commonly debated is how the school may tend to lack sufficient funding. However, school safety should be a priority in terms of budgeting.[170] In prioritizing school safety, schools should provide professional training and emergency planning to school personnel in case of emergencies like school shootings.[171] Many schools do routine drills in which an active shooter situation is fictionally played out so that students know what procedures and steps to take, such as where to hide.[172]

Arming teachers and staff with guns or weapons is another highly controversial idea.[173] Of course, if this is a plausible idea that a school is considering, then there must be strict evaluations on teachers and their mental health, what specific weapons to arm them with, and what to do in the case of an accidental shooting.[174] This option is highly debatable and controversial, but an idea nonetheless. An additional security measure would be to install metal detectors at school entrances.[175] Installing metal detectors may also be related to issues of school funding, but with the increased threats on social media and school shootings, installation of the metal detectors should be seriously considered as a priority. Increased security at schools could also help to identify suspicion of a student carrying a weapon who poses a potential safety risk, and thus allow a legal search of a student.[176] Although these ideas are based on school policy and funding, they can help deter school shootings and threats, and may even assist the legal side of this problem before a mass casualty occurs.

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[169] KENNETH S. TRUMP, PROACTIVE SCHOOL SECURITY AND EMERGENCY PREPAREDNESS PLANNING 20 (Arnis Burvikovs et al. eds., 2011).
[170] *Id.* at 23.
[171] *Id.* at 39.
[172] *Id.*
[173] *Id.* at 48.
[174] *Id.* at 49.
[175] *Id.* at 52.
[176] TRUMP, *supra* note, at 169.

VII. Conclusion

Social media can be used in many sentimental and positive ways, but it can also be a tool used to threaten and harm students. School shootings have evolved from shocking events to unfortunately frequent occurrences, and the role social media plays in school shooting threats only increases their commonality. There is still much debate and litigation as to what extent social media may be regulated and monitored when dealing with school shooting threats, but it is now more important than ever to address the issue and weigh it against the interest of protecting schools and students. Online threats of this nature may be classified as true threats and thus subject to regulation. Many states have already taken action to deter online school shooting threats—however, more action must be taken. It is imperative to educate students on the seriousness of online threats, and why such threats should not be trends to follow. Social media has the ability to warn us about potential school shootings when individuals make true threats. Action needs to be taken once threats are made, as these threats cannot be protected by the First Amendment.

THURGOOD MARSHALL
LAW REVIEW

VOLUME 47 FALL 2022 NUMBER 1

POLICING A VIRTUAL WORLD: CRIME AND PUNISHMENT IN THE METAVERSE

Shaneil Snipe*

I. Introduction

"Now Cain said to his brother Abel, 'Let's go out to the field.' While in the field, Cain attacked his brother Abel and killed him."
Genesis 4:8[1]

Notions of crime and punishment existed before the dawn of the internet, cell phones, and social media. The Bible presents the story of Cain and Abel.[2] They were brothers who were expelled from the garden by God.[3] Cain killed Abel because God accepted Abel's sacrifice but not Cain's.[4] Then came the first crime, a murder fueled by jealousy.[5] Any class on human behavior talks about the consequences of acting contrary to laws, customs, and norms. In the Bible, the consequence was that God cursed Cain so his farming would no longer yield crops.[6] To that extent, a moral compass of wrong versus right was developed.

Fast forward to October 2016, when gamer Jordan Belamire penned a letter on the Medium website documenting her experience with virtual reality groping.[7] In this post she described this experience as she played the multi-player mode of the QuiVr

[1] Genesis 4:8 (King James).
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *See id.*
[7] Jordan Belamire, *My First Virtual Reality Groping*, MEDIUM (Oct. 20, 2016), https://medium.com/athena-talks/my-first-virtual-reality-sexual-assault-2330410b62ee.

game.[8] She recalled that every player appeared identical with a floating helmet, a bow in one hand, and the other hand free.[9] She said a user's floating helmet faced her dead on.[10] Then, the free-floating hand of the user approached her body, and virtually started to rub her chest.[11] The user continued to follow her around in the game after she yelled, "stop!"[12] At this point the user chased her, making grabbing and pinching motions toward her chest.[13] Her letter went on to say, "emboldened, he even shoved his hand toward my virtual crotch and began rubbing."[14] The gamer acknowledged that, of course, there was no physical touching.[15] However, this did not take away from the fright and violation she felt.[16]

Online harassment is no longer a novel occurrence. In 2021, the Pew Research Center published a survey on the state of online harassment. The study found that women are more likely to report being victims of sexual assault.[17] The report stated that 33% of women under 35 reported that they have been harassed online.[18] Approximately 55% of Americans believe online harassment has become a major problem.[19] Pivoting to gaining insight on potential solutions, more than half of the users considered permanently banning users that harass as an effective way to reduce its occurrence.[20] The concept of online harassment may be relatively new, but it is here, and it must be effectively addressed.

The purpose of this Note is to provide an overview of the extent of social interactions in virtual worlds, examine the migration of real-world crime to the Metaverse, and propose novel solutions for the potential harm. Part II discusses the history of the internet and the technology leading up to the creation of the Metaverse. Part III evaluates the immersive nature of this technology and the impact of the psychology of its users. Part IV

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[8] *Id.*
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] Belamire, *supra* note 7.
[15] *Id*.
[16] *Id*.
[17] Emily A. Vogels, *The State of Online Harassment*, PEW RESEARCH CTR. (Jan. 13, 2021), https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/.
[18] *Id*.
[19] *Id*.
[20] *Id*.

paints a broad picture of the traditional approach to crime and leads to an exploration of different kinds of virtual crime. As a catalyst for this discussion, Part V addresses the issue of sexual assault and rape culture in the U.S. Although difficult to conceptualize, Part VI explores the potential for murder in a virtual world and how criminal law would apply. Looking toward implementable solutions, Part VII provides recommendations and action steps toward a peaceful Metaverse.

II. Online Interaction: Historical Background

The 21st century combined the advancements of the telephone, film, and television and birthed the mammoth called the internet.[21] A new level of game play and social interactions followed. [22] The computer was the new meeting ground of not only familiar places, but those that were a product of our dreams and imaginations. The internet brought previously unknown and imaginary worlds to us, like the transportation of reading a book. Online worlds of the 70s and 80s used text-based technology in games such as *Adventure* and *Avatar*.[23] The natural progression was to have visual experiences that accompanied solely text-based interactions. Genres such as fantasy, role-play, and first-person shooters exploded in the 80s and 90s. [24] In 1994, the world wide web brought thousands to the internet. Naturally, this meant there were more users looking to play games and interact with others. The social aspect of the internet that exists today came later with the launch of *Worlds Chat* in 1995. [25] Users could now "teleport" to a three-dimensional space while having an audio experience and exchanging text.[26]

In December 1996, the internet giant AOL abolished their hourly fee and introduced a new flat rate for unlimited internet access. [27] The daily average of time spent on the internet doubled to 32 minutes online every day. [28] With an increase in online users,

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[21] Bruce Damer, *Meeting in the Ether: A Brief History of Virtual Worlds as a Medium for User-Created Events*, 2 J. Of Virtual Worlds Rsch. 94, 94 (2008).
[22] *Id.*
[23] *Id.* at 95.
[24] *Id*.
[25] *Id*. at 96.
[26] *Id.*
[27] Peter H. Lewis, *An 'All You Can Eat' Price Is Clogging Internet Access*, N.Y. TIMES (Dec. 17, 1996), https://www.nytimes.com/1996/12/17/business/an-all-you-can-eat-price-is-clogging-internet-access.html.
[28] *See id*.

role-playing games needed a lot more players to support their systems. The greatest skyrocket of users came with the birth of *World of Warcraft*. [29] The game launched in 2004 and by 2006 it had 7 million subscribers. Those numbers were unheard for people sharing in a virtual world.

A. Defining the Metaverse

The definition of the virtual world is ever-evolving, similar to the technology itself. One view is that a virtual world is a shared space that is "used by many players at the same time."[30] One thing that differentiates this from other forms of interactive technology is that the users experience immediacy.[31] Additionally, a virtual world should offer its users the ability "to alter the world they are in; the space is interactive."[32] Lastly, a virtual world must be persistent and continue to exist after a user has logged out or quit the game.[33]

Although the version envisioned by Facebook has not been launched to the public, elements of the Metaverse are being used today in the form of popular games such as *Fortnite*.[34] Fortnite's CEO, Tim Sweeney, made references to envisioning Fortnite as more than a game, and many players would agree that it already is.[35] In addition to being a cultural phenomenon and the most popular new game in recent times, *Fortnite* has created a platform for social networking.[36] Though social networking may have been the original purpose, platforms like these have become more advanced and fallen to more sinister uses.

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[29] Damer, *supra* note 21, at 96.
[30] *Chapter 2: A Social History of Virtual Worlds*, ALA TECH. SOURCE, https://journals.ala.org/index.php/ltr/article/view/4254/4860 (last visited Jan. 4, 2022).
[31] *Id*.
[32] *Id.*
[33] *Id*.
[34] *What is the Metaverse?* META, https://about.meta.com/what-is-the-metaverse/ (last visited Jan. 4, 2022).
[35] Keith Stuart, *Fortnite Is so Much More Than a Game*, MEDIUM, (Aug. 17, 2018), https://gen.medium.com/fortnite-is-so-much-more-than-a-game-3ca829f389f4.
[36] George P. Slefo, *Fortnite Emerges As A Social Media Platform For Gen Z*, COMMUNICATE (Jun. 11, 20190), https://communicateonline.me/category/industry-insights/post-details/fortnite-emerges-as-a-social-media-platform-for-gen-z#:~:text=A%20new%20study%20suggests%20that,younger%20consumers%20that%20brands%20covet.

III. The Immersive Nature of Virtual Worlds

Virtual worlds are immersive environments. Headsets like the Oculus serve as the vehicle to deliver this immersive experience to its users.[37] In the virtual reality (VR) space, the word "presence" comes up often.[38] Outside of the obvious need for users to feel like they are in the game, and not merely a consumer, presence goes further.[39] It attempts to trick the brain of the user to feel that they are truly a part of the game.[40] When effective, presence can cause users to forget or doubt that the wall in the game is not solid, and that the faces reflected in the simulated mirror do not belong to them.[41] Technology today focuses on sight to create the feeling of being immersed.[42] Additionally, the headsets operate to incorporate sound so that a user can hear and see whatever the virtual world wants them to.[43]

This immersive nature is both the draw and the detriment of virtual worlds. In research studies, many people who reported having their avatars grabbed and harassed said it felt realistic.[44] This was true especially for people utilizing the full-body tracking to replicate the movement of their limbs.[45] This was the experience of a woman who reported that another virtual reality user got so close to her face as if to kiss her.[46] She recalled that this action made her feel afraid, as if someone had done the same in the real world.[47] Users who have been harassed in virtual worlds report developing anxiety and a loss of trust in the people they interact with online.[48] Damaging effects come from the immersive nature of virtual worlds which causes the threat to feel physical and therefore real.[49]

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[37] *Quest*, META, https://www.meta.com/quest/ (last visited Jan. 4, 2022).
[38] Jaclyn Seelagy, *Virtual Violence*, 64 UCLA L. REV. DISC. 412, 414 (2016).
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] Rachel Metz, *Harassment is a problem in VR, and it's likely to get worse*, CNN BUSINESS (May 5, 2022, 10:01 PM), https://www.cnn.com/2022/05/05/tech/virtual-reality-harassment/index.html.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.

A 21-year-old woman claimed to be raped within just one hour of being in the Metaverse.[50] The young woman was in the game "Horizon Worlds," when she was led into a private room at a party on the Metaverse platform.[51] She accounts that her avatar was raped by a user while others watched and passed around a virtual bottle of vodka.[52] The video clip of the incident was released by the platform SumOfUs. The avatar is displayed saying, "check this out. It's a free show. Oh, getting it. Getting down with that gritty, ya heard."[53] The program is set up so that when a user is touched by another in the Metaverse, the controllers vibrate in their hand.[54] The user recounted that it all happened so fast that she disassociated, and even thought, "this isn't a real body."[55] Additionally, other users have reported concerning behavior such as verbal abuse, sexual harassment, racial slurs and an invasion of personal space.[56]

A. The Psychology of Virtual Worlds

The general consensus in the field of social science is that support from social relationships benefits overall well-being.[57] The lack of meaningful social connections increases the risk for depression, isolation, and even premature mortality.[58] Researchers have found that Virtual Reality (VR) can create psychological issues for young children as it relates to distinguishing imagination from reality.[59] Evidence has shown that VR creates false memories in pre-school aged children and causes them to confuse the limitations and boundaries of fantasy and physical reality.[60] New findings from the Institute of Engineering and Technology predict

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[50] Adriana Diaz, *Disturbing reports of sexual assaults in the metaverse: 'It's a free show'*, N.Y. POST (May 27, 2022, 2:33 PM), https://nypost.com/2022/05/27/women-are-being-sexually-assaulted-in-the-metaverse/.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] Hyun-Woo Lee et al., *Social Virtual Reality (VR) Involvement Affects Depression When Social Connectedness and Self-Esteem Are Low: A Moderated Mediation on Well-Being*, FRONTIERS IN PSYCH. (Nov. 30, 2021), https://www.frontiersin.org/articles/10.3389/fpsyg.2021.753019/full.
[58] *Id*.
[59] CATHERINE ALLEN & VERITY MCINTOSH, SAFEGUARDING THE METAVERSE, 10 (2022).
[60] *Id*.

that children are likely to spend about 10 years in VR over the course of their lifetime.[61] This amounts to approximately two hours and 45 minutes per day.[62]

For individuals who spend a significant amount of hours inside massively multiplayer online role-playing games (MMORPG), and operating through their avatars, anything that happens outside their will is undoubtedly troubling.[63] For some users, watching their avatar experience graphic representations of sexual attacks will negatively affect their psyche.[64]

For those that have no interest in virtual worlds, the use and impact may be difficult to comprehend. However, it is imperative to attempt to understand it. Envisioning these experiences from the perspective of a user who spends a significant amount of time in simulated environments will help others appreciate the power it can have over a user's mind.[65] Although not fully understood by psychologists, it is clear to them that virtual worlds not only offer entertainment, but a place of escape.[66] Many users do not see their lives in the virtual world as secondary reality, but as their first place of residence and interaction.[67] It is only from viewing these worlds from the mindset of a person who spends most of their time functioning as an avatar that law enforcement and the criminal justice system can appreciate the potential for long-lasting psychological impact. It is only by understanding this mentality that one can begin to comprehend how a person can report a virtual assault as a virtual rape.[68]

IV. Traditional Approach to Crime

Crime is traditionally thought of as something that happens in the real world, where a physical reality is shared.[69] These crimes

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[61] *Children likely to spend 10 years of their lives in VR metaverse*, E&T MAG. (Apr. 20, 2022), https://eandt.theiet.org/content/articles/2022/04/children-likely-to-spend-10-years-of-their-lives-in-vr-metaverse-study-suggests/.
[62] *Id*.
[63] *See* Marc Goodman, *Crime and Policing in Virtual Worlds*, FREEDOM FROM FEAR, Jul. 18, 2010, at 52.
[64] *Id*. at 58.
[65] *Id*. at 53.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *See* Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 298 (2004-2005).

typically happen in homes, public streets, and buildings.[70] So, when it comes to punishment, the law is concerned with the imposition of liability for the infliction of harm or injury to persons or property.[71] As such, a fundamental premise of crime and punishment is that the liability is applied based on conduct versus intangible behaviors such as thoughts.[72]

Interestingly, the concept of virtual crime predates the rise in popularity of cyberspace. For example, the English Treason Act criminalized to "compass or imagine the death of our Lord, the King, or of our Lady, his companion, or of his eldest son and heir."[73] This crime did not require any volitional act to a person or property.[74] This was truly a thought crime, and now a relic of the past. Anglo-American law has since rejected the notion of thought crimes.[75] The common law tradition recognizes crimes consisting of four elements: "conduct, mental state, attendant circumstances and a forbidden result or harm."[76] Behavior in cyberspace presents a unique challenge to the existence of these elements.

A. VIRTUAL CRIMES

Criminal laws impose liability for what occurs in the physical world. The challenging undertaking will be in applying those same principles to actions that manifest themselves entirely in the virtual world. It is easy to imagine crimes committed using a computer such as hacking, phishing, and even fraud. However, it is more difficult to grasp those that are carried out entirely online. One of the most prevalent and publicized crimes is cyberbullying.[77] The crime of cyberbullying is the act of verbally abusing someone with the intent to embarrass or hurt.[78]

B. MySpace and Megan Meier

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[70] *Id*.
[71] *Id*.
[72] *Id*.
[73] *See* JOHN GEORGE HODGES, REPORT OF THE TRIAL OF JOHN MITCHELL FOR FELONY 11 (1848).
[74] *Id.*
[75] Will Penman, *Is it just a game? Virtual crime*, WILLPENMAN.COM, http://willpenman.com/teaching/is-it-just-a-game.html (last visited Jan. 4, 2022).
[76] *Id*.
[77] Matthew J. Johnson, *A New (Virtual) World Order: A Look at Criminal Activity in Online Communities*, SETON HALL L. (2010), https://scholarship.shu.edu/student_scholarship/51/.
[78] *Id.*

MySpace predates Instagram, TikTok, and even Facebook. It could be considered the pinnacle of social media for millennials. MySpace was created in 2003. Between 2005 to 2008, it was the most visited social networking site in the world.[79] Co-founder Chris DeWolfe came up with the idea for the social site from the final project in his business school class.[80] It was the space to talk with friends, share photos, and play music.[81] Megan Meier was almost 14 when she befriended a 16-year-old boy named "Josh" on MySpace.[82] She spoke to Josh daily and was ecstatic that he thought she was pretty.[83] There was a drastic shift in the tone of their messages when Josh accused her of not being nice, and seemed to have shared their messages with other people.[84] Things took a nasty turn when other MySpace users started calling her "a slut" and "fat."[85] Megan Meier hung herself that night in her closet.[86] Following her suicide, the family made several shocking discoveries.[87] The most incriminating of which included what they believed to be the last message Megan read which said, "Everybody in O'Fallon knows how you are. You are a bad person and everybody hates you. Have a shitty rest of your life. The world would be a better place without you."[88]

After Megan's death her family learned that "Josh" was really Lori Drew, the mother of one of Megan's former friends.[89] She ran the account and communicated with Megan along with her daughter and an 18-year-old employee.[90] Prosecutors in Missouri sought to charge Drew with a crime, but there was no federal statute

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[79] Lori Kozlowski, *New Life: How MySpace Spawned A Start-Up Ecosystem*, FORBES (May 15, 2012, 1:26 PM), https://www.forbes.com/sites/lorikozlowski/2012/05/15/how-myspace-spawned-a-startup-ecosystem/?sh=4e24230740ba.
[80] *Id*.
[81] *Id*.
[82] Alissa Phillips, *Cyberbullying and the Tragic Case of Megan Meier*, MEDIUM (Mar 22, 2019), https://medium.com/@alissaphillips/cyberbullying-and-the-tragic-case-of-megan-meier-9bb9d3611094.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id.*; *see also* ENCYCLOPEDIA OF CYBERCRIME 42 (Samuel C. McQuade, ed., 2008).
[87] Phillips, *supra* note 82.
[88] *Id*.
[89] *Id*.
[90] *Id*.

addressing cyber bullying.[91] Instead, they decided to charge her under the anti-hacking statute.[92] This claim was based on the user agreement requiring that users provide factual information about themselves, refrain from soliciting minors, and refrain from using MySpace for the purpose of harassing other people.[93] In the case *United States v. Drew*, the question was whether the intentional breach of an internet website's terms of service, without more, constituted a Computer Fraud and Abuse Act (CFAA), a misdemeanor violation.[94] The court summarized that if any conscious breach of a website's terms of service was held to be enough to constitute intentionally accessing a computer without authorization, too much discretion to the police and too little notice to citizens who wish to use the internet would result.[95]

C. Stalking and MMORPGs

MMORPGs combine role-playing games (RPGs) and multiplayer gaming worlds.[96] Some characteristics of MMORPG video games are multiplayer gameplay, free-to-play or monthly subscription, character creation, character progression, and open-world exploration.[97] Common complaints in virtual worlds such as MMORPGs include stalking, intimidation, and harassment.[98] Another term for this is "griefing."[99] Griefing occurs when a user becomes the subject of unwanted attention and the focus of another user.[100] Here, the user's purpose of being in a virtual world is to harass and intimidate others rather than actual gameplay.[101]

The popular game Minecraft has some of the most prevalent instances of griefing.[102] In Minecraft, instead of surviving together in the generated block world, griefers work to

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[91] Kim Zetter, *Judge Acquits Lori Drew in Cyberbullying Case, Overrules Jury,* WIRED (Jul. 2, 2009, 3:04 PM), https://www.wired.com/2009/07/drew-court/.
[92] *Id*.
[93] *Id*.
[94] United States v. Drew, 259 F.R.D. 449, 451 (C.D. Cal. 2009).
[95] *Id*.
[96] *MMORPG Guide: 6 Characteristics of MMORPGs,* MASTERCLASS, https://www.masterclass.com/articles/what-does-mmorpg-stand-for (Jun. 28, 2021).
[97] *Id*.
[98] Goodman, *supra* note 63, at 58.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Griefing – what is it exactly?,* DIGITAL GUIDE IONOS (Jan. 05, 2022), https://www.ionos.com/digitalguide/online-marketing/social-media/griefing/.

prevent that.[103] Griefers deliberately demolish blocks, steal what the users worked hard to create, and attack players indirectly as well as directly.[104] A part of griefing involves blocking the actions of players or placing objects in their path.[105] In July 2022, the popular game Grand Theft Auto (GTA) had an update aimed at preventing griefing.[106] Typically, griefers in GTA will take the form of stealing other players' vehicles, damaging vehicles, or killing unsuspecting players.[107] The update prevents users from driving backwards to ruin races and impacts kill ratios during non-competitive gameplay.[108] While these efforts directly combat it, griefing has proven to be persistent, and in many cases, escalating.

V. Sexual Assault

Perhaps the most disruptive of the potential virtual crimes is sexual assault. 10 U.S.C. § 920 defines the perpetrator of sexual assault as one who:

> (1) commits a sexual act upon another person by—
>
> (A) threatening or placing that other person in fear;
>
> (B) making a fraudulent representation that the sexual act serves a professional purpose; or
>
> (C) inducing a belief by any artifice, pretence, or concealment that the person is another person;
>
> (2) commits a sexual act upon another person—
>
> (A) without the consent of the other person; or
>
> (B) when the person knows or reasonably should know that the other person is asleep,

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[103] *Id.*
[104] *Id*.
[105] *Id*.
[106] Ryan Lemay, *GTA update cracks down on wide-scale griefing problem,* DEXERTO, (Jul. 22, 2022, 3:48 PM), https://www.dexerto.com/gaming/gta-update-cracks-down-on-wide-scale-griefing-problem-1880808/.
[107] *Id.*
[108] *Id*.

> unconscious, or otherwise unaware that the sexual act is occurring.[109]

Laws that impact sexual harassment and rape have progressed over the years. Most recently the advance of the #MeToo movement has turned a once private and taboo discussion into a worldwide cry for change and reform.[110] The magnitude of the outpouring of stories and recollections paint a grim picture of the rights of men and women and their protection from sexual assault.

A. Brief History of Laws on Sexual Assault in the U.S.

Common law rape in the Early American colonies was defined as "carnal knowledge of a woman 10 year or older, forcibly and against her will."[111] The temperance and suffrage movement in the late 1800s advocated to raise the age of consent from 10 to between 14 and 18.[112] At this time, most states excluded Black women from the protection of rape laws.[113] Barriers to prosecution were addressed by eliminating the prompt reporting requirement and enacting rape shield laws.[114] States moved from the requirement of utmost resistance to "earnest resistance," which persisted as late as 1981.[115] Many states abandoned the resistance requirement later into the 80s.[116] Technically, marital rape was outlawed by all 50 states in 1993.[117]Although there has been change to the laws, the attitudes supported by previous laws have

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[109] 10 U.S.C. § 920 Art. 120.
[110] Holly Corbett, *#MeToo Five Years Later: How the Movement Started and What Needs to Change*, FORBES (Oct. 27, 2022, 12:02 PM), https://www.forbes.com/sites/hollycorbett/2022/10/27/metoo-five-years-later-how-the-movement-started-and-what-needs-to-change/?sh=60d6d8945afe.
[111] Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, ARK. J. OF SOC. CHANGE & PUB. SERV. (Apr. 15, 2018), https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states/.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] Barbara Bradley Hagerty, *American Law Does Not Take Rape Seriously, Permeating every moment of Harvey Weinstein's trial is the disturbing history of sexual-assault prosecution in America*, THE ATLANTIC (Jan. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/01/american-law-rape/605620/.
[117] *Id*.

been an unfortunate inheritance passed down to the current generation.[118]

B. Rape Culture in the Media

During Donald Trump's presidential campaign, a video was leaked from a lewd conversation recorded in 2005.[119] In the video, Trump was sharing a story about his encounter with a married woman where he went on to say, "When you're a star, they let you do it. You can do anything. Grab 'em by the p---y. You can do anything."[120] Donald Trump was elected President of the United States.

Experts defined rape culture as the adoption of the idea that survivors of sexual assault bear the blame for what happens to them.[121] Especially among college-aged women, one of the main locales of rape culture is social media.[122] To that extent, rape has become normalized as an inevitable part of our society.[123] Even when victims take the step of reporting assaults, formal charges are often not brought or do not result in a conviction.[124] At various stages of the criminal justice system, the influence of persuasive myths continues to inform its function, or lack thereof. This lack of trust prevents victims from coming forward out of fear of not being believed or of an unfavourable outcome in the courts.[125]

C. Virtual Rape

A virtual rape occurs when one person's avatar is forced into a sexual situation against his/her desire.[126] This is to be

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[118] *Id*.

[119] Jessica Taylor, '*You Can Do Anything': In 2005 Tape, Trump Brags About Groping, Kissing Women,* NPR (Oct. 7, 2016, 6:05 PM), https://www.npr.org/2016/10/07/497087141/donald-trump-caught-on-tape-making-vulgar-remarks-about-women.

[120] *Id.*

[121] Samantha Kolb, *Social media is only reinforcing rape culture. Millions serve as bystanders,* THE DAILY ORANGE (Apr. 12, 2021, 10:17 PM), https://dailyorange.com/2021/04/social-media-rape-culture/.

[122] *Id*.

[123] Holly Jeanine Boux & Courtenay W. Daum, *At the intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the "Real" Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L. TECH. & POL'Y 149, 154 (2015).

[124] *Id*. at 155.

[125] *Id*.

[126] Regina Lynn, *Virtual Rape Is Traumatic, but Is It a Crime,* WIRED (May 4, 2007, 12:00 PM), https://www.wired.com/2007/05/sexdrive-0504/.

distinguished from consenting adults carrying out fantasy role plays online.[127] Sceptics immediately doubt that this is possible, noting that rape is not possible without a physical human victim.[128] Additionally, victims of real world rape and sexual assault may view it as an insult to their own experiences. Nevertheless, victims of virtual world sexual assault are coming forward and seeking redress from the law.[129] Their cases are emboldened by the advance in graphics used in MMORPGs and virtual worlds that allows the depiction of real world scenarios very accurately.

VI. Murder in the Metaverse

Sexual harassment and sexual assault are not the only foreseeable crimes in the virtual world. In a speech at the World Economic Forum in Switzerland, the Minister of State for artificial intelligence for the United Arab Emirates warned that murder in the Metaverse should be illegal.[130] Omar Sultan Al Olama illustrated his point by stating:

> …if I come into the Metaverse and it's a realistic world that we're talking about in the future and I actually murder you, and you see it, … It actually takes you to a certain extreme where you need to enforce aggressively across the world because everyone agrees that certain things are unacceptable.[131]

This argument undoubtedly challenges the definition of murder.[132]

In envisioning what this may look like, two criminal lawyers and a former prosecutor turned law professor were interviewed by The Sun.[133] Two of those experts said that violent

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[127] *Id.*
[128] Boux & Daum, *supra* note 124, at 157.
[129] *Id*. at 169.
[130] Victor Tangermann, *UAE Official Says Murder Should Be Illegal in the Metaverse, Does killing somebody in the metaverse make you a murderer*? FUTURISM (May 26, 2022), https://futurism.com/uae-official-murder-illegal-metaverse.
[131] *Id*.
[132] *Id*.
[133] Christopher Eberhart, *Meta Your Maker*, *Metaverse experts reveal if you can murder in VR – and whether you can be punished*, THE SUN (Apr. 10, 2022, 12:04 PM), https://www.thesun.co.uk/tech/18212229/can-you-murder-in-metaverse/.

crimes like murder could be interpreted as speech-related, similar to harassment or stalking.[134] John Bandler, professor of cyber security and cyber-crime at New York's Elisabeth Haub School of Law at Pace University, said it would be dependent on the laws as they are currently written.[135] The laws currently protect "real, living people" and not avatars or software codes.[136] The idea is that this protection will be derived from the First Amendment limitations on the protection of free speech.[137]

A. Application of Criminal Law in the Virtual World

Traditionally, criminal law focuses on the physical perspective and not a virtual one.[138] The laws are written to prevent and punish crimes committed based on a series of elements that need to be strictly construed.[139] The determination of whether a person is guilty of a crime depends on those elements being met.[140] The elements of crimes tend to be physical, that "require physical acts, communications between physical places, and impact on real physical people."[141] To illustrate, the crime homicide prohibits causing the death of a physical person and not an avatar.[142] The statute's definition for homicide is, "A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual."[143] Anyone would be hard pressed to find that the killing of an avatar in a virtual game satisfies these elements. Specifically, the requirement for the death of an individual creates an insurmountable challenge. Further, a large part of online gaming involves killing other avatars. This would require a clear distinction between a death that is part of the game and one that is subject to criminal punishment. With a player in a MMORPG averaging so many kills in a short period of gameplay, trying to establish that distinction would be futile.

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[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] Orin S. Kerr, *Criminal Law in Virtual Worlds,* 2008 U. OF CHI. LEGAL F. 415, 418 (2008), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1432&context=uclf.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*.
[143] Tex. Penal Code Ann. § 19.01(a).

B. Discerning Jurisdiction

Although aspects of the Metaverse exist today in different forms, the version envisioned by its founder where most real-world activities occur in a virtual space is still to come. Along with this is the need for regulatory framework. Currently, there are no laws that can be attached to the Metaverse.[144] Most companies and legal professionals anticipate that traditional legal concepts will transfer to the Metaverse, similar to how they did with the inception of the internet and social media.[145]

Michael Fluhr, of counsel at DLA Piper, intimated that there are no disputes in the Metaverse, just a new way for people to interact.[146] He went on to compare it to Facebook, or Craigslist.[147] Fluhr explained that it is not a place and just a novel vehicle for human interaction.[148] Nick Abrahams, global co-leader of digital transformation practice at Norton Rose Fulbright, further affirmed that "sovereign countries are not going to cede jurisdiction over their citizens to some form of 'global online legal system.'"[149] He went on to add that this was a suggestion with the first arrival of the internet in the 1990s, and nothing like this has materialized.[150]

Nonetheless, other countries have taken a more directed approach to the issue of jurisdiction. For example, Federal prosecutors in Belgium recently had their Belgian Federal Computer Crime Unit visit the scene of a crime in the popular VR game Second Life to investigate a virtual rape.[151] With this, it appears that jurisdictional, choice-of-law, and judgment recognition rules could be in flux, partially due to the virtualization of social interactions.[152]

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[144]Smita Verma, *What laws govern the Metaverse?* BLOCKCHAIN COUNCIL (Jan. 16, 2023), https://www.blockchain-council.org/metaverse/what-laws-govern-the-metaverse/.

[145] Cassandre Coyer, *Virtual Limits: Lawyers Expect Jurisdictional Boundaries to Still Apply in Metaverse*, LAW.COM (Sep. 1, 2022, 11:00 AM), https://www.law.com/legaltechnews/2022/09/01/virtual-limits-lawyers-expect-jurisdictional-boundaries-to-still-apply-in metaverse/?slreturn=20221104205931.

[146] *Id*.

[147] *Id*.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] Lynn, *supra* note 126.

[152] Paul S. Berman, *Legal Jurisdiction and Virtual Social Life*, 27 CATH. U. J. L. & TECH 103, 126 (2019).

In the 19th century, principles of legal jurisdiction and choice-of-law were settled nearly exclusively in the territorial power of the sovereign.[153] However, the growth of interstate commerce, transportation, and cross-border activity in the early 20th century put pressure on the idea that the state's judicial power only went as far as its territorial boundary.[154] Consequently, by the end of the 20th century, the newly settled principles indicated that a state may exercise jurisdiction over a person if the effects of their actions are felt within the state's borders, even without them setting foot in the state.[155] It flows naturally that as society advances and new issues arise, a need for new answers also arises. The jurisdictional changes were unquestionably met with pushback over the years. However, it is almost impossible to imagine this custom any other way.

VII. Policies for the Future

A. Recommendations

In 2000, Marty McSorley, a hockey player with the Boston Bruins, used his hockey stick to hit player Donald Brashear in the head.[156] Brashear had a concussion and suffered from memory loss following this incident.[157] McSorley was charged with assault in a British Columbia court.[158] The claim was based on the theory that the hit was beyond the rules of the game.[159] The trial judge agreed and held that McSorley's conduct was outside the scope of professional hockey and therefore not a part of the game since he targeted Brasher's head.[160] The judge concluded that if the McSorley had aimed at the shoulder with the intent to start a fight, it would have been within the "common practices" of the game, and therefore not assault.[161] The judge was guided by the social understandings of hockey to assess the players' conduct;[162] a similar approach could be used in the virtual world. At this stage,

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[153] *Id*. at 125.
[154] *Id*.
[155] *Id*. at 126.
[156] Kerr, *supra* note 138, at 421.
[157] *Id*.
[158] R v. McSorley, [2000] BCPC 116 (Can.).
[159] *Id; see also* Kerr, *supra* note 138, at 421.
[160] R v. McSorley, [2000] BCPC 116 (Can.).
[161] *Id*.
[162] *Id.*

courts should consider a hands-off approach for conduct that has no real-world application of the law. The creators and hosts of the software know the virtual worlds the best and are most distinctively equipped to handle issues that arise and happen exclusively in this environment. They would be considered the arbiters of justice in the Metaverse.

The next point to be addressed is the applicable rule of law. One approach to determining the standard practices and norms is to look at the company's Terms of Service and End-User License Agreements.[163] The hosts of the websites can change and update the language regularly to keep up with advancements in the virtual world. This can be accomplished much more quickly and efficiently than relying on changes to make their way through the legislature. Further, with new and complex language related to the Metaverse, MMORPGs, and virtual interactions generally, it can be difficult for legal professionals to keep up with the technical language. Nevertheless, policy makers will need to be informed of the activities of these immersive technologies so that they can provide oversight. Consequently, attorneys will need to learn the technical jargon as it becomes relevant. Considering the millions of users expected to use the Metaverse daily, a taskforce should be established to channel, monitor, and sort through complaints.

An extension of the hands-off approach envisions a set of rules or guidelines that would operate as a deterrent to the virtual user with ill intent. Companies like Microsoft have implemented strategies to deal with users who participate in griefing using Xbox Live.[164] One such approach is providing a space for players to leave feedback so that other users can check their reputation before choosing to engage with them.[165] Once there is a critical mass of negative feedback, Microsoft will ban that user.[166] Microsoft has resorted to this response a few thousand times, enough for it to be a potent deterrent.[167] Similarly, the developers and hosts of the Metaverse can utilize a feedback system to allow people to share their experience with other users. This should be monitored to detect when there are high amounts of negative feedback. To the

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[163]Kerr, *supra* note 138, at 422.

[164]David Becker, *Inflicting pain of "griefers", On-line game companies seek new ways to confront antisocial players who drive players away*, CNET (Dec. 13, 2004, 5:48 PM), https://www.cnet.com/tech/gaming/inflicting-pain-on-griefers/.

[165] *Id*.

[166] *Id*.

[167] *Id*.

extent that the critical mass is reached either in quantity or severity, the user should be suspended. The time of suspension should match the severity or frequency of the offense.

Another hurdle to imposing liability is identifying users in the Metaverse. Anonymity can be a cover for unscrupulous activity carried on without identification. In this regard, enforcement will be more difficult than in physical reality.[168] Since tracking an avatar to its real-world user will be time consuming, a more proactive approach should be taken. Developers can build programs that require users to be identifiable before joining or creating an account. This would function like familiar websites that require identifying information and confirmation of identity before use. Since this activity is digital, every action will likely be logged. This feature can be used to identify the owner of each avatar and assist with making the Metaverse safer. Although this implementation will raise privacy concerns, the immersive nature of the Metaverse requires solutions more closely related to the real world.

To prevent the laws from falling behind as technology advances, a new bill of rights to the Constitution should be proposed.[169] This would specifically address issues of virtual reality.[170] In his 1789 speech in Congress, James Madison declared that a bill of rights:

> [W]ould be a valuable bulwark of individual liberty because of its versatility, defending sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority.[171]

These words ring true even today. A bill of rights would effectively address the need for adaptability.

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[168] Seelagy, *supra* note 38.
[169] Aaron C. Mandelbaum, *Give Me Liberty: Why We Need a Cybersecurity Bill of Rights and What It Could Include*, GEO. L. TECH. REV. (Apr. 2022), https://georgetownlawtechreview.org/give-me-liberty-why-we-need-a-cybersecurity-bill-of-rights-and-what-it-could-include/GLTR-04-2022/.
[170] *Id*.
[171] *Id.*

B. Conclusion

Returning to the story of the woman who claimed to have been raped in a virtual reality space called Horizon Worlds, responses to her report have yielded comments accusing her of crying for attention and even suggesting that she refrain from choosing a female avatar next time. [172] Yet, there are others who have started to inquire about whether getting hurt in the Metaverse is a viable concern.[173] Joseph Jones, the president of Bosco Legal Services, specializing in cyber and social media, asserts that it is unlikely that she has a strong case for sexual harassment.[174] At the same time, he acknowledges that this is an emerging space.[175]

Merriam-Webster adds new words to the dictionary yearly to keep up with the changing times and best serve the current social climate. This year, the word "yeet" was added to the dictionary and gaslighting was the word of the year.[176] This is a simple illustration of how the world adapts to change, diverging from customs and norms and creating new ones. Just as societal norms dictate behavior in the physical world, the Metaverse will grow and evolve to establish what is considered acceptable.

The tagline emblazoned on the top of the official website for Meta reads: "The metaverse may be virtual, but the impact will be real."[177] The same characteristic that makes the Metaverse appealing is the one that positions it to be on the frontlines to influence user behavior and encourage compliance. It is imperative that occurrences of harassment and assault be addressed with vigor and not brushed aside as an exaggeration or cry for attention. With more awareness regarding the psychological effects of assault and other crimes, the outlook is positive. Society has been tasked with addressing issues of crime and punishment since the story of Cain and Abel. The great migration of these activities to a virtual world only shifts the location and the means. Just as society adapted to

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[172]Michelle Shen, *Sexual harassment in the metaverse? Woman alleges rape in virtual world*, USA TODAY, (Feb. 1, 2022, 4:47 PM), https://www.usatoday.com/story/tech/2022/01/31/woman-allegedly-groped-metaverse/9278578002/.

[173] *Id*.

[174] *Id*.

[175] *Id*.

[176] *Yeet*, MERRIAM-WEBSTERS DICTIONARY OF ENGLISH USAGE (rev. ed. 2022).

[177] *About*, META, https://about.meta.com/metaverse/impact/ (last visited Dec. 6, 2022).

the invention of the internet and pivoted to address the perils of social media, it shall continue to adjust.

THURGOOD MARSHALL LAW REVIEW

VOLUME 47 | FALL 2022 | NUMBER 1

THE COST OF FREEDOM: THE NEED FOR BAIL REFORM IN TEXAS

Shanon Merino*

I. Introduction

In 2015, Sandra Bland was found dead in her jail cell three days after she was arrested during a traffic stop.[1] Waller County, Texas, set her bail at $5,000.[2] This means that to post bail and get out of jail, Sandra needed to either pay the $5,000 or a $500 nonrefundable fee to a bondsman.[3] Her family was working to gather the necessary money to pay for Sandra's freedom when they received the news about her suicide.[4]

Unfortunately, this is not an isolated case. In Harris County, Texas alone, fifty-five inmates died in county jail from 2009 to 2015 waiting for trial.[5] While this is a prominent problem in the United States, Texas has a higher incarceration rate than any democracy in the

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[1] Sharon Grigsby, *Another Outrage in Sandra Bland Injustice: She Couldn't Find $500 Bail*, THE DALL. MORNING NEWS (Jul. 27, 2015, 5:38 PM), https://www.dallasnews.com/opinion/2015/07/27/another-outrage-in-sandra-bland-injustice-she-couldn-t-find-500-bail/.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] James Pinkerton, *Tough Bail Policies Punish the Poor and the Sick, Critics Say 55 Died Awaiting Trial in Harris County Jail since 2009*, HOUS. CHRON. (Dec. 28, 2015, 1:17 PM), https://www.houstonchronicle.com/news/houston-texas/houston/article/Tough-bail-policies-punish-the-poor-and-the-sick-6721984.php.

world, including the United States.[6] Shockingly, two-thirds of people in Texas jails have not been convicted of a crime.[7]

Why are so many people detained when they are innocent in the eyes of the law? Like most states in the United States, Texas uses a cash bail system that detains people who have not been convicted of the crime they were charged with, simply because they cannot afford their bail amounts.[8] While there has been little effort by the state to reform the broken jail system, several cases stirred reform in the state's biggest counties.[9] One of these cases involved a grandmother whose bail was set at $150,000 after she was charged with shoplifting school uniforms for her grandchildren.[10] Because she could not afford to pay the ten percent for a bondsman, much less the full amount, she spent two months in Dallas County jail, and taxpayers paid around $3,300 for her detention.[11] In fact, Texas local governments spend $905,028,085 per year to detain pretrial inmates.[12]

This Note will propose a legislative solution to ending cash bail in Texas. The first part of this Note will discuss the history of monetary bail in the United States. The second part will explain the harmful effects of the cash bail system. Third, this Note will discuss the reform efforts made in Texas. And finally, the last part of this Note will propose a legislative solution centered around the concepts of restoration and release.

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[6] *Texas Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/TX.html (last visited Dec. 11, 2022).

[7] Matt Keyser, *While Texas Counties Pursue Bail Reform, the State Legislature is Pushing for a Rollback,* NAT'L P'SHIP FOR PRETRIAL JUST., http://www.pretrialpartnership.org/news/while-texas-counties-pursue-bail-reform-the-state-legislature-is-pushing-for-a-rollback/ (last visited Dec. 11, 2022).

[8] Cary Aspinwall, *Why Dallas County Can Set $150,000 Bail for a $105 Shoplifting Charge—and How Taxpayers Lose*, THE DALL. MORNING NEWS (Dec. 29, 2016, 9:22 AM), https://www.dallasnews.com/news/2016/12/29/why-dallas-county-can-set-150000-bail-for-a-105-shoplifting-charge-and-how-taxpayers-lose/.

[9] *Id.*

[10] *Id*.

[11] *Id.*

[12] *Pretrial Decision-Making Practices*, *Criminal Justice Committee Report & Recommendations,* TEX. JUD. COUNCIL, 3 (October 2016), http://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf.

II. History of the Cash Bail System in the United States

The concept of bail evolved in England in the Anglo-Saxon era to keep defendants who were sued in private grievances from fleeing and avoiding paying their victims for their injuries.[13] During the eleventh century, the state began shifting from monetary fines to capital and corporate sentences.[14] This shift to physical punishment further incentivized criminal defendants to flee out of fear of execution or physical harm, which led judges to utilize bail to ensure a defendant's presence at trial.[15] In response to this practice, Parliament passed the Statute of Westminster, which protected defendants from abusive bail practices by distinguishing between bailable and nonbailable offenses.[16] Bail was considered a right in all crimes except capital offenses.[17] In 1689, the English Bill of Rights was enacted to prohibit excessive bail and to prevent judges from abusing their power and setting unaffordable bail amounts.[18]

A. Early Protections

These bail practices became fundamental in colonial America,[19] which implemented the English bail tradition of personal sureties.[20] Sureties merely required an accused to promise to pay if he or she failed to appear in court.[21] This practice was rooted in the presumption of innocence and a defendant's right to protection from punishment until proven guilty.[22] The Framers of the Constitution codified these protections within the Eighth Amendment's right to

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[13] Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36 BUFF. PUB. INT. L.J. 28, 38 (2019).
[14] *Id.*
[15] *Id.*
[16] *Id.* at 38-39.
[17] *Id.* at 39.
[18] *Id.* at 39-40.
[19] *Id.* at 40.
[20] Muhammad B. Sardar, *Give Me Liberty or Give Me Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1420, 1427 (2019).
[21] *Id.*
[22] *Id.*

protection from excessive bail.[23] However, the Framers failed to include explicit language giving citizens an absolute right to bail in most cases, thus leaving the right to bail up to Congress and the states.[24] Additionally, Congress enacted the Judiciary Act of 1789, which laid out that a defendant's right to bail in non-capital cases vested upon the discretion of the court to ensure appearance at trial.[25] The omission of an absolute right to bail in these early laws has contributed to a lack of uniformity between state legislatures and courts.[26]

B. The Shift to Secured Monetary Bail

Without these explicit protections, the 1800s saw a shift in American bail practices when personal sureties began refusing to take responsibility for defendants without payment.[27] As a result, when judges imposed secured money conditions on the accused, defendants could not meet bail.[28] Despite Eighth Amendment challenges to monetary bail, courts argued "that an amount was not excessive simply because it was unattainable."[29] In the 1900s, the United States shifted away from "rules against profit and indemnification at bail" as most courts stopped asking for a promise to pay and instead began asking for full payment as a condition of release.[30] The increased practice of requiring secured conditions, usually a request of full payment, disproportionally affected those who could not afford to be released.[31]

The new shift to secured monetary conditions presented the Supreme Court with several opportunities to address the constitutionality of the bail system. In *Stack v. Boyle,* the Supreme Court held that bail set at an amount higher than necessary to assure the defendant stands trial and submits to his sentence if found guilty is

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[23] *Id.* at 1427-28.
[24] Johnson, *supra* note 13, at 40.
[25] *Id.* at 40-41.
[26] *Id.* at 41.
[27] Sardar, *supra* note 20, at 1428.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

excessive under the Eighth Amendment.[32] Additionally, the Supreme Court explained that a person arrested for a non-capital offense has a right to bail, and the infliction of punishment before conviction should be avoided.[33] However, the Court in *Carlson v. Landon* limited *Stack*'s holding by clarifying that the Eighth Amendment did not provide a right to bail in all cases but merely stated that bail should not be excessive.[34] Later, in 1971, the Court struck down a Texas law which required that a person unable to pay monetary bail must be incarcerated to satisfy the fine at a credit of $5 per day.[35] The Court ruled that applying a fee to those who could afford it but converting that fee to imprisonment for those who could not was a denial of equal protection rights.[36] Through these cases, the Court highlighted the unconstitutionality of excessive bail, but it also limited pretrial release.[37]

The growth of the cash bail system and the practice of judges discretionally setting high bail amounts across the country sparked public criticism on the system's efficacy.[38] In response, Congress passed the Bail Reform Act of 1966, which created a presumption towards the release of defendants accused of non-capital crimes.[39] Additionally, the Act required a judge who believed that release on recognizance would be insufficient to ensure the defendant's appearance at trial to "choose the least restrictive alternative condition."[40]

These victories were short-lived after violent crimes committed by defendants who were released pretrial gained public attention.[41] Congress passed the Bail Reform Act of 1984, which allowed a judge to detain a defendant without bail based on the accused's flight risk or potential danger to the community.[42] The Bail Reform Act of 1984 helped shape the bail system currently followed

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[32] Stack v. Boyle, 342 U.S. 1, 5 (1951).
[33] *Id.* at 4.
[34] Carlson v. Landon, 342 U.S. 524, 546 (1952).
[35] Tate v. Short, 401 U.S. 395, 395 (1971).
[36] *Id.* at 399.
[37] Johnson, *supra* note 13, at 44.
[38] *Id.* at 50.
[39] Sardar, *supra* note 20, at 1429.
[40] *Id.*
[41] Johnson, *supra* note 13, at 47.
[42] Sardar, *supra* note 20, at 1430-31.

by most states in the United States.[43] Allowing the consideration of a person's "future dangerousness" in deciding between pretrial detention or release expanded the judges' discretion[44] beyond the discretion given in *Stack v. Boyles* and the Bail Reform Act of 1966. Additionally, the Bail Reform Act of 1984 helped create a system shift from the presumption of pretrial release towards a rebuttable presumption of pretrial detention[45] based on a defendant's potential danger to the community.[46]

The constitutionality of the Bail Reform Act of 1984 was challenged in *U.S. v. Salerno*.[47] The respondents were arrested and denied bail after the prosecution showed evidence that the respondents were members of a crime family and participated in conspiracies to commit crimes through violent means.[48] Based on this evidence, the trial court judge held the defendants posed a threat to the community and should not be released.[49] The Supreme Court held that there is no absolute right to bail and that the consideration of future dangerousness created in the Bail Reform Act is constitutional.[50]

As a result of the Bail Reform Act of 1984 and the Court's decision in *Salerno*, most states put a strong emphasis on consideration of community safety and flight risk in their bail practices.[51]Additionally, many states have adopted bail schedules which provide judges with set bail amounts based exclusively on the offense charged without making an individualized determination.[52]

C. The 20th Century and a Call for Reform

These policies in turn, led to overcrowded jails across the country and an investigation into the effects of pretrial detention. For example, "between 2000 and 2015, the growth in the number of inmates detained pretrial…accounted for 95 percent of the growth in

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[43] *Id.* at 1430.
[44] *Id.* at 1430-31.
[45] *Id.* at 1431.
[46] Johnson, *supra* note 13, at 47-48.
[47] U.S. v. Salerno, 481 U.S. 739, 739 (1987).
[48] *Id.* at 743.
[49] *Id.* at 743-44.
[50] *Id.* at 754.
[51] Sardar, *supra* note 20, at 1433-34.
[52] *Id.* at 1434.

the country's jail population."[53] This number is especially shocking when only ten percent of inmates serving pretrial detention are detained prior to trial for public safety reasons.[54] Instead, most people are detained because they cannot afford the bail amount that has been set.[55] Other defendants with similar charges as those being detained, including individuals charged with the most violent offenses, get to walk free before trial because they can afford to pay their bail amount.[56] Although the United States only accounts for about "4% of the world's population," the country "has almost 20% of the world's pretrial jail population."[57]

During the last several years, multiple states including Alaska, California, Colorado, Connecticut, Illinois, Kentucky, New Jersey, New Mexico, New York, and Oregon, have made significant changes in their laws and constitutions regarding their bail practices.[58] In other jurisdictions, court decisions have limited the practice of cash bail.[59]

Specifically, courts are faced with questions regarding the constitutionality of cash bail practices in relation to economic disparity. Because the Supreme Court has not established a clear rule in deciding whether a law that deprives indigent people of certain rights due to their inability to pay is unconstitutional, the rights and protections of indigents in bail practices vary within jurisdictions.[60] For example, there is a split between the Fifth Circuit and Eleventh Circuit's view on cash bail.[61] In 2018, the Fifth Circuit ruled that a law which detained indigent defendants who could not afford bail was unconstitutional.[62] During the same year, the Eleventh Circuit ruled a

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[53] CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 129 (Maura Roessner ed., 2019).
[54] *Id.*
[55] *Id.*
[56] RACHEL ELISE BARKOW, PRISONERS OF POLITICS BREAKING THE CYCLE OF MASS INCARCERATION 60 (2019).
[57] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1128 (2018).
[58] Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 861 (2020).
[59] *Id.*
[60] Liza Batkin, *Wealth-Based Equal Process and Cash Bail*, 96 N.Y.U.L. REV. 1549, 1551 (2021).
[61] *Id.* at 1553.
[62] *Id.*

similar law was constitutional.[63] The conflicting rulings stemmed from a disagreement on whether defendants suffered an "absolute deprivation while being detained.[64] Similarly, the Ninth Circuit and Eleventh Circuit disagree on whether there is a fundamental right to liberty before trial.[65] These disputes show the uncertainty surrounding the constitutionality of monetary bail and pretrial detention.[66]

III. How Does Cash Bail Work and Why is it Ineffective?

As more states move away from secured monetary bail, it is important to understand why the shift is happening. Cash bail is a system in which pretrial detention is used as a consequence for those who cannot afford bail.[67] The amount of bail ordered varies depending on the jurisdiction and the crime, but minor offenses can result in bail set as high as $10,000.[68] Most defendants cannot afford to pay these amounts in cash.[69] Their other option is to use a bail bondsman who charges a nonrefundable fee of ten percent of the bond total.[70] Unfortunately, people with low incomes cannot afford either option.[71] In fact, a recent study shows that in the United States, four out of ten people cannot afford to pay $400 for an unplanned expense.[72] As a result, about half a million people across the United States are incarcerated even though they have not been found guilty of committing the crime charged.[73]

This system comes with damaging repercussions on both the individuals detained and the community.[74] While those who cannot

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[63] *Id.*
[64] *Id.* at 1574.
[65] *Id.* at 1575.
[66] *Id.*
[67] Sardar, *supra* note 20, at 1435.
[68] PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 24 (2019).
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] The Bail Project, *After Cash Bail A Framework for Reimagining Pretrial Justice*, THE BAIL PROJECT, 8 (2020), https://bailproject.org/wp-content/uploads/2020/02/the_bail_project_policy_framework_2020.pdf.
[73] *Id.* at 3.
[74] *Id.*

afford bail wait in jail for their day in court, they may experience deterioration of their mental and physical health, face sexual violence, and suffer trauma.[75] Additionally, their day to day lives are turned upside down as the risk of losing their jobs, homes, custody of children, and community ties increases.[76] The impact of these consequences is grave, as seventy-seven percent of people who committed suicide in jails between the year 2000 and 2019 had not been convicted of a crime.[77] Because of these dangers, low-income defendants tend to plead guilty even if they are innocent so they can go home.[78]

Those who do not plead guilty and are detained for longer periods are more likely to commit new crimes after release.[79] A study in Kentucky showed that people who were detained in jail for a two or three day period were forty percent more likely to commit a crime after release than a similar defendant who spent less than twenty-four hours in jail.[80] Similarly, studies have shown that an increase in pretrial detention results in longer sentences and more convictions.[81]

Additionally, pretrial detention hinders a defendant's ability to formulate an adequate defense.[82] This happens for several reasons, such as the inability to effectively interact with counsel or obtain private counsel, since the defendant is in jail and losing income.[83]

Studies have also shown that pretrial detention disproportionately impacts minorities.[84] The African American and Latino communities are jailed at higher rates than the rest of the community.[85] In New York City, "[B]lacks are jailed at nearly twelve times the rate of whites and Latinos more than five times the rates of

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[75] *Id.*
[76] *Id.*
[77] E. Ann Carson, *Suicide in Local Jails and State and Federal Prisons*, *2000-2019 – Statistical Tables*, BUREAU OF JUST. STAT., 6 (Oct. 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sljsfp0019st.pdf.
[78] The Bail Project, *supra* note 72, at 9.
[79] *Id.* at 9.
[80] *Id.*
[81] Sardar, *supra* note 20, at 1436.
[82] *Id.*
[83] *Id.*
[84] *Id.* at 1438.
[85] *Id.*

whites."[86] Unfortunately, the individual being detained is not the only one who is affected by the high rates of pretrial detention.[87] The system results in high costs to local and state budgets.[88]

In addition to the punitive effects that cash bail imposes on an individual, cash bail is also ineffective in serving its purpose. The two main reasons cited for the use of bail are to promote public safety and to ensure appearance at trial.[89] Contrary to the claims of cash bail proponents, the system does little to promote community safety.[90] About seventy-five percent of the United States' incarcerated population are in jail for nonviolent traffic, public order, property, or drug offenses.[91] Likewise, the system is ineffective in preventing flight.[92] A common misconception surrounding nonappearance in court is that people who miss a court date do so in an attempt to flee the consequences.[93] Instead, people who fail to appear usually do so because of common obstacles, including work schedule conflicts, childcare responsibilities, confusion with the court system, or lack of transportation.[94] Because monetary bail does little to promote public safety and ensure appearance at trial, pretrial detention is not serving the purpose of bail.

The current pretrial system used in most states around the country punishes the poor through high bail amounts and lack of options.[95] The goal of pretrial detention should not be to punish. However, pretrial detention is commonly imposed upon defendants who do not pose a threat to public safety or are not a high flight risk.[96] The harm pretrial detention causes defendants is excessive and punitive relative to the harm it is intended to deter.[97] Pretrial detention increases the probability of conviction, increases the likelihood of

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[86] *Id.*
[87] *Id.* at 1439.
[88] *Id.*
[89] Sardar, *supra* note 20, at 1430.
[90] *Id.* at 1440.
[91] *Id.*
[92] The Bail Project, *supra* note 72, at 20.
[93] *Id.*
[94] *Id.*
[95] WILLIAM R. KELLY, THE CRISIS IN AMERICA'S CRIMINAL COURTS IMPROVING CRIMINAL JUSTICE OUTCOMES BY TRANSFORMING DECISION-MAKING 177 (2019).
[96] *Id.* at 87.
[97] *Id.* at 138.

recidivism, results in harsher punishment,[98] and does little to promote public safety[99] or ensure presence at trial.[100] Because cash bail has proven ineffective, there is a need to reform these practices.

IV. Reform Efforts in Texas

Like in most states around the country, Texas operates on secured and unsecured bail.[101] Secured bail requires the person detained to post bond out of pocket or to pay a generally required ten percent non-refundable payment to a third-party surety in exchange for posting bail.[102] On the other hand, unsecured bail allows the release of the defendant without posting bond and might involve the use of non-monetary conditions.[103] But if the arrestee fails to appear in court or comply with nonfinancial bail conditions, he becomes responsible for the bail amount.[104] During a bail hearing, most Texas counties adhere to a bail schedule that suggests bail amounts based on the crime charged.[105] The Texas Code of Criminal Procedure, in its plain language, prohibits the mechanic application of the bail schedule and instead calls for an individualized review of the detainees' circumstances.[106] During this review, a judge must consider several factors, including the defendant's ability to pay, the charge, community safety, and flight risk.[107]

A. Harris County Stops the Use of Cash Bail in Most Misdemeanor Cases

Although the Texas Code calls for an individualized review instead of reliance on the schedule bail, this is not always the practice.[108] In May 2016, Maranda Lynn O'Donnell spent two days in

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[98] *Id.* at 137.
[99] Sardar, *supra* note 20, at 1440.
[100] The Bail Project, *supra* note 72, at 20.
[101] O'Donnell v. Harris Cnty., 892 F. 3d 147, 153 (5th Cir. 2018).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Keyser, *supra* note 7.
[106] Tex. Code Crim. Pro. Ann. art. 17.028, § (d).
[107] Tex. Code Crim. Pro. Ann. art. 17.15.
[108] *O'Donnell*, 892 F. 3d at 153.

Harris County jail because she could not make her $2,500 bond after being arrested for driving without a license.[109] After O'Donnell and others filed a class action lawsuit against Harris County for its bail setting procedures, the court found that Harris County officials "impose the scheduled bail amounts … about 90 percent of the time."[110] Additionally, even when release on personal bond is recommended by Pretrial Services, hearing officers go against the recommendation sixty-six percent of the time.[111] As a result of these practices, less than ten percent of misdemeanor defendants are given unsecured-personal bonds.[112]

In *O'Donnell v. Harris County*, the Fifth Circuit Court of Appeals held that indigents constitute a suspect class and receive heightened scrutiny when a defendant is detained because of his or her inability to pay.[113] The court further found that indigent misdemeanor arrestees "sustain[ed] an absolute deprivation of their most basic liberty intertest—freedom from incarceration", and Harris County's practices were a violation of the Constitution's Due Process and Equal Protection Clauses. [114] Thus, the court ordered the County to establish necessary procedures to evaluate an arrestee's circumstances on a case-by-case basis using the factors required in the Texas Criminal Procedure Code.[115]

B. The Effects of the O'Donnell Consent Decree in Harris County

As a result of the Fifth Circuit ruling, the O'Donnell Consent Decree, or Local Rule 9, was enacted in Harris County.[116] Local Rule 9 requires that misdemeanor arrestees be released on non-financial

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[109] Cary Aspinwall, *A Brief History of Texas Bail Reform, as 5th Circuit Looks At Jail Lawsuit*, THE DALL. MORNING NEWS (Oct. 4, 2017, 10:57 AM), https://www.dallasnews.com/news/crime/2017/10/04/a-brief-history-of-texas-bail-reform-as-5th-circuit-looks-at-jail-lawsuit/.
[110] *O'Donnell*, 892 F. 3d at 154.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 161.
[114] *Id.* at 162.
[115] *Id.* at 163.
[116] Harris Cnty. (Tex.) Crim. Ct. Loc. R. 9.1.

conditions or personal bond as soon as practicable after arrest.[117] It excludes certain charges, including assaultive offenses, driving while intoxicated, violations of court orders or conditions of bond on violent crimes, and a few others.[118] For those who do not qualify for release without a hearing, a bail hearing must be held no more than forty-eight hours after the person is detained.[119] During this hearing, the judge must determine the least restrictive pretrial conditions necessary to assure public safety and appearance at trial.[120] Contrary to prior practice during these hearings, the arrestee has a right to counsel.[121] In any misdemeanor case, the presiding judicial officer has discretion to release the defendant on personal bond.[122]

Despite criticism of the new policies, a report tracking the effects of Rule 9 in Harris County shows improvement.[123] For starters, there has been a significant decrease in initial bail amounts.[124] Before the implementation of the O'Donnell Consent Decree, in most misdemeanor cases bond was set at $500 or more.[125] In 2019, after Local Rule 9 went into effect, bail amounts drastically dropped.[126] In 2020, bond amounts in sixty-eight percent of cases were $100 or less.[127]

Another improvement is observed in a big decrease in the number of convictions resulting from guilty pleas.[128] In 2018, forty percent of misdemeanor cases resulted in criminal convictions and ninety-six percent of those convictions resulted from guilty pleas.[129] In

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[117] Harris Cnty. (Tex.) Crim. Ct. Loc. R. 9.4.
[118] *Id.*
[119] *Id.*
[120] Harris Cnty. (Tex.) Crim. Ct. Loc. R. 9.12.
[121] Harris Cnty. (Tex.) Crim. Ct. Loc. R. 9.11.
[122] Harris Cnty. (Tex.) Crim. Ct. Loc. R. 9.10.
[123] *See* Brandon L. Garrett et al., *Monitoring Pretrial Reform in Harris County Third Report of the Court-Appointed Monitor*, ODONNELL MONITOR (Sept. 3, 2021), https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2021/09/ODonnell-Monitor-Third-Report-v.-29.pdf.
[124] *Id.* at 34.
[125] *Id.*
[126] *Id.* at 35.
[127] *Id.*
[128] *Id.* at 38.
[129] *Id.*

2019, only thirty percent of misdemeanor cases resulted in convictions and ninety-four percent of those convictions were from guilty pleas.[130]

Additionally, while the year 2020 saw an increase in the number of charges filed against a person while the person was on pretrial release, these numbers do not signify a failure of the program. First, this change can be attributed to the pandemic. Since the beginning of the COVID-19 pandemic, courts have been stalled and fewer trial dates have been set.[131] Second, before Local Rule 9, there was a higher number of guilty pleas.[132] Thus, any reoffending would not be taking place while the defendant was out on bail.[133] Additionally, during 2020 there was an increase in the length of time it took to close a case.[134] To put this in perspective, in 2015, fifty-two percent of misdemeanor cases were disposed of in three months or less, and in 2020 this number fell to sixteen percent.[135] The year 2019 saw a decrease in the number of persons convicted of misdemeanors who are charged with a new crime within a year of the first one.[136] Overall, the data shows no significant change in misdemeanor reoffending.[137]

Despite the progress made in Harris County, a case in which the defendant was charged with stabbing his wife to death while he was out on bail generated criticism of the new Harris County bail practices.[138] Prior to her death, Caitlynne Guajardo filed charges against her husband accusing him of hitting her and killing her cat.[139] After payment of a $150 fee, he was released on a personal-recognizance bond.[140] Less than twenty-four hours later, he was arrested for Guajardo's death.[141] Her family filed a lawsuit against

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[130] *Id.*
[131] Garrett, *supra* note 123.
[132] *Id.* at 38.
[133] *Id.*
[134] *Id.* at 38.
[135] *Id.*
[136] *Id.* at 43.
[137] *Id.*
[138] Holly Hansen, *Prominent Civil Rights Attorney Alleges Harris County Bond Reforms Are Illegal, Calls Odonnell Settlement 'Improper'*, THE TEXAN (Aug. 5, 2021), https://thetexan.news/prominent-civil-rights-attorney-alleges-harris-county-bond-reforms-are-illegal-calls-odonnell-settlement-improper/.
[139] *Id.*
[140] *Id.*
[141] *Id.*

Harris County citing Local Rule 9 as the issue and challenging the O'Donnell decision.[142] However, the court dismissed the lawsuit.[143]

While cases like these are tragic and measures can be taken to keep similar instances from occurring, the assumption that these instances are a result of the increase in the number of personal bonds in the county is misplaced. A Houston Chronicle investigation found that in Harris County, between the years 2013 and 2020, there was a total of 221 murder and capital murder cases in which a defendant was on pretrial release.[144] Further, forty-two of those defendants were out on personal recognizance bonds at the time the charges were filed.[145] This means that over eighty percent of the accused were not out on personal bonds and most likely had secured bonds.[146] Thus, the rhetoric used by government officials of the need to limit the use of personal recognizance bonds to promote public safety is misguided.

C. Texas Legislature is not Onboard with Local Reform

While local efforts to implement bail reform took place, lawmakers saw this as an opportunity to attack reforms and implement statewide rollbacks.[147] Using a focus on defendants who were charged with murder while on pretrial release, Governor Greg Abbott attacked personal- recognizance bonds during the past legislative session.[148] In September 2021, Abbott signed the Damon Allen Act which has changed bail practices across the state of Texas.[149] As of December 2, 2021, release on personal bond is no longer an option for defendants charged of certain crimes, including mostly violent misdemeanors and

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[142] *Id.*
[143] Infinger v. Harris Cnty., No. 4:21CV02506 (S.D. Tex. dismissed 2021).
[144] Nicole Hensley & Samantha Ketterer, *As killings tied to defendants out on bond rise in Houston, crime data reveals a crisis in courts*, HOUS. CHRON. (Jul. 19, 2021, 10:23 AM), https://www.houstonchronicle.com/news/investigations/article/crime-murder-bonds-defendants-courts-crisis-16302521.php.
[145] *Id.*
[146] *Id.*
[147] Keyser, *supra* note 7.
[148] *Id.*
[149] Press Release, Office of the Texas Governor, Governor Abbott Signs Samon Allen Act Into Law At Safer Houston Summit (Sept. 13, 2021), https://gov.texas.gov/news/post/governor-abbott-signs-damon-allen-act-into-law-at-safer-houston-summit.

felonies.[150] This law sets back local practices like the ones implemented in Harris County, where most defendants charged on violent misdemeanors cannot receive automatic release, but a judicial officer has discretion to set a personal bond after a bail hearing.[151]

The Damon Allen Act was named after Trooper Damon Allen who was murdered during a 2017 traffic stop.[152] At the time of the murder, the accused was out on a cash bond of $15,000.[153] During a press release, Governor Abbott assured that this Act "ensures Texas communities are safe and secure by making it harder for dangerous criminals to be released on bail."[154] However, the new law does not prevent these detainees from being released as long as they can afford a cash bond.[155] The law only targets personal bonds without mentioning secured bonds.[156] It is also worthwhile to point out that the defendant charged with killing Allen, the namesake of the Act, was out on a cash bond and not on a personal bond.[157] So, this new law would not have prevented the defendant's release or the victim's death.[158] Critics of the bill have opined that this law is less concerned with public safety and more concerned with protecting the billion dollar industry of bail bonds in Texas.[159]

D. What the Future Holds for Texas

The fight in Texas against cash bail and toward reform is far from over. With pushback from the state legislature and misguided information about the effects of personal recognizance bonds, the future of bail reform in Texas is unknown. While the Texas legislature has shown disapproval of reform, all eyes are on Texas courts as

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[150] Tex. Code Crim. Pro. Ann. art. 17.03, § (b-2).
[151] Harris Cnty. (Tex.) Crim. Ct. Loc. R. 9.4-9.5.
[152] Paul Flahive, *Senate Bill 6 Signed into law, Cash-Bail Opponents Question its Impact on Public Safety*, TEX. PUB. RADIO (Sept. 14, 2021, 10:55 AM), https://www.tpr.org/criminal-justice/2021-09-14/senate-bill-6-signed-into-law-cash-bail-opponents-question-its-impact-on-public-safety.
[153] *Id.*
[154] Office of the Texas Governor, *supra* note 149.
[155] *See generally* Tex. Code Crim. Pro. Ann. Art. 17.03.
[156] *Id.*
[157] Flahive, *supra* note 152.
[158] *Id.*
[159] *Id.*

important class action suits regarding local bail practices are pending. In *Russell v. Harris County*, the court will determine the constitutionality of Harris County practices of holding pretrial felony defendants who cannot afford secured monetary bond.[160] Additionally, in *Daves v. Dallas County*, plaintiffs are challenging the constitutionality of Dallas County's pretrial practices regarding secured money bail.[161] These court decisions will help determine the future of bail practices in Texas and have the potential to pave the way towards statewide reform away from cash bail practices.

V. A Proposal with a Focus on Restore and Release

With the lack of uniformity around bail practices in Texas, there is a need for legislative action. As discussed above, cash bail is ineffective and more harmful than helpful. While most reform in other states has centered around risk assessment tools, Texas should instead focus on legislative reform emphasizing the concepts of restore and release.

A. Why Not Implement Risk Assessment Tools?

As states begin to shift away from cash bail, most of them are relying on risk assessment tools.[162] Risk assessment tools typically use a checklist of risk factors to predict the probability that a defendant will flee or be a danger to the community if released.[163] These tools have a list of factors that are assigned points.[164] Common factors that are awarded points usually include prior misdemeanor conviction, prior felony conviction, and prior failure to appear in court.[165] The defendant is given a score that the judge uses to determine whether the person will be released pending trial.[166] Risk assessment tools fail to include individualized characteristics and context as to the past actions

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[160] *See* Russell v. Harris Cnty., CV H-19-226, 2020 WL 6585708 (S.D. Tex. Nov. 10, 2020).
[161] *See* Daves v. Dallas Cnty., 984 F.3d 381 (5th Cir. 2020), *reh'g en banc granted*, *order vacated*, 988 F.3d 834. (5th Cir. 2021*) on reh'g en banc*, 22 F.4th 522 (5th Cir. 2022).
[162] Sardar, *supra* note 20, at 1441.
[163] *Id.* at 1442.
[164] *Id.*
[165] *Id.*
[166] *Id.*

of the defendant.[167] For example, when asked about "prior failure to appear in court," someone who appeared in court a day late because she could not get childcare will get the same number of points as a person who fled the country before his court date.[168] These tools have also been shown to perpetuate racial inequality.[169] For example, a study in Kentucky showed that judges were more likely to disregard the default recommendation to waive a financial bond for moderate risk accused people if the accused person was Black.[170] For these reasons, risk assessment tools are not the best solution.

B. Restore and Release

The proposed solution to the current pretrial system in Texas is to restore the presumption of innocence and release the majority of pretrial defendants. This note proposes a solution through three major steps: (1) make releasing defendants the norm, (2) increase due process protections, and (3) promote court appearances.

First, the default in pretrial procedures should be to release, and the exception should be detention.[171] The pretrial release procedure can be accomplished by mandating the practice of noncustodial citations in as many crimes as possible.[172] No conditions of release should be imposed on citations except a promise to appear in court.[173] Additionally, citation forms should be easy to read and understand in order to make it easier for people to comply.[174] Non-custodial citations reduce some of the negative effects of pretrial detention, such as missing days at work or school, missing medical appointments, and separating children from parents.[175]

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[167] *Q & A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions*, HUM. RTS. WATCH (June 1, 2018, 7:00 AM), https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions.
[168] *Id.*
[169] *Id.*
[170] The Bail Project, *supra* note 72, at 25.
[171] SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 188 (2018).
[172] The Bail Project, *supra* note 72, at 10.
[173] *Id.*
[174] *Id.*
[175] *Id.*

When deciding which charges should be given citations and which should be given bail hearings, charge-based distinctions can be helpful in limiting eligibility nets.[176] However, the use of charge-based approaches should be limited.[177] Reliance on charge-based distinctions reinforces misperceptions regarding a willful fight and the probability of danger.[178] Contrary to popular belief, a higher crime does not mean an increase in future dangerousness.[179] While it may make sense to detain felony defendants, most of these individuals have under a three percent chance of committing a violent crime while released.[180] Thus, people accused of felonies should not be automatically excluded from pretrial release.

Those who are arrested should also have a presumption of unconditional release. Detention and conditional release should be limited. They should only be imposed if one of two risks is present: (1) there is a "substantial and imminent risk that the defendant will inflict serious bodily harm to a reasonably identifiable person" or (2) a "substantial and imminent risk that the person will intentionally flee the jurisdiction."[181] The prosecution would bear the burden of showing that such risk exists by clear and convincing evidence.[182] This high burden requires actual evidence showing that a risk is more likely than not to exist without mere reliance on the underlying charge.[183] In other words, the prosecution cannot simply say that because the person is facing a long prison sentence, she may flee.[184]

While it is important to detain as few people as possible before trial, it is also important to protect victims and potential witnesses from threats or harm from the defendant.[185] If a defendant possesses a high risk of committing a violent crime against an individual and the risk cannot be mitigated through conditions, the defendant should be detained.[186] The number of people detained because of a risk of violent

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[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] BAUGHMAN, *supra* note 171, at 189.
[181] The Bail Project, *supra* note 72, at 12.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] BAUGHAM, *supra* note 171, at 190.
[186] *Id.*

crime should be minimal.[187] If a judge deems appropriate, she can release a defendant and impose other conditions such as a no contact order instead of choosing pretrial detention.[188] A no contact order keeps a defendant from contacting any individual (usually a witness or a victim) involved in the case.[189] Contact includes "anything from calls, letters, third-party contact, and direct physical contact."[190] Violation of this order would result in revocation of the condition and detention until the court date.[191] These orders would remain in place during the entire time that the case is pending or until a judge orders removal of the condition.[192] However, if there is a serious risk that this condition will not be effective, the defendant should be detained in order to protect the victims.[193] The burden of proving the risk is on the government, and there should always be a presumption of release before trial.[194] Any other condition imposed should be the least restrictive given the circumstances.[195]

The second step in this proposal involves a substantive, individualized hearing with due process protections for those cases where the prosecution seeks release conditions or detention.[196] During this hearing, a defendant must have the right to be represented by counsel.[197] If a person cannot afford to hire a lawyer one should be appointed to him.[198] Additionally, during this hearing, the defendant should be allowed to testify, cross-examine witnesses, and present evidence.[199] The defendant's hearing should be held no more than forty-eight hours after the accused is detained.[200] Under these procedures, there will be fewer hearings as most people will be

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[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] BAUGHAM, *supra* note 171, at 190.
[193] *Id.*
[194] *Id.*
[195] The Bail Project, *supra* note 72, at 14.
[196] *Id.* at 13.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*

released without a hearing.[201] Therefore, courts will have more resources to conduct these hearings with the proper due process requirements.[202]

Finally, the third step in this proposal involves a need to focus on solving common obstacles to court appearance rather than focus on the risk of flight.[203] Courts should implement text and phone call court date reminders.[204] Other programs such as free or subsidized transportation for court and childcare assistance would help ensure defendants return to court.[205] Implementing these programs promotes appearance at trial by tackling common reasons people miss court dates.

VI. Conclusion

The Texas bail system has turned into an instrument of oppression against people who cannot afford to be released pretrial. One of the most basic legal concepts is the presumption of innocence until proven guilty. A shift from cash bail is necessary to restore that presumption while promoting community safety and decreasing nonappearance at trial. As Texas counties begin to look for a path away from monetary bail, the Texas legislature needs to implement statewide reform and stop detaining people simply because they cannot afford to pay to be released. By creating a system that restores the presumption of innocence, Texas can ensure that freedom does not come at a high cost.

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[201] *Id.*
[202] The Bail Project, *supra* note 72, at 14.
[203] *Id.* at 20.
[204] *Id.* at 21.
[205] *Id.* at 22.

THURGOOD MARSHALL LAW REVIEW

VOLUME 47 | FALL 2022 | NUMBER 1

DEATH BY DISABILITY DENIED

Tamsin Woolley*

I. Introduction

"To remain silent and indifferent [to the treatment of capital defendants with intellectual disability] *is to deny the Constitution's protection of human dignity and to stand defiantly against the mandates of the United States Supreme Court. Unless purposeful change occurs, like hail on fretted terrain, Texas's death penalty politics with its feast of flaws and the shocking indifference displayed by its leaders will continue to erode our most sacred constitutional safeguards."* Ana Otero[1]

Capital punishment, also known as the death penalty, continues to be a controversial issue in the United States. One aspect of the death penalty that is unanimously agreed upon and protected by law, however, is that executing intellectually disabled prisoners is unconstitutional.[2] Despite this, Texas, with the highest execution rate

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I would like to thank both of my mothers, Virginia Woolley and Kimberly Walker, for their on-going support throughout law school. I would also like to thank my Drexel family for continuing to believe in me; the Volume 47 Editorial Board for their dedication to the TMLR this year; Professor Shelley Bennett for supervising this Note and for always encouraging me; and Professor Ana Otero for the constructive feedback and guidance in drafting this Note.

[1] Ana M. Otero, A Murder of Crows: *The Politics of Death in Texas - The Bobby James Moore Story*, 57 GONZ. L. REV. 425, 507 (2021).

[2] *See generally* Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("conclude[ing] death is not a suitable punishment for a mentally retarded criminal.").

by far of any state, has a longstanding history of doing just that.[3] Fortunately, the number of Texas executions has dropped considerably in recent years and the Texas Court of Criminal Appeals has reversed or stayed executions based on the exception for intellectual disability.[4] However, Texas has yet to enact legislation barring the execution of intellectually disabled prisoners in compliance with the U.S. Supreme Court's decision in *Atkins v. Virginia* and subsequent decisions.

Part I of this Note provides a brief history of the modern era of capital punishment. Part II analyzes the evolution of federal law to protect intellectually disabled prisoners from death row. Part III addresses the modern clinical standard for diagnosing intellectual disability and Texas's historical misuse of diagnostic criteria. Part IV analyzes the necessity for Texas to adhere to using modern clinical criteria when assessing prisoners for intellectual disability. Lastly, Part V offers action steps to ensure Texas does not continue to infringe on the constitutional rights of intellectually disabled prisoners.[5]

A. A Brief Overview of the Death Penalty and Texas Statistics

The death penalty, considered the ultimate punishment, "is defined as the legally authorized 'execution of an offender sentenced to death after conviction by a court of law of a criminal offense.'"[6] The use of the death penalty dates to ancient times, tracible to the Code of

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[3] Texas Coalition Against the Death Penalty, *Texas Death Penalty Developments in 2022: The Year in Review*, TEX. COAL. AGAINST DEATH PENALTY (2022), https://tcadp.org/wp-content/uploads/2023/01/Texas-Death-Penalty-Developments-in-2022-print-version.pdf (last visited Apr. 17, 2023) [hereinafter Texas Coalition Against the Death Penalty 2022].

[4] *Id.*

[5] The term "mental retardation" may be used throughout this Note in quoted text for historical context. However, the term "mental retardation" has been replaced in professional and legal use by the term "intellectual disability." *See* Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability,* INTELL. & DEV. DISABILITIES, 116 (Apr. 2007); *see also* Otero, *supra* note 1, at 427-428 (illustrating the shift in terminology from mental retardation to intellectual disability).

[6] Neal Davis Law Firm, *Houston criminal defense attorney Neal Davis explains how the death penalty works in Texas, its history, and what to do if you've been charged with a capital offense*, NEAL DAVIS LAW FIRM https://www.nealdavislaw.com/criminal-defense/law-texas-death-penalty.html (last visited Dec. 11, 2022).

Hammurabi from the eighteenth century BCE and the ancient legal philosophy of *lex talionis* ("an eye for an eye, tooth for a tooth, and life for a life").[7] In the United States, the death penalty was practiced until 1972 when the U.S. Supreme Court heard the *Furman v. Georgia* case.[8] While the Court ruled that the death penalty was not per se unconstitutional, in *Furman* the Court held that the death penalty statutes reviewed were "cruel and unusual punishment in violation of the Eighth Amendment."[9] After Furman struck down the then-existing state system's for imposing the death penalty, states scrambled to revise their statutes.[10] In the four years to follow, thirty-five states passed new death penalty statutes.[11]

This halt to the death penalty was short-lived, as the Court revived the death penalty in its decision of *Gregg v. Georgia* in 1976.[12] The Court ruled that the death penalty itself was not unconstitutional so long as it was not imposed in an "arbitrary and capricious manner" and followed court guidelines.[13] *Gregg* marks the beginning of the modern era of the death penalty in the United States.[14] Post-*Gregg*, states resumed executions and the nation reached a peak in 1999 with ninety-eight executions.[15]

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[7] Michael H. Reggio, *History of the Death Penalty*, PBS (Feb. 9, 1999), https://www.pbs.org/wgbh/frontline/article/history-of-the-death-penalty/.

[8] Megan Green, Comment, *Texas, the Death Penalty, and Intellectual Disability*, 50 ST. MARY'S L.J. 1029, 1030-31 (2019).

[9] *See* Furman v. Georgia, 408 U.S. 238, 239 (1972).

[10] Evan J. Mandery, *It's Been 40 Years Since the Supreme Court Tried to Fix the Death Penalty — Here's How It Failed*, THE MARSHALL PROJECT (Mar. 30, 2016, 10:00 PM), https://www.themarshallproject.org/2016/03/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed.

[11] *Id.* Notably, Texas quickly passed a new statute within a year that complied with *Furman* to continue its use of the death penalty. *See* Otero, *supra* note 1, at 450.

[12] Green, *supra* note 8, at 1031; *see also* Gregg v. Georgia, 428 U.S. 153, 175 (1976). The constitutionality of the new death penalty statutes was tested in the *Gregg* and four companion cases. The Court upheld the new death penalty statutes of Texas, Florida, and Georgia, but found the new statutes of Louisiana and North Carolina unconstitutional. *See generally* Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

[13] *See* Gregg, 428 U.S. at 168-169.

[14] *Death Penalty 101*, ACLU, https://www.aclu.org/other/death-penalty-101 (last visited Apr. 17, 2023).

[15] *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (2022), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf (last visited Apr. 17, 2023).

To date, twenty-seven states, the U.S. military, and the federal government continue to employ the death penalty.[16] Since 1976, there have been 1,568 executions in the United States as a whole.[17] Texas has consistently led with the highest number of executions.[18] Of those 1,568 executions, 583 occurred in Texas alone.[19] Texas also has the third highest number of prisoners on death row.[20] Data shows a decrease in sentencing and executions nationally.[21] Yet, one is still one too many.

II. The Evolution of Federal Protection of Human Dignity

This part of the Note reviews the history of changes under the law to protect intellectually disabled prisoners from the death penalty. Each subsection outlines a notable Supreme Court case in which an issue impacting intellectually disabled prisoners was raised and its significance.

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[16] *The Death Penalty in 2022: Year End Report*, DEATH PENALTY INFO. CTR. (2022), https://reports.deathpenaltyinfo.org/year-end/Year-End-Report-2022.pdf (last visited Apr. 17, 2023).

[17] *Executions Overview*: *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Apr. 17, 2023). Post-Gregg, the death penalty is "almost exclusively a Southern phenomenon."
See Mandery, *supra* note 10. Of the 1564 executions since 1976, 1275 took place in the Southern region. *Executions Overview*: *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 (last visited Apr. 17, 2023).

[18] *See* Mandery, *supra* note 10.

[19] *Id.*; *see also Death Row Information*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_facts.html (last visited Apr. 17, 2023).

[20] Deborah Fins, *Death Row U.S.A. Summer 2022*, NAACP LEGAL DEF. & EDUC. FUND, INC. (Apr. 17, 2022), https://www.naacpldf.org/wp-content/uploads/DRUSASummer2022.pdf.

[21] *Facts and Research: Sentencing Data*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/sentencing-data (last visited Apr. 17, 2023).

A. Pre-Contemplation Stage: Recognizing One Size Does Not Fit All

In 1978, *Lockett v. Ohio* raised the issue of whether a judge has discretion to consider mitigating circumstances before imposing the death penalty.[22] Lockett was convicted of aggravated murder and aggravated robbery and was sentenced to death pursuant to Ohio's mandatory death sentence statute.[23] The statute required a death sentence unless "by a preponderance of the evidence: '(1) [t]he victim of the offense induced or facilitated [the offense]; (2) [i]t is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; or (3) [t]he offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.'"[24] The Supreme Court held that the Ohio statute's "limited range of mitigating circumstances which may be considered by the sentencer" was unconstitutional.[25] In its opinion, the Court stated:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.[26]

This decision was a first step in acknowledging that death penalty statutes that meet constitutional requirements must allow

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[22] Lockett v. Ohio, 438 U.S. 586, 597 (1978).
[23] *Id*. at 593.
[24] *Id.* at 607 (citing OHIO REV. CODE ANN. § 2929.04 (B) (1975)).
[25] *Lockett*, 438 U.S. at 608.
[26] *Id.* at 605.

consideration of all relevant mitigating factors.[27] However, the specific issue of exemption from the death penalty for intellectually disabled prisoners was not broached in this case, and therefore such executions unfortunately continued.

B. Contemplation Stage: The Decision Not to Exempt Intellectually Disabled Prisoners

In 1989, the case of *Penry v. Lynaugh* brought the issue of intellectual disability and the death penalty before the Supreme Court.[28] John Paul Penry was charged with capital murder in Texas.[29] Despite the fact that Penry had the mental age of a six-and-a-half year old and was diagnosed as intellectually disabled, the jury found Penry competent to stand trial.[30] The jury rejected evidence provided by Penry to support his insanity defense and found Penry guilty of capital murder.[31] Under Texas law at the time of Penry's trial, a mandatory death sentence was required if a jury affirmatively answered the following three questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) if raised by the evidence, whether the conduct of the defendant in
> killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[32]

Penry's attorneys raised several objections to the proposed jury

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[27] *Id.* at 608 (holding "a death penalty statute must not preclude consideration of relevant mitigating factors.").
[28] Penry v. Lynaugh, 492 U.S. 302, 307 (1989).
[29] *Id.*
[30] *Id*. at 308.
[31] *Id.* at 310.
[32] *Id.* (citing Tex. Code Crim. Proc. Ann., art. 37.071(b)-(e) (Vernon 1981)).

instructions, with all objections overruled.[33] The jury unanimously answered "yes" to all three questions, requiring the court to impose a death sentence.[34]

Unsuccessful in his appeals, Penry filed a petition for writ of certiorari, which was granted.[35] Penry argued that the jury was not instructed on how to weigh his intellectual disability as a mitigating factor in answering the three questions.[36] Penry also argued that it was cruel and unusual punishment under the Eighth Amendment to execute an intellectually disabled person like himself.[37] The Court held that a defendant's intellectual disability is a mitigation factor for the judge or jury to consider when imposing a sentence.[38]

The *Penry* decision reaffirmed *Lockett*, reiterating that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[39] However, the Court decided, absent a lack of instruction, the Eighth Amendment did not exempt a defendant from the death penalty "by virtue of his or her mental retardation alone."[40] Penry provided several opinion surveys to

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[33] *See Penry*, 492 U.S. at 310-311.
[34] *Id*. at 311.
[35] *Id.* at 313
[36] *Id.* at 315. Penry also argued that his childhood abuse should be considered and given effect as a mitigating factor. *Id.*
[37] *Id.* at 312.
[38] *Id.* at 319.
[39] Lockett, 438 U.S. at 604 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).
[40] *Penry*, 492 U.S. at 340. Dissenting in part, Justice Brennan found the execution of intellectually disabled prisoners unconstitutional. Justice Brennan wrote, "The consideration of mental retardation as a mitigating factor is inadequate to guarantee, as the Constitution requires, that an individual who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty." *Id.* at 346-47 (Brennan, J., dissenting). Justice Brennan further stated, "There is a second ground upon which I would conclude that the execution of mentally retarded offenders violates the Eighth Amendment: killing mentally retarded offenders does not measurably further the penal goals of either retribution or deterrence… Since mentally retarded offenders as a class lack the culpability that is a prerequisite to the proportionate imposition of the death penalty, it follows that execution can never be the 'just deserts' of a retarded offender and that the punishment does not serve the retributive goal." *Id.* at 348 (citations omitted).

demonstrate the strong opposition from the public to executing intellectually disabled prisoners.[41] In closing, the Court stated, "While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today."[42] Data from national opinion polls showed society felt otherwise. [43] In the late 1980s, data reflected 71% of the population supported the death penalty but with only about 25% in support of upholding the execution of intellectually disabled prisoners.[44] Society's emerging standards were further reflected between 1989 and 2002 when the execution of intellectually disabled prisoners was banned by sixteen states that had the death penalty.[45]

C. Action Stage: The Supreme Court's Hallmark Decision in *Atkins*

Early in the 21st Century, eighteen of the thirty-six states with the death penalty had banned executing intellectually disabled

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[41] *Penry*, 492 U.S. at 334. The Court rejected Penry's argument that there was a national consensus against executing intellectually disabled individuals. *Id*. The Court stated, "In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus." *Id*. Notably, a poll taken in Texas showed 86% of those polled supported the death penalty, but 73% opposed its application to the mentally retarded. *Id.*

[42] *Id.* at 335. At the time of the *Penry* decision, Georgia was the only state that banned the execution of intellectually disabled prisoners. *Id.* at 334. Maryland also enacted a similar bill, but it was not yet in effect. *Id.*

[43] *Id.*

[44] SAMUEL R. GROSS & PHOEBE C. ELLSWORTH, SOCIAL SCIENCE AND THE EVOLVING STANDARDS OF DEATH PENALTY LAW 241-242 (Eugene Borgida & Susan T. Fiske eds., 2008).

[45] *Intellectual Disability and the Death Penalty*, ACLU, https://www.aclu.org/other/intellectual-disability-and-death-penalty (last visited Feb. 13, 2023). *See* ARIZ. REV. STAT. § 13-703.02 (2001); ARK. CODE ANN. § 5-4-618 (Michie 2001); COLO. REV. STAT. § 16-9401(2) (2001); CONN. GEN. STAT. § 1-Ig (2001); FLA. STAT. ANN. § 921.137 (West 2002); IND. CODE ANN. § 35-36-9-1 (Michie 2002); KY. REV. STAT. ANN. § 532.130 (Michie 2001); MO. REV. STAT. § 565.030 (2001); NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2002); TENN. CODE ANN. § 39-13-203 (2001); WASH. REV. CODE § 10.95.030 (2002).

prisoners.[46] Society was calling for change, and the Supreme Court listened. The issue of exempting intellectually disabled prisoners from execution was brought back to the Supreme Court in June 2002.[47] In the seminal case of *Atkins v. Virginia*, the Supreme Court overturned *Penry* by holding that the execution of intellectually disabled prisoners constituted cruel and unusual punishment and was unconstitutional.[48] The Court acknowledged much had changed with state legislatures since the Court's decision in *Penry*.[49] In concluding that a national standard had developed against executing intellectually disabled prisoners, the Court listed several states that enacted statutes prohibiting the execution of intellectually disabled prisoners and noted the following:

> It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.[50]

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[46] Alexis Krulish Dowling, *Post-Atkins Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL. L. REV. 773, 784 (2003). As highlighted by one scholar, taking these eighteen states with explicit statutes in conjunction with the twelve states that do not have the death penalty, the execution of intellectually disabled prisoners has been banned in over half of the states. *Id.*

[47] Atkins v. Virginia, 536 U.S. 304, 307 (2002).

[48] *Id.*

[49] *Id.* at 314.

[50] *Id.* at 315-316.

The Court next analyzed the limitations and impairments that contribute to the diminished capacities of intellectually disabled prisoners.[51] Based on its analysis of the legislative consensus, the Court provided two reasons for categorically excluding intellectually disabled prisoners from execution: (1) there was a serious question as to whether retribution or deterrence, the recognized justifications for the death penalty, applied to intellectually disabled prisoners[52]; and (2) that the reduced capacity of intellectually disabled offenders increases the risk of wrongful execution.[53] As such, the Court noted, "pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate."[54]

In his dissent, Justice Scalia expressed his concern that offenders would "feign" intellectual disability to evade the death penalty.[55] He wrote:

> [t]his newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who

[51] *Id.* at 318. The Court noted that the deficiencies of intellectually disabled offenders "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id*.

[52] *Id*. at 318-320 ("Unless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.").

[53] *Id*. at 320-321 ("The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,' is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.") (citations omitted).

[54] *Atkins*, 536 U.S. at 319

[55] *Id.* at 353 (Scalia, J., dissenting).

> feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), the capital defendant who feigns mental retardation risks nothing at all.[56]

However, a decade later, data showed fewer than 10% of prisoners asserted an intellectual disability claim and only 43-55% of those were successful.[57] Thus, Justice Scalia's assertion that exempting intellectually disabled prisoners from the death penalty would promote false claims was, itself, false.[58]

III. Intellectual Disability Defined

First, this section of the Note reviews the criteria for diagnosing intellectual disability used by the medical profession and discusses how Texas has historically implemented its own outlier standard. Second, this section analyzes the significance of the Supreme Court's decision in *Moore I* and *Moore II*, discussing the impact of these cases on Texas's method of diagnosing intellectual disability.

A. Who Qualifies? Understanding the Modern Diagnostic Criteria

The *Atkins* decision to exempt intellectually disabled prisoners from the death penalty was pivotal in the evolution of the Supreme Court's opinions governing intellectual disability. To define the protected class, the Court referred to definitions established by the

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[56] *Id.* (citations omitted).

[57] John H. Blume et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL OF RTS. J. 393, 397-400 (2014) (providing data to refute Justice Scalia's assertion that "every death row inmate and his brother would assert an intellectual disability in an effort to cheat the executioner."); *see also* Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 276 (2003) (advising "any concerns that an individual could somehow manage to feign cognitive impairment, undetected by clinical evaluators should be dispelled….").

[58] Mossman, *supra* note 57 ("In fact, examination of diagnostic criteria suggests that mental retardation is hard to fake successfully, because the criteria require evidence that retardation began during childhood—evidence, that is, that the condition existed years before the defendant committed a capital crime.").

American Association on Mental Retardation (AAMR), now known as the American Association on Intellectual and Developmental Disabilities (AAIDD), and the Diagnostic and Statistical Manual Fourth Edition (DSM-IV) produced by the American Psychiatric Association (APA).[59] The AAMR's manual defined "mental retardation" as:

> substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.[60]

Comparably, the DSM-IV defined "mental retardation" as:

> significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).[61]

Thus, similar in nature, both definitions require three criteria: (1) significant subaverage intellectual functioning; (2) significant

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[59] *Atkins,* 536 U.S. at 308 n.3.

[60] *Id.*; *see also* AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992).

[61] *Atkins*, 536 U.S. at 308 n.3; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text revision 41, 2000)

limitations in adaptive functioning; and (3) onset in the developmental period before age eighteen.[62]

Despite references to the AAMR and DSM, the Court did not impose guidelines on how to determine who was intellectually disabled.[63] The Court left it to the states' discretion to establish their own method.[64] As a result, states created varying requirements to implement *Atkins*.[65] While the states agreed that intellectually disabled prisoners should be exempt, the lack of clear guidance from the Court resulted in inconsistency about which defendants meet the exemption.[66] Some states imposed more restrictive requirements on the IQ prong.[67] Others focused on the adaptive prong and imposed guidelines beyond the considerations of medical professionals.[68] As scholars have aptly noted, the lack of uniformity among the states' definitions of intellectual disability is troubling as it means an offender may be exempt from execution based on his diagnosis in one state but may not be exempt in another.[69]

In 2014, the Supreme Court narrowed the scope of states' discretion to determine intellectual disability in capital cases in *Hall v. Florida*. At the time, Florida's statute defining intellectually disability in capital cases included a 70-point IQ test score cut off.[70] This cut off was interpreted by the Florida Supreme Court as any "person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is

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[62] *Atkins*, 536 U.S. at 308 n.3; *see also* Hensleigh Crowell, *The Writing is on the Wall: How the Briseno Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*, 94 TEX. L. REV. 743, 748 (2016).

[63] *Atkins*, 536 U.S. at 317

[64] *Id*. The Court chose not to adopt a national standard for determining intellectually disability for criminal offenders. *Id.* Instead, the Court "le[ft] to the States the task to develop[] appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[65] Mossman, *supra* note 57, at 274-76 (discussing state's broad discretion in implementing Atkins without guidance from mental health professionals).

[66] Dowling, *supra* note 46, at 789.

[67] *Id*. at 789-793; s*ee also* Clinton M. Barker, Note, *Substantial Guidance Without Substantive Guides: Resolving the Requirements of Moore v. Texas and Hall v. Florida*, 70 VAND. L. REV. 1027, 1037-1039 (2017).

[68] Barker, *supra* note 67, at 1069.

[69] Dowling, *supra* note 46, at 810; *see also* John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 693 (2009).

[70] Hall v. Florida, 572 U.S. 701, 704 (2014).

barred from presenting other evidence that would show his faculties are limited."[71] The U.S. Supreme Court held that Florida's strict 70-point IQ threshold was unconstitutional,[72] stating:

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.[73]

The Court acknowledged that several other states also had strict IQ cutoffs,[74] however, it noted "every state legislature to have considered the issue after *Atkins* — save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida."[75] Noting that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection,"[76] *Hall* is significant as it reaffirmed the "medical community's diagnostic framework['s]" role in determining intellectual disability.[77]

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[71] *Id.* at 711-712

[72] *Id.* at 721

[73] *Id.* at 712.

[74] *Id.* at 714-718.

[75] *Id.* at 718. The Court found that the "vast majority of States" rejection of the strict 70-point cutoff provided "strong evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id.*

[76] Hall, 572 U.S. at 719. "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 720-721.

[77] *Id.* at 721-722 ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession."). As such, the Court found Florida's rule was in "direct opposition to the views of those who design, administer, and interpret the IQ test." *Id.* at 724

B. Just Like Lennie: Exploring Texas's misuse of the *Briseño* Factors

Historically, Texas has set a low bar when deciding competency to stand trial and execution.[78] Prior to *Atkins*, in 2001 the Texas legislature proposed a bill exempting intellectually disabled prisoners from execution.[79] The bill was unanimously passed, but was later vetoed by the former Governor of Texas, Rick Perry.[80] Perry found "serious legal flaw in the bill"[81] and how it apportioned the responsibility to determine intellectual disability between judges and juries.[82] As a result, when *Atkins* was decided, Texas had no legislation to resolve intellectual disability claims by prisoners on death row.[83] Thus, when the Texas Court of Criminal Appeals (CCA) was faced with its first post-*Atkins* claim, the CCA created its own judicial procedures to determine intellectual disability.[84] The CCA applied the AAMR three prong test but felt the adaptive functioning prong was too subjective.[85] Creating its own variation, the CCA implemented what it believed captured intellectual disability more adequately.[86] These factors became known as the *Briseño* factors.[87] These factors were as follows:

> (1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

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[78] Brandi Grissom, *Trouble in Mind: How Should Criminals Who Are Mentally Ill Be Punished?*, TEX. MONTHLY (Mar. 2013), https://www.texasmonthly.com/articles/trouble-in-mind/ (last visited Apr. 17, 2023).
[79] Crowell, *supra* note 62, at 745.
[80] *Id.*
[81] Veto Proclamation of Gov. Perry, Tex. H.B. 236, 77th Leg., R.S. (2001), https://lrl.texas.gov/scanned/vetoes/77/hb236.pdf
[82] *Id.; see also* Crowell, *supra* note 62, at 745-46.
[83] Crowell, *supra* note 62, at 746.
[84] Ex parte Briseno, 135 S.W.3d 1, 5, 8 (Tex. Crim. App. 2004).
[85] *Id.* at 8.
[86] *Id.*
[87] Green, *supra* note 8, at 1038.

(2) Has the person formulated plans and carried them through or is his conduct impulsive?

(3) Does his conduct show leadership or does it show that he is led around by others?

(4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

(5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

(6) Can the person hide facts or lie effectively in his own or others' interests?

(7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[88]

The *Briseño* factors have rightfully been harshly criticized over time. It has been said that Texas "botched it" by creating the *Briseño* factors.[89] First, these factors were derived from stereotypical assumptions of intellectual disability based on the character Lennie from *Of Mice and Men*.[90] Second, the *Briseño* factors violated the established clinical standard that the second prong of adaptive functioning solely focuses on deficits, not strengths or abilities.[91] Additionally, as expressed by Justice Ruth Bader Ginsburg, the *Briseño* factors, which are not credible, were an "invention…and 'create an unacceptable risk that persons with intellectual disability

[88] Ex parte Briseno, 135 S.W.3d at 8-9.
[89] Hannah Brewer, *The Briseño Factors: How Literary Guidance Outsteps the Bounds of Atkins in the Post-Hall Landscape*, 69 BAYLOR L. REV. 240, 256 (2017).
[90] *Id.* at 256-258
[91] *Id.* at 258-265; *see also* Blume, *supra* note 57, at 407-08 (noting how the *Briseño* factors distort the analysis of adaptive functioning).

will be executed.'"[92] It is notable that Texas's *Briseño* standard to determine intellectual disability used within the death penalty system is an outlier to Texas's own practices.[93] Texas does not use the non-medical *Briseño* factors when diagnosing intellectual disability in any context other than determining eligibility for the death penalty.[94] For example, when Texas assesses whether a public school student or juvenile offender is intellectually disabled, it uses modern medical definitions.[95] Thus, to affirm no findings of intellectual disability in carrying out the death penalty, Texas created and implemented an idiosyncratic method that was inconsistent with accepted standards by medical consensus.[96]

C. Texas Needs Moore Limitations: The Supreme Court's Decision in *Moore I* and *Moore II*

The result of Texas's use of the *Briseño* factors was that intellectually disabled prisoners were executed despite their protection under *Atkins* and the U.S. Constitution. Data shows Texas executed approximately thirty to forty prisoners with strong intellectual disability claims employing the *Briseño* factors.[97] As an example, despite having an IQ of sixty-one, and additional strong evidence of

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[92] Moore v. Texas, 581 U.S. 1, 6 (2017) [hereinafter Moore I]. In an amicus brief in support of a petitioner in 2012, the AAID rebuked the CCA stating, "[t]he [*Briseño*] factors were dictated without reference to scientific or professional authority and instead appear to be based entirely on the judges' own impressions and assumptions." Brief for the American Association and Developmental Disabilities as Amicus Curiae Supporting Petitioner at 11, Wilson v. Thaler, 133 S. Ct. 81 (2012) (No. 12-5349).

[93] *Moore I*, 581 U.S. at 19.

[94] *Id.*

[95] *Id.* Justice Ginsburg noted "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake." *Id.*; *see also* 19 Tex. Admin. Code §89.104(c)(5) (2015); 37 Tex. Admin. Code §380.8751(e)(3) (2016).

[96] *Moore I*, 581 U.S. at 5-6.

[97] Robin M. Maher, *Moore v. Texas: US Supreme Court Enforces Constitutional Prohibition Against Executing Intellectually Disabled Defendants*, PENAL REFORM INT'L (Apr. 6, 2017), https://www.penalreform.org/blog/moore-v-texas-the-united-states-supreme-court/.

being intellectually disabled, Marvin Wilson was executed in 2012.[98] The *Briseño* factors were successfully challenged in the case of *Moore v. Texas*.[99] The case was reversed twice by the U.S. Supreme Court, which ultimately overturned Moore's death sentence.[100]

(1) *Moore Instruction: The Supreme Court Limits the States' Autonomy*

In 1980, Moore was convicted of murder and sentenced to death.[101] In 2002, following *Atkins*, Moore's counsel filed a motion to stay Moore's direct appeal from an earlier punishment retrial "until the Texas Legislature enacted legislation to implement *Atkin's* mandate."[102] The CCA denied the motion.[103] Moore's counsel continued to file various appeals and motions, and in 2011, Moore's counsel filed a Factual Supplement in support of Moore's *Atkins* claim.[104] An evidentiary hearing was ordered, and in anticipation of the hearing, the court appointed mental-health experts for both parties.[105] After a two-day evidentiary hearing in January 2014, Judge Brown determined that Moore was intellectually disabled and issued a seventy-six page document with the recommendation that the CCA grant relief on Moore's claims.[106] The CCA disagreed, however, stating that the habeas court erred by not employing the *Briseño*

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[98] *Id.* Reportedly, Wilson "could not handle money or navigate a phone book, a man who sucked his thumb and could not always tell the difference between left and right, a man who, as a child, could not match his socks, tie his shoes or button his clothes." *See* Andrew Cohen, *Of Mice And Men: The Execution of Marvin Wilson*, THE ATLANTIC (Aug. 8, 2012), https://www.theatlantic.com/national/archive/2012/08/of-mice-and-men-the-execution-of-marvin-wilson/260713/.

[99] *Id.*

[100] *Bobby Moore, Whose Case Changed How Texas Determines Intellectual Disability, Granted Parole After 40 Years in Prison*, DEATH PENALTY INFO. CTR. (Jun. 10, 2020), https://deathpenaltyinfo.org/news/bobby-moore-whose-case-changed-how-texas-determines-intellectual-disability-granted-parole-after-40-years-in-prison.

[101] Moore v. State, 700 S.W.2d 193, 195 (Tex. Crim. App. 1985).

[102] Ex parte Moore, 470 S.W.3d 481, 504 (Tex. Crim. App. 2015).

[103] *Id.*

[104] *Id.* at 506.

[105] *Id.* at 508-509.

[106] *Id.* at 484-485.

factors.[107] Based on the *Briseño* factors, the CCA determined Moore was not intellectually disabled and affirmed Moore's death sentence.[108] As the sole dissenter, Judge Elsa Alcala took issue with the majority's reliance on the outdated *Briseño* factors.[109] Judge Alcala noted that "merely lamenting the Texas Legislature's failure to act in the decade since Atkins was decided abdicates this Court's responsibility to ensure that federal constitutional rights are fully protected in Texas."[110] She wrote:

> This Court cannot continue to apply an outdated and erroneous standard in the wishful hope that the Legislature will act soon, particularly in light of the fact that the legislative session just ended several months ago, and the Legislature does not meet again for approximately two years. Although it would obviously be preferable for the Legislature to set forth the policy with respect to who should be exempted from the death penalty on the basis of intellectual disability, this Court is required to uphold the federal Constitution as it has been interpreted by the Supreme Court. Doing what we have always done simply because the Legislature has not told us to do it otherwise is not the right answer.[111]

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[107] *Id.* at 486. In its opinion, the CCA made clear that its continued use of the intellectual disability definition adopted in *Briseño* for *Atkins* claims was due to the absence of legislative guidance on implementing the *Atkin's* mandate. *Id*. While acknowledging the medical standard for intellectual disability had changed since *Atkins* and *Briseño*, the court stated, "although the mental-health fields and opinions of mental-health experts inform the factual decision, they do not determine whether an individual is exempt from execution under *Atkins*." *Id.* at 486-487.

[108] Ex parte Moore, 470 S.W.3d at 489. Rejecting the lower court's findings and conclusions, the CCA also commented that Judge Brown either did not consider or "unreasonably disregarded, a vast array of evidence in this [Moore's] lengthy record that cannot rationally be squared with a finding of intellectual disability." *Id*.

[109] *Id*. at 528.

[110] *Id.* at 528 n.2.

[111] *Id.*

The U.S. Supreme Court granted certiorari and heard the case in 2017.[112] The Court focused on whether the CCA's use of outdated medical standards and its reliance on *Briseño* was constitutional and in compliance with the Court's precedents.[113] The Court found the CCA's attachment to the *Briseño* factors impeded its assessment of Moore's adaptive functioning.[114] The Court held the use of the *Briseño* factors unconstitutional, vacated the CCA's ruling, and remanded back to the CCA to further review Moore's intellectual disability claim with current medical standards.[115] In its opinion, the Court reiterated its instruction in *Hall* that courts should "be informed by the views of medical experts" when determining intellectual disability in capital cases.[116] The Court further stated:

> That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. Moreover, the several factors *Briseno* set out as indicators of intellectual disability are an invention of the CCA untied to any acknowledged source. Not aligned with the medical community's information, and drawing no strength from our precedent, the *Briseno* factors "creat[e] an unacceptable

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[112] *Moore I*, 581 U.S. at 1. The following organizations filed amici briefs in support of Moore: Constitutional Accountability Center; The National Religious Campaign Against Torture, et al.; International Organizations Interested in Medical Expertise, Psychiatry and Criminal Justice; International Law and Human Rights Institutes, Societies, Practitioners and Scholars; and The American Academy of Psychiatry and the Law, et al.; American Civil Liberties Union, and the ACLU of Texas; International Organizations and Individuals Interested in Medical Expertise and Psychiatry; American Psychological Association, et al.; The American Bar Association; The American Association on Intellectual and Developmental Disabilities, et al.; The Constitution Project; and The Criminal Justice Legal Foundation. *See* Otero, *supra* note 1, at 488 n.353.

[113] *Moore I*, 581 U.S. at 12.

[114] *Id.* at 17. The Court listed five points in error with the CCA's adaptive functioning analysis. *Id.* at 15-18; *see also* Moore v. Texas, 139 S. Ct. 666, 668-669 (2019) [hereinafter Moore II]. In *Moore II*, the Court refers to the five errors identified in *Moore I* and notes that it "criticized the use of these factors both because they had no grounding in prevailing medical practice, and because they invited 'lay perceptions of intellectual disability' and 'lay stereotypes' to guide assessment of intellectual disability." Moore II, 139 S. Ct. at 669.

[115] *Moore I*, 581 U.S. at 5-6.

[116] *Id.* at 5.

> risk that persons with intellectual disability will be executed." Accordingly, they may not be used, as the CCA used them, to restrict qualification of an individual as intellectually disabled.[117]

The *Moore I* decision was significant as it illustrated that the states did not have "complete autonomy to define intellectual disability as they wished."[118] It is also noteworthy that although Chief Justice Roberts and Justices Alito and Thomas dissented, the Justices agreed with the majority's determination that "[the *Briseño*] factors are an unacceptable method of enforcing the guarantee of Atkins, and that the CCA therefore erred in using them to analyze adaptive deficits."[119]

(2) *Once Moore: A Return to the Supreme Court for Moore II*

Unfortunately, the CCA did not fully adhere to the Supreme Court's ruling on remand. To re-evaluate Moore, the CCA employed the clinical standard in the DSM-V to assess Moore for intellectual disability.[120] The DSM-V diagnoses intellectual disability by "deficits in general mental abilities"; "impairment in everyday adaptive functioning, in comparison to an individual's age, gender, and socioculturally matched peers"; and "onset during the developmental period."[121] The CCA acknowledged the DSM-V "should control [its] approach to resolving the issue of intellectual disability", and abandon its reliance on the *Briseño* factors to determine the adaptive deficits requirement.[122] The CCA gave greater weight to the State's expert, Dr. Compton, whose assessment was "based on assumptions and her application of the *Briseño*-style strength-weakness balancing rather

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[117] *Id.* at 5-6 (citation omitted).
[118] *Id.* at 20
[119] *Id.* at 21 (Roberts, C.J., dissenting).
[120] Ex parte Moore, 548 S.W.3d 552, 555 (Tex. Crim. App. 2018).
[121] *Id.* at 560; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 31-37 (5th ed. 2013).
[122] Ex parte Moore, 548 S.W.3d at 560.

than on current medical standards alone."[123] As a result, the CCA found that Moore did not meet the criteria for intellectual disability.[124]

The case returned to the Supreme Court in 2019 as *Moore II*.[125] In its opinion, the Court criticized the CCA's focus on Moore's adaptive improvements in prison and his adaptive strengths rather than his compelling deficits.[126] Additionally, the Court believed that the CCA continued to implicitly rely on many of the *Briseño* factors in again reaching the conclusion that Moore was not intellectually disabled.[127] Recognizing that clinicians "also ask questions to which the court of [criminal] appeals' statements might be relevant," the Court opined that the "similarity of language and content between *Briseño*'s factors and the court of appeals' statements suggest[ed] that *Briseño* continues to 'pervasively infec[t] the [the court of criminal appeals'] analysis.'"[128] The Court clarified:

> To be sure, the court of appeals opinion is not identical to the opinion we considered in Moore. There are sentences here and there suggesting other modes of analysis consistent with what we said. But there are also sentences here and there suggesting reliance upon what we earlier called "lay stereotypes of the intellectually disabled."[129]

The Court therefore concluded:

> The appeals court's opinion, when taken as a whole and when read in the light both of our prior opinion and the trial court record, rests upon analysis too much of which too closely resembles what we previously found

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[123] *Id.* at 605 (Alcala, J., dissenting)
[124] *Id.* at 573. After Moore filed a petition for writ of certiorari, the Harris County District Attorney, Kim Ogg, filed a brief agreeing "[Moore] is intellectually disabled and cannot be executed." Moore II, 139 S. Ct. at 670; *see also* Keri Blakinger, *Texas AG Fights Harris County Prosecutors to Keep Bobby Moore on Death Row*, HOUS. CHRON. (Nov. 7, 2018, 9:55 PM), https://www.chron.com/news/houston-texas/article/Texas-AG-fights-Harris-County-prosecutors-to-keep-13373197.php.
[125] *Moore II*, 139 S. Ct. at 667.
[126] *Id.* at 667-670.
[127] *Id.* at 671.
[128] *Id.* at 672.
[129] *Id.*

> improper. And extricating that analysis from the opinion leaves too little that might warrant reaching a different conclusion than did the trial court. We consequently agree with Moore and the prosecutor that, on the basis on the trial court record, Moore has shown he is a person with intellectual disability.[130]

The Court overturned the CCA's decision, ruling that Moore was intellectually disabled based on the proper application of current medical standards.[131]

Begrudgingly, the CCA complied with the Supreme Court's ruling. In a short opinion, the CCA wrote:

> This last conclusion of the Supreme Court is determinative. Having concluded that [Moore] is a person with intellectual disability that is exempt from the death penalty, the Supreme Court has resolved [Moore's] claim in his favor. There is nothing left for us to do but to implement the Supreme Court's holding. Accordingly, we reform [Moore's] sentence of death to a sentence of life imprisonment.[132]

On remand, Moore was finally resentenced and removed from death row.[133] He was subsequently released on parole in August 2020 after serving forty years in prison.[134] *Moore II* is a landmark case for intellectual disability and the death penalty as it reinforces the prohibition against executing intellectually disabled prisoners and solidifies further limitations on how states can determine intellectual disability.[135]

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[130] *Id.*

[131] *Id.* Noting his previous dissent in *Moore I*, Justice Roberts concurred with the Court's decision, stating the CCA "repeated its improper reliance on the factors articulated in *Ex parte Briseno*." *Id.* at 672-673 (Roberts, J., concurring).

[132] Ex parte Moore, 587 S.W.3d 787, 788-89 (Tex. Crim. App. 2019).

[133] *Id.* at 789.

[134] Jolie McCullough, *Bobby Moore's Supreme Court case changed how Texas defines intellectual disabilities. After 40 years in prison, he's just been granted parole*, THE TEXAS TRIBUNE (Jun. 08, 2020, 4:00 PM), https://www.texastribune.org/2020/06/08/texas-death-row-bobby-moore-parole/.

[135] *Moore II*, 139 S. Ct. at 667.

IV. Letting Go of Old Habits: Why Texas Should Adhere to Proper Standards

This part of the Note analyzes various issues faced by intellectually disabled prisoners that illustrate the necessity for Texas to use the proper clinical standard to ensure prisoners receive due process. Further, this section provides several brief case examples of intellectually disabled prisoners who would have had different outcomes if Texas continued using its outlier criteria.

Because of Texas's historically high rate of executions, the stakes are high for prisoners on death row.[136] Prisoners with intellectual disabilities are especially vulnerable.[137] Research shows that "[t]he death penalty is used disproportionately in cases of persons with serious mental disabilities. . . .In spite of decisions ostensibly banning the practice, defendants with mental retardation and serious mental disabilities continue to be executed."[138] Due to their disability, intellectually disabled prisoners are at a heightened risk for wrongful execution, inadequate representation, false confessions, inability to adequately testify on their own behalf and can present a demeanor that may appear as lack of remorse.[139] Additionally, "[b]ecause of the stigma attached to intellectual disabilities, people with these disabilities often become adept at hiding them, even from their lawyer, not understanding the importance of this information to the outcome of the case."[140]

If Texas continued using the *Briseño* factors, in conjunction with the aforementioned challenges, many intellectually disabled prisoners would be facing execution. At the time of the *Moore I* decision, there were 254 prisoners on death row whose intellectual

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[136] Peter Aldhous, *Is This Man Smart Enough To Face The Death Penalty?*, BUZZFEED NEWS (Nov. 15, 2016 9:01 AM), https://www.buzzfeednews.com/article/peteraldhous/mice-men-and-intellectual-disability#.kuzMe7KwAv.

[137] Karen L. Salekin et al., *Offenders With Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 J. OF MENTAL HEALTH RSCH. IN INTELLECTUAL DISABILITIES 97, 111 (2010).

[138] MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 7 (Rowman & Littlefield 2013).

[139] Intellectual Disability and the Death Penalty, ACLU, https://www.aclu.org/other/intellectual-disability-and-death-penalty (last visited Dec. 22, 2022).

[140] *Id.*; *see also* Otero, *supra* note 1, at 438-441 (discussing the vulnerabilities of intellectual disabled defendants).

disability claims were denied based on the *Briseño* factors.[141] Fortunately, Texas has not continued to use the *Briseño* factors. In fact, in 2021 the Texas Coalition to Abolish the Death Penalty (TCADP) reported the following updates on intellectual disability and the death penalty that have occurred since *Moore I* and *Moore II*: "[e]leven people have been resentenced and removed from death row[,] several other cases have been remanded to their respective trial courts for a review on their merits and are pending; nine executions have been stayed by state or federal courts; and current DAs have taken the death penalty off the table in at least four cases, including two this year."[142] In addition, the following case examples illustrate how *Moore* has affected the outcome for Texas death row prisoners.

A. Case Example: Blaine Milam

Milam was sentenced to death row in 2008 for murdering his girlfriend's child.[143] The CCA stayed Milam's execution in January 2021 and ordered his intellectual disability claim to be properly reviewed.[144]

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[141] *Supreme Court Finds Texas Briseno Factors for Establishing Intellectual Disability Unconstitutional*, ABA (Mar. 01, 2017), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2017/spring/supreme-court-finds-texas-briseno-factors-for-establishing-intel/

[142] Texas Coalition Against the Death Penalty, *Texas Death Penalty Developments in 2021: The Year in Review*, TEX. COAL. AGAINST DEATH PENALTY (2021), https://tcadp.org/wp-content/uploads/2021/12/TCADP-Report-Texas-Death-Penalty-Developments-in-2021.pdf (last visited Apr. 17, 2023) [hereinafter Texas Coalition Against the Death Penalty 2021]. TCADP's 2022 year-end report reflects an additional two men have been resentenced in the wake of the *Moore* cases. *See* Texas Coalition Against the Death Penalty 2022, *supra* note 3 ("Thirteen men have been resentenced in the wake of the U.S. Supreme Court's decisions in Moore v. Texas in 2017 and 2019.").

[143] Courtney Stern, *Man on death row for 2008 murder of child in Rusk County granted stay of execution*, LONGVIEW NEWS J. (Dec. 29, 2022), https://www.news-journal.com/news/police/man-on-death-row-for-2008-murder-of-child-in-rusk-county-granted-stay-of/article_dec181ac-5783-11eb-8fa6-47d2d01db7b9.html.

[144] Texas Coalition Against the Death Penalty 2021, *supra* note 142.

B. Case Example: Edward Busby

Busby was sentenced to death row in 2004 for murdering a retired Texas Christian University professor.[145] The CCA stayed Busby's execution in February 2021 and ordered his intellectual disability claim to be properly reviewed.[146]

C. Case Example: Ramiro Ibarra

Ibarra was sentenced to death row in 1977 for sexually assaulting and murdering a sixteen-year-old girl.[147] The CCA stayed Ibarra's execution in February 2021 to allow Ibarra to litigate his intellectual disability claim.[148]

D. Case Example: Charles Brownlow

Brownlow was sentenced to death in 2013 for murdering five people.[149] The CCA reversed Brownlow's death sentence in February 2020 due to the trial court's improper reliance on the *Briseño* factors to deny Brownlow's intellectual disability claim.[150] In January 2021, Brownlow was diagnosed as intellectually disabled based on the

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[145] NBC DFW, *Court Again Halts Execution for Man Condemned in TCU Professor's Death*, NBC NEWS. (Feb. 4, 2021, 11:29 AM), https://www.nbcdfw.com/news/local/court-again-halts-execution-for-man-condemned-in-tcu-professors-death/2542271/.

[146] *Id.*

[147] Danielle Haynes, *Texas court stays execution on intellectual disability grounds*, U.S. NEWS (Feb. 25, 2021, 8:11PM), https://www.upi.com/Top_News/US/2021/02/25/Texas-court-stays-execution-on-intellectual-disability-grounds/1321614295281/.

[148] Ex parte Ibarra, No. WR-48,832-05, 2021 WL 727985, at *3 (Tex. Crim. App. Feb. 24, 2021) (not designated for publication).

[149] Brownlow v. State, No. AP-77,068, 2020 WL 718026, at *2-6 (Tex. Crim. App. Feb. 12, 2020). *See also* Mathew Richards, *Brownlow to be sentenced to life in prison without parole after new standards deem him intellectually disabled; death sentence previously reversed by appeals court*, INFORNEY (Apr. 15, 2021), https://www.inforney.com/crime/brownlow-to-be-sentenced-to-life-in-prison-without-parole-after-new-standards-deem-him/article_eea1e412-5cfc-11eb-b81f-6fa401bd19ef.html.

[150] *Texas Overturns Death Sentence of Charles Brownlow*, DEATH PENALTY INFO. CTR. (Feb. 12, 2020), https://deathpenaltyinfo.org/stories/news-developments-texas-overturns-death-sentence-of-charles-brownlow.

proper standards, and his sentence was subsequently commuted to life in prison without the possibility of parole.[151]

E. Case Example: Juan Lizcano

Lizcano was sentenced to death row in 2007 for murdering a police officer.[152] The CCA previously rejected Lizcano's intellectual disability claim based on the *Briseño* factors.[153] In September 2020, the CCA resentenced Lizcano to life in prison without the possibility of parole based on the proper standards for determining intellectual disability.[154]

V. Moving Forward: An Urgent Need for Legislation

This section of the Note suggests next steps in Texas legislation necessary ensure the continuance of the constitutional protections of intellectually disabled prisoners. Data shows that prosecutors in Texas are seeking fewer death sentences, and the number of sentences is decreasing.[155] The Texas Coalition to Abolish the Death Penalty acknowledged that one of the key factors for the decline in the death row population is the resentencing and removal from death row of intellectually disabled prisoners.[156] For example, the CCA stayed three of eight scheduled executions in 2022 because of intellectual disability claims.[157] However, despite the fact that Texas's death sentences have

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[151] CBS DFW, *Texas Murder Spree: Death Sentence Overturned For Intellectually Disabled Man, Charles Brownlow*, CBS NEWS (Feb. 12, 2020, 11:09AM), https://dfw.cbslocal.com/2020/02/12/texas-murder-spree-death-sentence-overturned/.

[152] Ex parte Lizcano, NO. WR-68, 348-03, 2020 2020 WL 5540165 (Tex. Crim. App. Sep. 16, 2020).

[153] *Texas Court of Criminal Appeals Reverses Course, Takes A Second Foreign National with Intellectual Disability Off Death Row,* DEATH PENALTY INFO. CTR. (Oct. 2, 2020), https://deathpenaltyinfo.org/news/texas-court-of-criminal-appeals-reverses-course-takes-another-prisoner-with-intellectual-disability-off-death-row.

[154] Jolie McCullough, *Texas court tosses death sentence in police killing due to intellectual disability*, THE TEXAS TRIBUNE (Sept. 16, 2020, 12:00PM), https://www.texastribune.org/2020/09/16/juan-lizcano-texas-death-row/.

[155] Texas Coalition Against the Death Penalty 2021, *supra* note 142.

[156] *Id.*

[157] *See* Texas Coalition Against the Death Penalty 2022, *supra* note 3.

remained in single digits since 2014, Texas is still the leading state in the total number of executions.[158]

Although the CCA is making progress based on the Supreme Court's guidance in *Moore I* and *Moore II*, the Texas Legislature still has not established a formalized judicial process to determine whether a defendant in a capital case is intellectually disabled and protected from execution.[159] This is not from a lack of trying. Since *Atkins*, bills have gone to the Texas Legislature biennially, but none have passed.[160] It is beyond time for the Texas Legislature to work together to propose, advocate for, and pass a bill to truly uphold and implement *Atkins* and *Moore*. The failure of the Legislature to act has resulted in a "hodgepodge system of deciding the crucial question of whether a person facing a death sentence should be spared from execution."[161] Texas needs concrete uniformity for every court to follow. As stated by Court of Criminal Appeals Judge Michael Keasler, "[w]ithout a unified procedure, intellectual-disability determinations may vary from county to county, court to court, and case to case. . . .The gravity of defendants' intellectual-disability claims are too weighty to be subject to such disparity."[162]

To help establish a uniform procedure to determine intellectual disability post-*Atkins*, in 2006 the American Bar Association (ABA) adopted the following resolution for courts nationwide to follow: "Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental

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[158] *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 17, 2023), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf

[159] Jolie McCullough, *Texas still doesn't have a law on intellectual disability and the death penalty. Will that change this year?*, THE TEXAS TRIBUNE (Feb 1, 2019 12:00 AM), *https://www.texastribune.org/2019/02/01/texas-legislature-death-penalty-intellectual-disability/.*

[160] Otero, *supra* note 1, at 498-502 (overviewing the Texas Legislature's refusal to enact legislation over the past two decades)*; see also* The American Bar Association Death Penalty Due Process Review Project, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, ABA (Sept. 2013), https://www.capitalclemency.org/file/Texas-Assessment.pdf (discussing rejected legislative proposals between 1999 and 2013).

[161] McCullough, *supra* note 159.

[162] *Id.*

retardation, dementia, or a traumatic brain injury."[163] Though it should have, Texas did not heed the recommendation.[164]

In 2013, the ABA organized a Texas Capital Punishment Assessment Team ("ABA Assessment Team"), with the mission of "helping ensure fairness and accuracy in [Texas's] death penalty system."[165] The ABA Assessment Team published a comprehensive report, identifying issues with Texas's policies and analyzing Texas's compliance with ABA recommendations. In the report, the ABA Assessment Team made the following recommendations specifically addressing intellectual disability:

> 1) Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD). Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.
>
> 2) All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death-row inmates.
>
> 3) The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the

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[163] The American Bar Association Death Penalty Due Process Review Project, *supra* note 160, at 440.

[164] Otero, *supra* note 1, at 483. The Texas Legislature met in 2007 and yet again failed to pass any bills regarding the execution of the intellectually disabled. *Id.*

[165] *Texas Assessment Team Releases Report on State's Death Penalty System, Cites Urgent Need for Reform*, The University of Texas at Austin School of Law (Sept. 18, 2013), https://law.utexas.edu/news/2013/09/18/deathpenaltyreport/.

significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.

4) For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia* or the State's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.

5) The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.

6) During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

7) The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against

> "waivers" that are the product of their mental disability.[166]

Texas was judged not in full compliance with any of these recommendations.[167]

In an attempt to follow these ABA recommendations, Texas should start by using current medical standards as the basis to develop legislation. To comply with *Moore* and to avoid contradicting current clinical standards, one scholar has recommended state statutes should include the following language:

> An individual is intellectually disabled for the purposes of capital punishment if they meet the definition of intellectual disability listed in the most recently published edition of either the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) or the American Association on Intellectual and Developmental Difficulties' (AAIDD) manuals. Individuals who understand the criminality of their behavior and the difference between right and wrong may still meet the criteria for intellectual disability, and are to be allowed to present evidence demonstrating their intellectual disability.[168]

If Texas does not follow this model exactly, it must create legislation with clear and explicit definitions, standards, and procedures for defining intellectual disability in capital cases. Additionally, the legislation should address and account for adjustments for standard

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[166] The American Bar Association Death Penalty Due Process Review Project, *supra* note 160, at 46. For a fuller discussion of each recommendation see The American Bar Association Death Penalty Due Process Review Project, *supra* note 160, at 451-479.

[167] *Id.* Texas was "not in compliance" with Recommendations 1 and 4 and in "partial compliance" with the remainder (Recommendations 2, 3, 5, 6, and 7). *Id.*

[168] Alexander H. Updegrove et al., *Intellectual Disability in Capital Cases: Adjusting State Statutes after Moore v. Texas*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 527, 543 (2018).

error, the Flynn effect,[169] and other such variables. Until the Legislature passes a bill that satisfies the standards set out in *Atkins* and *Moore*, Texas should impose an immediate moratorium on all executions and new death penalty sentences. Once the legislation is established, all prisoners currently on death row should be reassessed according to the legislation to verify eligibility and ensure no prisoner's constitutional rights are infringed upon.

VI. Conclusion

Since the death penalty has deep roots in Texas, it is unlikely to be abolished by legislation any time soon. Texas's historical use of the *Briseño* factors was inconsistent with clinical consensus and the U.S. Constitution and required the intervention of the Supreme Court. Although Texas has adopted modern clinical standards, it still lacks clear legislation that allows intellectually disabled prisoners due process. Until the Texas Legislature passes such a statute, prisoners should not be executed in Texas. The 88th Legislature regular session is now underway through May 29th. As predicted, a bill, H.B. 381, has been introduced addressing the process to determine intellectual disability for defendants in capital cases.[170] H.B. 381 proposes to "amend[] the Code of Criminal Procedure to prohibit the sentencing to death of a defendant who is a person with an intellectual disability and to provide for a hearing process to determine whether the defendant is such a person."[171] By passing this bill, the Legislature will take the first step towards adequately protecting the constitutional rights of intellectually disabled prisoners, and Texas might lead the way for other states in the South to follow. However, if the Legislature kills the bill, Texas will resume its dire need for a clear, fair statute and resume its long-standing record of imposing death by disability denied.

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[169] The Flynn Effect is described as "a phenomenon whereby 'the administration of older psychological tests will generally result in higher test scores,' thereby causing inflated scores if a defendant is given an older test." Barker, *supra* note 67, at 1038 (quoting Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in Atkins Proceedings*, THE CHAMPION, Jan./Feb. 2014, at 44, 44-45 (describing the Flynn Effect).

[170] Bill Analysis, HB00381H, Thompson of Harris, Texas 88th Regular Legislative Session, https://capitol.texas.gov/Search/DocViewer.aspx?ID=88RHB003812A&QueryText=%22intellectual+disability%22&DocType=A.

[171] *Id.*