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INTERSECTING TRENDS IN ABORTION AND CAPITAL PUNISHMENT POLICY

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ABSTRACT

A recent bill in Ohio brought to the forefront of the nation's consciousness the intersection of abortion and capital punishment. The bill sought to redefine "person" to include "unborn humans," therefore making the termination of a pregnancy the intentional killing of another person. Further, because one of Ohio's aggravating circumstances for the imposition of capital punishment is child homicide, those who choose to have an abortion would be subject to the possibility of capital punishment. While the bill died in committee, it provides a unique lens through which to examine the intersection of the debate over abortion restrictions and capital punishment as they pertain to the dignity of each person. This paper seeks to analyze those debates through the lens of Ohio Bill 565, assess the value of state action in each arena, and examine the Supreme Court's jurisprudential inclinations towards recognizing the dignity of each person in those contexts.

INTRODUCTION

When discussing the opposition to the death penalty, Mahatma Gandhi's phrase, "An eye for an eye leaves the whole world blind,"¹ calls attention to the inevitable consequences of retaliation. There is an inherent contradiction in the idea of killing a person in response to that person's killing of another. In our current political moment, it is also a logically relevant concept to consider with respect to abortion regulation at the state level. Pro-life and pro-choice advocates are battling for legislative power to essentially codify the value of life. While both have reasonable justification for their positions, constitutional issues arise when the proposals of such measures implicate the state's power to restrict abortions and possibly impose the death penalty upon would-be mothers.

The intersection of abortion and capital punishment provides a space for constitutional conversation. The Supreme Court of the United States has established that a woman's right to an abortion is fundamental and protected against undue burden by the state's effort to regulate her choice before fetal

¹ *An Eye for an Eye Will Make the Whole World Blind*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2010/12/27/eye-for-eye-blind/> (last visited Feb. 15, 2019) (noting that the Gandhi Institute for Nonviolence states that the Gandhi family believes it is an authentic Gandhi quotation, but no example of its use by the Indian leader has ever been discovered).

viability.² Simultaneously, the parameters of cruel and unusual punishment under the Eighth Amendment are understood to limit the methods of seeking recourse for crimes.³ The lens through which this paper will analyze these constitutional issues is a recently-failed bill that was proposed in the Ohio state legislature.⁴ Alongside the analysis of this bill is an assessment of the trends in abortion precedent, which aims to frame this discussion as a socio-political matter, as well.

Notwithstanding Ohio House Bill 565's (HB 565) failure in the Health Committee,⁵ there are valuable questions to be considered through an analysis of its constitutionality, and through its comparison to patterns in other states' laws. Aside from its probable judicial failure, HB 565 reflects a segment of society's political perspective on human rights and dignity. However, this position is inconsistent with societal trends.

Importantly, the efforts being made to pass bills like HB 565 elsewhere in the country demonstrate a likely future trend in Supreme Court rulings in abortion cases. Public predictions about the trajectory of the Supreme Court claim that Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh may be willing to hear constitutional challenges to *Roe v. Wade* given their individual political affiliations.⁶ Additionally, President Trump's promise to overturn *Roe v. Wade* when talking about his new appointments to the Supreme Court further provoke these concerns.⁷

Justice Kavanaugh perceivably joined the liberal side of the bench in the Supreme Court's denial of certiorari of two cases that stripped funding for Planned Parenthood, possibly in an effort to alleviate the tumult of his Su-

² Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

³ U.S. CONST. amend. VIII.

⁴ See H.B. 565, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

⁵ See *House Bill 565 Status*, OHIO LEG., <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA132-HB-565> (last visited Feb. 15, 2019).

⁶ Anna North, *The Supreme Court's Surprising Decision on Planned Parenthood, Explained*, VOX (Dec. 10, 2018), <https://www.vox.com/identities/2018/12/10/18134365/supreme-court-planned-parenthood-kavanaugh-thomas-abortion> (explaining that although Justice Kavanaugh may want to wait to take up an abortion case due to a controversial confirmation process, the possibility of doing so is not completely implausible).

⁷ Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016), <https://www.cnn.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

preme Court confirmation.⁸ However, those two cases did not directly deal with abortion.⁹ This leaves Justice Kavanaugh's perspective on abortion cases unrevealed. However, Justices Gorsuch and Alito joined a dissenting opinion by Justice Thomas insinuating that the Court did not take those cases because the respondents were named "Planned Parenthood."¹⁰ This tension is indicative of the ideas these members of the Supreme Court hope to promote, and reveals the political stances underpinning the dissent in those cases.

Given these predictions and political positions, states are attempting to pass more restrictive legislation as the Court might be more favorable to restrictions on abortion. This analysis contemplates the political demographic of the bench throughout the seminal cases which now control our current reproductive choice laws. Further, this analysis may assuage these concerns by analyzing our precedential history, as well as current trends in proposed reproductive rights legislation.

The focal point here is fundamental rights that have been deemed constitutionally protected,¹¹ and the message that legislation like HB 565 delivers about our societal perspective on the value of human life and dignity. This piece calls attention to the constitutional and socio-political shortcomings of states as they attempt to swing the pendulum in the opposite direction through the criminalization of fundamental and protected rights through state-proposed restrictions on abortion.

This paper proceeds in four parts. Part I explains the purpose and intended effect of Ohio HB 565. Then, Part II describes the United States's abortion precedent. This section expounds upon the Supreme Court's constitutional analysis of abortion laws as applied to HB 565 and describes the trends in other states' laws restricting abortion. Next, Part III discusses the Death Penalty and Eighth Amendment "cruel and unusual punishment" jurisprudence. This section examines the narrowing sentencing scheme requirement, analyzes HB 565 under the Eighth Amendment, and engages with the public perspectives on the intermingling of abortion and the death penalty. Finally, Part IV argues that using the death penalty as a response to abortion is per se unconstitutional. This section explores the ineffectiveness of the death penalty in achieving its goals, the problematic implementation of the death penalty in Ohio, and common sense and political considera-

⁸ North, *supra* note 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Casey, 505 U.S. at 953.

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tions to conclude that the death penalty is an inappropriate response to abortion.

I. OHIO HOUSE BILL 565

The goal of House Bill 565 was to protect the unborn through the abolition of abortion in Ohio.¹² HB 565 aimed to criminalize abortion with a focus on the perceivable deterrent value inherent in punishing individual behavior.¹³ Had it passed, HB 565 would have redefined “person,” to include “unborn humans,”¹⁴ and in turn, would have qualified abortion as murder.¹⁵

An eligibility factor (or aggravating circumstance) for capital punishment in Ohio is the purposeful killing of a child under the age of thirteen.¹⁶ Ohio Code § 2903.09(B) provides that an unborn human is an individual organism of the species homo sapiens from fertilization until live birth.¹⁷ This section of the proposed legislation transplants abortion into the purview of the death penalty because § 2903.01 prohibits the purposeful termination of a human pregnancy which causes the death of an unborn human.¹⁸ As HB 565 would have made an “unborn fetus” a “person” in the eyes of the law, women who had abortions in Ohio could have been found guilty of homicide of a child, and in turn, been eligible for the death penalty.¹⁹

While there were exceptions in HB 565 for the unintentional loss of a fetus during a medical procedure, HB 565 lacked exceptions for rape, incest, or pregnancies that threatened the health or life of the mother.²⁰ There was an exception, however, for those who provided information in the event of an abortion: § 2919.193(D)(1) alleviated any criminal or civil penalties that may be imposed upon a pregnant woman who procures an abortion if she

¹² H.B. 565, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

¹³ AJ Willingham, *A Proposed Ohio Law Would Redefine a Person to Include ‘Unborn Humans’ and Could Treat Abortion Like Murder*, CNN (Nov. 21, 2018), <https://www.cnn.com/2018/11/21/us/ohio-abortion-ban-bill-criminal-law-trnd/index.html>.

¹⁴ See H.B. 565, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

¹⁵ Willingham, *supra* note 13.

¹⁶ OHIO REV. CODE § 2903.01 (2019) (effective March 20, 2019).

¹⁷ *Id.* at § 2903.09(B).

¹⁸ *Id.* at § 2903.01.

¹⁹ See *id.*; see H.B. 565, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

²⁰ Chantal Da Silva, *Ohio Considering Bill That Could See Abortions Punishable By Death*, NEWSWEEK (Nov. 20, 2018), <https://www.newsweek.com/ohio-considering-bill-could-see-abortions-punishable-death-1224078>.

(a) makes a report; (b) provides information during an investigation; or (c) participates in a hearing.²¹

HB 565 failed to pass the Health Committee of the Ohio Legislature,²² but this bill still provides an ideal opportunity to analyze the constitutionality of this type of proposed legislation. HB 565 would have had difficulty passing judicial scrutiny under current traditional abortion precedent, as well as under the standards for cruel and unusual punishment in the Eighth Amendment.

II. ABORTION PRECEDENT

The controlling precedent on reproductive choice issues and rights in America is couched under Fourteenth Amendment substantive due process law.²³ As recognized in *Planned Parenthood v. Casey*, “choices central to personal dignity and autonomy, are central to the liberty protected by the *Fourteenth Amendment*.”²⁴ Generally, states were prohibited by the decision in *Roe v. Wade* from banning abortions on the basis that a woman’s right to an abortion is a fundamental right protected by the Constitution.²⁵ Writing for the Supreme Court in *Lawrence v. Texas*, Justice Anthony Kennedy opined “*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.”²⁶

It is important to understand the political and ideological breakdown of the Supreme Court at the time that cases like *Casey* were decided. Decided in 1992, the *Casey* decision was the product of a predominantly conservative bench.²⁷ In *Casey*, the Supreme Court substantiated and bolstered the

²¹ H.B. 565, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

²² *OH HB565 Regards Abolition of Abortion*, BILL TRACK 50, <https://www.billtrack50.com/BillDetail/971714> (last visited Feb. 12, 2019).

²³ See Mark L. Rienzi, *Substantive Due Process as a Two-Way Street: How the Court Can Reconcile Same-Sex Marriage and Religious Liberty*, 68 STAN. L. REV. ONLINE 18, 22 (2015) (discussing how the Supreme Court used a substantive due process analysis in its abortion jurisprudence).

²⁴ *Casey*, 505 U.S. at 851.

²⁵ See *Roe v. Wade*, 410 U.S. 113, 155 (1973); Michael Dorf, Symposium, *Abortion is Still a Fundamental Right*, SCOTUSBLOG (Jan. 4, 2016), <https://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/>.

²⁶ *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

²⁷ *Justices of the U.S. Supreme Court*, GREEN PAPERS (Oct. 6, 2018),

essential holding of *Roe v. Wade*,²⁸ recognizing that the right to abortion is fundamental under the Due Process Clause of the Fourteenth Amendment.²⁹ The Court's plurality opinion, joined by Justices Sandra Day O'Connor, Kennedy, and David Souter is most commonly known as the controlling precedent from *Casey*.³⁰ Despite his typical role as a conservative voice on the bench, Justice Kennedy's vote was the fifth vote to reaffirm the right to abortion established in *Roe*.³¹ Justice O'Connor was appointed to the Supreme Court in 1981 by Republican president, Ronald Reagan,³² and Justice Souter was appointed by another Republican president, George H.W. Bush, in 1990.³³

Casey clarified which regulations are permissible by making a distinction with respect to when the state's interest is strong enough to justify a legislative ban on abortions.³⁴ The significance of a conservative bench writing this decision is a hallmark in reproductive rights precedent. It is a testament to the court's ability to assess and attempt to maintain a balance between women's choice and the state's interest in the protection of unborn life. The demographic of the Supreme Court at that time and the decision they penned provides some hope for the preservation of these rights under constitutional precedent and the guidelines for state-imposed restrictions on abortion which that progeny provides.

A. Constitutional Analysis in Abortion Cases

Before *Casey*, a strict scrutiny analysis was required when a statute deprived women of the right to an abortion or interfered with the free exercise

<https://www.thegreenpapers.com/Hx/JusticesUSSC.html>.

²⁸ David Von Drehle, *Attacking Roe v. Wade Means Going Through Planned Parenthood v. Casey, Too*, CHI. TRIB. (July 4, 2018), <https://www.chicagotribune.com/news/opinion/commentary/ct-supreme-court-roe-wade-casey-20180704-story.html>.

²⁹ *Casey*, 505 U.S. at 923–24.

³⁰ Jon D. Anderson, *Abortion: State Regulations – Planned Parenthood v. Casey*, 505 U.S. ___, 112 S. Ct. 2791 (1992), 76 MARQ. L. REV. 317, 340 (1992).

³¹ M.S.R., *How Endangered is Roe v. Wade?* ECONOMIST (July 5, 2018), <https://www.economist.com/democracy-in-america/2018/07/05/how-endangered-is-roe-v-wade>.

³² Sandra Day O'Connor, OYEZ, https://www.oyez.org/justices/sandra_day_oconnor (last visited Feb. 1, 2019).

³³ David H. Souter, OYEZ, https://www.oyez.org/justices/david_h_souter (last visited Feb 1, 2019).

³⁴ *Casey*, 505 U.S. at 860.

thereof.³⁵ Ultimately, the infringement of fundamental rights is permissible only if it survives strict scrutiny, meaning that the regulations must be narrowly tailored to serve a compelling government interest.³⁶

HB 565 would have interfered with a woman's right to choose an abortion pre-*Casey* even by just having her participate in a hearing, provide information during an investigation, or make a report to avoid criminal or civil penalties for doing so.³⁷ A woman operating under the confines of HB 565 would have to interrupt her decision-making process regarding her reproductive health and instead direct her attention and effort toward the judicial system for hearings, investigations, and paperwork. All of these interferences are inconsistent with a woman's established right to choose and would lead to the next step in the analysis of the Bill.

Once it was determined that the statute would effectively interfere with the free exercise of a fundamental right, the intent of the statute to achieve a compelling government purpose would have been considered.³⁸ If there was no compelling government interest sought, then HB 565 would have failed the strict scrutiny analysis at this level.³⁹ However, it would have likely been argued that HB 565 did intend to achieve the compelling government interest of protecting unborn life, in which the state has an interest once the fetus reaches viability under the *Casey* decision.⁴⁰

The final step in determining whether or not HB 565 would have survived strict scrutiny (before *Casey*) is considering whether there were any less restrictive means for achieving the purpose of the legislation.⁴¹ There *are* less restrictive means to achieve the state's goal of protecting unborn life, and research has provided that the use of contraceptives is the most effective way of reducing abortion rates.⁴² Assuming for these purposes that

³⁵ See *Roe*, 410 U.S. at 154–55.

³⁶ Dorf, *supra* note 25.

³⁷ See Caroline Mala Corbin, *A Very Short Abortion Law Primer*, AM. CONST. SOC'Y (July 12, 2018), <https://www.acslaw.org/acsblog/a-very-short-abortion-law-primer/> (describing how *Casey* made it so that abortion regulations were unconstitutional if they placed an “undue burden” on person seeking them, instead of if they failed strict scrutiny, and that even significant hardships may not meet this standard).

³⁸ *Roe*, 410 U.S. at 155.

³⁹ See *id.*

⁴⁰ *Casey*, 505 U.S. at 932–33 (Blackmun, J., concurring in part) (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 553–54 (1989)).

⁴¹ See *Roe*, 410 U.S. at 164.

⁴² William Wan, *Amid New Talk of Criminalizing Abortion, Research Shows the Dangers of Making It Illegal for Women*, WASH. POST (Apr. 5, 2018),

contraceptives would be used before viability, this one method alone would be dispositive as a less restrictive means for protecting unborn life in which the state has an interest.

Ultimately, the possibility of capital punishment is arguably the *most* restrictive means by which the purpose of HB 565 would have been achieved. Taking someone's life is the most restrictive form of recourse available in the American criminal justice system. Extinguishing someone's breath is to take away something that cannot be restored; society cannot recreate that same individual. It would be unconstitutional to let state legislatures tread into the business of taking souls through the permanence of capital punishment for conduct the Supreme Court has deemed protected by substantive due process under *Roe*. Accordingly, HB 565 would have failed the strict scrutiny analysis even before the Supreme Court amended the ideology of state's interest to consider the concept of viability.

In *Casey*, the Court established that "the State's interest in fetal life is constitutionally adequate" at viability,⁴³ or when the fetus is able to survive outside of the mother's womb.⁴⁴ *Casey* also deemed regulations imposed before viability impermissible; before viability, the state cannot impose an undue burden on the right to choose an abortion because the state's interest is not compelling enough.⁴⁵ Here, the Supreme Court replaced the legal framework of the strict-scrutiny analysis with the "undue burden" test.⁴⁶ A restriction on abortion imposing an "undue burden," is one that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁴⁷

Not unlike the final step in the strict scrutiny analysis (whether any less restrictive means for achieving the legislative purpose exists), the death penalty stands as a substantial obstacle in the way of a woman trying to decide to exercise her reproductive health rights. If the death penalty itself was not an effective obstacle, then HB 565's purpose would still be seeking

http://www.washingtonpost.com/news/to-your-health/wp/2018/04/05/amid-new-talk-of-criminalizing-abortion-research-shows-dangers-for-women/?utm_term=.0784b35251bf.

⁴³ *Casey*, 505 U.S. at 860.

⁴⁴ Franklin Foer, *Fetal Viability*, SLATE GIST (May 25, 1997), <https://slate.com/news-and-politics/1997/05/fetal-viability.html>.

⁴⁵ *Casey*, 505 U.S. at 846.

⁴⁶ *The Undue Burden Standard After Whole Woman's Health v. Hellerstedt*, CTR. FOR REPROD. RTS., <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WWH-Undue-Burden-Report.pdf> (last visited Feb. 1, 2019).

⁴⁷ *Casey*, 505 U.S. at 877.

to further an impermissible goal at which the “undue burden” test was aimed. HB 565’s purpose to protect unborn life represented an attempt to require women who had abortions to make that information public through court proceedings and legal paperwork.⁴⁸ Perceivably, Ohio HB 565 did not necessarily purport to impose an undue burden on the right to choose. But even if a court were to decide that HB 565 did not purport to impose an undue burden on the mother, Eighth Amendment issues would still arise when it came to meting out punishment for violation of the law.

B. Trends in Other State Laws Restricting Abortions

Considered alongside Ohio HB 565, a similar Mississippi state law that sought to ban abortions after fifteen weeks of pregnancy further reflects the trend in state legislatures to restrict abortions.⁴⁹ In 2018, Mississippi House Bill 1510: The Gestational Age Act (HB 1510) aimed to make “Mississippi the safest place in America for an unborn child.”⁵⁰ HB 1510 was struck down by a federal judge who reasoned that a regulation banning abortions after fifteen weeks infringed upon women’s Fourteenth Amendment due process rights and ran contrary to Supreme Court precedent.⁵¹ HB 1510 contained language that was strikingly similar to that of HB 565; it contained exceptions only for medical emergencies and cases where there is a “severe fetal abnormality.”⁵² There were no exceptions written into either bill for circumstances of rape or incest.⁵³

Mississippi also “has a trigger law that will ban abortions in the event *Roe v. Wade* is overturned.”⁵⁴ Portrayed in the media, there is public concern that *Roe* will be overturned with Justice Kavanaugh on the bench.⁵⁵ The general political climate may also be an impetus or catalyst for politi-

⁴⁸ H.B. 565, 132d Gen. Assemb., Reg. Sess. (Ohio 2018).

⁴⁹ Emanuella Grinberg, *Judge Notes ‘Sad Irony’ of Men Deciding Abortion Rights as He Strikes Mississippi’s Abortion Law*, CNN (Nov. 21, 2018), <http://cnn.com/2018/11/20/health/mississippi-abortion-ban-15-weeks-ruling/index.html>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Da Silva, *supra* note 20; *see also id.*

⁵⁴ Grinberg, *supra* note 49.

⁵⁵ Dylan Matthews, *Brett Kavanaugh Likely Gives the Supreme Court the Votes to Overturn Roe. Here’s How They’d Do It*, VOX (Oct. 5, 2018), <https://www.vox.com/policy-and-politics/2018/7/10/17551644/brett-kavanaugh-roe-wade-abortion-trump> (stating that the author is “quite confident that Kavanaugh is a vote to overturn *Roe* and *Casey*”).

cians' efforts to push this kind of legislation.⁵⁶ However, given the history of the Supreme Court's rulings, even with conservative members and opinions, precedent has been consistent with respect to the preservation of women's right to an abortion.⁵⁷ A practical example of the influence of the Supreme Court's political terrain on decision making was demonstrated in *Casey*. The Court will likely continue to rule that it would be unconstitutional under current precedent to impose restrictions on abortions that have arbitrary punishments or impede women's ability to exercise a right that has been deemed fundamental alongside marriage, making decisions for your family, and procreation.⁵⁸

Notwithstanding these considerations (and ultimately, mere predictions), the current political climate is still shaped by proposals like Ohio HB 565, Mississippi's Gestational Age Act, and most recently, Alabama's state law which recognizes the right to life for unborn children.⁵⁹ Similarly to Mississippi HB 1510, Alabama's measure prepares a response to the possibility of *Roe* being overturned, meaning that the law would only take effect should federal precedent change.⁶⁰ Should that precedent be overturned, Alabama aims to ban, or at least restrict, abortions. And like both Ohio and Mississippi's failed state laws, Alabama's proposed legislation provides no exceptions for circumstances of rape, incest, nor the risk to the mother's life.⁶¹

Actions by more states, including West Virginia, Colorado, and North Dakota, demonstrate a trend that has developed over the past few years — the use of state law initiatives to pass “personhood clauses” in an attempt to

⁵⁶ See Alice Miranda Ollstein & Rachel Roubein, *Here Come the Roe v. Wade Challenges*, POLITICO (Nov. 8, 2018), <https://www.politico.com/story/2018/11/08/abortion-roe-v-wade-abortion-court-cases-supreme-court-944166>. (expressing concern for abortion precedent following Justice Kavanaugh's recent appointment to the Supreme Court).

⁵⁷ See Alex Markels, *Supreme Court's Evolving Rulings on Abortion*, NAT'L PUB. RADIO (Nov. 30, 2005), <https://www.npr.org/templates/story/story.php?storyId=5029934> (explaining how the Supreme Court has consistently upheld the central holding of *Roe* and outlining the abortion-related cases the Court has heard since that decision).

⁵⁸ *Casey*, 505 U.S. at 926–27 (Blackmun, J., concurring in part).

⁵⁹ H.B. 98, 2017 Leg., Reg. Sess. (Ala. 2017). H.B. 98 was enacted on Apr. 27, 2017 and election was held on November 6, 2018. The proposed amendment passed by a vote fifty-nine percent to forty-one percent. The election results can be accessed at <https://www.sos.alabama.gov/sites/default/files/voter-pdfs/2018/2018-Official-General-Election-Results-Certified-2018-11-27.pdf>. See also Ollstein & Roubein, *supra* note 56.

⁶⁰ H.B. 98, 2017 Leg., Reg. Sess. (Ala. 2017); Ollstein & Roubein, *supra* note 56.

⁶¹ Ollstein & Roubein, *supra* note 56.

roll back the right to abortion.⁶² Pro-life or anti-abortion advocates across the country seem to be preparing for Justice Kavanaugh's presence on the Supreme Court in the hope that he will help overturn *Roe* and are proposing laws in the vein of furthering that mission by state law.⁶³ However, it is somewhat unlikely that this sort of precedent overhaul would take place any time soon. Given the tension created by Justice Kavanaugh's confirmation hearing, some predict that he will not make any controversial decisions in the wake of those very public and visceral moments seen during his confirmation to the Supreme Court.⁶⁴

III. THE DEATH PENALTY AND THE EIGHTH AMENDMENT

An assessment of the constitutionality of the death penalty requires intense judicial scrutiny under the Eighth Amendment's Cruel and Unusual Punishment Clause and the Due Process Clause of the Fourteenth Amendment.⁶⁵ For the purpose of assessing the constitutionality of the death penalty as a response to abortion, the assertion that HB 565 did not necessarily purport to impose an undue burden on the mother will be accepted, positioning the hypothetical enactment of HB 565 toward the subsequent punishment that would have been effectuated by the bill.

A. The Narrow Sentencing Scheme Requirement

It is an accepted tenet of capital punishment jurisprudence that the death penalty must be reserved for the most heinous of crimes, imposed only upon the worst of the worst.⁶⁶ Quoting *Loving v. U.S.*, the Court in *Dallas v. Dunn* noted that the Eighth Amendment required "that a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'"⁶⁷ The requirement that the sentencing actor find at least one aggravating circum-

⁶² *Id.*

⁶³ *Id.*

⁶⁴ North, *supra* note 6.

⁶⁵ *The Death Penalty and Human Rights: Is the U.S. Out of Step?* CONST. RTS. FOUND. (Spring 1999), <http://www.crf-usa.org/bill-of-rights-in-action/bria-15-2-b-the-death-penalty-and-human-rights-is-the-u-s-out-of-step>.

⁶⁶ *See, e.g., Furman v. Georgia*, 408 U.S. 238, 293–94 (1972) (Brennan, J., concurring).

⁶⁷ *Dallas v. Dunn*, No. 2:02-CV-777-WKW, 2017 U.S. Dist. LEXIS 109749, at *73 (M.D. Ala. July 14, 2017) (quoting *Loving v. United States*, 517 U.S. 748, 755 (1996)).

stance is a threshold standard or checkpoint unique to capital punishment.⁶⁸ More importantly, aggravating circumstances essentialize the constitutional need for assessment of punishments that implicate the Eighth Amendment.⁶⁹ While an individual's eligibility for capital punishment relies on aggravating circumstances to distinguish the facts from others found guilty of non-capital murder, this plays no role in the constitutionally required narrowing process.⁷⁰

The constitutionality of the sentencing scheme is a separate question that Ohio HB 565 would have called into question. HB 565 does not narrow the class of persons because it is not particularized; it does not specifically address aggravating circumstances that are necessary to pursue capital murder charges. Those aggravating circumstances are imputed to HB 565, however, through capital punishment laws otherwise in effect in Ohio.⁷¹ HB 565 would have effectively criminalized abortion to the extent that terminating a pregnancy would be categorized as child homicide, and thereby foreseeably punishable upon penalty of death in Ohio.⁷² Therefore, HB 565 would have actually widened the class of persons in the sentencing scheme, running contrary to the holdings in *Loving* and *Dallas*.

B. Analysis of the Death Penalty and HB 565 as Cruel and Unusual Punishment

Conversations discussing the constitutionality of the death penalty under the analysis of cruel and unusual punishment are not new. In 1972, the Supreme Court in *Furman v. Georgia* held that “the imposition and carrying out of the death penalty...constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”⁷³ The arbitrary and capricious application of the death penalty in that case was the basis for the Court's decision.⁷⁴ Four years later, however, the Supreme Court affirmed the death penalty in a 7-to-2 decision, establishing that the death penalty

⁶⁸ *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

⁶⁹ See Linda Carter, *The Evolution of Justice Kennedy's Eighth Amendment Jurisprudence on Categorical Bars in Capital Cases*, 44 MCGEORGE L. REV. 223, 233 (2013) (discussing the constitutional need to afford individualized consideration of each defendant).

⁷⁰ See *Dunn*, 2017 U.S. Dist. LEXIS 109749, at *82–84 (explaining the process for determining eligibility for the death penalty).

⁷¹ OHIO REV. CODE § 2903.01 (2018).

⁷² *Id.* at § 2903.01(C).

⁷³ *Furman*, 408 U.S. at 239–40.

⁷⁴ *Id.* at 294–95.

does not violate the Eighth and Fourteenth Amendments in all circumstances.⁷⁵

In 1981, Justice Marshall's concurrence in *Estelle v. Smith* displayed remnants of categorical disagreement with the imposition of the death penalty.⁷⁶ Justice Marshall's position in *Estelle* was that the death penalty is under all circumstances, cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.⁷⁷ *Trop v. Dulles* later illuminated dignity as the basic concept of the Eighth Amendment.⁷⁸ Cruel and unusual punishment violates basic human dignity and is clearly inhumane.⁷⁹ While dignity itself is not a right defined in the Constitution, Kevin Barry defines it as a "core value 'underlying, or giving meaning to, existing constitutional rights and guarantees,' — 'a lens through which to make sense of the [Constitution's] structural and individual rights guarantees.'"⁸⁰

In capital punishment jurisprudence, the "evolving standards of decency that mark the progress of a maturing society" are the standards by which we preserve and protect dignity of each person from cruel and unusual punishment.⁸¹ These evolving standards of decency are determined by objective indicators of contemporary values rather than the subjective impressions of a court.⁸² It is worth noting that courts rarely stray far from dominant public opinion; it typically reflects the social and political movements of the time.⁸³ The predominant and binding objective indicators include legislation and data about sentencing juries, which inevitably display some vignette of

⁷⁵ *Gregg v. Georgia*, 428 U.S. 153, 203 (1976).

⁷⁶ *See Estelle v. Smith*, 451 U.S. 454, 474 (1981) (Marshall, J., concurring).

⁷⁷ *Id.*

⁷⁸ *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

⁷⁹ *The Case Against the Death Penalty*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/other/case-against-death-penalty> (last visited Jan. 21, 2019).

⁸⁰ Kevin Barry, *The Death Penalty and the Dignity Clauses*, 102 IOWA L. REV. 383, 395 (2017) (citing Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 777 (2006); Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39, 40 (2014); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1736 (2008)).

⁸¹ *See Trop*, 356 U.S. at 101.

⁸² *See Corinna Barrett Lain*, *Furman Fundamentals*, 82 WASH. L. REV. 1, 4 (2007).

⁸³ *Id.* at 66; *see also* James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1136–37 n. 425 (1993) (explaining that "Judges who stray [from popular sentiment] face reversals if they sit on lower courts, derision on and off the bench, declining influence over future cases caused by lack of respect and cooperation, and even impeachment in extreme situations.").

contemporary values.⁸⁴ Informative of those contemporary values are society's positions and general posture toward abortion, the death penalty, and punishment as separate matters.

C. Public Perspectives on Abortion, the Death Penalty, and Punishment

According to a Marquette Law School poll, which assessed public attitudes toward punishment, rehabilitation, and reform, 88.1 percent of respondents believed that people should get the punishment they deserve.⁸⁵ "Tough on crime," has become known as a common conservative perspective on criminal justice reform,⁸⁶ and may be reflected in this sample of those who support proportionate punishment. Further, given the fact that courts rarely stray from dominant public opinion,⁸⁷ a concern about the direction courts might take when imposing punishments as part and parcel of recently proposed reproductive choice legislations may be fairly-grounded.

Generally, just under fifty-four percent of Americans support the death penalty, while thirty-nine percent oppose it.⁸⁸ However, Pew Research Center recorded the general support for the death penalty at historic lows in 2016.⁸⁹ Even while the trend here reflects a decline in support for capital punishment, the country remains predominantly in favor of imposing death sentences. Importantly, this study lacks any classification of the crimes that people imagine when they are asked whether or not they support the death penalty. Additionally, these subjects may not have considered specific crimes at all, but rather, they might have categorically and absolutely supported the death penalty. Nonetheless, society's perspective on the death penalty remains divided and, for seven percent of people, undecided. The extent to which public opinion still favors the death penalty is problematic

⁸⁴ See Lain, *supra* note 82, at 18–19 (commenting on how the courts could consider legislation and jury tendencies when determining public opinion on the death penalty).

⁸⁵ Michael M. O'Hear, *Public Attitudes Toward Punishment, Rehabilitation, and Reform: Lessons from the Marquette Law School Poll*, 29 FED. SENT'G REP. 47, 47–48 (2016).

⁸⁶ Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, GUARDIAN (Aug. 5, 2018), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform>.

⁸⁷ Lain, *supra* note 82, at 66; see also Wilson, *supra* note 83.

⁸⁸ *National Polls and Studies*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/national-polls-and-studies> (last visited Jan. 31, 2019).

⁸⁹ *Public Opinion on Abortion*, PEW RES. CTR. (Oct. 15, 2018), <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion>.

because it maintains the tension inherent in these situations where abortion and the death penalty share the same space.

Surveys on public attitudes toward abortion are more splintered. Pew Research Center also surveyed adults in the United States and produced the following percentages reflecting the public's views on abortion: thirty-four percent of adults surveyed believe that most, but not all, abortions should be legal.⁹⁰ Twenty-five percent of adults believe that abortion should be legal in all cases.⁹¹ On the other end of the spectrum, twenty-two percent believe abortion should be illegal in most cases, and fifteen percent say abortion should be illegal in all cases.⁹² In a rudimentary capacity, this survey reflects that fifty-nine percent of American adults believe abortion should be legal in most if not all cases.⁹³ The remaining thirty-seven percent believe that abortion should be illegal in most if not all cases.⁹⁴ Given these percentages, it is reasonable to believe that dominant public opinion supports women's exercise of their right to reproductive choice.

The purpose behind evolving standards of decency is the capacity for change. The Eighth Amendment's meaning should reflect society's attitude and the political movement of the time.⁹⁵ Assuming the Court honors public opinions and values when adjusting its opinions to time's changes within the framework of evolving standards of decency, these statistics may reasonably inform our predictions about the future of capital punishment.

A more concrete visual representation of what makes laws that aim to criminalize abortion particularly cruel and unusual is the United States's infant mortality rate. HB 565 would have been particularly cruel and unusual given the United States's historically high infant mortality rate as compared to other developed nations.⁹⁶ In 2018, the infant mortality rate was 5.7 deaths out of 1,000 live births.⁹⁷ Despite the decline in these numbers over the years,⁹⁸ the United States still maintains one of the highest infant mor-

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (adding twenty-five percent for "in all cases" and thirty-four percent "in most cases").

⁹⁵ See Lain, *supra* note 82, at 66; see also Wilson, *supra* note 83.

⁹⁶ See 2016 Annual Report: Comparison with Other Nations, AM. HEALTH FOUND., <https://www.americashealthrankings.org/learn/reports/2016-annual-report/comparison-with-other-nations> (last visited Feb. 17, 2019).

⁹⁷ CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK (Feb. 11, 2019).

⁹⁸ See FED. RESERVE BANK OF ST. LOUIS, INFANT MORTALITY RATE IN THE U.S.

tality rates among developed and wealthy countries.⁹⁹ In 2016, only six other countries out of the thirty-five countries in the Organization for Economic Co-operation and Development had higher rates.¹⁰⁰ In other developed countries, infant mortality rates equal half of what they are in the United States.¹⁰¹

In 2017, Ohio's infant mortality rate totaled 7.2 per 1,000 live births, which is higher than the national average in the United States.¹⁰² The number of infants who die before the age of one widens the class of those who would have been subject to the repercussions of this law. Infant mortality rates implicate a significant portion of the population, which exceeds the cap on the "worst-of-the-worst" standard maintained by the death penalty; thus, including abortions exceeds the requirement that states narrow the death-eligible class in capital punishment sentencing schemes.¹⁰³ The operative question then, is what percentage of these numbers account for abortions?

IV. THE DEATH PENALTY IS A PER SE INAPPROPRIATE RESPONSE TO ABORTION

"The Eighth Amendment succinctly prohibits 'excessive sanctions.'"¹⁰⁴ If not unconstitutional for its excessive nature, the death penalty is at least morally inappropriate. It is the ultimate, final, and most excessive sanction available in our criminal justice system. Under constitutional and jurisprudential standards regarding the dignity of life, narrowing the sentencing scheme of those eligible for the death penalty, and considerations of cruel

(Sept. 27, 2018).

⁹⁹ See *America's Health Rankings*, UNITED HEALTH FOUND., <https://www.americashealthrankings.org/learn/reports/2016-annual-report/comparison-with-other-nations> (last visited Feb. 17, 2019).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Brie Zeltner, *Ohio Infant Deaths in 2017 Second Lowest on Record, Disparity Rises*, CLEVELAND.COM (Dec. 7, 2018), <https://www.cleveland.com/healthfit/2018/12/ohio-infant-deaths-in-2017-second-lowest-on-record-disparity-rises.html>.

¹⁰³ *Compare* Furman, 408 U.S. at 292–93 (Brennan, J., concurring) (stating that the United States could have executed "at most... one criminal each week" between 1961 and 1970), with *Reproductive Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 3, 2018), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm> (reporting over 23,000 infant deaths in the United States in 2016).

¹⁰⁴ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

and unusual punishment, the death penalty is an inappropriate response to the exercise of abortion. Abortion is a fundamental right protected by precedent and underpinned by the garment of human dignity and the autonomy of personal choice inherent in the visionary ideals of our nation.

The “extinguishment of life is the ultimate humiliation”¹⁰⁵ and calls into question reproductive choice legislation’s position on women’s dignity. A glance at the requirements a woman choosing to have an abortion in Ohio must satisfy to avoid sanctions is indicative of the element of humiliation hidden in laws like HB 565.¹⁰⁶ Those requirements imposed by HB 565 serve no other conceivable purpose. They are impractical and force a woman to publicize her private decision to have an abortion. It does not dignify a person by purposely humiliating her, nor making her disclose information about her health to anyone other than her doctor or care providers.

While some restrictions on abortion are conditionally permissible under *Casey*, it is possible that the trends in political and social views are more pervasively affecting nationwide attitudes toward the value of life. For as long as dignity remains at the forefront of our conversations about the constitutionality of the potential punishments that would be imposed by these laws, questions about the value of *all* lives *should* inevitably arise. Execution runs afoul of any belief that all persons have inherent dignity. It should concern us as citizens and human beings that we take life off the earth through the pen of our own legislators and sovereign power of our states.

A. The Death Penalty Also Does Not Effectuate its “Purposes” in Other Crimes

Common justifications for the death penalty often take the form of categorizing individuals as those who are likely to be a continuing threat or considered likely to be dangerous in the future.¹⁰⁷ This ideology categorizes individuals as unlikely to be rehabilitated, and therefore too dangerous to be released back into society.¹⁰⁸ The death penalty aims to assure society that there will be no risk that the individual will reoffend.

¹⁰⁵ Barry, *supra* note 80, at 394 (citing Furman, 408 U.S. at 291 (Brennan, J., concurring)).

¹⁰⁶ See H.B. 565, 132d Gen. Assemb., Reg. Sess. (Ohio 2018) (noting that making a report, participating in an investigation, and participating in a hearing are actions subject to public record).

¹⁰⁷ Estelle, 451 U.S. at 458.

¹⁰⁸ James Fieser, *Capital Punishment*, in *Moral Issues That Divide Us*, U. TENN., <https://utm.edu/staff/jfieser/class/160/7-cap-pun.htm> (lasted updated Sept. 1, 2017).

Another argument in favor of capital punishment highlights the deterrent value executions have on those who may otherwise commit a violent crime.¹⁰⁹ Proponents often claim that the death penalty is a “strong deterrent” to violent crime.¹¹⁰ However, research shows the opposite.¹¹¹ *The Deterrence and the Death Penalty* report by the National Research Council criticizes studies that promote deterrence-based ideologies.¹¹² The report found that existing studies on the deterrent value of the death penalty were “fundamentally flawed” for various reasons, including a general lack of credibility due to unfounded assumptions upon which the studies are based.¹¹³ Rather, a large percentage – eighty-eight percent – of academic experts in criminological societies do not agree that the death penalty has any deterrent value.¹¹⁴ It is dangerous to use “deterrence” as justification for the imposition of capital punishment through bills that aim to protect life; these bills do not purport to teach lessons, but rather reduce abortion rates using the death penalty as a teaching method.

B. A Brief History of Execution in Ohio

In the past ten years, twenty-eight people have been executed in Ohio.¹¹⁵ However, of that number, none have been female.¹¹⁶ In fact, out of fifty-six total executions between 1977 and 2018 (the first was actually in 1999),

¹⁰⁹ See John A. Tures, *Does the Death Penalty Reduce the Murder Rate?* HUFF. POST (Dec. 2, 2017), https://www.huffingtonpost.com/john-a-tures/does-the-death-penalty-re_b_13362760.html (criticizing the position that the death penalty deters crime).

¹¹⁰ E.g., *Does the Death Penalty Deter Crime?*, PROCON.ORG, <https://deathpenalty.procon.org/view.answers.php?questionID=000983> (last visited Feb. 17, 2019).

¹¹¹ See *The Death Penalty: Questions and Answers*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/death-penalty-questions-and-answers> (last visited Feb. 17, 2019).

¹¹² *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Feb. 17, 2019).

¹¹³ See *Deterrence: National Research Council Concludes Deterrence Studies Should Not Influence Death Penalty Policy*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/deterrence-national-research-council-concludes-deterrence-studies-should-not-influence-death-penalty> (last visited Feb. 12, 2019).

¹¹⁴ *Facts About the Death Penalty*, *supra* note 112.

¹¹⁵ *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/views-executions> (last visited Feb. 12, 2019) (select all years from 2009 through 2019 under the year filter, select “OH” for the state filter, and click the “apply” button to search using these parameters).

¹¹⁶ *Id.*

Ohio has not executed any females.¹¹⁷ The implications of HB 565 would have widened the class of people executed in Ohio to include women and might have resulted in the first execution of a female since the famous overturning of Sandra Lockett's death sentence in 1978.¹¹⁸

Extending the sentencing scheme to include abortions would not only expand the class of people upon which the death penalty is imposed but would encompass a whole new category of individual behavior that is eligible for the execution. The types of crimes for which people have been executed in Ohio include robbery, murder, raping and strangling, and stabbing.¹¹⁹ HB 565 would have included new behavior not ever considered in any of Ohio's capital punishment statutes. With that inclusion of new behavior, the effect of HB 565 would have greatly expanded the reach of the death penalty in Ohio.

C. Common Sense Considerations and Political Influence

As a practical matter, there are reasons to conclude that bills like Ohio HB 565 are inherently contradictory and would likely face strong opposition. For example, research has shown that criminalizing abortion with the possible penalty of death does not actually deter abortion.¹²⁰ The most effective way to reduce abortion is to prevent unintentional pregnancies through modern contraception.¹²¹ Modern contraceptives eliminate the concern of the future dangerousness factor that has been used to determine the

¹¹⁷ *Id.*

¹¹⁸ See *Ohio*, DEATH PENALTY INFO. CTR., <https://www.deathpenaltyinfo.org/ohio-1> (last visited Feb. 14, 2019). See generally *Lockett v. Ohio*, 438 U.S. 586, 608–09 (1978) (detailing the decision that led to the overturning of Sandra Lockett's death sentence).

¹¹⁹ See OHIO REV. CODE § 2903.01(B) (2018); *Executions 1999-Present*, DEP'T REHABILITATION & CORRECTION, <https://drc.ohio.gov/executions/1999-present> (last visited Feb. 14, 2019) (indicating that technically the death penalty has only been given for aggravated murder; however, aggravated murder includes circumstances of robbery, murder, raping and strangling, and stabbing).

¹²⁰ William Wan, *Amid New Talk of Criminalizing Abortion, Research Shows the Dangers of Making it Illegal For Women*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/news/to-your-health/wp/2018/04/05/amid-new-talk-of-criminalizing-abortion-research-shows-dangers-for-women/?utm_term=.0784b35251bf.

¹²¹ *Id.*

necessity of capital punishment.¹²² In these situations, women who have abortions are only a future danger if they are impregnated again. Given public dispositions toward the legality of abortion, it is unlikely that our evolving standards of decency (marking the progress of our maturing society) would find a woman exercising her fundamental right as a future danger.

Larger questions arise when we consider the intent and motives that encourage pro-life legislation drafters to propose these types of laws. Politicians and backers of bills like HB 565 claim their interest is protecting unborn life.¹²³ But it is worth noting the contradiction inherent in the concept of a bill that penalizes abortion — presumably for the purpose of protecting human life on the reasoning that unborn life is still *life* — but still ends in the possible penalty of death of the would-be mother.

It is relevant to consider that the country is in a moment of legislative conflict; New York recently passed a law swinging the pendulum in the exact opposite direction of pro-life movement legislation.¹²⁴ New York has officially legalized the right to an abortion even after the physical birth of the child.¹²⁵ The Reproductive Health Act goes as far as removing protections for babies who survive abortion procedures, meaning that legally, he or she can be left to die even outside of the womb.¹²⁶ Other states, including New Mexico, Rhode Island, Virginia, and Washington, are projected to adopt similar laws, or to similarly lift bans on abortion, in fear of the Supreme Court overturning *Roe*.¹²⁷

This recent battle between extreme pro-life and extreme pro-choice proposals requires our society to examine the value of life. Do we truly value life? If we do, then our response should be the same in cases of unborn life and of people in general — that as a society we must reflect through the vein of our evolving standard of decency an attentive concern toward the

¹²² See Estelle, 451 U.S. at 454.

¹²³ See Nicole Russell, *Ohio Is Quietly Becoming One of the Most Pro-Life States*, WASH. EXAMINER (Nov. 21, 2018), <https://www.washingtonexaminer.com/opinion/ohio-is-quietly-becoming-one-of-the-most-pro-life-states>.

¹²⁴ S. 240, Sen. Assemb., Reg. Sess. (N.Y. 2019).

¹²⁵ *Id.*; Penny Starr, *8 Shocking Facts About New York's Radical Abortion Law*, BREITBART (Jan. 24, 2019), <https://www.breitbart.com/politics/2019/01/24/8-shocking-facts-about-new-yorks-radical-abortion-law/>.

¹²⁶ S. 240, Sen. Assemb., Reg. Sess. (N.Y. 2019); Starr, *supra* note 125.

¹²⁷ Caleb Parke, *New York is Latest State Pushing Abortion Laws Amid Fears Roe v. Wade Will Be Overturned*, FOX NEWS (Jan. 29, 2019), <https://www.foxnews.com/us/new-york-is-latest-state-pushing-abortion-laws-amid-fears-roe-vs-wade-will-be-overturned>.

preservation of dignity. We may lack clarity with respect to the right way to verify or codify dignity through our laws, but sometimes it is just as valuable to know what is not, has not, and will not be effective.

CONCLUSION

Guaranteed in our Constitution is our right to life, liberty, and equality, wherein our individual dignity is nestled.¹²⁸ In *The Social Contract*, Enlightenment thinker and philosopher Jean Jacques Rousseau posited that there is no man so bad that he cannot be made good for something.¹²⁹ A better vision for our legislative trends and tendencies toward punishment in our criminal justice system might actually consider the capacity for goodness and usefulness in all people. Just as we are more than our worst actions, our worst decisions, and worst ideas, our dignity is more than the sum of its parts as well. The Constitution gives us a shield to protect our dignity in these sorts of cases through the Due Process Clause and the Eighth Amendment.¹³⁰ For that shield to be effective, we must write and require our laws to work within the bounds of those protections.

¹²⁸ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

¹²⁹ JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 25 (1762).

¹³⁰ *See* U.S. CONST. amend. VIII; U.S. CONST. amend. XIV, § 1.