
PROSECUTORIAL AUTHORITY AND ABORTION

ANDREW T. INGRAM*

INTRODUCTION

In the wake of *Dobbs*, abortion is now unlawful in many states. States that prohibit abortion use their regulatory authority, civil justice systems, and criminal law to do so. Presumably, many of the activists and politicians who have been fighting to ban abortion will want to see that outlawing abortion is effective at reducing the incidence of abortion in fact. Once abortion is unlawful in a state, some pro-life partisans will also want those who perform or assist abortions to be criminally punished.

This Essay identifies a serious procedural obstacle to the use of the criminal law against abortion in a post-*Dobbs* world: exclusive local authority to bring criminal prosecutions. The obstacle is constitutional in a small number of states, but one of those states, Texas, is the most populous state where abortion is now illegal. In these states, only local, autonomous prosecutors (district attorneys and county attorneys) can pursue indictments or file informations to commence criminal cases. Prosecutorial localism is enshrined in the Texas Constitution.

Inside the borders of states that do not allow their attorneys general to initiate prosecutions, criminal law against abortion will be a dead letter in certain urban and suburban counties as pro-choice electorates pick prosecutors who will not bring abortion prosecutions. For politicians in states like Texas with well-entrenched Republican leadership at the statewide

* Ph.D., The University of Texas at Austin, 2018; J.D., *with highest honors*, The University of Texas School of Law, 2013; A.B., Brown University, 2009.

Visiting Assistant Professor, Chicago Kent College of Law, 2019–2021; Law Clerk to the Honorable Gregg Costa, United States Court of Appeals for the Fifth Circuit, 2016–2017; Law Clerk to the Honorable Michael Massengale, Texas Court of Appeals for the First District, 2013–2014.

The author's previous work on the criminal law has appeared in *Houston Law Review*, *University of Richmond Law Review*, and *The Ohio State Journal of Criminal Law*.

Associate, Yetter Coleman LLP. The views expressed in this Essay are the author's own and do not represent the views of his employer.

level, the pressure to act forcefully against abortion will be immense, but without changes to jurisdictional laws, Republican attorneys general will be unable to enforce abortion bans through criminal law. At the same time, the pressure on Democratic county and district attorneys not to enforce the abortion laws will be equally immense. The outcome may be highly contentious constitutional litigation to revisit old understandings about the allocation of authority between state and local elected officials, as well as efforts in state legislatures to amend statutes and constitutional provisions that mandate localism in criminal procedure.

This brief Essay adds to the growing literature on criminal procedure in a post-*Dobbs* world. Those prosecuted for performing or having abortions who have lost the Fourteenth Amendment's shield for the procedure itself will still be protected by the Fourth, Fifth, and Sixth Amendments, as well as broader common law traditions and workaday rules of criminal trials in their states. For instance, Peter Salib and Guha Krishnamurthi have already pointed out the deterrent effect of jury nullification on abortion prosecutions.¹

This Essay closes by recognizing that criminal prosecutions are not the only tool that pro-life leaders at the state level have to promulgate antiabortion policy. The fact that those involved with abortion in some "blue" counties in some "red" states will be safe from criminal prosecution will not restore the pre-*Dobbs* status quo. Rather, the likely result in these counties is a kind of gray market condition where unlicensed providers of medication abortions will be able to operate while licensed professionals and established clinics will be kept closed by the threat of regulatory fine, license revocation, and civil liability. And of course, this assumes that pro-life politicians and voters do not quickly amend state laws—even state constitutions—to permit attorneys general to prosecute abortion.

I. HAMSTRUNG ATTORNEYS GENERAL

A. THE CRIMINAL JURISDICTION OF ATTORNEYS GENERAL, GENERALLY

The criminal jurisdiction of attorneys general varies immensely from state to state. In a few states—Alaska, Delaware, and Rhode Island—the attorney general is the sole prosecutor, and all subordinate prosecutors in the state are appointed by her.² In most states, the attorney general has some authority to initiate prosecutions, but this authority is limited to special

1. Peter N. Salib & Guha Krishnamurthi, *Jury Nullification in Abortion Prosecutions: An Equilibrium Theory*, 72 DUKE L.J. ONLINE, Fall 2022, at 72.

2. Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 280 (2017).

circumstances.³ For example, many attorneys general possess a narrow subject matter jurisdiction, confined to special categories of crime (like antitrust offenses).⁴ In other states, the attorney general may only act on the request of the governor.⁵ Under the most permissive state laws, the attorney general has full concurrent jurisdiction with local prosecutors and can bring indictments on her own initiative.⁶

While there are many states in which the attorney general can only prosecute certain types of crime, these limitations are usually imposed by statute, not the state constitution, and so are subject to revision by the provincial legislature.⁷ There are only three states in which the attorney general lacks general criminal jurisdiction in virtue of the state's constitution: Florida,⁸ Texas,⁹ and Connecticut.¹⁰ Of these three, only Texas is sure to prohibit and criminalize abortion. While Florida's political leadership has the will to criminalize it,¹¹ abortion is protected (for now) by the state's constitution.¹²

3. See, e.g., 15 ILL. COMP. STAT. 205/4 (2022) (allowing the Attorney General to prosecute election law violations when the local prosecutor declines to do so).

4. E.g., N.C. GEN. STAT. § 75-13 (2023) (allocating to the Attorney General the power to prosecute antitrust crimes).

5. E.g., COLO. REV. STAT. § 24-31-101(1)(b) (2023) (providing that the Attorney General shall “appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested *when required to do so by the governor*” (emphasis added)).

6. E.g., IOWA CODE § 13.2(1)(b) (2023) (instructing the Attorney General to “[p]rosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general’s judgment, the interest of the state requires such action”).

7. See, e.g., Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150, 150–52 (2021) (discussing state legislatures that have granted new powers to attorneys general to prosecute certain categories of crime in response to the policies of progressive urban prosecutors).

8. See FLA. CONST. art. IV, § 4(b).

9. See TEX. CONST. art. IV, § 22.

10. *Mobil Oil Corp. v. Killian*, 301 A.2d 562, 569 (Conn. Super. Ct. 1973).

11. See, e.g., Anthony Izaguirre, *Florida 15-Week Abortion Ban Reinstated After Legal Appeal*, AP NEWS (July 5, 2022), <http://apnews.com/article/abortion-health-florida-government-and-politics-e8b8b85e6736085606ba2661c186a1d5> [<http://perma.cc/W6GY-3ZFR>] (describing a ban on abortion after fifteen weeks that “was passed by the GOP-controlled legislature and signed by Republican Gov. Ron DeSantis this spring”).

12. *In re T.W.*, 551 So. 2d 1186, 1193–94 (Fla. 1989). The Florida Supreme Court is now dominated by appointees of Republican governors, and informed observers suspect the court as currently constituted will reverse *T.W.* Arek Sarkissian, *Thousands Travel to Florida for Abortions. The Supreme Court’s Ruling Could Change That*, POLITICO (June 24, 2022, 2:03 PM), <http://www.politico.com/news/2022/06/24/florida-abortions-supreme-court-ruling-00040959> [<http://perma.cc/29NX-8UP5>] (“But the state Supreme Court, reshaped by DeSantis, is far more conservative now than when it overturned the parental permission case. Court watchers, abortion rights advocates and anti-abortion rights groups suspect the current state Supreme Court could interpret the privacy clause in a different way . . .”). If the state supreme court overturns *T.W.*, Florida law has a potential loophole to let the state government initiate abortion prosecutions: its constitution allows a statewide prosecutor appointed by the Attorney General to prosecute crime involving more than one of the state’s judicial circuits. FLA. CONST. art. IV, § 4(b). In

Why winnow the states in this manner? This Essay investigates what will happen in blue counties, particularly large urban counties, that fall within the borders of red states. For present purposes, red states are states in which the three branches of the central state government are dominated by anti-abortion Republicans; blue counties are counties in which the local prosecutors are pro-choice Democrats. I assume that pro-choice prosecutors in blue counties will not prosecute abortion, prompting the relevant attorneys general to seek criminal penalties themselves.

Because those opposed to abortion control all three branches of state government in red states, legislative limits on the power of attorneys general can be disposed of to allow prosecution of abortion. The same is true in those states in which the attorney general can only prosecute when called upon to do so by the governor. While even Texas allows its Attorney General to participate in a criminal prosecution if *invited* to do so by a district attorney,¹³ a prerogative that rests with blue county prosecutors is consistent with local power to forestall prosecution of all abortion-related offenses. In a state in which statewide offices are firmly in the hands of abortion's foes, only an impediment in the state constitution will create a meaningful, lasting barrier to the attorney general enforcing criminal laws against abortion.

After *Dobbs*, Texas will be the most populous state to criminalize abortion. It is also the paradigmatic red state and the home of several statewide officeholders with known presidential ambitions that pass through Republican primary elections. At the same time, it hosts megacities like Dallas and San Antonio in which the district attorneys, elected in local races, have pledged not to prosecute those who obtain, perform, or assist in abortions.

light of the potential for Florida to charge conspiracies to commit abortion that allegedly cross circuit lines, this leaves Texas as the only state with a general constitutional impediment to the Attorney General initiating criminal prosecutions. Furthermore, the Florida Governor also has the power to suspend state or county officers for "neglect of duty" and the power to appoint a temporary successor. FLA. CONST. art. IV, § 7(a). The Governor of Florida recently removed Andrew Warren, the State Attorney of Florida's Thirteenth Judicial Circuit, for allegedly neglecting his duty by pledging not to prosecute certain offenses, including abortion offenses. Sue Carlton & Dan Sullivan, *DeSantis and the State Attorney He Ousted: Where the Case Stands Now*, TAMPA BAY TIMES (Nov. 1, 2022), <http://www.tampabay.com/news/florida-politics/2022/11/01/desantis-state-attorney-he-ousted-where-case-stands-now> [http://perma.cc/WU96-UTZK]. The Texas Governor has no such power to remove local prosecutors. See TEX. LOC. GOV'T CODE ANN. § 87.015 (West 2023) (permitting removal of a district attorney only through a petition filed in district court).

13. Saldano v. State, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002).

B. CRIMINAL JURISDICTION IN TEXAS—CONSTITUTIONAL HARD STOPS

1. The Rigid “Redeemer” Constitution

The Texas Constitution forbids the Attorney General from initiating criminal prosecutions. Although it has been heavily amended since its original adoption, the current constitution has been in place since 1876.¹⁴ Known as the “Redeemer Constitution,”¹⁵ the Texas Constitution was the combined handiwork of segregationist Southern Democrats¹⁶—the “Redeemers”—and agrarian populists under the banner of the Grange.¹⁷ Both groups dominated the drafting of the new constitution at the 1875 convention after the Republicans were ousted in 1873—marking the end of Reconstruction in Texas.¹⁸

Because Texas Republicans, including many African Americans, had frequently governed the state from Austin during the Reconstruction period,¹⁹ the Redeemers were hostile to centralized authority and sought to weaken the officials who gathered at the state capitol.²⁰ The Grangers were also suspicious of centralized power and wealth, and their delegates tended to support a weaker state government at the convention.²¹ Evidence of this hostility persists to this day: Texas has a part-time Legislature that only meets every other year unless called into special session by the Governor,²² it has a Governor that is one of the weakest in the nation,²³ and it gives nearly

14. Ron Beal, *Texas: A Weak Governor State, or Is It?*, 52 ST. MARY'S L.J. 263, 264 (2021).

15. E.g., Joseph A. Ranney, *A Fool's Errand? Legal Legacies of Reconstruction in Two Southern States*, 9 TEX. WESLEYAN L. REV. 1, 28 n.170 (2002).

16. See, e.g., Lupe S. Salinas, *Gus Garcia and Thurgood Marshall: Two Legal Giants Fighting for Justice*, 28 T. MARSHALL L. REV. 145, 157 (2003) (describing how the 1876 constitution segregated schools); Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. (SPECIAL ISSUE) 53, 55 (1987) (“The 1876 Constitution greatly limited the powers of the governor and was a reaction to the powers exercised by Governor E.J. Davis under the 1869 Constitution.”).

17. John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1638 (1990) (“The Grangers were the most numerous and vocal advocates of a restrictive constitution, and their protests put them squarely in the mainstream of the emerging national trend towards restrictive constitutionalism.”).

18. See *id.* at 1640 (“Grangers and the other rank-and-file Democrats . . . dominated the Convention and wrote a restrictive organic law.”).

19. Alwyn Barr, *Black Legislators of Reconstruction Texas*, 32 CIV. WAR HIST. 340, 340 (1986).

20. See A.J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 912–14 (1957) (“When the voices of moderation finally prevailed, and Texas was given the opportunity to oust the carpetbag regime, the delegates to the Constitutional Convention of 1875 determined to include in the state’s basic instrument as many safeguards as possible to prevent the recurrence of such widespread and flagrant abuse of power.”). These authors share the resentments and racist attitudes that they chronicle, an unsurprising fact for a 1957 law review article in a Southern state.

21. See Mauer, *supra* note 17, at 1637 (describing the constitutional provisions favored by the distrustful Grangers).

22. TEX. CONST. art. III, § 5(a).

23. See Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV.

all power to prosecute crime to local district and county attorneys.²⁴

The Texas Constitution grants county and district attorneys the power to represent Texas in *all cases* in the trial courts where felonies and misdemeanors are adjudicated.²⁵ Both are elected by the local voters to serve four-year terms, and the division of powers and duties between district and county attorneys is left up to the Legislature.²⁶ The normal pattern set by the Legislature is for the district attorneys to represent the state in felony cases and for the county attorneys to prosecute misdemeanors and represent their counties in civil matters.²⁷

In keeping with the document's post-Reconstruction localism, the Texas Constitution establishes the Office of Attorney General but narrowly and precisely defines its role:

The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.²⁸

The office is civil in nature; even the Attorney General's authority to go after corporations for exceeding their charters is exclusively civil in character.²⁹ Notably, the power to represent the State in the Supreme Court

1337, 1339 (1990) ("The convention fragmented the executive branch by providing for a weak governor and separate elections of several officers."). *But see* Beal, *supra* note 14, at 283 ("It has been established that Governor Abbott has taken steps in his official capacity to wholly control all rulemaking by regulatory agencies in Texas and—at his discretion—maintain select state officers who will do his bidding for a tenure potentially lasting until the people of Texas decide he should no longer guide the State of Texas as governor. Pursuant to this actual reality, the State of Texas cannot be labeled a weak governor state.").

24. See TEX. CONST. art. V, § 21.

25. See *id.*

26. *Id.*

27. DAVID B. BROOKS, TEX. ASS'N OF CNTYS., 2021 GUIDE TO TEXAS LAWS FOR COUNTY OFFICIALS 142 (2021), <http://www.county.org/TAC/media/TACMedia/Legal/Legal%20Publications%20Documents/2021/2021-Guide-to-Laws-for-County-Officials.pdf> [<http://perma.cc/KDQ5-K72M>].

28. TEX. CONST. art. IV, § 22.

29. See *State v. Stephens*, Nos. PD-1032-20, PD-1033-20, 2021 Tex. Crim. App. LEXIS 1194, at *13 (Tex. Crim. App. Dec. 15, 2021) ("[T]he enumerated duties of the Attorney General, as specified by the Constitution, are limited to inquiring into charter rights of private corporations, suing in state court to prevent private corporations from exercising powers not authorized by law, seeking judicial forfeiture of charters, and providing legal advice to the governor and other executive officers.").

of Texas is not a criminal power because the Texas Court of Criminal Appeals, not the supreme court, has jurisdiction to hear criminal appeals from the intermediate appellate courts.³⁰

The Attorney General is elected by the voters at large,³¹ and is neither appointed by nor subordinate to the Governor.³² Assuming parallels hold with the Office of the United States Attorney General is a broad path to error.

2. Precedent Confirms Texas Attorney General Lacks Criminal Jurisdiction

In the *State v. Stephens* decision, issued at the end of 2021, the Texas Court of Criminal Appeals clarified that the final phrase “perform such other duties as may be required by law” does not permit the Legislature to enlarge the Attorney General’s authority to originate criminal prosecutions.³³ Speaking in broad terms, the court held that the power to commence criminal proceedings was constitutionally vested in the district and county attorneys who are part of the judicial branch, not the executive branch where the Attorney General is housed.³⁴

Stephens is the precedent that would bar the Attorney General from prosecuting abortion in Texas counties where he is unwelcome; but it is also a political bellwether teaching legal realists that the judges of the Texas Court of Criminal Appeals will probably not change their views of the constitution amidst the potent politics of abortion. *Stephens* was an election law case: the Attorney General had prosecuted Stephens on his own initiative for violations of the election code when the local district attorney declined to do so.³⁵ Stephens moved to quash the indictment the Attorney General obtained against her, the trial court granted her motion, but the court of appeals reversed. Stephens then successfully petitioned the Texas Court of Criminal Appeals for discretionary review.³⁶

While Stephens was accused of apolitical campaign finance

30. TEX. CONST. art. V, § 5.

31. *See id.* art. IV, § 2.

32. *See State v. Brabson*, 976 S.W.2d 182, 186 (Tex. Crim. App. 1998) (Womack, J., concurring) (“The constitution created seven officers in the executive department, only one of whom is appointed by the governor, the others being elected by popular vote. This in effect creates a separation of powers within the executive department itself.”) (footnote omitted), *adopted by Reynolds v. State*, 4 S.W.3d 13, 15 (Tex. Crim. App. 1999) (“[W]e also adopt Judge Womack’s concurring opinion on original submission in *Brabson* on the ‘parties’ or ‘privity’ issue.”) (footnote omitted).

33. *Stephens*, 2021 Tex. Crim. App. LEXIS 1194, at *11–13 (citing TEX. CONST. art. IV, § 22).

34. *Id.* at *23–25.

35. *Id.* at *1–3.

36. *Id.* at *5–6.

violations,³⁷ the issue before the court of criminal appeals had a political valence that captured the attention of Texas's Republican leadership.³⁸ Pushing for a crackdown on supposedly rampant voter fraud has lately been a key political goal for the Republican Party nationally and in Texas.³⁹ There is no evidence that voter fraud is a material problem in the state,⁴⁰ but even still, Republican officeholders, including the Governor, criticized their fellow Republicans on the Texas Court of Criminal Appeals for their 8-1 majority opinion.⁴¹ Despite a pressure campaign to get the judges to change their minds on rehearing, including a call to action on conservative talk radio by the Attorney General himself,⁴² the judges stood by their opinion on a motion for rehearing.⁴³

The *Stephens* opinion rests on three constitutional pillars: the delegation of prosecutorial authority to county and district attorneys; the lack of express prosecutorial authority in the Attorney General whose explicit tasks are mostly civil in nature; and the separation of powers in the Texas Constitution, which, oddly,⁴⁴ organizes local prosecutors in the judicial branch and the Attorney General in the executive branch.

Regarding county and district attorneys, the Texas Constitution states, The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature.⁴⁵

Long before *Stephens*, the Texas Court of Criminal Appeals recognized that district or county attorneys' primary function is to represent the State in criminal cases.⁴⁶

Attorney General is an elected constitutional office in Texas, with a long paragraph detailing its role. The Attorney General speaks for the State

37. *Id.* at *1–2.

38. Patrick Svitek, *Texas Republicans Pressure Court to Reverse Decision Blocking Attorney General from Prosecuting Election Cases*, TEX. TRIB. (Jan. 26, 2022, 1:00 PM), <http://www.texastribune.org/2022/01/26/texas-ken-paxton-court-election-prosecution> [<http://perma.cc/T6GH-NWTW>].

39. See Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 268–82 (2022) (chronicling how voter fraud became a major concern for the Republican Party).

40. Svitek, *supra* note 38.

41. *Id.*

42. *Id.*

43. *State v. Stephens*, Nos. PD-1032-20, PD-1033-20, 2022 Tex. Crim. App. LEXIS 677, at *1 (Tex. Crim. App. Sept. 28, 2022) (rejecting rehearing with only two judges dissenting).

44. It is odd at least to those inured to the federal way of doing things.

45. TEX. CONST. art. V, § 21.

46. See *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987).

in the supreme court (a wholly civil court in Texas⁴⁷), regulates corporations, provides legal advice to the executive branch, and “perform[s] such other duties as may be required by law.”⁴⁸ The last clause could be interpreted as permitting the Legislature to confer duties on the Attorney General as it pleases by passing laws. Indeed, the Attorney General pressed this argument in *Stephens*.⁴⁹

The Attorney General argued that the Legislature had given him the power to prosecute criminal violations of election law⁵⁰: “The attorney general may prosecute a criminal offense prescribed by the election laws of this state.”⁵¹ Applying *ejusdem generis*, the Texas Court of Criminal Appeals readily disposed of this argument due to the civil nature of the constitutionally enumerated responsibilities of the Attorney General’s Office.⁵²

The broadest argument accepted by the court, however, was that the power to commence criminal prosecutions belongs entirely to the county and district attorneys who reside within the judicial branch, not the Attorney General who resides in the executive branch.⁵³ Unlike the Federal Constitution, separation of powers is an express mandate of the Texas Constitution.⁵⁴ The top criminal jurists unequivocally concluded that

[a]ny attempt to overlap the Attorney General’s constitutional duties with county and district attorneys’ constitutional duties in the sense of a Venn diagram of sorts is unconstitutional. Practically speaking, any overlap is necessarily invitational, consensual, and by request: a county or district attorney must request the assistance of the Attorney General.⁵⁵

The new election law that gave the Attorney General the power to initiate prosecutions was thus structurally unconstitutional.⁵⁶

Despite the internecine political hubbub that followed, this was not a hard decision for the Texas Court of Criminal Appeals. Nearly twenty years before *Stephens*, it had already held that the Attorney General had “no general authority to initiate a prosecution” and was “limited to assisting the

47. See TEX. CONST. art. V, § 3(a).

48. TEX. CONST. art. IV, § 22.

49. See *State v. Stephens*, Nos. PD-1032-20, PD-1033-20, 2021 Tex. Crim. App. LEXIS 1194, at *11 (Tex. Crim. App. Dec. 15, 2021).

50. *Id.*

51. TEX. ELEC. CODE ANN. § 273.021(a) (West 2023).

52. See *Stephens*, 2021 Tex. Crim. App. LEXIS 1194, at *13–14.

53. *Id.* at *6–11.

54. *Id.* at *7–8 (citing TEX. CONST. art. II, § 1).

55. *Id.* at *24.

56. *Id.* at *25.

district or county attorney, upon request.”⁵⁷

II. PRACTICAL CONSEQUENCES

A. NO ABORTION PROSECUTIONS IN BLUE COUNTIES

In states where abortion becomes criminal post-*Dobbs*, whether or not people are prosecuted for obtaining, performing, or facilitating abortion is likely to hinge on the allocation of prosecutorial authority in those states. The current landscape of state abortion legislation is highly irregular; there is no one model for a pro-life legal regime. The variables include whether a state has a pre-*Roe* ban on abortion that is enforceable once again, whether a state bans all abortions or only abortions under certain conditions or at certain stages of pregnancy, and whether abortion bans are wholly civil or criminal.⁵⁸ As of May 2022, twenty-two states have criminal abortion bans; most of these states exempt those who obtain or self-administer abortions from criminal penalties.⁵⁹ However, in states with pro-life leadership at the state level, additional criminal penalties could be enacted to take advantage of the vacuum left by the Supreme Court.

The political prominence of abortion and the lack of moral consensus around the country about its legality mean that prosecutors are likely to adopt stances on abortion prosecution that fit their ideologies, ethics, and politics or the ideology, ethics, and politics of their constituents. In counties where typically pro-choice Democrats occupy local prosecutors’ offices, many of these elected prosecutors will refuse to prosecute abortion. At the same time, attorneys general in Republican states will feel pressure to initiate abortion prosecutions, perhaps in reaction to urban county leaders forswearing the same.

As explained earlier, whether these attorneys general will be able to act on their desire to prosecute abortion varies greatly from state to state. There are many states in which the attorney general’s power to prosecute is restricted by statute to only a handful of categories of crime.⁶⁰ But, because these limits are statutory, pro-life leadership in the legislature and governor’s mansion could readily assign new power to the attorney general. This could take the form of a blanket permission to the attorney general to commence prosecutions when the local prosecutor refuses to do so, a grant of general

57. *Saldano v. State*, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002).

58. See Megan Messerly & Alice Miranda Ollstein, *Abortion Bans and Penalties Would Vary Widely by State*, POLITICO (May 6, 2022, 4:30 AM), <http://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572> [<http://perma.cc/L4CX-HL7Q>].

59. See *id.*

60. See *supra* Section I.A.

criminal jurisdiction to the attorney general, or a narrowly tailored law only expanding the attorney general's criminal jurisdiction to cover abortion offenses.

In Texas, springing criminal abortion bans combine with a strict *constitutional* ban on the Attorney General initiating criminal prosecutions. Under the Texas “trigger law,” abortion is now a first-degree felony.⁶¹ The law applies from the moment of conception.⁶² The sentence for a person guilty of a first-degree felony can range anywhere between a maximum term of life imprisonment and a minimum term of five years imprisonment.⁶³ “[A] pregnant female on whom an abortion is performed, induced, or attempted” cannot be penalized under the Texas trigger law.⁶⁴

The district attorneys in three urban Texas counties—Travis (home of Austin), Dallas (home of Dallas), and Bexar (home of San Antonio)—have already pledged not to prosecute abortions.⁶⁵ The current Attorney General, Ken Paxton, is a Republican and an outspoken opponent of abortion.⁶⁶ He may feel great pressure to fill the void, but any indictments or informations he brings should be easily quashed pursuant to the *Stephens* decision of the Texas Court of Criminal Appeals.

B. GRAY MARKETS

In counties where abortion is unlawful but prosecutors with exclusive authority will not seek indictments, the result will not be a continuation of the pre-*Dobbs* status quo. On the contrary, regulatory penalties and civil enforcement will ensure that doctors and clinics that provide abortion will not be able to do so openly. For example, even though the Travis County District Attorney has pledged not to prosecute and the Texas Attorney General lacks the jurisdiction to do so, Austin abortion providers will still be subject to a minimum \$100 thousand civil penalty for each violation, enforceable through suits brought by the Attorney General.⁶⁷ All doctors and

61. TEX. HEALTH & SAFETY CODE ANN. § 170A.004(b) (West 2023); *id.* § 245.002(1) (West 2023).

62. *See id.* § 170A.001(5) (West 2023).

63. TEX. PENAL CODE ANN. § 12.32(a) (West 2023).

64. TEX. HEALTH & SAFETY CODE ANN. § 170A.003 (West 2023).

65. Elizabeth Zavala, *Bexar DA Joins Four Others to Say: We Won't Prosecute Women Seeking Abortions*, SAN ANTONIO EXPRESS-NEWS, (Apr. 12, 2022, 5:01 PM), <http://www.expressnews.com/news/local/article/Bexar-County-DA-not-prosecuting-abortion-17075783.php> [<http://perma.cc/JSU8-BLWV>].

66. *See* Sneha Dey, *With Renewed Attention on Abortion, Democrats in Attorney General Runoff Vow to Defend Reproductive Rights*, TEX. TRIB. (May 17, 2022, 11:00 AM), <http://www.texastribune.org/2022/05/17/texas-democrats-attorney-general-runoff-abortion> [<http://perma.cc/SE46-SCU3>] (“In his two terms as attorney general, Paxton has aggressively fought to restrict abortion access in the state.”).

67. TEX. HEALTH & SAFETY CODE ANN. § 170A.005 (West 2023).

nurses are also subject to licensure revocation.⁶⁸ Both these civil enforcement mechanisms are in addition to the threat of overwhelming liability under Senate Bill (“SB”) 8⁶⁹ that already exists for performing abortions after six weeks in Texas.⁷⁰

Nonetheless, unlicensed providers in cities like Austin, whether motivated by their belief in abortion rights or self-interest, will be able to provide or facilitate abortions without fear of criminal prosecution. Moreover, if such a provider or facilitator has no license to lose and no assets to seize, the threat of civil penalties enforced by the Attorney General or regulatory state will not be an effective deterrent. This situation—in which abortion is unlawful and criminal but clandestinely available from unlicensed providers and facilitators—I refer to as a “gray market.”

The phrase gray market is already used in business law to describe the sale of branded products through unlicensed channels.⁷¹ When I speak of a gray market, however, I mean a state of affairs where a good or service is semilegal—illegal enough to keep it from being overtly offered, particularly through mainstream corporate channels, but legal enough to be readily found through discreet providers.

Gray markets are meaningfully different from black markets. Because participants do not need to fear criminal prosecution, there is less secrecy, violence, and ruthlessness than in black markets.⁷² A true black market good, like heroin, is difficult to find because of the harsh criminal penalties against it that are aggressively enforced by the police. A true white market good, like Kellogg’s Corn Flakes, is sold unabashedly by publicly traded corporations that operate openly and strive for full regulatory compliance. A gray market good—like marijuana in a jurisdiction where it is criminal to possess but local prosecutors and police ignore the offense⁷³—is quietly available from

68. *Id.* § 170A.007 (West 2023).

69. Texas Heartbeat Act, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2023).

70. See generally Howard M. Wasserman & Charles W. “Rocky” Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1032, 1038 (2022) (“By melding exclusive private enforcement with an unbounded ‘any person’ cause of action, Texas sought to . . . allow the threat of massive litigation and liability to chill the exercise of constitutional rights . . .”).

71. *E.g.*, Paul Lansing & Joseph Gabriella, *Clarifying Gray Market Gray Areas*, 31 AM. BUS. L.J. 313, 313 (1993).

72. See, *e.g.*, Jeffrey A. Miron, *Violence, Guns, and Drugs: A Cross-Country Analysis*, 44 J.L. & ECON. 615, 617 (2001) (describing how increasing enforcement of prohibitions on a good or service breeds violence and diminishes trust among providers); John Burge, *Legalize and Regulate: A Prescription for Reforming Anabolic Steroid Legislation*, 15 LOY. L.A. ENT. L.J. 33, 45–46 (1994) (describing how increased police activity attracted “clandestine laboratories” and “hardened criminals” to the market for performance enhancing drugs).

73. See, *e.g.*, Catherine Griffith, *The Grass Is Greener Where You Water It: Regulating Water Use for Marijuana Cultivation to Curb California’s Severe Drought*, 22 W.-NW. J. ENV’T L. & POL’Y 85, 96

retailers who do not take credit cards and have no fixed store or office. Or it may be sold in a store but with a disingenuous pretext about its most likely usage: examples here include the wares at “head shops” and “novelty shops.”⁷⁴ With gray market goods, the fact of illegality, and the concomitant risk of civil and regulatory penalties, keeps established or corporate providers out of the market. Gray markets are thus left to small-time or solo operators who have little to fear from the civil justice system.

In a post-*Dobbs* gray market, pharmaceutical abortions may still be available in cities like Austin or Dallas, albeit outside of a medical context that can manage complications and provide informed, professional advice.⁷⁵ They may be sold by those motivated by money or donated by activists, either in-person or through the mail.⁷⁶ Given that the War on Drugs has not kept even black market goods like MDMA tablets out of reach from Americans who want them, it is easy to predict that some people, operating discreetly out of their houses and apartments and motivated by moral conviction or profit, will not be cowed from providing pharmaceutical abortifacients when they need not risk prison for doing so.

C. CAVEATS

The legal situation that creates a gray market in abortion in urban Texas counties may not endure for long.⁷⁷ While it would take a constitutional

(2016) (describing how a rural California sheriff licensed illegal marijuana grow operations to regulate their environmental impacts).

74. See, e.g., Alana Chazan, *Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices*, 18 TEX. J. WOMEN & L. 263, 264–65 (2009) (describing how the author was trained to sell “sex toys” without referring to them as such so as not to run afoul of a Texas law criminalizing the sale of “obscene devices”).

75. See generally Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151, 188–90 (2021) (explaining the mechanism of pharmaceutical or medication abortion).

76. Cf. Christopher Rowland, Laurie McGinley & Jacob Bogage, *Abortion Pills by Mail Pose Challenge for Officials in Red States*, WASH. POST (May 4, 2022, 5:42 PM), <http://www.washingtonpost.com/business/2022/05/04/abortion-pills-online-telemedicine> [<http://perma.cc/5WK4-GUC8>] (“The end of a national right to abortion could trigger a surge of interest in a method of pregnancy termination that has become popular in states that already restrict the procedure: Abortion pills by mail.”).

77. While this Essay was in the editing stage, the Texas Legislature made a first attempt at asserting control over district and county attorneys who refuse to prosecute certain categories of crimes. See H.B. 17, 88th Leg., Reg. Sess. (Tex. 2023). The Legislature changed the definition of “official misconduct” in the statute giving grounds for removing district and county attorneys to include “an adoption or enforcement of a policy” prohibiting prosecution of a given criminal offense. See *id.*; TEX. LOC. GOV’T CODE ANN. § 87.011(3) (West 2023). The Legislature also ensured that a petition to remove a district or county attorney is received by the presiding judge of the administrative judicial region where the petition is filed and that the presiding judge must then assign a district court judge and prosecutor from a judicial district or county different from that of the district or county attorney subject to the removal proceeding. Tex. H.B. 17; TEX. LOC. GOV’T CODE ANN. §§ 87.0151, .018 (West 2023). While the law is likely constitutional, it leaves large loopholes and shelters for local prosecutors who must be convicted by a

amendment (or a concerted effort to pack the Texas Court of Criminal Appeals through vacancy appointments and primary elections), pro-life forces that dominate state government could give the Attorney General the authority to prosecute abortion and related offenses. The Attorney General has requested that the Legislature give him this authority in the past, prior to *Stephens*.⁷⁸

In order to amend the Texas Constitution, the State Legislature must approve a proposed amendment by a two-thirds vote in each House.⁷⁹ The question is then submitted to the voters at an election (which may be a spring off-cycle election), at which point it must receive majority support to become law.⁸⁰ As of 2023, the Republican Party has a majority, but not a two-thirds majority, in both Houses.⁸¹

The restraints on abortion prosecution described in this Essay depend on the occupants of local prosecutors' offices. In Texas, if a district attorney (the official who typically has exclusive authority to prosecute felonies)⁸² resigns, dies, or is removed from office, the Governor appoints the interim replacement.⁸³ County attorneys, who usually prosecute misdemeanors,⁸⁴ are appointed by the local county commissioners when vacancies occur between elections.⁸⁵ Those who provide or facilitate abortions trusting in their local district attorney not to proceed against them will have to face the risk that the sympathetic district attorney will be replaced by a substitute who is opposed to abortion and will prosecute actions that occurred before she took office.

Finally, this Essay assumes that antiabortion leaders, both officeholders and leading activists, will want to pursue criminal prosecution of abortion. It may be that the inability of attorneys general, including the constitutionally restrained Attorney General in Texas, to lodge prosecutions will be of little

jury from their home county, *see* LOC. GOV'T § 87.018(a)–(b) (prescribing that trial by jury and ordinary rules for civil cases be observed in removal proceedings), and who can avoid trouble altogether by not making a formal pronouncement of their intent to ignore certain offenses, *see* LOC. GOV'T § 87.011(3)–(4).

78. Emma Platoff, *Texas Attorney General Ken Paxton Is Seeking More Power This Session to Prosecute Voter Fraud and Abortion-Related Crimes*, TEX. TRIB. (Feb. 4, 2019, 12:00 AM), <http://www.texastribune.org/2019/02/04/Texas-ken-paxton-prosecute-abortion-voter-fraud> [http://perma.cc/H9DV-GZFM].

79. TEX. CONST. art. XVII, § 1(a).

80. *See id.* § 1(c).

81. *See* Party Affiliation on the First Day of the Legislative Session, LEGIS. REFERENCE LIBR. OF TEX., <http://lrl.texas.gov/legeleaders/members/partyList.cfm> [http://perma.cc/6SRU-Z4AN].

82. BROOKS, *supra* note 27, at 142.

83. *See* TEX. CONST. art. IV, § 12(a).

84. BROOKS, *supra* note 27, at 142.

85. TEX. LOCAL GOV'T. CODE ANN. § 87.041(a)(5) (West 2023).

consequence if pro-life groups believe the strategy will not serve their cause. They may come to this conclusion out of concern for public opinion or practical difficulties in bringing successful criminal cases. As Salib and Krishnamurthi point out, jury nullification is an obstacle and deterrent to prosecuting people for abortion,⁸⁶ and this factor will weigh most heavily in counties where jury pools are mostly composed of pro-choice people. Both locally elected prosecutors and the jury system embody the preference for local control in American criminal law.

D. FUTURE STRUGGLES

As the foregoing acknowledges, it is true that pro-life state voters and leaders may act quickly to give attorneys general prosecutorial power over abortion in response to the deliberate inaction of pro-choice, urban prosecutors. However, vesting the discretion to prosecute in independent, county-level officials is only one salient example of local power over the criminal law in the United States. Pro-choice electorates and their leaders will have countermoves available should their district attorneys lose their effective veto power over pursuing abortion criminally.

So far, this Essay has highlighted the exclusive authority of local prosecuting attorneys and mentioned jury nullification as tools by which pro-choice majorities at the county and city level can prevent abortion from being charged in their jurisdictions. But the criminal justice system in the United States is intensely local by design, and there are other decision points that pro-choice people can control to effectively decriminalize abortion.

Just as local juries have the power to derail prosecutions through nullification, locally elected trial judges can enter directed verdicts and find mistrials that will bar further prosecutions. In Texas, for example, district judges, who hear all felony cases,⁸⁷ are elected by the voters of their district.⁸⁸ In large urban counties, the districts of the several district judges are coextensive with the county.⁸⁹ A judge who is adamantly opposed to the criminalization of abortion, whether due to moral conviction or political expediency, has ample opportunity (with or without a colorable legal basis) to direct verdicts and leave no chance for the prosecution to seek appellate review.⁹⁰ A directed verdict triggers the protections of the Double Jeopardy

86. Salib & Krishnamurthi, *supra* note 1, at 49–50.

87. TEX. CODE CRIM. PROC. ANN. art. 4.05 (West 2023).

88. TEX. CONST. art. V, § 7(b).

89. *E.g.*, TEX. GOV'T CODE ANN. § 24.112(a) (West 2023) (establishing the Eleventh District Court for all of Harris County, where Houston is located).

90. *See* *Evans v. Michigan*, 568 U.S. 313, 318–19 (2013); *cf.* *Smalis v. Pennsylvania*, 476 U.S. 140, 144–46 (1986) (barring the prosecution from appealing a directed verdict).

Clause and renders a second prosecution by the same sovereign constitutionally impossible.⁹¹ In some cases, these local judges would be abandoning their judicial role and violating their oaths of office, but such is the ardor roused by abortion: professional ethics may yield to moral conviction or political pressure. Ensuring defendants' access to these sympathetic judges, criminal venue provisions in state law generally give the defendant the right to be tried in the county where the alleged offense occurred.⁹²

Most police in this country are under the control of locally elected officials—mayors, city councils, and sheriffs. Police are the eyes and ears of the state on the streets.⁹³ Local cops far outnumber state police: 2018 data in Texas reports that there were 38,595 officers in sheriff's departments and municipal departments versus only 4,164 officers under the command of the state.⁹⁴ If the police ignore something, the chances are low that it will be detected by officials and subject to prosecution to begin with.⁹⁵ There are ways that pro-life state officials could overcome this lack of cooperation: they can mandate that police investigate whenever they have a reasonable suspicion of abortion-related crime,⁹⁶ but they can also enlist private citizens through rewards and bounties. In Texas, pro-life advocates have already implemented such a law in the form of SB 8's private cause of action allowing any person to sue abortion providers for damages.⁹⁷ For the reasons explained above, gray market participants generally have little to fear from civil liability. However, such a bounty system could be used by state attorneys general to identify prosecution targets when local police are being uncooperative and deliberately turning a blind eye.

There is a related personnel problem for state attorneys general aiming to prosecute abortion: a lack of experienced criminal lawyers to stand in for the assistant district attorneys who are sitting on their hands at the behest of their bosses. Assembling a parallel prosecutor's office to target abortion offenses in the state's most populous counties will be a difficult task and require, at a minimum, the injection of large amounts of new funding into

91. *Evans*, 568 U.S. at 318–19.

92. *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 13.18 (West 2023).

93. Judith A.M. Scully, *Rotten Apple or Rotten Barrel?: The Role of Civil Rights Lawyers in Ending the Culture of Police Violence*, 21 NAT'L BLACK L.J. 137, 142 (2008) ("Police officers are the prosecutor's eyes and ears on the streets and police testimony is often necessary to convict most criminal defendants.").

94. See TEX. DEP'T OF PUB. SAFETY, 2018 CRIME IN TEXAS 49 (2019), <http://www.dps.texas.gov/sites/default/files/documents/crimereports/18/citch8.pdf> [<http://perma.cc/X2LM-QBZQ>].

95. See Scully, *supra* note 93, at 142.

96. Such a law may be of little power in comparison to the instructions of those who pay the salary of the police, who boss them around on a daily basis, and who hold the power to discipline and fire them.

97. See Texas Heartbeat Act, TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2023).

attorney general offices.

The need for additional funding in order for attorneys general to effectively prosecute abortion points to a larger political obstacle—simply, professional and bureaucratic jealousy felt by local prosecutors who do not wish to concede power to state officials, regardless of the prosecutors’ political affiliations or views on abortion. These local prosecutors, already organized into lobbying groups,⁹⁸ may turn their influence against amendments to state statutes and constitutions that would let attorneys general intrude on their exclusive criminal jurisdiction. In Missouri, for example, state officials were angry at the perceived laxity of the new progressive prosecutor elected in St. Louis, so they sought to give the Attorney General concurrent jurisdiction to prosecute offenses with the local district attorneys.⁹⁹ Despite the fact that most Missouri district attorneys were not progressive prosecutors, they nonetheless rallied against the measure in the name of local community control of criminal justice.¹⁰⁰

Efforts by blue county officials to stop an expansion of the attorney general’s criminal jurisdiction would accordingly benefit from the official jealousy of even red county prosecutors. In Texas, whether such a political effort would succeed in beating back a constitutional amendment could depend on just how broad the proposed expansion of the Attorney General’s powers turns out to be. Putting a general grant of criminal jurisdiction on the ballot—to let the Attorney General prosecute any and all offenses—risks offending the provincial or libertarian instincts of Texas voters who do not want the government in Austin to have the power to prosecute them.

CONCLUSION

The emergence of great moral and political controversies can place new strain on legal seams that have not attracted public attention for decades. Criminal law that was designed to handle indisputably *malum in se* crime was not meant to process questions about which there is little social consensus. Both jury nullification and the discretion of locally elected prosecutors are areas familiar to criminal law scholars that are now relevant to all involved in the abortion debate.

98. See Tyler Yeargain, *Prosecutorial Disassociation*, 47 AM. J. CRIM. L. 85, 86 (2020).

99. Note, *Prosecuting in the Police-Less City: Police Abolition’s Impact on Local Prosecutors*, 134 HARV. L. REV. 1859, 1878 n.100 (2021) (“In Missouri, legislators sought to transition enforcement authority from St. Louis’s local prosecutor, Circuit Attorney Kimberly Gardner, to the state’s Attorney General.”).

100. See Ty Gaither, Opinion, *Prosecutions in Missouri Are Best Handled Locally*, KAN. CITY STAR, Sept. 28, 2021, at 7A (explaining how the author, and 114 of his fellow prosecuting attorneys, opposed a bill that would give original and concurrent jurisdiction to prosecute crime to Missouri’s Attorney General).