The Court’s Morality Play: The Punishment Lens, Sex, and Abortion

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THE COURT’S MORALITY PLAY: THE PUNISHMENT LENS, SEX, AND ABORTION

JUNE CARBONE* & NAOMI CAHN†

ABSTRACT

This Article uncovers the hidden framework for the Supreme Court’s approach to public values, a framework that has shaped—and will continue to shape—the abortion debate. The Court has historically used a “punishment lens” to allow the evolution of moral expression in the public square, without enmeshing the Court itself in the underlying values debate. The punishment lens allows a court to redirect attention by focusing on the penalty rather than the potentially inflammatory subject for which the penalty is being imposed, regardless of whether the subject is contraception, abortion, Medicaid expansion, or pretrial detention.

This Article is unique in discussing the circumstances in which the Court has simultaneously concluded that the state could regulate but could not punish, even if that means redefining a sanction as not punitive. By making visible this framework, we offer the Court and the states a potential off-ramp from the continuation of an ugly and litigious future on abortion access. If the Supreme Court seeks to deflect the outrage over Dobbs, the simplest way to do so would be to take seriously the statement that all it has to do is to return the issue to the states. In that case, the Court’s focus should be, as Justice Kavanaugh suggested in his concurrence, on the impermissibility of punishment that infringes on established rights, independent of a right to abortion, such as the right to travel, the First Amendment right to communicate accurate information about abortion

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availability, or doctors’ efforts to perform therapeutic abortions necessary to preserve a pregnant person’s health. The Court would not pass judgment on the permissibility of abortion, and it could affirm the propriety of state bans, but still strike down heavy-handed prosecutions and ill-defined prohibitions that impose undue penalties.

After Dobbs v. Jackson Women’s Health Organization, this Article is particularly important for three reasons. First, this Article examines the ways in which the Court has used considerations of punishment to deflect irreconcilable values clashes. Second, a focus on punishment often illuminates the “dark side” of government action, justifying limits on such actions. Third, a focus on “punishment” often illustrates the consequences of government actions, consequences that may be an indirect result of statutes or regulations but that have disproportionate effects on marginalized communities. Understanding how the Court has used this elusive concept in the past may thus help shape the response to Dobbs.

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INTRODUCTION

The concept of punishment is central to the Supreme Court’s jurisprudence on abortion—and, beyond abortion, to the expression of moral values in the public square. In Dobbs v. Jackson Women’s Health Organization, Justice Alito found “an unbroken tradition of prohibiting abortion on pain of criminal punishment” throughout the common law until the Court’s decision in Roe v. Wade in 1973.¹ He noted that “the great common-law authorities—Bracton, Coke, Hale, and Blackstone—all wrote that a post-quickening abortion was a crime”² and he traced these developments from the thirteenth century forward.³

The Dobbs opinion, like most criminal law discussions, assumes that the power to prohibit includes the power to punish violations of those prohibitions. And, indeed, criminal law scholars have produced an extensive literature on the justifications for the imposition of criminal sanctions and the constitutional limits on that imposition.⁴

What neither that vast literature nor the Dobbs opinion addresses, however, is the role of punishment in the evolution of the jurisprudence addressing the expression of public values, separate and apart from the existence of the laws prohibiting conduct. As this Article shows, when the Supreme Court has focused on the state’s justification for punishment independently from the underlying policy, it has often used the nature of punishment as a justification for striking down legislation—even when the Court concedes that the state purpose is otherwise legitimate.⁵ And it sometimes uses the declaration that onerous provisions are not “penalties” to uphold coercive legislation that, as a practical matter, limits access to what the Court otherwise recognizes as important rights.⁶ As these cases show,

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² Id. at 2236.
³ Id.
⁵ See infra notes 75–81 and accompanying text.
⁶ Wyman v. James, 400 U.S. 309, 316 (1971) (“When a case involves a home and some type of official intrusion into that home, as this case appears to do, an immediate and natural reaction is one of concern about Fourth Amendment rights and the protection which that Amendment is intended to afford. Its emphasis indeed is upon one of the most precious aspects of personal security in the home . . . .”); Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”).
outside of the narrow context of whether a criminal prohibition justifies the imposition of a particular sentence, punishment has an ill-defined life of its own in Supreme Court jurisprudence.

This Article is the first to detail how the Supreme Court has viewed the concept of “punishment” as a justification for upholding or invalidating government acts in the context of issues involving contested values. While an intense debate raged at mid-century over whether the state should regulate morality, that debate generally assumed that if the state could regulate, it could also punish. This Article is unique in discussing the circumstances in which the Court has simultaneously concluded that the state could regulate but could not punish. For example, the Court held that a state could discourage teen sex but not by encouraging pregnancy as the consequence or could adopt restrictive measures, such as blanket refusals to fund medically necessary abortions, so long as the statute did not prohibit abortion or penalize those seeking one.

This Article is particularly important following Dobbs for three reasons. First, it illustrates the ways in which the Court has used considerations of punishment to deflect irreconcilable values clashes. For those who would like to extricate the Court from the conflicts Dobbs has inflamed, limiting punishment, for example, of those exercising a constitutionally protected right to travel, offers a potential off ramp.

7. While an extensive literature addresses the propriety of sentencing for specific offenses, the Supreme Court has been criticized for failing to adopt a rigorous definition of what constitutes “punishment,” even in the context of determining “cruel and unusual punishment,” a doctrine in which the definition of punishment is of constitutional significance. See Raff Donelson, Cruel and Unusual What? Toward A Unified Definition of Punishment, 9 WASH. U. JURIS. REV. 1, 3 (2016) (concluding that “the Court has largely tried to sidestep the question of what should count as punishment”).

8. While other scholars have discussed the propriety of morals regulation, that literature generally assumes that the power to regulate morality includes the power to punish—or that the harshness of punishment constitutes an argument for repealing morals regulations. See Alice Ristroph, Third Wave Legal Moralism, 42 ARIZ. ST. L.J. 1151 passim (2010) (summarizing the debate).

9. See id. (describing the traditional argument that criminal laws should reflect shared moral institutions and that the failure to enforce them would lead to social disintegration); see also Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 S. CAL. L. REV. 1, 21 (2007) (arguing that the power of the criminal justice system relies on the community’s belief in the moral credibility of the law).


11. Harris, 448 U.S. at 297–99.

12. While some see this as ‘punishing’ the poor, see, e.g., Deborah L. Rhode, Feminism and the State, 107 HARV. L. REV. 1181, 1205 (1994), the Court rejected such a label in Harris, maintaining that since the poor have no affirmative right to government funding, selectively choosing to fund some procedures (childbirth) and not others (abortion) is not punishment. Harris, 448 U.S. at 317 n.19 (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”).
Second, a focus on punishment often illuminates the “dark side” of government action. The opinion in Griswold v. Connecticut placed great weight on the intrusiveness of policing the use of contraceptives in the marital bedroom. The ugliness of imposing punishment may similarly become a focal point for organization in response to the patchwork of state laws after Dobbs.

Third, a focus on “punishment” is often used to illustrate the consequences of government actions, consequences that may be an indirect result of statutes or regulations but that have disproportionate effects on marginalized communities. Abortion bans may aggravate race and class-based differences, prompting greater recognition of the rights of the pregnant to obtain the medical care needed to safeguard their health. Understanding how the Court has used this elusive concept in the past can thus help shape the response to Dobbs.

The Supreme Court’s conception of “punishment” underlying these considerations is slippery, perhaps intentionally so. The Court uses the concept at both an expressive level, reinforcing public norms, and a practical level, specifying the consequences for the violation of government mandates, both civil and criminal. Most critically for this Article, it provides the Court

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15. See, e.g., Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity (2009). In some cases, the effect is intentional, maintaining moral hierarchies that fall along lines of race and class. Much of the opposition to Medicaid expansion, for example, has been focused on penalizing those perceived as “undeserving” of government benefits. See infra notes 205–210 and accompanying text; Nicole Huberfeld & Jessica L. Roberts, Health Care and the Myth of Self-Reliance, 57 B.C. L. REV. 1, 14 (2016) (“State politicians have displayed reticence to opt into Medicaid expansion based on bias against those historically deemed unworthy of governmental assistance . . . .”).

Khiara Bridges observes

And so the fall of Roe ushers black people into a regime in which they are likely to engage in criminalized behavior more frequently and in which their racial unprivilege makes them more likely to be swept into the apparatus of the criminal legal system. In this way, the fall of Roe inflicts a racial injury.


17. Given the ambiguities in many abortion bans, court action may be necessary to secure access to the use of abortion-like procedures, even in cases in which the fetus is already dead or has no chance of survival but threatens a person’s life. See discussion infra notes 304–309 and accompanying text.

18. See, e.g., Donelson, supra note 7, at 3, 10 (concluding that “the Court has largely tried to sidestep the question of what should count as punishment” and noting support for the Court’s failure to define punishment “on the grounds that the Court should avoid broad, theoretically ambitious decisions, especially on factually or ethically complex matters”). Precisely because the Court has used the concept of “punishment” or “penalties” without exact definitions to aid the Court in sidestepping issues, we do not offer a definition here, but instead underscore how the commonalities in the way the Court uses the term, rather than in how it (inconsistently) defines it.
with a way to shape emerging norms in the context of public unease.

After describing the multidisciplinary literature on punishment’s multiple roles, we examine the way that the Court has deployed punishment as a rationale for invalidating government action, particularly in the context of cases involving sexual morality. Eisenstadt v. Baird, which stuck down bans on the sale of contraceptives to single women, provides a classic case: the Court simultaneously “conceded” that “the State could . . . regard the problems of extramarital and premarital sexual relations as ‘(e)vil . . .’” but still held that this could not be the purpose of the Massachusetts legislation because it “would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . ..” The irrationality of the punishment, not the permissibility of unmarried sex, provided the basis for the decision—and implicitly for the limitation of state power to regulate sexual morality.

We then explore how the Court has used the determination of what is a punishment to affirm state decision-making power in a federal system. The question of when the state is inflicting a punishment as opposed to imposing a reasonable condition or proceeding on appropriate administrative grounds arises in contexts ranging from welfare “home visits” to detention to Medicaid expansion, with the Court using the punishment lens to sidestep the substantive bases for these decisions.21

Finally, this Article considers cases that directly engage the relationship between punishment and the underlying values debate. Lawrence v. Texas, which invalidated Texas’s same-sex sodomy statute, provides the most striking example. Justice Kennedy’s majority opinion did not just strike down the criminalization of the sexual conduct.22 It affirmed the dignity and worth of the expression of intimacy in the case. Justice Scalia’s dissent, by contrast, saw punishment as the point, with both the majority and dissent agreeing that the values debate was central to the discussion.23

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20. Id. The reasoning in Eisenstadt is particularly striking because the state, in outlawing contraception for single women, did not address pregnancy per se; instead, the Court treated it as part of the implicit basis for the prohibition. See discussion infra Section II.A.
23. Id. at 602.
This Article observes that the “punishment lens” provides a powerful tool for shaping the evolution of public values without enmeshing the Court in the underlying values debate. We consider whether the punishment lens can be successful in two ways: guiding the evolution of public values without triggering a backlash that further entrenches polarized opposition or, failing that, reaching decisions in controversial cases that do not undermine the Court’s own legitimacy and authority. By this standard, Eisenstadt v. Baird, which used the punishment lens to avoid the underlying values questions while striking down barriers to contraceptive access, and Lawrence v. Texas, which instead of relying on the punishment lens directly engaged the values questions, both succeeded in resolving issues in ways that helped move public opinion and lock in legal conclusions that remain embedded in American law. Whether applying the punishment lens to abortion can enjoy similar success remains to be seen, but this Article concludes by outlining the possibilities a focus on punishment can offer.

I. PUNISHMENT AND THE RULE OF LAW

The role of state-administered punishment is much studied—and much contested. Existing literature addresses the questions of what might justify the ability of the state to inflict intentionally burdensome treatment on its citizens, what purposes such punishment should serve, and what constitutes appropriate punishment. As this scholarship establishes, law

24. Neil Siegel has labelled this “judicial statesmanship.” Neil S. Siegel, The Virtue of Judicial Statesmanship, 86 TEX. L. REV. 959, 963 (2008). Siegel argues that statesmanship is what allows “the legal system to legitimate itself” and it requires “expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement.” Id.


27. See, e.g., Joshua Kleinfeld, Three Principles of Democratic Criminal Justice, 111 NW. U. L. REV. 1455, 1479 (2017) (noting that both the expressive conception of punishment and the prosocial punishment principle use “the expressive qualities of punishment to condemn a crime, affirm the social norm violated by the crime, and affirm the dignity of any victim or victims of the crime”).

28. The U.S. Constitution, for example, prohibits “cruel and unusual” punishment but the meaning of the clause is limited and contested. See, e.g., John F. Stinneford, Rethinking Proportionality Under the Cruel and Unusual Punishments Clause, 97 VA. L. REV. 899, 903 (2011) (arguing that the Supreme Court reviews whether punishments are proportionate to the crime only in a narrow range of cases that involve
enforcement—and punishment of egregious crimes—is essential to a state’s legitimacy. Without punishment of criminal acts, a state cannot govern—and command either the support of its constituents or deference from the international order. This literature, however, in its most idealized form, tends to assume a straightforward relationship between crime and punishment: the state prohibits certain acts, imposes prescribed penalties for the violation of the law, and administers the penalties in accordance with principles of procedural and substantive justice, emphasizing due process rights for the accused and fairness defined in terms of proportionality between the crime and the punishment.

This Section goes beyond the conventional analysis of criminal punishment to explore the expressive role that punishment serves. It shows that the judicial oversight of punishment serves four roles that pose difficult challenges in the face of contested or changing values: establishing shared societal values, maintaining or dismantling social hierarchies, mediating disputes over the authority of governmental actors to impose punishment, and channeling the individual desire for vengeance into state-approved channels.

First, the administration of punishment defines and reinforces societal values, often in symbolic ways. For example, with the recognition that smoking caused cancer and other health risks, the perceived acceptability of smoking changed. In the United States, the state did not respond by prohibiting smoking. Instead, government entities gradually limited the places where smoking was permitted, first, creating “no smoking” areas and ultimately banning smoking in restaurants, offices, and other places. Over time, enforcement of these rules—and the imposition of sanctions on violators—did not just shift norms of politeness; they expressed moral

the death penalty and that the Court’s power to punish proportionality is not firmly established in the Constitution).

29. See, e.g., Larry May, Crimes Against Humanity: A Normative Account 13 (2005) (arguing that when a state fails to ensure its citizens’ safety and security, international bodies should be able to infringe on its sovereignty, with the need to protect human rights “providing a basis for justified interference with the sovereign affairs of the State”).

30. That idealized vision, of course, has been subject to extensive critique. See, e.g., Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 YALE L.J. 2054, 2066–68 (2017) (positing legal estrangement as a means for understanding alienation from the criminal justice system).


32. Dan M. Kahan, The Cognitively Illiberal State, 60 STAN. L. REV. 115, 138 (2007) [hereinafter Kahan, Cognitively Illiberal] (describing a shift that stamped “smoking...as undesirable, deviant behavior, and smokers as social misfits”).

disapproval of smoking as undesirable and deviant. In 1993, the Supreme Court of the United States embraced the shift in attitudes in a decision that held placing a nonsmoking prison inmate in a cell with a five-pack-a-day smoker could constitute constitutionally impermissible “cruel and unusual punishment.” In so ruling, the Court did not limit the word “punishment” to the prescribed penalties for a criminal act. Instead, its finding of “cruel and unusual punishment” reflected and reinforced the changed social meaning of smoking from an acceptable activity to one that violated evolving “standards of decency,” and concluded that violating this new moral sensibility could constitute “punishment” within the meaning of the Constitution. The act of placing a nonsmoker with a smoker thus became punishment because of the changed moral status of smoking.

Second, legal scholars have argued that beyond merely maintaining order, much of the power of state-administered punishment comes from this expression of “moral condemnation” and its role in establishing social hierarchies within a society. In accordance with this analysis, moral condemnation does not just declare particular conduct to be illegal; it establishes and reinforces social order and social standing in a society. Criminal acts threaten to upend the social order, as the person committing the crime asserts the right to defy established law and norms. Imposing punishment that carries moral condemnation with it restores the moral order, affirming the victim’s superior status to that of the violator.

34. Kahan, Cognitively Illiberal, supra note 32.
35. Donelson, supra note 7, at 9.
37. Helling, 509 U.S. at 29.
39. See Jessica Bregant, Eugene M. Caruso & Alex Shaw, Crime Because Punishment? The Inferential Psychology of Morality and Punishment, 2020 U. ILL. L. REV. 1177, 1177 (2020) (“Psychologically speaking, punishment may operate as a special case of social norm information, but what sets punishment apart from other norms is the moral weight punishment carries. . . . Information about punishment can influence the extent to which an act of wrongdoing is judged to have been harmful.”); Matthew Tokson & Ari Ezra Waldman, Social Norms in Fourth Amendment Law, 120 MICH. L. REV. 265, 268 (2021) (“Antisodomy laws, though largely unenforced, shaped social norms by stigmatizing gay people—and their invalidation by the Supreme Court in 2003 helped to promote norms favoring equality and acceptance.”).
40. Hegel argued that formal punishment in a court of law replaces vengeance for a particular act against a particular victim with universal principles and transforms the punishment “into the genuine reconciliation of right with itself . . . by the annulment of the crime, the law is restored, and its authority is thereby actualized.” Keally McBride, Punishment and Political Order 7 (2007).
41. Bregant et al., supra note 39, at 1181–82. Bregant et al. refer to this justification for punishment as “expressive retributivism.” Id. at 1181. They observe that “[u]nder this theory, crimes are themselves expressive acts that send a message to a victim and to society about the standing of the victim relative to the offender. Punishment, in contrast, sends the opposite message, rejecting the offender’s false claim and restoring the victim’s position in society.” Id. at 1181–82 (footnote omitted).
Punishment can thus signal that “the community values the victim”42 while the failure to punish can indicate indifference, or even disdain, toward the victim.43 Accordingly, both imposing punishment and failing to punish send important messages about what a society values. State-administered punishment can thus establish and reinforce norms in ways that contribute to social cohesion.44 cohesion operating at the group as well as the individual level.45 Disturbingly, the imposition of punishment can breed cohesion even if there is no crime;46 nonetheless, the state reaffirms its legitimacy and authority when it punishes in the name of a value or ideal, rather than simply because it can.47

The role of punishment in establishing social hierarchies, particularly when it operates at a group-based level, contributes to the dark side of punishment.48 Brain imaging studies49 show that the act of punishing engages the part of the brain that produces feelings of reward—the same area of the brain involved in drug addiction.50 Individuals may thus derive

43. Id. Indeed, a study of five to eight-year-old children indicated that the children liked “the victim of a theft more if the thief who committed the act was punished, compared to when the thief went unpunished.” Bregant et al., supra note 39, at 1182. That is, punishment validated the victim.
44. McBride, supra note 40, at 9 (observing that a “dominant theme in punishment literature examines how the process of punishment is used as a tool of social cohesion”).
45. Dan Kahan notes, for example, that “by infusing a law with meanings that affirm a person’s worldview, [legislators] diminish the status anxiety that might otherwise have caused that person to resist its adoption.” Kahan, Cognitively Illiberal, supra note 32, at 149. Political theorist Keally McBride argues that administering such punishment builds social cohesion, observing, “[t]he power of the community is expressed when it punishes; the members of the community bond through their imposition of pain upon outsiders.” McBride, supra note 40, at 9.
47. McBride, supra note 40, at 9 (observing that on the playground, “punishment is necessary for the existence of the group, not because of the inevitability of crime,” but that the modern state does not ordinarily “punish simply because it can—rather, it must punish in the name of a value or ideal”).
48. See, e.g., Molly J. Crockett, Comment, Moral Outrage in the Digital Age, 1 Nature Hum. Behav. 769, 769–71 (2017) (“Moral outrage is a powerful emotion that motivates people to shame and punish wrongdoers. Moralistic punishment can be a force for good, increasing cooperation by holding bad actors accountable. But punishment also has a dark side—it can exacerbate social conflict by dehumanizing others and escalating into destructive feuds.”) (footnote omitted); Keith Jensen, Punishment and Spite, the Dark Side of Cooperation, 365 Phil. Transactions Royal Soc’y B 2635, 2645 (2010) (observing that the “dark side of human nature,” which can include spiteful punishment, “may not only be a shadow of the light side, but may be integral to the foundation of large-scale cooperation”).
pleasure from imposing punishment on others even when imposing
punishment makes the punisher worse off.51

This psychological dimension corresponds to some descriptions of the
retributivist purpose of punishment. Nietzsche argues that cruelty—and the
satisfaction some derive from it—is the point of punishment.52 Even Oliver
Wendell Holmes agreed that at least in some cases, punishment “is inflicted
for the very purpose of causing pain” and “one of its objects is to gratify the
desire for vengeance.”53 And the anger and moral outrage that fuels demand
for punishment can be manipulated.54 Research has tantalizingly suggested
that the act of punishment itself reinforces perception of harm.55 Cultural
cognition studies further show that people associate behavior contrary to
their moral norms with socially detrimental consequences.56

neuroscientist [https://perma.cc/M8UY-S48X]. In other work, Crockett documents how social media
stokes these feelings of moral outrage, observing that “expressions of outrage and contempt may help to
maintain a positive group image in response to group threat by derogating the out-group.” William J.
Brady, Molly J. Crockett & Jay J. Van Bavel, The MAD Model of Moral Contagion: The Role of
Motivation, Attention, and Design in the Spread of Moralized Content Online, 15 PERSPS. PSYCH. SCI.
978, 986 (2020).

51. Goldhill, supra note 50. “In both primates and humans, serotonin function tends to covary
positively with prosocial behaviors such as grooming, cooperation, and affiliation, and tends to covary
negatively with antisocial behaviors such as aggression and social isolation.” Jenifer Z. Siegel & Molly
J. Crockett, How Serotonin Shapes Moral Judgment and Behavior, 1299 ANNALS N.Y. ACAD. SCI. 42, 42
(2013). Other studies indicate that in lab experiments, there may be two different kinds of punishment:
punishment enforcing group norms that punishes unfairness directed at others, and punishment avenging
unfair behavior directed at the punisher. Yan Wu, Hongbo Yu, Bo Shen, Rongjun Yu, Zhiheng Zhou,
Guoping Zhang, Yushi Jiang & Xiaolin Zhou, Neural Basis of Increased Costly Norm Enforcement Under
Adversity, 9 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 1862, 1869–70 (2014).

52. 10 FRIEDRICH WILHELM NIETZSCHE, A Genealogy of Morals, in THE WORKS OF FRIEDRICH
stated:

[The anger of the community] plunges [the wrongdoer] back into the wild, out-law condition,
against which so far protection had been granted him. Community repudiates him, and now all
sorts of hostilities may wreak themselves upon him. ‘Punishment,’ in this stage of civilisation,
is simply the image, the minus of normal conduct, as manifested towards a hated, disarmed and
cast-down enemy, who has forfeited not only all privileges and all protections, but even every
claim to mercy; it is, therefore, the martial law and triumphal celebration of the vae victis! with
all its unrelentingness and cruelty . . . .

Id. at 85–86.


54. Indeed, researchers describe “affective group polarization,” as involving “intense, negative
attitudes toward the political outgroup.” Jordan Carpenter, William Brady, Molly J. Crockett, René Weber
& Walter Sinnott-Armstrong, Political Polarization and Moral Outrage on Social Media, 52 CONN. L.
REV. 1107, 1109–10 (2021).

55. Bregant et al., supra note 39, at 1202 (“[P]eople . . . infer that a punished act is more morally
wrong and more disgusting than an act that is not punished.”). Indeed, the authors report that “apparently
harmless violations are not really perceived as harmless at all”; instead, “subjective harm is imputed even
when the scenarios are written to foreclose the possibility of objective harm.” Id. at 1188.

56. Kahan, Cognitively Illiberal, supra note 32, at 115.
Precisely because the administration of punishment reinforces social standing at both the individual and the group level, it has implications that go beyond the punishment administered to any particular individuals. The decisions about which punishments to implement (such as firing an employee who refuses to be vaccinated or imposing work requirements as a condition of eligibility for state subsidized health insurance benefits) can create group-based winners and losers, elevating the status of one group at the expense of another. Yet, denying the legitimacy of such demands for punishment—or imposing them too harshly—can also undermine respect for law.

This leads to the third role of judicial oversight of punishment: mediating conflicts that involve the authority of different governmental actors to impose punishment. In the United States, for example, the Supreme Court has overseen evolving conflicts between the states and the federal government in the administration of family law. The U.S. Constitution has historically been viewed as entrusting family law to the states, but the Supreme Court has selectively intervened, at times to enhance or restrain state authority to impose punishment. In Stanley v. Illinois, for example, the Supreme Court held that Illinois could not treat Peter Stanley as an unfit parent—and thus deprive him of standing to seek the custody of his children after their mother’s death—solely because he had not married the mother. The Court intervened to limit the power of the state to punish unmarried fathers, at a time when attitudes were changing toward unmarried relationships.

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57. See, e.g., Kristen Underhill, “Everybody Knows I’m Not Lazy”: Medicaid Work Requirements and the Expressive Content of Law, 20 YALE J. HEALTH POL’Y. L. & ETHICS 225 passim (2021) (describing perceptions that the poor are lazy as a reason to oppose Medicaid expansion).

58. E.g., Deborah Tuerkheimer, Criminal Justice and the Mattering of Lives, 116 MICH. L. REV. 1145, 1164 (2018) (addressing the need to balance appropriate punishment and the deterrent and expressive goals of criminal law).


61. Id. at 650 (“[T]he State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law.”). The State of Illinois argued that to earn equal status with a child’s mother, a father must demonstrate his commitment to the family by marrying the mother. See Serena Mayeri, Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality, 125 YALE L.J. 2292, 2313 (2016).

62. “We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.” Stanley, 405 U.S. at 649.
Finally, the courts have historically overseen punishment in order to channel vengeance into socially constructive venues. The failure to punish perceived wrongs may persuade wronged individuals or groups to “take the law into their own hands” or to impose punishments out of proportion to the wrongful act. The courts, in contrast, are supposed to act “judiciously” in administering punishment in a neutral manner, not just on behalf of the wronged individual, but because the assertion of the moral values of the social order can contribute to a sense of social order and cohesion.

The challenge of serving these four roles increases as social norms change. The tension between maintaining order and imposing destabilizing punishments is particularly difficult if some social groups reject the norms, while others respond to the increasing defiance of the first group by calling for greater punishment as violations increase. The imposition of punishment thus involves an “ever-shifting relationship between a regime and a given population that makes up the most essential element in any political order.”

These four roles make the administration of punishment central to the rule of law. They are also evident as a longstanding aspect of Supreme Court jurisprudence. Yet, managing the tensions between these objectives can undermine as well as maintain social cohesion. Congress and various state legislatures, for example, have attempted to shift norms surrounding intimate relationships by changing the laws governing sexual assault to make date rape easier to prosecute. Imposing more serious penalties, however, may

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63. For a discussion on the rationales for the state monopoly on “revenge” and societies where victims “take the law into their own hands,” see Bilz, supra note 42, at 1094–96, discussing why vigilantism, or more colloquially, “taking the law into your own hands” is more prevalent in some cultures than in others. Id. at 1072 (describing the problem of “over-enforcement,” and maintaining that “[i]n a regime where victims have a taste for retribution, wrongdoers will be sanctioned more harshly than they deserve (from the standpoint of the amount of harm they inflicted on their victims”).


65. McBride, supra note 40, at 12 (noting that such punishment can be “destabilizing, creating resistance to and critique of a regime”).

66. Robert P. George & David A. J. Richards, The Twenty-First Amendment: Common Interpretation, NAT’L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xxi/interpretations/151 [https://perma.cc/DL75-6375] (last visited Apr. 17, 2023) (critics believed that “the widespread flouting of Prohibition laws was undermining respect for law in general and encouraging an attitude of contempt for rightful authority”); see also Paul H. Robinson, The Ongoing Revolution in Punishment Theory: Doing Justice As Controlling Crime, 42 ARIZ. ST. L.J. 1089, 1107 (2010) (“[A] criminal justice system that has squandered its moral authority by regularly deviating from desert is one that is more likely to be ignored during the public conversation because its view may be discounted as just one more example of how the system gets it wrong.”).


make judges and juries more reluctant to convict—and failures to impose punishment can undermine, in turn, the efforts to shift norms and also lead victims to feel even more isolated and aggrieved.\textsuperscript{69} Expressing moral condemnation while keeping punishments commensurate with the perceived seriousness of the offenses thus requires walking a tightrope, one that sways with changing public sensibilities. Abortion, perhaps as much as if not more than any other issue, involves “irreconcilable disagreement” that challenges the legitimacy of the judicial system itself. The issues of punishment in the abortion context will test whether the judiciary generally, and the Supreme Court in particular, retain any capacity for guiding the recreation of shared social values.\textsuperscript{70}

\textbf{II. SEX AND PUNISHMENT: RECOGNIZING REPRODUCTIVE RIGHTS}

At the time \textit{Roe v. Wade} was decided in 1973, the Supreme Court was carefully navigating a revolution in sexual mores.\textsuperscript{71} Sexual morality presents a classic case for the expressive role of punishment,\textsuperscript{72} with punishment serving to reinforce what are seen as consensus-based moral values broadly shared by the public.\textsuperscript{73} Enforcing such norms also involves, however, punishment of private consensual conduct.

\textsuperscript{69} Id. (commenting on the “stickiness” of norms around rape).
\textsuperscript{71} Although \textit{Roe} had originally come to the Court during the same term as had \textit{Eisenstadt}, it returned for reargument, and the opinion was issued the subsequent year. Susan Frelich Appleton, \textit{The Forgotten Family Law of Eisenstadt v. Baird}, 28 YALE J.L. & FEMINISM 1, 8 (2016). \textit{Roe} was a direct appeal to the Court, as permitted by 28 U.S.C. § 1253 (2022). In a May 3, 1971 order, the Court postponed the question of jurisdiction to the hearing on the merits. \textit{Roe v. Wade}, 402 U.S. 941 (1971).
\textsuperscript{73} Devlin argued that the determination of moral standards is embedded in community views and traditions rooted in “common sense.” Devlin, \textit{supra} note 72, at 14. Dan Kahan observes, however, that such views reflect the different values orientations of those who favor hierarchy and tradition rather than egalitarian values; in other words, as things change they become points of cultural division rather than consensus-based views. Kahan, \textit{Cognitively Illiberal}, \textit{supra} note 32, at 131.
This Part shows how the Supreme Court focused on the acceptability of punishment as a rationale for state action rather than on the changing norms themselves. It did so through a series of cases that addressed contraception, nonmarital children’s legitimacy status, welfare benefits, parentage—and ultimately abortion—though the lens of punishment for sexual conduct. Within this new jurisprudence, the Court carved out a right to privacy that did not address the propriety of intimate conduct, but rather evaluated the permissibility of state action designed to shape private conduct.

A. CONTRACEPTION AND THE PROPRIETY OF PREGNANCY AS PUNISHMENT FOR SEX

Starting with *Griswold v. Connecticut*\(^7^4\) in 1965, the Supreme Court began to strike down legislation that regulated sexuality in ways that the Court deemed needlessly punitive. In doing so, the Court never waged a frontal assault on the moral order that channeled sexuality into marriage.\(^7^5\) Instead, the Court examined the rationales underlying the laws and the consequences of imposing punishment.

*Griswold* addressed the constitutionality of a law that forbade the use of contraception. Anthony Comstock had spearheaded prohibition of contraceptives in the nineteenth century, convinced that they “facilitate[d] immoral conduct” because they “reduce[d] the risk that individuals who engage[d] in premarital sex, extramarital sex, or prostitution [would] suffer the consequences of venereal disease or unwanted pregnancy.”\(^7^6\) Comstock persuaded Congress to outlaw “print and pictorial erotica, contraceptives, abortifacients, information about contraception or abortion, sexual implements and toys, and advertisements” in 1873\(^7^7\) and the states adopted their own “Little Comstock laws” thereafter.\(^7^8\) Connecticut’s statute, adopted

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in 1879,\textsuperscript{79} was one of the most restrictive, banning not just the advertising and sale of contraceptives, but also the use of contraception.\textsuperscript{80}

The Court framed the case as one against defendants who “gave information, instruction, and medical advice to married persons as to the means of preventing conception.”\textsuperscript{81} In resolving the matter, the Court conceptualized a right to privacy, a right that justified looking the other way at sexual conduct. The Court wrote that “[w]e deal with a right of privacy older than the Bill of Rights older than our political parties, older than our school system.”\textsuperscript{82} The Court did not mention married couples’ efforts to limit the number of children they had directly, although it did refer to the marital relationship as “intimate to the degree of being sacred” and suggested that enforcing a ban on contraceptive use would have “a maximum destructive impact upon [the marital] relationship.”\textsuperscript{83} By contrast, the Court acknowledged the validity of the state’s purported rationale for the regulation: “the discouraging of extra-marital relations.”\textsuperscript{84} While the Court stated that this rationale “is admittedly a legitimate subject of state concern,”\textsuperscript{85} banning contraceptive use by married couples was simply too far removed from the purported subject of the statute to pass constitutional muster.\textsuperscript{86} The Court suggested that the state could regulate the manufacture or sale of contraceptives but not their use within marital unions.\textsuperscript{87} In short, the Court focused on the ugliness of enforcement\textsuperscript{88} rather than on the


\textsuperscript{80} Section 53–32 of the General Statutes of Connecticut (1958 rev.) provided that “[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” Griswold v. Connecticut, 381 U.S. 479, 480 (1965). Section 54–196 further stated that “[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.” Id.

\textsuperscript{81} Id. at 480 (emphasis in original).

\textsuperscript{82} Id. at 486.

\textsuperscript{83} Id. at 485–86 (“[I]n forbidding the use of contraceptives rather than regulating their manufacture or sale,” the statute has “a maximum destructive impact upon [the marital] relationship.”).

\textsuperscript{84} Id. at 498.

\textsuperscript{85} Id.

\textsuperscript{86} The Court stated that the “rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception . . . .” Id.

\textsuperscript{87} Id. at 485.

\textsuperscript{88} Id. at 485–86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).
permissibility of the underlying conduct—the use of contraception.\footnote{89}{The Griswold decision was not particularly controversial. Public opinion polls not long after the decision found that more than 80\% of Americans supported birth control, including 78\% of Catholics. Stone, supra note 76, at 78.}

Connecticut did not often enforce its ban on married couples’ contraceptive use, but the fact that the law was on the books effectively limited the ability to use contraception to those with access to doctors and pharmacists.\footnote{90}{Indeed, John Hart Ely, Chief Justice Earl Warren’s clerk at the time, wrote in a memorandum to Warren, that it was women without adequate financial resources who were the ones most in need of birth control, and that while “[c]linics are of course the answer . . . it is only against the clinics that the law is enforced . . . Thus, those who need birth control most are the only ones who are denied it.” Cary Franklin, The New Class Blindness, 128 YALE L.J. 2, 33–34 (2018).}

While the Griswold decision did not mention the issue,\footnote{91}{The briefs, however, did raise the issue. See Brief for Appellants at 70–71, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) (“Since the statutes are not generally enforced or enforceable, they can only be applied to individuals in an arbitrary fashion.”).} a major reason for challenging the ban on contraception was the unequal nature of contraceptive access.\footnote{92}{See Franklin, The New Class Blindness, supra note 90, at 26 (observing that “[d]isadvantaged women were foremost in the minds of the advocates who challenged Connecticut’s birth control ban in Griswold.”). In a retrospective on Griswold, a curator of the Smithsonian Institution told of her own mother’s efforts to secure contraception—so that she could limit her family to four. She observed that for most of the twentieth century, “[a]ccess to information about safe and effective contraception, like how to use condoms, was hidden to many, yet accessible to predominantly white, middle-class men and women.” Alexandra M. Lord, The Revolutionary 1965 Supreme Court Decision That Declared Sex a Private Affair, SMITHSONIAN MAG. (May 19, 2022), https://www.smithsonianmag.com smithsonian-institution/the-revolutionary-1965-supreme-court-decision-that-declared-sex-was-a-private-affair-180980089 [https://perma.cc/KDSL-3RWN].} By striking down criminal penalties for contraceptive sales, the Court effectively allowed doctors and clinics to make contraception more broadly available. The implicit principle at the core of this decision was that, while the state could steer sexuality into marriage, it could no longer seek to ensure that pregnancy be the unavoidable consequence of sexual relationships.

\textit{Eisenstadt v. Baird,}\footnote{93}{Eisenstadt v. Baird, 405 U.S. 438, 442 (1972).} decided in 1972, expanded the principle—that pregnancy was an unreasonable punishment—beyond marriage. \textit{Eisenstadt} struck down a Massachusetts statute that prohibited supplying contraception to single, as opposed to married, individuals. As in its decision in \textit{Griswold}, the Court “conceded” that “the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as ‘(e)vils.’”\footnote{94}{Id. at 448.} Nonetheless, it concluded that this could not be the purpose of the Massachusetts legislation because it “would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the
birth of an unwanted child as punishment for fornication." The Court acknowledged, as it did in Griswold, that notwithstanding the law, contraceptives are widely available, and thus "the rationality of this justification is dubious." By 1977, the Supreme Court was willing to say that the state could not prescribe pregnancy as the punishment for sex even where the state had a clear interest in discouraging sex between minors. In striking down a state law that prohibited selling contraceptives to minors under the age of sixteen, the Court noted the state interest in regulating the "morality of minors" in its efforts to promote "the State's policy against promiscuous sexual intercourse among the young." Again, however, the Court accepted the legitimacy of the state interest, but rejected the connection between such a state interest and the prohibition on sales of contraceptives to minors. The Court observed that, "with or without access to contraceptives, the incidence of sexual activity among minors is high, and the consequences of such activity are frequently devastating," but observed that there was little evidence that banning contraception had much impact. The Court thus concluded that the state could not promote an otherwise legitimate objective—discouraging "promiscuous sexual intercourse among the young"—by making pregnancy the punishment for sex and criminalizing efforts to avoid the consequences. And it emphasized that the justification for banning contraceptive sales became that much weaker as the evidence mounted that the laws on the books did not have the desired effect. It thus concluded that the "punishment" (pregnancy) did not serve the interests of either deterrence (teens with still have sex) or an appropriate desert (a child) for a wrongful act.

B. PUBLIC RECOGNITION AND THE REMOVAL OF THE SCARLET LETTER FROM CHILDREN

The Supreme Court relied on similar reasoning in dismantling the distinctions between "legitimate" and "illegitimate" children, with the Court ultimately concluding that the states could not seek to channel childbearing into marriage by punishing children for their parents' conduct. In the "seminal" case of Levy v. Louisiana, the Court considered a Louisiana law that restricted the ability to bring a tort action for the wrongful death of a

95. Id.
96. Id.
98. Id. at 696 (footnotes omitted).
99. Id. at 692 (rejecting New York's purported objective of discouraging teen promiscuity).
parent to “legitimate children.” As a result, an unmarried mother’s five children, who lived with her, and whom she raised on her own earnings, had no right to sue for their mother’s allegedly wrongful death. The Court, in striking down the statute in a brief opinion, observed that the Court could imagine no reason “why, in terms of ‘equal protection,’ should the tortfeasors go free merely because the child is illegitimate?” The Court reasoned that the circumstances of the birth had “no relation to the nature of the wrong allegedly inflicted on the mother;” the children, “though illegitimate, were dependent on her.” The Court even recounted how the mother in the Levy case supported her children by working as a domestic servant, “taking them to church every Sunday and enrolling them, at her own expense, in a parochial school.” In this opinion, the Court identified no countervailing state interest; the children were deprived of the right to sue for the loss of their mother simply because of the circumstances of their birth.

The Supreme Court in Levy did not mention the issue of race, but amicus briefs filed in the case emphasized that, particularly in Louisiana, the distinctions between marital and nonmarital children had a significant racial impact. Indeed, an amicus brief filed by Illinois law professor Harry Krause (and others) argued explicitly that the statute “discriminates on the basis of race.” The brief maintained that the discrimination stemmed partly from the fact that “disproportionately more Negro children than white children are born out of wedlock,” and, partly from the fact that “a high percentage (70%) of white illegitimate children are adopted . . . whereas very few (3-5%) Negro illegitimates find adoptive parents.” As a result, “95.8 percent of all persons affected by discrimination against illegitimates under the statute are Negroes.” The brief concluded, “the classification of illegitimacy . . . is a euphemism for discrimination against Negroes.”

Louisiana denied that it sought to punish the children for immorality in sexual behavior, but it nonetheless maintained that it sought to encourage marriage. And the state asserted: “If the community grants almost as much respect for non-marriage as for marriage, illegitimacy increases” and that

103. Id. at 72.
104. Id. at 70.
106. Id. at 18–19.
107. Id. at 6.
108. Id.
109. Brief for the Attorney General, State of Louisiana as Amicus Curiae Supporting Respondent at 4–5, Levy v. Louisiana, 391 U.S. 68 (1967) (No. 508), 1968 WL 112828, (noting its goal was “the preservation of the legitimate family as the preferred environment for socializing the child”).
“illegitimate daughters tend to err in the manner of their illegitimate mothers, producing more illegitimate children.” In short, Louisiana did argue that it was necessary to punish the children to deter their parents, if not quite in so many words. And the children who would be punished as a result were overwhelmingly Black. Louisiana’s efforts to punish nonmarital births thus reinforced a racial as well as moral line, though the majority opinion for the Court did not directly address the racial issue.

In subsequent cases, the Court made the role of punishment even more explicit. In 1972, the Court reaffirmed Levy in striking down a Louisiana statute that defined “child” so that only marital children were eligible for insurance benefits resulting from their father’s death. Justice Powell’s majority opinion held that the “status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage,” but still concluded that imposing “this condemnation on the head of an infant is illogical and unjust.” Powell concluded that the distinction between marital and nonmarital children was not justified by any state interest.

In 1977, the Court revisited the issue of inheritance, invalidating an Illinois statute that permitted nonmarital children to inherit only from their mothers, not their fathers. In a 5-4 decision, Justice Powell reiterated that “visiting this condemnation on the head of an infant is illogical and unjust.” He emphasized that, while the parents’ behavior might have been immoral, that was not the fault—nor the responsibility—of the children. The opposition to the punishment of children commanded a majority of an even more conservative Court than the Warren Court that had initially struck down such classification.

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110. Id. at 7.
113. Id. at 175 (emphasizing that “no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent”).
114. Id. at 176.
115. In 1971, the Court had upheld a Louisiana statute that allowed marital, but not nonmarital, children to inherit from their fathers pursuant to the state’s intestate succession provisions in 1971 because of the difficulties of establishing paternity. Labine v. Vincent, 401 U.S. 532, 533 (1971); see Mayeri, Marital Supremacy, supra note 111, at 1303 (observing that Blackmun, though sympathetic to the claims of the child in the case, who had been acknowledged by her biological father, had concerns about “spurious claims” and the “difficult aspect of proving paternity”).
117. Id. at 769–70 (quoting Weber, 406 U.S. at 175) (“The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents’ conduct nor their own status.”).
118. The following year, however, in Lalli v. Lalli, 439 U.S. 259, 267 (1978), the Supreme Court distinguished Trimble and upheld a New York statute that prevented nonmarital children from inheriting
C. THE RIGHT TO ABORTION: PART I

The Supreme Court’s 1973 decision in Roe v. Wade situated the case within the punishment lens the Court had constructed to deal with reproductive rights more generally. The case never squarely fit there, however, because abortion did not just involve the regulation of sexual behavior between consenting partners; it also raised issues about the involvement of the medical profession and the status of the fetus. Nonetheless, the Court framed the decision as a right centered on the irrationality of the state prescription of childbirth as a way to prevent illicit sex and a jurisprudence conscious of the consequences, intended and unintended, of regulating sexual morality. It thus treated laws banning abortion as imposing punishment—on the pregnant for incurring an unwanted pregnancy, on doctors for exercising medical judgment in treating patients, and on those who felt compelled to seek illegal abortions in unsafe circumstances.

Among the telling aspects of this analysis is the way the Court articulated the state interests at stake. The Court identified the first such interest as one based on “a Victorian social concern to discourage illicit sexual conduct.”119 Curiously, though, the Court acknowledged that Texas did not articulate that justification in Roe, and it appeared that courts and commentators had not actually taken the argument seriously.120 On the other hand, however, the Comstock laws, which banned abortifacients along with pornography and contraception, treated the regulation of sexual morality as of a piece with abortion.121 The Court thought the connection between an abortion ban and the regulation of morality sufficiently important to mention—and dismiss.

Second, the Court acknowledged that forcing a woman to carry an unwanted pregnancy to term is cruel.122 It referred to the burdens of pregnancy and childbirth, including the possibility that childbirth “may force upon the woman a distressful life and future,” her “[m]ental and physical health may be taxed by child care,” and the unwanted child may cause “distress, for all concerned.”123 The opinion acknowledged the hardship involved in bringing a child into a family that could not care for the child,

from their fathers where paternity had not been established during the father's lifetime. The Court distinguished Trimble on the ground that the purpose of the statute was “evidentiary,” not punitive. Lalli, 439 U.S. at 267.
120. Id.
121. See supra notes 76–80 and accompanying text (discussing adoption of Comstock laws).
123. Id.
and the potential for stigmatizing a nonmarital mother.\textsuperscript{124} The Court accordingly echoed earlier cases treating avoidable pregnancy and childbirth an inappropriate way to advance state purposes because of the burden imposed.

Third, the Court was aware that the states often brought criminal actions against doctors.\textsuperscript{125} One of the parties in \textit{Roe}, Dr. James Hubert Hallford, allegedly had faced prosecutions for violations of the Texas abortion statutes.\textsuperscript{126} Hallford maintained that the applicable statutes were unconstitutionally vague because he could not determine whether his patients’ situations would qualify as exceptions to the abortion ban,\textsuperscript{127} so he faced punishment for exercising a good faith medical judgment about his patients’ therapeutic needs. Justice Blackmun’s initial draft proposed striking down Texas’s anti-abortion law as unconstitutional only on the grounds that it was void for vagueness.\textsuperscript{128} The punishment that doctors faced in making delicate judgements was clearly a factor in the subsequent \textit{Roe} decision and in its declaration that abortion decisions should be left to “the woman and her responsible physician.”\textsuperscript{129}

Fourth, the Court dismissed state assertions that banning abortion was necessary to protect women’s health, observing that mortality rates during the first trimester of pregnancy “appear to be as low as or lower than the rates for normal childbirth” in contrast with the “prevalence of high mortality rates at illegal ‘abortion mills.’”\textsuperscript{130} While less explicit than the Court’s acknowledgment of the burdens of pregnancy, the Court recognized that resort to unsafe abortions was a punitive consequence of the prohibition of legal abortions.

In the background of the case, states’ law on abortion had begun to change, with some states repealing their anti-abortion statutes entirely and others reforming their law to expand the availability of therapeutic

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\textsuperscript{124} \textit{Id.} Indeed, Justice Powell appears to have been influenced by a lower court opinion that held that in the context of an unwanted pregnancy, “the right to an abortion is of even greater concern to the woman than the right to use a contraceptive protected in \textit{Griswold}.” Garrow, \textit{How Roe v. Wade Was Written}, supra note 79, at 908.


\textsuperscript{126} \textit{Roe}, 410 U.S. at 120–21.

\textsuperscript{127} \textit{Id.} at 121.

\textsuperscript{128} Garrow, \textit{How Roe v. Wade Was Written}, supra note 79, at 905. An earlier case, United States v. Vuitch, 402 U.S. 62, 72 (1971), had upheld an abortion statute challenged on vagueness grounds declaring that the statute’s promulgation of a “health” exception was not unconstitutionally vague so long as “health” was correctly understood to cover a pregnant woman’s “psychological as well as physical well-being.”

\textsuperscript{129} \textit{Roe}, 410 U.S. at 153.

\textsuperscript{130} \textit{Id.} at 149–50.
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aborts.\textsuperscript{131} A practical consequence was that, as with contraception, the availability of abortion, particularly safe abortion, differed significantly by race, location, and class.\textsuperscript{132} Partly as a result, women of color were substantially more likely—by some estimates twelve times more likely—\textsuperscript{133} to die from illegal abortion than white women.\textsuperscript{134}

In limiting the state ability to restrict abortion, the Court treated these restrictions as imposing impermissible penalties on those seeking abortion. The penalties were not so much the criminal sanctions themselves; these were rarely imposed on the individuals who secured abortions.\textsuperscript{135} Instead, states banning abortion were making childbirth the consequence of unprotected sex—and the risk of death the price of seeking an illegal abortion. The Court found that unacceptable. And while the Court recognized the state interest in protecting fetal life, it balanced that interest against the woman’s interest in deciding whether to give birth. Fetal life, as an interest separated from the sexuality (and women’s bodies) that produced it, would become more prominent as an issue only after \textit{Roe} was decided.\textsuperscript{136}

In these cases, the Supreme Court helped oversee a shift in sexual mores during a period where nonmarital sexuality was becoming more common and accepted. In focusing on the acceptability of the punishment, the Court did not endorse the changes directly; instead, it addressed the rationality of widely violated restrictions that imposed serious, arbitrary and
discriminatory harms. The Court’s use of the term “punishment” was not, however, consistent or the subject of a coherent jurisprudence. Sometimes, it referred to the state rationales (deterring sex by limiting access to contraception, making pregnancy the “punishment” for fornication), sometimes it referred to the intrusive nature of criminal enforcement (searching the marital bedroom) rather than the imposition of criminal sanctions, and sometimes it considered the collateral consequences of government action (the stigma and limitations associated with nonmarital births). In the process, however, the Court used the punishment lens to oversee a wholesale effort to strike down what it saw as the outdated remnants of “Victorian” sexual mores without disavowing the legitimacy of state efforts to channel sexuality into marriage.

III. PUNISHING PARENTS

The era that produced Roe involved overlapping interests reducing the support for a punitive approach to sexual morality: a change in sexual norms, a remaking of women’s roles, and more urgent calls for racial equality. In addition, the parties were less ideologically polarized, with greater elite consensus.

Nonetheless, by the mid-seventies, another jurisprudential revolution was taking place: one embedding a neoliberal view of the state into Supreme Court jurisprudence. The Warren Court had been sympathetic to calls not just for racial equality, but also for greater economic rights. These claims often took the form of calls to treat government benefits as entitlements, with more equal access to the benefits and more obstacles to denying eligibility. The neoliberal era taking hold by the late seventies

137. See Siegel, supra note 125, passim (explaining how the push to eliminate abortion bans changed from an emphasis on granting doctors more autonomy in medical decision-making to a call for women’s rights); Murray, supra note 132, at 2048 (observing that “in the period before Roe v. Wade was decided, the discourse surrounding abortion rights was diverse and multifaceted, reflecting concerns about the environment, the breadth of criminal regulation, sex equality, racial and class injustice, and intersectional claims that implicated both race and sex discrimination”).

138. By the time Roe was decided, the Warren Court had given way to the more conservative Burger Court, but Roe was still a 7-2 decision with a Democratic appointee (White) and a Republican appointee (Rehnquist) in dissent.


140. See Adam Cohen, Supreme Inequality: The Supreme Court’s Fifty-Year Battle for a More Unjust America xvi, xxii–xxiii (2020) (tracing the expansion of the due process rights of public welfare recipients); Naomi Cahn & June Carbone, The Blue Family Constitution, 35 J. AM. ACAD. MATRIM. LAWS. 505 (2023) (documenting the Court’s approach to public welfare over the past century).
rejected these claims. The Court embedded this perspective in the same way it had overseen the change in sexual mores: by using the punishment lens to resolve issues that involved farther reaching clashes in values. The Court did so by denying the very fact of punishment. It concluded that if a given regulation did not penalize the individuals subject to it for protected activity, no constitutional issue arose at all. In the process, the Court upheld regulations that supervised poor women’s sexuality and denied access to abortion funding.

This Section focuses on how the punishment lens applies in more varied civil settings, tracing the evolution of the Court’s treatment of government benefits. The first part of this Section describes how the Court deemed public benefit requirements non-punitive in order to uphold limitations on government benefits under the Aid to Families with Dependent Children (AFDC) and Medicaid programs; the second part of the Section shows how the punishment lens applies outside of the sexual-morality context, analyzing how it has been used to limit access to benefits under the Affordable Care Act.

A. WELFARE BENEFITS AND THE REJECTION OF POSITIVE RIGHTS

In the 1960s, the Supreme Court addressed the relationship between sexuality and eligibility for government benefits during a period in which the Court was enhancing access to government benefits more generally. The original Aid for Dependent Children (ADC) program was adopted in the 1930s as part of the New Deal’s far-reaching social legislation. The United States, unlike many European nations, had never adopted a universal system of family allowances to support childrearing but instead had a variety of state programs designed to provide widows’ pensions to support children who would otherwise land in orphanages because their mothers could not support them. In the 1930s, Congress nationalized these efforts, providing federal funding for a state-run system to compensate for the loss of a male breadwinner. Congress limited aid to children who had “been deprived of parental support or care by reasons of the death, continued absence from the home, or physical or mental incapacity of a parent” and allowed the states to impose additional eligibility standards, such as “moral character”

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142. June Carbone, From Partners to Parents: The Second Revolution in Family Law 200 (2000) (observing that by 1919, thirty-nine states and the territories of Alaska and Hawaii had authorized programs providing direct funds that allowed children to stay with their parents rather than go to orphanages).
requirements that excluded the children of unmarried parents from the program.\textsuperscript{144}

As early as the 1940s, critics argued that the moral requirements “were habitually used to disguise systematic racial discrimination; and that they senselessly punished impoverished children on the basis of their mothers’ behavior.”\textsuperscript{145} The federal government sought to discourage the moral requirements.\textsuperscript{146} By the late 1960s, the states had shifted from outright prohibition of benefits to “man in the house rules” that deemed the income of a man who cohabited with a welfare recipient to be available to the family, thereby affecting the family’s qualification for public welfare.\textsuperscript{147} These regulations were understood to serve the dual purpose of punishing African Americans and privatizing dependency by withholding public benefits from nonmarital families.\textsuperscript{148}

In \textit{King v. Smith}, the Supreme Court examined the punitive nature of these requirements. The Court sidestepped the constitutional issues in the case, striking down the Alabama regulation at issue on statutory grounds, noting that federal law precluded states from denying public welfare to children because “of their mothers’ alleged immorality or to discourage illegitimate births.”\textsuperscript{149} The Court concluded that “Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC.”\textsuperscript{150} Justice Douglas’s concurrence, however, would have reached the constitutional

\textsuperscript{144} CARBONE, supra note 142, at 201.


\textsuperscript{146} In 1960, Louisiana enacted legislation requiring, as a condition precedent for AFDC eligibility, that the home of a dependent child be “suitable,” and specifying that any home in which an illegitimate child had been born subsequent to the receipt of public assistance would be considered unsuitable. Louisiana Acts, No. 251 (1960). In the summer of 1960, approximately 23,000 children were dropped from Louisiana’s AFDC rolls [prompting federal action to override the action]. \textit{King}, 392 U.S. at 322.


\textsuperscript{148} CARBONE, supra note 142, at 202.

\textsuperscript{149} \textit{King}, 392 U.S. at 324.

\textsuperscript{150} \textit{Id}. at 325.
issue. He saw Alabama officials as discriminating against children on the basis of illegitimacy and therefore acting at odds with the ruling in *Levy v. Louisiana*, decided during the same term. He wrote that “the Alabama regulation is aimed at punishing mothers who have nonmarital sexual relations.” In administering the provisions, the “economic need of the children, their age, their other means of support, are all irrelevant. The standard is the so-called immorality of the mother.” He viewed that standard—and the attendant punishment—inflicted on the mother to be constitutionally impermissible.

By the time the Supreme Court decided the case in 1968, the nature of the AFDC program had changed. While 43% of the ADC caseload in 1937 consisted of widows, only 7% were in 1961. And as documented in an amicus brief in *Levy v. Louisiana*, decided the same term, the statute was both “overt discrimination on the basis of the criterion of illegitimacy,” and “covertly discriminate[d] on the basis of race.” The Court almost certainly saw the two cases as linked, although only Justice Douglas’s concurrence in *King* made the connection directly.

In deciding *King v. Smith*, the majority opinion, however, dealt with these issues only obliquely. Instead, it focused on the irrationality of the punishment imposed—the denial of benefits in a program intended to help children that would disproportionately disadvantage the very children the program was intended to help. The Court did not endorse a right to nonmarital sexuality. It did not discuss the discriminatory motive and

151. *Id.* at 334, 336 (Douglas, J., concurring).
152. *Id.* at 336 (Douglas, J., concurring).
153. *Id.*
154. The Supreme Court later addressed the constitutional issue more directly in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 621 (1973). The Court sustained an equal protection claim in which benefits “indispensable to the health and well-being of illegitimate children” were denied because of their parents’ marital status. *Id.*
155. CARBONE, supra note 142, at 202.
156. Brief for NAACP Legal Defense and Educational Fund, *supra* note 105, at 18–19. And Alabama’s record was egregious. “Between 1964 and 1966, Alabama’s substitute father regulation had resulted in the removal of 15,000 children from the rolls and the rejection of another 6,400 applications; [B]lack Americans like Smith comprised an estimated 97% of these cases.” *Tani, Administrative Equal Protection, supra* note 148, at 885 (citing Walter Goodman, The Case of Mrs. Sylvester Smith: A Victory for 400,000 Children, N.Y. TIMES, Aug. 25, 1968, at 29). The Court observed that by January 1967, “the total number of AFDC recipients in the State declined by about 20,000 persons, and the number of children recipients by about 16,000 or 22%.” *King v. Smith*, 392 U.S. 309, 315 (1968).
157. See *supra* notes 149–52 and accompanying discussion.
158. In subsequent cases, the Court would continue to strike down regulations involving statutory bans based solely on marital status. See, e.g., *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (finding the statutory bar to disability benefits for nonlegitimated nonmarital children born after the onset of an employee parent’s disability was not only not reasonably related to an otherwise valid governmental interest of preventing spurious claims but also contravened the equal protection provisions, but not
effect underlying the regulations. It did not recognize an affirmative “right” to federal benefits nor a right to privacy for benefit recipients. Instead, it focused solely on the legitimacy of the punishment, concluding that children could not be deprived of benefits in an effort to change their mothers’ conduct. It treated the man-in-the-house rules not as a rational effort to determine the resources available to the family, but as a subterfuge to continue morals regulation in the face of federal disapproval. The case was thus of a piece with the contraception and legitimacy cases in challenging irrational punishments: punishments that were irrational because once they failed to deter nonmarital sexuality in an era of changing mores, their application became a subterfuge.

In subsequent cases, however, the Supreme Court upheld provisions that burdened the poor and their children by deeming such provisions non-punitive. Thus, in Wyman v. James, the Court found constitutional a New York statute mandating home visits, that were in line with federal law’s requirements that aid be provided only after consideration of the family’s resources and only to children who were not being neglected. The “visits” could prove embarrassing in front of children and guests, and could serve to police sexual relationships. The Court refused to find that mandated visits

requirements tied to marital status that served purposes related to statutory purposes other than punishment of nonmarital sexuality. See, e.g., Mathews v. Lucas, 427 U.S. 495, 497 (1976) (upholding Social Security Act requirements that “condition the eligibility of certain illegitimate children for a surviving child’s insurance benefits upon a showing that the deceased wage earner was the claimant child’s parent and, at the time of his death, was living with the child or was contributing to his support”).

159. It did, however, acknowledge that “[c]ritics” had charged that the regulations were “used to disguise systematic racial discrimination.” King, 392 U.S. at 321–22.


161. See Wyman v. James, 400 U.S. 309, 311 n.2, 319 (1971) (upholding a New York law that required that social service workers remain in “close contact” with those on public assistance, directing that recipient “be visited as frequently” as necessary); Michael Grossberg, Some Queries About Privacy and Constitutional Rights, 41 Case W. Res. L. Rev. 857, 860 (1991) (discussing the Court’s class-based approach in Wyman). Lee Anne Fennell explains that Wyman “actually held that the ‘home visit’ was not a search at all, but rather a reasonable condition on receiving welfare (with no hint of the heightened scrutiny the Court would later apply to conditioned benefits in the property arena).” Lee Anne Fennell, Escape Room: Implicit Takings After Cedar Point Nursery, 17 Duke J. Const. L. & Pub. Pol’y 1, 24 (2022).

162. See Tani, Administrative Equal Protection, supra note 148, passim (describing a long history of federal-state tensions over the issue of morals requirements).

163. See Wyman, 400 U.S. 309; Grossberg, supra note 161, at 861 (discussing the Court’s class-based approach in Wyman).

164. Wyman, 400 U.S. at 315–16.

165. See Michele Estrin Gilman, Privacy as a Luxury Not for the Poor: Wyman v. James, in THE
were a penalty at all, terming them instead a condition of benefit eligibility,\textsuperscript{166} and not a substantive, much less punitive, standard tying loss of benefits to impermissible or arbitrary considerations.\textsuperscript{167}

The dissent objected on the grounds that welfare rights should be seen as entitlements.\textsuperscript{168} While both the majority and the dissent focused on the status of welfare benefits, Justice Blackmun’s majority opinion used the conclusion that the “conditions” on receipt of benefits were not penalties to lock in a neoliberal view of government action: because there is no right to benefits, the state could impose whatever standards it chooses as preconditions for eligibility, and those conditions never become punishment subject to constitutional scrutiny.\textsuperscript{169}

**B. PUNISHING SEX**

In subsequent cases, the Court’s characterization of a particular government action as non-punitive allowed it to uphold conditions that were challenged as discriminatory, cruel, or unjust. The results were particularly striking when the issue turned to abortion. Legislators who opposed abortion and who could not overturn \textit{Roe v. Wade} directly sought to express their disapproval of abortion by prohibiting the use of public funds to pay for abortions, while permitting those funds to be used for pregnancy and

\textsuperscript{166} See \textit{Wyman}, 400 U.S. at 317–18 (“If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be.”).

\textsuperscript{167} Indeed, Justice Blackmun’s majority opinion suggested that he thought the visits were warranted. Rather than take Barbara James’s blanket refusal to permit visits at face value, he observed that “[t]he record is revealing as to Mrs. James’ failure ever really to satisfy the requirements for eligibility; as to constant and repeated demands; as to attitude toward the caseworker; as to reluctance to cooperate; as to evasiveness; and as to occasional belligerency. There are indications that all was not always well with the infant Maurice (skull fracture, a dent in the head, a possible rat bite). The picture is a sad and unhappy one.” \textit{Wyman}, 400 U.S. at 322 n.9.

\textsuperscript{168} Justice Douglas began his dissent: “We are living in a society where one of the most important forms of property is government largesse which some call the ‘new property.’ ” \textit{Wyman}, 400 U.S. at 326 (Douglas, J., dissenting) (quoting Charles A. Reich, \textit{The New Property}, 73 \textit{Yale L.J.} 733, 737–39 (1964)). Douglas said explicitly that “[i]t becomes the task of the rule of law to surround this new ‘right’ to . . . benefits with protections against arbitrary government action, with substantive and procedural safeguards that are as effective in context as the safeguards enjoyed by traditional rights of property in the best tradition of the older law.” Id. at 334 (quoting Harry W. Jones, \textit{The Rule of Law and the Welfare State}, 58 \textit{COLUM. L. REV.} 143, 154–55 (1958)). He diverged from the majority in characterizing benefits as a “right,” making ineligibility a penalty for exercising a constitutional right, which was, in \textit{Wyman}, the right to privacy in the home protected by the Fourth Amendment. See \textit{Wyman}, 400 U.S. at 334.

\textsuperscript{169} “The penalty here is not, of course, invasion of the privacy of Barbara James, only her loss of federal or state largesse.” \textit{Wyman}, 400 U.S. at 327.
childbirth. \(^{170}\) Were these bans penalization of a constitutionally protected right—the right to elect abortion to terminate a pregnancy—or were they simply the exercise of legislative policy preferences to allocate public funds to support some activities and not others? The Supreme Court used the punishment lens to resolve the issue. Since individuals enjoyed no positive right to health care—or to abortion funding—the denial of funding could not constitute a penalty and thus had no constitutional implications. \(^{171}\)

An initial case upheld Connecticut regulations limiting public funding of abortions to medically necessary abortions during the first three months of pregnancy. \(^{172}\) Justice Powell wrote for the 6-3 majority that the Constitution did not impose any obligation on the states to pay pregnancy-related medical expenses of low-income women or any other medical expense. \(^{173}\) He noted that the Court had not found in previous cases that wealth was a suspect class \(^{174}\) and that Connecticut was accordingly free to subsidize childbirth and not abortion as an expression of state policy designed to encourage the former. \(^{175}\)

By 1980, Congress had gone further, adopting the Hyde Amendment, a prohibition on the use of federal funds to reimburse the cost of abortions under the Medicaid program, including abortions that were the result of rape or incest or medically indicated. \(^{176}\) In a 5-4 opinion later that year, the Supreme Court upheld the constitutionality of the Amendment. The majority opinion treated the issue as a classic one of negative liberty, explaining that the freedom to choose to have an abortion, even a medically necessary one, does not carry with it a government obligation to fund the abortion. \(^{177}\) It then

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170. See Franklin, The New Class Blindness, supra note 90, at 49 (discussing bans on Medicaid funding for abortion).
173. Id. at 469.
174. Id. at 471 (“But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).
175. Id. at 474. The Court insisted that “[t]he Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion” and, indeed, that “[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth” because she is free to rely on sources to obtain an abortion. Id. The Court even insisted that “influencing” the woman’s decision was permissible, concluding the “indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.” Id.
177. Id. at 316 (“[I]t simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”). The Court emphasized that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation.” Id.
explained that a woman’s poverty was “the product not of governmental restrictions on access to abortions, but rather of her indigency.”

Accordingly, the Court concluded that the failure to pay for abortions was not punishment and thus not subject to constitutional review.

The four dissenters viewed the Hyde Amendment as punitive and cruel. Justice Blackmun made the point that the legislators championing the Hyde Amendment cynically sought to express their own views on the morality of abortion by imposing those views “only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality.” He would have accordingly subjected the legislation to more exacting judicial review.

Justice Stevens emphasized that “the Court expressly approves the exclusion of benefits in ‘instances where severe and long-lasting physical health damage to the mother’ is the predictable consequence of carrying the pregnancy to term” and, indeed, “even if abortion were the only lifesaving medical procedure available.” He concluded that the result “is tantamount to severe punishment” for wanting an abortion.

Justice Marshall emphasized the racial impact of denying abortion funding and also noted that the Hyde Amendment resulted in “excess deaths.”

In Harris, the Court upheld the validity of an extraordinarily cynical statute. Congress, in effect, limited poor women’s abortion access because it could—it could allow expression of the anti-abortion sentiments of members of Congress at the expense of a relatively powerless group. By declaring that forced birth due to the failure to secure funding for an abortion was not a punishment, the Court avoided addressing the question of whether it burdened a constitutional right.

In Wyman and Harris, neither the majority nor the dissenting opinions treated these cases as imposing punishment for sex, and the majority opinions rejected even the premise that the aid recipients had been punished for the exercise of constitutional rights (privacy in Wyman, abortion in Harris). The reasoning in the cases backtracked on the entitlement language that had been building in the welfare rights era, leading to the conclusion that

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178. Id.
179. Id. at 332 (Brennan, J., dissenting).
180. Id.
181. Id. at 354 (Stevens, J., dissenting).
182. Id.
183. Id. at 340 (Marshall, J., dissenting).
184. The Court noted that Congress had “established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life.” Id. at 325.
if the benefits at issue were not entitlements, the failure to provide them could not be seen as punishment—effectively ending the discussion of whether the provisions at issue were unduly cruel or whether they reinforced class- or race-based social hierarchies.185

C. THE PUNISHMENT LENS BEYOND SEX

The litigation over the Affordable Care Act (ACA)186 involves the clash of values we have described in this Article and the use of the punishment lens to resolve some of the challenges. The ACA was the largest expansion of public largesse in a half century and therefore a direct challenge to neoliberal values. The legislation’s principle of universal health insurance coverage clashed with those who wished to limit government benefits altogether or to withhold them from those deemed unworthy, such as those who were not working, reinforcing class and racial hierarchies. In addition, by treating contraception as an integral part of women’s health care, the ACA conflicted with the views of some Christian employers who opposed contraception. The legislation thus involved, on a much larger scale, the clash of values underlying the characterization of government benefits in *Wyman* and *Harris*.

In the cases discussed in this Section, the Supreme Court returns to the issue of punishment, though without any more precise a definition of the concept. Instead, the Court repeatedly faced the question of whether the ACA provisions operated as a tax or a penalty, a condition or a penalty, and a provision of alternative means of compliance or a penalty, and used the characterization of the actions as penalty or not to resolve the cases.187 The net effect for the ACA was a compromise: the ACA endured but on somewhat more neoliberal terms than the Obama Administration and the Congress that enacted the legislation might have intended.188

185. See Jill E. Adams & Jessica Arons, *A Tragedy of Justice: Revisiting* *Harris v. McRae*, 21 WM. & MARY J. WOMEN & L. 5 *passim* (2014) (discussing the impact of *Harris* on low-income and minority women); Chemerinsky & Goodwin, supra note 16, at 1247 (describing racially disparate impact of limiting abortion access). *But see* Franklin, *The New Class Blindness*, supra note 90, at 63–65 (arguing that Planned Parenthood v. Casey, 505 U.S. 833 (1992), preserved the capacity to consider poverty as an obstacle to abortion at least where government restrictions directly obstructed access to abortion as opposed to the funding for abortion).


187. While the term “penalty” is not necessarily always identical to the term “punishment,” within the legal system, both terms can be used to identify the imposition of the prescribed consequences for legal violations. See United States v. La Franca, 282 U.S. 568, 572 (1931) (“[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.”).

188. The result in the cases we discuss below pushes the legal narrative toward more neoliberal norms, but without acknowledgment that outcome is the larger frame for the discussion. The overall result has been a devolution of power to the states that has increased regional disparities in health outcomes.
The ACA, in attempting to provide universal health care access, included a series of alternatives that were designed to balance the principles of expanded access, adequate funding, and reasonable private choice. In *National Federation of Independent Business v. Sebelius*, the most prominent of the ACA cases, the Court addressed two issues that turned on the concept of a penalty. The first involved the “individual mandate,” which required an individual who did not otherwise receive health insurance through their employers or other state provisions, to purchase health insurance on state exchanges or pay what the legislation described as a “penalty” collected by the Internal Revenue Service with the filing of individual tax returns. The Court rejected the government’s claim that the commerce clause authorized the mandate, but upheld it instead as a “tax.”

The Court reasoned that under the ACA, “if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes.” The Government accordingly argued that the mandate could “be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS.” Under this theory, the legislation does not establish “a legal command to buy insurance,” just a trigger for owing taxes, like “buying gasoline or earning income.” Therefore, the Court concluded that the ACA was within the Congressional tax power.

Critical to the Court’s reasoning was its decoupling of a requirement to buy insurance, which the Court concluded that Congress could not do, and a requirement to pay an amount, deemed by the Court a “tax,” intended to finance the program. In reaching this conclusion, the Court explained that “[i]n distinguishing penalties from taxes, this Court has explained that ‘if the concept of penalty means anything, it means punishment for an unlawful act or omission.’” The ACA mandate was not a penalty (or punishment)

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192. The Court was dismissive of the government’s defense of the ACA. See *Sebelius*, 567 U.S. at 558 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”).

193. Id. at 562–63.

194. Id. at 563.

195. Id.

196. Id. at 567 (citing United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)).
because while the mandate sought to incentivize health insurance purchases, it did not make the failure to do so “unlawful.” The fact that Congress sought to influence individual behavior did not matter, just as Congress’s efforts to encourage childbirth rather than abortion did not matter in Harris v. McRae; so long as the federal government did not outlaw the failure to buy insurance, the individual mandate was a tax, not a penalty (and not punishment for the failure to buy insurance). It was therefore constitutional.

The second issue the Court addressed was Medicaid expansion, which the Court again decided in terms of the acceptability of the Act’s “penalties.” Congress revised the existing Medicaid program, which is a federal-state partnership, to cover individuals within 138% of the poverty line, and to bring Medicaid coverage in line with the coverage health insurance policies offered on the exchanges. Congress then gave the states a choice: accept federal funding in accordance with the new expanded Medicaid program or forego federal Medicaid funding. The majority in Sebelius objected that the “choice” was too coercive, effectively mandating state participation in the program. It reasoned that while Congress could condition state eligibility for federal funding under a new program, it could not “penalize States that choose not to participate in that new program by taking away their existing Medicaid funding,” describing the “inducement” in the Act as “a gun to the head.” Justice Ginsburg’s dissent objected that Congress was, as it had done in the past, just requiring states to comply with “conditions” imposed by Congress to receive Medicaid funding.

The parallels between Sebelius and Wyman v. James are striking. The requirement that the states adopt Medicaid expansion in order to participate in the Medicaid program could have been described, as Justice Ginsburg wrote, as a condition for participation in a federally funded program. The

197. Sebelius, 567 U.S. at 567–68 (“While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful.”). The legal consequence was that the ACA was deemed simply to require that individuals who do not buy health insurance instead pay an amount to the IRS, not that their failure to buy the insurance was itself unlawful. Id. at 575 (noting that the federal government did not have the power to command people to buy health insurance, but did have the power to impose a tax).

198. Id. at 575.

199. Id. at 575–76.

200. Id. at 585–86.

201. The Court asked whether “the financial inducement offered by Congress” was “so coercive as to pass the point at which ‘pressure turns into compulsion.’ ” Id. at 580 (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)).


203. Id. at 581. The Court observed that “Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.” Id.

204. Id. at 626 (Ginsburg, J. dissenting).
Sebelius Court disagreed, finding that it penalized the states for the failure to agree to the program’s terms. The Court effectively treated the state’s existing funds as an entitlement the federal government could not threaten to take away in order to obtain the performance it sought. In Wyman, because welfare was not an entitlement, a welfare recipient’s failure to consent to intrusive home visits was not considered a penalty at all; it was labelled as “a condition of eligibility” to the continued receipt of benefits. The label—condition or penalty—resolved each case without engaging the substantive issue of whether the conditions themselves were reasonable or justified.

In Sebelius, the result cloaks the real issues underlying Medicaid expansion—skepticism about whether the poor merit medical benefits and opposition to the state role in meeting such needs. Indeed, the federal government picked up 100% of the initial costs associated with implementing the program, and 90% thereafter so that the financial burden on the states was relatively minimal—and less than the state share of the pre-ACA Medicaid program—and arguably much less of a burden on the states than asking a welfare recipient to consent to frequent, unannounced, and intrusive home visits (or the uninsured to go without health care).

205. Id. at 585; see also supra note 203 and accompanying text.
206. See Wyman v. James, 400 U.S. 309, 317–18 (“If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be.”).
207. See, e.g., Underhill, supra note 57, at 272–73.
208. Justice Ginsburg observed that “what makes this such a simple case, and the Court’s decision so unsettling” is that the legislation, in an effort “to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards.” Sebelius, 567 U.S. at 633.
210. Sebelius, 567 U.S. at 637 (noting that Congress reimbursed the prior Medicaid program at 83%).
211. The standard the Court used in Sebelius was whether, with respect to Medicaid expansion, “the financial inducement offered by Congress” was “so coercive as to pass the point at which ‘pressure turns into compulsion.’” Id. at 580 (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)). The Court concluded that since Congress did not compel participation in the ACA program, the alternative payment was not a penalty. See supra note 196 and accompanying text. With respect to Medicaid expansion, however, the Court used the opposite reasoning: the size of a loss, even of a program not guaranteed to continue, could become “compulsion,” mandating something beyond Congress’s power to mandate.
What Sebelius did not address is why states opposed Medicaid expansion, given the substantial financial incentives in the ACA for the states to do so. Most commentators attribute the opposition to the states’ ideological opposition to government provision of health insurance, if not outright hostility to the poor people in their states. Some states continue to resist Medicaid expansion, despite widespread public support for it. In effect, the Court, in the name of federalism, authorized the states to act with impunity in frustrating Congressional efforts to ensure accessible health insurance at the expense of people in their states who qualified for the benefits.

In a later ACA case, the Supreme Court also used the concept of punishment to address the employer mandate, which gave businesses the choice of providing health insurance that met federal standards for their employees or contributing to the exchanges so that employees could purchase their own insurance. Hobby Lobby, a closely held, for-profit corporation, provided health insurance for its employees, but refused to comply with federal requirements to cover certain forms of contraception, including the morning after pill, because, according to the company, they acted as an abortifacient. In a 5-4 decision, the Court held that requiring a company to cover certain mandated health care benefits, such as the pills in question, violated the Religious Freedom Reformation Act. The Court gave little regard to women’s loss of access to the contraceptives, holding that the federal government, if it chose, could provide them through “less restrictive means.”

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Sebelius, 567 U.S. at 580.
212. See, e.g., Trudy Lieberman, The Gloves Are Off in the Fight Over Medicaid Expansion in Holdout States, CT FOR HEALTH JOURNALISM. (May 5, 2021). https://centerforhealthjournalism.org/2021/05/04/why-fight-over-medicaid-expansion-holdout-states-far-over [https://perma.cc/NS5M-R9GE] (observing that the opposition comes primarily from fear that Medicaid expansion will eventually lead to a single payer health care system, but that others have attributed opposition to “[r]aism, a dislike for poor people, and a commonly held but mistaken belief that Medicaid recipients are able-bodied men and women too lazy to work”).
213. In recent years, Medicaid expansion has passed in every state where it was on the ballot, except in Montana, which proposed funding the state share through an unpopular tobacco tax, which triggered well-funded opposition from the tobacco industry. Erin Brantley & Sara Rosenbaum, Ballot Initiatives Have Brought Medicaid Eligibility to Many but Cannot Solve the Coverage Gap, HEALTH AFFS. (June 23, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210617.992286/#:~:text=More%20recently%2C%20almost%20all%20states,%E2%80%94Virginia%E2%80%94expanded%20through%20legislation [https://perma.cc/N7M7-52Q7].
215. Id.
217. Hobby Lobby, 573 U.S at 736 (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.”).
218. Id. at 722, n.37.
penalty to compel corporate owners to comply with the terms of a neutral
government program that benefitted their employees, if those terms conflicted with the owners’ religious beliefs.219

The employer mandate was essentially the same as the individual mandate—it gave those affected, whether individuals or employers, a choice: meet the ACA requirements (individuals by purchasing insurance that met federal standards or employers by providing such insurance) or pay the mandated sums to the federal treasury, in each case less than the cost of the insurance. With respect to the individual mandate, the Court concluded that the payment was a tax on those without insurance and not a penalty because the federal government had not (and could not) compel the purchase of insurance. In the case of the employer mandate, the Court concluded that the required payments were, in effect, a penalty for Hobby Lobby’s desire to act on its religious beliefs, rather than a condition for participation in a program providing federal subsidies.

To be sure, the two cases do not arise under identical bodies of law. Sebelius addressed two distinct legal issues: Congressional power to enact the individual mandate under the Commerce Clause and the taxing power, and the limits of Congressional power under a federal system to incentivize state participation in a federal program. Hobby Lobby was decided in accordance with a third body of law, determining the religious rights of for-profit corporations. Yet, in each case, the Court’s framing of the law as punishment or not—that is, whether the intricate provisions of the ACA acted as sanctions designed to compel specific behavior—determined the outcome. And, in each of these cases, the Court upheld moral hierarchies: protection of religious employers at the expense of employees denied access to federal contraception benefits, protection of states disapproving of health care subsidies at the expense of their citizens who would benefit from such subsidies, and limits on the power of the federal government vis-à-vis other actors, including the states and privately-held businesses.220

219. In her dissenting opinion, Justice Ginsburg emphasized that the majority opinion “demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.” Id. at 740 (Ginsburg, J., dissenting).

220. Jamila Michener, Fragmented Democracy: Medicaid, Federalism, and Unequal Politics 39 (2018) (“[F]ailures [of proposals for national health insurance] served to orient health care policy toward a model of federalist fragmentation . . . .”). Michener notes further that “by dint of federalism, Medicaid policy produces unequal politics and deepens already yawning racial, class, and geographic disparities in the United States” and underscoring that “among the states that were unwilling to implement Medicaid expansion were eight of the top eleven states with the largest share of the nation’s African-American population . . . and eight of the top eleven states with the highest poverty rates.” Id. at 54–55.
IV. RETURNING MORALITY TO THE PUBLIC SQUARE

In focusing on punishment, the Supreme Court oversaw a revolution in sexual mores without directly engaging the issue of what values should govern in the public square. The Court has also strengthened a neoliberal regime by simultaneously holding that imposing conditions on program beneficiaries does not constitute punishment while imposing conditions that require coverage constitutes a constitutionally unacceptable “penalty.” In relatively few of these cases did the Court, particularly in its majority opinions, directly engage the underlying values clash. The exception has come in the discussion of LGBT rights—and increasingly in the Court’s opinions on abortion. These exchanges pull back the curtain on the role of punishment in Supreme Court jurisprudence. In these cases, the argument for the losing parties, embraced by the dissents, maintain that punishment is the point—the necessary component to affirming the “right values” in the public square. In response, the Court, in a way it did not do so in the earlier cases, directly addresses the relationship between the status of those affected by punishment and the values they express by engaging in the prohibited activity.

A. LGBTQ+ RIGHTS AND THE “HOMOSEXUAL AGENDA”

One of the clearest clash of values prior to Dobbs occurred in the Supreme Court’s decision in Lawrence v. Texas. In Bowers v. Hardwick, the Court had considered whether there was a fundamental right to engage in same-sex sodomy, a formulation that the Court repeated in Dobbs. In both cases, the Court referred to the long history of criminalizing the conduct at issue, with those arguing for the constitutionality of such criminal penalties maintaining that the history of punishment reflected disapproval of the underlying conduct and provided evidence of the continuing legitimacy of such sanctions.

223. Id. at 192–95. In a concurrence, however, Justice Powell wrote that the rejection of a right to engage in same-sex intimacy, did not resolve the punishment issue, observing that: [R]espondents may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16–6–2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. In this case, however, respondent has not been tried, much less convicted and sentenced. Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us. Id. at 197–98.
224. See id. at 190 (“The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”).
Lawrence, which involved a criminal prosecution for same-sex sodomy, directly involved the issue of punishment. The two men in the case were arrested in a private residence when the police arrived to investigate a purported weapons disturbance.\textsuperscript{225} In his opinion for the majority, Justice Kennedy’s opinion had two levels of analysis. Like the Griswold line of cases, it affirmed a right to privacy, observing that “[t]he statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”\textsuperscript{226} The majority opinion then emphasized that the Texas statute being enforced in the case was not just about prohibiting a “particular sexual act”;\textsuperscript{227} it involved intimate conduct as part of “a personal bond that is more enduring.”\textsuperscript{228} The opinion thus concluded that such punishment was not just constitutionally impermissible\textsuperscript{229} but that the behavior at issue had societal value.\textsuperscript{230}

Justice O’Connor, in her concurrence in Lawrence, did not go as far as the majority. Instead, in a manner reminiscent of the earlier cases on contraception, she limited her analysis to a punishment lens, finding that Texas could not claim a legitimate interest. She thus rejected out of hand the asserted state interest in the case, which she described as nothing more than the “moral disapproval of an excluded group.”\textsuperscript{231} For O’Connor, the impermissibility of the punishment—and its discriminatory character—were enough to strike down the statute without necessarily requiring an affirmation of the value of same-sex intimacy.

Writing in dissent, Justice Scalia made clear that he thought that moral disapproval of same-sex sexuality was exactly what the case should have been about. He denounced what he called the “homosexual agenda,” which he defined as “the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”\textsuperscript{232} He cast his dissent explicitly in terms of maintaining a moral hierarchy based on that opprobrium.\textsuperscript{233}

\begin{thebibliography}{9}
\bibitem{225} Lawrence, 539 U.S. at 562.
\bibitem{226} Id. at 567.
\bibitem{227} Id.
\bibitem{228} Id.
\bibitem{229} Id.
\bibitem{230} Referring to gay men, the Court stated that the “State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” Id. at 578.
\bibitem{231} Id. at 567. The Court also recognized that “persons in every generation can invoke [the Constitution’s] principles in their own search for greater freedom.” Id. at 579.
\bibitem{232} Id. at 602 (Scalia, J., dissenting).
\bibitem{233} Scalia emphasized that:
Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as
\end{thebibliography}
The opinions in *Lawrence* thus frame, perhaps better than any of the other cases, the permissibility of punishment and the Court’s use of a punishment lens. They involve a clash between the ability to affirm moral values in the public square versus the preservation of private homes from the intrusion of the state. They also involve the use of the declaration of values to define those to be “protected,” in Scalia’s words, from those to be “excluded,” in O’Connor’s terms, thus reaffirming societal hierarchies between the groups. And they involve the permissibility of the imposition of criminal sanction to reinforce moral opprobrium, even when the behavior at issue is consensual conduct between two adults. The *Lawrence* Court’s 6–3 majority unequivocally rejected the propriety of punishment used to harden the lines between the protected and the excluded—and in the majority opinion, if not O’Connor’s concurrence,234 embraced an alternative view of the purpose of sexual conduct as an expression of commitment to a partner, not just as a means to procreation.

In *Obergefell v. Hodges*,235 the case upholding the right to marriage equality, the majority went even further in embracing same-sex relationships as an expression of family values236 while the dissents reaffirmed the need to channel sexuality into marriage—and to punish those who fell outside of such precepts.237 Kennedy wrote that there “is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.”238

The majority opinion added that the right to marry is not just about the couples’ relationship to each other, but also about their children. “Without the recognition, stability, and predictability marriage offers,” Kennedy wrote, “their children suffer the stigma of knowing their families are somehow lesser . . . . The marriage laws at issue here thus harm and humiliate the children of same-sex couples.”239 The opinion thus saw denial

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234. O’Connor concurred in *Lawrence* to emphasize that she did not join the majority in overturning earlier cases upholding sodomy laws, but rather thought that the Texas statute should be overturned on equal protection, not due process, grounds. She wrote that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’” *Id.* at 583 (O’Connor, J. concurring) (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)). She added that “because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior.” *Id.*


236. *Id.* (citing Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

237. See discussion of Roberts’s and Alito’s dissents *infra* notes 243–247 and accompanying text.


239. *Id.* at 668.
of the ability to marry as a punishment imposed not only on the couple but on their children. It accordingly equated the limitation of marriage to different-sex couples with imposition of a stigma on those raising families outside the institution.

The *Obergefell* majority did take sides in the culture wars—in recognizing the dignity and moral worth of same-sex relationships. In basing the decision on the changed nature of marriage, the Supreme Court acknowledged that marriage reflected a new moral sensibility: one that made autonomous choice, not religious or societal duty, the foundation of the marital relationship. The Court accordingly went beyond the rejection of the punishment (while noting “the harm and humiliation” involved in the refusal to recognize same-sex families) to confer public recognition and moral worth on LGBT families.

The four justices who dissented rejected both the premise that marriage had changed and that the Supreme Court should acknowledge that change. Chief Justice Roberts’s dissent explained that “for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.”

This reasoning is the same as the reasoning that justified the vilification of nonmarital sexuality a half century ago. In accordance with this reasoning, heterosexual sex, not just procreation, needs to be channeled into marriage and marriage needs to be about a moral command to avoid nonmarital sexuality. Punishment, whether material or symbolic, is the necessary complement to this reasoning.

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240. *Id.* (“Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’ ”) (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)).

241. And, indeed, many of *Obergefell*’s critics on the left decry that aspect of the opinion. See Melissa Murray, *Obergefell* v. *Hodges* and Nonmarriage Inequality, 104 CALIF. L. REV. 1207, 1210 (2016).

242. We argued in 2010 that these changes make marriage equality not only permissible but morally compelled by those who embraced the remade, modernist nature of the institution, a remade nature fully compatible with same-sex relationships, but not with traditionist religious teachings. See NAOMI CAHIN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 128 (2011) (describing marriage equality within the blue paradigm as “a matter of basic equality and fairness”).


244. Indeed, Roberts said explicitly that “by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without.” *Id.* at 689–90.

245. For similar reasoning, see *Turner* v. *Rogers*, 564 U.S. 431, 450, 461 (2011) (Thomas, J., dissenting) (justifying incarceration without procedural protections in civil child support enforcement actions, stating that “[t]his and other repercussions of the shift away from the nuclear family are ultimately
Alito’s dissent made explicit his objection to overturning traditional moral hierarchies. He wrote: “I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”246 In short, Alito’s concern lay directly with the ability to uphold the preferred values in the public square and fear that those who did so would now be the ones receiving punishment. And while he acknowledged that family understandings and behavior could change over time, he simply treated data such as the 40% nonmarital birth rate as further reason states could chose to double-down on traditional moral understandings247—drawing clear distinctions between preferred groups and those subject to moral condemnation even when a substantial or even majority of the public did not share such views.

Alito’s opinion accepted the right of moral traditionalists to insist on the primacy of heterosexual marriage and to punish those who create families or engage in sexual intimacy outside of marriage. He saw the majority, in contrast, as embracing same-sex families as entitled to equal moral worth and such views as necessarily punishing those who disagree as bigots. Moreover, he treated evidence of changing norms, such as the increase in nonmarital births, as evidence of a threat to the traditional moral order and therefore as additional reason for punishment. Framed in such terms, the legal question becomes one of power and authority to uphold the preferred views and, in Alito’s terms, punishment cannot be separated from the underlying values.

B. ABORTION REVISITED

With respect to abortion, however, neither the Court’s efforts to sidestep the morality of the underlying conduct nor its efforts to address the issues directly have yet succeeded. In the years after Roe, abortion became a political marker in part because the issue offers little opportunity for compromise.248 While the Court largely succeeded in making contraception more available without directly embracing the sexual revolution, the Court’s efforts to sidestep the moral issues underlying the abortion issue satisfied no

247. Id. at 739–40 (“While, for many, the attributes of marriage in 21st-century America have changed, those States that do not want to recognize same-sex marriage have not yet given up on the traditional understanding. They worry that by officially abandoning the older understanding, they may contribute to marriage’s further decay.”).
248. See Drew Westen, The Political Brain: The Role of Emotion in Deciding the Fate of the Nation 178 (2007) (“[Republicans] describe abortion as murder, define an uncompromising stance as the only moral stance one could take, get . . . Americans with the least tolerance for ambiguity on moral questions to the polls, and let the Democrats offer dozens of different positions . . . ”).
one. Roe satisfied neither those who saw reproductive rights as essential for gender equality nor those who believe the status of the fetus is not an issue that could be “bracketed.” These divisions, unlike those underlying recognition of LGBT relationships, have increased over time.

In Planned Parenthood v. Casey, the Court nonetheless tried to tamp down the divisions by directly engaging the values conflicts. Decided in the early 1990s, Casey had been widely expected to reverse Roe outright. Instead Casey preserved the core of the right to abortion, while permitting the states to impose new restrictions, such as waiting periods and parental consent provisions. Justice O’Connor’s plurality opinion was the only significant abortion decision for the Court written by a woman. She observed that the earlier decisions in Griswold, Eisenstadt, and Carey “support the reasoning in Roe relating to the woman’s liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.” Casey, alone in the Supreme Court’s reproductive rights decisions, made women’s relationship to the growing fetus central to the decision. It succeeded, however, only in delaying the day of reckoning over Roe itself.

Dobbs v. Jackson Women’s Health Organization is radically at odds with previous decisions that have used the concept of punishment to distract attention from inflammatory subjects. It is also at odds with the conception

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251. See Siegel, The Virtue of Judicial Statesmanship, supra note 24, at 1028, 1028 n.371 (commenting that the plurality in Casey respected and incorporated the incommensurable values of those on both sides of the abortion divide).


253. Id. at 319–20 (explaining that these provisions included “mandatory waiting periods, informed consent scripts that force doctors to give their patients information biased against abortion, onerous licensing and regulatory schemes for abortion providers, detailed reporting requirements, consent and notification requirements for minors, abortion procedure bans, and laws making abortion providers strictly liable for any and all damage to their clients’”) (footnotes omitted).


255. O’Connor explained that the clash over abortion involved two contrasting approaches to the question of responsibility. “One view,” she wrote, “is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to term no matter how difficult it will be to provide for the child and ensure its well-being.” Id. at 853. This framing underscores the relationship between religious views of sexuality and the unacceptability of abortion. The alternative view, she continued, “is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.” Id. This alternative view acknowledges the harsh nature of the state imposition of a child on a prospective parent unable or unwilling to accept the burden.

of judicial statesmanship, through which courts legitimate the judicial system while also recognizing social change and creating community in the midst of conflicting values’ clashes. Although Justice Alito claimed otherwise, the decision is designed to inflame and, in doing so, it is likely to empower state officials who wish to exercise their authority to punish—in order to affirm the moral superiority of their position, to reaffirm their values in the public square, to impose dominance over outgroups, and to restore a sense of hierarchical order that validates their position in society. The opinion itself invites such a response.

First, it goes out of its way to say not just that opposing views, but Roe itself were never legitimate. Alito’s majority opinion declares that “Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences.”

Second, it dismisses women’s interest in their bodily integrity as of no consequence, suggesting that those interests are amply protected through existing laws.

Third, while the opinion claims not to base the decision on recognition of a fetus as a human being from the moment of conception forward, it clearly views state actions based on such views as a legitimate basis for legislative action and declares that the fact that abortion serves to “destroy a ‘potential life’ ” justifies the Court’s treatment of Roe as precedent entitled to less deference than other Supreme Court precedents.

257. Id. at 2243; Siegel, The Virtue of Judicial Statesmanship, supra note 24, at 960 (noting that judicial statesmanship allows “the legal system to legitimate itself” and requires “expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement”).

258. Dobbs, 142 S. Ct. at 2243.

259. Justice Alito summarized some of the arguments in favor of permitting restrictions on abortions:

They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy; that leave for pregnancy and childbirth are now guaranteed by law in many cases; that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted “safe haven” laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home. They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.


260. Dobbs, 142 S. Ct. at 2261.
Fourth, unlike other Supreme Court decisions announcing a major change in governing law (with all deliberate speed), the Court provides no guidance for the states and no timelines for implementation. It simply overturns Roe and leaves the states—and the pregnant—on their own in the face of a rapidly shifting and still uncertain legal landscape.

The majority opinion thus has the hallmarks of an act of vengeance righting a wrong, rather than serving to provide judicial guidance in the face of contentious issues. It seeks to restore the moral hierarchy associated with the forces that see abortion as necessarily impermissible. It affirms states’ right to ban abortion without addressing the impact on the rights of states who wish to ensure its continuing availability. And in not only issuing the Dobbs’ decision, but in failing to restrain the states’ earlier vigilante laws, the Court’s current stance suggests that the states will be free to treat abortion as murder and punish those who provide abortions, those who seek abortions, and those who aid and abet those involved with abortions in any way.

V. THE FUTURE OF ABORTION PUNISHMENT

Abortion has become a flash point for political division because it falls on the fault lines of cultural polarization and political realignment. After Dobbs, the factors that drive political divisions are likely to overlap with the factors driving calls to punish those seeking and providing abortions.

In analyzing and moving forward on these issues, it is first critical to understand the sources of the call for punitive measures and then to consider whether a focus on punishment can also provide a strategy for defusing the conflict. Without such a strategy, this Article concludes, the likely result


263. See CASON & CARBONE, supra note 242, at 4–5, 92–95.

264. For other thoughts on moving forward, see, e.g., David S. Cohen, Greer Donley & Rachel Rebouché, Rethinking Strategy After Dobbs, 75 STAN. L. REV. ONLINE 1 passim (2022); Yvonne Lindgren & Nancy Levit, Reclaiming Tort Law to Protect Reproductive Rights, 75 ALA. L. REV. ____ (forthcoming 2023).
is a replication of the conditions that preceded *Roe*: pregnancy as the punishment for sex, aggravating the existing class and regional bifurcation in unintended births; a high-profile fight between elite actors on the boundaries of post-*Dobbs* public morality; and selective enforcement that disproportionately penalizes poor and minority women. As an alternative, this Article proposes that using the punishment lens analysis can serve as a means to de-escalate the coming legal wars over abortion.

**A. VALUES POLARIZATION AND ABORTION PUNISHMENT**

The analysis of the factors underlying the calls for punishment start with the factors driving political polarization. Political theorists link partisan polarization to a sorting between the parties based on cultural values. They describe those with conservative values orientations as favoring in-group unity and strong leadership, and having “a desire for clear, unbending moral and behavioral codes,” that include an emphasis on the importance of punishing anyone who strays from the code, “a fondness for systematization,” as well as “a willingness to tolerate inequality (opposition to redistributive policies).”

Those with a liberal values orientation, in contrast, tend to be more tolerant to outsiders, to consider context rather strict rules adherence when it comes to determining appropriate behavior. They also demonstrate more empathy and less interest in strict punishment for violations of moral and behavioral rules and greater intolerance of inequality.

Attitudes toward abortion both reflect and contribute to the partisan polarization. Abortion attitudes have become more partisan over time, and psychologist Drew Westen describes this outcome as a matter of intentional political strategy. Such a strategy was designed to attract people who see abortion in rigid moral terms to the Republican party in the 1990s and as


266. *Id.*

267. *Id.* at 165.


269. *WESTEN, supra* note 248 and accompanying text.

270. Luker characterizes sexual conservatives as dogmatists who “believe in a moral code derived from God, not man,” while sexual liberals “have a more forgiving view of morality.” She emphasizes that for liberals, sex is “natural,” while for conservatives, it is “sacred.” KRISTIN LUKER, WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES 99, 184 (2006); see also Mitchell Killian & Clyde Wilcox, *Do Abortion Attitudes Lead to Party Switching?*, 61 POL. RES. Q. 561, 561 (2008) (finding that pro-life Democrats tended to become Republicans); Neil A. O’Brien, *Before
that happened, self-identified Republicans became more opposed to abortion.\textsuperscript{271} Stances on abortion accordingly became a political marker.

Public opinion polls today confirm the high degree of partisan polarization on abortion. While 61\% of all Americans believe that abortion should be legal in all or most cases, 60\% of Republicans—and 72\% of those who identify as “conservative Republicans”—believe that abortion should be illegal in all or most cases.\textsuperscript{272} In contrast, 80\% of Democrats and 90\% of “liberal Democrats” believe that abortions should be legal in all or most cases.\textsuperscript{273} Public opinion polls indicate that support for the imposition of criminal sanctions closely tracks abortion views generally.\textsuperscript{274}

These attitudes correspond to the purposes and pitfalls of punishment. All groups seek affirmation of their values, but the values to be expressed are not parallel in their relationship to the imposition of punishment. Abortion rights advocates seek to preserve a right to privacy free from government intrusion through the democratic process, including referenda as well as litigation. To the extent they wish to exact punishment for taking away abortion rights, they have suggested defeating anti-choice politicians at the ballot box,\textsuperscript{275} impeaching Supreme Court justices for perjury about their willingness to follow precedent,\textsuperscript{276} and requesting ethics investigations.\textsuperscript{277} We could also imagine more aggressive efforts to counter the efforts of anti-abortion activists who attempt to interfere with abortion in states where abortion remains legal.\textsuperscript{278} Some of the most important actions


\textsuperscript{273} Id.

\textsuperscript{274} Id.


\textsuperscript{277} Morey & Blanchard, supra note 262.

pro-choice states have taken, however, is greater support to assist those coming from out-of-state, protecting their own health care workers, and ensuring access to medication abortion. The symbolism involves a greater and more visible state embrace of a right of abortion access.

The punishment desired by those opposed to abortion, by contrast, has two components. The first involves the expressive function of law and the declaration that abortion is wrong. The declaration reaffirms the moral hierarchy that elevates those who oppose abortion entirely; empirical studies indicate that when abortion is perceived as a “moral wrong” that produces outrage in those who oppose it; they dehumanize the women (and their partners) who seek abortions. Expressing this moral opposition even has a “shaming effect” on those who require abortions because of significant health issues. It also justifies subjecting those who seek therapeutic abortions to intrusive review of their doctor’s medical determinations or requiring those experiencing rape or incest to face onerous proof requirements, retraumatizing victims of sexual assault. Yet, the symbolic effect can occur with limited punishment, prosecuting only occasional cases that involve public defiance of the new abortion bans.

This dehumanization and shame, in turn, empowers those who would pursue the second component: waging a war to root out the practice. The National Right to Life Committee has proposed sweeping measures, for example, that would not only criminalize abortion itself, but treat it as a “criminal enterprise” that needs to be eliminated using “RICO-style laws” that would reach anyone providing any type of support to someone seeking an abortion. These provisions target not only medical personnel but those providing abortion information.


282. Oberman, supra 280, at 197 (arguing that restrictive abortion laws seek to “weaponize shame”).


284. Id.
state prosecutors but individual citizens to conduct surveillance on those visiting out-of-state abortion clinics, accessing internet websites providing abortion information, or even monitoring the pregnant (and their friends and family) more generally.285 These activities, particularly when carried out by private “vigilantes,” combine opposition to abortion with a moral crusade. While some laws immunize the pregnant from prosecution, existing laws in many states have already been used to prosecute women experiencing miscarriages for “feticide”286 and more draconian laws have been proposed that provide for prosecution for crimes based on an abortion.287 Even without new laws, the Attorney General of Alabama, for example, threatened to prosecute those crossing state lines to terminate their pregnancies or using abortion pills as child chemical endangerment, even if the patients legally obtain the pills within Alabama.288

Finally, prosecutions, particularly if they are brought against those who seek abortions, are likely to enforce gender, race and class hierarchies. As anti-abortion fervor has mounted, some states over the last decade have increased criminal investigations of various types of pregnancy loss,

285. See, e.g., infra note 288 and accompanying text.

286. Melissa Jeltsen, The Coming Rise of Abortion as a Crime, THE ATLANTIC (July 1, 2022), https://www.theatlantic.com/family/archive/2022/07/roe-illegal-abortions-pregnancy-termination-state-crime/661420 [https://perma.cc/2CJE-G89W]. For example, Texas charged a woman for murder for ending a pregnancy, despite the fact that the Texas abortion law specifically precludes prosecuting patients. The charges, however, were dropped. Julia Shapero, Texas District Attorney to Drop Murder Charge in “Self-Induced Abortion,” AXIOS (Apr. 10, 2022), https://www.axios.com/2022/04/10/texas-self-induced-abortion-dropped[https://perma.cc/87J-HQYT]; see Michele Goodwin, If Embryos and Fetuses Have Rights, 11 LAW & ETHICS HUM. RTS. 189, 196 (2018). In addition, an Indiana woman who used mail order pills to abort a second term fetus received a twenty-year prison sentence, until the sentence was reversed on appeal. See Associated Press, Indiana Declines to Appeal Purvi Patel’s Overturned Feticide Conviction, NBC NEWS (Aug. 24, 2016), https://www.nbcnews.com/news/asian-america/indiana-declines-appeal-purvi-patel-s-overturned-feticide-conviction-n637106 [https://perma.cc/DT5R-Y6RH]. A California woman was charged with homicide after the baby she was carrying was stillborn in the eighth month because she tested positive for meth—even though there was evidence that the drugs in her system could not have cause the stillbirth. See Sam Levin, She Was Jailed for Losing a Pregnancy. Her Nightmare Could Become More Common, THE GUARDIAN (June 4, 2022, 1:00 PM), https://www.theguardian.com/us-news/2022/jun/03/california-stillborn-prosecution-roev-wade[https://perma.cc/SV2X-XZDE].


including not just self-induced abortions but also miscarriages, stillbirths, and any form of infanticide. These cases overwhelmingly target “pregnant people who are poor, young, have substance abuse issues or live in areas with limited health services.” Advocates fear the reversal of Roe will fuel more such cases and particularly harm women of color, already disproportionately overpoliced and prosecuted on pregnancy-related issues. Farah Diaz-Tello, an attorney who works on reproductive health rights commented, “It’s this vicious cycle where lack of access, . . . increased scrutiny and stigma around abortion, as it becomes further restricted or criminalized, leads to more criminalization.” And the fact that the individuals are poor, minority group members, substance abusers, or otherwise lack full control of their lives contributes to the willingness of others to impose moral condemnation on their behavior.

Dobbs will only make this worse.

B. PUNISHMENT IN THE COURTS

Striking down Roe invited the states to adopt abortion bans that, in criminalizing abortion, also prescribe punishment. The courts have historically policed the limits of criminal punishment, requiring, for example, that criminal laws provide clear notice as to what acts are proscribed, that those accused enjoy appropriate procedural protections, and punishments are proportionate to the offence. This Article has gone beyond these traditional concerns to address how the Supreme Court uses a punishment lens to accomplish broader objectives, particularly in the face of irreconcilable and intrinsically divisive issues, and issues that may threaten judicial legitimacy. Abortion certainly qualifies as divisive, and Dobbs has already raised serious concerns about judicial legitimacy.

Indeed, in the years since Roe, anti-abortion activists have made the fetus the issue—with the impact on the person forced to give birth disappearing from view. When the fetus becomes the subject of concern, consensual sex—with no victims other than public mortality—is beside the

290. Cabrera, supra note 289.
291. Id.
292. Id. (this creates a “perfect storm,” she explains, “that sets up people who are already experiencing marginalization to be punished for the various situations that the states place them in”).
293. See Goodwin, If Embryos and Fetuses Have Rights, supra note 286, passim.
point. When prosecutors act to prosecute abortions, they are passing moral judgment on the permissibility of the abortion itself and often imposing significant penalties.294

Two arenas in particular, however, offer the Court an opportunity to tamp down the Dobbs-inspired conflicts.

First, if the Supreme Court seeks to deflect the outrage over Dobbs, the simplest way would be to take seriously its own statement that all it has to do is to return the issue to the states.295 Taking that seriously requires protecting the rights of states that wish to secure access to abortion—and protecting, as Justice Kavanaugh suggested in his concurrence, the constitutional right to travel.296 The most basic question involving the right to travel is whether citizens of one state can travel to another state, return to their home state, and be punished for their out-of-state conduct. Existing precedent from the Roe era suggests that such conduct is constitutionally protected and other limits on state jurisdiction ordinarily preclude punishment for out-of-state acts.297 Affirming the constitutional right to travel should also mean that states cannot burden exercise of the right to travel, by punishing, for example, those within the state who assist the traveler in leaving the state or acts that a pregnant person takes within the home state, such as researching out of state options, packing one’s bags, or driving to the state line for the purpose of accessing abortion in another state, just as the Court concluded in Hobby Lobby that forcing an employee to choose between an ACA compliant health plan or a monetary contribution to ACA funding constituted a burden on religious freedom.298 The Court should also strike down punishment that creates obstacles to First Amendment rights of expression,299 such as penalizing websites or advice to individuals that contain accurate information about abortion and out-of-state availability.300 The Court could also recognize that states encouraging private citizens to track those accessing out-of-state abortion clinics, websites, menstrual periods or other personal information either serves no legitimate state purpose to the extent it is intended to penalize the right to

294. See Goodwin, If Embryos and Fetuses Have Rights, supra note 286 and accompanying text; Levin, supra note 286 and accompanying text.
296. Id. at 2309 (Kavanaugh, J., concurring); see Cohen et al., The New Abortion Battleground, supra note 14, at 27–30 (discussing extraterritorial validity of abortion law).
298. See discussion of Hobby Lobby, supra notes 214–219 and accompanying text.
300. Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (Virginia law precluding publication from addressing the procurement of abortion struck down as a violation of the First Amendment).
travel or, like searching the marital bedroom for contraceptives, is so intrusive as to be constitutionally suspect. Striking down punishment that burdens the right to travel could simultaneously affirm state abortion bans and still protect its availability in the states that permit it.

The second arena where a punishment lens could be effective in defusing abortion controversies involves women’s right to medical treatment to protect their health. Statutes banning abortion pose a dilemma for doctors; they report that they fear retaliation for performing abortion-like procedures—even when the fetus is dead or the health threat to the patient is significant. In these cases, the risks are asymmetrical: the doctor faces punishment for “doing the right thing” and little in the way of negative consequences for not acting, even if the patient dies as a result. Uncertainty itself thus imposes punishment—and serves the purposes of those who would root out abortion (with inevitable spillover effects to abortion-like procedures). Yet, criminal prosecutions of the doctor in these cases, while risky and expensive for the doctor personally, could bring the criminal justice system into disrepute. For those seeking to ensure abortion access, the question therefore should be how to bring the issue of punishing doctors—and the corresponding ability of the pregnant to receive abortions necessary to protect their health—into public focus. Test cases on enforceability of abortion bans in circumstances threatening the life of the

301. States can regulate, even ban, abortion so long as there is “a rational basis on which the legislature could have thought that it would serve legitimate state interests.” Dobbs, 142 S. Ct. at 2284. If the purpose is to obstruct the right to travel, on the other hand, such regulation would be unrelated to a legitimate state interest. In addition, state encouragement to surveil every person who might become pregnant should be seen as so overbroad, discriminatory on the basis of sex and gender, and intrusive as to lack a rational relationship even to an otherwise legitimate state interest.

302. This leaves open, of course, the possibility of a federal abortion ban. See, e.g., Ramesh Ponnuru, Opinion, Pro-Lifers Should Hold Off on Seeking National Abortion Ban, BLOOMBERG (June 26, 2022, 5:00 AM), https://www.bloomberg.com/opinion/articles/2022-06-26/federal-abortion-ban-why-conservatives-should-hold-off#jv7zkg [https://perma.cc/PE2K-5L3M] (noting that Dobbs removes any constitutional obstacle to a federal ban on abortion).

303. Isabel Keane, Woman Forced to Carry Dead Fetus for Two Weeks After Miscarriage Due to US Abortion Ban, METRO (July 19, 2022, 8:04 PM), https://metro.co.uk/2022/07/19/woman-forced-to-carry-dead-fetus-after-miscarriage-due-to-abortion-ban-17030740 [https://perma.cc/8G96-YNH2]; Elizabeth Cohen, Danielle Herman & John Bonifield, In Some States, Doctors Weigh 'Ruinous' Litigation Against Proper Care for Women Who Have Miscarriages, CNN (July 20, 2022, 2:24 PM), https://www.cnn.com/2022/07/20/health/doctors-weigh-litigation-miscarriage-care/index.html [https://perma.cc/52SB-D9ST] [hereinafter Cohen et al., In Some States] (“The answer lies in fear: The same surgical procedure used to remove a dead fetus is also used to remove a living fetus, and doctors in states with strict anti-abortion laws worry they’ll be prosecuted for performing an abortion when they were actually providing miscarriage care.”).

304. Cohen et al., In Some States, supra note 303. On the dilemmas doctors face on whether to act in these circumstances, see Fox, supra note 4, at 1034–35. Fox does note: “Abortion laws illustrate the bind that clinicians can find themselves in when ambiguities blur these lines [between what is legal and what is prohibited]; criminally punished for ending a pregnancy or liable for malpractice if they don’t end one, buffered only by narrow exceptions that are vague and variable.” Id. at 1096.
mother might bring greater clarity. Such suits could also focus attention on the health threat that punishment poses to pregnant patients. Heavy-handed interventions into newborn care, in which governors sought to prolong the lives of children born with substantial birth defects, helped to discredit the interventions. The same approach might work in the context of pregnancy care. Justice Blackmun’s initial draft opinion in Roe sought to focus on the issue of professional judgment. Partisan differences on abortion are smaller (and overall support for punishment is substantially less) when the mother’s health is at risk. Striking down abortion laws that do not clearly immunize doctor’s decisions about medically therapeutic abortions is a first step; recognizing that the pregnant have a right to abortions necessary to protect their health is an important second step.

In cases of rape and incest, the effort ought to go further to highlight the callous treatment of such victims. Governor Greg Abbott declared, in response to questions about precluding abortion for the victims of involuntary sexual activity, that “Texas will work tirelessly to eliminate all rapists from the streets of Texas . . . .” In short, the Governor tried to deflect claims of punishment of one type (forcing the victims of rape to carry the rapist’s child to term) by talking about another type of punishment—that imposed on rapists. The veracity of the claim is not the issue, particularly because Texas has one of the highest rape rates in the country and Abbott had done little to combat it. As with abortions necessary to protect the

305. Many states do not have Article III limitations on standing in state court. Alternatively, doctors could attempt to get emergency declaratory judgments as they have done in cases involving the removal of feeding tubes or life support from infants with significant birth defects. See Eleanor Klibanoff, Women Denied Abortions Sue Texas to Clarify Exceptions to the Laws, TEX. TRIBUNE (Mar. 7, 2023), https://www.texastribune.org/2023/03/07/texas-abortion-lawsuit [https://perma.cc/PNJ3-VWAJ] (describing such a case).


308. Hartig, supra note 272 (though the partisan divisions remain much larger when an abortion is sought because the child would be born with significant health issues or birth defects).


310. Id. Alito’s opinion in Dobbs favorably cites the view of Matthew Hale on abortion without acknowledging that Hale is well known for suggesting that women routinely lie about rape—as well as engage in witchcraft. Jill Elaine Hasday, Opinion, On Roe. Alito Cites a Judge who Treated Women as Witches and Property, WASH. POST (May 9, 2022, 5:00 PM), https://www.washingtonpost.com/opinions/2022/05/09/alito-roec一字-matthew-hale-misogynist [https://perma.cc/LKN4-VNKF].
lives of the pregnant, partisan differences narrow considerably on cases of rape and incest and the failure to provide such exceptions underscores the punitive nature of the restrictions.311

Finally, cases in which patients are prosecuted ought to be used to highlight the cruelty associated with abortion restrictions in the United States.312 Restricting access to abortion is in fact just one more form of punishment of the marginalized, with the same groups that support abortion restrictions also opposing more generous provisions to the poor.313 White evangelical Protestants, for example, the religious group most opposed to abortion,314 is also one of the groups most likely to respond that aid to the poor does more harm than good.315 And the same groups have become more likely to oppose immigration and efforts to promote racial equality316 and to favor imposition of preferred values through authoritarian means.317 The cruelty of abortion bans is a large part of what motivated the decision in Roe. With abortion opponents calling for draconian enforcement measures,318 it

312. Chemerinsky & Goodwin, supra note 16, passim.
313. See Franklin, The New Class Blindness, supra note 90, at 78 (discussing how the elimination of a right to abortion in Dobbs is resulting in the effective elimination of access to abortion for marginalized subgroups, without the development of a strong social safety net for the resulting children in states that are restricting abortion).
315. Pew Research Center, U.S. Public Becoming Less Religious 104, PEW RSCH. CTR. (Nov. 3, 2015), https://www.pewresearch.org/religion/religious-landscape-study/religious-tradition/evangelical-protestant/views-about-government-aid-to-the-poor/ [https://perma.cc/G6WD-U8XC] (indicating that evangelical Protestants and Mormons, though not historically black Protestant churches, are most likely to respond that government aid does more harm than good). The partisan divide on these issues is even greater, with 69% of Republicans in comparison with 25% of Democrats responding that aid to the poor does more harm than good. Id.
316. ANTHEA BUTLER, WHITE EVANGELICAL RACISM: THE POLITICS OF MORALITY IN AMERICA (2021); Peter Kivisto, The Politics of Cruelty, 60 SOC. Q. 191, 197–98 (2019) (observing that Christian nationalism and white grievance have combined, with those who score high on the Christian nationalism, in particular, more likely to believe that Christian identity is threatened by academics, cultural elites, secularists, and Muslims, both at home and abroad).
317. Samuel L. Perry & Philip S. Gorski, With the Buffalo massacre, white Christian nationalism strikes again, WASH. POST (May 20, 2022), https://www.washingtonpost.com/outlook/2022/05/20/white-christian-nationalism-buffalo-abortion/ [https://perma.cc/5TB7-VLDC] (“For a segment of Christians, the battle over abortion is just one front in a wider war to make America Christian again—by any means necessary. They are not pro-life so much as pro-control.”).
should be a factor in mobilizing the opposition to post-Dobbs enforcement of abortion restrictions.319

CONCLUSION

Focusing on punishment will not resolve intractable values disputes; it simply changes the subject. Changing the subject, however, does offer a tactic for diffusing intractable disputes—or a long-term strategy for reframing what is at stake. In either case, it makes visible the consequences of public actions, such as abortion bans, on those affected by them in ways that can serve to underscore their cruelty. The public wants its core values expressed and respected in the public square; in cohesive societies the values are consensus based, and punishment reinforces them. The urge to punish, when embedded in group conflict, inflames divisions (threatening violence or civil war); channeling it effectively is central to the rule of law. Understanding this dynamic gives the Court tools (and a motive) to construct an offramp: it also allows states to decide their own approaches to abortion while protecting the pathways out of the states that ban it, and ensures that doctors can save the lives of their patients.

that states will seek extraterritorial reach of their abortion laws and civil and criminal punishment of not just health care providers but of those seeking an abortion; Kaylee Olivas, ‘Murderer’: OK Senator files bill to punish woman getting an abortion, wants to ban contraception, KFOR, (Feb. 7, 2024) https://kfor.com/news/oklahoma-legislature/ok-senator-files-bill-to-punish-woman-getting-an-abortion-wants-to-ban-contraception/?utm_source=substack&utm_medium=email [https://perma.cc/3765-XWCZ] (proposing bill that would allow charging women who terminate their pregnancies with murder, with no exception for rape or incest).

319. A lengthy literature discusses the relationship between the status threat perceived by those who see themselves on the losing end of social hierarchies and the desire for punishment. See, e.g., Rick Ruddell & Martin G. Urbina, Minority Threat and Punishment: A Cross-National Analysis, 21 JUST. Q. 903, 924 (2004) (finding that more diverse societies are more likely to impose the death penalty and higher rates of incarceration); Andrew P. Davis, Michael Gibson-Light, Eric Bjorklind & Teron Nunley, Institutional Arrangements and Power Threat: Diversity, Democracy, and Punitive Attitudes, 39 JUSTICE Q. 1545, 1549, 1558 (2022) (finding more punitive attitudes in democratic societies with greater diversity).