

12-6-2023

Helping or Hindering Life? The Ramifications of Overturning *Roe v. Wade* as It Relates to the Criminal Justice System

Samantha Moore
University of Dayton

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>



Part of the [Law Commons](#)

Recommended Citation

Moore, Samantha (2023) "Helping or Hindering Life? The Ramifications of Overturning *Roe v. Wade* as It Relates to the Criminal Justice System," *University of Dayton Law Review*: Vol. 49: No. 1, Article 5. Available at: <https://ecommons.udayton.edu/udlr/vol49/iss1/5>

This Comment is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

Helping or Hindering Life? The Ramifications of Overturning *Roe v. Wade* as It Relates to the Criminal Justice System

Cover Page Footnote

Special thanks to the entirety of the *University of Dayton Law Review* team, especially my Comment Editor, Andrew Ferguson. To Professor Thaddeus Hoffmeister for his inspiration and thoughtful feedback for each draft. To Professors David Bolk and Julie Zink for encouraging my academic development. To Benett for his unwavering support. To Seth and Karley for their undying motivation. And, most importantly, to my parents for always believing in their Sammy.

HELPING OR HINDERING LIFE?: THE RAMIFICATIONS OF OVERTURNING *ROE V. WADE* AS IT RELATES TO THE CRIMINAL JUSTICE SYSTEM

*Samantha Moore**

“Crime and bad lives are the measure of a State’s failure, all
crime in the end is the crime of the community.”¹

I. INTRODUCTION.....	123
II. BACKGROUND	126
A. <i>The History of Abortion</i>	126
B. <i>The Current State of Abortion</i>	128
C. <i>Factors that Impact Crime, Adding Snow to the Proverbial Snowball</i>	129
III. ANALYSIS	130
A. <i>The Relationship Between Abortion and Crime</i>	130
B. <i>How a Feeling of Unwantedness Leads to Crime</i>	132
C. <i>Minimizing the Snowball’s Size: Mitigation Methods for Abortion- Restricting States to Address the Inevitable Crime Influx</i>	134
1. Mandating Comprehensive Sexual Education.....	134
2. Widening the Already Present Loophole for Abortion Pills..	135
3. The Rotten Upbringing Defense.....	137
4. No Life Sentence or Death Penalty	140
5. Changing the Bindover Age for Juveniles.....	142
6. No Adult Prison Sentences for Juveniles.....	143
IV. CONCLUSION	145

I. INTRODUCTION

A mother becomes pregnant with twins and believes she cannot care

* J.D. Candidate, 2024, University of Dayton School of Law; B.S., 2021, Indiana State University. Special thanks to the entirety of the University of Dayton Law Review team, especially my Comment Editor, Andrew Ferguson. To Professor Thaddeus Hoffmeister for his inspiration and thoughtful feedback for each draft. To Professors David Bolk and Julie Zink for encouraging my academic development. To Benett for his unwavering support. To Seth and Karley for their undying motivation. And, most importantly, to my parents for always believing in their Sammy.

¹ H.G. WELLS, *A MODERN UTOPIA* 100 (Gregory Claeys & Patrick Parrinder eds., Penguin Classics 2005).

for them.² With abortion illegal, she attempts to give herself an at-home abortion, killing one fetus while the other one suffers severe brain damage.³ When this child is born, he is badly beaten and neglected by his mother, so the state removes the child and his seven siblings from the home.⁴ When the children are returned, the mother refuses to accept the child who suffered brain damage.⁵ As a result, he is passed around the foster care system until he ultimately murders two elderly men in separate robberies.⁶ The State of Texas later executes him.⁷ This is the true story of Clifford Bogges.⁸ Unfortunately, this story is not an anomaly when considering the unanticipated ramifications criminalized abortion has on the criminal justice system.

In a landmark decision in 1973, the United States Supreme Court concluded in *Roe v. Wade* it was a woman's right to choose whether to receive an abortion; states could not criminalize abortion until the third trimester.⁹ Nineteen years later, the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* reaffirmed that women retain the choice to receive an abortion but determined that the line is drawn at viability—not trimesters.¹⁰ However, in 2022, the Supreme Court in *Dobbs v. Jackson Women's Health Organization* overruled *Roe* and *Casey* and held the legality of abortion is returned back to the states.¹¹ Consequently, thirteen states had trigger laws in place that were designed to go into effect automatically if *Roe* was overruled.¹² Most of these laws severely restricted abortion, making it a felony to provide or attempt to provide an abortion with very limited exceptions for rape or incest.¹³ Accordingly, an increase in unwanted pregnancies is expected in states with restrictive bans.

Roughly eighteen years after *Roe* was decided, crime rates in the United States were at an all-time high.¹⁴ However, in 1991, crime—especially violent and property crime—began to decrease exponentially.¹⁵ In 2001, researchers John Donohue and Steven Levitt offered evidence to

² John J. Donohue & Steven D. Levitt, *The Impact of Legalized Abortion on Crime over the Last Two Decades*, 22 AM. LAW AND ECON. REV. 241, 285 n.41 (2020) [hereinafter Donohue & Levitt (2020)].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

¹⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 869–70 (1992).

¹¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022).

¹² Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

¹³ *Id.*

¹⁴ John J. Donohue & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON., 379, 392 (2001) [hereinafter Donohue & Levitt (2001)].

¹⁵ *Id.*

explain this sudden decrease in crime.¹⁶ Specifically, they found legalized abortion significantly contributed to this decrease and hypothesized abortion would contribute to an additional 20% decrease in crime over the next two decades.¹⁷ In 2020, Donohue and Levitt published evidence to review their 2001 hypotheses and discovered their findings were correct, if not more significant than their initial predictions.¹⁸ Thus, the evidence indicates that legalized abortion considerably reduces crime because there are less people to commit crimes and because children who are unwanted are more likely to become criminals; therefore, in the years following *Dobbs*, the states with strict abortion bans can expect a sharp increase in crime. This Comment poses mitigation methods for these abortion-restricting states because they should act now to address the inevitable crime influx.

Part II of this Comment will explore the background of abortion. It will address the history of abortion and the patriarchal strongholds it has had on women, especially women of color. It will assess abortion before *Roe* and the impact legalized abortion had on low-income, women of color. Likewise, it will examine *Dobbs* and the fourteen states that passed restrictive abortion bans following this decision.¹⁹ It will also explore the consequences of unwanted pregnancies and “layers of crime,” which are various factors that compile to lead a person to a life of crime, including: socioeconomic status, education, and many other factors.

Part III will highlight the scope of abortion following *Roe* by analyzing Donohue and Levitt’s abortion-crime link. It will discuss how a feeling of unwantedness leads to a life of crime by identifying specific cases where children who were the product of unwanted pregnancies became career criminals in early adulthood. Further, it will explore mitigation methods for states with strict abortion bans to address the inevitable crime increase, including: improving sexual education, making abortion pills available in abortion-criminalizing states, suggesting the Rotten Upbringing defense by utilizing mitigation specialists under the Federal Sentencing Guidelines (the “Guidelines”), changing the bindover age, limiting the use of adult prisons for juveniles, and using life sentences sparingly. Part IV of this Comment will succinctly summarize these conclusions.

In essence, the effect criminalized abortion has on already disadvantaged women and this impact on the criminal justice system can be analogized to a snowball colliding with its target.²⁰ In other words, imagine

¹⁶ *Id.* at 379; Donohue & Levitt (2020), *supra* note 2, at 283.

¹⁷ Donohue & Levitt (2001), *supra* note 14, at 415; Donohue & Levitt (2020), *supra* note 2, at 283.

¹⁸ Donohue & Levitt (2020), *supra* note 2, at 283.

¹⁹ This is based on the states with the strictest abortion laws at the time of publishing.

²⁰ While criminalized abortion impacts women across all backgrounds and experiences, it especially impacts low-income women of color. Liza Fuentes, *Inequity in US Abortion Rights and Access: The End of Roe Is Deepening Existing Divides*, GUTTMACHER INST. (Jan. 17, 2023), <https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roee-deepening-existing->

a snowball: each time it rolls down the hill, it gathers more and more snow and becomes larger. Eventually, as it becomes enormous, when it is thrown, its collision with the target is more damaging than it would have been if it collected less snow. Now consider an individual's susceptibility to crime. As each layer contributes more to a potentiality of crime—living an unwanted life, socioeconomic status, education, etc.—the individual's likelihood of committing crime becomes greater, and if the government does not take action to negate these disadvantageous factors, the individual's collision with the criminal justice system will be much more significant. This Comment proposes mitigation methods for abortion-restricting states to implement to prevent the proverbial snowball from becoming too large and having a detrimental, irreversible collision with the criminal justice system.

II. BACKGROUND

A. *The History of Abortion*

Until the mid-1800s, abortion remained legal in America.²¹ The common law allowed abortion prior to “quickening,” a term used to describe fetal movement that occurred around four months of pregnancy.²² Midwives, nurses, and unlicensed professionals resorted to herbs and medications to induce abortions.²³ Prior to the Civil War, Black women, including those enslaved, accounted for half of the women who provided abortions to other women.²⁴ This is because white men were not generally involved in gynecological care, and although abortion was legal during this time, slave owners controlled Black women's bodies and prohibited them from receiving an abortion.²⁵ Consequently, Black women creatively turned to herbs to secretly induce their own abortions.²⁶ Even after slavery was abolished in 1865, white people effectively controlled and regulated Black women's bodies.²⁷ This is because Black midwives were viewed as competition to white male gynecologists, and as a result, Black women were excluded from obstetrical care and subjected to nonconsensual, gynecological experiments.²⁸ Additionally, racist and misogynistic smear campaigns described Black

divides; *Race and Ethnic Disparities in the Criminal Justice System*, NAT'L CONF. OF STATE LEGISLATURES (May 24, 2022), <https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system>. Accordingly, this Comment will primarily focus on this group.

²¹ *Abortion Is Central to the History of Reproductive Health Care in America*, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america> (last visited Sept. 11, 2023).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, ACLU (July 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans>.

midwives as dangerous, unprofessional, and unhygienic.²⁹ The root of these stereotypes was to promote white supremacy and uphold patriarchal strongholds.³⁰

Beginning around the time of the Civil War, a coalition of male doctors led a movement to push state governments to outlaw abortion nationwide with the aim of taking away the authority of midwives to provide abortions.³¹ By 1910, this aim was achieved, and abortion was banned nationwide with the exception of those with means, specifically white women who could evade the law by traveling to obtain an abortion.³² Women without means were forced to resort to dangerous or deadly measures.³³ Abortion reform gained traction in the 1960s when eleven states liberalized their abortion laws.³⁴

In 1973, in a historic decision, the Supreme Court in *Roe* concluded a Texas statute that criminalized abortion without regard to the stage of pregnancy, and without considering other interests, violated the Due Process Clause of the Fourteenth Amendment.³⁵ Accordingly, during the first trimester, it was the woman's right to choose whether an abortion was the appropriate decision for her.³⁶ The states had the authority to regulate abortion "in ways that [were] reasonably related to maternal health" during the second trimester, and throughout the third trimester, states could regulate or prohibit abortion for the preservation of the life or health of the mother.³⁷ However, in 1992, the Supreme Court in *Casey* reaffirmed the right to abortion but eradicated the trimester framework by drawing the line at viability.³⁸ Nonetheless, although abortion remained legalized nationwide, it was still inaccessible to low-income women.³⁹ This was largely because the Hyde Amendment to the fiscal 1977 Medicaid appropriation prohibited federal Medicaid funding to be used for abortions, except when the woman's

²⁹ *Id.*

³⁰ *Id.*; see also *Abortion Is Central to the History of Reproductive Health Care in America*, *supra* note 21.

³¹ *Abortion Is Central to the History of Reproductive Health Care in America*, *supra* note 21.

³² *Id.* These women often traveled to places where practitioners did their work behind closed doors or inside private homes. Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN (June 27, 2016, 10:52 AM), <https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html>.

³³ Ravitz, *supra* note 32. Of these measures, one of the most common tools was a rubber catheter attached to a wire coat hanger, which women often performed on themselves. Elisabeth Stevens, *When Abortions Were Illegal—and How Women Got Them Anyway*, WASH. POST (June 24, 2022, 11:09 AM), <https://www.washingtonpost.com/history/2022/06/24/illegal-abortion-before-roe-dc/>. Other measures included injecting soapy solutions with a catheter, in hopes of making wombs contract, and drinking other toxic chemicals. *Id.*

³⁴ *Abortion Is Central to the History of Reproductive Health Care in America*, *supra* note 21.

³⁵ *Roe v. Wade*, 410 U.S. 113, 164 (1973).

³⁶ *Id.*

³⁷ *Id.* at 164–65.

³⁸ *Planned Parenthood v. Casey*, 505 U.S. 833, 869–70 (1992).

³⁹ *Abortion Is Central to the History of Reproductive Health Care in America*, *supra* note 21.

life was endangered from pregnancy.⁴⁰ Consequently, abortions funded by Medicaid dropped from roughly 300,000 to only a few thousand per year.⁴¹ Black and Hispanic women were impacted the most, and their access to abortion became even more restricted.⁴² This is because 31% of Black women and 27% of Hispanic women receive Medicaid, compared to 16% of white women.⁴³ Considering the history of the racist and patriarchal strongholds on abortion, low-income women of color have traditionally been impacted the most by criminalized abortion, and predictably, this tradition will continue in states with strict abortion bans.

*B. The Current State of Abortion*⁴⁴

In 2022, the Supreme Court in *Dobbs* overruled *Roe* and *Casey* and held the Due Process Clause of the Fourteenth Amendment does not apply to abortion because the United States Constitution makes no reference to abortion.⁴⁵ Thus, the legality of abortion was returned to the states.⁴⁶ As a result, at the time of publishing, fourteen states have passed restrictive abortion bans: Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia, (the “abortion-restricting states”).⁴⁷ These restrictive bans provide that abortion is banned with no exceptions for rape or incest.⁴⁸ Although not as restrictive, there are also bans in Arizona, Florida, Georgia, Nebraska, North Carolina, South Carolina, and Utah.⁴⁹ Further, bans are temporarily blocked in Iowa and Wyoming.⁵⁰ These pending bans prohibit abortion after six weeks of pregnancy and outlaw the use of abortion pills, respectively.⁵¹ The remaining states have legalized abortion with various limitations, such as to the point of viability or prohibiting state funds

⁴⁰ *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, ACLU, <https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion> (last visited Sept. 15, 2023).

⁴¹ *Id.*

⁴² *Abortion Is Central to the History of Reproductive Health Care in America*, *supra* note 21.

⁴³ *Medicaid and Reproductive Health*, PLANNED PARENTHOOD ACTION FUND, <https://www.plannedparenthoodaction.org/issues/health-care-equity/medicaid-and-reproductive-health> (last visited Sept. 15, 2023).

⁴⁴ This is current as of the time of publishing, and given current legal battles, abortion laws in various states are subject to change post-publication.

⁴⁵ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

⁴⁶ *Id.* at 2243.

⁴⁷ *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (Nov. 7, 2023, 9:15 PM).

⁴⁸ *Id.* Mississippi allows an exception for rape but not incest, and some states’ laws allow private citizens to sue abortion providers. *Id.*; Jan Hoffman, *The New Abortion Bans: Almost No Exceptions for Rape, Incest or Health*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/health/abortion-bans-rape-incest.html>.

⁴⁹ *Tracking the States Where Abortion Is Now Banned*, *supra* note 47. These bans allow for abortion, but some states outlaw it after six weeks of pregnancy. *Id.* In other states, abortion is banned after fifteen to twenty weeks. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

from covering the cost of most abortions.⁵² Nevertheless, it is apparent that the current outlook of abortion varies by state.

C. *Factors that Impact Crime, Adding Snow to the Proverbial Snowball*

When women are unable to obtain abortions, they must carry their unborn fetus and decide whether to place the child in the foster care system or to raise the child themselves. This can be a difficult decision, given that the vast majority of women who receive abortions are unmarried and in their twenties.⁵³ Most of these women are people of color, and nearly half of abortion-seeking persons live below the federal poverty level and over half already have children.⁵⁴ Further, individuals who experience stressful environments, such as being impoverished, have a higher likelihood to resort to crime in order to make ends meet.⁵⁵ These statistics are important to note because from the moment the fetus is born, it is already subjected to disadvantageous circumstances.

These are just some of the many factors that impact crime; other factors include: median income, poverty level, cultural and educational characteristics, as well as family conditions related to divorce and family cohesiveness.⁵⁶ Unwantedness, which occurs when a child feels neglected, rejected, abused, or overall unloved, is an additional factor that breeds criminal behavior.⁵⁷ With each unfavorable factor and circumstance, snow is added to the proverbial snowball. In fact, convicted criminals are likely to have experienced four times as many adverse childhood events than their non-criminal counterparts.⁵⁸ Clearly, crime is multifaceted and complex.⁵⁹ As Part III of this Comment will explore, prohibiting abortion adds an additional layer to the complexity of crime, causing the snowball to become larger as it prepares to collide with the criminal justice system.

⁵² *Id.*

⁵³ Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR., <https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/> (Jan. 13, 2023).

⁵⁴ *Id.*; see also *United States Abortion Demographics*, GUTTMACHER INST., <https://www.guttmacher.org/united-states/abortion/demographics> (last visited Sept. 15, 2023).

⁵⁵ *What Influences Criminal Behavior?*, WALDEN UNIV., <https://www.waldenu.edu/online-bachelors-programs/bs-in-criminal-justice/resource/what-influences-criminal-behavior> (last visited Sept. 20, 2023).

⁵⁶ *Variables Affecting Crime*, FBI: CRIM. JUST. INFO. SERV. DIV., <https://ucr.fbi.gov/hate-crime/2011/resources/variables-affecting-crime> (last visited Sept. 20, 2023).

⁵⁷ See Kimberly Levinson & Thomas P. Lowry, *Unwanted Children, Unwanted Crime*, WASH. POST, <https://www.washingtonpost.com/archive/opinions/1999/08/30/unwanted-children-unwanted-crime/83f53507-d247-4a2b-8ec2-cdd5096f8cac/> (last visited Sept. 20, 2023); Morgan Mandriota, *How Being Unloved in Childhood May Affect You as an Adult*, PSYCH CENT., <https://psychcentral.com/health/unloved-in-childhood-common-effects-on-your-adult-self> (Oct. 19, 2021).

⁵⁸ *What Influences Criminal Behavior?*, *supra* note 55.

⁵⁹ See generally *Variables Affecting Crime*, *supra* note 56.

III. ANALYSIS

A. *The Relationship Between Abortion and Crime*

In 2001, Donohue and Levitt offered evidence to prove legalized abortion contributes significantly to crime reduction.⁶⁰ In late 1969 and 1970, five states—California, New York, Alaska, Hawaii, and Washington (the “early-legalizing states”)—fully legalized abortion.⁶¹ Three years later, *Roe* legalized abortion nationwide, and the Supreme Court expressed the consequences of its decision:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.⁶²

Following this decision, between 1973 and 1991, crime was at unprecedented levels with violent crime nearly doubling and property crime increasing nearly 40%, while murder remained roughly unchanged.⁶³

However, in 1991, roughly eighteen years after *Roe* was decided, Donohue and Levitt observed that crime began to fall.⁶⁴ Specifically, the United States experienced the sharpest reduction in murder rates since the end of Prohibition in 1933, with homicide rates falling more than 40%.⁶⁵ Violent crime and property crime declined more than 30%.⁶⁶ The early-legalizing states experienced an earlier crime decrease compared to the other forty-five states and the District of Columbia.⁶⁷

When crime began declining in 1991, the first cohort impacted by *Roe* would have been roughly seventeen years old, just beginning to enter the prime age for criminal activity.⁶⁸ In the early-legalizing states, the first cohort would have been roughly twenty years old, just at the peak age for

⁶⁰ Donohue & Levitt (2001), *supra* note 14, at 379.

⁶¹ Donohue & Levitt (2020), *supra* note 2, at 246.

⁶² Donohue & Levitt (2001), *supra* note 14, at 384, quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁶³ Donohue & Levitt (2001), *supra* note 14, at 391–92.

⁶⁴ *Id.* at 392.

⁶⁵ *Id.* at 379.

⁶⁶ *Id.*

⁶⁷ *Id.* at 382.

⁶⁸ *Id.* at 393–94.

criminality.⁶⁹ Donohue and Levitt hypothesized that legalized abortion contributed to a decrease in crime due to either a reduction in cohort sizes or through lower per capita offending rates for affected cohorts.⁷⁰ In other words, when the cohort born after the legalization of abortion reaches the highest crime years (eighteen to twenty-four years old), there will be fewer people to commit crimes, therefore, leading to a reduction in crime.⁷¹ Additionally, Donohue and Levitt hypothesized that children born after *Roe* may have lower tendencies to commit crimes because the women who receive abortions are most at risk to give birth to children who would engage in criminal activity.⁷² This is because abortion allows for women to choose when they are prepared for parenthood, thus optimizing the likelihood that children will grow up in a nurturing environment where the father is present and any drug or alcohol abuse is minimal or nonexistent.⁷³

To test these predictions, Donohue and Levitt rationalized that crime should have decreased in the early-legalizing states while the rest of the states would experience reduction in the next three years.⁷⁴ Because abortion rates in the early-legalizing states were higher than other states—even after *Roe*—Donohue and Levitt used abortion rates as their abortion policy variable.⁷⁵ They compared the abortion rates of the early-legalizing states and the rest of the country with crime patterns within those states.⁷⁶ They discovered that—from 1985 to 1997—an additional 100 abortions per 1,000 live births led to a decrease of 12% in murder, 13% in violent crime, and 9% in property crime.⁷⁷ In broader terms, states with higher rates of abortion are strongly linked to lower crime and have experienced roughly 30% decrease in crime compared to states with lower abortion rates.⁷⁸ Accordingly, Donohue and Levitt revealed that 6% of any birth cohort is responsible for roughly half of the crime committed.⁷⁹ They further predicted that crime would decrease an additional 1% per year over the next two decades in cohorts that have access to abortion.⁸⁰ The delayed reduction is because the “impact of abortion on crime emerges only incrementally; the full impact is not felt for many

⁶⁹ *Id.*

⁷⁰ *Id.* at 381.

⁷¹ *Id.* at 381–82.

⁷² *Id.* at 381.

⁷³ *Id.*

⁷⁴ Jonathan Klick, *Urban Law Journal Special Series: The Current State of Abortion Law and Reproductive Rights: Econometric Analyses of U.S. Abortion Policy: A Critical Review*, 31 *FORDHAM URB. L.J.* 751, 765 (2004). The early legalizing states are Alaska, California, Hawaii, New York, and Washington. *Id.*

⁷⁵ *Id.* Meaning, Donohue and Levitt used the abortion rate per 1,000 live births, which is “the weighted average of the abortion rates of the birth cohorts in a state, with the weights determined by the 1985 share of total arrests nationally for a particular crime category of individuals of that age.” Donohue & Levitt (2020), *supra* note 2, at 248.

⁷⁶ Donohue & Levitt (2020), *supra* note 2, at 247.

⁷⁷ Donohue & Levitt (2001), *supra* note 14, at 404; Klick, *supra* note 74 at 765–66.

⁷⁸ Donohue & Levitt (2001), *supra* note 14, at 386.

⁷⁹ *Id.* at 386–87 (emphasis added).

⁸⁰ *Id.* at 415.

decades.”⁸¹

In 2020, Donohue and Levitt published a review of their 2001 hypotheses and found that their initial predictions were correct, if not more significant than what they originally anticipated.⁸² To test their original predictions, they reproduced the same data—comparing abortion rates of the early-legalizing states and the rest of the country with crime patterns within those states—and extended the data to cover the period from 1998 to 2014.⁸³ Donohue and Levitt ascertained that from 1998 to 2014, legalized abortion decreased violent crime by 47%, property crime by 33%, and murder by 41%.⁸⁴ Stated more broadly, legalized abortion may be responsible for as much as half of the overall crime reduction, benefiting society by saving the economy roughly \$30 billion annually due to the decrease in crime.⁸⁵ Consequently, most of the overall crime decline during this period can be attributed to legalized abortion.⁸⁶ Donohue and Levitt reasoned that legalized abortion diminishes unwanted pregnancies and births, thus having crime-reducing effects.⁸⁷ Accordingly, they hypothesized that if abortion remained legalized, then crime should continue to fall.⁸⁸ They concluded by noting that “[r]estraining access to abortion without reducing unwanted pregnancies is both personally and socially costly.”⁸⁹

B. *How a Feeling of Unwantedness Leads to Crime*

Feeling unwanted as a child can have long-lasting impacts into adulthood, placing unwanted children at an elevated risk for harmful life outcomes, including criminal involvement.⁹⁰ A feeling of unwantedness occurs when a child feels neglected, rejected, abused, or has an overall feeling of being unloved.⁹¹ This is largely in part because women who are denied abortions, but choose to raise their babies, are far less likely to nurture and hold their children.⁹² While unwantedness primarily affects individuals who are economically disadvantaged, it still impacts well-off families.⁹³ In fact, in the years following *Roe*, approximately 75% of unwanted pregnancies were

⁸¹ Donohue & Levitt (2020), *supra* note 2, at 247–48.

⁸² *See generally id.*

⁸³ *Id.*; *see also* Klick, *supra* note 74, at 765 (discussing the methodology used in Donohue and Levitt’s 2001 study).

⁸⁴ Donohue & Levitt (2020), *supra* note 2, at 256, 284.

⁸⁵ Donohue & Levitt (2001), *supra* note 14, at 414.

⁸⁶ Donohue & Levitt (2020), *supra* note 2, at 284.

⁸⁷ *Id.* at 285.

⁸⁸ *Id.* at 248.

⁸⁹ *Id.* at 286.

⁹⁰ *Id.* at 242; Lawrenz & Mandriota, *supra* note 57.

⁹¹ *See* Lawrenz & Mandriota, *supra* note 57.

⁹² Donohue & Levitt (2001), *supra* note 14, at 388.

⁹³ Sally Squires, *Unwanted Children Suffer Long-Term Difficulties*, WASH. POST (Aug. 22, 1989), <https://www.washingtonpost.com/archive/lifestyle/wellness/1989/08/15/unwanted-children-suffer-long-term-difficulties/6a372d81-bcab-4752-94a2-99d07e7e46b0/>.

aborted.⁹⁴ Legalized abortion has crime-reducing effects because it decreases unwanted pregnancies, and fewer unwanted pregnancies reduces abuse and neglect, which, in turn, reduces crime.⁹⁵

Clifford Boggess is an example of the consequences of a woman's inability to obtain an abortion.⁹⁶ In Texas during the 1960s, Clifford's mother was married but suffered from alcoholism and mental illness.⁹⁷ She had multiple pregnancies with her employer, and when she became pregnant with twins, she did not believe she could care for more children.⁹⁸ Because abortion was illegal, she attempted to give herself an at-home abortion.⁹⁹ As a result, one fetus died and the other one, Clifford, was born with brain damage.¹⁰⁰ Clifford was severely beaten and neglected while he was a baby, and when he was eleven months old, the state removed him and his seven siblings from the home.¹⁰¹ When the children were later returned, Clifford's mother refused to take him back because she believed she could not care for an infant.¹⁰² Consequently, he was bounced around the foster system and was rejected from different homes.¹⁰³ In 1986, when he was twenty-one years old, he killed two elderly men in separate robberies.¹⁰⁴ The state of Texas executed Clifford when he was thirty-three years old.¹⁰⁵

Similarly, Anders Breivik, a Norwegian mass murderer, is another example of an unwanted child turning to crime.¹⁰⁶ Anders's mother was a teenager suffering from mental illness when she fled an abusive household.¹⁰⁷ While she was pregnant with Anders, she described him as "a nasty child that wreaked havoc and tormented her."¹⁰⁸ She attempted to receive an abortion, but she was denied because she had passed the three-month limit.¹⁰⁹ When she gave birth to Anders, she stopped breastfeeding him because he was "sucking the life out of her."¹¹⁰ Child psychologists wanted to remove Anders from his mother's care because he "was brutally rejected" and because his mother openly stated that "she wished her son was dead."¹¹¹ When Anders

⁹⁴ Donohue & Levitt (2001), *supra* note 14, at 389. This figure was based on then-current self-report data. *Id.*

⁹⁵ See Donohue & Levitt (2020), *supra* note 2 at 286; see also Levinson & Lowry, *supra* note 57; Donohue & Levitt (2001), *supra* note 14, at 388.

⁹⁶ Donohue & Levitt (2020), *supra* note 2, at 285 n.41.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (internal quotation omitted).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (internal quotation omitted).

¹¹¹ *Id.* (internal quotation omitted).

was thirty-two years old, he murdered seventy-seven people.¹¹² While tragic, the stories of Clifford and Anders are not anomalies when considering the ramifications of outlawing abortion because unwanted children are disproportionately at risk to become involved in criminality.¹¹³ In sum, unwantedness adds another layer to the snowball, increasing its size as it prepares for collision with the criminal justice system.

*C. Minimizing the Snowball's Size: Mitigation Methods for Abortion-Restricting States to Address the Inevitable Crime Influx.*¹¹⁴

1. Mandating Comprehensive Sexual Education

One mitigation tactic to decrease the size of the snowball is by starting at the source and improving sex education. Eleven states do not require some form of sex education, whereas thirty-nine states and the District of Columbia impose such a mandate.¹¹⁵ Some of the states that do not require sex education are also states with strict abortion laws, namely, Arkansas, Louisiana, Mississippi, and Texas.¹¹⁶ Even in states that teach sex education, the curriculum is not entirely comprehensive. For example, less than half of high schools and less than a fifth of middle schools teach all topics as recommended by the Center for Disease Control and Prevention.¹¹⁷ These topics range from general information about sexually transmitted diseases to more personal information, such as communication and decision-making skills.¹¹⁸ Further, only twenty states require schools to provide information about contraception; other states require schools to only stress abstinence.¹¹⁹ Inconsistent policies and practices are extremely prevalent because guidelines on how sex education is taught vary among states and school districts.¹²⁰

Therefore, if public schools are not adequately teaching young people about sex, then the responsibility falls on the parents. Yet, there is no indication that many teens discuss sex education topics with their parents.¹²¹ If young people are not receiving proper sex education, either at school or at home, then they are engaging in conduct without fully understanding the

¹¹² *Id.*

¹¹³ Donohue & Levitt (2001), *supra* note 14, at 388.

¹¹⁴ This Comment is forecasting the increase of crime and proposing plans for the future; it is not distinguishing from some epidemic. This is a moving target.

¹¹⁵ *What's the State of Sex Education in the U.S.?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/for-educators/whats-state-sex-education-us> (last visited Sept. 18, 2023).

¹¹⁶ *Abstinence-Only Education States*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/abstinence-only-education-states> (Aug. 2023).

¹¹⁷ *What's the State of Sex Education in the U.S.?*, *supra* note 115.

¹¹⁸ *Id.*

¹¹⁹ Sarah Wood, *Sex Ed in Schools: What Parents Need To Know*, U.S. NEWS (June 16, 2022), <https://www.usnews.com/education/k12/articles/sex-ed-in-schools-what-parents-need-to-know>.

¹²⁰ *What's the State of Sex Education in the U.S.?*, *supra* note 115.

¹²¹ *Id.*

repercussions. This is especially problematic because research demonstrates that only 43% of teen females and 47% of teen males received sex education before engaging in penis-vagina sex.¹²² Consequently, the states with the highest rates of teen pregnancy—which are states with strict abortion bans—do not mandate sex education: Arkansas, Louisiana, Mississippi, and Texas.¹²³

Evidence indicates that thorough sex education decreases teen pregnancies; counties that implement more comprehensive sex education experience a 3% reduction in teen pregnancies.¹²⁴ Comprehensive sex education includes “developmentally and culturally responsive, science-based and medically accurate information on a broad set of topics related to sexuality, including human development, relationships, personal skills, sexual health and society and culture.”¹²⁵ It provides credible information about pregnancy and sexually transmitted diseases while allowing teens to access reproductive health services.¹²⁶ Within *one* year of implementing more comprehensive sex education, states can expect to see a decrease in teen pregnancy by 1.5%.¹²⁷ Additionally, federal funding at the county level for comprehensive sex education can reduce teen pregnancy by more than 3%.¹²⁸ While teens will still engage in sexual activity, equipping them with the knowledge of how to do so safely can help prevent unwanted pregnancies.

2. Widening the Already Present Loophole for Abortion Pills

Another mitigation method to minimize the snowball is to increase the accessibility of abortion pills. While abortion clinics are outlawed in fourteen states, the Food and Drug Administration (“FDA”) announced that retail pharmacies, such as corner drugstores, CVS, Kroger, and Walmart, are allowed to offer abortion pills.¹²⁹ Prior to this announcement, mifepristone, the first pill used in a two-pill medication for abortions, could only be distributed by mail-order pharmacies or by specially certified doctors or clinics.¹³⁰ Now, as long as patients have a prescription from a certified health care provider, any pharmacy that agrees to accept those prescriptions and

¹²² *Id.*

¹²³ *Abstinence-Only Education States*, *supra* note 116.

¹²⁴ Shirin Ali, *Comprehensive Sex Education Programs Can Lower Teen Pregnancy, Study Says*, THE HILL (Feb. 15, 2022), <https://thehill.com/changing-america/well-being/prevention-cures/594299-comprehensive-sex-education-programs-can-lower/>.

¹²⁵ *America's Sex Education: How We Are Failing Our Students*, UNIV. OF S. CAL. (Sept. 18, 2017), <https://nursing.usc.edu/blog/americas-sex-education/#legislation> (internal quotation omitted).

¹²⁶ Ali, *supra* note 124.

¹²⁷ *Id.* (emphasis added).

¹²⁸ Nicholas D. E. Mark & Lawrence L. Wu, *More Comprehensive Sex Education Reduced Teen Births: Quasi-Experimental Evidence*, 119 PROC. NAT'L ACAD. SCIENCES, Feb. 14, 2022, at 1.

¹²⁹ Pam Belluck, *Abortion Pills Can Now Be Offered at Retail Pharmacies, F.D.A. Says*, N.Y. TIMES (Jan. 3, 2023), <https://www.nytimes.com/2023/01/03/health/abortion-pill-cvs-walgreens-pharmacies.html>.

¹³⁰ *Id.* Mifepristone blocks hormones that are necessary for pregnancy to develop and is taken within the first ten to thirteen weeks of pregnancy. *Id.*

follows other criteria, can sell the pill in stores or by mail order.¹³¹ Misoprostol, the second pill in the two-step regimen, is obtained at pharmacies through the usual prescription process.¹³²

Yet, political and legal battles may influence a pharmacy's decision about whether to provide the medication.¹³³ Current laws in the abortion-restricting states make it extremely difficult for pharmacies to dispense abortion pills.¹³⁴ Nevertheless, telehealth medicine may serve as a solution. Telehealth became popular during the pandemic and enables doctors to tend to patients without an in-person visit by conducting virtual meetings and appointments.¹³⁵ The Department of Drug Enforcement Administration allowed health care providers, via telehealth, to prescribe medications across state lines.¹³⁶ In Arizona and Utah, where abortion is banned after fifteen and eighteen weeks respectively, a patient may still receive an abortion via telehealth with some restrictions.¹³⁷ Accordingly, women residing in states where access to abortion pills is prohibited or limited may use telehealth medicine to receive an abortion.¹³⁸ In addition, given that abortion-restricting states attempt to prohibit abortion pills from being shipped, agency discretion or legislation could expand access to these pills by using telehealth

¹³¹ *Id.*

¹³² *Id.* This pill is taken twenty-four to forty-eight hours after mifepristone. *Id.*

¹³³ *Id.* At the time of publishing, there has been a legal challenge to block the use of abortion pills nationwide. Devan Cole, *What to Know About the Lawsuit Aiming To Ban Medication Abortion Drug Mifepristone*, CNN, <https://www.cnn.com/2023/02/10/politics/fda-medication-abortion-lawsuit-mifepristone> (Mar. 13, 2023, 5:15 PM). Anti-abortion advocates filed a lawsuit in the Northern District of Texas to challenge the FDA's approval of abortion pills. Caroline Kitchener & Ann E. Marimow, *The Texas Judge Who Could Take Down the Abortion Pill*, WASH. POST (Feb. 25, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpscsrc=nl_most&carta-url=https%3A%2F%2F2.washingtonpost.com%2Fcar-ln. U.S. District Court Judge Kacsmaryk issued a broad ruling that blocked the approval of the drug. Ariane de Vogue & Tierney Sneed, *Supreme Court Protects Access to Abortion Pill*, CNN, <https://www.cnn.com/2023/04/21/politics/supreme-court-abortion-pill-mifepristone/index.html> (April 21, 2023, 9:46 PM). The Biden administration and Danco, a manufacturer of the medication, appealed to the United States Court of Appeals for the Fifth Circuit. *Id.* The Fifth Circuit allowed partial access to the drug, but with new limitations on how it is dispensed. Sarah McCammon, *U.S. Appeals Court Preserves Partial Access to Abortion Pill, but with Tighter Rules*, NPR, <https://www.npr.org/2023/04/13/1169217172/abortion-pill-mifepristone-ruling-texas-judge> (April 13, 2023, 6:33 PM). Thereafter, the Biden administration asked the Supreme Court to intervene. Vogue & Sneed, *supra*. The Supreme Court froze the lower-court rulings; consequently, access to the medication remains protected and available, pending appeal. *Id.*

¹³⁴ Belluck, *supra* note 129. These states are Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. *The Availability and Use of Medication Abortion*, KAISER FAMILY FOUND. (June 1, 2023), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/>. Additionally, Walgreens announced it will not distribute abortion pills in 20 states. Nathaniel Meyersohn & Carma Hassan, *Walgreens Will Not Distribute Abortion Pills in 20 States*, CNN (Mar. 3, 2023, 5:32 PM), <https://www.cnn.com/2023/03/03/business/abortion-pills-mifepristone-walgreens-pharmacies>.

¹³⁵ *What is Telehealth?*, TELEHEALTH.HHS.GOV, <https://telehealth.hhs.gov/patients/understanding-telehealth/> (last visited Sept. 13, 2023); see also Samantha Hunt, *Call Me, Beep Me, If You Want to Reach Me: Utilizing Telemedicine to Expand Abortion Access*, 76 VAND. L. REV. 323, 345 (2022).

¹³⁶ Hunt, *supra* note 135, at 345.

¹³⁷ *The Availability and Use of Medication Abortion*, *supra* note 134.

¹³⁸ *Id.* Telehealth enables health care providers to tend to patients without an in-person visit by conducting virtual meetings and appointments. *What Is Telehealth?*, *supra* note 135.

medicine.¹³⁹

Nonetheless, even in states with strict bans, women have creatively found loopholes.¹⁴⁰ Some states prosecute women who receive abortions, suggesting that women who wish to receive an abortion—but cannot travel out of state—will likely seek abortion pills purchased online through international telehealth companies.¹⁴¹ One such company is Aid Access, which consists of European doctors who provide online consultations and write prescriptions for abortion pills, which are filled and then mailed to the United States.¹⁴² Another loophole is when clinics, such as Just the Pill, strategically set up mobile clinics in states where abortion is legal that border states where the procedure is banned.¹⁴³ Patients cross the border for a consultation and then the pill is mailed to an address or pick-up location in the legalized state.¹⁴⁴ While these are creative loopholes, women still may face criminal liability.¹⁴⁵

Moreover, there is a cost associated with abortion pills.¹⁴⁶ Despite only costing roughly \$90 to manufacture, the medication costs around \$560.¹⁴⁷ Private insurance may cover the costs, depending on various factors, such as the policyholder's state of residence and the employer's coverage decisions.¹⁴⁸ The cost is even more burdensome for women who receive federal Medicaid funding because federal funding only covers abortions when the pregnancy is a result of rape or incest, or is a threat to the pregnant person's life.¹⁴⁹ Luckily, for some low-income women, sixteen states have chosen to use their own state funds to pay for abortions, yet eleven states have limitations on whether private insurance companies can cover abortion.¹⁵⁰ Thus, while the current political state of abortion pills is uncertain, women can use loopholes to receive the medication, but there is still a financial burden and a risk of criminal liability.

3. The Rotten Upbringing Defense

Another mitigation tactic to decrease the proverbial snowball's size is adopting an additional factor under the Guidelines. The Guidelines are

¹³⁹ Hunt, *supra* note 135, at 345.

¹⁴⁰ See generally Spencer Kimball, *Women in States That Ban Abortion Will Be Able to Get Abortion Pills Online from Overseas*, CNBC, <https://www.cnbc.com/2022/06/27/women-in-states-that-ban-abortion-will-still-be-able-to-get-abortion-pills-online-from-overseas.html> (June 27, 2022, 2:16 PM).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *The Availability and Use of Medication Abortion*, *supra* note 134.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; see also Beth Braverman, *Health Insurance and Abortion*, WEBMD (July 27, 2022), <https://www.webmd.com/health-insurance/features/health-insurance-and-abortion>.

rules that provide a uniform sentencing policy for criminal defendants convicted in the federal court system.¹⁵¹ They allow for more consistent sentencing, depending upon various factors.¹⁵² Each type of crime is assigned a base offense level, which is the first step in determining the seriousness of a particular offense; the more serious the crime, the higher the offense level.¹⁵³ Additionally, each offense has a number of specific offense characteristics, which are factors that can increase or decrease the base offense level a defendant receives.¹⁵⁴ Adjustment factors can also apply to any offense.¹⁵⁵ These are factors that can increase or decrease the offense level, such as the offender's role in the crime, victim-related adjustments, and obstruction of justice.¹⁵⁶ Further, a sentence may be reduced depending on whether the offender takes accountability for their actions.¹⁵⁷ The sentencing range is determined by taking the base offense level and then adding or subtracting any specific characteristics or adjustments that apply.¹⁵⁸

Once the guideline range is determined, judges may consider whether there are any aggravating or mitigating circumstances, enabling the judge to depart from the calculated range.¹⁵⁹ If the judge decides to depart from the guideline range, they must state in writing the reason for the departure.¹⁶⁰ While the Guidelines are not mandatory, judges must consider them when sentencing a criminal defendant.¹⁶¹ Thus, when judges exercise their discretion in determining whether to depart from the Guidelines, they must explain which factors warranted an increased or decreased sentence.¹⁶²

If a defendant faces a death penalty sentence, a mitigation specialist is used to dissuade the jury from imposing the death penalty.¹⁶³ Mitigation specialists are tasked with delving into a defendant's past to discover various experiences, such as childhood abuse.¹⁶⁴ This information is used to paint a sympathetic picture to sway a jury from imposing the death penalty.¹⁶⁵ Mitigation specialists come from an array of backgrounds and training, but

¹⁵¹ *Federal Sentencing Guidelines*, CORNELL L. SCH.: LEGAL INFO. INST. https://www.law.cornell.edu/wex/federal_sentencing_guidelines (last visited Sept. 22, 2023).

¹⁵² *Id.*

¹⁵³ *An Overview of the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N, www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf (last visited Sept. 22, 2023).

¹⁵⁴ *Id.* For example, an offender receives an increased sentence if a firearm was brandished during a robbery. *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; see also *Federal Sentencing Guidelines*, *supra* note 151.

¹⁶² *Federal Sentencing Guidelines*, *supra* note 151.

¹⁶³ Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must Be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1143 (2003).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1145.

their goal remains the same: uncover and disclose a comprehensive list of mitigating factors.¹⁶⁶ These factors demonstrate how the defendant's character and conduct relate to the offense.¹⁶⁷ Some examples of factors include: childhood maltreatment, family dynamics resulting in neglect, physical or emotional abuse, mental illnesses, and extreme poverty.¹⁶⁸

Furthermore, mitigation specialists investigate a defendant's developmental history.¹⁶⁹ This includes information about the defendant's conditions impacting them in utero to the present, including mental impairments.¹⁷⁰ If there are mental impairments, a mitigation specialist must investigate the defendant's social history, spanning back at least three generations to establish patterns and impacts of mental conditions, poverty, substance abuse, and other factors that negatively impacted the defendant's development.¹⁷¹ All of this information, including school, medical, social services, and employment records, are collected and analyzed.¹⁷² The mitigation specialist also inquires into trauma and maltreatment that may have occurred in a defendant's childhood.¹⁷³ The specialist is trained to elicit mitigating information from the defendant and their family members, which can be especially difficult because the circumstances are likely embarrassing and humiliating.¹⁷⁴ This is important, given the relationship between childhood victimization and criminal tendencies.¹⁷⁵ Clearly, the mitigation specialist plays a crucial role in the sentencing process.¹⁷⁶

Mitigation specialists have the ability to demonstrate "why" a particular offense occurred and the reasons for which the death penalty should be avoided for a particular defendant.¹⁷⁷ Therefore, given this vital responsibility, a mitigation specialist could be used when a judge sentences a defendant who was the product of an unwanted pregnancy. For the purposes of this Comment, this will be referred to as the "Rotten Upbringing Defense."¹⁷⁸ Accordingly, another mitigation solution to decrease the proverbial snowball's size is to enable defendants to use the Rotten Upbringing Defense, which could be considered as a mitigating factor under

¹⁶⁶ *Id.* at 1145.

¹⁶⁷ *Id.* at 1145–46.

¹⁶⁸ *Id.* at 1146.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1146–47.

¹⁷³ *Id.* at 1148.

¹⁷⁴ *Id.* at 1148–49.

¹⁷⁵ *Id.* at 1148.

¹⁷⁶ *Id.* at 1151.

¹⁷⁷ *Id.*

¹⁷⁸ This can be justified under a retributive theory of punishment. *Theories of Punishment*, CLIFFNOTES, <https://www.cliffsnotes.com/study-guides/criminal-justice/sentencing/theories-of-punishment> (last visited Sept. 23, 2023). Under this theory, the punishment ought to be proportional to the crime. *Id.* Meaning, the severity of the sentence is proportionate to the seriousness of the crime "according to an offender's moral blameworthiness." *Id.*

the Guidelines. This would allow a mitigation specialist to inquire into a defendant's background after the defendant claims they are the product of an unwanted pregnancy. Because mitigation specialists are already equipped to delve into complex and emotional backgrounds, these findings could enable a judge to impose a lesser sentence. Importantly, a large portion of mitigation specialists already work in local government, so states would not need to employ new specialists.¹⁷⁹

While the Rotten Upbringing Defense poses a possible mitigation method, many potential issues remain. One issue is whether it would apply to all offenses or only a certain category, such as violent crime. Another issue is the possibility of defendants always claiming a rotten upbringing, thus using more resources because there will be a higher demand for mitigation specialists. While these are valid concerns, states would need to choose the lesser of two evils: address the inevitable crime influx from criminalized abortion by imprisoning all defendants equally or address it by providing lesser sentences for defendants who were unwanted and whose mothers the state denied an abortion. The latter option will help decrease the snowball's size, and hopefully lessen its impact when it collides with the criminal justice system.

4. No Life Sentence or Death Penalty

Another mitigation approach is for the abortion-restricting states to be more forgiving in sentencing defendants who are the product of unwanted pregnancies.¹⁸⁰ These states could decline imposing the death penalty and/or limit the use of life sentences. Harsh sentencing is very prevalent, given that there are more than 1.4 million people in prison and one out of every seven inmates is serving a life sentence.¹⁸¹ That is more than 200,000 people.¹⁸² This is a growing number, evidenced by the fact that nearly five times as many people are serving life sentences now than they were in 1984.¹⁸³ Furthermore, the number of people serving a life sentence without parole is higher than ever.¹⁸⁴ For instance, Louisiana has nearly 4,400 people serving life sentences, roughly 14% of the state's prison population.¹⁸⁵

¹⁷⁹ *What Do Mitigation Specialists Do?*, FRANKLIN UNIV., <https://www.franklin.edu/career-guide/emergency-management-directors/what-do-mitigation-specialists-do> (last visited Sept. 15, 2023).

¹⁸⁰ Whereas the prior section recommends using mitigation specialists to unearth a defendant's negative life experiences for the Rotten Upbringing Defense, this section recommends that states decline imposing harsh sentences, specifically the death penalty and/or life sentences.

¹⁸¹ Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, THE SENT'G PROJECT 4 (Feb. 2021), <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 10, 16.

Harsh sentencing disproportionately impacts people of color.¹⁸⁶ Specifically, more than two-thirds of individuals serving a life sentence are people of color.¹⁸⁷ Twenty percent of Black men in prison are serving life sentences, and Latinx people account for 16% of those currently serving life sentences.¹⁸⁸ Georgia, Illinois, Louisiana, and Mississippi are among the states with the highest percentages of Black people serving life sentences.¹⁸⁹ Additionally, people from low-income and under-resourced communities are more likely to receive harsher sentences.¹⁹⁰ Unsurprisingly, states with harsh sentencing also have a considerable amount of prisoners on death row.¹⁹¹ The abortion-restricting states have hundreds of inmates awaiting their execution.¹⁹² For example, Texas has 192 inmates on death row, Alabama has 167, and Louisiana has 63.¹⁹³

It is apparent that the abortion-restricting states tend to impose harsher sentences, and given the abortion-crime link, these states can expect increases in cost and spending due to the growth of incarceration. To avoid overcrowding their prison systems, these states should decline to impose life sentences and death sentences on defendants who are the result of an unwanted pregnancy. This will help prevent the snowball from becoming too massive. Depending on the severity of the crime, there are several alternatives to imposing harsh sentences.¹⁹⁴ Some alternatives include: electronic monitoring, treatment courts, probation, suspended sentences, and restitution.¹⁹⁵

Further, many states impose a “Three Strikes” law—if a person is convicted of certain felonies, they are “out” on their third strike.¹⁹⁶ Meaning, the third time a defendant is convicted of a felony, they will receive a harsh

¹⁸⁶ *Id.* at 11.

¹⁸⁷ *Id.* at 4; Josh McGhee, *Over 200,000 People Are Serving Life in U.S. Prisons. These Are the Consequences.*, INJUSTICE WATCH (Feb. 25, 2021), <https://www.injusticewatch.org/news/prisons-and-jails/2021/sentencing-project-report-life-imprisonment/>.

¹⁸⁸ Nellis, *supra* note 181; *see also* McGhee, *supra* note 187.

¹⁸⁹ McGhee, *supra* note 187.

¹⁹⁰ Nellis, *supra* note 181.

¹⁹¹ *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Sept. 17, 2023).

¹⁹² *Id.* (including the states of Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin); *see Tracking the States Where Abortion Is Now Banned*, *supra* note 47.

¹⁹³ *Death Row*, *supra* note 191 (including the number of death row inmates in every state as of October 1, 2022).

¹⁹⁴ Rebecca Pirus, *Sentencing Alternatives: Probation, Fines, and Community Service*, NOLO, <https://www.nolo.com/legal-encyclopedia/sentencing-alternatives-prison-probation-fines-30294.html> (last visited Sept. 17, 2023).

¹⁹⁵ *Id.* (describing that a suspended sentence is one that remains on hold so long as the defendant is in compliance with the judge’s conditions).

¹⁹⁶ Jennifer Corbett, *Three Strike Law in Different States: 3 Strikes Law Facts*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/three-strikes-laws-in-different-states.html> (Mar. 1, 2021) (listing states with a Three Strikes law, including but not limited to Arkansas, Louisiana, Tennessee, Texas, and Wisconsin).

sentence, regardless of how insignificant the crime was.¹⁹⁷ Thus, abortion-restricting states should repeal their Three Strikes law to address the incoming crime influx. States that do not have a Three Strikes law should simply impose more lenient sentences. Declining to impose harsh sentences is one way to help lessen the snowball's impact when it collides with the justice system.

5. Changing the Bindover Age for Juveniles

Another option to lessen the impact is to increase the bindover age for juveniles. "Bindover" is "the process by which a juvenile court judge transfers a youth's case to an adult court to be tried and sentenced as an adult."¹⁹⁸ Some states impose a mandatory bindover, requiring the juvenile court to transfer the child to adult court if certain criteria are met.¹⁹⁹ Other states have a discretionary bindover, allowing the juvenile judge discretion to transfer the juvenile to adult court.²⁰⁰ Regardless, each state sets the minimum age at which a juvenile can be transferred to adult court.²⁰¹ For mandatory transfers, most states set the minimum age at eighteen years old.²⁰² However, other states are harsher.²⁰³ For instance, in West Virginia there is no minimum age, and in Kansas and North Dakota the minimum age is only ten years old.²⁰⁴

For discretionary transfers, the age varies more.²⁰⁵ In Missouri and Mississippi, depending on the crime, the juvenile need only be twelve and thirteen years old, respectively.²⁰⁶ In Alabama, Arkansas, Idaho, Kentucky, and Texas, the juvenile need only be fourteen years old.²⁰⁷ In other states, such as South Dakota, the youth must be sixteen years old, and Wisconsin, depending on the crime, the youth's age can range from fourteen to fifteen years old.²⁰⁸ Therefore, abortion-restricting states should first eliminate mandatory bindover laws. This will protect the ten-year-olds in Kansas and North Dakota who turned to crime. States with discretionary bindover should increase the minimum age to eighteen years old, effectively eliminating bindovers in most states. While increasing the bindover age will not prevent

¹⁹⁷ *Id.*

¹⁹⁸ *End Mandatory Bindover in Ohio*, OHIO FAMS. UNITE FOR POL. ACTION AND CHANGE, https://www.ofupac.org/end_mandatory_bindover_in_ohio (last visited Sept. 17, 2023).

¹⁹⁹ *Id.*

²⁰⁰ Leah Winsberg, *Ending Automatic Youth Transfers to Adult Court*, CHILD.'S L. CTR. (May 2022), extension://efaidnbmnnnibpcajpcgglefindmkaj/https://static1.squarespace.com/static/571f750f4c2f858e510aa661/t/6272a826338aa43681f5ce6a/1651681319246/Ohio+Mandatory+Bindover+Policy+Brief1.pdf.

²⁰¹ *Age Matrix*, INTERSTATE COMM'N FOR JUVS., <https://www.juvenilecompact.org/age-matrix> (Mar. 15, 2023).

²⁰² *See generally id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *See generally id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

crime, it will help accommodate children who are the products of unwanted pregnancies, ultimately lessening the snowball's impact.

6. No Adult Prison Sentences for Juveniles

Similar to the preceding section, an additional mitigation method to decrease the snowball's size is for states to avoid imposing adult prison sentences for juveniles. When a child is accused of specific crimes, and depending on the bindover age in the child's state, they may be sentenced to adult prison indefinitely.²⁰⁹ This is especially problematic because children younger than fourteen years old are still developing; they have less maturity, judgment, and knowledge than adults.²¹⁰ Additionally, children are generally less competent than adults, making them susceptible to false confessions, confusion about their rights, and at an overall disadvantage in the legal system.²¹¹

Every state has the option to house juveniles separately from adults, but many states refuse to do so.²¹² Many states have "once an adult, always an adult" policies, which mandate that if a child under eighteen years old has ever been charged as an adult, then all of their future cases must also be handled in the adult system.²¹³ Approximately 4,500 children are housed in adult prison facilities.²¹⁴ This disproportionately impacts Black and Brown youth as Black youth are 8.6 times more likely than their white counterparts to receive an adult prison sentence.²¹⁵ Similarly, Latino youth are four times more likely to receive an adult sentence.²¹⁶

Many children who are prosecuted as adults suffer from untreated mental illness, and they generally have very limited experience managing their anxieties, trauma, and disabilities.²¹⁷ Given that adult prisons are more aggressive, this stressful environment can exacerbate a child's mental health problems.²¹⁸ This is also because many children who are transferred from juvenile court to adult courts are automatically housed in adult facilities, placing the children at a high risk of sexual assault and suicide.²¹⁹ Further,

²⁰⁹ See *Children in Adult Prison*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/children-in-prison/> (last visited Sept. 17, 2023).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Maddy Troilo, *Locking Up Youth with Adults: An Update*, PRISON POL'Y INITIATIVE (Feb. 27, 2018), <https://www.prisonpolicy.org/blog/2018/02/27/youth/>.

²¹⁴ *Children in Adult Prison*, *supra* note 209. From 1990 to 1999, youth jail populations increased by 311%. Troilo, *supra* note 213.

²¹⁵ Troilo, *supra* note 213.

²¹⁶ *Id.*

²¹⁷ *Children in Adult Prison*, *supra* note 209; see also *Alternatives to Detention and Confinement*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION: MODEL PROGRAMS GUIDE, https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/alternatives_to_detection_and_confinement.pdf (Aug. 2014).

²¹⁸ *Children in Adult Prison*, *supra* note 209; see also Troilo, *supra* note 213.

²¹⁹ *Children in Adult Prison*, *supra* note 209; see also Troilo, *supra* note 213.

once a child is released from an adult facility, their recidivism rate increases.²²⁰ Some states implement a “sight and sound” separation, meaning that the child is separated from the adults.²²¹ However, this often entails the child being placed in solitary confinement where they are at risk for significant psychological trauma from isolation.²²² Thus, it is apparent that adult prison sentences serve no benefit to juveniles.

As an alternative to prison sentences, the abortion-restricting states can implement other treatment options, community-based sanctions, or residential placements.²²³ These alternatives are often less costly and serve many other benefits, such as avoiding the stigma of institutionalization and forming positive ties between the juvenile and their family and community.²²⁴ Specifically, one alternative is home confinement, also known as house arrest, which strictly monitors the offender while they live at home, attend school, and fulfill other responsibilities.²²⁵ Another option is day or evening treatment, which provides a highly structured, non-residential, intensive supervision program.²²⁶ The juvenile is required to report to a treatment facility daily for a specified number of days, but they are permitted to return home at night.²²⁷ Similarly, shelter care and group homes are an alternative.²²⁸ Youths who need short-term placement (usually less than thirty days) outside of their home are placed in homes that provide structural educational and recreational activities.²²⁹ This option is especially beneficial to juveniles who need placement because there are no suitable parents or family members available.²³⁰

While these options are not exhaustive, they are beneficial.²³¹ Youths who receive these alternatives are less likely to be rearrested.²³² Moreover, these youths reported fewer criminal activities, runaways, and fewer days spent in a juvenile detention facility.²³³ Overall, youths who receive these alternatives are less likely to reoffend and may experience more positive life outcomes.²³⁴ Therefore, while children who are the product of unwanted pregnancies are more likely to turn to crime, eradicating adult prison sentences for youths and implementing youth-friendly alternatives can help

²²⁰ Troilo, *supra* note 213.

²²¹ *Children in Adult Prison*, *supra* note 209.

²²² *Id.*

²²³ *Alternatives to Detention and Confinement Literature Review*, *supra* note 217.

²²⁴ *Id.*

²²⁵ *Id.* The youth can be monitored electronically or through frequent contact with court staff. *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *See generally id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

alleviate the snowball's impact when it collides with the criminal justice system.

IV. CONCLUSION

As this Comment demonstrates, there are countless unintended ramifications of criminalized abortion. Donohue and Levitt's research validates the correlation between legalized abortion and crime: a reduction in unwanted pregnancies reduces the amount of people likely to commit crimes, and allowing for optimization of parenthood ensures children grow up in nurturing environments.²³⁵ Without legalizing abortion, there will be an inescapable crime influx in the abortion-restricting states.²³⁶ Women across all backgrounds seek abortions. However, evidenced by the history of abortion, it is the women who are already disadvantaged due to their age, race, and socioeconomic status who are most impacted by criminalized abortion.²³⁷ When the state denies them an abortion, the snowball enlarges, and with each adverse experience—poverty, feeling unwanted, and many other factors—the snowball's size increases. Accordingly, it is imperative that the abortion-restricting states act now to address this inevitable crime influx in the coming years.

As discussed, the abortion-restricting states should implement mitigation methods to decrease the snowball's size, or to at least keep its size from increasing. Moreover, many of these methods are not unduly costly. For instance, enabling defendants to utilize the Rotten Upbringing Defense does not impose a burdensome cost because mitigation specialists already work in local government.²³⁸ Similarly, declining to sentence juveniles to adult prisons is not unduly costly because the suggested alternatives—day or evening treatment, home confinement, shelter care, etc.—are linked to lower recidivism rates.²³⁹ Perhaps if Clifford and Anders were afforded some of these mitigation methods, their collision with the criminal justice system would not have happened or would not have been as detrimental. While these methods are neither flawless, nor exhaustive, they provide a starting base to lessen the impact of the snowball when it inevitably collides with the criminal justice system. It is crucial for the abortion-restricting states to act now because “[c]rime and bad lives are the measure of a State's failure, all crime in the end is the crime of the community.”²⁴⁰

²³⁵ Donohue & Levitt (2001), *supra* note 14, at 381–82.

²³⁶ *Id.* at 415.

²³⁷ *See supra* notes 21–41 and accompanying text.

²³⁸ *What Do Mitigation Specialists Do?*, *supra* note 179.

²³⁹ *Alternatives to Detention and Confinement Literature Review*, *supra* note 217.

²⁴⁰ Wells, *supra* note 1.

