

TEXAS ABORTION LAW POST-*DOBBS*

I. T.X. Laws on the Books That Were Enjoined or Not Enforced Under *Roe*

In 1854, Texas first enacted a criminal abortion statute, which was shortly modified into substantially the form that the abortion statute took in 1973, when the Supreme Court held the Texas law unconstitutional in *Roe v. Wade*.

The pre-*Roe* statute provided:

Article 1191. Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By ‘abortion’ is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

Art. 1192. Furnishing the means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Art. 1193. Attempt at abortion

‘If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Art. 1194. Murder in producing abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

2A Tex. Penal Code arts. 1191-1194 at 429-436 (1961). The pre-*Roe* abortion statute contained only an exception for “an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” Art. 1196. Texas courts had long held that the pregnant person could not be prosecuted for securing an abortion or for attempted abortion. *See, e.g.*, *Gray v. State*, 178 S.W. 337 (Tex. Crim. 1915); *Shaw v. State*, 165 S.W. 930 (Tex. Crim. 1914).

In 2004, the Court of Appeals for the Fifth Circuit concluded that the Texas provisions that criminalized abortion and were found unconstitutional in *Roe* had “been repealed by implication.” *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004). Nonetheless, anti-choice legislators and activists have indicated an interest in applying them post-*Dobbs*.

II. T.X. Abortion Regulations in Effect at the Time *Dobbs*’ Was Issued That Have Criminal Penalties

The state also has a number of statutory provisions enforced today, where violation constitutes a criminal offense. These include:

- Texas law prohibits performing abortion using certain techniques including what the statute terms “dismemberment abortion” and “partial-birth abortion,” both of which are felonies. Tex. Health & Safety Code §§ 171.102, 171.103, 171.152, 171.153. The prohibition on partial-birth abortions also permits civil liability to “the father of the fetus or a parent of the mother of the fetus, if the mother is younger than 18.” Tex. Health & Safety Code § 171.104.
- Abortion after 20 or more weeks post-fertilization is also prohibited, Tex. Health & Safety Code § 171.044, and the statute seems to anticipate criminal and civil proceedings, Tex. Health & Safety Code § 171.047.
- Physicians and healthcare facilities are required to report abortion complications and face civil penalties of \$500 for each violation. Tex. Health & Safety Code § 171.006.
- Texas law sets a lengthy list of requirements for “informed consent,” including recordkeeping and documentation, mandated information, mandated sonogram and description, two-in-person trips with at least a twenty-four hour waiting period, and distribution of state materials. A physician who intentionally performs an abortion on a woman in violation of these requirements commits a misdemeanor punishable by a fine not to exceed \$10,000. Tex. Health & Safety Code § 171.018.

SB 4, which went into effect in December 2021, prohibits the provision of medications for the purposes of causing an abortion after 49 days (7 weeks) of gestation or later. Tex. Health & Safety Code §171.063. It also prohibits the medications from being provided by courier, delivery, or mail service, among other restrictions. It further prohibits providing medications for the purpose of causing an abortion by anyone other than a physician. Tex. Health & Safety Code §171.063(a)(1). Anyone who intentionally, knowingly, or recklessly violates these provisions commits a felony. Tex. Health & Safety Code § 171.065. SB 4 has not been challenged in court under *Roe/Casey*, due to SB8’s prohibition on abortion after 6 weeks gestation discussed below.

Texas also has a so-called trigger ban that prohibits a person from knowingly performing, inducing, or attempting an abortion on another person. Human Life Protection Act of 2021, [H.B. 1280](#) (signed into law June 16, 2021). It exempts medical emergencies, defined such that a person must be experiencing a “life-threatening physical condition aggravated by, caused by, or arising from a pregnancy” that puts them “in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.” It would go into effect 30 days after the Supreme Court issues a “decision overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion.” H.B. 1280, § 3.

The Texas Penal Code prohibits criminal homicide where a person intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual. Tex. Penal Code § 19.01(a). An individual is defined to include “an unborn child at every stage of gestation from

fertilization until birth.” Tex. Penal Code § 1.07(a)(26). The law excepts “a lawful medical procedure” performed by a physician or other licensed healthcare provider with the requisite consent “if the death of the unborn child was the intended result of the procedure;” a lawful medical procedure performed as part of assisted reproduction; and “the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.” Tex. Penal Code § 19.06.

After-*Dobbs*, the homicide statute could be applied to the performance of unlawful abortion under Texas law. The text makes clear that “death of an unborn child” caused by “conduct committed by the mother of the unborn child” does not violate the homicide statute. Tex. Penal Code § 19.06(a). The same exception is written into the assault statute. Tex. Penal Code § 22.12(a). These exemptions would apparently remain intact after *Dobbs*, meaning that self-induced abortion would not violate the homicide statute. The trigger ban includes the following provision: “This chapter may not be construed to authorize the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted.” H.B. 1280, § 2.

III. T.X.’s Current Civil Framework Regulating Abortion

The state has other provisions currently in effect that regulate access to abortions. The key restrictions are contained in the Health and Safety Code and include the following:

- An abortion may only be performed by a licensed physician (§ 171.003);
- Detailed recordkeeping and recording requirements about abortion complications, abortions performed on minors, and abortions performed due to medical emergency after the gestational age cut-off or without compliance with other restrictions (§§ 171.006 & 171.008);
- Mandatory counseling that must include prescribed content, the distribution of a state-created pamphlet (which includes dubious medical information as well as information about child support, adoption, and government assistance) and be performed by the same physician who performs the abortion (§ 171.012);
- Mandatory ultrasound during which the physician must verbally describe the images (including the dimensions of the embryo or fetus and the specific organs and limbs observed), must make the images visible to the pregnant patient, and must make any detected cardiac activity loud enough for the patient to hear (§ 171.012(a)(4));
- 24-hour waiting period between ultrasound and abortion unless the patient lives more than 100 miles from the nearest abortion facility (§ 171.012(a)(7));
- No abortions more than 20 weeks post-fertilization unless there is a severe fetal abnormality (§ 171.042);
- Parental consent or judicial bypass required for a minor seeking an abortion (Chapter 33 of Family Code);
- Assorted other provisions restrict insurance coverage, prohibit telehealth, require burial of fetal remains, and otherwise regulate abortion care differently from other medical care.

Two additional restrictions on abortion care facilities remain on the books but have not been enforceable since the Supreme Court's ruling in *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016). Section 245.010 of the Health and Safety Code requires abortion facilities to meet the standards for ambulatory surgical centers, and Section 171.0031 of the Health and Safety Code requires that a physician who performs abortions must have active admitting privileges at a hospital that is no further than 30 miles from the abortion facility.

The *Roe* trigger ban (H.B. 1280) also includes a \$100,000 penalty for each abortion that is not necessitated by a medical emergency, in addition to the criminal liability.

Texas SB 8, which went into effect on September 1, 2021, is superimposed on the laundry list of restrictions above. SB 8 prohibits anyone from knowingly performing or inducing an abortion after detection of embryonic cardiac activity, about 5 or 6 weeks from the first day of a person's last menstrual period. Tex. Health & Safety Code § 171.204. The law also prohibits anyone from aiding and abetting an abortion in Texas after embryonic cardiac activity is detected. Tex. Health & Safety Code § 171.208. The law is enforced by private citizens, not state agencies, through civil actions with statutory damages in an amount of not less than \$10,000 for each abortion. Tex. Health & Safety Code §§ 171.207 & 171.208. SB 8 faces multiple court challenges under various federal and state constitutional provisions.

Last updated: June 24, 2022



Criminalization of Pregnancy & Reproductive Health State-by-State Reports

Consistent with our Mission, the National Association of Criminal Defense Lawyers has launched its Criminalization of Pregnancy and Reproductive Health Project (CPRHP) to support attorneys defending individuals and entities at risk of prosecution as a result of the criminalization of abortion and abortion services. Following up on our 2019 report *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights into Criminal Wrongs*, NACDL's CPRHP has worked with dozens of law professors and other legal experts to create this overview of relevant state laws including existing abortion laws, trigger laws that are or will soon be in effect, pre-Roe statutes that prosecutors might invoke, and fetal personhood laws. NACDL is committed to developing resources to prepare attorneys to advise clients and defend cases in the face of the criminalization of personal choice and health.

NACDL's Criminalization of Pregnancy & Reproductive Health

This report was made possible by NACDL's Criminalization of Pregnancy & Reproductive Health efforts.

Learn more about this work at <https://www.nacdl.org/protecthealth>.

Acknowledgements

Thank you to all the volunteers who contributed these state reports. See a full list of acknowledgements at <https://www.nacdl.org/protecthealththanks>.

Disclaimer

NACDL is providing resources regarding the Criminalization of Pregnancy and Reproductive Health to the criminal defense community. Resources are provided without warranty or guarantee. Please consult the laws and rules of your state and local authorities.

NATIONAL
ASSOCIATION
OF CRIMINAL
DEFENSE LAWYERS



NACDL
FOUNDATION FOR
CRIMINAL
JUSTICE