BODIES OF EVIDENCE: THE CRIMINALIZATION OF ABORTION AND SURVEILLANCE OF WOMEN IN A POST-DOBBS WORLD

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ABSTRACT

In the wake of Dobbs v. Jackson Women's Health Organization, state laws criminalizing abortion raise concerns about the investigation and prosecution of women seeking reproductive health care and about the surveillance such investigations will entail. The criminalization of abortion is not new, and the investigation of abortion crimes has always involved the surveillance of women. However, state statutes criminalizing abortion coupled with surveillance methods and technologies that did not exist pre-Roe present new and complex challenges surrounding the protection of women's privacy and liberty interests—in addition to the interests of those who may provide or help pregnant people obtain reproductive care. Accordingly, surveillance, investigation, and the possibility of prosecution create new and more extensive privacy concerns than those traditionally associated with the right to decide whether to have an abortion.

What is also new and disruptive is the existence of medication abortion, which was not available pre-Roe. Medication abortion functionally allows people to self-manage abortions safely in the privacy

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of their own homes, and its availability undermines the efficacy of bans that target providers, aiders, and abettors. How states apply statutes that criminalize abortion and investigate "abortion crimes" in the context of new opportunities for safe, self-managed abortions will play out over time. This article, taking lessons about the surveillance of women from the pre-Roe era of abortion criminalization, is the first to evaluate new and existing laws criminalizing abortion post-Dobbs and consider how modern technologies directed toward the investigation of individuals self-managing abortions through medication will magnify the pervasiveness, scale, and harm of such surveillance.

INTRODUCTION

In 1965, in *Griswold v. Connecticut*,¹ the Supreme Court considered the constitutionality of a state law criminalizing the use of contraceptives by any person. In a 7-2 opinion, the Court invalidated the law as applied to married people, and, in doing so, recognized that criminalizing the private use of contraception would entail significant, unacceptable intrusions into the marital relationship:

[This case] concerns a law which, in forbidding the use of contraceptives, rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon th[e marital] relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama 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.²

A consideration of the kind and degree of surveillance necessary to enforce a criminal prohibition on the use of contraceptives and the violations of privacy that such a prohibition would involve played a role in the Court's rejection of the Connecticut law. The Court's reference to searching marital bedrooms, which in most instances would occur after the police obtained a warrant, implies that even the necessity of a warrant cannot provide sufficient protection against governmental

^{1. 381} U.S. 479 (1965).

^{2.} Id. at 485-86.

intrusions into personal spaces and relationships when the investigation concerns the crime of using contraception.³

A similar analysis is strikingly absent from the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.⁴ In spite of pre-*Roe* laws criminalizing abortion and the fact that states, through existing "trigger laws," were poised to enact or enforce similar laws if *Roe* should be overturned, the Court failed even to consider the kinds of surveillance that would be necessary to enforce such laws or the privacy intrusions such surveillance would entail. Indeed, the majority opinion is notably devoid of any contemplation of the far-reaching real-world consequences for women's actual lives that would inevitably follow a decision eviscerating the constitutional protection for the right to privacy.⁵

State laws criminalizing abortion in the wake of *Dobbs* have monumental implications for privacy writ large. Two dimensions of privacy⁶ are traditionally associated with the right to abortion: decisional privacy, which includes the right to make decisions about contraception, procreation, medical care, and parenting; and physical privacy and bodily integrity, which includes the threat of incarceration, forced medical procedures, the denial of medical care, compelled pregnancy, and forced birth.⁷ These laws also increasingly implicate informational privacy and the freedom, or lack thereof, from surveillance. Informational privacy includes an individual's interest in

^{3.} For additional discussion of *Grisworld* and its import as a criminal law case, *see* Melissa Murray, *Sexual Liberty and Criminal Law Reform: The Story of Griswold v. Connecticut*, in REPROD. RIGHTS AND JUSTICE STORIES 11, 30 (2019) (situating *Griswold* as a criminal law case about prosecution and policing in the context of the criminal law reform debate taking place at the time seeking "to limit the state's use of criminal law as a means of policing and enforcing compliance with majoritarian sexual mores.").

^{4. 597} U.S. 215 (2022).

^{5.} See id. at 411 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("The majority's refusal even to consider the life-altering consequences of reversing Roe and Casey is a stunning indictment of its decision."). While notable and offensive, this omission is not particularly surprising. Earlier decisions restricting abortion rights have similarly failed to acknowledge consequences. Describing Webster v. Reproductive Health Services, 492 U.S. 490 (1989) in 1989, Walter Dellinger wrote: "[A]bsent from the prevailing opinions was any sense of the social, economic and medical consequences of the disastrous course upon which at least four of the court's justices have embarked." Walter Dellinger, The Abortion Decision Monument to Confusion, Wash. Post. (July 9, 1989), https://www.washingtonpost.com/archive/opinions/1989/07/09/the-abortion-decision-monument-to-confusion/661e250b-61fa-42da-8438-c8d0d343dca2/.

^{6.} See discussion of the various dimensions of privacy, infra note 398.

^{7.} Jolynn Dellinger & Stephanie Pell, *Privacy in Peril: From Reproductive Freedom to Forced Birth*, VERFASSUNGSBLOG (Aug. 12, 2022), https://verfassungsblog.de/privacy-in-peril.

protecting the privacy of personal data and an interest in avoiding unwanted disclosure of personal information. In a modern world where more private information about us exists on our smartphones than in our homes, where location data can reveal everywhere we have been, and where the content of our communications is stored by third-party providers and available to law enforcement with limited court process, the degree to which these laws enable the surveillance of women and people who can become pregnant⁸ vastly outstrips the privacy-violating surveillance envisioned by the *Griswold* Court. This surveillance, in turn, compromises intellectual privacy—a fourth category of privacy—which includes the right to access information, read, and think freely and independently.

In addition to the many ways in which the *Dobbs* decision eviscerates the freedom and liberty interests of women, it also foments an environment where anti-abortion states will target and focus their surveillance powers on women while investigating abortion crimes. Surveillance, as we use the term in this discussion, means the close observation of a person or population. Most relevant here is law enforcement's ability to engage in surveillance through the collection and use of information from personal devices and from various third parties with or without the knowledge of those being surveilled. Surveillance may be conducted in real time, or it may be conducted by accessing historical data after an event takes place; it may also be conducted by people or machines. In the pre-digital age before *Roe*, time and resource demands limited the scope and pervasiveness of surveillance. Stakeouts, sending officers to search physical premises, tailing suspects, conducting interviews with informants or interested parties, sifting through file cabinets full of documents—all of these forms of surveillance required substantial sums of money and many hours of work by numerous people.9

^{8.} In this article, we use the terms "women," "pregnant people," and "people who can become pregnant." Our use of "women" recognizes that both current and historical discussions of abortion implicate the treatment of women as a group, gendered societal and religious stereotypes about motherhood and femininity, and laws and decisions that have specifically mentioned or applied to women. We use "pregnant people" and "people who can become pregnant" to recognize the broader category of people who face reproductive health issues and pregnancy, as well as privacy and surveillance issues, arising in the wake of *Dobbs*. We intend to be inclusive in our attempt to explore the consequences of the criminalization of abortion following *Dobbs*, while also conveying the ways in which the historical treatment of abortion in the U.S. relies on both stereotypes and the discriminatory treatment of women.

^{9.} See, e.g., United States v. Jones, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring) ("[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law

In today's digitally mediated environment, vast troves of data can be collected, searched and analyzed in a fraction of the time with a fraction of the human resources required pre-Roe, and surveillance technologies are increasingly affordable and accessible to state and local law enforcement. Historically, law enforcement would focus on a target or suspect and make plans to watch or track that person. Today's information (or surveillance) economy, powered by data collection and the ubiquitous use of personal devices, has created a situation in which an individual may be extensively surveilled in retrospect. Digital records documenting years of a person's location history, internet and mobile device activity, search history, purchase history, social media activity. commercial and interpersonal interactions, communications can be compiled for investigatory purposes. People generate these data through constant use of the internet and personal devices and may erroneously consider such digital interactions and the data they produce to be private. The capacity for surveilling individuals today simply dwarfs the surveillance possible prior to 1973—in scale, comprehensiveness, power, intensity, and invasiveness.

The coercive effects of such surveillance extend beyond the capacity to watch and collect data about people. Surveillance also involves "some capacity to control, regulate, or modulate behavior." Accordingly, we are concerned both about the individual targets of surveillance "whose freedoms are infringed upon" and the "larger effects on subject populations [in this case, women and people who can become pregnant] or society as a whole." Both the regulation of female bodies and the surveillance of women enabled by the *Dobbs* Court are manifestations of power—the leveraging of control to engineer preferred outcomes. In this case, those outcomes include reproductive compliance and forced birth. Surveillance, combined with the threat of prosecution, also chills intellectual freedom and autonomous decision-making, while simultaneously compromising

enforcement practices: limited police resources and community hostility."); Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018) ("[H]istorical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in Jones. . . . Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.").

^{10.} *Introduction* to SURVEILLANCE STUDIES: A READER xix (Torin Monahan and David Murakami Wood eds., 2018).

^{11.} Id. at xxvii.

intimate privacy,¹² reproductive health, civil rights, and civil liberties.¹³ A society that subjects women to a disproportionate level of surveillance, and thus control, can never be equal.

While modern technologies heighten and intensify the surveillance harms that flow from the *Dobbs* decision, the majority opinion also evokes painful lessons from the past that are relevant to the present and future well-being of women: prior to 1973, a number of states criminalized abortion, and women were surveilled in the course of law enforcement's investigation of abortion crimes. Now, more than thirteen states are enforcing some combination of the following: archaic laws dating back to the 1800s; laws that provide personhood status to fetuses; trigger laws outlawing and criminalizing abortion that were passed when abortion was a constitutionally protected right but did not take effect until the Supreme Court overruled *Roe*; and newly enacted abortion bans that criminalize abortion—all of which rely on surveillance for enforcement.

Going forward, self-managing abortions through medication may be the only way many women in anti-abortion states can access abortion. Women will face greater risks of surveillance and prosecution as state authorities attempt to eliminate the availability of medication abortion and penalize self-managed abortion.

This Article proceeds in six Parts. In Part I, we provide an overview of the criminalization of abortion in the pre-Roe era and the surveillance of women that criminalization enabled. We also describe a tension that has persisted over time between the ostensible desire to protect women and the countervailing inclination to prosecute and hold them morally responsible for their actions. We also describe how this tension manifests in the technologically and medically modern post-Dobbs landscape. Part II examines medication abortion as an alternative to abortion procedures conducted in a clinic or hospital setting and demonstrates the ways that self-managing abortion with

^{12.} See The Right to Intimate Privacy, THE MARKUP: HELLO WORLD (Dec. 3, 2022, 8:00 PM) (interview with Danielle Citron, Jefferson Scholars Found. Schenck Distinguished Pro. in L., Univ. Va. Sch. L.), https://themarkup.org/newsletter/hello-world/the-right-to-intimate-privacy:

Intimate privacy concerns the boundaries set around our intimate lives. It's information about and access to our bodies, our health, our innermost thoughts (which we document all day long as we browse, read, search, share, text, and email). It concerns information about our sexual orientation, gender, and our sexual activities. It concerns our closest relationships.

^{13.} Dellinger & Pell, supra note 7.

medication both promotes privacy interests and undermines efforts to ban abortions. In Part III, we consider how women who self-manage their abortions are at risk of prosecution in states that are criminalizing abortion. Our analysis of both historical and current statutory language categorizes statutes from a number of states with respect to how explicitly they permit or prohibit the prosecution of women who seek, obtain, or self-manage abortions. Part IV provides three hypotheticals about women self-managing abortions through medication and demonstrates how the current state of the law and surveillance technologies could facilitate investigations and prosecutions of their alleged crimes. Part V addresses the privacy harms associated with the surveillance of women's lives, reproductive decisions, and pregnancy outcomes. Part VI considers the potential remediation of these problems.

I. FROM THE PAST TO THE PRESENT: THE CRIMINALIZATION OF ABORTION, SURVEILLANCE, AN D THE PERSISTENT TENSION BETWEEN THE DESIRE TO PROTECT AND PROSECUTE WOMEN

The criminalization of abortion has always involved the surveillance of women. This fact often gets lost in the current narrative that only providers and those who aid and abet the provision of abortion are targeted by state laws criminalizing abortion. Regardless of whether women are explicitly subject to prosecution, laws criminalizing abortion render a woman's body the scene of a crime. Accordingly, her body and information about her body, her sex life, her relationships, and her conduct become evidence in the investigation of abortion crimes.

In some respects, history is repeating itself. Lessons from the pre-Roe period during which states criminalized abortion—from the mid-1800s through 1973—demonstrate that state attempts to enforce laws prohibiting abortion by explicitly targeting providers rested on the investigation and surveillance of women. As comprehensively illustrated by Leslie J. Reagan, law enforcement and prosecutors collected and used a wide range of evidence in their attempts to enforce abortion restrictions: dying declarations coerced from women in hospital settings following botched abortion attempts;¹⁴ testimony

^{14.} LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 118 (2d ed. 2022). See also JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900 219 (1978) (describing an 1875 New York law permitting dying declarations as admissible evidence in

about intimate matters elicited from family members, lovers, and friends for the purposes of coroners' inquests;¹⁵ invasive physical internal examinations of women's bodies;¹⁶ women's medical records;¹⁷ interrogations; and the compelled testimony in open court of women who obtained illegal abortions,¹⁸ to name just a few. As Reagan explains:

In their efforts to obtain dying declarations, police and physicians, usually male, repeatedly questioned women about their private lives, their sexuality, and their abortions; they asked women when they last menstruated, when they went to the abortionist and what he or she did. Were instruments introduced into "their privates"? If so, what did the instruments look like and how were they used? If the woman was unmarried, she was asked with whom she had been sexually intimate and when, precisely the information she may have hoped to keep secret by having an abortion.¹⁹

Accordingly, even when the laws targeted providers and those who assisted with the provision of abortion, evidence was extracted from women—their bodies, their data, and their private lives. As Reagan's research demonstrates, even in this pre-digital time, informational privacy was very much bound up with a woman's decisional and physical privacy.

Before *Roe*, law enforcement officials often coerced providers at hospitals into interrogating patients and reporting them to the police

abortion-related homicide prosecutions); MARY ZIEGLER, REPRODUCTION AND THE CONSTITUTION IN THE UNITED STATES 17 (2022) (describing dying declarations and their use in prosecutions: "For the most part, from the late nineteenth century into the early decades of the twentieth century, prosecutors pursued charges against abortion doctors only when a woman died.").

- 16. REAGAN, *supra* note 14, at 169–71.
- 17. Id. at 160-67.
- 18. *Id.* at 161–70, 191–92; ZIEGLER, *supra* note 14, at 23.
- 19. REAGAN, *supra* note 14, at 126.

^{15.} Dying declarations and coroner's inquests served as evidence when prosecutors focused on "abortionists responsible for abortion-related deaths," a common practice in the early 1900s as described by REAGAN, *supra* note 14, at 116. Reagan astutely points out that one could not get a full picture of a state's enforcement efforts by looking solely at convictions. Rather, the entire investigative process, including police arrests and inquests into deaths, paints a better picture of the state's efforts to repress abortion. *Id.* Likewise, in the modern era, we will need to focus on the surveillance and investigative inquiries, arrests and pleas to get a more complete assessment of the harm caused by laws criminalizing abortion. A recent If/When/How report notes that while only 10% of the cases they studied went to trial and ended with a guilty verdict, 45% ended with a guilty plea. LAURA HUSS ET AL., IF/WHEN/HOW: LAWYERING FOR REPROD. JUST., SELF-CARE, CRIMINALIZED: THE CRIMINALIZATION OF SELF-MANAGED ABORTION FROM 2000 TO 2020 25 (2023), https://ifwhenhow.org/resources/selfcare-criminalized/ [hereinafter "If/When/How Report"].

when the providers had reason to suspect an illegal abortion had been attempted. They threatened providers with prosecution, unwanted publicity, and loss of their medical licenses. As Reagan notes, "[i]t would have been virtually impossible for the state to enforce the criminal abortion laws without the cooperation of physicians." In these circumstances, then, women were subject to surveillance not only by law enforcement but by the people they turned to for health care. In some cases, providers withheld care from women who refused to provide the requested declaration or information.

Enforcement of anti-abortion laws has varied over time in response to cultural and socio-political changes.²³ Historically, selective enforcement of abortion prohibitions led to the formation of underground groups like the Jane Collective in Chicago; "the Janes" helped women find providers and later performed abortions themselves.²⁴ At other times, abortion providers even operated quietly in the open—receiving referrals from physicians in hospitals and doctors' offices and sometimes bribing police officers and prosecutors to look the other way. But when enforcement efforts ramped up, these operations were raided, providers were arrested, records were seized, and patients were detained and sometimes subjected to invasive internal examinations. In all these circumstances, acting in violation of laws on the books was a calculated risk. And when things went south, women's bodies and intimate data were key evidence in investigations—even when providers were the targets of investigations and the defendants in criminal prosecutions.

Criminalizing abortion has always been an attempt to stop abortions from happening. When abortions are primarily accomplished by physicians performing physical procedures on women's bodies in clinics or other medical facilities, passing laws that criminalize

^{20.} Id. at 3.

^{21.} Both If/When/How and National Advocates for Pregnant Women ("NAPW") note that a significant number of cases are still reported to law enforcement by health care providers. If/When/How Report, *supra* note 15, at 30 (39% of the cases studied by IWH were reported by health care providers); Russell Brandom et al., *The Biggest Privacy Risks in Post-Roe America*, THE VERGE (June 27, 2022, 3:47 PM), https://www.theverge.com/23185081/abortion-data-privacy-roe-v-wade-dobbs-surveillance-period-tracking ("At NAPW, we have had many, many cases where people are criminalized because health care providers have reported them to the police.").

^{22.} See REAGAN, supra note 14, at 301 n.34.

^{23.} See REAGAN, supra note 14, at 155 (discussing abortion providers who bribed police officers and prosecutors in exchange for non-prosecution); ZIEGLER, supra note 14, at 23 (pronatalism of the 1940s "fueled a much more aggressive crackdown on abortion").

^{24.} THE JANES (HBO Max 2022).

providers' conduct and threaten doctors with lengthy prison terms can be an effective way to accomplish that goal. Not surprisingly, clinics post-*Dobbs* have stopped providing abortions or closed altogether in states enforcing such criminal laws.²⁵ In places where certain abortions are permissible in very limited circumstances, doctors are required to confer with lawyers and administrators instead of immediately providing evidence-based care for their patients.²⁶ Across the country, targeted providers are taking actions necessary to avoid being charged and prosecuted.

The covert provision of physical abortion procedures would be far more challenging today than during the pre-Roe era. The vast proliferation of mobile devices and location-based products and services that produce cell site and GPS-generated location information would make rooting out covert providers child's play for law enforcement intent on eliminating the provision of abortion. The false names, multiple handoffs by intermediaries, undisclosed locations, blindfolds, and other forms of subterfuge²⁷ used by groups like the Janes in the pre-Roe era would not provide protection when both providers and patients are carrying cellphones or other personal devices like watches and wearables that constantly produce, collect, or record location and biometric data. Even in the unlikely event that all parties left their mobile devices at home or in a hotel room, 28 internet searches to map directions or make travel arrangements, digital communications, purchase histories, automated license plate readers, surveillance cameras, and data obtained or purchased from data brokers could all put providers and patients at risk of being discovered. The Janes are unlikely to reappear in modern-day Texas or Tennessee at least not to facilitate *physical* procedures.

But today, along with seemingly inescapable surveillance

^{25.} Marielle Kirstein et al., 100 Days Post-Roe: At Least 66 Clinics Across 15 States Have Stopped Offering Abortion Care, GUTTMACHER INST. (Oct. 6, 2022), https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care.

^{26.} Selina Simmons-Duffin, *Doctors Who Want to Defy Abortion Laws Say It's Too Risky*, NAT'L PUB. RADIO (Nov. 23, 2022, 5:01 AM), https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky.

^{27.} REAGAN, supra note 14, at 196–98.

^{28.} Simply turning off your cell phone may not prevent it from being tracked. See Can My Phone Be Tracked If Location Services Are Off?, MCAFEE, https://www.mcafee.com/learn/can-my-phone-be-tracked-if-location-services-are-off (last visited Dec. 17, 2023) ("Turning off the location service on your phone can help conceal your location. This is important if you don't want third parties knowing where you are or being able to track your movement. However, a smartphone can still be tracked through other techniques that reveal its general location.").

technologies, which make abortion laws more difficult to evade, a safe, far more private, and much harder to detect method²⁹ of obtaining an abortion is available: medication abortion, accomplished with pills that a person can take in the privacy of their own home. This development will make laws criminalizing the provision of abortion care by physicians and other health providers less effective in stopping abortion. In fact, networks of activists³⁰ like Las Libres—the modernday Janes—are already working to make medication abortion available to women in ban states. In their unflagging quest to prohibit abortion, Republican lawmakers and anti-abortion activists are taking the following steps to limit the availability of medication abortion: challenging the Federal Drug Administration's (FDA) approval of mifepristone;³¹ making it illegal to use telemedicine for abortion;³² supporting medically unnecessary restrictions on who can prescribe medication abortion:³³ and invoking the federal Comstock law³⁴ in an attempt to criminalize the mailing of abortion pills and pill "trafficking."35 These efforts, combined with the ambiguous and

^{29.} See The Availability and Use of Medication Abortion, KAISER FAM. FOUND. (June 1, 2023), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/ ("When taken, medication abortion successfully terminates the pregnancy 99.6% of the time, with a 0.4% risk of major complications, and an associated mortality rate of less than 0.001 percent.").

^{30.} Caroline Kitchener, Covert Network Provides Pills for Thousands of Abortions in U.S. Post Roe, WASH. POST (Oct. 18, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/10/18/illegal-abortion-pill-network/.

^{31.} Laurie McGinley & Ariana Eunjung Cha, Conservative Group Sues FDA to Revoke Approval of Abortion Pill, WASH. POST (Nov. 18, 2022, 7:00 PM), https://www.washingtonpost.com/business/2022/11/18/abortion-pill-lawsuit/.

^{32.} Emily Olsen, Complex Legal Landscape Limits Power of Telemedicine Abortion, MOBIHEALTHNEWS (May 13, 2022, 10:41 AM), https://www.mobihealthnews.com/news/complex-legal-landscape-limits-power-telemedicine-abortion.

^{33.} Patricia J. Zettler & Ameet Sarpatwari, State Restrictions on Mifepristone Access-The Federal Preemption, NEW Eng. J. Med. 386(8) https://www.nejm.org/doi/full/10.1056/NEJMp2118696 ("[M]ore than 30 states have passed laws permitting only physicians to dispense abortion medications, even though nonphysician practitioners are permitted to prescribe and dispense other drugs with safety profiles similar to that of mifepristone."); see also Sarah McCammon, As medication abortion becomes dominant, red states restrict pills, NAT'L PUB. RADIO (Mar. 29. 2022), https://www.npr.org/2022/03/29/1089290488/as-medication-abortion-becomes-dominant-redstates-restrict-pills.

^{34.} Ananya Bhattacharya, *After Roe v Wade, Anti-Abortion Activists Take Fight to Capitol Hill*, QUARTZ (Jan. 19, 2023), https://qz.com/anti-abortion-march-for-life-2023-washington-roe-v-wade-1850005825.

^{35.} Caroline Kitchener, *Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill 'Trafficking,'* WASH. POST (Dec. 14, 2022, 7:30 AM), https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe/.

imprecise statutory language in many state laws that criminalize abortion, create a fertile environment for the prosecution of women who self-manage abortions and, relatedly, more pervasive surveillance of women.

Dobbs explicitly handed the authority to regulate and prohibit abortion to "the people and their elected representatives." Nothing in Dobbs indicates that a state cannot completely ban abortion without exceptions. In fact, Tennessee initially did so, requiring a physician acting to save the life of the mother to break the law prohibiting all abortions and then to rely on an affirmative defense to justify her conduct. Moreover, as Mary Ziegler has noted, anti-abortion groups and Republican candidates have opposed or sought to narrow exceptions to abortion bans altogether, describing even the "life of the mother' exception as unnecessary and wrong." Nothing in Dobbs precludes the criminalization, prosecution, or incarceration of women themselves for obtaining abortions. In fact, prior to Roe, at least nineteen states explicitly criminalized women who sought, self-managed, obtained, or consented to abortions. ³⁹

Criminalizing women's conduct is one way of recognizing women's responsibility for their decisions. Notably, the states that explicitly criminalized pregnant women's conduct in the pre-*Roe* era existed in

^{36.} Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

^{37.} Claire Galofaro, *Lawyer's Mission: Translate Tenn.'s Bewildering Abortion Ban*, ASSOC. PRESS (Sept. 5, 2022, 1:10 AM), https://apnews.com/article/abortion-health-knoxville-statutesgovernment-and-politics-1a92f84003556cdd071f6297cd5f43c0; *See* TENN. CODE ANN. § 39-15-213 (West 2023) (permitting a doctor who performs a criminal abortion to assert an affirmative defense that the action was necessary to save the woman's life. A defendant would bear the burden of proof to establish such a defense.). Tennessee quietly amended its law adding exceptions for limited medical emergencies on April 28, 2023. 2023 Tenn. Pub. Acts ch. 313.

^{38.} Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, THE ATL. (July 25, 2022), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582/.

^{39.} See Mary Ziegler, Some Form of Punishment, 26 WM. & MARY BILL RTS. J. 735, 744 (citing Paul Benjamin Linton, The Legal Status of Abortion in the States if Roe v. Wade Is Overruled, 23 ISSUES L. & MED. 3, 6 n.15 (2007)) ("[M[ore than one-third of states criminalized the actions of women who terminated their own pregnancies or asked others to do so."); MOHR, supra note 14, at 202–06 (describing early laws criminalizing abortion in a number of states, several of which included provisions criminalizing women); Brief for the Thomas More Society as Amici Curiae Supporting Petitioners, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392), at 20 n.16 (available at: https://www.supremecourt.gov/DocketPDF/19/19-1392/184897/20210726123826819_19-

^{1932%20}Amicus%20Brief%20of%20The%20Thomas%20More%20Society.pdf) (collecting nineteen state statutory provisions criminalizing women); Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1785 (citing B. James George Jr., *Current Abortion Laws*, 17 CASE W. RES. L. REV. 371, 381–82 (1965)) (putting the number at fifteen states).

tension with another, more dominant thread of the historical antiabortion movement, which characterized women as victims in need of protection and providers as wrongdoers threatening the safety and lives of women and unborn children. Indeed, in spite of laws criminalizing women, scholars have noted "courts' reluctance to condemn women for committing what legislatures were so ready to call a crime" and a relative lack of convictions of women for violations of abortion laws. 40 In her 2018 work using original archival research, Ziegler explored the "history of pro-life debates about when, whether and how to punish women" and documented the persistent tension between the movement's oft-asserted commitment to a "woman-protective strategy" and the simultaneous justifications by people within the movement for the "prosecution of women who violated laws on abortion and drug use."41 She illuminates the troubling "gap between the rhetoric of abortion opponents—describing women as victims of abortion—and the willingness of abortion opponents to sign off on the prosecutions of women for related conduct."42

The protection of women has been and continues to be offered as a justification for abortion restrictions. During the *Roe* era, anti-abortion advocates asserted that clinics were unsafe and that abortion harms women in a variety of ways. They successfully lobbied for stringent regulations of clinics and abortion care, ostensibly to protect women's health and safety. Waiting periods, mandatory counseling, and ultrasounds have also been justified by reference to the need to protect women.⁴³ Reva Siegel has described the ways "antiabortion advocates

^{40.} Buell, *supra* note 39, at 1783–85, 1790 (emphasis added) (discussing the incoherence and implicit paternalism of the criminal law's treatment of women seeking abortions and documenting small number of reported cases of women convicted for procuring abortions). *See also* LAWRENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 122 (1990) (same); Cyril C. Means, *The Law of New York Concerning Abortion and the Status of the Fetus: A Case of (Cessation) of Constitutionality 1664–1968*, 14 N.Y.L.F. 411, 492 (1968) ("Prosecutors know very well which laws merely serve the ends of social hypocrisy, but, under which juries simply will not convict, and they do not put their reputations for securing convictions in jeopardy by initiating prosecutions where their chances of success are virtually nil.").

^{41.} Ziegler, *Some Form of Punishment, supra* note 399, at 735. In a pre-*Dobbs* article, Ziegler stressed the need for a reform campaign designed to ensure that the "reality and rhetoric surrounding the punishment of pregnant women" are in accord. Mary Ziegler, *Everyone Agrees Women Who Have Abortions Shouldn't Be Penalized. Or Do They?*, WASH. POST (Apr. 1, 2016) https://www.washingtonpost.com/posteverything/wp/2016/04/01/everyone-agrees-women-who-have-abortions-shouldnt-be-penalized-or-do-they/ (discussing anti-abortion tensions to both criminalize abortion and pay attention to women's health).

^{42.} Ziegler, Some Form of Punishment, supra note 39, at 738.

^{43.} E.g., Sandhya Somashekhar, The Most Important Abortion Case at the Supreme Court in a Generation Focuses on Women, not Fetuses, WASH. POST (Feb. 22, 2016, 8:09 PM),

... assert that women seeking abortions are vulnerable, dependent, and confused, and need restrictions on abortion to protect them from coercion and their own mistaken decision making and to free them to fulfill their natures as mothers."⁴⁴ More recently, anti-abortion groups have characterized a woman seeking an abortion as a "second victim of the abortion industry."⁴⁵ In an open letter to state legislators following the leaked *Dobbs* draft, a number of anti-abortion groups claimed that "[t]he mother who aborts her child is . . . the victim of a callous industry created to take lives—an industry that claims to provide for 'women's health,' but denies the reality that far too many American women suffer devastating physical and psychological damage following abortion."⁴⁶

Even more recently, in their reply in opposition to the FDA and Danco Laboratories' petition for writ of certiorari for Supreme Court review of the Fifth Circuit's decision to reverse FDA actions that enabled use and improved access to mifepristone, the Alliance for Hippocratic Medicine and its co-respondents invoked the need to protect women and girls from an allegedly dangerous drug in support of their spurious arguments.⁴⁷

But arguments premised on protection, safety, and health are unpersuasive in a world where safe, effective medication abortion

https://www.washingtonpost.com/national/abortion-foes-strategy-faces-a-key-test-at-the-supreme-court/2016/02/22/d8e29860-d59d-11e5-be55-2cc3c1e4b76b_story.html (writing that waiting periods, ultrasounds, state-approved counselling, and multi-day waiting periods "are predicated on possible harms that may come to women from unsafe conditions at abortion clinics.").

- 44. Reva Siegel, Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart, 117 YALE L.J. 1694, 1773, 1712–33 (2008).
- 45. Caroline Kitchener & Ellen Francis, *Talk of Prosecuting Women for Abortion Pills Roils Antiabortion Movement*, WASH. POST (Jan. 11, 2023, 7:11 PM), https://www.washingtonpost.com/nation/2023/01/11/alabama-abortion-pills-prosecution/ (quoting Kristan Hawkins, president of Students for Life of America, a leading national antiabortion group). *See also* Leah Savas & Myrna Brown, *Efforts to Abolish Abortion*, WORLD RADIO (Feb. 2, 2023), https://wng.org/podcasts/efforts-to-abolish-abortion-1675296676) (discussing letter from anti-abortion groups portraying "the mother of an aborted child as the second victim of the abortion industry.").
- 46. An Open Letter to State Lawmakers from America's Leading Pro-Life Organizations, NAT'L RT. TO LIFE COMM. (May 12, 2022), https://www.nrlc.org/uploads/communications/051222coalitionlettertostates.pdf.
- 47. Respondents' Br. In Opp. at 14–15, U.S. Food & Drug Admin. v. All. for Hippocratic Med., (No.23-235, No. 23-236) (2023) (available at https://www.supremecourt.gov/DocketPDF/23/23-236/289188/20231109104953504_23-235%20%2023-236%20Brief%20in%20Opposition.pdf) (arguing that the Fifth Circuit's "fact-bound analysis reimposes modest, common-sense safe-guards that protected women's health for 16 years [and urging the Supreme Court not to] blindly defer to FDA's determinations and rubber-stamp them as unimpeachably 'scientific.'").

poses minimal risk and where the risks associated with pregnancy and childbirth far exceed those associated with abortion generally.⁴⁸ Specious assertions of concern for women's mental health are similarly unpersuasive when fifty years of international psychological research⁴⁹ has shown that abortion is not linked to mental health issues. Rather, restricting access to abortion does cause harm.⁵⁰ The conceptualization of women as victims stands in stark contrast to the ideas of agency, empowerment, and equality that inform the reproductive justice movement and the recognition of a right to make affirmative, autonomous decisions about one's reproductive health, parenthood, and life. As Samuel Buell has noted, the "anomalous treatment of the woman's conduct" in criminal abortion law reflects "our culture's history of persistent denial of female autonomy" and "perpetuat[es] a now-dated perception of a woman who seeks an abortion as a victim, incapable of making moral decisions where her own body is concerned."51

Nevertheless, this portrayal of women as victims in need of protection continues to inform one facet of the anti-abortion movement's approach to criminalization. Consistent with their desire to portray themselves as a movement concerned with the protection of women, proponents of today's abortion bans frequently claim⁵² that women will not be prosecuted for having abortions and that women are

^{48.} Studies have long demonstrated that "[l]egal induced abortion is markedly safer than childbirth" and that the "risk of death associated with childbirth is approximately 14 times higher than that with abortion." Elizabeth G. Raymond & David A. Grimes, The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012). Meanwhile, since 2000, maternal mortality has continued to increase in the United States. Munira Z. Gunja et al., The U.S. Maternal Mortality Crisis Continues to Worsen: International Comparison, COMMONWEALTH Fund https://www.commonwealthfund.org/blog/2022/us-maternal-mortality-crisis-continues-worseninternational-comparison. Over the past decade, medication abortion has continued to improve the safety of abortion. Daniel Grossman & Sarah Raifman, Advancing New Standards IN REPROD. HEALTH (ANSIRH), ANALYSIS OF MEDICATION ABORTION RISK AND THE FDA REPORT "MIFEPRISTONE US POST-MARKETING ADVERSE EVENTS SUMMARY THROUGH 6/30/2021" 2–3 (2022) https://www.ansirh.org/sites/default/files/2022-11/mifepristone_safety_11-15-22_Updated_0.pdf (highlighting the safety of medication abortion from 2016 to 2021).

^{49.} Zara Abrams, *The Facts About Abortion and Mental Health*, AM. PSYCH. ASS'N (Apr. 21, 2023), https://www.apa.org/monitor/2022/09/news-facts-abortion-mental-health.

^{50.} *Id.*; *See The Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, https://www.ansirh.org/research/ongoing/turnaway-study__(presenting a longitudinal study examining the effects of unwanted pregnancy on women's lives).

^{51.} Buell, *supra* note 39, at 1778.

^{52.} Kitchener & Francis, *supra* note 45; Mary E. Harned, *Pro-Abortion States Accelerate Their Race to the Bottom*, CHARLOTTE LOZIER INST. (Mar. 22, 2023), https://lozierinstitute.org/pro-abortion-states-accelerate-their-race-to-the-bottom/.

exempt from prosecution under the law. But women have, in fact, been prosecuted.⁵³ As we will show in Part III, post-*Dobbs*, laws that criminalize abortion are often unclear and ambiguous with respect to whether women can be charged for self-managing an abortion.

Ziegler's extensive historical work documents anti-choice activists in the 1980s campaigning "for the extension of homicide, child abuse, and child neglect laws to unborn children" and an effort to "punish pregnant drug users and even women who self-induced abortions." Moreover, as a number of scholars and researchers have demonstrated, seven during the *Roe* era, women in America have been investigated, prosecuted, and incarcerated for numerous events during pregnancy: using drugs that harm a fetus, child endangerment, self-managing abortion, falling down stairs while pregnant, suspicious stillbirths, refusing a cesarean section, causing an abortion after twenty weeks, and the list goes on. If/When/How identified forty cases of adults "criminally investigated or arrested for allegedly ending their own pregnancy" across twenty-six states between 2000 and 2020. Thirty of those adults were criminally charged for self-managing their abortions. While 23% of the 30 individuals were charged under self-

^{53.} See If/When/How Report, supra note 15, at 22 (documenting forty cases in which women have been criminalized for allegedly self-managing their abortions in the United States).

^{54.} Ziegler, Some Form of Punishment, supra note 39 at 738 (citing Ziegler, Everyone Agrees Women Who Have Abortions Shouldn't Be Penalized. Or Do They?, supra note 41).

^{55.} See, e.g., Ziegler, Some Form of Punishment, supra note 39 at 773–75 (discussing the cases of Jennie Linn McCormack, Jennifer Whalen, Anna Yocca, and Purvi Patel, among others); Cary Aspinwall et al., They Lost Their Pregnancies. Then Prosecutors Sent Them to Prison, MARSHALL PROJECT (Sept. 1, 2022, 10:30 AM), https://www.themarshallproject.org/2022/09/01/they-lost-their-pregnancies-then-prosecutors-sent-them-to-prison (discussing the cases of Brooke Shoemaker, Ashley Traister, Kathryn Green, and several others); FARAH DIAZ-TELLO ET AL., ROE's UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL 10–12 (Farah Diaz-Tello et al. eds., 2018) (identifying states whose statutes had criminalized self-induced abortions pre-Dobbs); If/When/How Report, supra note 15, at 21 ("From 2000 to 2020, at least 61 people were criminally investigated or arrested for allegedly ending their own pregnancy or helping someone else do so."); see generally, MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD (2020); Cynthia Conti-Cook, Surveilling the Digital Abortion Diary, 50 U. BALT. L. REV. 1 (2020); Lynn M. Paltrow & Jeanne Flavin, Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health, J. HEALTH POL., POL'Y & L. 299 (2013).

^{56.} Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously, ACLU OF MAINE (Feb. 11, 2020, 5:04 PM), https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously.

^{57.} Cat Zakrzewski et al., Texts, Web Searches About Abortion Have Been Used to Prosecute Women, WASH. POST. (July 3, 2022, 9:20 AM), https://www.washingtonpost.com/technology/2022/07/03/abortion-data-privacy-prosecution/.

^{58.} If/When/How Report, *supra* note 15, at 21; *see also id.* at 22 (noting that 74% of 54 adult cases involved criminalization for a person self-managing her own abortion).

managed abortion bans, the majority were charged under criminal abortion laws (23%), fetal harm laws (13%), and "a range of crimes . . . related to fetal remains, child abuse, felony assault or assault of an unborn child, practicing medicine without a license, or homicide and murder" (40%). ⁵⁹ This research is consistent with earlier findings that "police and prosecutors overstep the authority conferred by criminal statutes, and find ways to punish people even where there is no authorizing statute." ⁶⁰ Specifically, Paltrow and Flavin documented that, "[s]ince 1973, more than 1,200 people, suspected of having caused their own miscarriages or having risked harm to their pregnancies notwithstanding a lack of any evidence that they desired to terminate their pregnancies, have been arrested for offenses ranging from feticide to child abuse to poisoning." The historical record thus demonstrates that women have been prosecuted for various pregnancy outcomes. ⁶²

More recently, a number of state officials, lawmakers, and politicians have publicly encouraged the criminalization and prosecution of women for seeking abortion care.⁶³ In two instances, future presidents who made such statements during debates were later encouraged to retract their positions. George H.W. Bush said that "he favored punishing and perhaps even jailing women who had abortions."⁶⁴ Donald Trump, asked in 2016 whether he thought women

^{59.} Id. at 37-38.

^{60.} Id. at 4.

^{61.} Brief for If/When/How: Lawyering for Reproductive Justice, et al. as Amici Curiae Supporting Petitioners at 25, June Med. Servs. L.L.C. v. Gee, 140 S. Ct. 2103 (2020) (No. 18-1323, 18-1460) (citing Paltrow & Flavin, *supra* note 55, at 309).

^{62.} If/When/How Report, *supra* note 15, at 15–17 (discussing several different kinds of cases where women faced prosecution); NIRH, WHEN SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK 21–22 (June 2017) at 22 (citing Jill E. Adams & Melissa Mikesell, *And Damned If They Don't: Prototype Theories to End Punitive Policies Against Pregnant People Living In Poverty*, 18 GEO. J. GENDER & L. 283, 323–24 (2017)) (asserting that low-income women and women of color are more likely to be prosecuted because they may lack access to private medical care); GOODWIN, *supra* note 55, at 45 ("[P]enalties now include criminal and civil incarceration for miscarriage and stillbirth, as well as punishments for behaviors perceived to threaten fetal health.").

^{63.} See, e.g., Blake Ellis & Melanie Hicken, These Male Politicians are Pushing for Women who Receive Abortions to be Punished with Prison Time, CABLE NEWS NETWORK (Sept. 21, 2022, 12:33 AM), https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html (identifying multiple examples); Craig Monger, 'Self-Managed' Abortions Could Still Bring Criminal Prosecution Under Child Chemical Endangerment Laws, 1819 NEWS (Jan. 7, 2023), https://1819news.com/news/item/self-managed-abortions-could-still-bring-criminal-prosecution-under-child-chemical-endagerment-laws (quoting Alabama Attorney General Steve Marshall's suggestion that women who undergo medication abortion could face prosecution under the state's chemical endangerment law).

^{64.} Ziegler, *Some Form of Punishment, supra* note 39, at 760 (citing E. J. DIONNE, Jr., WHY AMERICANS HATE POLITICS 316 (1991)).

who sought illegal abortions should face criminal punishment, responded, "[t]he answer is—that there has to be some form of punishment." "For the woman?" Chris Matthews asked. "Yes," Trump said. While such statements have been characterized as political missteps in the past, state lawmakers post-*Dobbs* have supported both the treatment of so-called "unborn children" as full-fledged persons beginning at the time of fertilization and abortion as murder under the law. In a bill proposed by South Carolina lawmakers, for example, abortion can be charged as murder, for which the death penalty would be an available sentence.

The majority of Americans support the legality of abortion.⁶⁸ When states criminalize abortion, however, people are divided over whether women should face penalties for obtaining abortions illegally. Research from the Pew Center in 2022 indicates that 50% of people believe a woman should not face a penalty for an illegal abortion while 47% believe she should.⁶⁹ The type of penalty a woman should face is also a matter of contention within the antiabortion movement, though incarceration does have support: 21% of Republicans and 24% of White evangelical Protestants believe a

^{65.} Phillip Bump, *Trump's Off-The-Cuff Abortion Position Moves Closer to Reality*, WASH. POST (May 16, 2022, 5:37 PM), https://www.washingtonpost.com/politics/2022/05/16/trumps-off-the-cuff-abortion-position-moves-closer-reality/; Emily Crockett, *Donald Trump: "There Has to be Some Form of Punishment" for Women Who Have Abortions*, VOX (Mar. 30, 2016, 5:02 PM), https://www.vox.com/2016/3/30/11333472/trump-abortions-punishment-women.

^{66.} Ziegler, Some Form of Punishment, supra note 39, at 736, 760.

^{67.} See Rebecca Shabad, S.C. Republicans Propose Bill that Could Subject Women Who Have Abortions to the Death Penalty, NAT'L BROAD. Co. NEWS (Mar. 15, 2023, 11:40 AM), https://www.nbcnews.com/politics/politics-news/sc-republicans-propose-bill-subject-women-abortions-death-penalty-rcna75060 ("The South Carolina Prenatal Equal Protection Act would 'ensure that an unborn child who is a victim of homicide is afforded equal protection under the homicide laws of the state.' . . . Under South Carolina law, people convicted of murder can face the death penalty or a minimum of 30 years in prison.").

^{68.} E.g., Laura Santhanam, Support for Abortion Rights Has Grown in Spite of Bans and Restrictions, Poll Shows, Pub. Broad. Serv. NewsHour (April 26, 2023, 5:00 AM), https://www.pbs.org/newshour/health/support-for-abortion-rights-has-grown-in-spite-of-bans-and-restrictions-poll-shows ("A majority of U.S. adults—59 percent—still say they oppose the justices' decision, which removed federal protections for many reproductive health care services, while another 40 percent of Americans agree with the nation's highest court."). In addition, two-thirds of Americans believe that mifepristone, a drug used in the majority of abortions in the U.S. should remain on the market. Emily Guskin, Most U.S. Adults Say the Abortion Pill Mifepristone Should Stay on the Market, Post-ABC Poll Finds, WASH. POST (May 9, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/05/09/mifepristone-abortion-poll/.

^{69.} America's Abortion Quandary, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americans-views-on-whether-and-in-what-circumstances-abortion-should-be-legal/.

woman should face jail time for having an illegal abortion.⁷⁰

History, both archaic and modern, evinces successful efforts to criminalize women who terminate their pregnancies and to prosecute women for various pregnancy outcomes. Like its predecessor, the modern anti-abortion movement continues to espouse the moral blameworthiness of women who obtain abortions while simultaneously characterizing these same women as victims. Indeed, abortion abolitionists,⁷¹ an increasingly vocal faction of the modern movement, actively support the prosecution of women for abortion crimes.⁷² The criminalization of abortion—both past and present—has consistently implicated the surveillance of women's bodies, decisions, and conduct, no matter who states have chosen to investigate and prosecute.

In the absence of *Roe*'s constitutional protection of privacy, and in a world where medication abortion is available online and can be consumed in the privacy of one's home, anti-abortion states may criminalize and prosecute women who self-manage abortion in an effort to stop abortions from occurring. As we will demonstrate, that direction is suffused with surveillance.

II. SELF-MANAGED ABORTION AND THE THREAT OF PROSECUTION FOR WOMEN

In 2020, medication abortion accounted for 54% of the total number of abortions in the U.S. The most common form of medication abortion in the U.S. consists of a two-drug regime⁷³ approved for use by the FDA for up to ten weeks of pregnancy.⁷⁴ The first pill, mifepristone,

^{70.} Id.

^{71.} See generally Debra Cassens Weiss, Abortion 'Abolitionists' Seek Equal Protection Rights for Fetuses, Prosecutions of Women, ABA J. (July 6, 2022, 11:59 AM), https://www.abajournal.com/news/article/abortion-abolitionists-seek-equal-protection-rights-for-fetuses-prosecutions-of-women (providing an overview of "abortion abolitionists" positions on abortion).

^{72.} See Carter Sherman, Anti-Abortion 'Abolitionists' Want to Charge Abortion Patients Like Murderers Now, VICE (Jan. 25, 2023, 10:41 AM), https://www.vice.com/en/article/5d3xgk/anti-abortion-murder-charge-bills ("A wing of activists who now identify as 'abortion abolitionists' believe that abortion should be legally categorized as murder and that, because a fetus is a person, individuals who get abortions should be punished like murderers.").

^{73.} David S. Cohen et al., *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735 (citing *Medication Abortion Up to 70 Days of Gestation*, 136 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS e31, e35 (2020)).

^{74.} Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST. (Dec. 1, 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-

blocks the hormone progesterone, resulting in the detachment of the fertilized egg from the uterine wall.⁷⁵ The second, misoprostol, generally taken twenty-four to forty-eight hours later, induces uterine contractions, causing the body to expel the contents of the uterus.⁷⁶ Misoprostol used alone has also proven to be a safe and effective method for terminating a pregnancy, although it may cause more side effects⁷⁷ and be less effective than the two-drug regimen.⁷⁸ "From a medical perspective, . . . there is no physically significant difference between a medication abortion and a spontaneously occurring miscarriage."⁷⁹

After *Dobbs*, clinics in many anti-abortion states stopped offering abortions.⁸⁰ While *Dobbs* has significantly limited access to abortion through the formal health care system, the ability of women to self-manage abortions safely through medication challenges the ability of anti-abortion states to prevent women from obtaining abortions. Self-managed abortion "generally refers to abortions obtained outside of

abortions (citing Claudia Willis, *Abortion Pills Are Very Safe and Effective, yet Government Rules Still Hinder Access*, SCI. AM. (Mar. 2022), https://www.scientificamerican.com/article/abortion-pills-are-very-safe-and-effective-yet-government-rules-still-hinder-access/).

- 75. Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627, 633 (2022) (first citing Irving M. Spitz & C.W. Bardin, *Mifepristone (RU 486I)—A Modulator of Progestin and Glucocorticoid Action*, 329 NEW ENG. J. MED. 404, 405 (1993), then citing *Medical Abortion*, MAYO CLINIC (May 14, 2020), https://www.mayoclinic.org/tests-procedures/medical-abortion/about/pac-20394687); *How Mifepristone Works*, L.A. TIMES (Aug. 14, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-aug-14-he-3902-story.html.
 - 76. Donley, *supra* note 75, at 633; *How Mifepristone Works, supra* note 75.
- 77. The Recommended Protocol for Misoprostol-Only Abortion, ADVANCING NEW STANDARDS IN REPROD. HEALTH (Feb. 26, 2023), https://www.ansirh.org/research/research/recommended-protocol-misoprostol-only-abortion.
- 78. Monica Dragoman, Caitlin Shannon, & Beverly Winikoff, Misoprostol as a Single Agent for Medical Termination of Pregnancy, UPTODATE (June 2023), https://www.uptodate.com/contents/misoprostol-as-a-single-agent-for-medical-termination-of-pregnancy/print; see also Misoprostol-Alone Medication Abortion is Safe and Effective, IBIS REPROD. HEALTH (Nov. 2021) (noting that a recent study found misoprostol alone caused a completion abortion in 78% of study participants and misoprostol used in combination with mifepristone successfully terminated between 80 and 95% of pregnancies).
- 79. Consumer Health Info: Medication Abortion and Miscarriage, NAT'L WOMEN'S HEALTH NETWORK (Aug. 15, 2019), https://nwhn.org/abortion-pills-vs-miscarriage-demystifying-experience/. But see Patrick Adams, In Poland, Testing Women for Abortion Drugs Is a Reality. It Could Happen Here (N.Y. Times Sept. 14, 2023), https://www.nytimes.com/2023/09/14/opinion/abortion-pills-testing-poland.html ("[T]here are reports that laboratory tests to detect abortion drugs have not only been created in Poland but are, in rare cases, also being used there to investigate the outcomes of pregnancies. . . . Americans would be wise to plan for the possibility that the technology could one day be used by law enforcement to suss out whether women have taken abortion pills—which are now banned or restricted in more than two dozen states.").
 - 80. Kirstein et al., *supra* note 25.

the traditional health care system," such as when "a pregnant person buys medication online directly from an international pharmacy" or "interact[s] with an international or out-of-state provider via telemedicine," who then either ships the medication directly to the pregnant person or orders a prescription from an international pharmacy for them. Pregnant people may also acquire medication to self-manage abortions from a friend, family member, or other third party without first obtaining a prescription.

Even pre-*Dobbs*, however, the promise of medication abortion—to make safe abortions available and accessible outside of a traditional hospital or clinic setting—was lagging, at least in part because the FDA required that mifepristone be dispensed in person. 82 Accordingly, mifepristone could not be mailed or picked up from a retail pharmacy. But in 2020, when the American College of Obstetricians and Gynecologists (ACOG) challenged these requirements, a federal district court issued an injunction temporarily suspending the in-person dispensing requirement, 83 thereby facilitating greater access to medication abortion through telehealth during the pandemic. 84 While the injunction was pending, virtual clinics sprang into action, providing women access to medication abortion without the burdensome inperson dispensing requirement. 85

In December 2021, the Biden FDA permanently lifted the inperson dispensing requirement, which enabled certified providers to mail mifepristone to patients and retail pharmacies to dispense it once they meet certification requirements.⁸⁶ On January 3, 2023, the FDA

^{81.} Greer Donley & Rachel Rebouche, *The Promise of Telehealth for Abortion*, DIGITAL HEALTH CARE OUTSIDE OF TRADITIONAL CLINICAL SETTINGS: ETHICAL, LEGAL AND REGULATORY CHALLENGES AND OPPORTUNITIES (forthcoming 2024) (manuscript at 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4276787. *But see* If/When/How Report, *supra* note 15, at 13 (defining self-managed abortion as abortion that occurs "outside of the clinical medical system and without the help of a licensed health care provider"). This definition is narrower than the one we use in this article, but any example of self-managed abortion that would be covered by If/When/How's definition would also be covered by the definition employed in this article.

^{82.} Donley, Medication Abortion Exceptionalism, supra note 75, at 642.

^{83.} Am. Coll. Of Obstetricians & Gynecologists v. U.S. Food & Drug Admin., No. 8:20-cv-01320-TDC 80 (D. Md. Jul. 13, 2020).

^{84.} Greer Donley & Rachel Rebouche, *The Promise of Telehealth for Abortion* 5 (U. Pitt. Sch. of L. Working Paper No. 2022-37), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4276787 (forthcoming in DIGITAL HEALTH CARE OUTSIDE OF TRADITIONAL CLINICAL SETTINGS: ETHICAL, LEGAL AND REGULATORY CHALLENGES AND OPPORTUNITIES) (manuscript at 5).

^{85.} Id. at 6.

^{86.} Id.

formalized the certification requirement for pharmacies.87

Post-*Dobbs*, the number of virtual clinics in states that permit telehealth for abortion is growing.⁸⁸ A greater number of virtual clinics prescribing or dispensing medication abortion in abortion-supportive states will, in some circumstances, enable women living in ban states to access medication abortion. Despite state laws banning abortion or prohibiting telehealth for abortion, "mailed medication abortion can cross borders in ways that undermine abortion bans."⁸⁹

As the availability of medication abortion increases, the antiabortion movement is going on the offensive to take mifepristone off the market. In November 2022, the anti-abortion group Alliance Defending Freedom filed a lawsuit in Texas against the FDA seeking to invalidate its 2000 approval of mifepristone. The plaintiffs purposely filed their lawsuit in the Amarillo Division of the Northern District of Texas—a division with a single district judge, Matthew Kacsmaryk, who is known for his anti-abortion beliefs. Their complaint alleged, among other things, that the FDA exceeded its

^{87.} Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, FDA, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation_See also Garney Henderson, Why Won't the FDA Adopt a Truly Bold Playbook on Medication Abortion?, TRUTHOUT (Jan. 14, 2023), https://truthout.org/articles/why-wont-the-fda-adopt-a-truly-bold-playbook-on-medication-abortion/ (noting that the FDA allowed pharmacies to dispense mifepristone if the pharmacies followed new certification requirements).

^{88.} Cohen et al., *supra* note 73, at 8. *See also* SOC'Y OF FAM. PLAN., #WECOUNT REPORT: APRIL 2022 TO JUNE 2023 2 (Oct. 24, 2023), https://societyfp.org/wpcontent/uploads/2023/10/WeCountReport_10.16.23.pdf ("Abortions provided by virtual-only clinics continue to increase in the post-*Dobbs* period, increasing from a monthly average of 4,045 abortions before the *Dobbs* decision (nearly 5% of all abortions), to an average of 6,950 abortions per month in the 12 months following the *Dobbs* decision (greater than 8% of all abortions). This change represents an increase of 72% in the number of abortions provided from virtual-only services, comparing post to pre-*Dobbs*[.]").

^{89.} Cohen et al., *supra* note 73, manuscript at 13. While "[v]irtual clinics require a patient's mailing address to be in a state where the provider is licensed and where telehealth for abortion is permitted most virtual clinics do not require that patients stay in the state to take the medications. So long as the clinic sends the pills to an address in the state where abortion is legal, the patient—or someone assisting the patient—could pick up the pills when convenient but take the pills somewhere else, including in a state where abortion is illegal. Moreover, information abounds online about how to use mail forwarding to circumvent abortion bans." *Id.* at 9–10.

^{90.} Complaint, All. for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. April 7, 2023) https://adflegal.org/sites/default/files/2022-11/Alliance-for-Hippocratic-Medicine-v-FDA-2022-11-18-Complaint.pdf.

^{91.} See 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/; Stephen I. Vladeck, Don't Let Republican 'Judge Shoppers' Thwart the Will of Voters, N.Y. TIMES (Feb. 5, 2023), https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html.

regulatory authority in approving mifepristone in 2000, that the drug is unsafe, and that the FDA's approval "permitted" and even "encouraged" 92 violations of the Comstock Act, 93 a federal law passed in 1873 that prohibits the mailing of abortion pills. 94 Judge Kacsmaryk entered a preliminary injunction in favor of the plaintiffs explaining that the FDA had exceeded its authority in approving mifepristone, 95 and the Supreme Court stayed that ruling on April 21, 2023.96 On August 16, 2023, the Fifth Circuit vacated parts of the district court's ruling but affirmed other parts pertaining to the FDA's relaxation of safety restrictions in 2016 and a 2021 decision to allow dispensation of the drug through the mail. 97 As noted by the court, its holding is "subject to the prior order of the Supreme Court, which stayed the district court's order pending resolution of this appeal and disposition of any petition for writ of certiorari."98 On September 8, 2023, the Department of Justice filed a petition for writ of certiorari, 99 which was granted by the Supreme Court on December 13, 2023. While this case is pending, medication abortion remains available.

This new reality—one in which access to medication abortion does not depend on a pregnant person's location—coupled with the expanded availability of mifepristone will undermine the traditional ways in which states have prevented and policed abortion. The shuttering of clinics in anti-abortion states and threats to prosecute abortion providers, for example, will not prevent women from accessing medication abortion. As anti-abortion activists and lawmakers in anti-abortion states react to this new environment, pregnant women who self-manage abortions, along with friends or family that may assist them, will face more direct threats of prosecution and surveillance via modern technologies that enable the investigation of abortion crimes.

^{92.} Complaint, All. for Hippocratic Med., 2023 WL 2825871 (No.2:22-CV-223-Z), at 6-7.

^{93. 18} U.S.C §§ 1461-1462.

^{94.} Complaint, All. for Hippocratic Med., 2023 WL 2825871 (No.2:22-CV-223-Z), at 32.

^{95.} All. for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023), at *1.

^{96.} U.S. Food & Drug Admin. v. All. For Hippocratic Med., 598 U.S. __ (2023).

^{97.} All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210, 222–23 (5th Cir. 2023).

^{98.} Id at 223.

^{99.} Petition for Writ of Certiorari, U.S. Food & Drug Admin. v. All. For Hippocratic Med., 78 F.4th 210, Sept. 12, 2023 (No. 23-235).

^{100.} Danco Labratories, L.L.C. v. Alliance for Hippocratic Medicine, SCOTUSblog https://www.scotusblog.com/case-files/cases/danco-laboratories-l-l-c-v-alliance-for-hippocratic-medicine/ (last visited Feb. 21, 2024). The Supreme Court docket is available at https://www.supremecourt.gov/docket/docketfiles/html/public/23-236.html.

This altered landscape is already beginning to affect how antiabortion states approach the criminalization of pregnant women who self-manage abortions with medication. As we will discuss further in Part III, Alabama Attorney General Steve Marshall has indicated that even though Alabama's Human Life Protection Act says that "no woman upon whom an abortion is performed ... shall be held criminally liable," it does not "provide an across-the-board exemption from *all* criminal laws, including the chemical-endangerment law—which the Alabama Supreme Court has affirmed and reaffirmed protects unborn children." He further explained that it does not prevent the state from prosecuting women who use pills to end their pregnancies under Alabama's existing laws on chemical endangerment to a child. 104

In addition, on January 19, 2023, Arkansas lawmakers introduced a bill to ensure that "all unborn children" would be protected under state homicide laws; if passed, the bill would allow prosecutors to charge women who have abortions with murder. A week earlier, a similar bill was introduced in Oklahoma, which, if passed, would eliminate language that protects women who have abortions from prosecution. 106

In a world where the provision of abortion care is "decentralized and independent of in-state physicians," the "contradictions of conservative abortion policy, defining the procedure as murder but not wanting to alienate the women they consider murderers, [will] . . . fold in on themselves." ¹⁰⁸ Accordingly, there is a greater risk that pregnant women who have miscarriages or abortions will become the targets of

^{101.} Ala. Code § 26-23H-5 (2023).

^{102.} Ex Parte Ankrom, 152 So. 3d 397 (Ala. 2013).

^{103.} Ex Parte Hicks, 153 So. 3d 53 (Ala. 2014).

^{104.} Amy Yurkanin, Women Can Be Prosecuted for Taking Abortion Pills, Says Alabama Attorney General, AL.COM (Jan. 10, 2023, 3:39 PM), https://www.al.com/news/2023/01/women-can-be-prosecuted-for-taking-abortion-pills-says-alabama-attorney-general.html. But see Kitchener & Francis, supra note 45 (noting that shortly after Attorney General Marshall made his statement, the Washington Post reported that Marshall's spokesperson issued a statement that appeared to back away from prosecuting women). See also Susan Rinkunas, Alabama AG Attempts to Walk Back Comment About Prosecuting People Who Take Abortion Pills, JEZEBEL (Jan. 12, 2023), https://jezebel.com/alabama-attorney-general-abortion-pills-1849979076 (noting that Jezebel then questioned the Post's interpretation of the spokesperson's very limited statement, averring that the threat of prosecution still stands).

^{105.} H.B. 1174, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

^{106.} S.B. 287, 59th Leg., 1st Sess. (Okla. 2023).

^{107.} Donley & Rebouche, *supra* note 81, at 1.

^{108.} David Dayen, *The Inevitable Prosecutions of Women Who Obtain Abortions*, AM. PROSPECT (Jan. 16, 2023), https://prospect.org/health/2023-01-16-prosecution-women-mifepristone-abortion-alabama/2

investigations.

2024]

Given these developments, we focus our attention on how the law criminalizes the actions of women who self-manage abortions with medication in a post-*Dobbs* landscape, along with the forms of surveillance that will enable prosecutors to investigate and prosecute these women. As part of that discussion, we illustrate the range of approaches that states are taking with respect to laws that criminalize the actions of women who seek, obtain, or self-manage abortions.

III. STATUTORY ANALYSIS: A SPECTRUM OF DOUBT

Following *Dobbs*, a woman no longer has a constitutional right to terminate a pregnancy. Instead, state legislatures are determining if and under what circumstances a woman can lawfully obtain an abortion. When abortion is banned, state legislatures can also decide whom to hold liable for seeking, obtaining, providing, or assisting in the provision of abortion-related care. And, when abortion is a crime, women seeking or obtaining abortions, along with those who assist them, will be subject to investigation, surveillance, and the full spectrum of criminal justice process.

With the fall of *Roe*, states have wasted no time criminalizing abortion. In addition, various types of laws that existed pre-*Dobbs* will enable prosecutions of pregnant women in states where most, if not all, abortions are now illegal. Post-*Dobbs*, the laws that make a woman vulnerable to prosecution for seeking, obtaining, or self-managing an abortion include:

1) Laws from the 1800s and 1900s that criminalize abortion and that were never repealed even after they became unenforceable as a result of Roe^{109} ;

^{109.} In some states, these older laws are being challenged on the theory that they have been impliedly repealed by subsequent laws. While laws remain on the books, however, they also remain part of the equation people must consider in evaluating risk and exposure to criminal liability. See, e.g., Sarah Lehr, The Legal Challenge of Wisconsin's 1849 Abortion Ban is Awaiting its Day in Court. Where Does the Case Stand?, WISCONSIN PUB. RADIO (Sep. 30, 2022, 6:25 PM), https://www.wpr.org/legal-challenge-wisconsins-1849-abortion-ban-awaiting-its-day-court-where-does-case-stand (quoting Wisconsin Attorney General Josh Kaul as explaining that "[t]he possibility of enforcement is out there now[] . . . What that has meant is that Planned Parenthood is no longer providing services in those three counties. If we get an order blocking enforcement of that law, that would allow them to resume services."). See also ERICA N. WHITE ET AL., NETWORK FOR PUB. HEALTH L., ABORTION ACCESS: POST-DOBBS LITIGATION THEMES 5 (Nov. 4, 2022), https://www.networkforphl.org/wp-content/uploads/2022/11/Western-Region-Memo-Abortion-Access-Litigation-Themes.pdf (describing other implied repeal challenges in West Virginia and Arizona).

- 2) Trigger laws¹¹⁰ pertaining to abortion that were passed by states in anticipation of the overruling of *Roe*;
- 3) Newly enacted, post-*Dobbs* laws criminalizing abortion, which include laws that provide "personhood status" to a fetus;
- 4) Laws that criminalize the conduct of parents like child endangerment, child abuse, or chemical endangerment that could be invoked in the medication abortion context;
- 5) A variety of feticide laws¹¹¹ (many of which were passed during the *Roe* era and not meant to apply to legal abortions) that criminalize a "violent or negligent act against a pregnant woman resulting in pregnancy loss."¹¹² Even pre-*Dobbs*, such laws were "already being used to prosecute pregnant women accused of willfully or recklessly causing their pregnancies to end—whether as a result of miscarriage, stillbirth, or abortion outside of an approved medical context";¹¹³
- 6) Homicide statutes that existed pre-*Dobbs*, some with exemptions for legal abortions, that would no longer apply in states that have made most if not all abortions illegal; and
- 7) A variety of other laws, including assault statutes, drug-related offenses, and domestic violence offenses.¹¹⁴

When considering whether a woman would have criminal exposure in any given state, it is important to recognize that some states have laws from two or more of these categories operating simultaneously. 115 While some of these laws may exempt women from prosecution under certain circumstances, other laws may criminalize the very same

^{110.} Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming had trigger laws in place prior to the *Dobbs* decision. Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When* Roe *Is Overturned*, GUTTMACHER INST. (Jun. 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

^{111.} See Abortion in America: How Legislative Overreach Is Turning Reproductive Rights Into Criminal Wrongs, NAT'L ASS'N OF CRIM. DEFENSE LAWS. 1, 3 (Aug. 2021), https://www.nacdl.org/getattachment/ce0899a0-3588-42d0-b351-23b9790f3bb8/abortion-in-america-how-legislative-overreach-is-turning-reproductive-rights-into-criminal-wrongs.pdf ("39 states have criminal laws giving fertilized eggs, embryos, and fetuses the status of separate crime victim.").

^{112.} Id. at 24.

^{113.} *Id*.

^{114.} *Id.* at 27–30.

^{115.} For a brief overview of the potentially conflicting laws in Texas, *see* Eleanor Klibanoff, *Texans Who Perform Abortions Now Face up to Life in Prison*, \$100,000 Fine, TEX. TRIB. (Aug. 25, 2022, 5:00 AM), https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/.

conduct—a feature, not a bug, of the fallout from *Dobbs*. ¹¹⁶ In spite of the chaotic legal landscape that such laws create, the prevailing narrative suggests that women cannot be prosecuted for having an abortion, ¹¹⁷ or even if they could be, they should not worry that it will ever happen. ¹¹⁸ The reality, however, is far more fraught.

In this Part, we examine whether and how state laws post-*Dobbs* may criminalize women who seek, obtain, or self-manage abortions. They are best conceptualized categorically—as a spectrum ranging from explicit criminalization to explicit exemption, at least to some degree, from prosecution. We provide some examples and analysis of state laws that fall within these categories:

- 1) Laws that explicitly criminalize women for abortion-related conduct;
 - 2) Personhood laws;
- 3) Laws that do not have language exempting women from prosecution;
- 4) Laws that have language *purporting* to exempt women from prosecution;

and

5) Laws that explicitly exempt women from prosecution, at least to some degree.

The chart below provides an overview of our classification of various state laws pertaining to the criminalization of abortion, focusing predominantly on states where abortion is banned or severely

^{116.} See discussion supra Part II, notes 101–104 and accompanying text (Alabama); infra Part III.D (Group 1), notes 251–266 and accompanying text (Alabama); infra Part III.D (Group 1) notes 267–280 and accompanying text (Texas). Texas A.G. Paxton's public statements show how public officials wield ambiguity and uncertainty surrounding state law as a way of threatening prosecution and chilling their conduct. Id.

^{117.} See, e.g., Marjorie Dannenfelser & Kristan Hawkins, We're Two Pro-Life Women Who Say 'no' to Prosecuting Women for Abortions, FOX NEWS (Aug. 3, 2022, 2:00 PM), https://www.foxnews.com/opinion/two-pro-life-women-say-no-prosecuting-women-abortions ("Few things cause more alarm than the idea of prosecuting women for abortion, which the prolife movement as a whole has rejected repeatedly."); Natalie M. Hejran & Sara E. Nolan, Why Women Are Not, And Should Not Be, Prosecuted for Abortion, AMS. UNITED FOR LIFE (Feb. 15, 2023), https://aul.org/2023/02/15/why-women-are-not-and-should-not-be-prosecuted-for-abortion/ (claiming that "[t]he American legal tradition shows women were not prosecuted for abortion").

^{118.} See, e.g., The Federalist Society, Dobbs and the Potential Implications for Data Privacy, YOUTUBE (Sep. 1, 2022) https://www.youtube.com/watch?v=c1o7_A45u74&t=6s (advance video to 30:58) ("[T]he appetite for criminalizing the behavior of women who are seeking abortions is really, really limited.").

restricted. If what follows in this Part seems confusing, imagine the challenge of navigating these laws while trying to determine the potential liability for terminating your own pregnancy. Or imagine yourself as an attorney trying to explain to a client what is permitted under her state's law and the risks she may face in self-managing an abortion.

Category	State	Breakdown	Content	Risk	Section
Explicit criminalization	Historical (NY, CT, CA, MN, OK, WY, AZ) Model Penal Code Recently repealed (SC (6-wk ban) Current NV (24- wk ban))		Statutes explicitly define seeking and/or having an abortion as misdemeanor	Dangerous	III.A (p.30)
Personhood laws	Current laws (GA (6-wk ban), AL (ban), MS (ban)) Proposals (KY (ban), SC (6-wk ban))		Fertilized egg or "unborn child in utero at any stage of development" = person	Dangerous	III.B (p.38)
Statutes that criminalize abortion and have no exemption provisions	FL (15/6-wk ban), NC (12-wk ban), SD (ban)	Group One – Broad liability: FL	"Any person"	Dangerous	III.C (p.45)
		Group Two – Limited Liability: NC, SD	X does something to Y	Prohibition is arguably inapplicable to pregnant women	III.C (p.46)

Category	State	Breakdown	Content	Risk	Section
Statutes that exempt from prosecution women "upon whom" an abortion is performed or induced"	TN (ban), ID (ban), AL (ban), TX (ban), WY (viability), KY (ban), SC (6-wk ban)	Group One – Broad Liability and Ambiguous Exemption: TN, ID, AL, TX, WY Group Two – Limited Liability and Ambiguous Exemption: KY, SC, TX,	"Any person" and Exempts Y when X does something to Y ("upon whom") X does something to Y and Exempts Y when X does something	Prohibition is arguably inapplicable to pregnant women	III.D (p.52)
		WY medication abortion laws	to Y ("upon whom")		
Laws that explicitly	MS (ban), WV (ban),	Many relevant statutes in each state and	Statute provides that no action	More explicit	III.E (p.64)
exempt women from	AK (ban), OK (ban),	unclear how	should be brought against pregnant	protection	
prosecution to some degree	LA (ban)	they interact; further grouping difficult	woman ¹¹⁹		

^{119.} For examples in this category, *see infra* notes 304–05 and accompanying text (quoting relevant Mississippi abortion laws that criminalize the actions of "[a]ny person, except the pregnant woman"); *infra* notes 313–15, 318–19 and accompanying text (quoting Arkansas and Oklahoma laws that explicitly do not "authorize the charging or conviction of a woman with **any** criminal offense in the death of her own unborn child."); and *infra* note 349 and accompanying text (quoting Louisiana statutory language that "[a]ny act taken or omission by a pregnant woman with regard to her own unborn child" shall not "be construed to create the crime of criminal abortion by means of an abortion-inducing drug").

State laws prohibiting and criminalizing abortion are in flux, and the discussion that follows is based on the laws that exist at the time of this writing. Our intent is not to provide an exhaustive analysis of how abortion is criminalized in every state or a comprehensive analysis of the legal jeopardy pregnant people may face in any state. We also do not focus on defenses that may be available to a criminal defendant to challenge these statutes or their application in a given case. Rather, we seek to illustrate the range of approaches that states are taking to criminalize the actions of women who seek, obtain, or self-manage abortions by presenting categories of statutory language that may enable or preclude the prosecution of women who obtain abortions. This analysis is critical for understanding the kinds of modern surveillance that facilitate investigations of abortion crimes and the harms that flow from the mere possibility of such investigations and prosecutions.

Prosecuting attorneys typically enjoy broad discretion when making decisions about whether and whom to prosecute. After *Dobbs*, prosecutors across the country will be interpreting their state laws and making decisions about charging individuals with abortion crimes. If a woman can be prosecuted for seeking or obtaining an abortion, she can be investigated and surveilled for a potential violation of abortion-related crimes. If a woman understands that she could be prosecuted or fears that she may be, it is prudent for her to act as if she will be surveilled and investigated.

A. Laws that explicitly criminalize women for having abortions – historical and current

Prior to the mid-1800s, abortion before quickening—roughly the first four months of pregnancy—was not treated as a crime in the United States. For a variety of social, religious, and political reasons,

^{120.} This article is current as of Fall 2023. We have included several more recent events that directly pertain to our analysis as they have come to our attention.

^{121.} See, e.g., Comment, Andrew S. Murphy, "Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Harm Their Own Fetuses," 89 IND. L. J. 847, 856–57, 861 (2014) (discussing common law immunity from prosecution for a woman causing the death of her fetus and the application of the rule of lenity that requires courts to resolve ambiguity in favor of the accused).

^{122.} See Ziegler, supra note 39, at 741 ("Until the mid-nineteenth century, abortion was not

states began passing laws criminalizing abortion in the mid-to-late 1800s. Historically, statutes prohibiting abortion tended to criminalize providers and people who helped others obtain abortions, but, by 1900, at least nineteen states also passed laws that criminalized women who sought, consented to having, or caused abortions. ¹²³ According to the National Institute for Reproductive Health, the "first criminal abortion law in New York, in 1828, did not prohibit self-abortion," but an 1845 amendment "for the first time brought the abortee herself under the criminal sanctions of the law." ¹²⁴ By 1872, New York law made "any woman pregnant with child' guilty of a felony upon the fetus she carried should she submit to an abortion voluntarily or abort herself." ¹²⁵ Connecticut's comprehensive abortion law passed in 1860 also specifically criminalized the pregnant woman, making:

the woman herself guilty of a felony for soliciting an abortion, for permitting one upon herself by others, or *even for attempting one upon herself*. As the Connecticut Supreme Court recognized in 1904,

a crime early in pregnancy. In the 1700s and early 1800s, abortion was generally legal until quickening, the point at which fetal movement could be detected (usually in the fourth month of pregnancy)."); see also Buell, supra note 39, at 1780–82 (discussing common law relevant to abortion).

123. Ziegler, *supra* note 39, at 744. Laws passed in the 1860s and 70s tended to criminalize the following categories of conduct: physicians performing abortions on women believed to be pregnant; women who sought, obtained, consented to or caused abortions with abortifacients; and distributers and advertisers of abortifacients or abortion providers. *See generally* MOHR, *supra* note 14, at Ch. 8, 277; Brief for the Thomas More Society as Amici Curiae Supporting Petitioners, *supra* note 39, at 20, n.16.

124. JORDAN GOLDBERG ET AL., WHEN SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK, NAT'L INST. FOR REPROD. HEALTH 27 (June 2017), https://nirhealth.org/wpcontent/uploads/2017/06/Self-Abortion-White-Paper-Final.pdf.

125. MOHR, *supra* note 14, at 218. The 1872 New York law included a provision on abortion subjecting to a term of four to twenty years "[a]ny person" that performs, assists, advises, intentionally procures a miscarriage with medicine or instruments that leads to the death of the woman or child. Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L. J. 395, 501 (1961) (quoting N.Y. GEN. STAT. ch. 181 § 1 (1872)). But the New York law also included a separate provision explicitly penalizing the conduct of pregnant women themselves:

Any woman pregnant with child who shall take any medicine, drug, substance or thing whatever, or shall use or employ, or suffer any other person to use or employ, or submit to the use or employment of any instrument or other means whatever, with the intent thereby to product the miscarriage of the child of which she is so pregnant, unless the same shall have been necessary to preserve her life or that of such child, shall, in the case the death of such child shall be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the State's prison for a term not less than four years or more than ten years.

Id. at 501 (quoting N.Y. GEN. STAT. ch. 181 § 2 (1872)). Although the code was "revised many times," and it was viewed as dead letter as late as 1967, the prohibition on self-induction was "actually... used, with at least five women charged in the last thirty years; four of the cases were dismissed, with a fifth ending in a conditional discharge." GOLDBERG ET AL., *supra* note 124, at 21

the legislature had consciously created a "new and distinct" offense that "limit[ed] the power of a woman to injure her own person." The legislators made the woman subject to less severe punishments than the abortionist, according to the court, because "the public policy which underlies this legislation is based largely on protection due to the woman, protection against her own weakness as well as the criminal lust and greed of others. The criminal intent and moral turpitude involved in the violation, by a woman, of the restraint put upon her control over her own person, is widely different from that which attends the man who, in clear violation of law and for pay or gain of any kind, inflicts an injury on the body of a woman, endangering health and perhaps life." 126

Likewise, California legislation in 1872 punished a woman who "voluntarily submitted to an abortion or tried to abort herself." 127 Minnesota "made the consenting woman, as well as the woman who 'perform[ed] upon herself any operation of any sort or character whatever with intent thereby to cause or produce miscarriage, or abortion, or premature labor' subject to punishment" for a misdemeanor. 128 Oklahoma's laws dating back to 1910 also provided penalties for both providers and women. Section 21-861 of the state code—still in effect today—criminalizes providers or procurers, 129 while Section 21-862—now repealed—provided slightly reduced criminal penalties for women who solicited, submitted to, or used drugs to accomplish an abortion. 130 Wyoming and the Arizona and Idaho Territories had similar provisions for the criminal liability of consenting women.¹³¹ In contrast, Vermont and Rhode Island, along with many other states, sought to exempt women from prosecution, "reaffirming a woman's traditional immunity from prosecution" in abortion cases. 132

^{126.} MOHR, *supra* note 14, at 201 (citations omitted) (emphasis added).

^{127.} Id. at 222.

^{128.} *Id.* at 223 (citation omitted).

^{129.} See OKLA. STAT. tit. 21, § 861 (Westlaw through 59th Leg., 2024) ("Every person who administers to any woman, or ... advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, ... shall be guilty of a felony[.]").

^{130.} See OKLA. STAT. tit. 21, § 862, repealed by S.B. 918, 58th Leg., 1st. Sess. (Okla. 2021) ("Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, . . . is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding One Thousand Dollars[.]").

^{131.} MOHR, *supra* note 14, at 229.

^{132.} Vermont rejected the example set by states criminalizing women: "The woman whose miscarriage shall have been attempted," the legislators stipulated, "shall not be liable to the penalties prescribed by this section." *Id.* at 210 (citation omitted). Rhode Island included a similar provision in its law of 1896. *See id.* at 229.

States' differing approaches to the criminalization¹³³ of women represented competing conceptions of women's role in society, their capacity for moral agency, and the propriety and utility of punitive measures. Ziegler has discussed the tension regarding the moral culpability of women that underlies these discrete approaches. Some laws envisioned women as vulnerable and in need of protection against their own weakness, as noted by the Connecticut Supreme Court, and as "victims of [both] self-serving men who demanded abortions" and unscrupulous providers.¹³⁴ But other laws reflected ideas of women as "selfish killers," choosing abortion for "personal ends' while swearing off their duties as mothers," and as "economically secure women who no longer accepted conventional roles." States and politicians supporting criminalization have also relied on the need to protect "the mother's morals"—a justification "apparently proceed[ing] from the premise that if abortion is prohibited, the threat of having to bear a child will deter a woman from sexual intercourse. Protecting the morals of the mother thus turns out to mean deterring her from having sexual relations."136 Overall, for a variety of reasons, "more than one-third of states criminalized the actions of women who terminated their own pregnancies or asked others to do so."137

Some of the laws explicitly criminalizing women were repealed over time; ¹³⁸ others remained on the books even though they were not

^{133.} In *Roe v. Wade*, the Court cited a New Jersey case for the proposition that "by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion." 410 U.S. 113, 151 n.50 (1973) (citing In re Vince, 2 N.J. 443 (N.J. 443)). In *In re Vince*, the Supreme Court of New Jersey did hold that a woman accused of undergoing an abortion was not subject to prosecution; however, the court relied on the gestational age of the fetus to reach its holding, reasoning that "[t]he common law crime of abortion is not committed unless the mother be quick with child." *Id.* at 449. The court explained that the relevant statutes also "make it plain that a woman who performs an abortion upon herself... is chargeable criminally only if the child were quick." *Id.* at 450. The court clarified that "[t]he statute regards [the woman] as the victim of crime, not as the criminal; as the object of protection, rather than of punishment." *Id.* (quoting State v. Murphy, 27 N.J.L. 112, 114 (N.J. 1858)).

^{134.} Ziegler, *supra* note 39, at 742.

^{135.} *Id.* at 742, 744.

^{136.} See Abele v. Markle, 342 F.Supp. 800, 809–10 (D. Conn. 1972) (Newman, J., concurring) (holding unconstitutional Connecticut state laws criminalizing abortion).

^{137.} Ziegler, *supra* note 39, at 735, 745, n.70; *see also* Brief for the Thomas More Society as Amici Curiae Supporting Petitioners, *supra* note 39, at 20, n.16 (identifying at least nineteen states that criminalized a woman's participation in her own abortion pre-*Roe*).

^{138.} For example, New York repealed its laws subjecting women to prosecution for abortion-related conduct. N.Y. LAWS ch. 1, § 5 (2019) (repealing N.Y. PENAL CODE §§ 125.50, 125.55); see also Katharine Bodde, Legislative Memo: Reproductive Health Act, ACLU OF N.Y. (Jan. 1, 2019), https://www.nyclu.org/en/legislation/legislative-memo-reproductive-health-act#_ftnref2 (describing the bill).

enforced. The American Law Institute (ALI) released the Model Penal Code (MPC) in 1962, which significantly influenced statutory abortion reform. At that time, the ALI's committees had carefully considered whether and to what extent either self-abortion or aiding a woman in self-abortion should be criminalized. The final recommendation proposed criminalizing self-abortion after twenty-six weeks as a thirddegree felony, with accompanying commentary recommending "exemption from criminal liability, except in the late-pregnancy situation," because "criminal liability of the woman for abortion committed on herself has not been useful in suppressing self-abortion" and the "prospect of prosecution is unlikely to deter" women. 139 The Code also provided that "[a] Person who purposefully and unjustifiably terminates the pregnancy of another . . . commits a felony of the third degree, or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree." The drafters of the MPC "stated that by limiting the offense to termination of the pregnancy of 'another,' they were limiting the woman's potential liability to the provision covering self-abortion late in pregnancy." ¹⁴¹ The drafters also noted that "exemption is the honest statement of present and foreseeable law enforcement, so that district attorneys and other responsible officials should not face the problem of the woman's liability as one of discretion."142

While criminalization provisions became less common in the *Roe* era, ¹⁴³ competing rationales for the prohibition and regulation of abortion persist. ¹⁴⁴ Anti-abortion activists frequently invoke the protection of women and women's health as rationales for prohibitions. Other anti-abortion activists publicly malign women for selfishly putting their own interests above those of a fetus, for engaging in irresponsible sex (or having sex at all), and for using abortion as birth control, suggesting that women should be held criminally responsible

^{139.} GOLDBERG ET AL., supra note 124, at 29.

^{140.} MODEL PENAL CODE § 230.3 (Am. L. INST., 1980).

^{141.} Buell, *supra* note 39, at 1797 (paraphrasing MODEL PENAL CODE & COMMENTARIES, PART II, at 436–39 (Am. L. INST. 1980)).

^{142.} Id . (quoting Model Penal Code & Commentaries, Part II, at 438 (Am. L. Inst. 1980)).

^{143.} See id. at 1803–04 (arguing that, following Webster v. Reproductive Health Services, 492 U.S. 490 (1989), states began to return to criminalization as a form of regulation of some types of abortion).

^{144.} See generally id. at 1820–30 (describing competing rationales for criminal abortion statutes); supra notes 34–41 and accompanying text (discussing competing rationales for abortion regulations).

for their moral failings and immoral conduct.

South Carolina¹⁴⁵ and Nevada¹⁴⁶ provide examples of recently repealed and current laws penalizing women for intentionally self-managing abortions.¹⁴⁷ Laws in effect in South Carolina until May 25, 2023, provided that "[a]bortion shall be a criminal act except when performed" by a physician in delineated circumstances.¹⁴⁸ Although abortion was permitted by physicians up to twenty-two weeks,¹⁴⁹ state law explicitly penalized women themselves for procuring and using drugs or any other means to cause abortions:

(b) Except as otherwise permitted by this chapter, any woman who solicits of any person or otherwise procures any drug, medicine, prescription or substance and administers it to herself or who submits to any operation or procedure or who uses or employs any device or instrument or other means with intent to produce an abortion, unless it is necessary to preserve her life, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for a term of not more than two years or fined not more than one thousand dollars, or both.¹⁵⁰

South Carolina's scheme reflected an approach reminiscent of older bifurcated laws, criminalizing the conduct of both providers and women themselves and setting forth discrete penalties for each. People who performed unlawful abortions on others—whether physical or with medication—were deemed to have committed felonies, but the women "upon whom" these procedures were performed were not subject to prosecution under *that* provision.¹⁵¹ Women who self-

^{145.} S.C. CODE ANN. § 44-41-80(B) (2012).

^{146.} NEV. REV. STAT. § 200.220 (2013).

^{147.} See Cohen et al., supra note 73, at 27–28 (discussing the status of laws in Nevada, Oklahoma and South Carolina and a variety of other criminal laws used to prosecute pregnant women for pregnancy outcomes).

^{148.} S.C. CODE ANN. § 44-41-20 (1974) (repealed 2023).

^{149.} South Carolina's 2016 Pain-Capable Unborn Child Protection Act prohibited abortion performed when "the probable post-fertilization age of the woman's unborn child is twenty or more weeks" absent some limited exceptions. S.C. CODE ANN. § 44-41-450(B) (repealed 2023). Because this statute measured pregnancy from the point of fertilization, abortions were performed under this law in South Carolina through twenty-two weeks based on the gestational age of the fetus. See Kate Zernike, South Carolina Supreme Court Upholds Abortion Law, Reversing Earlier Decision, N.Y. TIMES (Aug. 23, 2023), https://www.nytimes.com/2023/08/23/us/south-carolina-abortion-supreme-court.html ("Until now, South Carolina had allowed abortion until 22 weeks, which had increasingly made the state a haven for women seeking abortions as other Southern states banned the procedure.").

^{150.} S.C. CODE ANN. § 44-41-80(b) (1974) (repealed 2023). Like Florida, South Carolina did exempt women from prosecution for partial birth abortion, § 44-41-85(D). but the repealed statute did not contain any other exemption for women.

^{151.} Id. § 44-41-80(a) ("[T]he provisions of this item shall not apply to any woman upon whom

managed their own abortions, however, were deemed to have committed misdemeanors pursuant to Section 44-41-80(b). Subparagraph (b) also criminalized a woman's solicitation of and submission to an abortion that was not lawful under the chapter. Notably, South Carolina's 2023 Fetal Heartbeat and Protection from Abortion Act, signed into law on May 25, 2023, and upheld by the South Carolina Supreme Court on August 23, 2023, 2

Prior to the enactment of the new heartbeat law, a woman in Greenville, South Carolina, was arrested and charged in March 2023 based on allegations that she took abortion pills to end a pregnancy in 2021.¹⁵⁴ She apparently told health care providers that she had taken abortion pills when she sought help at the hospital after experiencing labor pains. The fetus was stillborn and determined to be approximately twenty-five weeks. 155 The coroner's office reported the event to the local police department. The warrant for her arrest was signed in September 2022, after an investigation revealed that "she had illegally obtained and self-administered the [abortion] medication." ¹⁵⁶ Notably, the pregnancy was terminated over two years before. Even though the alleged conduct would have been illegal in South Carolina under *Roe*, the warrant for her arrest was not signed until late 2022, after the *Dobbs* decision. The charges were dropped in 2023, ¹⁵⁷ and, presumably, such charges could not be brought against a woman in South Carolina under the new law.

an abortion has been attempted or performed.").

^{152.} Planned Parenthood South Atlantic v. South Carolina, 440 S. Ct. 465, 465, No. 2023-000896 (Aug. 23, 2023).

^{153.} The provisions of South Carolina's new law bring it within Category D, *infra* notes 234–303 and accompanying text, "state laws exempting women 'upon whom an abortion is performed or induced."

^{154.} Andrea González-Ramírez, *A Woman Has Been Charged for Allegedly Taking Abortion Pills*, THE CUT (Mar. 2, 2023), https://www.thecut.com/2023/03/south-carolina-woman-faces-abortion-pill-charges.html.

^{155.} The FDA has said medication abortion is safe for use through ten weeks. *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (Mar. 23, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation. The World Health Organization approves of use through twelve weeks. *WHO Recommendations on Self-Care Interventions*, WORLD HEALTH ORG. (2020), https://apps.who.int/iris/bitstream/handle/10665/332334/WHO-SRH-20.11-eng.pdf.

^{156.} González-Ramírez, supra note 154.

^{157.} David Ferrara, *Greenville Woman Arrested for Abortion has Charges Dismissed*, POST AND COURIER (Dec. 1, 2023), https://www.postandcourier.com/greenville/news/abortion-south-carolina-ban-woman-arrested-charged-crime-misdemeanor-felony-fetus-baby/article_6bacd494-8e46-11ee-917a-37343a484ede.html.

Nevada criminalizes self-managed abortion later in pregnancy: "A woman who takes or uses, or submits to the use of, any drug, medicine or substance, or any instrument or other means, with the intent to terminate her pregnancy after the 24th week of pregnancy, ... and thereby causes the death of the child of the pregnancy, commits manslaughter" and shall be punished by imprisonment for a term from one to ten years and may be fined not more than \$10,000. 158 This statute mirrors the approach of the MPC issued in 1962.¹⁵⁹ In 2019, Patience Frazier was arrested, charged with violating this statute, advised to plead guilty to manslaughter, sentenced to a term of thirty to ninety-six months, and imprisoned in Nevada. 160 When Frazier appealed, arguing that the crime of taking drugs to terminate a pregnancy was not a homicide, the court concluded that her entry of a guilty plea waived her right to challenge any events that occurred before the plea. 161 In a later proceeding challenging the conviction, Judge Charles M. McGee freed Frazier after she had spent two years in prison, calling the sentence a "total miscarriage of justice." The state appealed and reserved the right to re-charge Frazier. 163 Statutes criminalizing self-managed abortion in the later stages of pregnancy will become more problematic as increasingly restrictive abortion laws delay people seeking abortions.

As these cases in South Carolina and Nevada demonstrate, prosecutorial discretion—whether exercised in favor of or against the pregnant woman—will be a determinative factor in how the law is applied to pregnant women in the self-managed abortion context and in cases seeking to hold pregnant women criminally responsible for pregnancy outcomes.¹⁶⁴

^{158.} NEV. REV. STAT. ANN. § 200.220.

^{159.} See supra notes 140-43 and accompanying text.

^{160.} Savanna Strott, In Pro-Choice Nevada, Obscure Law Sends Women to Prison for Late-Term Pregnancy Loss, NEV. INDEP. (May 29, 2022, 2:00 AM), https://thenevadaindependent.com/article/in-pro-choice-nevada-obscure-law-sends-women-to-prison-for-late-term-pregnancy-loss.

^{161.} Frazier v. State, 456 P.3d 1084, 1084 (Nev. App. 2020).

^{162.} Decision to Set Aside the Petitioner's Plea of Guilty in the Underlying Case and Order for Further Proceedings at 1, Frazier v. State, 456 P.3d 1084 (Nev. App. 2020) (No. CV-002210). 163. *See* Strott, *supra* note 160.

^{164.} See supra note 55 and accompanying text (discussing work of Goodwin, Conti-Cook, and If/When/How); Brief for If/When/How: Lawyering for Reproductive Justice et al. as Amici Curiae Supporting Petitioners at 25, June Med. Servs. L.L.C. v. Gee, 140 S. Ct. 2103 (2020) (No. 18-1323, 18-1460) ("Since 1973, more than 1,200 people, suspected of having caused their own miscarriages or having risked harm to their pregnancies notwithstanding a lack of any evidence that they desired to terminate their pregnancies, have been arrested for offenses ranging from feticide to child abuse to poisoning.").

B. Laws that contain personhood language – Georgia, Alabama, Mississippi

Another category of laws that place women in criminal jeopardy for seeking, obtaining or self-managing abortions is so-called "personhood laws," which entitle fetuses or "unborn children" to a robust body of rights and protections. This personhood status manifests in state laws in different ways. Georgia's abortion-focused law broadly grants personhood status to fetuses. Alabama's abortion-focused law defines an unborn child at any stage of development as a human being and provides a less-than-clear exemption from prosecution for women who self-manage abortions. Mississippi's pre-*Dobbs* criminal law defines a fetus as a person and has an exception for abortion that may no longer apply. Post-*Dobbs*, however, a number of states are considering legislation that defines fertilized eggs or unborn children as persons for the purpose of homicide or, alternatively, that removes existing statutory language protecting a pregnant woman from prosecution. In the purpose of homicide or, alternatively that removes existing statutory language protecting a pregnant woman from prosecution.

Georgia, as of this writing, has enacted a so-called personhood law, entitled the "Living Infants Fairness and Equality" Act (LIFE Act), that bans abortion after six weeks. The LIFE Act, a trigger law originally passed in 2019,¹⁶⁹ states that "[i]t shall be the policy of the state of Georgia to recognize unborn children as natural persons." ¹⁷⁰ It defines "natural person" as "any human being, including an unborn child," and defines "unborn child" as "a member of the species of Homo sapiens at any stage of development who is carried in the womb." ¹⁷¹

By including "unborn child" in the definition of natural person, the LIFE Act raises the possibility that a woman who obtains or selfmanages an abortion after six weeks could be charged with murder. In

^{165.} See infra notes 170–71 and accompanying text.

^{166.} See infra notes 183–88 and accompanying text.

^{167.} See infra notes 197–98 and accompanying text.

^{168.} These states include Kentucky, South Carolina, Georgia, and Alabama. See discussion infra Section III.D.

^{169.} Sarah Johnson, *Georgia Pro-Birth Accountability Act*, BILL TRACK 50 (Feb. 24, 2023), https://www.billtrack50.com/blog/ga-pro-birth-accountability-act/.

^{170.} H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019).

^{171.} Id.

Georgia, a person "commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." No exemptions from prosecution are provided in the LIFE Act. While there is some ambiguity surrounding whether a woman having or self-managing an abortion could be prosecuted for murder under Georgia's LIFE Act, Douglas County District Attorney Ryan Leonard indicated that women in Georgia "should prepare for the possibility that they could be criminally prosecuted for having an abortion. . . . If you look at it from a purely legal standpoint, if you take the life of another human being, it's murder." ¹⁷³

Georgia also has a pre-*Dobbs* criminal abortion statute dating back to 1876, Code Section 16-12-140, which currently states that "[a] person commits the offense of criminal abortion when, in violation of Code Section 16-12-141, he or she administers any medicine, drugs, or other substance whatever to any woman or when he or she uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion." Section 16-12-141, amended in 2019, prohibits abortions after a fetal "heartbeat" is detected unless

^{172.} GA. CODE ANN. § 16-5-1(a). Louisiana's homicide statute contains a similar definition of murder. LA. STAT. ANN. § 14:29 ("Homicide is the killing of a human being by the act, procurement or culpable omission of another."). The Louisiana Supreme Court has rejected the state's argument that the amendment of the definition of "person" in an infanticide statute to "include[] a human being from the moment of fertilization and implantation" affected the meaning of the term "human being" in the homicide code. State v. Brown, 378 So. 2d 916, 917–18 (La. 1979). The Brown court held that the definition of murder could not be changed by implication ("The only extraneous materials available to us which relate to the legislative intent in amending the definition of the word 'person' do not reveal any intent to broaden the murder statute (except perhaps by implication), but rather an intent to legislate in the problematic field of abortion."). Id. at 918. The minutes indicate that the purpose of the bill was "to include human beings (as 'persons') from the moment of conception and therefore entitled to every protection of law. An intent to change the murder statute was not mentioned."). Mins., Senate Committee, Judiciary C, June 29, 1976 (La.). Similar to Louisiana, Georgia's LIFE Act also offers a definition of person that may not effectively alter the murder provision of its homicide code. H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019). An intent to change the murder statute was not explicitly mentioned in the LIFE Act. Whether courts would consider the legislative findings by the Georgia legislature in the LIFE Act as explicitly supporting its intent to treat an unborn child as a human being for purposes of the murder statute has not been determined.

^{173.} Tessa Stuart, Georgia D.A. Says He Would Prosecute Women Who Get Abortions, ROLLING STONE (May 23, 2019), https://www.rollingstone.com/politics/politics-news/george-d-asays-he-will-prosecute-women-who-get-abortions-836145/.

^{174.} GA. CODE ANN. § 16-12-140(a).

^{175.} The frequent use of the term "heartbeat" in the context of abortion laws is "misleading and medically inaccurate." See Kaitlin Sullivan, 'Heartbeat Bills': Is There a Fetal Heartbeat at Six Weeks of Pregnancy?, NBC NEWS, (April 17, 2022, 4:30 AM), https://www.nbcnews.com/health/womens-health/heartbeat-bills-called-fetal-heartbeat-six-weeks-pregnancy-rcna24435 (citing several doctors explaining the science behind the

a physician determines that there is a medical emergency or that the pregnancy is medically futile. An additional exception is provided when the pregnancy is under twenty weeks and the result of rape or incest for which a police report has been filed. It In Hillman v. State, the Georgia Supreme Court held that Section 16-12-140 is "specifically directed to prevent the conduct of persons other than the pregnant woman. It Is The court explained that the statute "is written in the third person, clearly indicating that at least two actors must be involved." Under this interpretation of Section 16-12-140, a woman could not be prosecuted for self-managing an abortion. But at least one Georgia legislator interprets the law differently, publicly suggesting that a woman can be prosecuted under Georgia's criminal abortion law.

Even though Georgia's LIFE Act does not prohibit abortion until after six weeks, state legislators have now introduced a new bill, premised on the idea that "the lives of unborn persons... should be protected with the same criminal and civil laws protecting the lives of born persons." This bill would make a woman who obtains or self-manages an abortion at any stage of pregnancy liable for homicide. 181

Alabama's "Human Life Protection Act," a trigger law originally passed in 2019 but enjoined until after *Dobbs*, ¹⁸² also incorporates personhood language. This broad abortion ban defines an unborn child as a "human being, specifically including an unborn child in utero at any stage of development, regardless of viability." ¹⁸³

The Human Life Protection Act also acknowledges in its legislative findings that Alabama's criminal code defines an "unborn child in utero at any stage of development, regardless of viability" as a "person" for purposes of its homicide statutes, which include murder,

development of a fetal heartbeat). The correct medical term for what is observed at only six weeks of pregnancy is "cardiac activity" because the anatomical structure that we think of as a heart does not exist until approximately ten weeks of gestation and "continues to develop over the course of the pregnancy." The term heartbeat is accurate closer to seventeen to twenty weeks of pregnancy. *Id.*

^{176.} GA. CODE ANN. § 16-12-141.

^{177.} *Id.* § 16-12-141(b)(2).

^{178.} Hillman v. State, 503 S.E. 2d 610, 613–14 (Ga. Ct. App. 1998).

^{179.} See Stuart, supra note 173 (quoting Republican state legislator who suggested that abortion is murder and women can be prosecuted as such under Georgia's LIFE Act).

^{180.} H.B. 496, 2023 Gen. Assemb. Reg. Sess. (Ga. 2023).

^{181.} *Id*.

^{182.} Xavier Wherry, *Human Life Protection Act Now in Full Effect in Alabama*, WAAY-TV (June 24, 2022), https://www.waaytv.com/news/human-life-protection-act-now-in-full-effect-in-alabama/article_11e814b2-f40c-11ec-b49d-0f3fa6009935.html.

^{183.} Ala. Code § 26-23H-3(7).

manslaughter and criminally negligent homicide.¹⁸⁴ But there are exemptions from prosecution under the homicide statutes, including: "(1) any person for conduct relating to an abortion for which the consent of the pregnant woman or a person authorized by law to act on her behalf has been obtained or for which consent is implied by law or (2) any woman with respect to her unborn child."185 In addition, the law provides that "[n]othing in this section shall make it a crime to perform or obtain an abortion that is otherwise legal. Nothing in this section shall be construed to make an abortion legal which is not otherwise authorized by law."186 With the enactment of the Human Life Protection Act—which legalizes only those abortions performed to save the life of the mother—those who perform or aid and abet abortions that would have been lawful prior to its effective date may now be liable for homicide or other crimes.¹⁸⁷ But for purposes of Alabama's homicide statutes, pregnant women are clearly exempted from prosecution under the language highlighted above. 188

Some Alabama legislators want to ensure that women who self-manage abortions can be prosecuted. In May 2023, Representative Ernie Yarbrough (R-Trinity) and co-sponsors introduced H.B. 454, the "Equal Protection Act," with a stated purpose of "repeal[ing] the provision [in the existing criminal code] that prohibits the prosecution of homicide or assault against any woman with respect to her own unborn child." With respect to the crimes of criminal homicide or assault, the bill would amend Section 13A-6-1 of Alabama's criminal code to define the term "person" as a human being that "includ[es] an unborn child *from the moment of fertilization* at any stage of development, regardless of viability." The bill also removes the

^{184.} ALA. CODE § 13A-6-1(a)(3).

^{185.} Id. § 13A-6-1(d) (emphasis added).

^{186.} Id. § 13A-6-1(e).

^{187.} Martin Antonio Sabelli, et al., *Abortion in America: How Legislative Overreach Is Turning Reproductive Rights into Criminal Wrongs: Alabama Appendix*, NAT'L ASS'N OF CRIM. DEF. LAWS, 13–19 (2021), https://www.nacdl.org/getattachment/e2b15f5f-2e74-4034-ae03-8d9d56cd21d5/abortion-in-america-alabama-appendix.pdf.

^{188.} However, the protections in Alabama's homicide statutes may not be wholly determinative of whether pregnant women are exempt from prosecution after *Dobbs*. The Human Life Protection Act itself contains relevant language: "No woman upon whom an abortion is performed or attempted to be performed shall be criminally or civilly liable for those actions." ALA. CODE § 26-23H-5. As we will argue in Section D of this Part, however, such "upon whom" language in conjunction with Alabama's broad liability statute does not clearly exempt from prosecution pregnant women who self-manage abortions. 188. *See infra* Part III-D.

^{189.} H.B. 454, 2023 Leg., Reg. Sess. (Ala. 2023).

^{190.} Id. (emphasis added).

previous language, quoted above, that prevented a woman from being prosecuted for the death of her own unborn child and prevented prosecution of physicians for otherwise lawful abortions. ¹⁹¹ Should this bill or another like it pass, women who have abortions could be held liable for murder or assault.

An additional wrinkle to the personhood discussion in Alabama comes courtesy of the Alabama Supreme Court's decision about in vitro fertilization (IVF), holding that frozen embryos are children under Alabama's Wrongful Death of a Minor Act. 192 While the decision has created "widespread shock, anger and confusion over how to proceed" with IVF in Alabama, 193 Lynn Paltrow, the founder of Pregnancy Justice, notes that the decision should "not . . . have come as a surprise given the many Alabama laws and earlier decisions holding that fertilized eggs, embryos, and fetuses are separate legal persons."194 She explains that "Alabama already leads the nation in . . . 'pregnancy criminalization' ... [where,] [s]ince 2006, more than six hundred women have been arrested for allegedly endangering an in utero fertilized egg, embryo, or fetus."195As further discussed in Part D, Group 1, the Alabama Supreme Court has upheld these prosecutions by interpreting the word "child," as it appears in relevant criminal statutes, to include "the born and unborn at all stages of development," and finding that "the word 'environment' 'clearly' includes 'the mother's womb."196

Mississippi's pre-*Dobbs* criminal law already defines a fetus as a person. Under Mississippi's criminal code, the term "human being" includes an "unborn child at every stage of gestation from conception until live birth." The inclusion of an unborn fetus in the definition of

^{191.} See id. § 13A-6-1(d) (replacing existing statutory language).

^{192.} LePage v. Ctr. for Reprod. Medicine, 2024 AL SC-2022-0579U.

^{193.} Tim Craig & Sabrina Malhi, Shock, anger, confusion grip Alabama after court ruling on embryo, WASH. POST (Feb. 21, 2024) https://www.washingtonpost.com/nation/2024/02/20/alabama-supreme-court-ivf-embryos/

^{194.} Lynn M. Paltrow, *After Alabama*, ABORTION, EVERY DAY (Mar. 1, 2024), https://jessica.substack.com/p/after-alabama.

^{195.} *Id. See also*, PURVAJA S. KAVATURR ET AL., THE RISE OF PREGNANCY CRIMINALIZATION: A PREGNANCY JUSTICE REPORT 2, 11 (2023) (documenting 1,396 criminal arrests between 2006 and 2022 related to instances where "someone is either arrested for reasons related to their pregnancy, or where the terms of their bail, sentencing, or probation are heightened because they became pregnant after being charged with an unrelated crime"; 46.5% of those arrests were in Alabama).

^{196.} Ex Parte Ankrom, 152 So. 3d 397 (Ala. 2013). See id.

^{197.} MISS. CODE ANN. § 97-3-37. Unlike Georgia and Louisiana, Mississippi directly defines a human being in its homicide statute. *Id*.

human being does "not apply to any legal medical procedure performed by a licensed physician or other licensed medical professional, including legal abortions, when done at the request of a mother of an unborn child or the mother's legal guardian, or to the dispensing or administration of lawfully prescribed lawful medication."198 Although the law has exemptions for lawful abortions, abortions are no longer lawful in Mississippi. 199 Accordingly, this law could create criminal liability for people obtaining unlawful abortions. Because a person commits first-degree murder in Mississippi when they "kill[] ... a human being without the authority of law... [w]hen done with deliberate design to effect the death of an unborn child," a pregnant woman who self-manages an abortion could be liable for firstdegree murder.²⁰⁰ It remains to be seen how this potential for criminal liability for murder would be affected by Mississippi's trigger law, discussed below in Part E, which explicitly exempts women from prosecution for abortion crimes.

The personhood approach is gaining popularity in other antiabortion states post-Dobbs. State legislators have introduced bills defining fertilized eggs or unborn children as persons to enable equal protection under the law for the purpose of homicide. A Kentucky bill, for example, defines "unborn child" as "an individual from fertilization until live birth" and specifies that both "person" and "human being" include an unborn child.²⁰¹ This bill then states that "in a prosecution under this chapter where the victim is an unborn child, enforcement shall be subject to the same legal principles as would apply to the homicide of a person who had been born alive."²⁰² No explicit exemptions from prosecution are provided for those obtaining abortions. But the defense of coercion and standard defenses that ordinarily apply "to the assault of or related offenses against a person who had been born alive" are recognized. 203 The bill also gives concurrent jurisdiction to the attorney general and commonwealth attorneys.²⁰⁴

In South Carolina, a bill entitled "The Prenatal Equal Protection Act of 2023" would "afford equal protection of the laws to all preborn

^{198.} Id. § 97-3-37(3).

^{199.} MISS. CODE ANN. § 41-41-45 (effective 2022).

^{200.} MISS. CODE ANN. § 97-3-19(1).

^{201.} H.B. 300, § 1(3), (5), 2023 Leg., Reg. Sess. (Ky. 2023).

^{202.} Id. § 2.

^{203.} See id. §§ 6-7.

^{204.} Id. § 8.

children from the moment of fertilization."²⁰⁵ The legislators supporting the bill are particularly concerned that "an unborn child who is a victim of homicide [or assault] is afforded equal protection under the homicide laws of the State."²⁰⁶ Here again, the bill does not exempt people who obtain or self-manage abortions from prosecution, but recognizes defenses to homicide or assault that would ordinarily apply under the law.²⁰⁷ The bill also gives concurrent jurisdiction to the attorney general to prosecute homicide cases against unborn children.

C. Laws that restrict or prohibit abortion that do not explicitly exempt pregnant women from prosecution – Florida, North Carolina, and South Dakota

We next turn to state laws that limit or prohibit abortion and fail to provide any explicit provisions precluding the prosecution of women who seek, participate in, obtain, perform, or self-manage their own abortions. Laws in this category leave open the possibility that state attorneys will prosecute women for self-managing abortions.

As Mary Ziegler has illustrated in her discussion of fetal-protective laws generally, while most "do not authorize punishments for women," "many on the books do not rule out such penalties." Discussing the thirty-eight states that make feticide a crime, Ziegler explained that prior to *Dobbs*,

While excusing anyone performing a legal abortion, several state laws say nothing about women who self-induce abortion or do so at times or in ways that run afoul of state law. With the spread of abortion drugs and the rising number of restrictions on access to abortions performed by doctors, it seems likely that more women will face prison time for having illegal abortions.²⁰⁹

The climate Ziegler describes has only intensified since *Dobbs*: access to physical procedures has been eliminated entirely in many states; the use of medication abortion has expanded dramatically; and laws criminalizing abortion are compelling women seeking abortion to obtain the necessary drugs online, often from overseas, outside the traditional health care system.²¹⁰ State laws like those of North Carolina

^{205.} H.B. 3549, 2023-2024 Leg., 125th Sess. (S.C. 2023).

^{206.} Id.

^{207.} See id. § 4(B) (recognizing limited defenses).

^{208.} Ziegler, supra note 39, at 779.

^{209.} Id. at 781.

^{210.} See David Ingram, A Dutch Doctor and the Internet are Making Sure Americans Have Access to Abortion Pills, NBC NEWS (July 7, 2022, 9:00 AM),

and Florida authorize abortions in very limited circumstances, require all abortions to be performed by licensed physicians, and say nothing at all about self-induced or self-managed abortion. In an environment characterized by increased reliance on self-managed medication abortion, these laws expose women to substantial risk.

Group One – Broad Liability (Florida)

At the time of this writing, Florida allows some abortions through fifteen weeks. A law already signed by Governor DeSantis will move the limit back to six weeks if the Florida Supreme Court resolves a pending challenge to the current law in favor of the state.²¹¹ Only a physician can lawfully terminate a pregnancy in Florida, and there are numerous requirements placed on physicians who perform abortions. Pursuant to the current law, "[a]ny person who willfully performs, or actively participates in, a termination of pregnancy in violation of the requirements" of the laws regarding the termination of pregnancies before or during viability "commits a felony of the third degree, punishable" by a term of imprisonment not exceeding five years and fines.²¹² There is no exemption for pregnant women. The "any person" language subjects women who self-manage abortion through medication to the threat of investigation and prosecution.²¹³ Recognizing this possibility, Florida legislators have recently proposed H.B. 111. If passed, the bill would explicitly exempt pregnant women from prosecution for terminating their pregnancies: "This paragraph does not apply to the pregnant woman who terminates the pregnancy."

https://www.nbcnews.com/tech/tech-news/dutch-doctor-internet-are-making-sure-americans-access-abortion-pills-rcna35630; *How To Get an Abortion Pill Online in the U.S.*, AID ACCESS, https://aidaccess.org/en/page/2934559/how-to-get-the-abortion-pill-online (last visited Dec. 26, 2023).

^{211.} S.B. 300, 2023 Leg., Reg. Sess. (Fla. 2023).

^{212.} See FLA. STAT. § 390.0111(10) (noting that terminating a pregnancy is a felony of the third degree, punishable as provided in Sections 775.082, 775.083, and 775.084 of the state code).

^{213.} *Id.* Notably, a provision in Section 390.0111 that specifically bans partial birth abortion includes explicit language exempting women from prosecution for such procedures: "A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section for a conspiracy to violate the provisions of this section." *Id.* § 5(b). No other language in the statute exempts women from prosecution for abortion in any other circumstances.

^{214.} H.B. 111, 2024 Leg., Reg. Sess. (Fla. 2023). See also Ed Pilkington, DeSantis Contradicts Own Abortion Law to Claim Woman Will Not Be Criminalized, THE GUARDIAN, (Sep. 9, 2023, 7:02 PM), https://www.theguardian.com/us-news/2023/sep/14/ron-desantis-abortion-law-contradict-criminalize (quoting a statement from Florida Governor DeSantis insisting that women who terminate their pregnancies will not be criminalized in spite of the law's broad language).

Florida's six-week ban similarly dictates the limited circumstances in which physicians may perform abortions and provides that "only a physician may perform or induce a termination of pregnancy."²¹⁵ The new law features the same broad language prohibiting "any person" from engaging in the proscribed conduct.²¹⁶ Accordingly, women will continue to be at risk of investigation and prosecution under the new law.

Group Two – Limited Liability (North Carolina and South Dakota)

Like Florida, North Carolina has a gestational restriction. North Carolina's criminal liability provision, however, is more limited. The North Carolina legislature criminalized abortion and treated it as a felony pursuant to two laws, Sections 14-44 and 14-45, originally passed in the 1800s²¹⁷:

If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be punished as a Class H felon.²¹⁸

While both Sections 14-44 and 14-45 use the phrase "any person,"

[W]e are not disposed thus to restrict the criminal act, but to hold that it may be committed at any stage of pregnancy. It was determined by the supreme court of Pennsylvania in *Mills v. Commonwealth*, 13 Penn. State Rep., 631, and we quote the clear and forcible language in which the principle is announced in the opinion of COULTER, J.: 'It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman because it interferes with and violates the mysteries of nature in the process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountains of life and therefore it is punished. . . . It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated.'

State v. Slagle, 83 N.C. 630, 632 (N.C. 1880). The North Carolina Supreme Court later construed N.C. Gen. Stat. § 14-44, passed in 1881, as applying only when women were "pregnant, i.e., quick with child." State v. Jordon, 227 N.C. 579, 581 (1947). See also State v. Forte, 222 N.C. 537, 538 (1943) (holding bill of indictment under law criminalizing abortion insufficient where proof failed to conform to the allegation by showing an operation "upon a woman quick with child as charged").

218. N.C. GEN. STAT. § 14-44 (criminalizing abortion after quickening as a Class H felony, as construed by the N.C. Supreme Court). *See also* N.C. GEN. STAT. § 14-45 (establishing inducing miscarriage with drugs as a Class I felony).

^{215.} H.B. 111 § (2) (Fla. 2023).

^{216.} Id. § (10)(a).

^{217.} Construing common law, prior to enactment of these statutes, North Carolina rejected the relevance of quickening to the criminality of abortion:

the provisions' language describes a scenario in which that person provides care "to" or "for" another person: the pregnant woman. Older pre-*Roe* cases have interpreted similar statutory language used in liability provisions criminalizing abortion, as opposed to exemptions from those provisions. These cases provide further support that Section 14-44, and legislation like it, should be interpreted literally—that is, the statute draws a distinction between the target actor and the pregnant person who is acted-upon.

In *State v. Barnett*, a 1967 case from the Oregon Supreme Court, the statute under which a defendant provider was tried, provided:

If any person administers to any woman pregnant with a child any medicine, drug or substance whatever, or uses or employs any instrument or other means, with intent thereby to destroy such child, unless the same is necessary to preserve the life of such mother, such person shall, in case of death of such child or mother is thereby produced, be deemed guilty of manslaughter.²¹⁹

The *Barnett* court concluded that this statute criminalized only the provider and not the pregnant woman:

A reading of the statute indicates that the acts prohibited are those which are performed upon the mother rather than any action taken by her. She is the object of the acts prohibited rather than the actor. The class of persons against whom the statute is directed does not include those upon whom abortions are performed. Most similar state statutes are so construed.²²⁰

A New York court construed the language of N.Y. Section 294 similarly in *People v. Vedder*:

The language of section 294, fairly construed, implies that the person upon whom this operation is performed cannot be one of the persons guilty of the offense described.... The statute plainly contemplates two persons as co-operating in the commission of the crime, the one being the guilty person against whom the penalties of the statute are directed, and the other, the subject upon whose body the crime is committed. It then proceeds to define the respective crimes committed by the respective persons participating in the act, and pronounces different penalties for the respective offenses. It is quite clear that the woman spoken of in the statute is

^{219.} OR. REV. STAT. ANN. § 163.060 (repealed 1969).

^{220.} State v. Barnett, 437 P.2d 821, 822 (Or. 1968) (emphasis added). *See also* Hatfield v. Gano, 15 Iowa 177, 178 (Iowa 1863) ("It is clear to us from the wording of this act, that it was the person who used the means with the pregnant woman to procure the abortion, and not the woman herself, that the Legislature intended to punish.").

not regarded as one of the persons who could be guilty of the crime described in the 294th section, and that she could not, therefore, be indicted under that section.²²¹

The *Vedder* court also explained that the woman was not to be considered an accomplice of the provider in Section 294 and noted that she was subject to separate penalties in the statutory scheme based on her own conduct.

These cases interpreting older criminal liability provisions suggest that statutory language contemplating the involvement of two people—an actor and one acted upon—operate to criminalize only the actor. North Carolina's prohibitions of abortion in Sections 14-44 and 14-45 may be similarly construed.²²²

At the time of the *Dobbs* decision, North Carolina had an additional provision describing a discrete category of abortions that were "not unlawful." Under General Statute 14-45.1, abortions that were: 1) performed by a qualified physician, 2) during the first twenty weeks of pregnancy, and 3) in a hospital or certified clinic subject to the requirements of the statute, were not unlawful.²²³ Section 14-45.1 did not itself provide for any criminal penalties. Rather, the Section's language explicitly modified the criminal penalties already outlined at Sections 14-44 and 14-45, declaring some conduct to be "not unlawful" "[n]otwithstanding any of the provisions of G.S. 14-44 and 14-45." Notably, no language in Section 14-45.1 exempted women from prosecution for self-managing or self-inducing abortions.

On May 17, 2023, the North Carolina legislature overrode Governor Roy Cooper's veto to enact a new law, effective July 1, 2023, that repeals Section 14-45.1 and bans abortion after twelve weeks. Like Section 14-45.1, the new law does not include criminal penalties but declares that "[n]otwithstanding any of the provisions of G.S. 14-44 and G.S. 14-45, and subject to the provisions of this Article, it shall not be unlawful to procure or cause a miscarriage or an abortion" in specified circumstances.²²⁵ Abortions are permitted when performed by a qualified physician: in a medical emergency at any stage of pregnancy;

^{221. 98} N.Y. 630, 631 (N.Y. 1885) (quoting N.Y. PENAL CODE § 294).

^{222.} This interpretation also reflects the approach taken by the American Law Institute drafting the Model Penal Code many years later, using a paradigm involving two individuals—an actor and one acted upon—to criminalize only conduct performed by one person upon another person.

^{223.} N.C. GEN. STAT. § 14-45.1 (repealed 2023).

^{224.} Id.

^{225.} N.C. GEN. STAT. § 90-21.81B.

prior to twelve weeks of pregnancy; up to twenty weeks in cases of rape or incest; and up to twenty-four weeks in cases of life-limiting fetal anomalies. The structure of the new law suggests an intent to characterize only those abortions performed by qualified physicians as "lawful." Section 90-21.81B(2), however, may be read to suggest that all "medical abortion[s] . . . procured" during the first twelve weeks of a woman's pregnancy are also lawful, no matter who does the procuring.

In any event, read together, the structure of the statute suggests that the legislature never intended to address self-managed abortions at all and that the statutes on the books simply do not apply to or criminalize self-managed abortions.

North Carolina also has a separate statute known as the Unborn Victims Act, which provides that a person who unlawfully causes the death of an unborn child can be guilty of murder in some circumstances.²²⁶ Explicit exceptions are made for *lawful* abortions under Section 14-45.1, which, as noted, has been repealed. But unlike Sections 14-44 and 14-45, the Unborn Victims Act explicitly exempts women from prosecution. Pursuant to Section 14-23.7, the Act shall not be construed to permit the prosecution under that article of acts committed by a pregnant woman with respect to her own unborn child, including acts that result in miscarriage or stillbirth. Procuring and taking medication abortion are acts by a pregnant woman with respect to her own child. If construed as acts that result in miscarriage or stillbirth within the meaning of the statute, a woman cannot be subject to prosecution for murder under the Unborn Victims Act. Her exemption from "prosecution under this Article," however, would appear to be unrelated to potential prosecution for a felonious abortion under Sections 14-44 or 14-45 if those sections are interpreted to criminalize self-managed abortions.

South Dakota presents a similar risk for pregnant people who self-manage abortions. The applicable law, Section 22-17-5.1, provides that "[a]ny person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion . . . is guilty of a Class 6 felony," which can entail "two years imprisonment in a state correctional facility

^{226.} N.C. GEN. STAT. §§ 14-23.1-14-23.8.

^{227.} S.D. CODIFIED LAWS § 22-17-5.1 (emphasis added).

or a fine of four thousand dollars, or both."²²⁸ The law does not contain a provision exempting women from prosecution.

In the absence of an exemption, the phrase "any person" used in this statute could conceivably be read to permit the criminalization of a woman who procures for herself and administers to herself medication abortion. Conversely, the language "to any pregnant female" and "for any pregnant female"—which differentiates this law from Florida's²²⁹ and looks more like the language in North Carolina's law²³⁰ and in the MPC²³¹—should be read to imply that the "any person" subject to the law is a person other than the pregnant female. Under this reading, women who self-manage abortions would be outside the scope of the prohibition. The ambiguity created by alternate readings may be construed against criminal liability, potentially resulting in the dismissal of charges or a reversal of a conviction under this statute, but the ambiguity may also lead to arrests and prosecutions of women in the meantime.

South Dakota Governor Kristi Noem has said, "I don't believe women should ever be prosecuted. I don't believe that mothers in this situation [should] ever be prosecuted. Now doctors who knowingly violate the law, they should be prosecuted." Governor Noem's personal beliefs, however, were not offered as a legal opinion, nor does her statement reflect the various ways the current law in South Dakota could be construed. Recognizing the ambiguity of the law as it currently stands, lawmakers in South Dakota proposed an amendment in February 2023 purportedly designed to make clear that women will not be prosecuted for abortion in South Dakota. H.B. 1220—which has the approval of the Governor's office—provides that: "A female who undergoes an unlawful abortion, as set forth in Section 22-17-5.1, may not be held criminally liable for the abortion." It would, of course, be

^{228.} S.D. CODIFIED LAWS § 22-6-1(9).

^{229.} See supra notes 212-15 and accompanying text.

^{230.} See supra notes 223–26 and accompanying text.

^{231.} See supra notes 138–42.

^{232.} Sophie Tatum, *Kristi Noem Celebrates Roe v. Wade's Overturning but Says Women Shouldn't 'Be Prosecuted' for Abortions*, AM. BROAD. CO. NEWS (June 26, 2022, 3:36 PM), https://abcnews.go.com/Politics/kristi-noem-celebrates-roe-wades-overturning-women-prosecuted/story?id=85706146.

^{233.} Austin Goss, *House Committee Passes Bill that Would Protect Mother From Prosecution in the Event of Abortion*, KEVN BLACK HILLS FOX (Feb. 15, 2023, 12:06 PM), https://www.blackhillsfox.com/2023/02/15/house-committee-passes-bill-that-would-protect-mother-prosecution-event-abortion/.

^{234.} H.B. 1220, 2023 Leg., Reg. Sess. (S.D. 2023) (emphasis added).

clearer to say that women will not be held criminally liable for any violation of the statute.

State officials' repeated declarations that women will not or cannot be prosecuted under anti-abortion laws should guide prosecutorial decision-making. Loopholes and ambiguity, however, combined with prosecutorial discretion and a vitriolic environment featuring an anti-abortion narrative that blames women for irresponsible sex and selfish, immoral decision-making create unacceptable risks for women post-*Dobbs*. We explore those risks further in Part D.

D. Laws that exempt women "upon whom an abortion is performed or induced" from criminal liability but do not unambiguously exempt women who self-manage their abortions from prosecution – Tennessee, Idaho, Alabama, Texas, Wyoming, Kentucky, South Carolina

Those who support legislation banning and criminalizing abortion routinely argue²³⁵ that women are not subject to criminal prosecution or civil suits—that the laws target only providers, aiders, and abettors. And a number of the laws do include language that can be read to exempt from prosecution pregnant women upon whom abortion procedures are performed. That exact language often appears in such exemptions—describing a woman having an abortion as a passive character in her own story—a person "upon whom" an abortion is performed by a medical provider. Tennessee's law making abortion a felony provides an example of this approach: "This section does not subject the pregnant woman upon whom an abortion is performed or attempted to criminal conviction or penalty."²³⁶ In the previous section, we examined similar language in the context of liability provisions. In this section, the language comes into play in exemption provisions.

Whether an exemption provision casting the pregnant woman as the object or victim of the procedure exempts women from prosecution for abortion in all circumstances is not clear. Several factors complicate the analysis: 1) the language defining the exemption varies from state to state and is, at best, unclear; 2) some states have a number of

^{235.} See Ziegler, supra notes 41–42; see also Mark Joseph Stern, Women Will Be Punished, SLATE (July 31, 2018), https://slate.com/human-interest/2018/07/misoprostol-and-roe-v-wade-abortion-is-increasingly-something-a-woman-can-do-to-herself.html (noting that the position taken by some members of the antiabortion movement that women who choose to have abortions are victims whom no one would want to punish is unconvincing where "abortion is increasingly something a woman can do to herself" safely.).

^{236.} TENN. CODE ANN. § 39-15-213(e).

different abortion laws that appear to conflict with each other; 3) some of the exemptions are found not in the abortion laws but in other state laws like feticide and child endangerment laws that were crafted during the *Roe* era when some abortions were constitutionally protected; and 4) very few of the laws seem to have been passed with an understanding of the implications of medication abortion and the reality of selfmanaged abortion. In addition, exemptions with this ambiguous language must often be read in conjunction with liability provisions that are equally ambiguous, like those in North Carolina and South Dakota. And even when statutes contemplate medication abortion, they do not always account for self-managed abortion, which may not always involve a doctor interacting directly with a patient, if at all. The lack of clarity in these exemptions is particularly concerning in states where prosecutors have historically prosecuted women for pregnancyrelated outcomes using a variety of statutes not intended for that purpose and where activists are lobbying for expansion of criminal liability for pregnant women.

First, we will look at ambiguous exemptions contained in laws with unambiguous, broadly phrased liability provisions in Tennessee, Idaho, Alabama, and Texas. Then, we will look at the medication abortion-specific provisions of Texas and Wyoming's laws, as well as the more general abortion laws of Kentucky and South Carolina, where ambiguous exemptions accompany limited liability provisions for abortion crimes.

Group One – Broad Liability and Ambiguous Exemption (Tennessee, Idaho, Alabama, and Texas)

Let's return to a further examination of the abortion laws in Tennessee. Tennessee's trigger ban is one of the most stringent abortion laws in the country; it prohibits abortion at all stages of pregnancy, and it broadly states that "[a] person who performs or attempts to perform an abortion commits the offense of criminal abortion," a Class C felony. The statute, as amended in April 2023, provides only limited exceptions for medical emergencies. The trigger ban exemption provides that: "[t]his section does not subject the pregnant woman *upon whom* an abortion is performed or attempted to criminal conviction or penalty." Tennessee represents our first example of a

^{237.} Id. § 39-15-213(b).

^{238.} Id. § 39-15-213(c).

^{239.} Id. § 39-15-213(e) (emphasis added).

broad liability provision combined with an ambiguous exemption.

We established earlier that older pre-Roe cases support the interpretation that language in criminal liability provisions identifying two parties—an actor and a person acted upon—criminalizes only the former. Accordingly, when an exemption from liability is phrased using language envisioning two actors—an actor (provider) and a passive recipient of care (a pregnant woman)—and that exemption precludes the imposition of criminal liability on the pregnant woman "upon whom an abortion is performed," it does not necessarily follow that the woman will be exempted from criminal liability based on her own conduct—when she is the person performing the abortion. An exemption phrased in this manner would not necessarily protect the woman from culpability for her own conduct, particularly when combined with a broad criminal liability provision. To be clear, we are not saying that "upon" or "on whom" language should be read to criminalize self-managed abortions. What we are saying is that the exemption is not explicit, especially in the context of a self-managed medication abortion where a woman may not have any direct interaction with a doctor or where no doctor may be involved at all, such as when a pregnant person obtains pills from a third party or on the black market. This lack of clarity invites an aggressive prosecutor to charge such conduct, especially when there may be no doctor to prosecute.

This "upon whom" passive-recipient exemption phrasing is popular in state statutes criminalizing abortion. Idaho, Alabama, Texas, Kentucky, and South Carolina also provide examples of exemptions from criminal liability for women "upon whom" abortions are performed. Some state officials are on record in public interviews conveying their belief that these exemptions preclude the prosecution of women for abortion-related conduct.²⁴⁰ Other state officials are actively working to create more opportunities to prosecute women for abortion-related conduct.²⁴¹ In most states, local law enforcement and state prosecutors determine investigative priorities, and state attorneys make decisions about whom, what, and whether to prosecute. Lack of clarity puts women's fate—and susceptibility to investigation and prosecution—in the hands of these actors.

^{240.} See, e.g., Yurkanin, supra note 104 (quoting Alabama Attorney General Steve Marshall, who said that the state's law "does not provide an across-the-board exemption from all criminal laws, including the chemical-endangerment law.").

^{241.} See supra notes 55–59 and accompanying text.

Idaho's law bans abortion completely: "[E]very person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion."242 Section 18-622 defines criminal abortion as a felony punishable by a sentence of imprisonment of no less than two years and no more than five years in prison.²⁴³ Exceptions exist for when an abortion is necessary to prevent the death of the pregnant woman, and in instances of rape and incest during the first trimester of pregnancy, but only when the rape or incest has been reported to law enforcement.²⁴⁴ As of July 2023, the Idaho legislature amended the law to indicate that these exceptions do not need to be asserted as affirmatives defenses by doctors, as previously required.²⁴⁵ The law also requires that physicians must perform abortions and do so in a way that provides the best opportunity for the unborn child to survive. 246 Like the other states described here, Idaho's exception for the pregnant woman provides: "Nothing in this section shall be construed to subject a pregnant woman on whom any abortion is performed or attempted to any criminal conviction and penalty."²⁴⁷ Nevertheless, a self-managed medication abortion would not be legal under Section 18-622, and the exemption does not clearly exempt pregnant women who obtain medication and act to terminate their own pregnancies from prosecution.²⁴⁸

Moreover, Idaho is one of the states, previously described, that historically penalized women for their own abortion-related conduct. An older statute, which has not been explicitly repealed, makes it a felony for a woman to terminate her own pregnancy.

Every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony and shall be fined not to exceed five thousand dollars (\$5,000) and/or imprisoned in the state prison for

^{242.} IDAHO CODE § 18-622(1) (2023).

^{243.} Id.

^{244.} *Id.* § 18-622(2)–(3).

^{245.} Sheryl Gay Stolberg, *As Abortion Laws Drive Obstetricians From Red States, Maternity Care Suffers*, N.Y. TIMES (Sept. 7, 2023), https://www.nytimes.com/2023/09/06/us/politics/abortion-obstetricians-maternity-care.html.

^{246.} Idaho Code § 18-622(2).

^{247.} *Id.* § 18-622(5) (emphasis added).

^{248.} While not an issue that was before the court, in *Planned Parenthood Great Northwest v. Idaho*, an opinion addressing whether "the Idaho Constitution protects abortion from the legislature's broad power to enact laws concerning the public's health, welfare, and safety," the Idaho Supreme Court stated that, unlike the pre-*Roe* laws, 18-622 "does not subject the mother to any criminal penalties." 522 P.3d 1132, 1147, 1153 (2023).

not less than one (1) and not more than five (5) years.²⁴⁹

It is unclear how sections 18-622 and 18-606 will work together.

The lack of clarity in Idaho is not entirely surprising. As acknowledged by John Vander Woude, Republican Chair of the House Health and Welfare Committee in Idaho, when legislators passed Idaho's 2020 trigger law, "[w]e never looked that close, and what exactly that bill said and how it was written and language that was in it We did that thinking Roe v. Wade was never going to get overturned. And then when it got overturned, we said, OK, now we have to take a really close look at the definitions."250 While this statement was made in reference to the way the law was affecting everyday medical practice after the fall of Roe, it is illustrative of lawmakers' failure to consider the broader consequences of unclear language on people with reproductive capacity.

Alabama's "Human Life Protection Act" (H.B. 314) makes it "unlawful for any person to intentionally perform or attempt to perform an abortion" but permits abortion when a physician licensed in Alabama performs an abortion that is necessary in order to prevent a serious health risk to the unborn child's mother.²⁵¹ The Rules of Alabama's State Board of Health and Department of Public Health also provide that only physicians can provide an abortion in Alabama.²⁵² People who violate the statute commit a Class A felony and are subject to imprisonment for up to ninety-nine years.²⁵³

Like the other state statutes discussed in this Section, the exemption from prosecution for pregnant women is phrased as follows: "No woman upon whom an abortion is performed or attempted to be

^{249.} IDAHO CODE § 18-606(2) (2023) (emphasis added). In McCormack v. Hiedeman, the Ninth Circuit held that McCormack had demonstrated the likelihood of success on the merits of her claim that 18-606 was unconstitutional based on its conclusion that 18-606's provision criminalizing the conduct of the pregnant woman placed an undue burden on her constitutional right to terminate her pregnancy before viability under Casey for a variety of reasons. 694 F.3d 1004, 1015 (9th Cir. 2012). In that case, McCormack "received from a physician FDA-approved medication used to induce an abortion." Id. at 1018. The court enjoined enforcement of 18-606 as against McCormack but did not enjoin the enforcement of the statute more broadly. Id. at 1025. Because Casey has been overruled by Dobbs and is no longer good law, the McCormack court's conclusions regarding 18-606 are not dispositive of the law's validity.

^{250.} Stolberg, *supra* note 245.

^{251.} Alabama Human Life Protection Act (H.B. 314), 2019 Ala. Laws 2019-189 (codified at ALA. CODE § 26-23H-4 (2022)).

^{252.} See ALA. ADMIN. CODE r. 420-5-1.02(5)(d) (2014) ("Only a physician may perform an abortion. Only a physician may give, sell, dispense, administer or otherwise prescribe an abortioninducing drug.").

^{253. § 26-23}H-6.

performed shall be criminally or civilly liable."²⁵⁴ Like the other states, Alabama does not make clear in this recent law whether women can be prosecuted for their own conduct when they self-manage an abortion, which, again, could involve a situation where a woman obtains a medication abortion without any direct interaction with a doctor.

Alabama also has a pre-Roe law pursuant to which "[a]ny person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aids, abets or prescribes for the same" shall on conviction be guilty of a misdemeanor punishable by fines up to \$1,000 and imprisonment or hard labor for the county for up to twelve months. 255 While the older pre-Roe law does not contain an exemption, its liability language suggests two parties an actor and an acted upon (the pregnant woman)—and one reading would exclude criminal liability for the pregnant woman on that basis.²⁵⁶ In fact, the liability provision included in the newer law, 26-23H-4, is arguably broader than the liability provision in the older law, criminalizing "any person" and exempting from prosecution only those acted upon by another. Nevertheless, recognizing the ambiguity of the older law and the risk that pregnant women who self-manage their own abortions may be prosecuted under this pre-Roe statute, Democratic lawmakers²⁵⁷ have recently proposed legislation to repeal²⁵⁸ the older provision. But given the broad language of the newer prohibition and the ambiguity of the exemption in that law, repealing the old law will not explicitly protect pregnant people from prosecution.

Notably, Alabama state officials have indicated a desire and willingness to prosecute women for pregnancy outcomes and abortions. Alabama has a history of prosecuting women for chemical endangerment of a child when a woman exposes her unborn child to a controlled substance. The state's chemical endangerment law was passed in 2006 "to protect small children from fumes and chemicals from home-based meth labs," but district attorneys "began applying the law to protect the fetuses of women who used various drugs during

^{254. § 26-23}H-5.

^{255.} ALA. CODE § 13A-13-7 (2018).

^{256.} *Id*.

^{257.} Alander Rocha, *Abortion Rights Advocates Fear Pre-Roe Law Could be Used to Prosecute Alabama Women*, ALA. REFLECTOR (Feb. 21, 2023, 7:00 AM), https://alabamareflector.com/2023/02/21/abortion-rights-advocates-fear-pre-roe-law-could-be-used-to-prosecute-alabama-women/.

^{258.} H.B. 17, 2023 Leg., Reg. Sess. (Ala. 2023).

pregnancy."²⁵⁹ The Alabama Supreme Court upheld prosecutions of pregnant people in 2013 and 2014.²⁶⁰ A 2015 investigation revealed that nearly five-hundred new and expecting mothers had been prosecuted under the expanded law.²⁶¹

A spokesperson for Alabama Attorney General Steve Marshall has expressed Marshall's inclination to use these same chemical endangerment laws as a basis for prosecuting women who self-manage abortions with medication, notwithstanding the fact that the statute was not designed for that purpose.²⁶² Citing the language of the Alabama abortion law, Marshall explained in an emailed statement that "[t]he Human Life Protection Act targets abortion providers, exempting women 'upon whom an abortion is performed or attempted to be performed' from liability under the law," but "[i]t does not provide an across-the-board exemption from all criminal laws, including the chemical-endangerment law-which the Alabama Supreme Court has affirmed and reaffirmed protects unborn children."263 These statements by public officials and related news coverage²⁶⁴ are bringing to light the persisting tension within the antiabortion movement between treating women as victims—passive recipients of abortion procedures—and treating them as actors with agency who must suffer criminal consequences for their conduct.

Alabama legislators, with the help of an organization called End Abortion Alabama, have also recently introduced proposals that would explicitly bring abortion within the definition of homicide, a change that would permit prosecution of any person who intentionally terminates a pregnancy for murder. End Abortion Alabama's founder, DJ Parten, returns to the uncomfortable competing narratives underlying anti-abortion legislation: "Women who are victims, who are in difficult situations and maybe pressured to commit an abortion, we're working on some things to protect those women. . . . But women who intentionally terminate their child should not be granted blanket

^{259.} Yurkanin, supra note 104.

^{260.} *Id.* ("Since [2014], the law has been used against more than a thousand Alabama women who used drugs during pregnancy. Its enforcement varies widely. District attorneys in some counties rarely apply the law to pregnant women, while others routinely arrest those who use any illegal substance, including marijuana, while pregnant.").

^{261.} Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), https://www.propublica.org/article/when-the-womb-is-a-crime-scene.

^{262.} Monger, *supra* note 63.

^{263.} Yurkanin, supra note 104.

^{264.} Kitchener & Francis, supra note 45.

^{265.} END ABORTION ALABAMA, https://www.endabortional.org/ (last visited July 26, 2023).

immunity.... Nobody by nature of being a woman should be immune from prosecution."²⁶⁶

The historical criminalization of women, together with the past and ongoing application of abortion- and non-abortion-related laws and pending bills, demonstrate Alabama's inclination to prosecute women for their own conduct.

Texas's trigger ban, the Human Life Protection Act of 2021, which took effect on August 25, 2022, broadly states that "[a] person may not knowingly perform, induce, or attempt an abortion." The law prohibits all abortions with extremely limited exceptions for the following conduct: abortions performed by a licensed physician "to prevent the death or serious risk of substantial impairment of a major bodily function of the pregnant person," and "[m]edical treatment provided to the pregnant female by a licensed physician that results in the accidental or unintentional injury or death of the unborn child." Otherwise, abortions are considered first-degree felonies that can carry sentences up to ninety-nine years in prison.

Like the statutes in Tennessee and Idaho, the Texas law indicates that the 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."²⁷¹ Texas law broadly prohibits "any person" from performing any abortion, and the statute requires abortions to be performed by a licensed physician (like Florida).²⁷² Because the exemption in the trigger ban explicitly contemplates immunity from prosecution only for women "on whom" abortions are performed, the liability of women who self-manage abortions is unclear, especially in situations where there is no direct interaction with or involvement by a doctor.²⁷³

^{266.} Jacob Holmes, Abortion Access Advocacy Groups Slam Bill Allowing Women to be Charged with Homicide, ALA. POL. REP. (May 15, 2023, 7:35 AM), https://www.alreporter.com/2023/05/15/abortion-access-advocacy-groups-slam-bill-allowing-women-to-be-charged-with-homicide/.

^{267.} Human Life Protection Act of 2021, 2021 Tex. Sess. Law. Serv. Ch. 800 (H.B. 1280) (West) (codified at Tex. Health & Safety Code Ann. §§ 170A.001–.007 (2022)).

^{268.} Tex. Health & Safety Code Ann. § 170A.002(b).

^{269.} Id. § 170A.002(d).

^{270.} *Id.* § 170A.004 (criminal penalties for abortion); TEX. PENAL CODE ANN. § 12.32. A person who violates the statute may also be subject to civil penalties and the revocation of professional licenses. *See id.* at § 170A.005, 170A.007.

^{271.} TEX. HEALTH & SAFETY CODE ANN. § 170A.003 (emphasis added).

^{272.} See supra note 216 and accompanying text.

^{273.} In April 2022, Lizella Herrera, a twenty-six-year-old woman, was arrested and charged with murder relating to a self-induced abortion. She spent three in jail before the charges were

Given the abortion desert created in the wake of *Dobbs*, self-managed abortions likely constitute the majority of abortions taking place in the state now. Attorney General Ken Paxton has stated in an interview that he "promises to 'use the full force of [the Trigger Ban] to make people pay if they're going to do abortions." While Paxton was not addressing the prosecution of pregnant women, his willingness to assist local prosecutors pursuing criminal charges under the Act and his inclination to prosecute to the full extent permitted by law are evident. Accordingly, the ambiguity of the statute and the extent to which it could be read to permit prosecution of a woman who obtains drugs and induces her own abortion are important questions to resolve.

Following *Dobbs*, Attorney General Paxton also communicated his support²⁷⁵ for prosecutors who wish to use pre-*Roe* laws on the books criminalizing abortion.²⁷⁶ These laws criminalize the administration of a drug or medicine to a pregnant woman to procure an abortion and provide criminal penalties for those who knowingly procure or assist, i.e., furnish the means for, or administer drugs for medication abortion.²⁷⁷ On July 1, 2022, Paxton tweeted: "Texas's pre-Roe statutes criminalizing abortion is [sic] 100% good law, and I'll ensure they're enforceable."²⁷⁸ However, in *Fund Texas Choice v. Paxton*, a federal district court held that Texas's pre-*Roe* abortion laws "have been repealed by implication"²⁷⁹ and granted plaintiffs' motion to enjoin

dropped. See Jolie McCullough, After Pursuing an Indictment, Starr County DA Drops Murder Charge Over Self-Induced Abortion, TEX. TRIB. (Apr. 1, 2022), https://abc13.com/texas-news-lizelle-herrera-murder-charges-dropped-self-induced-abortion/11734455/; Carrie N. Baker, Texas Woman Lizelle Herrera's Arrest Foreshadows Post-Roe Future, Ms. MAGAZINE (Apr. 16, 2022), https://msmagazine.com/2022/04/16/texas-woman-lizelle-herrera-arrest-murder-roe-v-wade-abortion/. Texas law enforcement apparently relied on a murder statute to charge and arrest Herrera. The Texas murder statute does not apply to the death of an unborn child if "the conduct charged in committed by the mother of the unborn child." TEX. PENAL CODE ANN. Title 5, § 19.06(2) (2003). However, this case occurred before the Human Life Protection Act took effect on Aug. 25, 2022. The extent of criminal liability under the Human Life Protection Act of 2021 for those self-managing abortions is not clear.

- 274. Complaint at 10, Fund Texas Choice v. Paxton, 658 F. Supp. 3d 377 (W.D. Tex. 2023) (No. 1:22-cv-00859).
- 275. E.g., Attorney General Ken Paxton (@KenPaxtonTx), X (July 1, 2022, 4:48 AM), https://twitter.com/KenPaxtonTX/status/1542792157299367936.
- 276. TEX. REV. CIV. STAT. ANN. arts. 4512.1–4512.6 (West 2023) (formerly Arts. 1191–94, 1196).
 - 277. Id. arts. 4512.1-4512.3.
- 278. Attorney General Ken Paxton (@KenPaxtonTx), X (July 1, 2022, 4:48 AM), https://twitter.com/KenPaxtonTX/status/1542792157299367936.
- 279. Fund Texas Choice, 658 F. Supp. 3d at 384. In so holding, the court relied substantially on the Fifth Circuit's decision in McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004) (holding Texas's pre-Roe laws had been repealed by implication). The court rejected the argument that legislative findings to the contrary contained in S.B. 8 and the trigger law somehow resuscitated those laws.

local prosecutors from enforcing those laws.²⁸⁰

Paxton's public statements are pertinent not because they provide any kind of definitive statement of the law, but rather because they show how state officials wield the ambiguity and uncertainty surrounding the state of the law as a way of threatening people with prosecution and thereby chilling their conduct. If a state genuinely wants to preclude all possibility of prosecuting women for any abortion-related conduct, it would be easy to say so clearly and explicitly. Legislators' failure to do so allows anti-abortion states to leverage the uncertainty and confusion to their benefit.

Group Two – Limited Liability and Ambiguous Exemption (Texas, Wyoming, Kentucky, and South Carolina)

Some state laws include more limited liability provisions. In contrast to its broadly worded Human Life Protection Act of 2021, Texas has an additional, more specific Health and Safety Code provision regulating medication abortion. Pursuant to this law, a person "may not knowingly provide an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion in the pregnant woman or enabling another person to induce an abortion in the pregnant woman."281 The law also prohibits a manufacturer, supplier, physician or any other person from "provid[ing] to a patient any abortioninducing drug by courier, delivery, or mail service."282 A violation of any of these provisions is considered a state jail felony.²⁸³ The language of both these provisions suggests the involvement of two people: an actor and the person acted upon (the pregnant woman). This regulatory scheme was passed pre-Dobbs and became effective on December 2, 2021. The Health and Safety Code exempts from prosecution a "pregnant woman on whom a drug-induced abortion is attempted, induced, or performed."284 While this exemption looks like those in

Id. at 412.

^{280.} *Id.* at 415. It is worthy of note that, in dismissing the plaintiffs' claims against A.G. Paxton based on the pre-*Roe* statutes, the district court found the Attorney General had no authority to enforce the pre-*Roe* laws because enforcement power was delegated exclusively to Texas district and county attorneys. *Id.* at 402. Unfortunately, the A.G.'s lack of enforcement authority would not in any way mitigate the chilling effects of his statements along with statements by local prosecutors upon people in Texas trying to comply with abortion laws, most of whom are unlikely to know who enforces which laws.

^{281.} Tex. Health & Safety Code Ann. § 171.063 (2023).

^{282.} Id. § 171.063(b).

^{283.} Tex. Health & Safety Code Ann. § 171.065(a) (2023).

^{284.} *Id.* § 171.065(b) (emphasis added).

Tennessee, Idaho, Alabama, and Texas's Human Life Protection Act, the liability provision it modifies is more similar to those in North Carolina and South Dakota law.²⁸⁵ The language strongly suggests that these regulations were never intended to apply to self-managed abortion.

Wyoming has passed a law specifically banning "chemical abortions." Notwithstanding any other laws, Notwithstanding any other laws, San Wyoming's ban makes it unlawful to use any drug "for the purpose of ... performing an abortion on any person." A violation of the law by a physician or any other person is considered a misdemeanor. The exemption provides that a "woman upon whom a chemical abortion is performed or attempted shall not be criminally prosecuted" pursuant to the section. Enforcement of the law has been enjoined pending the resolution of a lawsuit. Like Texas's medication abortion law, both the liability provision and the exemption appear to envision two different people involved in the abortion process: a provider (of the drugs) and a pregnant recipient.

Kentucky's and South Carolina's abortion statutes have similarly limited liability provisions in conjunction with ambiguous "upon whom" exemptions. Kentucky's 2019 Human Life Protection Act²⁹¹ provides that:

No person may knowingly: 1. Administer to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being; or 2. Use or employ any instrument or procedure upon a pregnant woman with

^{285.} See supra Part III(c) and accompanying text.

^{286.} WYO. STAT. § 35-6-139 (2023).

^{287.} Abortion is currently legal through viability in Wyoming as the legislature's attempts to ban abortion remain tied up in court. See Rebecca Pifer, Wyoming Bans Abortion Pills, HEALTHCARE DIVE (Mar. 20, 2023), https://www.healthcaredive.com/news/wyoming-ban-abortion-pills/645408/; see also Madelyn Beck, Wyoming Governor, AG Rebut Call for Halt on Medication Abortion Ban, WYOFILE (May 26, 2023), https://wyofile.com/wyoming-governor-agrebut-call-for-halt-on-medication-abortion-ban/.

^{288.} WYO. STAT. § 35-6-120(a) (emphasis added).

^{289.} *Id.* § 35-6-120(d) (emphasis added).

^{290.} Aedan Hannon, Wyoming Must Answer Fact-Finding Questions in Abortion Lawsuit, Teton County Judge Rules, CASPER STAR TRIB. (Sep. 1, 2023), https://trib.com/news/local/business/health-care/wyoming-abortion-lawsuit-discovery-legal-battle/article_8334f7b2-4793-11ee-b917-3b6aac6e7f6c.html; Mead Gruver, Judge Blocks Wyoming's 1st-in-the-Nation Abortion Pill Ban while Court Decides Lawsuit, ASSOCIATED PRESS (June 22, 2023, 2:02 AM), https://apnews.com/article/wyoming-abortion-pill-ban-lawsuit-429266bcea6bf5ded1b9c9892ee5578b.

^{291.} Human Life Protection Act, 2019 Ky. Acts ch. 152, sec. 1.

the specific intent of causing or abetting the termination of the life of an unborn human being.²⁹²

Any person who violates that provision is guilty of a Class D felony.²⁹³ The language of the liability provision is thus similar to the language used in North Carolina and South Dakota.²⁹⁴ The exemption in the Kentucky statute mirrors the language in the liability provision: "Nothing in this section may be construed to subject the pregnant mother *upon whom any abortion is performed* or attempted to any criminal conviction and penalty."²⁹⁵

As explained above, the phrasing of the liability provision anticipating the involvement of two individuals may be read to criminalize conduct only when one person is acting upon another individual. Here, a woman's self-management of her own abortion would arguably not come within the terms of the statutory prohibition in the first place. In statutes like these, a similarly phrased exemption from liability for the person acted upon may be included merely to clarify that the pregnant woman, who is the party acted upon (usually willingly) will not bear criminal responsibility for submitting to the procedure.²⁹⁶

Republican Attorney General Daniel Cameron is on record as saying the Kentucky statute as written "does not permit the prosecution of pregnant mothers," describing the "trigger law as one that 'appropriately values the life of a pregnant woman and her unborn child."" ²⁹⁷ In spite of the current Attorney General's belief that women will not be prosecuted, the ambiguity is concerning and leaves women at the whim of elected officials and state attorneys. Indeed, other state officials in Kentucky are simultaneously pushing for even more stringent, punitive laws. Republican legislators in Kentucky²⁹⁸ introduced a bill entitled the "Prenatal Equal Protection Act" that

^{292.} Ky. REV. STAT. ANN. § 311.772 (West 2023) (emphasis added).

^{293.} *Id*.

^{294.} See supra Part III.C.

^{295.} Ky. REV. STAT. ANN. § 311.772(5) (emphasis added).

^{296.} Prosecuting women under these more limited liability provisions should prove challenging. If this more limited liability provision were construed to penalize women for self-managing abortion (in spite of the two-actor language), a prosecutor would have to construe the exemption provision to limit the criminal liability of pregnant women only when they are the passive recipients of abortion care, which would be inconsistent, both logically and grammatically).

^{297.} Alex Acquisto & Austin Horn, *Abortion Could be Prosecuted as Criminal Homicide under Bill Filed by Kentucky Lawmaker*, LEXINGTON HERALD LEADER (Feb. 15, 2023, 10:32 AM), https://www.kentucky.com/news/politics-government/article272513029.html. 298. *Id.*

would characterize abortion as homicide.²⁹⁹ The only defense for a pregnant woman under this proposal appears to be one based on coercion by threat of unlawful physical force: "The defense provided by subsection (1) of this section is available for an offense of intentional homicide where the victim is an unborn child as defined in Section 1 of this Act and the defendant is the child's mother."³⁰⁰

South Carolina's 2023 Fetal Heartbeat and Protection from Abortion Act (S.B. 474) provides that "no person shall perform or induce an abortion *on* a pregnant woman." That article includes the following exemption:

A pregnant woman *on whom* an abortion is performed or induced in violation of this article may not be criminally prosecuted for violating any of the provisions of this article or for attempting to commit, or conspiring to commit a violation of any of the provisions of the article and is not subject to a civil or criminal penalty based on the abortion being performed or induced in violation of any of the provisions of this article.³⁰²

A separate provision entitled "Criminal Penalties" provides that "[a]ny person, except as permitted by this chapter, who provides, supplies, prescribes or administers any drug, medicine, prescription or substance to any woman or uses or employs any device, instrument or other means *upon* any woman"³⁰³ in enumerated circumstances shall be deemed guilty of a felony punishable by two to five years in prison. Thus, the criminal liability provisions of the 2023 South Carolina law, like those in the Kentucky statute, anticipate two different parties: the actor and the woman acted upon. They criminalize only the actor. Because the exemption language tracks the liability language—exempting from prosecution any woman "upon whom" an abortion has been performed—the statutory scheme can be interpreted as one that was not intended to encompass liability of women for self-managed abortions.

Importantly, the 2023 South Carolina law also repealed and replaced the previous version of Section 44-41-80(b) of the state code, which, until July 2023, explicitly imposed criminal liability on the pregnant woman. The recent repeal of that provision would support an

^{299.} H.B. 300, 2023 Leg., Reg. Sess. (Ky. 2023).

^{300.} Id

^{301.} S.C. CODE 44-41-630(B) (2023) (emphasis added).

^{302.} *Id.* § 44-41-670 (emphasis added).

^{303.} Id. § 44-41-80(a) (emphasis added).

argument that current South Carolina law does not permit the prosecution of women for abortion-related crimes.

In an ideal situation where a woman is legally permitted to obtain a full spectrum of reproductive health care, including abortion when needed or desired, a provider may be the person obtaining, procuring, providing, and prescribing medication abortion to or for a woman. Sometimes, this is how the system still works. But, in reality, that is not how self-managed abortion always works. Medication abortion is available online (and undoubtedly on the black market), and women are accessing it outside the traditional medical system. As reliance on medication abortion grows, states attempting to stop abortion from happening will increasingly focus their efforts on women rather than providers.

State law loopholes permitting the prosecution of women for self-managed abortion can be exploited. The admittedly ambiguous exemptions in Texas's and Wyoming's medication abortion laws and in the abortion statutes of Kentucky and South Carolina provide stronger arguments prohibiting the prosecution of women who self-manage abortions because they are paired with limited liability provisions. But the broader criminal liability provisions and ambiguous exemptions in Tennessee, Idaho, Alabama, and Texas are highly concerning. It is possible that prosecutors will drop charges or that courts adjudicating criminal charges against women would resolve ambiguities in the law in favor of the pregnant person. But even so, dropped charges and favorable adjudications would not occur until after a woman is entangled in the criminal justice system.

E. Laws that exempt women from prosecution with somewhat more explicit language – Mississippi, West Virginia, Arkansas, Oklahoma, and Louisiana

While many of the statutes discussed in the previous section use awkward phrasing, giving rise to ambiguities in interpretation, other states that attempt to exempt pregnant women from prosecution have done so in a somewhat more explicit manner. But even when more explicit exemption language is employed in trigger laws or new laws that criminalize abortion post-*Dobbs*, they don't always address separate, existing laws that may still permit a pregnant woman to be charged for conduct pertaining to seeking, obtaining, or self-managing an abortion. If a state legislature is serious about exempting pregnant women from prosecution or the threat of prosecution, it must examine

existing laws in its criminal and health codes and amend or repeal those laws that could place pregnant women in criminal jeopardy now that there is no longer a constitutional right to terminate a pregnancy. In what follows, we examine exemption language from five different states and other elements of state law that may, nevertheless, permit the prosecution of a pregnant woman.

Mississippi

In Mississippi, "[n]o abortion shall be performed or induced ... except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape."304 Unless these exceptions exist, this Mississippi trigger law bans all abortions and criminalizes the actions of "[a]ny person, except the pregnant woman, who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion in the State of Mississippi," with a penalty of imprisonment for not less than one year nor more than ten years. 305 The exemption of the pregnant woman from prosecution is direct and explicit. But an understanding of whether a pregnant woman faces criminal jeopardy in Mississippi for seeking, obtaining, or selfmanaging an abortion does not begin and end with its trigger law. As discussed in Section B above, a woman who self-manages an abortion could conceivably be charged with first degree murder under Mississippi's pre-Dobbs murder statute. How a court may interpret these two statutes together is unclear.

West Virginia

In West Virginia, the Unborn Child Protection Act, enacted post-Dobbs, prohibits the performance, attempted performance, or inducement of an abortion unless a licensed medical official determines that the "embryo or fetus is nonviable," the "pregnancy is ectopic," or a "medical emergency exists." The statute also provides certain exceptions for rape and incest when these crimes have been reported to law enforcement or a "patient" receives treatment for them from a licensed medical professional. A licensed medical professional who has West Virginia hospital privileges must perform abortions under the law, which would make self-managed abortions unlawful. While a

^{304.} MISS. CODE ANN. § 41-41-45 (2023).

^{305.} Id. § 41-41-45(4) (emphasis added).

^{306.} W. VA. CODE § 16-2R-3 (2023).

^{307.} Id.

^{308.} Id.

person who "knowingly and willfully performs, induces, or attempts to perform or induce an abortion" that is not lawful can be prosecuted for a felony punishable up to ten years, the statute more explicitly exempts pregnant women from prosecution: "This section shall not be construed to subject any pregnant female upon whom an abortion is performed or induced or attempted to be performed or induced to a criminal penalty for any violation of this section as a principal, accessory, accomplice, conspirator, or aider and abettor." 310

As previously noted, "on or upon whom" language found in some statutory exemptions with broad liability provisions like West Virginia creates ambiguity in the law, potentially enabling an aggressive prosecutor to investigate and indict a woman who self-manages an abortion. The West Virginia statute adds, however, that a pregnant woman "upon whom an abortion is performed" cannot be charged as a principal, accessory, accomplice, conspirator, aider, or abettor. Given the list's breadth, this statute should be read to exempt pregnant women from prosecution, even those who self-manage abortions.³¹¹

Arkansas

In Arkansas, the Human Life Protection Act,³¹² a trigger law now in effect, prohibits a person from "purposely perform[ing] or attempt[ing] to perform an abortion except to save the life of a pregnant woman in a medical emergency."³¹³ This law excludes the removal of a dead or unborn child or an ectopic pregnancy from its definition of abortion.³¹⁴ The trigger law explicitly exempts a pregnant woman from prosecution: "This section does not authorize the charging or conviction of a woman with *any* criminal offense in the death of her own unborn child."³¹⁵ As of this writing, Arkansas has not repealed other pre-*Dobbs* laws regulating abortion. As is the case with a number of anti-abortion states, Arkansas has "voluminous"³¹⁶ anti-abortion laws, all of which

^{309.} W. VA. CODE § 61-2-8 (2023).

^{310.} Id

^{311.} But if the "as a principal, accessory, accomplice, conspirator, or aider and abettor" is read to modify the "female upon whom an abortion is performed" language, the exemption is not as clear.

^{312.} Arkansas Human Life Protection Act, S.B. 149, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019) (codified as amended at Ark. Code Ann. §§ 5-61-301-04 (2023)).

^{313.} ARK. CODE ANN. § 5-61-304(a) (West 2022).

^{314.} *Id.* § 5-61-303. From a medical perspective, both removing a dead or unborn child and the termination of an ectopic pregnancy are abortion procedures.

^{315.} *Id.* § 5-61-304(c)(1) (emphasis added).

^{316.} MARTIN ANTONIO SABELLI ET AL., ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS, NAT'L ASS'N OF

must be evaluated when attempting to determine whether and under what circumstances a pregnant woman could face criminal jeopardy for seeking, obtaining, or self-managing an abortion. But Arkansas does a better job than some states in drafting a clear exemption.

Some Arkansas legislators would, however, like to take away the existing protections for pregnant women. Like some other state laws, proposed H.B. 1174 would treat an unborn child from the time of fertilization as a person and apply the provisions of the Arkansas criminal code relating to "the death of any other person" to a "prosecution for the death of an unborn child."³¹⁷ Notwithstanding the protections in the current law, this bill would allow those who seek, obtain, or self-manage abortions to be prosecuted for homicide.

Oklahoma

Oklahoma's post-*Dobbs* legal landscape features a number of different laws pertaining to the criminalization or prohibition of abortion, including: a trigger ban, S.B. 612,³¹⁸ passed in 2021 and amended in 2022³¹⁹; a criminal law dating back to 1910, Section 861 of Title 21; and a provision of the Oklahoma Public Health Code, Section 1-733.³²⁰ Guidance recently provided by the Attorney General emphasizes that none of these laws permit the prosecution of women who seek or self-manage abortions.³²¹

The Oklahoma Supreme Court invalidated the state's trigger ban in March 2023,³²² but Section 861 continues to broadly criminalize

CRIM. DEF. LAWS. 1 (2021), https://www.nacdl.org/getattachment/66f30586-2e09-4d18-867f-440d473a7481/abortion-in-america-arkansas-appendix.pdf.

^{317.} H.B. 1174, 94th Gen. Assemb., Reg. Sess. (Ark. 2023).

^{318.} S.B. 612, 58th Leg., 1st Sess. (Okla. 2022) (codified as amended at OKLA. STAT. tit. 63, § 1-731 (2022)).

^{319. &}quot;Notwithstanding any other provision of law, *a person* shall not purposely perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency." OKLA. STAT. tit. 63, § 1-731.4(B) (Westlaw through 59th Leg., 2024), *held unconstitutional by* Oklahoma Call for Reprod. Just. v. Drummond, 2023 OK 24, 526 P.3d 1123 (2023). S.B. 612 provides an explicit and equally broad exemption prohibiting the criminal prosecution of mothers: "this section does not... authorize the charging or conviction of a woman with *any* criminal offense in the death of her own unborn child." *Id.* at 1133 n.1 (Kauger, J. concurring).

^{320.} See 63 O.S.2021 sec. 1-101.

^{321.} OFF. OF THE OKLA. ATT'Y GEN Attorney General Memorandum (Nov. 21, 2023), https://www.oag.ok.gov/sites/g/files/gmc766/f/documents/2023/memo_to_law_enforcement_part_ii_final.pdf.

^{322.} The Oklahoma Supreme Court ruled 5-4 in March 2023 that the state's broad ban must include "an exception for cases in which there is 'a reasonable degree of medical certainty or probability' that a pregnancy would endanger a patient's life." Oklahoma Call for Reprod. Just.

abortion as a felony punishable by up to five years in prison, unless it is "necessary to preserve [the woman's] life." Pursuant to Section 861, "[e]very person who administers to any woman, or who prescribes for any woman, or advises or procures any woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman," commits a felony. While Section 861 does not contain a provision exempting women from prosecution, this statute clearly envisions two people: a provider (the actor) and a pregnant woman (the recipient of the action). Similar to the laws in North Carolina and South Dakota, this statute could be interpreted to criminalize only the provider.

This interpretation is also supported by the fact that Section 861 was originally part of a dual statutory scheme like that in South Carolina, which included Section 21-862, 325 a separate provision of the 1910 law that explicitly criminalized the conduct of women. Section 21-862, entitled "Submitting to or soliciting an attempt to commit abortion," provided that "[e]very woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life" can be punished by a one-year prison sentence or a fine. 326 The legislature repealed Section 21-862 in 2022 when it amended the trigger law. 327 The Attorney General interprets the repeal of this provision as an indication that the legislature did not want women to be prosecuted for abortion. 328

Section 1-733, a health code provision, explicitly prohibits self-induced abortion without the supervision of a physician: "No woman shall perform or induce an abortion upon herself, except under the supervision of a duly licensed physician." This language is reminiscent of explicit prohibition laws discussed in Part A. But Section

v. Drummond, 2023 OK 24, 526 P.3d 1123 (2023). See also Christina Cauterucci, What Anti-Abortion Advocates Really Think of Women's Lives, SLATE (March 24, 2023, 9:00 AM), https://slate.com/news-and-politics/2023/03/oklahoma-abortion-ban-judges-dissents-say-pregnant-women-have-no-right-to-life.html.

^{323.} OKLA. STAT. tit. 21, § 861 (Westlaw through 59th Leg., 2024).

³²⁴ Id

^{325.} OKLA. STAT. tit. 21, § 862, repealed by S.B. 918, 58th Leg., 1st Sess. (Okla. 2021).

^{326.} *Id*.

^{327.} OFF. OF THE OKLA. ATT'Y GEN., Attorney General Opinion (Nov. 21, 2023) at 6.

^{328.} *Id.* at 6.

^{329.} OKLA. STAT. tit. 63, § 1-733 (Westlaw through 59th Leg., 2024).

1-733 does not define self-induced abortion as a "crime" per se; it is merely a prohibition included in the health code.

In light of Section 1-733, a number of Republican Oklahoma legislators requested an official opinion from the Attorney General as to whether Oklahoma law criminalizes self-induced abortion.³³⁰ These legislators believed that Sections 21 and 4 of Title 21, read together with Section 1-733, required the conclusion that self-induced abortion be considered a misdemeanor: "where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed in any statute, the doing of such an act is a misdemeanor."331 They argued that the fact that self-induced abortion is a "crime" under Oklahoma law subjects pregnant women who induce their own abortions to criminal penalties for assault and battery or criminal homicide, under the unborn victims provisions³³² of Oklahoma law.³³³ The legislators noted the confusion created by opposing voices in the national debate and presented a multi-page argument in support of the conclusion that Oklahoma law makes self-induced abortion a crime.334

In November 2023, Attorney General Gentner Drummond of Oklahoma issued guidance for Oklahoma law enforcement following *Dobbs*, opining that "Oklahoma laws prohibiting abortion clearly do not allow for the prosecution or punishment of any mother for seeking or obtaining an abortion."³³⁵ A.G. Gentner also issued an official Opinion in response to the Oklahoma legislators' specific question indicating that "Section 1-733 of title 63 does not permit the charging of a pregnant woman with a misdemeanor or felony for performing or inducing an abortion on herself to intentionally terminate her

^{330.} Letter from Lawmakers to Attorney General John O'Connor (Oct. 13, 2022), https://app.box.com/v/2022-10-13-ok-ag-request); Andy Weber, *Oklahoma Lawmakers Still Want to Know What is Legal After Abortion Ban*, KOCO NEWS (Nov. 28, 2022, 4:36 PM), https://www.koco.com/article/oklahoma-lawmakers-question-abortion-ban/42088551.

^{331.} Letter from Lawmakers to Attorney General John O'Connor (Oct. 13, 2022), https://app.box.com/v/2022-10-13-ok-ag-request.

^{332.} OKLA. STAT. tit. 21, §§ 652(E) (Westlaw through 59th Leg., 2024) ("Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child *unless the mother has committed a crime that caused the death of the unborn child.*" (emphasis added)). This provision is about the use of deadly weapons and does not appear applicable in spite of the legislators' best efforts; § 691(D) ("Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child unless the mother has committed a crime that caused the death of the unborn child.").

^{333.} Letter from Lawmakers, supra note 319.

^{334.} Id

^{335.} OFF. OF THE OKLA. ATT'Y GEN., Attorney General Memorandum (Nov. 21, 2023), at 1.

pregnancy, nor does any other Oklahoma statute."336

Meanwhile, legislators have continued to introduce bills³³⁷ in the Oklahoma Senate to criminalize women who self-induce or obtain abortions.³³⁸ Senate Bill 1729, for example, proposes that the definition of "human being" for purposes of the homicide statute include an unborn child and that the provisions of the law will apply to charges of murder "if the victim is an unborn child and the defendant is the child's mother."339 There are also reasons for concern that prosecutors in Oklahoma will exploit opportunities to prosecute women for various pregnancy outcomes. Since 2019, at least twenty-six women have been charged with felony child neglect for using marijuana during their pregnancies.³⁴⁰ Prosecuting pregnant women in these circumstances is controversial. Indeed, "[a]ll of the criminal cases for marijuana use . . . were filed in just two of Oklahoma's 77 counties, by prosecutors who have aggressively charged mothers for substance use during pregnancy—[Brian] Hermanson in Kay County, on the Kansas border, and Kyle Cabelka in Comanche County, in the southwest corner of the state."341

Louisiana

Under Louisiana law, all abortions are unlawful: it is "unlawful for a physician or other person to perform an abortion, with or without the consent of the pregnant female." While Louisiana does not provide statutory exceptions to this broad prohibition, it effectively creates exceptions by affirmatively excluding from the definition of abortion certain acts "performed by a physician," such as a physician's removal of an ectopic pregnancy, a "dead unborn child," or "an unborn child who is deemed to be medically futile." Louisiana law also excludes

^{336.} OFF. OF THE OKLA. ATT'Y GEN., Attorney General Opinion (Nov. 21, 2023) at 10.

^{337.} S.B. 287, 59th Leg., 1st Sess. (Okla. 2023).

^{338.} Alanna Vagianos, 2 States Introduce Radical Bills to Prosecute Pregnant People for Abortions, HUFFINGTON POST (Jan. 20, 2023, 3:08 PM), https://www.huffpost.com/entry/states-introduce-radical-bills-to-prosecute-pregnant-people-for-abortions_n_63cad58be4b0c2b49ad52898.

^{339.} S.B. 1729, 59th Leg., 2nd Sess. (Okla. 2024).

^{340.} Brianna Bailey, *Oklahoma Is Prosecuting Pregnant Women for Using Medical Marijuana*, THE MARSHALL PROJECT (Sep. 13, 2022, 6:00 AM), https://www.themarshallproject.org/2022/09/13/oklahoma-is-prosecuting-pregnant-women-for-using-medical-marijuana.

^{341.} *Id*.

^{342.} La. Stat. Ann. § 14:87.7 (2022).

^{343.} *Id.* § 14:87.1. Like Arkansas, Louisiana creates unnecessary confusion by defining abortion procedures as "not abortions" under the statute.

from the definition of abortion a medical procedure performed by a physician:

to prevent the death or substantial risk of death to the pregnant woman due to a physical condition, or to prevent the serious, permanent impairment of a life sustaining organ of a pregnant woman . . . [although] the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child in a manner consistent with reasonable medical practice.³⁴⁴

While Louisiana broadly criminalizes abortion and punishes violators with "hard labor for not less than one year nor more than ten years," it explicitly exempts pregnant women from prosecution: "This Section does not apply to a pregnant female upon whom an abortion is committed or performed in violation of this Section, and the pregnant female shall not be held responsible for the criminal consequences of any violation of this Section." Although the less explicit "upon whom" language appears in this statute, the additional language in the second clause suggests that a pregnant woman shall not be liable for *any* criminal violation of the statute. Notably, the Louisiana Supreme Court has explicitly rejected the argument that a fetus is a human being for purposes of its murder statute, so a woman who obtains or self-manages an abortion would not be liable for murder. 346

Louisiana has a separate law specifically pertaining to medication abortion: "Criminal abortion by means of an abortion-inducing drug" is committed under Louisiana law "when a person knowingly causes an abortion to occur by means of delivering, dispensing, distributing, or providing a pregnant woman with an abortion-inducing drug." And any person "who knowingly performs an abortion by means of an abortion-inducing drug . . . shall be imprisoned at hard labor for not less than one nor more than five years." But the law explicitly states that "[a]ny act taken or omission by a pregnant woman with regard to her own unborn child" shall not "be construed to create the crime of criminal abortion by means of an abortion-inducing drug." Thus, while it would not be lawful for a woman to self-manage an abortion, she is explicitly exempted from prosecution.

^{344.} Id.

^{345.} Id. § 14:87.7.

^{346.} See State v. Brown, 378 So. 2d 916 (La. 1979).

^{347.} La. Stat. Ann. § 14:87.9 (2022).

^{348.} Id.

^{349.} Id.

* * *

If, by chance, this lengthy exegesis is tremendously confusing, dear and patient reader, just imagine the plight of a woman living in one of these states trying to figure out what conduct is illegal and what liability she might face based on any decision she might make about terminating a pregnancy.

The foregoing spectrum of categories illustrates the profound lack of clarity characterizing the current abortion landscape when it comes to the criminalization of women and liability for self-managed abortions. As Justice O'Connor explained in *Casey*, "Liberty finds no refuge in a jurisprudence of doubt." Today, that doubt infects state legislation as well as state and federal jurisprudence. The *Dobbs* Court's infidelity to precedent and evisceration of the right to privacy have resulted in the enactment and enforcement of numerous, often contradictory, statutes rife with doubt and uncertainty. "The impossibility of anticipating whether or how one might be charged creates the ultimate 'jurisprudence of doubt."

When women and those who help them obtain abortion medication can be prosecuted, they will be subject to invasive surveillance and investigation. Even if laws are not reliably or consistently enforced, and even if convictions are ultimately reversed on appeal years down the road, the existence of these laws creates a hostile environment for people with reproductive capacity. Surveillance, investigation, arrest, plea agreements, prosecution, convictions, and incarceration all affect the privacy, equality, and liberty of women. Moreover, when it is unclear whether a woman can be prosecuted and when the language of a given statute or set of statutes permits a prosecutor to make a colorable case that a woman can, in fact, be prosecuted, people with reproductive capacity must act as if they can be prosecuted. In the next part, we explore some hypotheticals demonstrating the ways confusing statutory language, conflicting laws, and uncertainty affect women's liberty, privacy, and reproductive health.

^{350.} Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

^{351.} See Dellinger & Pell, supra note 7 (explaining the threat Dobbs poses to physical privacy and bodily integrity, decisional privacy, and informational privacy).

^{352.} Brief for If/When/How: Lawyering for Reproductive Justice, *supra* note 61, at 24 (citing *Casey*, 505 US at 844).

IV. HYPOTHETICALS: SURVEILLANCE POST-DOBBS

In Part III, we discussed categories of statutory language that, contrary to the dominant narrative, may expose pregnant people to criminal jeopardy for seeking, obtaining, or self-managing abortions. In this Part, we present three hypothetical scenarios involving law enforcement investigations of a single mom, a college student, and a high school student for their alleged self-managed abortions through the use of medication. In each of the scenarios, we apply state law from some of the categories in Part III to illustrate how such laws could enable the investigation of abortion crimes and surveillance of women via modern-day technologies and data trails.

We are not suggesting that these exact scenarios have occurred or will occur. But aspects of these scenarios are consistent with cases described in If/When/How's 2023 report documenting the ways in which women were investigated and prosecuted for conduct pertaining to self-managed abortions between 2000 and 2020, prior to the fall of *Roe* and the rise of the post-*Dobbs* legal landscape. These themes include: (1) that someone known to the pregnant person often alerts law enforcement about conduct that prompts the investigation;³⁵³ (2) that the digital footprints of individuals provide critical evidence in investigations;³⁵⁴ and (3) that "unpredictable application of the law . . . poses monumental risks and confusion for abortion seekers and those that support them.³⁵⁵ We attempt to illustrate what is *possible* based on the current state of the law, surveillance technologies,³⁵⁶ and the kinds

^{353.} See generally If/When/How Report, supra note 15, at 34 ("[T]hese cases demonstrate the risk that people face when they share information about a self-managed abortion. Even if they share with someone they trust, that person may share further with someone who feels compelled to call the police. For example, in one case, a woman confided in a close friend that she had ended her pregnancy at home by taking pills ordered online. This friend then shared the information with his sister, who subsequently contacted police.")

^{354.} *Id* at 43. ("In instances where devices were seized, law enforcement obtained a range of information to build a criminal case, including text exchanges and online search histories. In one case in which a woman's phone data was downloaded by law enforcement, prosecutors used the fact that she searched online for ways to induce a miscarriage and buy abortion medication to establish criminal intent. In another, a woman's monthslong text exchange with her best friend was key evidence used in the arrest affidavit. This text exchange included a range of deeply personal information, such as details about the woman's relationship, the pregnancy, her menstrual cycle, her estimated gestational age, ordering and taking medication abortion from an online pharmacy, and details about the pain and bleeding she experienced after the pregnancy ended. This evidence then permeated throughout the case and was used at trial, helping to persuade the jury to render a guilty verdict.").

^{355.} *Id* at 40.

^{356.} See Carter Sherman, Idaho Mother and Son Charged With Kidnapping Over Out-of-State Abortion, The GUARDIAN (Nov. 1, 2023), https://www.theguardian.com/us-

of data available to law enforcement should a district attorney (D.A.) choose to investigate a person who self-manages an abortion. We conclude this part by offering some observations about these scenarios and the surveillance they entail.

A. Single Mom: Ambiguous Statutory Language, Crisis Pregnancy Centers, Amazon Ring, Location Data, and Call Detail Records

Latonya has two kids, two jobs, a parent she cares for, and no life partner. She is thirty years old, unintentionally pregnant, and looking for help. During her downtime on her night shift as a front desk clerk for Motel 6 in rural Texas, Latonya uses her phone to search online for "abortion" and finds the Lakewood Pregnancy Center³⁵⁷ less than twenty minutes away. She submits her name, email, and phone on the online form to schedule an appointment for the following day.

Gina, the woman who conducts her appointment at Lakewood,³⁵⁹ offers an ultrasound and a lot of information about fetal development but, in spite of the mention of abortion on the website, provides no information about how to obtain one.³⁶⁰ In response to direct questions, Gina tells Latonya abortion is related to depression, suicide, and breast

news/2023/nov/01/idaho-mother-son-kidnap-charges-abortion (explaining how, in a post-*Dobbs* case in Idaho where a mother and son were charged with kidnapping following their facilitation of an out-of-state abortion, police used cell phone location data to confirm that they traveled with the son's pregnant girlfriend to Oregon around the time of the procedure.).

357. In June of 2022, Google launched a new program that affixes labels to search results related to abortion. Designed to flag whether advertisers offer medical services to terminate a pregnancy, the program in practice often fails to flag crisis pregnancy centers, causing unwitting searchers to engage with non-medical organizations that aim to convince them not to obtain abortions. For a more detailed discussion, see Julia Love & Davey Alba, *Google is Still Failing to Label Many Ads from Anti-Abortion Centers*, BLOOMBERG: TECH. + EQUAL. (Sep. 29, 2022), https://www.bloomberg.com/graphics/2022-google-search-abortion-clinic-crisis-pregnancy-center-ads.

358. Mobile geofencing technology aids anti-abortion crisis pregnancy centers. See Christina Cauterucci, Anti-Abortion Groups are Sending Targeted Smartphone Ads to Women in Abortion Clinics, SLATE: THE XX FACTOR (May 26, 2016, 4:31 PM), https://slate.com/human-interest/2016/05/anti-abortion-groups-are-sending-targeted-smartphone-ads-to-women-in-abortion-clinics.html (noting that anti-abortion groups are using geofencing technology to deliver anti-abortion ads to people visiting medical facilities via their mobile devices.).

359. According to the American Medical Association, "[1]ay volunteers who are not licensed clinicians at CPCs often wear white coats and see women in exam rooms." Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 Am. MED. Ass'N J. OF ETHICS No. 3:269-277 269, 270 (Mar. 2018).

360. See Carrie N. Baker & Jenifer McKenna, Anti-Abortion 'Crisis Pregnancy Centers' Face New Accountability Post-Roe, Ms. MAGAZINE (Oct. 18, 2022), https://msmagazine.com/2022/10/18/post-roe-anti-abortion-crisis-pregnancy-centers/ (describing how crisis pregnancy centers use deceptive advertising about abortion to lure women to visit centers but provide medical disinformation to women upon their arrival).

cancer and is actually illegal.³⁶¹ Lakewood adds Latonya's information³⁶² to a report it will submit to the local police department listing the names and identifying information of all women who visited the center and expressed an interest in abortion.³⁶³

Returning home, Latonya has a discussion with her friend and neighbor Mia in the otherwise empty hallway of their apartment building. Mia tells her about a person she knows who has helped others and may be able to help Latonya. "It's really safe and you don't need a doctor. It will probably be about \$400. I know it sounds like a lot for pills, but she's taking a risk," Mia tells her. Unbeknownst to Mia and Latonya, much of their conversation is recorded by the Amazon Ring doorbell of the occupant of the apartment across the hall.³⁶⁴

Three weeks later, Latonya goes to the hospital closest to where she lives because she is experiencing bleeding and cramping. She reports that she is twelve weeks pregnant and is having a miscarriage.

The Investigation

2024]

Crisis pregnancy centers,³⁶⁵ which are not medical clinics, are not covered entities³⁶⁶ under the Health Insurance Portability and

^{361.} See U.S. H.R. COMM. ON GOV'T REFORM SPECIAL INVESTIGATIONS DIV., FALSE AND MISLEADING HEALTH INFO. PROVIDED BY FED. FUNDED PREGNANCY RES. CTRS. PREPARED FOR REP. HENRY A. WAXMAN 6–7 (July 2006) [hereinafter WAXMAN REP.], https://motherjones.com/files/waxman2.pdf (detailing that 87% of federally funded pregnancy crisis centers provided "false or misleading information to callers" purporting to be seventeen-year-old girls in an investigation on Compassion Capital Fund grantees).

^{362.} Beyond the information Latonya provided on the online form, crisis pregnancy crisis centers often take down visitors' personal information, much like a doctor's office collects intake forms. See, e.g., Abigail Abrams & Vera Bergengruen, Anti-Abortion Pregnancy Centers Are Collecting Troves of Data That Could Be Weaponized Against Women, TIME MAG. (Jun. 22, 2022, 12:02 PM), https://time.com/6189528/anti-abortion-pregnancy-centers-collect-data-investigation/ (describing one center scanning government IDs before seeing patients and denying services without data collection).

^{363.} Xenia Ellenbogen, So-called 'crisis pregnancy centers' are surveilling clients and may help criminalize them, reproductive advocates say, PRISM REPORTS (Aug. 24, 2022), https://prismreports.org/2022/08/24/anti-abortion-centers-surveilling-criminalizing-clients/.

^{364.} Yael Grauer, *Video Doorbell Cameras Record Audio, Too*, CONSUMER REPS. (May 18, 2022), https://www.consumerreports.org/video-doorbells/video-doorbell-cameras-record-audio-too-a4636115889/.

^{365.} For a general overview on crisis pregnancy centers, see What Are Crisis Pregnancy Centers?, PLANNED PARENTHOOD (Nov. 4, 2021, 6:03 PM), https://www.plannedparenthood.org/blog/what-are-crisis-pregnancy-centers (explaining that crisis pregnancy centers are clinics or mobile health vans designed to look like real abortion-providing facilities run by anti-abortion activists).

^{366. &}quot;Covered entities" include health plans, health care clearinghouses, and health care providers who transmit health information in electronic form in connection with the former two entities. Because crisis pregnancy centers do not transmit health information to health plans or

Accountability Act (HIPAA).³⁶⁷ Accordingly, they are not required by the statute or the HIPAA privacy rule to protect the privacy of any information that a pregnant person may share with them.³⁶⁸ At the end of the week in which Latonya's appointment took place, staff at the Lakewood Pregnancy Center submit a report containing Latonya's name, address, and phone number, along with other information she provided about her pregnancy to a local police department in Texas. The notes indicate that Latonya was nine weeks pregnant at the time of the visit, that she conveyed her inability to support another child, and that she was thinking about having an abortion, but had not yet made up her mind.

The local D.A. has been looking for the "right case" to address the problem of women self-managing abortions in Texas with medication.³⁶⁹ The D.A. plans to attack the medication abortion problem on two fronts: (1) keep women from getting access to the pills by investigating and prosecuting the people helping them obtain the pills; and (2) where necessary, prosecute women who take the pills, thereby deterring other pregnant women from using them.

The police are aware that Latonya is approximately ten weeks pregnant and considering having an abortion. After an appropriate period of time passes, they plan to follow up and determine whether Latonya still appears to be pregnant. They wait approximately three and a half months, when she should be approaching the end of her second trimester and clearly showing. An officer waiting outside of her apartment complex observes her coming out of the building with two kids and a relatively flat stomach. She does not appear to be pregnant. With this observation, the police decide to subpoena medical records from local medical facilities that could shed light on the outcome of Latonya's pregnancy and to start interviewing Latonya's neighbors, friends, and family.

Records returned from one local hospital indicate that Latonya sought treatment for bleeding and cramps at approximately twelve

health care clearinghouses, they are not covered by HIPAA. *See* Health Insurance Portability and Accountability Act Privacy Rule, 45 C.F.R. §§ 160, 164 (2002) [hereinafter HIPAA Privacy Rule] (defining "covered entities" in greater detail).

^{367.} Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, §§ 261-64, 110 Stat. 1936 (1996) [hereinafter HIPAA].

^{368.} See supra notes 353, 366 and accompanying text.

^{369.} Caroline Kitchener, Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill 'Trafficking', WASH. POST (Dec. 14, 2022, 7:30 AM), https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe/

weeks of pregnancy. She told the nurse and doctor that she was experiencing a miscarriage. The police interview a woman who lives on Latonya's hall. She remembers hearing Latonya talking to their other neighbor, Mia, about getting some pills—the walls in this apartment complex are very thin. One of the officers notices that the woman they are interviewing has an Amazon Ring doorbell³⁷⁰ affixed to the front of her door. When he inquires, she tells them that she has the Ring audio and video footage programmed to be saved for 180 days. The officer asks the woman if she would share the recordings with him, and she does.³⁷¹ The police are able to obtain video and audio of a conversation between Latonya and Mia where they are discussing how Latonya could obtain abortion pills for approximately \$400 from someone without having to go to a doctor.

Because there is no significant physical difference between a medication abortion and a miscarriage, police are unable to determine, at least at this point in time,³⁷² whether the loss of Latonya's pregnancy was due to a miscarriage or induced with medication without other external evidence clearly indicating that Latonya ingested abortion medication. Based on the circumstantial evidence collected to date, the

^{370.} Alfred Ng, *The Privacy Loophole in Your Doorbell*, POLITICO (Mar. 7, 2023, 4:30 AM), https://www.politico.com/news/2023/03/07/privacy-loophole-ring-doorbell-00084979. ("The police said they were conducting a drug-related investigation on a neighbor, and they wanted videos of 'suspicious activity' between 5 and 7 p.m. one night in October. Larkin cooperated, and sent clips of a car that drove by his Ring camera more than 12 times in that time frame. He thought that was all the police would need. Instead, it was just the beginning.")

^{371.} On January 24, 2024, Amazon Ring announced that it would no longer permit the police to contact residents through its Neighbors app to request Ring footage without a warrant. While public safety agencies can still share information through the app, the request for information tool "will be disabled." Lawmakers and privacy advocates "have long criticized Ring for helping to expand police surveillance in communities, seemingly threatening privacy and racial profiling." But as demonstrated in this hypothetical, this new policy "will not stop police from trying to get Ring footage directly from device owners without a warrant." Ashley Belanger, *Amazon Ring Stops Letting Police Request Footage in Neighbors App After Outcry*, ARSTECHINA (Jan. 24, 2024, 4:28 PM), https://arstechnica.com/tech-policy/2024/01/amazon-ring-stops-letting-cops-get-doorbell-footage-without-a-warrant/.

^{372.} But see Adams, supra note 79 ("[T]here are reports that laboratory tests to detect abortion drugs have not only been created in Poland but are, in rare cases, also being used there to investigate the outcomes of pregnancies. . . . Americans would be wise to plan for the possibility that the technology could one day be used by law enforcement to suss out whether women have taken abortion pills—which are now banned or restricted in more than two dozen states."); see also Phoebe Davis, British Police Testing Women for Abortion Drugs, TORTOISE MEDIA (Oct. 30, 2023), https://www.tortoisemedia.com/2023/10/30/british-police-testing-women-for-abortiondrugs/ ("British police are testing women for abortion drugs and requesting data from menstrual tracking apps after unexplained pregnancy losses. [P]olice have requested a mass spectrometry test, which can detect the presence of the abortion drugs mifepristone and misoprostol in the urine, blood and placenta of women under investigation.").

D.A. concludes, correctly or not, that Latonya self-managed an abortion with medication. He believes he can threaten to prosecute both Latonya and Mia if they do not cooperate in an investigation targeting the source and network distributing the pills. Texas's Human Life Protection Act broadly prohibits a person from "knowingly perform[ing], induc[ing], or attempting an abortion." Mia could be charged with aiding and abetting an abortion.

Notwithstanding the language in the Human Life Protection Act, which exempts women "on whom" an abortion is performed from being prosecuted,³⁷⁴ the D.A. believes that a credible argument can be made that self-managed abortions are not covered by this language.³⁷⁵ Accordingly, he thinks he can charge Latonya with inducing an abortion, which is a first-degree felony punishable "for life or for any term of not more than 99 years or less than 5 years."³⁷⁶ Even if a court were ultimately to interpret the statute as precluding the prosecution of women who self-manage abortions, the D.A. can leverage the ambiguity in the statute to his benefit.

Prior to sending the police to their apartments to do initial interviews, the D.A. subpoenas all of Mia's and Latonya's call detail records (numbers dialed and calls received on both their cell phones and land lines) for the three-week period beginning with the hallway conversation about the pills and ending with Latonya's alleged miscarriage. The D.A. also has the police serve a search warrant on each of their cell phone service providers for historical location data for this same three-week period. These records will begin to help the D.A. identify the individual who was the source of the pills.

B. College Student: Surveillance—Cell Phones, Search Histories, and Femtech—Even Without Prosecution of the Pregnant Woman

Madison is a freshman at a Mississippi college. In early October, it occurs to her that she has not had her period in a while. Because she has never been particularly regular, her hometown doctor suggested she use a period-tracking app to help keep track of her cycles. She checks her Eve app to see the start date of her last period. She is

^{373.} H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021) (codified as amended in scattered sections of Tex. Health & Safety Code Ann. § 170A).

^{374.} *Id.*; TEX. HEALTH & SAFETY CODE ANN. § 170A.002(b)(2).

^{375.} He does not believe, however, that Texas' specific law pertaining to medication abortion allows him to prosecute Latonya. See discussion *supra* Part III.D.

^{376.} Tex. Penal Code § 12.32(a).

shocked to see that her last period was in August. Suddenly, that onetime hookup with Jason at that party in September makes her panic. She thought they had been careful, but maybe it had not worked, or maybe it was just irregularity.

She buys a pregnancy test from CVS. While waiting for the results in her dorm room, she goes online to search for information about abortion—no matter how conservative her family is, she thinks, there is no way she is having a kid right now. When her roommate Angela comes in, she acts like she is studying. Angela opposes abortion based on her religious views.

Positive test in hand, Madison is pretty freaked out but trying to stay calm and make a plan. She texts "SOS" to her best friend Molly with a picture of the test results and texts Jason, "We need to talk ASAP." The Planned Parenthood site Molly recommends says the only clinic choices are in Illinois, Florida, or North Carolina. There is a telehealth option, but to get the medicine in the mail using telehealth she must have an address in one of the states listed, and she does not have that. Planned Parenthood gets her to Plan C, which ultimately gets her to Aid Access, where she could order pills to self-manage an abortion.³⁷⁷ The Plan C website³⁷⁸ says that people have actually been arrested and prosecuted for self-managing abortions by ordering pills and taking them, but also says there are not too many cases over the past twenty years. Her friend Molly thinks it is unlikely they would come after her. So, she decides to do it and orders the drugs from Aid Access. She is going to need at least \$150,379 and it is going to take two to three weeks for the pills to arrive. They have to come from India and only work for ten weeks or so. Madison knows she does not have a lot of time. She also does not have \$150 lying around. Molly says Madison can use her credit card to pay for the medicine. Madison has the package mailed to Jason, who lives in an apartment off campus.

Angela is not as oblivious as Madison thinks. She has an idea about

^{377.} AID ACCESS, https://aidaccess.org/en/ (last visited June 24, 2023) ("Aid Access will help you order abortion pills by mail.").

^{378.} See Frequently Asked Questions: Safety Considerations, PLAN C, https://www.plancpills.org/guide-how-to-get-abortion-pills#can-i-get-in-trouble-for-using-abortion-pills (last visited June 24, 2023) ("Can I get in trouble for using abortion pills?... from 2000 to 2020, at least 61 people who have self-managed an abortion or have helped someone else are known to have been arrested or prosecuted.").

^{379.} Frequently Asked Questions, PLAN C, https://www.plancpills.org/guide-how-to-get-abortion-pills ("Online ordering services and new telehealth abortion services charge \$150 and up.... Many services accept insurance/Medicaid or offer discounts to those who can't pay. Just ask."); see also Aid Access, supra note 377 ("The service costs \$150.").

what is going on and is aware of the laws against abortion. She sees Jason bring a package to the dorm and give it to Madison. Madison then goes inside the bathroom, comes out a few minutes later, and stashes the box in the back of a bureau drawer. Angela keeps waiting for a time that she is alone in the room to look at the package. Madison tells Angela she is not feeling well and is not going to class on Friday. She then hangs around their dorm room for most of the weekend, making frequent trips to the bathroom. Angela notices there are a lot of bloody maxi pads in the trash can. Molly visits Madison a couple times over the weekend and brings her food, but Molly and Madison do not talk very much when Angela is around.

On Monday afternoon, Madison finally goes to class, and Angela is able to look in Madison's drawer. When she finds empty packaging that looks like it could have contained pills, Angela calls the police department and reports her roommate for taking pills to cause an abortion. She describes Madison's behavior over the past several days, along with the empty packaging and bloody pads she found. She also tells the police that she thinks Madison keeps track of when she gets her period through a period-tracking app on her phone, although she is not sure which app she uses. She mentions Molly's and Jason's apparent involvement.

The Investigation

The police discuss the facts with the District Attorney, who drafts a search warrant for Madison's dorm room and the adjoining bathroom for purposes of obtaining evidence that Madison took pills to induce an abortion. Police inform university administrators that they are in the process of obtaining a warrant and are going to post officers outside of the dorm room and bathroom to make sure that evidence is not removed before the warrant is executed. The D.A. also drafts a search warrant for Madison's phone in order to obtain information from the app mentioned by Angela that would be relevant to establishing that she was pregnant, along with other evidence on the phone—things like search history, numbers dialed, text messages, or email—that may reveal how she found and acquired the medication for the abortion.

Under Mississippi's trigger law, abortion is illegal except to save the life of the mother, or in the case of rape when a formal charge of rape has been filed. Any person, *except the pregnant woman*, who performs or attempts to perform or induce an abortion is subject to imprisonment for not less than one year nor more than ten years.

Under this explicit exemption, Madison could not be prosecuted for attempting to induce an abortion under Mississippi's trigger law. However, that exemption does not apply to those who may aid, abet, or assist in the commission of a crime.³⁸⁰ Accordingly, the police and the D.A. can conduct an investigation to determine whether an illegal abortion occurred and who may have been involved in the commission of a crime.

While police officers are obtaining the warrant for Madison's dorm room and bathroom, two other police officers approach Madison as she is leaving class later that day. They tell her she is not in trouble and ask her to walk to a more private place on campus where they can talk. She reluctantly follows them, and they tell her that they think she took pills to have an abortion. They want to find out how she got the pills and who helped her get them. She tells them she is not going to talk to them and walks back to her dorm room. She is prevented from entering her dorm room because the police are in the process of conducting the search. As she is standing outside wondering what to do, a police officer presents her with a search warrant for her phone and takes her phone from her.

As the investigation continues over subsequent weeks, the police are able to use a mobile device forensic tool³⁸¹ to extract data from Madison's phone. From the Eve app, they learn that her last recorded period was in August. They also find evidence that she visited the websites of Planned Parenthood, Aid Access, and Plan C, along with the texts she sent to Molly and Jason with pictures of her positive pregnancy test.

The D.A. now must decide whether to compel Madison's testimony before a grand jury, which would allow him to question her directly about the abortion and all of the people who assisted her. If he is going to compel her testimony, he will need to immunize her from prosecution for any crimes that are implicated by her self-managed

^{380.} See NAT'L ASS'N OF CRIM. DEFENSE LAWS., ABORTION IN AMERICA: MISSISSIPPI APPENDIX 1, 14–15 (2021), https://www.nacdl.org/getattachment/52976d02-5140-41ff-952f-244ceb307af3/abortion-in-america-mississippi-appendix.pdf (noting that under Mississippi law, aiders and abettors can be charged as principals to the crime which could lead to prosecutors seeking to expand criminal liability for a self-induced abortion to anyone who encouraged the woman's choice).

^{381.} See LOGAN KOEPKE ET AL., MASS EXTRACTION: THE WIDESPREAD POWER OF U.S. LAW ENFORCEMENT TO SEARCH MOBILE PHONES 11 (2020), https://www.upturn.org/static/reports/2020/mass-extraction/files/Upturn%20-

^{%20}Mass%20Extraction.pdf (providing an overview of law enforcement use of mobile device forensic tools).

abortion. While the D.A. knows that he could not charge Madison under Mississippi's trigger law, an Assistant D.A. from his office reminds him that under Mississippi's criminal code, the term "human being" includes an "unborn child at every stage of gestation from conception until live birth."382 While Mississippi's pre-Dobbs criminal code makes clear that inclusion of an unborn fetus in the definition of human being does "not apply to any legal medical procedure performed by a licensed physician or other licensed medical professional, including legal abortions, when done at the request of a mother of an unborn child or the mother's legal guardian, or to the administration of lawfully prescribed dispensing or medication,"383 abortion is no longer legal in Mississippi. Accordingly, first-degree murder³⁸⁴ charges may be available to the D.A. should he wish to bring a case against Madison.³⁸⁵ Given the evidence collected to date—which includes Angela's testimony, packaging and pads from Madison's dorm room and bathroom, and the information extracted from her cell phone—the D.A. considers charging Madison under one of Mississippi's homicide statutes.

Ultimately, consistent with the trigger law's exemption of pregnant women from prosecution, the D.A. makes the decision not to charge Madison with homicide. Instead, he intends to focus the investigation on those that aided and abetted her abortion. He immunizes Madison and questions her under oath about the circumstances that led to her inducing an abortion with medication. While she cannot be indicted unless she lies to the grand jury, she is forced to implicate both Molly and Jason in the unlawful inducement of her abortion.

^{382.} MISS. CODE ANN. § 97-3-37 (2020).

^{383.} Id. § 97-3-37(3).

^{384.} See MISS. CODE ANN. §§ 97-3-47 ("all other homicides"), 97-3-19 ("murder, capital murder").

^{385.} A person can be guilty of first degree murder in Mississippi when they "kill[] a human being without the authority of law... with deliberate design to effect the death of the person killed or of any human being." MISS. CODE ANN. § 97-3-19(1)(a) (2020).

C. High School Student: Personhood Status for the Fetus, 24/7 School Safety Surveillance,386 and Facebook Messages

The Mann County³⁸⁷ School System in Georgia has a contract with Safe Spaces,³⁸⁸ a company providing software and services designed to monitor all student communications and online activity³⁸⁹—such as searches, emails, instant messages, texts, and interactive documents—taking place through school accounts and services or on school-issued laptops. Following a deadly shooting at a Mann County high school in 2019, the School Board urged the superintendent to implement programs that would assist educators and parents in creating safer, healthier online environments for students and in identifying students who have the potential to engage in dangerous activities and behaviors. The County decided to implement the monitoring as part of its broader efforts to combat online bullying and to enable the early detection of students who may be at risk of harming themselves or others.

Using algorithmic systems and real-time human content moderators, Safe Spaces markets itself as a tool for proactive 24/7 student safety. Safe Spaces sends email alerts to school administrators when it detects content related to drugs, alcohol, blocked or banned words or content, or harassment. If there is evidence of harmful sexual conduct, imminent self-harm or harm to others, or other serious illegal conduct, Safe Spaces will alert law enforcement directly. Safe Spaces may also alert law enforcement directly about serious issues arising outside school hours. Safe Spaces does not communicate directly with parents about its monitoring services, but instead relies on the broad

^{386.} See Am. C.L. Union, Digital Dystopia: The Danger in Buying What the EDTECH Surveillance Industry is Selling 5 (2023), https://www.aclu.org/sites/default/files/field_document/digital_dystopia_report_aclu.pdf ("Approximately 1 in 5 students surveyed reported concerns that surveillance technology could be used to identify students seeking reproductive health care, including abortion (21 percent) and seeking gender affirming care (18 percent).").

^{387.} Mann County is a fictional county.

^{388.} Safe Spaces is a fictional company, but educational technology is prolific in American schools. For example, companies like Gaggle, Bark Technologies, GoGuardian, and Securly Inc. use artificial intelligence and algorithms "to monitor students' online activity around the clock." Warren, Markey Investigation Finds That EdTech Student Surveillance Platforms Need Urgent Federal Action to Protect Students, Office of Senator Elizabeth Warren (Mar. 30, 2022), https://www.warren.senate.gov/oversight/reports/warren-markey-investigation-finds-that-edtech-student-surveillance-platforms-need-urgent-federal-action-to-protect-students.

^{389.} See Letter from Gaggle to Senator Elizabeth Warren (Oct. 12, 2021), https://www.warren.senate.gov/imo/media/doc/Gaggle_Senate_Response_Letter_10_12_21.pdf (explaining that companies like Gaggle create software "designed to monitor the school-provided devices and platforms 24 hours a day as schools are responsible for student safety on school-provided technologies at all times.").

notice issued by Mann County schools indicating that all student online activity and communications are monitored. The notification is buried in a flurry of notices and emails that parents receive at the beginning of the school year. It is not possible for students to opt out of the monitoring. To communicate without Safe Spaces surveillance, students would need to use their own personal devices, refrain from syncing personal devices with school-issued devices, and only use accounts and services that are not provided by the school. Students who sync their personal devices with their school devices, students who use school-issued devices to charge their personal devices, and students without access to personal devices are subject to more intrusive monitoring.³⁹¹

Georgia has passed anti-abortion legislation entitling a fetus to a robust body of rights and protections. Dessi, an eighteen-year-old senior in high school, purchased a pregnancy test after being two weeks late and discovered she was pregnant. About four weeks later, on a Friday morning during her study period, Dessi, using her school-issued Chromebook, messages her boyfriend and lets him know that she "got the pills to get rid of it." Right after school is over, she messages him again, asking him to come over and be with her that evening when she takes the pills. Dessi's mom, a regional store manager who is raising her alone, is out of town supervising some audits and will not return home until sometime the following week. Safe Spaces brings Dessi's messages to the attention of school administrators who, in turn, conclude that Dessi may be about to self-manage her abortion.

The Investigation

The school day has ended and several calls by school administrators to Dessi's mom have gone unanswered. Dessi is also failing to answer her phone. Because it is now after 6:00 PM, school administrators contact the local police department, share the information that was collected through Safe Spaces, and provide the police with Dessi's address. Because some of the communications happened outside of

^{390.} Pia Ceres, *Kids Are Back in Classrooms and Laptops Are Still Spying on Them*, WIRED (Aug. 3, 2022, 12:01 AM), https://www.wired.com/story/student-monitoring-software-privacy-in-schools/ ("Gaggle said in a statement that it does not scan private texts on charging phones, but that a phone's photos do get uploaded to a school's account (and scanned) when the student plugs their phone into a school-issued laptop. The associate principal I spoke to says he advises students not to plug their personal devices into their school-issued laptops.")

^{391.} Separate and apart from the school's use of Safe Spaces, simply connecting to the school's Wi-Fi enables the school to track students' internet activity. *See* Theresa McDonough, *School Wi-Fi: Can See What You Search?*, TECH WITH TECH: A MAGAZINE FOR ALL THINGS TECH (Nov. 10, 2022), https://techwithtech.com/school-wi-fi-sees-what-you-search-for/.

school hours, the police have also received a separate alert from Safe Spaces about the possibility of a student taking "pills." When the police arrive at Dessi's house and ask if her mother is home, Dessi tells them she is out of town. The police tell her that is fine, but they would like to come inside and talk with her. The police are aware that, at eighteen years old, Dessi is no longer a minor. Dessi is not sure what she should do, but she reluctantly tells them it's okay to come inside.

Once inside, the police ask Dessi how she is feeling. She says she is feeling fine. They ask her if she has taken any pills in the last twenty-four hours. Now very scared, Dessi starts to cry and says that she doesn't want to be in trouble, but that she didn't know what else to do. One of the officers asks her if she is pregnant. She says yes. He asks her how far along she is, and she says she's not sure, but she has missed two periods. Then he asks her if she took anything to get rid of the baby. She says she took the first pill. The officer asks her if she has the rest of the pills here at the house. She says she does. He asks her to show him where they are. The police follow Dessi into her bedroom, and she retrieves a package of pills marked as containing mifepristone and misoprostol from the drawer in her nightstand. The officers observe that the mifepristone is missing, but all of the doses of misoprostol remain.

The officer next asks Dessi how she got the pills. She scrolls through what appear to be Facebook messages on the phone she is holding and says that a friend in college, Kyle, who goes to school in Boston, got the pills for her, because she didn't know how to get them in Georgia. Dessi then asks if she's trouble.

The police call the local D.A. to see how he would like to proceed. In Georgia, the Living Infants Fairness and Equality (LIFE) Act bans abortions after a fetal heartbeat is detected (around six weeks), with certain exceptions for rape and incest. Self-managed abortions would not be lawful under the LIFE Act at any time because only a licensed physician is permitted to perform an abortion. In defining a fetus as a "natural person," the LIFE Act also affords a fetus the rights and legal status of any other person under the law, which exposes Dessi to liability for murder under the D.A.'s interpretation of the law.³⁹²

^{392.} The District Attorney in Douglas County, Georgia, Ryan Leonard, has stated that women in Georgia "should prepare for the possibility that they could be criminally prosecuted for having an abortion. . . . If you look at it from a purely legal standpoint, if you take the life of another human being, it's murder." Tessa Stuart, Georgia D.A. Says He Would Prosecute Women Who Get Abortions, ROLLING STONE (May 23, 2019),

Based on Dessi's statements to the police and the officers' examination of the abortion pills, the D.A. concludes that there is enough evidence to arrest Dessi on a charge of attempted murder. The D.A. drafts a warrant for Dessi's arrest, along with separate search warrants to search and seize the abortion pills from Dessi's bedroom and to compel her to undergo a medical exam to verify the gestational age of the fetus. The D.A. also plans to have the police serve a search warrant on the Mann County School System and Safe Spaces for any other communications about pregnancy, pills, or getting rid of "it," potentially collected by Safe Spaces personnel or school administrators. In addition, the D.A. plans to have the police serve a search warrant on Meta for any Facebook messages between Dessi and someone named Kyle relating to pregnancy or pills over the last eight weeks. In advance of obtaining the search warrant, the D.A. has investigators send a 2703(f) letter to Meta, pursuant to the Stored Communication Act, 393 to preserve all communications between Dessi and anyone named Kyle over the last eight weeks.

When Meta receives the search warrant from the investigators in Georgia, it is flagged for further review because it may implicate a September 2022 California law, A.B. 1242. The statute prohibits companies that provide electronic communication services whose principal executive offices are located in California from "provid[ing] records, information, facilities, or assistance in accordance with the terms of a warrant, court order, subpoena, wiretap order, pen register trap and trace order, or other legal process issued by, or pursuant to, the procedures of another state or a political subdivision thereof that relates to an investigation into or enforcement of a prohibited violation."³⁹⁴ A "prohibited violation" is "any violation of law that creates liability for, or arising out of, either of the following: (i) Providing, facilitating, or obtaining an abortion that is lawful under California law[, or] (ii) Intending or attempting to provide, facilitate, or

https://www.rollingstone.com/politics/politics-news/george-d-a-says-he-will-prosecute-women-who-get-abortions-836145/. *See also* Brief for If/When/How: Lawyering for Reproductive Justice, *supra* note 61, at 56 ("Some criminal investigations began when a person was still pregnant after their alleged or actual self-managed abortion attempt did not end their pregnancy. In two such cases, the individuals were arrested and held in jail for the duration of their pregnancies.").

^{393. 18} U.S.C. § 2701-2711. Under 18 U.S.C. § 2703(f)(1), electronic communication services "upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process."

^{394.} A.B. 1242, 2021–22 Leg., Reg. Sess. (Cal. 2022) (available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1242).

87

obtain an abortion that is lawful under California law."³⁹⁵ Upon further investigation and review, Meta attorneys decide they cannot disclose the Facebook messages because the information requested appears to relate to an investigation of an abortion that would be lawful under California law.

When the D.A. learns that Meta does not intend to comply with the warrant pursuant to A.B. 1242,³⁹⁶ he decides it will be quicker to get a warrant to search Dessi's phone than to bring an action compelling Meta to disclose the information. Given Dessi's prior statements about Kyle and the police officers' observation that she appeared to be referring to Facebook messages on her phone when answering questions about how she got the pills, the D.A. believes he has probable cause to get a warrant to search the phone for relevant communications with Kyle. But if a judge believes that the information is now stale because a number of weeks have gone by and thus will not issue the warrant, or if the phone is searched and the messages no longer exist, the D.A. can still consider legal action against Meta because he believes that the relevant communications are preserved by Meta under the 2703(f) letter.

* * *

As these three scenarios illustrate, when states criminalize abortion, pregnant women are caught in the crosshairs of the criminal justice system and subjected to invasive surveillance whether or not they are the targets of investigations of abortion crimes. Both Latonya and Dessi are targets of an investigation. Both experience the unwanted disclosure of personal health information. In Latonya's case, law enforcement also interviews neighbors and collects a sensitive conversation recorded by an Amazon Ring doorbell, historical location

^{395.} Id.

^{396.} Prior to the passage of A.B. 1242, covered communications providers would, in most cases, have no legal grounds to refuse to comply with a search warrant and no due diligence obligations to determine whether an out-of-state warrant, subpoena, or court order pertained to an investigation of an abortion that was lawful in California. In a case involving an abortion that was self-managed with medication, Nebraska investigators obtained Facebook messages between a mother and daughter that appear to show the mother coaching the daughter about taking the pills. See Martin Kaste, Nebraska Cops Used Facebook Messages to Investigate an Alleged Illegal Abortion, NPR (Aug. 12, 2022, 2:49 PM), https://www.npr.org/2022/08/12/1117092169/nebraska-cops-used-facebook-messages-to-investigate-an-alleged-illegal-abortion. We are not suggesting that A.B. 1242 is a full-proof way to prevent the disclosure of evidence in investigations of abortion crimes, but it is a barrier that did not exist when Dobbs was decided. How strong a barrier against the disclosure of information it will prove to be will, to a significant degree, depend on the processes that covered companies put in place to determine when the information requested pertains to an investigation of a crime involving an abortion.

data, and call detail records. In Dessi's case, law enforcement collects messages intercepted over a school surveillance system and attempts to get Facebook messages. In Madison's case, the D.A. considers pursuing a homicide charge, but decides not to make her a target of his investigation. Nevertheless, the police searched her dorm room, bathroom, and cell phone because the D.A. was able to obtain search warrants where, consistent with the requirements of the Fourth Amendment, he established that there was probable cause to believe that these places contained evidence of a crime.

With respect to the electronic records, data, and surveillance technologies at issue in these scenarios, it is worth noting that but for a more rudimentary form of call detail records, none of the other kinds of records or surveillance technologies were available to investigators in the pre-*Roe* era. The capabilities and evidence available to police to investigate abortion crimes in the pre-*Roe* era simply pale in comparison to the surveillance technologies available post-*Dobbs*.

With respect to the physical searches and evidence collected in these scenarios, recall the *Griswold* Court's implication that even the necessity of a warrant could not provide sufficient protection against governmental intrusions into our personal spaces and relationships in investigations of contraception crimes.³⁹⁷ In contrast, the *Dobbs* Court's evisceration of a woman's constitutional right to terminate a pregnancy allows states to criminalize abortion broadly and enables invasive searches of bathrooms and the seizure of bloody pads.

As these scenarios illustrate, the fate of pregnant people like Latonya, Madison, and Dessi lies with the discretion of state prosecutors. Each of the prosecutors in these hypotheticals made different decisions, but all their investigations would have a profound impact on the lives of the pregnant women in these scenarios, as well as their family and friends. Recall that even though the D.A. decided not to prosecute Madison, law enforcement officers searched her private living area, and she was forced to testify under oath and implicate her friends in the criminal inducement of her abortion.

As Part III demonstrates, in a post-*Dobbs* era, state laws criminalizing abortion increasingly present opportunities for state prosecutors to investigate and prosecute women who self-manage abortions. How many state prosecutors will pursue such investigations and prosecutions and the circumstances under which they choose to do

so are stories yet to unfold. Notwithstanding the prosecutorial discretion at play, there are individual and societal harms associated with the very possibility of such prosecutions and the surveillance they entail. We address those harms in Part V.

V. POST-DOBBS SURVEILLANCE AND THE MULTI-FACETED HARMS TO PHYSICAL, DECISIONAL, INTELLECTUAL, AND INFORMATIONAL PRIVACY

The criminal laws that states are enacting and enforcing in the wake of *Dobbs* violate every dimension of privacy—physical, decisional, intellectual, and informational.³⁹⁸ From a physical and decisional privacy standpoint, these laws compromise women's bodily integrity and right to make life-altering decisions autonomously—free of surveillance, coercion, and intrusion. The surveillance that the enforcement of such laws entails also compromises intellectual privacy—the ability to search for information, read, and think freely.³⁹⁹ And these laws compromise informational privacy⁴⁰⁰ on two fronts: violating an individual's interest in protecting the privacy of her personal data⁴⁰¹ and her interest in avoiding disclosure of personal

^{398.} This list of dimensions draws on Beate Roessler's three dimensions of privacy (local, informational and decisional) as described by Marijn Sax in *Privacy from an Ethical Perspective*, THE HANDBOOK OF PRIVACY STUDIES: AN INTERDISCIPLINARY INTRODUCTION 143, 146 (Bart van der Sloot & Aviva de Groot eds., 2018) (citing BEATE ROESSLER, THE VALUE OF PRIVACY (2004)). Anita Allen likewise discusses dimensions of privacy—including associational and proprietary as well as physical, decisional, informational, and intellectual aspects. *See* ANITA ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 5–6 (2011) (presenting a taxonomy of privacy interests). These dimensions, whatever their definition, often overlap; the categorization merely provides a helpful framework.

^{399.} Anita Allen describes Neil Richards' concept of "intellectual privacy" as a complex hybrid of associational and informational privacy. UNPOPULAR PRIVACY: WHAT MUST WE HIDE? 4 (2011). Because intellectual privacy involves access to information, it also implicates decisional privacy.

^{400. &}quot;The informational dimension of privacy refers to 'control over what other people can know about oneself." *Id.* at 146. As used here, "informational privacy" primarily refers to information privacy or data privacy and, to some extent, touches on the constitutional right to informational privacy, which involves a purported "constitutional limit[] on the government's ability to disclose sensitive data about its citizens, such as their medical records." NEIL RICHARDS, WHY PRIVACY MATTERS 163 (2021). This right, which has been discussed but not proclaimed by the Supreme Court, has significant implications for abortion, but an extended discussion is outside the scope of this paper. For more on varying uses of "informational privacy," *see* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 133–78 (2017).

^{401.} Data privacy might be conceptualized as "the ability (or inability) to keep confidential, disaggregated and non-commoditized the data that are generated from one's travels in both cyberspace and physical space." KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 133 (2017).

information to the government. 402 We have discussed the uncertainty created by confusing and ambiguous statutory language and conflicting laws as well as the pervasive commercial and criminal surveillance technologies that enable law enforcement investigations of abortion crimes. In this Section, we describe how laws criminalizing abortion and their attendant investigations and surveillance harm these specific privacy interests. We note that the harms to women's lives, health, access to care throughout pregnancy and childbirth, and economic stability resulting from the *Dobbs* decision are legion. In this Section of the paper, though, we attempt to address only those harms associated with privacy and surveillance.

Some will protest that, in fact, states are not actually prosecuting women for abortion crimes post-*Dobbs*. But women have been charged and prosecuted for abortion-related crimes both before and during the *Roe* era⁴⁰³—this punitive exercise of prosecutorial discretion will inevitably continue. Moreover, as the hypotheticals illustrate, women and their bodies will be surveilled no matter who prosecutors decide to target when investigating and prosecuting abortion-related crimes.

The privacy harms that flow from the criminalization of abortion arise from the potential entanglement of women in all stages of the criminal justice system by virtue of seeking health care: being reported, investigated, arrested, and charged; entering into plea agreements; providing compelled testimony in front of a grand jury or at trial (if immunized from prosecution); and being subject to pretrial detention, trial, incarceration, probation, and parole. The mere threat of any of these outcomes affects several distinct privacy interests. Accordingly, privacy harms are not commensurate with or solely measurable by reference to the number of prosecutions.

In addition, when provisioning and accessing reproductive health

^{402.} Khiara Bridges provides a compelling discussion of this type of informational privacy, describing it as the "individual's interest in preventing the government from subjecting her to interrogations that demean her, degrade her, and remind her that she exists at the bottom of the social hierarchy." *Id.* More broadly, that interest extends to an individual's interest in preventing the government from collecting sensitive intimate information about her without a compelling need for such data.

^{403.} See, e.g., González-Ramirez, supra note 154 (describing 2023 arrest of woman in South Carolina for using medication abortion); Sandhya Dirks, Criminalization of Pregnancy Has Already Been Happening to the Poor and Women of Color, NAT'L PUB. RADIO (Aug. 3, 2022, 10:30 AM), https://www.npr.org/2022/08/03/1114181472/criminalization-of-pregnancy-has-already-been-happening-to-the-poor-and-women-of (detailing prosecution and incarceration of women for pregnancy outcomes). See also discussion of investigation, prosecution, and incarceration of women for various pregnancy outcomes, supra note 55.

care are criminalized, a person is subject to suspicion and surveillance and the associated harms merely by virtue of being a woman or a person with reproductive capacity. Any pregnancy might end in miscarriage—also known as "spontaneous abortion." "It is estimated that as many as 26% of all pregnancies end in miscarriage and up to 10% of clinically recognized pregnancies." Because miscarriages brought on by medication abortion do not differ from spontaneous miscarriages from a medical perspective, both would present similarly to a health care provider. Accordingly, pregnancy and a wide variety of pregnancy outcomes and complications may subject a person to suspicion and surveillance and place them in the crosshairs of the criminal justice system.

Government control and surveillance of women's bodies, coupled with the limits placed on women's decision-making abilities, are harmful privacy violations. Here, we conceptualize harmfulness as the invasion or compromise of a privacy interest itself (e.g., an invasion of the body, a limitation on decision-making, or law enforcement access to profoundly personal data), in addition to the consequences for women that those privacy violations cause (e.g., emotional trauma, distress, anxiety, physical discomfort or injury, loss of custody, financial loss, reputational damage, or stigma).

The ability to conceptualize and understand harmfulness in the privacy arena can be distorted by our tendency to focus on legal characterizations of harm and its demands. Citron and Solove have explained that recognizing privacy harms is important beyond litigation: "Law is expressive. It changes the social meaning of activities,

^{404.} Carla Dugas & Valori H. Slane, *Miscarriage*, STATPEARLS, https://www.ncbi.nlm.nih.gov/books/NBK532992/ (last updated June 27, 2022).

^{405.} See Consumer Health Info: Medication Abortion and Miscarriage, NATIONAL WOMEN'S HEALTH NETWORK (Aug. 15, 2019), https://nwhn.org/abortion-pills-vs-miscarriage-demystifying-experience/ ("From a medical perspective, there is no physically significant difference between a medication abortion and a spontaneously occurring miscarriage.").

^{406.} Recently, in Ohio, a young pregnant woman was arrested after miscarrying in her bathroom. She had previously made multiple trips to the hospital but did not appear to receive adequate medical treatment. After she miscarried in her bathroom, she attempted to flush the fetal tissue and then returned to the hospital for care. A nurse notified the police that they needed to locate a fetus, and, after recovering the remains, police charged the woman with abuse of a corpse, punishable by up to a year in prison. "The autopsy report found that the fetus had died in utero—before delivery—because of complications of premature rupturing of the membranes." A grand jury refused to indict her. Remy Tumin, *Grand Jury Declines to Indict Ohio Woman Who Miscarried at Home*, N. Y. TIMES (Jan. 11, 2024), https://www.nytimes.com/2024/01/11/us/brittanywatts-ohio-miscarriage.html.

thus shifting societal attitudes, expectations, and practices."407 We do not construe or evaluate harm as an element of a tort or as a legally cognizable basis for standing or recovery in a court of law,⁴⁰⁸ or even for purposes of data protection legislation and regulation, but rather, as a way to describe the broad spectrum of privacy interests that laws banning abortion compromise or extinguish, the real-life damage these laws can cause, and the inequities that ubiquitous surveillance inflicts upon women.

As with most discussions about privacy, it is important to acknowledge at the outset that privacy has historically been less accessible to people with lower incomes, people of color, young people, and marginalized groups in the United States. The surveillance related to reproductive health and decision-making that we describe throughout this article often disproportionately targets these groups and, accordingly, will have a disparate impact on the privacy interests of individual members of these intersecting communities.⁴⁰⁹

A. Surveillance and Criminalization Harm Physical Privacy

Physical examinations incident to enforcement of abortion laws and bodily intrusions required by abortion regulations, such as those

^{407.} Daniel J. Solove & Danielle Keats Citron, *Privacy Harms*, 102 B.U. L. REV. 793, 826 (2022) (explaining the importance of properly recognizing privacy harms).

^{408.} In their article *Privacy Harms*, Daniel J. Solove and Danielle Keats Citron address "the issue of *what should constitute cognizable privacy harm*, ... [and] examine the issue of *when privacy harm should be required*," noting that, "[i]n many cases, harm should not be required because it is irrelevant to the purpose of the lawsuit." *Id.* at 799. They suggest ways that the law should more effectively align enforcement goal and legal remedies and lay out a comprehensive typology of harms including "(1) physical harms; (2) economic harms; (3) reputational harms; (4) psychological harms; (5) autonomy harms; (6) discrimination harms; and (7) relationship harms." *Id.* at 831.

^{409.} See e.g. Human Rights Watch, Human Rights Crisis: Abortion Rights in the UNITED STATES AFTER DOBBS 26-32 (2023); Becca Damante & Kierra B. Jones, A Year After the Supreme Court Overturned Roe v. Wade, Trends in State Abortion Laws Have Emerged, CTR. FOR AM. PROGRESS (June 15, 2023), https://www.americanprogress.org/article/a-year-after-thesupreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged/ ("abortion bans disproportionately affect marginalized groups."); Samantha Lai & Brooke Tanner, Examining the Intersection of Data Privacy and Civil Rights, BROOKINGS (July 18, 2022) https://www.brookings.edu/articles/examining-the-intersection-of-data-privacy-and-civil-rights/; Anita L. Allen, Dismantling the "Black Opticon": Privacy, Race, Equity, and Online Data-Protection Reform, 131 YALE FORUM 907 (2022)https://www.yalelawjournal.org/forum/dismantling-the-black-opticon; Mary Madden, Michele Gilman, Karen Levy, & Alice Marwick, Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans, 95 WASH. U. L. REV. 53 (2017); Brief for If/When/How: Lawyering for Reproductive Justice, supra note 61, at 60 ("While the threat of criminalization potentially looms over anyone who self-manages an abortion, this threat is not borne equally across races or social strata.").

93

requiring confirmation of a "heartbeat," violate a person's physical privacy and bodily integrity. In particular, compliance with six-week "heartbeat" laws can require providers to subject women to transvaginal ultrasounds in order to obtain information about their pregnancies. 410 To perform a transvaginal ultrasound, a provider inserts a wand-shaped device—a transducer—into a woman's vaginal canal to detect the electrical activity misleadingly characterized as a "heartbeat." Requiring someone to submit to a medically unnecessary transvaginal ultrasound to obtain health care is a physical privacy harm. 412 Such invasions are not new: physical exams were imposed on women who had undergone abortions at clinics that were raided by the police in the pre-Roe era, 413 and regulations requiring medically unnecessary ultrasounds prior to abortion, common during the *Roe* era, 414 appear in newly enacted laws. 415 These types of violations may cause physical and emotional discomfort, pressure, anxiety, embarrassment, shame, humiliation, inconvenience, and financial hardship. Simply put, the subjection of one's body to unnecessary, physically invasive investigation is violating and demeaning. 416 This lack

2024]

^{410.} Selena Simmons-Duffin & Carrie Feibel, *The Texas abortion ban hinges on 'fetal heartbeat.' Doctors call that misleading*, NAT'L PUB. RADIO (May 3, 2022, 4:55 PM), https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion. Georgia and Florida's abortion bans both use the language of fetal heartbeat. *See supra* notes 165–73, 211–15 and accompanying text. States that restrict but do not ban abortion may also have provisions requiring women to submit to ultrasounds prior to obtaining abortion. *See, e.g.*, S.B. 20, Gen. Assemb., Reg. Sess. (N.C. 2023). 411. *Id.*

^{412.} Solove and Citron explain that "[p]rivacy violations can lead to physical harms, which are harms that result in bodily injury or death." Supra note 407, at 831. Being forced to carry a pregnancy to term against one's will is a privacy violation that could result in bodily injury or death, but being forced to carry a pregnancy to term is also, in and of itself, harmful to privacy regardless of additional injury or death. Likewise, in this context we assert that being subjected to a medically unnecessary transvaginal ultrasound is, itself, a physical harm, regardless of whether it also results in some kind of additional bodily injury or physical discomfort. Moreover, for some women who are survivors of sexual childhood abuse, a transvaginal ultrasound can be a stressful and triggering experience. See Brigitte Leeners, et al., Effect of Childhood Sexual Abuse Gynecologic Care as an Adult, SCI. DIRECT (Apr. https://www.sciencedirect.com/science/article/pii/S0033318207710010 (discussing specific factors that can lead to stress during gynecologic care).

^{413.} See REAGAN, supra note 14.

^{414.} See State Ultrasound Requirements in Abortion Procedure, KAISER FAMILY FOUND., https://www.kff.org/womens-health-policy/state-indicator/ultrasound-requirements (last updated Apr. 25, 2023) ("Routine ultrasound is not considered medically necessary as a component of a first-trimester abortion.").

^{415.} For example, North Carolina's twelve-week ban, S.B. 20, requires medically unnecessary ultrasounds as precondition to lawful abortion. *See* NC GEN. STAT. §§ 90-21.82, 90-21.83A(b)(2), 90-21.85 (2022).

^{416.} See Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held

of respect for physical privacy interests undermines a person's dignity and humanity.

When a state criminalizes abortion, it effectively forces a woman to continue an unwanted pregnancy and to give birth if the pregnancy is ultimately carried to term—often referred to as forced birth. Forcing someone to continue a pregnancy and give birth against her will, enduring physical challenges and potential complications, violates bodily integrity and is itself a physical privacy harm. Moreover, carrying a child to term is fourteen times more likely to result in the death of a pregnant woman than an abortion, 418 and requiring a woman to subject herself to that risk is a privacy harm. Laws forcing women to carry a pregnancy to term treat women as means to an end, rather than as human beings of inherent value in and of themselves, undermining the dignity and humanity of women.

Most states that have banned abortion do not provide exceptions for instances of rape and incest.⁴¹⁹ In those states, forcing women to carry to term pregnancies resulting from forced sex constitutes and creates an additional array of physical, psychological, and emotional privacy harms: carrying and birthing a child resulting from rape or incest can cause anxiety, anguish, concern, irritation, sadness, anger,

more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.'"); Safford Unified School Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (recognizing indignity and degrading nature of strip search of student).

417. See generally Khiara Bridges, When Pregnancy is an Injury: Rape, Law and Culture, 65 STAN. L. REV. 457 (2013) (discussing importance of recognizing unwanted pregnancy as an injury).

418. Elizabeth G. Raymond & David A. Grimes, The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, NATIONAL LIBRARY OF MEDICINE: NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Feb. https://pubmed.ncbi.nlm.nih.gov/22270271/. See also Adebayo Adesomo, Pregnancy is Far More Abortion, SCIENTIFIC AM. (May https://www.scientificamerican.com/article/pregnancy-is-far-more-dangerous-to-women-thanabortion/; Amande Jean Stevenson, The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant, DUKE UNIV. PRESS (2021), https://read.dukeupress.edu/demography/article/58/6/2019/265968/The-Pregnancy-Related-Mortality-Impact-of-a-Total (quantifying "the magnitude of an increase in pregnancy-related deaths that would occur solely because of the greater mortality risk of continuing a pregnancy rather than having a legal induced abortion.").

419. See Fabiola Cineas, Rape and incest abortion exceptions don't really exist, Vox (July 22, 2022, 4:20 PM), https://www.vox.com/23271352/rape-and-incest-abortion-exception (listing three states—Mississippi, South Carolina, and Georgia—with rape and incest exceptions as of July 2022).

disruption, aggravation, trauma, and depression.⁴²⁰ The states that do permit exceptions for pregnancies resulting from rape and/or incest typically require expeditious reporting of the crime in order to qualify for an abortion within the exception.⁴²¹ Reporting rape and sexual assault carries with it a host of additional impositions on privacy including reliving the assault through repeated retellings in the context of police reports, investigations, and potential court proceedings.

Detention and incarceration are, of course, physical privacy harms. When incarcerated or detained, a person is persistently surveilled by guards, her freedom of movement is constrained, and her liberty is denied. She lacks privacy in living, bathing, and bathroom facilities. And she typically will receive substandard health care, which will be far more consequential if she happens to be pregnant.⁴²²

In addition, detention and incarceration, whether preceded by a finding of guilt or not, often result in other harms like deportation, loss of employment, or housing. The loss of a job or housing may also necessitate the eventual application for government benefits. Khiara Bridges has explained the dignity-harming privacy violations associated with intrusive government collection of unnecessary data in this context. Detention and incarceration may also cause women to lose custody of existing children, either temporarily or permanently. For many single mothers or those without family support, loss of custody can result in children being placed in foster care. Entanglement with the criminal justice system can also result in shame and ostracization in the community. 424

B. Surveillance and Criminalization Harm Decisional Privacy

Laws that criminalize abortion and prevent a person from deciding

^{420.} See, e.g., Pooja Lakshmin, Rape, Pregnancy and Mental Health: What the Politics Ignores, MEDSCAPE (Sept. 16, 2019), https://www.medscape.com/viewarticle/918068?reg=1.

^{421.} See, e.g., W. VA. CODE § 16-2R-3 (2023); IDAHO CODE ANN. § 18-622 (West 2023). In contrast, North Carolina's new twelve-week ban allows abortion in cases of rape or incest through twenty weeks and does not require an individual to report the rape or incest to obtain the abortion. NC GEN. STAT. § 90-21.81(B)(3) (2022).

^{422.} See Leah Wang, Unsupportive environments and limited policies: Pregnancy, postpartum, and birth during incarceration, PRISON POL'Y INITIATIVE (Aug. 19, 2021), https://www.prisonpolicy.org/blog/2021/08/19/pregnancy_studies/; U.S. Gov't Accountability Off., GAO-21-147, Pregnant Women in DOJ Custody: U.S. Marshals Service and Bureau of Prisons Should Better Align Policies with National Guidelines (Jan. 2021), https://www.gao.gov/assets/gao-21-147.pdf.

^{423.} BRIDGES, *supra* note 401, at 162–78 (detailing pregnancy outcomes for women in federal custody).

^{424.} If/When/How Report., *supra* note 15, at 58.

for herself whether to have a child violate decisional privacy interests by interfering with autonomous decision-making and moral agency. The decision whether to bear a child is "central to a woman's life, to her dignity. It's a decision she must make for herself. And when government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices."425 Laws criminalizing abortion are a form of social engineering and coercion that force pregnant women to serve the ends of the state rather than their own ends. 426 The ability to control one's body is integrally related to the degree of control one has over one's life. Laws banning abortion-which exert control over women's bodies-permit governments to wield power and control over women's lives more broadly. Children and young women in high school and college may elect to have abortions because they are too young to handle responsibilities of parenting, because they are financially unable to support a child, or because parenting at such a young age would interfere with their ability to complete the education they need to obtain gainful employment. Life decisions about education, work, career, and parenting are central to one's identity. A government's usurpation of the ability and authority to make those choices violates an individual's decisional privacy.

Approximately 60% of women who seek abortions have existing children. For the women in this group whose decisions to obtain abortions are based in part on concerns about their ability to care for the children they already have, a state's criminalization of that decision interferes with the privacy right the Supreme Court has recognized regarding parenting decisions. 428

^{425.} Ruth Bader Ginsburg on abortion during confirmation hearing, C-SPAN, https://www.c-span.org/video/?c4915673/user-clip-ruth-bader-ginsburg-abortion-confirmation-hearing.

^{426.} Solove and Citron identify numerous categories of autonomy harms, including: "(1) coercion—the impairment on people's freedom to act or choose; (2) manipulation—the undue influence over people's behavior or decision-making; (3) failure to inform—the failure to provide people with sufficient information to make decisions; (4) thwarted expectations—doing activities that undermine people's choices; (5) lack of control—the inability to make meaningful choices about one's data or prevent the potential future misuse of it; (6) chilling effects—inhibiting people from engaging in lawful activities." *Supra* note 407, at 845–46.

^{427.} Jessica D'Argenio Waller, *The majority of women who seek abortions are already mothers*, MOTHERLY (June 24, 2022), https://www.mother.ly/health-wellness/womens-health/women-seeking-abortion-are-mothers/.

^{428.} See, e.g., Santosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing the Court's "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment"); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking a statute prohibiting the teaching of certain languages at public schools); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1928) (holding that a statute is unconstitutional due to

In addition, laws criminalizing and drastically restricting abortion subject women's private relationships with health care providers to state surveillance. Such laws often impose reams of reporting requirements on the provision of reproductive care, obligating providers to interrogate patients and submit reports documenting their answers to state health departments.⁴²⁹ This form of surveillance will deter women from seeking the advice and assistance of health care providers when they are faced with one of the most important and consequential health decisions they will ever make.

Just as investigations of the illegal use of contraceptives would require invasions of the home and marital relationship under the Connecticut law at issue in Griswold, state officials will invade the doctor-patient relationship to determine whether medication abortion has been prescribed or used in accordance with the law. 430 Superimposing the state onto a doctor's ability to provide evidencebased care necessarily affects the integrity of the doctor-patient relationship, and criminalizing evidence-based medical care threatens the confidentiality and privacy of the provider-patient relationship. In this scenario, any woman seeking care could be a threat to a provider, and any provider could pose a threat to a woman. Either could be inclined or coerced to report the other. Law enforcement has historically leaned on providers to help enforce laws criminalizing abortion. 431 Numerous criminal laws seek to deter providers with the threat of felony convictions, exorbitant fines, and loss of licensure. Despite these laws, many doctors are taking heroic measures and putting themselves at risk to protect women's health. 432 The threat of

its interference with an important liberty interest).

^{429.} See, e.g., S.B. 20, Gen. Assemb., Reg. Sess. (N.C. 2023); NC GEN. STAT. § 90-21.93 (2023).

^{430.} Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

^{431.} See REAGAN, supra note 14, at 113–31 (describing the weaponization of care providers to pursue abortion-related crimes).

^{432.} See, e.g., Emily Bazelon, Risking Everything to Offer Abortions Across State Lines, N.Y. TIMES (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-roe.html (exploring the work of Dr. Linda Prine and other doctors providing conscientious abortion care); David Ingram, A Dutch doctor and the internet are making sure Americans have access to abortion pills, NBC NEWS (July 7, 2022, 9:00 AM), https://www.nbcnews.com/tech/technews/dutch-doctor-internet-are-making-sure-americans-access-abortion-pills-rcna35630 (profiling Aid Access, an online shipper of abortion pills, and the European doctor who runs it); Cecilia Nowell, How Mexican Feminists Are Helping Americans Get Abortions, THE GUARDIAN (June 10, 2022, 5:00 PM), https://www.theguardian.com/world/2022/jun/10/mexico-abortion-access-americans (profiling Mexican abortion-access group Las Libres); Sheryl Gay Stolberg & Ava Sasani, Doctor Informed State of 10-Year-Old Girl's Abortion, N.Y. TIMES (July 14, 2022), https://www.nytimes.com/2022/07/14/us/10-year-old-abortion-caitlin-bernard-indiana.html (describing Indiana physician Dr. Caitlin Bernard following state procedure around providing

enforcement of criminal laws will make it impossible for both providers and pregnant individuals to know whom to trust. If women cannot have private and trusting relationships with care providers unencumbered by the surveillance of the state, they cannot make free and independent decisions about their own health and well-being.

Notably, the American College of Obstetricians and Gynecologists (ACOG) "opposes the prosecution of a pregnant woman for conduct alleged to have harmed her fetus, including the criminalization of selfinduced abortion," explaining that:

The threat of prosecution may result in negative health outcomes by deterring women from seeking needed care, including care related to complications after abortion. ACOG also opposes administrative policies that interfere with the legal and ethical requirement to protect private medical information by mandating obstetrician-gynecologists and other clinicians to report to law enforcement women they suspect have attempted self-induced abortion. Such actions compromise the integrity of the patient–physician relationship.⁴³³

Criminalization disincentivizes women from seeking the care that they need-either in the course of a wanted pregnancy or in the unusual case in which complications arise from medication abortion. 434 While medication abortion is extremely safe, some women may nonetheless require medical intervention or follow-up. Although medication is available online, every pregnant person should have the right to seek medical care through the traditional health care system, and criminalization of abortion interferes with that right. Pregnant women experiencing spontaneous miscarriages or other problems during pregnancy may be equally dissuaded from obtaining medical

abortion for 10-year-old rape victim); Ruth Murai, Hero of 2022: Abortion Providers Who Refused to Quit, MOTHER JONES (Dec. 22, 2022), https://www.motherjones.com/politics/2022/12/heroabortion-providers-dobbs-roe-vs-wade-texas-trust-women/ (reporting on physicians continuing to provide abortions); Judith Levine, Should Doctors Break the Law?, THE INTERCEPT (Aug. 6, 2022), https://theintercept.com/2022/08/06/abortion-bans-doctors-civil-disobedience/ (discussing ethics of civil disobedience to provide evidence-based care).

433. Decriminalization of Self-Induced Abortion, Am. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/clinical-information/policy-and-positionstatements/position-statements/2017/decriminalization-of-self-induced-abortion (last visited Mar. 1, 2023).

434. See Lynn M. Paltrow & Jeanne Flavin, Arrests and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health, 38 J. HEALTH POL., POL'Y, & L. 299, 332 (2013) ("Our findings also lend support to the medical and public health consensus that punitive approaches undermine maternal, fetal, and child health by deterring women from care and from communicating openly with people who might be able to help them.").

care for fear of suspicion and prosecution. These aspects of decisional privacy go not to the decision to terminate, but to the decision to seek medical care generally.

Crisis pregnancy centers⁴³⁵ create an additional surveillance problem. Designed to promote pregnancy and childbirth and to deter abortion, these centers provide misleading information about the availability and the consequences of abortion. Crisis pregnancy centers routinely advertise that they provide reproductive care services when, in reality, they are rarely staffed with actual medical professionals, and they never provide abortions, refer people for abortions, or provide accurate information about abortion. 436 Increasingly the recipients of extensive state funding from anti-abortion states, 437 these entities tend to promote religious views. 438 Investigations have shown that employees at these centers intentionally delay providing information to women about their pregnancies to make it more difficult for those women to obtain abortions. These deceptive practices, in combination with surveillance enabled by laws criminalizing abortion, undermine decision-making ability and subvert their women's privacy expectations.

Crisis pregnancy centers frequently appear in online searches of terms like "abortion," causing women to make appointments and go

^{435.} Bryant & Swartz, *supra* note 359; Am. Coll. of Obstetricians & Gynecologists, *Issue Brief: Crisis Pregnancy Centers* (Oct. 2022), https://www.acog.org/-/media/project/acog/acogorg/files/advocacy/cpc-issue-brief.pdf; *see also Crisis Pregnancy Centers*, CRISIS PREGNANCY CENTER MAP, https://crisispregnancycentermap.com/cpcs/ (last visited July 15, 2023).

^{436.} See Bryant & Swartz, supra note 359; Am. Coll. Of Obstetricians & Gynecologists, supra note 435.

^{437.} Kimberlee Kruesi, *Millions in tax dollars flow to anti-abortion centers in US*, ASSOCIATED PRESS (Feb. 5, 2022, 12:01 PM), https://apnews.com/article/abortion-business-health-nashville-personal-taxes-fffa6f6f86e6eaa448b8ea89087a1c46 (discussing the funding of crisis pregnancy centers across the country); *Crisis Pregnancy Centers*, PRO-CHOICE NORTH CAROLINA, https://prochoicenc.org/fake-womens-health-centers/ (last visited July 16, 2023) (noting that the state of North Carolina earmarked \$18 million for crisis pregnancy centers in its 2021–23 budget); Laura Morel & Clara-Sophia Daly, *Anti-abortion pregnancy centers may get vastly more state funds from Florida lawmakers*, TAMPA BAY TIMES (Mar. 22, 2023), https://www.tampabay.com/news/florida-politics/2023/03/22/anti-abortion-pregnancy-centers-may-get-vastly-more-state-funds-florida-lawmakers/ (discussing proposed funding of \$25 million for crisis pregnancy centers in Florida in 2023).

^{438.} Sonya Borrero, Susan Frietsche, & Christine Dehlendorf, *Crisis Pregnancy Centers: Faith Centers Operating in Bad Faith*, 34 J. GEN. INTERNAL MED. 144 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6318184/; Bryant & Swartz, *supra* note 359.

^{439.} Emma Roth, *Google results for abortion clinics are misleading and politically fraught*, THE VERGE (Aug. 16, 2022, 10:16 AM), https://www.theverge.com/2022/8/16/23307850/google-maps-results-abortion-clinics-crisis-pregnancy-centers.

to these facilities seeking care. When doing so, pregnant women will undoubtedly share personal information with these entities. Staff members at crisis pregnancy centers may report women seeking abortion to state authorities. Because these centers are not covered entities under HIPAA, and because they are not typically providing medical care, no laws prevent them from disclosing individuals' personal data. Research has also shown that Google's targeted advertising⁴⁴⁰ has been directed at low-income women, steering them disproportionately toward crisis pregnancy centers. To the extent low-income women are disproportionately directed to these fake services, they are more exposed to surveillance and prosecution for abortion-related crimes.

C. Surveillance and Criminalization Harm Intellectual Privacy

Surveillance chills conduct and speech and inhibits intellectual inquiry and exploration. Information about sex, contraception, pregnancy, reproductive health, and abortion is widely available on the internet. Information about how to obtain medication abortion is also available online through sites like Plan C, Hey Jane, Carafem, and Aid Access.441 People can use Google or other search engines to find these sites or other information about abortion. Increasingly, people may use OpenAI's ChatGPT or similar artificial intelligence chatbots to discover information about abortion. Search terms and natural language conversations employed to discover abortion-related information as well as visits to and interactions with sites surfaced by these inquiries can be used as evidence against individuals being investigated for abortion-related crimes. Law enforcement can obtain that information from the companies directly or may compel internet service providers to produce a person's domain name system (DNS) queries, which can reveal websites visited. Surveillance and the threat

^{440.} Poppy Noor, *Google targets low-income US women with ads for anti-abortion pregnancy centers, study shows*, THE GUARDIAN (Feb. 7, 2023, 12:01 AM), https://www.theguardian.com/world/2023/feb/07/google-targets-low-income-women-anti-abortion-pregnancy-center-study.

^{441.} Notably, Texas legislators are pushing legislation that would block pro-choice websites in Texas, preventing people in Texas from gaining access to information about abortion and medication abortion and allowing Texas citizens to sue ISPs that fail to block proscribed content. See Adam Kovacevich, Opinion: Reproductive health censorship bill threatens the open internet, AUSTIN-AM. STATESMAN (Apr. 29, 2023, 8:00 PM), https://www.statesman.com/story/opinion/columns/your-voice/2023/04/29/opinion-reproductive-health-censorship-bill-threatens-the-open-internet/70146540007/; Human Life Protection Act of 2021, 2021 Tex. Sess. Law. Serv. Ch. 800 (H.B. 1280) (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 170A.001–.007 (2022)).

of prosecution will dissuade women from using the internet to search for and access information about abortion and reproductive options. As explained by the National Institute for Reproductive Health, "[f]ear of prosecution makes it more difficult to share or acquire accurate, reliable information about the safer methods of self-abortion, including medications like mifepristone or misoprostol."⁴⁴² To the extent people fail to understand how commercial data collection puts them at risk, they may not know how to protect themselves. Self-help, however, is unlikely to be completely effective in these circumstances, even for a person knowledgeable about technology and the law.⁴⁴³

The Supreme Court has recognized thinking, reading, and learning as peripheral rights integral to the protection of freedom of speech and expression. 444 In Stanley v. Georgia, the Court held unconstitutional a law making the private possession of obscene material a crime, explaining that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." 445 Surveillance chills the ability to think, read, and learn freely and without inhibition. In The Dangers of Surveillance, Neil Richards argues that surveillance compromises intellectual privacy by "threaten[ing] the development of individual beliefs" and life choices "in ways that are inconsistent with the basic commitments of democratic societies."446 For Richards, surveillance creates a power disparity between the watcher and the watched and enables discrimination, coercion, and selective enforcement of the laws. His analysis supports the understanding that the criminalization of women's reproductive decisions harm women as individuals and society writ large.

It could be argued that chilling effects will arise only if women understand that they are at risk of investigation or prosecution *and* if they understand how their everyday interactions online and with mobile devices put them at risk. But of course, if women do not

^{442.} NATIONAL INSTITUTE FOR REPRODUCTIVE HEALTH, WHEN SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK 23 (June 2017), https://nirhealth.org/wpcontent/uploads/2017/06/Self-Abortion-White-Paper-Final.pdf.

^{443.} Dellinger & Pell, *supra* note 7.

^{444.} See Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read... and freedom of inquiry, freedom of thought, and freedom to teach.").

^{445.} Stanley v. Georgia, 394 U.S. 557, 564–65 (1969) ("[T]he Constitution protects the right to receive information and ideas" and "also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

^{446.} Neil Richards, The Dangers of Surveillance, 126 HARV. L. REV. 1934, 1936 (2013).

understand the circumstances under which abortion is illegal in their state, their everyday interactions with the digital world will necessarily put them at risk when they become pregnant and decide to pursue alternatives to childbirth. The inability to understand the law or how it applies in individual circumstances makes it difficult, if not impossible, to engage in risk assessment and threat modeling and to conform one's conduct to the risk environment. From this perspective, the chilling effect that occurs for those women who understand the risks is a form of protection, albeit a harmful one. But women's privacy interests are harmed either way.

D. Surveillance and Criminalization Harm Informational Privacy

The *Dobbs* Court criticized *Roe*'s recognition of a constitutional "right of personal privacy," contending that *Roe* "conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference.... Only the cases involving this second sense of the term could have any possible relevance to the abortion issue[.]"⁴⁴⁷ As the post-*Dobbs* state of affairs has made clear, the right to shield information from disclosure is absolutely relevant to the abortion issue.

If women know abortion is illegal, they can discern that seeking, obtaining, or self-managing an abortion subjects them to surveillance in conjunction with the enforcement of anti-abortion laws. Surveillance thus constricts informational privacy—both data privacy and the individual's interest in avoiding disclosure of personal matters—and, in doing so, affects a person's ability to make personal decisions without interference from the government. In this way, different aspects of privacy are interconnected:

Information privacy—e.g., keeping the fact of pregnancy to oneself—can create the breathing space away from familial or societal censure necessary for decisional privacy—e.g., to choose whether to have an abortion. Or, in reverse, consider how decisional privacy shields an individual from disclosing to the state her justifications for exercising some choice, thereby fortifying her information privacy.⁴⁴⁸

^{447.} Dobbs v. Jackson Women's Health, 142 S. Ct. 2228, 2267–68 (2022).

^{448.} Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1203–04 (1998) (noting the ways different privacy clusters pertaining to space, information and decisions are "functionally interconnected and often simultaneously implicated"). *See also*

Surveillance also impedes free, honest, and private communication, causing harm to important relationships. When we experience major life events like pregnancy and face the decision whether to have a child, we talk with our partners, parents, and close friends. When our communication and internet activity are subject to surveillance to serve state interests in preventing or investigating abortion crimes, the confidentiality of our important relationships is compromised, damaging our ability to trust and rely upon these relationships. Surveillance in this context disincentivizes honest and intimate relationships, community, and the use of support networks.⁴⁴⁹

VI. RECOMMENDATIONS

Until the right to terminate a pregnancy becomes constitutionally protected once again, women's physical, decisional, intellectual, and informational privacy will continue to be compromised and harmed. But in the interim, smaller steps can help mitigate the damage created by *Dobbs*—steps designed to prevent the disclosure of information in support of abortion investigations. Of course, states that ban abortion can choose not to criminalize abortion. At a minimum, legislators can write laws that more clearly and explicitly exempt pregnant women from prosecution.

A. Disrupting Surveillance and Prosecution by Preventing the Disclosure of Information

Not all states are banning and criminalizing abortion. Some states have attempted to protect the right to abortion by passing shield laws designed to protect the lawful provision of care within their borders and to disrupt the surveillance, investigation, and prosecution of individuals for abortion-related conduct.⁴⁵⁰ Connecticut led the way in May 2022 by passing the first shield law⁴⁵¹ and, at the time of this writing, these additional states have passed shield laws of their own: New York, Delaware, New Jersey, Massachusetts, California, Illinois,

BRIDGES, *supra* note 391, at 150 (discussing the "simultaneity of informational privacy and decisional autonomy" at issue in *Whalen*, 429 U.S. 589 (1977)), 150–56 (capturing how informational privacy "facilitates decisional autonomy," "prevents social control," and "protects human dignity.").

^{449.} Anita Allen would likely characterize surveillance as a violation of "associational privacy" for these reasons. *See* ALLEN, *supra* note 388, at 5–6 (2011).

^{450.} See David Cohen, Greer Donley, & Rachel Rebouche, Abortion Shield Laws, 2 NEJM EVIDENCE, Mar. 28, 2023 (describing nine features of shield laws enacted in the wake of Dobbs). 451. H.B. 5414, 2023 Leg. (Conn. 2023).

Hawaii, New Mexico, Washington, Colorado, Nevada, Maryland, Washington, D.C., Minnesota, and Vermont. Many of these laws prohibit law enforcement from executing arrest warrants issued in other states concerning abortion crimes, cooperating with investigations initiated in other states, and extraditing individuals who have provided care to residents of states where abortion is banned. Massachusetts's law may be unique thus far in its protection for providers who care for patients in other states via telehealth. 452

Some of the laws include provisions specifically designed to interfere with surveillance and investigation of abortion crimes. California's law may have the potential for outsized protection because it prohibits companies that provide electronic communications services and are incorporated or headquartered in California from complying with warrants, other court orders, or subpoenas for information when companies know or should know that those requests support investigation of abortion crimes.⁴⁵³ The law requires an out-of-state warrant submitted to a California corporation to include "an attestation that the evidence sought is not related to an investigation into, or enforcement of" an inquiry about abortion, and companies are permitted to rely on those attestations.⁴⁵⁴ A separate provision mandates that both California corporations and companies with a principal place of business in California "shall not, in California, provide records, information, facilities, or assistance in accordance with the terms of a warrant, court order, subpoena, wiretap order, pen register trap and trace order, or other legal process issued by, or pursuant to, the procedures of another state or a political subdivision thereof that relates to an [Abortion Inquiry]."455 This section does not include an attestation requirement.

Every state that permits abortion should become a shield state,

^{452.} Carrie N. Baker, Groundbreaking Massachusetts Law Protects Telemedicine Abortion Providers Serving Patients Located in States Banning Abortion, Ms. MAGAZINE (Aug. 18, 2022), https://msmagazine.com/2022/08/18/massachusetts-abortion-law/.

^{453.} Dana Brusca et al., California Poised to Enact Law Prohibiting Electronic Communication Services Providers from Complying with Out-of-State Legal Process Relating to Abortion Inquiries, ZWILLGEN BLOG (Sep. 2, 2022), https://www.zwillgen.com/law-enforcement/california-prohibiting-electronic-communication-services-providers-complying-out-of-state-legal-process-abortion-inquiries/ ("Under Section 8 [of A.B. 1242], California ECSPs may not produce records in response to an out-of-state warrant 'when the corporation knows or should know that the warrant relates to an investigation into, or enforcement of a prohibited violation.").

^{454.} A.B. 1242, 2021–22 Leg., Reg. Sess. (Cal. 2022).

^{455.} *Id*.

passing laws that protect providers and women and disrupt efforts by ban states to surveil people seeking, obtaining, and providing abortion care. California's law is an excellent start, but the law provides a broader spectrum of protections for data held by companies incorporated in California (e.g., GoGuardian, Uber, and Cisco) than it does to companies simply headquartered there. Washington (home of Microsoft) and New York have passed similar legislation preventing certain in-state companies from complying with out-of-state warrants in connection with abortion crimes.⁴⁵⁶

Washington's law is, in fact, more protective than California's. 457 As the Center for Democracy and Technology has explained:

Section 13(d)(i)(A) of [H.B. 1469] bars these companies from providing "records, information, facilities, or assistance" in response to any "subpoena, warrant, court order, or other civil or criminal legal process" that relates to protected health care services. This language is different from the California law in an important respect: While the California law refers to "records, information, facilities, or assistance" *in California*, the Washington law makes no distinction on where this aid is located, meaning its protections apply even if data is stored and assistance is provided out of state, so long as the company is incorporated or based in Washington. 458

Companies providing electronic communications services can comply with legal process only if the process includes an attestation under penalty of perjury "that the demand 'does not seek documents, information, or testimony' that is being used to create criminal or civil liability for protected health care services."⁴⁵⁹ The Washington law also establishes some non-disclosure requirements for companies that are not providers of electronic communications services. ⁴⁶⁰ These protections are particularly important in Washington, given the state's proximity to Idaho, which has passed an "abortion trafficking" law

^{456.} Jake Laperruque, *Momentum Builds Against Abortion Surveillance as New States Enact Shield Laws*, CTR. FOR DEMOCRACY & TECH. (May 10, 2023), https://cdt.org/insights/momentum-builds-against-abortion-surveillance-as-new-states-enact-shield-laws/.

^{457.} See Nina Shapiro, Amid post-Roe landscape, WA lawmakers pass abortion 'shield law', SEATTLE TIMES (Apr. 12, 2023, 6:00 AM), https://www.seattletimes.com/seattlenews/politics/amid-post-roe-landscape-wa-lawmakers-pass-abortion-shield-law/.

^{458.} Laperruque, supra note 456.

^{459.} Id.

^{460.} Andreas Kaltsounis, Washington State's New Shield Law, Part of Washington's 'Choice-Defending Agenda,' Modifies Obligations Related to Other States' Criminal and Civil Process, JD SUPRA (Apr. 18, 2023), https://www.jdsupra.com/legalnews/washington-state-s-new-shield-law-part-2512472/.

prohibiting adults from helping minors obtain abortions without parental consent.⁴⁶¹ New York's law is less protective, restricting compliance only with warrants (but not with other forms of criminal or civil process), and failing to include an attestation requirement for these warrants.

Delaware has passed a shield law designed to protect physicians and patients providing and receiving care in the state. Given its historical popularity as a state of incorporation for companies, law a substantial effect on the surveillance landscape by passing a law similar to California's that is applicable to all companies incorporated in Delaware—Alphabet, Apple, Facebook, Amazon, Twitter, Snapchat, Securly, LexisNexis, Oracle, Acxiom, and Clearview AI, to name a few. Such a law could require out-of-state warrants and other process to include an attestation under penalty of perjury "that the evidence sought is not related to an investigation into, or enforcement of" an inquiry about abortion, and permit reliance on those attestations. Like Washington's law, the proposed Delaware law should make no distinction regarding where the act of disclosure or the data is located.

As the post-*Dobbs* landscape evolves, taking action to protect the privacy and autonomy of providers and women is better than the alternative—cooperating with the surveillance, investigation, and prosecution of individuals for reproductive outcomes when those actions run counter to the values of a given state.

B. Remediation: Protecting Privacy around the Edges

In the wake of *Dobbs*, Washington state has also pursued a broader consumer-protection-oriented response with the passage of the "My Health, My Data Act," designed to provide special protections for

^{461.} IDAHO CODE § 18-622 (2023) (available at: https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2023/legislation/H0242.pdf).

^{462.} Amy Simonson, *Delaware governor signs bill expanding abortion access and provider protection*, CABLE NEWS NETWORK (June 29, 2022, 9:02 PM), https://www.cnn.com/2022/06/29/politics/delaware-governor-signs-abortion-access-law/index.html.

^{463.} See Chauncey Crail et al., Why Incorporate in Delaware? Benefits & Considerations, FORBES ADVISOR (June 3, 2023, 12:15 AM), https://www.forbes.com/advisor/business/incorporating-in-delaware/ (noting that 68% of Fortune 500 companies and 93% of all U.S.-based initial public offerings are incorporated in Delaware).

health data.⁴⁶⁴ The Act,⁴⁶⁵ signed into law in April 2023, attempts to protect health data that falls outside the scope of HIPAA's limited protections.⁴⁶⁶ The new Act's protections are strengthened by the state's shield law. Where possible, states should pursue consumer protection laws designed to protect the privacy of health and location data along with shield laws.

While shield laws and data protection efforts are important and helpful steps, they cannot ultimately prevent the surveillance of women that the criminalization of abortion permits, particularly in the ban states, nor will they adequately protect the privacy interests these laws compromise.

CONCLUSION

Back in 1989, Justice Rehnquist, writing for a plurality in *Webster* intent on crippling *Roe*, declared that there was certainly no reason to assume that "legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the Dark Ages."⁴⁶⁷ Such a view, he noted, "does scant justice to those who serve in such bodies and the people who elect them."⁴⁶⁸ As it turns out, Justice Rehnquist was overly optimistic—about both legislators and the democratic process.

More than thirty years later, the *Dobbs* Court utterly failed to imagine the practical consequences or collateral damage flowing from a decision that gives states unfettered authority to criminalize abortion. State legislatures have lost no time criminalizing abortion, and state laws that purport to exempt pregnant women from prosecution are (1) not sufficiently explicit and (2) do not necessarily prevent women from being prosecuted under other parts of the criminal code. State action in the aftermath of *Dobbs* has dealt a crushing blow to the physical, decisional, intellectual, and informational privacy of women and people who can become pregnant.

^{464.} Kendra Clark, Washington's health data bill explained: 'strongest protections outside of HIPAA', THE DRUM (Apr. 7, 2023), https://www.thedrum.com/news/2023/04/07/washington-s-health-data-bill-explained-the-strongest-protections-outside-hipaa.

^{465.} H.B. 1155, 68th Gen. Assemb., Reg. Sess. (Co. 2023).

^{466.} Press Release, Wash. State Off. Att'y Gen., AG Ferguson, Rep. Slatter bill creating health data privacy protections passes (Apr. 17, 2023).

^{467.} Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989).

^{468.} Id.

The desire to eliminate abortion does not justify or necessitate criminalization. If legislators were truly interested in preventing abortion, they would take steps to prevent unwanted pregnancy and support the following holistic approach: comprehensive sex education in public schools beginning as soon as girls are able to become pregnant; freely available contraception for all people; measures to reduce and respond effectively to sexual violence; and freely available abortion services, via medication and physical procedures, in accordance with the *Roe* framework.⁴⁶⁹ If states choose to regulate abortions, criminal penalties should not be imposed against providers, aiders and abettors, or women themselves. Criminalizing anyone in connection with reproductive health outcomes subjects women as individuals and as a demographic to oppressive surveillance, which itself leads to the raft of privacy harms described above.

State laws criminalizing abortion do not unambiguously preclude the prosecution of women. At a minimum, states that persist in criminalizing abortion must make absolutely clear—in simple, explicit statutory language—that no pregnant individuals can or will be prosecuted for actions taken with respect to their own pregnancies. A failure to provide clarity should be read for what it is: in some cases, a deliberate obfuscation of anti-abortion goals; in others, a tolerance of dangerous ambiguity. Lack of clarity and confusion are features of this new dystopic reality, not bugs. If the anti-abortion legislators driving the adoption of laws criminalizing abortion are serious in their assertions that women will not be prosecuted, they should enact clear laws and repeal provisions of existing laws containing language that suggests otherwise.

^{469.} To more holistically promote reproductive decision-making, states could also provide additional support for childcare, health and nutrition services for children, and paid parental leave.