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Abortion, the Underground Railroad, and Evidentiary Privilege

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Abstract

Building on my recent article in the Minnesota Law Review *proposing reforms of evidentiary privilege law, this Article focuses on the unique context of communication about abortion. There is an urgent need to protect such communication in the wake of the Supreme Court's decision in* Dobbs v. Jackson Women's Health Organization*, which allowed states to recriminalize abortion. Now abortion seekers, providers, and third parties who aid and abet abortion could face significant exposure to both criminal penalties and civil suits in many states. Those states are attempting to extend the reach of their bans by sanctioning out-of-state travel and third-party aid to the traveler if the purpose of the travel is to abort a pregnancy. Advocates for reproductive freedom recognize the need to establish an "underground railroad" akin to the surreptitious assistance of fugitive slaves fleeing the Antebellum South. A stricter evidentiary privilege for abortion-related communication is crucial to protect those who seek to defy the draconian new regime.*

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In this Article, I offer a model rule that legislatures and judges should adopt. I also propose a comprehensive set of related reforms including changes to the crime-fraud exception in privilege law, changes to attorneys' ethical rules, and changes to regulations governing data privacy.

The benefits of this Article's proposals could be significant. For those who need to terminate their pregnancies but live in states that have criminalized abortion—a population consisting largely of low-income people of color—the new privilege could be the difference between privacy or prison. The proposals in this Article would improve access to abortion, reduce exposure to reprisals in court after an abortion, and limit the surveillance that could otherwise plague people of childbearing age.

From a conceptual standpoint, this Article's proposals would make privilege law more egalitarian by shifting the focus from the professional credentials of the audience to the subject matter of the conversation—a long-overdue reorientation. Evidentiary privilege should not be coextensive with economic privilege.

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INTRODUCTION

When the Supreme Court issued its landmark ruling in *Dobbs v. Jackson Women's Health Organization*[1] on June 24, 2022, overturning nearly fifty years of precedents protecting the constitutional right to an abortion,[2] critics lamented a return to

1. 142 S. Ct. 2228 (2022). For a more detailed discussion of *Dobbs*, see *infra* Part I.A.

2. *E.g.*, Roe v. Wade, 410 U.S. 113, 163–65 (1973) (holding that states may not constitutionally ban abortion before viability, which occurs at approximately the end of the second trimester); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870, 873 (1992) (holding that states may not impose an "undue burden" on the right to an abortion).

the era of limited reproductive rights in the early 1970s.[3] But an astute observer might also draw an analogy to an even earlier period in our nation's history: the 1850s.

During that infamous decade preceding the Civil War, the South sought to preserve and even strengthen the institution of slavery.[4] Many states in the North offered safe havens for enslaved people.[5] Abolitionists set up a clandestine network in the South for the purpose of facilitating slaves' flight to freedom in the North.[6] The metaphor for that network was "the Underground Railroad."[7] Southerners in Congress attempted to thwart the escape of slaves by passing the Fugitive Slave Act.[8] This legislation required residents of Northern states to assist slaveholders in the capture of slaves fleeing the South.[9] Abolitionists decried the Fugitive Slave Act as an extraterritorial extension of the "slave power."[10] The Supreme

3. *E.g.*, Carli Pierson, Opinion, *The Supreme Court Overturning* Roe v. Wade *Completes the GOP's Three-Step Nanny-State Plan*, USA TODAY (June 25, 2022, 8:00 AM), https://perma.cc/ZZ78-MTZ4 (criticizing the *Dobbs* majority for "effectively sending American women back to pre-1973 America, before *Roe v. Wade*"); Tom Sherman, *How Will Illegal Abortions Be Prosecuted? 1968 NYPD Manual Offers Hints*, WASH. POST (July 11, 2022, 7:00 AM), https://perma.cc/NBH4-M5PX (emphasizing that "with the overturning of *Roe* and a likely imminent spike in abortion prosecutions, it may feel as if not much has changed at all" since the pre-*Roe* era).

4. *See* Diane Miller, *The Underground Railroad*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY 1, 10–13 (Jon Butler ed., 2022), https://perma.cc/4MFC-CZQH (PDF).

5. *See id.* at 13–14.

6. *See id.* at 20–22.

7. For a comprehensive history of the Underground Railroad, see generally WILBUR H. SIEBERT, THE UNDERGROUND RAILROAD FROM SLAVERY TO FREEDOM (1898). This operation began in the early 1800s and continued until the abolition of slavery at the end of the Civil War. *See id.* at 22.

8. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864) (requiring law enforcement personnel and even private citizens to assist in the recovery of fugitive slaves, whether found in free or slave states, and establishing both criminal penalties and civil remedies to ensure compliance).

9. *See* Gautham Rao, *The Federal* Posse Comitatus *Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 5 (2008) (indicating that, under the Fugitive Slave Act of 1850, "a national duty to assist in the recovery of fugitive slaves imposed the legal norms of slave society on free states").

10. *See* James Foreman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 908 (2004) ("The fight over the fugitive slave laws was, for

Court, for its part, refused to recognize the authority of Northern states to grant freedom to former slaves.[11] Legal historians generally agree that the Supreme Court's decision in *Dred Scott v. Sandford*,[12] rejecting a slave's claim for freedom upon his arrival in the North,[13] was the worst subversion of justice by the Court in all of U.S. history.[14]

The parallel between the 1850s and the present is troubling indeed.[15] After *Dobbs*, approximately half the states in the United States immediately banned, or will soon ban, abortion within their boundaries.[16] Many of these states are imposing both criminal and civil liability on abortion providers and abortion seekers, as well as on third parties who aid and abet abortion.[17] Some conservative states are also attempting to enforce their abortion restrictions extraterritorially by preventing their citizens from traveling to other states for the purpose of terminating pregnancies, even if abortion is legal in the destination states.[18] Antiabortion states are authorizing civil suits and even criminal charges against out-of-state abortion doctors and third-party benefactors who aid with cross-border abortions.[19] In effect, the antiabortion states are attempting to make the pro-choice states complicit in enforcing

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many in the North, simply one battle in the larger war against the encroaching slave power.").

11. *See* Ableman v. Booth, 62 U.S. 506, 526 (1858) (declaring that the Fugitive Slave Act of 1850 was constitutional "in all of its provisions" and that abolitionist states could not circumvent its requirements).

12. 60 U.S. 393 (1857).

13. *See id.* at 452 ("[N]either Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.").

14. *See* Walter Ehrlich, *Scott v. Sanford*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 889 (Kermit L. Hall ed., 2d ed. 2005) ("American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court.").

15. *See* Michael Hiltzik, *Threats to Criminalize Out-of-State Abortions Are a Scary Reminder of 1850s America*, L.A. TIMES (July 12, 2022, 1:58 PM), https://perma.cc/A6G8-JVZD (noting that after *Dobbs*, "several red states are prepared to replicate [the Fugitive Slave Act] on their own books").

16. *See infra* Part I.A.

17. *See infra* Part I.A.

18. *See infra* Part I.A.2.

19. *See infra* Part I.A.1, I.A.3.

the new abortion rules—a strategy redolent of the Fugitive Slave Act.[20] The Supreme Court has lifted its restraints on the antiabortion states,[21] and when an abortion seeker tries to escape such a state, the Court is no more likely to offer protection than it did in the *Dred Scott* case.[22]

The post-*Dobbs* regime seems certain to cause great hardship. Penalties for abortion-related crimes in some states range from five years to life in prison.[23] The new laws criminalizing abortion sometimes do not make exceptions for rape and incest, and the health-related exemptions are difficult to invoke.[24] In some areas of the country, the nearest abortion clinic is now hundreds of miles away, and abortion medication is impossible to obtain by mail.[25] Death rates will increase as desperate abortion seekers resort to dangerous nonmedical procedures, or forego abortions despite significant (but legally insufficient) health reasons for terminating their pregnancies.[26] Some commentators predict that the post-*Dobbs* era will actually be more oppressive than the pre-*Roe* period because police and private "bounty hunters" will be able to use modern surveillance technology.[27] They will attempt to track the movement, social interactions, online activity, credit card history, and other personal records of pregnant people, as well as many others who are of childbearing age.[28] Minority and low-income communities will suffer the most from the new restrictions and surveillance: in effect, these communities will be under siege by the antiabortion forces.[29]

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20. *See infra* Part I.
21. *See infra* Part I.A.
22. *See infra* Part I.A.2.
23. *See infra* Part I.A.
24. *See infra* Part I.A.1.
25. *See infra* Part I.A.1.
26. *See infra* Part I.A.2.
27. *See, e.g.*, Jia Tolentino, *We're Not Going Back to the Time Before* Roe. *We're Going Somewhere Worse*, NEW YORKER (June 24, 2022), https://perma.cc/7MJP-MQR9.
28. *See infra* Part I.B.
29. *See infra* Part I.C.

The only hope for reproductive freedom after *Dobbs* is a modern underground railroad.[30] In conservative states, access to abortion care will depend on a network of information and travel assistance.[31] Third parties will play an important role in providing the resources, counseling, and support necessary to connect abortion seekers with the care they need—whether these patients meet the narrow eligibility requirements for in-state abortions or they must travel to clinics in other states.[32] Even the reliance on abortion medications, formerly available through telemedicine and mail-order pharmacies, will require extensive logistical planning and travel to other states where receipt of such drugs is permissible.[33] Nonprofit organizations or employers that provide resources to abortion seekers will need to comport themselves carefully so that they avoid civil suits and criminal prosecution.[34] While attempting to travel across state lines, abortion seekers will need to elude surveillance by police and antiabortion vigilantes.[35] The hazards will be different from those faced by the nineteenth-century fugitives escaping on the original underground railroad, but safe passage will be a difficult challenge nonetheless.[36]

Confidentiality will be absolutely essential if the new underground railroad is to succeed.[37] Privacy allows the necessary repose in which to ponder news of pregnancy and consult with trusted confidants about the range of options that might be available.[38] If abortion seems to be the right decision, the next step often must be to solicit the advice and help of third

30. Longtime civil rights activist and U.S. Court of Appeals Judge A. Leon Higginbotham, Jr., gave an address at the National Underground Railroad Freedom Center in which he urged that reformers in modern times should strive to emulate the "conductors of the Underground Railroad." A. Leon Higginbotham, Jr., *My Metaphorical Journey on the Underground Railroad*, 67 U. CIN. L. REV. 761, 767 (1999); *see id.* at 762 ("I submit that the concept of the Underground Railroad is not obsolete and that its goal of enabling all Americans to be truly free has not been fully realized.").

31. *See infra* Part I.D–E.

32. *See infra* Part I.D.1–2.

33. *See infra* Part I.D.3.

34. *See infra* Part I.A.3.

35. *See infra* Part I.A.2, I.B.

36. *See infra* Part I.

37. *See infra* Part I.E.

38. *See infra* Part I.D.

parties who can assist abortion seekers in availing themselves of the few remaining opportunities to terminate their pregnancies.[39] Strict secrecy will be crucial to enable the candid discussions that are necessary for both abortion seekers and their supporters to navigate the new minefield of criminal and civil liability.[40] Without confidentiality, the new abortion regulations and surveillance will have a chilling effect[41] that could end access to abortions altogether, especially among the low-income and minority communities that will suffer the greatest hardship following *Dobbs*.[42]

Unfortunately, current confidentiality rules are inadequate. The traditional professional privileges—which prevent the evidentiary use of conversations with lawyers, doctors, psychologists, and clergy, among other professionals—are insufficient to protect the people who need confidentiality the most.[43] Low-income and minority populations have fewer interactions with the categories of professionals to whom these privileges apply, and exceptions for discussions of crime would frequently vitiate the privileges even if they did apply.[44] The spousal privilege has little utility for abortion seekers due to declining overall marriage rates and the tendency for abortion to occur outside of marriage.[45] The privilege against self-incrimination does not apply unless the government is directly questioning the abortion seeker; the government may easily obtain a suspect's communications with third parties.[46] Federal legislation protecting the privacy of health-related information only applies to records maintained by health care providers and insurers, so this legislation accords no protection to the records held by employers, credit card companies, and nonmedical organizations helping abortion seekers.[47] Regulations that shield the privacy of online activity

39. *See infra* Part I.D.
40. *See infra* Part I.A.2–A.3.
41. *See infra* Part I.A.2–A.3.
42. *See infra* Part I.C.
43. *See infra* Part II.A.
44. *See infra* Part II.A.
45. *See infra* Part II.B.
46. *See infra* Part II.C.
47. *See infra* Part II.D.

are woefully inadequate.[48] In short, the present legal landscape makes abortion seekers, providers, and facilitators vulnerable to monitoring and evidentiary use of their most sensitive communication about abortion.

The time has come for a comprehensive set of reforms that would strengthen confidentiality in the particular context of abortion-related communication. This Article proposes federal and state legislation known as the Pregnancy Privacy Act.[49] The Act would codify an evidentiary privilege for communication with any audience concerning abortion, so long as the person making the statement or providing the information has no knowledge of eavesdropping or other circumstances that make it unreasonable to expect secrecy.[50] The privilege would be valuable in interstate civil litigation even if some conservative states refused to adopt it.[51] The Act would also modify the crime-fraud exception to various privileges so that the exception could not apply to communication about an abortion in a jurisdiction where the procedure is legal.[52] A related reform would add rules to state bar codes requiring that no prosecutor could direct surveillance of abortion-related communication, extract such information through discovery or other means, or charge a case based on surveillance of abortion-related information, except in narrow circumstances involving coercion by third parties.[53] Finally, this Article advocates new regulations to prohibit the storing and disclosure of electronic data, internet search histories, location information, and other records indicating whether a person has become pregnant or has explored the possibility of obtaining an abortion.[54] The combination of proposals offered in this Article would bring significant benefits, increasing access to abortion, reducing the likelihood of sanctions in court after an abortion, and limiting the onerous surveillance directed at people of childbearing age.[55]

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48. *See infra* Part II.E.
49. *See infra* Part III.
50. *See infra* Part III.B.
51. *See infra* Parts III.B., III.E., IV.A.
52. *See infra* Part III.B.
53. *See infra* Part III.C.
54. *See infra* Part III.D.
55. *See infra* Part III.E.

To be sure, this Article's proposals would not be the optimal way to protect abortion seekers. The most effective approach would be for Congress or state legislatures to restore abortion rights. Given political realities, however, the nationwide restoration of an enforceable right to abortion seems improbable in the foreseeable future.[56] There is a greater likelihood that some progressive and moderate states might see fit to adopt the privacy protections that this Article proposes. A coalition of Democratic and Republican legislators could conceivably agree on the need to protect the secrecy of conversations about pregnancy,[57] and state bars—usually more progressive than the overall population[58]—could be receptive to new ethical rules limiting surveillance of pregnant people. Polls show bipartisan support for protecting privacy as a general proposition.[59] Democratic legislators want to protect conversations with counselors who advise about abortion, while Republican legislators want to protect conversations with counselors who advise about alternatives to abortion.[60] Both categories of communication would fall under the umbrella of the new privilege proposed in this Article, so lawmakers in both parties would have reasons to support the proposal.

A more fundamental point bears mentioning here. People of all political stripes consider abortion to be a uniquely sensitive and controversial topic that they are uncomfortable discussing in public.[61] Indeed, the conservative Supreme Court Justices in the *Dobbs* majority were furious when their own preliminary deliberations about abortion did not remain confidential.[62] Conservatives and liberals may never agree about abortion, but the very divisiveness of this topic provides a compelling reason to protect the privacy of abortion-related communication.

This Article will proceed in four steps to make its case for the Pregnancy Privacy Act and related reforms. Part I will focus on the reasons why the law should protect the confidentiality of

56. *See infra* notes 354–365 and accompanying text.
57. *See infra* note 338 and accompanying text.
58. *See infra* note 322 and accompanying text.
59. *See infra* note 280 and accompanying text.
60. *See infra* notes 281–282 and accompanying text.
61. *See infra* notes 283–284 and accompanying text.
62. *See infra* note 285 and accompanying text.

discussions about whether, when, where, and how to terminate a pregnancy. Part II will explain why current privilege law is insufficient to protect the confidentiality of abortion-related communication. Part III will propose a comprehensive set of reforms including a new privilege, a revision of the current crime-fraud exception, an ethical rule prohibiting certain categories of evidence collection, and regulations protecting data privacy. Part IV will list foreseeable objections to this Article's proposals and will attempt to respond to those objections.

I. THE URGENT NEED FOR CONFIDENTIAL COMMUNICATION ABOUT ABORTION

A review of the *Dobbs* decision and the subsequent legislative initiatives in many states will show that significant legal hazards await many people who contemplate obtaining or helping another person to obtain an abortion.[63] Surveillance of private data and online activity exacerbates the peril.[64] The burden falls disproportionately on minority and low-income populations.[65] The need is dire for legal protection of secret communication about in-state and out-of-state options for abortion seekers.

A. *Dobbs'* Leviathan*: States Impose Criminal and Civil Liability*

In one sense, Thomas Dobbs, the lead petitioner in the case that overturned *Roe v. Wade*,[66] is an incongruous namesake for the new era of abortion restrictions. He is hardly an antiabortion crusader. Throughout his tenure as Mississippi's top health officer, he has never publicly declared his position on abortion.[67]

63. *See infra* Part I.A.

64. *See infra* Part I.B.

65. *See infra* Part I.C.

66. 410 U.S. 113 (1975), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

67. Bill Chappel, *The Abortion Case Is Named After Thomas Dobbs, Who Says He Has Nothing to Do with It*, NPR (June 24, 2022, 4:48 PM), https://perma.cc/2Y4L-UFQQ. When plaintiffs challenged Mississippi's law in 2018, they had no choice but to sue Thomas Dobbs in his capacity as the state's top health officer, even though he had no involvement in drafting the bill or advocating against abortion rights. *Id.*

But in another sense, it is fitting that Thomas Dobbs' name has become synonymous with the new antiabortion regime. This name bears a striking resemblance to that of Thomas Hobbes, the most vehement advocate of authoritarianism in the Anglo-American philosophical tradition.[68] Hobbes' *Leviathan* was an unapologetic argument for the oppression of liberty.[69] Hobbes invoked the biblical Leviathan—a ferocious sea monster—as a symbol for an all-powerful state that sacrifices individual rights to achieve the despot's desired version of order.[70] Such a conception of government usually has little application in modern U.S. history, but it aptly describes the state regulation of abortion that is emerging after the Supreme Court's ruling on June 24, 2022.[71]

What exactly did the Supreme Court hold in *Dobbs*? A detailed analysis of that decision is beyond the scope of this Article, but certain highlights are important to note here because they show why states now have such wide latitude to restrict abortion. In *Dobbs*, the Court considered a challenge to the Gestational Age Act,[72] a Mississippi law that generally prohibited abortion after the fifteenth week of pregnancy.[73] The Court upheld the law.[74] In doing so, the Court overturned *Roe v. Wade*, which had held that a state may not constitutionally ban abortion before viability (approximately the end of the second

68. *See* Tom Sorrell, *Hobbes' Reputation in Anglo-American Philosophy*, *in* INSIDERS AND OUTSIDERS IN SEVENTEENTH-CENTURY PHILOSOPHY 192–206 (G.A.J. Rogers et al. eds., 2010).

69. *See generally* THOMAS HOBBES, LEVIATHAN, OR THE MATTER, FORME, & POWER, OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL (1651).

70. *See* Steven Smith, *The Sovereign State: Hobbes,* Leviathan, YALE UNIV., at 32:10, https://perma.cc/T79K-5L5T ("For many today, Hobbes's conception of the *Leviathan* state is synonymous with anti-liberal absolutism.").

71. *See infra* Part I.A.1–3.

72. MISS. CODE ANN. § 41-41-191 (2023) ("[A] person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.")

73. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2234 (2022).

74. *See id.* at 2242 (stating that the right to abortion is not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty").

trimester).[75] The Court also overturned *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[76] which had held that a state may not unduly burden the right to abortion.[77] After abrogating *Roe* and *Casey*, the Court simply needed to determine that the Gestational Age Act had a rational basis,[78] and the Court found that the law easily cleared this low bar.[79] The Court noted that abortion had been a crime under the common law,[80] and "had long been a crime in *every single* State."[81] The Court used language indicating, or at least strongly implying, that life begins at conception,[82] suggesting the possibility that states could prosecute feticide under generic homicide laws. The Court concluded that state legislatures must

75. *See* Roe v. Wade, 410 U.S. 113, 164 (1973), *overruled by Dobbs*, 142 S. Ct. 2228; *Dobbs,* 142 S. Ct. at 2265 (characterizing *Roe* as "egregiously wrong and deeply damaging").

76. 505 U.S. 833 (1992), *overruled by Dobbs*, 142 S. Ct. 2228.

77. *See id.* at 876; *Dobbs,* 142 S. Ct. at 2265 (describing *Roe* and *Casey* together as "an error that cannot be allowed to stand").

78. *See Dobbs*, 142 S. Ct. at 2283–84.

79. *Id.* at 2284 (finding that Mississippi's interest in "protecting the life of the unborn," along with the state's concern about the dangerousness of certain abortion procedures, provided a rational basis for the statute under review).

80. *Id.* at 2240 (indicating that *Roe* was "plainly incorrect" in asserting "that abortion was probably never a crime under the common law").

81. *Id.* at 2248; *see id.* at 2248–49 ("By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow."); *id.* at 2253–54 ("[A]n unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until [the Court's *Roe* ruling in] 1973.").

82. *See, e.g.*, *id.* at 2243 (referring to "fetal life" and "unborn human being"); *id.* at 2256 (noting a long history of criminalizing abortion, and indicating that the rationale for such laws was "a sincere belief that abortion kills a human being"); *id.* at 2260 (distinguishing the abortion cases from prior cases involving the right to privacy, because the prior cases did not implicate the destruction of life); *id.* at 2259 (stating that Americans who believe in restricting abortion argue that modern technology has brought "a new appreciation of fetal life"); *id.* at 2261 (stressing the "State's interest in prenatal life"); *id.* at 2284 (indicating that a state legislature's "legitimate interests include respect for and preservation of prenatal life at all stages of development"). By contrast, *Roe* and *Casey* had referred to the fetus as "potential life." *Roe,* 410 U.S. at 163; *Casey*, 505 U.S. at 870.

have the power to regulate abortion as they see fit,[83] whether under the criminal or civil law, and such legislative judgments deserve a high degree of deference from reviewing courts.[84]

States began exploiting this opportunity shortly after the Court handed down its ruling in *Dobbs*—some on the very day the Court announced its decision. Approximately half the states have banned or will soon ban abortion in the wake of *Dobbs*.[85] Abortion bans typically impose criminal penalties on violators,[86] sometimes as great as life in prison,[87] and the Supreme Court

83. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2234 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."); *id.* at 2317 (Breyer, Sotomayor, & Kagan, JJ., dissenting) ("States will feel free to enact all manner of restrictions.").

84. *See id.* at 2283–84 ("States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot substitute their social and economic beliefs for the judgment of the legislative bodies." (internal quotation omitted)); *id.* at 2284 ("A law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity." (internal quotation omitted)).

85. *See* Claire Cain Miller & Margot Sanger-Katz, *What Does the End of* Roe *Mean? Key Questions and Answers*, N.Y. TIMES (May 3, 2022), https://perma.cc/HSH5-UWPM (last updated June 27, 2022) ("Abortion will remain legal in about half of the states, but the rest will probably ban it."); Tierney Sneed, *Some States Move Quickly to Ban Abortion After Supreme Court Ruling*, CNN, https://perma.cc/P6CQ-NWSP (last updated June 25, 2022, 8:38 PM) ("In all, 26 states have laws that indicate they could outlaw or set extreme limits on abortions, effectively banning abortion in those states . . . ."); LAURA DEAL, CONG. RSCH. SERV., LSB10779, LEGAL SIDEBAR: STATE LAWS RESTRICTING OR PROHIBITING ABORTION 2–8 (2022), https://perma.cc/L36J-S5LQ (PDF) (breaking down restrictive state laws into several categories, including pre-*Roe* bans that *Dobbs* reactivated).

86. *See* Megan Messerly & Alice Miranda Ollstein, *Abortion Bans and Penalties Would Vary Widely by State*, POLITICO (May 6, 2022, 4:30 AM), https://perma.cc/5LB9-6YXN (including an interactive map showing that all but one of the states with abortion bans would impose prison time for violations); Amanda Zablocki & Mikela Sutrina, *The Impact of State Laws Criminalizing Abortion*, LEXISNEXIS PRAC. GUIDANCE J., https://perma.cc/T3WS-BUK9 (PDF) (last updated Aug. 22, 2022) (listing states that criminalize abortion and noting penalties including fines and incarceration ranging from "a few months to life in prison").

87. *See, e.g.*, Debra Cassens Weiss, *Is Prison Time a Possibility Under Restrictive Abortion Laws? One State Authorizes Life Sentences for Medical Doctors*, ABA J. (May 23, 2022, 8:20 AM), https://perma.cc/L8RE-VFMR (reporting that Texas law authorizes incarceration for five years to life, and Alabama law imposes a minimum prison term of ten years and a maximum of ninety-nine years).

has clearly approved these sanctions.[88] A growing number of states are authorizing civil suits against abortion providers and others who aid and abet abortion.[89] Legislators in these states are not simply trying to prevent abortions within their own boundaries, but are also attempting to prevent those states' residents from obtaining abortions elsewhere.[90] Prominent antiabortion organizations are drafting model bills that would prohibit both in-state and out-of-state abortions.[91] The antiabortion lobby is campaigning for federal prohibitions of cross-border abortions and of mailing abortion drugs.[92] The

88. *See Dobbs*, 142 S. Ct. at 2253–54 (asserting that criminal penalties for abortion have a long pre-*Roe* history); *id.* at 2318 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (noting that "[a] State can of course impose criminal penalties on abortion providers, including lengthy prison sentences," in the aftermath of *Dobbs*).

89. *See Memo: Fifteen States and Counting Poised to Copy Texas' Abortion Ban*, NARAL PRO-CHOICE AM., https://perma.cc/H47S-V5DJ (listing fifteen states poised to copy Senate Bill 8 in Texas, which allows third-party suits against abortion providers and facilitators, and also providing links to bills).

90. *See* Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J.F. 197, 198 (2022) ("[S]ome antiabortion activists and legislators seek not only to eliminate abortions within their states, but also to prevent residents from traveling to get abortions where they are legal . . . ."); Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Prevent Patients from Crossing State Lines*, WASH. POST (June 29, 2022, 6:17 PM), https://perma.cc/MM3W-KGNQ (last updated June 30, 2022, 8:30 AM) ("Several national antiabortion groups and their allies in Republican-led state legislatures are advancing plans to stop people in states where abortion is banned from seeking the procedure elsewhere, according to people involved in the discussions."); Christian F. Nunes, *The Senate Failed Women Today—But Women Will Not Fail This November*, NAT'L ORG. FOR WOMEN (May 11, 2022), https://perma.cc/GQ5B-ETJ3 (indicating that "right-wing legislators are advocating for and passing law after law to . . . prohibit travel to other states for abortion care").

91. One example is the multifaceted model statute drafted by an attorney for the National Right to Life Committee, the nation's largest antiabortion group. MODEL ABORTION LAW introductory cmt. (NAT'L RIGHT TO LIFE COMM., Proposed Draft 2022), https://perma.cc/DW6Z-KU4J (PDF) (listing recommendations for a model abortion law). The conservative Thomas More Society is also drafting model legislation focusing on abortion travel. *See* Kitchener & Barrett, *supra* note 90 ("The Thomas More Society . . . is drafting model legislation . . . that would allow private citizens to sue anyone who helps a resident of a state that has banned abortion from terminating a pregnancy outside of that state.").

92. Memorandum from Majority Staff, Comm. on Oversight & Reform, on Analysis of Republican Efforts to Restrict Abortion Nationwide 1 (Sept. 29, 2022), https://perma.cc/G4E5-8SYF (noting that Republicans in Congress had

long-term goal of this campaign is to ban abortion throughout the United States.[93]

The following Sections will explore in detail how the new laws are targeting three categories of people: abortion providers,[94] abortion seekers,[95] and "aiders and abettors" of abortion.[96] This analysis will set the stage for a later argument that all three categories of people would benefit greatly from laws protecting the confidentiality of communication regarding abortion.

1. Liability for Abortion Providers

Several states now impose criminal and civil liability on doctors, pharmacists, and other medical providers who take part in terminating pregnancies within those states' borders, unless the patients receiving the abortion care fall within a narrow set of exceptions. A portion of the states with abortion bans make exceptions for rape or incest, but approximately one dozen of the antiabortion states do not.[97] Some states allow abortion before a certain gestational stage: in states with "fetal heartbeat" laws,

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introduced four bills "targeting a person's ability to travel to obtain an abortion"); Rachel Treisman, *Removing Federal Abortion-Rights Protections May Spark New Legal Fights Between States*, NPR (May 5, 2022, 1:10 PM), https://perma.cc/9KYG-G4DR (reporting that, according to NYU law professor Melissa Murray, "it's possible that a majority-conservative Congress could pass a law prohibiting the use of the mails to distribute abortion medications").

93. Jennifer Haberkorn, *With* Roe *Dead, Republicans Call for Abortion Bans in All States*, L.A. TIMES (June 24, 2022, 9:04 AM), https://perma.cc/9PJA-Y7RL (quoting former Vice President Mike Pence and other Republicans who are striving to eliminate abortion in all states).

94. *See infra* Part I.A.1.

95. *See infra* Part I.A.2.

96. *See infra* Part I.A.3.

97. *See* Dana Goldstein & Ava Sasani, *What New Abortion Bans Mean for the Youngest Patients*, N.Y. TIMES (July 16, 2022), https://perma.cc/8GG3-7XJ7 (last updated July 25, 2022) (indicating that the "[new abortion] bans in nearly a dozen states do not make exceptions for rape or incest"); Nunes, *supra* note 90 (indicating that "the Mississippi abortion case emboldened state legislatures to unleash a tidal wave of cruelty" and that "right-wing legislators are advocating for and passing law after law to criminalize abortion with no exceptions for rape and incest"); Editorial, *The Ruling Overturning* Roe *Is an Insult to Women and the Judicial System*, N.Y. TIMES (June 24, 2022), https://perma.cc/8JZR-PL65 ("Many women may be forced by law to carry pregnancies to term, even, in some cases, those caused by rape or incest.").

the deadline tends to be approximately six weeks.[98] A pregnant person who faces a grave medical risk may generally obtain an abortion for that reason,[99] but proof of such a condition can be difficult to demonstrate.[100] Providers of abortion care who defy the new laws in conservative states face not only criminal prosecution, but also civil litigation. Texas passed its notorious Senate Bill 8 (hereafter "S.B. 8") in 2021 to authorize third-party suits against abortion providers,[101] and many other states have shown interest in emulating the Texas model.[102] The conservative states' reliance on private enforcement by "bounty hunters" will persist after the new criminal bans take effect, because lawmakers worry that some liberal prosecutors will be reluctant to charge abortionists to the full extent that the law permits.[103] The foregoing discussion refers to abortion-specific

98. *See* Julie Carr Smyth, *Explainer: Abortion Landscape Under State "Heartbeat" Laws*, AP NEWS (June 29, 2022), https://perma.cc/NY83-NFN3 (explaining "fetal heartbeat bills" and listing the states that have them in effect).

99. *See, e.g.*, MODEL ABORTION LAW § 3 (NAT'L RIGHT TO LIFE COMM., Proposed Draft 2022), https://perma.cc/DW6Z-KU4J (PDF) (treating all abortions as felonies, except those necessary to save the mothers' lives).

100. *See, e.g.*, Aria Bendix, *How Life-Threatening Must a Pregnancy Be in Order to End It Legally?*, NBC NEWS (June 30, 2022, 1:57 PM), https://perma.cc/F6AS-AW73 ("Most abortion bans that have gone into effect . . . make exceptions for life-threatening situations . . . [b]ut there is no clear legal definition of which conditions qualify for those exceptions, or how severe they have to be for a doctor to perform an abortion free of liability.").

101. The Texas Legislature has posted the final version of S.B. 8 that became law on September 1, 2021. *See* S.B. 8, 87th Leg., 3d Spec. Sess. (Tex. 2021) (allowing third parties, even those unrelated to abortion patients, to recover damages and attorneys' fees from abortion providers).

102. *See* Allison Durfee, *South Dakota Governor Latest to Introduce Texas Abortion Copycat Bill—Here Are All the States Weighing a Similar Ban*, FORBES (Jan. 21, 2022, 4:26 PM), https://perma.cc/C2Z4-Z6NF (updated Jan. 31, 2022, 3:32 PM) (listing states that are attempting to copy Texas's S.B. 8); Christine Vestal, *Citizen Enforcement of Texas Abortion Ban Could Spread to Other Laws*, PEW CHARITABLE TRS.: STATELINE (Sept. 23, 2021), https://perma.cc/CH7P-KFVF (predicting that fourteen states could adopt the Texas model); Zubrzycki, *supra* note 90, at 203 (noting that Oklahoma has adopted a law authorizing such suits).

103. *See* MODEL ABORTION LAW introductory cmt. at 2 (NAT'L RIGHT TO LIFE COMM., Proposed Draft 2022), https://perma.cc/DW6Z-KU4J (PDF) (asserting that the reluctance of "radical Democrat prosecutors to . . . enforce pro-life laws post-*Roe*" necessitates the continued use of third-party civil suits to stop abortion providers); Caroline Kitchener, *Conservatives Claim Abortion Bans*

statutes, but abortion providers also need to be mindful of generic homicide and wrongful death statutes that could apply to terminating pregnancies now that the Supreme Court seems to allow states to treat a fetus as a human life.[104] The cumulative effect of these various legal hazards is to discourage abortion providers from operating at all in conservative states.[105]

Out-of-state abortion providers could also face legal jeopardy if they serve patients coming from states where abortion is illegal. In some antiabortion states, legislators and prosecutors believe that criminal charges are appropriate for out-of-state abortion providers.[106] Such prosecutions could theoretically proceed under existing conspiracy laws;[107] the

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Not Enforced, Want Jail Time for Pill "Trafficking", WASH. POSt (Dec. 14, 2022, 6:00 AM), https://perma.cc/9U9U-ZDY9 (last updated Dec. 14, 2022, 7:30 AM).

104. *See supra* note 82 and accompanying text; *see also* Mark Joseph Stern, *The Ironic, Unintended Consequence of SCOTUS's Plan to Overturn* Roe, SLATE (May 19, 2022, 2:21 PM), https://perma.cc/DNQ3-FZYH ("A new crop of 'fetal personhood' bills would grant legal rights to fetuses, deeming their termination 'homicide' under state law and subjecting providers to serious legal jeopardy."); Eugene Volokh, *Justice Kavanaugh on the Right to Travel to Get an Abortion*, REASON: THE VOLOKH CONSPIRACY (June 24, 2022, 1:26 PM), https://perma.cc/WKJ3-CRHR (noting that abortions "may already be actionable under the normal wrongful death statutes of a state that defines life as beginning at conception").

105. *See, e.g.,* Selena Simmons-Duffin, *Doctors Who Want to Defy Abortion Laws Say It's Too Risky*, NPR (Nov. 23, 2022, 5:01 AM), https://perma.cc/S348-78C3 (quoting one doctor who said that, while she is sympathetic to the plight of abortion seekers, "[t]here is no way that I would risk my personal freedom and jail time for providing medical care"); Amir Vera & Randy Kaye, *Abortion Clinics in the Deep South Are Dealing with the Realities of a Post-*Roe v. Wade *World*, CNN, https://perma.cc/7SPX-H9TV (last updated June 28, 2022, 8:26 AM) (indicating that abortion clinics are shutting down altogether in antiabortion states); Kate Gibson, *More Than a Quarter of Abortion Clinics Could Close If* Roe v. Wade *Is Struck Down, Study Finds*, CBS NEWS: MONEYWATCH (June 21, 2022, 5:50 PM), https://perma.cc/89PN-YUBE (citing a study indicating that approximately 200 of the nation's 800 abortion clinics would shut down after a reversal of *Roe*).

106. *See* Hiltzik, *supra* note 15 ("Antiabortion states have passed or are considering laws that would expose out-of-state medical providers to . . . criminal liability for assisting in abortions . . . ."); Stern, *supra* note 104 (reporting that "red-state lawmakers are already considering measures . . . [authorizing] criminal charges against [out-of-state] providers who serve patients from conservative states").

107. *See* Carly Wanna, *Abortion Clinics Fear They'll Be Targeted by Out-of-State Prosecutors*, BLOOMBERG: BLOOMBERG EQUALITY (June 30, 2022, 8:00 AM), https://perma.cc/7MGZ-GAKH.

object crime would be the violation of a new antiabortion statute or the murder of a fetus now deemed to be equivalent to a human being.[108] Such prosecutions might allege a sufficient jurisdictional nexus based on the defendant's communication or other joint activity with "co-conspirators" in the prosecuting state, such as coordinating with an in-state medical clinic to collect a blood sample or conduct an ultrasound exam for a patient who seeks a cross-border abortion.[109] While the defendants in such cases could make arguments to resist extraterritorial jurisdiction, they would be vulnerable to the extent that they or their assets were ever in the prosecuting states, and the uncertainty as to extraterritorial jurisdiction would not dissuade zealous prosecutors from filing charges.[110] Another risk is that civil plaintiffs in antiabortion states could sue out-of-state abortionists,[111] and these suits would be more

108. *See* Kaia Hubbard, *Making Abortion Murder*, U.S. NEWS (May 6, 2022), https://perma.cc/84JA-8NV5.

109. *See* Dan Hinkel, *With End of* Roe*, Can Abortion Proponents in Other States Sue or Prosecute Illinois Residents?*, CRAIN'S CHI. BUS. (Nov. 17, 2022, 4:27 PM), https://perma.cc/G5MX-T356 (reporting that, in the view of some legal experts, "the law is unsettled enough that courts could rule prosecutors can target out-of-state providers who perform abortions on people from their states if some element of the alleged crime happened in the prosecutor's jurisdiction"); Megan Donovan, *Improving Access to Abortion Via Telehealth*, GUTTMACHER INST.: GUTTMACHER POL'Y REV. (May 16, 2019), https://perma.cc/KVY4-PRXB.

110. An article in the *Columbia Law Review* predicts that many pro-life states will simply push ahead with prosecutions of cross-border abortions until courts prohibit such prosecutions. *See* David S. Cohen et al., *The New Abortion Battleground*, 132 COLUM. L. REV. 1, 30 (2023) [hereinafter Cohen et al., *The New Abortion Battleground*]

> Antiabortion states and cities will not wait for the U.S. Supreme Court to give them permission to apply their laws extraterritorially; as the Missouri bills and sanctuary city ordinances above make clear, they will just do it. It could take years before the litigation surrounding these developments reaches the Court, and in the meantime, states will try what they can to stop abortion, waiting for courts to call their bluff.

accord Ava Sasani, *Is It Legal for Women to Travel out of State for an Abortion?*, N.Y. TIMES (June 24, 2022), https://perma.cc/4TJN-Z7C2 (last updated June 27, 2022) (citing Drexel University law professor David Cohen, who cautioned that the lack of such prosecutions to date or the uncertainty as to their constitutionality would not necessarily stop zealous prosecutors from filing charges now that the Supreme Court has overturned *Roe*).

111. *See* Ken Dilanian, *There's Another War Between the States Coming over Abortion*, NBC NEWS (June 27, 2022, 4:54 PM), https://perma.cc/MLK2-

likely to withstand challenges than would cross-border prosecutions.[112] Even the act of mailing abortion drugs from a pro-choice state to an antiabortion state could bring criminal charges or lawsuits.[113] Commentators believe these various sanctions will have a chilling effect that will discourage out-of-state abortion providers from serving patients who live in states that have outlawed abortion.[114]

Abortion doctors could lose their licenses. State legislatures or medical boards have the power to determine that terminating a pregnancy provides a ground for revoking a doctor's ability to practice any category of medicine.[115] Forfeiture of a medical

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2LRZ (indicating that "some states [are] allowing private lawsuits against out-of-state providers"); Adam Liptak, *The Right to Travel in a Post-*Roe *World*, N.Y. TIMES (July 11, 2022), https://perma.cc/4XYZ-CW79 (indicating that Missouri has twice considered a bill authorizing lawsuits against out-of-state abortion providers who serve Missourians); Volokh, *supra* note 104 (discussing the possibility of cross-border wrongful death suits for abortion).

112. *See* Kitchener & Barrett, *supra* note 90 ("In relying on private citizens to enforce civil litigation, rather than attempting to impose a state-enforced ban on receiving abortions across state lines, such a law is more difficult to challenge in court . . . .").

113. *See* Zubrzycki, *supra* note 90, at 204 (noting that a caucus of Texas legislators has declared that the state's criminal prohibitions extend to "drug-induced abortions if 'any part of the drug regimen is ingested in Texas, even if the drugs were dispensed by an out-of-state abortionist'"); Kitchener, *supra* note 103 (noting that the election of an antiabortion President in 2024 could lead to severe penalties for the distribution of abortion pills); Claire Marblestone, *Three Considerations for Health Care Providers After the* Dobbs *Decision*, NAT'L L. REV. (June 27, 2022), https://perma.cc/4RSV-A2HX (providing examples of the hazards faced by out-of-state prescribers or shippers of abortion drugs).

114. *See, e.g.,* Kitchener & Barrett, supra note 90 (predicting that laws authorizing cross-border civil suits for abortion "could have a chilling effect, where doctors in surrounding states stop performing abortions before courts have an opportunity to intervene, worried that they may face lawsuits if they violate the law").

115. *See* Maggie Stevens et al., *Is Abortion Legal? What the Supreme Court Overturning of* Roe v. Wade *Means*, GRID (June 24, 2022), https://perma.cc/M4FJ-FYVP ("Many state medical boards are allowed to censure or revoke the licenses of doctors who perform abortions."); Kayte Spector-Bagdady & Michelle Mello, *Protecting the Privacy of Reproductive Health Information After the Fall of* Roe v. Wade, 3 JAMA HEALTH F., no. 6, June 3, 2022, at 1, 1 (noting that current privacy laws would not impede "a state board of medical licensing investigating whether a physician provided illegal abortions"). Some state legislators had even attempted to revoke medical licenses for abortionists before *Dobbs*. *E.g.*, Heide Brandes, *Oklahoma*

license would not necessarily require a criminal prosecution or any sort of judicial proceeding.[116] Doctors could lose their licenses if they cross state lines from time to time to perform abortions in states where abortion is legal,[117] or if they do so in federal enclaves such as military bases within states that have banned abortion.[118] The fact that a doctor has a separate license in a state that permits abortion would not necessarily protect the doctor from disciplinary proceedings in a state that prohibits abortion, even if the doctor were careful to perform abortion only in a jurisdiction that permits the procedure.[119]

2. Liability for Abortion Seekers

Historically, states that have criminalized abortion have targeted abortion providers rather than patients, but *Dobbs* invites states to impose criminal penalties on both groups.[120]

Lawmakers Approve Bill to Revoke Licenses of Abortion Doctors, REUTERS (Apr. 22, 2016, 1:18 PM), https://perma.cc/65TJ-55LW (reporting that the Oklahoma House of Representatives had approved a bill providing that "doctors who perform abortions would risk losing their medical licenses" unless they could cite a reason such as "protecting the mother or removing a miscarried fetus").

116. Stevens et al., *supra* note 115 ("Medical boards don't adhere to the same legal standards as a courtroom, so a medical board could opt to revoke a doctor's license even if the doctor is not found guilty of performing an abortion [in a judicial proceeding].").

117. *See* Alice Miranda Ollstein, *Abortion Doctors' Post*-Roe *Dilemma: Move, Stay or Straddle State Lines*, POLITICO (June 29, 2022, 4:30 AM), https://perma.cc/359N-WMVF (indicating that some abortionists might be willing to cross state lines periodically in order to perform abortions in states where the practice is permissible, but also recognizing that these doctors are highly sensitive to the risk of losing their licenses in their home states).

118. *See* Charlie Savage, *Bracing for the End of* Roe v. Wade*, the White House Weighs Executive Actions*, N.Y. TIMES (June 16, 2022), https://perma.cc/VLU2-KY4P (last updated June 27, 2022) (noting that even if President Biden allowed abortions at federal enclaves, doctors who performed abortions there would risk losing their licenses because licensure is controlled by state agencies).

119. *See* Marblestone, *supra* note 113 ("It is possible that state licensing agencies where abortion is illegal could pursue disciplinary action against a provider who is licensed in multiple states, if that provider performs a legal abortion in another state.").

120. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting)

> A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law

Some conservative state legislators and prosecutors seem interested in seizing the new opportunity to pursue abortion seekers as criminals.[121] Legislatures in such states could create criminal penalties for patients who obtain abortions, or even for patients who attempt to do so.[122] In states where abortion statutes only criminalize the provision rather than the receipt of abortion care, prosecutors could charge patients with aiding and abetting abortion.[123] These states could also treat the act of abortion as feticide cognizable under traditional homicide statutes; in such prosecutions, the patient would be directly liable, or could face derivative liability as an accessory to or co-conspirator with the doctor performing the abortion.[124]

> will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion.

121. *See* Dana Hall McClain, Opinion, *The Problems with Criminalizing Women*, AL.COM (July 6, 2022, 7:11 AM), https://perma.cc/RAZ5-25J9 (noting that a subset of the antiabortion movement "wants to pursue criminal penalties for women who abort, and they're garnering attention in some corners"); *e.g.*, Justin Miller & Michelle Pitcher, *Before "*Roe*"—And After*, TEX. OBSERVER (July 11, 2022, 9:00 AM), https://perma.cc/F8JV-BRRH (reporting that Farah Diaz-Tello, senior counsel and legal director at the reproductive justice group If/When/How, "expects that prosecutors in Texas and other anti-abortion states will take it upon themselves to prosecute people who end their pregnancies"); Poppy Noor, *Onslaught of New Abortion Restrictions Looms in Reddest of States*, THE GUARDIAN (Dec. 13, 2022, 5:00 AM), https://perma.cc/VH77-GEG4 (indicating that in upcoming legislative sessions, "far-right groups" will seek to impose criminal penalties on abortion seekers, not just for abortion providers).

122. *See* Noa Yachot, *Who Will Be Prosecuted for Abortion If Fetuses Are Recognized as People?*, THE GUARDIAN (May 18, 2022, 5:00 AM), https://perma.cc/5M4R-LM58 (indicating that the "reversal of *Roe v. Wade* will lead to more women being charged over pregnancy outcomes" and reporting that the National Association of Criminal Defense Lawyers has identified "thousands of crimes" with which prosecutors may charge pregnant people after the fall of *Roe*).

123. Some authority precludes prosecutors from charging a person with aiding and abetting a crime if that person was a victim of the crime. *See, e.g.*, MODEL PENAL CODE § 2.06(6)(a) (defining a person not considered an accomplice). But now that the Supreme Court and some states accept the premise of fetal personhood, the fetus could be a third-party victim, allowing prosecutors to sidestep such preclusions in charging abortion patients.

124. *See, e.g.*, Miller & Pitcher, *supra* note 121 (indicating that a district attorney in Texas charged a woman with murder after she self-induced an abortion); Robert Baldwin III, *Losing a Pregnancy Could Land You in Jail in Post-*Roe *America*, NPR: ALL THINGS CONSIDERED (July 3, 2022, 5:27 AM),

Involuntary manslaughter or negligent homicide would be also be possible charges for defendants who have caused the termination of pregnancies under circumstances in which prosecutors could not prove beyond a reasonable doubt that the defendants intended to abort.[125] In addition, civil plaintiffs could sue abortion patients under abortion-specific statutes or wrongful death statutes.[126] Some legislators are even advocating to allow lawsuits by the families of rapists to prevent the rape survivors from obtaining abortions.[127]

Would interstate travel allow residents in antiabortion states to obtain abortions elsewhere? The logistical challenges would certainly be significant, especially for abortion seekers with limited financial resources,[128] but experts expect that demand for cross-border abortions will soar after *Dobbs*.[129] Lawmakers in some antiabortion states have declared that they want to prevent their states' residents from terminating their pregnancies in other states.[130] One widely discussed means of

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https://perma.cc/57XM-UYFW (reporting that thirty-eight states already have statutes under which prosecutors could charge "fetal harm").

125. *See, e.g.,* Baldwin, *supra* note 124 (providing examples of such charges).

126. *See* Vaughan Jones, *Arizona Law Professor Says Civil Lawsuits Could Further Abortion Ban Enforcement*, KJZZ (July 18, 2022, 7:29 AM), https://perma.cc/FEP6-UCJD (interviewing Barbara Atwood, a law professor at the University of Arizona, reporting that such suits will likely increase following the reversal of *Roe*, and that antiabortion groups are drafting model legislation to facilitate these suits).

127. *See, e.g,* Alysha Qamar, *"I Don't Care How the Conception Occurred": Wisconsin Lawmaker Advocates for No Abortion Exceptions*, DAILY KOS (Mar. 17, 2022, 1:28 PM) https://perma.cc/R4MH-KPJA.

128. *See infra* Part I.C.

129. *See* Alejandro O'Connell-Domenech, *One in Ten Abortions Performed on People Who Had to Travel out of State, Report Finds*, THE HILL: CHANGING AMERICA (July 21, 2022) https://perma.cc/2RTK-Q2DE.

130. *See* Proposed Brief for State of California et al. as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction at 3, Fund Tex. Choice v. Paxton, No. 22cv859 (W.D. Tex. Oct. 4, 2022), 2022 U.S. Dist. Ct. Motions LEXIS 321902 (pointing out that state leaders in Texas and other states have "explored legislation and other opportunities to deter interstate travelers who obtain [abortions] outside their borders"); Zubrzycki, *supra* note 90, at 204 ("[T]here is good reason to think that the near future will see more express efforts to prevent pregnant people from traveling to states where abortion is legal."); Kitchener & Barrett, *supra* note 90 (noting the role of national antiabortion organizations in orchestrating the passage of travel restrictions); Nunes, *supra* note 90 (indicating that "right-wing legislators are

restricting cross-border abortions would be to criminalize travel for the purpose of obtaining an abortion.[131] States could pass new statutes that explicitly criminalize such travel.[132]

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advocating for and passing law after law to . . . prohibit travel to other states for abortion care"); Elie Mystal, *Could GOP States Really Stop Pregnant People from Traveling to Get Abortions?*, THE NATION (July 22, 2022), https://perma.cc/N3XP-NJ2E ("Already, Republican states have moved to propose laws that would restrict the right of women and pregnant people to seek abortions in other states."); Janelle Stecklein Cnhi, *Gov. Stitt Signs Bill Banning Nearly All Abortions*, CLAREMORE DAILY PROGRESS (May 26, 2022), https://perma.cc/B6XA-DRVK (reporting fears that, after *Dobbs*, Oklahoma's Republican legislators will attempt "to ban women from traveling to other states to obtain abortions"); Editorial, *First Abortion, Next Birth Control: Women Understand the Stakes*, SUN SENTINEL (May 21, 2022), https://perma.cc/XW6E-8ZCF (PDF), 2022 WLNR 15982200 ("The next wave of restrictions will probably target the ability of women to leave an abortion-ban state to get the procedure in a safe-haven state . . . .").

131. *See* Gloria Oladipo, *U.S. Abortions Decrease by 10,000 Since Repeal of* Roe v. Wade *in June*, THE GUARDIAN (Oct. 31, 2022, 11:07 AM), https://perma.cc/6M9V-4KAU ("States have also been exploring possible ways to target criminalizing interstate travel for an abortion . . . ."); Cohen et al., *The New Abortion Battleground*, *supra* note 110, at 22 ("After *Roe*, state protectors and legislators will likely try to impose civil or criminal liability on their citizens who travel out of state to obtain an abortion . . . ."); *accord The Ruling Overturning Roe Is an Insult to Women and the Judicial System*, *supra* note 97 (predicting that abortion seekers in antiabortion states "who are able to travel to other states could face the risk of prosecution").

132. *See* Noor, *supra* note 121 (reporting that in upcoming legislative sessions, "[a]bortion rights advocates are bracing themselves for . . . bills to criminalize out-of-state travel for abortion"); Sasani, *supra* note 110 (discussing the risk that after *Dobbs* states will try to criminalize cross-border travel to obtain abortions); Laura Hancock, *Will Lame Duck Ohio Legislature Pass a Near Total Abortion Ban? Scenarios for the Future of Abortion Rights*, CLEVELAND.COM (Nov. 5, 2022), https://perma.cc/6CYC-AY9X (PDF), 2022 WLNR 35412754 (reporting that Ohio lawmakers "also may consider a bill criminalizing people who travel outside of state lines to obtain an abortion"); Hannah Mackay, *Will Canada Become Metro Detroit's Closest Abortion Haven?,* DETROIT NEWS (June 21, 2022, 11:00 PM), https://perma.cc/55UP-9QY7 ("Several states, including Mississippi and Texas, have attempted to pass laws limiting or criminalizing travel for out-of-state abortions . . . ."); Mark Patrick Miller, *Who Will Face Punishment When Abortions Are Banned, and How?*, WICHITA EAGLE (May 21, 2022, 7:00 AM), https://perma.cc/TKP4-CK9N (last updated May 23, 2022, 12:48 PM) ("Conservatives in some states, including Missouri, have introduced 'abortion travel bans' that criminalize either women leaving their states to have abortions or helping women to do so."); Stern, *supra* note 104 ("And red-state lawmakers are already considering measures that would punish individuals who travel across state lines to terminate a pregnancy . . . ."); Rebbeca Traister, *The Limits of Privilege: The New Abortion Regime Is Going to Affect Everyone*, THE CUT (May 7, 2022),

Alternatively, states could rely on existing homicide statutes and charge abortion travel as an inchoate offense such as conspiracy or attempting to aid and abet feticide (the actus reus for such an offense would occur entirely within the prosecuting state).[133] Many states also appear likely to authorize civil suits whereby antiabortion activists could secure $10,000 in damages from defendants who travel out of state to obtain abortions.[134] National advocacy groups are already circulating templates for such legislation, and are using S.B. 8 in Texas as a model.[135] One commentator has referred to these laws as "fugitive womb laws"—an allusion to the Fugitive Slave Act of 1850.[136] Congresswoman Lizzie Fletcher of Texas has warned that the new laws restricting abortion travel could portend a "humanitarian crisis."[137]

A debate has arisen over whether antiabortion states have authority to impede travel by citizens seeking abortions in other states. Some law professors opine that these restrictions are unconstitutional,[138] while other professors are less certain about

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https://perma.cc/VD8Q-W6CK ("Even crossing to another state to obtain an abortion may entail legal jeopardy as states consider various means to prohibit and criminalize abortion travel.").

133. *See, e.g.*, People v. Garton, 412 P.3d 315, 334 (Cal. 2018) (indicating that "our courts do have jurisdiction to criminally prosecute a defendant both for in-state conspiracies to commit offenses out of state, and for in-state aiding and abetting of the commission of offenses out of state" (internal quotation omitted)); *cf.* Naomi Cahn et al., *Is It Legal to Travel for Abortion After* Dobbs*?*, BLOOMBERG L. (July 11, 2022, 4:00 AM), https://perma.cc/A5TN-M3VH (setting forth three law professors' views that a state generally cannot criminalize acts outside the state, but querying whether a state could prosecute preliminary steps toward obtaining an out-of-state abortion).

134. *See* Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), https://perma.cc/U337-UNWZ.

135. *See* Kitchener & Barrett, *supra* note 90 ("The National Association of Christian Lawmakers, an antiabortion organization led by Republican state legislators, has begun working with the authors of the Texas abortion ban to explore model legislation that would restrict people from crossing state lines for abortions . . . ."); *see also* MODEL ABORTION LAW §§ 9–10 (NAT'L RIGHT TO LIFE COMM., Proposed Draft 2022), https://perma.cc/DW6Z-KU4J (PDF).

136. *See* Mystal, *supra* note 130.

137. Benjamin Wermund, *House Passes Abortion Access Legislation Led by Houston Rep. Lizzie Fletcher*, HOUS. CHRON. (July 15, 2022, 1:40 PM), https://perma.cc/S6W9-3MMV.

138. According to George Mason University law professor Ilya Somin, states' attempts to criminalize abortion-related travel might be vulnerable to

the viability of a constitutional challenge.[139] The Supreme Court has given mixed signals on this issue.[140] The odds that a constitutional challenge might succeed would vary depending on

challenge on the grounds, *inter alia*, that such laws might exceed states' extraterritorial jurisdiction, unduly burden citizens' right to travel, and offend the Dormant Commerce Clause. Ilya Somin, *Can States Ban Residents from Getting Abortions in Other States, If* Roe v. Wade *Is Overturned?*, REASON: THE VOLOKH CONSPIRACY (May 10, 2022, 5:08 PM), https://perma.cc/74L2-6XAW.

139. Erwin Chemerinsky, Dean of the U.C. Berkeley School of Law and one of the nation's foremost experts on constitutional law, offered this analysis:

> [S]tates that prohibit abortion will also likely try to adopt laws forbidding women from leaving the state to obtain an abortion.
>
> The constitutionality of such efforts is uncertain.
>
> Until that constitutionality is decided in court, states can implement travel bans unless Congress enacts blanket abortion protections for the whole country.

Erwin Chemerinsky, Opinion, *Guns, Prayer and Marriage Equality: How the Supreme Court Is About to Change Life in California*, S.F. CHRON (May 4, 2022), https://perma.cc/3DN5-95AP (last updated June 23, 2022, 9:47 AM); *accord* Cohen et al., *supra* note 110, at 19 (indicating that the constitutionality of antiabortion states' extraterritorial enforcement is "unclear"); Zubrzycki, *supra* note 90, at 203 ("[T]here is a live debate about how broadly such laws can apply . . . in contexts where women leave their home states to seek an abortion.").

140. In dictum near the end of his concurrence in *Dobbs*, Justice Kavanaugh expressed doubt that a ban on abortion-related travel would be constitutional. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) ("[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."). No other Supreme Court Justice squarely addressed this issue in *Dobbs*, and the three dissenters predicted that some states would prohibit interstate travel for the purpose of obtaining an abortion. *See id.* at 2318 (Breyer, Sotomayor, & Kagan, JJ., dissenting) ("In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions . . . ."). Commentators have cautioned against reliance on Justice Kavanaugh's dictum in *Dobbs*, because he lacked any co-authors for this concurrence, he has previously reversed his positions on abortion, and the right to travel he mentioned does not have an explicit constitutional basis—just like the abortion right he refused to acknowledge in *Dobbs*. *See* Liptak, *supra* note 111 (citing skepticism expressed by U.C. College of the Law, San Francisco, law professor Rory Little, and quoting a statement by University of Pittsburgh law professor Greer Donley that the dictum "offered 'literally no protection' to out-of-state doctors and clinics who provide abortions to women from states where the procedure is illegal"); *accord* Mystal, *supra* note 130 (raising misgivings about Justice Kavanaugh's dictum on abortion travel); Zubrzycki, *supra* note 90, at 205 (cautioning against reliance on Justice Kavanaugh's dictum).

the nature of the state action under review. An explicit ban on interstate travel might not withstand judicial review, but other state strategies might survive review if the impact on travel was more indirect—for example, if prosecutors had charged inchoate offenses under existing homicide statutes and relied on defendants' conduct entirely within the prosecuting states' boundaries before defendants crossed over to states permitting abortion. Furthermore, the constitutional objections would be of little avail if raised against civil suits by private parties,[141] or if raised against a federal ban on abortion travel.[142] The attorneys advising the antiabortion legislatures do not doubt that these states have authority to restrict abortion travel,[143] and these states seem likely to sanction such travel until appellate courts direct otherwise,[144] which will not occur until after several years of litigation, if at all.[145] In the meantime, states' restrictions on

141. *See* Kitchener & Barrett, *supra* note 90 (reporting that proponents of civil suits over abortion travel are copying the strategy of S.B. 8 because "such a law is more difficult to challenge in court because abortion rights groups don't have a clear person to sue").

142. *See* Somin, *supra* note 138 ("A federal law banning interstate travel for the purpose of getting an abortion would likely fare better in Court . . . .").

143. *See* Kitchener & Barrett, *supra* note 90 ("'Just because you jump across a state line doesn't mean your home state doesn't have jurisdiction,' said Peter Breen, vice president and senior counsel for the Thomas More Society. 'It's not a free abortion card when you drive across the state line.'").

144. *See* Liptak, *supra* note 111 (quoting Rebecca Rebouché, interim dean of Temple University School of Law, who believes that antiabortion states "will start throwing everything at the wall to see what sticks"); *see also* Cohen et al., *The New Abortion Battleground*, *supra* note 110, at 30 (predicting that antiabortion states "will not wait for the U.S. Supreme Court to give them permission to apply their laws extraterritorially . . . and in the meantime, states will try what they can to stop abortion, waiting for courts to call their bluff"); Zubrzycki, supra note 90, at 204 (opining that "there is sufficient ambiguity in the legality of such efforts for states to at least attempt to undertake prosecutions of residents who travel to get abortions, either under laws prohibiting abortion generally or under laws expressly addressing interstate travel"); Mystal, *supra* note 130 (stating that "[c]onservative legislatures shouldn't be able to pass fugitive womb laws, but that doesn't mean they won't do it anyway—and get away with it").

145. *See* Steven Lubet, Opinion, *So Much for States' Rights: Republicans Target Out-of-State Abortions*, THE HILL (July 13, 2022, 8:00 AM), https://perma.cc/VU8N-H5AV ("[I]t would take years of litigation to get a definitive ruling from the Supreme Court [on the constitutionality of abortion-related travel restrictions], while thousands of women and their helpmates are intimidated by the prospect of vigilante prosecutions.").

abortion travel seem impervious to challenges and attempted countermeasures by President Joe Biden,[146] Attorney General Merrick Garland,[147] and Democrats in Congress.[148] In sum, the

146. The White House has expressed support for pregnant people seeking out-of-state abortions. In an executive order, *Protecting Access to Reproductive Healthcare Services,* the Biden Administration took some steps to assist abortion seekers who cross state lines. *See* Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 13, 2022) (convening a group of pro bono attorneys to assist abortion travelers and offering technical assistance to states in interpreting the right to travel). Observers are not optimistic that this order will make a practical difference. *See* Amanda Seitz & Colleen Long, *Biden's Efforts to Protect Abortion Travel Hit Roadblocks*, AP NEWS (Dec. 6, 2022), https://perma.cc/M8DS-5DSU ("In reality, though, the administration is shackled by a ban on federal funding for most abortions, a conservative-leaning Supreme Court inclined to rule against abortion rights and a split Congress unwilling to pass legislation on the matter."); *see also* Juliana Kim, *A New Executive Order Aims to Preserve Abortion Access, But Its Reach Is Limited*, NPR (July 8, 2022, 12:39 PM), https://perma.cc/C27C-BPNB (citing criticism that the Biden Administration is not directly providing travel assistance to abortion seekers).

147. *See* Press Release, Department of Justice, Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), https://perma.cc/5ZHJ-FS8D (announcing that DOJ will strive to protect reproductive freedom and the right to interstate travel for the purpose of terminating pregnancies). *But see* Thor Benson, *Interstate Travel Post-*Roe *Is Not as Secure as You May Think,* WIRED, (July 25, 2022, 7:00 AM), https://perma.cc/76H9-ZWQ2 (citing Professor Rebouché's pessimism that DOJ could prevail against states' travel restrictions, especially if states follow the Texas model of authorizing private enforcement, which DOJ unsuccessfully challenged last year).

148. Democrats in the U.S. House of Representatives passed a bill protecting abortion travel, but that bill will not pass the Senate. *See* Sahil Kapur, et al., *Republicans Block Bill to Protect Women Who Travel to Other States for Abortions*, NBC NEWS (July 14, 2022, 6:00 PM), https://perma.cc/856F-4XT3 (reporting that Senate Republicans have already blocked the bill and noting that passage in the Senate would require ten Republicans to vote with Democrats in order to end a filibuster)*; accord* Steve Benen, *Nearly Every GOP Rep Rejects Bill to Protect Interstate Abortion Travel*, MSNBC (July 18, 2022, 10:41 AM), https://perma.cc/6BN9-27EK (predicting that this bill has "zero" chance of passing in Senate). Senate Democrats introduced a bill in December 2022 that would provide funding for abortion travel, but that bill also has virtually no chance of becoming law. *See* Julia Mueller, *Senate Democrats Introduce Bill Funding Travel for Abortions*, THE HILL (Dec. 8, 2022 12:41 PM), https://perma.cc/4ERS-DQ4A (calling for grants from the Department of the Treasury to nonprofits helping with abortion-related travel); Devi Shastri, *Fresh off Win on Same-Sex Marriage, Sen. Tammy Baldwin Proposes Federal Travel Funds for Women Seeking Abortions*, MILWAUKEE J. SENTINEL (Dec. 8, 2022, 9:55 AM),

law governing interstate travel by abortion seekers will remain dangerously chaotic in the foreseeable future.

3. Liability for Third Parties Who Aid and Abet Abortion

Criminal and civil liability for an abortion, or attempt to obtain an abortion, could extend to an "accessory"—that is, some third party who aids and abets the "principal" seeking the abortion.[149] Virtually every state has a generic aiding and abetting statute that cross-applies to each statute criminalizing particular conduct.[150] An accessory can be liable for acts of aiding and abetting that occur before, during, and after the crime committed by the principal.[151] The actus reus requirement for aiding and abetting sets a very low bar—in other words, the assistance furnished need not be particularly helpful to the principal, so long as the person providing the assistance has a mens rea of specifically intending that the principal commit the object crime.[152] After *Dobbs,* antiabortion states could conceivably use their generic aiding and abetting statutes to charge any third party that helps an abortion seeker. Those third parties could be liable for aiding and abetting the crimes of abortion under new post-*Dobbs* statutes or fetal homicide under statutes predating *Dobbs*.[153] Some states are also emulating the Texas approach of empowering private "bounty hunters" to sue anyone who helps an abortion seeker, including one seeking an out-of-state abortion.[154]

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https://perma.cc/F863-UDY9 (last updated Dec. 9, 2022, 4:42 PM) (reporting that the chief sponsor of this bill admits it has "slim" chance of passing).

149. MODEL ABORTION LAW introductory cmt. at 6–8, §§ 4, 9 (NAT'L RIGHT TO LIFE COMM., Proposed Draft 2022), https://perma.cc/DW6Z-KU4J (PDF) (subjecting aiders and abettors to both criminal and civil liability).

150. JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 749–80 (9th ed. 2021).

151. *Id.*

152. *Id.*

153. *See* Zablocki & Sutrina, *supra* note 86 (discussing criminal liability for abortion and fetal homicide).

154. *See* Kitchener & Barrett, *supra* note 90 (reporting that the Thomas More Society's model statute would authorize private third-party civil suits against anyone who aids and abets abortion, with draft language "borrow[ing] from the novel legal strategy behind a Texas abortion ban . . . in which private citizens were empowered to enforce the law through civil litigation"); Sasani, *supra* note 110 (indicating that Oklahoma has also adopted such a statute);

Aiding and abetting theories could apply to a wide range of acts. As detailed in model statutes written by antiabortion groups, the theories could potentially cover out-of-state conduct that helps the principal to obtain an illegal abortion in the prosecuting state, or they could cover in-state conduct that assists the principal in obtaining an out-of-state abortion.[155] The list of acts that could give rise to this accessory liability is quite expansive. The following acts might possibly count as aiding and abetting illegal abortions:

1) Employers providing health insurance or travel aid with which employees can obtain out-of-state abortions;[156]
2) Nonprofit organizations subsidizing abortion travel;[157]
3) Any person providing transportation that allows an abortion seeker to reach a site, either in-state or out-of-state, where that person can receive abortion care;[158]
4) Any person providing a pregnancy test, blood test, ultrasound exam, or other procedure knowing that the

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Memo: Fifteen States and Counting Poised to Copy Texas' Abortion Ban, *supra* note 89.

155. *See* Sasani, *supra* note 110 ("People who assist a woman seeking an abortion in a neighboring state could also be at risk of prosecution."); *id.* (quoting Professor David Cohen as explaining that "it's likely that [the prosecutors] will go after the people that help the woman get the abortion" in another state (alteration in original)); Stern, *supra* note 104 (reporting that "red-state lawmakers" are already considering criminal charges for aiding and abetting cross-border abortions); *see also supra* notes 91–93 and accompanying text.

156. *See* Chris Marr & Robert Iafolla, *Can States Ban Employer Abortion Aid? Post-*Roe *Limits Explained*, BLOOMBERG L. (June 28, 2022, 10:17 AM), https://perma.cc/KF8Z-FX63; *see, e.g.,* Letter from Texas Freedom Caucus to Yvette Ostolaza, Mgmt. Comm. Chair, Sidley & Austin LLP (July 7, 2022), https://perma.cc/HEX9-4BUC (setting forth Texas legislators' threats, pursuant to existing and proposed law, of criminal liability for employers that cover costs of employees' travel to obtain out-of-state abortions).

157. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) (predicting that, in the wake of *Dobbs,* some states will criminalize the act of providing funding to abortion seekers).

158. Press Release, Senator Ron Wyden, Wyden Delivers Floor Speech After Republicans Block the Women's Health Protection Act (May 11, 2022), https://perma.cc/GYP7-MFVN (warning that, after *Dobbs*, conservative states will "criminalize women who travel to other states for an abortion, and even the person who gives them a ride").

recipient intends to use the results for the purpose of obtaining an out-of-state abortion;[159]

5) Any person serving as an "abortion doula" or otherwise giving care and support, however minor, to an abortion patient either before or after the termination of a pregnancy;[160] and
6) Any person merely providing information concerning options for abortion care.[161]

This potential liability has a chilling effect. All of the above-listed acts could possibly expose third parties to both criminal prosecutions and lawsuits in antiabortion states. Even if public officials insist that they will not enforce the aiding-and-abetting statutes, a few zealous private parties could take over enforcement pursuant to a statute modeled after S.B. 8 in Texas. The prosecutions and lawsuits would not need to be successful to impose huge costs—in terms of lost time, financial expenses, social opprobrium, and lost peace of mind—on the targets of this litigation. The predictable result is that aiding and abetting liability in antiabortion states is deterring a large number of third parties from offering assistance to desperate abortion seekers.[162]

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159. *Cf.* Donovan, *supra* note 109 (explaining that such procedures are necessary in an abortion seeker's own state before an out-of-state abortion provider may assist that person).

160. *See* MODEL ABORTION LAW introductory cmt. at 6, § 4 (NAT'L RIGHT TO LIFE COMM., Proposed Draft 2022), https://perma.cc/DW6Z-KU4J (PDF) (imposing liability for providing or offering doula services to a person who is seeking or has obtained an abortion).

161. *See Dobbs*, 142 S. Ct. at 2318 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (predicting that antiabortion acts will criminalize the sharing of information about abortion care, even care in states where the procedure is legal); MODEL ABORTION LAW introductory cmt. at 6 (NAT'L RIGHT TO LIFE COMM., Proposed Draft 2022), https://perma.cc/DW6Z-KU4J (PDF)

> Aiding or abetting an illegal abortion should include, but not be limited to . . . giving instructions over the telephone, the internet, or any other medium of communication regarding self-administered abortions or means to obtain an illegal abortion; [or] hosting or maintaining a website, or providing internet service, that encourages or facilitates efforts to obtain an illegal abortion . . . .

162. *See* Proposed Brief for State of California et al. as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 130, at 2 (explaining that plaintiffs funding abortion-related travel are "chilled by the ruinous criminal and civil liability" imposed under Texas law); *id.* (explaining that the antiabortion lawmakers "have explicitly admitted that [their] intent

B. *"Uterus Surveillance" Could Become Widespread*

Civil libertarians worry that, after *Dobbs*, people of childbearing age could be subject to onerous surveillance.[163] The aim of this surveillance would be to determine who is pregnant, who could become pregnant, who is considering an abortion, and who has received an abortion.[164] Armed with such information, police and private investigators could intercede to prevent abortions, or they could pass the information along to prosecutors and third-party plaintiffs who could exact reprisals against abortion patients in court proceedings.[165]

Threats to data privacy after *Dobbs* are a significant concern. Internet search histories could reveal who has sought information about pregnancy or abortion.[166] Location data

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in passing their antiabortion laws [was] to impede an individual's ability to . . . support a patient in need of an abortion"); Christopher Rowland, *Groups That Aid Abortion Patients Pull Back, Fearing Legal Liability*, WASH. POST (July 15, 2022, 6:00 AM), https://perma.cc/4FNX-EUE2; Erin Douglas & Eleanor Klibanoff, *Abortion Funds Languish in Legal Turmoil, Their Leaders Fearing Jail Time If They Help Texans*, TEX. TRIB. (June 29, 2022, 4:00 PM), https://perma.cc/4RNT-GR49.

163. *See* Nick Gillespie, *Get Ready for the Post-*Roe *Sex Police!*, REASON (June 24, 2022, 5:55 PM), https://perma.cc/2QMP-L9ZE ("This is not a recipe for limited government but for one that must, in the name of protecting life, liberty, and the pursuit of happiness, surveil and track all acts of potential procreation.").

164. *See* Tolentino, *supra* note 27.

165. *See id.*

> We have entered an era not of unsafe abortion but of widespread state surveillance and criminalization—of pregnant women, certainly, but also of doctors and pharmacists and clinic staffers and volunteers and friends and family members, of anyone who comes into meaningful contact with a pregnancy that does not end in a healthy birth.

Press Release, Senator Ron Wyden, *supra* note 158 ("With abortion criminalized, women's personal data is going to be weaponized against them by bounty hunters and the government.").

166. *See* Jessica Karins, *E&C Advances Privacy Bill Without Clarifying Abortion Implications*, INSIDE HEALTH POL'Y (July 20, 2022, 6:31 PM), https://perma.cc/V28B-VQT9 (PDF), 2022 WLNR 23481735 (citing the concern of Representative Anna Eshoo that, due to loopholes in current law and pending bills, "a prosecutor in a state that has criminalized abortion since the *Dobbs* decision could use . . . search history data[] to prosecute those who seek abortions"); Bobby Allyn, *Privacy Advocates Fear Google Will Be Used to Prosecute Abortion Seekers*, NPR (July 11, 2022, 5:00 AM), https://perma.cc/5K35-7ULW ("When someone uses a Google service on their

stored on cell phones could show visits to the offices of ob-gyn doctors or to abortion clinics.[167] Text messages might disclose news about pregnancy or plans to obtain an abortion.[168] Data from reproductive health apps, known as "period tracker apps," could show who is pregnant and who has ended a pregnancy.[169] Electronically stored payment history could indicate whether a person has purchased medical services or products related to pregnancy or abortion.[170] One nightmare scenario is that law enforcement could collect this various information to determine whether a suspect might be seeking an abortion, and then a squad car would intercept the fugitive when cell phone location data showed a trip to a border town with an abortion clinic. Another possibility is that prosecutors or private "bounty hunters" could initiate court proceedings to shame, punish, and sanction people who have obtained or provided abortions. Shockingly, the above-listed data is not difficult to obtain. Investigators could retrieve it with a subpoena or could monitor it proactively with judicial authorization.[171] Brokers are able to acquire this data, aggregate it, and sell it to the highest

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phone with location history enabled, Google logs that phone's position about every two minutes."). Anya Prince, a law professor specializing in health privacy, wrote that her expertise was not sufficient to conceal evidence of her own pregnancy from the "advertising ecosystem." Anya E.R. Prince, *I Tried to Keep My Pregnancy Secret*, THE ATLANTIC (Oct. 10, 2022), https://perma.cc/4UMU-9RBA.

167. *See* Press Release, Senator Ron Wyden, *supra* note 158 ("I have been sounding the alarm for years about the abuse of location data taken from people's cell phones. In a world where Sam Alito is in charge of abortion laws, that becomes a massive, massive crisis.").

168. *See* Tolentino, *supra* note 27 (discussing prosecutorial use of suspects' text messages as basis for charging abortion-related crimes after *Dobbs*).

169. Geoffrey A. Fowler & Tatum Hunter, *For People Seeking Abortions, Digital Privacy Is Suddenly Critical*, WASH. POST (June 24, 2022), https://perma.cc/SQR2-S3VT; *see* Karin, *supra* note 166 (referring to the potential for prosecutors to use data from period-tracker apps); Samantha Masunaga, *How Data from Period-Tracking and Pregnancy Apps Could Be Used to Prosecute Pregnant People*, L.A. TIMES (Aug. 17, 2022), https://perma.cc/33M9-XPSX (last updated Aug. 18, 2022, 4:49 PM) (citing a study showing that these apps do not adequately protect the privacy of users).

170. *See* Tolentino, *supra* note 27 (explaining that payment data is valuable to prosecutors).

171. *See* Allyn, *supra* note 166 (noting that in the first half of 2021, "law enforcement sent Google more than 50,000 subpoenas" and that "'Google is increasingly the cornerstone of American policing'").

bidder.[172] Antiabortion advocacy groups could purchase vast amounts of highly private information about people who are of childbearing age, and could use this information to create a virtual cage denying access to abortion.[173]

More traditional investigative tactics could also cause significant hardship for people suspected of seeking abortions. Police could dispatch detectives to conduct investigations whenever a pregnancy has not resulted in the birth of a healthy baby.[174] Detectives could interrogate the suspect's acquaintances as witnesses, "squeezing" aiders and abettors by promising leniency in exchange for information that inculpates abortion patients and abortionists. Police could also dust off some of the strategies from the pre-*Roe* era, executing search warrants, subpoenaing medical records, rummaging through garbage, paying for tips from nosy neighbors, conducting deceptive undercover investigations, and staking out hotels where interstate travelers stay on trips to obtain abortion care.[175] Through the utilization of both traditional and modern

172. *See* Ashley Belanger, *Sneaky Ways Cops Could Access Data to Widely Prosecute Abortions in the US*, ARS TECHNICA (Nov. 23, 2022, 6:45 AM), https://perma.cc/62W2-VBBH ("Third-party data brokers give police warrantless access to 250 million devices."); Spector-Bagdady, & Mello, *supra* note 115 (noting that law enforcement and third parties can buy "commercially collected data" about pregnancy); Dorothy Mills-Gregg & Cara Smith, *HHS Office for Civil Rights Releases Post-*Roe *Privacy Protection Plan*, INSIDE HEALTH POL'Y (June 29, 2022, 8:12 PM), https://perma.cc/WP8N-RL59 (PDF), 2022 WLNR 21106525 ("Period tracker apps are not covered by HIPAA, so companies are allowed to sell data collected through the app to third parties"); Press Release, Senator Ron Wyden, *supra* note 158

> Shady data brokers are already tracking women who go to Planned Parenthood clinics, and they will sell that data to anybody with a credit card. Imagine for a moment what not just prosecutors, but these deranged rightwing vigilantes, will do with this data. The apps women use, the websites they visit, the places they go. All of that can and will be used against them by prosecutors.

173. *Cf.* Fowler & Hunter, *supra* note 169 ("[P]rivacy advocates say data collection could become a liability for people seeking abortions in secret . . . . How can people protect information about their reproductive health when popular apps and websites collect and share clues about it thousands of times a day?").

174. *See* Tolentino, *supra* note 27 ("In the states where abortion has been or will soon be banned, any pregnancy loss past an early cutoff can now potentially be investigated as a crime.").

175. *See* Sherman, *supra* note 3 (discussing officers' reliance on record collection, witness interviews, phone surveillance, and sting operations in the

investigative techniques, the antiabortion states could create a regime of relentless "uterus surveillance" that would all but extinguish reproductive autonomy.[176]

C. *Socioeconomic and Racial Disparities Could Be Stark*

The post-*Dobbs* regime will greatly exacerbate inequality in access to abortion. The sanctions imposed by state legislatures will affect low-income and minority communities the most. The *Dobbs* dissenters warned that the impact of the majority's ruling would vary depending on the socioeconomic status of abortion seekers:

> [T]he loss of *Roe* and *Casey* could be disastrous.
>
> That is especially so for women without money. When we count the cost of *Roe*'s repudiation on women who once relied on that decision, it is not hard to see where the greatest burden will fall. In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. Even with *Roe*'s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs

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pre-*Roe* era); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor, & Kagan, JJ., dissenting) ("And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so"); Joyce Hanson, *Hotels Face New Risks as Women Travel for Abortions*, LAW360 (Nov. 16, 2022, 9:18 PM), https://perma.cc/CYR2-JX49 (citing legal experts who foresee that police will investigate abortion travel by treating hotels as "crime scenes," surveilling suspects who stay there, and demanding records from hotel owners); Spector-Bagdady & Mello, *supra* note 115 (noting that HIPAA allows prosecutors to obtain medical records with ease).

176. *See* Press Release, Senator Ron Wyden, *supra* note 158 (using the phrase "uterus surveillance" in a floor speech).

> and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.[177]

The disproportionate impact on minority communities is an urgent concern.[178] These communities will experience greater hardship in the post-*Dobbs* regime for several reasons. First, the states most likely to restrict abortion rights have higher percentages of minority residents, particularly in the South.[179] Second, the per-capita demand for abortion has been higher in minority communities.[180] Third, the baseline health conditions in these communities were already abject before *Dobbs*.[181] Fourth, the isolation of minority communities from medical services in general, and from abortion providers in particular,[182] will make access a much more difficult challenge than in

177. *Dobbs*, 142 S. Ct. at 2344–45 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (alterations omitted) (footnotes omitted) (internal quotations omitted); *see id.* at 2318 ("Above all others, women lacking financial resources will suffer from today's decision").

178. *See* Keon L. Gilbert et al., Dobbs, *Another Frontline for Health Equity*, BROOKINGS (June 30, 2022), https://perma.cc/3R7Y-4PRL ("[O]ne of the most important consequences of the *Dobbs* decision is that it reinscribes denial of access to reproductive health care as a form of racism . . . and will continue to cultivate the conditions for a permanent underclass of low-income families and families of color.").

179. *See* Anne Branigin & Samantha Chery, *Women of Color Will Be Most Impacted by the End of* Roe*, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM), https://perma.cc/QPT7-RXFU ("Of the 22 states that have banned or may now severely limit abortion, many are in the South, which is home to nearly half of the country's Black population.").

180. *See* Kiara Alfonseca, *Why Abortion Restrictions Disproportionately Impact People of Color*, ABC NEWS (June 24, 2022, 10:43 AM), https://perma.cc/C8UK-KFQE (citing data collected by the CDC indicating that Black and Hispanic women have the highest abortion rates among various demographics in the United States).

181. *See* Christine M. Slaughter & Chelsea N. Jones, *How Black Women Will Be Especially Affected by the Loss of* Roe, WASH. POST (June 25, 2022, 7:00 AM), https://perma.cc/T6MJ-XR5P (listing some of the baseline conditions that make Black women more vulnerable to the harm resulting from abortion restrictions, such as "higher maternal mortality, more problem pregnancies, worse health care and less insurance").

182. *See* Branigin & Chery, *supra* note 179 ("Even with *Roe* as the law of the land, access to abortion has been 'very limited' for marginalized groups, who often encounter financial and structural barriers to accessing medical care . . . ." (quoting Professor Melissa Murray)).

predominantly white communities where pregnant people have shorter travel distances to abortion clinics,[183] greater resources with which to pay for this travel, and stronger networks of professionals, counselors, and supporters to aid them in seeking abortion care. Fifth, police surveillance will fall more heavily on minority communities[184] due to bias (both explicit and implicit), as well as the longstanding concentration of law enforcement resources in those areas and the shortfall of legal representation for people of color.[185] In light of all the above-listed considerations, it is not surprising that some critics insist that the new abortion restrictions are racist by design.[186]

D. *Secret Communication About Abortion Is Critical After* Dobbs

There is a reason why the antiabortion movement is trying to criminalize the mere act of providing information about abortion care.[187] Continued access to abortion after *Dobbs* will depend heavily on whether potential abortion seekers can

183. *See* Benjamin Rader et al., *Estimated Travel Time and Spatial Access to Abortion Facilities in the US Both Before and After the* Dobbs v Jackson Women's Health *Decision*, 238 J. AM. MED. ASS'N 2041, 2045–46 (2022) (presenting the findings of a study demonstrating that travel times tripled after *Dobbs* and that the burden was heaviest for in low-income and minority communities); Brenna C. Kelly et al., *Disparities in Distance to Abortion Care Under Reversal of* Roe v. Wade, UTAH WOMEN'S HEALTH REV. (May 9, 2022), https://perma.cc/DBA2-VK2T (indicating that, after *Dobbs*, travel distances to abortion care will increase for 46.7% of women in the United States and the distances will be higher for women of color); *cf.* Melissa Jeltsen, *We Are Not Prepared for the Coming Surge of Babies*, THE ATLANTIC (Dec. 16, 2022), https://perma.cc/2NEN-QTPB (citing research by Professor Caitlin Meyers, who found that a disproportionate number of low-income women will be unable to travel the increased distances necessary to access abortion care after *Dobbs*). According to Professor Meyers, "[t]his is really an inequality story about who ends up trapped by distance and poverty, and who doesn't." *Id.*

184. *See* Traister, *supra* note 132 (commenting that surveillance in the post-*Dobbs* era will pervade all classes and races, but "scrutiny will be sharpest on poor and Black and brown people").

185. *See infra* Part II.A.

186. *See* Nicquel Terry Ellis, *"Pushed to the Margins": Why Some Activists and Lawmakers Say Abortion Bans Are a Form of White Supremacy*, CNN (May 18, 2022, 2:46 PM), https://perma.cc/79GU-F7CQ (citing various critics including Representative Ayanna Pressley, who said that "[t]he anti-abortion movement in America is rooted in organized White supremacy").

187. *See supra* note 161 and accompanying text.

obtain information about the range of options available and about the hazards that might arise if one were to explore those options. Secret communication is the primary way to spread that information. The following Sections will analyze why confidential communication will be vital for anyone seeking either in-state or out-of-state abortion care.

1. Communication About Intrastate Options

Confidential communication is valuable when a pregnant person is considering options within that person's home state. The first step is to determine whether and to whom to disclose the news of pregnancy. This disclosure can sometimes bring harmful consequences, including employment discrimination[188] and violent reprisals from intimate partners,[189] so a pregnant person sometimes needs confidential advice before deciding whether to make the disclosure. The next step is to determine whether to carry the pregnancy to term—a difficult reckoning that entails conversations with loved ones and trusted advisors who help to evaluate the pregnant person's fitness to become a parent alongside options such as abortion and adoption. If a pregnant person settles on terminating the pregnancy, the next step is to determine eligibility for a legal abortion.[190] In states with abortion restrictions, the exceptions are sometimes difficult to interpret, even for grounds such as health risks[191]

188. *See* Julie Daw, Note, *"Is That Still Going On?": Continuing Difficulties for the Pregnant Worker & Opportunities for Countering Discrimination*, 83 U. PITT. L. REV. 137, 137–38 (2021) ("More than forty years after Congress passed the Pregnancy Discrimination Act . . . , pregnant people continue to encounter discrimination in the workplace. Workers who become pregnant may be fired outright, or they may face conditions that force them to quit.").

189. Margaret Kelly, Note, *Increasing Victimization Through Fetal Abuse Redefinition*, 20 WM. & MARY J. WOMEN & L. 685, 688 (2014) ("[E]vidence suggests that for many women in abusive relationships the violence actually escalates during pregnancy.").

190. Exceptions for gestational age, health risks, rape, and incest vary widely. For example, twelve states' abortion bans do not make exceptions for rape and incest. *See supra* notes 98–99 and accompanying text.

191. *See* Bendix, *supra* note 100 (discussing the difficulty of applying exceptions for medical risks); *see also* J. David Goodman & Azeen Ghorayshi, *Women Face Risks as Doctors Struggle with Medical Exceptions on Abortion*, N.Y. TIMES (July 20, 2022), https://perma.cc/Q4HM-JZA3 (stating that the assessment of medical risks under abortion bans is "fraught with uncertainty and legal risk").

and rape.[192] Next, the abortion seeker must find an in-state abortion provider who might be willing to accept the patient.[193] If accepted, the patient must raise the money and make the logistical arrangements (such as time off work and care for current children) necessary to proceed with the abortion. Afterward, the patient will need support while recovering from the abortion, both physically and emotionally.

All of these steps will necessitate secret communication with others, most of whom will be unlikely to have the professional credentials required for protection under traditional evidentiary privilege law.[194] Without secrecy, an abortion patient could be vulnerable to lawsuits and prosecution, and might even decide to forego an abortion altogether,[195] though the consequences could be dire.[196] Third-party facilitators of abortion who provide information, money, and other support also could face significant risks if their involvement does not remain private, and they may need to cease operations if they cannot depend on secrecy.[197]

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192. For example, some conservative states only accept rape as a ground for abortion if the survivor has filed a criminal complaint. *See* Megan Messerly, *In States That Allow Abortion for Rape and Incest, Finding a Doctor May Prove Impossible*, POLITICO (June 27, 2022, 4:30 AM), https://perma.cc/GZ4E-USEW (last updated June 27, 2022, 11:15 AM). Such requirements create uncertainty about how far the criminal case must have progressed to allow an abortion, and in any event, many survivors have good reasons not to report rape. Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1617 (2008).

193. *See* Messerly, *supra* note 192 (indicating that some abortion providers refuse to accept patients who are invoking certain exceptions to abortion bans, such as rape, because these providers fear legal liability if the patient's characterization does not stand up in court).

194. *See infra* Part II.A.

195. Nikolas Guggenberger, director of the Yale Information Society Project, has argued that these new laws will hang over the heads of abortion seekers and those who assist them. Fowler & Tatum, *supra* note 169. "'People want to be on the safe side, so even if the law doesn't apply to what they're doing, it has a chilling effect.'" *Id.*

196. *See* Michael Ollove, *Critics Fear Abortion Bans Could Jeopardize Health of Pregnant Women*, PEW CHARITABLE TRS.: STATELINE (June 22, 2022), https://perma.cc/HFU5-8S5K (citing evidence that maternal mortality could rise significantly if abortion seekers do not obtain the care they need).

197. *See* Proposed Brief for State of California et al. as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 130, at 14 (explaining that fears of legal repercussions are leading third parties such as "abortion funds" to withdraw support from abortion seekers in conservative states).

2. Communication About Interstate Travel for Abortion Procedures

Accessing out-of-state abortion care requires even more planning and secret communication. An abortion seeker must overcome what one Planned Parenthood official has described as "navigational barriers."[198] Because demand for abortions is highest among people with limited means,[199] financial support from third parties will often be necessary to cover travel costs. The donors will need to keep a low profile to avoid liability,[200] but they usually will not be the sorts of professionals to whom evidentiary privileges attach.[201] Abortion seekers must consult with third parties to find an out-of-state clinic that is accessible and that has space for another appointment.[202] The practical

198. *See* Margot Sanger-Katz et al., *Interstate Abortion Travel Is Already Straining Parts of the System*, N.Y. TIMES: THE UPSHOT (July 23, 2022), https://perma.cc/SH5B-GU3B (quoting Dr. Katherine Farris, medical director for a Planned Parenthood affiliate); *see, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2317–18 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) (describing the logistical challenges).

199. *See* Theresa Ghilarducci, *59% of Women Seeking Abortion Are Mothers Facing High Poverty Risk*, FORBES (Dec. 24, 2021, 8:21 PM), https://perma.cc/4LJT-6ET8 ("Women who seek abortions are more than three time[s] as likely to be poor; 49% are poor while the national poverty rate is about 12% . . . .").

200. *See* Elaine Kamarck, *The Supreme Court's Abortion Decision—Just the Beginning of the Battle*, BROOKINGS (June 24, 2022), https://perma.cc/5JNH-NRSS

> Groups are already forming in states that provide abortions to raise money and help provide safe passage to women from states that ban abortions. All of this will need to happen quietly and without fanfare to prevent civil suits in states that allow private citizens to sue those who help women get abortions.

see also Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), https://perma.cc/7QH3-G4LB.

201. *See infra* Part II.A.

202. *See Dobbs*, 142 S. Ct. at 2345 n.25 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("[I]ncreased out-of-state demand will lead to longer wait times and decreased availability of services in States still providing abortions. This is what happened in Oklahoma, Kansas, Colorado, New Mexico, and Nevada last fall after Texas effectively banned abortions past six weeks of gestation." (citations omitted)); *see also* Sanger-Katz et al., *supra* note 198 (reporting that abortion clinics in pro-choice states near antiabortion states are seeing a surge in demand, necessitating long wait times, prioritization of certain cases, and declination of others).

challenge of transportation across state lines will be formidable, especially in areas with heavy surveillance by police and "bounty hunters."

A lack of secrecy could be disastrous for interstate travelers and their supporters. Without confidentiality to cover the travelers' tracks, there is a substantial risk of interdiction during the outbound trip or prosecution at the end of the return trip.[203] The third-party donors who make such travel possible for abortion seekers could not continue their work if it were too transparent to their antagonists.[204] There is even a possibility that pregnant people would not seek financial assistance from their employers or from third-party donors if the requests could not be held in strict confidence: the stigma surrounding abortion, and the risk that of prosecutions and civil suits, might deter the initial conversations that are vital to provide funding for abortion travel.[205]

3. Communication About Ordering Drugs from Pro-Choice States

Prior to *Dobbs*, abortion drugs provided a relatively simple, reliable, and safe means of terminating a pregnancy.[206] Abortion seekers had been able to obtain prescriptions for abortion drugs through telemedicine and pharmacies had delivered the drugs

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203. *See* Jeremy Snyder, Commentary, *Revisiting the Ethics of Circumvention Tourism*, 50 J.L. MED. & ETHICS 563, 564 (2022) ("U.S. residents will increasingly travel between states to access abortion services and some states may choose to prohibit such travel or punish residents upon their return.").

204. *See* Valerie Montague et al., *Data Privacy in the Post-*Roe *Era*, NIXON PEABODY (July 12, 2022), https://perma.cc/9P7C-CA2Q (discussing the heightened importance of confidentiality after *Dobbs* because, "for those persons that travel to states where abortion is still legal, individuals who assist in obtaining the abortion can potentially be charged with aiding and abetting residents . . . in the state in which the individual ending their pregnancy resides").

205. *See* Christine Vestal, *Privacy, Stigma May Keep Workers from Using Abortion Travel Benefits*, PEW CHARITABLE TRS.: STATELINE (Oct. 3, 2022), https://perma.cc/P7HL-NKPW ("Among workers' potential concerns are the stigma of abortion and worries that private medical information could intentionally or unintentionally leak to state authorities [because] most private companies aren't set up to handle sensitive medical information.").

206. *See* Tolentino, *supra* note 27.

by mail.[207] These medications were responsible for approximately half of all abortions in the United States before *Dobbs*.[208] Now many states are threatening to sanction out-of-state doctors who prescribe such medicine, out-of-state pharmacists who mail it, and in-state patients who receive and take it.[209] Confidential communication with various third parties will be necessary for abortion seekers to understand whether there are any circumstances under which the use of abortion drugs would still be permissible.[210] In the most restrictive states, the only prudent way to access these drugs may be to plan a long trip to another state where they are legal, visit a pharmacy or arrange a telemedicine call in that state, wait until the drugs arrive, take the drugs over a period of days, and then finally return back home.[211] This strategy would likely require secret communication with third parties to raise money for the trip, to arrange transportation, to line up child care and time off work, and to stay abreast of the ever-changing rules for obtaining drugs from out-of-state vendors.[212] Any "leak" of such communication could result in civil and criminal liability.

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207. *Id.*

208. *Id.*

209. *See supra* Part I.A.1–2; *see also* Zubrzycki, *supra* note 90, at 204 (discussing potential criminal liability for out-of-state providers of abortion drugs).

210. *See* Alice Miranda Ollstein & Megan Messerly, *Abortion Advocates' Strategy Depends on Pills. An Information Gap Threatens Their Efforts.*, POLITICO (April 24, 2022, 7:00 AM), https://perma.cc/CT3M-JLQR (discussing polls and other evidence showing an "information gap" about use of abortion drugs and their legality).

211. *See* Cohen et al., *The New Abortion Battleground*, *supra* note 110, at 2023; Tolentino, *supra* note 27.

212. *See, e.g.*, Katherine Houghton & Arielle Zionts, *Montana Clinics Preemptively Restrict Out-of-State Patients' Access to Abortion Pills*, NPR (July 7, 2022, 5:00 AM), https://perma.cc/FG7A-CZ4Q (mentioning a new requirement that restricts "distribution of abortion pills to only patients from states without abortion bans in effect"); *see also* Laura Weiss, *After* Roe*'s Repeal, CVS Told Pharmacists to Withhold Certain Prescriptions*, NEW REPUBLIC (July 20, 2022), https://perma.cc/R6FQ-QGT7 (reporting that CVS, the largest pharmacy chain in the U.S., will not dispense abortion drugs unless patients can satisfactorily answer certain questions).

E. *The Underground Railroad Must Depend on Confidentiality*

The original Underground Railroad required the highest degree of confidentiality to provide safe passage for fugitives. According to one author whose ancestors had used the Underground Railroad, "[t]he need for secrecy was paramount as there were severe penalties for slaves and those who helped them escape to freedom."[213] Confidentiality was necessary to circulate information to potential fugitives who were considering whether to use the Underground Railroad.[214] Once they committed to travel north, they needed secrecy to collect their belongings, alert their loved ones, and escape without detection.[215] Those who helped the fugitives needed confidentiality so they could secure the supplies, vehicles, and safe houses necessary for the long journey north without arousing the suspicion of law enforcement or private slave catchers.[216] Indeed, the very name "Underground Railroad," and various railroad terminology such as "tracks" and "conductor," served as a code that allowed fugitives and their allies to discuss the clandestine network without alerting contemporaries to the true nature of the enterprise.[217]

Similar confidentiality will be necessary for the modern underground railroad to deliver abortion seekers to locations where reproductive freedom is possible. Like the fugitives of the 1800s, modern-day fugitives will need to proceed furtively so they can stay one step ahead of law enforcement officers and vigilantes. The strength of legal protections for confidentiality will make a huge difference in determining whether both "passengers" and "conductors" will be willing to travel on the new underground railroad, and whether they can do so safely.

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213. Bryan Walls, *Underground Railroad Terminology: Freedom Marker: Knowledge*, PBS: UNDERGROUND RAILROAD: THE WILLIAM STILL STORY, https://perma.cc/9QTK-94AF.

214. *Id.*

215. *Id.*

216. *Id.*

217. *See id.* (explaining that "railroad terminology was used to maintain secrecy and confuse the slave catchers").

II. THE INADEQUACY OF CURRENT PRIVILEGE LAW

The principal means of protecting confidentiality in court proceedings is through the invocation of evidentiary privileges. These privileges exclude certain communication and information from use as evidence.[218] Privileges also provide a basis for objecting to subpoenas, discovery requests, and deposition questions.[219] While privileges do not apply directly to law enforcement personnel, the inability to use evidence in court has an indirect effect on investigative strategies: police generally do not gather evidence that prosecutors cannot use later in court.[220]

Unfortunately, the current evidentiary privileges do not cover a significant portion of abortion-related communication. In particular, current privileges provide scant protection for communication about whether to bring a pregnancy to term, about options for terminating the pregnancy, and about logistical planning to obtain an abortion in the post-*Dobbs* world. The following Subparts will explain why several current privileges are insufficient for abortion seekers, providers, and facilitators.

A. *Professional Privileges*

The term "professional privileges" refers to privileges that apply to communications involving people in certain categories of occupations, such as attorneys, doctors, psychotherapists, counselors, and clergy.[221] As a general matter, such privileges protect communication between a layperson and a professional on a subject related to the professional's area of work.

The attorney-client privilege applies to confidential communication between an attorney and a client for the purpose of providing or receiving legal services.[222] This privilege has

218. *See* 2 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 1.1 (4th ed. 2023).

219. *See id.*

220. *See* United States v. Leon, 468 U.S. 897, 916 (1984) (explaining that the rule excluding evidence seized in violation of the Fourth Amendment serves to deter police misconduct); *accord* Davis v. United States, 564 U.S. 229, 236–37 (2011) (stressing the rule's deterrent function).

221. 2 IMWINKELRIED, *supra* note 218, § 6.2.

222. *See id.* § 6.2.4.

little utility in the context of obtaining abortion care. To begin, the need for abortions is greatest among people with limited means,[223] who generally cannot afford to hire attorneys.[224] Even when an abortion seeker can secure legal counsel, the attorney-client privilege does not apply to most of that client's third-party communication that is necessary in the course of planning to obtain an abortion: disclosure to third parties removes those matters from the coverage of the privilege even if the client incidentally discusses the same matters with the attorney.[225] Finally, the crime-fraud exception overrides the privilege if the client is seeking the attorney's assistance to commit, or assist another in the commission of, any crime or fraud,[226] and states that outlaw abortion have generally made this procedure a crime.[227]

Similar privileges apply to communication with medical personnel such as doctors and psychologists. The privileges arise when patients have confidential conversations with medical personnel for the purpose of diagnosis or treatment.[228] Once again, this category of privilege has limited utility to abortion seekers. Some of their most difficult challenges are nonmedical—for example, determining whether they want an abortion, planning travel to the few locations where abortion care is available, circumventing surveillance, and arranging for the financial assistance, child care, time off work, and emotional support they need to obtain abortions.[229] In the realm of abortion care, there are many categories of staff and volunteers whose work is not sufficiently "medical" to fall within the scope of current privileges for medical professionals; moreover, abortion by means of medication may not, in some instances, require any involvement by a medical professional covered by the

223. *See supra* note 199 and accompanying text.

224. *See* Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013) ("For decades, bar studies have consistently estimated that more than four-fifths of the individual legal needs of the poor . . . remain unmet.").

225. *See* 2 IMWINKELRIED, *supra* note 218, § 6.12.4 (explaining the effect of disclosure to a third party).

226. *Id.* § 6.13.2.

227. *See supra* Part I.A.

228. *See* 2 IMWINKELRIED, *supra* note 218, §§ 6.2.6–6.2.8.

229. *See supra* Part I.D.1–2.

privilege.[230] Even when abortion seekers do consult with doctors and psychologists, these conversations will not always be off-limits for use in court. A crime-fraud exception defeats the medical privileges just as it defeats the attorney-client privilege, and subpoenas from prosecutors could easily obtain medical records in connection with a criminal investigation.[231] There is also some authority indicating that medical personnel should disclose patient communication when necessary to prevent

230. *See* David S. Cohen et al., *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 7 (2022) [hereinafter Cohen et al., *Rethinking Strategy After* Dobbs] ("Abortion rights historically were tethered to the physician-patient relationship, but that is changing as more and more people receive care from healthcare providers who are not doctors and end pregnancies with pills, often without the direct help of any provider."); *see, e.g.,* Melissa O'Neill, *Ohio's Patient-Physician Privilege: Whether Planned Parenthood Is a Protected Party*, 17 J.L. & HEALTH 297 (2002) (discussing the limited scope of the patient-physician privilege).

231. Writing for the *Journal of the American Medical Association*'s Health Forum, Kayte Spector-Bagdady and Michelle Mello discussed the limited utility of the physician-patient privilege as a defense against government investigations of abortion after *Dobbs:*

> [L]aw enforcement officials may be able to use a subpoena to obtain patients' medical records related to abortions. State statutes generally designate confidential communications or other information arising within a patient-physician relationship as privileged and therefore inadmissible in legal proceedings. However, this privilege is not absolute, its scope varies greatly across states, and in many cases medical record information has been successfully used to substantiate a criminal charge, such as child abuse. Thus, there is substantial uncertainty about how courts will address assertions of physician-patient privilege relating to reproductive health care records.

Spector-Bagdady & Mello, *supra* note 115, at 1 (footnotes omitted); *see* 2 IMWINKELRIED, *supra* note 218, § 6.13.2 (noting exceptions to the physician-patient privilege). Indeed, an abortion patient's potential exposure to criminal prosecution is so great in some states after *Dobbs* that lawyers and clinicians may have an ethical duty to read the patient *Miranda* warnings before discussing the patient's desire for an abortion. *See* David Hoffman, *Miranda* Warnings for Abortion Patients? Disclosure and Confidentiality in the Era of *Dobbs*, CLE Program at Columbia School of Professional Studies (Oct. 8, 2022), https://perma.cc/J2SC-BG7V. For an excellent discussion of the increasing (if reluctant) role played by medical personnel in law enforcement investigations, see Teneille R. Brown, *When Doctors Become Cops*, 97 S. CAL. L. REV. (forthcoming 2024).

future harm to third parties;[232] an imminent abortion could fall within the scope of that exception now that many courts and legislatures consider a fetus to be cognizable life.[233]

The clergy-penitent privilege applies to confidential communication between a worshipper and an official affiliated with a church, synagogue, mosque, or other house of worship.[234] Some people contemplating abortion do confer with clergy, but the clergy-penitent privilege provides negligible protection in these circumstances. The privilege does not cover third-party interactions, even concerning matters raised in confidential communications with clergy,[235] and of course an abortion seeker will need to communicate with a wide range of people other than clergy to undertake the complicated planning that is necessary for abortion care in the aftermath of *Dobbs*.[236] Another challenge in invoking the clergy-penitent privilege is that the percentage of Americans with traditional church affiliations is now at an all-time low,[237] particularly in low-income communities,[238] and courts are reluctant to apply the privilege to nontraditional spiritual counselors and confidants.[239] The clergy-penitent privilege also has limited utility when the subject of the conversation is a crime.[240]

Some states have established privileges for interaction with domestic violence counselors, social workers, rape counselors, human trafficking counselors, and other similar

232. *See, e.g.*, Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 349–50 (1976) (holding that the psychotherapist-patient confidentiality must give way when the patient will imminently harm another).

233. *See supra* Part I.A.

234. *See* 2 IWINKELRIED, *supra* note 218, § 6.2.3.

235. *See id.*

236. *See supra* Part I.D.

237. *See* Jeffrey M. Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP (Mar. 29, 2021), https://perma.cc/9F5X-EELV.

238. *See* Patton Dodd, *Low-Income Communities Are Struggling to Support Churches,* THE ATLANTIC (Jan. 7, 2018), https://perma.cc/QQ8T-HGPB (discussing the economic and social considerations that have led to declining numbers of churches in low-income neighborhoods).

239. *See* Ronald J. Colombo, Note, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U L. REV. 225, 243–46 (1998) (describing how conservative states have used a narrow, traditional definition of "clergy" and have excluded nontraditional spiritual advisors).

240. *See* 2 IMWINKELRIED, *supra* note 218, § 6.13.2 n.173.

professionals.[241] The privileges applicable to such professionals will not provide much help to the people most in need of confidentiality for abortion-related communication, however. The states that have created these privileges tend to be left-leaning, and these states generally are not banning abortion after *Dobbs*; by contrast, the conservative states with abortion bans are unlikely to have specialized privileges for such counseling.[242] It is important to bear in mind that the privileges for counselors and social workers will yield to court orders requiring disclosure, and the crime-fraud exception will vitiate these privileges as well.[243]

B. *Spousal Privileges*

There are two categories of evidentiary privileges for married people. One is the marital communication privilege, which shields confidential communication between spouses during the period of marriage.[244] This privilege is rarely valuable to abortion seekers. Marriage rates are relatively low in the socioeconomic groups that are most likely to need abortion care.[245] Furthermore, in all socioeconomic groups, most abortions occur outside of marriage.[246] There is no privilege for an unmarried couple that is cohabitating during a pregnancy.[247] Even among current spouses, the martial communication privilege does not protect communication in furtherance of a

241. *See generally* LEGAL MOMENTUM, STATE CONFIDENTIALITY STATUTES (2019), https://perma.cc/3VS7-DZ8A (PDF).

242. *See id.* (highlighting disparities in statutory abortion protections between left- and right-leaning states).

243. *See* 2 IMWINKELRIED, *supra* note 218, § 6.13.2 (discussing the breadth of the crime-fraud exception).

244. *See id.* § 6.2.1 (indicating that most states have a marital communication privilege).

245. *See* Richard Fry & Kim Parker, *Rising Share of U.S. Adults Are Living Without a Spouse or Partner*, PEW RSCH. CTR. (Oct. 5, 2021), https://perma.cc/6UQS-GX5E (citing census data to show that marriage rates are declining in the United States, particularly in low-income and minority communities).

246. *See* Margot Sanger-Katz et al., *Who Gets Abortions in America?,* N.Y. TIMES: THE UPSHOT (Dec. 14, 2021), https://perma.cc/C7PR-8AMJ (reporting that only 14% of abortion patients are married).

247. *See* 2 IMWINKELRIED*, supra* note 218, § 6.2.1 (stressing that marriage at the time of a communication is necessary for the privilege to apply).

crime,[248] so states that have criminalized abortion would be able to utilize marital communications in prosecuting spouses, their doctor, and anyone else who aided or abetted their attempt to obtain an abortion.

A second privilege for married people is the right not to testify against one's spouse. The privilege-holder may refuse to testify about any subject, not simply about confidential marital communication.[249] While potentially expansive in scope, the spousal testimonial privilege suffers from a significant limitation. Many jurisdictions allow the witness-spouse to testify over the other spouse's objection.[250] So a husband who insists that his wife bring a pregnancy to term could testify in a suit to block his wife's abortion and could testify about his wife's preliminary steps to obtain an abortion, so long as the husband does not disclose confidential marital communication.

C. *Privilege Against Self-Incrimination*

The U.S. Constitution and its state counterparts forbid the government from compelling a person to give a self-incriminating statement.[251] This protection might seem to be valuable to abortion seekers in states that have criminalized abortion after *Dobbs*. Yet the scope of the privilege against self-incrimination is actually quite narrow. Most of the evidence that the government collects in a criminal investigation does not consist of the defendant's statements to police or the defendant's testimony in response to questions by prosecutors. Statements that the defendant made to private parties, however incriminating, are not subject to the privilege.[252] Nor does the privilege cover the defendant's handwritten notes, emails, letters, or internet search history, despite their incriminating

248. *See id.* § 6.13.2.

249. *See id.* § 1.3.6.

250. *See id.* (noting that a witness-spouse may often testify over the other spouse's objection); Trammel v. United States, 445 U.S. 40, 53 (1980) (holding that the witness-spouse has this power).

251. *See* U.S. CONST. amend. V ("[N]o person shall be compelled in any criminal case to be a witness against himself."); *see, e.g.*, OR. CONST. art. I, § 12 ("No person shall . . . be compelled in any criminal prosecution to testify against himself.").

252. *See* Fisher v. United States, 425 U.S. 391, 401 (1976).

nature, because the government did not compel the defendant to make these statements.[253]

The privilege against self-incrimination would rarely present an impediment to private litigation against abortion seekers, providers, or aiders and abettors. So long as the plaintiff did not use government compulsion to extract self-incriminating statements from the defendant, the privilege would not apply in this context.[254]

Even in prosecutions of alleged crimes involving abortion, the government would be able to use several categories of statements to a government audience. Statements by suspects during custodial interrogation by law enforcement officials are admissible in criminal prosecutions so long as the suspects had received *Miranda* warnings and declined to invoke their right against self-incrimination.[255] During trials of criminal cases, the prosecution could overcome the privilege against self-incrimination by immunizing the witness so that testimony could not possibly expose the witness to punishment; the government might possibly use this strategy to compel testimony against abortionists or other third-party defendants.[256]

D. *HIPAA*

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)[257] limits the extent to which health care providers, insurers, and their business associates can disclose patients' information.[258] HIPAA's privacy requirements do not apply to many categories of health-related records that could be relevant to litigation concerning abortion. These categories include records maintained by patients themselves, by

253. *See id.* at 409–10.

254. *See* 2 IMWINKELRIED, *supra* note 218, § 1.3.10.

255. *See* 29 AM. JUR. 2D *Evidence* § 743 (2023).

256. *See* 41 AM. JUR. 2D *Indictments and Information* § 216 (2023).

257. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 and 42 U.S.C.).

258. *See id.* § 264(a), 110 Stat. at 2033 (instructing the Secretary of Health and Human Services to issue "detailed recommendations on standards with respect to the privacy of individually identifiable health information"); 45 C.F.R. §§ 164.502–164.514 (2023).

employers, by credit card companies, by social workers, by counselors, by schools, and by charities that provide funding and transportation to abortion seekers.[259] Even organizations directly involved with providing abortion care might not be subject to HIPAA if they do not maintain electronic records; information transmitted orally or appearing in printed documents is exempt from HIPAA.[260]

HIPAA does not address the threat to privacy posed by "big tech." When an abortion seeker's cell phone generates location data indicating a visit to an abortion clinic, HIPAA does not shield the data.[261] When an abortion seeker's internet search history shows exploration of many websites relating to terminating pregnancies, HIPAA offers no protection.[262] When a "period-tracker app" senses that the user may be pregnant, HIPAA does not guarantee the privacy of that information.[263]

To the extent that HIPAA does apply, its protection is not absolute. HIPAA yields to a court order demanding disclosure of a patient's records, whether or not that patient is a party in the pending litigation.[264] In fact, a recent directive from the U.S. Department of Health and Human Services' Office of Civil

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259. *See* 45 C.F.R. § 164.512 (2023); Spector-Bagdady & Mello, *supra* note 115, at 1 (discussing HIPAA's limited value in protecting against disclosure of abortion-related records because a large portion of such records are not held by entities covered by HIPAA).

260. *Abortion Reporting*, ELEC. FRONTIER FOUND., https://perma.cc/M9LK-M389 (last updated 2015) ("An abortion facility may or may not be a covered entity under the Health Insurance Portability and Accountability Act (HIPAA), depending on whether it transmits any health information electronically.").

261. Spector-Bagdady & Mello, *supra* note 115, at 2.

262. *Id.*

263. *See* Mills-Gregg & Smith, *supra* note 172 ("Period tracker apps are not covered by HIPAA, so companies are allowed to sell data collected through the app to third parties."); Spector-Bagdady & Mello, *supra* note 115, at 2

> Much reproductive health information is collected and shared through websites and apps that are not HIPAA-regulated or protected by physician-patient privilege, such as period tracking apps (used by millions of US women) that collect information on timing of menstruation and sexual activity and on reproductive health information construed from shopping data.

264. *See* 45 C.F.R. § 164.512(e)(1)(i) (2023) (allowing for the disclosure of medical information "in the course of any judicial or administrative proceeding . . . [i]n response to an order of the court"); Spector-Bagdady & Mello, *supra* note 115, at 1.

Rights made clear that when a state court issues an order requiring production of abortion-related records, HIPAA provides no basis on which to withhold the records.[265] A prosecutor or civil plaintiff in an abortion-related case could also obtain records covered by HIPAA if that party serves a subpoena on a health care provider and represents that the records are not available through other means. According to one federal judge, the potential porousness of HIPAA's privacy regulations could permit "a significant intrusion" on the privacy of abortion seekers.[266]

E. *Regulations Governing Data Privacy*

Existing statutes and regulations do little to stop the collection, storage, and even sale of highly sensitive data relating to pregnancy and abortion.[267] The United States presently lacks a national data privacy law, and regulations in this area are scant.[268] In 2022, Congress debated proposals for new legislation that would usher in regulations protecting data privacy, but so far the proposals have not addressed the unique problems relating to reproductive matters.[269] In fact, the House version of the American Data Privacy and Protection Act (ADPPA),[270] which emerged from the Energy and Commerce Committee on July 20, 2022, did not include any language protecting data relating to reproductive health.[271]

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265. Off. of C.R., Dep't of Health & Hum. Servs., HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, https://perma.cc/JP45-B6S7 (last updated June 29, 2022).

266. Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 U.S. Dist. LEXIS 1701, at *19 (N.D. Ill. Feb. 6, 2004). The court noted that the loopholes in HIPAA can be especially worrisome in the unique context of abortion, an issue "indisputably of the most sensitive stripe." *Id.* at *18.

267. *See supra* Part I.B.

268. Allyn, *supra* note 166.

269. Cameron F. Kerry, *Endgame On: The Narrowing Path Ahead for Privacy Legislation*, BROOKINGS: TECHTANK (June 22, 2022), https://perma.cc/46W3-HV7Z (summarizing privacy debates in Congress, including discussions on civil rights protections; limits on data collection, use, and sharing; and a private cause of action for privacy violations).

270. H.R. 8152, 117th Cong (2022).

271. *See* Karins, *supra* note 166 (noting that the bill did not indicate expressly that it "would protect pregnant people in states that outlaw abortion from having their data shared with law enforcement"); *id.*

The Biden Administration issued an executive order in July 2022 that included provisions addressing data privacy relating to pregnancy and abortion.[272] The order "encouraged" the Federal Trade Commission (FTC) and the Department of Health and Human Services (HHS) to bring enforcement actions under current regulations and to consider "providing guidance" on these regulations.[273] The order also instructed HHS to work with the Attorney General in "educat[ing] consumers on how best to protect their health privacy and limit the collection and sharing of their sensitive health-related information."[274] Critics complained that the order was too general[275] and would not make a practical difference in addressing the problems faced by abortion seekers in conservative states.[276]

> Rep. Anna Eshoo (D-CA) said the current version of the legislation is flawed because it does not address the health app privacy concerns created by the high court's Dobbs v. Jackson Women's Health Clinic [sic] decision that overturned Roe v. Wade. "The bill before us has a major loophole that could allow law enforcement to access private data to go after women," she said.

accord Mills-Gregg & Smith, *supra* note 172 (noting that the House version of ADPPA would yield to state law in determining whether "companies, including health companies like a period tracker app developer, must turn in personal health data to be used in civil or criminal litigation").

272. Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 13, 2022).

273. *Id.* at 42,054.

274. *Id.*

275. Rutgers University law professor Kim Mutcherson described Biden's executive order as "very vague" and "about as milquetoast as you could be." Alissa Chang et al., *The Impact That President Biden's Executive Order on Abortion Access Will Have*, NPR: ALL THINGS CONSIDERED (July 8, 2022, 4:50 PM), https://perma.cc/BF38-FFJ4. Mutcherson added that "the generality of this order makes me feel like . . . this administration isn't willing to fight." *Id.*

276. Georgetown University law professor Lawrence Grostin expressed pessimism about the efficacy of Biden's initiative: "'Nothing in his executive order will fundamentally change the everyday lives of poor women in a red state.'" Li Zhou, *The Limitations of Joe Biden's Executive Order on Abortion*, VOX (July 8, 2022, 6:30 PM), https://perma.cc/5BMX-9DF9; *see also* Kim, *supra* note 146 (reporting the shared belief among many Democrats that Biden's order did not provide meaningful help to abortion seekers in conservative states).

III. A NEW PRIVILEGE FOR ABORTION-RELATED COMMUNICATION

This Article proposes a combination of changes to evidentiary privilege law, along with related reforms of attorneys' ethics rules and regulations governing data privacy. The title for the bill to reform evidentiary privilege law would be "The Pregnancy Privacy Act."[277] The following Subparts will explain the theoretical underpinnings of the proposals, the details of the proposals, and the efficacy of the proposals in protecting abortion seekers, providers, and facilitators.

A. *Conceptual Validity According to Traditional Rationales*

Before presenting the proposals, it is important to take account of the long-standing rationales for evidentiary privileges. The following paragraphs will focus on the utilitarian rationale, the libertarian rationale, and the equitable rationale, and will discuss how each rationale could support a new privilege for communication about pregnancy and abortion.

The utilitarian rationale usually justifies an evidentiary privilege on the ground that it increases aggregate social utility by improving the quality of life or otherwise allowing society to function better.[278] For example, the historical rationale for professional privileges is that people experience a higher quality of life when they can communicate confidentially with certain professionals and that governments want to encourage candor in such communication because it brings social benefits.[279] Similar utilitarian reasoning favors adoption of a new privilege protecting communications about pregnancy and abortion. Polls show bipartisan support for protecting privacy as a general

277. The draft title in an earlier version of this article was "Pregnancy Privacy Protection Act," but, on reflection, that title seemed overwhelmingly alliterative.

278. *See* Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317–20 (2003) (summarizing the utilitarian theory's foundation in encouraging socially useful confidential communication).

279. *See id.* at 317 (describing the underlying behavioral assumption in utilitarian theory "that the typical layperson such as a prospective client or patient would neither consult with nor divulge to a confidant, such as an attorney or therapist, but for the assurance of confidentiality furnished by a formal evidentiary privilege").

proposition,[280] and both parties have particular interest in protecting communication about pregnancy and abortion: Democrats want to protect such communication to ensure access to abortion,[281] while Republicans want to protect such communication so that pregnant women receive counseling about alternatives to abortion.[282] More generally, people of all political stripes prefer to keep their discussion of abortion private. They consider abortion to be a uniquely sensitive and controversial topic[283] that they are uncomfortable discussing in

280. *See Public Opinion on Privacy*, ELEC. PRIVACY INFO. CTR., https://perma.cc/RS97-JGLY ("Democrats (86%) and Republicans (81%) expressed bipartisan support for Congress to prioritize a federal privacy bill.").

281. *See, e.g.*, Letter from Fourteen Democratic U.S. Senators to Auren Hoffman, Chief Exec. Officer, SafeGraph, Inc. (May 17, 2022), https://perma.cc/EJ9P-9UU9 (demanding strict privacy for women seeking abortions).

282. "Crisis pregnancy centers" generally promise confidential counseling about alternatives to abortion. *See* Molly Duane, Note, *The Disclaimer Dichotomy: A First Amendment Analysis of Compelled Speech in Disclosure Ordinances Governing Crisis Pregnancy Centers and Laws Mandating Biased Physician Counseling*, 35 CARDOZO L. REV. 349, 350 (2013) (noting that websites for these centers generally "promise to provide free and confidential services"). Republican lawmakers strongly support these centers. *See* Anna North, *The Antiabortion Social Safety Net*, VOX (June 28, 2022, 7:30 AM), https://perma.cc/N59L-V2N2 (reporting that these centers are the "go-to solution" for many antiabortion legislators). Conservative commentators have expressed concern that visitors and staff at crisis pregnancy centers need more privacy and protection from demonstrators in the aftermath of *Dobbs*. *See, e.g.*, 168 CONG. REC. S3047 (daily ed. June 22, 2022) (statement of Sen. Mitch McConnell inveighing against harassment at crisis pregnancy centers); *cf.* Kelly Laco, *Republicans Push DOJ to Protect Pro-Life Centers from 'Assault' by Violent Activists*, FOX NEWS (June 23, 2022, 6:24 AM), https://perma.cc/3GZK-DPGE. It is perhaps no coincidence that the chief Republican co-sponsor of the nation's most expansive privacy bill, the American Data Privacy and Protection Act, is also a co-sponsor of the Protect Pregnancy Care Centers Act of 2022. *Compare* Press Release, Representative Cathy McMorris Rodgers, ICYMI: Rodgers and Pallone on ABC to Discuss Online Privacy Legislation (Dec. 8, 2022), https://perma.cc/H29D-95Y5, *with* Press Release, Representative Cathy McMorris Rodgers, McMorris Rodgers, Smith Introduce Legislation to Help Protect Pregnancy Care Centers Against Violent Attacks (Sept. 20, 2022), https://perma.cc/D483-7CZJ.

283. *Cf.* Nat'l Abortion Fed'n v. Ashcroft, No. 04 C 55, 2004 U.S. Dist. LEXIS 1701, at *18 (N.D. Ill. Feb. 6, 2004) (acknowledging, in the context of a motion to obtain abortion records, that "the abortion decision is one of the most controversial decisions in modern life"); Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 644 (2016) (Alito, J., dissenting) (describing abortion as "one of

public.[284] Indeed, the conservative Supreme Court justices in the *Dobbs* majority expressed outrage when their own preliminary deliberations about abortion did not remain confidential.[285] Conservatives and liberals may never agree about abortion, but the very divisiveness of this topic[286] provides a strong reason to protect the privacy of abortion-related communication. In the lexicon of the utilitarian rationale, a privilege for abortion-related communication would improve the quality of life and increase aggregate social utility.

The libertarian rationale also supports a new evidentiary privilege for communication about pregnancy and abortion. A

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the most controversial issues in American law"), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

284. *See* Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 HARV. J.L. & GENDER 285, 326 (2014) (discussing "public attitudes toward abortion" and how "abortion comes across as an intensely private subject, inappropriate for public discussion"); Brooke Raunig, Comment, *Is This Hospital Catholic? Assessing the Legality of Merger Contracts that Demand Adherence to Religious Doctrine*, 54 CAL. W.L. REV. 151, 192 (2017) ("As the current and past political climates indicate, the issue of abortion is controversial and uncomfortable to many."); Brit Bennett, *It Can Be Really Uncomfortable to Talk About Abortion. Here's Why We Should*, PBS (Dec. 8, 2017, 6:15 PM), https://perma.cc/7WFH-ZN35 ("[I]t's really uncomfortable to talk about abortion."); E.C. Duckworth, Note, *Raising Our Standards: Rethinking the Supreme Court's Abortion Jurisprudence*, 81 MO. L. REV. 519, 519 (2016) ("Abortion is an incredibly sensitive subject to countless Americans . . . ."). The topic is sensitive for both conservatives and liberals. According to Fox Media analyst Howie Kurtz, abortion "is a difficult and uncomfortable subject for public discussion." *Fox News @ Night* (Fox News television broadcast May 2, 2022), 5/7/22 AP Alerts 10:17:19 (West). College students, most of whom are liberal, are "self-censoring" on the topic of abortion more than on any other topic. *See* Ben Zeisloft, *Survey: 80% of Students Are "Self-Censoring Their Viewpoints", Many Feel Uncomfortable Speaking Up in Class*, ACTIVIST POST (Sept. 24, 2021), https://perma.cc/T4EN-54F6.

285. *See* Glenn Fine, *The Supreme Court's Investigation of the Leaked Draft Opinion*, BROOKINGS: FIXGOV (May 6, 2022), https://perma.cc/Z2GM-RDQP (reporting Chief Justice Roberts' official statement characterizing the leak as a "betrayal").

286. *See* Rust v. Sullivan, 500 U.S. 173, 215 (1991) (Blackmun, J., dissenting) ("[T]he abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years."); Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206, 246 (Iowa 2018) (Mansfield, J., dissenting) ("Abortion is one of the most divisive issues in America today."); *What Comes After* Roe v. Wade*?*, USC ANNENBERG CTR. FOR HEALTH JOURNALISM, https://perma.cc/8TCE-J79F (referring to abortion as "one of the most polarizing issues in America").

privilege comports with this rationale if it advances individual liberty, even if it may not promote aggregate social utility.[287] For example, the attorney-client privilege serves libertarian goals for an individual defendant in a criminal case, although society as a whole might prefer not to "shield the guilty" in some prosecutions.[288] This Article's proposed privilege for communication related to pregnancy and abortion also furthers libertarian objectives. Though the *Dobbs* majority declined to find a constitutional privacy right that required access to abortion,[289] that decision does not foreclose the possibility that privacy concerns relating to pregnancy and abortion are cognizable in the sort of policy analysis that informs privilege law. In fact, very few of the current privileges have a constitutional basis: the privilege against self-incrimination and the clergy-penitent privilege spring from constitutional rights,[290] but the attorney-client privilege, the doctor-patient privilege, the spousal testimonial privilege, and most other privileges do not.[291] There is certainly a compelling liberty interest in speaking privately about such sensitive matters as pregnancy and abortion. That interest relates closely to privacy rights that the Supreme Court still protects, such as the right to contraception[292] and consensual sexual relations with another adult.[293] The reasons for protecting the privacy of one's reproductive affairs would certainly outweigh the reasons for at

287. *See* Imwinkelried, *supra* note 278, at 325–37 (discussing the libertarian rationale for evidentiary privileges under a rubric of "Humanistic Theory, Based on Autonomy or Decisional Privacy").

288. 7 JEREMEY BENTHAM, *On Exclusion of Evidence*, *in* THE WORKS OF JEREMY BENTHAM 335, 473–75 (John Bowring ed. 1843) (deploring the attorney-client privilege to the extent that it helps the guilty to go free).

289. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.").

290. U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."); U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

291. *See supra* Part II.A–B.

292. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (recognizing the marital privacy right as underlying the right to contraception).

293. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (recognizing the right to consensual sex as protected from state "intrusion into the personal and private life of the individual").

least some of the privileges currently in states' evidence codes, such as the informant-reporter privilege and the stenographer-employer privilege.[294]

Finally, the equitable rationale offers a particularly cogent reason for a privilege protecting confidential communication about pregnancy and abortion. The equitable rationale finds its basis in preambulatory language at the start of evidence codes and ethical rules for attorneys.[295] This rationale prioritizes fairness to all people, including those who may be at a disadvantage due to limited resources or other socioeconomic factors.[296] Traditional evidentiary privileges often depend on the pedigree of the audience: conversations with lawyers, doctors, psychotherapists, and other well-heeled professionals remain private,[297] but conversations about the same subject matter with a different audience would lie outside the privilege. Similarly, the declining marriage rate among low-income people makes the spousal privileges somewhat elitist.[298] The clergy-penitent privilege is not as egalitarian as it should be due to the relatively low percentage of low-income people who attend the traditional houses of worship most likely to be subject to the privilege.[299] A new privilege that depends on the subject matter of the communication—not the credentials of the audience—would make the privilege more egalitarian. This inclusive approach is especially urgent in the context of communication about abortion given the data that low-income people are the most likely to need abortion care.[300] Evidentiary privilege should not be co-extensive with economic privilege.

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294. *See* PAUL F. ROTHSTEIN, *Rule 501. Privilege in General*, *in* FEDERAL RULES OF EVIDENCE (2023 ed. 2023).

295. *See* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly . . . ."); MODEL RULES OF PRO. CONDUCT pmbl. ¶ 12 (AM. BAR ASS'N 2020) ("The [legal] profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns . . . .").

296. *See* Jayne R. Reardon, *As Lawyers, We Must Further the Public Interest*, ABA: GPSOLO MAG. (Aug. 13, 2021), https://perma.cc/T2XK-CKMW (interpreting the Preamble of the Model Rules of Professional Conduct to require that lawyers prioritize the concerns of low-income people).

297. *See supra* Part II.A.

298. *See supra* notes 245–246 and accompanying text.

299. *See supra* notes 237–238 and accompanying text.

300. *See supra* Part I.C.

B. *Model Rule and Amendment to Crime-Fraud Exception*

The following language would fit easily in the Federal Rules of Evidence (FRE) and in its state counterparts. In the FRE, this language should appear as new Rule 503. Federal courts could also adopt the new rule in common law, especially as more and more states in each federal circuit add the rule to their evidence codes. At the state level, codification would be a better route than ad hoc adoption by state supreme courts, because codification is customary and is a faster avenue of reform.

> **Privilege for Communication Relating to Pregnancy and Abortion**
>
> **(a) Privilege.** A person, public officer, corporation, association, or other organization or entity, either public or private, that has made or directly received a communication regarding the communicator's current pregnancy, intention to become pregnant, intention to receive abortion care, or past receipt of abortion care, has a privilege to refuse to disclose, and to prevent others from disclosing, this communication, subject to the exceptions set forth in subsection (b).
>
> **(b) Exceptions.** The privilege in subsection (a) does not apply in the following circumstances:
>
> **(1)** the communicator has expressly consented to the disclosure of the communication;
>
> **(2)** prior to the communication, the communicator had received actual notice that the communication would not be kept confidential;
>
> **(3)** the communication concerns abortion care that the communicator is seeking or has sought due to coercion by a third party rather than of the communicator's own volition;
>
> **(4)** the communication concerns an abortion or attempted abortion performed by a person lacking the required medical qualifications to perform this procedure, and the communicator presently does not have the capacity to give consent for disclosure; or
>
> **(5)** the communicator is a minor and the communication indicates that the communicator has become pregnant due to rape or incest, in which case disclosure of the communication is permissible pursuant

> to the procedures set forth in [cross-reference statute governing reporting of child abuse].
>
> **(c) Definitions.** The following terms used in subsections (a) and (b) have these definitions:
>
> **(1)** "Communication" includes any verbal or written communication, or nonverbal communication intended by the actor to be assertive, relating to subjects listed in subsection (a). The communication need not be made to a particular person. The term "communication" includes any act whereby the actor retrieves, collects, records, or stores information for the actor's own reference or for the reference of others. A communication could consist of inputting information into a computer, cell phone, or other electronic device even if the actor does not intend that this information reach another human being.
>
> **(2)** "Communicator" refers solely to a person who is currently pregnant, intends to become pregnant, intends to receive abortion care, or has received abortion care at any time.
>
> **(3)** "Abortion care" consists of medical procedures relating to the purposeful termination of a pregnancy, including diagnosis, and treatment of any other sort, whether it occurs before, during, or after termination of the pregnancy. Abortion care includes the termination of pregnancy by means of medication.
>
> **(d) Applicability to litigation involving an out-of-state party.** The privilege in this section provides a basis for any person to obtain an order from a court in this state quashing a subpoena or discovery request served by an out-of-state party seeking information about events, conduct, or communication occurring in this state. A court in this state may issue a protective order to limit the scope of questions in a discovery request served on a party in this state, or questions in a deposition, hearing, or trial occurring in this state, so that the questions do not lead to the disclosure of information protected by the privilege in this section.

Federal and state jurisdictions should also revise their versions of the crime-fraud exception, which vitiates an evidentiary privilege when the privilege-holder has communicated for the purpose of obtaining assistance to commit

a crime or fraud.[301] The crime-fraud exception usually appears as a generic statue applicable to various evidentiary privileges.[302] The following language should appear at the end of each jurisdiction's statute setting forth the crime-fraud exception. In federal court, the crime-fraud exception is a matter of common law, and courts should reform the common law to include the following limitation.

> **Exclusion of Abortion from Definitions of "Crime" and "Fraud."** As used in this section, the terms "crime" and "fraud" do not include obtaining or providing, attempting to obtain or provide, or acting as an accomplice to obtaining or providing an abortion in a jurisdiction where abortion is lawful under then-existing circumstances.

How would the new rules operate as a practical matter? Simply put, the privilege would prevent the use in litigation of any pregnancy- or abortion-related communication unless extraordinary circumstances exist. The privilege would provide a basis to object to questions asked of witnesses at trials or in hearings.[303] The privilege would also support a motion to quash a pretrial deposition subpoena or other discovery request seeking to elicit information covered by the privilege—whether that subpoena or discovery request originates in the same state that has adopted the privilege or in another state without the privilege.[304] Because the privilege would prevent the use of certain evidence in court proceedings, it would indirectly reduce surveillance and other gathering of such information by any means because the information would have no value in court

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301. *See* United States v. Zolin, 491 U.S. 554, 562–63 (1989) ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." (citations omitted)).

302. *See, e.g.*, FLA. STAT. § 90.502(4)(a) (2022) ("There is no lawyer-client privilege under this section when . . . [t]he services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud."); CAL. EVID. CODE § 956(a) (Deering 2022) ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.").

303. *See* 2 IMWINKELRIED, *supra* note 218, § 6.6.

304. *See id.*

proceedings.[305] The amendment to the crime-fraud exception would make sure that a person who plans to obtain an out-of-state abortion in a state where this procedure is legal would not forfeit any evidentiary privileges even as to communication taking place in a state where abortion is illegal. For a detailed discussion of the ways in which this Article's full combination of proposals would shield abortion seekers, providers, and facilitators, see Part III.E.

The "Pregnancy Privacy Act" has a legitimate chance of becoming law. Democrats and Republicans in Congress will soon discover that they cannot pass laws establishing a nationwide rule making abortion legal or illegal.[306] They can perhaps agree, however, that privacy as to the highly sensitive and personal matter of pregnancy is worth protecting. Democrats will value such protection to facilitate discussions about abortion, while Republicans will value such protection to reduce discrimination against pregnant people and to allow communication with clergy, "crisis pregnancy centers," and counselors who will advise against abortion.[307] The controversy now raging on the subject of abortion will provide strong reason for both parties to favor safeguarding the confidentiality of discussions on this matter.[308] State legislatures should share these concerns, even in states where one party has a substantial majority. Indeed, virtually all red state legislatures have approved the attorney-client privilege,[309] which sometimes impedes criminal

305. *See supra* note 220 and accompanying text.

306. *See* Lisa Mascaro, *Political Reality: Congress Can't Save—Or End—Abortion,* AP NEWS (May 10, 2022), https://perma.cc/9HHW-BSJN (noting that to pass such a bill in the Senate would require sixty votes to overcome a filibuster and that a ban would additionally require a two-thirds Republican majority in both chambers to overcome a presidential veto); Shefali Luthra, *How Some State Legislatures Are Preparing to Further Limit Abortion Rights*, PBS: NEWS HOUR (Dec. 6, 2022, 5:02 PM), https://perma.cc/WHN4-CPSR ("With Republicans controlling the U.S. House, federal abortion legislation—whether a ban or national protection—is unlikely to pass.").

307. *See supra* notes 281–282 and accompanying text; *see, e.g.*, Pamela Wolf, *Senate HELP Committee Sends Pregnant Workers Fairness Act to Full Chamber*, LAB. & EMP. L., Aug. 9, 2021, ¶ 37,564, https://perma.cc/DP3S-23HR (PDF), 2021 WL 3475890 (noting strong bipartisan support for recent legislation to reduce pregnancy discrimination).

308. *See supra* notes 283–286 and accompanying text.

309. *See* Stacy Kochanowksi, Comment, *Attorney-Client Privilege: Expanding the Crime-Fraud Exception to Intentional Torts*, 67 BUFF. L. REV.

prosecutions, and virtually all blue state legislatures have approved of the police-informant privilege,[310] which sometimes impedes the defense in criminal cases. Legislators in both parties are already comfortable with the general idea of evidentiary privilege law, and extending that body of law incrementally to cover a highly sensitive area should be a palatable proposal to both parties. In fact, most states have recently begun the process of considering proposals to strengthen their legislation protecting privacy.[311] At a minimum, it is reasonable to expect that left-leaning states—"destination states" for travelers seeking abortion care—would choose to adopt the privilege proposed in this Article, helping to shield the travelers from reprisals by prosecutors and third-party plaintiffs in their home states.[312]

C. *Additional Duties in Ethics Codes for Lawyers*

The changes to privilege law set forth above would be most efficacious if state bars adopted related revisions to ethical rules for lawyers. The following paragraphs offer model language for such revisions. The usual approach to revising state bars' ethics codes is for the American Bar Association to take the lead by revising its template, the ABA Model Rules of Professional Conduct (hereafter the "ABA Model Rules").[313] State bars usually adopt the provisions in the ABA's boilerplate.[314]

The commentary to ABA Model Rule 1.6 should include the following new paragraph:

> Abortion usually will not provide a ground for an exception to the duty of confidentiality. Under Rule 1.6(b)(1), a client's

1213, 1243 (2019) (listing and comparing the states' versions of the attorney-client privilege).

310. *See* 2 IMWINKELRIED, *supra* note 218, § 7.3.1 n.48 ("The Kentucky Supreme Court is the only state supreme court that has expressly refused to recognize the [informer] privilege.").

311. *See* Anne Godlasky, *Data Privacy Act Has Bipartisan Support. But . . .*, NAT'L PRESS FOUND. (Nov. 30, 2022), https://perma.cc/Z3F5-BH3S (last updated Dec. 28, 2022) (reporting that thirty-one states considered privacy legislation in 2022).

312. *See infra* Part III.E.

313. *See* Reardon, *supra* note 296.

314. John Armour et al., *Augmented Lawyering*, 2022 U. ILL. L. REV. 71, 96 (2022).

> voluntary termination of a pregnancy would not count as "reasonably certain death or substantial bodily harm," but that exception could apply if a client were compelling a third party to terminate a pregnancy over the third party's express objections. Under Rules 1.6(b)(2) and 1.6(b)(3), a client's decision to obtain or provide an abortion, or to assist another in obtaining or providing an abortion, would not be a "crime or fraud" if the conduct has occurred or were to occur in a jurisdiction where abortion is or were lawful under then-existing circumstances.

ABA Model Rule 3.4 should include the following new subsection (g):

> A lawyer shall not . . . (g) at a trial or hearing, attempt to introduce or allude to evidence that any person has obtained or provided an abortion, has assisted another in doing so, or has attempted or assisted another in attempting any of the foregoing conduct, unless the judge or presiding officer has expressly ruled that no privilege applies and the evidence is otherwise admissible.

ABA Model Rule 3.8 should include the following new subsection (i):

> A prosecutor shall not direct, approve, participate in, or acquiesce in surveillance, interrogation, or other collection of information indicating that a person has obtained or provided an abortion, has assisted another in doing so, or has attempted or assisted another person in attempting any of the foregoing conduct, unless the information concerns coercion of a person to obtain or provide an abortion despite that person's express objections. A prosecutor shall not file any charge based, in whole or in part, on an investigation that has involved such surveillance, interrogation, or other collection of information.

ABA Model Rule 4.4(a) should include the following additional language:

> Recognizing the unique sensitivity of information about abortion, a lawyer shall not seek to obtain, by means of discovery, questioning, or any other form of collection, any information indicating that a person other than the lawyer's client has obtained or provided an abortion, has assisted person another in doing so, or has attempted or assisted another person in attempting any of the foregoing conduct, except that the lawyer may seek to obtain such information

> if it concerns coercion of a person to obtain or provide an abortion despite that person's express objections.

New ethical rules precluding lawyers' involvement in collecting or introducing certain categories of evidence would have a significant impact.[315] These rules would ensure that prosecutors and other categories of attorneys do not use the tools at their disposal to extract information about abortion or utilize this information in court.[316] Attorneys' self-interest would ensure that they follow the rules closely, because the sanctions for disobedience would be suspension and disbarment rather than exclusion of evidence.[317] The rules would also indirectly affect such information-gathering by law enforcement officers or private investigators. Many investigative techniques used by these officers and investigators require the prior approval of lawyers who are subject to the state bar codes.[318] Even in the absence of such requirements, there would be little incentive to gather information that would be off-limits for attorneys to use in court.[319] Prosecutors could not even charge a case based on an investigation that involved impermissible collection of information about abortion, even if the prosecutors had not directed or approved that misconduct and did not want to use the information in court, so there is a powerful disincentive for investigators to engage in such conduct.

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315. *See* Bruce A. Green & Ellen Yaroshefsky, *Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?*, 58 DUQ. L. REV. 249, 254–63 (2020) (stating that state bar rules are effectively "law" even though state legislatures do not need to approve them).

316. *See id.* at 273 ("[P]rosecutorial conduct rules may influence the culture of prosecutors' offices and the broader judicial and professional cultures within which prosecutors function.").

317. *See* Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753, 757 (2018) (arguing that prosecutors have greater concern about bar disciplinary proceedings than about adverse court rulings, because the former could result in personal detriment while the latter could only jeopardize the results in court cases).

318. *See* Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL'Y REV. 391, 393 (2006) [hereinafter Lininger, *Federalism and Antiterroism Investigations*] (explaining that non-attorney investigators may not use certain investigative techniques, such as grand jury subpoenas or many categories of electronic surveillance, without the approval of prosecutors).

319. *See supra* note 220 and accompanying text.

Adoption of this Article's proposed ethical rules by the ABA and state bars seems to be a strong possibility. The legal profession governs itself.[320] Changes to the ethics codes for lawyers do not require approval by state legislatures.[321] Lawyers tend to be more progressive than the general public, and therefore lawyers are more likely to be left-leaning than legislators representing the general public.[322] The ABA, which authors the template for ethics rules adopted by state bars, has taken a strong position against the *Dobbs* ruling and in favor of protecting reproductive freedom.[323] Within state bars, defense attorneys and civil libertarians who would favor this Article's proposals outnumber the prosecutors who might oppose these proposals.[324] Even in the most conservative states, lawyers tend to find themselves at odds with antiabortion crusaders.[325] Past experience has shown that bar codes in conservative states often incorporate ABA-authored amendments that those states' legislatures might find objectionable.[326] The reforms proposed in

320. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 10 (AM. BAR ASS'N 2020).

321. In many states, the highest courts must approve the bars' ethics codes, but those courts tend to go along with the ABA boilerplate. *See* Reardon, *supra* note 296. In any event, court approval may only be necessary for the blackletter law in ethics codes, not for comments and bar officials' ethics opinions. Those latter categories of authority could provide a vehicle for protecting information about abortion pursuant to rules already in state bar codes. For an explanation of how the ethics rules proposed in this article relate closely to rules already adopted by most state bars, see MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

322. *See* Debra Cassens Weiss, *Lawyers Are More Liberal Than General Population, Study Finds; What About Judges?*, ABA J. (Feb. 2, 2015, 7:56 AM), https://perma.cc/6C3N-J4NU (citing results from a nationwide study of campaign contributions by lawyers).

323. *See* Press Release, ABA, Statement of ABA President Reginald Turner Re: Reproductive Choice and the *Dobbs* Decision (June 24, 2022), https://perma.cc/2G3V-CAGL (criticizing *Dobbs* and vowing that the ABA "remains committed to doing all it can to support reproductive choice").

324. Lininger, *Federalism and Antiterrorism Investigations*, *supra* note 318, at 404.

325. For example, a letter from the Texas Freedom Caucus, a group of Texas legislators, threatened criminal and civil liability for the law firm Sidley Austin because the firm was offering to cover the costs of employees' travel to obtain out-of-state abortions. Letter from Texas Freedom Caucus to Yvette Ostolaza, Mgmt. Comm. Chair, Sidley & Austin LLP, *supra* note 156.

326. One example is ABA Model Rule 3.8(d), which state bars have uniformly adopted even though this rule expands prosecutors' disclosure obligations beyond the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963).

this Article would seem to be a comfortable fit in state codes because the proposed rules are similar to other rules already on the books in virtually all states.[327] In sum, the authors of the legal ethics rules seem to have both the motivation and ability to undercut the enforcement of abortion bans—an odd irony, given that the proponents of abortion restrictions have relied so heavily on lawyers for enforcement through criminal prosecutions and lawsuits for damages.[328]

D. *Reform of Data Privacy Regulations*

Due to space limitations, this Article cannot offer model language for new regulations governing data privacy. In modern times, the publication of a proposed rulemaking can take up 100 or more pages in the Federal Register.[329] Nonetheless, it is possible to sketch here the broad contours of what regulatory reform should look like if it is to provide meaningful protection to abortion seekers, providers, and facilitators.

The Federal Trade Commission (FTC) has authority to regulate unfair and deceptive trade practices that affect interstate commerce.[330] Pursuant to this authority, the FTC may issue "rules which define with specificity acts or practices

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See Green & Yaroshefsky, *supra* note 315, at 259–69. Another example is the relatively new ABA Model Rule 8.4(g), which prohibits lawyers from engaging in conduct that harasses or discriminates against certain listed groups; state bars in over half of the states, including several in conservative states, have adopted this rule. *See* CPR POL'Y IMPLEMENTATION COMM., ABA, RULE 8.4(G) SNAPSHOT (2023), https://perma.cc/DXB2-YQE2 (PDF).

327. All four of the ethics rules proposed in this Article are similar to existing provisions in the ABA Model Rules and their state counterparts. The proposals simply would extend lawyers' confidentiality obligations to their own clients (Rule 1.6), lawyers' duties of fairness to opposing parties during litigation (Rule 3.4), prosecutors' obligation to refrain from abusive tactics and charge only meritorious cases (Rule 3.8), and lawyers' duties to avoid unduly burdening third parties' during evidence collection (Rule 4.4).

328. *See supra* Part I.A.

329. *See generally* OFF. OF THE FED. REG., NAT'L ARCHIVES & RECS. ADMIN., A GUIDE TO THE RULEMAKING PROCESS, https://perma.cc/D8XH-GP8B (PDF) (explaining the steps of the rulemaking process, including the notice process).

330. *See A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), https://perma.cc/QQ2B-ZFSF (explaining that Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 57a, authorizes the agency to address unfair or deceptive practices affecting interstate commerce).

which are unfair or deceptive."[331] The FTC should now utilize this power to prohibit, at a minimum, the nonconsensual collection, sale, or disclosure of consumers' personal data, in the form of internet search histories and location data stored on any computer or device, relating to any attempt to terminate a pregnancy. The FTC should also apply the same prohibition to any data about a particular person's menstruation patterns or pregnancy tests. The technological feasibility of such regulation is apparent in Google's recent decision to delete all location data that shows the proximity of people to abortion clinics.[332] There is no legitimate need for the preservation and dissemination of such information and, given the apparent ease with which companies can protect this highly private data, the FTC should specify in new regulations that strict protection is necessary to avoid unfair or deceptive practices that harm consumers.[333]

Would the FTC be capable of adopting such changes without additional congressional authorization? In 2022, a majority of FTC Commissioners seemed interested in strengthening protection of consumers' data privacy in general, and particularly in the context of pregnancy and abortion.[334] The FTC has the authority to engage in rulemaking on its own when it has reason to believe that a particular unfair or deceptive trade practice has become "prevalent."[335] Certainly the widespread threats to reproductive privacy following *Dobbs* would provide a compelling ground to utilize this authority.[336]

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331. *Id.*; *see id.* (discussing the FTC's rulemaking power under Section 18 of the Act).

332. *See* Allyn, *supra* note 166.

333. *Cf.* Mark MacCarthy, *Why the FTC Should Proceed with a Privacy Rulemaking*, BROOKINGS: TECHTANK (June 29, 2022), https://perma.cc/5N6L-HSHM.

334. *See id.* (suggesting that a majority of current Commissioners on the FTC would support regulations strengthening data privacy); Kristin Cohen, *Location, Health, and Other Sensitive Information: FTC Committed to Fully Enforcing the Law Against Illegal Use and Sharing of Highly Sensitive Data*, FTC: BUS. BLOG (July 11, 2022), https://perma.cc/ZGK9-QTVY.

335. *See* MacCarthy, *supra* note 333 (analyzing the prevalence standard in Section 18 of the Federal Trade Commission Act).

336. *See* Fowler & Hunter, *supra* note 169 ("Suddenly, Google searches, location information, period-tracking apps and other data could be used as evidence of a crime. There is precedent for it, and privacy advocates say data collection could become a major liability for people seeking abortions in secret.").

Experts agree that the FTC can act independently to issue regulations on data privacy,[337] but even assuming congressional authorization were necessary, a bipartisan coalition has shown increasing interest in directing the FTC to proceed.[338]

E. *Efficacy in Protecting Abortion Seekers, Providers, and Facilitators*

This Article's combination of proposals would bring significant benefits. First, the reforms would improve access to abortion. In the aftermath of *Dobbs*, the threats posed by criminal prosecutions, civil suits, and relentless surveillance are causing a significant chilling effect.[339] This intimidation campaign is deterring abortion doctors and charitable organizations from serving patients who live in states that have banned abortion—even if those patients might still be eligible for abortions under certain circumstances and in certain locations.[340] The new regime terrorizes potential abortion seekers by holding out the risk of criminal and civil liability if they have the temerity to mention a possible interest in terminating a pregnancy.[341] To be clear, the chilling effect is an *access problem*. It becomes harder to find abortion care in or near conservative states, and prospective patients are more reluctant to access this care when it is available. Sometimes the threat to access could be even more direct: law enforcement officials and "bounty hunters" could use private information to thwart an attempted abortion.[342] This Article's proposals would address the access problem by protecting confidentiality strictly and making abortion-related activity less conspicuous. With stronger safeguards against surveillance, abusive discovery requests, and intrusive questioning in court proceedings, there

337. *See, e.g.*, MacCarthy, *supra* note 333.

338. *See* Brian G. Cesaratto et al., *A Recently-Released "Discussion Draft" of the "American Data Privacy and Protection Act" Provides Insight into Recent Bipartisan Efforts to Pass Nationwide Privacy Law*, NAT'L L. REV. (June 9, 2022), https://perma.cc/ZNQ9-45XU (discussing bipartisan cooperation in drafting data privacy legislation).

339. *See supra* notes 114, 162, 195 and accompanying text.

340. *See supra* note 162 and accompanying text.

341. *See supra* Part I.A.2.

342. *See* Tolentino, *supra* note 27.

would be a zone of repose in which abortion providers, seekers, and facilitators could operate with less fear. Greater privacy would allow abortion care to continue in circumstances and locations where it is still legal after *Dobbs*.

Second, this Article's reforms would improve outcomes in court proceedings. In criminal prosecutions, the exclusion of abortion-related evidence under the new privilege could make the difference between conviction and acquittal. In civil cases brought by "bounty hunters," the privilege would equip defendants to file motions to quash the plaintiff's subpoenas for records and witnesses.[343] This Article's proposals would even be valuable for a defendant who lives in a state that declined to adopt the privilege: if that defendant had obtained an abortion in another state that adopted the privilege and the defendant later faced a prosecution or lawsuit in the conservative state, the defendant could thwart proof of the abortion itself because the privilege would deprive the court of any evidence from the state where the abortion occurred. A prosecutor in a conservative state could not prove beyond a reasonable doubt that a defendant had obtained an abortion in a neighboring state merely because the defendant came back without a baby. Interstate civil litigation in federal court—for example, a suit by a plaintiff in State A seeking damages for wrongful death due to the cross-border abortion that the defendant obtained in State B—would need to use the stricter privilege rules in State B pursuant to Federal Rule of Evidence 501.[344] In addition, this Article's proposed amendments to ethical rules would foreclose certain categories of discovery or questioning by attorneys and would bar prosecutors from filing charges based on improper abortion-related surveillance. In sum, the new privilege and ethical rules would greatly reduce the persecution of defendants in abortion-related litigation.

Third, the reforms would decrease the overall level of surveillance directed at people of childbearing age. Prosecutors would not be able to direct or approve such surveillance and could not even charge a case in which the investigation had employed such techniques. Police, while not directly subject to

343. *See supra* note 219 and accompanying text.

344. This rule provides that, in a diversity suit, a federal court will apply the privilege law of the state supplying the rule of decision. FED. R. EVID. 501.

regulation by the ethical rules for lawyers, would not be able to rely on lawyers any more for access to high-level investigative techniques such as electronic surveillance or grand jury subpoenas. Moreover, the inability of prosecutors to indict cases involving improper surveillance and the inability of any lawyer to use evidence violating the new privilege would take away the incentive for law enforcement officers to gather such evidence in the first place. Even assuming that police remained motivated to continue such surveillance, the new data privacy regulations would limit the scope of the data they could obtain. The harmful effects of surveillance—including the targets' sense of limited privacy and the risk of discrimination against pregnant people and abortion patients—would probably diminish somewhat. "Uterus surveillance" might not end entirely, but reproductive organs would become nearly inscrutable to outsiders, as should be the case in any civilized society.

IV. FORESEEABLE OBJECTIONS

This Part will consider possible objections to the proposals discussed above. Space constraints limit the extent of the analysis in the following Subparts, but it is useful to list and begin responding to certain foreseeable objections. A more thorough treatment must await future scholarship.

A. *Nonuniform Adoption at State Level*

One possible criticism is that conservative state legislatures might not choose to adopt the proposed amendments to their evidence codes. If the greatest need for protection of confidentiality is in states that might not adopt the privilege, could this Article's proposals really make a difference?

This criticism is too pessimistic. To begin with, the Pregnancy Protection Act stands a reasonable chance of adoption in a wide range of states because there is bipartisan agreement on the need to safeguard the confidentiality of communication about pregnancy-related matters.[345] It is also important to bear in mind that only a subset of states with abortion bans are taking the most aggressive positions, such as sanctioning citizens who travel out of state for abortion care; a

345. *See supra* notes 280–282 and accompanying text.

substantial number of states with abortion bans do not want to go this far, and states in this portion of the political spectrum would be potentially receptive to stronger confidentiality protections.[346] Of course, two of this Article's proposals do not need the approval of state legislatures: the revised ethical rules for attorneys, which are likely to win approval because state bars are more progressive than legislatures,[347] and the new data privacy regulations that the FTC should issue. Even assuming, *arguendo*, that some conservative states might not adopt this Article's proposed privilege, citizens in those conservative states would still benefit greatly if neighboring states adopted the privilege to shield abortion travelers from reprisals when they return to the conservative states. As noted previously, the privilege would prevent the conservative states' prosecutors and bounty hunters from obtaining evidence about the abortion care that occurred in the neighboring states, and the privilege would also apply in federal civil litigation involving tort claims brought by plaintiffs in conservative states against defendants in states adopting this Article's proposed privilege.[348]

Critics who lament the imperfection of this Article's proposals in protecting abortion rights should consider the value of experimenting with several different approaches to the challenge of *Dobbs*. A patchwork of state regulation would not be ideal, but it would allow a comparison to see which reforms are relatively successful in protecting abortion seekers from harassment. Proponents of abortion rights have emphasized the need after *Dobbs* to experiment with a range of novel strategies, just as the pro-life movement tried several different strategies to restrict access to abortion.[349]

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346. One example is Iowa, a state with a "fetal heartbeat" ban, where top Republicans are reluctant to limit out-of-state travel for abortions. *See* Skylar Tallal, *Grassley, Hinton Against States Imposing Travel Bans for Those Seeking an Abortion*, IOWA'S NEWS NOW (July 14, 2022), https://perma.cc/8SHM-SPWH.

347. *See supra* notes 322–323.

348. *See supra* Part III.E.

349. *See* Cohen et al., *Rethinking Strategy After* Dobbs, *supra* note 230, at 7–8

> The conservative legal movement has moved novel, even outlandish, legal theories from laughable to legitimate . . . . Abortion rights scholars and advocates also can move creative ideas into the mainstream . . . . Pressing creative

B. *Difficulty of Judicial Administration*

Another possible criticism is that the privilege proposed in this Article might be challenging for judges to administer. Whereas the applicability of professional privileges depends on the identity of the audience—a fact that is fairly easy for judges to discern—the applicability of a subject-based privilege may always not admit of such clear demarcation. A critic who prioritizes ease of judicial administration[350] might fault this Article's proposals for potentially delaying court proceedings, injecting subjectivity into privilege law, and undermining the predictability of court rulings.

Two responses to this criticism are possible. First, there are already several long-standing privileges that depend in whole or in part on the subject matter of the communication: examples include privileges for trade secrets, political votes, and attorneys' mental impressions in preparation for litigation.[351] There is no indication that the existing topical privileges are too unwieldy, so a new privilege for communication about abortion should be just as workable. Second, judicial administration is not more important than fairness, and current privilege law treats low-income litigants unfairly by conditioning secrecy on the pedigrees of professional advisors, many of whom are too expensive for a large segment of the population to hire.[352]

C. *Hindrance of Legitimate Criminal Investigations*

Some observers might worry that the proposed privilege and ethical rules would impede categories of prosecutions that both conservatives and liberals consider to be important. For

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> arguments in a variety of jurisdictions will produce unpredictable, possibly surprising results.
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> . . . New ideas should be aired, considered, and—if there is a plausible argument to support them—tested in some form or other. It is impossible to predict with certainty which strategies will be effective, but there is strategic importance in overwhelming the antiabortion movement with legal arguments it must defend.

350. *Cf.* FED. R. EVID. 102 (indicating that rules should be construed to reduce delay).

351. 2 IMWINKELRIED, *supra* note 218, §§ 9.2–9.3; FED. R. CIV. P. 26(b)(3).

352. *See supra* Part II.A.

example, in a rape case with a survivor who is unwilling to testify, perhaps evidence of an abortion would be useful to prove that the rapist impregnated the survivor. So too would evidence of an abortion be central in the prosecution of a charlatan who harmed an abortion patient by fraudulently claiming to have medical credentials.

In fact, this Article's proposals would not impose any appreciable new burdens on prosecutions. The abortion patient is always the privilege-holder and can consent to a waiver in a prosecution of a third party or in any other circumstance the privilege-holder deems appropriate. The privilege also makes exceptions for child rape cases, which a jurisdiction must treat in accordance with its existing statutory scheme on this subject, and the privilege allows disclosure when an abortion patient has become incapacitated as a result of mistreatment by an abortionist who fraudulently claimed medical licensure. In any event, a complainant's reluctance or unavailability to testify could doom a prosecution under the Confrontation Clause of the Sixth Amendment,[353] so the incremental hindrance caused by this Article's proposals would be negligible in such cases.

CONCLUSION

On May 12, 2022, in the state of Ohio, a 27-year-old man raped a 10-year-old girl multiple times, causing her to become pregnant.[354] She sought to terminate her pregnancy at the end of June.[355] Under Ohio's "trigger law" that took effect hours after the *Dobbs* ruling, the girl was ineligible for an abortion because her gestation had progressed beyond six weeks, and there was no exception for rape.[356] The girl fled to Indiana, where she barely managed to obtain a legal abortion before that state's legislature held a special session to ratchet up abortion

353. *See* Crawford v Washington, 541 U.S. 36, 67–68 (2004) (reinforcing the Sixth Amendment confrontation right).

354. Chuck Johnston, *A Man Was Charged in the Rape of a 10-Year-Old Who Traveled to Indiana for an Abortion*, CNN, https://perma.cc/KQR2-KY5E (last updated July 14, 2022, 1:11 PM).

355. Dareh Gregorian, *Indiana Attorney General Says He Is Investigating Doctor Who Treated 10-Year-Old Rape Victim*, NBC (July 14, 2022, 12:53 PM), https://perma.cc/RU8H-K7XW (last updated July 14, 2022, 7:59 PM).

356. *Id.*

restrictions.[357] Antiabortion politicians showed little sympathy for the girl or her abortion doctor.[358] At first the critics dismissed the girl's story as a hoax.[359] When her rapist eventually confessed to police,[360] the critics pivoted to a different argument: they insisted that the girl should have borne the rapist's child.[361] The girl's abortion doctor faced a criminal investigation by the Indiana Attorney General.[362] This ordeal would have been even more nightmarish if the girl had fled from a state like Texas, where prosecutors and civil plaintiffs might have targeted her, her abortion doctor, and anyone else who assisted with her travel to a pro-choice state.[363] Given that thousands of rape survivors under the age of fifteen become pregnant in the United States, and many of them live in the dozen states that prohibit

357. *See* Casey Smith, *Outgoing Indiana Lawmakers Still Committed to Special Session*, INSIDE IND. BUS. (July 18, 2022, 11:15 AM), https://perma.cc/R7WP-QBD6 (last updated July 18, 2022, 12:51 PM).

358. *See* Mike Freeman, Opinion, '*Just Imagine Being that Little Girl': Rape of 10-Year-Old and the Monsters Within*, USA TODAY (July 16, 2022, 6:00 AM), https://perma.cc/4VVC-DGM3 (last updated July 16, 2022, 1:27 PM).

359. *See id.* ("Ohio Attorney General Dave Yost, a Republican . . . initially said that as more time passed the more likely the store of this little girl was a fabrication. GOP Rep. Jim Jordan called the story a lie in a tweet.").

360. *See* Johnston, *supra* note 354.

361. *See, e.g.*, Cheryl Teh, *A Lawyer Who Proposed Strict Abortion Legislation for Indiana Said He Wished the 10-Year-Old Ohio Rape Victim Would Have Understood the "Benefit of Having the Child*," INSIDER (July 15, 2022, 4:49 AM), https://perma.cc/N4M5-TXDV (quoting the lawyer who drafted model legislation for the National Right to Life Committee).

362. *See* Ana Marie Cox, Opinion, *Ohio's 10-Year-Old Victim Forced Republicans to Look at Their Own Cruelty*, NBC: THINK (July 16, 2022, 5:30 AM), https://perma.cc/QBC5-Y7GQ (reporting that the "Indiana attorney general proudly said he'd prosecute the doctor who performed the procedure"). The Indiana Attorney General eventually switched strategies from seeking criminal charges to seeking professional discipline of the abortion doctor. Tom Davies & Arleigh Rodgers, *AG: Penalize Doctor Who Spoke of Ohio 10-Year-Old's Abortion*, AP NEWS (Nov. 30, 2022), https://perma.cc/D38M-EY38 (pointing out that the range of possible outcomes could include suspension or revocation of the doctor's license to practice medicine in Indiana).

363. *See* Eleanor Klibanoff, *Texans Who Perform Abortions Now Face up to Life in Prison, $100,000 Fine*, TEX. TRIB. (Aug. 25, 2022, 10:02 AM), https://perma.cc/ZML2-KM9K (noting that Texas's "trigger law criminalizes performing an abortion from the moment of fertilization unless the pregnant patient is facing a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy" (internal quotation omitted)).

abortions in cases of rape or incest,[364] stories like that of the desperate Ohio girl will likely become more common—and their conclusions will sometimes be even more horrifying.[365]

In the 1800s, the Underground Railroad offered a path to freedom for victims of such persecution.[366] Allies of the oppressed provided safe passage so that fugitives could reach havens affording them the basic human rights of self-determination and bodily autonomy.[367] The modern invocation of the nineteenth-century metaphor may seem hyperbolic to conservative critics, but the reality is that some states are trying to impose a sort of involuntary servitude that seems eerily familiar to historians of the Antebellum South.[368] Now that *Dobbs* permits antiabortion states to override the objections of pregnant people and require that all pregnancies must proceed to term, even in cases of rape and incest, these states are violating the spirit, if not the letter, of the Thirteenth

364. *See* Goldstein & Sasani, *supra* note 97 (indicating that "more than 1,000 girls under 15 seek abortions each year" in the United States, and "[new abortion] bans in nearly a dozen states do not make exceptions for rape or incest").

365. *See* Lauren Hazard Owen, *Unimaginable Abortion Stories Will Become More Common. Is American Journalism Ready?*, NIEMANLAB (July 13, 2022, 2:53 PM), https://perma.cc/ZY7P-RJ8G (opining that unless out-of-state abortion care is available, "more girls who are raped will [end up] having babies while they are still in elementary school").

366. SIEBERT, *supra* note 7, at 22.

367. *See* Miller, *supra* note 4, at 14 ("Along with white and Native American allies, [free Black communities] formed an interracial freedom movement, risking their lives in defense of freedom seekers.").

368. *See* Kate Masur, Opinion, *What Pre-Civil War History Tells Us About the Coming Abortion Battle*, WASH. POST (July 14, 2022, 6:00 AM), https://perma.cc/GF2J-P544

> Any historical comparison requires considerable care, with attention to differences as well as similarities. The inability to access abortion, however degrading and oppressive, is quite unlike the horrors of chattel slavery, in which enslavers tortured and murdered enslaved people with impunity, sold children and adults away from loving families and required enslaved status to be passed from one generation to the next.
>
> Yet, like antebellum slavery, abortion is a question of fundamental individual rights, an issue of critical national importance and a matter of great moral significance, marked by bitter divisions in public opinion.

Amendment.[369] Compulsory childbearing is forced labor, both figuratively and literally. The Underground Railroad once provided an escape from involuntary servitude, and the time has come to uncover those same train tracks for the benefit of abortion seekers in the post-*Dobbs* era.

This Article has analyzed the many ways in which conservative states are not only criminalizing abortion within their borders, but are also trying to ensnare abortion seekers, providers, and facilitators who seek to circumvent the conservative states' laws by arranging abortions across state lines.[370] Expansive prosecution, bounties for civil suits, relentless surveillance, collection of private data—all are part of the antiabortionists' strategy to deny any hope of reproductive freedom. Access to abortion is dwindling as doctors withdraw from abortion care to avoid civil and criminal liability. Employers and pro-choice organizations face significant risks if they fund travel for abortions. The heaviest burden falls on minority and low-income communities, for whom abortion may soon be out of reach altogether.

Of course, the best solution to this crisis would be for the Supreme Court or Congress to reinstate the right to abortion throughout the United States. But wishing for that remedy seems unrealistic in the short term.[371] The great suffering portended by *Dobbs* should lead reformers to consider suboptimal measures that would ameliorate some of the hardship while advocacy for restoration of the abortion right proceeds in earnest.

This Article has proposed a comprehensive set of reforms that stand a good chance of adoption. The Pregnancy Privacy Act would establish an evidentiary privilege for communication about pregnancy or abortion.[372] This Act would win support from

369. *Cf.* Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment,* 112 COLUM. L. REV. 1917, 1935–43 (2012) (comparing abortion restrictions to involuntary servitude and arguing that Thirteenth Amendment should apply to both).

370. *See supra* Part I.A–B.

371. *See* Isaac Chotiner, *How the Supreme Court Could Approach Laws Upholding—Or Banning—Abortion*, NEW YORKER (June 28, 2022), https://perma.cc/6S5S-A8SA (indicating that Democrats in the Senate lack the votes to codify *Roe*, at least in the near term).

372. *See supra* Part III.B.

Democrats and Republicans alike, given their shared commitment to privacy and their concern about emboldening pregnant people to seek counseling.[373] A related proposal would amend the crime-fraud exception to evidentiary privileges so that they would remain in effect if the privilege-holders obtained, provided, or facilitated abortions in states where the procedure remained legal, even if the patients came from antiabortion states.[374] This Article has also proposed to reform the ethics rules for attorneys, limiting the gathering of information about abortion and prohibiting criminal charges based on improper collection of such information.[375] The proposal to amend bar codes would exploit the fact that, while conservative states are relying heavily on attorneys to enforce new antiabortion measures, the ABA and the state bars that write the ethics codes are generally pro-choice. Finally, this Article's proposal for new data privacy regulations would take advantage of the growing receptiveness among FTC officials to limits on the misuse of internet search histories, "period tracker apps," and cell phone data as a means for harassment of abortion seekers. In combination, the reforms proposed in this Article would make a significant difference by improving access to abortion, reducing the risk criminal and civil liability after an abortion, and limiting surveillance that targets people of childbearing age.

It is unclear how far the antiabortion states will go to extinguish reproductive freedom in the next few years, but one thing is certain: anyone who could become pregnant has a stronger interest in confidentiality than at any other time in the last fifty years. Doctors and third parties who assist abortion seekers have a greater need for secrecy than at any time since *Roe*. Stronger confidentiality rules could make the difference between privacy and prison. Pro-choice activists should never stop pushing to restore abortion rights, but while that campaign awaits results, activists should demand confidentiality for communication about pregnancy and abortion—some of the most sensitive and potentially dangerous information in the United States today.

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373. *See supra* notes 280–282 and accompanying text.

374. *See supra* Part III.B.

375. *See supra* Part III.C.