



CSU
College of Law Library

Journal of Law and Health

Volume 37 | Issue 1

Article


10-20-2023

Legal and Health Risks of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of Dobbs

Adrienne R. Ghorashi

DeAnna Baumle

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>

 Part of the [Criminal Law Commons](#), [Health Law and Policy Commons](#), and the [Supreme Court of the United States Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Adrienne R. Ghorashi and DeAnna Baumle, *Legal and Health Risks of Abortion Criminalization: State Policy Responses in the Immediate Aftermath of Dobbs*, 37 J.L. & Health 1 (2023)
available at <https://engagedscholarship.csuohio.edu/jlh/vol37/iss1/5>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

LEGAL AND HEALTH RISKS OF ABORTION CRIMINALIZATION: STATE POLICY RESPONSES IN THE IMMEDIATE AFTERMATH OF *DOBBS*¹

Adrienne R. Ghorashi, JD; DeAnna Baumle, JD, MSW²

ABSTRACT. Major changes to the landscape of abortion law and service delivery have rapidly proliferated since the Supreme Court’s decision in *Dobbs*, in some cases overnight. Using legal epidemiology methods, the authors of this Article and a team of researchers created a legal dataset that identifies and tracks state laws impacting abortion access in the months immediately following the *Dobbs* ruling. This Article explores the dataset’s findings, detailing changes in abortion laws including abortion bans and related penalties, interstate shield laws, and data privacy protections, from June 1, 2022, through January 1, 2023. While several states moved quickly to restrict or ban abortion, others have strengthened protections and developed innovative laws aimed at shielding patients and providers from abortion criminalization. However, the ever shifting landscape and increased risk of criminalization have chilled accessibility and quality of reproductive health services, and gaps remain even in states that have enacted protective laws. Moving forward, researchers and policymakers must learn from the past and prioritize advancing racial and health equity. Despite the many harms that continue to result from *Dobbs*, this moment also presents an opportunity to rebuild a more inclusive and equitable vision of reproductive justice for all.

¹ The legal dataset described in this article was created by the Center for Public Health Law Research (CPHLR) at Temple University’s Beasley School of Law, and funding for the dataset was provided by the Society for Family Planning (SFP). The views expressed here do not necessarily reflect the views of CPHLR or SFP. The authors gratefully acknowledge CPHLR staff Amy Cook, Alexandra Hess, and Cydney Murray for their contributions to the legal dataset. The authors thank Patty Skuster, Zakiya Luna, and Scott Burris for their valuable review and input.

² Adrienne is a Lead Law and Policy Analyst and DeAnna is a Senior Law and Policy Analyst at CPHLR.

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	AN INTERDISCIPLINARY PUBLIC HEALTH APPROACH TO ABORTION LAW	5
	A. HOW ABORTION BANS INCREASE LEGAL RISK AND JEOPARDIZE CARE.....	5
	B. TRACKING ABORTION LAW THROUGH LEGAL EPIDEMIOLOGY.....	7
	C. CONSTRUCTING A LEGAL DATASET OF POST- <i>DOBBS</i> RESTRICTIONS AND PROTECTIONS.....	7
III.	LEGAL IMPLICATIONS OF CRIMINAL ABORTION BANS UNDER <i>DOBBS</i>	9
	A. UNCONSTITUTIONAL BANS ON ABORTION BECAME LEGALLY ENFORCEABLE.....	9
	i. PRE- <i>ROE</i> AND TRIGGER BANS.....	11
	ii. ENFORCEMENT THROUGH PRIVATE RIGHTS OF ACTION.....	13
	B. UNCLEAR APPLICATION OF PENALTIES TO PROVIDERS, PATIENTS, AND HELPERS.....	15
IV.	INTERSTATE SHIELD LAWS AS A COUNTERMEASURE TO ABORTION BANS	17
	A. OVERVIEW OF INTERSTATE SHIELD LAWS IN RESPONSE TO <i>DOBBS</i>	18
	B. STATE AND OTHER ACTORS GOVERNED BY INTERSTATE SHIELD LAWS.....	19
	C. KEY FEATURES OF INTERSTATE SHIELD PROVISIONS.....	21
	D. POTENTIAL LIMITATIONS OF INTERSTATE SHIELD LAWS.....	25
V.	STATE LAWS ADDRESSING ABORTION DATA PRIVACY POST-<i>DOBBS</i>	27
	A. HIPAA AND GAPS IN PATIENT DATA PROTECTIONS.....	27
	B. EMERGING STATE LAW PROTECTIONS FOR ABORTION DATA PRIVACY.....	28
VI.	PUBLIC HEALTH AND POLICY IMPLICATIONS OF <i>DOBBS</i>	29
	A. <i>DOBBS</i> THREATENS TO EXACERBATE EXISTING INEQUITIES.....	29
	B. RESEARCH AND POLICY OPPORTUNITIES TO PROTECT ACCESS.....	32
VII.	CONCLUSION	34

I. Introduction

The Supreme Court's callous treatment of abortion rights in *Dobbs v. Jackson Women's Health* cast a national spotlight on law and law enforcement's role in criminalizing reproductive healthcare.³ The *Dobbs* ruling uprooted nearly 50 years of federal and state abortion rights jurisprudence by holding that the Constitution did not confer a right to abortion and overturning the precedents set by *Roe* and *Casey*, allowing states to ban pre-viability abortions freely.⁴ The swift ramifications of *Dobbs* have unleashed legal chaos across the abortion ecosystem for providers, patients, assisters, and the general public. Previously unconstitutional laws that went unenforced for decades under *Roe* suddenly became de facto bans on abortion as they either took effect or threatened to.

However, it is important to recognize that the promise of *Roe* served as little more than a veneer of constitutional protection, as states could still overregulate abortion to the point that the "right" was rendered meaningless for many. Shortly after the landmark ruling, the courts drew sharp distinctions between the right to abortion and abortion access, allowing states to place obstacles in the path of abortion seekers, such as mandatory waiting periods and bans on insurance coverage.⁵ From 1973 to 2021, over 1,300 state abortion restrictions were enacted.⁶ Restrictions on where abortion could be provided and by whom were passed under the thinly veiled guise of protecting women's health, such as Targeted Regulation of Abortion Providers (TRAP) laws.⁷ Singling out abortion from other forms of healthcare, started as a movement to consolidate power and status amongst physicians, which has reinforced political divides and stigmatized care.⁸ Navigating the barriers created by abortion care's increasing medicalization and regulation required resources and privileges. State legislatures' unrelenting encroachment on access to abortion over the past decades played a key role in *Roe v. Wade*'s abrupt expiration and laid the groundwork for *Dobbs*.

Despite *Roe*'s shortcomings, many court-imposed injunctions on state abortion bans and restrictions relied on *Roe* and its progeny. Post-*Dobbs*, several states were able to quickly (and in some cases, immediately) enforce abortion bans and restrictions, both new and old. Within six months of the *Dobbs* ruling, nearly a third of states severely restricted abortion with significant consequences for public health. States attempting to protect abortion access also moved swiftly in anticipation of an uptick in the need for abortion services from out-of-state patients. States were sharply divided in their response to *Dobbs*, and issues of interjurisdictional conflict over abortion bans arose without clear theoretical or practical answers.⁹ Could a state pass a law banning someone from traveling out-of-state to receive an abortion? Could a provider or abortion fund face legal action for serving patients from a state where abortion is banned? Would abortion seekers become the target of criminal investigation and prosecution? While the *Dobbs* majority asserts that the previous legal standard was "unworkable," the complexity of

³ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁴ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁵ *Harris v. McRae*, 448 U.S. 297, 298, 100 S. Ct. 2671, 2678, 65 L. Ed. 2d 784 (1980).

⁶ Elizabeth Nash, *For the First Time Ever, U.S. States Enacted More Than 100 Abortion Restrictions in a Single Year*, GUTTMACHER INSTITUTE (Oct. 4, 2021), <https://www.guttmacher.org/article/2021/10/first-time-ever-us-states-enacted-more-100-abortion-restrictions-single-year>.

⁷ Bonnie S. Jones, Sara Daniel, Lindsay K. Cloud, *State Law Approaches to Facility Regulation of Abortion and Other Office Interventions*, 108 AM. J. PUB. HEALTH Journal of Public Health 421, 486-92 (2018).

⁸ Beth Gibson, *The Termination of the Quickening Doctrine: American Law, Society, and the Advent of Professional Medicine in the Nineteenth Century*, W. KY. UNIV. (Apr. 1, 1995) <https://digitalcommons.wku.edu/theses/910>.

⁹ David S. Cohen et al., *The New Abortion Battleground*, 123 Colum. L. Rev. 1, 22-27 (2023).

the legal landscape has grown exponentially as battles over local, state, and federal authority continue to play out with no end in sight.

The murkiness of these untested legal waters has created a chilling effect that pervades not only the provision of abortion care, but any healthcare that might affect a pregnancy. Currently, the vast majority of abortion laws and penalties do not apply explicitly to the pregnant person, and in fact, many include specific exemptions. Instead, pregnancy criminalization more often occurs when law enforcement uses broadly-applicable criminal laws (such as homicide or conspiracy) to charge a pregnant person. Yet any and all abortion restrictions threaten to “widen the net” that can implicate individuals in the criminal legal system, whether or not an abortion is involved.¹⁰ When faced with the threat of lawsuits, prison sentences, or license revocation, the legal risk imposed on providers and others involved in abortion leaves their hands tied. Hospitals and institutions may prohibit willing providers from exercising their best medical judgment in favor of more risk-averse policies. Additionally, with the increasing availability of abortion pills and information online, laws targeting medication, abortion, or abortion pills might be enforced against pregnant people and anyone who attempts to help them. For pregnant people unable to access essential healthcare, it is predicted that the risk of criminal consequences will rise drastically under *Dobbs*.¹¹ In succeeding *Roe*’s legacy, *Dobbs* threatens to exacerbate existing inequities by enabling mass surveillance, jeopardizing provider-patient confidentiality, and criminalizing care.¹²

This Article reports on the detailed collection and analysis of abortion laws across the 50 U.S. states and D.C. immediately before and after *Dobbs*. The Article will discuss existing abortion restrictions that are newly relevant under the ruling and summarize emerging trends in state legislation in an effort to further illuminate the intersections of abortion law, criminalization, and public health. Part II of the article provides background on the role of law and law enforcement in criminalizing pregnancy and how *Dobbs* expands its reach. The section will also introduce the interdisciplinary legal epidemiology methods used to construct a longitudinal post-*Dobbs* state policy dataset and its utility in better understanding the public health effects of regulations on abortion. Part III characterizes the different types of state abortion restrictions and bans enacted prior to and immediately after *Dobbs* and raises questions surrounding their legal enforceability. This Part will also describe the ambiguous nature of how criminal and civil penalties for violations of abortion law may apply to providers, patients, and helpers.

Part IV shifts focus to proactive policy measures attempting to mitigate legal risk in a post-*Dobbs* setting. As some states have moved swiftly to institute abortion bans and restrictions with free reign under *Dobbs*, others have responded by strengthening existing protections and enacting new measures to expand abortion access. The urgent necessity to protect abortion patients and providers from potential legal consequences has forced states to respond in innovative but untested ways. Interstate “shield laws” are one example of innovative policy responses that have spread hastily in response to the pressing concerns of increased criminalization and liability. These laws attempt to provide legal shelter for anyone involved in seeking or providing abortion care that is lawful in the receiving state but may be banned elsewhere.

¹⁰Maria Thomas et al. *Abortion Decriminalization is Part of the Larger Struggle Against Policing and Criminalization* (November 2021)

<https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/6194235775f2a0615ea53cde/1637098383973/Decriminalize+Abortion>.

¹¹ Kimport, Katrina, *Abortion after Dobbs: Defendants, denials, and delays*, SCIENCE ADVANCES, (Sep. 7, 2022) Vol 8, Issue 36, DOI: 10.1126/sciadv.ade5327.

¹² Lynn M. Paltrow, Lisa H. Harris & Mary Faith Marshall, *Beyond Abortion: The Consequences of Overturning Roe*, The American Journal of Bioethics, 22:8, 3-15 (2022). DOI: 10.1080/15265161.2022.2075965

This part will detail key provisions of interstate shield laws and their proliferation and variation across states.

Given the integral role that reproductive health data plays in investigating and prosecuting abortion-related offenses, certain states and localities have also taken measures to guard data privacy. Protections for clinic and patient confidentiality may help to mitigate some of the anticipated damage from law enforcement infiltration or anti-abortion zealots. Still, the ubiquitous nature of digital surveillance and personal data collection, coupled with gaps in legal oversight, make effective regulation a challenge to address. After a brief overview of gaps in current data privacy protections, Part V will highlight examples of state-level data privacy measures related to abortion care that may bolster protections for providers and patients.

Finally, Part VI will discuss the inequitable public health implications of abortion criminalization and potential research and policy opportunities for safeguarding abortion access in a post-*Roe* landscape. Using a reproductive justice framework¹³, this part will discuss how abortion policy, both pre- and post-*Dobbs*, has undermined people's autonomy and continued to perpetuate racial inequity and systemic oppression. The Article hypothesizes that nimble policy responses are a critical interim strategy to reduce legal risk and public health harm from the immediate fallout of *Dobbs*, while sustained research on the impacts of these laws is needed to ensure the effectiveness of policy solutions. To remediate the current public health crisis, policy solutions should be reproductive justice-informed and prioritize communities historically marginalized from care and targeted by law enforcement. A collaborative, interdisciplinary approach can be used to tailor strategies to the most critical policy gaps and promote health and racial equity. Engaging a diverse and inclusive coalition of stakeholders can help center the needs of communities most likely impacted. A reproductive justice lens is essential to ensuring that past harms and inequities are not replicated as we move forward from the failed promise of *Roe*.

II. An Interdisciplinary Public Health Approach to Abortion Law

A. How Abortion Bans Increase Legal Risk and Jeopardize Care

Unpacking the dynamics of pregnancy criminalization from a socio-legal and public health perspective is critical to understanding the evolving role of abortion restrictions in a post-*Dobbs* context. Most abortion laws and related legal penalties are focused on regulating the conduct of abortion providers, rather than the recipient of abortion services. For example, laws may prohibit certain types of abortions from being performed, regulate the qualifications of providers, and require pre-abortion testing at the facility. Though empirical research is limited, the available evidence shows that arrests and prosecutions of people suspected of unlawfully ending their own pregnancies have typically involved general criminal laws or laws intended to protect the pregnant person and fetus, rather than alleged violations of abortion law.¹⁴ Charges prosecutors have brought against people suspected of self-managing an abortion or harming their fetus range from child welfare and endangerment laws to drug charges to fetal assault, homicide and murder.¹⁵ Potential cases are often brought to the attention of law enforcement

¹³ The reproductive justice framework includes: (1) the right to have a child under the conditions of one's choosing; (2) the right not to have a child using birth control, abortion, or abstinence; and (3) the right to parent children in safe and healthy environments free from violence by individuals or the state.

¹⁴ Laura Huss, MPhil, Farah Diaz-Tello, JD, & Goleen Samari, *Self-Care, Criminalized: August 2022 Preliminary Findings* (August 2022), [file:///C:/Users/tud49071/Downloads/22_08_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief_FINAL%20\(4\).pdf](file:///C:/Users/tud49071/Downloads/22_08_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief_FINAL%20(4).pdf).

¹⁵ *Id.*

through reporting of the pregnant individual by healthcare providers and social workers or by close acquaintances with knowledge of the situation.¹⁶ Thus, pregnant people are most vulnerable to investigation by law enforcement when interacting with the healthcare and family regulation systems ostensibly meant to protect them.¹⁷

Restrictive abortion laws can contribute to pregnancy criminalization by stigmatizing care and relegating access.¹⁸ A hostile abortion environment may prevent pregnant individuals from seeking care due to stigma, fear, misinformation, and lack of access.¹⁹ This can lead to circumstances in which management of the pregnancy loss (intentional or not) occurs outside of the formal healthcare system and invokes suspicion. A pregnant person may attempt to self-manage an abortion or experience poor health outcomes such as a miscarriage or other pregnancy complications. With the advent of telehealth and medication abortion, which accounts for more than half of all abortions in the U.S., self-managing an abortion can be medically safe but still holds legal risk.²⁰ In cases where a person seeks post-abortion care in a clinical setting, they may risk being reported and investigated. Additionally, since the clinical presentation of a spontaneous miscarriage and a medication abortion is indistinguishable, providers may mistakenly report their patients for a suspected abortion.²¹

Further, the legal changes brought on by *Dobbs* leaves gray areas in interpreting the law, making compliance murky and creating a chilling effect on the provision of healthcare. Providers may fear retribution or liability for their actions, and unclear applications of the law, such as narrow medical exceptions, may deter them from providing care that is arguably legal.²² While exemptions or affirmative defenses in the law may attempt to account for medical emergencies, drawing such a line in the provision of care is subjective and unpredictable. To exercise exceptions for rape or incest, states may require documentation that the incident was reported to law enforcement prior to receiving an abortion, which is problematic for victims who are unable or unwilling to engage the authorities.²³ Medical conditions or fetal anomalies may not clearly fall within the law's exceptions, or even when they do, hospital administrators may be advised not to take on the legal risk of having to prove their compliance, preventing physicians from providing medically appropriate care.²⁴ Five women in Texas recently sued the state, asserting that abortion bans prevented them from receiving medical care for their pregnancy

¹⁶ Bach, Wendy A. *PROSECUTING POVERTY, CRIMINALIZING CARE*. WILLIAM AND MARY LAW REVIEW, 809 vol. 60, no. 3 (Feb. 2019). link.gale.com/apps/doc/A587656732/AONE?u=temple_main&sid=bookmark-AONE&xid=af79c291. Accessed 26 Feb. 2023.

¹⁷ *Id.*

¹⁸ Taylor Riley, Yasaman Zia, Goleen Samari, and Mienah Z. Sharif, *Abortion Criminalization: A Public Health Crisis Rooted in White Supremacy*, AMERICAN JOURNAL OF PUBLIC HEALTH, 112, 1662-1667, (2022) <https://doi.org/10.2105/AJPH.2022.307014>.

¹⁹ Janet M. Turan, Henna Budhwani, *Restrictive Abortion Laws Exacerbate Stigma, Resulting in Harm to Patients and Providers*, AMERICAN JOURNAL OF PUBLIC HEALTH 111, 37-39 no. 1 (January 1, 2021). <https://doi.org/10.2105/AJPH.2020.305998>.

²⁰ Patty Skuster & Heidi Moseson, *The Growing Importance of Self-Managed and Telemedicine Abortion in the United States: Medically Safe, but Legal Risk Remains*, 112 AM. J. PUB. HEALTH 1100, 1103 (2022).

²¹ Gabriela Weigel, BS et al., *Criminalizing Pregnancy Loss and Jeopardizing Care: The Unintended Consequences of Abortion Restrictions and Fetal Harm Legislation*, 30 Women's Health Issues 143 (2020).

²² Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few are Granted*, N.Y. Times, Jan. 21, 2023.

²³ Elizabeth Nash, *Focusing on 'Exceptions' Misses the True Harm of Abortion Bans*, Ms. Magazine (Dec. 13, 2022), <https://msmagazine.com/2022/12/13/abortion-ban-exceptions-rape-incest-health-life/>.

²⁴ AP News, *Texas hospitals delaying care over abortion law, letter says* (July 15, 2022) <https://apnews.com/article/abortion-health-texas-government-and-politics-da85c82bf3e9ced09ad499e350ae5ee3>.

complications and endangered their health.²⁵ The burden then falls unduly on healthcare administrators and individual providers to exercise discretion and judgment in the face of potential criminal, civil, and licensing penalties. This lack of clarity was persistent in regulatory schemes under *Roe* and *Casey*, but *Dobbs* has only served to heighten the stakes.

State law on abortion was incredibly complex before *Dobbs* and became even more so afterward, as states gained more power to regulate abortion and attention to the issue spurred action by political leaders at all levels of government. The ever-shifting landscape of abortion law (both restrictive and protective) poses new challenges for a range of actors. Beyond the abortion seekers and providers, other medical providers, practical support networks, and social service workers who refer abortion patients face challenges in understanding the legal risks associated with their actions. A muddy picture of abortion regulation inhibits abortion-supportive funders, researchers, advocates, and lawmakers from understanding trends and developing informed strategies. Now more than ever, there is a need to carefully track and document the laws impacting abortion access around nationwide and empirically measure the effect of those laws.

B. Tracking Abortion Law Through Legal Epidemiology

Legal epidemiology is the scientific study of law as a factor in the cause, distribution, and prevention of disease and injury in a population.²⁶ It provides an innovative framework for mapping and evaluating laws' positive, negative, and incidental effects on population health.²⁷ The tools offered by a legal epidemiological approach include policy surveillance methods, which categorize observable features of the law to create precise points of comparison across any number of jurisdictions and over time. Such methodology is particularly valuable in this moment of legal uncertainty and fast-paced changes in state abortion law. Where traditional legal research demands in-depth interpretation and analysis of law at one given point in time, policy surveillance allows for the tracking, comparison, and analysis of state laws as written over time. Additionally, an analysis of whether any particular law inhibits access to abortion may fail to encompass the cumulative barriers faced by patients and providers in an overlapping web of restrictions within their state and neighboring jurisdictions. By integrating legal epidemiology methods, empirical researchers can better document and investigate the effect of specific characteristics of laws nationwide on health and social outcomes.²⁸

C. Constructing a Legal Dataset of Post-*Dobbs* Restrictions and Protections

To facilitate a comprehensive and epidemiological analysis of the dramatically shifting legal landscape, Temple University's Center for Public Health Law Research (CPHLR) and the Society of Family Planning (SFP) conceptualized a scientific legal mapping dataset capturing changes to state abortion restrictions and protections. The dataset is meant to serve as a resource for researchers seeking to

²⁵ Sarah McCammon, *5 Texas women denied abortions sue the state, saying the bans put them in danger*, NPR (March 8, 2023, 10:50 AM), <https://www.npr.org/2023/03/07/1161486096/abortion-texas-lawsuit-women-sue-dobbs>.

²⁶ Scott Burris et al, *The Growing Field of Legal Epidemiology*, 26 J. Pub. Health Mgmt. and Prac. March-April 2020, at S4.

²⁷ Scott Burris et al, *Policy Surveillance: A Vital Public Health Practice Comes of Age*, 41 J. HEALTH, POL., POL'Y, & L. 1151–1173 (2016).

²⁸ Scott Burris et al, *Identifying data for the empirical assessment of law (IDEAL): a realist approach to research gaps on the health effects of abortion law*, BMJ GLOBAL HEALTH, June 2021, at 1.

understand the impact of the *Dobbs* decision better and is a companion resource to SFP's #WeCount project, a national abortion reporting effort.²⁹

As of the writing of this article, the dataset provides a high-level overview of state abortion restrictions and protections from June 1, 2022, to January 1, 2023.³⁰ Specifically, the dataset captures statutes, regulations, and executive orders in all 50 U.S. states and the District of Columbia. It tracks laws banning abortion (including total and near-total bans, gestational age bans of 20 weeks or less, “fetal heartbeat” bans, method bans, and reason-based bans), medication abortion restrictions, telehealth restrictions, restrictions on self-managed abortion, penalties for abortion provision, interstate shield laws, ballot measures, and other abortion protections.³¹ The dataset identifies the law as it exists on the books at any given time during the set period, but also provides brief notes when court-rulings have limited in-scope laws. The dataset is published on CPHLR’s LawAtlas website, which houses a library of over 120 public health legal datasets and provides interactive maps and tables searchable by state and legal variable, as well as citations and access to the full text of in-scope laws.³²

The Post-*Dobbs* dataset research team included four legal researchers and one supervisor. The dataset was produced using a novel legal mapping method called sentinel surveillance of emerging laws and policies, which modifies well-established policy surveillance methods to track laws faster so that researchers may more quickly evaluate the impact of law and policy on health, well-being, and equity.³³ In order to ensure that the captured legal variables were of immediate use and interest, the supervisor conducted stakeholder interviews with key researchers and collaborators to inform and refine the legal coding framework. The team then conceptualized and created the coding questions, which were further refined in collaboration with SFP. The researchers reviewed CPHLR’s State Abortion Laws Database³⁴ to identify a baseline of laws, regulations, court orders, and attorney general opinions within the scope of the coding questions. The researchers then conducted research on Westlaw, Lexis, Google, and state government websites to identify newly enacted or amended laws within the project scope. Quality control during the research phase involved consulting several secondary sources to ensure all relevant laws were captured.

²⁹ Society of Family Planning, #WeCount, <https://societyfp.org/research/wecount/>.

³⁰ Center for Public Health Law Research (CPHLR), *Post-Dobbs State Abortion Restrictions and Protections*, LAWATLAS, <https://lawatlas.org/datasets/post-dobbs-state-abortion-restrictions-and-protections>. The dataset will continue to be updated by CPHLR staff throughout 2023. The information contained herein does not constitute legal advice. If you have questions regarding your legal rights or obligations, please contact an attorney in your state.

³¹ The Post-Dobbs Abortion Restrictions and Protections legal dataset captures many additional legal variables and nuances related to state abortion regulation, only a few of which we focus on for discussion in this Article. *Post-Dobbs State Abortion Restrictions and Protections*, *supra* note 30.

³² Center for Public Health Law Research, *Topics*, LAWATLAS, <https://lawatlas.org/topics>. Datasets are published alongside a detailed research protocol outlining the methodology of the project, empirical legal data that can be downloaded in Excel, and a codebook that includes a list of variables, variable labels, and values.

³³ Typically, policy surveillance is a months-long process involving rigorous and iterative quality control measures at all stages of the project, including redundant research, redundant coding, and post-production statistical quality control. By contrast, sentinel surveillance includes more limited quality control measures, allowing for the swift identification of novel legal approaches to instigate faster evaluation of laws. The resulting data provides a high-level overview of laws and policies and gives policymakers, advocates, and researchers a snapshot of a new or rapidly evolving legal landscape.

³⁴ Policy Surveillance Program, *State Abortion Laws*, LawAtlas, <https://lawatlas.org/datasets/abortion-laws> (last visited Sep 10, 2023).

The research team then coded measurable aspects of the laws for each jurisdiction across the entire dataset period into MonQcle, CPHLR's in-house software platform that allows for the creation of longitudinal datasets converting text linked to user-configured jurisdictions to numerical data.³⁵ During the coding phase, the team also redundantly coded—in other words, had two researchers independently code the same jurisdiction—a targeted sample of states as an additional quality control measure. The team discussed and resolved any divergences, and once coding was complete, the supervisor spot-checked the resulting data to verify accuracy and consistency across responses, caution notes, and citations. Further detail on the methods involved in creating this dataset are outlined in the research protocol.³⁶ The final dataset allows for observation of various features and trends of state abortion laws during the dataset period and provides the basis for the analysis throughout this Article.

III. Legal Implications of Criminal Abortion Bans Under *Dobbs*

A. Unconstitutional Bans on Abortion Became Legally Enforceable

An orchestrated attack by the antiabortion movement on *Roe* across state legislatures and the judiciary ultimately gave birth to the decision in *Dobbs*. While the majority opinion claimed it was returning the authority to regulate abortion back to the states, abortion restrictions were already thriving on the state-level in the prior decades.³⁷ Regulation of abortion under *Roe* and *Casey*'s progeny resulted in a complex patchwork pieced together by state statutes and regulations, federal law, court rulings, and attorney general opinions. Because *Roe* characterized abortion rights as falling within a woman's personal right to privacy, which must be balanced against a compelling state interest in protecting "potential life," the ruling fell short of guarantees to unencumbered access to abortion.³⁸ Moreover, the undue burden test that emerged from the plurality opinion in *Casey* abandoned the strict scrutiny standard previously set forth by *Roe*, further weakening constitutional protections for abortion access.³⁹

Following *Roe*'s backlash, the Hyde amendment, institutionalized discrimination against people with low-income by prohibiting Medicaid recipients from accessing abortion through federal funding.⁴⁰ The Supreme Court in *Harris v. McCrae* (1980) sanctioned the notion that access to abortion could somehow be entirely distinguished from the constitutional right to "choose" an abortion:

Regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, *supra*, it does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category.⁴¹

With this less-than-robust federal scaffolding in place, state legislatures were largely free to enact restrictions as long as they did not present as an outright ban on pre-viability abortions (though even these were sometimes passed into law). The various types of abortion restrictions enacted since *Roe* included mandatory waiting periods, provider restrictions, parental involvement laws, pre-abortion testing requirements, bans on public funding, bans on private insurance coverage, restrictions on medication

³⁵ MonQcle, <https://monqcle.com/> (last visited Sep 14, 2023).

³⁶ Center for Public Health Law Research, *supra* note 30.

³⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

³⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁹ *Planned Parenthood v. Casey*, 505 U.S. 833, 881 (1992).

⁴⁰ Jill E. Adams and Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McCrae*, 21 Wm. & Mary J. Women & L., December 2014, at 5, 56.

⁴¹ *Harris v. McCrae*, 448 U.S. 297, 317 (1980).

abortion, “reason-based” bans, bans on specific abortion procedures, and TRAP laws.⁴² Restrictions were often passed on top of each other without repealing older laws, convoluting the regulatory scheme and making it difficult to understand which laws should apply. While any one of these abortion restrictions might have presented an undue burden, the cumulative effect of such a dense conglomerate of legal and logistical barriers rendered access impossible for some. Moreover, most of these restrictions were concentrated within states in the geographic South and Midwest, creating large areas of abortion deserts.⁴³ This stark reality is why reproductive justice advocates have long called any assurances supposedly offered by *Roe* “the floor, not the ceiling.”⁴⁴

The multitude of restrictions enacted by state legislatures and upheld by certain courts were part of a long game strategy to erode abortion rights steadily and undermine meaningful access.⁴⁵ A key tactic was to pass blatantly unconstitutional abortion restrictions in violation of *Roe*, in order to chip away at legal standards and force the issue up through the courts.⁴⁶ State and federal courts often conflicted on whether different types of abortion restrictions constituted an impermissible undue burden, fracturing the legal landscape. Some court challenges successfully obtained injunctions—but states could legislate new restrictions faster than litigation could resolve these issues. The resulting circuit splits aimed to push supposedly settled issues in the arena of constitutional law up to the Supreme Court. A previous attempt to challenge a direct ruling on abortion in *June Medical v. Russo* arose from the Fifth Circuit but was unsuccessful in overturning *Roe*.⁴⁷ With the sudden shift in the makeup of the Supreme Court under Trump, however, the antiabortion movement’s strategy finally paid off and yielded their desired result in *Dobbs*.⁴⁸

In states with antiabortion legislatures and governors, bills in flagrant conflict with *Roe* would become law with little hindrance. For example, Alabama passed a total ban on abortion in 2019—well before the *Dobbs* decision.⁴⁹ In almost all cases, the laws were immediately challenged in court and prohibited from taking effect through injunctions.⁵⁰ Still, the result was that states had several unconstitutional abortion restrictions officially written into law even if they could not be legally enforced. This strategy may have seemed fruitless on the surface, but created a crucial foothold for *Dobbs*. The court orders prohibiting these abortion restrictions from taking effect were largely based on following *Roe* and *Casey*.⁵¹ Thus, when *Dobbs* overturned these two precedents, the impact of the injunctions were no

⁴² *State Abortion Laws*, *supra* note 34.

⁴³ *Abortion deserts*, ANSIRH, <https://www.ansirh.org/abortion/restrictions/abortion-deserts> (last visited Sept. 15, 2023).

⁴⁴ Anoa Changa, *Black Women-Led Organizations Launch Reproductive Justice Agenda On 49th Anniversary of Roe v. Wade*, Newsone (Jan. 22, 2022), <https://newsone.com/4280127/black-women-led-organizations-launch-reproductive-justice-agenda-on-49th-anniversary-of-roe-v-wade/>.

⁴⁵ Mary Ziegler, *Abortion and the Law in America: Roe v. Wade to Present* (2020).

⁴⁶ Mary Ziegler and Robert Tsai, *How the Anti-Abortion Movement Used the Progressive Playbook to Chip Away at Roe v. Wade*, Politico (June 13, 2021), <https://www.politico.com/news/magazine/2021/06/13/anti-abortion-progressive-roe-v-wade-supreme-court-492506>.

⁴⁷ *June Med. Serv. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

⁴⁸ Joan Biskupic, *Conservative justices seized the moment and delivered the opinion they’d long promised*, CNN (June 25, 2022), <https://www.cnn.com/2022/06/24/politics/conservative-supreme-court-analysis-roe-dobbs/index.html>.

⁴⁹ Ala. Code § 26-23H-4 (2019).

⁵⁰ The Policy Surveillance Program, *Abortion Bans*, LAWATLAS (Nov. 1, 2022), <https://lawatlas.org/datasets/abortion-bans>.

⁵¹ Court cases in at least 10 states have additionally relied on interpreting the state’s constitution to protect abortion, usually under a right to privacy or due process and equal protection. See the Policy Surveillance Program, *Statutory*

longer in force or were unclear, potentially allowing bans to become effective. As litigation battles proceed over whether these laws are legally enforceable, the chilling effect was enough to abruptly halt abortion services in many states.⁵²

i. Pre-*Roe* and Trigger Bans

Though there were many other variations, two main types of abortion bans set the stage for the rapid curtailing of abortion services: “trigger” bans and “pre-*Roe*” bans.⁵³ Pre-*Roe* abortion bans (as the label suggests) were laws criminalizing abortions prior to the protections handed down in *Roe*. These laws were “on the books” but had gone unenforced for decades given their unconstitutionality. Ten states (Alabama, Arizona, Arkansas, Michigan, Mississippi, North Carolina, Oklahoma, Texas, West Virginia, and Wisconsin) had pre-*Roe* abortion bans at the time of the *Dobbs* decision.⁵⁴ New Mexico repealed its outdated abortion ban in 2021 in anticipation of the overturn of *Roe*.⁵⁵ Although eight of the ten states’ bans had previously been enjoined or declared unconstitutional by the courts, the status of these statutes were uncertain under *Dobbs* and potentially became legally enforceable. For example, the state Supreme Court of Texas held that its 1925 ban on abortion could be enforced despite a district judge’s ruling temporarily blocking enforcement.⁵⁶ Arizona’s Attorney General announced that the state’s 1901 law banning all abortion could be enforced just days after the *Dobbs* decision, even as the Governor had signed a new 15-week ban into law in March.⁵⁷ Wisconsin’s Attorney General, on the other hand, filed a lawsuit to stop enforcement of its 1849 ban criminalizing abortions and claiming it was superseded by a 1985 law banning abortion at around 20 weeks.⁵⁸

So-called “trigger” bans were a creative, if not subversive, legal mechanism to allow abortion bans on the books that circumvented judicial review under *Roe* and *Casey*.⁵⁹ These laws intended to ban abortions, but the effective dates were contingent on a hypothetical (at the time) event of a ruling overturning *Roe v. Wade*. The effect was that these laws would lay dormant until the day abortion was no longer constitutionally protected, upon which the ban would activate. Thirteen states (Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming) had enacted trigger bans prior to *Dobbs*.⁶⁰ The statutory language describing the

and Constitutional Right to Abortion, LAWATLAS (Nov. 1, 2022), <https://lawatlas.org/datasets/statutory-and-constitutional-right-to-abortion>.

⁵² Society of Family Planning, *#WeCountReport: April 2022 to December 2022*, (2023), <https://doi.org/10.46621/143729dhcsyz>.

⁵³ Caroline Kitchener et. al., *States where abortion is legal, banned, or under threat*, Washington Post (June 24, 2022, 10:23 AM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/>.

⁵⁴ The Policy Surveillance Program, *Abortion Bans*, LAWATLAS (Nov. 1, 2022), <https://lawatlas.org/datasets/abortion-bans>.

⁵⁵ AP News, *New Mexico governor signs bill to preserve abortion rights*, (Feb. 26, 2021, 4:41 PM), <https://apnews.com/article/legislature-michelle-lujan-grisham-statutes-legislation-us-supreme-court-e233ebef60f2af544ca9d59287a634315>.

⁵⁶ Zach Despart, *Texas can enforce 1925 abortion ban, state Supreme court says*, Texas Tribune (July 2, 2022), <https://www.texastribune.org/2022/07/02/texas-abortion-1925-ban-supreme-court/>.

⁵⁷ The Associated Press, *Arizona’s attorney general says a pre-1901 abortion ban is enforceable*, NPR (June 30, 2022, 8:13 AM), <https://www.npr.org/2022/06/30/1108871251/arizonas-attorney-general-says-pre-1901-abortion-ban-is-enforceable>.

⁵⁸ Oriana González, *Wisconsin governor files lawsuit to challenge state’s pre-*Roe* abortion ban*, Axios (June 28, 2022), <https://www.axios.com/2022/06/28/wisconsin-abortion-pre-roe-ban-court-block>.

⁵⁹ Heidi S. Alexander, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 Rutgers L. Rev. 381 (2009).

⁶⁰ Center for Public Health Law Research, *supra* note 32.

contingency for taking effect varied somewhat between states, with some requiring certification by the attorney general. For example, Ark. Code § 5-61-304 states:

This act becomes effective on and after the certification of the Attorney General that:(1) The United States Supreme Court overrules, in whole or in part, the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), reaffirmed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), thereby restoring to the State of Arkansas the authority to prohibit abortion; or(2) An amendment to the United States Constitution is adopted that, in whole or in part, restores to the State of Arkansas the authority to prohibit abortion.⁶¹

The Attorney General of Arkansas certified the act mere hours after the *Dobbs* ruling was officially handed down, immediately stopping abortion services in the state.⁶² In other states such as Tennessee, the effective date language gave a 30-day grace period for activating the ban and required written confirmation.⁶³ Some states' trigger bans, such as Kentucky, Louisiana, and South Dakota, prescribed for the acts to take effect immediately and did not include any requirements for certification by the attorney general, leading to confusion about whether and when they would be enforced.⁶⁴

These trigger bans were enacted mainly from 2005-2021 and were constructed specifically to evade judicial review by the courts despite the clear threat to *Roe* and *Casey*.⁶⁵ By making the effective date of the abortion ban contingent upon *Roe* being overruled, the laws were difficult to challenge. Bringing litigation against trigger bans was likely relegated as a lower priority for the abortion rights movement in the face of so many other restrictions of immediate concern, or perhaps because the thought that *Roe* would ever cease to exist may have seemed far off. Before the final opinion in *Dobbs* was announced, legal experts were weighing the possibility that the statutory language might leave potential ambiguities should the ruling have not explicitly overturned *Roe*. However, the decisive nature of *Dobbs* cleared the way for all 13 trigger bans to take effect within the hours, days, and months immediately following the decision. Once the laws were in effect, substantive legal challenges were able to be raised, such as in North Dakota and Idaho.⁶⁶

In addition to existing abortion laws that were suddenly enforceable under *Dobbs*, some states hurried to enact entirely new bans on abortion unencumbered by *Roe*. Shortly after the decision, five states passed additional bans on abortion, including 15-week gestational limits in Arizona and Florida and near-total bans in Indiana, Oklahoma, and Wyoming.⁶⁷ Patients and providers navigating multiple

⁶¹ ARK. CODE ANN. § 5-61-304 (2023).

⁶² Ronak Patel, *Arkansas AG Rutledge certifies trigger law allowing enforcement of abortion ban*, Little Rock Public Radio (June 24, 2022), <https://www.ualrpublicradio.org/local-regional-news/2022-06-24/attorney-general-rutledge-certifies-trigger-laws-allowing-enforcement-of-abortion-bans>.

⁶³ TENN. CODE ANN. § 39-15-213 (2023).

⁶⁴ Elizabeth Nash and Isabel Guarnieri, *13 States Have Abortion Trigger Bans – Here's What Happens when Roe is Overturned*, Guttmacher Institute (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

⁶⁵ An early version of a trigger law was found in the legislative intent of the Illinois Abortion Law of 1975, which used more obscured language: "Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated." The law was challenged in court, but S1 was not addressed because it had "no substantive effect." The entire law was eventually repealed in 2019. 720 ILCS 510/1 (repealed by P.A. 101-13). See *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978).

⁶⁶ *Access Indep. Serv. Inc. v. Wrigley*, No. 08-2022-CV-1608 (D. N.D. July 6, 2022); *United States v. State of Idaho*, No. 1:22-cv-329-BLW, (D. Idaho Aug. 2, 2022).

⁶⁷ Center for Public Health Law Research, *supra* note 32.

overlapping abortion bans now have to deal with the added confusion of trying to understand which laws apply with unclear legal implications under *Dobbs*. For example, Arkansas had a pre-*Roe* ban, a trigger ban, and a total ban on abortion at the time of the *Dobbs* decision.⁶⁸ Abortion bans in at least 18 states have been challenged in court in the first six months after *Dobbs* with varying outcomes on whether laws can go into effect or have been enjoined.⁶⁹ As of January 1, 2023, the courts blocked at least six states' near-total bans (out of the 19 states with these bans), with litigation ongoing in others.⁷⁰ With legal changes unfolding so rapidly and changing by the day, the impact on the ground has been that abortion services are extremely limited or unavailable as legal battles continue to play out. As states are emboldened to act, unprecedented attempts to regulate abortion beyond state boundaries may emerge and lead to further interjurisdictional conflict, such as laws aimed at limiting interstate travel.⁷¹

ii. Enforcement Through Private Rights of Action

Another type of abortion ban that rose to nationwide infamy, known as TX SB8, was enacted shortly before *Dobbs* and was also specifically crafted to evade judicial review. The law instituted a “fetal heartbeat” ban prohibiting abortion upon detection of fetal cardiac activity, which can occur as early as 6 weeks gestation and before most people realize they are pregnant.⁷² A gestational limit on abortions this early in pregnancy would clearly be in violation of *Roe* and *Casey*.⁷³ In fact, 11 other states had “fetal heartbeat” bans on the books prior to *Dobbs* (Arkansas, Georgia, Idaho, Iowa, Kentucky, Mississippi, North Dakota, Ohio, Oklahoma, South Carolina, and Tennessee), all of which were subsequently held unconstitutional and enjoined by the courts.⁷⁴ In order to avoid being struck down, SB8 created a private right of action allowing the law to be enforced by civil suits rather than by state or local governmental entities:

- (a) Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208.⁷⁵

Tex. Health & Safety Code § 171.208 states that any person can bring suit against anyone who “performs or induces an abortion in violation of this subchapter” or “knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise[...].” The section goes on to require the court to award a minimum of \$10,000 in statutory damages, attorneys fees and injunctive relief—hence evoking the comparison to “bounty-hunter” laws reminiscent of protections for slave-owners.⁷⁶

⁶⁸ Ark. Code Ann. § 5-61-102; Ark. Code Ann. § 5-61-304; Ark. Code Ann. § 5-61-404.

⁶⁹ KFF, *State and Federal Reproductive Rights and Abortion Litigation Tracker* (Feb. 17, 2023), <https://www.kff.org/womens-health-policy/report/state-and-federal-reproductive-rights-and-abortion-litigation-tracker/>.

⁷⁰ Center for Public Health Law Research, *supra* note 30.

⁷¹ Christine Vestal, *First state law to criminalize out-of-state abortion travel may inspire others*, Portland press herald (April 7, 2023), <https://www.pressherald.com/2023/04/07/first-state-law-to-criminalize-out-of-state-abortion-travel-may-inspire-others/>.

⁷² Joanna C. Lampe & Jon O. Shimabukuro, Cong. Rsch. Serv., Isb10651, *The Texas Heartbeat Act (S.B. 8)*, *Whole Woman's Health v. Jackson*, and *United States v. Texas*; Frequently asked questions 1 (2021).

⁷³ *Id.* at 5-6.

⁷⁴ Policy Surveillance Program, *Abortion Bans*, LAW ATLAS, (Nov. 1, 2022), <https://lawatlas.org/datasets/abortion-bans>.

⁷⁵ TEX. HEALTH & SAFETY CODE §171.207(a).

⁷⁶ Sylvie Douglas, *Do You Want To Live In A Bounty House?*, NPR (Sept. 9, 2021, 4:49:00 PM), <https://www.npr.org/transcripts/1035741353>.

Unlike the trigger ban mechanism, using civil lawsuits as an enforcement mechanism was not a unique concept within the realm of abortion regulation, but gained national attention through SB8.⁷⁷ Twenty-five states, including Texas, created private rights of action related to abortion laws prior to SB8.⁷⁸ Many state “partial-birth” and “dismemberment” abortion bans, enacted throughout the 1990s and early 2000s, included provisions that allowed the pregnant person or the fetus’ father or other family members to sue providers who performed an abortion in violation of the law.⁷⁹ However, several key distinctions from these earlier iterations have evolved in the mechanism of SB8: 1. The target of civil action was not limited to the provider and could also include anyone who “aids or abets” the abortion; 2. “Any person” can bring suit rather than just the pregnant person or close relatives;⁸⁰ and 3. The enforcement mechanism was intended to skirt the unconstitutionality of a 6-week abortion ban.⁸¹

The Texas ban intended to test the limits of the Supreme Court, and by allowing the law to stand, both opponents and advocates of abortion saw this as an early sign that *Roe* was indeed doomed.⁸² Multiple pre-enforcement challenges to the ban failed after courts found that the correct parties had not been named, an intentional device of the law.⁸³ Oklahoma and Idaho enacted copycat legislation shortly after getting the green light from the Court.⁸⁴ The fear surrounding this law was enough to suspend all abortion services prior to 6-weeks within Texas, but important questions remain regarding its legal implications and practical effect.⁸⁵ Although the statutory language in SB8 creates a cause of action and allows “any person” to sue, successful lawsuits would likely still require a concrete showing of harm

⁷⁷ Diego Zambrano ET AL., *Private Enforcement in the States*, 2023 UNIV. OF PA. LAW REV. (forthcoming), <http://dx.doi.org/10.2139/ssrn.4365144>.

⁷⁸ Center for Public Health Law Research, *supra* note 30.

⁷⁹ Guttmacher Institute, *Bans on Specific Abortion Methods Used After the First Trimester*, (March 1, 2023), <https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester>. So-called “partial birth abortion” is not a medical term. These bans may be interpreted to prohibit certain abortion procedures including the D&X procedure (dilation and extraction) used in a small share of second trimester abortions. These bans may also be interpreted to apply to the more common second trimester D&E procedure (dilation and evacuation), which has led to controversy about the bans’ scope. See KFF, *State Bans on So-called “Partial Birth” Abortion*, (May 1, 2022), <https://www.kff.org/womens-health-policy/state-indicator/partial-birth-abortion-bans>; Danielle Paquette, *The gruesome language anti-abortion activists are using to win support*, THE WASHINGTON POST, (April 5, 2016, 10:50:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2016/04/05/the-campaign-to-end-fetal-dismemberment-is-spreading/>.

⁸⁰ A pregnant person who has an abortion is explicitly exempt from a cause of action brought under SB8, though they could still be implicated in the investigation and face other related risks. “This subchapter may not be construed to: (1) authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced.” TEX. HEALTH & SAFETY CODE §171.206.

⁸¹ Diego A. Zambrano, *Maneuvering Around the Court: Stanford’s Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, Stan. Law School Blogs, (Sept. 8, 2021), <https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law/?sf150825496=1&fbclid=IwAR3nVLAkt1MRbSR8TDyUCyidy76ncKDKS1I>.

⁸² I. Glenn Cohen et al., *The Supreme Court, the Texas Abortion Law (SB8), and the Beginning of the End of Roe v. Wade?*, JAMA Network (Sept. 23, 2021), <https://jamanetwork.com/journals/jama/article-abstract/2784582>.

⁸³ *Whole Women’s Health v. Jackson*, 142 S.Ct 522, 535-6; 8 (2021).

⁸⁴ Center for Reproductive Rights, *Texas SB8 copycat ban | In effect*, <https://reproductiverights.org/wirf-abortion-bans/texas-sb8-copycat-ban-in-effect/>, (last visited May 17, 2023).

⁸⁵ Taylor Goldstein & Austin Bureau, *First abortion ‘bounty hunter’ lawsuit is tossed, judge rules not just anyone can sue*, Houston Chronicle, (Dec. 8, 2022), <https://www.houstonchronicle.com/politics/texas/article/hc120822braidsuit-17640982.php>.

(e.g., injury in fact) in order to award damages or injunctive relief.⁸⁶ Idaho narrowed its civil enforcement mechanism by limiting who could bring suit to the pregnant person and family members.⁸⁷ In another lawsuit, Texas abortion funds sued after receiving letters from the Thomas More Society threatening legal action under SB8. The funds claimed that by receiving a potential lawsuit threat, they could hold the group accountable and avoid the defects of previous court challenges to the law.⁸⁸

B. Unclear Application of Penalties to Providers, Patients, and Helpers

Adding to the confusion of a rapidly shifting legal landscape, the vagueness of statutory language regarding application of penalties may provide room for interpretation in criminalizing various actors. Statutes and regulations governing the provision of abortion services can include penalties for legal infractions in the form of criminal punishment, civil liability, and professional licensing sanctions. The laws apply most commonly to the conduct of abortion providers, but the expanded reach of abortion regulation under *Dobbs* raises concerns that more people will be implicated in legal investigation and consequences. Affirmative defenses and narrow exceptions, such as for health risks, fetal anomaly, or in cases of rape and incest, are difficult to comply with due to their subjectivity and may offer little protection for providers and patients.⁸⁹ The conduct regulated by abortion restrictions can range from prohibiting the provision of certain types of abortions or abortion pills to limiting who can provide abortions and where they are provided. As of January 1, 2023, at least 35 states' laws contain criminal penalties specific to certain abortion bans, and 16 of those additionally list civil penalties and licensing sanctions.⁹⁰ Violations of the law could result in misdemeanors or felonies, jail time, thousands of dollars in fees, statutory damages, license revocation and injunctive relief.⁹¹

While most penalties are aimed at healthcare providers, the law can either explicitly or implicitly apply to others. Penalties prescribed specifically for violations of abortion law could potentially apply to actors including patients or helpers in several ways: 1. The law regulates conduct such as soliciting, aiding or assisting in an abortion; 2. The law contains restrictions explicitly related to self-managed abortion; or 3. The statutory language prohibits conduct by "any person" and does not specify exemptions for pregnant people or non-healthcare personnel.⁹² Generally applicable criminal laws such as conspiracy or aiding and abetting could also be implicated.⁹³ As of 1/1/2023, five states (Idaho, Mississippi, Nevada, South Carolina, and Wyoming) penalize the act of soliciting or submitting to an abortion and five states (Idaho, Nevada, Oklahoma, South Carolina, and Wyoming) explicitly include reference to self-managed

⁸⁶ To have Article III standing to sue in federal court, a plaintiff must show, among other things, that the plaintiff suffered concrete injury in fact. Central to assessing concreteness is whether the asserted harm has a "close relationship" to a harm "traditionally" recognized as providing a basis for a lawsuit in American courts. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2198 (*Quoting* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 and *Spokeo, Inc. v. Robins*, 578 U. S. 330, 340).

⁸⁷ IDAHO CODE §18-8807 (2023).

⁸⁸ Caroline Kitchener, *Texas's strict new abortion law has eluded multiple court challenges. Abortion rights advocates think they have a new path to get it blocked.*, Washington Post, (March 21, 2022, 1:37:00 PM), <https://www.washingtonpost.com/politics/2022/03/21/texas-abortion-sb8/>.

⁸⁹ Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few are Granted*, N.Y. Times (Jan. 21, 2023), <https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html?searchResultPosition=163>.

⁹⁰ Center for Public Health Law Research, *supra* note 30.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Generally applicable criminal laws such as conspiracy, aiding and abetting, homicide, and murder, as well as laws specific to child welfare or fetal endangerment are beyond the scope of this Article.

abortion.⁹⁴ Nev. Rev. Stat. § 200.220 makes it a felony for a pregnant person to self-induce an abortion after 24 weeks of gestation.⁹⁵ Nevada, Idaho and South Carolina specifically include the pregnant person in penalty provisions.

Idaho Code § 18-606 states:

Except as permitted by this act: (1) Every person who, as an accomplice or accessory to any violation of section 18-605, [Idaho Code,] induces or knowingly aids in the production or performance of an abortion; and (2) Every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony and shall be fined not to exceed five thousand dollars (\$5,000) and/or imprisoned in the state prison for not less than one (1) and not more than five (5) years [...]⁹⁶

South Carolina Code § 44-41-80 states:

(b) Except as otherwise permitted by this chapter, any woman who solicits of any person or otherwise procures any drug, medicine, prescription or substance and administers it to herself or who submits to any operation or procedure or who uses or employs any device or instrument or other means with intent to produce an abortion, unless it is necessary to preserve her life, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for a term of not more than two years or fined not more than one thousand dollars, or both.⁹⁷

Application of the law may be less clear where penalties could apply to “any person,” and the law does not specify that pregnant persons are exempt (though many do). In addition to criminalizing providers and the pregnant person themselves, laws may implicate people assisting in the abortion or assisting the pregnant person to obtain an abortion. Mo. Rev. Stat. § 188.075 states that any person who “performs, induces, or aids in the performance or inducing of any abortion” in violation of the chapter is guilty of a misdemeanor.⁹⁸ Nebraska Rev. Stat. § 28-327.11(6) creates a cause of action against anyone who “aids or abets the commission of a self-induced abortion.”⁹⁹ Two months prior to *Dobbs*, a mother and daughter were criminally charged under Nebraska law for their actions related to the daughter’s self-induced abortion.¹⁰⁰ Only the mother was charged with violations of abortion law (which exempt the pregnant person), while both mother and daughter were charged with mishandling human remains and other non-abortion related statutes.¹⁰¹ This has led to a cascade of questions regarding who exactly is legally implicated: Does the law apply to the receptionist who scheduled the appointment? The ride-share driver who drove a patient to their appointment? The abortion fund who provided resources and funding for someone’s abortion? A federal judge recently ruled that Texas abortion funds could not be prosecuted for assisting people traveling out-of-state to receive abortions.¹⁰² Without clear answers, ambiguity in which the law and penalties may apply to specific actors and/or certain conduct leads to a chilling effect on not only abortion care but any tangential support or services.

⁹⁴ CPHLR, *supra* note 30.

⁹⁵ NEV. REV. STAT. § 200.220 (2023).

⁹⁶ IDAHO CODE § 18-606 (2023).

⁹⁷ S.C. CODE § 44-41-80 (2023).

⁹⁸ MO. REV. STAT. § 188.075 (2023).

⁹⁹ NEB. REV. STAT. § 28-327.11(6) (2023).

¹⁰⁰ Shaila Dewan and Sheera Frenkel, *A Mother, A Daughter and an Unusual Abortion Prosecution in Nebraska*, New York Times (Aug. 18, 2022), <https://www.nytimes.com/2022/08/18/us/abortion-prosecution-nebraska.html#:~:text=The%20mother%20in%20the%20case,to%20two%20years%20in%20prison>

¹⁰¹ *Id.*

¹⁰² Eleanor Klibanoff, *Texas abortion funds likely safe from prosecution, federal judge rules*, Texas Tribune (Feb. 24, 2023), <https://www.texastribune.org/2023/02/24/texas-abortion-funds-ruling/>.

IV. Interstate Shield Laws as a Countermeasure to Abortion Bans

As abortion justice activists have long asserted, states hostile to abortion rights will not be content with simply banning abortion within their borders. The recent FDA litigation surrounding the availability of mifepristone for use in medication abortions is one example of this.¹⁰³ By the end of 2022, no state had explicitly criminalized obtaining or providing an abortion across state lines,¹⁰⁴ but anti-abortion activists and policymakers are actively looking to enforce abortion restrictions extra-territorially and ultimately eliminate access nationwide.¹⁰⁵ In response to such attempts, several states have taken a proactive approach to safeguarding abortion access by implementing laws aimed to protect from extra-territorial action by other states. These interstate “shield” laws limit the ability of hostile states (and those states’ citizens) to criminally prosecute or civilly enforce abortion restrictions across state lines.¹⁰⁶ Although this specific type of shield law is new in the wake of *Dobbs*, the concept of legally shielding providers for certain healthcare decisions generally is not—the U.S. has a long history of shielding providers for *refusing* to provide medically-indicated services (including refusing to provide abortions).¹⁰⁷ These interstate shield laws are beginning to chip away at the historical imbalance and resulting disproportionate harms of so-called “conscientious refusal” laws by shielding healthcare workers for *providing* abortion services.¹⁰⁸

This section discusses the proliferation of interstate shield laws aimed at protecting abortion access in the immediate aftermath of *Dobbs* and that were in effect as of January 1, 2023. However, several states are considering, or have already enacted, additional shield laws in the 2023 legislative

¹⁰³ Pam Belluck, *Judge Invalidates F.D.A. Approval of the Abortion Pill Mifepristone*, New York Times (April 7, 2023), <https://www.nytimes.com/2023/04/07/health/abortion-pills-ruling-texas.html>.

¹⁰⁴ In April 2023, Idaho enacted a law that, in part, aims to criminalize interstate abortion care by creating a new offense—entitled “abortion trafficking”—which targets any adult who assists a minor in Idaho with obtaining an abortion (including by, for example, transporting the minor to another state to obtain the abortion). Idaho Code § 18-623. The law goes into effect May 5, 2023. 2023 Idaho Laws Ch. 310 (H.B. 242). Additionally, the Idaho Attorney General issued a letter in March 2023 claiming that the state’s abortion ban—which bans providers from “assist[ing] in performing or attempting to perform an abortion”—prohibits health care providers from referring a patient across state lines for abortion care. Letter from Raúl R. Labrador, Idaho Attorney General, to Brent Crane, Idaho State Representative (Mar. 27, 2023) (link to letter available at Ryan Mendias, *Idaho Attorney General’s Abortion Opinion Shows Overturning Roe Was Only the Beginning* (Apr. 25, 2023), ACLU, <https://www.aclu.org/news/reproductive-freedom/idaho-attorney-generals-abortion-opinion-shows-overturning-roe-was-only-the-beginning>).

¹⁰⁵ See Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J. at 197, 199 (2022); Cohen, Donley, & Rebouché, *New Abortion Battleground*, Colum. L.R., at 4, 5.

¹⁰⁶ In this article, “shield laws” refer only to laws protecting from *interstate* action. This definition does not include laws that prohibit prosecutorial action *within* a state (such as laws that ban government officials from penalizing a pregnant person for self-managing abortion within the state). See, e.g., 775 ILL. COMP. STAT. 55/1-20; WASH. REV. CODE § 9.02.120 (2023). Although not the focus of this article, these laws are an incredibly important piece to protecting equitable access to abortion, as pregnant people are often subject to penalty for pregnancy outcomes even in states where abortion is legal. See Laura Huss, Farah Diaz-Tello, & Goleen Samari, *Self-Care, Criminalized: August 2022 Preliminary Findings*, IF/WHEN/HOW (2022), <https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/>. There has been a small but significant increase in laws explicitly prohibiting penalties for self-managed abortion post-*Dobbs*: three jurisdictions had such laws on June 1, 2022 (Colorado, District of Columbia, Illinois), jumping up to six jurisdictions as of January 1, 2023 (California, Colorado, District of Columbia, Illinois, Michigan, Washington). CPHLR, *supra* note 30.

¹⁰⁷ See *Policy Surveillance Program, Refusal to Perform Abortions*, LawAtlas.org (Nov. 1, 2022), <https://lawatlas.org/datasets/refusal-to-perform-abortions>.

¹⁰⁸ Dov Fox, *Medical Disobedience and the Conscientious Provision of Prohibited Care*, AMERICAN JOURNAL OF BIOETHICS (2021). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853807.

session.¹⁰⁹ Further, in February 2023, 21 state governors launched the Reproductive Freedom Alliance, a coalition committed to protecting abortion rights by, among other things, sharing model statutory and executive order language to protect patients and providers from interstate prosecution and penalties.¹¹⁰ Several local governments and officials have also implemented shield protections, including in states that do not have any statewide shield laws.¹¹¹ Innovative and unique legal approaches to protecting abortion rights across state lines will likely continue to emerge as states and localities enact and supplement shield laws and as the abortion landscape continues to transform across the nation.

A. Overview of Interstate Shield Laws in Response to *Dobbs*

As of January 1, 2023, seventeen states had at least one shield law in effect: California, Colorado, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, and Washington.¹¹² All of these laws were newly enacted or issued in anticipation of, or in response to, the overturning of *Roe*, and some states explicitly call out the *Dobbs* decision in the laws.¹¹³ Michigan was the first state to have a shield law in effect: the governor issued an executive directive, which became immediately effective, on May 25, 2022.¹¹⁴ By the time the *Dobbs* decision was released on June 24, 2022, three additional states had shield laws in effect: New York (via several statutes that took effect on June 13), Massachusetts (via executive order issued on June 24), and California (via statute that took effect on June 24). State governors and legislatures acted quickly in the aftermath of *Dobbs*: sixteen states had at least one shield law in effect by the end of July 2022.¹¹⁵ Overall, states with shield laws are geographically concentrated in the northeast and the west, with only a few outliers in the middle of the country.¹¹⁶

¹⁰⁹ See, e.g., H.B. 4664, 102nd Gen. Assemb., Reg. Sess., 102 Ill. Laws 1117 (2023); see also Megan Rose, *Here's What States Are Doing to Abortion Rights in 2023*, PROPUBLICA (Feb. 8, 2023), <https://www.propublica.org/article/us-abortion-legislation-2023>.

¹¹⁰ Bill Barrow & Jeff Mulvihill, *Democratic governors form alliance on abortion rights*, AP (Feb. 21, 2023), <https://apnews.com/article/abortion-us-supreme-court-politics-texas-gavin-newsom-5db36213df3b4de5ad94ebbb53d01d30>; see also Press Release, Office of Governor Gavin Newsom, *Twenty-One States Announce Historic Governor-Led Reproductive Freedom Alliance* (Feb. 21, 2023), <https://www.gov.ca.gov/2023/02/21/twenty-states-announce-historic-governor-led-reproductive-freedom-alliance/>.

¹¹¹ See, e.g., Atlanta, Ga., Resolution 22-R-3711 (effective July 21, 2022); Austin, Tex., Resolution 20220721-002 (effective July 21, 2022); PITTSBURGH, PA. CODE OF ORDINANCES § 620D.02 (effective July 21, 2022); PHILA., PA., CODE §§ 6-1402, 6-1503 (effective Jan. 16, 2023); see also National Institute for Reproductive Health, *Meeting the Moment Post-Dobbs: A Review of Proactive Abortion Policies Passed in States & Localities, June 24 - October 1, 2022*, <https://nirhealth.org/resources/meeting-the-moment-post-dobbs/>.

¹¹² CPHLR, *supra* note 30. See also Table 1, *infra* note 149.

¹¹³ See, e.g., Cal. Exec. Order No. N-12-22 (June 27, 2022) (“WHEREAS the U.S. Supreme Court’s decision in *Dobbs v. Jackson Whole Women’s Health* has overturned half a century of settled precedent and stripped away the Constitutional right to reproductive freedom, jeopardizing safe access to reproductive health care across the United States”); Mich. Exec. Directive No. 2022-5 (May 25, 2022) (“As the recent draft opinion in *Dobbs v. Jackson Women’s Health Organization* demonstrates, the United States Supreme Court appears poised to eliminate a right to abortion that has been part of American law for nearly five decades.”).

¹¹⁴ Mich. Exec. Directive No. 2022-5 (May 25, 2022).

¹¹⁵ CPHLR, *supra* note 30. Hawaii became the seventeenth state with a shield law when Governor Ige issued an executive order on October 11, 2022. Haw. Exec. Order No. 22-05 (Oct. 11, 2022).

¹¹⁶ CPHLR, *supra* note 30.

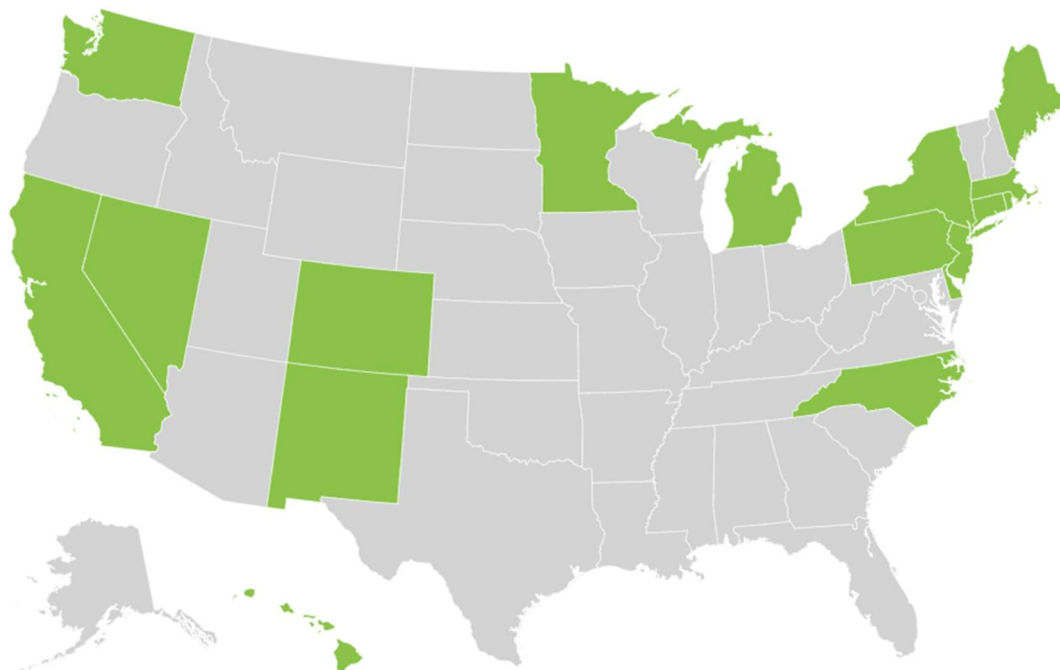


Figure 1: Map showing states with shield laws (statutes and executive orders) in effect as of January 1, 2023.¹¹⁷

States have used two legal mechanisms to implement shield protections: via statute (passed by the legislature and approved by the governor) and via executive order or directive (issued by the governor alone). On January 1, 2023, five states had statutory shield protections (Connecticut, Delaware, Massachusetts, New Jersey, New York), eleven had issued shield protections via executive order or directive (Colorado, Hawaii, Maine, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Pennsylvania, Rhode Island, Washington), and one state had shield protections both in statutes and an executive order (California).¹¹⁸ Although most states enacted their shield laws via a single legislative act or executive order, others have had multiple laws that became effective at different times over several months. For instance, in California, an act including shield statutes became effective June 24, 2022, an executive order became effective June 27, 2022, and several more acts with shield statutes became effective on September 27, 2022, and January 1, 2023.¹¹⁹

B. State and Other Actors Governed by Interstate Shield Laws

State shield laws primarily work by prohibiting certain actors from taking specified actions. As of January 1, 2023, every state shield law applies to state actors (people acting on behalf of the

¹¹⁷ CPHLR, *supra* note 30.

¹¹⁸ Massachusetts previously had both statutes and an Executive Order with shield protections. The Executive Order was issued on June 24, 2022, and the statutes became effective on July 29, 2022. Mass. Exec. Order No. 600 (June 24, 2022); *An Act Expanding Protections for Reproductive and Gender-Affirming Care*, 2022 Mass. Acts Ch. 127. The Governor later rescinded the Executive Order because the enacted statutes incorporated and expanded on the protections contained in the order. Mass. Exec. Order No. 601 (Aug. 24, 2022).

¹¹⁹ Act of June 24, 2022, Cal. Stat. Ch. 42 (effective June 24, 2022); Cal. Exec. Order No. N-12-22 (June 27, 2022); Act of Sept. 27, 2022, Cal. Stat. Ch. 628 (effective Sept. 27, 2022); Act of Sept. 27, 2022, Cal. Stat. Ch. 627 (effective Sept. 27, 2022); Act of Sept. 27, 2022, Cal. Stat. Ch. 565 (effective Sept. 27, 2022); Act of Sept. 27, 2022, Cal. Stat. Ch. 629 (effective Jan. 1, 2023); Act of Sept. 29, 2022, Cal. Stat. Ch. 810 (effective Jan. 1, 2023).

government).¹²⁰ Specifically, shield laws typically apply to state and local agencies, law enforcement officers, judges and court officials, and/or provider licensing boards. Twelve states' laws apply exclusively to state actors: Colorado, Hawaii, Maine, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, and Washington.¹²¹

A handful of states have shield protections that also limit other actors. Connecticut, Delaware, and New Jersey have laws that limit the actions of healthcare providers; specifically, these states prohibit healthcare providers from sharing health records and information related to abortion.¹²² Connecticut's and New Jersey's laws also prohibit "covered entities" as defined in federal law—which includes health insurance entities and health care clearinghouses¹²³—from sharing health records and information about abortion.¹²⁴

As of January 1, 2023, California is the only state to explicitly regulate private corporations (aside from health insurance companies) in its shield law. Specifically, one of California's shield laws prohibits any "California corporation that provides electronic communication services or remote computing services to the general public" from producing certain records related to abortion in response to an out-of-state warrant.¹²⁵ Another California shield law prohibits any "California corporation or [] corporation whose principal executive offices are located in California that provides electronic communications services California" from providing records or information to assist an investigation or enforcement proceeding related to abortion.¹²⁶

Massachusetts is the only state, as of January 1, 2023, with a shield law that limits an individual's action (other than providers). The law prohibits "judgment creditor[s]"—i.e., anyone who has obtained a money judgment in their favor in connection with legally protected health care, including abortion—from attempting to enforce that judgment in the state.¹²⁷ This type of protection may become critical in protecting abortion seekers and providers, given the rise of private enforcement schemes and "bounty hunter" laws in restrictive states that allow anyone to sue anyone who obtains, performs, or assists with abortion care. However, this law—and all shield laws—are necessarily limited by only being able to reach state actors and actors within the protective state; patients and providers are still subject to penalty outside of the shielding state.¹²⁸ Shield laws can thus act as an important tool to protect abortion access but cannot, by themselves, address the increasingly legally risky abortion landscape across the nation.

¹²⁰ CPHLR, *supra* note 30.

¹²¹ CPHLR, *supra* note 30.

¹²² CONN. GEN. STAT. §§ 52-146W, 52-146X (2022); DEL. CODE ANN. TIT. 10, § 3926(B)-(C) (2022); N.J. STAT. ANN. § 2A:84A-22.18 (WEST 2022).

¹²³ 45 C.F.R. § 160.103 (2013) defines covered entities to include "(1) A health plan[,] (2) A health care clearinghouse[, and] (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter." The law further defines a health plan to include, *inter alia*, health insurance issuers, Medicare issuers, Medicaid programs, veterans' health care programs, and the Indian Health Service program. 45 C.F.R. § 160.103 (2013). The law defines a health care clearing house as "a public or private entity, including a billing service, repricing company, community health management information system or community health information system, and "value-added" networks and switches, that does either of the following functions: (1) Processes or facilitates the processing of health information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a standard transaction[, or] (2) Receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity."

¹²⁴ CONN. GEN. STAT. §§ 52-146W, 52-146X (2022); N.J. STAT. ANN. § 2A:84A-22.18 (WEST 2022).

¹²⁵ CAL. PENAL CODE § 1524.2(C) (2022).

¹²⁶ CAL. PENAL CODE § 1546.5(A) (2022).

¹²⁷ MASS. GEN. LAWS ch. 218 § 4A(c) (2019).

¹²⁸ David S. Cohen, Greg Donley, & Rachel Rebouché, *Abortion Shield Laws*, 2 NEJM Evidence, no. 4, at 1, 4, (March 28, 2023) <https://evidence.nejm.org/doi/full/10.1056/EVIDra2200280>.

C. Key Features of Interstate Shield Provisions

Most states' shield laws work primarily (and some, exclusively) by attempting to protect abortion patients and providers from criminal investigation and prosecution by other states. One of the most common features of shield laws prohibit court officials and law enforcement officers generally from assisting criminal investigations—sixteen states have such a provision.¹²⁹ These laws usually utilize broad language by prohibiting expending or using “time, money, facilities, property, equipment, personnel or other resources” to further such investigations, prohibiting “provid[ing] any information” in furtherance of such investigations, or “assist[ing]” and “cooperat[ing]” with such investigations.¹³⁰ Another common feature is provisions that more specifically prohibit courts and officials from issuing or complying with a subpoena, warrant, and/or summons related to an out-of-state criminal investigation or proceeding.¹³¹ California and New York additionally prohibit law enforcement from making arrests related to protected reproductive healthcare.¹³² Fourteen states also explicitly attempt to shield people from extradition—by prohibiting extradition or surrender for abortion violations specifically, by prohibiting extradition or surrender if the alleged actions are legal in the shielding state more generally, or by governors stating that they will choose to exercise their discretion to decline extradition requests related to abortion.¹³³

Despite the seeming breadth of these shield laws, they are subject to several limitations. Many include explicit exceptions to their prohibitions, which could undermine their effectiveness and applicability. For instance, some states allow assistance or compliance if a court order requires the action.¹³⁴ Others limit the prohibition only to the extent the out-of-state investigation or proceeding concerns abortion that is legal within the state.¹³⁵ Some states also limit shield laws to the extent they

¹²⁹ As of January 1, 2023, those states are: California, Colorado, Connecticut, Hawaii, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, and Washington. See CPHLR, *supra* note 30. Although Delaware does not have a provision broadly prohibiting assisting or cooperating with criminal investigations, Delaware explicitly prohibits issuance of or compliance with a summons or subpoena in connection with such investigations. Del. Code Ann. tit. 10, § 3928(b) (2021).

¹³⁰ See, e.g., Conn. Gen. Stat. § 54-155a (2022); N.Y. Exec. Law § 837-w (2022), Wash. Directive of the Governor No. 22-12 (July 5, 2022).

¹³¹ See, e.g., Cal. Penal Code § 13778.2(c)(2) (2022); Del. Code Ann. tit. 10, § 3928(b) (2022); N.M. Exec. Order 2022-107 (June 27, 2022).

¹³² N.Y. Criminal Procedure Law § 140.10(3-a); Cal. Penal Code § 13778.2(a).

¹³³ Cal. Exec. Order No. N-12-22 (June 27, 2022); Conn. Gen. Stat. § 54-162 (2018); Del. Code Ann. tit. 11, § 2506 (2022); Me. Exec. Order No. 4 (July 2022); Mass. Gen. Laws Ch. 276 § 13 (2022); Mich. Exec. Order No. 2022-4 (July 13, 2022); Minn. Emergency Exec. Order No. 22-16 (Aug. 1, 2022); Nev. Exec. Order No. 2022-08 (2022); N.J. Stat. § 2A:160-14.1 (June 28, 2022); N.M. Exec. Order No. 2022-107 (June 27, 2022); N.Y. Crim. Proc. Law § 570.17 (2023); N.C. Exec. Order No. 263 (July 6, 2022); Pa. Exec. Order No. 2022-01 (July 12, 2022); R.I. Exec. Order No. 22-28 (July 5, 2022).

¹³⁴ See, e.g., Colo. Exec. Order No. D 2022 032 (July 6, 2022) (“All state agencies and principal departments shall not, unless pursuant to a court order, provide information or data... or expend time, money, facilities, property, equipment, personnel, or other resources...” (emphasis added)); Haw. Exec. Order 22-5 (Oct. 11, 2022) (“Except as otherwise required by law or as required by order of a court of competent jurisdiction...”).

¹³⁵ See, e.g., Cal. Penal Code § 13778.2(b) (2022) (“A state or local public agency, or any employee thereof acting in their official capacity, shall not cooperate with or provide information to... regarding an abortion that is lawful under the laws of this state and that is performed in this state.”); Conn. Gen. Stat. § 54-155a (2022) (“This section shall not apply to any investigation or proceeding where the conduct subject to potential liability under the investigation or proceeding would be subject to liability under the laws of this state if committed in this state.”); Del. Ann. Code tit. 10, § 3928(b) (2022) (“The State shall not... [i]ssue a summons... unless the acts forming the basis of the prosecution or investigation would constitute a crime in this State.”).

conflict with federal law.¹³⁶ These limitations are likely meant to recognize potentially unsettled areas of law regarding state comity and federalism.¹³⁷ Yet by including these carve-outs, states are preemptively limiting the protective potential of these laws, expanding law enforcement and court official discretion, and ultimately leaving behind people most at risk of criminalization.

In addition to protecting patients and providers from criminal penalties, many states also provide explicit protections in civil proceedings. Many shield laws use the same or similar language that applies to criminal proceedings to civil proceedings as well—generally prohibiting assistance and cooperation with investigations and proceedings and prohibiting the issuance of summonses and subpoenas.¹³⁸ Some states also provide additional protections specific to civil lawsuits—for example, Connecticut, Delaware, and New Jersey prohibit sharing health records or health information related to abortion care in civil proceedings.¹³⁹ California and Massachusetts specifically prohibit courts from applying out-of-state civil laws in state courts,¹⁴⁰ and from enforcing out-of-state judgments within the state.¹⁴¹ These civil protections are likely to become even more important as restrictive states increasingly rely on civil and private enforcement actions to enforce abortion bans.¹⁴² However, shielding patients and providers from civil liability may be more difficult than shielding them from criminal prosecution, in part because of the wider availability of jurisdiction in civil cases and because private parties can initiate civil suits.¹⁴³

Another common feature of interstate shield laws is a provision protecting healthcare providers from professional sanctions or discipline for providing abortion care. Nine states include these protections as of January 1, 2023: California, Delaware, Massachusetts, Nevada, New Jersey, New Mexico, New York, Pennsylvania, and Rhode Island.¹⁴⁴ Some of these provisions prohibit disciplining providers within the state based on another state’s threatened or imposed sanction on the provider for abortion care.¹⁴⁵ Others more specifically target interstate action by explicitly prohibiting sanctions on providers who provide, assist, or counsel patients from other states.¹⁴⁶

Finally, a few states have gone a step further by providing their citizens not only a shield from out-of-state actions but also a sword: Connecticut, Delaware, Massachusetts, and New York have proactively created a private right of action to protect the right to abortion against interference. All four states include “clawback” provisions that allow persons subject to out-of-state civil judgments to recover

¹³⁶ See, e.g., Mass. Gen. Laws ch. 223A § 11 (2022) (“Notwithstanding any other provision of this section to the contrary and except as required by federal law...”); Minn. Emergency Exec. Order No. 22-16 (Aug. 1, 2022) (“To the maximum extent permitted under the United States and Minnesota Constitutions...”).

¹³⁷ See Cohen, Donley, & Rebouché, *New Abortion Battleground*, *supra* note 9, at 52-53.

¹³⁸ See, e.g., Del. Code tit. 10, § 3928(b) (2022); Colo. Exec. Order No. D 2022 032 (July 6, 2022).

¹³⁹ CONN. GEN. STAT. §§ 52-146W, 52-146X (2022); DEL. CODE TIT. 10, § 3926A (2022); N.J. STAT. § 2A:84A-22.18 (2022).

¹⁴⁰ CAL. HEALTH & SAFETY CODE § 123467.5 (2022); MASS. GEN. LAWS ch. 12 § 11I¾ (2022).

¹⁴¹ CAL. HEALTH & SAFETY CODE § 123467.5 (2022); MASS. GEN. LAWS ch. 218 § 4A (2019).

¹⁴² See Zubrzycki, *supra* note 104 (discussing currently effective laws and proposed bills imposing civil liability on abortion seekers, providers, and assistants); see also Katherine Florey, *Dobbs and the Civil Dimension of Extraterritorial Abortion Regulation*, 98 N.Y.U. L. Rev. (forthcoming) (manuscript at 13-16, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172494).

¹⁴³ Florey, *supra* note 140.

¹⁴⁴ CPHLR, *supra* note 30.

¹⁴⁵ CAL. BUS. & PROF. CODE §§ 2253(E), 2746.6(B), 2761.1(B), 3502.4(F); NEV. EXEC. ORDER No. 2022-08; N.M. EXEC. ORDER No. 2022-107; N.Y. EDUC. LAW § 6505-D; PA. EXEC. ORDER No. 2022-01; R.I. EXEC. ORDER No. 22-28.

¹⁴⁶ DEL. CODE TIT. 24, §§ 1731(B)(26), § 1773(C), 1922(D); MASS. GEN. LAWS ch. 112 § 5F½; N.J. STAT. § 45:1-21; N.Y. EDUC. LAW § 6531-B; N.Y. PUBLIC HEALTH LAW § 230(9-C).

damages from any party that brought or enforced the out-of-state judgment.¹⁴⁷ These clawback provisions may prevent people in restrictive states from initiating out-of-state private enforcement actions in the first place.¹⁴⁸ New York's and Massachusetts's laws also create a right of action if the abortion resulted in criminal proceedings in another state.¹⁴⁹ New York's law allows for the recovery of punitive damages in addition to compensatory damages, attorneys' fees, and costs.¹⁵⁰

Table 1: Overview of states with interstate shield protections and data privacy protections in effect as of January 1, 2023.

State	Interstate Shield Protections	Data Privacy Protections
California	Prohibits: <ul style="list-style-type: none"> • Disclosure of health records • Disclosure of communications records • Issuance of a subpoena • Issuance of a warrant • Enforcement of out-of-state judgments • Assisting investigations or proceedings • Applying out-of-state laws in state court • Imposing provider sanctions • Extradition • Arrest 	Prohibits anyone from publicly disclosing on the internet patient and provider information with intent to threaten or incite harm Maintains address confidentiality program
Colorado	Prohibits: <ul style="list-style-type: none"> • Disclosure of health records • Assisting investigations or proceedings 	No additional protections (interstate shield protections only)
Connecticut	Prohibits: <ul style="list-style-type: none"> • Disclosure of health records • Disclosure of communications records • Issuance of a subpoena • Issuance of a summons to testify • Assisting investigations or proceedings • Extradition Allows for recovery of civil damages	No additional protections (interstate shield protections only)
Delaware	Prohibits: <ul style="list-style-type: none"> • Disclosure of health records 	No additional protections (interstate shield protections only)

¹⁴⁷ CONN. GEN. STAT. § 52-571M; DEL. CODE TIT. 10, § 3929(B)-(D); MASS. GEN. LAWS ch. 12 § 11(D); N.Y. CIV. RIGHTS LAW § 70-B.

¹⁴⁸ Cohen, Donley, & Rebouché, *New Abortion Battleground*, *supra* note 127, at 49.

¹⁴⁹ MASS. GEN. LAWS ch. 12 § 11I ½(D); N.Y. CIV. RIGHTS LAW § 70-B.

¹⁵⁰ N.Y. CIV. RIGHTS LAW § 70-b.

	<ul style="list-style-type: none"> • Disclosure of communications records • Issuance of a subpoena • Issuance of a summons to testify • Imposing provider sanctions • Extradition <p>Allows for recovery of civil damages</p>	
District of Columbia	None	Maintains address confidentiality program
Hawaii	Prohibits: <ul style="list-style-type: none"> • Disclosure of health records • Issuance of a warrant • Assisting investigations or proceedings 	No additional protections (interstate shield protections only)
Maine	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings • Extradition 	None
Massachusetts	Prohibits: <ul style="list-style-type: none"> • Issuance of a subpoena • Issuance of a summons to testify • Enforcement of out-of-state judgments • Assisting investigations or proceedings • Applying out-of-state laws in state court • Imposing provider sanctions • Extradition <p>Allows for recovery of civil damages</p>	None
Michigan	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings • Extradition 	Protects the identity and address of abortion patients as confidential unless disclosure is required by a court proceeding or consented to by the patient
Minnesota	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings • Extradition 	None
Nevada	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings • Imposing provider sanctions • Extradition 	None

New Jersey	Prohibits: <ul style="list-style-type: none"> • Disclosure of health records • Disclosure of communications records • Assisting investigations or proceedings • Imposing provider sanctions • Extradition 	Maintains address confidentiality program
New Mexico	Prohibits: <ul style="list-style-type: none"> • Issuance of a warrant • Assisting investigations or proceedings • Imposing provider sanctions • Extradition 	None
New York	Prohibits: <ul style="list-style-type: none"> • Disclosure of health records • Issuance of a subpoena • Issuance of a summons to testify • Assisting investigations or proceedings • Imposing provider sanctions • Extradition • Arrest <p>Allows for recovery of civil damages</p>	Maintains address confidentiality program Prohibits furnishing a report of a referral of abortion services unless the request is from a law enforcement agency, a governmental health agency, a court order, or the patient
North Carolina	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings • Extradition 	None
Pennsylvania	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings • Imposing provider sanctions • Extradition 	None
Rhode Island	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings • Imposing provider sanctions • Extradition 	None
Washington	Prohibits: <ul style="list-style-type: none"> • Assisting investigations or proceedings 	None

D. Potential Limitations of Interstate Shield Laws

Interstate shield laws are a promising new development in the post-*Dobbs* era. In response to calls to action by abortion justice organizers, advocates, and scholars, some state policymakers—who had, in many ways, become complacent about abortion protections and overly reliant on the limited protections

of *Roe* and its progeny—moved relatively quickly to support abortion rights. Anti-abortion extremists have significantly increased their legal attacks on bodily autonomy more broadly since *Dobbs*, but state policymakers have taken a step in the right direction by shielding access to reproductive healthcare and, increasingly, gender-affirming care as well.¹⁵¹ Early evidence shows that shield laws may successfully lead to increased access to abortion across state lines. In 2023, more than 3500 people living in states where abortion is banned received abortion medication via telehealth from providers located in states with shield laws that protect them from liability.¹⁵² Additionally, although not yet measured, shield laws may deter states or individual actors from pursuing legal actions against patients and providers across state lines.

Nevertheless, as welcome as these shield laws are, it is important to recognize their limitations. Shield laws are geographically concentrated and limited in their reach, leaving patients and providers who travel to unprotected states, or return to hostile states, vulnerable to legal consequences.¹⁵³ They are often self-limiting, protecting only abortion care that is legal within the state—yet even protective states have abortion restrictions (such as viability bans),¹⁵⁴ and patients could remain at risk of criminalization for abortion (including self-managed abortion) and pregnancy outcomes if other types of criminal laws are applied.¹⁵⁵ Further, despite the growing demand for—and increasing legal risks of—medication abortion provided via telehealth, as of January 1, 2023, only one state (Massachusetts) explicitly provides protections for abortion providers who provide telehealth abortion care to patients located in other states.¹⁵⁶ Shield laws may be vulnerable to attacks in court based on federal constitutional law or state comity.¹⁵⁷ Many shield protections are contained within executive orders, which are necessarily limited in scope to areas of executive branch discretion and may not last with changes in the administration.¹⁵⁸

Finally, nearly all shield laws rely on state actors to comply with their prohibitions, but history has shown that such actors cannot necessarily be trusted to safeguard abortion rights.¹⁵⁹ Relying solely on state enforcement and the judicial system to protect abortion providers and patients has troubling implications due to their role in perpetuating criminalization. As the abortion landscape continues to change rapidly after *Dobbs*, policymakers and advocates must consider creative ways to protect patients and providers without reinforcing systemic harms.

¹⁵¹ See, e.g., Mass. Gen. Laws ch. 12 § 11I ½ (shielding reproductive healthcare and gender-affirming healthcare); see also Samantha Riedel, *Colorado Passed Three "Shield Laws" Protecting Abortion and Gender-Affirming Care*, THEM (Apr. 17, 2023), <https://www.them.us/story/colorado-shield-laws-protecting-abortion-gender-affirming-care>.

¹⁵² Press Release, Aid Access, USA abortion providers Aid Access started serving all USA states (Jul. 14, 2023), <https://aidaccess.org/en/page/3767036/usa-abortion-providers-aid-access-started-serving-all-usa-states>.

¹⁵³ Cohen, Donley, & Rebouché, *New Abortion Battleground*, *supra* note 127, at 46.

¹⁵⁴ See Policy Surveillance Program, *Abortion Bans*, LAWATLAS (Nov. 1, 2022), <https://lawatlas.org/datasets/abortion-bans>.

¹⁵⁵ See Huss, Diaz-Tello, & Samari, *supra* note 105.

¹⁵⁶ MASS. GEN. LAWS ch. 12 § 11I ½ (defining legally-protected health care activity to include “the provision of such a health care service by a person duly licensed under the laws of the commonwealth and physically present in the commonwealth... shall be legally protected if the service is permitted under the laws of the commonwealth, regardless of the patient’s location”). Other states are considering adding similar protections to their shield laws in the 2023 session. See, e.g., S.B. 1066A, 2023-2024 Reg. Sess. (N.Y. 2023).

¹⁵⁷ Florey, *supra* note 140, at 48-53; see also Cohen, Donley, & Rebouché, *New Abortion Battleground*, *supra* note 127, at 44, 52.

¹⁵⁸ Cohen, Donley, & Rebouché, *Abortion Shield Laws*, *supra* note 127 at 44, 52.

¹⁵⁹ See, e.g., Natasha Lennard, *Reproductive Rights Activists Charged Under Law Intended to Protect Abortion Clinics*, THE INTERCEPT (Feb. 3, 2023), <https://theintercept.com/2023/02/03/abortion-clinics-face-act/> (discussing law enforcement’s use of a law meant to protect abortion clinics to charge abortion activists); Huss, Diaz-Tello, & Samari, *supra* note 105 (discussing cases where abortion seekers were criminalized by law enforcement); Ji Seon Song, *Care and Carceralism*, INQUEST (Apr. 18, 2023), <https://inquest.org/care-and-carceralism/> (discussing the increasing cooperative relationship between law enforcement and healthcare providers).

V. State Laws Addressing Abortion Data Privacy Post-*Dobbs*

A. HIPAA and Gaps in Patient Data Protections

The overturn of *Roe* and its resulting legal chaos has highlighted existing gaps in health data privacy, which plays a pivotal role in criminalization. Patients and providers alike may mistakenly believe that abortion health records and data are completely protected from disclosure under the Health Insurance Portability and Accountability Act of 1996 (HIPAA),¹⁶⁰ but HIPAA contains several exceptions allowing for the disclosure of protected health information (PHI) in response to requests related to criminal, civil, and administrative proceedings.¹⁶¹ On the other hand, some providers may mistakenly believe that they are required to disclose PHI to law enforcement related to abortion or feel pressured or coerced to share such information in response to a law enforcement request. In April 2023—amidst growing concerns over criminalization of care—HHS issued a notice of proposed rulemaking that introduced a new category of PHI related to reproductive healthcare and would change the Privacy Rule to explicitly bar providers and insurers from sharing PHI with law enforcement related to legal abortion care (including when patients travel across state lines to seek abortion).¹⁶² However, that change is not yet in effect and is being challenged by several state officials.¹⁶³ Additionally, the rule would only apply to reproductive care that is provided lawfully and may permit disclosure of PHI in states where abortion is criminalized.

Moreover, HIPAA is limited in scope, applying only to certain health information contained in electronic health records and maintained only by specified covered entities.¹⁶⁴ Health records and data are often shared outside the parameters of HIPAA—for instance, providers routinely share data with other providers to facilitate care,¹⁶⁵ and patients themselves share data with friends, family members, and even phone applications without realizing that data lacks protection.¹⁶⁶ The mother-daughter example from Nebraska also highlights troubling reliance on social media—the duo exchanged messages that were perceived to be “private” but were used by law enforcement to implicate them.¹⁶⁷ Technological advances have led to increasing surveillance and data mining overall, and tech companies regularly share the data they collect freely or for profit.¹⁶⁸ Geolocation data that could pinpoint a user in a specific location, such as outside an abortion clinic, are still outside existing protections. The sharing of such data has already led to investigations and prosecutions of abortion seekers and is likely to increase as more states look to criminalize abortion and bodily autonomy more generally.¹⁶⁹

¹⁶⁰ Carmel Shachar, *HIPAA, Privacy, and Reproductive Rights in a Post-Roe Era*, 328 JAMA 417, 417 (2022).

¹⁶¹ 45 CFR 164.512(e)-(f); see also Shachar, *supra* note 159.

¹⁶² Alice Miranda Ollstein, *Biden admin to shore up HIPAA to protect abortion seekers and providers*, POLITICO (Apr. 12, 2023), <https://www.politico.com/news/2023/04/12/biden-admin-to-shore-up-hipaa-to-protect-abortion-seekers-and-providers-00091581>.

¹⁶³ Susan Rinkunas, *19 Republican Attorneys General Want Police to Investigate People for Abortions*, JEZEBEL (Jul. 18, 2023), <https://jezebel.com/19-republican-attorneys-general-want-police-to-investig-1850648742>.

¹⁶⁴ Shachar, *supra* note 159.

¹⁶⁵ Zubrzycki, *supra* note 104, at 209.

¹⁶⁶ Shachar, *supra* note 159; see also Rebecca Saber, *The Impact of the Post-Dobbs Criminalization of Abortion on the Cybersecurity Ecosystem in the United States*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2023), <https://nyujlpp.org/quorum/saber-cybersecurity-post-dobbs/>. In one study of cases where abortion was criminalized, only 39% of cases were reported to law enforcement by healthcare providers, while 26% of cases were reported by friends, parents, intimate partners, or other acquaintances. Huss, Diaz-Tello, & Samari, *supra* note 14, at 3.

¹⁶⁷ <https://www.nytimes.com/2022/08/18/us/abortion-prosecution-nebraska.html>.

¹⁶⁸ Eunice Park, *Reproductive Health Care Data Free or For Sale: Post-Roe Surveillance and the “Three Corners” of Privacy Legislation Needed*, 47.3 N.Y.U. REV. OF L. & SOC. CHANGE 3 (2023), 21-42, <https://ssrn.com/abstract=4321244>.

¹⁶⁹ Katherine Tangelakis-Lippert, *Facebook and Google are handing over user data to help police prosecute abortion seekers*, BUSINESS INSIDER (Mar. 4, 2023), <https://www.businessinsider.com/police-getting-help-social-media-to-prosecute-people-seeking-abortions-2023-2>; see also Zubrzycki, *supra* note 104.

In response to this increasing surveillance and criminalization, some states have endeavored to protect patient data and provider confidentiality from attack. These laws—some new and some that pre-date *Dobbs*—attempt to fill existing legal gaps by prohibiting disclosure of certain data and information (including in response to out-of-state court orders and requests), and creating legal mechanisms to help maintain privacy and confidentiality. Yet data privacy laws remain few and far between and contain significant gaps in protection, failing to comprehensively protect patients and providers from surveillance, interference, and prosecution.

B. Emerging State Law Protections for Abortion Data Privacy

Prior to the *Dobbs* decision, only four states, plus the District of Columbia, had at least one type of data privacy law specific to abortion in effect.¹⁷⁰ Unlike the quick proliferation of interstate shield laws generally (some of which include data privacy provisions), the number of abortion data privacy laws has increased very modestly in the aftermath of *Dobbs*: as of January 1, 2023, seven states and D.C. had such a law in effect.¹⁷¹ Connecticut, Hawaii, and Delaware enacted a new data privacy law in 2022 after the release of the *Dobbs* decision. Additionally, although California and New York already had data privacy laws in effect prior to *Dobbs*, both states enacted new, additional privacy laws after the decision as well.

The most common type of data privacy law is a prohibition on the sharing of abortion health records: seven states had such a law in effect as of January 1, 2023.¹⁷² All seven of these states' laws are in the form of interstate shield protections and specifically prohibit the disclosure of abortion medical records and/or information in the context of another state's criminal and/or civil proceedings.¹⁷³ California also has a law prohibiting prison staff in particular from disclosing health records in response to another state's request.¹⁷⁴

However, a handful of states have data privacy laws that go beyond shielding patients and providers from out-of-state actions. For instance, although Michigan does not have a law prohibiting disclosure of health records entirely, it does protect the identity and the address of all abortion patients, unless disclosure is required by a court proceeding or consented to by the patient.¹⁷⁵ Four jurisdictions (California, New Jersey, New York, and the District of Columbia) allow abortion providers—and in some instances, patients—to participate in an address confidentiality program.¹⁷⁶ Address confidentiality programs are available in a majority of states, typically for survivors of abuse, trafficking, and other qualified offenses¹⁷⁷—but these four jurisdictions are the only ones that extend the program to include people providing or obtaining abortion services. These laws allow certain individuals to use a designated address in public records rather than their actual home address. New Jersey's law has the broadest applicability, applying to abortion patients, providers, employees, volunteers, contractors, and their family members.¹⁷⁸ New York's law applies to abortion providers, employees, volunteers, patients, and

¹⁷⁰ As of June 23, 2022—the day before the *Dobbs* release—those jurisdictions were: California, Michigan, New Jersey, New York, and the District of Columbia. CPHLR, *supra* note 30.

¹⁷¹ CPHLR, *supra* note 30. The three additional states are: Connecticut, Delaware, and Hawaii.

¹⁷² CPHLR, *supra* note 30.

¹⁷³ CAL. PENAL CODE § 13778.2; Colo. Exec. Order No. D 2022 032; CONN. GEN. STAT. § 52-146w; DEL. CODE tit. 10, § 3926A; Haw. Exec. Order No. 22-05; N.J. STAT. § 2A:84A-22.18; N.Y. EXEC. LAW § 837-w.

¹⁷⁴ CAL. PENAL CODE § 3408(r) (2023).

¹⁷⁵ MICH. COMP. LAWS § 333.17015(19)-(20) (2023).

¹⁷⁶ CAL. GOV'T CODE § 6215.2; N.J. STAT. § 47:4-4; N.Y. EXEC. LAW § 108; D.C. CODE § 4-555.02.

¹⁷⁷ See Martin Austermuhle, *Addresses Of Domestic Abuse Survivors, Abortion Providers Will Soon Be Allowed To Remain Private In D.C.*, WAMU 88.5 (Jul. 16, 2019), <https://wamu.org/story/19/07/16/addresses-of-domestic-abuse-survivors-abortion-providers-will-soon-be-allowed-to-remain-private-in-d-c/>.

¹⁷⁸ N.J. STAT. § 47:4-3 (2023).

immediate family members of providers.¹⁷⁹ California's and the District of Columbia's laws apply only to abortion service providers, employees, and volunteers (but not patients).¹⁸⁰

New York and California also have some additional and unique data privacy laws. New York has a law dating back to 1971 that prohibits “any person, firm or corporation doing business in th[e] state [from] furnish[ing] a report of a referral for abortifacient services or a report of an inquiry or request therefor” unless the request is from a law enforcement agency, a governmental health agency, a court order, or the patient.¹⁸¹ Much more recently, in 2022, California enacted a series of data privacy laws that prohibit (1) any person from posting of personal information of abortion patients, providers, or assistants, or other individuals residing at the same home address, on the internet or social media for the purpose of threatening or inciting harm or when the patient, provider, or other individual has demanded nondisclosure;¹⁸² (2) courts from ordering the interception or surveillance of communications related to abortion;¹⁸³ and (3) corporations from producing communication records related to abortion in response to another state's request or order.¹⁸⁴

Overall, states have failed to address the significant data privacy gaps after the fall of *Roe*. Few states have any abortion data privacy protections, and of the ones that do, most apply only in the context of out-of-state court proceedings and investigations. Other data privacy measures, such as laws aimed at protecting the confidentiality of abortion patients and providers and preventing disclosure of communications data, hold promise but are failing to proliferate in the same way as interstate shield laws and other abortion protection laws more generally. Given the significant role of healthcare-related data in surveillance and investigation by law enforcement, safeguarding data privacy is an essential step in reducing the risks of criminalization post-*Dobbs*.

VI. Public Health and Policy Implications of *Dobbs*

A. *Dobbs* Threatens to Exacerbate Existing Inequities

The intersections of criminalization and coercion in reproductive healthcare have existed long before the fall of *Roe* and in contexts beyond abortion. The reproductive justice framework posits the right to abortion as part of one tenet in an interconnected set of human rights: (1) the right to have a child under the conditions of one's choosing; (2) the right not to have a child using birth control, abortion, or abstinence; and (3) the right to parent children in safe and healthy environments free from violence by individuals or the state.¹⁸⁵ The lack of inclusion for the concerns of women of color in the mainstream pro-choice and feminist movements gave rise to the reproductive justice movement, which advocates for an intersectional viewpoint rather than focusing solely on “the right to choose.”¹⁸⁶ The recognition that pregnancy, abortion, and parenting are inseparable fluctuations on the reproductive spectrum sheds light on the interconnectedness of these issues, as both a public health and legal matter.

¹⁷⁹ N.Y. EXEC. LAW § 108.

¹⁸⁰ CAL. GOV'T CODE § 6215.2 (2023); D.C. CODE § 4-555.01 (2023).

¹⁸¹ N.Y. GEN. BUS. LAW § 394-e, *as amended* (1978).

¹⁸² CAL. GOV'T CODE §§ 6218, 6218.01 (2023).

¹⁸³ CAL. PENAL CODE §§ 629.52(e), 638.52(m) (2023).

¹⁸⁴ CAL. PENAL CODE §§ 1524.2(c), 1546.5(a) (2023).

¹⁸⁵ Loretta J. Ross (2017) *Reproductive Justice as Intersectional Feminist Activism*, *Souls*, 19:3, 286-314, DOI: [10.1080/10999949.2017.1389634](https://doi.org/10.1080/10999949.2017.1389634).

¹⁸⁶ Price, Kimala. "What is reproductive justice? How women of color activists are redefining the pro-choice paradigm." *19 Meridians*, S1, 340-62, (2020).

Viewed through a reproductive justice lens, it is clear that restrictive abortion policy has consistently failed to acknowledge the interrelatedness of abortion and parenting and undermines the ability of individuals to make the best decisions for their own lives. States with more restrictive abortion laws tend to have worse maternal and infant health outcomes, which exhibit deep structural and racial disparities.¹⁸⁷ The implication of health systems in surveilling and reporting pregnant people suspected of illicit behavior illustrate cooperation between law enforcement and healthcare providers. The threats of extraterritorial criminal prosecution for abortion seekers traveling out of state and the deputizing of private citizens to enforce abortion bans have evoked troubling comparisons to the Fugitive Slave Acts.¹⁸⁸ Reproductive justice scholars such as Dorothy Roberts and Michele Goodwin have made explicit the historical connections between reproductive oppression, structural racism, and mass incarceration dating back to slavery.¹⁸⁹ From enslavement to sterilization, to family separation, to substance-use reporting, an examination of past subjugation of pregnant people proffers clear insight into the looming harm of a post-*Roe* landscape.¹⁹⁰

The uncertainty of legal risk and policy implications have continued to hinder access as the abortion landscape shifts rapidly. Legal battles at every level of government have sown confusion amongst providers, patients, and the public. Preliminary research has started to document the harms of low-quality care resulting from post-*Dobbs* restrictions on abortion, and evidence will likely continue to mount.¹⁹¹ As the legal risks and threats to public health escalate, the consequences will not fall equitably across populations. The structural influences responsible for the marginalization of Black, Indigenous, immigrant, rural, and low-income communities from healthcare exacerbate the likelihood that a person is at risk of worse health, social, and legal outcomes.¹⁹² Adolescents also face unique barriers in accessing confidential sexual and reproductive health services.¹⁹³ Unsurprisingly, the same racial and socioeconomic disparities commonly reflected elsewhere in the criminal legal and healthcare systems manifest in pregnancy criminalization through setting events and the profiling of specific populations. In an analysis of arrests of pregnant women from 1973 to 2005, 52% of cases brought were against Black

¹⁸⁷ Dovile Vilda et al., “State Abortion Policies and Maternal Death in the United States, 2015–2018”, 111 Am. J. Pub. Health, no. 9, 1696-1704, (Sept. 1, 2021): <https://doi.org/10.2105/AJPH.2021.306396>.

¹⁸⁸ Aziz Huq, *What Texas’s abortion law has in common with the Fugitive Slave Act*, Washington Post, Nov. 1, 2021, <https://www.washingtonpost.com/outlook/2021/11/01/texas-abortion-law-history-rights-suppressed/>.

¹⁸⁹ Michele B. Goodwin, *Policing The Womb: Invisible Women And The Criminalization Of Motherhood*, (2020); *see also*, Dorothy Roberts, *Killing The Black Body: Race, Reproduction And The Meaning Of Liberty*, 150-201, (1997).

¹⁹⁰ Michele Goodwin, *The Urgency for Reproductive Freedom: From Slavery to the New Jane Crow* MS MAGAZINE (May 24, 2022), <https://msmagazine.com/2022/05/24/abortion-slavery-reproductive-freedom-13th-amendment-constitution-black-women-history/>.

¹⁹¹ Grossman D, Joffe C, Kaller S, Kimport K, Kinsey E, Lerma K, Morris N, White K. *Care Post-Roe: documenting cases of poor-quality care since the Dobbs decision*. ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH (ANSIRH), University of California, San Francisco, 2023.

¹⁹² Bailey ZD, et al., *Structural Racism and Health Inequities in the USA: Evidence and Interventions*. LANCET, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(17\)30569-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(17)30569-X/fulltext); Blankenship, Kim M., et al. “*Structural Racism, the Social Determination of Health, and Health Inequities: The Intersecting Impacts of Housing and Mass Incarceration*,” AM. J. OF PUBLIC HEALTH (2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9877374/>; Rotter, Merrill, Michael Compton, *Criminal legal involvement: A Cause and Consequence of Social Determinants of Health*, PSYCHIATRIC SERVICES, 73.1, 108-111 (2022) <https://ps.psychiatryonline.org/doi/epdf/10.1176/appi.ps.202000741>.

¹⁹³ Sarah Bousquet, *The Impact of Restrictive Abortion Policies on Children: How Dobbs v. Jackson Women’s Health Organization Decision Negatively Affects Youth*, CHILD USA (Feb. 2023), <https://childusa.org/wp-content/uploads/2023/02/Impact-of-Abortion-Bans-FINAL.pdf>.

women and 71% qualified for indigent defense.¹⁹⁴ Those without resources are more likely to plead guilty and experience negative consequences from interacting with the criminal legal system, even if the charges are eventually dropped.¹⁹⁵ In a post-*Dobbs* setting, this may translate to an increase in the targeting of pregnant individuals, particularly low-income women of color, by law enforcement.

Even under *Roe*, the multitude of legal restrictions and lack of funding and support for abortion previously left many people without access. The majority of abortion seekers are people of color, low-income, and already parenting.¹⁹⁶ The challenges of overcoming financial and logistical barriers such as taking time off work, finding childcare, and traveling to a clinic, leads to delays in obtaining care and subsequently increase costs and hardships.¹⁹⁷ So-called “Crisis Pregnancy Centers” (CPCs) target vulnerable individuals under the guise of providing resources and information on abortion and pregnancy while in reality, diverting them from these services.¹⁹⁸ The role of CPCs in a post-*Dobbs* era is particularly concerning given their ties to anti-abortion networks and the potential for collusion with law enforcement, as they gain access to sensitive data.¹⁹⁹ At worst, these barriers may be insurmountable and the pregnant person may be unable to obtain an abortion, which can have devastating health and social effects.²⁰⁰ Maternal morbidity and mortality in the US have continued to rise and the maternal mortality rate is more than 3 times higher for Black women than for white women.²⁰¹ States with restricted abortion access have worse maternal and child health outcomes and have often failed to implement family-friendly policies such as paid family and sick leave, meaning forced childbirth carries greater risks and consequences.²⁰²

Access to healthcare, logistical support, and legal resources are crucial to navigating the many uncertainties of the current abortion environment but may not be readily available to all who need it. Those with poorer pregnancy outcomes may be more at risk of needing emergency care, thus exposing

¹⁹⁴ Paltrow LM, Flavin J., *Arrests of and forced interventions on pregnant women in the United States, 1973-2005: implications for women's legal status and public health*. J. HEALTH POLIT POLICY LAW, (2013) <https://www.ama-assn.org/system/files/a22-saturday-tote.pdf>.

¹⁹⁵ *Id.*

¹⁹⁶ Margot Sanger-Katz, Claire Cain Miller, Quoc Trung Bui, *Who Gets Abortions in America*, NEW YORK TIMES (Dec. 14, 2023), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html>.

¹⁹⁷ *Id.*

¹⁹⁸ ACOG, Crisis Pregnancy Centers, <https://www.acog.org/advocacy/abortion-is-essential/trending-issues/issue-brief-crisis-pregnancy-centers#:~:text=CPC%20is%20a%20term%20used,care%20and%20even%20contraceptive%20options> (Last accessed May 17, 2023).

¹⁹⁹ Abigail Abrams, *Exclusive: Elizabeth Warren and Senate Democrats Press Crisis Pregnancy Centers on Abortion Data Gathering*, TIME (Sept. 21, 2022), <https://time.com/6214503/elizabeth-warren-crisis-pregnancy-centers-abortion-data/>.

²⁰⁰ Foster, Ralph, Biggs, Gerds, Roberts, Glymour. Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions, (Mar. 2018). Am. J. of Public Health, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5803812/>; see also, Miller, Wherry, Foster. The Economic Consequences of Being Denied an Abortion. (Jan. 2020), The National Bureau of Economic Research, NBER Working Paper No. 26662; see also, Upadhyay UD, Biggs MA, Foster DG. The effect of abortion on having and achieving aspirational one-year plans. Nov. 2015. BMC Women's Health, 15:102.

²⁰¹ Gianna Melillo, US Ranks Worst in Maternal Care, Mortality Compared With 10 Other Developed Nations, AJMC (Dec. 3, 2020), <https://www.ajmc.com/view/us-ranks-worst-in-maternal-care-mortality-compared-with-10-other-developed-nations>.

²⁰² Alina S. Schnake-Mahl, ScD, MPH, Jennifer L. Pomeranz, JD, MPH, Nina Sun JD, Irene Headen, PhD, MS, Gabriella O'Leary, MPH, Jaquelyn L. Jahn PhD, MPH, Forced Birth and No Time Off Work: Abortion Access and Paid Family Leave Policies, Am. J. of Preventive Med. (2023), <https://doi.org/10.1016/j.amepre.2023.04.014>.

them to interactions with the healthcare system that may lead to reporting and investigation.²⁰³ While telehealth and self-managed abortion provide promising models to mitigate the lack of clinic access in some states, legal risk still remains.²⁰⁴ Whether current criminal abortion laws apply to self-managed abortion is often unclear and subject to interpretation. Questions about the application of the Comstock Act to the mailing of abortion pills are a cause for concern.²⁰⁵ The individualized legal risk tolerance of abortion seekers, providers, clinics, and practical support organizations may determine when, where, and how services are accessed or offered. Additionally, abortion policies and jurisprudence are only one piece of the criminalization puzzle and cannot fully address intersecting systemic harms. The fallout from *Dobbs* greatly threatens to deepen existing racial and health inequities; thus, policy solutions should prioritize communities at highest risk of legal and health consequences. Despite representing a paradigm shift in abortion jurisprudence, the post-*Dobbs* legal landscape echoes enduring legacies of oppression and marginalization in reproductive healthcare and underscores its interdependence on a rapidly expanding carceral state.

B. Research and Policy Opportunities to Protect Access

As the legal and public health fields struggle to navigate an increasingly dystopian era of mass surveillance and criminalization, *Dobbs* has brought the interdependence of these systems sharply into focus. Law has failed to keep pace with the breakneck speed of technological advancements and maintains inadequate safeguards for its equitable and ethical use, particularly when it comes to use by law enforcement.²⁰⁶ Current law has significant gaps in sufficiently quelling the specter of criminal prosecution and other legal risk related to abortion care. State-level policy responses are key in the battle to preserve the right to abortion. Bold and nimble legislative strategies are needed to respond to the emerging challenges of a shifting legal landscape in the absence of federal protections. Shield laws are just one example of the innovative policy solutions attempting to address the legal and public health turmoil brought on by *Dobbs*.

In light of policy responses enacted in the interim, sustained tracking and evaluation of these efforts is essential to informing evidence-based policymaking for longer-term solutions as the landscape continues to evolve. Policy surveillance methods can enable policymakers and advocates to quickly learn about initiatives taken in other jurisdictions and model or adapt their strategies. Empirical abortion researchers can use legal datasets to quantify and understand the effect of state law on abortion-seeking behavior and population health post-*Dobbs*. Government agencies and foundations can support robust research and data collection that centers the perspectives and needs of communities most impacted. Building up a strong evidence base of research on the impact of laws in a post-*Dobbs* environment will better inform policymaking and tailor more effective solutions, while documenting the harms. An interdisciplinary approach that engages stakeholders across sectors is necessary for equitable, evidence-informed solutions.

While litigation battles between hostile states and protective states continue to play out, policymakers can look toward creating more robust legal protections for abortion patients, providers, and helpers. Coalitions and taskforces comprised of multidisciplinary stakeholders can draw on a wide range of diverse expertise and collaborate on policy solutions guided by evidence. California, for example, has

²⁰³ Wendy A. Bach, *Prosecuting poverty, Criminalizing Care*, CAMBRIDGE UNIV. PRESS, (2022).

²⁰⁴ Skuster, *supra* note 20.

²⁰⁵ Luke Vander Ploeg and Pam Belluck, *What to Know About the Comstock Act*, NEW YORK TIMES (May 16, 2023), <https://www.nytimes.com/2023/05/16/us/comstock-act-1978-abortion-pill.html>.

²⁰⁶ Mobilio, Giuseppe. *Your face is not new to me—Regulating the surveillance power of facial recognition technologies*. INTERNET POLICY REVIEW 12.1 (2023) <https://doi.org/10.14763/2023.1.1699>.

been a leader in enacting proactive state policy, enacting multiple and varied data privacy laws targeting not only disclosure of official health records, but also communications—an important step since abortion criminalization can result from non-medical data like internet searches, cell phone applications, and messages to friends.²⁰⁷ California’s Attorney General launched a reproductive rights task force focused on protecting and expanding access to abortion and other reproductive healthcare.²⁰⁸ Other states, such as New York, have also announced similar initiatives to devise policy solutions and provide legal information and resources for abortion seekers.²⁰⁹

States and localities have taken steps to increase funding for abortion access and practical support organizations and promote expanded provision of services, which can lessen the hardships faced by abortion patients both in and out of the state. Massachusetts crafted its shield laws to explicitly include protections for abortion services via telehealth, a significant step in allowing the provision of medication abortion pills across state lines.²¹⁰ In addition to strengthening data privacy related to healthcare, policymakers can target CPCs and combat deceptive practices that may fuel legal uncertainty and inaccurate medical advice. Proactive states have taken measures prior to *Dobbs* to codify a right to abortion and decriminalize it (including self-managed abortion) or repeal existing restrictions—reducing the risk of criminalization.²¹¹ Since the decision, California, Vermont, and Michigan voters also approved ballot measures protecting abortion under the state’s constitution.²¹² While policy solutions alone cannot provide a comprehensive fix, particularly in states where care is still banned, they may offer a critical interim strategy to reducing the harmful impacts of *Dobbs*.

Lastly, it is important to note that policies narrowly focused on abortion will not be enough to sufficiently address the impact of *Dobbs* on pregnancy criminalization and its broader public health implications. Criminalization intersects with healthcare, family regulation, immigration, and many other systems perpetuating injustice. A reproductive justice-informed approach can help remove the siloes around abortion, pregnancy, and parenting, and offer intersectional strategies. The reproductive health, rights, and justice movements can continue building connections across movements to support abortion providers, patients and helpers navigating a fraught landscape. Advancing family-friendly policies and racial health equity are essential pieces of addressing a rising maternal morbidity and mortality crisis. Policymakers, researchers, and advocates must continue to work hand-in-hand with the communities most directly impacted by these laws and avoid repeats of the missteps that led to a two-tiered system of abortion access under *Roe*. While this next phase of abortion criminalization may present new and unique challenges, important lessons learned can be gleaned from the historical context of reproductive oppression in the U.S. and used to enact more equitable and comprehensive policy solutions.

²⁰⁷ Shachar, *supra* note 159. See also Eunice Park, *Reproductive Health Care Data Free or For Sale: Post-Roe Surveillance and the “Three Corners” of Privacy Legislation Needed*, Publication forthcoming in *N.Y.U. Rev. of L. & Soc. Change* Vol. 47.3 (2023), at 18-42.

²⁰⁸ California OAG, *Attorney General Bonta Launches California Reproductive Rights Task Force* (Oct. 25, 2022), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-launches-california-reproductive-rights-task-force>.

²⁰⁹ New York OAG, *Reproductive rights Health Care & Insurance*, <https://ag.ny.gov/resources/individuals/health-care-insurance/reproductive-rights-abortion-legal-new-york> (last accessed May 17, 2023).

²¹⁰ Caroline Kitchener, *Blue-state doctors launch abortion pill pipeline into states with bans*, WASHINGTON POST (July 19, 2023), https://www.washingtonpost.com/politics/2023/07/19/doctors-northeast-launch-abortion-pill-pipeline-into-states-with-bans/?utm_campaign=wp_the7&utm_medium=email&utm_source=newsletter&wpscsrc=nl_the7.

²¹¹ Policy Surveillance Program, *Statutory and Constitutional Right to Abortion*, LAWATLAS (Nov. 1, 2022), <https://lawatlas.org/datasets/statutory-and-constitutional-right-to-abortion>.

²¹² CPHLR, *supra* note 30.

VII. Conclusion

Major changes to the landscape of abortion law and service delivery have rapidly proliferated since the Supreme Court's decision in *Dobbs*, in some cases overnight. However, we have yet to see the full extent of this legal and public health crisis, which will be felt for years to come. Overlapping laws regulating and criminalizing abortion have led to an exceedingly complex web of restrictions that has only intensified under *Dobbs*, without clear resolutions in sight. The risks of criminalization and threats of legal uncertainty related to abortion care have chilled the availability and accessibility of reproductive health services. The negative consequences will fall inequitably across populations, as was already the reality under the failed promise of *Roe*. States have taken innovative countermeasures addressing legal risk and data privacy in order to safeguard abortion access but significant gaps remain. Scientific legal mapping methods can be integrated to track and evaluate post-*Dobbs* legislative responses and inform effective policy solutions. To reckon with and learn from our past, racial and health equity must be prioritized in research and policymaking at all levels. Despite the many harms suffered, *Dobbs* also presents an opportunity to rebuild a more inclusive and equitable vision of reproductive justice for all.