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Abortion Ally or Abettor: Accomplice and Conspiracy Liability After Dobbs

Mary Fan

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Abortion Ally or Abettor: Accomplice and Conspiracy Liability After *Dobbs*

Mary D. Fan*

ABSTRACT

The bristle of state laws criminalizing abortion after Dobbs v. Jackson Women’s Health Organization raises important questions about accomplice and conspiracy liability for helping people pursue reproductive freedoms out of state. Abortion funds, grassroots organizations, pilots, and other humanitarian volunteers are vital for people in need of abortions, who often are trapped by a lack of resources in abortion criminalization jurisdictions. Threats of prosecution are chilling and even shutting down assistance by abortion funds for travel to pursue reproductive freedoms. The liability questions after Dobbs arise against a backdrop of increasing prosecutions in Europe and the United States for crimes of compassion—providing aid to migrants across international borders.

This Article is the first to ground defenses to liability for helping people pursue reproductive and gender freedoms after Dobbs in anti-totalitarian theory and in light of how courts have curbed the criminalization of compassion to migrants. The Article offers a normative and theoretical frame for new questions about the criminalization of assistance after Dobbs, grounded in the tradition of anti-totalitarianism that protected against pervasive government control of movements, bodies, and information. Through the anti-totalitarian lens, the Article frames clusters of defenses grounded in freedom of speech, the right of interstate travel, and canons of statutory construction. Although the primary targets thus far have been in the abortion context, which is the Article’s focus, the Article’s insights also have wider impact as a growing number of states criminalize the provision of gender-affirming care to minors, raising important questions about liability for aiding the pursuit of gender-affirming as well as reproductive freedoms.

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* Jack R. MacDonald Endowed Chair, University of Washington School of Law. Email: mdfan@uw.edu. Phone: (206) 685-4971. Thanks to Ryan Calo and Cindy Fester for excellent suggestions and to lead Articles Editor Laura Zecca, Senior Articles Editor Shloke Nair, and Senior Managing Editor Julianna Pendleton for outstanding editing, leadership, and vision. Thanks also to participants at the 2025 AALS Annual Meeting panel on pregnancy crimes, especially co-organizers Valena E. Beety and Eve Hanan, for an important dialogue.

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INTRODUCTION

As states rushed to criminalize abortion after *Dobbs v. Jackson Women’s Health Organization*¹ overturned the right to abortion, volunteer pilots with Elevated Access organized to fly women to states where abortion remained safe and legal.² Soon, the volunteer pilots also began flying youths in need of gender-affirming healthcare as twenty-one states enacted bans on such care—including all fourteen states with

¹ 597 U.S. 215 (2022).

² Kelcie Moseley-Morris, *Volunteer Pilots Offer to Fly Patients in States like Idaho to Abortion Clinics*, IDAHO CAP. SUN (Sept. 19, 2022, 4:30 AM), <https://idahocapitalsun.com/2022/09/19/volunteer-pilots-offer-to-fly-patients-in-states-like-idaho-to-abortion-clinics> [https://perma.cc/2PXY-3TD7]; see also *Dobbs*, 597 U.S. at 231–33, 292 (holding that states may ban abortions, overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

abortion bans.³ The pilots flying the above-ground route to reproductive and gender freedoms use only their first name because of the risk of prosecution as accomplices.⁴

Lourdes Matsumoto of the Abortion Access Fund does not use a pseudonym and operates in the shadow of potential felony prosecution in a state that created the crime of “abortion trafficking” to prosecute persons who help minors obtain abortions out of state without parental consent.⁵ The law expands the state’s controversial abortion criminalization except where the pregnant woman faces death, targeting even those who help pregnant persons seeking abortion out of state as criminal accomplices.⁶ The Abortion Access Fund and a partner organization, the Indigenous Idaho Alliance, which works with Native American communities, offer financial, informational, and logistical support for people seeking abortions.⁷ The groups are among a growing number of grassroots organizations that, like the pilots of Elevated Access, operate in the shadow of potential criminal liability for their vital work making abortion and gender freedoms a reality for people marooned in ban states.⁸

Nearly three-quarters of patients who obtained abortions in the United States had low incomes hovering near the federal poverty line according to a national snapshot of abortion facility patients between June 2021 and July 2022.⁹ More than 40% of abortion patients lived

³ Kelcie Moseley-Morris, *Echoing History, Reliance Upon Travel Rises for Abortion Care Post-Dobbs*, IDAHO CAP. SUN (June 22, 2023, 4:00 AM), <https://idahocapitalsun.com/2023/06/22/echoing-history-reliance-upon-travel-rises-for-abortion-care-post-dobbs> [https://perma.cc/W8CM-64SB].

⁴ *Id.* Similarly, “[m]any workers in the Underground Railroad toiled anonymously, keeping their identities and actions a secret to avoid detection.” Scott Mingus, *For Many Slaves, the Underground Railroad and Road to Freedom Ran Through York County, Pa.*, YORK DAILY REC. (Dec. 11, 2019, 6:44 AM), <https://www.ydr.com/in-depth/news/2019/10/29/underground-railroad-conductors-location-york-county-pa-harriet-tubman/3958310002> [https://perma.cc/8KPW-AK6T].

⁵ See *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1051–52 (D. Idaho 2023), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024); IDAHO CODE § 18-623 (2024).

⁶ See IDAHO CODE § 18-622(2)(a)(i) (2024) (criminalizing the provision of abortion unless necessary to prevent a pregnant woman’s death), *preliminarily enjoined by* *United States v. Idaho*, 623 F. Supp. 3d 1096, 1102, 1109 (D. Idaho 2022), *reconsideration denied*, No. 1:22-CV-00329, 2023 WL 3284977, at *5 (D. Idaho May 4, 2023), *cert. granted before judgment sub nom.* *Moyle v. United States*, 144 S. Ct. 540, 540 (2024), *cert. granted before judgment*, 144 S. Ct. 541, 541 (2024), *cert. dismissed as improvidently granted sub nom.* *Moyle v. United States*, 144 S. Ct. 2015, 2015 (2024).

⁷ See *Matsumoto*, 701 F. Supp. 3d at 1051–52 (detailing Matsumoto’s work and that of the Northwest Abortion Access Fund and the Indigenous Idaho Alliance).

⁸ See *infra* Section I.A.

⁹ Rachel K. Jones & Doris W. Chiu, *Characteristics of Abortion Patients in Protected and Restricted States Accessing Clinic-Based Care 12 Months Prior to the Elimination of the Federal Constitutional Right to Abortion in the United States*, 55 PERSPS. ON SEXUAL & REPROD. HEALTH 80, 82 tbl.1 (2023) (noting that 73% of survey respondents had incomes below 200% of the federal poverty line).

at less than the federal poverty line.¹⁰ Financial barriers are also one of the most commonly reported challenges of persons in need of gender-affirming care for gender dysphoria, which is the incongruence between a person's experienced gender and their physical and socially constructed gender.¹¹ A substantial proportion of persons who report identities as transgender or gender nonconforming also report poverty-level incomes.¹² Some scholars posit that people will vote with their feet and flee states repressing reproductive or gender freedoms after *Dobbs*.¹³ Although a theoretical possibility, for many persons seeking care, financial barriers preclude moving, leaving people trapped.¹⁴ The network of humanitarian organizations arising to address the bans on abortion and gender-affirming care are crucial for many people needing to exercise the reproductive or gender freedoms outlawed in their home state.¹⁵ Emergency services providers in abortion criminalization jurisdictions are also wrestling with the need to airlift pregnant women for abortion-related care out of state after *Dobbs*.¹⁶

¹⁰ *Id.*

¹¹ Jae A. Puckett, Peter Cleary, Kinton Rossman, Kinton Rossman, Brian Mustanski & Michael E. Newcomb, *Barriers to Gender-Affirming Care for Transgender and Gender Nonconforming Individuals*, 15 *SEXUALITY RSCH. & SOC. POL'Y* 48, 48, 56 (2018).

¹² *Id.*

¹³ *See, e.g.*, Ilya Somin, *How Federalism Promotes Unity Through Diversity*, 47 *HARV. J.L. & PUB. POL'Y* 65, 68 (2024) (arguing that a virtue of federalism and a diversity of decentralized approaches to hot-button issues like abortion is that people can move to the state conducive to their preferences, though acknowledging the costs of a permanent move); Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 *U. PA. L. REV.* 399, 435 (2024) (discussing the contemplation in the Constitution that people will “vote with their feet” and move to states with more conducive policies).

¹⁴ *See, e.g.*, Alana Semuels, *The Barriers Stopping Poor People from Moving to Better Jobs*, *THE ATLANTIC* (Oct. 12, 2017), <https://www.theatlantic.com/business/archive/2017/10/geographic-mobility-and-housing/542439> [<https://perma.cc/D5YT-LT2G>] (discussing the barriers, such as housing costs, precluding moving from poorer areas, such as the Deep South or Midwest to higher-wage, higher-education jurisdictions such as New York and San Francisco); David Dayen, *Why the Poor Get Trapped in Depressed Areas*, *NEW REPUBLIC* (Mar. 18, 2016), <https://newrepublic.com/article/131743/poor-get-trapped-depressed-areas> [<https://perma.cc/AE8Z-2LPX>] (“[W]hile the suggestion to ‘go get a U-Haul’ sounds simple, it’s an impossible task for somebody with no savings.”).

¹⁵ *See, e.g.*, Áine Cain, *After Roe, People Seeking Abortion Face Long Travel, Steep Costs. Grassroots Organizations Are Stepping in to Help*, *BUS. INSIDER* (June 29, 2022, 12:53 PM), <https://www.businessinsider.com/abortion-travel-assistance-organizations-roe-dobbs-2022-6> [<https://perma.cc/SDR2-M44B>] (discussing the steep costs of pursuing an abortion out of state and how grassroots abortion funds and other organizations help); Alice Markham-Cantor & Molly Minta, *The Grassroots Abortion-Access Movement: An Interactive Map*, *THE NATION* (Dec. 3, 2019), <https://www.thenation.com/article/archive/abortion-reproductive-justice-grassroots-interactive-map> [<https://perma.cc/3A7M-GAJM>] (discussing the growing network of grassroots groups and abortion funds to redress the reality that “access to abortion in America has long been dependent on socioeconomic status and on geography”).

¹⁶ *See, e.g.*, *Moyle v. United States*, 144 S. Ct. 2015, 2017 (2024) (discussing the spike in airlifts of pregnant women out of Idaho by emergency services providers after *Dobbs*).

The array of allies offering financial, logistical, informational, and travel aid are facing important and murky questions about potential accomplice and conspiracy liability and resulting criminal penalties.¹⁷ Accomplice liability is broad and severe in the United States, subjecting persons who aid and abet a crime to the same liability and punishment for the offense as the perpetrator.¹⁸ Conspiracy liability is also notoriously potentially broad, criminalizing the agreement to commit a crime and possibly imposing vicarious liability for crimes committed by one's co-conspirators.¹⁹ Unlike the doctors operating in jurisdictions where reproductive and gender-affirming freedoms remain intact, the network of allies who help seekers of abortion or gender-affirming care to travel to safe states often are situated in the places where the care is illegal.²⁰ The risk of accomplice liability looms for a host of humanitarian and public interest groups seeking to help women and children trapped in states criminalizing what other states recognize as gender and reproductive freedoms.²¹

¹⁷ See, e.g., Complaint for Declaratory and Injunctive Relief at 2, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450, 2024 WL 1999546 (M.D. Ala. May 6, 2024) [hereinafter *Yellowhammer Fund* Complaint] (describing threats of prosecution for assisting people in getting abortions out of state); Complaint for Declaratory and Injunctive Relief at 4, *W. Ala. Women's Ctr. v. Marshall*, No. 2:23-cv-00451 (M.D. Ala. July 31, 2023) [hereinafter *W. Ala. Women's Ctr. Complaint*] (describing fears of reproductive rights group over prosecution as conspirators or accomplices to abortion); *Interim Update: Abortion-Related Crimes After Dobbs*, TEX. DIST. & CNTY ATT'YS ASS'N (June 24, 2022), <https://www.tdcaa.com/legislative/dobbs-abortion-related-crimes> [<https://perma.cc/8SK9-BRNF>] (discussing various accomplice liability provisions that could apply to individuals assisting people secure abortions and the welter of open questions surrounding the provisions); Mary Anne Pazanowski, *Abortion 'Helpers' Sue Alabama over Threatened Prosecution*, BLOOMBERG L. (July 31, 2023, 1:46 PM), <https://news.bloomberglaw.com/litigation/abortion-helpers-sue-alabama-over-threatened-prosecution> [<https://perma.cc/7VXU-3PMM>] (discussing statements by the Alabama Attorney General about prosecuting abortion funds and those who help women get abortion out of state).

¹⁸ See, e.g., *People v. Shafou*, 330 N.W.2d 647, 654 (Mich. 1982) (“Accomplices generally are punished as severely as the principal, on the premise that when a crime has been committed, those who aid in its commission should be punished like the principal.”); Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1220 (2007) (critiquing “[t]he harsh penalties attached to accomplice liability”); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 96–97 (1985) (discussing how in the “great majority” of cases accomplices who assist are punished the same as the principal even if the accomplice was not present at the time of the crime).

¹⁹ See *infra* text accompanying notes 87–93.

²⁰ See, e.g., All Things Considered, *Grassroots Abortion-Rights Groups are Preparing for a Post-Roe v. Wade World*, NPR (May 8, 2022, 5:30 PM), <https://www.npr.org/2022/05/08/1097514187/grassroots-abortion-rights-groups-are-preparing-for-a-post-roe-v-wade-world> [<https://perma.cc/MC85-PAE7>] (interview with Aimee Arrambide, Executive Director of Avow discussing work of grassroots organization in Texas in the shadow of abortion restrictions and criminalization).

²¹ See, e.g., NAT'L ASS'N OF CRIM. DEF. LAWS., *ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS* 31–33 (2021), <https://www.nacdl.org/getattachment/ce0899a0-3588-42d0-b351-23b9790f3bb8/abortion-in-america->

The new questions over accomplice and conspiracy liability after *Dobbs* are arising against a backdrop of European and U.S. authorities increasingly prosecuting people for providing humanitarian assistance to migrants crossing international borders.²² Firefighters saving migrants at sea from drowning, pastors opening their churches to people in need of shelter, elderly people offering families rides, and humanitarian volunteers placing food and water in the most dangerous migrant crossing routes to avert deaths from exposure and dehydration are just some of the people prosecuted for their acts of conscience.²³ Under the first Trump Administration, humanitarian workers who had long offered aid to prevent migrant deaths at the U.S.-Mexico border began facing prosecution.²⁴ In the United States, courts have begun pushing back against such prosecutorial overreach.²⁵

This Article is the first to frame defenses from an anti-totalitarian lens for aiding people pursuing reproductive and gender freedoms after *Dobbs* in light of cases on criminalizing humanitarian aid to international migrants.²⁶ The Article grounds an array of defenses to accomplice and conspiracy liability for humanitarian aid in a strong theoretical tradition of anti-totalitarianism in constitutional and criminal law interpretation.²⁷ Anti-totalitarianism refers to an interpretive tradition in post-World War II American jurisprudence aimed at preventing a freedom-stunting totalitarian regime like that of Nazi Germany or the former Soviet Union.²⁸ Anti-totalitarianism in constitutional interpretation helped shaped modern First Amendment freedoms, limits on police power, and protections for minority groups vulnerable to repression.²⁹ This Article breaks new ground by extending this intellectual tradition to new questions of police power and the criminalization of

how-legislative-overreach-is-turning-reproductive-rights-into-criminal-wrongs.pdf [https://perma.cc/ZS5Y-R383] (discussing the risk of accomplice liability for persons and organizations aiding people seeking abortions).

²² See *infra* Section I.B.

²³ See, e.g., *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1276–77 (D. Ariz. 2020) (prosecution of humanitarians who provide water to migrants in the desert); *United States v. Warren*, No. CR 18-00223-TUC-RCC, 2018 WL 6729483, at *1–4 (D. Ariz. Aug. 7, 2018) (prosecution of man who shared barn with migrants); Tania Karas, *Crimes of Compassion: US Follows Europe's Lead in Prosecuting Those Who Help Migrants*, THE WORLD (June 6, 2019), <https://theworld.org/stories/2019-06-06/crimes-compassion-us-follows-europes-lead-prosecuting-those-who-help-migrants> [https://perma.cc/S24N-JEVB] (prosecutions of fireman who saved migrants from drowning, people who provide water to border crossers).

²⁴ See *infra* Section I.B.

²⁵ See *infra* Section I.B.

²⁶ See *infra* Parts II–III.

²⁷ See *infra* Part II.

²⁸ Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 437–50 (1996).

²⁹ *Id.* at 437.

humanitarian compassion for persons in need of care marooned in states criminalizing abortions.³⁰ Although the main focus of the Article is liability for assisting abortions out of state because the primary targets thus far come from this context, the analyses also apply to those who help families secure gender-affirming care for minors as states begin criminalizing such conduct.³¹

The Article proceeds in three parts. Part I situates the new wave of fears over criminal liability for helping people seeking reproductive and gender freedoms against the rise of prosecutions for humanitarian assistance in Europe and the United States.³² This Part contrasts the current criminal liability questions over assisting interstate travel for abortion and gender-affirming care with prosecutions for humanitarian assistance to migrants crossing international borders.³³ Although some European nations have been aggressively prosecuting humanitarian aid for more than a decade, the rise of prosecutions for compassionate aid to migrants at the U.S.-Mexico border is of more recent vintage, beginning in earnest with the first Trump Administration.³⁴

Part II examines how U.S. courts have begun to push back on prosecutorial overreach in punishing humanitarian aid and offers an overarching theoretical frame grounded in anti-totalitarianism for this new wave of cases.³⁵ Emerging in the post-World War II era, the anti-totalitarian principle shaped the interpretation of constitutional rights to avert the repressive dangers of regimes such as Nazi Germany and the Soviet Union under the Iron Curtain.³⁶ The principle shaped landmark jurisprudence on issues such as freedom of speech and limits on the police power to criminalize, punish, and investigate.³⁷ To prevent totalitarianism, the constitutional tradition safeguarded freedoms of conscience and the protection of vulnerable groups against majoritarian violence and subjugation.³⁸

Part III applies the anti-totalitarian lens to fortify three clusters of defenses to criminal liability for humanitarian assistance to people pursuing reproductive and gender freedoms.³⁹ The first defense is grounded in First Amendment freedoms.⁴⁰ The second basis of challenge is the constitutional right of interstate travel, which the Article argues

³⁰ See *infra* Part III.

³¹ See *infra* text accompanying notes 103–11.

³² See *infra* Section III.A.

³³ See *infra* Section III.B.

³⁴ See *infra* text accompanying notes 112–81.

³⁵ See *infra* Part II.

³⁶ *Infra* Part II.

³⁷ *Infra* Part II.

³⁸ *Infra* Part II.

³⁹ See *infra* Part III.

⁴⁰ See *infra* Section III.B.

safeguards travel toward reproductive and gender freedoms out of state.⁴¹ The third cluster of defenses center on statutory construction to exclude extraterritorial application, drawing on the canons of avoiding constitutional conflicts, lenity, and the Due Process vagueness doctrine.⁴² The Article argues for strong readings of all three grounds under the overarching lens of anti-totalitarianism to avoid criminalization of humanitarian assistance for interstate travel to pursue reproductive and gender freedoms.⁴³

I. HERO OR CRIMINAL: ACCOMPLICE AND CONSPIRACY LIABILITY FOR HUMANITARIAN AID

Grassroots abortion funds were helping people in states restricting abortion access to obtain care out of state even before the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*.⁴⁴ *Dobbs* held that there is no constitutional right to abortion, overruling long-settled precedents in *Roe v. Wade*⁴⁵ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁶ *Dobbs* left the decision over how to regulate abortion to the states.⁴⁷ In response, numerous states enacted or revived abortion criminalization statutes, extending what Jonathan Simon has termed “governing through crime”—criminalization as a form of social control—to a formerly fundamental reproductive right.⁴⁸

Several states and their attorneys general also revived the threat of prosecution under general conspiracy and accomplice statutes and even specifically enacted statutes targeting groups that help abortion seekers.⁴⁹ Faced with potential criminal liability, in-state abortion

⁴¹ See *infra* Section III.A.

⁴² See *infra* Section III.C.

⁴³ See *infra* Part III.

⁴⁴ See, e.g., *Fast Facts About Abortion Funds*, NAT'L NETWORK OF ABORTION FUNDS, <https://abortionfunds.org/abortion-funds-fast-facts> [<https://perma.cc/74LV-7Z26>] (explaining the work of independent grassroots abortion funds and the founding of the National Network of Abortion Funds in 1993 as an umbrella for independent organizations); Erin Douglas & Eleanor Klibanoff, *Abortion Funds Languish in Legal Turmoil, Their Leaders Fearing Jail Time If They Help Texans*, TEX. TRIB. (June 29, 2022, 4:00 PM), <https://www.texastribune.org/2022/06/29/texas-abortion-funds-legal> [<https://perma.cc/5TTH-9EDU>].

⁴⁵ 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

⁴⁶ 505 U.S. 833 (1992), *overruled by* *Dobbs*, 597 U.S. 215; *Dobbs*, 597 U.S. at 231–33, 292.

⁴⁷ *Dobbs*, 597 U.S. at 292.

⁴⁸ Jonathan Simon, *After Roe: Governing Abortion Through Crime?*, BERKELEY NEWS (June 27, 2022), <https://news.berkeley.edu/2022/06/27/after-roe-governing-abortion-through-crime> [<https://perma.cc/3CUK-DS6B>].

⁴⁹ See, e.g., IDAHO CODE § 18-623 (2024) (criminalizing assistance to minors to secure abortions without parental consent); Memorandum from the Oklahoma Att'y Gen. to All Oklahoma L. Enf't Agencies (Aug. 31, 2022), <https://oklahoma.gov/content/dam/ok/en/oag/documents/news->

clinics and some abortion funds that help people obtain abortions out of state stopped their vital work.⁵⁰ Other abortion funds and grassroots aid organizations are persisting in helping people obtain abortions out of state and challenging state laws that threaten to criminalize their aid efforts.⁵¹

This Part situates the bristle of questions surrounding potential liability for assisting the pursuit of reproductive and gender freedoms against the trend of prosecutions for compassionate assistance in the international migration context.⁵² The threats and open questions about accomplice liability are emerging against an international and domestic backdrop of increasing prosecutions for crimes of compassion—humanitarian aid to migrants crossing international borders.⁵³ Although the primary focus of the Article is on the numerous organizations that assist in helping people obtain abortions outside of ban states, the analysis also applies to those who assist minors obtain gender-affirming care in the growing number of states that are criminalizing the provision of gender-affirming care to minors.⁵⁴

documents/2023/november/memo_to_law_enforcement_part_ii_final.pdf [https://perma.cc/LPX2-FY9K] (regarding guidance for Oklahoma law enforcement following *Dobbs v. Jackson Women's Health Organization*) (“Oklahoma law prohibits aiding and abetting the commission of an unlawful abortion, which may include advising a pregnant woman to obtain an unlawful abortion.”); TEX. DIST. & CNTY ATT’YS ASS’N, *supra* note 17 (discussing how accomplice liability provisions could apply to assisting people in obtaining abortions); Jeff Poor Show, *Alabama Attorney General Steve Marshall*, FM TALK 1065, at 08:00 (Aug. 11, 2022), <https://fmtalk1065.com/podcast/alabama-attorney-general-steve-marshall-jeff-poor-show-thursday-8-11-22> [https://perma.cc/B84Z-7GMQ] (discussing scrutiny of abortion funds in Alabama for prosecution as accomplices to abortion).

⁵⁰ See Marielle Kirstein, Joerg Dreweke, Rachel K. Jones & Jesse Philbin, *100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care*, GUTTMACHER INST. (Oct. 6, 2022), <https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care> [https://perma.cc/CSC8-GZYW]; Douglas & Klibanoff, *supra* note 44.

⁵¹ See, e.g., *Yellowhammer Fund Complaint*, *supra* note 17, at 2 (describing threats by Attorney General to prosecute abortion funds for helping people obtain abortions out of state); *W. Ala. Women's Ctr. Complaint*, *supra* note 17, at 4; Complaint for Declaratory Judgment at 16–18, *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032 (D. Idaho 2023) (No. 1:23-cv-00323) [hereinafter *Matsumoto Complaint*] (seeking declaratory and injunctive relief against Idaho’s draconian anti-abortion laws), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024).

⁵² See *infra* Sections I.A–B.

⁵³ See, e.g., Delphine Rodrik, Note, *Solidarity at the Border: How the EU and US Criminalize Aid to Migrants*, 39 BERKELEY J. INT’L L. 81, 89–95 (2021) (detailing E.U. and U.S. pursuit of persons who aid migrants); Maria Serrano, *How Europe Turned Compassion Into a Crime*, AMNESTY INT’L (Oct. 25, 2018), <https://www.amnesty.org/en/latest/news/2018/10/how-europe-turned-compassion-into-a-crime> [https://perma.cc/JPF4-WHS4] (detailing the arrests of humanitarians such as fire-fighters for saving refugee lives, a pastor for giving food and shelter to a homeless man who was an “irregular” migrant from Togo in Switzerland, and an elderly woman who helped two teen asylum seekers from Guinea).

⁵⁴ See *infra* text accompanying notes 103–11.

A. *Abetting the Pursuit of Reproductive and Gender Freedoms*

Consider the illustrative plight of the Frontera Fund (“Fund”) and of the people in the Rio Grande Valley of Texas, where the Fund operates.⁵⁵ A third of the population and nearly half of the children—45.5%—live in poverty.⁵⁶ For years before *Dobbs*, the Fund supported the reproductive rights of persons living within one hundred miles of the Texas-Mexico border and undocumented persons living in Texas.⁵⁷ In a state where access to abortion was eroding even before the Supreme Court permitted outright abortion bans in *Dobbs*, the Fund helped people desperate for care pay for abortions and obtain abortions out of state.⁵⁸ In the legal turmoil the week after the *Dobbs* judgment issued, the Fund had to turn help-seekers away, explaining that because of the risk of liability, the organization had to cease funding abortions.⁵⁹

Even before the *Dobbs* judgment was issued, Texas legislators in 2021 enacted a “trigger law,” called the Human Life Protection Act,⁶⁰ that revived the criminalization of abortion upon the reversal of *Roe*.⁶¹ Texas was among more than a dozen states passing trigger laws criminalizing abortion, emboldened by the leak of the forthcoming *Dobbs* opinion, which the Court ultimately formally issued in 2022.⁶² The criminal sanctions for performing, attempting, or inducing an abortion under the Texas trigger law were harsh, with a maximum punishment of up

⁵⁵ Douglas & Klibanoff, *supra* note 44.

⁵⁶ Alexa Ura, *Latest Census Data Shows Poverty Rate Highest at Border, Lowest in Suburbs*, TEX. TRIB. (Jan. 19, 2016, 6:00 AM), <https://www.texastribune.org/2016/01/19/poverty-prevalent-on-texas-border-low-in-suburbs> [<https://perma.cc/QJD6-K5AU>] (referencing data for Hidalgo County, “[a]t the heart of the Rio Grande Valley”).

⁵⁷ *Frontera Fund*, NAT’L NETWORK ABORTION OF FUNDS, <https://abortionfunds.org/fund/frontera-fund> [<https://perma.cc/XJ2P-PZLD>].

⁵⁸ Douglas & Klibanoff, *supra* note 44; *see also* Julian Aguilar & Joseph Leahy, *Texas Republicans’ Long-Sought ‘Trigger Law’ on Abortion Takes Effect*, KUT NEWS (Aug. 25, 2022, 8:05 AM), <https://www.kut.org/politics/2022-08-25/texas-republicans-long-sought-trigger-law-on-abortion-takes-effect-thursday> [<https://perma.cc/42VX-6T5J>] (explaining that even before *Dobbs*, a range of “Texas laws already make getting a legal abortion close to impossible” such as Senate Bill 8, passed in 2021, that banned abortions after six weeks of pregnancy).

⁵⁹ Douglas & Klibanoff, *supra* note 44.

⁶⁰ Human Life Protection Act of 2021, Tex. Health & Safety Code Ann. §§ 170A.001–170A.007 (West 2023).

⁶¹ Dan Solomon, *Roe v. Wade Has Been Overturned. Here’s What Texans Who Need Abortions Face Next*, TEX. MONTHLY (June 24, 2022), <https://www.texasmonthly.com/news-politics/roe-v-wade-overturned-what-texans-who-need-abortions-face-next> [<https://perma.cc/W5YN-6TGE>]; Tex. Health & Safety Code Ann. §§ 170A.001–170A.007 (West 2023).

⁶² *See* Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [<https://perma.cc/DL5E-L8TL>]. The states were Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming. *Id.*

to twenty years in prison if the fetus does not die or up to life if the fetus dies.⁶³ The Texas Supreme Court upheld the abortion ban against a constitutional challenge brought by women facing severe complications if forced to deliver, explaining the law offered an exception when the pregnant person faced a risk of death or serious impairment of a major bodily function.⁶⁴

The Human Life Protection Act of 2021 also contained the legislative finding that “the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother’s life is in danger.”⁶⁵ Among those pre-*Roe* criminal laws was a provision specifying that “[w]hoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.”⁶⁶

Regardless of the continuing validity of pre-*Roe* abortion-specific accomplice liability provisions, state codes have general accomplice liability and conspiracy provisions that apply to anyone who assists or conspires to commit any crime.⁶⁷ As threats by the Alabama Attorney

⁶³ See TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (West 2023) (classifying abortion as a felony of the first degree if the fetus dies, or in the second degree otherwise); TEX. PENAL CODE ANN. § 12.32 (West 2023) (providing that a felony of the first degree is punishable by imprisonment “for life or for any term of not more than 99 years or less than 5 years”); TEX. PENAL CODE ANN. § 12.33 (West 2023) (providing that a felony of the second degree is punishable by imprisonment “for any term of not more than 20 years or less than 2 years”). The statute also added civil penalties with a mandatory minimum of \$100,000 for each violation as well as attorney’s costs and fees to bring a civil suit to collect the fines. TEX. HEALTH & SAFETY CODE ANN. § 170A.005 (West 2023).

⁶⁴ *State v. Zurawski*, 690 S.W.3d 644, 664–71 (Tex. 2024).

⁶⁵ Human Life Protection Act of 2021, Tex. Health & Safety Code Ann. §§ 170A.001–170A.007 (West 2023).

⁶⁶ TEX. PENAL CODE art. 1192 (1925) (current version at TEX. REV. CIV. STAT. ANN. art. 4512.2 (West 1974)); see also TEX. OFF. OF ATT’Y GEN., *Updated Advisory on Texas Law Upon Reversal of Roe v. Wade* (July 27, 2022), [https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20\(07272022\).pdf](https://texasattorneygeneral.gov/sites/default/files/images/executive-management/Updated%20Post-Roe%20Advisory%20Upon%20Issuance%20of%20Dobbs%20Judgment%20(07272022).pdf) [<https://perma.cc/4LTL-BNE9>] (noting “local prosecutors may choose to immediately pursue criminal prosecutions based on violations of Texas abortion prohibitions predating *Roe* that were never repealed by the Texas Legislature” and thus “are still Texas law”).

⁶⁷ See, e.g., ALA. CODE § 13A-2-23(2) (2024) (“A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense: . . . [h]e aids or abets such other person in committing the offense”); ALA. CODE § 13A-4-3(a) (2024) (“A person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he or she agrees with one or more persons to engage in or cause the performance of the conduct, and any one or more of the persons does an overt act to effect an objective of the agreement.”); IDAHO CODE § 18-204 (2024) (“All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed.”); IDAHO CODE § 18-1701 (2024) (“If two (2) or more persons combine or conspire to commit any crime or

General to prosecute abortion funds illustrate, an aggressive prosecutor may use these general conspiracy and accomplice liability provisions to target individuals and entities who help people obtain care out of state.⁶⁸ The Alabama Attorney General's threat forced the Yellowhammer Fund to stop offering financial and logistical aid to people seeking abortion out of state for fear of criminal prosecution.⁶⁹ Similarly, the Attorney General's threat chilled another Alabama aid group, the West Alabama Women's Center, from even offering information, counseling, and support to pregnant persons seeking abortions out of state for fear of prosecution as conspirators or accomplices to a crime.⁷⁰

Under the U.S. approach to complicity, accomplice liability is a mode of liability in which a person who aids an offense is guilty of the facilitated crime and punished the same as the perpetrator.⁷¹ The liability for the crime derives from the assistance that the accomplice renders.⁷² Any assistance, however slight, suffices for accomplice liability.⁷³ U.S. criminal law is notable for its harshness toward accomplices because it does not distinguish between the relative degrees of contribution and culpability of perpetrators and persons who aid and abet.⁷⁴ Indeed, the assistance does not even have to exert a causal effect toward the

offense prescribed by the laws of the state of Idaho, and one (1) or more of such persons does any act to effect the object of the combination or conspiracy, each shall be punishable upon conviction in the same manner and to the same extent as is provided under the laws of the state of Idaho for the punishment of the crime or offenses that each combined to commit.”); TEX. PENAL CODE ANN. § 702(a)(2) (2023) (“A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense”); TEX. PENAL CODE ANN. § 15.02(a)(1)–(2) (2023) (“A person commits criminal conspiracy if, with intent that a felony be committed: (1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and (2) he or one or more of them performs an overt act in pursuance of the agreement.”).

⁶⁸ *Yellowhammer Fund v. Marshall*, No. 2:23cv450, 2024 WL 1999546, at *3 (M.D. Ala. May 6, 2024); *Yellowhammer Fund* Complaint, *supra* note 17, at 2 (describing threats by Attorney General to prosecute abortion funds for helping people obtain abortions out of state); *W. Ala. Women's Ctr.* Complaint, *supra* note 17, at 4 (describing plaintiffs' fear that they will be prosecuted as conspirators); *Matsumoto* Complaint, *supra* note 51, at 16–18 (seeking declaratory and injunctive relief against Idaho's draconian anti-abortion laws).

⁶⁹ *Yellowhammer Fund*, 2024 WL 1999546, at *4; Declaration of Jenice Fountain in Support of Plaintiff's Motion for Summary Judgment ¶ 24, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450 (M.D. Ala. June 17, 2024).

⁷⁰ *W. Ala. Women's Ctr.* Complaint, *supra* note 17, at 4.

⁷¹ 1 JENS DAVID OHLIN, *WHARTON'S CRIMINAL LAW* § 10:14 (16th ed. 2023); Dressler, *supra* note 18, at 96–97.

⁷² Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. 323, 338, 342–43 (1985).

⁷³ *Id.* at 361–62.

⁷⁴ See OHLIN, *supra* note 71, § 10:14; see also, e.g., Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428–29 (2008) (“American accomplice law is a disgrace. It treats the accomplice in terms of guilt and potential punishment as if she

commission of the crime.⁷⁵ The American approach contrasts sharply with more finely differentiated schemes, such as that of Germany, which distinguishes the relative degrees of contribution to the offense and resulting punishment.⁷⁶ Accomplice liability is thus an avenue by which a person who assists an abortion via advice, funding, or travel aid is liable for that abortion and subject to the prescribed punishment.⁷⁷

The modern elimination of safeguards constraining the broad reach of accomplice liability makes the risk of prosecution even more acute for humanitarian aid groups.⁷⁸ In the earlier days of common law, to curb the harshness of the doctrine, courts created a web of technical limitations to accomplice liability, such as requiring that a principal perpetrator be charged and convicted before accomplices could be convicted of the same offense.⁷⁹ Many jurisdictions eliminated that old roadblock, permitting accomplices to be tried and convicted of an offense even if no principal perpetrator is ever charged.⁸⁰ This modification is particularly important concerning prosecutions of humanitarian aid groups assisting people with out-of-state reproductive and gender-affirming care because the actual physician perpetrators of the prohibited conduct are in states where abortion is legal.⁸¹ Moreover, abortion criminalization statutes often treat the pregnant person as a victim not subject to prosecution rather than an offender.⁸²

A murky accomplice liability question—and potential defense—is that assisting an abortion committed out of state is not a crime at all because state abortion criminalization laws cannot extend to

were the perpetrator, even when her culpability may be less than that of the perpetrator . . . and/or her involvement in the crime is tangential.” (footnotes omitted)).

⁷⁵ Dressler, *supra* note 18, at 99; Kadish, *supra* note 72, at 366–67; Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 633 (1984).

⁷⁶ Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT’L CRIM. JUST. 977, 979–80 (2007).

⁷⁷ See *supra* text accompanying notes 67–75.

⁷⁸ See, e.g., Dressler, *supra* note 18, at 94–98 (discussing the erosion of ancient limits to accomplice liability).

⁷⁹ ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 755–57 (3d ed. 1982).

⁸⁰ Dressler, *supra* note 18, at 94–98.

⁸¹ See, e.g., Katie Watson & Michelle Oberman, *Abortion Counseling, Liability, and the First Amendment*, 389 NEW ENG. J. MED. 663, 664 (2023) (“First, to be an accomplice, the act one aids must itself be illegal. Someone who has an abortion in a state where abortion is legal has not committed a crime.”).

⁸² See, e.g., *State v. Rose*, 267 P.2d 109, 112 (Idaho 1954) (explaining the view of the “vast majority of courts passing on the question” before *Roe v. Wade* that the pregnant person is the victim and cannot be prosecuted under an abortion criminalization statute); *Richmond v. Commonwealth*, 370 S.W.2d 399, 400 (Ky. 1963) (explaining the “generally accepted view . . . that the woman upon whom an abortion is performed is not an accomplice; that she is a victim rather than offender”); *Wolcott v. Gaines*, 169 S.E.2d 165, 166 (Ga. 1969) (“The female upon whom a criminal abortion has been performed is not an accomplice with the perpetrator of the offense” (quoting *Gullatt v. State*, 80 S.E. 340, 341 (1913))).

extraterritorial conduct.⁸³ An axiom of criminal law is that ordinarily, state criminal laws apply within the boundaries of the state and cannot reach out-of-state conduct.⁸⁴ Aggressive prosecutors may try to circumvent the usual limitation by arguing that abortions of a fetus from a resident of their state has effects within the state; or that an element of the offense, such as preparation, occurred in the state; or that they have the power to criminalize aiding and abetting activity committed in their territory.⁸⁵ Extraterritorial overreach criminalizing out-of-state conduct is of dubious and contested constitutionality, as will be further discussed in Part III.⁸⁶

As threats by the Alabama Attorney General illustrate, people and organizations who aid in abortions also may be charged with the crime of conspiracy.⁸⁷ Whereas accomplice doctrine is a mode of derivative liability for the crime one assists, conspiracy is an inchoate crime based on the agreement to commit a crime and an overt act—a minimal act in support of the conspiracy—committed by one of the co-conspirators.⁸⁸ Whereas accomplices are subject to the same harsh punishment prescribed in the criminal statute for the perpetrator of an offense, the crime of conspiracy often is graded as a lesser offense than the object offense.⁸⁹ American criminal law also is notorious for the broad web of liability under conspiracy doctrine, famously called “that darling of the modern prosecutor’s nursery” by Judge Learned Hand.⁹⁰ Most infamously, in jurisdictions that codify common law

⁸³ Texas prosecutors have acknowledged another similar murky question about whether accomplice liability can be imposed if there is no principal perpetrator, such as when state laws exempt the pregnant person from criminalization. *See* TEX. DIST. & CNTY ATT’YS ASS’N, *supra* note 17.

⁸⁴ David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 31 (2023).

⁸⁵ *Id.* at 31–34 (explaining the scholarly debate).

⁸⁶ *See infra* Part III; *see also, e.g.*, Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 627–31 (2007) (outlining the Supreme Court’s dicta on limits to extraterritorial reach of state criminal laws and explaining the open and murky questions about constitutionality); Susan Frelich Appleton, *Gender, Abortion, and Travel After Roe’s End*, 51 ST. LOUIS U. L.J. 655, 667 (2007) (explaining that the constitutionality of extraterritorial abortion criminalize is “an exceedingly hard, but open, question that the Supreme Court might well need to address after *Roe*’s demise”).

⁸⁷ Jeff Poor Show, *supra* note 49.

⁸⁸ *See, e.g.*, Herbert Wechsler, William Kenneth Jones & Harold L. Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 571–72 (1961) (discussing the inchoate nature of the crime of conspiracy); Laurent Sacharoff, *Conspiracy as Contract*, 50 U.C. DAVIS L. REV. 405, 428 (2016) (discussing the evolution of the overt act requirement to supplement the agreement element of conspiracy).

⁸⁹ 1 JENS DAVID OHLIN, WHARTON’S CRIMINAL LAW § 8:16 (16th ed. 2023).

⁹⁰ *Harrison v. United States*, 7 F.2d 259, 260, 263 (2d Cir. 1925); *see also, e.g.*, Richard Siegel, *Federal Criminal Conspiracy*, 43 AM. CRIM. L. REV. 495, 497 (2006) (discussing broad construction of conspiracy and its prevalence as a charge).

vicarious liability—sometimes referred to as the *Pinkerton*⁹¹ doctrine for the Supreme Court case applying the rule—one is liable for not just the conspiracy but also crimes committed by one’s co-conspirators in reasonably foreseeable furtherance of the conspiracy.⁹² Conspiracy is yet another in the arsenal of charges that some state Attorneys General threaten against humanitarian aid groups, in addition to accomplice liability.⁹³ The defenses against criminalizing compassion that this Article frames in Part III apply to such charges as well.

The real-world import of the question is demonstrated by how the risk of criminal liability succeeded in shutting down scrappy abortion funds that withstood numerous other threats and attacks. Consider, for example, the Texas Equal Access Fund, an abortion fund operating in North Texas.⁹⁴ This fund weathered numerous slings and arrows even before *Dobbs*.⁹⁵ A Waskom, Texas ordinance named the Texas Equal Access Fund as a “criminal organization” along with other organizations such as Planned Parenthood.⁹⁶ The ordinance levied criminal accomplice liability for offering funding or transportation to help people obtain abortions.⁹⁷ A legislator sent cease and desist letters to the organization and seven other abortion funds and threatened accomplice liability under an old pre-*Roe* law even before the Texas trigger law took effect.⁹⁸ After Texas passed Senate Bill 8⁹⁹ in 2021, permitting private parties to bring civil actions for aiding and abetting abortions of fetuses with a detectable heartbeat,¹⁰⁰ anti-abortion attorneys brought a private suit against the leaders of the abortion fund.¹⁰¹ Still, the Texas Equal Access Fund persisted until *Dobbs* reversed *Roe* and the Texas

⁹¹ 328 U.S. 640 (1946).

⁹² *Id.* at 646–47; James M. Branden, *Conspiracy*, 24 AM. CRIM. L. REV. 459, 486 (1987).

⁹³ *See, e.g., AG: State Can Prosecute Those Who Help Women Travel for Abortions*, ALA. DAILY NEWS (Sept. 3, 2023), <https://aldailynews.com/ag-state-can-prosecute-those-who-help-women-travel-for-abortions> [<https://perma.cc/U52C-B44A>] (discussing threats to bring conspiracy charges against aid groups).

⁹⁴ Douglas & Klibanoff, *supra* note 44.

⁹⁵ *Id.*

⁹⁶ Waskom City, Tex., Ordinance No. 336 art. B.3 (June 11, 2019), <https://www.scribd.com/document/413414195/Waskom-City-Abortion-Ordinance> [<https://perma.cc/3NGK-CMPK>] (“Ordinance Outlawing Abortion in the City of Waskom, Declaring Waskom a Sanctuary for the Unborn . . .”).

⁹⁷ *Id.* art. C.2.

⁹⁸ Eleanor Klibanoff, *Abortion Nonprofits Say Texas State Rep. Briscoe Cain Defamed Them in “Cease-and-Desist” Letter*, TEX. TRIB. (Mar. 30, 2022), <https://www.texastribune.org/2022/03/29/abortion-funds-defamation-briscoe-cain> [<https://perma.cc/TC35-H9MG>].

⁹⁹ Texas Heartbeat Act, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (West 2023).

¹⁰⁰ S.B. 8, 2021 Leg., 87th Sess. (Tex. 2021), <https://legiscan.com/TX/text/SB8/id/2395961> [<https://perma.cc/J43U-WA3M>].

¹⁰¹ Eleanor Klibanoff, *Anti-Abortion Lawyers Target Those Funding the Procedure for Potential Lawsuits Under New Texas Law*, TEX. TRIB. (Feb. 23, 2022, 2:00 PM), <https://www.texastribune.org/2022/02/23/texas-abortion-sb8-lawsuits> [<https://perma.cc/4UX9-56LD>].

trigger law's severe criminal provisions activated, forcing the organization to cease funding abortions.¹⁰²

Although many of the illustrative post-*Dobbs* examples in this Article involve abortion funds, the rise of laws proscribing gender-affirming care to minors also raises the same issues of criminal liability for those who help minors obtain care out of state.¹⁰³ In the culture wars over reproductive freedom and the rights of transgender persons, several states have criminalized providing gender-affirming care to minors.¹⁰⁴ Numerous other states are considering criminal and civil penalties for providing gender-affirming care.¹⁰⁵ Another approach, taken by Texas via executive interpretation of the state Governor and Attorney General—and later enjoined by a state court—is to define providing gender-affirming care to a minor as criminal child abuse.¹⁰⁶ Such care could include hormone treatments or surgical interventions to address gender dysphoria—the sense that one's physical phenotype does not cohere with one's gender.¹⁰⁷

Parents and physicians are trying to block the new laws in court—arguing that the prohibitions violate the Equal Protection rights of children with gender dysphoria, the Due Process rights of parents over the care of their children, and First Amendment rights—with mixed success at the trial court level and some major defeats at the appellate

¹⁰² Douglas & Klibanoff, *supra* note 44.

¹⁰³ See, e.g., HRC Foundation, *Map: Attacks on Gender Affirming Care by State*, HUMAN RTS. CAMPAIGN FOUND. (Nov. 13, 2023), <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map> [https://perma.cc/7RUN-UT5E] (visualizing the rise of laws prohibiting gender-affirming care).

¹⁰⁴ See, e.g., ALA. CODE § 26-26-4 (2022) (making the provision of gender-affirming care a Class C felony); Trisha Ahmed, *North Dakota Governor Signs Law Criminalizing Trans Health Care for Minors*, PBS NEWS HOUR (Apr. 20, 2023, 2:35 PM), <https://www.pbs.org/newshour/politics/north-dakota-governor-signs-law-criminalizing-trans-health-care-for-minors> [https://perma.cc/72PM-GRSX] (discussing new North Dakota legislation); Audrey Dutton, *New Law Makes It A Crime in Idaho to Provide Gender-Affirming Care to Transgender Youth*, IDAHO CAP. SUN (Apr. 4, 2023, 9:24 PM), <https://idahocapitalsun.com/2023/04/04/it-is-now-a-crime-in-idaho-to-provide-gender-affirming-care-to-transgender-youth> [https://perma.cc/46ZJ-NWR6] (discussing new Idaho legislation); Thalia Beaty, Brendan Farrington & Hannah Schoenbaum, *Transgender Adults in Florida Are Blindsided That A New Law Also Limits Their Access to Health Care*, ASSOCIATED PRESS (June 4, 2023, 4:17 PM), <https://apnews.com/article/florida-transgender-health-care-adults-e7ae55eec634923e6593a4c0685969b2> [https://perma.cc/9TV2-LPET] (discussing new Florida legislation).

¹⁰⁵ Megan Medlicott, Note, *A Parent's Right to Obtain Puberty Blockers for Their Child*, 56 CONN. L. REV. 301, 308 (2023); *Developments in the Law—Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2164 (2021).

¹⁰⁶ Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Commissioner, Texas Department of Family and Protective Services (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime20220221358.pdf> [https://perma.cc/FHS4-GEWE]; Opinion of Texas Attorney General Ken Paxton, No. KP-0401 (Feb. 18, 2022), <https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf> [https://perma.cc/KX55-44GJ].

¹⁰⁷ See, e.g., *Brandt v. Rutledge*, 667 F. Supp. 3d 877, 888 (E.D. Ark. 2023) (findings of fact regarding gender-affirming care and gender dysphoria).

level.¹⁰⁸ On December 4, 2024, the U.S. Supreme Court heard oral arguments in *United States v. Skrmetti*,¹⁰⁹ involving an equal protection challenge to Tennessee’s ban on gender-affirming medical treatments for minors.¹¹⁰ People and organizations in ban states who offer financial aid, travel assistance, and advice to minors and their families seeking gender-affirming care in another state face similar risks and murky questions surrounding accomplice liability and conspiracy charges.¹¹¹

B. *Rising Prosecutions for Humanitarian Assistance to Migrants*

The new accomplice liability questions roused by state criminalization of abortions and gender-affirming care are emerging against a backdrop of prosecutions for rendering compassionate aid in the international migration context. Wrestling with waves of migration surges wrought by armed conflict, famine, poverty, and environmental catastrophes, Europe and the United States have recurrent cycles of political turmoil and penal harshness toward unauthorized migration.¹¹² An example of the harshening trend is usually progressive Denmark, which has toughened its policies over the years, with a goal of “zero” arriving migrants beyond those from the United Nations resettlement system.¹¹³ To deter further entries, Danish authorities have threatened to deport refugees back to conflict-torn Syria.¹¹⁴ Great Britain’s Brexit—the momentously controversial withdrawal from the European

¹⁰⁸ Compare, e.g., *id.* at 885, 916–25 (enjoining Arkansas law prohibiting gender-affirming care to minors because of violations of the Equal Protection Clause and the Due Process rights of parents to direct the care of their children and the First Amendment rights of physicians), and *Abbott v. Doe*, No. 03-22-00126-CV, 2022 WL 837956, at *2 (Tex. App. Mar. 21, 2022) (issuing preliminary injunction against Texas Governor’s letter interpreting child abuse to include the provision of gender-affirming care), with *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1224, 1231 (11th Cir. 2023) (reversing preliminary injunction against Alabama law criminalizing gender-affirming care, holding there is not a likelihood of success on the merits by parent plaintiffs), and *Williams v. Skrmetti*, 73 F.4th 408, 416–21 (6th Cir. 2023) (reversing grant of preliminary injunction and holding that there is not a likelihood of success on the merits of Equal Protection and Due Process claims).

¹⁰⁹ 144 S. Ct. 2679 (2024) (mem.) (granting certiorari).

¹¹⁰ Transcript of Oral Argument at 1, *United States v. Skrmetti*, 144 S. Ct. 2679 (2024) (No. 23-477).

¹¹¹ See *supra* text accompanying notes 67–102.

¹¹² See, e.g., Kristina Bakkær Simonsen, *The Democratic Consequences of Anti-Immigrant Political Rhetoric: A Mixed Methods Study of Immigrants’ Political Belonging*, 43 POL. BEHAV. 143, 145, 148 (2021) (contrasting anti-immigrant rhetoric in Europe and the United States); Wesley Hiers, Thomas Soehl & Andreas Wimmer, *National Trauma and the Fear of Foreigners: How Past Geopolitical Threat Heightens Anti-Immigration Sentiment Today*, 96 SOC. FORCES 361, 363–69 (2017) (exploring factors shaping waves of anti-immigrant sentiment across Europe).

¹¹³ Emily Rauhala, *How Progressive Denmark Became the Face of the Anti-Migration Left*, WASH. POST (Apr. 6, 2023, 11:00 AM), <https://www.washingtonpost.com/world/2023/04/06/denmark-zero-asylum-refugees> [<https://perma.cc/Q3R9-3ZVK>].

¹¹⁴ *Id.*

Union—was driven in part by concerns over migration and E.U. policies of free movement across its member states.¹¹⁵ The United Kingdom also threatened to send asylum-seekers to Rwanda to wait for claims processing.¹¹⁶ In southern Europe, Greece and Italy have toughened policies against refugees crossing the high seas from North Africa and the Middle East, trying to reach the closest landing into the European Union.¹¹⁷ France, Austria, and Switzerland fortified border towns to try to stem migrant inflows after their initial landing in Italy.¹¹⁸

The United States also has experienced recurrent waves of outcry over immigration and toughening laws, including the growth of “cimmigration”—the criminalization of immigration-related offenses.¹¹⁹ This Section first discusses the turn to criminalizing acts of compassion toward international migrants in Europe.¹²⁰ The Article then turns to the more recent trend under the first Trump Administration to criminalize humanitarian aid to migrants at the U.S.-Mexico border.¹²¹ How U.S. courts have pushed back against such prosecutorial overreach in criminalizing compassionate aid is instructive for the new wave of questions over liability for assisting people pursuing reproductive and gender-affirming freedoms.¹²²

1. *Criminalizing Compassion to Unauthorized Migrants in Europe*

As early as 2002, member states of the European Union began punishing people who provide humanitarian aid to migrants under an E.U. directive requiring member states to criminalize aiding the

¹¹⁵ Adrian Favell & Roxana Barbuлесcu, *Brexit, ‘Immigration’ and Anti-Discrimination*, in THE ROUTLEDGE HANDBOOK OF THE POLITICS OF BREXIT 118 (Patrick Diamond et al. eds., 2018).

¹¹⁶ *What Is the UK’s Plan to Send Asylum Seekers to Rwanda?*, BBC (Jan. 30, 2024), <https://www.bbc.com/news/explainers-61782866> [<https://perma.cc/3S4X-5Y4Z>].

¹¹⁷ Nicolas Niarchos, *Why Hundreds Drowned Off the Coast of Greece*, NEW YORKER (June 26, 2023), <https://www.newyorker.com/news/daily-comment/why-hundreds-drowned-off-the-coast-of-greece> [<https://perma.cc/RSR5-LYG8>]; Patrick Smith, *Far-Right Victories in Greece Highlight Trend Across Europe*, NBC NEWS (June 27, 2023, 6:18 AM), <https://www.nbcnews.com/news/world/election-greece-right-wing-spartans-trend-europe-italy-lepen-vox-rcna91094> [<https://perma.cc/D6TX-755F>].

¹¹⁸ Phillip Connor, *Italy on Track to Surpass Greece in Refugee Arrivals for 2016*, PEW RSCH. CTR. (Nov. 2, 2016), <https://www.pewresearch.org/short-reads/2016/11/02/italy-on-track-to-surpass-greece-in-refugee-arrivals-for-2016> [<https://perma.cc/MH3U-C6NS>].

¹¹⁹ See, e.g., Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1, 32–36 (2007) (discussing recurrent waves of concern over border security and immigration and fortification measures); César Cuauhtémoc García Hernández, *Deconstructing Cimmigration*, 52 U.C. DAVIS L. REV. 197, 200–07 (2018) (offering a history of intertwined fears and panics that gave rise to immigration criminalization—“cimmigration”).

¹²⁰ See *infra* Section I.B.1.

¹²¹ See *infra* Section I.B.2.

¹²² See *infra* Section II.A.

“unauthorised entry, transit and residence” of migrants.¹²³ Some of the most egregious examples of prosecuting humanitarian aid in the European context come from cases involving rescues of migrants from drowning.¹²⁴ In 2004, for example, Italy prosecuted members of a German nongovernmental organization (“NGO”), called Cap Anamur, operating the rescue ship *Cap Anamur*, which conducted the first rescue of migrants from an unseaworthy vessel in the Strait of Sicily.¹²⁵ Italian prosecutors charged the captain, first officer, and director of the humanitarian NGO with abetting unauthorized migration—forcing the NGO to suspend its aid activities.¹²⁶ Nearly five years after Italian authorities detained the humanitarian workers, they were acquitted.¹²⁷

Authorities also prosecuted other humanitarian rescuers over the years.¹²⁸ Though most seafarers aiding people in distress were acquitted, the protracted proceedings through the byzantine Italian criminal court system would take years.¹²⁹ For example, in 2007, Italian authorities arrested the crews of two Tunisian fishing boats, the *Morthada* and *El Heidi*, for rescuing forty-four African asylum seekers.¹³⁰ The charges revolved around aiding and abetting unauthorized entry.¹³¹ Like the *Cap Anamur* case, the defense in the *Morthada* and *El Heidi* cases drew on the duty to rescue people in distress at sea.¹³² The acquittal of the detained crew members took between two and four years.¹³³

The risk of prosecutions had a severe chilling effect on humanitarian efforts notwithstanding the acquittals years later.¹³⁴ The rescuers faced detention, loss of their livelihood, and the severe psychological stress of convictions, fines, and reversals.¹³⁵ Captain Stefan Schmidt of

¹²³ Council Framework Decision 2002/946/JHA of 28 November 2002, On the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence, 2002 O.J. (L 328) 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0946> [<https://perma.cc/2PMX-NW6G>]; see also Liz Fekete, *Europe: Crimes of Solidarity*, 50 RACE & CLASS 83, 84 (2009) (discussing prosecutions).

¹²⁴ Fekete, *supra* note 123, at 83–84.

¹²⁵ Eugenio Cusumano, *The Sea as Humanitarian Space: Non-Governmental Search and Rescue Dilemmas on the Central Mediterranean Migratory Route*, 23 MEDITERRANEAN POL. 387, 388 (2018); Obiora Chinedu Okafor, *On the Legality Under International Law of the Criminalization or Suppression of the Expression of Solidarity to Refugees*, 114 AM. SOC’Y INT’L L. PROC. 102, 103 (2020).

¹²⁶ Cusumano, *supra* note 125, at 388; Okafor, *supra* note 125, at 103.

¹²⁷ Okafor, *supra* note 125, at 103.

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ Tugba Basaran, *The Saved and the Drowned: Governing Indifference in the Name of Security*, 46 SEC. DIALOGUE 205, 211 (2015).

¹³² *Id.*

¹³³ Okafor, *supra* note 125, at 103.

¹³⁴ *See* Basaran, *supra* note 131, at 206, 211.

¹³⁵ *Id.* at 211–12.

the *Cap Anamur* captured how the threat of prosecution would deter humanitarian efforts, even if an acquittal ultimately occurred: “If seafarers at sea notice a refugee boat, they know that we stood trial for three years [after a year and half of awaiting trial]. The acquittal then perhaps does not play an important role anymore.”¹³⁶ Indeed, controversial cases of migrants drowning at sea despite distress calls have recurred in recent years.¹³⁷ Infamously, for example, in 2021, twenty-seven migrants, including Kurdish people from Iraq and Iran, a Somali woman, and Afghan and Egyptian men, drowned after the U.K. Coast Guard and French rescue services ignored multiple reports of migrants crammed in a boat in distress.¹³⁸

Still, the prosecutions of humanitarians continue in Europe—and not just by Italian authorities.¹³⁹ The main European nations involved in prosecuting crimes of compassion are Denmark, France, Germany, Greece, Italy, Spain, and the United Kingdom.¹⁴⁰ For example, German pastors who allowed Sundanese refugees to rest in church structures are among the hundreds of compassionate aid-givers searched, arrested, and charged with crimes related to aiding unauthorized migration.¹⁴¹ French authorities arrested and convicted an elderly woman who gave a woman and teen a ride on charges “of facilitating illegal immigration.”¹⁴² Danish authorities convicted a woman who gave a refugee family with

¹³⁶ *Id.* at 211.

¹³⁷ See, e.g., Basaran, *supra* note 131, at 205–06 (discussing drownings after ignored distress calls); Aaron Walawalker, Eleanor Rose & Mark Townsend, *UK Coastguard ‘Left Channel Migrants Adrift’ in Lead-Up to Mass Drowning*, *GUARDIAN* (Apr. 29, 2023, 1:44 PM), <https://www.theguardian.com/world/2023/apr/29/uk-coastguard-left-channel-migrants-adrift-in-lead-up-to-mass-drowning> [<https://perma.cc/3WK5-92BK>] (reporting on the deaths of at least twenty-seven people after the United Kingdom Coast Guard ignored reports of their distress in the English Channel).

¹³⁸ Julia Pascual, *Investigation of 2021 Drowning of 27 Migrants in Channel Shows Rescue Services Ignored Calls for Help*, *LE MONDE* (Jan. 3, 2023, 3:02 PM), https://www.lemonde.fr/en/france/article/2022/11/14/investigation-into-2021-death-of-27-migrants-in-the-channel-shows-rescue-services-ignored-calls-for-help_6004228_7.html [<https://perma.cc/VJE4-LKP9>]; *Channel Tragedy: French Authorities Identify 26 Victims*, *BBC* (Dec. 14, 2021), <https://www.bbc.com/news/world-europe-59650239> [<https://perma.cc/4GUT-S69Z>].

¹³⁹ See, e.g., Agence France-Presse, *Spanish Firefighters in Court Accused of Trying to Help Migrants Enter Greece*, *GUARDIAN* (May 7, 2018, 10:06 AM) <https://www.theguardian.com/world/2018/may/07/spanish-firefighters-danish-volunteers-greek-court-accused-trying-help-migrants-lesbos> [<https://perma.cc/ZH72-VZUV>] (discussing prosecutions of Spanish firefighters in Greece for rescuing drowning migrants).

¹⁴⁰ Nandini Naira Archer, Claudia Torrisi, Claire Provost, Alexander Nabert & Belen Lobos, *Hundreds of Europeans ‘Criminalised’ for Helping Migrants—As Far Right Aims to Win Big in European Elections*, *OPENDEMOCRACY* (May 18, 2019, 5:57 PM), <https://www.opendemocracy.net/en/5050/hundreds-of-europeans-criminalised-for-helping-migrants-new-data-shows-as-far-right-aims-to-win-big-in-european-elections> [<https://perma.cc/DWZ3-7W4U>]; Karas, *supra* note 23.

¹⁴¹ Archer et al., *supra* note 140.

¹⁴² *Id.*

two young children a ride, resulting in a sentence of a fine of 4,000 euros or fourteen days in prison for facilitating the movement of unauthorized migrants.¹⁴³

Another egregious example involves the prosecution of three Spanish firefighters by Greece for rescuing drowning migrants.¹⁴⁴ The firefighters were moved to humanitarian action by the heartbreaking photo of the drowned body of Aylan Kurdi, a three-year-old Syrian child, washed ashore in his tiny red shirt and shorts.¹⁴⁵ The firefighters were part of an elite team relied upon by Greece for some of the toughest at-sea rescues in difficult conditions.¹⁴⁶ As fathers, the firefighters were moved by the horrors of one of the largest refugee crises, the massive displacement of Syrians by violent conflict.¹⁴⁷ They volunteered for the humanitarian group Proem-Aid—Professional Emergency Aid.¹⁴⁸ The same Greek Coast Guard that called on the firefighters' expertise for sea rescues in rough conditions arrested the firefighters and accused them of facilitating unauthorized entry of migrants—charges carrying a ten-year maximum sentence under Greek law.¹⁴⁹

Although a Greek court acquitted the three firefighters, the Italian government soon arrested another Spanish firefighter, Miguel Roldán, for saving the lives of thousands of drowning migrants.¹⁵⁰ The Italian charges carried a maximum of twenty years of imprisonment.¹⁵¹ The hardball prosecution tactics, and the refusal to let NGO rescue ships dock, have forced NGOs to cease rescue operations in the Mediterranean Sea, where thousands of migrants drown while crossing each year.¹⁵² The year after Roldán's arrest, in 2018, there were 2,275 crossing deaths in the Western Mediterranean migrant route—averaging six

¹⁴³ Galya Ben-Arieh & Volker M. Heins, *Criminalisation of Kindness: Narratives of Legality in the European Politics of Migration Containment*, 42 *THIRD WORLD Q.* 200, 200–01 (2021).

¹⁴⁴ Marta Rodriguez Martinez, *Three Spanish Firefighters Accused of Trafficking People in Lesbos*, *EURONEWS* (Sept. 12, 2019, 11:08 AM), <https://www.euronews.com/2018/03/06/three-spanish-firefighters-accused-of-trafficking-people-in-lesbos> [<https://perma.cc/VVW4-KS9E>].

¹⁴⁵ Patricia Ortega Dolz, *Spanish Firefighters on Trial for Rescuing Refugees at Sea*, *EL PAÍS* (May 7, 2018, 1:03 PM), https://english.elpais.com/elpais/2018/05/07/inenglish/1525676312_002491.html [<https://perma.cc/KU8R-KWCE>].

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*; Martinez, *supra* note 144.

¹⁵⁰ *See* Nacho Sánchez, *Spanish Fireman Faces 20 Years in Prison for Rescuing Migrants at Sea*, *EL PAÍS* (Apr. 2, 2019, 8:32 AM), https://english.elpais.com/elpais/2019/03/27/inenglish/1553678880_692129.html [<https://perma.cc/36TX-ZMGK>]; *Euro-Med Calls on the Italian Authorities to Allow a Fair Trial for Spanish Fireman Accused of Human Trafficking When Rescuing Migrants*, *EURO-MED HUM. RTS. MONITOR* (Apr. 8, 2019), <https://euromedmonitor.org/en/article/2819/Euro-Med-calls-on-the-Italian-authorities-to-allow-a08-fair-trial-for-Spanish-fireman-accused-of-human-trafficking-when-rescuing-migrants> [<https://perma.cc/4ZQD-CUJG>].

¹⁵¹ *See* Sánchez, *supra* note 150.

¹⁵² *See* Karas, *supra* note 23.

migrant deaths each day.¹⁵³ The NGO withdrawal despite the deaths “is the direct result of harassment, arrests and criminal procedures by states—Italy, mainly—in the Mediterranean Sea,” the humanitarian affairs adviser with Doctors Without Borders, Hassiba Hadj Sahraoui, explained in a news report.¹⁵⁴

2. Prosecuting Humanitarian Aid to Migrants in the United States

In the United States, prosecutions of humanitarian aid to international migrants are of more recent vintage than in Europe.¹⁵⁵ Crossings across the furnace-like deserts of the U.S.-Mexico border are notoriously dangerous as border fortification and deterrence policies funnel migration to the most desolate, deadly routes.¹⁵⁶ NGOs such as Humane Borders and No More Deaths have long operated in the U.S.-Mexico borderlands, trying to stem the tide of migrant deaths by providing water and humanitarian aid.¹⁵⁷ Although there was an early attempt in 2008 to issue littering citations against a humanitarian volunteer for placing gallon-sized plastic bottles of water along migrant crossing routes in the Buenos Aires National Wildlife Refuge, the littering conviction was reversed by the Ninth Circuit.¹⁵⁸ According to the founding member of No More Deaths, Reverend John Fife, the group had a largely respectful relationship with the Border Patrol until the first Trump Administration.¹⁵⁹ Even during the furor over unauthorized migration in 2007, groups such as Humane Borders secured permits and funds from Pima County, Arizona, to place water tanks along migrant routes, trying to stem surging numbers of migrant deaths.¹⁶⁰ The figure below shows a volunteer filling one such water tank, marked with a high blue flag as a beacon for migrants.

¹⁵³ U.N. HIGH COMM’N ON REFUGEES, *DESPERATE JOURNEYS: REFUGEES AND MIGRANTS ARRIVING IN EUROPE AND AT EUROPE’S BORDERS JANUARY–DECEMBER 2018* at 5 (2019), <https://www.unhcr.org/desperatejourneys> [<https://perma.cc/8EU6-PEWT>]; Sánchez, *supra* note 150.

¹⁵⁴ Karas, *supra* note 23.

¹⁵⁵ *Id.*

¹⁵⁶ DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE AND MIRRORS* 108–14 (2002); Benjamin A. Keller et al., *Understanding the Burden of Traumatic Injuries at the United States–Mexico Border: A Scoping Review of the Literature*, 95 J. TRAUMA & ACUTE CARE SURGERY 276, 277–81 (2023).

¹⁵⁷ Mary D. Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC’Y REV. 701, 719–21 (2008).

¹⁵⁸ *United States v. Millis*, 621 F.3d 914, 914–16, 918 (9th Cir. 2010).

¹⁵⁹ Karas, *supra* note 23.

¹⁶⁰ Fan, *supra* note 157, at 719.

FIGURE. PHOTO BY AUTHOR. FILLING WATER TANKS ON MIGRANT TRAILS IN IRONWOOD FOREST NATIONAL MONUMENT, A MAJOR CROSSING POINT IN THE REMOTE ARIZONA DESERT.



During the Trump Administration, however, federal agencies began to target the humanitarian workers for criminal prosecutions.¹⁶¹ A centerpiece of President Donald Trump’s politics is his tough stance on migration.¹⁶² In April 2017, President Trump’s Attorney General, Jeff Sessions, issued a directive to all federal prosecutors to prioritize prosecutions for “aiding or assisting criminal aliens to enter” the United States, in violation of 8 U.S.C. § 1327, and “bringing in and harboring certain aliens,” in violation of 8 U.S.C. § 1324.¹⁶³ According to Reverend Fife, before the directive, No More Deaths “had an agreement with the Tucson sector of the Border Patrol that was in place for four years that recognized the work of No More Deaths and our camps as humanitarian aid centers and that they would respect those

¹⁶¹ Jason A. Cade, “*Water is Life!*” (and *Speech!*): *Death, Dissent, and Democracy in the Borderlands*, 96 IND. L.J. 261, 274 (2020); Jasmine Aguilera, *Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border*, TIME (Nov. 21, 2019, 3:29 PM), <https://time.com/5732485/scott-warren-trial-not-guilty> [<https://perma.cc/V5ZD-R5HY>].

¹⁶² Karen Musalo, Book Note, 56 LAW & SOC’Y REV. 309, 309 (2022) (reviewing REBECCA HAMLIN, *CROSSING: HOW WE LABEL AND REACT TO PEOPLE ON THE MOVE* (2021)) (“The former U.S. president, Donald Trump, made harsh rhetoric and actions against immigrants a hallmark of his presidency, while anger over European Union migration and refugee policies fueled the successful Brexit campaign, and continues to be a source of tension within the European Union.”).

¹⁶³ Memorandum for All Federal Prosecutors from the Attorney General, Jeff Sessions, *Renewed Commitment to Criminal Immigration Enforcement* (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/MXS7-3VX2>].

standards and respect our volunteers in the field.”¹⁶⁴ After the directive, Border Patrol agents began arresting members for aiding migrants.¹⁶⁵

On July 19, 2017 and August 13, 2017, eight total No More Deaths volunteers were arrested for the misdemeanors of operating a motor vehicle in a wilderness area, in violation of Title 50, section 35.5 of the Code of Federal Regulations (“C.F.R.”); entering a national wildlife refuge without a permit, in violation of Title 50, section 26.22(b) of the C.F.R.; and abandoning property in violation of Title 50, section 27.93 of the C.F.R.¹⁶⁶ The aid workers were leaving food and water for migrants crossing the Cabeza Prieta National Wildlife Refuge.¹⁶⁷ The area has a fifty-six-mile border with Mexico and is “one of the most extreme environments in North America” that “contains no sources of safe drinking water.”¹⁶⁸ Charges against four of the volunteers were ultimately dismissed with prejudice in March 2019, pursuant to a negotiated plea agreement with the government.¹⁶⁹

Four other volunteers were convicted by a magistrate judge, but the district court reversed the convictions under the Religious Freedom Restoration Act (“RFRA”).¹⁷⁰ A federal statute protecting religious liberty, RFRA requires the government to exempt people acting on sincere exercise of their religious beliefs from laws that substantially burden the free exercise of these beliefs unless applying the law is the “least restrictive means” to further a “compelling government interest.”¹⁷¹ The defendants successfully argued that their prosecution violated RFRA — an outcome that will be examined in detail in Section II.A.¹⁷²

Prosecutors filed more serious charges against Ajo, Arizona resident Scott Warren, who volunteered with multiple humanitarian groups in the area, including No More Deaths and Ajo Samaritans.¹⁷³ The

¹⁶⁴ Karas, *supra* note 23.

¹⁶⁵ United States v. Warren, No. CR 18-00223-TUC-RCC, 2018 WL 6729483, at *1–3 (D. Ariz. Aug. 7, 2018); United States v. Deighan, No. MJ-17-0340-TUC, 2018 WL 2046811, at *1 (D. Ariz. May 2, 2018).

¹⁶⁶ Deighan, 2018 WL 2046811, at *1 (describing July 19, 2017 arrest of four individuals); United States v. Hoffman, 436 F. Supp. 3d 1272, 1278 (D. Ariz. 2020) (describing the specific charges); United States v. Hoffman, No. MJ-17-0339-TUC, 2018 WL 2464115, at *1 (D. Ariz. June 1, 2018) (describing August 13, 2017 arrest of four individuals).

¹⁶⁷ Hoffman, 436 F. Supp. 3d at 1276–77; Parker Deighan, *I’m Being Prosecuted for Trying to Save the Lives of Three Migrants*, CNN (Feb. 2, 2019, 12:38 PM), <https://www.cnn.com/2019/02/01/opinions/prosecuted-for-trying-to-save-migrants-deighan/index.html> [<https://perma.cc/N4QV-DZ69>].

¹⁶⁸ Hoffman, 436 F. Supp. 3d at 1277.

¹⁶⁹ Order Granting Motion to Dismiss Information with Prejudice, United States v. Deighan, No. MJ-17-0340-TUC, 2018 WL 2046811 (D. Ariz. Mar. 5, 2019), ECF No. 174.

¹⁷⁰ 42 U.S.C. §§ 2000bb to 2000bb-4; Hoffman, 436 F. Supp. 3d at 1278.

¹⁷¹ 42 U.S.C. § 2000bb-1(b); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014); Hoffman, 436 F. Supp. 3d at 1279.

¹⁷² See *infra* text accompanying notes 190–213.

¹⁷³ Claire Mullen, *An Aid Worker Is on Trial for Helping Migrants. But Groups Like His Are Still Doing Their Work*, WORLD (June 6, 2019), <https://theworld.org/stories/2019-06-06/>

remote heat-blasted desert around Ajo, Arizona, is one of the deadliest crossing points for unauthorized migrants funneled from more populated areas of the border and other border states by fortifications and heavy border policing.¹⁷⁴ Trying to stem the surging number of migrant deaths, multiple humanitarian groups engaged in food drops and maintain water stations in the area.¹⁷⁵ Warren rented a barn in the area and his costs were reimbursed by No More Deaths.¹⁷⁶ On January 17, 2018, Border Patrol agents began surveilling the barn and ultimately surrounded the property and ordered one of the barn occupants to exit.¹⁷⁷ After the occupant stated he was illegally in the United States, the agents arrested Warren and the two undocumented migrants sheltering in the barn.¹⁷⁸ The government charged Warren with two felony counts of harboring unauthorized “aliens” and one felony count of conspiracy to transport “aliens” in violation of 8 U.S.C. § 1324.¹⁷⁹ After a hung jury in an initial trial, the government dropped the conspiracy to transport charge and retried Warren.¹⁸⁰ The jury acquitted Warren of the harboring unauthorized “aliens” charges in the retrial.¹⁸¹

Although the first Trump era ended with the election of President Joe Biden, the threat of potential prosecutorial overreach in criminalizing acts of compassion remained—and is even more acute in the second Trump term.¹⁸² Volunteers with humanitarian aid groups on both sides of the border, such as Pueblo Sin Fronteras, Ajo Samaritans, and Casa del Migrante, allege that they continue to be targeted for retaliatory detentions, surveillance, and searches by the government because of their work.¹⁸³ Trump’s successor, President Joe Biden, faced heavy criticism

aid-worker-trial-helping-migrants-groups-his-are-still-doing-their-work [https://perma.cc/95TC-JPUE]; Aguilera, *supra* note 161.

¹⁷⁴ Daniel Gonzalez, *Border Crossers, and the Desert that Claims Them*, USA TODAY: THE WALL, <https://www.usatoday.com/border-wall/story/immigration-mexico-border-deaths-organ-pipe-cactus/608910001/> [https://perma.cc/YF5B-4QDQ]; Anita Snow, *Smugglers Are Steering Migrants into the Remote Arizona Desert, Posing New Border Patrol Challenges*, ASSOCIATED PRESS (Sept. 1, 2023, 11:41 AM), <https://apnews.com/article/immigration-arizona-desert-border-patrol-6910a0552681e31232f37a8f3ab7fc8c> [https://perma.cc/MD4T-DZC8].

¹⁷⁵ Mullen, *supra* note 173.

¹⁷⁶ Report and Recommendation on Defendant’s Motion to Suppress, *United States v. Warren*, No. CR 18-00223-TUC-RCC, 2018 WL 6729483, at *1 (D. Ariz. Aug. 7, 2018).

¹⁷⁷ *Id.* at *2–3; Aguilera, *supra* note 161.

¹⁷⁸ *Warren*, 2018 WL 6729483, at *2–3.

¹⁷⁹ 8 U.S.C. § 1324(a)(1)(A)(iii), (B)(ii); Report and Recommendation on Defendant’s Motion to Suppress, *Warren*, 2018 WL 6729483, at *2–3; Closing Jury Instructions at 1, *United States v. Warren*, No. CR 18-00223-TUC-RCC(DTF), 2019 WL 6271563 (D. Ariz. Nov. 20, 2019).

¹⁸⁰ Aguilera, *supra* note 161.

¹⁸¹ Verdict, *Warren*, No. CR 18-00223-TUC-RCC(DTF), 2019 WL 6271566, ECF No. 407 (Jury Verdict as to Scott Daniel Warren, Count 2 and Count 3).

¹⁸² See *infra* text accompanying notes 183–84.

¹⁸³ See *Adlerstein v. U.S. Customs & Border Prot.*, No. CIV 19-500-TUC, 2023 WL 3079662, at *1 (D. Ariz. Apr. 25, 2023).

and pressure to revive similarly tough policies, and Trump promised draconian immigration-related measures in his second term.¹⁸⁴ As further explored in Part II, courts can be an important bulwark against the tectonic political pressures to prosecute crimes of compassion, drawing on multiple strategies of judicial pushback.¹⁸⁵

II. CURBING THE CRIMINALIZATION OF COMPASSION THROUGH AN ANTI-TOTALITARIAN LENS

Using an array of approaches, from broadly construing freedoms of speech, religion, and interstate travel, to narrowly construing criminal laws, U.S. courts have attempted to curb prosecutions for humanitarian assistance.¹⁸⁶ This Part addresses the diverse ways courts have reversed or prevented convictions of persons for offering water, food, and shelter to migrants and temporarily enjoined a law that would punish those who help people obtain abortions out of state.¹⁸⁷ The rulings, largely by trial courts or even a magistrate judge, may at times seem cursory because of the fast-paced nature of trial practice.¹⁸⁸ Filling in the theoretical details, this Part offers an overarching normative frame for the diverse approaches and conclusions courts have taken, grounded in venerable principles of anti-totalitarianism that have shaped constitutional rights and criminal defenses.¹⁸⁹

¹⁸⁴ See Nick Miroff & Toluse Olorunnipa, *Biden Pledge to Shut Down Border Points to Policy Shortfalls*, WASH. POST (Jan. 27, 2024, 7:19 PM), <https://www.washingtonpost.com/immigration/2024/01/27/biden-immigration-policy-trump> [https://perma.cc/2XVJ-RGDA]; Tyler Mattiace & Vicki B. Gaubeca, *Biden Expands Trump-Era Border Restrictions Once Again*, HUM. RTS. WATCH (Jan. 5, 2023, 10:38 PM), <https://www.hrw.org/news/2023/01/05/biden-expands-trump-era-border-restrictions-once-again> [https://perma.cc/QA3S-8UYK].

¹⁸⁵ See *infra* Section II.A.

¹⁸⁶ See, e.g., *United States v. Millis*, 621 F.3d 914, 914–16, 918 (9th Cir. 2010) (applying lenity and strict construction of littering statute to overturn conviction); *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1062–66 (D. Idaho 2023) (issuing preliminary injunction against Idaho’s abortion trafficking statute on grounds of vagueness in violation of Fourteenth Amendment Due Process and chilling First Amendment freedom of speech), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024); *Matsumoto v. Labrador*, 701 F. Supp. 3d 1069, 1076–78 (D. Idaho 2023) (upholding the plausibility of plaintiffs’ claim that Idaho’s abortion trafficking statute violates the right to interstate travel); *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1278 (D. Ariz. Feb. 3, 2020) (reversing conviction under broad construction of RFRA); *Closing Jury Instructions, United States v. Warren*, No. CR 18-00223-TUC-RCC(DTF), 2019 WL 6271563 (D. Ariz. Nov. 20, 2019) (requiring proof that “the defendant harbored, concealed, or shielded from detection” the material witnesses “with intent to violate the law”).

¹⁸⁷ See *infra* Section II.A.

¹⁸⁸ See *infra* text accompanying notes 230–34.

¹⁸⁹ See *infra* Section II.B.

A. *The Judicial Instinct to Curtail Prosecutorial Overreach*

The sentencing memos offered poignant portraits of young community builders who should be winning public service awards rather than being sentenced for misdemeanor convictions.¹⁹⁰ Natalie Renee Hoffman, twenty-three, volunteered as an elder care provider on the Navajo Nation; worked with youths with developmental disabilities; volunteered at the Southern Arizona AIDS Foundation—and “hiked into the desert carrying bottles of water in 110 degree heat to provide relief to strangers dying there.”¹⁹¹ Her sentencing memo did not specify a religion but reiterated her “spiritual imperative that life is sacred and to help end suffering.”¹⁹²

Madeline Abbe Huse, twenty-three, worked on a pepper farm to learn about migrant laborers; translated Spanish for elementary school students and their parents; cooked for the unhoused population—and also volunteered for No More Deaths bearing water to migrants in the heat.¹⁹³ Her sentencing memorandum also did not specify any religious membership but reiterated her “moral imperative to love thy neighbor and care for others in need.”¹⁹⁴

Zaachila Orozco-McCormick was just twenty-one and volunteered at the Seattle Children’s Theater and at an after-school engineering program for girls in addition to her work bearing water for migrants in the desert.¹⁹⁵ Her sentencing memorandum also did not specify any religious affiliation but emphasized her “deeply-held belief that water is a sacred life force and all human beings deserve access to life giving water.”¹⁹⁶

The oldest of the four, Oona Holcomb, thirty-nine, was the only one with a specified religion: Presbyterian.¹⁹⁷ Her extensive volunteering

¹⁹⁰ See, e.g., Sentencing Memorandum in Support of Natalie Hoffman, United States v. Hoffman, No. 17-00339MJ-TUC-BPV, 2019 WL 1023837 (D. Ariz. Feb. 25, 2019); Sentencing Memorandum in Support of Madeline Abbe Huse, United States v. Huse, No. 17-00339MJ-TUC-BPV, 2019 WL 1023838 (D. Ariz. Feb. 25, 2019); Sentencing Memorandum in Support of Zaachila I. Orozco-McCormick, United States v. Orozco-McCormick, No. 17-00339MJ-TUC-BPV, 2019 WL 1023839 (D. Ariz. Feb. 25, 2019); Sentencing Memorandum in Support of Zaachila I. Orozco-McCormick, United States v. Oona Megan Holcomb, No. 17-00339MJ-TUC-BPV, 2019 WL 1023840 (D. Ariz. Feb. 25, 2019).

¹⁹¹ Sentencing Memorandum in Support of Natalie Hoffman at 1, *Hoffman*, 2019 WL 1023837.

¹⁹² *Id.*

¹⁹³ See Sentencing Memorandum in Support of Madeline Abbe Huse at 2, *Huse*, 2019 WL 1023838.

¹⁹⁴ *Id.*

¹⁹⁵ Sentencing Memorandum in Support of Zaachila I. Orozco-McCormick at 1–2, *Orozco-McCormick*, 2019 WL 1023839.

¹⁹⁶ *Id.* at 2.

¹⁹⁷ Sentencing Memorandum in Support of Oona Meagan Holcomb at 2, United States v. Hoffman, 436 F. Supp. 3d 1272 (D. Ariz. Feb. 3, 2020) (No. 17-00339MJ-TUC-BPV), 2019 WL 1023840.

experience included working with organizations dedicated to addressing unfair labor practices, aiding unhoused persons, addressing climate change, and supporting immigrant communities.¹⁹⁸ A trained Emergency Medical Technician, Holcomb worked in community health and provided medical support to other social and environmental justice volunteers.¹⁹⁹

All four were criminally charged for leaving water and food for migrants in the Cabeza Prieta National Wildlife Refuge as part of their work with No More Deaths/No Más Muertes, a “faith-based organization” and “ministry of the Unitarian Universalist Church of Tucson.”²⁰⁰ They were convicted by a magistrate judge of the misdemeanors of entering the wildlife refuge without a permit and abandoning property, in violation of Title 50 sections 26.22(b) and 2793 of the C.F.R.²⁰¹ Hoffman, who drove the quartet, also was convicted of “driving in a wilderness area in violation of 50 C.F.R. § 35.5.”²⁰² They appealed their convictions to the district judge under 18 U.S.C. § 3402.²⁰³

U.S. District Judge Rosemary Márquez reversed the convictions under RFRA.²⁰⁴ RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” except if the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”²⁰⁵ RFRA gives criminal defendants an affirmative defense if the defendant makes a prima facie showing (1) that they were exercising a sincerely held religious belief, and (2) the government substantially burdened that religious exercise.²⁰⁶ If the defendant makes that showing, the government bears the burden to demonstrate (1) the “compelling governmental interest,” and (2) that the government’s prosecution “is the least restrictive means of furthering that compelling governmental interest.”²⁰⁷

Earlier precedent in the Ninth Circuit, which governed in the case, provided that the defendants’ beliefs must be “actually religious in nature (rather than philosophical or political . . .).”²⁰⁸ Judge Márquez

¹⁹⁸ *Id.* at 2–3.

¹⁹⁹ *Id.* at 3.

²⁰⁰ *Hoffman*, 436 F. Supp. 3d at 1277.

²⁰¹ *Id.* at 1278.

²⁰² *Id.*

²⁰³ See *id.* at 1278–79.

²⁰⁴ 42 U.S.C. § 2000bb-1(b); *Hoffman*, 436 F. Supp. 3d at 1289.

²⁰⁵ 42 U.S.C. § 2000bb-1.

²⁰⁶ *United States v. Grady*, 18 F.4th 1275, 1285 (11th Cir. 2021); *United States v. Murry*, 31 F.4th 1274, 1293 (10th Cir. 2022); *United States v. Christie*, 825 F.3d 1048, 1056 (9th Cir. 2016).

²⁰⁷ *Grady*, 18 F.4th at 1285; *Christie*, 825 F.3d at 1055; *Murry*, 31 F.4th at 1293.

²⁰⁸ *Christie*, 825 F.3d at 1056.

held, however, that “the fact that Defendants do not profess belief in any particular established religion does not bar their RFRA claim.”²⁰⁹ Reasoning that the Ninth Circuit’s approach to determining what constituted a protected religious belief was “a generous functional (and even idiosyncratic)’ approach,” Judge Márquez ruled that “the proper standard to apply here is whether the beliefs professed are sincerely held and whether they are, in Defendants’ own scheme of things, religious.”²¹⁰ The ruling drew on the U.S. Supreme Court’s decision in *United States v. Seeger*,²¹¹ which interpreted a statutory exemption from the draft for conscientious objectors based on “religious training and belief” to include a claimant with a “belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed . . . without belief in God, except in the remotest sense.”²¹² Judge Márquez reversed the convictions and directed acquittals for all the defendants.²¹³

In an earlier case involving a citation for leaving gallons of water on migrant trails in the Buenos Aires National Wildlife Refuge, the Ninth Circuit took a different approach, via statutory constriction, to reverse the conviction.²¹⁴ The defendant was Daniel Millis, a No More Deaths volunteer, who received a citation for “Disposal of Waste” on the wildlife refuge, in violation of Title 50, section 2794(a) of the C.F.R.²¹⁵ Throughout his trial by magistrate judge and appeals, Millis argued that “humanitarian aid is never a crime.”²¹⁶ What earned the reversal of his conviction, however, was the principle of lenity, a canon of construction which limits criminal statutes to their clear textual meaning and construes any ambiguity against the government.²¹⁷ The statutory interpretation question was whether leaving purified drinking water constituted the offense of “littering, disposing, or dumping in any manner of garbage.”²¹⁸ Noting the government had even in the past granted “special use permits . . . to allow the placement of water drums within the refuge for humanitarian purposes,” the Ninth Circuit ruled

²⁰⁹ *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1283 (D. Ariz. Feb. 3, 2020).

²¹⁰ *Id.* at 1280–81 (footnote omitted) (quoting *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1537 (9th Cir. 1985) (Canby, J., concurring)).

²¹¹ 380 U.S. 163 (1965).

²¹² *Id.* at 165–66, 187; *Hoffman*, 436 F. Supp. 3d at 1280–81.

²¹³ *Hoffman*, 436 F. Supp. 3d at 1289.

²¹⁴ *United States v. Millis*, 621 F.3d 914, 915–18 (9th Cir. 2010).

²¹⁵ *Id.* at 915–16.

²¹⁶ *Id.* at 916.

²¹⁷ *Id.* at 916–18; *see also, e.g.*, *Skilling v. United States*, 561 U.S. 358, 410 (2010) (discussing “the familiar principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity’” (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000))).

²¹⁸ 50 C.F.R. § 2794(a); *Millis*, 621 F.3d at 916.

the term “garbage” was “sufficiently ambiguous that the rule of lenity would apply” in favor of *Millis*.²¹⁹

In the most severe prosecution for humanitarian aid to date, against Scott Warren for sharing his shelter with two migrants, the trial judge’s responses to jury questions and instructions in a retrial after an initial hung jury likely facilitated Warren’s acquittal.²²⁰ On the second day of Warren’s trial, the jury asked: “Is providing humanitarian aid to an alien against the law?”²²¹ The scrawled answer to the question was “NO.”²²² The judge instructed the jury at the opening and closing of trial that the government had to prove that Warren “harbored, concealed, or shielded from detection” a person he knew was an “alien . . . not lawfully in this country” and did so “with intent to violate the law.”²²³ Intent to violate the law is one of the toughest mens rea standards for the government to satisfy, making even unreasonable mistakes of law a defense as long as the jury believes the defendant sincerely thought he was not violating the law.²²⁴ Ordinarily, ignorance of the law is no defense, much less unreasonable mistakes of law.²²⁵ The jury acquitted Warren.²²⁶ Warren’s lead attorney, Greg Kuykendall, credited the victory in part to the jury instructions in which the judge required proof of intent to violate the law, establishing a high hurdle in future humanitarian aid cases.²²⁷

For the new wave of accomplice liability questions post-*Dobbs*, organizations and aid workers who help people seek abortions out of state are not waiting until they are prosecuted to seek judicial protection.²²⁸ Abortion funds and aid workers operating in abortion criminalization states are bringing suits for declaratory judgment and injunctive relief, aiming to preclude application of state laws

²¹⁹ *Millis*, 621 F.3d at 918.

²²⁰ See *supra* and *infra* text accompanying notes 173–227.

²²¹ Jury Questions During Trial Day 2, *United States v. Warren*, No. CR 18-00223-TUC-RCC(DTF), 2019 WL 6271565 (D. Ariz. Nov. 20, 2019), ECF No. 400.

²²² *Id.*

²²³ Opening Jury Instructions at 18–19, *Warren*, No. CR 18-00223-TUC-RCC(DTF), 2019 WL 6271565, ECF No. 399; Closing Jury Instructions at 15–16, *Warren*, No. CR 18-00223-TUC-RCC(DTF), 2019 WL 6271563, ECF No. 404.

²²⁴ See *Cheek v. United States*, 498 U.S. 192, 200–02 (1991).

²²⁵ *McFadden v. United States*, 576 U.S. 186, 192 (2015).

²²⁶ Verdict, *Warren*, No. CR-18-00223-TUC-RCC(DTF), 2019 WL 6271565, ECF No. 407 (not guilty verdict as to Count Two); Verdict, *Warren*, No. CR-18-00223-TUC-RCC(DTF), ECF No. 408 (not guilty verdict as to Count Three).

²²⁷ See *Aguilera*, *supra* note 161.

²²⁸ See, e.g., *Yellowhammer Fund* Complaint, *supra* note 17, at 1–3, 9–11, 19–22, 36–37 (suing for declaratory relief that Alabama’s abortion, conspiracy, and accomplice liability laws cannot be used to prosecute abortion funds helping Alabamans obtain abortions out of state, notwithstanding Attorney General’s threats); *Matsumoto* Complaint, *supra* note 51, at 27–32 (seeking declaratory and injunctive relief against application of Idaho’s abortion trafficking law).

criminalizing abortion, conspiracy, and accomplice liability to their work.²²⁹ The first to address the new wave of litigation, Magistrate Judge Debora Grasham in the District of Idaho, granted the request for a preliminary injunction against Idaho’s new abortion “trafficking” law.²³⁰

Enacted by the Idaho legislature in April 2023, the “abortion trafficking” law makes it a felony with a mandatory minimum sentence to help a minor obtain an abortion without parental consent, including “recruiting,” or “harboring, or transporting the pregnant minor.”²³¹ The law explicitly provides that it is no defense that the abortion provider is out of state—effectively criminalizing helping a minor obtain an abortion in a state where the procedure is lawful.²³² Magistrate Judge Grasham agreed that the plaintiffs—grassroots organizations and workers that help Idahoans obtain abortions out of state—made strong showings that the law likely violated the abortion helpers’ (1) First Amendment freedom of speech to provide information, counseling, advocacy, and support, and (2) Due Process rights because of the vagueness of the criminalization of abortion “recruiting” and two other statutory terms.²³³ In another memorandum decision and order issued the same day on Idaho’s motion to dismiss, Magistrate Judge Grasham also ruled that the plaintiffs had a plausible claim that the abortion trafficking law violated the constitutional right to interstate travel.²³⁴

The rulings enjoining Idaho’s far-reaching abortion trafficking laws follow an earlier district court ruling enjoining Idaho’s strict in-state abortion ban unless the life of the pregnant person is threatened.²³⁵ In *United States v. Idaho*,²³⁶ U.S. District Judge Winmill ruled that the state law conflicted with the federal Emergency Medical Treatment and Labor

²²⁹ See, e.g., *W. Ala. Women’s Ctr. Complaint*, *supra* note 17 at 4; *Yellowhammer Fund Complaint*, *supra* note 17, at 1–3, 19–22, 36–37; *Matsumoto Complaint*, *supra* note 51, at 27–32.

²³⁰ *Matsumoto v. Labrador*, 701 F. Supp. 3d 1069, 1072 (D. Idaho 2023).

²³¹ Act of Apr. 5, 2023, ch. 310, 2023 Idaho Sess. Laws 947 (codified at IDAHO CODE § 18-623 (2023)).

²³² IDAHO CODE § 18-623(3) (2023).

²³³ *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1050–54, 1069 (D. Idaho 2023), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024).

²³⁴ *Matsumoto v. Labrador*, 701 F. Supp. 3d 1069, 1075–78 (D. Idaho 2023).

²³⁵ See IDAHO CODE § 18-622(2)(a)(i) (2023) (criminalizing the provision of abortion unless necessary to prevent a pregnant woman’s death), *preliminarily enjoined by United States v. Idaho*, 623 F. Supp. 3d 1096, 1109, 1117 (D. Idaho 2022), *reconsideration denied*, No. 1:22-CV-00329, 2023 WL 3284977 (D. Idaho May 4, 2023), and *cert. granted before judgment sub nom. Moyle v. United States*, 144 S. Ct. 540 (2024), and *cert. granted before judgment*, 144 S. Ct. 541 (2024), and *cert. dismissed as improvidently granted sub nom. Moyle v. United States*, 144 S. Ct. 2015 (2024).

²³⁶ 623 F. Supp. 3d 1096 (D. Idaho 2022), *reconsideration denied*, No. 1:22-CV-00329, 2023 WL 3284977 (D. Idaho May 4, 2023), *cert. granted before judgment sub nom. Moyle v. United States*, 144 S. Ct. 540 (2024) (mem.), *cert. granted before judgment*, 144 S. Ct. 541 (2024), and *cert. dismissed as improvidently granted sub nom. Moyle v. United States*, 144 S. Ct. 2015 (2024).

Act (“EMTALA”),²³⁷ which requires emergency medical providers to offer stabilizing medical treatment for patients with emergency medical conditions.²³⁸ Judge Winmill issued a preliminary injunction against Idaho’s abortion ban that held it was preempted by the EMTALA because it was impossible for Idaho emergency medical providers to comply with both state and federal law.²³⁹ The U.S. Supreme Court granted certiorari before the Ninth Circuit could review the preliminary injunction en banc—only to dismiss certiorari as improvidently granted.²⁴⁰ The dismissal of certiorari is only a temporary twist in the waves of litigation, permitting further development of the case in the lower courts before future consideration by the U.S. Supreme Court.²⁴¹

B. An Overarching Theory of Anti-Totalitarianism for Curbing Prosecutorial Overreach After Dobbs

The array of approaches that U.S. courts take to prevent or reverse criminal liability for humanitarian assistance may seem like a grab bag without any unifying theory.²⁴² The decisions tend to be brief, either because of the ostensibly minor nature of the convictions, such as misdemeanors for trespassing and abandoning property, or because of the procedural posture, like a busy magistrate judge issuing a preliminary injunction.²⁴³ What is striking, however, is the resounding reluctance of courts within their institutional role to permit prosecutions for compassionate assistance to people in need.²⁴⁴ Although not explicit, the judicial concerns over punishing acts of conscience is consistent with a venerable tradition of anti-totalitarianism in judicial interpretation of constitutional and statutory rights.²⁴⁵ This Section argues that the anti-totalitarian tradition offers a rich overarching theoretical framework for the varying judicial approaches to invalidating or rendering difficult the prosecution of humanitarian aid. Historically important,

²³⁷ 42 U.S.C. § 1395dd.

²³⁸ *United States v. Idaho*, 623 F. Supp. 3d at 1102–03, 1109, 1116–17.

²³⁹ *Id.* at 1109.

²⁴⁰ *Moyle v. United States*, 144 S. Ct. 540 (2024); *Idaho v. United States*, 144 S. Ct. 541 (2024), *cert. dismissed as improvidently granted sub nom. Moyle v. United States*, 144 S. Ct. 2015 (2024).

²⁴¹ *See, e.g., Moyle v. United States*, 144 S. Ct. 2015, 2017 (2024) (Kagan, J., joined by Sotomayor & Jackson, JJ., concurring) (“With this Court’s writ of certiorari dismissed, the lower courts can proceed with this litigation in the regular course.”).

²⁴² *See supra* Section II.A.

²⁴³ *See supra* text accompanying notes 214–19, 230–34.

²⁴⁴ *See, e.g., United States v. Hoffman*, 436 F. Supp. 3d 1272, 1289 (D. Ariz. 2020) (reversing convictions of No More Deaths volunteers); *United States v. Millis*, 621 F.3d 914, 915–16, 918 (9th Cir. 2010) (reversing conviction of humanitarian volunteer); *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1068–69 (D. Idaho 2023) (enjoining operation of abortion trafficking law against abortion funds and aid workers), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024).

²⁴⁵ *See infra* text accompanying notes 247–88.

anti-totalitarianism has renewed import today in the post-*Dobbs* era in construing defenses to liability for assisting people pursuing reproductive and gender freedoms.²⁴⁶

After World War II, a desire to distinguish the United States from totalitarian and fascist regimes like Nazi Germany and the Soviet Union shaped the Supreme Court's constitutional interpretation of civil rights and police power.²⁴⁷ Scholars have written about how international critiques of racial subordination in the United States during the Cold War era exerted pressure on the Supreme Court to decide landmark cases trying to dislodge the racial caste system, such as the school desegregation case *Brown v. Board of Education*.²⁴⁸ The desire to distinguish American democracy and constitutionalism from centrally controlled, freedom-stifling regimes went beyond pragmatic realpolitik, however, and shaped the interpretation and evolution of our modern rights against police and prosecutorial overreach.²⁴⁹ During the *Roe v. Wade* era, Professor Jed Rubenfeld extended the anti-totalitarian theory to ground the right to an abortion as an anti-totalitarian privacy right against forced conscription of a woman's body with "life-occupying effects."²⁵⁰ Although *Dobbs* overruled the right to abortion, whether grounded in privacy or Fourteenth Amendment Due Process, the reversal only makes anti-totalitarian theory more vital in its classic formulation as a principle against police and prosecutorial misuse of criminal laws.²⁵¹

The influence is explicit in *Chambers v. Florida*,²⁵² when the Supreme Court explained why constitutional criminal procedure rights formerly applicable only to the federal government applied to the states through incorporation via the Fourteenth Amendment Due Process Clause.²⁵³ "Tyrannical governments," the *Chambers* Court explained, "had immemorially utilized dictatorial criminal procedure

²⁴⁶ See *infra* Part III.

²⁴⁷ See Robert A. Burt, *Brown's Reflection*, 103 YALE L.J. 1483, 1486–87 (1994); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 25–27 (1994); Primus, *supra* note 28, at 437–50; Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1196–97 (1998).

²⁴⁸ 347 U.S. 483 (1954); e.g., Mary L. Dudziak, *Brown As a Cold War Case*, 91 J. AM. HIST. 32, 34 (2004) (discussing the import of foreign relations considerations on the road to *Brown*); Klarman, *supra* note 247, at 26–29 (discussing the "Cold War imperative" to dismantle desegregation, which was an international embarrassment to the United States).

²⁴⁹ See *infra* text accompanying notes 253–86; Raymond, *supra* note 247, at 1196, 1244–61.

²⁵⁰ JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 225–27, 239–40 (2001).

²⁵¹ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 219–20 (2022) (reversing the privacy-grounded ruling of *Roe v. Wade*, 410 U.S. 113 (1973) and the Fourteenth Amendment Due Process ruling of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

²⁵² 309 U.S. 227 (1940).

²⁵³ *Id.* at 236–38.

and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.”²⁵⁴ Referencing both historical and modern tyrannical regimes, the Supreme Court explained, “[t]he testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations.”²⁵⁵ The rich exegesis was a reminder that constitutional criminal procedure protections did not just exist to protect ordinary criminals—but also potential heroes, courageous upstanders, and the vulnerable persecuted via criminal law.

The strong anti-totalitarian theme of reading the Constitution to protect Americans from persecution for their beliefs also runs through the writing of Justice Frank Murphy—who is best known for his fiery dissent against interning Japanese-Americans in *Korematsu v. United States*.²⁵⁶ During World War II, Murphy was part of the National Committee against Nazi Persecution and Extermination of the Jews, which organized against anti-Semitism.²⁵⁷ While other influential people remained silent, Murphy advocated vigorously for the protection of the Jewish people from persecution and the Holocaust by Nazi Germany.²⁵⁸ Clearly concerned about the risk of eroding democratic freedoms, Justice Murphy wrote a strong dissent with anti-totalitarian themes in *Harris v. United States*,²⁵⁹ decrying a “ransacking” of an apartment in a five-hour search following an arrest.²⁶⁰ He cautioned:

[T]o destroy all the rights to privacy in an effort to uproot crime may suit the purposes of despotic power, but those methods cannot abide the pure atmosphere of a free society. . . . The principle established by the Court today can be used as easily by some future government determined to suppress political opposition under the guise of sedition History is not without examples of the outlawry of certain political, religious and economic beliefs and the relentless prosecution of those who dare to entertain such beliefs. And history has a way of repeating itself.²⁶¹

²⁵⁴ *Id.* at 236.

²⁵⁵ *Id.* at 237.

²⁵⁶ 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 585 U.S. 667 (2018); *id.* at 233 (Murphy, J., dissenting).

²⁵⁷ SIDNEY FINE, *FRANK MURPHY: THE WASHINGTON YEARS* 229–31 (1984); J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY* 353 (1968).

²⁵⁸ FINE, *supra* note 257, at 233.

²⁵⁹ 331 U.S. 145 (1947), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

²⁶⁰ *Id.* at 148–49; *id.* at 191 (Murphy, J., dissenting).

²⁶¹ *Id.* at 192, 194 (Murphy, J. dissenting).

Justice Murphy's position would prevail decades later, when the Warren Court overruled *Harris* and held that the five-hour search of the four-bedroom apartment far exceeded the power to search incident to arrest.²⁶² What reverberates through history, especially in light of his example as a vigorous voice against the violent tide, are Justice Murphy's cautions about the need to protect the upstanders who champion the vulnerable from government persecution.

Cross-fertilization with anti-totalitarian values was also particularly direct with an early member of the famous Warren Court that forged modern constitutional rights, Justice Robert H. Jackson.²⁶³ Justice Jackson took leave from the U.S. Supreme Court to serve as the Chief Prosecutor for the United States of Nazi criminals at the Nuremberg Tribunal.²⁶⁴ Building cases at Nuremberg, Justice Jackson gained painful insights into how a democratic nation slides into fascist violence.²⁶⁵ These insights shaped Justice Jackson's rulings on police investigative power and helped shape modern constitutional criminal procedure and rights today.²⁶⁶ The influence of Justice Jackson's Nuremberg experience is clear in his dissent in *Brinegar v. United States*,²⁶⁷ lamenting that some constitutional rights are preferred while others, such as Fourth Amendment rights against government searches and seizures, are marked as "secondary rights."²⁶⁸ "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government," Justice Jackson wrote.²⁶⁹

And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.²⁷⁰

Writing for the majority in *Johnson v. United States*²⁷¹ about the central import of the Fourth Amendment's prohibition against entering private living quarters without a warrant, Justice Jackson explicitly

²⁶² *Chimel*, 395 U.S. at 768 (explaining that *Harris* "ha[s] been the subject of critical commentary for many years" and overruling the case).

²⁶³ See Brian R. Gallini, *Nuremberg Lives On: How Justice Jackson's International Experience Continues to Shape Domestic Criminal Procedure*, 46 *LOY. U. CHI. L.J.* 1, 5 (2014).

²⁶⁴ *Id.* at 1, 3, 5.

²⁶⁵ See *id.* at 3–5.

²⁶⁶ *Id.* at 5.

²⁶⁷ 338 U.S. 160 (1949).

²⁶⁸ *Id.* at 180 (Jackson, J., dissenting).

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 180–81.

²⁷¹ 333 U.S. 10 (1948).

cautioned against fascism.²⁷² “Any other rule,” Justice Jackson wrote, “would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.”²⁷³

Anti-totalitarian influences are also evident in the writings of Justice Felix Frankfurter, a brilliant jurist who was the first tenured Jewish professor at Harvard Law School before his ascension to the highest court.²⁷⁴ Hauntingly, in light of the horrors of fascist Germany, he wrote of how “the commentary of recent history” showed the need for protection of “one’s privacy against arbitrary intrusion by the police” and the terror of a “knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police.”²⁷⁵ Justice Frankfurter’s modernist rationale for Fourth Amendment freedoms regulating government investigative powers were not just grounded in “outworn . . . Eighteenth Century romantic rationalism” but the modern need to “maintain[] a free society and avoid[] the dangers of a police state.”²⁷⁶ He wrote: “A sturdy, self-respecting democratic community should not put up with lawless police and prosecutors. . . . [This] ‘certainly leads down the road to totalitarianism.’”²⁷⁷

References to “totalitarian” regimes—which shifted from fascist Germany to the Soviet Union and other communist or apartheid states during the Cold War era—also appear in the writings of other Justices, as well as influential jurists beyond the U.S. Supreme Court.²⁷⁸ Dissenting against the largely unfettered discretion of police to board buses and question people in ostensible consensual encounters that actually were highly coercive, Justice Marshall wrote: “This is not Hitler’s Berlin,

²⁷² *Id.* at 11, 16–17.

²⁷³ *Id.* at 17.

²⁷⁴ See Paul Finkelman, *Felix Frankfurter: The Jewish Justice Who Lost Track of Justice and His Heritage*, ASS’N JEWISH STUD. PERSP., Fall 2002, at 76–78, https://associationforjewishstudies.org/docs/default-source/ajs-perspectives/ajsp-fall-2022-justice-issue-web2.pdf?sfvrsn=49811cc5_51 [<https://perma.cc/AZK2-772D>] (offering a biography of Justice Frankfurter).

²⁷⁵ *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁷⁶ *Harris v. United States*, 331 U.S. 145, 161, 171 (1947) (Frankfurter, J., dissenting), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

²⁷⁷ *Irvine v. California*, 347 U.S. 128, 149 (1954) (Frankfurter, J., dissenting) (quoting *Statement of Director J. Edgar Hoover*, 21 FBI L. ENF’T BULL. 1, 1 (1952)).

²⁷⁸ See, e.g., *Ker v. California*, 374 U.S. 23, 62 (1963) (Brennan J., concurring in part, dissenting in part) (“[T]here is likewise no logical ground for distinguishing between the stealthy manner in which the entry in this case was effected, and the more violent manner usually associated with totalitarian police of breaking down the door or smashing the lock.”); *Estes v. Texas*, 381 U.S. 532, 570, 572, 574–75 (1965) (Warren, J., concurring) (expressing concerns over televised trials, referencing “the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium” and “[t]he Soviet Union’s trial of Francis Gary Powers” with the aim of “providing an object lesson to the public”).

nor Stalin's Moscow, nor is it white supremacist South Africa."²⁷⁹ Justice Douglas cautioned against the spread of covert audio surveillance by wiretap, arguing the tactics "would take us closer to the ideological group we profess to despise . . . that kind of totalitarian regime."²⁸⁰ He also decried the Court's nonregulation of covert recording of conversations by undercover agents or informants, writing, "I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here."²⁸¹ Justice Harlan similarly expressed concern over stealth recording by quoting scholar Alan Westin's work "contrasting privacy in the democratic and the totalitarian state."²⁸²

Second Circuit Judge Jerome Frank also used totalitarian contrasts in his famous dissents—some of which found vindication in the U.S. Supreme Court.²⁸³ In *United States v. Grunewald*,²⁸⁴ Judge Frank waxed philosophical about the import "of the individual's 'substantive' right of privacy, a right to a private enclave where he may lead a private life."²⁸⁵ He wrote:

That right is the hallmark of our democracy. The totalitarian regimes scornfully reject that right. They regard privacy as an offense against the state. Their goal is utter depersonalization. They seek to convert all that is private into the totally public, to wipe out all unique "private worlds," leaving a "public world" only, a la Orwell's terrifying book, "1984." . . . We should beware of moving in the direction of totalitarian methods, as we will do if we eviscerate any of the great constitutional privileges.²⁸⁶

The fear of eliminating free expression of personal belief that permeates the anti-totalitarian tradition was also evocatively captured in another dissent by Judge Frank, in *United States v. On Lee*.²⁸⁷

²⁷⁹ *Florida v. Bostick*, 501 U.S. 429, 443 (1991) (Marshall, J., dissenting).

²⁸⁰ *Berger v. New York*, 388 U.S. 41, 65–67 (1967) (Douglas, J., concurring).

²⁸¹ *United States v. White*, 401 U.S. 745, 762–65 (1971) (Douglas, J., dissenting).

²⁸² *Id.* at 785 n.21 (Harlan, J., dissenting) (quoting ALAN F. WESTIN, *PRIVACY AND FREEDOM* 23 (1967)).

²⁸³ *See, e.g., United States v. On Lee*, 193 F.2d 306, 311, 317 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952); *United States v. Grunewald*, 233 F.2d 556, 571, 581–82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957). In *United States v. On Lee*, Judge Frank expressed concern over the use by U.S. investigators of concealed audio surveillance that is "used in totalitarian lands." *On Lee*, 193 F.2d at 317 (Frank, J., dissenting).

²⁸⁴ 233 F.2d 556 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957).

²⁸⁵ *Id.* at 581–82 (Frank, J., dissenting).

²⁸⁶ *Id.* at 582.

²⁸⁷ 193 F.2d 306, 311 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952); *see id.* at 317 (Frank, J., dissenting).

He described how, in fascist Germany, family members were forced to hide “in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of [covert surveillance].”²⁸⁸

Anti-totalitarianism thus offered an overarching theoretical frame for answering an array of new questions at the time about weighty issues, such as electronic surveillance, covert recording, and dwelling searches.²⁸⁹ In framing the scope of government power and individual rights and defenses, anti-totalitarianism provided values as guideposts grounded in the protection of conscientious dissenters and other vulnerable groups from government persecution, surveillance, and silencing.²⁹⁰ Constitutional rights are construed to protect “those who differed, who would not conform and who resisted tyranny” and prevent the “tragically unjust sacrifices of some who were the noblest and most useful of their generations.”²⁹¹ The goal was to avert the total control, eliminating individual privacy, liberty, and freedom of thought and conscience that totalitarian states exerted over their citizens.²⁹² The recurring anti-totalitarian themes of the need to curb police and prosecutorial overreach and protect acts of conscience, dissent, and the pursuit of freedoms offer a rich theoretical context for new questions today.

III. FORTIFYING DEFENSES TO ACCOMPLICE LIABILITY AND CONSPIRACY CHARGES AFTER *DOBBS*

An anti-totalitarian lens starkly illuminates the fundamental issue at stake in accomplice liability after *Dobbs*. Can a state exert such totalizing control that people and organizations face punishment for acting based on a freedom of belief to assist people seeking abortion or gender-affirming care that is lawful out of state?²⁹³ The rich tradition of anti-totalitarian thought that has shaped our modern constitutional criminal procedural rights counsels against such comprehensive control over state residents.²⁹⁴

²⁸⁸ *Id.* at 317 (Frank, J., dissenting).

²⁸⁹ *See, e.g.*, *Chambers v. Florida*, 309 U.S. 227, 236, 239–40 (1940) (incorporating constitutional protections to regulate coercive interrogations with threats of mob violence in the states); *Johnson v. United States*, 333 U.S. 10, 16–17 (1948) (ruling that warrantless entries into dwellings to arrest and search violate the Fourth Amendment); *Berger v. New York*, 388 U.S. 41, 41–42, 67 (1967) (Douglas, J., concurring) (invalidating overbroad state statute authorizing wiretaps); *Harris v. United States*, 331 U.S. 145, 148, 191 (1947) (Murphy J., dissenting), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969) (framing the scope of searches of dwellings incident to arrest).

²⁹⁰ *See supra* notes 247–88 and accompanying text.

²⁹¹ *Chambers*, 309 U.S. at 236–37.

²⁹² *See* text accompanying note 286.

²⁹³ *See supra* notes 254–86 and accompanying text regarding the abhorrence of the obliteration of the personal and private via state control in totalitarian states.

²⁹⁴ *See supra* Section II.B.

The anti-totalitarian lens provides a normative frame to construe three major bases for challenging the criminalization of helping people find reproductive or gender-affirming care. The first group of challenges are based on First Amendment freedoms.²⁹⁵ The second basis of challenge is the constitutional right of interstate travel.²⁹⁶ The third cluster of challenges involve statutory construction to avoid constitutional conflict and also draws on lenity and the Due Process vagueness doctrine.²⁹⁷ The anti-totalitarian frame illuminates how each ground of challenge should be construed to protect conscientious dissenters and those who courageously help the vulnerable pursue freedoms that remain lawful in other states.²⁹⁸

A. *First Amendment Defenses for Care Facilitators*

One of the strongest grounds of defense for abortion funds and helpers who provide abortion counseling and information is that criminal liability for such protected expression violates First Amendment freedom of speech.²⁹⁹ The argument is supported by U.S. Supreme Court precedent and lower court decisions, including the first post-*Dobbs* decision to consider a challenge to a state statute criminalizing assistance to minors to obtain an abortion without parental consent.³⁰⁰ Although a strong defense for grassroots groups that engage in advice and information provision, extending the First Amendment may be more challenging for acts of transportation, such as by the pilots of Elevated Access.³⁰¹ This Section argues that transportation and related acts of assistance constitute protected First Amendment expressive conduct.³⁰² Analyzed through an anti-totalitarian lens, each ground is fortified by the normative understanding that in a free nation, a state

²⁹⁵ See *infra* Section III.A.

²⁹⁶ See *infra* Section III.B.

²⁹⁷ See *infra* Section III.C.

²⁹⁸ See *Chambers v. Florida*, 309 U.S. 227, 236 (1940).

²⁹⁹ See *Bigelow v. Virginia*, 421 U.S. 809, 811–12, 825–26 (1975) (overturning, on First Amendment grounds, the misdemeanor conviction of Virginia newspaper editor for running an ad about abortions available in New York under state law prohibiting the encouragement of abortions); *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 741 (Mo. 2007) (holding that “information and counseling provided by Planned Parenthood” is “core protected speech” and cannot be criminalized under the First Amendment); *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1062–65 (D. Idaho 2023) (preliminarily enjoining Idaho abortion trafficking student on grounds that it violates the First Amendment freedoms of abortion funds to counsel and provide information), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024).

³⁰⁰ See *Bigelow*, 421 U.S. at 811–12, 824 (historic precedent); *Matsumoto*, 701 F. Supp. 3d at 1062–65 (first post-*Dobbs* challenge).

³⁰¹ See *infra* Section III.A.2.

³⁰² See *supra* notes 204–13 and accompanying text; *United States v. Hoffman*, 436 F. Supp. 3d 1272, 1277 (D. Ariz. 2020) (reversing conviction under RFRA).

may not censor the free flow of information about, or compassionate aid toward, freedoms and care lawfully available in another state.³⁰³

1. Criminalizing the Provision of Abortion-Related Information Violates the First Amendment

The First Amendment is a cornerstone protection against a creep toward authoritarian or totalitarian government by protecting the free flow of information, dissent, and the power of the people to make informed decisions.³⁰⁴ The First Amendment is founded on the belief “that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”³⁰⁵ State efforts to prevent “free and general discussion of public matters” is anathema to First Amendment freedoms because such discussion is “absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.”³⁰⁶ The First Amendment thus protects the right of the speaker as well as the right of the public to receive information and ideas.³⁰⁷ The public’s right to receive information is at the core of protected First Amendment freedoms because it is vital in a democracy to have people capable of making informed decisions.³⁰⁸

In *Bigelow v. Virginia*,³⁰⁹ the U.S. Supreme Court held that a state violates First Amendment freedom of speech by criminalizing the dissemination of information about abortions available in another state.³¹⁰ *Bigelow* entails a travel back in time to shortly before *Roe v. Wade* invalidated state laws prohibiting abortions, when states criminalized abortion—a haunting ghost of our present regression.³¹¹ Virginia law at

³⁰³ See, e.g., Carlos E. Sluzki, *The Impact of Authoritarian Regimes on the Capacity to Think and Act Critically*, 104 J. WASH. ACAD. SCIS. 11, 14–15 (2018) (explaining that totalitarian regimes “expect the citizenry to believe and inhabit the worldview embedded in the official discourse . . . and enforce the adoption of that view” through threat of punishment, “destroy[ing] our ability to be agents of our own lives”).

³⁰⁴ See, e.g., Nat’l Inst. of Fam. & Life Advoc. v. Becerra, 585 U.S. 755, 780 (2018) (Kennedy, J., concurring) (discussing the history of the First Amendment as a bulwark against “authoritarian government as the Founders then knew it” and how history continues to show “how relentless authoritarian regimes are in their attempts to stifle free speech”).

³⁰⁵ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

³⁰⁶ *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–50 (1936) (quoting 2 THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 886 (8th ed. 1927)).

³⁰⁷ *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972).

³⁰⁸ See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting) (“The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution.”).

³⁰⁹ 421 U.S. 809 (1975).

³¹⁰ *Id.* at 828–29.

³¹¹ See *Roe v. Wade*, 410 U.S. 113, 154, 163 (1973) (holding that the right to personal privacy protected via the Due Process Clause of the Fourteenth Amendment precludes states from

the time made it a criminal misdemeanor to “encourage or promote the performing of an abortion or the inducing of a miscarriage.”³¹² In 1971—two years before *Roe*—Virginia prosecuted Jeffrey C. Bigelow, the managing editor of the *Virginia Weekly*, because the newspaper that primarily circulated on the University of Virginia campus ran an ad stating, “UNWANTED PREGNANCY LET US HELP YOU.”³¹³ The ad informed readers: “Abortions are now legal in New York. There are no residency requirements.”³¹⁴ The ad provided the address and contact details for the Women’s Pavilion, which placed women in accredited New York hospitals and clinics at low cost.³¹⁵

While Bigelow’s conviction was pending appeal, the Supreme Court decided *Roe*.³¹⁶ Notwithstanding *Roe*, the Virginia Supreme Court reaffirmed Bigelow’s conviction, reasoning that nothing in *Roe* pertained to abortion advertising and incorrectly assuming that the First Amendment does not apply to advertising.³¹⁷ The Supreme Court reversed, holding that the First Amendment protected the free circulation of the advertisement, which

conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.³¹⁸

Nothing in *Dobbs* disturbs the First Amendment ruling in *Bigelow*, which is on an even firmer constitutional foundation today after the Supreme Court’s series of rulings protecting commercial speech because of the public interest in receiving information.³¹⁹ Commercial speech receives constitutional protection because the free flow of commercial information is important for making “intelligent and well-informed”

interfering with the right to an abortion before the first trimester), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

³¹² VA. CODE ANN. § 18.1-63 (1960).

³¹³ *Bigelow*, 421 U.S. at 811–12.

³¹⁴ *Id.* at 812.

³¹⁵ *Id.*

³¹⁶ *See Roe*, 410 U.S. at 154, 163.

³¹⁷ *Bigelow v. Commonwealth*, 200 S.E.2d 680, 680 (Va. 1973) (“We find nothing in the new decisions of *Roe v. Wade* and *Doe v. Bolton* which in any way affects our earlier view.”), *rev’d sub nom. Bigelow*, 421 U.S. 809.

³¹⁸ *Bigelow*, 421 U.S. at 822, 829.

³¹⁹ *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding that even purely commercial speech that does “no more than propose a commercial transaction” and is driven by the advertiser’s purely economic interest is protected by the First Amendment (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 385 (1973))).

decisions.³²⁰ The commercial speech cases recognized the case for First Amendment protection in *Bigelow* because the abortion ad contained “factual material of clear ‘public interest’”—not just “a commercial transaction.”³²¹ The argument is even stronger in the case of grassroots groups and abortion funds, which are generally public interest nonprofit groups disseminating information, not companies engaging in commercial speech for profit.³²² Information about procedures lawfully available in other states is vital for informed decision-making, and chilling or censoring that information by threat of criminal prosecution violates the First Amendment.³²³

Lower courts also have recognized that it would violate the First Amendment to criminalize counseling and provision of information about abortion.³²⁴ In Alabama, U.S. District Judge Myron H. Thompson ruled that the Yellowhammer Fund had a viable First Amendment challenge to the Attorney General’s threats to prosecute abortion assistance under conspiracy and accomplice liability statutes.³²⁵ Allowing the Yellowhammer Fund’s claims to proceed over a motion to dismiss, Judge Thompson explained that strict scrutiny applied to content-based regulation, such as prosecutors targeting abortion funds for advising abortion seekers.³²⁶

To avoid violating the First Amendment, the Missouri Supreme Court construed a state statute providing that “no person shall intentionally cause, aid, or assist a minor to obtain an abortion” without parental consent to exempt providing information and counseling.³²⁷ Most recently, the U.S. District Court for Idaho issued a preliminary injunction against Idaho’s new abortion trafficking law because it would punish protected First Amendment speech in terms of “providing information, support, and assistance about reproductive health options, including legal abortion services, to pregnant individuals.”³²⁸ Although the lower-court decisions tend to be briefer, the outcomes are in line

³²⁰ *Id.* at 765.

³²¹ *Id.* at 760.

³²² See, e.g., *The Fight Isn’t Over. Not Even Close., FAQs: Is This Donation Tax Deductible?*, NAT’L NETWORK OF ABORTION FUNDS, <https://abortionfunds.org/donate> [<https://perma.cc/B9MZ-D4KJ>] (“National Network of Abortion Funds is a 501(c)3 tax-exempt organization.”).

³²³ Cf. *Bigelow*, 421 U.S. at 824–25 (holding that a state “may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State”).

³²⁴ *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 741 (Mo. 2007); *Matsumoto v. Labrador*, 701 F. Supp. 3d 1032, 1050–55 (D. Idaho 2023), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024).

³²⁵ *Yellowhammer Fund v. Marshall*, No. 2:23cv450, 2024 WL 1999546, at *20–21 (M.D. Ala. May 6, 2024).

³²⁶ *Id.* at *18–21.

³²⁷ *Planned Parenthood of Kan.*, 220 S.W.3d at 741–42.

³²⁸ *Matsumoto*, 701 F. Supp. 3d at 1050.

with an important understanding of the First Amendment as a bulwark against authoritarian efforts to use criminal punishment to stop the free flow of information and independent, informed decision-making.³²⁹ In keeping with a long tradition since World War II, courts interpreting the First Amendment are a crucial line of defense against the misuse of criminal law to exert totalizing control over information, ideas, and movement within a population.³³⁰

2. *Transportation and Related Facilitation Is Expressive Conduct Protected by the First Amendment*

Although the First Amendment provides a strong defense for abortion counseling and information provision, the doctrine has gaps when it comes to acts of aiding and facilitation, such as providing transportation or money.³³¹ Not all conduct constitutes First Amendment protected “speech,” even if the person engaged in the action intends to express an idea.³³² Criminalized conduct such as smuggling noncitizens into the country or providing counterfeit immigration documents is nonexpressive, according to the U.S. Supreme Court.³³³ An illustrative example is the failed recent attempt of the Ninth Circuit to invalidate a federal law, 8 U.S.C. § 1324(a)(1)(A)(iv), which prohibits “‘encourage[ing] or induc[ing]’ illegal immigration,” as the Supreme Court summarized it.³³⁴ The Ninth Circuit reasoned that the prohibition was overly broad, potentially encompassing protected speech.³³⁵ The Supreme Court reversed the Ninth Circuit’s extension of the First Amendment, ruling that the prohibition incorporated well-settled criminal law prohibitions on solicitation and facilitation and regulated nonspeech conduct.³³⁶

Helpers like Elevated Access who fly abortion seekers or minors and their families seeking gender-affirming care may try to argue that the

³²⁹ See, e.g., *Scales v. United States*, 367 U.S. 203, 274 (1961) (Douglas, J., dissenting) (“When belief in an idea is punished as it is today, we sacrifice those ideals and substitute an alien, totalitarian philosophy in their stead.”).

³³⁰ See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) (“The rhetoric used in the World War II-era opinions that repeatedly saved petitioners’ coreligionists from petty prosecutions reflected the Court’s evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged.”).

³³¹ See *Texas v. Johnson*, 491 U.S. 397, 403–04 (1989) (explaining that the First Amendment is not triggered by regulation of acts not constituting “expressive conduct”).

³³² *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

³³³ See *United States v. Hansen*, 599 U.S. 762, 781–82 (2023).

³³⁴ See *United States v. Hansen*, 25 F.4th 1103, 1110 (9th Cir. 2022), *rev’d and remanded*, 599 U.S. 762 (2023); *Hansen*, 599 U.S. at 766.

³³⁵ *United States v. Hansen*, 25 F.4th at 1109–11.

³³⁶ See *Hansen*, 599 U.S. at 781.

conduct is expressive, reflecting a protest against draconian state criminalization laws.³³⁷ The Supreme Court has applied First Amendment protections to expressive conduct such as burning a flag or conducting a sit-in in a “whites only” library area to protest segregation.³³⁸ Persons engaged in transporting or otherwise facilitating the travel of persons seeking abortions or gender-affirming care may argue that their actions are a protest against restrictive abortion policies and thus at the core of the First Amendment’s protections for dissent.³³⁹ Protecting the protest expressed by the volunteer activity honors the First Amendment’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”³⁴⁰

The problem is more complex, however, because a court might deem conduct such as providing transportation or financial aid to embody both speech and nonspeech elements.³⁴¹ The Supreme Court has held that when conduct includes both speech and nonspeech elements, the government may regulate such conduct because “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”³⁴² For example, the Supreme Court upheld a punishment for burning a draft card based on the state’s “substantial governmental interest” in “the smooth and proper functioning of the system that Congress has established to raise armies” and a law that was narrowly targeted to promote that interest.³⁴³

Even if the acts of aid are viewed as a combination of expressive and nonexpressive conduct, the abortion and gender-affirming care helpers have a strong argument that the state lacks any legitimate interest in restricting their travel assistance.³⁴⁴ In *Bigelow*, the Supreme Court held that Virginia does not have a legitimate state interest in shielding its citizens from lawful abortions out of state because the state’s police powers do not extend outside its borders into New York.³⁴⁵ *Bigelow* explained: “A State does not acquire power or supervision over the internal affairs of another State merely because the welfare

³³⁷ See *Moseley-Morris*, *supra* note 2; *cf.* *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (holding that burning a flag to protest the war is First Amendment protected expressive conduct); *Brown v. Louisiana*, 383 U.S. 131, 133, 143 (1966) (holding that a sit-in by African Americans in a “whites only” designated area was expressive acts of protest).

³³⁸ *Johnson*, 491 U.S. at 420; *Brown*, 383 U.S. at 133, 143.

³³⁹ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968) (discussing “[t]he public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment”).

³⁴⁰ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³⁴¹ See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

³⁴² *Id.* at 368.

³⁴³ *Id.* at 367, 381–82.

³⁴⁴ See *Bigelow v. Virginia*, 421 U.S. 809, 823–25 (1975).

³⁴⁵ *Id.* at 827–28.

and health of its own citizens may be affected when they travel to that State.”³⁴⁶ Thus, states lack a legitimate countervailing interest to justify infringement of the expressive component of the aid that abortion and gender-affirming care helpers provide. Rather, criminalization of acts of compassion violates the First Amendment’s protections for expressive conduct to facilitate courageous acts of dissent and airing of competing views vital to a free society.³⁴⁷

B. *The Right of Interstate Travel Toward Reproduction and Gender Freedoms*

Another avenue of attack against liability for assisting people in obtaining abortions or gender-affirming care out of state draws on the constitutional right of interstate travel.³⁴⁸ An anti-totalitarian lens illuminates how restrictions on the right of travel are anathema to U.S. freedoms, a tactic of Cold War “Iron Curtain” regimes that restricted the freedom of people to migrate toward freedom.³⁴⁹ Although the word “travel” appears nowhere in Constitutional text, “the ‘constitutional right to travel from one State to another’ is firmly embedded in [the Supreme Court’s] jurisprudence.”³⁵⁰ The right to travel is such a vital U.S. freedom that the Constitution makes it “a virtually unconditional personal right” protected “against private interference as well as governmental action.”³⁵¹

Encompassed in the right of interstate travel are two important freedoms relevant to challenging accomplice and conspiracy liability

³⁴⁶ *Id.* at 824.

³⁴⁷ See *Knox v. Serv. Emps. Int’l Union, Loc. 1000*, 567 U.S. 298, 309 (2012) (“The First Amendment creates ‘an open marketplace’ in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.”); *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (famously expressing the First Amendment faith “that the ultimate good desired is better reached by free trade in ideas” and cautioning “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country”).

³⁴⁸ E.g., *Yellowhammer Fund* Complaint, *supra* note 17, at 32–34 (right to travel claim); *Matsumoto* Complaint, *supra* note 51, at 29 (right to travel claim); *W. Ala. Women’s Ctr.* Complaint, *supra* note 17, at 31–32 (right to travel claim).

³⁴⁹ See Marlies Glasius, *Extraterritorial Authoritarian Practices: A Framework*, 15 *GLOBALIZATIONS* 179, 179 (2018) (“One of the defining features of the rule of the Soviet bloc during the Cold War was the ‘Iron Curtain’: with rare exceptions, citizens were not free to travel or migrate to democratic countries.”).

³⁵⁰ *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)).

³⁵¹ *Id.* (quoting *Shapiro v. Thompson*, 394 U.S. 618, 643 (1966) (Stewart, J., concurring)).

after *Dobbs*.³⁵² First is the right to leave one state and enter another freely—a freedom of “free ingress and regress to and from any other State” that was referenced in the Articles of Confederation preceding the U.S. Constitution.³⁵³ Second is the right of a citizen of one state traveling to another state to enjoy the “Privileges and Immunities of Citizens in the Several States” that the person visits.³⁵⁴ This freedom is so important that it finds textual expression in Article IV, section 2 of the U.S. Constitution, which provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”³⁵⁵ This constitutionally protected equal treatment includes the right of access to the healthcare facilities of the states one visits.³⁵⁶

A state law that penalizes the exercise of the right of interstate travel is subject to strict scrutiny.³⁵⁷ To survive such heightened scrutiny, the law must be “necessary to accomplish a compelling state interest.”³⁵⁸ As discussed, *supra*, in Section III.A.2, the U.S. Supreme Court in *Bigelow v. Virginia* indicated that a state has no legitimate interest in punishing conduct that is lawful in another state.³⁵⁹ *Bigelow* noted that a state’s police powers do not extend to conduct in another state, reasoning that a state does not acquire supervisory power “merely because the welfare and health of its own citizens may be affected when they travel to that State.”³⁶⁰ Thus, any attempt by a state to impose accomplice or conspiracy liability for assisting people in obtaining lawful abortions out of state is an unconstitutional interference in the right to travel that cannot survive strict scrutiny.

Presciently, as early as 1992, when *Dobbs* was almost three decades in the future, Professor Seth F. Kreimer argued that a state may not engage in extraterritorial regulation of abortion because of the right to travel, among other constitutional safeguards.³⁶¹ While *Roe* was still the law of the land, Professor Kreimer noted that before *Roe*, states tried to prosecute intermediaries, such as travel agents and counselors, who assisted women in obtaining abortions out of state.³⁶² Moreover,

³⁵² *Saenz*, 526 U.S. at 500. There are at least three freedoms encompassed in the right of travel. *Id.* But the third one, about equal treatment of newly arrived permanent residents, is not applicable to the arguments regarding travel for healthcare.

³⁵³ *United States v. Guest*, 383 U.S. 745, 758 (1966); *Saenz*, 526 U.S. at 500.

³⁵⁴ *Saenz*, 526 U.S. at 501–02 (quoting U.S. CONST. art. IV, § 2).

³⁵⁵ U.S. CONST. art. IV, § 2.

³⁵⁶ *See Doe v. Bolton*, 410 U.S. 179, 200 (1973), *abrogated on other grounds by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

³⁵⁷ *See Att’y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 906 & n.6 (1986).

³⁵⁸ *Id.*

³⁵⁹ *See supra* notes 345–47 and accompanying text.

³⁶⁰ *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

³⁶¹ Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 509–10 (1992).

³⁶² *Id.* at 456–57.

nations such as Ireland tried to block information about, and travel to obtain, abortions abroad.³⁶³ Germany prosecuted women for obtaining abortions abroad—even forcibly subjecting women to gynecological examinations at the border in order to gain evidence.³⁶⁴ Professor Kreimer filled in the constitutional theory behind the U.S. Supreme Court’s observations in *Bigelow v. Virginia* that a state’s police powers to punish abortion-related activities do not extend outside its borders to conduct in other states where abortion is lawful.³⁶⁵ The Privileges and Immunities Clause of the U.S. Constitution guarantees travelers to another state the same privileges as people in the receiving state—and also the same protections for their lawful activities there, even when they return home.³⁶⁶

The first post-*Dobbs* ruling on a right to travel claim brought by an abortion fund came in the challenge to Idaho’s new abortion trafficking law.³⁶⁷ U.S. Magistrate Judge Grasham rejected Idaho’s motion to dismiss the constitutional challenge brought by grassroots abortion aid groups.³⁶⁸ Judge Grasham ruled that the threat of criminal prosecution for those who help minors obtain abortions out of state without parental consent deterred interstate travel, triggering strict scrutiny.³⁶⁹ Indeed, the legislative history of the law indicates that impeding interstate travel to obtain abortions was the point of the criminalization.³⁷⁰ Thus, the plaintiffs had a sufficiently substantial claim of unconstitutionality to survive the motion to dismiss.³⁷¹ The ruling also coheres with Justice Kavanaugh’s view in his concurrence in *Dobbs v. Jackson Women’s Health Organization* that a state may not bar its residents from traveling to another state for an abortion because that would violate the constitutional right of interstate travel.³⁷²

In Alabama, U.S. District Judge Myron Thompson held that threatening prosecutions of abortion funds would violate the right to travel.³⁷³ Judge Thompson reasoned that “if a State cannot outright prohibit” pregnant persons from “traveling to receive lawful out-of-state abortions, it cannot accomplish the same end indirectly by prosecuting

³⁶³ *Id.* at 457–58.

³⁶⁴ *Id.* at 458.

³⁶⁵ *Bigelow*, 421 U.S. at 827–28.

³⁶⁶ Kreimer, *supra* note 361, at 509–14.

³⁶⁷ *Matsumoto v. Labrador*, 701 F. Supp. 3d 1069, 1072 (D. Idaho 2023), *aff’d in part, rev’d in part*, No. 23-3787, 2024 WL 4927266 (9th Cir. Dec. 2, 2024).

³⁶⁸ *Id.* at 1075–76.

³⁶⁹ *Id.* at 1076–78.

³⁷⁰ *Id.* at 1077.

³⁷¹ *Id.* at 1075–80.

³⁷² *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring).

³⁷³ *Yellowhammer Fund v. Marshall*, No. 2:23cv450, 2024 WL 1999546, at *13–14 (M.D. Ala. May 6, 2024).

those who assist them.”³⁷⁴ The U.S. Constitution’s protections prohibit state actors from using the threat of prosecution to deter or impede interstate travel, including impeding assistance for travel.³⁷⁵

One of the virtues of a federal system is that a state can choose to be a beacon of freedoms not available in another state.³⁷⁶ The freedom of interstate travel and the Privileges and Immunities Clause of the U.S. Constitution empower Americans to flow toward freedoms and opportunities—perhaps with compassionate assistance if they lack the means to travel.³⁷⁷ From an anti-totalitarian perspective, a state may not despotically control the movements of its residents, trapping them in one jurisdiction’s ideological straitjacket by deterring their free flow toward freedoms available elsewhere in the nation.³⁷⁸

C. *Canons of Construction to Limit Police and Prosecutorial Overreach*

Because of the grave constitutional concerns detailed in the preceding Sections, state statutes should be construed as having no extraterritorial application to helping people seek lawful out-of-state care.³⁷⁹ A fundamental canon of statutory construction is to read statutes to avoid conflict with constitutional protections.³⁸⁰ The Supreme Court’s long-standing maxim is that “[s]o far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts.”³⁸¹

An illustrative example of an imperfect narrowing construction is how the Missouri Supreme Court construed its statute criminalizing

³⁷⁴ *Id.* at *13.

³⁷⁵ *Id.* at *13–14.

³⁷⁶ *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (“[O]ne of the peculiar strengths of our form of government [is] each State’s freedom to ‘serve as a laboratory; and try novel social and economic experiments.’” (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting))).

³⁷⁷ *See supra* text accompanying notes 350–56.

³⁷⁸ *See, e.g.*, Larry Diamond, *Beyond Authoritarianism and Totalitarianism: Strategies for Democratization*, 12 WASH. Q. 141, 142–43, 160 (1989) (noting how totalitarian and authoritarian regimes “are distinct in the degree to which they control the lives of their citizens,” including their access to ideas, information, and movements).

³⁷⁹ *See* *Bigelow v. Virginia*, 421 U.S. 809, 811–12, 824 (1975) (invalidating conviction for running out-of-state abortion ad on First Amendment grounds and also noting the limits on the power of a state to criminalize conduct lawful in another state); *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732, 742–43 (Mo. 2007) (applying narrowing construction to a state statute that criminalizes the provision of abortions to minors without consent to avoid wholly extraterritorial application or application to abortion counseling or provision of information to avoid First Amendment conflict).

³⁸⁰ *See* *Fox v. Washington*, 236 U.S. 273, 277 (1915).

³⁸¹ *Id.* (citation omitted).

aiding a minor seeking an abortion without parental consent.³⁸² As drafted, the state legislature plainly aimed to punish assistance for out-of-state abortions.³⁸³ The statute provided: “It shall not be a defense . . . that the abortion was . . . otherwise lawful in the state or place where the abortion was performed or induced.”³⁸⁴ Because of the Supreme Court’s ruling in *Bigelow* that it is beyond the police powers of one state to regulate activities outside its borders, the Missouri Supreme Court applied a narrowing construction that criminal liability must be “based on conduct occurring in Missouri.”³⁸⁵

The narrowing construction by the Missouri Supreme Court is imperfect, however, because it only precludes application of the criminal statute to “wholly out-of-state conduct” and still allows room to target “in-state conduct” like a group or organization situated in the state helping people leave for care.³⁸⁶ Under the insufficient narrowing construction, helpers must be wholly out-of-state to escape the reach of the criminal provision.³⁸⁷ For the reasons discussed in the preceding Sections, there are grave constitutional faults with targeting those who help people seeking lawful care out of state—regardless of whether the helper is located in the criminalization state.³⁸⁸ Indeed, to reach people most in need of care, helpers must be situated in the same community, such as the grassroots abortion funds now fearing criminal liability.³⁸⁹

When the threat of liability comes from general accomplice liability or conspiracy statutes, targeted groups or persons assisting out-of-state care also can draw on the presumption against extraterritoriality, the canon of lenity, and the Due Process vagueness doctrine in their defense.³⁹⁰ As discussed in Section I.A, the threats of criminal liability that are chilling or shutting down the work of abortion funds are often predicated on general accomplice liability and conspiracy provisions in state laws.³⁹¹ Threats by the Alabama Attorney General to prosecute abortion funds and other grassroots groups helping Alabamans obtain abortions out of state illustrate such prosecutorial overreach.³⁹² In an

³⁸² See *Planned Parenthood of Kan.*, 220 S.W.3d at 742–43.

³⁸³ See MO. REV. STAT. § 188.250.3 (2005) (precluding defense that the abortion was legal in the state where it was performed).

³⁸⁴ *Id.*

³⁸⁵ *Planned Parenthood of Kan.*, 220 S.W.3d at 742–43.

³⁸⁶ See *id.* at 743.

³⁸⁷ See *id.* at 742 (addressing concerns with prosecuting “non-Missouri health care providers and others who are engaged in speech and conduct wholly outside Missouri”).

³⁸⁸ See *supra* Sections II.A–B.

³⁸⁹ See *supra* text accompanying notes 9–15.

³⁹⁰ See discussion of liability predicated on general accomplice liability or conspiracy statutes, *supra* notes 67–82, 87–93.

³⁹¹ See *supra* Section I.A.

³⁹² See *infra* text accompanying notes 396–411.

infamous appearance on talk radio that stirred fears across abortion aid groups, the Alabama Attorney General stated:

There's no doubt that [the Abortion Ban] is a criminal law, and the general principles that apply to a criminal law would apply to this . . . a Class A felony, the most significant offense that we have as far as punishment goes under our criminal statute absent a death penalty case, and so provisions relating to accessory liability—uh provisions relating to conspiracy—uh would have applicability involving [the Abortion Ban]. So, for example, if someone was promoting themselves out as a funder of abortions out of state, uh, then that is potentially criminally actionable for us.³⁹³

Responding to a constitutional challenge brought by Alabama abortion funds, the Attorney General noted the long-standing rule that the pregnant person is a victim—not an offender—under abortion criminalization statutes but asserted the power to prosecute groups who assist the pregnant person in securing an abortion out of state.³⁹⁴

Although general accomplice liability and conspiracy statutes are silent about whether they apply to aiding conduct that is lawful where it occurred, well-settled canons of construction and Due Process fair notice requirements preclude such an extraterritorial overreach.³⁹⁵ First, in construing criminal statutes, there is a powerful presumption against extraterritorial effect—whether the extraterritorial effect is in relation to an international jurisdiction or another state.³⁹⁶ The presumption is all the more important in light of the Supreme Court's indication in *Bigelow* that a state lacks the police power to regulate activities that occur lawfully out of state.³⁹⁷

Second, when a statute is ambiguous or silent, lenity calls for construing criminal statutes in favor of the defendant and against the prosecuting government.³⁹⁸ The long-standing principle is that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”³⁹⁹ The Supreme Court has reiterated the principle that “when

³⁹³ Jeff Poor Show, *supra* note 49, at 8:05–8:45.

³⁹⁴ Motion to Dismiss at 13–14, 16–18, *Yellowhammer Fund v. Marshall*, Case No. 2:23-cv-00450-MHT-KFP (Aug. 28, 2023), ECF No. 28.

³⁹⁵ See *infra* text accompanying notes 396–411.

³⁹⁶ See, e.g., *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013) (applying canon to federal conspiracy statute to evaluate whether it had extraterritorial effect to actions abroad); *Churchill Vill., L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000) (noting presumption against extraterritorial application of California state law to actions in another state), *aff'd sub nom. Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004).

³⁹⁷ *Bigelow v. Virginia*, 421 U.S. 809, 827–28 (1975).

³⁹⁸ *United States v. Bass*, 404 U.S. 336, 347 (1971).

³⁹⁹ *Rewis v. United States*, 401 U.S. 808, 812 (1971).

choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”⁴⁰⁰ Before punishing people, legislatures must make the requirements “plainly and unmistakably” clear.⁴⁰¹ When statutes are ambiguous, “doubts are resolved in favor of the defendant.”⁴⁰² Although lenity is oft-invoked and rarely successful, particularly with the changing personnel of the contemporary Supreme Court, its potential is illustrated by the successful overturning of the conviction of a No More Deaths worker by the Ninth Circuit applying the lenity principle, as discussed in Section II.A.⁴⁰³

Lenity is related to Due Process protections against depriving people of “life, liberty, or property, without due process of law” because of the common concern about fair notice before someone is punished.⁴⁰⁴ A long-standing part of the tradition of a free nation is that there needs to be “fair warning . . . in language that the common world will understand” to make the boundary of lawful conduct and a crime clear.⁴⁰⁵ Because criminal liability reflects “the moral condemnation of the community,” the American—and anti-totalitarian—tradition embodies the refusal to imprison people “unless the lawmaker has clearly said” their conduct is criminal and punishable.⁴⁰⁶ Thus, the canon of construction operates as a restraint against prosecutorial overreach to stretch the criminal law to the state’s will without fair notice.⁴⁰⁷

Indeed, lack of fair notice can amount to a Due Process violation under the vagueness doctrine.⁴⁰⁸ The doctrine provides that a state violates Due Process by prosecuting people under criminal laws that are either (1) so vague that it lacks fair notice as to what conduct is criminalized, or (2) so standardless that it risks arbitrary and discriminatory enforcement.⁴⁰⁹ Due Process protections stand in stark contrast to totalitarian or authoritarian regimes that punished people for conduct deemed undesirable to the state regardless of whether the preexisting law covered the conduct.⁴¹⁰ For example, the Reich Minister of Justice

⁴⁰⁰ *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952).

⁴⁰¹ *Bass*, 404 U.S. at 348–49 (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)).

⁴⁰² *Id.*

⁴⁰³ *See supra* text accompanying notes 214–19.

⁴⁰⁴ *Wooden v. United States*, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring); U.S. CONST. amends. V, XIV.

⁴⁰⁵ *Bass*, 404 U.S. at 348 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

⁴⁰⁶ *Id.*

⁴⁰⁷ *See id.*; *Wooden*, 595 U.S. at 389.

⁴⁰⁸ *See Johnson v. United States*, 576 U.S. 591, 595 (2015).

⁴⁰⁹ *See Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983).

⁴¹⁰ *See, e.g.*, ANTONIO CASSESE, GUIDO ACQUAVIVA, MARY FAN & ALEX WHITING, *INTERNATIONAL CRIMINAL LAW* 54 (2011) (discussing Nazi theorists mocking the requirement of preexisting law defining a conduct as criminal before punishment).

Franz Gürtner infamously boasted, “[e]veryone who commits an act deserving of punishment shall receive due punishment regardless of the incompleteness of law. . . . National Socialism imposes a new and high task on Criminal Law, namely the realization of true justice.”⁴¹¹ The anti-totalitarian lens illuminates the violation of fundamental principles of fair notice in deploying general accomplice liability and conspiracy statutes to pursue people and organizations who help people obtain care that is lawful out of state.

CONCLUSION

As the United States becomes a patchwork of stark gradients in freedoms, with people marooned in states criminalizing the formerly fundamental right of abortion, aid groups and workers that help people obtain care out of state are vital.⁴¹² Moreover, as states also begin criminalizing the provision of gender-affirming care to minors, aid groups are taking on even larger roles in assisting people seeking reproductive and gender freedoms.⁴¹³ This Article is the first to ground defenses to accomplice liability and conspiracy for assisting people pursuing reproductive and gender freedoms in anti-totalitarian theory and in light of cases criminalizing compassion in the international migration context.⁴¹⁴

The rise in prosecutions for humanitarian aid in the international migration context offers a daunting backdrop for the new questions of accomplice and conspiracy liability after *Dobbs*—but also hope.⁴¹⁵ In the United States, courts have used various grounds to curtail prosecutorial overreach to criminalize acts of compassion.⁴¹⁶ Although the normative and theoretical frame is not specified in the often brief opinions, this Article grounds the cases and their lessons for new questions of accomplice and conspiracy liability after *Dobbs* in the venerable anti-totalitarian tradition in constitutional construction.⁴¹⁷

The anti-totalitarian lens also offers a normative frame to fortify defenses in the pressing new wave of litigation surrounding the criminalization of assistance to help people pursue reproductive and gender freedoms out of state.⁴¹⁸ Since World War II, U.S. constitutional protections have been shaped by a judicial imperative to distinguish U.S. freedoms from crushing control in authoritarian and totalitarian

⁴¹¹ *Id.*

⁴¹² *See supra* notes 9–15 and accompanying text.

⁴¹³ *See supra* notes 3, 103–11 and accompanying text.

⁴¹⁴ *See supra* Parts II–III.

⁴¹⁵ *See supra* Sections I.B, II.A.

⁴¹⁶ *See supra* Section II.A.

⁴¹⁷ *See supra* Section II.B.

⁴¹⁸ *See supra* Part III.

regimes that restrict free flow of ideas, movement, and dissent.⁴¹⁹ The historical tradition of reading constitutional protections to protect “those who differed, who would not conform and who resisted tyranny” and prevent the “tragically unjust sacrifices of some who were the noblest and most useful of their generations” has fresh resonance to defenses for those who help people pursue reproductive and gender freedoms.⁴²⁰

⁴¹⁹ See *supra* Section II.B.

⁴²⁰ *Chambers v. Florida*, 309 U.S. 227, 236–37 (1940).