PROSECUTION FOR A MISSED PERIOD: UNREGULATED REPRODUCTIVE SURVEILLANCE AND THE NEED FOR INCREASED MEDICAL DATA PROTECTIONS AFTER *DOBBS*

Alison R. Beaulieu*

*In the sphere of post-*Dobbs *reproductive surveillance, privacy laws and Fourth Amendment jurisprudence must adapt to ensure the security of patients' healthcare information. Patients seeking reproductive healthcare services after the Supreme Court's decision to overturn* Roe v. Wade *in* Dobbs v. Jackson Women's Health Organization *are subjected to invasive investigations and prosecutions under state laws criminalizing abortion access, regardless of whether these patients actually obtained an abortion. Previous works have separately analyzed the impact of data shield laws and Fourth Amendment jurisprudence in the field of reproductive health law but have failed to address the inherent intersection of these two areas in creating a holistic solution to protecting medical data for all patients after* Dobbs*. This Note argues that a two-pronged solution including both a federal medical data shield law and a warrant requirement for third-party access to medical information will best address the privacy concerns within the reproductive healthcare space after* Dobbs*. By addressing both cross-jurisdictional privacy concerns and preventing warrantless access to medical records, patients' deeply personal reproductive health information will be treated with the care required under the Fourth Amendment.*

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* J.D. Candidate, University of Arizona, James E. Rogers College of Law, Class of 2026. I would like to thank Professors Andrew Woods and Shalev Roisman, as well as my Note Editor, Brielle Hadley, for their guidance and support throughout the writing process. I would also like to thank my family and friends who have supported me throughout my time at Arizona Law. This Note would not be possible without all of you.

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INTRODUCTION

When the absence of a regular menstrual cycle becomes evidence of a crime, anyone with a uterus is at risk of prosecution for bodily functions out of their control. In fact, in the sphere of post-*Dobbs* reproductive surveillance, any evidence of pregnancy could become evidence of a crime.[1] State-by-state criminalization of

1. *See* Layla Quran, Maea Lenei Buhre & Amna Nawaz, *The Increasing Risk of Criminal Charges for Women Who Experience a Miscarriage*, PBS NEWS (Jan. 9, 2024,

abortion has led to a patchwork of prosecutorial strategies and restriction mechanisms, many of which directly target pregnant patients and miscarriages. For example, anti-choice advocates in Texas created whistleblowing systems for anonymous reporting of suspected abortions as the basis for a criminal investigation into a patient's reproductive health in response to the passage of Senate Bill 8, which provides private parties with a cash reward if they successfully sue healthcare providers who have performed or assisted in abortion services.[2] Further, in Nebraska, a teen and her mother were investigated and prosecuted after Facebook user data showed that the mother had purchased abortion medication online to end her daughter's pregnancy.[3] Similarly, in Ohio, Brittany Watts, a 34-year-old woman, was 22 weeks pregnant when her pregnancy was deemed nonviable.[4] Two weeks after miscarrying in her bathroom, she was arrested on charges of felony abuse of a corpse.[5] These circumstances highlight the direct threat that the post-*Dobbs* lack of abortion protection poses to pregnant people across the United States.[6] Criminalizing reproductive healthcare forces invasive disclosure of personal medical information to "prove" or "justify" irregular menstruation patterns in the face of criminalized abortion allegations.[7]

Further, a recent rise in reproductive health misinformation related to the safety and efficacy of birth control has experts concerned that patients may be at an increased risk of unwanted pregnancies.[8] Due to a broad mistrust of government information related to reproductive health,[9] people are increasingly turning to online

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at 18:25 ET), https://www.pbs.org/newshour/show/the-increasing-risk-of-criminal-charges-for-women-who-experience-a-miscarriage [https://perma.cc/QEJ5-E5SW].

2. *See* Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, at 05:00 ET), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law [https://perma.cc/MD79-WFEH].

3. *See* Aaron Sanderford, *Facebook Data Used to Prosecute Nebraska Mother, Daughter After Alleged Abortion*, NEB. EXAM'R (Aug. 10, 2022, at 05:45 MT), https://nebraskaexaminer.com/2022/08/10/facebook-data-used-to-prosecute-nebraska-mother-daughter-after-alleged-abortion/ [https://perma.cc/K32G-ND4C].

4. Quran, Buhre & Nawaz, *supra* note 1.

5. *Id.*

6. *See generally id.* (highlighting the risks of prosecution for patients who miscarry in states that criminalize abortion).

7. *See id.*

8. *See* Sara Berg, *What Doctors Wish Patients Knew About Birth Control*, AM. MED. ASS'N (Aug. 2, 2024), https://www.ama-assn.org/delivering-care/public-health/what-doctors-wish-patients-knew-about-birth-control [https://perma.cc/7L4T-927J].

9. In one study, 82% of respondents claimed they were not likely to trust a cycle-tracking app recommended by law enforcement or government officials at all. Jiaxun Cao et al., *"I Deleted It After the Overturn of* Roe v. Wade*": Understanding Women's Privacy Concerns Toward Period-Tracking Apps in the Post* Roe v. Wade *Era*, *in* CHI '24: PROC. 2024 CHI CONF. HUM. FACTORS COMPUT. SYS. 1, 8 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/10-Laabadli-Understanding-Womens-Privacy-Concerns-Toward-Period-Tracking-Apps-in-the-Post-Roe-v-Wade-Era.pdf [https://perma.cc/9MAF-LARE].

sources for information about reproductive healthcare.[10] On TikTok, users seeking advice or information about birth control are met with a slew of "scientifically inaccurate or unsound" accounts[11] of personal experience and pseudoscience, including "women blaming their weight gain on the pill," claims that "birth control can lead to infertility," and anecdotes of worsened depression or anxiety misattributed to the use of hormonal birth control.[12] Many social media influencers are encouraging the use of "natural alternatives—such as timing sex to menstrual cycles"[13]—and selling unsubstantiated "hormone balancing" regimens, arguing that "eating certain foods and doing the right exercises at prescribed times" will correct "sluggishness, acne, headaches, and weight gain."[14] In one video, conservative commentator Candace Owens can be seen denouncing hormonal birth control as "unnatural," saying that she is a "big advocate of getting women to realize this stuff is not normal," and "claiming that viewers of her content told her copper IUDs can harm women's fertility."[15]

As doctors scramble to correct misinformation, some states have begun to restrict access to contraceptives.[16] The Fifth Circuit recently upheld a Texas law that requires minors to obtain parental consent before accessing contraceptives.[17] The three-judge panel reasoned that the law does not run counter to Title X, which has historically been used to provide free contraceptives to anyone regardless of age, income, or immigration status.[18] Physicians have reported that, due to the rise of reproductive misinformation coupled with heightened restrictions to contraceptive access, more patients are traveling for abortions from states that have banned the procedure, with many patients seeking out the procedure "after believing what they see on social media about the dangers of hormonal birth control and the effectiveness of tracking periods to prevent pregnancy."[19] Amid this rise of misinformation, it is imperative that patients across the country can access accurate reproductive healthcare information from medical professionals who can provide necessary care

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10. Mai Fleming, Christine Dehlendorf & April J. Bell, *Misinformation Around Birth Control Online Is a Form of Contraception Coercion*, SCI. AM. (June 21, 2024), https://www.scientificamerican.com/article/misinformation-around-birth-control-online-is-a-form-of-contraception/ [https://perma.cc/W5SA-M8VD].

11. *Id.*

12. Lauren Weber & Sabrina Malhi, *Women Are Getting Off Birth Control Amid Misinformation Explosion*, WASH. POST (Mar. 21, 2024), https://www.washingtonpost.com/health/2024/03/21/stopping-birth-control-misinformation/ [https://perma.cc/EL5F-HV2Z].

13. *Id.* (internal quotations omitted).

14. Haley Weiss, *You Don't Need to Balance Your Hormones*, TIME (May 9, 2023, at 08:00 ET), https://time.com/6277941/balance-hormones-cycle-syncing-myth/ [https://perma.cc/Y9BX-U49B].

15. *See* Weber & Malhi, *supra* note 12.

16. Pooja Salhotra, *5th Circuit Upholds Texas Law Requiring Minors to Obtain Parental Consent for Contraception*, TEX. TRIB. (Mar. 13, 2024), https://www.texastribune.org/2024/03/12/texas-parental-consent-birth-control-fifth-circuit-title-x/ [https://perma.cc/4WJB-Y5GZ].

17. *Id.*

18. *Id.*

19. *See* Weber & Malhi, *supra* note 12.

without fear of prosecution—especially in areas where access to abortion may not be available in the event of an unwanted pregnancy.[20]

In the ever-changing landscape of criminalized reproductive healthcare, patients' medical information must be adequately protected from unlawful seizure. Some Democratic states have adopted data shield laws in the wake of *Dobbs* to prevent companies in their jurisdictions from turning over consumer data that could be used as evidence in criminal abortion proceedings.[21] Such laws can provide foundational protection for personal health information in preventing invasive and unjust investigations.[22]

This Note argues that data shield laws provide crucial protections against the misuse of personal medical information in post-*Dobbs* criminal prosecutions. Part I explains the historical development of abortion access rights as defined under substantive due process, the history of prosecution for pregnancy loss before the *Dobbs* decision, the impacts of the decision on healthcare, and the current landscape of prosecutions for pregnancy loss under *Dobbs*. Part II examines the legal issues in medical data privacy and the breach of medical privacy implicated by allowing law enforcement access to patient data. Part III discusses existing data shield laws as a protective measure employed by states after the *Dobbs* decision. Part IV proposes a data shield and warrant requirement as a protective device against invasive prosecutions and misuse of medical information after *Dobbs*.

I. THE HISTORY OF AND CONSIDERATIONS RELEVANT TO ABORTION ACCESS IN THE UNITED STATES

Before *Dobbs*, the Court grounded the right to access abortion in the doctrine of substantive due process, aligning abortion access with other rights related to marital and intimate privacy, which include the right to access contraception and the right to same-sex intimacy.[23] *Dobbs* revoked abortion's status as a fundamental right with heightened judicial protections, leaving states with no

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20. *See generally id.* (highlighting cases in which women are ceasing use of contraceptives due to online medical misinformation); Stacy Weiner, *The Fallout of* Dobbs *on the Field of OB-GYN*, AAMC (Aug. 23, 2023), https://www.aamc.org/news/fallout-dobbs-field-ob-gyn [https://perma.cc/AZP3-RXX7] (spotlighting the fear of prosecution for professionals in the OB-GYN field).

21. *See* H.B. 1469, 2023 Gen. Assemb., 68th Sess. (Wash. 2023); H.B. 1242, 2022 Gen. Assemb., Reg. Sess. (Cal. 2022).

22. *See* Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post*-Dobbs *World*, 19 DUKE J. CONST. L. & PUB. POL'Y 1, 103–06 (2024).

23. Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992), *overruled by*, *Dobbs*, 597 U.S. 215; *see also* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that a right to contraceptive access was protected under the Due Process Clause's protection of personal liberties); Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding that the Due Process Clause protected private homosexual conduct as a personal liberty); Obergefell v. Hodges, 576 U.S. 644, 672–73, 675 (2015) (holding that the Due Process Clause's right to marriage, outlined in *Loving v. Virginia*, established a right to same-sex marriage).

substantive due process limitation and a variety of available mechanisms for the restriction and prosecution of abortion at all stages of pregnancy.

A. A Brief History of Abortion Access Under Substantive Due Process and Privacy Rights

Roe v. Wade and *Planned Parenthood of Southeastern Pennsylvania v. Casey* provided for a universal constitutional right to abortion up until the point of fetal viability.[24] Prior to the *Dobbs* decision, while some patients were prosecuted for behaviors while pregnant and resultant pregnancy losses, such cases were restricted to the narrower standards of child endangerment and neglect laws, and presented a niche statutory issue applied in relatively few cases.[25] At-home abortion medication provided a safe, accessible option for patients seeking to terminate pregnancies, with unrestricted in-office care supplementing the care needs for patients in the event of complications.[26]

*1. The Pre-*Dobbs *Legal Landscape*

Under *Roe* and *Casey*, the right to access abortion was grounded in the doctrine of substantive due process, considered to fall under the same "right to privacy" framework as decisions involving access to contraceptives and rights to same-sex marriage and intimacy.[27] Under these decisions, infringement on an individual's right to an abortion constituted an infringement on a fundamental right subject to the strict scrutiny standard.[28] This standard requires a compelling government interest to justify upholding a regulation that deprives citizens of an individual right.[29]

Even before *Dobbs*, however, prosecutions for pregnancy loss subjected patients to invasive, traumatic investigations and prosecutions.[30] Such prosecutions applied child endangerment laws, creating a narrow scope of cases that criminalized forms of lawful behavior while pregnant, such as substance use, attempting suicide, or declining medical treatment.[31] These cases provide a grim look into the

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24. *Roe*, 410 U.S. at 154, 163–64; *Casey*, 505 U.S. at 870.

25. *See infra* Subsection I.A.1.b.

26. *See generally Opposition to the Criminalization of Self-Managed Abortion*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (July 6, 2022), https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2022/opposition-to-the-criminalization-of-self-managed-abortion [https://perma.cc/MLJ8-X53Y] (highlighting the need for in-office care after complications).

27. *See supra* note 23 and accompanying text.

28. *See Roe*, 410 U.S. at 169–70 (Stewart, J., concurring); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (applying the strict scrutiny standard in reviewing racial classifications); Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by*, Trump v. Hawaii, 585 U.S. 667 (2018) (applying the strict scrutiny standard in reviewing state laws restricting the rights of persons based on race).

29. *See Loving*, 388 U.S. at 11–12 (stating that racial classifications demand strict scrutiny if they are ever to be upheld and must be necessary to the accomplishment of some legitimate state purpose); *see also Korematsu*, 323 U.S. at 216 (applying the strict scrutiny standard to state laws restricting the rights of persons based on race).

30. *See infra* Subsection I.A.1.b.

31. *See infra* Subsection I.A.1.b.

post-*Dobbs* reality, which would expand the prosecutorial toolkit and allow for investigations outside of the "fetal harm" framework.[32]

a. Substantive Due Process and the Right to Privacy

In 1973, *Roe v. Wade* grounded the right to abortion access in the doctrine of substantive due process.[33] Substantive due process rights have been described as the "fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all."[34] Based on the framework from *Griswold v. Connecticut*, these rights have been commonly understood as privacy rights.[35] In *Griswold*, the Court held that a ban on contraceptive access violated a right to privacy in marital relations.[36] The majority explained that the Fourth and Fifth Amendment protections against unreasonable search and seizure contain an implied right to privacy, which is then protected through the Due Process Clause of the Fourteenth Amendment.[37] Concurring in the judgment, Justice Goldberg explained that the "fundamental personal rights and liberties" protected by the Due Process Clause include this privacy right.[38]

In *Roe*, the Court expanded the privacy rights protected by substantive due process, holding that the constitutional right to privacy established in *Griswold* protects the right to an abortion.[39] The Court established a trimester framework for the legality of restrictions on abortion.[40] The framework declared that regulations prohibiting abortion before the second trimester were unconstitutional.[41] In the second trimester, the Court allowed for regulations in the interest of maternal health.[42] After this point, the Court held that states could restrict access to abortion in the interest of the potential human life but could never pass laws restricting access to abortion when the procedure would be necessary to save the life of the mother, regardless of fetal viability.[43]

In *Casey*, the Court affirmed the constitutional due process right to abortion under *Roe*, stating that "[c]onstitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment" and that "in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold* . . . afford[s] constitutional protection."[44] The Court held that abortion restrictions are invalid if

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32. *See infra* Section I.B.
33. *See Roe*, 410 U.S. at 153–54.
34. Slaughter-House Cases, 83 U.S. 36, 116 (1872) (Bradley, J., dissenting).
35. 381 U.S. 479, 484–85 (1965).
36. *Id.* at 485–86.
37. *Id.* at 484–85.
38. *Id.* at 487 (Goldberg, J., concurring) (internal quotes and emphasis omitted).
39. Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).
40. *Id.* at 164–65.
41. *Id.* at 164.
42. *Id.*
43. *Id.* at 164–65.
44. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992), *overruled by*, *Dobbs*, 597 U.S. 215.

the purpose or effect is to place a substantial obstacle in the path of access to abortion before fetal viability.[45] Importantly, *Casey* replaced the trimester framework from *Roe*, which had been somewhat challenging to implement in practice, and instead held that fetal viability marked the point of a compelling state interest for regulation.[46] This improved the workability of abortion access laws and clarified the national status of abortion's constitutional protections for patients and doctors alike.[47]

b. Pre-*Dobbs *Prosecutions of Pregnancy Loss

Although the *Casey* framework provided for abortion access for 30 years before *Dobbs*, pregnant patients still faced prosecution. Pre-*Dobbs* prosecutions of pregnancy loss relied on applications of law not intended for use concerning pregnancies or fetuses.[48] These prosecutions criminalized "using substances during pregnancy, attempting suicide, or declining to proceed with a recommended medical procedure, such as a cesarean delivery."[49]

Between 1973 and 2005, the "charges most frequently filed [to prosecute pregnant patients] were child abuse or child endangerment."[50] In one such case in South Carolina, a 23-year-old Black woman was charged with homicide by child abuse after she experienced a stillbirth.[51] The arrest warrant alleged that the stillbirth was the result of alcohol and drug use.[52] Continued research revealed that "she had used a small amount of powder cocaine, consumed alcohol, and taken eight Tylenol in an effort to commit suicide on her twenty-third birthday."[53]

After 2005, attempted legal interventions for patients' behaviors while pregnant continued, regardless of whether the patient had any actual intent to end the pregnancy.[54] In 2009, Samantha Burton, a Florida mother of two facing pregnancy complications, was subjected to court-ordered treatment for three days to save her pregnancy after she attempted to refuse care; in its brief on appeal, the

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45. *Id.* at 877.
46. *Id.* at 878–79.
47. *See id.*
48. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 321 (2013).
49. *Opposition to the Criminalization of Self-Managed Abortion*, *supra* note 26.
50. Paltrow & Flavin, *supra* note 48, at 321.
51. *Id.* at 314.
52. *Id.*
53. *Id.*
54. *See, e.g.*, *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy...Seriously.*, ACLU ME. (Feb. 11, 2010, at 17:04 MT) [hereinafter ACLU ME.], https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously [https://perma.cc/Z54H-W9H4]; *ACLU Asks Florida Court To Protect The Rights Of Pregnant Women To Refuse Medical Care*, ACLU (Aug. 3, 2009, at 00:00 MT) [hereinafter ACLU], https://www.aclu.org/press-releases/aclu-asks-florida-court-protect-rights-pregnant-women-refuse-medical-care [https://perma.cc/FJ2L-ZG3J]; Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES MAG. (Apr. 1, 2015), https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html [https://perma.cc/C4ZS-4XCW].

ACLU argued that the court-ordered medical treatment was both unconstitutional and a danger to public health, stating that "women will be discouraged from coming to a hospital for pregnancy care if they know that any disagreement may lead to forced medical treatment."[55] In 2010, Christine Taylor, then 22, was investigated and nearly prosecuted in Iowa after she blacked out, tripped, and fell down the stairs.[56] In 2015, Purvi Patel was sentenced to 20 years in prison for feticide after reporting a stillbirth when police recovered text messages between Patel and a friend in which she described ordering abortion medication.[57] While the prosecution never conclusively proved that Patel had used the medication, Patel was convicted under a heavily contested theory that she had delivered a living baby and killed the child after unsuccessfully attempting to abort the child with the medication.[58] In all of these cases, women were investigated or prosecuted based on their statements to medical professionals that they likely assumed were confidential.[59]

The fear of prosecution may drive patients to pursue "self-managed abortion[s]" outside of formal healthcare settings, subjecting these patients to increased risks of mortality and severe medical complications.[60] The term "self-managed abortion" includes "any action taken to end a pregnancy outside of the formal healthcare system."[61] Such measures can range from self-sourcing approved medications recommended by the World Health Organization—such as mifepristone or misoprostol—to riskier measures like ingesting herbs, alcohol, or other substances; in more extreme circumstances, patients may resort to physically violent methods like punching themselves in the abdomen.[62] Health risks arising from self-managed abortion can include incomplete abortions, infection, hemorrhage, and uterine injury.[63] In fact, if left untreated, these conditions can lead

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55. ACLU, *supra* note 54.

56. ACLU ME., *supra* note 54.

57. Bazelon, *supra* note 54.

58. Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, GUTTMACHER POL'Y REV., Summer 2015, at 70, 73–74.

59. *See* Madalyn K. Wasilczuk, *Fifth Amendment Rights as Abortion Rights*, HARV. L. REV. BLOG (Apr. 11, 2023), https://harvardlawreview.org/blog/2023/04/fifth-amendment-rights-as-abortion-rights/ [https://perma.cc/NLJ4-ZYD2]; Bazelon, *supra* note 54; ACLU ME., *supra* note 54; *see also* ACLU, *supra* note 54 (describing the court-ordered treatment Samantha Burton was required to receive to save her fetus after admission to the hospital).

60. *Opposition to the Criminalization of Self-Managed Abortion*, *supra* note 26 ("Rates of attempted self-managed abortion appear to be higher among people facing barriers to abortion care."); *see also* Ushma D. Upadhyay, Alice F. Cartwright & Daniel Grossman, *Barriers to Abortion Care and Incidence of Attempted Self-managed Abortion Among Individuals Searching Google for Abortion Care: A National Prospective Study*, 106 CONTRACEPTION 49, 54–55 (Sep. 21, 2021) (finding that patients show higher rates of attempted self-managed abortion in areas with more barriers to accessing abortion care).

61. *Opposition to the Criminalization of Self-Managed Abortion*, *supra* note 26.

62. Lauren Ralph et al., *Self-Managed Abortion Attempts Before vs After Changes in Federal Abortion Protections in the US*, 7 JAMA NETWORK OPEN 1, 2 (July 30, 2024).

63. Lisa H. Harris & Daniel Grossman, *Complications of Unsafe and Self-Managed Abortion*, 382 NEJM 1029, 1029 (2020).

to sepsis and result in death.[64] In one case, a healthy 24-year-old woman presented with abdominal pain and internal bleeding after attempting to terminate her pregnancy with a coat hanger.[65] Later, she experienced sepsis, chorioamnionitis, and acute respiratory distress syndrome and ultimately had to undergo a total abdominal hysterectomy.[66]

Self-management, however, did not eliminate the risks of prosecution pre-*Dobbs*.[67] Between 2000 and 2020, prosecutions for self-managed abortion occurred across 26 states, even in states where self-managed abortion is legal.[68]

2. An Overview of the Dobbs *Decision*

Initially, *Dobbs* did not arrive at the Supreme Court as a case aiming to resolve the broad constitutionality of abortion in the United States.[69] On appeal from the Fifth Circuit,[70] the issue presented to the Court was whether Mississippi's Gestational Age Act, which prohibited all abortions after a gestational age of 15 weeks with few exceptions, was constitutional within the *Roe* and *Casey* frameworks.[71]

Ultimately, the Supreme Court veered well beyond the bounds of the issue presented,[72] holding that (1) the Constitution does not provide a right to abortion, and (2) the Court can overrule a wrongly decided constitutional decision, as stare decisis[73] is not an absolute requirement.[74] The majority's decision overruled *Casey*'s

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64. *Id.* at 1030.

65. Teresa A. Saultes, Diane Devita & Jason D. Heiner, *The Back Alley Revisited: Sepsis After Attempted Self-Induced Abortion*, 10 W.J. EMERGENCY MED. 278, 278–79 (2009).

66. *Id.* at 279.

67. *See* Laura Huss, Farah Diaz-Tello & Goleen Samari, *Self-Care, Criminalized: Preliminary Findings*, IF/WHEN/HOW (Aug. 1, 2022), https://ifwhenhow.org/resources/self-care-criminalized-august-2022-preliminary-findings/ [https://perma.cc/9LQ5-9R6H].

68. *Id.* Prosecutions for self-managed abortion occurred across the country, including in states often recognized as liberal, pro-choice powerhouses like California and New York. *Id.*

69. *See* Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 271 (5th Cir. 2019), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

70. The Fifth Circuit had invalidated the Gestational Age Act as an "unconstitutional ban on pre-viability abortions." *Id.* at 268–69.

71. *Dobbs*, 597 U.S. at 230–31.

72. *The Case in Depth:* Dobbs v. Jackson Women's Health Organization, CTR. FOR REPROD. RTS., https://reproductiverights.org/case/scotus-mississippi-abortion-ban/dobbs-jackson-womens-health/ [https://perma.cc/53JB-GUES] (last visited Oct. 6, 2025).

73. Stare decisis refers to the legal doctrine of adherence to precedent, encouraging courts to adhere to consistent reasoning when deciding a case on the same or a closely related issue as seen in a past case. *Stare Decisis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis [https://perma.cc/Q56A-AQBB] (last visited Oct. 6, 2025). The Supreme Court has stated that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991).

74. *Dobbs*, 597 U.S. at 218, 231, 294, 302.

reasoning that the right to an abortion was protected as a "liberty" under the Due Process Clause, grounding its decision in the idea that the right to an abortion was not conferred through privacy rights under substantive due process.[75]

The majority tried to quell public anxiety by stating that the elimination of one right historically conferred under substantive due process did not signal a tragic fate for the other personal liberties found under the same reasoning.[76] It even went so far as calling such fears "unfounded"[77] and noting that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[78] But Justice Thomas immediately turned his focus to target the doctrine of substantive due process as a whole, arguing that the doctrine "is an oxymoron that lack[s] any basis in the Constitution."[79] He continued by stating, "[t]he Due Process Clause does not secure any substantive rights," and that "in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[80]

Ultimately, the Court's holding eliminated federal constitutional protections to abortion access.[81] In practice, this has pushed the legality of abortion access back to the states and created a new avenue for prosecutors to take legal action against people who seek reproductive healthcare procedures—including patients who are not obtaining abortions at all.[82]

*B. The Post-*Dobbs *Landscape of Abortion Criminalization*

After *Dobbs*, states looking to criminalize abortion access are no longer restricted within the "unlawful while pregnant" framework of the pre-*Dobbs* era[83] or the viability time constraints provided by *Casey*.[84] Georgia criminalizes abortion upon detection of a fetal heartbeat,[85] and other extreme states leave no exceptions for cases of rape or incest.[86]

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75. *Id.* at 235–36, 302.

76. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the Due Process Clause's protection of "liberty" confers an implied right to privacy permitting the use of contraceptives by married persons and protecting the privacy of intimate relations); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia's ban on interracial marriage by holding that the Due Process Clause protects a fundamental right to marry); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that the Due Process Clause protected private homosexual conduct as a personal liberty); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the Due Process Clause's right to marriage, outlined in *Loving v. Virginia*, established a right to same-sex marriage).

77. *Dobbs*, 597 U.S. at 262.

78. *Id.* at 295 (citation modified).

79. *Id.* at 331 (Thomas, J., concurring) (internal quotes omitted).

80. *Id.* at 332; *see supra* note 76 and accompanying text.

81. *Dobbs*, 597 U.S. at 235 (majority opinion).

82. *See* Quran, Buhre & Nawaz, *supra* note 1.

83. *See supra* Subsection I.A.1.b.

84. *See supra* Subsection I.A.1.a.

85. GA. CODE ANN. § 16-12-141(b) (West 2024).

86. *See, e.g.*, ALA. CODE § 26-23H-4 (2024); ARK. CODE ANN. § 5-61-304 (West 2024); KY. REV. STAT. ANN. § 311.772 (West 2025).

1. State Statutes After Dobbs

In the wake of *Dobbs*, statutes expressly criminalizing abortion have become increasingly common.[87] After the Supreme Court's decision, several states' trigger laws went into effect, immediately restricting access to abortion within their borders.[88] As of 2022, at least 38 states have passed "fetal harm" laws.[89] The original intent of fetal harm statutes was to increase protection for pregnant persons who are the victims of violence by counting the fetus as a separate victim; for example, battery of a pregnant patient would result in two separate charges for battery—one for harming the parent and one for harming the fetus.[90] However, in practice, these "[laws] have been used to investigate and prosecute different forms of pregnancy loss, including miscarriages, stillbirths and self-induced abortions."[91] Such prosecutions typically begin when medical professionals take on a law-enforcement role, reporting their patients to local police under mandatory reporting requirements.[92] Without proper warnings about their rights against self-incrimination or the potential for their medical statements to be used in law enforcement investigations, patients often unknowingly incriminate themselves when communicating with medical professionals and seeking treatment.[93]

Given the power the *Dobbs* decision gave state legislatures, a variety of states passed new laws criminalizing abortion and breathed new life into dormant trigger laws. Georgia's Living Infants Fairness and Equality Act, commonly known as the Heartbeat Bill, criminalizes abortions after the detection of a fetal heartbeat.[94] The bill claims that the point of fetal heartbeat provides an adequate measure of "viable intrauterine gestation," as was necessary under the *Casey* framework at the time.[95] Georgia's law classifies "unborn children" as "living, distinct persons," with an "unborn child" being defined as "a member of the species Homo sapiens at any age of development who is carried in the womb."[96] Under this law, medical professionals can be prosecuted for providing abortions where the fetus has a detectable heartbeat.[97]

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87. *See supra* note 86; *see also* Robert Baldwin III, *Losing a Pregnancy Could Land You in Jail in Post-*Roe *America*, NPR (July 3, 2022, at 05:27 ET), https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss [https://perma.cc/6KNX-R7SX] (detailing the criminal laws for abortion after *Dobbs*).

88. Baldwin, *supra* note 87.

89. *Id.*

90. *Id.*

91. *Id.*

92. Wasilczuk, *supra* note 59.

93. *Id.*

94. H.B. 481, 2019 Gen. Assemb., Reg. Sess. (Ga. 2019).

95. *Id.* (citation modified); *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992), *overruled by*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (holding that states have the right to restrict abortion access after the point of fetal viability).

96. H.B. 481, 2019 Gen. Assemb., Reg. Sess. (Ga. 2019); GA. CODE ANN. § 1-2-1(e)(2) (West 2020).

97. GA. CODE ANN. § 16-12-141 (West 2024). The statute provides exceptions only where (1) professionals find a "medical emergency," defined as "a condition in which an abortion is necessary in order to prevent the death of . . . or the substantial and irreversible physical impairment" of the patient; (2) the probable gestational age of the fetus is less than

Similarly, Florida's House Bill 5, upheld by the State's Supreme Court,[98] criminalizes all abortions after the fetus reaches a gestational age of six weeks.[99] The statute provides limited exceptions for cases when "the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman other than a psychological condition," or where multiple physicians certify in writing that the fetus has a fatal abnormality.[100]

As of January 24, 2025, Congressman Eric Burlison, a representative from Missouri, has introduced the Life at Conception Act on the House floor.[101] This bill aims "[t]o implement equal protection under the [Fourteenth Amendment] for the right to life of each born and preborn human person."[102] The bill defines a "human person" to include human persons at all stages of life, "including the moment of fertilization, cloning, or other moment at which an individual member of the human species comes into being."[103]

2. The Functional Impact of Dobbs *on Healthcare*

Healthcare providers report that the *Dobbs* decision has "interfered in the physician-provider relationship, undercut their ability to provide evidence-based care, and put them in legal peril."[104] Following the *Dobbs* decision, OB-GYNs became increasingly more hesitant to take jobs in states with restrictive abortion laws. In a study by AMN Healthcare, one of the largest healthcare staffing services in the United States, 63% of OB-GYNs surveyed said "they would not likely take a position in a restrictive state."[105] Another survey revealed that 60% of third-year and fourth-year medical students reported that they would not apply for residency programs in restrictive states; experts believe this trend can be attributed to concerns that local laws in states with extreme bans would prevent these students from receiving the "fullest possible OB-GYN training."[106] Furthermore, female medical students also worry about their own access to care if they were to match with residency programs in these states. Given that OB-GYN programs attract a largely female applicant pool (86% of fellows and residents in the field identified as female in 2021), the fallout of *Dobbs* has threatened the long-term survival of these programs across restrictive states.[107]

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20 weeks, and the pregnancy was the result of rape or incest; or (3) the medical professional finds that the pregnancy is "medically futile," meaning that the fetus would be incapable of sustained life. *Id.*

98. *See generally* Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67 (Fla. 2024) (upholding the original text of House Bill 5, codified as FLA. STAT. ANN § 390.0111 (West 2023)); *see* H.B. 5, 2022 Fla. Gen. Assemb., Reg. Sess. (Fla. 2022).

99. FLA. STAT. ANN § 390.0111 (West 2023).

100. *Planned Parenthood of Sw. & Cent. Fla.*, 384 So. 3d at 72.

101. Press Release, Congressman Eric Burlison, Congressman Burlison Introduces the Life at Conception Act (Jan. 24, 2025).

102. H.R. 722, 119th Cong. (2025).

103. *Id.* § 3(1).

104. Weiner, *supra* note 20.

105. *Id.*

106. *Id.*

107. *See id.*

On the patient side, women's rights groups documented difficulty in accessing abortion in cases of miscarriage, forced travel across state lines in emergencies, denial of care in cases of ectopic pregnancy, and delayed healthcare, with hospitals waiting to act until the woman's health has deteriorated to a level most certainly to fit within narrow and vague "risk to [the] life of the mother" exceptions.[108] Other reports involved professionals withholding information, fearing that their advice could violate anti-abortion laws.[109] Groups further reported reduced access to non-reproductive healthcare, the infliction of serious psychological harm on women and girls forced to carry an unwanted pregnancy, complications for adolescents forced to give birth, reduced access to contraception and other forms of reproductive healthcare, heightened risk of violence faced by pregnant individuals in abusive relationships, and pregnant individuals forgoing prenatal care to avoid surveillance.[110]

3. Abortion Medication and In-Office Care

In the majority of cases, the safest means for self-managed abortion is through medication.[111] Mifepristone and misoprostol successfully terminate pregnancies in over 95% of cases, while the risk of severe or life-threatening complications fall below 1%.[112] Medication abortion, provided through telemedicine appointments, has been lauded as a game-changing option for patients in states that have restricted access to other abortion methods.[113] However, recent judicial decisions could complicate the legality of interstate distribution and, therefore, threaten the drug's widespread availability.[114]

a. Legal Challenges to the Availability of Abortion Medication

Brought by an alliance of organizations representing anti-abortion activists in the medical field, *FDA v. Alliance for Hippocratic Medicine* challenged the validity of relaxed regulations for mifepristone.[115] In 2021, the Food and Drug Administration relaxed the regulations for mifepristone, allowing patients to access the drug without an in-person visit to a healthcare provider.[116] Prior to the arrival of

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108. *See Human Rights Crisis: Abortion in the United States After* Dobbs, HUM. RTS. WATCH (Apr. 18, 2023, at 00:01 EDT), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/S8H2-BY8B].

109. *See id.*

110. *See id.*

111. *See How to Have a Safe Self-Managed Abortion*, DRS. WITHOUT BORDERS (Nov. 10, 2021), https://www.doctorswithoutborders.org/latest/how-have-safe-self-managed-abortion#:~:text=Abortion%20pills%20successfully%20ends%20pregnancy,at%20home%20without%20any%20problem [https://perma.cc/7W5K-WCPT].

112. *Id.*

113. Abigail R. A. Aiken et al., *Safety and Effectiveness of Self-Managed Medication Abortion Provided Using Online Telemedicine in the United States: A Population Based Study*, LANCET REG'L HEALTH – AMS., June 2022, at 2 (2022).

114. *See* Wasilczuk, *supra* note 59.

115. 602 U.S. 367, 372–73 (2024).

116. *Id.* at 376. Mifepristone, approved by the FDA in 2000, works by blocking production of progesterone early in pregnancies; when used in combination with misoprostol, the drug can safely terminate pregnancies up to ten weeks gestation. *Questions and Answers*

this case at the Supreme Court, the Alliance for Hippocratic Medicine argued that the FDA "overlooked important safety risks in approving mifepristone and amending its restrictions."[117] The Supreme Court granted certiorari to determine whether the Alliance had standing to bring the suit.[118]

The Court held that the Alliance lacked standing as they had not been directly injured by the FDA's regulations—none of the doctors involved in the suit had ever prescribed mifepristone and, therefore, had no personal injury resulting from the FDA's relaxed regulations.[119] However, the Court has left the issue open; plaintiffs may still argue that the regulations were invalidly promulgated, as the case was not decided on the merits of the claims.[120] With mifepristone substantively unprotected by the case outcome, it was only a matter of time before plaintiffs took another shot at the medication.[121]

Notably, Missouri, Idaho, and Kansas have taken the bait, intervening and joining the Alliance in their claims against the FDA.[122] In an amended complaint, the states alleged that the FDA's relaxed regulations for mifepristone have led to an increase in medical complications for patients using the drug, which caused an increase in costs to the states by way of increased use of Medicaid funding, public insurance, and public hospitals.[123] By establishing an alleged injury to the states, the plaintiffs may have another chance to bring mifepristone to the Supreme Court, challenging the FDA's relaxed regulations and potentially restricting the drug's availability for patients across the country.[124]

b. The Importance of Access to In-Office Care

The side effects of abortion medication can, in rare cases, lead to extreme complications and threaten the patient's life if untreated by medical professionals.[125] Thus, the availability of abortion medication still necessitates the corresponding availability of medical professionals who are ready and willing to address possible

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on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, U.S. FOOD & DRUG ADMIN. (Feb. 11, 2025), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation [https://perma.cc/8WSU-BU58].

117. All. for Hippocratic Med. v. U.S. FDA, 78 F.4th 210, 220 (5th Cir. 2023), *rev'd*, FDA v. All. for Hippocratic Med., 602 U.S. 367 (2024).

118. *All. for Hippocratic Med.*, 602 U.S. at 378.

119. *Id.* at 396–97.

120. *See id.*

121. *See generally id.* (deciding the issue solely based on standing, declining to address the substantive issues in the case).

122. *See generally* Intervenor Complaint, Missouri v. U.S. FDA, No. 2:22-cv-00223 (N.D. Tex. Jan. 12, 2024) (pleading the states each have a sufficient injury in fact to establish standing).

123. *Id.* at 68–78.

124. *See All. for Hippocratic Med.*, 602 U.S. at 396.

125. *See How Safe Is the Abortion Pill?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill/how-safe-is-the-abortion-pill [https://perma.cc/WQ4H-UA6T] (last visited Sep. 29, 2025).

complications.[126] In 2024, Amber Thurman experienced rare complications in taking abortion medication at home and sought a dilation and curettage, a "routine procedure" to clear remaining fetal tissue from the uterus commonly used in cases of miscarriage; the procedure is now a felony under Georgia law, subject to few exceptions for life-saving circumstances.[127] Doctors, frozen by the risk of felony charges, watched her septic infection spread.[128] By the time physicians intervened, the infection was life threatening, and the patient ultimately passed away after doctors waited 20 hours to perform life-saving surgery.[129] If doctors have to weigh the legality of medical intervention for these side effects and complications under life-or-death circumstances, complications from self-managed abortion may become increasingly dangerous to patients across the country.[130]

Further, given that the complications from miscarriage mirror the complications from medication abortion, researchers continue to express concern that women experiencing miscarriages may face risks of erroneous prosecution given the widespread availability of abortion medication in a country that increasingly criminalizes self-managed abortion.[131] They argue that the "mere existence of medication abortion" has driven the extension of abortion prosecutions beyond cases of intentional abortion by "providing some legal authorities reason to conduct fishing expeditions to go after not only women who have clearly terminated a pregnancy, but also women whom they suspect have done so."[132]

C. Causes of Menstrual Irregularities Excluding Pregnancies

While a missed period is commonly associated with pregnancy, secondary amenorrhea—the absence of three or more periods in a row by someone who has had periods in the past—results from a multitude of causes.[133] Psychological stress, excessive exercise, and disordered eating account for up to 35% of secondary amenorrhea in premenopausal women.[134] Other causes of amenorrhea include polycystic ovarian syndrome, ovarian failure, uterine scarring, hyperthyroidism or hypothyroidism, pituitary tumors, and the use of prescription drugs, including

126. *See* Kavitha Surana, *Abortion Bans Have Delayed Emergency Medical Care. In Georgia, Experts Say This Mother's Death Was Preventable*, PROPUBLICA (Sep. 16, 2024, at 05:00 ET), https://www.propublica.org/article/georgia-abortion-ban-amber-thurman-death [https://perma.cc/UY57-V7GF].

127. *Id.*

128. *See id.*

129. *Id.*

130. *See generally* Harris & Grossman, *supra* note 63 (detailing the possible health complications that can arise from self-managed abortion).

131. Rowan, *supra* note 58, at 70, 73.

132. *Id.* at 73.

133. *See* Chrisandra L. Shufelt, Tina Torbati & Erika Dutra, *Hypothalamic Amenorrhea and the Long-Term Health Consequences*, 35 SEMIN. REPROD. MED. 256, 256 (2017); *Amenorrhea*, MAYO CLINIC (Feb. 9, 2023), https://www.mayoclinic.org/diseases-conditions/amenorrhea/symptoms-causes/syc-20369299 [https://perma.cc/R2SF-R8HT].

134. *See* Shufelt, Torbati & Dutra, *supra* note 133.

hormonal birth control, antidepressants, and blood pressure medication.[135] Further, young patients are highly likely to experience menstrual irregularity without a singular cause.[136] In the first few years after menstruation begins, "long, irregular cycles" are quite common, with many teens going months between periods in the initial years after puberty.[137] These menstrual irregularities provide yet another open pathway for prosecutors in restrictive jurisdictions to target those who have not broken any law.

II. PROTECTING INDIVIDUAL HEALTH INFORMATION AND DOCTOR–PATIENT CONFIDENTIALITY

With the rise of telemedicine and personal health tracking, many Americans store some amount of personal healthcare information on their personal devices.[138] With this in mind, it is imperative that these methods are met with adequate security in the face of invasive investigations and prosecutions after *Dobbs*.[139] The Health Insurance Portability and Accountability Act ("HIPAA") protects patients' health information in formalized medical settings, preventing disclosure of personal medical information by physicians and other staff in medical settings.[140] But the popularity of personal health tracking applications requires additional protections to secure personal health information stored on alternative platforms.[141]

Proposed legislation like the My Body, My Data Act—while likely well-intentioned—does little to protect patients' health information from interception by law enforcement or government entities, and this lack of protection from law enforcement fuels patient fears and avoidance of official, verified reproductive healthcare information.[142] With mandatory reporting requirements for doctors and no clear rule about when a warrantless search of medical records would be constitutional absent probable cause, patients in restrictive states have no clarity or comfort as to when their medical information could be used against them,[143] regardless of whether they have had an abortion.[144]

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135. *Amenorrhea*, YALE MED., https://www.yalemedicine.org/conditions/amenorrhea [https://perma.cc/KHM8-6829] (last visited Oct. 7, 2025).

136. *See* Liza Torborg, *Mayo Clinic Q and A: Irregular periods can be common at first*, MAYO CLINIC NEWS NETWORK (Dec. 19, 2017), https://newsnetwork.mayoclinic.org/discussion/mayo-clinic-q-and-a-irregular-periods-can-be-common-at-first/ [https://perma.cc/C4SS-RBHH].

137. *Id.*

138. Kate Gambier-Ross, David J. McLernon & Heather M. Morgan, *A Mixed Methods Exploratory Study of Women's Relationships with and Uses of Fertility Tracking Apps*, 4 DIGIT. HEALTH 1, 1–2 (2018).

139. *See infra* Section II.B.

140. *See* Health Insurance Portability and Accountability Act, Pub. L. No. 104–191, 110 Stat. 1936, 1936–2103 (1996) (codified as amended at 42 U.S.C. §§ 1320d–1320d-9).

141. *See infra* Section II.B.

142. *See* Cao et al., *supra* note 9, at 14.

143. *See infra* Sections II.C–E.

144. *See* Quran, Buhre & Nawaz, *supra* note 1.

A. An Overview of HIPAA

HIPAA[145] provides foundational protections for patients' health information by preventing disclosures of health information without patients' consent.[146] The statute contains two central provisions: the Privacy Rule and the Security Rule.[147]

The Privacy Rule defines which organizations are subject to HIPAA disclosure requirements, known as "covered entities," and details the permitted uses of patient health information.[148] Covered entities include healthcare providers, health plans, and healthcare clearinghouses.[149] Business associates are also subject to HIPAA requirements based on their contractual affiliation with covered entities; these include any "person or entity that performs certain functions or activities that involve the use or disclosure of protected health information on behalf of, or provides services to, a covered entity."[150] Such "function[s] or activit[ies]" include "claims processing or administration, data analysis, processing or administration, utilization review, quality assurance, patient safety activities . . . billing, benefit management, practice management, and repricing."[151]

Under the Privacy Rule, covered entities and business associates are permitted to disclose patient data in several situations.[152] First, it allows for disclosure to the individual patient and the parties involved in the patient's healthcare treatments and payments.[153] Second, it allows for disclosure when the patient has had an "opportunity to agree or object to" disclosure of their health information.[154] Third, it enables any disclosures incidental to otherwise permitted uses, as well as disclosures necessary in the course of research, public health, or healthcare operations.[155] Last, it allows for disclosures of patient health information in the public interest under 12 "national priority purposes."[156] These purposes

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145. Health Insurance Portability and Accountability Act, Pub. L. No. 104–191, 110 Stat. 1936, 1936–2103 (1996).

146. *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, U.S. CTR. FOR DISEASE CONTROL & PREVENTION (Sep. 10, 2024), https://www.cdc.gov/phlp/php/resources/health-insurance-portability-and-accountability-act-of-1996-hipaa.html#:~:text=At%20a%20glance,information%20cover%20the%20Privacy%20Rule [https://perma.cc/ML8R-X7QE].

147. *Id.*

148. *Id.*

149. *See id.*

150. *Business Associates*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Apr. 3, 2003), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/business-associates/index.html [https://perma.cc/SR4U-GR9Y].

151. 45 C.F.R. § 160.103(1)(i).

152. *Health Insurance Portability and Accountability Act of 1996 (HIPAA)*, *supra* note 146.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

include disclosures when required by law, when necessary in a judicial or administrative proceeding, and when essential to government functions.[157]

The HIPAA Security Rule specifically addresses security concerns related to electronic protected health information ("e-PHI").[158] Under this rule, covered entities and associates must (1) ensure the "confidentiality, integrity, and availability of all e-PHI"; (2) "[d]etect and safeguard against anticipated threats to the security of the information"; (3) "[p]rotect against anticipated impermissible uses or disclosures that are not allowed by the rule"; and (4) "[c]ertify compliance by their workforce."[159]

B. Menstrual and Fertility Tracking on Personal Devices

HIPAA does not protect information accessed or stored on a personal device.[160] Unless the app or platform is a covered entity or business associate, any health information accessed on a personal phone, computer, or tablet is not subject to HIPAA protections.[161]

The lack of protection, however, has not stopped American users from downloading various applications to track their personal health information.[162] Studies have shown that at least 58% of mobile phone users in the U.S. have downloaded a health information app.[163] Of key concern among such health information apps are menstrual and fertility-tracking apps; over 50 million women worldwide use these applications to track their menstrual cycles.[164] These tracking apps receive no HIPAA protections, as they are not classified as covered entities by the statute.[165] These apps pose a unique danger for users who may have data turned over to law enforcement without protection.[166]

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157. *Id.* Other circumstances for mandatory disclosures include those relevant to public health initiatives; relevant to an investigation for abuse, neglect, or domestic violence; relevant in the oversight and operation of a healthcare facility; necessary for functions concerning deceased persons, such as identification; necessary when handling cadaveric organ, tissue, or eye donation; necessary in medical research; necessary to "prevent or lessen a serious threat to health or safety"; and when necessary to assess claims of workers' compensation. *Id.*

158. *Id.*

159. *Id.*

160. *Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet*, OFF. FOR C.R., U.S. DEP'T OF HEALTH & HUM. SERVS. (June 29, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html [https://perma.cc/7YRD-ECC3].

161. *See id.*

162. *See* Gambier-Ross, McLernon & Morgan, *supra* note 138, at 1.

163. *Id.* at 2.

164. Bridget G. Kelly & Maniza Habib, *Missed Period? The Significance of Period-Tracking Applications in a Post-*Roe *America*, SEX. & REPROD. HEALTH MATTERS, Sep. 2023, at 1.

165. *Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet*, *supra* note 160.

166. *See, e.g.*, Kelly & Habib, *supra* note 164; Madeline Knight, *An Epidemic in Enforceability: A Growing Need for Individual Autonomy in Health Care Data-Privacy Protection in an Era of Digital Tracking*, 25 VAND. J. ENT. & TECH. L. 749, 750–51 (2023);

While awareness of the danger posed by storing menstrual or fertility data in unprotected apps has grown since the *Dobbs* decision,[167] these apps have remained a popular means of tracking individual health information.[168] A study from Duke University and the University of North Carolina at Chapel Hill revealed that, even after *Dobbs*, a significant population is likely still using menstrual tracking software.[169] Users of these apps explain that they use the apps to "(1) be aware of how their body is doing, (2) understand their body's reactions to different phases of their cycle, (3) be prepared, (4) become pregnant, and (5) inform conversations with healthcare providers."[170] One respondent explained that she "previously tracked on her paper calendar, but later switched to apps when trying to get pregnant to get more symptom tracking."[171] Key to their popularity, "[m]ost apps support tracking factors beyond the timing of a woman's menstrual cycle, including information about the period itself (e.g., color, volume), factors predictive of period onset (e.g., cramping, mood), and other health-related factors (e.g., exercise, sleep)."[172] These additional factors help users make note of symptoms that could be relevant to other health conditions, creating a log of information that could be presented to a physician when seeking medical help or diagnosis.[173]

C. Gaps in Proposed Legislation

While members of Congress have introduced bills in response to concerns related to the insecurity of health-tracking apps, these bills have failed to address users' concerns related to law enforcement access to personal health information.[174] The My Body, My Data Act—introduced in 2022 by Representative Sara Jacobs[175] and again in 2023 by Senator Mazie Hirono[176]—aimed to provide federal protection for patient health information on menstrual cycle tracking apps by restricting the use of user information and prohibiting the sale of health information "except as is strictly necessary to provide a product or service."[177] The bill did not, however,

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Allysan Scatterday, *This Is No Ovary-Action: FemTech Apps Need Stronger Regulations to Protect Data and Advance Public Health Goals*, 23 N.C. J.L. & TECH. 636, 644–45 (2022).

167. Gabrielle M. Salvatore, Iris Bercovitz & Danielle Arigo, *Women's Comfort with Mobile Applications for Menstrual Cycle Self-Monitoring Following the Overturning of* Roe v. Wade, 10 MHEALTH 1, 7 (2024) (finding that "about two-thirds of women in [the sample population] indicated reconsideration of [menstrual cycle] tracking app use" after the *Dobbs* decision overturned *Roe v. Wade*, with "more than half of participants in the present sample report[ing] that they were not currently willing to store personal health data using a [menstrual cycle] tracking app").

168. *See* Cao et al., *supra* note 9, at 7–8.

169. *Id.*

170. Daniel A. Epstein et al., *Examining Menstrual Tracking to Inform the Design of Personal Informatics Tools*, *in* CHI '17: PROC. 2017 CHI CONF. ON HUM. FACTORS COMPUT. SYS. 6876, 6879 (2017), https://dl.acm.org/doi/10.1145/3025453.3025635 [https://perma.cc/RD47-643W].

171. *Id.* at 6879 (internal quotation marks omitted).

172. *Id.* at 6880.

173. *See id.* at 6879.

174. Cao et al., *supra* note 9, at 14.

175. My Body, My Data Act of 2022, H.R. 8111, 117th Cong. (2022).

176. My Body, My Data Act of 2023, S. 1656, 118th Cong. (2023).

177. *See* Cao et al., *supra* note 9, at 14.

include any definition for what is "strictly necessary," and law enforcement cooperation could likely be considered a necessary disclosure.[178] In fact, the bill contained no information at all on how companies should interact with law enforcement when user data is requested.[179] The My Body, My Data Act, therefore, entirely fails to address the key issue driving the legislation itself: the potential for law enforcement access to menstrual information in a post-*Roe* climate.[180]

Currently, health information about users stored on personal devices, whether in menstrual cycle tracking apps or through other methods, has no protection.[181] Without a regulatory body overseeing the development and distribution of menstrual and fertility-tracking platforms,[182] and without widespread legislation in place to protect user health data on a broader scale, storing any menstrual health information on a personal device puts users at risk of potential criminal investigation for any suspected or recorded abnormality.[183]

D. The Scope of Doctor–Patient Confidentiality in Criminal Proceedings

The scope of doctor–patient confidentiality varies based on individual state rules of evidence but typically protects confidential communications between a patient and physician made while seeking diagnosis and treatment in civil cases at a minimum.[184] However, many states restrict this privilege in the criminal context.[185] In Texas, the rules of evidence state that "[t]here is no physician–patient privilege in a criminal case."[186] In Louisiana, the privilege is not upheld in criminal cases where the confidential communication "was intended to assist the patient or another person to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud."[187] In Hawaii, communications will not be privileged if a physician's services were sought specifically to enable or aid in a crime or tort.[188]

These restrictions become particularly problematic when they intersect with mandatory reporting requirements, which compel doctors to report criminal activity by their patients.[189] A doctor's failure to comply with mandatory reporting requirements could lead to "civil liability, fines, or other penalties and problems on

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178. *Id.*

179. *Id.*; *see generally* My Body, My Data Act of 2022, H.R. 8111, 117th Cong. (2022) (containing no information about law enforcement interactions); S.1656, 118th Cong. (2023) (revisiting the 2022 proposal but still failing to address law enforcement interactions).

180. *See* Cao et al., *supra* note 9, at 14.

181. *See generally id.* (describing the lack of protections for data shared in cycle-tracking apps).

182. Gambier-Ross, McLernon & Morgan, *supra* note 138, at 2.

183. *See* Cao et al., *supra* note 9, at 15.

184. *See, e.g.*, HAW. REV. STAT. § 626-1, Rule 504(b); MISS. R. EVID. 503.

185. *See* TEX. R. EVID. 509; LA. CODE EVID. ANN. art. 510(C)(2)(b) (2024).

186. TEX. R. EVID. 509(b) (allowing an exception only for examinations related to drug use).

187. LA. CODE EVID. ANN. art. 510(C)(2)(b) (2024).

188. HAW. REV. STAT. § 626-1, Rule 504(d)(5).

189. Joel M. Geiderman & Catherine A. Marco, *Mandatory and Permissive Reporting Laws: Obligations, Challenges, Moral Dilemmas, and Opportunities*, 1 J. AM. COLL. EMERG. PHYSICIANS OPEN 38, 39 (2020).

the part of the physician."[190] Some mandatory reporting laws encompass reportable injuries, often those associated with criminal incidents or dangerous conditions—e.g., gunshot or stab wounds, signs of poisoning or sexual assault, and animal bites.[191] With states criminalizing access to abortions, physicians may be required to report injuries associated with abortions.[192] The District of Columbia and 45 states currently have at least one mandatory reporting requirement related to abortion care, and reporting requirements are often heightened in jurisdictions with restricted abortion access.[193]

E. Medical Searches Under the Fourth Amendment

Although medical professionals may have a duty to report evidence of criminal activity under specified circumstances, this does not exempt the discovery of this evidence from the Fourth Amendment prohibition on unreasonable search and seizure.[194] The Supreme Court has protected patients' health information where such information could be disclosed to law enforcement, requiring informed consent or probable cause in procedures such as drug testing.[195] In *Ferguson v. City of Charleston*, the Supreme Court held that a state hospital could not conduct involuntary drug testing on pregnant women without probable cause or informed consent if the results were provided to law enforcement.[196] The Court in *Ferguson* distinguishes the case at hand from those in which a school or employer conducted drug testing without providing results to law enforcement; the disclosure of the test results to government entities without informed consent or probable cause was a key differentiating factor.[197]

Further, such warrantless searches may not occur for the purpose of detecting criminal activity.[198] While medical professionals may have a duty to provide evidence of criminal activity to law enforcement when such evidence is discovered incidental to and through the course of routine treatment, "when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients*, they have a special obligation to make sure that the patients are fully informed about their constitutional rights."[199]

It remains unsettled whether warrants are required for law enforcement to investigate medical records held by a third party.[200] In *Kerns v. Bader*, the Tenth Circuit refused to provide a conclusive answer to this question, instead relying on

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190. *Id.*
191. *Id.*
192. *See Abortion Reporting Requirements*, GUTTMACHER INST. (Oct. 1, 2025), https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements [https://perma.cc/26TJ-56ZJ].
193. *Id.* The only states lacking any reporting requirements are California, Maryland, Michigan, and New Jersey. *See id.*
194. *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 76, 84–86 (2001); Kerns v. Bader, 663 F.3d 1173, 1184 (10th Cir. 2011).
195. *See Ferguson*, 532 U.S. at 77, 85–86.
196. *Id.* at 77–80.
197. *Id.* at 77–81.
198. *Id.* at 84–85.
199. *Id.*
200. Kerns v. Bader, 663 F.3d 1173, 1184 (10th Cir. 2011).

the finding of probable cause in the case to justify a search.[201] Should the issue be revisited on the merits, the Supreme Court could uphold the validity of warrantless searches for medical records held by third parties, risking major breaches of medical privacy without probable cause for patients across the country.[202]

Even though the Supreme Court has held that highly sensitive information, like cell phone location data from a third party, still requires a warrant, the Court has provided little insight into what other highly sensitive information held by third parties may be subject to the same warrant requirement.[203] The Court in *Carpenter* looked only at the tracking of a suspect's physical location over a months-long period using cell phone location data.[204] The Court held that, given the "seismic shifts" in location technology allowing for essentially unlimited access to all cell phone users' locations without any meaningful consent on the part of the users, obtaining location data from a third party like a cell phone provider constitutes a search of highly sensitive and personal information.[205] In such cases, the Court reasoned, a warrant must be required.[206]

While the Court declined to look at other instances where highly sensitive information may be conveyed by third parties, lower courts have interpreted the case as providing several factors relevant in determining where warrants are necessary when obtaining information from third parties.[207] These factors are the revealing nature of the data collected, the amount of data collected, the automatic nature of data disclosure, the inescapable nature of the technology or surveillance used, the cost of surveillance, and the number of persons surveilled.[208] Matthew Tokson posits that the most influential factors are, first, the revealing nature of the data collected, stating that "[c]ourts almost always found a search after determining that surveilled data was revealing," and second, the amount of data collected, sharing that "the court reached the decision indicated by the amount factor" in 92.2% of cases citing amount as a factor.[209] These two factors have been cited most frequently as the grounds for a particular holding or decision.[210]

Although *Carpenter* only discussed location data, its principles of privacy for sensitive information are highly relevant to the issue of reproductive health data searches.[211] First, the location data addressed in *Carpenter* is directly implicated in cases of reproductive privacy. When a patient seeks healthcare at a facility like Planned Parenthood or other clinics offering abortion services—regardless of

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201. *See id.* at 1190.

202. *See generally id.* (leaving open the issue of whether warrants are required to access medical information held by a third party where law enforcement cannot establish probable cause for a warrantless search).

203. *See, e.g.*, Carpenter v. United States, 585 U.S. 296, 316–20 (2018).

204. *Id.* at 302–03.

205. *Id.* at 313, 316.

206. *Id.* at 320.

207. Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790, 1821–24 (2022).

208. *Id.* at 1823–24.

209. *Id.* at 1823.

210. *See id.*

211. *See Carpenter*, 585 U.S. at 320.

whether the care sought is an abortion, birth control prescription, or gynecological exam—law enforcement should not have unfettered, warrantless access to information about the patient's physical location when they seek out necessary care. Calling such information "deeply revealing," the Court held that location information must be protected with a warrant requirement due to its "depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection."[212] As Chief Justice Roberts stated, "the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection."[213] Patients seeking reproductive healthcare deserve these same protections.

Second, health information demonstrates a similar sensitivity that justifies extending the *Carpenter* treatment to medical data.[214] Just as location information is "deeply revealing," so too is medical information related to patients' pregnancies, miscarriages, and other reproductive health needs.[215] The Supreme Court has held that requests for medical information constitute searches requiring probable cause under the Fourth Amendment.[216] Warrantless requests for medical information from third-party healthcare providers must necessarily implicate the same Fourth Amendment concerns, as the "interests in human dignity and privacy" inherent in medical privacy laws are still present when those records are held by a third party.[217] Because courts have "almost always" found a search where information held by a third party was found to be revealing,[218] and since nothing is arguably more revealing than medical information, personal health records should join this analysis and must only be accessed through an investigative purpose supported by a warrant.

III. DATA SHIELD AND PRIVACY LAWS AS A PROTECTIVE MEASURE IN POST-*DOBBS* PROSECUTIONS

Shield laws have traditionally served to protect the identity of sources who provide information to reporters, "allow[ing] reporters to conceal a source's identity."[219] For example, the Colorado Press Shield Law "provides a qualified privilege for materials and information obtained by a newsperson in the course of newsgathering activities," protecting reporters from being compelled to testify in court about confidential sources.[220] The concept guiding shield laws has been

212. *Id.*
213. *Id.*
214. *See* Tokson, *supra* note 207, at 1801.
215. *See id.*
216. Schmerber v. California, 384 U.S. 757, 767 (1966).
217. *Id.* at 769–70.
218. *See* Tokson, *supra* note 207, at 1823.
219. *Shield Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/shield_laws [https://perma.cc/4H7N-PP6X] (last visited Oct. 11, 2025).
220. David Giles, *Colorado*, REPS. COMM. FOR FREEDOM PRESS, https://www.rcfp.org/privilege-compendium/colorado/ [https://perma.cc/V8P2-Q9PT] (last visited Nov. 16, 2025); C.R.S. § 13-90-119(e)(2) ("Notwithstanding any other provision of law to the contrary and except as provided in subsection (3) of this section, no newsperson shall, without such newsperson's express consent, be compelled to disclose, be examined concerning refusal to disclose, be subjected to any legal presumption of any kind, or be cited, held in contempt, punished, or subjected to any sanction in any judicial proceedings for

adapted to provide a variety of other protections in the judicial process,[221] including in the form of data or privacy shields, which prevent disclosure of user data by businesses collecting consumer information and aim to prevent breaches of consumer privacy.[222]

As a hub for the tech industry, California has acted proactively to protect consumer data, passing extensive shield protections that impose disclosure requirements on any tech companies based within its borders.[223] The California Consumer Privacy Act of 2018 gives people the right to "request a business to disclose the categories and specific pieces of personal information that it collects about the consumer, the categories of sources from which that information is collected, the business purposes for collecting or selling the information, and the categories of third parties with which the information is shared."[224] Under this pre-*Dobbs* law, California-based corporations must comply with such requests and disclose their uses of customer data.[225] Further, users have a right to request deletion of personal data, and corporations must comply with the request.[226] Consumers may also opt out of programs by which their data is sold to third parties; similarly, California corporations must comply with this request.[227] Finally, the bill prohibits selling personal information about consumers under the age of 16.[228]

Medical shield laws have been pitched by experts as the next step in protecting access to reproductive healthcare across state lines.[229] Connecticut passed the first health shield law in May 2022 after the leak of the *Dobbs* decision,[230] with several other Democrat-stronghold states following suit shortly thereafter.[231] Such laws typically prohibit cooperation with out-of-state warrants or subpoenas for

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refusal to disclose any news information received, observed, procured, processed, prepared, written, or edited by a newsperson, while acting in the capacity of a newsperson . . . .").

221. Other forms of shield laws include rape shields, which prevent defendant counsel from using the sexual history of accusers as evidence in trials for sexual assault, and shields for patients and providers of gender-affirming healthcare. *Rape shield law*, BRITANNICA, https://www.britannica.com/topic/rape-shield-law [https://perma.cc/T8LH-9ASF] (last visited Oct. 11, 2025); KAISER FAM. FOUND., *State Shield Laws: Protections for Abortion and Gender-Affirming Care Providers* (July 2025), https://www.kff.org/other/state-indicator/shield-laws/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/FF4Z-MEQL].

222. Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES WIRECUTTER (Sep. 6, 2021), https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/ [https://perma.cc/7VTF-4FSM].

223. *See generally* Assemb. B. 375, 2017–2018 Assemb., Reg. Sess. (Cal. 2018) (establishing a shield law to protect user data stored by companies based within the state).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *See* Dellinger & Pell, *supra* note 22, at 103–07.

230. *See id.* at 103; *see also* H.B. 5414, 2022 Gen. Assemb., Reg. Sess. (Conn. 2022) (establishing a shield system for medical information stored within the state).

231. *See* Dellinger & Pell, *supra* note 22, at 103–04.

information related to protected healthcare activity, including access to emergency contraceptives or abortions.[232]

A. Examples of Existing State Shield Laws for Reproductive Health Privacy

In response to *Dobbs* and a growing number of bills targeting gender-affirming care, a variety of states have adopted shield laws specifically protecting information about patients' health information as a protective measure against out-of-state prosecutions.[233] As of February 2025, eight states have drafted telemedicine shield laws to protect providers from criminal penalties if they provide abortion medication to patients in states with strict abortion bans.[234] These protections have allowed providers to prescribe and send over 10,000 abortion medications per month to patients in states with abortion bans through telehealth services.[235]

1. Washington's Shield Law

Washington's Shield Law aims to protect personal information for patients seeking reproductive and gender-affirming healthcare within the State.[236] The law quashes or denies subpoenas from foreign states requesting documents related to protected healthcare services under the act in statutory or tort actions.[237] Further, the law states that courts will not issue orders to intercept communications in criminal proceedings investigating the provision or receipt of protected healthcare services that are legal in the state of Washington; as such, the issuance of warrants and arrests of persons within the state of Washington related to these charges is prohibited.[238] Finally, the law prohibits the governor from surrendering persons charged with providing or receiving protected healthcare services in the state.[239]

2. California's Data Shield Law

California's data shield law applies to California-based corporations and corporations offering electronic communication services with a principal place of business in the state, prohibiting these companies from "providing records, information, facilities, or assistance in accordance with the terms of a warrant, court order, subpoena, wiretap order, pen register trap and trace order, or other legal

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232. *Id.*

233. *Shield Laws for Reproductive and Gender-Affirming Health Care: A State Law Guide*, UCLA L. CTR. ON REPROD. HEALTH L. & POL'Y (Oct. 2025), https://law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy/shield-laws-reproductive-and-gender-affirming-health-care-state-law-guide [https://perma.cc/AU8S-2A9Y]; *see, e.g.*, H.B. 1469, 68th Leg., Reg. Sess. (Wash. 2023); Assemb. B. 1242, 2021–2022 Assemb., Reg. Sess. (Cal. 2022); N.Y. EXEC. LAW § 837-x (McKinney 2025).

234. Pam Belluck & Emily Cochrane, *New York Doctor Indicted in Louisiana for Sending Abortion Pills There*, N.Y. TIMES (Jan. 31, 2025), https://www.nytimes.com/2025/01/31/health/abortion-louisiana-new-york-prosecution-shield-law.html [https://perma.cc/CZG2-ZTT2].

235. *Id.*

236. H.B. 1469, 68th Leg., Reg. Sess. (Wash. 2023).

237. *Id.*

238. *Id.*

239. *Id.*

process," preventing personal data from being provided for purposes of out-of-state investigations or law enforcement proceedings.[240] The law further prohibits the issuance of warrants or ex parte search orders in cases interfering with privacy rights related to providing, assisting in, or receiving an abortion in the state.[241] The law sets bail at $0 for any individuals arrested in connection with out-of-state abortion proceedings.[242]

3. New York's Shield Act and Legal Battle with Louisiana

New York's Senate Bills S9077A and S1066B protect both patients and providers by preventing State entities from cooperating with out-of-state investigations.[243] The bills, codified as Executive Law 837, prohibit government entities or employees from providing any information to foreign jurisdictions regarding cases of health activity that would be legally protected in New York.[244]

A pending criminal trial, however, could threaten the validity of the New York law, as the State of Louisiana has indicted a New York-based physician for mailing abortion medication to a telemedicine patient in violation of Louisiana's abortion ban.[245] The case demonstrates the first time a state has filed criminal charges against an out-of-state abortion provider.[246] The prescribing physician's actions are currently protected by the New York shield statute, which has prevented the Louisiana courts from prosecuting the physician, as New York officials have refused to comply with requests to extradite him to Louisiana.[247] Given the multi-state implications, the case will likely end up in federal court and potentially in front of the U.S. Supreme Court,[248] a move that could impact the availability of telehealth abortion services and shield protections on a national scale. If the Court overturns the New York law, this could dismantle the framework applied across shield states.[249] Pro-choice legal experts have called the move a scare tactic "designed to frighten other doctors from providing care to women trapped in states where abortion is banned and options are limited."[250]

In response to the indictment, New York Governor Kathy Hochul has passed a law to further protect physicians' privacy.[251] The new law "allows doctors

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239. Assemb. B. 1242, 2021–2022 Assemb., Reg. Sess. (Cal. 2022).

241. *Id.*

242. *Id.*

243. S.B. S9077A, 244th Leg., 2021–2022 Reg. Sess. (N.Y. 2022); S.B. S1066B, 245th Leg., 2023–2024 Reg. Sess. (N.Y. 2023).

244. S.B. S9077A, 244th Leg., 2021–2022 Reg. Sess. (N.Y. 2022); S.B. S1066B, 245th Leg., 2023–2024 Reg. Sess. (N.Y. 2023); N.Y. EXEC. LAW § 837-x (McKinney 2025).

245. Belluck & Cochrane, *supra* note 234.

246. *Id.*

247. Brendan Pierson, *New York Doctor Indicted in Louisiana for Prescribing Abortion Pill Taken by Teen*, REUTERS (Feb. 1, 2025, at 00:03 MST), https://www.reuters.com/legal/new-york-doctor-indicted-louisiana-prescribing-abortion-pill-teen-reports-say-2025-01-31/ [https://perma.cc/XC76-YBHN].

248. Belluck & Cochrane, *supra* note 234.

249. *See id.*; Pierson, *supra* note 247.

250. Pierson, *supra* note 247.

251. S.B. S36A, 246th Leg., 2025–2026 Reg. Sess. (N.Y. 2025); Assemb. B. A2145A, 246th Leg., 2025–2026 Reg. Sess. (N.Y. 2025); Erik Uebelacker, *New York Enacts*

who prescribe abortion pills to request that the dispensing pharmacy print the name of their practice on prescription labels, rather than their personal name."[252] Hochul, who signed the 2023 telehealth shield into effect,[253] hopes that the law will protect physicians in the state from civil or criminal repercussions, allowing New York to remain a "safe haven" for patients seeking reproductive care and doctors providing such care.[254]

B. The Stored Communications Act

The Stored Communications Act ("SCA") aims to protect electronic data from unauthorized access or disclosure.[255] Covering "stored wire and electronic communications," including emails, online messages, voicemails, computer transmissions, and subscriber billing information, names, and IP addresses, "[t]he SCA prohibits providers from sharing electronic communications," governing "records at rest or in electronic storage held by providers."[256]

Subsection 2702(b) of the SCA provides for voluntary and discretionary disclosure of user data by private parties.[257] Subpart (b)(7) of the statute allows for voluntary disclosure of information to a law enforcement agency if the contents "were inadvertently obtained by the service provider" and "appear to pertain to the commission of a crime."[258] Subpart (b)(8) allows for voluntary disclosure "to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency."[259] Neither of these disclosures are mandatory.[260]

Section 2703 of the SCA provides for mandatory disclosure "only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal

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Shield Law for Abortion Pill Prescribers After Louisiana Indictment, COURTHOUSE NEWS SERV. (Feb. 3, 2025), https://www.courthousenews.com/new-york-enacts-shield-law-for-abortion-pill-prescribers-after-louisiana-indictment/#:~:text=Appeals-,New%20York%20enacts%20shield%20law%20for%20abortion%20pill%20prescribers%20after,abortion%20pills%20across%20state%20lines [https://perma.cc/U9Y6-BPKQ].

252. Uebelacker, *supra* note 251.

253. Press Release, Governor Kathy Hochul, Protecting Reproductive Freedom: Governor Hochul Signs Legislation Affirming New York's Status as a Safe Haven for Reproductive Health Care (Feb. 3, 2025), https://www.governor.ny.gov/news/protecting-reproductive-freedom-governor-hochul-signs-legislation-affirming-new-yorks-status#:~:text=In%202023%2C%20Governor%20Hochul%20signed,those%20restrictive%20states%20through%20telehealth [https://perma.cc/8GHA-5RSN].

254. Uebelacker, *supra* note 251.

255. JIMMY BALSER, OVERVIEW OF GOVERNMENTAL ACTION UNDER THE STORED COMMUNICATIONS ACT (SCA) 1 (2022), https://www.congress.gov/crs-product/LSB10801 [https://perma.cc/J4KX-QLDE]; 18 U.S.C. §§ 2702–13.

256. BALSER, *supra* note 255 (internal quotes omitted).

257. 18 U.S.C. § 2702(b).

258. *Id.* § 2702(b)(7).

259. *Id.* § 2702(b)(8).

260. *See generally id.* § 2702(b) (categorizing the listed disclosures as voluntary, not mandatory).

Procedure" or the relevant local rules in the state court of jurisdiction.[261] Therefore, without a warrant supported by probable cause, private entities cannot be required to disclose consumer information to government entities.[262]

C. Gaps in Company-Side Shields and State Law Application

While shield laws, HIPAA, and the SCA all prevent providers and data collectors from being compelled to provide stored data to foreign state jurisdictions, they do little to protect patients facing prosecution who may have health information stored on personal devices.[263] Whether this information is stored in menstrual tracking apps[264] or shared inadvertently through personal messaging services,[265] personal health information can be easily intercepted by law enforcement to aid prosecutions, even where no abortion has occurred.[266] Access to menstrual data and information about patients' pregnancies, especially in states with whistleblower statutes, could be used to target patients without adequate reasonable suspicion or probable cause, posing an invasive threat to individual privacy and subjecting patients to potentially traumatizing investigations and prosecutions.[267]

State-by-state protections on the company side fail to aid users being targeted for prosecution in restrictive jurisdictions, as they can only bind companies based within their borders and do nothing to aid the users who may live in alternate jurisdictions.[268] Further, with New York's shield law directly at issue in pending criminal trials,[269] federal courts could strike down states' abilities to draft shield protections and require state compliance with foreign subpoenas and warrants.

IV. PROPOSAL: A USER-SIDE MEDICAL INFORMATION PRIVACY LAW AND WARRANT REQUIREMENT

Protecting patient health information in the age of telemedicine will require a two-pronged approach, adapting federal law to allow for enhanced data protections across jurisdictions while simultaneously enforcing a warrant requirement for the highly sensitive information implicated in reproductive care.

First, borrowing from the existing state shield frameworks,[270] a federal shield law should be applied to reinforce states' control over healthcare access

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261. *Id.* § 2703(a).

262. *See id.*

263. *See, e.g.*, *Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet*, *supra* note 160; *see supra* Section III.A; *see supra* Section III.B.

264. *See generally* Scatterday, *supra* note 166 (describing the risks of storing personal health information in menstrual tracking apps).

265. *See* Sanderford, *supra* note 3.

266. *See* Cao et al., *supra* note 9, at 15 (detailing the lack of protections for health information stored in private party applications).

267. *See generally* Bowman, *supra* note 2 (describing the prosecutions conducted after the Texas whistleblower system was established).

268. *See generally* Scatterday, *supra* note 166 (describing the risks of law enforcement access to menstrual health information after *Dobbs*).

269. *See* Belluck & Cochrane, *supra* note 234; Pierson, *supra* note 247.

270. *See* Dellinger & Pell, *supra* note 22, at 103–04.

within their individual borders. Obtaining healthcare that is lawful within one state's jurisdiction should not amount to a crime within the borders of another.[271] On a national scale, such a law would unify the existing data law frameworks, allowing states to prevent compliance with out-of-state investigations related to lawful personal healthcare access within state borders. By prohibiting assistance or compliance with out-of-state subpoenas and warrants, medical data shield laws are best suited to address the current patient-privacy issues related to both HIPAA-compliant and private, user-driven services.[272] A functional data shield statute should take a two-step approach to protecting personal health information. To start, the law must require companies with access to personal health information to obtain informed consent to possible disclosures of health data;[273] further, the law must plainly prevent restrictive states from investigating healthcare services that are legal within the shielded state's borders.

Second, the warrant requirement in *Carpenter*[274] should be adapted to protect medical information held by third parties. Applying *Carpenter* as written would prevent law enforcement from using third parties like cell service providers to track patients' location data at reproductive care clinics without a warrant;[275] in addition to location data, this warrant requirement should also extend to third-party access to health information. Just as location data is "deeply revealing," so is medical data.[276]

Informed consent must be a priority in the development of medical protections. Expanding the *Ferguson*[277] requirement for informed consent to data companies could aid in addressing user-side privacy concerns. Such informed consent must come from a place of true understanding, not merely allowing users to scroll to the bottom of a terms and conditions contract without reading the details. Like in California's Consumer Privacy Act,[278] companies in possession of personal health information must be required to meaningfully inform users of any potential distribution of personal data and allow users to request that their information be deleted.

This would not broadly halt access to medical records in criminal cases; where needed to investigate criminal behavior, the shield could still permit access to medical information upon issuance of a warrant supported by probable cause.[279] A warrant requirement like that established in *Carpenter* would apply a necessary limiting principle, ensuring that states are not unduly hindered in criminal

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271. *See supra* Section III.A.

272. *See* Dellinger & Pell, *supra* note 22, at 103–06.

273. *See generally* Assemb. B. 375, 2017–2018 Assemb., Reg. Sess. (Cal. 2018) (requiring tech companies to obtain informed consent from consumers before user information is disclosed to third parties).

274. Carpenter v. United States, 585 U.S. 296, 320 (2018).

275. *See id.*

276. *Id.*

277. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

278. Assemb. B. 375, 2017–2018 Assemb., Reg. Sess. (Cal. 2018).

279. *See Carpenter*, 585 U.S. at 320; Kerns v. Bader, 663 F.3d 1173, 1184–85 (10th Cir. 2011).

investigations while allowing for adequate protection of potential defendants' Fourth Amendment rights.[280]

It is well established in criminal law that personal devices and medical information can contain an excessive amount of revealing, private information about a suspect and that the search of such contents cannot occur without probable cause.[281] The same principle should apply in investigations related to personal health activity, whether in cases related to reproductive health, gender-affirming care, or another variety of personal health decisions that may be criminalized on a state-by-state basis. Just as anonymous tips alone are insufficient to establish probable cause,[282] whistleblower reporting alone, without any evidence of the whistleblower's veracity or reliability, cannot provide substantial evidence to demonstrate probable cause. To conduct a search of personal health information, investigators should be required to showcase concrete and particularized evidence of a crime to support a finding of probable cause allowing for a warrant.[283]

A federal statute requiring company disclosures for the use or distribution of personal health information and prohibiting government or law enforcement access to such personal health information without a warrant supported by probable cause will help protect doctors, patients, and data companies from criminal and civil liability.

CONCLUSION

In light of rapid shifts in the legal landscape of reproductive healthcare, patients' medical data must be given heightened protection. Data shield laws adopted in the wake of *Dobbs* have provided a foundational step in protecting consumer data that could be used as evidence in criminal abortion proceedings, but additional protections are necessary to close the user-side gaps in legislation and ensure that law enforcement investigations remain within the bounds of the Fourth Amendment. Patients should not risk jail time for involuntary bodily functions, and doctors should not risk loss of licensure or imprisonment for saving the lives of patients. Protecting medical data in the wake of *Dobbs* could save the lives of millions of patients in the United States by encouraging these patients to access legitimate medical treatment without fear of prosecution.

First, nationalizing the data shield framework in tandem with expanding *Carpenter* to require a warrant for third-party searches of medical information would best address patients' healthcare privacy concerns after *Dobbs*. A national shield system would protect state autonomy over healthcare services while allowing

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280. *See Carpenter*, 585 U.S. at 320.

281. Riley v. California, 573 U.S. 373, 403 (2014) (holding that a search of a cell phone without a warrant supported by probable cause violated a defendant's Fourth Amendment rights); *see also* Schmerber v. California, 384 U.S. 757, 768 (1966) (holding that an involuntary blood draw did not violate a defendant's Fourth Amendment rights where an officer had probable cause to believe that the defendant was intoxicated and that collecting blood evidence was reasonable under the circumstances).

282. Florida v. J.L., 529 U.S. 266, 274 (2000) (holding that an anonymous tip lacking indicia of reliability, without more, did not supply probable cause to search a defendant without a warrant).

283. *See supra* Section III.C.

doctors to operate in protective jurisdictions without fear of criminal punishment out-of-state and shielding patients from prosecution for obtaining healthcare that is legal in the protective state. Second, a warrant requirement would bolster these protections in both protective and restrictive states by requiring law enforcement interventions in reproductive healthcare to be supported by probable cause beyond mere whistleblowing or anonymous reporting. This two-pronged approach is best suited to protect highly sensitive medical information in the wake of *Dobbs*, reinforcing the strength of the Fourth Amendment and protecting individual privacy interests in reproductive healthcare.