

# HIPAA v. DOBBS

Wendy A. Bach<sup>†</sup> & Nicolas Terry<sup>††</sup>

## ABSTRACT

Following the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health*, the Biden administration issued guidance seeking to reassure doctors and patients that the federal HIPAA Privacy Rule would allow women to feel confident that they could still seek reproductive healthcare without worrying that the information in their medical records would end up in the hands of police. This Article disagrees with the administration’s assessment and emphasizes how, rather than revealing the strength of healthcare privacy protections in U.S. law, *Dobbs* and the Biden administration’s highlighting of limited HIPAA protections and seriously inadequate protection of mobile app data draw crucial attention to what has always been a relatively weak set of privacy models. Tragically, and long before *Dobbs*, this weakness has facilitated thousands of prosecutions related to reproductive conduct. After *Dobbs* this will likely only escalate. The Article describes the United States’ long history of criminalizing reproductive conduct, describe the nature of the likely escalation of these harms and the informational privacy harms at stake after the *Dobbs* ruling, and inquire into whether HIPAA or other federal laws can be expanded to better protect reproductive information. The Article concludes by acknowledging the uncertainties and harms that lie ahead and the urgent need for federal corrective action. It is our hope that in the aftermath of *Dobbs* there might be sufficient political will to revisit informational and healthcare privacy, and to build far more robust barriers to the use of healthcare data to reduce the criminalization of women and support their reproductive choices.

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† Professor of Law, University of Tennessee College of Law. [wbach@utk.edu](mailto:wbach@utk.edu).

†† Hall Render Professor of Law, Executive Director, Hall Center for Law and Health, Indiana University Robert H. McKinney School of Law. [npterry@iu.edu](mailto:npterry@iu.edu).

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## I. INTRODUCTION

Just days after the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,<sup>1</sup> the Biden administration issued guidance<sup>2</sup> seeking to reassure doctors and patients that the Health Privacy Rule, often simply referred to as HIPAA,<sup>3</sup> would allow women to feel confident that they could still seek reproductive healthcare without worrying that the information in their medical records would end up in the hands of law enforcement. The contents of our medical records and the conversations patients have with their doctors, the administration seemed to be saying, would remain protected.

*Dobbs* draws attention to the serious health privacy gaps in U.S. law. Justifiably, patients in traditional care settings, those who manage their own health using technology such as apps, or persons just using web services to become better informed about health issues and resources, may be surprised to learn of HIPAA’s deficiencies. After all, for the past two decades, every American’s initial engagement with a healthcare provider has included the receipt of a strongly worded “Notice of privacy practices for protected health

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1. 142 S. Ct. 2228 (2022).

2. U.S. Dep’t Health & Human Servs., Guidance on HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html> (last reviewed June 29, 2022).

3. 45 C.F.R. §§ 160–164 (2013).

information” that addresses the uses and disclosures that may be made by the covered entity, the patient’s rights, and the covered entity’s legal duties.<sup>4</sup>

Even as the earliest ripples from *Dobbs* spread, however, it became clear that the decision not only would exacerbate the criminalization of poverty and reproductive conduct but also jeopardize the confidentiality of the physician-patient relationship and, particularly, of reproductive health privacy. In short, the Biden administration’s guidance was not reassuring. This Article emphasizes how, rather than revealing the strength of healthcare privacy protections in U.S. law, the Biden administration’s highlighting of HIPAA protections and protection of mobile app data draws crucial attention, alongside *Dobbs*, to what has always been a relatively weak set of privacy models.

Tragically, and long before *Dobbs*, this weakness has facilitated thousands of prosecutions related to reproductive conduct. After *Dobbs*, this will likely only escalate. Although the primary purpose of this Article is to highlight the grave informational privacy issues that *Dobbs* has revealed, it argues that in the aftermath of *Dobbs*, there might be sufficient political will to revisit informational and healthcare privacy, and to build far more robust barriers to the use of healthcare data to reduce the criminalization of women and their reproductive choices.

To make this point and sketch out this possibility, this Article proceeds in five Parts after this Introduction (Part I). Part II starts with the United States’ long history of criminalizing reproductive conduct and describes the nature of the likely escalation of these harms. Part III turns directly to privacy and catalogs the privacy harms at stake after the *Dobbs* ruling and the passage of state legislation antithetical to reproductive freedoms. Part IV examines HIPAA itself by drawing a sharp contrast between what people assume it does and its far less protective reality, especially in the context of post-*Dobbs* criminalization. Part V briefly surveys some of the federal and state guidances, statutes, and executive orders designed to lessen the impact of *Dobbs*. Part VI asks whether HIPAA or other federal laws can be expanded to better protect reproductive information and discusses the potential passage of the bipartisan and bicameral American Data Privacy and Protection Act. The Article concludes by acknowledging the uncertainties and harms that lie ahead and the urgent need for federal corrective action.

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4. *Id.* § 164.520 (2013).

## II. THE SPECTER AND THE REALITY OF CRIMINALIZATION POST-*DOBBS*

Post-*Dobbs*, the reality of criminalization of reproductive conduct has become brutally clear. The news is filled with accounts of doctors fearing prosecution,<sup>5</sup> patients being denied essential care,<sup>6</sup> and the prospect and reality of prosecutors seeking information from people's Facebook accounts<sup>7</sup> and period trackers.<sup>8</sup> Those who can become pregnant are being counseled to use encrypted apps<sup>9</sup> and to delete search histories, all in the name of keeping their private conduct away from the prying eyes of police. The prospect that a wide range of actors—doctors, nurses, counselors, parents, friends, and even pregnant people—will be prosecuted for conduct related to reproductive healthcare is all too real.<sup>10</sup> But while the possibility of many abortion-related prosecutions is certainly evident, neither prosecutions related to reproductive conduct nor the use of presumptively private healthcare information to support prosecutions is new. In fact, both have been happening for decades.

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5. See, e.g., Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), <https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients>; Ariana Eunjung Cha, *Physicians Face Confusion and Fear in Post-Roe World*, WASH. POST (June 28, 2022), <https://www.washingtonpost.com/health/2022/06/28/abortion-ban-roe-doctors-confusion/>.

6. See, e.g., Carrie Feibel, *Because of Texas' Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022), <https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare>; Laura Kusisto, *Doctors Struggle with Navigating Abortion Bans in Medical Emergencies*, WALL ST. J. (Oct. 13, 2022), <https://www.wsj.com/articles/doctors-struggle-with-navigating-abortion-bans-in-medical-emergencies-11665684225>.

7. Jason Koebler & Anna Merlan, *This Is the Data Facebook Gave Police to Prosecute a Teenager for Abortion*, MOTHERBOARD (Aug. 9, 2022), <https://www.vice.com/en/article/n7zevd/this-is-the-data-facebook-gave-police-to-prosecute-a-teenager-for-abortion>.

8. Michela Moscufo, MaryAlice Parks & Jeca Taudte, *Period-tracking Apps May Help Prosecute Users, Advocates Fear*, ABC NEWS (July 1, 2022), <https://abcnews.go.com/Health/abortion-advocates-fear-period-tracking-apps-prosecute-abortion/story?id=85925714>.

9. Geoffrey A. Fowler & Tatum Hunter, *For People Seeking Abortions, Digital Privacy is Suddenly Critical*, WASH. POST (June 24, 2022), <https://www.washingtonpost.com/technology/2022/05/04/abortion-digital-privacy/>.

10. For example, the Indiana doctor who performed a then lawful abortion on a 10-year-old rape victim from Ohio is being actively investigated by the Indiana Attorney-General. See Megan Messerly, *Doctor Who Performed Abortion for 10-year-old Sues Indiana AG, Alleges 'Fishing Expedition'*, POLITICO (Nov. 3, 2022), <https://www.politico.com/news/2022/11/03/doctor-who-performed-abortion-for-10-year-old-sues-indiana-ag-over-fishing-expedition-00065001>. In South Carolina a woman has been arrested for an attempt to end her pregnancy with abortion pills that occurred prior to the reversal of *Roe*. Poppy Noor, *South Carolina Woman Arrested for Allegedly Using Pills to End Pregnancy*, GUARDIAN (Mar. 3, 2023), <https://www.theguardian.com/us-news/2023/mar/03/south-carolina-woman-arrested-abortion-pills>; see also *infra* notes 29–30 and accompanying text.

Historically, pregnant people and people who have given birth have been prosecuted for a wide variety of crimes from the most serious, including murder, to a wide range of lower-level felonies and misdemeanors. Prosecutions have involved a wide range of allegations. Although these prosecutions are notoriously difficult to count, various advocates and academics have documented at least 1,700 forced interventions, through either criminal prosecution or civil commitment, between 1973 and 2020.<sup>11</sup> While the vast majority of these cases involved charges arising from allegations that a fetus was harmed by the person's drug use during pregnancy, allegations have also targeted other conduct, including fighting, failing to wear a seatbelt,<sup>12</sup> attempting suicide, and mishandling fetal remains.

Although these criminal cases cover a vast range of alleged conduct, to get a sense of the breadth, it makes sense to look at three categories of crimes that are charged against pregnant people. The first category involves circumstances in which the state alleges that the pregnant person attempted a self-managed abortion; the second and sometimes overlapping category involves miscarriages; the third involves live births.

First, individuals have been prosecuted when the state believed that they had attempted to induce their own abortion. If/When/How, an advocacy group that, for many years, has documented the criminalization of abortion, released a report in August 2022 documenting sixty-one cases between 2000 and 2020 of individuals who were criminally investigated or arrested for ending their own pregnancies or helping someone else do so.<sup>13</sup>

Second, in the last several years, journalists, academics, and policy advocates have highlighted several prosecutions across the country that arose out of a miscarriage and/or stillbirth. Women have been charged with murder, feticide, and manslaughter. To take just a few examples, in 2018 prosecutors in Indiana brought charges against Kelli Leever-Driskel for feticide and involuntary manslaughter, alleging that Ms. Driskel's drug use during

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11. *Arrests and Prosecutions of Pregnant Women, 1973–2020*, NAT'L ADVOC. FOR PREGNANT WOMEN (2021), <https://www.nationaladvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020/>.

12. Ed. Bd., *When Prosecutors Jail a Mother for Miscarriage*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html>.

13. LAURA HUSS, FARAH DIAZ-TELLO & GOLEEN SAMARI, SELF-CARE CRIMINALIZED, AUGUST 2022 PRELIMINARY FINDINGS 2, IF/WHEN/HOW (Aug. 2022), [https://www.ifwhenhow.org/wp-content/uploads/2023/06/22\\_08\\_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief\\_FINAL.pdf](https://www.ifwhenhow.org/wp-content/uploads/2023/06/22_08_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief_FINAL.pdf).

pregnancy caused her miscarriage.<sup>14</sup> Similarly, in 2013, a court in Indiana sentenced Purvi Patel to twenty years in prison for feticide and felony child neglect.<sup>15</sup> The prosecution in that case alleged that Ms. Patel induced her own abortion with the use of medication.<sup>16</sup> In 2010, Bei Bei Shuai was charged with murdering her fetus.<sup>17</sup> She originally faced the possibility of twenty-five years to life in prison, but, after public outcry, she was offered and accepted a plea to criminal recklessness and was sentenced to 178 days in jail.<sup>18</sup> Women who miscarried have also been charged with a variety of crimes concerning how they handled the fetal remains.<sup>19</sup>

Finally, although the charges involving self-managed abortion, miscarriage, and/or stillbirth have been some of the most notorious—and in terms of extent of punishment, the most serious—far more frequent are prosecutions of new parents in cases in which their infants survived but the state alleged that they were harmed because of the pregnant person's conduct. For example, between 2014 and 2016, the State of Tennessee prosecuted at least 120 women for the crime of fetal assault, which the state at the time defined as in-utero transmission of narcotics resulting in harm.<sup>20</sup> Similarly, in Alabama, the state charged at least 479 women with chemical endangerment of a fetus,<sup>21</sup> and prosecutors in South Carolina charged at least 182 women with a variety of crimes based on conduct during pregnancy.<sup>22</sup> Every case involved an allegation of drug use.

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14. TheIndyChannel.com Staff, *Woman Charged with Baby's Death After Police Say She Admitted to Drug Use During Pregnancy*, WRTV INDIANAPOLIS (Feb. 15, 2018), <https://www.wrtv.com/news/local-news/madison-county/woman-charged-with-babys-death-after-police-say-she-admitted-to-drug-use-during-pregnancy>.

15. 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>.

16. *Id.*

17. Diana Penner, *Woman Freed After Plea Agreement in Baby's Death*, USA TODAY (Aug. 2, 2013), [www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/](http://www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/).

18. *Id.*

19. See Ed. Bd., *How My Stillbirth Became a Crime*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html>; Ed. Bd., *When Prosecutors Jail a Mother for Miscarriage*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html>.

20. WENDY A. BACH, PROSECUTING POVERTY, CRIMINALIZING CARE 189 (2022).

21. Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PRO PUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>.

22. See Grace Elizabeth Howard, *The Criminalization of Pregnancy: Rights, Discretion, and the Law* 62 (Oct. 2017) (unpublished Ph.D. dissertation, Rutgers University) (on file with authors).

Criminalization, when broadly defined to include other forced interventions by the state in pregnancy, does not stop with prosecutions. States also frequently turn to civil commitment to control the movements and conduct of pregnant people. For example, in three states (Minnesota, Wisconsin and South Dakota) substance use during pregnancy is a ground for civil commitment.<sup>23</sup> Similarly, child welfare systems (which are more aptly termed family regulation<sup>24</sup> or family policing<sup>25</sup> systems) regularly intervene in families based on the conduct of pregnant people. While there are scattered cases involving other allegations,<sup>26</sup> most of these cases involve allegations of fetal harm based on the conduct of the pregnant person during pregnancy. The latter cases generally involve allegations of substance misuse. With one notable statutory exception,<sup>27</sup> these cases are generally initiated at or shortly after birth. The child welfare agency typically alleges that the newborn child is dependent or neglected because of the pregnant person's drug use during pregnancy and takes temporary custody of the infant. Currently, twenty-four states and the District of Columbia consider substance exposure to be abuse or neglect,<sup>28</sup> laying a sufficient basis to terminate parental rights. Finally, it is important to understand that while the laws underlying these prosecutions and forced intervention are neutral on their face, the actual cases have targeted—disproportionately—low-income women and women of color.<sup>29</sup>

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23. *Substance Use During Pregnancy*, GUTTMACHER INST. (Feb. 1, 2023), <https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy>.

24. Nancy D. Polikoff & Jane M. Spinak, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 431 (2021).

25. Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 462–63 (2021).

26. See, e.g., *Jefferson v. Griffin Spalding Cnty. Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981) (where mother, in her 39<sup>th</sup> week of pregnancy, had a complete placenta previa, making it, in her doctor's opinion, 99% likely that child would not survive vaginal delivery, and mother's chances of surviving were less than 50%, where doctor opined that both would have almost 100% chance of living if woman were to undergo cesarean delivery, but mother refused, on basis of religious beliefs, and also refused any blood transfusion; court ordered the surgery and placed fetus in temporary custody of Georgia Department of Human Resources).

27. See TEX. FAM. CODE ANN. § 161.102 (permitting the filing of a petition for termination of parental rights on behalf of an unborn child). *But see* TEX. DEP'T OF FAM. & PROTECTIVE SERVS., STATEWIDE INTAKE POL'Y & PROC. 4510 (2020), [https://www.dfps.state.tx.us/handbooks/SWI\\_Procedures/Files/SWP\\_pg\\_4000.asp#SWP\\_4510](https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4510).

28. GUTTMACHER INST., *supra* note 23.

29. See Huss et al., *supra* note 13, at 2 (among those investigated or prosecuted for conduct concerning self-managed abortion “people of color are disproportionately represented; [and] . . . the majority of adult cases . . . involved people living in poverty.”); BACH, *supra* note 20, at 86 (noting that the majority of prosecutions for fetal assault in Tennessee involved low income women.); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal*

Post-*Dobbs* we are likely to see not only an escalation of these types of prosecutions but also prosecutions of a wider range of actors and conduct. First, it is entirely possible that healthcare professionals will be prosecuted for performing abortion. In Alabama, for example, the Alabama Human Life Protection Act bans abortion except to save a woman's life or to prevent a serious health risk.<sup>30</sup> Performing an abortion in violation of this statute is a Class A felony with a possible sentence of ten to ninety-nine years in prison. States across the country have similar statutes. The Indiana attorney-general's pursuit of a board-certified obstetrician-gynecologist who performed a legal abortion on a ten-year-old rape victim has garnered national attention.<sup>31</sup> Also subject to potential prosecution are other individuals who assist pregnant people to travel to states where abortion is legal, individuals who assist women in obtaining abortion-inducing medication, and anyone who can be charged with other crimes associated with the unlawful disposal of fetal remains. Finally, we are likely to see additional prosecutions in the context of miscarriage and stillbirth. Those prosecutions could not only target the patient but could also target anyone who assisted the pregnant person in any alleged attempt to terminate the pregnancy. In addition to prosecutions, many states already classify fetal harm as a form of child abuse, which already does and could heighten the vulnerability of pregnant people.

While the constitutionality and legality of this anticipated flood of prosecutions will be litigated in the coming years,<sup>32</sup> there is no doubt that many of these cases will rely on a combination of two basic kinds of healthcare related data. First, they will rely on data contained in medical records—data that is often, but not always, classified as protected health information under HIPAA. A wide variety of presumptively confidential protected health information—including testing results, diagnostic notes, the contents of statements by the patient to medical personnel, and the results of medical testing—could be evidence of these crimes. Second, a wide variety of personal information on computers, cell phones, and other devices will also be relevant to these cases and sought by prosecutors and police. Considering this, to the

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*Status and Public Health*, 38 J. OF HEALTH POL., POL'Y & L. 299, 310 (2013) (noting that between 1973 and 2005, prosecutions and forced interventions targeted disproportionately poor women, the vast majority of whom were African American).

30. ALA. CODE § 26-23H-4 (2019).

31. Tom Davies, *Indiana AG Seeks Punishment for Doctor Who Provided Abortion to 10-year-old Rape Survivor*, PBS (Nov. 30, 2022), <https://www.pbs.org/newshour/health/indiana-ag-seeks-punishment-for-doctor-who-provided-abortion-to-10-year-old-rape-survivor>.

32. David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 22–42 (2023).



extent one believes that healthcare records should be private, ensuring that we have sufficient protections in place is crucial.

### III. POST-*DOBBS* HEALTH PRIVACY HARMS

The *Dobbs* dissenters were under no illusion as to the harms that would follow the decision:

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.<sup>33</sup>

In a relatively short period of time since the decision in *Dobbs* (or the leak of its draft), several of the informational privacy implications of state laws unleashed by *Dobbs* have surfaced together with deep concerns over what privacy issues may arise in the future. It is quite clear that state total or near-total bans are only the first step in the upheaval of the *Roe* world. Until they realize a federal legislative ban, antiabortion activists, legislators, and prosecutors will concentrate on shutting down the supply of out-of-state abortion medications and the travel of their domiciliaries for out-of-state abortion services. Advocates are already promoting dramatically expanded prohibitions and enforcement.<sup>34</sup> As David Cohen, Greer Donley, and Rachel Rebouché have argued, "Antiabortion states and cities will not wait for the U.S. Supreme Court to give them permission to apply their laws extraterritorially."<sup>35</sup> The gasoline that will fuel these prosecutions is medical information and informational privacy increasingly will be viewed as necessary collateral damage.

The Biden Administration swiftly issued sub-regulatory guidance on HIPAA protections of healthcare reproductive information<sup>36</sup> and protecting

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33. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2318 (2022) (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

34. *See, e.g.*, Letter from James Bopp, Jr., NRLC General Counsel, Courtney Turner Milbank & Joseph D. Maughon to Nat'l Right to Life Comm. and Whom it May Concern (June 15, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf>.

35. Cohen et al., *supra* note 32, at 30.

36. HIPAA Privacy Rule and Disclosures, *supra* note 2.

non-HIPAA information residing on personal devices such as phones.<sup>37</sup> The former stressed the responsibilities of healthcare providers but noted the broad exceptions that apply in the case of law enforcement. The latter admitted the long-known deficiencies in our broader protection of health data. Neither was particularly reassuring. Part IV examines in detail defects in the HIPAA informational privacy model and contrasts the popular conception of the extent to which health privacy is safeguarded and its far less protective reality.

To better understand these harms, this Article works from an established taxonomy. Daniel Solove identified “four basic groups of harmful activities” that affect informational privacy: “(1) information collection, (2) information processing, (3) information dissemination, and (4) invasion,”<sup>38</sup> all of which seem implicated by trigger or post-*Dobbs* abortion laws.<sup>39</sup> Specifically in this context, “collection” refers to the collection of personal health information by HIPAA-covered entities (and their typical storage in electronic health records systems) or other sensitive data collected by mobile devices and apps or search engines. “Processing” refers to the aggregation of health information, medically-inflected data, and other data to create profiles of categories or of individual persons. “Dissemination” is the disclosure of HIPAA-protected personal health information because of the myriad of HIPAA exceptions or the sale or disclosure of non-HIPAA protected health information (PHI) such as by data aggregators. “Invasion” refers to the tools of modern healthcare, from electronic health records (EHR) to on-device health data being repurposed by states or their agents as tools of surveillance.

Importantly—as should become clear—in the context of health information, it is helpful to separate that information into the two basic categories identified above: (1) information that is at least presumptively protected by HIPAA or other health privacy laws, and (2) information that falls outside the scope of those protections.

#### A. COLLECTION

Not surprisingly, collection of personal health information has been an immediate concern for women of reproductive age in states with highly

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37. *Guidance on Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet*, U.S. DEP'T HEALTH & HUMAN SERVS. (June 29, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html>.

38. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 489 (2006).

39. Abortion “trigger” laws were restrictive abortion laws passed by some states that were automatically “triggered” if *Roe* was reversed. See Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned>.

restricted abortion laws.<sup>40</sup> This anxiety focuses both on information categorized as protected health information (PHI) under HIPAA and information outside of those protections.

In the category of PHI, it is quite clear that medical records will contain a plethora of information that is potentially relevant to pregnancy related prosecutions. To take just one relatively recent example, in a recently completed study on the prosecution of about 120 women for the “crime” of fetal assault in Tennessee,<sup>41</sup> the research team gathered the complete criminal court files for sixty-three of the defendants. Fifty-seven of those files contained detailed information clearly obtained through medical testing or in conversations between the defendant and medical personnel. This included a wide range of information—from test results, to diagnosis, to statements by the women to nurses and doctors. An additional three case files contained allegations concerning medical facts, but there was no clear indication of the source of that information. Only three charging documents contained information solely based on nonmedical sources, such as an admission by the defendant to the Department of Children’s Services DCS or investigative personnel.

Similarly, in *Policing the Womb*, Professor Michele Goodwin carefully documented the ways in which, in cases she terms the “criminalization of motherhood,” medical providers have played a significant role in both policing the conduct of their pregnant patients and conveying information to police and other government officials.<sup>42</sup>

It seems clear that a direct prosecution against a medical provider for performing what the state alleges was an unlawful abortion will similarly rely heavily on information in those records. Prosecutors will mine health records to investigate whether life-saving abortions were truly necessary and to flag doctors who performed abortions at a higher rate.<sup>43</sup> Beyond this, in cases involving miscarriage in which there is suspicion of a self-managed abortion, medical records may contain relevant statements as well as other evidence. In fact, some reports have suggested that most of these potential prosecutions

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40. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Feb. 10, 2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

41. BACH, *supra* note 20, at 130.

42. MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 78–97 (2020).

43. See Kavitha Surana, “We Need to Defend This Law”: Inside an Anti-Abortion Meeting with Tennessee’s GOP Lawmakers, PRO PUBLICA (Nov. 15, 2022), <https://www.propublica.org/article/inside-anti-abortion-meeting-with-tennessee-republican-lawmakers>.

will follow the script laid down in the past and rely on PHI to prove their cases.<sup>44</sup>

Outside of PHI, significant concerns have been raised about data surveillance.<sup>45</sup> One of the first types of technology identified as problematic were fertility and period tracking apps.<sup>46</sup> These apps used by an estimated 50 million women worldwide<sup>47</sup> could reveal the date of last menstruation to a subpoena-wielding prosecutor. This class of apps already has a somewhat checkered past regarding protecting user privacy.<sup>48</sup> While some are more respectful of their users, even avoiding apps that use cloud storage may not be enough. Apps such as Planned Parenthood’s “Spot On”<sup>49</sup> may save all data locally, but that will not protect the data if a prosecutor acquires the user’s phone.<sup>50</sup> In the wake of *Dobbs*, Google announced that it will make it easier for Google Fit and Fitbit users to delete menstruation logs.<sup>51</sup>

The immediate future of abortion in abortion-hostile states will involve either travel to abortion-friendly states or mail-order facilitated medication abortions.<sup>52</sup> As to the former, Justice Kavanaugh asked and answered the following hypothetical in his *Dobbs* concurrence: “[M]ay a State bar a resident

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44. Eleanor Klibanoff, *Lawyers Preparing for Abortion Prosecutions Warn About Health Care, Data Privacy*, TEX. TRIB. (July 25, 2022), <https://www.texastribune.org/2022/07/25/abortion-prosecution-data-health-care/>.

45. See generally Anya E. R. Prince, *Reproductive Health Surveillance*, 64 B.C. L. REV. 1077, 1085 (2023).

46. See generally Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, STAN. L. REV. (forthcoming 2023), <http://dx.doi.org/10.2139/ssrn.4099764>.

47. Lauren Worsfold, Lorrae Marriott, Sarah Johnson & Joyce C. Harper, *Period Tracker Applications: What Menstrual Cycle Information are They Giving Women?*, 17 WOMENS HEALTH 1, 1 (2021).

48. *Developer of Popular Women’s Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of their Health Data*, FED. TRADE COMM’N (Jan. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc-allegations-it-misled-consumers-about> (reporting settlement with the Federal Trade Commission of allegations that a period-tracking app developer shared the health information of users with outside data analytics providers after promising that such information would be kept private).

49. *Spot On Period Tracker*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/get-care/spot-on-period-tracker> (last accessed June 18, 2023).

50. Giulia, Carbonaro, *Could Period-Tracking Apps Be Dangerous in a Post-Roe v. Wade U.S.?*, NEWSWEEK (May 6, 2022), <https://www.newsweek.com/could-period-tracking-apps-dangerous-post-roe-v-wade-us-1704216>.

51. Jen Fitzpatrick, *Protecting People’s Privacy on Health Topics*, GOOGLE BLOG (July 1, 2022), <https://blog.google/technology/safety-security/protecting-peoples-privacy-on-health-topics/>.

52. See generally David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4335735](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735).

of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.”<sup>53</sup> However, the dissenters in *Dobbs* were far less sanguine as to what might follow:

After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States’ abortion services.<sup>54</sup>

As anxiety has ramped up amid the real possibility of, for example, antiabortion vigilantes lurking around interstate bus stations and emergency rooms, attention has also focused on other, non-medical types of sensitive data, particularly location data.<sup>55</sup> Specifically, there are concerns that abortion prosecutions will be based on data showing that a person visited an abortion clinic or sought abortion services or products. In its 2022 guidance, the Department of Health and Human Services (HHS) recommended that users turn off their device’s location services.<sup>56</sup> However, the guidance basically admitted that most sensitive information (for example, cell phone location data) is unprotected and could well fall into the hands of data brokers or law enforcement. This is because turning off location services does not stop cellular providers from tracking its customers.<sup>57</sup>

In *Carpenter v. United States*, the Supreme Court held that a warrant is required for access to historical cell-site location information,<sup>58</sup> but seeking a warrant will not be a major hurdle for a zealous prosecutor. Meanwhile, the federal courts have interpreted *Carpenter* narrowly, and therefore have opened

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53. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2309 (2022).

54. *Id.* at 2318.

55. *See generally* Anya E. R. Prince, *Location as Health*, 21 HOUS. J. HEALTH L. & POL’Y 43 (forthcoming 2021).

56. Protecting the Privacy and Security of Your Health, *supra* note 37.

57. *Id.* In a subsequent Bulletin that was not explicitly targeted at reproductive surveillance, OCR cautioned HIPAA entities and their business associates about tracking technologies, “Regulated entities are not permitted to use tracking technologies in a manner that would result in impermissible disclosures of PHI to tracking technology vendors or any other violations of the HIPAA Rules.” *Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates*, U.S. DEP’T HEALTH & HUM. SERVS. (Dec. 1, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-online-tracking/index.html> (reference omitted).

58. *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *see also* *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021) (warrant required for search of email attachments).

up access to analogous data.<sup>59</sup> Worse, location data have been routinely provided to law enforcement under what are known as “geofence warrants.” A typical Fourth Amendment warrant depends on demonstrating probable cause for the search of a person or place. However, a geofence warrant works in reverse. In such a warrant the provider is ordered to identify all devices in a particular area and provide that information to the police.<sup>60</sup> In a recent case before a District Court in Virginia, Google noted that “geofence warrants comprise more than twenty-five percent of *all* warrants it receives in the United States.”<sup>61</sup> In what may prove to be a landmark ruling, the court held that the geofence warrant in issue was invalid because it failed to establish probable cause to search every one of the persons in the geofence area.<sup>62</sup> In addition to geofence warrants, law enforcement also circumvents *Carpenter* protection by purchasing location data from data brokers.<sup>63</sup>

Annually there are almost 20 million Google searches for “abortion,” with residents of states that have more restrictive reproductive rights laws making significantly more searches for abortion services.<sup>64</sup> Following the leak of the *Dobbs* opinion in May 2022, internet searches for abortion medications spiked to record highs and, not surprisingly, were higher in states that restrict reproductive rights.<sup>65</sup> Mobile apps contain location data on the device and/or in the cloud while online map services or other search engines may have data showing that a person searched for an abortion clinic or abortion drugs.<sup>66</sup>

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59. See, e.g., *United States v. Moore-Bush*, 963 F.3d 29 (1st Cir.), *reh'g en banc granted, vacated*, 982 F.3d 50 (1st Cir. 2020), and *on rehearing en banc*, 36 F.4th 320 (1st Cir. 2022) (pole camera recording); *United States v. Contreras*, 905 F.3d 853 (5th Cir. 2018) (IP addresses); *Commonwealth v. McCarthy*, 484 Mass. 493 (2020) (automatic license plate reader data).

60. Matthew Guariglia, *Geofence Warrants and Reverse Keyword Warrants are So Invasive, Even Big Tech Wants to Ban Them*, EFF (May 13, 2022), <https://www.eff.org/deeplinks/2022/05/geofence-warrants-and-reverse-keyword-warrants-are-so-invasive-even-big-tech-wants>.

61. *United States v. Chatric*, 590 F. Supp. 3d 901, 914 (E.D. Va., 2022).

62. *Id.* at 927–33. Ultimately, however, in this case the court applied the “good faith” exception. *Id.* at 936–38. *Cf.* *In re Search of Info. that is Stored at Premises Controlled by Google LLC*, No. 21-SC-3217, 2021 WL 6196136, at 87–88 (D.D.C. Dec. 30, 2021) (overbreadth of warrant cured by two-step search procedure, requiring further court approval after initial identification).

63. See *supra* note 86 and accompanying text.

64. Sylvia Guendelman, Elena Yon, Elizabeth Pleasants, Alan Hubbard & Ndola Prat, *Shining the Light on Abortion: Drivers of Online Abortion Searches Across the United States in 2018*, 15 PLOS ONE 1, 9 (2020).

65. Adam Poliak, Nora Satybaldiyeva, Steffanie A. Strathdee, Eric C. Leas, Ramesh Rao, Davey Smith & John W. Ayers, *Internet Searches for Abortion Medications Following the Leaked Supreme Court of the United States Draft Ruling*, 182 JAMA INTERNAL MED. 1001(2022).

66. Patience Haggin, *Phones Know Who Went to an Abortion Clinic. Whom Will They Tell?*, WALL ST. J. (Aug. 7, 2022), <https://www.wsj.com/articles/phones-know-who-went-to-an-abortion-clinic-whom-will-they-tell-11659873781>.

There is already evidence that the major online pharmacies that sell abortion medication share large amounts of data with Google.<sup>67</sup>

Concerns about online and on-device privacy are not new to the abortion wars. In 2015 a Massachusetts digital marketing company was hired to send targeted advertisements to “abortion-minded women” attending clinics. The technique employed geofencing, using mobile geofences near abortion clinics that captured a user’s device ID, and then targeting the user’s browser with advertisements about abortion alternatives. In 2017, the company entered a settlement agreement with the Massachusetts Attorney General and agreed not to target Massachusetts healthcare facilities.<sup>68</sup>

Finally, medical records created in a safe haven or abortion “island” state relating to a procedure, by default, will travel back to the patient’s domicile. Carleen Zubrzycki describes this as an “interoperability trap,” one that safe haven states should close by, for example, prohibiting the transfer of abortion-related data across state lines.<sup>69</sup>

Medication abortions using the FDA-approved combination of Mifepristone and Misoprostol accounted for 53 percent of all abortions in the United States as of December 1, 2022.<sup>70</sup> This trajectory likely has been accelerated by the FDA decision to allow mail-order provision following a telemedicine consultation first during the pandemic<sup>71</sup> and now permanently.<sup>72</sup> Requests for telemedicine-intermediated abortions increased substantially

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67. Jennifer Gollan, *Websites Selling Abortion Pills Are Sharing Sensitive Data with Google*, PRO PUBLICA (Jan. 18, 2023), <https://www.propublica.org/article/websites-selling-abortion-pills-share-sensitive-data-with-google>.

68. OFF. OF ATT’Y GEN. MAURA HEALEY, *AG Reaches Settlement with Advertising Company Prohibiting ‘Geofencing’ Around Massachusetts Healthcare Facilities* (Apr. 4, 2017), <https://www.mass.gov/news/ag-reaches-settlement-with-advertising-company-prohibiting-geofencing-around-massachusetts-healthcare-facilities>.

69. Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J. FORUM 197, 208–23 (2022).

70. Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin & Marielle Kirstein, *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST. (Dec. 1, 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions>.

71. Letter from Janet Woodcock, M.D., Acting Commissioner of Food and Drugs to Maureen G. Phipps, MD, MPH, FACOG, Chief Executive Officer, American College of Obstetricians and Gynecologists, and William Grobman, MD, MBA, President, Society for Maternal-Fetal Medicine (Apr. 12, 2021), [https://www.aclu.org/sites/default/files/field\\_document/fda\\_acting\\_commissioner\\_letter\\_to\\_acog\\_april\\_12\\_2021.pdf](https://www.aclu.org/sites/default/files/field_document/fda_acting_commissioner_letter_to_acog_april_12_2021.pdf).

72. Questions and Answers on Mifepristone for Medical Termination of Pregnancy through Ten Weeks Gestation, U.S. FOOD & DRUG ADMIN. (Jan. 4, 2023), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation>.

following the *Dobbs* decision particularly in states that have implemented total bans.<sup>73</sup> Nineteen states already require in-person prescribing or explicitly ban the use of telemedicine for medication abortions.<sup>74</sup> However, antiabortion groups reportedly are unhappy with enforcement of these bans and are exploring strategies such as wastewater surveillance.<sup>75</sup> FDA approval of Mifepristone is also under challenge. Both its original approval and the relaxation of its prescribing requirements were successfully challenged before the District Court for the Northern District of Texas before being partially stayed by the Fifth Circuit Court of Appeals.<sup>76</sup> Thereafter, the Supreme Court issued a broader, emergency stay pending resolution by the Fifth Circuit.<sup>77</sup>

To curtail the pharmacological end-run around their abortion bans, states with restrictive laws inevitably will seek out and prosecute those who prescribe, transport, or ingest abortion pills.<sup>78</sup> Inevitably, as lawful supply chains are shut down by state lawmakers, they will be replaced with underground sources<sup>79</sup> and their concomitant health risks.<sup>80</sup> While post-*Dobbs* restrictive abortion measures primarily target abortion clinics and physicians, it is an open question

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73. Abigail R. A. Aiken, Jennifer E. Starling, James G. Scott & Rebecca Gomperts, *Requests for Self-managed Medication Abortion Provided Using Online Telemedicine in 30 US States Before and After the Dobbs v Jackson Women's Health Organization Decision*, 328 J. AM. MED. ASS'N 1768 (2022).

74. *State Requirements for the Provision of Medication Abortion*, KFF (Apr. 2023), <https://www.kff.org/womens-health-policy/state-indicator/state-requirements-for-the-provision-of-medication-abortion/>; *The Availability and Use of Medication Abortion*, KFF (June 1, 2023), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/>.

75. Caroline Kitchener, *Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill 'Trafficking'*, WASH. POST (Dec. 14, 2022), <https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe/>.

76. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023).

77. *Danco Lab's, LLC v. All. for Hippocratic Med., et al.* 598 U.S. \_\_\_\_ (2023), [https://www.supremecourt.gov/opinions/22pdf/22a901\\_3d9g.pdf](https://www.supremecourt.gov/opinions/22pdf/22a901_3d9g.pdf).

78. See Kerry Breen, *People in Alabama Can Be Prosecuted for Taking Abortion Pills, State Attorney General Says*, CBS NEWS (Jan. 11, 2023), <https://www.cbsnews.com/news/abortion-pills-alabama-prosecution-steve-marshall/>; Arwa Mahdawi, *Worried that women will be prosecuted for using abortion pills? It's already happening*, GUARDIAN (Mar. 4, 2023), <https://www.theguardian.com/commentisfree/2023/mar/04/abortion-pills-women-prosecution-week-in-patriarchy>.

79. Stephanie Taladrid, *The Post-Roe Abortion Underground*, NEW YORKER (Oct. 10, 2022), <https://www.newyorker.com/magazine/2022/10/17/the-post-roe-abortion-underground>.

80. See, e.g., U.S. Food & Drug Admin., *Warning Letter to Aidaccess.org*, MARCS-CMS 575658 (Mar. 8, 2019), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/aidaccessorg-575658-03082019> (“Dugs that have circumvented regulatory safeguards may be contaminated; counterfeit, contain varying amounts of active ingredients, or contain different ingredients altogether.”).



whether prosecutors will also target abortion seekers or those who abort. This is a political rather than legal question because of reassurances the antiabortion movement has given to women over the years that they are not their targets. However, as medication abortions become dominant it is highly likely that prosecutors will turn their attention to those who take the drugs.<sup>81</sup>

In many cases the information needed by prosecutors will be found on mobile devices. For example, and discussed above,<sup>82</sup> in 2013 Purvi Patel purchased mifepristone and misoprostol online and used the drugs to terminate her pregnancy, which resulted in a live birth followed by the baby's death. She was convicted by an Indiana court of child neglect and felony feticide and sentenced to 30 years of imprisonment. Evidence at trial included texts discovered on her tablet in which she discussed the use of the drugs with a friend as well as a receipt from an online supplier. The Indiana Court of Appeals overturned her feticide conviction, and she was released after time served when resentenced on a lower-level neglect charge.<sup>83</sup> A somewhat similar case was reported in 2022 involving a Nebraska teenager and her mother who allegedly acquired mifepristone and misoprostol to terminate a 28-week pregnancy (Nebraska then having a ban after 20 weeks). The prosecution case includes evidence from Facebook chats on mobile devices and computers recovered through a search warrant.<sup>84</sup>

## B. PROCESSING

HIPAA protects personal health information such as hospital records from unauthorized disclosure. As a result, data aggregators (aka brokers), or at least those acting lawfully, will usually not have access to that PHI. However, data aggregators do have access to deidentified health records, data received from public health agencies, and a broad array of what may be described as medically inflected data such as credit card data recording the purchase of health products and services. To these data, aggregators add mobile data such as location data or data derived from apps, search engines, or web trackers.

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81. See, e.g., Caroline Kitchener & Ellen Francis, *Talk of Prosecuting Women for Abortion Pills Roils Antiabortion Movement*, WASH. POST (Jan. 11, 2023), [https://www.washingtonpost.com/nation/2023/01/11/alabama-abortion-pills-prosecution/\(discussing suggestion by Alabama attorney-general that he would prosecute women for taking abortion pills\)](https://www.washingtonpost.com/nation/2023/01/11/alabama-abortion-pills-prosecution/(discussing%20suggestion%20by%20Alabama%20attorney-general%20that%20he%20would%20prosecute%20women%20for%20taking%20abortion%20pills)).

82. See *supra* Part II.

83. Patel v. State, 60 N.E.3d 1041 (Ind. Ct. App. 2016); *Purvi Patel is Released After Feticide Conviction Overturned*, ASSOCIATED PRESS (Sept. 1, 2016), <https://www.indystar.com/story/news/crime/2016/09/01/purvi-patel-releases-feticide-conviction-overturned/89707582/>.

84. Jason Koebler & Anna Merlan, *This Is the Data Facebook Gave Police to Prosecute a Teenager for Abortion*, MOTHERBOARD (Aug. 9, 2022), <https://www.vice.com/en/article/n7zevd/this-is-the-data-facebook-gave-police-to-prosecute-a-teenager-for-abortion>.

They then sell data sets or predictive data drawn from the data.<sup>85</sup> Increasingly, such data (including location data) is sold to law enforcement, typically without any warrant.<sup>86</sup>

It was not surprising that, soon after the draft *Dobbs* opinion was leaked, a data aggregator was contacted by unnamed companies requesting mobile-device data identifying persons who had visited abortion clinics along the Illinois-Missouri border.<sup>87</sup> It is highly likely that such data already exists in the hands of some aggregator or soon will be built out. Some further clues can be gleaned from the current litigation between the Federal Trade Commission (FTC) and Kochava, an Idaho-based company that describes itself as the “largest independent data marketplace for connected devices.”<sup>88</sup> The FTC apparently is arguing that the company’s data sets make it possible to track consumers to sensitive locations, such as reproductive health clinics.<sup>89</sup> Importantly, as discussed below, the types of aggregated health or medically-inflected data at issue are only thinly regulated<sup>90</sup> and highly unlikely to be subject to HIPAA.

Because personal health information is held in confidence by healthcare providers, unauthorized dissemination or disclosure is a well-established harm (and an obvious HIPAA violation<sup>91</sup>). Indeed, there are numerous accounts of

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85. Nicolas P. Terry, *Big Data Proxies and Health Privacy Exceptionalism*, 24 HEALTH MATRIX 65, 85–87 (2014).

86. *Data Broker Helps Police See Everywhere You’ve Been with the Click of a Mouse: EFF Investigation*, ELEC. FRONTIER FOUND. (Sept. 1, 2022), <https://www.eff.org/press/releases/data-broker-helps-police-see-everywhere-youve-been-click-mouse-eff-investigation>. See generally Dori H. Rahbar, *Laundering Data: How the Government’s Purchase of Commercial Location Data Violates Carpenter and Evades the Fourth Amendment*, 122 COLUM. L. REV. 713, 716–17 (2022) (describing instances in which federal agencies have bought location data from commercial data aggregators).

87. Haggin, *supra* note 66.

88. Ashley Belanger, *FTC Sued by Firm Allegedly Selling Sensitive Data on Abortion Clinic Visits*, ARSTECHNICA (Aug. 18, 2022), <https://arstechnica.com/tech-policy/2022/08/ftc-sued-by-firm-allegedly-selling-sensitive-data-on-abortion-clinic-visits/>.

89. Compl., *Kochava Inc. v. Fed. Trade Comm’n*, No. 2:22-cv-00349 (N.D. Idaho Aug. 12, 2022), <https://cdn.arstechnica.net/wp-content/uploads/2022/08/Kochava-v-FTC-Complaint.pdf>.

90. See generally Nicolas P. Terry, *Assessing the Thin Regulation of Consumer-Facing Health Technologies*, 48 J.L. MED. & ETHICS 94 (2020) (arguing that the design and structures of existing data protection and safety regulation in the U.S. have resulted in exceptionally thin protection for the users of consumer-facing devices and product that rely on or that facilitate consumer collection or aggregation of health and wellness data).

91. See, e.g., Health and Human Services, *Dental Practice Pays \$10,000 to Settle Social Media Disclosures of Patients’ Protected Health Information*, U.S. DEP’T HEALTH & HUM. SERVS. (Dec. 31, 2020), <https://public3.pagefreezer.com/browse/HHS.gov/31-12-2020T08:51/https://>

persons who work in hospitals or pharmacies accessing the health records of family members or friends.<sup>92</sup> Many of these have led to lawsuits,<sup>93</sup> even reported cases,<sup>94</sup> while a few offenders have faced employment<sup>95</sup> or even criminal justice sanctions.<sup>96</sup> Moreover, as detailed below,<sup>97</sup> HIPAA contains numerous exceptions that in the face of escalating prosecution and intervention will almost inevitably lead to more and more disclosures.

### C. DISSEMINATION

This probable dissemination will upend the tradition of healthcare confidentiality. It is also likely to reopen the debate as to just how much information healthcare providers need to acquire and whether they should retain it, a battle that has generally been lost by privacy advocates as modern medicine has attempted to overcome system fragmentation with broad information sharing and the adoption of electronic health records.<sup>98</sup> The post-*Dobbs* world will upend patient expectations of privacy as states enact whistleblower protections,<sup>99</sup> which will essentially encourage snooping on

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[www.hhs.gov/hipaa/for-professionals/compliance-enforcement/agreements/elite/index.html](http://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/agreements/elite/index.html).

92. See generally Charles Ornstein, *Small-Scale Violations of Medical Privacy Often Cause the Most Harm*, PROPUBLICA (Dec. 10, 2015) (providing examples of snooping in the medical records of friends and family members), <https://www.propublica.org/article/small-scale-violations-of-medical-privacy-often-cause-the-most-harm>.

93. See, e.g., Susan Vela, *Young woman sues Woman Sues Beaumont, Livonia clinic over medical privacy* CLINIC OVER MEDICAL PRIVACY, HOMETOWN LIFE, (Nov. 20, 2019), <https://www.hometownlife.com/story/news/local/—ivonia/2019/11/20/young-woman-sues-hospital-clinic-alleging-privacy-invasion/4191030002/>.

94. See, e.g., *Yath v. Fairview Clinics*, N.P., 767 N.W.2d 34 (Minn. Ct. App. 2009) (describing unsuccessful privacy action against healthcare providers whose employees allegedly posted information from the patient's medical record on the internet); *Doe v. Guthrie Clinic, Ltd.*, 22 N.Y.3d 480, 5 N.E.3d 578 (2014) (holding breach of confidence action against a healthcare provider was not sustainable when the employee responsible for the breach acted outside the scope of his or her employment); *Walgreen Co. v. Hinchy*, 21 N.E.3d 99, 103 (Ind. Ct. App. 2014), *on reh'g*, 25 N.E.3d 748 (Ind. Ct. App. 2015) (holding evidence supported finding that pharmacist's actions were within the scope of employment when divulged the information she learned from patient records).

95. See, e.g., Fred Donovan, *TECHTARGET, New York Suspends Nurse for HIPAA Violation Affecting 3K Patients*, TECHTARGET (June 11, 2018), <https://healthitsecurity.com/news/new-york-suspends-nurse-for-hipaa-violation-affecting-3k-patients>.

96. See, e.g., Debra Wood, *Nurse Pleads Guilty to HIPAA Violation*, AMERICANAM.MOBILE (June 25, 2017), <https://www.americanmobile.com/nursezone/nursing-news/nurse-pleads-guilty-to-hipaa-violation/>.

97. See *infra* Part IV.

98. See generally Nicolas P. Terry & Leslie P. Francis, *Ensuring the Privacy and Confidentiality of Electronic Health Records*, 2007 U. ILL. L. REV. 681 (2007).

99. See, e.g., S. 1373, 124th Sess. § 44-41-950(D) (S.C. 2022).

records and disclosing what has heretofore been confidential healthcare information.

Many states increasingly will strangle access to information about abortion and other reproductive services. For example, a proposed South Carolina law would criminalize both (1) providing internet information regarding self-administered abortions and (2) hosting or maintaining a website that provides information on how to obtain an abortion.<sup>100</sup> Leaving First Amendment<sup>101</sup> and Communications Decency Act<sup>102</sup> challenges aside, such state provisions are bound to chill online discourse, cutting off women from needed health information. As abortion foes reduce information such as how to access FDA approved abortion medications<sup>103</sup> or out-of-state abortion services, they are as likely to encourage *misinformation* about medically appropriate services and products.<sup>104</sup> There are already reports of social media sites being flooded with misinformation about “abortion reversal pills.”<sup>105</sup> It is likely we will see more disinformation campaigns directed at the vulnerable.<sup>106</sup> Having been successful in raising First Amendment claims against state attempts to regulate misinformation-disseminating “crisis pregnancy centers,”<sup>107</sup> increasing numbers of shadowy or state-promoted organizations will seek to increase the

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100. See, e.g., *id.* § 44-41-860(B).

101. Brett Wilkins, “*Aiding and Abetting*”: SC GOP Pushes “Blatantly Unconstitutional” Bill to Ban Abortion Info Online, SALON (July 25, 2022), [https://www.salon.com/2022/07/25/aiding-and-abetting-sc-pushes-blatantly-unconstitutional-bill-to-ban-abortion-info-online\\_partner/](https://www.salon.com/2022/07/25/aiding-and-abetting-sc-pushes-blatantly-unconstitutional-bill-to-ban-abortion-info-online_partner/) (discussing freedom of speech issues related to proposed SC law that would criminalize the online sharing of abortion information).

102. 47 U.S.C. § 230.

103. See generally *The Availability and Use of Medication Abortion*, KFF (June 1, 2023), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/> (detailing how state use restrictive laws to reduce access to mifepristone to by restricting telemedicine access and mandating unsubstantiated claims about the drug’s safety or side effects).

104. This is not solely a post-*Dobbs* phenomenon. See, e.g., *Translating Abortion Disinformation: The Spanish Language Anti-Choice Landscape*, NARAL PRO CHOICE AM., <https://www.prochoiceamerica.org/wp-content/uploads/2022/05/Translating-Abortion-Disinformation-The-Spanish-Language-Anti-Choice-Landscape.pdf> (last visited July 29, 2023).

105. Rebecca Kern & Ruth Reader, *The Latest Social Media Misinformation: Abortion Reversal Pills*, POLITICO (Aug. 20, 2022), <https://www.politico.com/news/2022/08/20/abortion-misinformation-social-media-00052645>.

106. See generally Jenna Sherman, *How Abortion Misinformation and Disinformation Spread Online*, SCI. AM. (June. 24, 2022), <https://www.scientificamerican.com/article/how-abortion-misinformation-and-disinformation-spread-online/> (detailing misinformation and disinformation appearing on social media channels).

107. Nat’l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018) (California law requiring crisis pregnancy centers to follow a government-drafted script about the availability of state-sponsored services was a content-based regulation of speech).

friction already suffered by those already dealing with difficult and heretofore private decisions.<sup>108</sup> The growing seriousness of the misinformation issue already can be gauged from Google’s notification to Congress that only advertisements from certified abortion providers<sup>109</sup> will be displayed in search results.<sup>110</sup>

#### D. INVASION

Finally, post-*Dobbs* privacy harms will extend further into intrusions into women’s lives and decisional interference.<sup>111</sup> The former suggests a dystopian future where the most personal and private aspects of a woman’s life are probed and investigated by zealous prosecutors and vigilantes. The latter brings us full circle to *Dobbs*’ rejection of decisional privacy in the face of state interests in prenatal life.

The physical and psychological harms that do and will flow from these invasions are immeasurable. Justifiably, the initial reaction to *Dobbs* has been to examine the impact on pregnant women and related services. For example, will doctors be able to give *legally* safe treatments for miscarriages given that treatment for abortion and miscarriage are the same?<sup>112</sup> Will restrictive abortion laws impact the evidence-based treatment of ectopic pregnancies?<sup>113</sup> Related concerns have been raised regarding continued access to some contraceptive methods and even in vitro fertilization.<sup>114</sup> As the American

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108. Cf. S.B. 23-190, 74th Gen. Assemb., Reg. Sess. (Colo. 2023) (prohibiting dissemination of advertisement provides abortion or emergency contraception services when they do not).

109. *About Abortion Certification and Disclosures, Advertising Policies Help*, GOOGLE, <https://support.google.com/adspolicy/answer/9274988> (last visited July 29, 2023).

110. See Letter from Google to Senator Warren and Representative Slotkin (Aug. 25, 2022), [https://www.warner.senate.gov/public/\\_cache/files/c/7/c7753efa-3adc-4cd7-9b09-6d12ab88999a/CDCOFFBD434398E0AE66A038707FA10B.response-to-warner-slotkin.pdf](https://www.warner.senate.gov/public/_cache/files/c/7/c7753efa-3adc-4cd7-9b09-6d12ab88999a/CDCOFFBD434398E0AE66A038707FA10B.response-to-warner-slotkin.pdf).

111. Solove, *supra* note 38, at 552–62.

112. See Charlotte Huff, *In Texas, Abortion Laws Inhibit Care for Miscarriages*, NAT’L PUB. RADIO (May 10, 2022), <https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages>.

113. See Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), <https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients>.

114. Nicole Karlis, *How Abortion “Trigger Laws” Could Inadvertently Impede Fertility Treatments* (May 10, 2022), SALON, <https://www.salon.com/2022/05/10/abortion-trigger-laws-ivf/>. Some states may clarify this issue. See S. 1373, 124th Sess. § 44-41-840 (S.C. 2022) (noting that bill did not apply to “contraception” or “in vitro fertilization and assisted reproductive technology procedures”).

Medical Association and other national bodies representing providers have noted:

Without access to medications proven to be safe and effective, our patients' health is at risk. As physicians and pharmacists, we view patient wellbeing as paramount and are deeply troubled that continuity of care is being disrupted. We call on state policymakers to ensure through guidance, law, or regulation that patient care is not disrupted and that physicians and pharmacists shall be free to continue to practice medicine and pharmacy without fear of professional sanction or liability.<sup>115</sup>

Restrictive abortion laws must also be viewed through the wider lens of maternal health. Overall, states with restrictive abortion laws have a greater proportion of maternity care “deserts” and fewer maternal care providers. Pregnancy-related death rates and overall maternal death rates are significantly higher there compared to those in abortion-access states.<sup>116</sup>

It is not hard to picture some far broader harms. The Affordable Care Act brought major advances for women's health, including, in particular, preventative care as an essential health benefit.<sup>117</sup> These preventative care services include contraception, counseling for sexually transmitted infections, and screening for HIV, cervical cancer, and domestic violence.<sup>118</sup> Women who faced criminalization pre-*Dobbs* have long weighed the risks of criminal charge(s) from seeking care against its benefits, and have avoided full engagement with care as a result.<sup>119</sup> Post-*Dobbs*, more women of child-bearing age may start to avoid routine interactions with the healthcare system because

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115. Press Release, AMA, APhA, ASHP, NCPA Statement on State Laws Impacting Patient Access to Medically Necessary Medications, ASHP NEWS CENTER (Sept. 8, 2022), <https://www.ashp.org/news/2022/09/08/statement-on-state-laws-impacting-patient-access-to-medically-necessary-medications>.

116. Eugene Declercq, Ruby Barnard-Mayers, Laurie C. Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), <https://doi.org/10.26099/z7dz-8211>.

117. *ACA-Covered Preventive Health Services for Women*, AGENCY FOR RSCH. HEALTHCARE & QUALITY, <https://www.ahrq.gov/ncepcr/tools/healthier-pregnancy/fact-sheets/preventive-health-services.html> (last visited Apr. 20, 2023).

118. *Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being*, HUMAN RES. & SERVS. ADMIN. AGENCY, <https://www.hrsa.gov/womens-guidelines> (last visited Dec. 2022).

119. In one particularly chilling example, during a focus group convened by researchers studying the effect of Tennessee's fetal assault law, one woman affected by that law reported that, “when I was pregnant, I was scared to death to have that open relationship with my doctor because the laws in effect prevented . . . it from being a care issue. It became a law, a liability issue. I was freaking terrified.” See BACH, *supra* note 20, at 130–31.

they are fearful that their health information may in the future be used against them. A comparison to the utilization of healthcare services by undocumented persons (or even documented persons from families that include undocumented persons) during increased Immigration and Customs Enforcement (ICE) is apposite. Research has shown that Hispanic respondents were less likely to use a regular healthcare provider or have an annual checkup when there was increased ICE activity in their state<sup>120</sup> as well as healthcare avoidance, stress, and anxiety.<sup>121</sup>

Finally, as women react to the post-*Dobbs* world and the perils associated with some of their online behaviors, it may not only be period trackers that they delete.<sup>122</sup> Mobile technologies have been deployed to improve health behaviors,<sup>123</sup> empower patients,<sup>124</sup> and increase patients' engagement with their own health.<sup>125</sup> Yet, post-*Dobbs* prosecutions may broadly chill the use of health-related technologies or even technologically mediated care, such as telehealth.<sup>126</sup> In the dystopian future triggered by *Dobbs*, women will find the technologies they rely on for their health turned against them as tools of surveillance.

As is the case in pregnancy prosecution generally, these privacy harms will be borne disproportionately by those who are already subjected to surveillance and criminalization. Scholars have long documented the ways in which privacy is severely compromised and often non-existent for those who are poor, for

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120. See Abigail S. Friedman & Atheendar S. Venkataramani, *Chilling Effects: US Immigration Enforcement and Health Care Seeking Among Hispanic Adults*, 40 HEALTH AFF. (MILLWOOD) 1056 (2021).

121. See Karen Hacker, Jocelyn Chu, Lisa Arsenault & Robert P. Marlin, *Provider's Perspectives on the Impact of Immigration and Customs Enforcement (ICE) Activity on Immigrant Health*, 23 J. HEALTH CARE FOR POOR & UNDERSERVED 651, 655 (2012).

122. Flora Garamvolgyi, *Why US Women Are Deleting Their Period Tracking Apps*, GUARDIAN (June 28, 2022), <https://www.theguardian.com/world/2022/jun/28/why-us-woman-are-deleting-their-period-tracking-apps>.

123. Myeunghye Han & Eunjoo Lee, *Effectiveness of Mobile Health Application Use to Improve Health Behavior Changes: A Systematic Review of Randomized Controlled Trials*, 24 HEALTHCARE INFORMATICS RSCH. 207 (2018).

124. Emily May, *How Digital Apps Are Empowering Patients*, DELOITTE (Oct. 19, 2021), <https://www2.deloitte.com/us/en/blog/health-care-blog/2021/how-digital-health-apps-are-empowering-patients.html>.

125. Tim Wood, *Patient Engagement Technology & Its Role in Healthcare*, J2 INTERACTIVE, (Oct. 25, 2021), <https://www.j2interactive.com/blog/patient-engagement-technology/>.

126. Oliver J. Kim, *Dobbs and Telehealth: What's the Impact?*, BIPARTISAN POL'Y CTR. (Aug. 16, 2022), <https://bipartisanpolicy.org/blog/dobbs-and-telehealth/>.

those who are Black and Brown, and for those who seek social welfare support.<sup>127</sup>

An analysis of the various informational privacy harms that may follow the fall of *Roe* is a critical step in understanding the future role of the HIPAA Privacy Rule to protect patients' reproductive autonomy. The Privacy Rule only applies to "covered entities," typically most healthcare insurers and healthcare providers<sup>128</sup> and only with regard to "protected health information (PHI)."<sup>129</sup> Developers or providers of fertility and period tracking apps, mapping or search services, text and chat apps, and data brokers typically are not covered entities and HIPAA will not apply except in rare cases where a healthcare provider or its "business associate" (BA)<sup>130</sup> provided the app or service in question. Therefore, HIPAA will not apply even though a developer, service provider, or aggregator is holding personal health information.<sup>131</sup>

It follows that HIPAA's application is limited to cases of disclosure of PHI held in confidence by insurers or healthcare providers or their employees.<sup>132</sup> PHI may not be disclosed by covered entities unless authorized by the patient<sup>133</sup> or as permitted or required under the Privacy Rule.<sup>134</sup>

The impact of state whistleblower protections to, say, a healthcare employee who discloses abortion-related information is an open question; in general, the HIPAA Privacy Rule preempts state law, unless the latter is more protective of PHI.<sup>135</sup> It is unlikely that the Secretary would apply the public health "compelling need"<sup>136</sup> or other exceptions to whistleblowers or other state enforcement processes.<sup>137</sup> Notwithstanding, there are specific exceptions permitting disclosure in judicial or administrative proceedings such as in

127. See, e.g., KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017); Priscilla Ocen, *The New Racially Restrictive Covenant: Race, Welfare and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012); Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J.L. & FEMINISM 317 (2014).

128. 45 C.F.R. §§ 160.102, 160.103 (2013).

129. *Id.* § 160.103. The role of healthcare clearinghouses, an additional group of covered entities, is outside the scope of this Article.

130. *Id.*

131. See, e.g., Nicolas P. Terry, *Big Data Proxies and Health Privacy Exceptionalism*, 24 HEALTH MATRIX 65, 87 (2014); Terry, *supra* note 90, at 95.

132. 45 C.F.R. § 164.502(a) (2013).

133. *Id.* § 164.508.

134. *Id.* § 164.502.

135. *Id.* § 160.202.

136. *Id.* § 160.203.

137. *Id.* § 160.204.



response to subpoena or discovery request<sup>138</sup> or to law enforcement in the case of warrants, subpoenas, and similar demands or requests.<sup>139</sup>

#### IV. HIPAA GESTALT V. HIPAA REALITY

A mythology of generalized health privacy protection has emerged around HIPAA. Some claims about its scope are simply risible such as when a serving Congressperson was asked about her vaccination status and replied, “Your . . . question is a violation of my HIPAA rights.”<sup>140</sup> In fact, there is a long history of the Privacy Rule being cited as a barrier to the most innocuous or incidental discussions of patients and refusals by providers to share information with family members.<sup>141</sup> Providers who have been criticized for failure to share patient information will often cite HIPAA restrictions rather than admit to their own outdated technologies.<sup>142</sup> Often the HIPAA myth is rooted in understandable but nevertheless overly cautious reactions by healthcare workers to HIPAA and its sanctions.<sup>143</sup> On other occasions, the over-citation of HIPAA is more disturbing, such as when reports surfaced that HIPAA sanctions have been used to intimidate whistleblowers.<sup>144</sup> The sobering reality is that HIPAA, the nation’s preeminent health privacy law, can address only a small number of post-*Dobbs* privacy issues.

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138. *Id.* § 164.512(e).

139. *Id.* § 164.512(f)(1)(ii); *see also id.* § 164.103 (defining “[r]equired by law”).

140. Philip Bump, *That’s Not How Any of This Works, Marjorie Taylor Greene*, WASH. POST, (July 21, 2021), <https://www.washingtonpost.com/politics/2021/07/21/thats-not-how-any-of-this-works-marjorie-taylor-greene/>; @Acyn, TWITTER (July 20, 2021, 2:10 PM), <https://twitter.com/Acyn/status/1417592852759007236>.

141. *See* Paula Span, *Hipaa’s Use as Code of Silence Often Misinterprets the Law*, N.Y. TIMES (July 17, 2015), <https://www.nytimes.com/2015/07/21/health/hipaas-use-as-code-of-silence-often-misinterprets-the-law.html>; *see also* *When Health Care Providers May Communicate About You with Your Family, Friends, or Others Involved in Your Care*, U.S. DEP’T HEALTH HUM. SERVS., OFF. CIV. RTS. (June 8, 2020), [https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer\\_ffg.pdf](https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_ffg.pdf).

142. Christina Farr, *Consumer Privacy Laws Are Not to Blame for Health Care’s Biggest Mess*, CNBC (Jan. 16, 2018), <https://www.cnbc.com/2018/01/16/hipaa-not-reason-for-difficult-medical-record-sharing-commentary.html>; *see also* *11 Debunked Myths About HIPAA and Medical Records Privacy for Patients*, HIPAA SEC. SUITE (Jan. 15, 2019), <https://hipaasecuritysuite.com/11-debunked-myths-about-hipaa-and-medical-records-privacy-for-patients/>.

143. *See* Bryan K. Touchet, Stephanie R. Drummond & William R. Yates, *The Impact of Fear of HIPAA Violation on Patient Care*, 55 PSYCHIATRIC SERVS. 575, 575–76 (2004).

144. Joe Davidson, *VA Uses Patient Privacy to Go After Whistleblowers, Critics Say*, WASH. POST (July 17, 2014), [https://www.washingtonpost.com/politics/federal\\_government/va-uses-patient-privacy-to-go-after-whistleblowers-critics-say/2014/07/17/bafa7a02-0dcb-11e4-b8e5-d0de80767fc2\\_story.html](https://www.washingtonpost.com/politics/federal_government/va-uses-patient-privacy-to-go-after-whistleblowers-critics-say/2014/07/17/bafa7a02-0dcb-11e4-b8e5-d0de80767fc2_story.html).

## A. PRIVACY VERSUS CONFIDENTIALITY

Judged as a data protection law, the HIPAA Privacy Rule is nothing more than a modest endeavor. It employs a downstream data protection model that seeks to contain collected health information within the healthcare system by prohibiting its migration to non-healthcare parties. HIPAA does not in any way control or regulate the collection of patient data as would an upstream, collection-focused “privacy” model.<sup>145</sup> A more accurate description of the Privacy Rule would be “the doctor/hospital/insurer” confidentiality rule.”<sup>146</sup> HIPAA regulates a relatively narrow cohort of data custodians, traditional health-care providers, and provides detailed guidance as to the occasions when disclosure may be authorized,<sup>147</sup> permitted, or required.<sup>148</sup> However, it is a mistake to overstate its scope and view it as a law providing broad or unqualified protection of health information.

## B. HEALTH INFORMATION CURATED OUTSIDE OF THE HEALTHCARE SYSTEM

The root of HIPAA’s greatest limitation is that its scope is limited to a cohort of data custodians rather than to a type of data. Its “original sin” was that it was structured around a group of identified health-care data custodians rather than *anyone* collecting or disclosing health-care data.<sup>149</sup> Because of the limitation to HIPAA-covered entities or their BAs the HIPAA rules seldom will apply to web or app-based consumer-facing health technologies that, for example, enable patient-accessed, -generated, or -curated healthcare information.<sup>150</sup> This limited scope can be illustrated by observing the transfer of an ob-gyn medical record from a provider to the patient’s on-device health app, a function that has been encouraged by the federal government.<sup>151</sup> Such data are non-rival and so they can exist in more than one place, yet with distinct legal protections. The records stored on the provider’s EHR would be protected by the HIPAA Privacy Rule, but the patient’s copy stored on their mobile device would not. The latter would exist in what is sometimes called

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145. Nicolas P. Terry, *Big Data Proxies and Health Privacy Exceptionalism*, 24 HEALTH MATRIX 65, 87 (2014).

146. Nicolas P. Terry, *Regulatory Disruption and Arbitrage in Health-Care Data Protection*, 17 YALE J. HEALTH POLY, L. & ETHICS 143, 162 (2017).

147. 45 C.F.R. § 164.508 (2013).

148. *Id.* § 164.502 (2013).

149. Terry, *supra* note 146, at 164.

150. Terry, *supra* note 90, at 94.

151. See, e.g., Stephen Barlas, *HHS Proposes Steps Toward Health Data Interoperability CMS and ONC Proposals Would Implement Cures Act*, 44 PHARMACY & THERAPEUTICS 347, 348–49 (2019).

the HIPAA-free zone and would be relatively unprotected,<sup>152</sup> although as already discussed both versions are likely exposable by subpoena or warrant.

C. *DOBBS*, HIPAA EXCEPTIONS, AND REPRODUCTIVE HEALTHCARE PRIVACY

In truth, the HIPAA Privacy Rule's list of permitted disclosures has always tainted the Rule as reading "less like a list of confidentiality protections and more like a catalogue of exceptions and, specifically, process rules for authorizations to avoid confidentiality."<sup>153</sup> Within the Rule, there are exceptions to the general rule of non-disclosure, including authorization, required disclosures, and permitted disclosures.

With very few exceptions the patient themselves can authorize the disclosure of their PHI. Consent has not been an explicit part of the Privacy Rule since 2002,<sup>154</sup> where requirements for initial consent to share health information with a provider were removed.<sup>155</sup> Authorization is a special form of consent with quite specific requirements<sup>156</sup> and is somewhat akin to informed consent.<sup>157</sup> Required disclosures are quite limited, arising when patients request access to their records or in the case of an HHS enforcement procedure.<sup>158</sup>

Permitted (in the sense that the patient's authorization is not required) disclosures apply in a broad range of situations including sharing information for essentially internal use (treatment, payment, and healthcare operations).<sup>159</sup> Most concerning, in the context of *Dobbs*, however, are the myriad of circumstances permitting disclosure. In short, despite the efforts of the Biden administration to reassure patients and providers, the reality is that HIPAA, even if rigorously enforced, contains significant exceptions that can undermine the privacy of patient information in a context in which a state criminalizes or makes relevant to child welfare cases additional aspects of reproductive conduct.

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152. See generally Terry, *supra* note 90 at 95.

153. Terry & Francis, *supra* note 98, at 717.

154. See 67 Fed. Reg. 53182, 53255 (Aug. 14, 2002).

155. Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164.506(a) (2000).

156. *Id.* § 164.508.

157. See generally *What Is the Difference Between "Consent" and "Authorization" Under the HIPAA Privacy Rule?*, U.S. DEP'T HEALTH & HUM. SERVS., (Dec. 28, 2022) <https://www.hhs.gov/hipaa/for-professionals/faq/264/what-is-the-difference-between-consent-and-authorization/index.html>.

158. See 45 C.F.R. § 164.502(a) (2023).

159. *Id.* § 164.506.

First, and most significantly, HIPAA allows disclosure “as required by law.”<sup>160</sup> The regulations specify that the covered entity “may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.”<sup>161</sup> This regulation clearly applies both to federal and state law. It further instructs that the covered entity must “meet the requirements” described in other, more specific subsections of the regulations that cover various situations in which a disclosure might be “required by law.” Relevant here are the rules concerning disclosures for “law enforcement purposes”<sup>162</sup> and disclosures for “judicial and administrative proceedings.”<sup>163</sup>

Several aspects of the law enforcement exception are important here. First, HIPAA allows disclosure to law enforcement to comply with a specific law requiring disclosure of certain types of wounds or other physical injuries. The paradigmatic example here is the reporting of gunshot victims. But this exception is not limited to those circumstances. If a state legislature required reporting of pregnancy-related conditions like miscarriage, HIPAA would allow those disclosures. As noted above, long before *Dobbs*, individuals have been prosecuted for engaging in self-managed abortions. A state that is concerned that miscarriages might be the result of self-managed abortion could require disclosure of healthcare records that contain evidence of miscarriages or other pregnancy complications, which could open the door to further prosecutions of this nature.

Second, HIPAA allows disclosure to comply with a court order, court-ordered warrant or a subpoena or summons, to comply with a grand jury subpoena, or, in slightly more limited circumstances, to comply with administrative requests for information. Once a prosecution is commenced, courts can authorize the disclosure of significant parts of healthcare records.

The HIPAA crime victim exception is also concerning. Under HIPAA covered entities may disclose information in response to police requests concerning an individual who is suspected to be a victim of a crime.<sup>164</sup> While generally, the crime victim must consent to disclosure, if the crime victim

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160. *Id.* § 164.512(a).

161. *Id.*

162. *Id.* § 164.512(f).

163. *Id.* § 164.512(e).

164. *Id.* § 164.512(f)(3).

cannot consent because of “incapacity” the covered entity can disclose without consent.<sup>165</sup>

The concern here involves the growing state law trend defining a fetus as a victim of a crime. By definition, the fetus would likely be “incapacitated” under the HIPAA rules, allowing for disclosure without consent. Currently 38 states have fetal homicide laws.<sup>166</sup> While many of these laws explicitly exempt pregnant women from prosecution under these statutes, this is not universally true. Moreover, nothing after *Dobbs* bars states from revising those statutes and prosecuting women who they believe have attempted to abort their fetuses in violation of state law. In addition, there is a long history of prosecutions of pregnant women for conduct during pregnancy even in the face of laws that purport to exempt prosecution of the woman herself. As noted above, journalists, advocates, and scholars already have documented thousands of prosecutions and forced interventions involving pregnancy.<sup>167</sup> In addition, at least two states—South Carolina and Alabama—have permitted prosecution for pregnancy-related conduct against individuals who were pregnant.<sup>168</sup> Finally, while states may continue to exempt the pregnant person from prosecution, that does not render the crime victim exception irrelevant. Take for example, a patient who discloses to a healthcare provider that she obtained abortion-inducing medication from a particular source. That fetus could be a “crime victim” and information about who provided the medication is still relevant and disclosable under this exception.

In the civil law context, HIPAA also provides some exceptions that raise concerns. For example, HIPAA allows disclosure of protected health information to “a public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.” While standards about what constitutes reportable information as well as who must report vary significantly by state,<sup>169</sup> the federal Child Abuse Prevention and Treatment Act (CAPTA) requires every state, as a condition of federal funding, to have in place “provisions or procedures for an individual to report known and suspected instances of child abuse and neglect, including a State law for

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165. *Id.* § 164.512(f)(3)(ii) (noting that in the case of the crime victim not consenting disclosure is subject to the additional requirements at 164.512(f)(3)(ii)(A)–(C)).

166. *Who Do Fetal Homicide Laws Protect? An Analysis for a Post-Roe America*, PREGNANCY JUST., <https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-homicide-brief-with-appendix-UPDATED.pdf> (last visited July 29, 2023).

167. *See supra* notes 11–24 and accompanying text.

168. *See Whitner v. State*, 492 S.E.2d 777 (S.C. 1997); *In re Ankrom*, 152 So. 3d 397 (Ala. 2013).

169. *Mandatory Reporters of Child Abuse and Neglect*, CHILD WELFARE INFOR. GATEWAY, <https://www.childwelfare.gov/pubpdfs/manda.pdf> (last visited July 29, 2023).

mandatory reporting by individuals required to report such instances.”<sup>170</sup> In every state, healthcare providers are included among those who must report.<sup>171</sup>

Again, the concern here is about laws focused on fetal harm. As detailed above, at least twenty-six states require health-care providers to report when they treat infants who show evidence at birth of having been exposed to drugs, alcohol, or other controlled substances,” and in twenty-three states and the District of Columbia, “prenatal exposure to controlled substances is included in definitions of child abuse or neglect in civil statutes, regulations, or agency policies.”<sup>172</sup> In addition, in Texas at least, state law authorizes the filing of a petition for termination of parental rights before the birth of a child<sup>173</sup> and courts have made clear that such a termination can be based on pregnancy-related conduct.<sup>174</sup> Finally, in the context of substance use and pregnancy, three states (Minnesota, Wisconsin and South Dakota) specifically authorize the civil commitment of pregnant people to protect the fetus they are carrying. One can easily imagine, after *Dobbs*, states going further and defining either abortion or the intention to secure an abortion as child abuse. Such a possibility raises the serious concern that a person who discloses to a healthcare provider that she intends to obtain an abortion could end up reported to the child welfare system.

Also in the civil realm, the privacy rule specifies that a covered entity “may disclose protected health information in the course of any judicial or administrative proceeding . . . in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order.”<sup>175</sup> In addition, a covered entity may also disclose information pursuant to a “subpoena, discovery request or other lawful process” provided that the entity receives assurances regarding notice to the individual and efforts to obtain a qualified protected order in the litigation.<sup>176</sup> Texas has already turned to civil enforcement as a means of preventing abortion. In this context the civil law exceptions raise serious concerns.

Finally, the privacy rule allows for disclosures, in some circumstances, in which the covered entity concludes that they possess information that is

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170. 42 U.S.C. § 5106a(b)(2)(B)(i).

171. CHILD WELFARE INFOR. GATEWAY, *supra* note 169.

172. *Id.*

173. TEX. FAM. CODE ANN. § 161.102 (1995).

174. *See, e.g., In re K.L.B.*, 2009 WL 3444833 (Tex. App. July 16, 2009) (holding that the Texas statute concerning abuse and neglect can include pregnancy-related conduct).

175. 45 C.F.R. § 164.512I (2023).

176. *Id.* § 164.512(e)(ii).

necessary to prevent a “serious threat to health or safety.”<sup>177</sup> Again, in a state in which abortion is largely outlawed, a court could easily conclude that a disclosure that a person intends to obtain an abortion falls under this exception.

Although not applicable to sharing with other treatment providers<sup>178</sup> or when required by law,<sup>179</sup> HIPAA does have an important disclosure-minimizing requirement that otherwise applies. The “minimum necessary” standard<sup>180</sup> requires covered entities to evaluate their practices and enhance safeguards as needed to limit unnecessary or inappropriate access to and disclosure of protected health information.”<sup>181</sup>

In summary, while HIPAA provides a reasonably strong confidentiality rule, it is limited in its applicability, has almost zero applicability in the mobile health space, and is subject to a long list of exceptions. The Office for Civil Rights, the HHS enforcement office, is not large and primarily relies on complaints and self-reporting through breach notifications to trigger investigations. The relatively small number of cases brought tend to be high profile ones or exemplars<sup>182</sup> and HHS-OCR has been criticized for failing to enforce smaller or repeat violations.<sup>183</sup>

#### D. REPRODUCTIVE INFORMATION AND HIPAA NON-COMPLIANCE

In the area of reproductive healthcare criminalization specifically there is significant evidence of HIPAA non-compliance.<sup>184</sup> Returning for a moment to the Tennessee fetal assault prosecutions and the plethora of PHI contained in the criminal court files, it is fair to question whether that PHI was all lawfully disclosed. To be fair, there are plausible legal exceptions to HIPAA that could

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177. *Id.* § 164.512(j).

178. *Id.* § 164.502(b)(2)(i).

179. *Id.* § 164.502(b)(2)(v).

180. *Id.* §§ 164.502(b), 164.514(d).

181. *Minimum Necessary Requirement*, U.S. DEP’T HEALTH & HUM. SERVS. (Apr. 4, 2003), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/minimum-necessary-requirement/index.html>.

182. *See generally* U.S. DEP’T HEALTH & HUMAN SERVS., ANNUAL REPORT TO CONGRESS ON HIPAA PRIVACY, SECURITY, AND BREACH NOTIFICATION RULE COMPLIANCE FOR CALENDAR YEAR 2021 (Feb. 17, 2023), <https://www.hhs.gov/sites/default/files/compliance-report-to-congress-2021.pdf>.

183. *See, e.g.*, Charles Ornstein & Annie Waldman, *Few Consequences for Health Privacy Law’s Repeat Offenders*, PROPUBLICA (Dec. 29, 2015), <https://www.propublica.org/article/few-consequences-for-health-privacy-law-repeat-offenders>.

184. Although this Article focuses on healthcare involving pregnancy, scholars have documented extensive evidence of widespread disclosure of presumptively confidential information particularly in the emergency room setting. *See, e.g.*, Ji Seon Song, *Cops in Scrubs*, 48 FLA. ST. U.L. REV. 861, 885–87 (2021).

have resulted in these disclosures. So perhaps all the specific health information contained in the criminal files was disclosed to a child welfare agency who then disclosed it to police or prosecutors. On the other hand, the Tennessee study found that none of the criminal files contained any court orders, subpoenas or other written legal processes. So perhaps these disclosures were all lawful results of disclosures to child welfare agencies, or perhaps compliance with HIPAA in this context was not entirely legal.

The concern regarding the legality of these disclosures was heightened as the team conducted the qualitative interview portion of the study. As one prosecutor explained,

If we needed to talk to a nurse about a situation, or we needed additional records, we could get those records. If we needed to go down to a facility and meet with people, and talk to them about it, or needed information, they always seemed very . . . I never had any obstacles with the local hospitals at all.<sup>185</sup>

Similarly, in another interview of a prosecutor the team asked whether their office faces any resistance from hospitals or doctors about testifying or sharing information. The prosecutor responded, “no, never a problem, it would be the opposite.”<sup>186</sup>

The HIPAA regulations require that, absent narrow emergency circumstances, prosecutors would have to issue a subpoena or obtain another court order to get such information, but it appears quite clear that is not the practice on the ground. So, there is at least some evidence on the ground that in the specific area of reproductive healthcare and criminalization, HIPAA is underenforced. To the extent that the Biden administration is signaling, through its guidance, that it intends to enforce the protections available in the privacy rule, this is good news for patients seeking care. But even rigorously enforced, HIPAA does not offer sufficient protection.

## V. EXPANDING LEGAL PROTECTIONS POST-*DOBBS*

The Biden administration has been scrambling to find a federal legal response to the state laws ecstatically embracing an end to federal constitutional scrutiny of reproductive health limitations. Additionally, policymakers must endure a very different judicio-political environment from that of *Roe* and the 1970s. The destruction of *Roe* has become a singular policy for one of our two dominant political parties while abortion became the

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185. BACH, *supra* note 20, at 133.

186. *Id.*



predominant litmus test for Senate confirmation of justices nominated to the Supreme Court.<sup>187</sup> In turn, that court seems more respectful of state rights (increasingly and questionably equating democratic liberty with state decision-making) and keen to curtail federal agency powers. For example, both *Chevron* “Zero”<sup>188</sup> analysis and the “major questions” doctrine<sup>189</sup> could sharply curtail federal attempts to use rulemaking to preserve substantive abortion rights or related informational privacy protections. With its options limited it is not surprising that the Biden administration would cast a broad net looking for legal support.

Given that access to abortion services is a subset of access to healthcare services generally, it was natural for the Biden administration to attempt to leverage the Emergency Medical Treatment and Labor Act (EMTALA), a broad federal statute that requires emergency departments to, *inter alia*, screen and stabilize persons including those in labor.<sup>190</sup> In a July 2022 guidance, the Centers for Medicare and Medicaid Services (CMS) noted that screenings for a medical emergency are matters for clinicians and “include, but are not limited to: ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.”<sup>191</sup> The guidance also noted that “[i]f a physician believes that a pregnant patient presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment” and that EMTALA preempts state law.<sup>192</sup> In *Texas v. Becerra*, the District Court placed this guidance under a nationwide injunction.<sup>193</sup> However, the EMTALA argument fared better before a District Court in Idaho. At issue

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187. See, e.g., Carl Hulse, *Kavanaugh Gave Private Assurances. Collins Says He ‘Misled’ Her*, N.Y. TIMES (Jun. 24, 2022), <https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html>; Leigh Ann Caldwell & Julie Tsirkin, *Conservatives push anti-abortion rights as litmus test for next nominee*, NBC NEWS (Sept. 21, 2020), <https://www.nbcnews.com/politics/congress/conservatives-push-anti-abortion-rights-litmus-test-next-nominee-n1240628>.

188. See, e.g., *King v. Burwell*, 576 U.S. 473, 485 (2015). See generally Cass R. Sunstein, “*Chevron Step Zero*,” 92 VA. L. REV. 187 (2013) (describing Supreme Court jurisprudence concerning the circumstances under which courts should apply *Chevron* deference and seeking to resolve that doctrine).

189. See, e.g., *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2595 (2022). See generally Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

190. Social Security Act, 42 U.S.C. § 1395dd.

191. CTR. MEDICARE & MEDICAID SERVS., QSO-21-22-HOSPITALS, REINFORCEMENT OF EMTALA OBLIGATIONS SPECIFIC TO PATIENTS WHO ARE PREGNANT OR ARE EXPERIENCING PREGNANCY LOSS (Aug. 25, 2022).

192. *Id.*

193. *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022) at \*19–\*26 (arguing that the guidance “goes well beyond EMTALA’s text.”).

was the state's abortion trigger law which bans all abortions,<sup>194</sup> leading the Biden administration to seek to enjoin the law to the extent it conflicted with EMTALA.<sup>195</sup> Judge Winmill reflected on the decisional and informational lacunae *Dobbs* opened up for “the pregnant patient, laying on a gurney in an emergency room facing the terrifying prospect of a pregnancy complication that may claim her life [and the unimaginable] anxiety and fear she will experience if her doctors feel hobbled by an Idaho law that does not allow them to provide the medical care necessary to preserve her health and life.”<sup>196</sup>

Whether requesting it or not, the Biden administration clearly is hoping for assistance from states that are less hostile to reproductive services. Before *Dobbs*, researchers increasingly identified “abortion deserts”<sup>197</sup> as the Supreme Court reduced the protections initially provided by *Roe* and states passed stricter restrictions such as TRAP laws<sup>198</sup> aimed at threading *Casey*'s undue burden test.<sup>199</sup> After *Dobbs*, attention has shifted somewhat to identifying “abortion access islands.”<sup>200</sup> Some of these “islands,” states that increasingly provide abortion services to non-residents, have themselves legislated in the wake of *Dobbs*. For example, Colorado,<sup>201</sup> Nevada,<sup>202</sup> New York,<sup>203</sup>

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194. See IDAHO CODE § 18-622 (2020).

195. U.S. v. Idaho, 623 F. Supp. 3d 1096, 1105 (D. Idaho 2022).

196. *Id.* at \*14. Notwithstanding the argument that the Biden administration overreached with its EMTALA guidance, there are press reports of hospitals being investigated for breaching the statute's screen and stabilize mandate. See, e.g., Harris Meyer, *Hospital Investigated for Allegedly Denying an Emergency Abortion After Patient's Water Broke*, KFF HEALTH NEWS (Nov. 1, 2022), <https://khn.org/news/article/emtala-missouri-hospital-investigated-emergency-abortion/>.

197. See, e.g., Alice F. Cartwright, Mihiri Karunaratne, Jill Barr-Walker, Nicole E. Johns, and Ushma D. Upadhyay, *Identifying National Availability of Abortion Care and Distance from Major US Cities: Systematic Online Search*, 20 J. OF MED. INTERNET RSCH. 186, 192 (2018).

198. See *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 22, 2020), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers>.

199. See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (“Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause”).

200. See, e.g., Jessica Lussenhop, *Minnesota Set to Become “Abortion Access Island” in the Midwest, but for Whom?*, PROPUBLICA (Aug. 25, 2022), <https://www.propublica.org/article/minnesota-abortion-access-island-barriers>.

201. S.B. 23-188, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).

202. See Nev. Exec. Order 2022-08, *Protecting Access to Reproductive Health Services In Nevada* (June 28, 2022), [https://gov.nv.gov/layouts/full\\_page.aspx?id=360658](https://gov.nv.gov/layouts/full_page.aspx?id=360658).

203. See Harris Meyer, *Hospital Investigated for Allegedly Denying an Emergency Abortion After Patient's Water Broke*, KFF HEALTH NEWS (Nov. 1, 2022), <https://kffhealthnews.org/news/article/emtala-missouri-hospital-investigated-emergency-abortion/>.

Connecticut,<sup>204</sup> and Washington<sup>205</sup> have passed laws or issued directives protecting their states' providers from actions in other states and prohibits law enforcement and courts from cooperating with out of state civil or criminal actions. Meanwhile, the Governor of New Mexico has announced the building of a new abortion clinic near the Texas border.<sup>206</sup> Of particular relevance to informational privacy is the Governor of California's Executive Order that, *inter alia*, prohibits state agencies or employees from "providing any information, including patient medical records, patient-level data, or related billing information . . . [regarding] . . . reproductive healthcare services legally performed or provided in California."<sup>207</sup> The Governor also used some of his reelection funds to buy advertisements on billboards in several states with restrictive abortion laws stating, "[Y]ou do not need to be a California resident to receive abortion services."<sup>208</sup>

## VI. REFORMING INFORMATIONAL PRIVACY

There is an inverse relationship between healthcare access and health privacy. As healthcare access increases and patients are protected against discrimination based on health (for example, by prohibiting insurers from medical underwriting<sup>209</sup>), the need for health privacy should decrease.<sup>210</sup> *Dobbs* suggests a cycle moving in the opposite direction; because of decreasing of healthcare access (here, access to reproductive healthcare services) there is an urgent need to increase privacy protection for women of reproductive age.

Section 4 of President Biden's July 2022 Executive Order on "Protecting Access to Reproductive Healthcare Services" directs the Attorney-General, the Secretary of Homeland Security, the Chair of the FTC, and the Secretary of the HHS to address the protection of privacy, safety, and security regarding

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204. See N.Y. CRIM. PROC. LAW § 570.17 (2022); Substitute H.B. 5414, Public Act No. 22-19., Reg. Sess. (Conn. 2022).

205. See Off. Governor. Jay Inslee, Directive of the Governor 22-12 (June 30, 2022), [https://www.governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20assistance%20with%20interstate%20abortion%20investigations%20\(tmp\).pdf](https://www.governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20assistance%20with%20interstate%20abortion%20investigations%20(tmp).pdf).

206. See N.M. Exec. Order 2022-123, Expanding Access to Reproductive Health Care Services (Aug. 31, 2022), <https://www.governor.state.nm.us/wp-content/uploads/2022/08/Executive-Order-2022-123.pdf>.

207. Cal. Exec. Order N-12-22 (June 27, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/06/6.27.22-EO-N-12-22-Reproductive-Freedom.pdf>.

208. David Weigel, *Calif. Governor Rents Billboards in Red States to Tout Abortion Access*, WASH. POST (Sept. 15, 2022), <https://www.washingtonpost.com/politics/2022/09/15/gavin-newsome-abortion/>.

209. See, e.g., 45 C.F.R. § 147.108 (2015).

210. Nicolas P. Terry & Christine Coughlin, *A Virtuous Circle: How Health Solidarity Could Prompt Recalibration of Privacy and Improve Data and Research*, 74 OKLA. L. REV. 51, 52 (2021).

reproductive services.<sup>211</sup> HHS and FTC were directed to consider actions respectively under HIPAA and the FTC Act, respectively.

#### A. EXPANDING HIPAA

The question is, does HHS have the power to better regulate the reproductive services informational space, sub-regulatory guidance aside?<sup>212</sup> Given the voluminous provisions that HHS promulgated in the two decades after HIPAA became law, the HIPAA enabling statute was extraordinarily bareboned. The explanation is relatively obvious: Congress was essentially addressing its later self, establishing the scaffolding for its future legislation. However, and pursuant to the initial statute,<sup>213</sup> when that option expired, the Secretary's recommendations were turned into a final rule.

Among the rudimentary provisions of the original HIPAA statute are three that made for serious limitations going forward and will reduce HHS's options post-*Dobbs*. First, the statute clearly regulates by reference to certain limited cohorts of healthcare persons (health plans, healthcare clearinghouses, and most healthcare providers) holding personal health information rather than *any* persons holding health data.<sup>214</sup> Second, the enabling statute has a broad carve out for public health activities “under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.”<sup>215</sup> Overall, and as noted by the Fourth Circuit, the legislation provided “a clear mandate from Congress directing HHS to act in accordance with the intelligible principles set forth in HIPAA [with] clear limits upon the scope of that authority and the type of entities whose actions are to be regulated.”<sup>216</sup> However, neither HIPAA nor later legislation suggest any broader legislative mandate that could right many of the informational privacy wrongs that initially flowed from evolving personal technologies and now from *Dobbs*.

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211. Exec. Order 14076, Protecting Access to Reproductive Healthcare Services, 87 Fed. Reg. 42053 (July 8, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/07/08/executive-order-on-protecting-access-to-reproductive-healthcare-services/>.

212. See *Guidance on HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care*, U.S. DEP'T HEALTH & HUMAN SERVS. (June 29, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html>; *Guidance on Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet*, U.S. DEP'T HEALTH & HUMAN SERVS. (June 29, 2022), <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html>.

213. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, Sec. 264(c)(1), 110 Stat. 1936 (1996).

214. 42 U.S.C. § 1320d(1); see also 42 U.S.C. § 300jj(3).

215. 42 U.S.C. § 1320d(7)(b).

216. *South Carolina Medical Ass'n v. Thompson*, 327 F.3d 346, 352 (4th Cir. 2003).

The 1999 proposed rule,<sup>217</sup> the initial final rule,<sup>218</sup> and, after the Secretary reopened the public comment period,<sup>219</sup> the 2002 final rule with modifications addressing topics such as consent and marketing<sup>220</sup> were all enacted pursuant to the original HIPAA statute and seemed clearly within the enabling statute's scope. In 2009, Congress passed the HITECH Act authorizing, *inter alia*, the extension of certain Privacy Rule provisions directly to the business associates of covered entities,<sup>221</sup> new notification of breach provisions,<sup>222</sup> further limitations on disclosures of PHI for marketing purposes,<sup>223</sup> limitations on the sale of EHR data,<sup>224</sup> expansions of patient rights of access,<sup>225</sup> and improved enforcement.<sup>226</sup>

Other than an Interim final rule on enforcement<sup>227</sup> authorized by HITECH,<sup>228</sup> the only major regulatory action following the passage of HITECH was the so-called Omnibus Rule that HHS promulgated under HIPAA, HITECH, and GINA.<sup>229</sup> The Omnibus Rule made some

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217. Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59918 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pts. 160, 164).

218. Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462 (Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160, 164).

219. Request for Comments, Standards for Privacy of Individually Identifiable Health Information, 66 Fed. Reg. 12738 (Feb. 28, 2001).

220. Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53183 (Aug. 14, 2002) (to be codified at 45 C.F.R. pts. 160, 164).

221. Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 226 (Feb. 17, 2009), § 13401, § 13404.

222. *Id.* at § 13402.

223. *Id.* at § 13406.

224. *Id.* at § 13405(d), further discussed below, text at n. 232.

225. *Id.* at § 13405(e).

226. *Id.* at § 13410.

227. *HIPAA Administrative Simplification: Enforcement, Interim final rule* 67 FR 53182, HEALTH & HUM. SERVS. (Oct. 30, 2009), <https://www.govinfo.gov/content/pkg/FR-2002-08-14/pdf/02-20554.pdf>.

228. Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 226 (Feb. 17, 2009), § 13410(d).

229. Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, 78 Fed. Reg. 5566, 5702 (Jan. 25, 2013) (to be codified at 45 C.F.R. pt. 160–164), <https://www.govinfo.gov/content/pkg/FR-2013-01-25/pdf/2013-01073.pdf>. In the years that followed the Omnibus Rule there have been a series of relatively minor amendments to the Privacy Rule, e.g., Technical Corrections to the HIPAA Privacy, Security, and Enforcement Rules, 78 FR 34264 06/07/2013; 79 FR 7289 (February 6, 2014), <https://>

fundamental changes to the HIPAA model,<sup>230</sup> but HHS's reliance on specific language in HITECH arguably confirms that the original HIPAA statute lacked sufficient authority to make such changes.

For example, while it is likely that HHS always wanted to directly regulate “business associates,” the original HIPAA Rule had to do so indirectly through BA contracts<sup>231</sup> because BAs were not included in the original HIPAA statute's list of regulated persons. The popularity of mobile health—and now the concerns raised in the wake of *Dobbs*—require extending health privacy beyond traditional healthcare stakeholders. However, the omnibus rule's extension of HIPAA beyond those stakeholders to their business associates was based on specific and limited statutory language, which suggests that HITECH had not meaningfully extended the regulatory scope. This was also the case with the regulation of non-traditional healthcare providers who supplied “personal health records” in the case of security breaches. Again, the statutory language (“vendor of personal health records”), albeit here directed at FTC rulemaking, was both precise and limited.<sup>232</sup>

Post-*Dobbs*, attention also has been paid to HIPAA's treatment of what are called “psychotherapy notes” keying on what appears to be exceptional status applied to a particular subset of health information. These are notes taken by a mental health professional “documenting or analyzing the contents of conversation during a private counseling session” and do not, for example, include typical medical records information such as medications or treatment plans.<sup>233</sup> HIPAA provides additional protection for these notes by requiring

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[www.govinfo.gov/content/pkg/FR-2014-02-06/html/2014-02280.htm](https://www.govinfo.gov/content/pkg/FR-2014-02-06/html/2014-02280.htm); Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 81 Fed. Reg. 382, 396 (Jan. 6, 2016) (to be codified at 45 C.F.R. pt. 1), <https://www.govinfo.gov/content/pkg/FR-2016-01-06/pdf/2015-33181.pdf>. A more substantial NPRM, Proposed Modifications to the HIPAA Privacy Rule to Support, and Remove Barriers to, Coordinated Care and Individual Engagement, has been published but is limited to fragmentation and other matters internal to the healthcare system. Proposed Modifications to the HIPAA Privacy Rule to Support, and Remove Barriers to, Coordinated Care and Individual Engagement, 86 Fed. Reg. 6446, 6538 (Jan. 21, 2021) (to be codified at 45 C.F.R. pts. 160 and 164), <https://www.govinfo.gov/content/pkg/FR-2021-01-21/pdf/2020-27157.pdf>.

230. For a summary, see generally Melissa M. Goldstein & William F. Pewen, *The HIPAA Omnibus Rule: Implications for Public Health Policy and Practice*, 128 PUB. HEALTH REP. 554 (2013).

231. *Business Associate Contracts*, HEALTH & HUM. SERVS. (Jan. 25, 2013), <https://www.hhs.gov/hipaa/for-professionals/covered-entities/sample-business-associate-agreement-provisions/index.html>.

232. HITECH Act, § 13407; *see also* 16 C.F.R. § 318 (2009).

233. 45 C.F.R. § 164.501 (2013).

authorization for many uses<sup>234</sup> and limiting the patient’s right of access.<sup>235</sup> Although this is a carve-out of a subset of information, psychotherapy notes do not provide a particularly persuasive analogy to reproductive information. These psychotherapy notes, sometimes called process notes,<sup>236</sup> are not health records in the sense that reproductive health documentation would be.

HITECH also provided new authority for HHS to require market inalienability for PHI.<sup>237</sup> This led to the Omnibus Rule’s requirement that “a covered entity must obtain an authorization for any disclosure of protected health information which is a sale of protected health information . . . [s]uch authorization must state that the disclosure will result in remuneration to the covered entity.”<sup>238</sup> Inalienability provisions are effective privacy tools. Could HITECH authorize some type of “criminal inalienability” rule prohibiting even warrant- or subpoena-authorized use of a person’s health record in proceedings focused on reproductive health? Leaving aside the merit or workability of such a provision, the HITECH language is too limited to support such a rule.<sup>239</sup>

Notwithstanding these limitations, HIPAA’s leaky faucet is overdue for reform. HHS should aim to reduce the use of healthcare information in prosecution and re-examine some of the broader exceptions to patient confidentiality, particularly those that bow too generously to state law, state agencies, state courts, and law enforcement.

These limited but nontrivial goals are partially reflected in the Notice of Proposed Rulemaking (NPRM) published by HHS in April 2023.<sup>240</sup> The agency had decided:

“[To] provide heightened protections for another especially sensitive category of health information—PHI sought for the purposes of conducting a criminal, civil, or administrative investigation into or proceeding against any person in connection with seeking, obtaining,

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234. *Id.* § 164.508(a)(2).

235. *Id.* § 164.524(a)(1)(i).

236. *See* Rebecca A. Clay, *Keeping Track*, *American Psychological Association*, AM. PSYCHOLOGICAL ASS’N (Jan. 2007), <https://www.apa.org/gradpsych/2007/01/track> (last visited Apr. 20, 2023) (discussing difference between “progress notes” and “process notes”).

237. Health Information Technology for Economic and Clinical Health (HITECH) Act, Pub. L. No. 111-5, § 13405(d), 123 Stat. 226 (2009).

238. 45 C.F.R. § 164.508(a)(4) (2013).

239. *See* HITECH § 13405(d)(1) (“[A] covered entity or business associate shall not directly or indirectly receive remuneration in exchange for any protected health information of an individual.”).

240. HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506 (Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164) [hereinafter NPRM].

providing, or facilitating reproductive health care that is lawful under the circumstances in which it is provided.”<sup>241</sup>

In the proposed rule, disclosure for investigation or proceeding is prohibited only when the reproductive healthcare is “lawful.”<sup>242</sup> The NPRM lists three situations: first, if the care is lawful in the state where performed,<sup>243</sup> second, if required or authorized by a federal law (such as EMTALA<sup>244</sup>);<sup>245</sup> or third, if the healthcare was lawful (including, for example, if a rape or incest exception applied<sup>246</sup>) but still under investigation.<sup>247</sup> The prohibition on disclosure will be operationalized by requiring the covered entity to condition some disclosures on the receipt of a signed attestation that the use for which the PHI is sought was not a prohibited use.<sup>248</sup>

While useful in some circumstances, the scope of these “heightened protections” fails to address many of the fundamental healthcare record privacy issues identified in this Article. First, the provisions themselves are quite narrow. Perhaps as a result, the proposed rule fails to address central preexisting dangers to healthcare privacy and fails to cut off a key source of disclosures that have been and are likely to be central to prosecutions.

The scope of these “heightened protections” is quite narrow. Most importantly, increasingly reproductive healthcare is *not* lawful. Fifteen states have enacted either total or effectively total (such as six week) bans<sup>249</sup> and this number is likely to increase. As such the NPRM’s greatest impact is likely to be on information about abortions performed in abortion destination states when the state of residence asserts extraterritoriality for its investigations or proceedings and seeks to punish patients and those that assisted them.<sup>250</sup> The practical impact of the federal law authorization provision is less clear. As already discussed, the CMS guidance<sup>251</sup> asserting EMTALA preemption has already met legal pushback from abortion restrictive states,<sup>252</sup> and it is unclear

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241. See NPRM at 23509–10.

242. *Id.* at 23552 (proposed 45 C.F.R. § 164.502(a)(5)).

243. *Id.* (proposed 45 C.F.R. § 164.502(a)(5)(iii)(C)(1)).

244. *Id.* at 23531.

245. *Id.* at 23552 (proposed 45 C.F.R. § 164.502(a)(5)(iii)(C)(2)).

246. See *id.* at 23531.

247. *Id.* at 23552 (proposed 45 C.F.R. § 164.502(a)(5)(iii)(C)(3)).

248. *Id.* at 23553 (proposed 45 C.F.R. § 164.509).

249. *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (July 24, 2023), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html>.

250. See *supra* notes 30–32.

251. CTR. MEDICARE & MEDICAID SERVS., QSO-21-22-HOSPITALS, REINFORCEMENT OF EMTALA OBLIGATIONS SPECIFIC TO PATIENTS WHO ARE PREGNANT OR ARE EXPERIENCING PREGNANCY LOSS (Aug. 25, 2022).

252. See *supra* notes 190–196.



how healthcare providers faced with the legal indeterminacy around following federal over state law or *vice versa* will decided when presented with, say, a woman facing a miscarriage or ectopic pregnancy who needs pregnancy loss management. Finally, the “lawful” healthcare provision is sufficiently narrow such that it is likely to have minimal effects.

Second, the proposed changes fail to address the use of healthcare data in the circumstances that have historically been central to the prosecutions involving pregnancy: allegations that conduct during pregnancy—primarily but not exclusively drug use—harmed and/or resulted in the demise of the fetus. As detailed above, the proposed regulation focuses on “circumstances in which the PHI is sought for the purpose of investigation or imposing liability on any person for the mere act of seeking, obtaining, providing or facilitating reproductive healthcare.” The problem here is that in the majority of previous cases, the allegation was that during the pregnancy the pregnant person did something that resulted in fetal harm.<sup>253</sup> The allegations in these cases had nothing to do with “seeking, obtaining, providing or facilitating reproductive healthcare.” Therefore, the proposed rule likely not effect disclosures regarding cases that have historically been central to pregnancy-related prosecutions.

Third, the attestation requirement fails to address what has historically been a central method of criminalizing pregnancy: the disclosure of PHI pursuant to 45 C.F.R 164.512(b)(ii), permitting disclosures to a “public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.”<sup>254</sup> Given the growing trend of defining the fetus as a person, the number of states that define pregnancy-related conduct as child abuse, and the very real possibility that states expand these efforts, the attestation requirement, which simply requires those requesting information to attest that the use or disclosure is not for a prohibited purpose,<sup>255</sup> does nothing to address disclosures pursuant to these provisions.

Finally, the question arises whether the NPRM will withstand legal challenge. Indeed, it is clear from the NPRM’s extensive background discussion, the careful mapping of the proposed rule changes to the HIPAA’s statutory and regulatory history,<sup>256</sup> and its detailed focus on the physician-

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253. See *supra* note 11–22 and accompanying text.

254. 45 C.F.R. § 164.512(b)(ii) (2013).

255. NPRM at 23553.

256. See, e.g., NPRM at 23525 (noting that the “widely recognized distinction between public health activities, which primarily focus on improving the health of populations, and criminal investigations”).

patient relationship's grounding in trust<sup>257</sup> that HHS is anticipating such a challenge. HHS's core argument is that the original balance between protecting PHI and disclosing it for law enforcement purposes has been disrupted by state abortion restrictions that include investigations and prosecutions and that new prohibitions on disclosure are required to "preserve that balance."<sup>258</sup> Although we disagree with the premise that the prior balance was appropriately struck, litigation will largely turn on this analysis.

## B. PRIVACY PROTECTIONS OUTSIDE HIPAA

In general, confidentiality laws regulate disclosure of personal information. The HIPAA privacy model, modified by HITECH, combines confidentiality with breach notification. However, those are not the only protective models available to policymakers. Others include Anonymization (mandating the removal of certain identifiers prior to correction), Inalienability (prohibiting the transfer of certain data), and Privacy (prohibiting or limiting the collection of information).<sup>259</sup> These are all models that could be useful in dealing with the fallout from *Dobbs*.

As discussed previously, the only types of *Dobbs*-escalated informational privacy harms that HIPAA is equipped to deal with are those involving collection and dissemination. Further, the HIPAA Privacy Rule only applies to a subset of such cases: those where a covered entity or BA is responsible for the disclosure. Neither HIPAA nor HITECH seems to authorize more expansive regulation aimed at, for example, mobile health developers or data aggregators.

In contrast, some federal laws already go beyond HIPAA confidentiality and provide additional protection of health information. For example, the Genetic Information Nondiscrimination Act of 2008 (GINA) was based on the recognition of "the potential misuse of genetic information to discriminate in health insurance and employment."<sup>260</sup> In part, GINA prohibits employment discrimination based on genetic information. It prohibits employers from requesting, requiring, or purchasing genetic information about a person or

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257. NPRM at 23509 (noting that "individuals do not forgo lawful healthcare when needed—or withhold important information from their healthcare providers that may affect the quality of healthcare they receive—out of a fear that their sensitive information would be revealed outside of their relationships with their healthcare providers").

258. NPRM at 23516.

259. Terry, *supra* note 146, at 151–55.

260. Genetic Information Non-discrimination Act of 2008. 42 U.S.C. § 2000ff(2).

their family members (Title II).<sup>261</sup> As such, it adopts aspects of both Inalienability and Privacy.

After HIPAA, the federal laws with the strongest informational privacy footprint are those administered by the FTC. The Commission's primary tool is § 5 of the Federal Trade Commission Act which prohibits "unfair or deceptive acts or practices in or affecting commerce."<sup>262</sup> Section 5 frequently is used in proceedings against businesses that misrepresent their products or fail to comply with their own privacy policies. For example, in the health app space, the former would include making a representation that an app was as accurate as a traditional blood pressure cuff without competent and reliable scientific evidence substantiating such a claim.<sup>263</sup> The latter is well-illustrated by the case of the developer of a period tracking app sharing health information of its users with outside data analytics providers notwithstanding a promise that such information would be kept private.<sup>264</sup>

Overall, the FTC's jurisdiction and enforcement authority are best understood as broad<sup>265</sup> but "thin,"<sup>266</sup> as evidenced by the agency's apparent frustration with having only a few privacy protecting powers that it can use in policing data aggregators.<sup>267</sup> Notwithstanding, and of particular relevance for health privacy harms that occur in the HIPAA-free zone, the FTC seems acutely aware of the dangers and is increasingly asserting its presence in the space. For example, in 2016 the Commission published guidance for mobile app developers which emphasized data minimization (limiting data collection to what is necessary to accomplish a specified purpose<sup>268</sup>) and the

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261. *Genetic Information Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/genetic-information-discrimination> (last visited Apr. 20, 2023).

262. 15 U.S.C. § 45.

263. *See* Fed. Trade Comm'n v. Aura Labs, Inc., No. 8:16-cv-02147-DOC-KES, 2016 WL 7055120 (C.D. Cal. Dec. 2, 2016).

264. *See In re Flo Health, Inc.*, Case No. C-4747 (Fed. Trade Comm'n June 17, 2021), [https://www.ftc.gov/system/files/documents/cases/192\\_3133\\_flo\\_health\\_decision\\_and\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/192_3133_flo_health_decision_and_order.pdf).

265. *See generally A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), <https://www.ftc.gov/about-ftc/mission/enforcement-authority> (describing the commissions investigative, law enforcement and rulemaking authority).

266. *See generally* Terry, *supra* note 90, at 95 (observing that FTC prohibitions on "unfair or deceptive acts or practices" are limited when compared to more robust privacy regimes).

267. *See Data Brokers, A Call for Transparency and Accountability*, FED. TRADE COMM'N (May 2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

268. *Glossary: D*, EUR. DATA PROT. SUPERVISOR, [https://edps.europa.eu/data-protection/data-protection/glossary/d\\_en#data\\_minimization](https://edps.europa.eu/data-protection/data-protection/glossary/d_en#data_minimization) (last visited Nov. 25, 2023).

implementation of security by design.<sup>269</sup> In 2021, the FTC doubled down on its Health Breach Notification Rule<sup>270</sup> issued pursuant to the HITECH Act<sup>271</sup> with an eyebrow-raising interpretative guidance that “[w]hen a health app . . . discloses sensitive health information without users’ authorization, this is a ‘breach of security’ under the Rule.”<sup>272</sup>

However, the FTC initiative most relevant to the post-*Dobbs* world is the Commission’s announced interest in engaging in future rulemaking to restrict commercial surveillance or lax data security practices.<sup>273</sup> Such regulation would increase pressure on businesses to reduce the privacy harms associated with collection, processing, and dissemination of reproduction-related information. The extant example of such privacy harms is the ongoing Kochava litigation.<sup>274</sup> The FTC argued that the data aggregator’s sale of its geolocation data sourced from mobile devices could be used to trace the movements of persons to and from sensitive locations, such as reproductive health clinics, places of worship, homeless and domestic violence shelters, and addiction recovery facilities.<sup>275</sup> The Commission argued that the release of such data “is likely to injure consumers through exposure to stigma, discrimination, physical violence, emotional distress, and other harms.”<sup>276</sup>

Another federal privacy regime applies to those types of harms although its current legal status is in flux. The Confidentiality of Alcohol and Drug Abuse Patient Records rule,<sup>277</sup> often referred to as “Part 2,” introduced a special layer of confidentiality applicable to the identity and records of patients with substance use disorders (SUD). Promulgated prior to the passage of HIPAA, Part 2 remained in force after HIPAA Privacy was enacted, serving

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269. *Mobile Health App Developers: FTC Best Practices*, FED. TRADE COMM’N (Dec. 2022), <https://www.ftc.gov/business-guidance/resources/mobile-health-app-developers-ftc-best-practices>.

270. 16 C.F.R. pt. 318 (2009).

271. See HITECH, *supra* note 228.

272. Fed. Trade Comm’n, Statement of the Commission on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1596364/statement\\_of\\_the\\_commission\\_on\\_breaches\\_by\\_health\\_apps\\_and\\_other\\_connected\\_devices.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596364/statement_of_the_commission_on_breaches_by_health_apps_and_other_connected_devices.pdf).

273. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273–74 (Aug. 22, 2022) (to be codified at 16 C.F.R. ch. 1), <https://www.govinfo.gov/content/pkg/FR-2022-08-22/pdf/2022-17752.pdf>.

274. See Complaint, *supra* note 89.

275. *Id.* at 6.

276. *Id.* at ¶ 29.

277. Confidentiality of Substance Use Disorder Patient Records, 85 Fed. Reg. 42986–3096 (July 15, 2020) (to be codified at 42 C.F.R. pt. 2), <https://www.govinfo.gov/content/pkg/FR-2020-07-15/pdf/2020-14675.pdf>.

as an additional and arguably more robust protection of exceptionally sensitive health information. Part 2, like GINA and, to an extent, psychotherapy notes, applied exceptional protections to specific cohorts of health information and so serves as an important analogy for the protection of reproduction information.

Briefly, Part 2 requires a detailed consent in writing from the patient for any use of their health information that includes the purpose of the disclosure and its recipient identified with considerable specificity. A notice informs the recipient that in most cases redisclosure is prohibited and specifies other use restrictions.<sup>278</sup> Because people who use drugs may become involved in the criminal justice system with a subset being involved in judicial diversion programs, Part 2 contains specific protective provisions addressing those issues.<sup>279</sup>

On its face, Part 2 thereby seems like an attractive model for informational privacy after *Dobbs*; it identifies a particularly sensitive subset of health information that has serious implications for stigma, distress, and involvement with the criminal justice system, and it makes it far harder for healthcare providers—let alone those outside of the healthcare system—to access the information. However, in something of a surprise, Congress included a provision in the otherwise pandemic-specific CARES Act of 2020 that will fundamentally change Part 2's enabling legislation.<sup>280</sup> The legislation clearly intended to align the protection of substance use records with the more broadly applicable HIPAA model.<sup>281</sup> This change was driven in part by the concerns of providers who treat individuals with both SUD and other, non-behavioral conditions who have struggled to keep two separate sets of records, particularly when they are stored in an electronic health record. Providers also worried about the impact of segregating the records on emergency department assessment and overall coordinated care.<sup>282</sup>

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278. 42 C.F.R. §§ 2.31–33 (2020).

279. *See id.* § 2.35 (2018); *Id.* §§ 2.61–67 (2020).

280. Coronavirus Aid, Relief, and Economic Security Act or the CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 2020).

281. On November 28, 2022, OCR and SAMHSA issued a Notice of Proposed Rulemaking to revise Part 2 that carries out the CARES Act mandate by closely aligning HIPAA and Part 2. Confidentiality of Substance Use Disorder (SUD) Patient Records, 87 Fed. Reg. 74216–87 (Dec. 2, 2022) (to be codified at 42 C.F.R. pt. 2; 45 C.F.R. pt. 164). Although the revision does further restrict the use and disclosure of Part 2 records in civil and criminal proceedings, a court order will overrule any restriction. *See* 87 Fed. Reg. 74216–87, 74245–46.

282. Nicolas Terry, Melissa Goldstein & Kirk Nahra, *COVID-19: Substance Use Disorder, Privacy, and the CARES Act*, HEALTH AFFS. BLOG (June 8, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200605.571907/full/>.

Although much of Part 2 will later be aligned with the HIPAA Privacy Rule, it still retains some particularly strong protections designed to minimize the use of substance use records in court proceedings. A party seeking disclosure of a patient's substance use record must show "good cause" requiring the court to "weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services."<sup>283</sup> In the absence of that specific order, a substance use record "may not be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority, against a patient,"<sup>284</sup> barring the record from, for example, use as evidence in a criminal prosecution,<sup>285</sup> law enforcement investigation,<sup>286</sup> or an application for a warrant.<sup>287</sup> If reproductive health records were similarly protected by federal law, it would come close to some kind of presumptive "criminal inalienability" protective model.

Of course, beyond the FTC or Part 2 there are countless other examples of alternatives or additions to mainstream confidentiality rules like HIPAA. For example, Illinois' Biometric Information Privacy Act provides robust protection against the retention or disclosure of biometric information, albeit subject to exceptions for subpoenas and admissibility in legal proceedings.<sup>288</sup> Texas<sup>289</sup> and Washington<sup>290</sup> have similar laws. Many states have taken similar steps to protect the results of HIV-related information,<sup>291</sup> and many states include the option to allow for anonymous testing.<sup>292</sup> However, state laws in reproductive autonomy-friendly states will be of little utility, and in autonomy-rejecting states such privacy protections likely will be interpreted or legislated away.

### C. REFORMATIVE FEDERAL PRIVACY LEGISLATION

Predictably, an analysis of the limitations of our federal health information privacy models in the face of *Dobbs* leads to a proposal for a stronger federal law dealing with the issue. It is conceded that the passage of enhanced federal privacy legislation would be addressing a symptom of *Dobbs* rather than curing

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283. 42 U.S.C. § 290dd-2(b)(2)(C).

284. 42 U.S.C. § 290dd-2(c).

285. *Id.*

286. 42 U.S.C. § 290dd-2(c)(3).

287. 42 U.S.C. § 290dd-2(c)(4).

288. 740 ILL. COMP. STAT. 14 (2010).

289. TEX. BUS. & COM. CODE ANN. § 503.001 (2017).

290. WASH. REV. CODE § 19.375.020 (2017).

291. 35 PA. CONS. STAT. § 7601 (1999).

292. ARIZ. ADMIN. CODE § 9-6-1005 (2018); CAL. HEALTH AND SAFETY CODE § 120895 (Deering 2006).

the fundamental problem, which will require federal reproductive autonomy legislation. It must also be conceded that if the current Administration or a future one finds itself with a filibuster-proof Senate majority, reproductive autonomy, not privacy, will likely be the legislative priority.

Notwithstanding, pursuing a far stronger federal privacy law, even if it is not the *Dobbs* “silver bullet,” is a worthy end because it could remove or reduce some of the health privacy harms that adversely impact reproductive autonomy and establish a beachhead in the continuing fight for increased recognition of liberty interests.

We have already discussed the mythology of generalized health privacy protection that has grown up around HIPAA.<sup>293</sup> In practical terms, that myth accomplishes little. Very few understand the level of exposure for health information found in the HIPAA-free zone ameliorated by only the occasional assist from the FTC. However, the HIPAA mythology—or more accurately, the *expectations* of privacy that it fuels—may have political force. HIPAA is a touchstone for health privacy expectations just as *Roe* was for reproductive autonomy. Used correctly and understood as cultural touchpoints, both could help create popular pressure for legislative change. Opinion polls clearly fail to impress lawmakers in conservative-leaning states, but nationally a strong majority favors abortion rights,<sup>294</sup> a position apparently endorsed by the success of pro-abortion ballot initiatives<sup>295</sup> and evidenced by the larger role of abortion preferences<sup>296</sup> displayed in the November 2022 midterm elections. Most Americans believe it is difficult to control access their online

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293. See *supra* Part IV.

294. See Steven Shepard, *Abortion Was a 50/50 Issue. Now, It's Republican Quicksand*, POLITICO (Apr. 8, 2023), <https://www.politico.com/news/2023/04/08/republican-party-abortion-trap-00091088>; Alison Durkee, *How Americans Really Feel About Abortion: The Sometimes Surprising Poll Results As Court Ruling Threatens Mifepristone Access*, FORBES (Apr. 11, 2023), <https://www.forbes.com/sites/alisondurkee/2023/04/11/how-americans-really-feel-about-abortion-the-sometimes-surprising-poll-results-as-court-ruling-threatens-mifepristone-access/?sh=4c1165d07933>.

295. See Rachel M. Cohen, *How Abortion Rights Advocates Won Every Ballot Measure This Year*, VOX (Nov. 11, 2022), <https://www.vox.com/policy-and-politics/23451074/abortion-ballot-measure-midterms-kentucky-montana-michigan>.

296. Alice Miranda Ollstein & Megan Messerly, *A Predicted 'Red Wave' Crashed into Wall of Abortion Rights Support on Tuesday*, POLITICO (Nov. 11, 2022), <https://www.politico.com/news/2022/11/09/abortion-votes-2022-election-results-00065983>.

information<sup>297</sup> and an even larger number favor increased protection for their health information.<sup>298</sup>

There also appears to be substantial political traction for increased privacy protection at the federal level. Privacy and particularly health privacy enjoy a long history of bipartisanship. Although bipartisanship is highly unlikely to outweigh the GOP's commitment to abortion restrictions, federal privacy legislation that reduces some of the post-*Dobbs* privacy harms might still have traction.

Beyond the beltway, a growing appreciation of the interrelationships between reproductive access and informational privacy could create a powerful narrative that would encourage fundamental legislative reforms in Washington. For example, a recent survey of a sample of registered voters nationwide found 63 percent in favor of Congress acting to ban the sale or sharing of app or search engine reproductive data.<sup>299</sup> Some politicians already have embraced these interrelationships. For example, Senator Ron Wyden's reaction to *Dobbs* included the following:

“Congress must pass legislation protecting people’s data so their web searches, text messages and location tracking aren’t weaponized against them. Technology companies must take immediate steps to limit the collection and retention of customer data so that they don’t become tools of persecution.”<sup>300</sup>

Representative Sara Jacobs, when she announced her “My Body, My Data Act,” stated, “It’s unconscionable that information could be turned over to the government or sold to the highest bidder and weaponized against us, and

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297. Brooke Auxie, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar & Erica Turner, *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/>; Neil Lloyd & Chris Jackson, *Most Americans Say It Is Increasingly Difficult to Control Who Can Access Their Online Data*, IPSOS (Jan. 7, 2022), <https://www.ipsos.com/en-us/news-polls/data-privacy-2022>.

298. *Patient Survey Shows Unresolved Tension Over Health Data Privacy*, AM. MED. ASS'N (July 25, 2022), <https://www.ama-assn.org/press-center/press-releases/patient-survey-shows-unresolved-tension-over-health-data-privacy>; Sydney Murphy, *9 in 10 Americans Want Their Health Info Kept Private*, HEALTHDAY NEWS (Aug. 2, 2022), <https://www.webmd.com/health-insurance/news/20220802/9-in-10-americans-want-their-health-info-kept-private>.

299. *Abortion Rights and Democracy: A Guide for Advocates*, NAVIGATOR RSCH. (Sept. 22, 2022), <https://navigatorresearch.org/wp-content/uploads/2022/09/Navigator-Update-09.22.2022.pdf>.

300. Press Release, Wyden Statement on the Overturning of *Roe v. Wade* (June 24, 2022), <https://www.wyden.senate.gov/news/press-releases/wyden-statement-on-the-overturning-of-roe-v-wade>.



especially against low-income people and people of color . . .”<sup>301</sup> Subsequently, Representative Jacobs and Representative Anna Eshoo introduced their proposed “Secure Access for Essential Reproductive (SAFER) Health Act,” that, among other things, would require patient authorization (HIPAA-speak for consent) for disclosure of information about pregnancy termination or loss in civil, criminal, administrative, or legislative proceedings.<sup>302</sup>

It is not only patients’ interests that have been unraveled. Doctors have also been negatively affected as the healthcare they provide is demonized and criminalized.<sup>303</sup> As the AMA Privacy Principles argue, “Health care information is one of the most personal types of information an individual can possess and generate . . . and individuals accessing, processing, selling, and using it without the individual’s best interest at heart can cause irreparable harm.”<sup>304</sup>

A potential vehicle for expanding privacy protections for health information is the bipartisan and bicameral American Data Privacy and Protection Act (ADPPA).<sup>305</sup> ADPPA fundamentally differs from the current approach to the regulation of private persons in the United States. Rather than being domain- or entity-specific, the statute would apply to most data and most data custodians. At its heart are Fair Information Practices (FIPPS) principles,<sup>306</sup> such as data proportionality, transparency, and consent. Additional obligations would apply to data aggregators.<sup>307</sup> “Sensitive Covered Data,” which includes a “healthcare condition or treatment,”<sup>308</sup> are subject to

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301. Press Release, Congresswoman Jacobs Announces My Body, My Data Act to Protect Reproductive Health Data (June 2, 2022), <https://sarajacobs.house.gov/news/documentsingle.aspx?documentid=542> (last accessed Apr. 20, 2023).

302. Press Release, On 50th Anniversary of Roe, Eshoo and Jacobs Introduce Legislation to Protect Reproductive Healthcare (Jan. 25, 2023), <https://eshoo.house.gov/media/press-releases/50th-anniversary-roe-eshoo-and-jacobs-introduce-legislation-protect>.

303. Selena Simmons-Duffin, *Doctors Weren’t Considered in Dobbs, But Now They’re on Abortion’s Legal Front Lines*, NPR (July 3, 2022), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortion-legal-front-lines>.

304. AMA PRIVACY PRINCIPLES 2, AM. MED. ASS’N (2020), <https://www.ama-assn.org/system/files/2020-05/privacy-principles.pdf>.

305. American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2021–2022).

306. Pam Dixon, *A Brief Introduction to Fair Information Practices*, WORLD PRIVACY FORUM, (Jan. 4, 2008), <https://www.worldprivacyforum.org/2008/01/report-a-brief-introduction-to-fair-information-practices/>.

307. *Overview of the American Data Privacy and Protection Act, H.R. 8152*, CONG. RSCH. SERV. (Aug. 31, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10776>.

308. American Data Privacy and Protection Act, H.R. 8152, 117th Cong. § 2(28)(A)(ii) (2021–2022).

additional levels of protection.<sup>309</sup> The Act would be enforced by a newly established “Bureau of Privacy” within the FTC<sup>310</sup> and by state attorneys general.<sup>311</sup> Compliance with HIPAA by a HIPAA-covered entity would satisfy most provisions of the ADPPA.<sup>312</sup>

By addressing many, if not all, of the privacy gaps and harms wrought by private persons identified above, the ADPPA would improve reproductive informational privacy. Specifically, sensitive reproduction-inflected data held by app developers, search engines, and data aggregators in the HIPAA-free zone would be far better protected. However, ADPPA would be less effective in dealing with the harms triggered by public persons. Prosecutors would still be able to pursue reproductive information using subpoena or warrant powers. As a result, to minimize and possibly eliminate the informational fallout from *Dobbs*, two additional reforms are required.

First, Congress must borrow from Part 2 and require that any records concerning of reproductive healthcare “may not be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State, or local authority, against a patient,”<sup>313</sup> absent a court hearing weighing “the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services” and a clear finding authorizing disclosure.<sup>314</sup>

Second, and certainly contrary to the trend toward data maximization in healthcare generally, this Article has made clear the enormous harms that flow from the presence of healthcare when wielded by those who seek to criminalize reproductive conduct. As a result, there must be an increased emphasis on data minimization. There is no question that data minimization in this particular domain will be a sea change for healthcare, but absent legislation we are going to have to look to healthcare providers to be far more circumspect as to what reproductive information they collect and how long they retain it.

## VII. CONCLUSION

The repercussions of *Dobbs* are still being understood. The state statutes triggered by the decision or the new, repressive laws being crafted across the country extend the deep fissures about equitable access to healthcare services and, potentially, state attitudes to federal health privacy policies. Some of the

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309. *See, e.g., id.* at § 102(2)(3).

310. *Id.* at § 401.

311. *Id.* at § 402.

312. *Id.* at § 404 (a)(3).

313. 42 U.S.C. § 290dd2(c).

314. 42 U.S.C. § 290dd2(b)(2)(C).

repercussions are not new but are just now brutally highlighted. *Dobbs* will encourage states to double down on fetal personhood and the criminalization of the pregnant poor or persons of color. And, because confidential health information will be a key to successful prosecutions, health information about women or designed to help them increasingly will be targeted.

This Article has not identified a “silver bullet” to address the health information issues raised by *Dobbs*. Indeed, most of the deficiencies in our privacy models and specifically in HIPAA have long been recognized. HIPAA and the soon to be reformulated Part 2 do not proffer “off-the-shelf” solutions for the health informational privacy crisis that is unfolding. Notwithstanding, HIPAA’s heightened consent rule (“authorization”), its “minimum necessary” standard, and Part 2’s requirement of a strict judicial order, all indicate that there are models available to better protect highly sensitive health information.

What our Article makes clear is that, as well-meaning as no doubt it was, the Biden administration guidance reassuring doctors and patients about HIPAA protections does not withstand analysis. The criminalization of reproductive services will increase dramatically, and medical records *will* end up in the hands of law enforcement and other government entities that can forcibly interfere in families’ lives. While it is obvious that *Dobbs* itself must be reset by federal legislation, it is equally the case that federal privacy legislation must be recast to truly protect reproductive information.

