HIPAA v. Dobs[*]

Wendy A. Bach[**] and Nicolas Terry[***]

I. Introduction 2
II. The Specter and the Reality of Criminalization Post-*Dobbs* 3
III. Post-*Dobbs* Health Privacy Harms 9
  A. Collection 11
  B. Processing 18
  C. Dissemination 19
  D. Invasion 22
IV. HIPAA Gestalt v. HIPAA Reality 26
  A. Privacy versus Confidentiality 27
  B. Health Information Curated Outside of the Health Care System 28
  A. *Dobbs*, HIPAA Exceptions, and Reproductive Healthcare Privacy 29
  B. Reproductive Information and HIPAA Non-Compliance 34
V. Expanding Legal Protections Post-*Dobbs* 35
VI. Reforming Informational Privacy 38
  A. Expanding HIPAA 39
  B. Privacy Protections Outside HIPAA 43
  C. Reformative Federal Privacy Legislation 48
VII. Conclusion 52

---

[*] ©2023 Wendy A. Bach and Nicolas Terry. All rights reserved. We thank Anya Prince for her helpful comments on an earlier draft.
[**] Professor of Law, University of Tennessee College of Law. 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

I. Introduction

Just days after the Supreme Court's decision in *Dobbs v. Jackson Women's Health*,[1] the Biden administration issued guidance[2] seeking to reassure doctors and patients that the Health Privacy Rule, often simply referred to as HIPAA,[3] 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.

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, both *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. 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

---

[1] 142 S. Ct. 2228 (2022)
[2] U.S. Department of Health and Human Services, HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care, available at https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html
[3] 45 CFR Parts 160 and 164, promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, 104th Congress and 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), codified at 42 U.S.C. §§300jj et seq.; §§17901 et seq.

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 better support their reproductive choices.

To make this point and sketch out this possibility, this article proceeds in five parts. 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 catalogues the privacy harms at stake after the *Dobbs* ruling and the passage of state legislation antithetical to reproductive freedoms. Part IV examines HIPAA itself, drawing a sharp contrast between what people assume HIPAA 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.

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,[4] patients being denied essential care,[5] and the prospect and reality of prosecutors seeking information from people's Facebook accounts[6] and period trackers.[7] Those who can become

[4] See e.g., https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients; https://www.washingtonpost.com/health/2022/06/28/abortion-ban-roe-doctors-confusion/

[5] See e.g. https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare; https://www.wsj.com/articles/doctors-struggle-with-navigating-abortion-bans-in-medical-emergencies-11665684225.

[6] https://www.vice.com/en/article/n7zevd/this-is-the-data-facebook-gave-police-to-prosecute-a-teenager-for-abortion

[7] https://abcnews.go.com/Health/abortion-advocates-fear-period-tracking-apps-prosecute-abortion/story?id=85925714

pregnant are being counseled to use encrypted apps[8] 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.[9] 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.

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 estimate, a variety of advocates and academics have documented at least 1,700 forced interventions, through either criminal prosecution or civil commitment, between 1973 and 2020.[10] 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,[11] 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

---

[8] https://www.washingtonpost.com/technology/2022/05/04/abortion-digital-privacy/

[9] 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

[10] National Advocates for Pregnant Women, *Arrests and Prosecutions of Pregnant Women, 1973 - 2020*(2021), *available at* https://www.nationaladvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020/.

[11] New York Times Editorial, *When prosecutors jail a mother for miscarriage,* December 28, 2018, available at https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html

involves circumstances in which the state alleges that the pregnant person attempted a self-managed abortion; the second, and sometimes overlapping category involves miscarriages, and 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 2022 of individuals who were criminally investigated or charged with ending their own pregnancies or helping someone else do so.[12]

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 pregnancy caused her miscarriage.[13] Similarly, in 2013 a court in Indiana sentenced Purvi Patel to twenty years in prison for feticide and felony child neglect. The prosecution in that case alleged the Ms. Patel induced her own abortion with the use of medication.[14] In 2010 Bei Bei Shuai was charged with murdering her fetus. 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

[12] Laura Huss and Goleen Samari, *Self Care Criminalized, August 2022 Preliminary Findings*, available at https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/.

[13] WRTV Indianapolis, *Woman charged with baby's death after police say she admitted to drug use during preg*nancy, February 15, 2018, available at https://www.wrtv.com/news/local-news/madison-county/woman-charged-with-babys-death-after-police-say-she-admitted-to-drug-use-during-pregnancy (drug exposure)

[14]Emily Bazelon, *The New York Times, Purvi Patel Could Be Just The Beginning* April 1, 2015, available at https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html

in jail.[15] Woman who miscarried have also been charged with a variety of crimes concerning how they handled the fetal remains.[16]

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, 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.[17] Similarly, in Alabama, the state charged at least 479 women with chemical endangerment of a fetus,[18] and prosecutors in South Carolina charged at least 182 women with a variety of crimes based on conduct during pregnancy.[19] Every case involved an allegation of drug use.

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.[20] Similarly, child welfare systems (which are more aptly termed family regulation[21] or family

---

[15] Diana Penner, *The Indianapolis Star and Tribune*, Woman freed after plea agreement in baby's death, August 2, 2013, available at www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/.

[16] New York Times, *How My Stillbirth Became a Crime,* December 28, 2018, available at https://www.nytimes.com/interactive/2018/12/28/opinion/stillborn-murder-charge.html); New York Times, *When Prosecutors Jail a Mother For Miscarriage,* December 28, 2018, available at https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-pregnancy-pro-life.html.

[17] Wendy A. Bach PROSECUTING POVERTY, CRIMINALIZING CARE at 189.

[18] Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, ProPublica(Sept. 23, 2015), *available at* https://www.propublica.org/article/when-the-womb-is-a-crime-scene [https://perma.cc/PB7W-5WRH].

[19] Howard, 63. Oct. 2017.

[20] The Guttmacher Institution, *Substance Use During Pregnancy*, available at https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy

[21] Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 Colum. J. Race & L. 429 (2021).

policing[22] systems) regularly intervene in families based on the conduct of pregnant people. While there are scattered cases involving other allegations,[23] 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,[24] these cases are generally initiated at or shortly after birth. The 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 24 states and the District of Columbia consider substance exposure to be abuse or neglect, [25] 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.[26]

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

---

[22] Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 Colum. J. Race & L. 455 (2021).
[23] *See e.g.* Jefferson v. Griffin Spalding County Hospital Authority, 247 Ga. 86, 86, 274 S.E.2d 457 (1981) (where mother, in her 39th 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 caesarian 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).
[24] 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* https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4510).
[25] The Guttmacher Institution, *Substance Use During Pregnancy*, available at https://www.guttmacher.org/state-policy/explore/substance-use-during-pregnancy
[26] *See e.g. Self Care Criminalized* footnote 12 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."); Wendy A. Bach PROSECUTING POVERTY, CRIMINALIZING CARE at 86 (the majority of prosecutions for fetal assault in Tennessee involved low income women.); Lynn Paltrow and Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health,* JOURNAL OF HEALTH POLITICS, POLICY AND LAW 2013 at 310 (Between 1973 and 2005, prosecutions and forced interventions targeted disproportionately poor women, the vast majority of whom were African American,)

conduct. First, it is entirely possible that health care 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.[27] Performing an abortion in violation of this statute is a Class A felony with a possible sentence of ten to 99 years in prison. States across the country have similar statutes. The pursuit by the Indiana attorney-general of a board-certified obstetrician-gynecologist who performed a legal abortion on a 10-year-old rape victim has garnered national attention.[28] 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 target anyone who assisted the pregnant person is 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,[29] 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

---

[27] AL ST § 26-23H-4.

[28] Tom Davies, Indiana AG seeks punishment for doctor who provided abortion to 10-year-old rape survivor, Nov 30, 2022, https://www.pbs.org/newshour/health/indiana-ag-seeks-punishment-for-doctor-who-provided-abortion-to-10-year-old-rape-survivor

[29] Cohen, David S. and Donley, Greer and Rebouche´, Rachel, The New Abortion Battleground (August 30, 2022). 123 Columbia Law Review (2023, Forthcoming), U. of Pittsburgh Legal Studies Research Paper No. 2022-09, Temple University Legal Studies Research Paper No. 2022-05, Available at SSRN: http://dx.doi.org/10.2139/ssrn.4032931.

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 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

Constitutional scrutiny of repressive state laws relating to sexual relationships and reproduction have long implicated privacy claims. For example, privacy, at least the "penumbral" privacy right derived from multiple rights enumerated in the Bill of Rights, was relied on, in the contraception cases, *Griswold v. Connecticut*[30] and *Eisenstadt v. Baird*.[31] Subsequently *Roe* relied on decisional privacy to undergird a woman's termination rights.[32] However, by the time of *Casey* privacy had been deprecated in Supreme Court decision-making in abortion cases. By then, the primary pillar upholding access to abortion services was the liberty interest based on 14th Amendment substantive due process.[33] However, while neither informational privacy nor decisional privacy would play any part in *Dobbs*, the informational privacy repercussions of *Roe's* reversal were immediately apparent to the *Dobbs* dissenters.

> 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

[30] 381 U.S. 479 (1965)
[31] 405 U.S. 438 (1972)
[32] "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153 (1973)
[33] *Dobbs*, Justice Alito, 142 S.Ct. at 2271. Cf. Thomas J., concurring, 142 S.Ct. at 2301-02, expressing fundamental doubts about substantive due process and viewing it as oxymoronic. See also Kavanaugh J., concurring, "I emphasize what the Court today states: Overruling *Roe* does not mean the overruling of those precedents and does not threaten or cast doubt on those precedents." 142 S. Ct. at 2309.

> 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.[34]

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 abortion medications from out of state and the travel of their domiciliaries for out-of-state abortion services. Advocates are already promoting dramatically expanded prohibitions and enforcement.[35] As David Cohen, Greer Donley and Rachel Rebouché have argued, "Antiabortion states and cities will not wait for the Court to give them permission to apply their laws extraterritorially."[36] 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[37] and protecting non-HIPAA information residing on personal devices such as phones[38] The former stressed the responsibilities of health care

---

[34] *Dobbs*, Justices Breyer, Sotomayor, and Kagan, dissenting, 142 S.Ct. at 2318

[35] See e.g., NRLC Post-Roe Model Abortion Law, https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf

[36] Cohen, David S. and Donley, Greer and Rebouche´, Rachel, The New Abortion Battleground (August 30, 2022). 123 Columbia Law Review (2023, Forthcoming), U. of Pittsburgh Legal Studies Research Paper No. 2022-09, Temple University Legal Studies Research Paper No. 2022-05, Available at SSRN: http://dx.doi.org/10.2139/ssrn.4032931 [Draft at p.24]

[37] 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

[38] Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone1 or Tablet, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html

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.

Already there has been a media-frenzied documentation of real or predicted privacy harms. 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,"[39] all seem implicated by trigger or post-*Dobbs* abortion laws. 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 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 PHI such as by data aggregators. "Invasion" refers to the tools of modern health care, from electronic health records 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: information that is at least presumptively protected by HIPAA or other health privacy laws and information that falls outside the scope of those protections.

A. Collection

Not surprisingly an immediate concern raised for women of reproductive age in states with highly restricted abortion laws[40] has

[39] Daniel J. Solove, A Taxonomy of Privacy, 154 U. Pa. L. Rev. 477, 488 (2006)
[40] https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html

been the collection of their personal health information. 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,[41] 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, for example an admission by the defendant to DCS or investigative personnel.

Similarly, In POLICING THE WOMB, Professor Michelle Goodwin has 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.[42]

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. Health records will be mined to investigate whether life-saving abortions were truly necessary and to flag doctors who performed abortions at a higher

---

[41] WENDY A. BACH, PROSECUTING POVERTY, CRIMINALIZING CARE 130 (2022).
[42] Michelle Goodwin, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD, 78-97 (2020).

rate.[43] Beyond this, cases involving miscarriage in which there is a 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 will follow the script laid down in the past a rely, to an extraordinary degree, on PHI to prove their cases.[44]

Outside of PHI there has been significant concerns raised about data surveillance.[45] One of the first types of technology identified as problematic were fertility and period tracking apps[46] These apps used by an estimated 50 million women worldwide[47] 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.[48] 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"[49] may save all data locally but that will not protect the data if a prosecutor acquires the user's phone.[50] In the wake of *Dobbs*, Google announced that it will make it easier for Google Fit and Fitbit users to delete menstruation logs.[51]

The immediate future of abortion in abortion-hostile states will involve either travel to abortion-friendly states or mail-order facilitated

[43] 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

[44] https://www.texastribune.org/2022/07/25/abortion-prosecution-data-health-care/

[45] See generally Anya Prince, Reproductive Health Surveillance, Boston College Law Review (forthcoming, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4176557

[46] See generally Fowler, Leah R. and Ulrich, Michael R., Femtechnodystopia (May 3, 2022). Available at http://dx.doi.org/10.2139/ssrn.4099764

[47] Worsfold L, Marriott L, Johnson S, Harper JC. Period tracker applications: What menstrual cycle information are they giving women? Womens Health (Lond). 2021 Jan-Dec;17:17455065211049905. doi: 10.1177/17455065211049905. PMID: 34629005; PMCID: PMC8504278.

[48] https://www.ftc.gov/news-events/news/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc-allegations-it-misled-consumers-about

[49] https://www.plannedparenthood.org/get-care/spot-on-period-tracker

[50] https://www.newsweek.com/could-period-tracking-apps-dangerous-post-roe-v-wade-us-1704216

[51] https://blog.google/technology/safety-security/protecting-peoples-privacy-on-health-topics/

medication abortions.[52] As to the former, Justice Kavanaugh in his *Dobbs* concurrence asked and answered the hypothetical, "[M]ay a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."[53] 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.[54]

As anxiety has ramped up amid the real possibility of, for example, anti-abortion vigilantes lurking around interstate bus stations and emergency rooms, attention has also focused on other, non-medical types of sensitive data, particularly location data.[55] 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 HHS recommended that users turn-off their device's location services.[56] However, the guidance basically admitted that most sensitive information (for example, cell phone location data) was 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.[57]

[52] See generally Cohen, David S. and Donley, Greer and Rebouche, Rachel, Abortion Pills (September 20, 2022). U. of Pittsburgh Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=4224762 or http://dx.doi.org/10.2139/ssrn.4224762

[53] 142 S.Ct. at 2309.

[54] 142 S.Ct. at 2318

[55] See generally Anya E. R. Prince, Location as Health, 21 Hous. J. Health L. & Pol'y 43 (2021).

[56] Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone1 or Tablet, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html

[57] 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

Carpenter v. United States held that a warrant is required for access to historical cell-site location information,[58] but seeking a warrant will not be a major hurdle for a zealous prosecutor. Meanwhile, the federal courts have interpreted *Carpenter* narrowly, opening up access to analogous data[59] Worse, routinely location data have been 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 requests the identification of all devices in a particular area.[60] In a recent case before a District Court in Virginia Google noted, "geofence warrants comprise more than twenty-five percent of all warrants it receives in the United States."[61] 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.[62] In addition to geofence warrants, law enforcement also circumvent *Carpenter* protection by purchasing location data from data brokers.[63]

Annually there are almost 20 million Google searches for "abortion" while residents of states that have more restrictive laws on reproduction rights make significantly more searches for abortion

---

violations of the HIPAA Rules." Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates, 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, 201 L. Ed. 2d 507 (2018). See also United States v. Wilson, 13 F.4th 961 (9th Cir. 2021) (warrant required for search of email attachments).

[59] See e.g., United States v. Moore-Bush, 963 F.3d 29 (1st Cir.), reh'g en banc granted, opinion vacated, 982 F.3d 50 (1st Cir. 2020), and on reh'g 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, 142 N.E.3d 1090 (2020) (automatic license plate reader data);

[60] https://www.eff.org/deeplinks/2022/05/geofence-warrants-and-reverse-keyword-warrants-are-so-invasive-even-big-tech-wants

[61] United States v. Chatrie, 590 F.Supp.3d 901, 914 (E.D. Va., 2022) *8

[62] Id at *18-*25. Ultimately, however, in this case the court applied the "good faith" exception, id at *28. Cf. 2021 WL 6196136. Cf. Matter of Search of Info. that is Stored at Premises Controlled by Google LLC, No. 21-SC-3217 (GMH), 2021 WL 6196136 (D.D.C. Dec. 30, 2021) *16 (overbreadth of warrant cured by two-step search procedure, requiring further court approval after initial identification).

[63] See discussion below

services.[64] 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.[65] Mobile apps contain location data on 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.[66]

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, used mobile geofences near abortion clinics that captured a user's device ID and then targeted its 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 health care facilities.[67]

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.[68]

Medication abortions, using the FDA-approved combination of Mifepristone and Misoprostol, currently account for 54 per cent of all

[64] Guendelman S, Yon E, Pleasants E, Hubbard A, Prata N (2020) Shining the light on abortion: Drivers of online abortion searches across the United States in 2018. PLoS ONE 15(5): e0231672. https://doi.org/10.1371/journal.pone.0231672
[65] Poliak A, Satybaldiyeva N, Strathdee SA, et al. Internet Searches for Abortion Medications Following the Leaked Supreme Court of the United States Draft Ruling. JAMA Intern Med. Published online June 29, 2022. doi:10.1001/jamainternmed.2022.2998
[66] https://www.wsj.com/articles/phones-know-who-went-to-an-abortion-clinic-whom-will-they-tell-11659873781
[67] Office of Attorney General Maura Healey, AG Reaches Settlement with Advertising Company Prohibiting 'Geofencing' Around Massachusetts Healthcare Facilities, 4/04/2017, https://www.mass.gov/news/ag-reaches-settlement-with-advertising-company-prohibiting-geofencing-around-massachusetts-healthcare-facilities
[68] Carleen M. Zubrzycki, Zubrzycki, Carleen, The Abortion Interoperability Trap, 132 Yale Law Journal Forum 197, 208-223 (2022).

abortions in the U.S.[69] This trajectory likely has been accelerated by the FDA decision to allow mail-order provision following a telemedicine consultation first during the pandemic[70] and now permanently.[71] Requests for telemedicine-intermediated abortions increased substantially following the *Dobbs* decision particularly in states that have implemented total bans.[72]Nineteen states already require in-person prescribing or explicitly ban the use of telemedicine for medication abortions.[73] However, antiabortion groups reportedly are unhappy with enforcement of these bans and are exploring strategies such as wastewater surveillance.[74]

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. Inevitably, as lawful supply chains are shut down by state lawmakers, they will be replaced with underground sources[75] and their concomitant health risks.[76]

---

[69] Rachel K. Jones, Elizabeth Nash, Lauren Cross, Jesse Philbin, and Marielle Kirstein, Medication Abortion Now Accounts for More Than Half of All US Abortions, Mar. 2, 2022, https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions

[70] https://www.aclu.org/sites/default/files/field_document/fda_acting_commissioner_letter_to_acog_april_12_2021.pdf

[71] FDA, Questions and Answers on Mifeprex, 2021, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifeprex

[72] Aiken ARA, Starling JE, Scott JG, Gomperts R. 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. JAMA. 2022;328(17):1768–1770. doi:10.1001/jama.2022.18865

[73] https://www.kff.org/womens-health-policy/state-indicator/state-requirements-for-the-provision-of-medication-abortion/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Physical%20Presence%20of%20Prescribing%20Clinician%20Required%20or%20Explicit%20Ban%20on%20Use%20of%20Telemedicine%20for%20Medication%20Abortion%22,%22sort%22:%22desc%22%7D

[74] 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/

[75] Stephania Taladrid, The Post-Roe Abortion Underground, The New Yorker, Oct. 10, 2022.

[76] See e.g., Brent McDonald, Paula Mónaco Felipe, Caroline Kim, Souleyman Messalti and Miguel Tovar, Mexican Activists Answer Calls for Abortion Pills From the U.S., NY Times, July 15, 2022, https://www.nytimes.com/2022/07/15/world/americas/abortion-pills-mexico-us.html

In many cases the information needed by prosecutors will be found on mobile devices. For example and discussed above,[77] 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.[78] 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.[79]

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. They then sell data sets or predictive data drawn from the data.[80] Increasingly, such

[77] *Supra*, Part 2
[78] Patel v. State, 60 N.E.3d 1041 (Ind. Ct. App. 2016)
[79] https://www.vice.com/en/article/n7zevd/this-is-the-data-facebook-gave-police-to-prosecute-a-teenager-for-abortion
[80] Nicolas P. Terry, Big Data Proxies and Health Privacy Exceptionalism, 24 Health Matrix 65, 87 (2014).

data (including location data) is sold to law enforcement and typically without any warrant.[81]

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.[82] 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 FTC and Kochava, an Idaho-based company that describes itself the "largest independent data marketplace for connected devices."[83] 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.[84] Importantly, as discussed below, the types of aggregated health or medically-inflected data at issue are only thinly regulated[85] and highly unlikely to be subject to HIPAA.

C. Dissemination

Because personal health information is held in confidence by health care providers, unauthorized dissemination or disclosure is a well-established harm (and an obvious HIPAA violation[86]). Indeed, there are numerous accounts of persons who work in hospitals or pharmacies

---

[81] EFF, Data Broker Helps Police See Everywhere You've Been with the Click of a Mouse, Sep. 1, 2022, https://www.eff.org/press/releases/data-broker-helps-police-see-everywhere-youve-been-click-mouse-eff-investigation See generally See generally Dori H. Rahbara, Laundering Data: How the Government's Purchase of Commercial Location Data Violates Carpenter and Evades the Fourth Amendment, 122 Colum. L. Rev. 713 (2022).
[82] https://www.wsj.com/articles/phones-know-who-went-to-an-abortion-clinic-whom-will-they-tell-11659873781
[83] https://arstechnica.com/tech-policy/2022/08/ftc-sued-by-firm-allegedly-selling-sensitive-data-on-abortion-clinic-visits/
[84] https://cdn.arstechnica.net/wp-content/uploads/2022/08/Kochava-v-FTC-Complaint.pdf
[85] Terry NP. Assessing the Thin Regulation of Consumer-Facing Health Technologies. J Law Med Ethics. 2020 Mar;48(1_suppl):94-102. doi: 10.1177/1073110520917034. PMID: 32342747.
[86] See e.g., https://public3.pagefreezer.com/browse/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/agreements/elite/index.html

accessing the health records of family members or friends.[87] Many of these have led to lawsuits,[88] even reported cases,[89] while a few offenders have faced employment[90] or even criminal justice sanctions.[91] Moreover, as detailed below[92] HIPAA contains numerous exceptions that in the face of escalating prosecution and intervention, almost inevitably will lead to more and more disclosures.

This probable dissemination will upend the tradition of health care confidentiality. It is also likely to reopen the debate as to just how much information health care 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.[93] The post-*Dobbs* world will upend patient expectations of privacy as states enact whistleblower protections,[94] essentially encouraging snooping on records and disclosing what has heretofore been confidential health care information.

Many states increasingly will strangle access to information about abortion and other reproductive services. For example, a proposed South Carolina law would criminalize providing Internet information regarding self-administered abortions or hosting or maintaining a website that provides information on how to obtain an abortion.[95]

[87] See e.g., See generally https://www.propublica.org/article/small-scale-violations-of-medical-privacy-often-cause-the-most-harm
[88] https://www.hometownlife.com/story/news/local/livonia/2019/11/20/young-woman-sues-hospital-clinic-alleging-privacy-invasion/4191030002/
[89] See e.g., Yath v. Fairview Clinics, N.P., 767 N.W.2d 34 (Minn. Ct. App. 2009), Doe v. Guthrie Clinic, Ltd., 22 N.Y.3d 480, 5 N.E.3d 578 (2014). 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).
[90] https://healthitsecurity.com/news/new-york-suspends-nurse-for-hipaa-violation-affecting-3k-patients
[91] https://www.americanmobile.com/nursezone/nursing-news/nurse-pleads-guilty-to-hipaa-violation/
[92] *See infra* Section IV.
[93] See generally Nicolas P. Terry and Leslie P. Francis, Ensuring the Privacy and Confidentiality of Electronic Health Records, 2007 U. Ill. L. Rev 681.
[94] See e.g., South Carolina S. 1373, Section 44-41-950(D), 124th Session, 2021-2022.
[95] See e.g., South Carolina S. 1373, Section 44-41-860(B), 124th Session, 2021-2022.

Leaving First Amendment[96] and Communications Decency Act[97] 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[98] or out-of-state abortion services they are as likely to encourage *misinformation* about medically appropriate services and products.[99] There are already reports of social media sites being flooded with misinformation about "abortion reversal pills."[100] It is likely we will see more disinformation campaigns directed at the vulnerable.[101] Having been successful in raising First Amendment claims against state attempts to regulate misinformation-disseminating "crisis pregnancy centers"[102] increasing numbers of shadowy or state-promoted organizations will seek to increase the friction already suffered by those already dealing with difficult and heretofore private decisions. The growing seriousness of the misinformation issue already can be gauged from Google's notification to Congress that only advertisements from certified abortion providers[103] will be displayed in search results.[104]

---

[96] https://www.salon.com/2022/07/25/aiding-and-abetting-sc-pushes-blatantly-unconstitutional-bill-to-ban-abortion-info-online_partner/

[97] 47 U.S.C. § 230

[98] See generally KFF, The Availability and Use of Medication Abortion, Apr. 6, 2022, https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/

[99] This is not solely a post-*Dobbs* phenomenon, see e.g., NARAL, Translating Abortion Disinformation, https://www.prochoiceamerica.org/wp-content/uploads/2022/05/Translating-Abortion-Disinformation-The-Spanish-Language-Anti-Choice-Landscape.pdf

[100] https://www.politico.com/news/2022/08/20/abortion-misinformation-social-media-00052645

[101] See generally Jenna Sherman, How Abortion Misinformation and Disinformation Spread Online, Scientific American, Jun. 24, 2022, https://www.scientificamerican.com/article/how-abortion-misinformation-and-disinformation-spread-online/

[102] National Institute of Family and Life Advocates 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).

[103] https://support.google.com/adspolicy/answer/9274988

[104] https://www.warner.senate.gov/public/_cache/files/c/7/c7753efa-3adc-4cd7-9b09-6d12ab88999a/CDC0FFBD434398E0AE66A038707FA10B.response-to-warner-slotkin.pdf

D. Invasion

Finally, post-*Dobbs* privacy harms will extend into intrusions into women's lives and decisional interference.[105] 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 and women be able to receive *legally* safe treatments for miscarriages given that treatment for abortion and miscarriage are the same?[106] Will restrictive abortion laws impact the evidence-based treatment of ectopic pregnancies?[107] Related concerns have been raised regarding continued access to some contraceptive methods and even *in vitro* fertilization.[108] As the American 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.[109]

---

[105] Solove, *supra* at 552-562

[106] https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages

[107] https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients

[108] https://www.salon.com/2022/05/10/abortion-trigger-laws-ivf/ Some states may clarify this issue, see South Carolina S. 1373, Section 44-41-840 124th Session, 2021-2022.

[109] Press release, AMA, APhA, ASHP, NCPA Statement on State Laws Impacting Patient Access to Medically Necessary Medications, Sept. 8, 2022,

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 compared to those in abortion-access states.[110]

It is not hard to picture some far broader harms. The Affordable Care Act brough major advances for women's health, in particular the inclusion of preventative care as an essential health benefit.[111] These preventative care services include contraception, counseling for sexually transmitted infections, and screening for HIV, cervical cancer, and domestic violence.[112] Women who have already faced criminalization have long weighed the risks of criminalization from seeking care against its benefits and avoided full engagement with care as a result.[113] Post-*Dobbs*, more women of child-bearing age may start to avoid routine interactions with the health care system because they are fearful that their health information may in the future be used against them. A comparison to the utilization of health care 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 health care provider or have an annual checkup when there was increased ICE

---

https://www.ashp.org/news/2022/09/08/statement-on-state-laws-impacting-patient-access-to-medically-necessary-medications?

[110] Eugene Declercq et al., How New State Abortion Bans and Restrictions Could Worsen Access to Maternal Care and Health Outcomes (Commonwealth Fund, Dec. 2022). https://doi.org/10.26099/z7dz-8211

[111] https://www.ahrq.gov/ncepcr/tools/healthier-pregnancy/fact-sheets/preventive-health-services.html

[112] https://www.hrsa.gov/womens-guidelines

[113] 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." Wendy A, Bach, PROSECUTING POVERTY, CRIMINALIZING Care at __NEED PAGE NUMBER.

activity in their state[114] as well as health care avoidance, stress, and anxiety.[115]

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.[116] Mobile technologies have been deployed to improve health behaviors,[117] empower patients,[118] and increase patients' engagement with their own health.[119] Yet, post-*Dobbs* prosecutions may broadly chill the use of health-related technologies or even technologically mediated care, such as telehealth [120] 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 those who a Black and Brown and for those who seek social welfare support.[121]

---

[114] Friedman AS, Venkataramani AS. Chilling Effects: US Immigration Enforcement and Health Care Seeking Among Hispanic Adults. Health Aff (Millwood). 2021 Jul;40(7):1056-1065. doi: 10.1377/hlthaff.2020.02356. PMID: 34228522.

[115] Hacker K, Chu J, Arsenault L, Marlin RP. Provider's perspectives on the impact of Immigration and Customs Enforcement (ICE) activity on immigrant health. J Health Care Poor Underserved. 2012 May;23(2):651-65. doi: 10.1353/hpu.2012.0052. PMID: 22643614; PMCID: PMC3753075.

[116] Flora Garamvolgyi, Why US women are deleting their period tracking apps, Tue 28 Jun 2022, https://www.theguardian.com/world/2022/jun/28/why-us-woman-are-deleting-their-period-tracking-apps

[117] Han M, Lee E. Effectiveness of Mobile Health Application Use to Improve Health Behavior Changes: A Systematic Review of Randomized Controlled Trials. Healthc Inform Res. 2018 Jul;24(3):207-226. doi: 10.4258/hir.2018.24.3.207. Epub 2018 Jul 31. PMID: 30109154; PMCID: PMC6085201.

[118] https://www2.deloitte.com/us/en/blog/health-care-blog/2021/how-digital-health-apps-are-empowering-patients.html

[119] https://www.j2interactive.com/blog/patient-engagement-technology/

[120] Oliver J. Kim, Dobbs and Telehealth: What's the Impact? Bipartisan Policy Center, Aug 16, 2022, https://bipartisanpolicy.org/blog/dobbs-and-telehealth/

[121] 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. Law and Feminism 317 (2014).

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 health care insurers and health care providers[122] and only with regard to "protected health information (PHI)."[123] 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 health care provider or its "business associate" (BA)[124] 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.[125]

It follows that HIPAA's application is limited to cases of disclosure of PHI held in confidence by insurers or health care providers or their employees.[126] PHI may not be disclosed by covered entities unless authorized by the patient[127] or as permitted or required under the Privacy Rule.[128]

The impact of state whistleblower protections to, say, a health care 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.[129] It is unlikely that the Secretary would apply the public health "compelling need" [130] or other exceptions to whistleblowers or other state enforcement processes.[131]

---

[122] 45 C.F.R. §§ 160.102, 160.103.
[123] 45 C.F.R. § 160.103. The role of health care clearinghouses, an additional group of covered entities is outside the scope of this article.
[124] 45 C.F.R. § 160.103.
[125] See generally Nicolas P. Terry, Big Data Proxies and Health Privacy Exceptionalism, 24 Health Matrix 65, 87 (2014); Terry NP. Assessing the Thin Regulation of Consumer-Facing Health Technologies. J Law Med Ethics. 2020 Mar;48(1_suppl):94-102. doi: 10.1177/1073110520917034. PMID: 32342747
[126] 45 C.F.R. § 164.502(a).
[127] 45 C.F R. § 164.508
[128] 45 C.F R. § 164.502
[129] 45 C.F.R. § 160.202
[130] 45 C.F.R. § 160.203
[131] 45 C.F.R. § 160.204

Notwithstanding, there are specific exceptions permitting disclosure in judicial or administrative proceedings such as in response to subpoena or discovery request[132] or to law enforcement in the case of warrants, subpoenas, and similar demands or requests.[133]

IV. HIPAA Gestalt v. HIPAA Reality

Despite popular misunderstanding and popular belief in the force of HIPAA, the sobering reality is that HIPAA, the nation's preeminent health privacy law, can address only a small number of post-*Dobbs* privacy issues. Thus, *Dobbs* draws attention to the serious health privacy gaps in U.S. law. Justifiably, patients in traditional care settings, those that manage their own health using technology such as apps, or persons just using web services to become better informed about health issue 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 health care provider has included the receipt of a strongly worded "Notice of privacy practices for protected health information," addressing the uses and disclosures may be made by the covered entity, the patient's rights, and the covered entity's legal duties.[134]

Indeed, a mythology of generalized health privacy protection has grown up around HIPAA. Some claims about its scope are simply risible such as when a serving Congressperson asked about her vaccination status replied, "Your … question is a violation of my HIPAA rights."[135] 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

---

[132] 45 C.F.R. § 164.512(e)

[133] 45 C.F.R. § 164.512(f)(1)(ii). See also 45 CFR 164.103 (definition of "Required by law").

[134] 45 C.F.R. § 164.520

[135] 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-this-works-marjorie-taylor-greene/

members.[136] Providers who have been criticized for failure to share patient information will often cite HIPAA restrictions rather than admit to their own outdated technologies.[137] Often the HIPAA myth is rooted in understandable but nevertheless over-cautious reactions by health care workers to HIPAA and its sanctions.[138] On other occasions HIPAA's over-citation is more disturbing, such as when reports surfaced that HIPAA sanctions have been used to intimidate whistleblowers.[139]

A. Privacy versus Confidentiality

Judged as a data protection law the HIPAA Privacy Rule is a nothing more than a modest endeavor. It employs a downstream data protection model that seeks to contain collected health information within the health care system by prohibiting its migration to non-health care parties. As a downstream model HIPAA does not in any way control or regulate the collection of patient data as would an upstream, collection-focused "privacy" model.[140] A more accurate description of the Privacy Rule would be a "the doctor/hospital/insurer" confidentiality rule."[141] Within that brief 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

---

[136] See generally, Paula Span, Hipaa's Use as Code of Silence Often Misinterprets the Law, NYT, July 17, 2015, https://www.nytimes.com/2015/07/21/health/hipaas-use-as-code-of-silence-often-misinterprets-the-law.html. See also HHS-OCR, When Health Care Providers May Communicate About You with Your Family, Friends, or Others Involved In Your Care, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_ffg.pdf

[137] Christina Farr, Consumer privacy laws are not to blame for health care's biggest mess, 16 Jan 2018, https://www.cnbc.com/2018/01/16/hipaa-not-reason-for-difficult-medical-record-sharing-commentary.html

[138] Brief Reports: The Impact of Fear of HIPAA Violation on Patient Care, Bryan K. Touchet, Stephanie R. Drummond, and William R. Yates, Psychiatric Services 2004 55:5, 575-576

[139] 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

[140] Nicolas P. Terry, Big Data Proxies and Health Privacy Exceptionalism, 24 Health Matrix 65, 87 (2014).

[141] Nicolas P. Terry, Regulatory Disruption and Arbitrage in Health-Care Data Protection, 17 Yale J. Health Pol'y, L. & Ethics 143, 162 (2017).

authorized,[142] permitted or required.[143] 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 Health Care 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.[144] 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.[145] 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.[146] 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 the HIPAA-free zone and relatively unprotected,[147] although as already discussed both versions are likely exposable by subpoena or warrant.

---

[142] 45 C.F R. § 164.508

[143] 45 C.F R. § 164.502

[144] Nicolas P. Terry, Regulatory Disruption and Arbitrage in Health-Care Data Protection, 17 Yale J. Health Pol'y, L. & Ethics 143, 164 (2017)

[145] Terry NP. Assessing the Thin Regulation of Consumer-Facing Health Technologies. J Law Med Ethics. 2020 Mar;48(1_suppl):94-102. doi: 10.1177/1073110520917034. PMID: 32342747, at 95.

[146] See e.g., Barlas S. HHS Proposes Steps Toward Health Data Interoperability CMS and ONC Proposals Would Implement Cures Act. P T. 2019 Jun;44(6):347-349. PMID: 31160869; PMCID: PMC6534171.

[147] See generally Terry NP. Assessing the Thin Regulation of Consumer-Facing Health Technologies. J Law Med Ethics. 2020 Mar;48(1_suppl):94-102. doi: 10.1177/1073110520917034. PMID: 32342747; Nicolas P. Terry, Regulatory Disruption and Arbitrage in Health-Care Data Protection, 17 Yale J. Health Pol'y, L. & Ethics 143 (2016).

A. *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."[148] Almost everywhere one turns 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 is not part of the Privacy Rule, its only presence—initial consent to share health information with a provider,[149] being excised in 2002.[150] Authorization is a special form of consent with quite specific requirements[151] and is somewhat akin to informed consent.[152] Required disclosures are quite limited, arising when patients request access to their records or in the case of an HHS enforcement procedure.[153]

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 health care operations).[154]
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

[148] Nicolas P. Terry and Leslie P. Francis, Ensuring the Privacy and Confidentiality of Electronic Health Records, 2007 U. Ill. L. Rev 681, 717.
[149] Standards for Privacy of Individually Identifiable Health Information, 12/28/2000, 45 C.F.R. §164.506(a), https://www.federalregister.gov/documents/2000/12/28/00-32678/standards-for-privacy-of-individually-identifiable-health-information#sectno-reference-164.506
[150] See 67 FR 53182, 53255 (August 14, 2002).
[151] 45 C.F.R. § 164.508.
[152] See generally https://www.hhs.gov/hipaa/for-professionals/faq/264/what-is-the-difference-between-consent-and-authorization/index.html
[153] 45 C.F.R. § 164.502(a).
[154] 45 C.F.R. §164.506

context in which a state criminalizes or makes relevant to child welfare cases additional aspects of reproductive conduct.

First, and most significantly, HIPAA allows disclosure "as required by law."[155] 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."[156] 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 sub-sections 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"[157] and disclosures for "judicial or administrative proceedings."[158]

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 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 health care 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

[155] 45 CFR 164.512(a).
[156] *Id.*
[157] 45 CFR 164.512(f)).
[158] 45 CFR 164.512(e).

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.[159] While generally, the crime victim must consent to disclosure, if the crime victim cannot consent because of "incapacity" the covered entity can disclose without consent.[160]

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. According to the National Conference of State Legislatures, as of 2018, 38 states had fetal homicide laws.[161] While many of these laws explicitly exempt pregnant women from prosecution under these statutes, this is not universally true. Moreover, nothing bars states, after *Dobbs*, 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 women herself. As noted above, there are over thousands of protections and forced interventions have been documented already. In addition, at least two states, South Carolina and Alabama, have permitted prosecution for pregnancy-related conduct against individual who were pregnant.[162] 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 health care provider that she obtained abortion-inducing medication from a particular source. That fetus is a still a "crime victim" and information about who provided the medication is still relevant and disclosable under this exception.

[159] 45 CFR 164.512(f)(3)).
[160] 45 CFR 164.512(f))(3)(ii).
[161] https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx
[162] Whitner v. State, 492 S.E.2d 777 (S.C. 1997); In Re. Ankrom, 152 So.3d 397 (Al. 2013).

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,[163] 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 mandatory reporting by individuals required to report such instances."[164] In every state, healthcare providers are included among those who must report.[165]

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."[166] In addition, in Texas at least, state law authorizes the filing a petition for termination of parental rights before the birth of a child[167] and courts have made clear that such a termination can be based on pregnancy-related conduct.[168] 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 health care provider

[163] https://www.childwelfare.gov/pubpdfs/manda.pdf
[164] 42 U.S.C. § 5106a(b)(2)(B)(i).
[165] https://www.childwelfare.gov/pubpdfs/manda.pdf
[166] Parental Substance Use as Child Abuse. (2019).
[167] TEX. CODE ANN. 161.102.
[168] *See e.g. In the Interest of K.L.B., a child*, 2009 WL 3444833, (Tex. App. 2009) (holding that the Texas statute concerning abuse and neglect can include pregnancy-related conduct).

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."[169] 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.[170] 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 necessary to prevent a "serious threat to health or safety."[171] 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 treating providers[172] or when required by law,[173] HIPAA does have an important disclosure-minimizing requirement that otherwise applies. The "minimum necessary" standard[174] 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."[175]

---

[169] 45 CFR 164.512(e).
[170] *Id.*
[171] 45 CFR 164.512(j).
[172] 45 C.F.R. § 164.502(b)(2)(i)
[173] 45 C.F.R. § 164.502(b)(2)(v)
[174] 45 C.F.R. § 164.502(b); 45 C.F.R. § 164.514(d)
[175] https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/minimum-necessary-requirement/index.html

In summary, while HIPAA is 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. HHS-OCR, its enforcement office, is not large and primarily relies on complaints and self-reporting (breach notification) to trigger investigations. The relatively small number of cases brought tend to be high profile ones or exemplars[176] and HHS-OCR has been criticized for failing to enforce smaller or repeat violations.[177]

B. Reproductive Information and HIPAA Non-Compliance

In the area of reproductive healthcare criminalization specifically there is significant evidence of HIPAA non-compliance. 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 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, one interesting finding from the Tennessee study was that the none of the criminal files contained any court orders, subpoenas or other written legal process. 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

---

[176] https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/data/enforcement-results-by-year/index.html
[177] See e.g., https://www.propublica.org/series/patient-privacy

> about it, or needed information, they always seemed very ... I never had any obstacles with the local hospitals at all.[178]

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:

> Mm-mm (negative). Matter of fact when I was ... back when this law was going on … to say there was a problem, no, never a problem, it would be the opposite.[179]

The HIPAA regulations require that, absent narrow emergency circumstances, prosecutors would have to issue or 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 limitations. Additionally, policymakers must endure a very different judicial-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 predominant litmus test for Senate

[178] Wendy A. Bach, PROSECUTING POVERTY, CRIMINALIZING CARE at 133.
[179] *Id.*

confirmation of justices nominated to the Supreme Court.[180] 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"[181] analysis and the "major questions" doctrine[182] 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 health care 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.[183] In a July 2022 guidance the Centers for Medicare and Medicaid Services (CMS) noted that the screening for a medical emergency is a matter 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."[184] The guidance also noted that "If 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.[185] In *Texas v. Becerra* the District Court placed

[180] See e.g., Carl Hulse, Kavanaugh Gave Private Assurances. Collins Says He 'Misled' Her, NYT, June 24, 2022, https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html; Leigh Ann Caldwell and Julie Tsirkin, Conservatives push anti-abortion rights as litmus test for next nominee, Sept. 21, 2020, https://www.nbcnews.com/politics/congress/conservatives-push-anti-abortion-rights-litmus-test-next-nominee-n1240628
[181] See e.g., King v. Burwell, 576 U.S. 473, 485 (2015) (per Roberts, CJ).
[182] See e.g., W. Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2595 (2022).
[183] Social Security Act, 42 U.S.C. § 1395dd
[184] CMS, Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (QSO-21-22-Hospitals- Updated July 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf
[185] Id.

this guidance under a nationwide injunction.[186] However, the EMTALA argument fared better before a District Court in Idaho. At issue was the state's abortion trigger law which bans all abortions,[187] leading the Biden administration to seek to enjoin the law to the extent it conflicted with EMTALA.[188] 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."[189]

Whether requesting it or not the Biden administration clearly is hoping for assistance from states that are less hostile to reproductive services. As the Supreme Court reduced the protections initially provided by *Roe* and states passed stricter restrictions such as TRAP laws[190] aimed at threading *Casey's* undue burden test,[191] so researchers increasingly identified "abortion deserts"[192] After *Dobbs* attention has shifted somewhat to identifying "abortion islands."[193] Some of these

---

[186] State of Texas v. Becerra, (ND Tex. 08/23/22), https://storage.courtlistener.com/recap/gov.uscourts.txnd.365015/gov.uscourts.txnd.365015.73.0.pdf arguing that the guidance "goes well beyond EMTALA's text."
[187] Idaho Code 18-622
[188] U.S. v. Idaho, --- F.Supp.3d ----2022 WL 3692618 (D. Idaho 2022)
[189] 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, KHN, Nov. 1, 2022, https://khn.org/news/article/emtala-missouri-hospital-investigated-emergency-abortion/
[190] https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws
[191] 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").
[192] See e.g., Cartwright AF, Karunaratne M, Barr-Walker J, Johns NE, Upadhyay UD. Identifying National Availability of Abortion Care and Distance from Major US Cities: Systematic Online Search. J Med Internet Res. 2018 May 14;20(5):e186. doi: 10.2196/jmir.9717. PMID: 29759954; PMCID: PMC5972217.
[193] See e.g., Jessica Lussenhop, Minnesota Set to Become "Abortion Access Island" in the Midwest, but for Whom? Pro Publica, Aug. 25, 2022, https://www.propublica.org/article/minnesota-abortion-access-island-barriers

"islands," states that increasingly provide abortion services to non-residents, have themselves legislated in the wake of *Dobbs*. For example, Nevada,[194] New York,[195] Connecticut,[196] and Washington[197] 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, while the Governor of New Mexico has announced the building of a new abortion clinic near the Texas border.[198] 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 health care services legally performed or provided in California."[199] The Governor also used some of his reelection funds to buy advertisements on billboards in several states with restrictive abortion laws stating, "you do not need to be a California resident to receive abortion services."[200]

VI. Reforming Informational Privacy

There is a hydraulic relationship between healthcare access and health privacy. As access to healthcare access increases and patients are protected against discrimination based on health (for example, by prohibiting insurers from medical underwriting[201]), the need for health

[194] Executive Order 2022-08, Protecting Access to Reproductive Health Services In Nevada, https://gov.nv.gov/News/Executive_Orders/2022/Executive_Order_2022-08_Protecting_Access_to_Reproductive_Health_Services_in_Nevada/
[195] https://legislation.nysenate.gov/pdf/bills/2021/S9077A
[196] https://cga.ct.gov/2022/ACT/PA/PDF/2022PA-00019-R00HB-05414-PA.PDF
[197] 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?
[198] New Mexico Executive Order 2022-123, https://www.governor.state.nm.us/wp-content/uploads/2022/08/Executive-Order-2022-123.pdf
[199] Executive Order N-12-22, https://www.gov.ca.gov/wp-content/uploads/2022/06/6.27.22-EO-N-12-22-Reproductive-Freedom.pdf
[200] David Weigel, Calif. governor rents billboards in red states to tout abortion access, Wash. Post, Sep. 15, 2022, https://www.washingtonpost.com/politics/2022/09/15/gavin-newsome-abortion/
[201] See e.g., 45 CFR § 147.108

privacy should decrease.[202] *Dobbs* suggests a cycle moving in the opposite direction; because of the deprecation of health care 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 HHS to address the protection of privacy, safety, and security regarding reproductive services.[203] HHS and FTC were directed to consider actions respectively under HIPAA and the FTC Act.

A. Expanding HIPAA

Therefore, the question arises, issuing sub-regulatory guidance aside,[204] does HHS have the power to better regulate the reproductive services informational space? Given the voluminous provisions that HHS would promulgate over two decades, 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,[205] 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

[202] 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 (2021).
[203] Executive Order on Protecting Access to Reproductive Healthcare Services, Jul. 8, 2022, https://www.whitehouse.gov/briefing-room/presidential-actions/2022/07/08/executive-order-on-protecting-access-to-reproductive-healthcare-services/
[204] Guidance on the 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; Guidance on Protecting the Privacy and Security of Your Health Information When Using Your Personal Cell Phone or Tablet, https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/cell-phone-hipaa/index.html
[205] Public Law 104 - 191 - Health Insurance Portability and Accountability Act of 1996, Sec. 264(c)(1).

certain limited cohorts of health care persons holding personal health information rather than *any* persons holding health data.[206] Second, that regulated group is quite narrow, health plans, health care clearinghouse, and most if not all health care providers.[207] Third, 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."[208] 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."[209] However, neither HIPAA nor later legislation suggest any broader legislative mandate that could right the informational privacy wrongs that initially flowed from evolving personal technologies and now from *Dobbs*.

The 1999 proposed rule,[210] the initial final rule,[211] and, after the Secretary reopened the public comment period,[212] the 2002 final rule with modifications addressing topics such as consent and marketing[213] 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, new notification of breach provisions, further limiting

[206] 42 U.S. Code § 1320d(4)
[207] 42 U.S. Code § 1320d(1)(2)(3), § 1320d–1
[208] 42 U.S. Code § 1320d–1(7)(b)
[209] South Carolina Medical Ass'n v. Thompson, 327 F.3d 346, 352 (4th Cir. 2003)
[210] DHHS, Standards for Privacy of Individually Identifiable Health Information, 45 CFR Parts 160 and 164 Federal Register/Vol. 64, No. 212, 59918
[211] DHHS, Standards for Privacy of Individually Identifiable Health Information, 45 CFR Parts 160 and 164 Final rule, 82462 Federal Register/Vol. 65, No. 250/Thursday, December 28, 2000, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/privacyrule/prdecember2000all8parts.pdf
[212] DHHS, Standards for Privacy of Individually Identifiable Health Information, Final rule; request for comments, 66 FR 12738, March 2001
[213] DHHS, Standards for Privacy of Individually Identifiable Health Information, Final rule 67 FR 53182 (August 14, 2002), https://www.govinfo.gov/content/pkg/FR-2002-08-14/pdf/02-20554.pdf

disclosures of PHI for marketing purposes, expanding patient rights of access, and improving enforcement.[214]

Other than an Interim final rule on enforcement[215] authorized by HITECH,[216] the only major regulatory action following the passage of HITECH was the so-called Omnibus Rule that HHS promulgated under HIPAA, HITECH, and GINA.[217] The Omnibus Rule made some fundamental changes to the HIPAA model,[218] but HHS's reliance on specific language in HITECH merely confirms there was insufficient authority under the original HIPAA statute to make the 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[219] 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 *Dobbs* require extending health privacy beyond traditional health care stakeholders. However, the omnibus rule rule's extension of HIPAA beyond those stakeholders to their business associates was based on specific and limited statutory language, suggesting that HITECH had nor

---

[214] 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), codified at 42 U.S.C. §§300jj et seq.; §§17901 et seq.

[215] DHHS, HIPAA Administrative Simplification: Enforcement, Interim final rule 67 FR 53182 (Oct. 30, 2009), https://www.govinfo.gov/content/pkg/FR-2002-08-14/pdf/02-20554.pdf

[216] Section 13410(d)

[217] 78 FR 5565 (January 25, 2013), 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://www.govinfo.gov/content/pkg/FR-2014-02-06/html/2014-02280.htm ; 81 FR 382 (January 6, 2016), 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, 6446 Federal Register/Vol. 86, No. 12/Thursday, January 21, 2021, https://www.govinfo.gov/content/pkg/FR-2021-01-21/pdf/2020-27157.pdf, has been published but is limited to fragmentation and other matters internal to the health care system.

[218] For a summary see Goldstein MM, Pewen WF. The HIPAA Omnibus Rule: implications for public health policy and practice. Public Health Rep. 2013 Nov-Dec;128(6):554-8. doi: 10.1177/003335491312800615. PMID: 24179268; PMCID: PMC3804103.

[219] https://www.hhs.gov/hipaa/for-professionals/covered-entities/sample-business-associate-agreement-provisions/index.html

meaningfully extended the regulatory scope. This was also the case with a federal health privacy "first," regulating non-traditional health care 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 rule making, was both precise and limited.[220]

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.[221] HIPAA provides additional protection for these notes in that authorization is required for many uses[222] and there are limitations on the patient's right of access.[223] Although this is a carve-out of a sub-set of information it is not a particularly persuasive analogy. In essence and these notes, sometimes called process notes,[224] are not health records in the sense that reproductive health documentation would be and are more analogous to FERPA "Possession Records."[225]

One final HITECH provision needs addressing. The statute provided new authority for HHS to require market inalienability for PHI. 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."[226] Inalienability provisions are effective privacy tools and the question arises whether HITECH could authorize some type of "criminal inalienability" rule prohibiting even warrant- or

[220] HITECH Act Sec. 13407. The FTC regulation is to be found at https://www.ftc.gov/legal-library/browse/rules/health-breach-notification-rule
[221] 45 C.F.R. § 164.501
[222] 45 C.F.R. § 164.508(a)(2)
[223] 45 C.F.R. § 164.524(a)(1)(i)
[224] https://www.apa.org/gradpsych/2007/01/track
[225] 20 U.S. Code § 1232g(a)(4)(b)(1)
[226] 45 CFR § 164.508(a)(4)

subpoena-authorized use of a person's health record in proceedings focuses on reproductive health. Leaving aside the merit or workability of such a provision the HITECH language is too limited to support such a rule.[227]

Notwithstanding these limitations HIPAA's leaky faucet is overdue for reform. HHS should 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 and aim to reduce the use of healthcare information in prosecutions.

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).[228] These are all models that could be useful in dealing with the fall-out from *Dobbs*.

As discussed previously the only types of *Dobbs*-escalated informational privacy harms that HIPAA is equipped to deal with are those characterized above as involving dissemination or disclosure. Further, the HIPAA Privacy Rule will only apply to a subset of such cases, those where a covered entity or BA is responsible for the disclosure. Neither the HIPAA nor HITECH would seem 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.

[227] HITECH Sec. 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."
[228] Nicolas P. Terry, Regulatory Disruption and Arbitrage in Health-Care Data Protection, 17 Yale J. Health Pol'y, L. & Ethics 143, 151-55 (2016).

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."[229] In part GINA prohibits employment discrimination based on genetic information and one of the ways it ensures the latter is by prohibiting employers from requesting, requiring or purchasing genetic information about a person or their family members (Title II).[230] 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 section 5 of the Federal Trade Commission Act which prohibits "unfair or deceptive acts or practices in or affecting commerce."[231] 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.[232] The latter is well illustrated by the case of the developer of a period tracker app developer sharing health information of its users with outside data analytics providers notwithstanding a promise that such information would be kept private.[233]

Overall, the FTC's jurisdiction and enforcement authority are best understood as broad[234] but "thin,"[235] as evidenced by the agency's evident frustration at having only few privacy protecting powers that

[229] Genetic Information Non-discrimination Act of 2008. 42 USC 2000ff, Sec. 2
[230] See generally https://www.eeoc.gov/genetic-information-discrimination
[231] 15 USC 45
[232] Federal Trade Commission v. Aura Labs, Inc., 12/09/16, https://www.ftc.gov/system/files/documents/cases/161212_aura_labs_final_order.pdf
[233] In the Matter of Flo Health, Inc. June 17, 2021, https://www.ftc.gov/system/files/documents/cases/192_3133_flo_health_decision_and_order.pdf
[234] https://www.ftc.gov/about-ftc/mission/enforcement-authority
[235] Terry NP. Assessing the Thin Regulation of Consumer-Facing Health Technologies. J Law Med Ethics. 2020 Mar;48(1_suppl):94-102. doi: 10.1177/1073110520917034. PMID: 32342747

it can use in policing data aggregators.[236] Notwithstanding, and of particular relevance with regard to 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 and the implementation of security by design.[237] In 2021the FTC doubled down on its Health Breach Notification Rule[238] issued pursuant to the HITECH Act[239] 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."[240]

However, the FTC initiative of the most relevance 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.[241] 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.[242] The FTC argued in its complaint 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

---

[236] Data Brokers, A Call for Transparency and Accountability, Federal Trade Commission May 2014, https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf
[237] Mobile Health App Developers: FTC Best Practices, https://www.ftc.gov/business-guidance/resources/mobile-health-app-developers-ftc-best-practices
[238] 16 C.F.R. Part 318
[239] Discussed above
[240] Statement of the Commission, On Breaches by Health Apps and Other Connected Devices, Sep. 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
[241] Advance notice of proposed rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security, 08/22/2022, https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security
[242] See discussion above

violence shelters, and addiction recovery facilities.[243] 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.[244]

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,[245] 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 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 with 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 other use restrictions.[246] Because of the potential for people who use drugs becoming involved in the criminal justice system and a subset being involved in judicial diversion programs Part 2 contains specific protective provisions addressing those issues.[247]

On its face, therefore, Part 2 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,

---

[243] Federal Trade Commission v. Kochava Inc., Case No. 2:22-cv-377, (D. Idaho, 08/29/22), https://www.ftc.gov/system/files/ftc_gov/pdf/1.%20Complaint.pdf
[244] Id. at ¶29.
[245] 42 CFR Part 2, Promulgated pursuant to 42 U.S. Code § 290dd–2. The current rule's most recent amendments were in July 2020, https://www.federalregister.gov/documents/2020/07/15/2020-14675/confidentiality-of-substance-use-disorder-patient-records
[246] See 42 CFR Subpart C, §§2.31-.33
[247] See 42 CFR § 2.35; 42 CFR Subpart E §§ 2.61-67.

distress, and involvement with the criminal justice system and it makes it far harder for health care providers, let alone those outside of the health care 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.[248] The clear intent of the legislation was to align the protection of substance use records with the more broadly applicable HIPAA model.[249] This change was driven in part by providers who treat individuals with both SUD and other conditions have struggled to separate two sets of records, particularly when they appear in electronic health records. Providers also worried about the impact of segregating the records on emergency department assessment and overall coordinated care.[250]

Although much of Part 2 will in the future 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. Thus, while a patient's substance use record may be disclosed following a court order, the application 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."[251] 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,"[252] barring the record from, for example, use as evidence in a

[248] Public Law No: 116-136 (03/27/2020) Coronavirus Aid, Relief, and Economic Security Act or the CARES Act https://www.congress.gov/116/bills/hr748/BILLS-116hr748eas.pdf
[249] 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. https://www.federalregister.gov/documents/2022/12/02/2022-25784/confidentiality-of-substance-use-disorder-sud-patient-records. Although the revision does further restrict the use and disclosure of Part 2 records in civil and criminal proceedings, a court order will allow overrule any restriction. See § 2.65 at ¶ 36 NPRM.
[250] See Nicolas Terry, Melissa Goldstein & Kirk Nahra, COVID-19: Substance Use Disorder, Privacy, and the CARES Act, HealthAffairs: Health Affs. Blog (June 8, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200605.571907/full/
[251] 42 U.S. Code § 290dd–2(b)(2)(c)
[252] 42 U.S. Code § 290dd–2(c)

criminal prosecution,[253] law enforcement investigation,[254] or an application for a warrant.[255] If reproductive health records were similarly protected by federal law this 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 such as 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.[256] Texas,[257] and Washington[258] have similar laws. Many states have taken similar steps to protect the results of HIV-related information[259] and many states include the option of Anonymization, allow for anonymous testing.[260] 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 out of the way.

C. Reformative Federal Privacy Legislation

It is predictable that an analysis of the limitations of our federal health information privacy models in the face of *Dobbs* would lead to a proposal for a stronger federal law dealing with the issue. At the outset, it must be conceded that the passage of enhanced federal privacy legislation would be addressing a symptom of *Dobbs* rather than curing the fundamental problem which will require federal reproductive autonomy legislation. Equally, it must be conceded that if the current Administration or a future one finds itself with a filibuster-proof Senate majority the legislative priority likely will be reproductive autonomy not privacy.

---

[253] 42 U.S. Code § 290dd–2(c)(1)
[254] 42 U.S. Code § 290dd–2(c)(3)
[255] 42 U.S. Code § 290dd–2(c) (4)
[256] 740 ILCS 14/1
[257] Tex. Bus. & Com. Code Ann. § 503.001
[258] 19.375 RCW
[259] 35 P.S. § 7601
[260] Ariz. Admin. Code § R9-6-1005; California Code, Health and Safety Code § 120895

Notwithstanding, pursuing a far stronger federal privacy law, even if it is not the *Dobbs* "silver bullet," is a worthy end, 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.[261] In practical terms that myth accomplishes little that is positive; privacy lawyers but very few consumers understand the level of exposure for health information that finds itself 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*" had played that role for reproductive autonomy. Used correctly and understood as cultural touchpoints, both could play a role in creating popular pressure for legislative change. Opinion polls clearly fail to impress lawmakers in conservative-leaning states but nationally a strong majority favor transforming the *Roe* formula into legislation,[262] a position apparently endorsed by the success of pro-abortion ballot initiatives[263] and the larger role of abortion preferences[264] displayed in the November 2022 mid-term elections. A large percentage of Americans favor more control over surveillance of their online activities[265] and an even larger number favor increased protection for their health information.[266]

---

[261] *Supra*, Part IV.

[262] https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-national-poll-abortion-rights-may-2022/

[263] 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

[264] ALICE MIRANDA OLLSTEIN and 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

[265] https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/

[266] https://www.ama-assn.org/press-center/press-releases/patient-survey-shows-unresolved-tension-over-health-data-privacy

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 found 63 per cent in favor of Congress acting to ban the sale or sharing of app or search engine reproductive data.[267] 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."[268] 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 especially against low-income people and people of color…"[269] It is not only patients' interests that have been unraveled; also negatively affected are doctors as the health care they provide has been both demonized and criminalized.[270] 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

---

[267] Navigator Research, Abortion Rights and Democracy: A Guide for Advocates, Sept. 22, 2022, https://navigatorresearch.org/wp-content/uploads/2022/09/Navigator-Update-09.22.2022.pdf

[268] 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

[269] https://sarajacobs.house.gov/news/documentsingle.aspx?DocumentID=542

[270] https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines

without the individual's best interest at heart can cause irreparable harm.[271]

A potential vehicle for expanding privacy protections for health information is the bipartisan and bicameral American Data Privacy and Protection Act (ADPPA).[272] ADPPA fundamentally differs from the current approach to the privacy regulation of private persons in the U.S. privacy. Rather than being domain specific or entity specific the statute would apply to most data and most data custodians. At its heart are Fair Information Practices (FIPPS) principles[273] such as data proportionality, transparency, and consent. Additional obligations would apply to data aggregators.[274] "Sensitive Covered Data," that includes "healthcare condition or treatment"[275] are subject to additional levels of protection.[276] The Act would be enforcement by a newly established "Bureau of Privacy" within the FTC[277] and by state attorneys general.[278] Compliance with HIPAA by a HIPAA covered entity would be deemed to satisfy most provisions of the ADPPA.[279]

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, if not eliminate the informational fallout from *Dobbs*, two additional reforms are required.

---

[271] AMA Privacy Principles, https://www.ama-assn.org/system/files/2020-05/privacy-principles.pdf

[272] H.R.8152 - American Data Privacy and Protection Act, 117th Congress (2021-2022)

[273] https://www.worldprivacyforum.org/2008/01/report-a-brief-introduction-to-fair-information-practices/

[274] See generally CRS, Overview of the American Data Privacy and Protection Act, H.R. 8152, Aug. 31, 2022, https://crsreports.congress.gov/product/pdf/LSB/LSB10776

[275] Sec. 2(28)(A)(ii)

[276] See e.g., Sec. 102(2)(3)

[277] Sec. 401

[278] Sec. 402

[279] Sec. 404 (a)(3)

First, Congress must borrow from Part II 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,"[280] 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.[281]

Second there must be an increased emphasis on data minimization. Data minimization will be a sea change for health care. While it is well accepted in other informational domains, the consensus has been that to promote good health outcomes there should be data *maximization*. As a result, and given the bipartisan coalition behind legislation, such as ADPPA likely would crumble if a pro-abortion services amendment was tabled, we are going to have to look to health care providers to be far more circumspect as to what reproductive information they collect and how long they retain it and be transparent in addressing questions about post-*Dobbs* risks.

VII. Conclusion

The repercussions of *Dobbs* are still being parsed. The state statutes either triggered by the decision or the new, repressive laws being crafted across the country extend the deep fissures about equitable access to health care services and, potentially, state attitudes to federal health privacy policies.[282] However, some of the repercussions are not new but now are 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 heretofore confidential health information will be an important key to successful prosecutions, health information about women or designed to help them increasingly will be targeted.

[280] 42 U.S. Code § 290dd–2(c)
[281] 42 U.S. Code § 290dd–2(b)(2)(c)
[282] Cf. Craig Konnoth, Health Data Federalism, 101 B.U. L. Rev. 2169 (2021).

This article has not identified any "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 do 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.