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The Legal Landscape After Roe's Reversal

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THE LEGAL LANDSCAPE AFTER *ROE*'S REVERSAL

Rachel Rebouché[*]

LECTURE INTRODUCTION

Welcome, everybody. Thank you so much for coming today. For those of you who do not already know me, my name is Tim Armstrong. I am the Associate Dean for Faculty and Research here at the University of Cincinnati College of Law. On behalf of Dean Haider Ala Hamoudi, the College of Law faculty and administration, I am pleased to welcome you to the 2024 Robert S. Marx Lecture here at the College of Law.

Before we introduce our speaker for today, the Robert S. Marx lecture was established by Judge Marx to enrich the curriculum of the College of Law by bringing to the law school the scholarship and learning of eminent persons in various fields of law. Judge Marx was a graduate of this College and an outstanding member of the Cincinnati Bar for fifty-one years. The lecture was endowed in 1989 through the generosity of the Robert S. Marx testamentary trustees, and we are grateful for their support.

Our lecturer this year is Rachel Rebouché. Rachel Rebouché is the Dean and Peter J. Liacouras Professor of Law at Temple University School of Law. She is also a faculty fellow at the Temple Center for Public Health Law Research, and a leading scholar in family law, public health law, and reproductive health law. Prior to her appointment as Dean, she served as interim dean for one year and was the Associate Dean for Research for four years. Dean Rebouché is the co-author or editor of seven books, the author of dozens of articles in law reviews and peer-reviewed journals, and a frequent contributor to national publications and media outlets in her areas of expertise. Dean Rebouché received a J.D. from Harvard Law School, an LL.M. from Queens University Belfast, and a B.A. from Trinity University. Prior to law school, she worked as a researcher for the Northern Ireland Human Rights Commission and the Human Rights Center at Queens University, Belfast. After law school, Dean Rebouché clerked for Justice Kate O'Regan of the Constitutional Court of South Africa and practiced law in Washington, D.C., where she was an Associate Director of Adolescent Health Programs at the National

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* This Article is adapted from the lecture given by Dean Rachel Rebouché at the annual Robert S. Marx lecture on February 23, 2024, at the University of Cincinnati College of Law, and draws from research and publications with Professor Greer Donley and Professor David Cohen. Dean Rebouché is Kean Family Dean and the Peter J. Liacouras Professor of Law at Temple University Beasley School of Law. Many thanks to Dori Hoffman Filler for research assistance and to the editors of the *University of Cincinnati Law Review*.

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Partnership for Women and Families, formerly the Women's Legal Defense Fund, and as a Women's Law & Public Policy fellow at the National Women's Law Center.

Please join me in welcoming Dean Rebouché.

REMARKS BY DEAN REBOUCHÉ

Thank you. I am delighted to be here, and I am honored to deliver the Marx Lecture.

Today, I am going to talk about the legal landscape after *Dobbs v. Jackson Women's Health Organization*, the case that overturned *Roe v. Wade* and *Planned Parenthood v. Casey*.[1] First, I would like to provide some context and background on the *Dobbs* decision. Then, I will pivot to what the legal landscape looks like and emphasize the interstate conflict that has emerged in *Dobbs*'s wake, before addressing the present battle over medical abortion. I will examine how mailed medication abortion is changing abortion care on the ground, some of the challenges facing the proliferation of pills, and the efforts that have been used to support the distribution of medication abortion.

By way of background, in *Roe v. Wade*, decided in 1973, the Supreme Court found a constitutional right to abortion before viability, using a trimester framework in which state power to regulate and restrict abortion was at its lowest in the first trimester of pregnancy and at its highest in the third trimester of pregnancy.[2] In *Planned Parenthood v. Casey*, a 1992 decision, the Supreme Court had the opportunity to revisit *Roe*. In fact, many thought that *Casey* would overturn *Roe*. Instead, the Court fashioned a different test for protecting constitutional rights to abortion: the undue burden test.[3] The bottom line from *Roe* to *Casey* was that, before viability, states could restrict abortion so long as regulation did not impose an undue burden on the decision to end a pregnancy, which arguably precluded states from banning abortion. In *Dobbs,* the Court considered the constitutionality of a Mississippi law banning abortion after fifteen weeks, well before viability.[4] Thus, the question the Supreme Court addressed in *Dobbs* was whether pre-viability abortion bans are *per se* unconstitutional.[5] In other words, should the Supreme Court rethink the constitutional right to abortion set out in *Roe v. Wade* and *Planned Parenthood v. Casey*?

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling Roe v. Wade, 413 U.S. 113 (1973)).

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

3. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

4. *Dobbs*, 597 U.S. at 215 (referencing the Mississippi Gestational Age Act).

5. *Id.*

The Court could have decided *Dobbs* a number of ways. The Court could have struck down the Mississippi law as an undue burden because it was a ban that applied before viability. It could have upheld the Mississippi law using the undue burden test; Mississippi only had one abortion provider, and that one provider only offered abortions through sixteen weeks of pregnancy. In other words, the Court could have held that the law was not an undue burden because few people seeking in-state services would be affected given the difference of a one-week cut-off. Chief Justice John Roberts considered this argument in his concurrence.[6] Another option, which the majority of the Court adopted, was to overturn *Roe* and *Casey*. Justice Samuel Alito, writing for the majority, described *Roe* as "egregiously wrong . . . from the day it was decided."[7] Finding that history and tradition do not support a constitutional right to pre-viability abortion, the Court abandoned the strict scrutiny that characterized *Roe*, and the undue burden test under *Casey*.[8]

Now the test for the constitutionality of abortion regulation in the United States is the rational basis test, which generally is deferential to state legislative judgment as well as a state's interests in passing the law in question.[9] In his conclusion of the majority opinion, Justice Alito offered a non-exhaustive list of legitimate state interests in regulating abortion:

> [R]espect for and preservation of prenatal life at all stages of development . . . the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of sex, race, or disability.[10]

The first state interest—preservation and protection of life from the earliest stages of pregnancy—appears to be an invitation for states to ban abortion at conception or at any stage at which the state deems life exists; a nod toward the recognition of fetal personhood and ripe for discussion after the Alabama Supreme Court's recent decision to confer rights on embryos.[11]

To arrive at *Dobbs*'s holding, Justice Alito offered five reasons to overturn precedent: (1) the nature of the error of the previous case; (2) the quality of the reasoning of the precedent; (3) the disruptive effects on other areas of the law; (4) the absence of concrete reliance on the rights announced in the precedent; and (5) the workability of the rules that *Roe*

6. *Id.* at 148 (J. Thomas concurring).
7. *Id.* at 218.
8. *Id.* at 222.
9. *Id.*
10. *Id.* at 301.
11. *See* LePage v. Ctr. for Reprod. Med., P.C., 2024 Ala. LEXIS 60 (Ala. 2024).

and *Casey* imposed on the country.[12] I will focus today on reliance and workability to consider what the legal landscape looks like after *Dobbs*.

First, reliance on the constitutional abortion right set out in *Roe* and *Casey*, said the majority, is not like reliance on other rights.[13] It is not like a contract right, or property right, because it is insufficiently concrete. Individuals with unplanned pregnancies cannot argue that they relied on an abortion right when they decided to pursue education or employment, because their pregnancies were unexpected. According to dicta of the majority opinion, whether abortion restrictions impact one's ability to pursue education, employment, or equality in public life is an empirical question that courts cannot answer.[14] Said another way, courts cannot assess whether a law that bans or restricts abortion makes someone's life better or worse. However, Justice Alito suggested that abortion restrictions may not make anyone's life harder; according to the majority opinion, in contrast to 1973, pregnancy has become easier to manage, with less stigma and more laws that punish pregnancy discrimination and support pregnant people.[15] We have the Affordable Care Act, unpaid medical leave, and the Pregnancy Discrimination Act. We have, according to six members of the Supreme Court, a social safety net that buoys all pregnant people to the surface. Indeed, one foundational difference between the dissent and majority opinions were divergent visions regarding the nature and realities of pregnancy.

Second, workability. Workability is the idea that *Casey* and *Roe* deepened the conflict over abortion in this country and created tests that resulted in confusing and inconsistent case law.[16] Overturning *Roe* might shine some light on common ground, or at least give states the ability to take the temperature of their own electorates and pass policies in response. But where are we now? Did overturning *Roe* and *Casey* result in more workable standards and less conflict or division? I submit to you that we are not navigating a more workable legal landscape today than we were before *Dobbs*.

The post-*Dobbs* legal landscape is defined by conflict, among states and between states and the federal government. About one-third of states in the wake of *Dobbs* have banned abortion, many of them from the earliest moments of pregnancy.[17] In another third of the country, states that have passed laws or enacted constitutional amendments seeking to

12. *Dobbs*, 597 U.S. at 218-22.

13. *Id.* at 220-21.

14. *Id.* at 221.

15. *Id.* at 257-60.

16. *Id.* at 280-81.

17. *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS. (2024), https://reproductive rights.org/maps/abortion-laws-by-state/.

protect abortion rights.[18] At the time of these remarks, seventeen states and D.C. have enacted so-called shield laws to protect in-state providers from out-of-state lawsuits.[19] Shield laws are not just prophylactic measures as states seek to impose their policy choices as widely as possible, even across state lines.

For instance, consider new abortion trafficking laws.[20] The law applies to minors, but it penalizes those who help minors returning to their home state after seeking an abortion in another state where it is legal. In another example, the Attorney General of Alabama recently suggested that he will pursue conspiracy charges against those who help individuals leave the state to have an abortion that is legal elsewhere.[21] Conflict is also interjurisdictional. The current federal government has taken steps to protect abortion rights, and litigation now seeks to determine whether the federal Emergency Medical Treatment and Labor Act (EMTALA) preempts state abortion bans like those in Idaho and Texas, requiring emergency abortion care that state abortion law criminalizes.[22]

It is not just abortion law, however, that is experiencing a seismic shift. It is also abortion practice. I would like to focus on the uptake and regulation of medication abortion. This is the subject of an article I co-authored with Professors David Cohen and Greer Donley entitled "Abortion Pills," published in the Stanford Law Review.[23]

Medication abortion is a two-drug regimen that the U.S. Food & Drug Administration (FDA) has approved to end a pregnancy through ten weeks of gestation. The growth of virtual clinics, which offer medication abortion through telehealth, followed a court decision in 2020 that temporarily enjoined an FDA restriction on the first drug used in a medication abortion, mifepristone.[24] This rule specified that patients had to pick up mifepristone, prescribed with misoprostol, at a healthcare facility, such as a clinic, medical office, or hospital.

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18. *Id.*

19. Kelly Baden & Jennifer Driver, *The State Abortion Policy Landscape One Year Post-Roe*, GUTTMACHER INST. (2023), https://www.guttmacher.org/2023/06/state-abortion-policy-landscape-one-year-post-roe. This has since been updated, as more states now have enacted shield laws, and three additional states have executive orders.

20. ID. CODE § 18-623 (2023).

21. Alander Rocha, *Alabama Attorney General Doubles Down on Threats to Prosecute Out-of-State Abortion Care*, ALA. REFLECTOR (Aug. 31, 2023), https://alabamareflector.com/2023/08/31/alabama-attorney-general-doubles-down-on-threats-to-prosecute-out-of-state-abortion-care/.

22. At the time of this lecture, the Supreme Court had not decided *Moyle v. U.S.*, concerning the EMTALA challenge. *See* Moyle v. U.S., 144 S. Ct. 2015 (2024). This case was consolidated with Idaho v. U.S., 144 S. Ct. 541 (2024) (case dismissed as improvidently granted).

23. David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. 317 (2024).

24. Am. Coll. of Obstetricians and Gynecologists v. U.S. Food & Drug Admin., 472 F. Supp. 3d 183, 216 (D. Md. 2020).

Of the twenty thousand drugs regulated by the FDA, mifepristone was the only drug that you had to pick up in person but could take at any location, such as at home, without provider supervision. Initially, suspending the rule was a pandemic measure to reduce patient-provider contact; evidence demonstrated that the rule did not protect patient health or provide patients any benefit.[25] The FDA permanently lifted the in-person retrieval requirement in December 2021.[26] With the removal of the in-person restriction, mifepristone, along with misoprostol, can now be mailed to a patient following a telehealth appointment. In addition, in January 2023, the FDA announced plans to allow pharmacies, for the first time, to seek certification to dispense mifepristone with misoprostol.[27] A few pharmacies have started to do so.

In the wake of these changes, virtual clinics have proliferated. Abortion on Demand, for example, is the first large-scale telehealth abortion provider in the United States. An automated asynchronous intake is followed by an informed consent process utilizing a pre-recorded video. Gestational age is assessed by an at-home pregnancy test and the date of the first day of the last menstrual period. Abortion on Demand prescribes medication abortion up to ten weeks of pregnancy and only for people aged eighteen or older, so as to not run afoul of some states' parental involvement laws. The entire Abortion on Demand process takes between two and three days and is three to four hundred dollars less expensive than a medication abortion offered by a brick-and-mortar clinic.

To be sure, many people cannot seek a medication abortion through telehealth. Tele-abortion depends on various forms of privilege. Most patients must have a smartphone or a stable internet connection, as well as an uncomplicated pregnancy. Even with remote care, the need for clinical spaces is not going to disappear. If patients require a procedural abortion, either out of need or preference, in-person appointments are necessary.

Nevertheless, mailed medication abortion—because of its design and based on its implementation—has been a vehicle for delivering abortion care across state lines, no matter where individuals live. Organizations like Aid Access work with providers both inside and outside the United States to ship pills across the country, regardless of whether patients live in a state with a ban.

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25. *See* Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. 1369 (2021).

26. *Questions and Answers on Mifepristone for Medical Termination of Pregnancy through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (Dec. 16, 2021), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

27. *Id.*

I offer this snapshot of the delivery of medication abortion to underscore the conflict between those who are seeking to expand avenues of access for abortion pills and those seeking to shut them down. Per the latter, I am going to focus on two examples that might facilitate discussion.

Alliance for Hippocratic Medicine sued to remove mifepristone from the market by claiming it was unlawful for the FDA to approve the drug in the first place, twenty-four years ago, in 2000.[28] Judge Kacsmaryk, a federal district court judge in Amarillo, Texas, agreed.[29] In April 2023, the United States District Court for the Northern District of Texas issued a preliminary injunction suspending mifepristone's approval.[30] Then, on emergency appeal, the Fifth Circuit stayed the district court's suspension of mifepristone's approval but affirmed the injunction suspension of all FDA action after 2016, at which point the FDA made several changes to the restrictions on mifepristone.[31] Before that injunction could take effect, the Supreme Court stayed the order until it either denied cert or issued a final opinion.[32]

In a decision on the merits, the Fifth Circuit ruled that the plaintiffs likely failed to timely challenge the drug's approval in 2000 and were unable to show injury caused by the approval of the 2019 generic version of mifepristone.[33] But the Fifth Circuit held that the FDA acted arbitrarily and capriciously when it lifted restrictions on mifepristone taking effect after 2016, including the change in 2021 to alter the in-person pickup requirement.[34]

The Supreme Court granted cert and handed down a decision in June.[35] A unanimous Supreme Court held that Alliance did not have standing to bring its claims because the organization and its members did not establish that the FDA's actions caused actual injury.[36] But Justice Brett Kavanagh, writing for the Court, noted: "it is not clear that no one else would have standing to challenge [the] FDA's relaxed regulation of mifepristone."[37] So although the Supreme Court did not address the issues of the case, future litigants seeking to establish standing will pursue

28. Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024).

29. All. for Hippocratic Med. v. Food & Drug Admin., 668 F. Supp. 3d 507 (N.D. Tex., 2023).

30. *Id.*

31. All. for Hippocratic Med. v. Food & Drug Admin., 78 F. 4th 210 (5th Cir. 2023).

32. Danco Lab'ys, L.L.C. v. All. for Hippocratic Med., 144 S. Ct. 537 (2023).

33. Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367 (2024).

34. All. for Hippocratic Med. v. Food & Drug Admin., 78 F. 4th 210 (5th Cir. 2023).

35. This lecture was given before the Supreme Court issued an opinion in the *Alliance for Hippocratic Medicine* case in June 2024; the text of this Article was amended to reflect the outcome of the case.

36. Food & Drug Admin. v. Alliance for Hippocratic Medicine, 602 U.S. 367 (2024).

37. *Id.* at 23-24.

similar substantive claims. We should expect to see Alliance's arguments resurface.

This litigation captures a second development, which is the Alliance for Hippocratic Medicine's reliance on a nearly 150-year-old federal law, the Comstock Act. Anti-abortion advocates contend the Act could stop all abortion—including mailed medication abortion—across the country.[38]

Named after Anthony Comstock, a nineteenth century anti-vice and obscenity crusader, the law dates from 1873 and prohibited importation and mailing of information regarding "how or by what means conception may be prevented and abortion produced." Section 1461 of the Act, relevant to our conversation, declares as non-mailable matter every "article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use," and every "article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral use."[39]

The Comstock Act was enforced for the first forty years: an estimated four thousand people were convicted and almost one hundred sixty tons of literature destroyed. But public backlash along with several one-hundred-year-old federal court decisions, which narrowed interpretation of the Act, led to its disuse.

Up to this point, abortion providers, drug manufacturers, and abortion rights organizations have not had to think about the Comstock Act. Congress repealed the provisions relating to contraceptives, not abortion, and *Roe v. Wade* established a constitutional right to abortion.[40] Yet Alliance for Hippocratic Medicine and other abortion opponents argue that the plain language of the Act bans mailing almost every medical instrument, supply, or drug that could possibly be used for any abortion. In other words, ignoring the narrowing construction applied by federal circuit courts and the fact that the Act never applied to legal abortion,[41] anti-abortion advocates press that the Act should ban abortion nationwide because it prohibits mailing every pill, instrument, or other "thing." It is worth emphasizing that, under this argument, the Act refashioned as a nationwide ban would have no exceptions and would carry criminal penalties applied to people in *every* state.

Seeking to penalize anything mailed, specifically pills but also anything related to abortion, complements efforts to target both access

38. Comstock Act, ch. 258, 17 Stat. 598 (1873).

39. 18 U.S.C. § 1461.

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

41. *See* Reva B. Siegel & Mary Ziegler, *Comstockery: How Government Censorship Gave Birth to the Law of Sexual and Reproductive Freedom, and May Again Threaten It*, 134 Yale L.J. (forthcoming 2024).

and information. Legislators in Texas, for example, have floated the idea of requiring internet providers to block abortion pill websites, though it is unclear how this would work in practice.[42] A related strategy has been to undermine the information provided about virtual clinics with misleading information that attempts to stop or deter people from gaining access to pills.

Moreover, states could not just penalize providers, but also to seek to punish those who attempt to self-manage an abortion. States long have targeted pregnant people's choices and behaviors through various criminal laws.[43] We might expect to see states criminalize out-of-state providers if any part of the medication abortion process occurs within a state's border. (The second drug in a medication abortion, misoprostol, is taken twenty-four to forty-eight hours after the first drug, mifepristone).

Despite strategies aimed at stopping mailed medication abortion, pills continue to proliferate. A recent study showed that, as a national average, the number of abortions now is higher than the year before *Dobbs* was decided.[44] Let me repeat: the nationwide abortion rate is higher than before the Supreme Court overturned *Roe* and *Casey*. That is, in part, because of groups like Aid Access, which estimates that it ships thousands of packets of pills a month.

To in part explain how the total number of abortions is increasing, I turn back to the shield laws mentioned earlier. At the time of this lecture, of the seventeen states with shield laws, six have provisions addressing telehealth.[45] What do shield laws cover generally? First, shield laws attempt to protect in-state providers' licenses and malpractice insurance rates. For example, if a state tries to impose criminal or civil liability on a healthcare professional providing an abortion to someone from another state, that prosecution or lawsuit could be reported to the provider's licensing board, which typically has broad discretion in governing ethics and standards of conduct.[46] Being named a defendant too many times or being subject to a disciplinary investigation, even if the provider ultimately prevails, could result in licensure suspension, higher malpractice insurance costs, and reputational damage. Shield laws prohibit state medical boards and in-state malpractice insurance

42. H.B. No. 2690, 88th Leg., Reg. Sess. (Tex. 2023).

43. *Pregnancy Justice Report Reveals Massive Scope of the Criminalization of Pregnant People*, PREGNANCY JUST. (Sept 19, 2023), https://www.pregnancyjusticeus.org/press/pregnancy-justice-new-report-reveals-massive-scope-of-pregnancy-criminalization/.

44. Isaac Maddow-Zimet & Candace Gibson, *Despite Bans, Number of Abortions in the United States Increased in 2023*, GUTTMACHER INST. (May 10, 2024), https://www.guttmacher.org/2024/03/despite-bans-number-abortions-united-states-increased-2023.

45. Now there are eight states: California, Colorado, Massachusetts, Maine, New York, Rhode Island, Vermont, and Washington.

46. Cohen, Donley & Rebouché, *supra* note 24.

companies from taking adverse action against providers who face out-of-state legal consequences for assisting out-of-state abortion patients.[47] This is not blanket immunity by any means. Rather, it is targeted protection applicable to out-of-state investigations, disciplinary actions, lawsuits, or prosecutions arising from services performed in compliance with the provider's home state law.

Second, shield laws attempt to thwart interstate investigations, both civil and criminal, of care provided to patients from other states. On the criminal side, every state has enacted a version of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, which seeks to increase cooperation among states. The Act has a civil counterpart which accomplishes similar goals.[48] In the criminal context, even before witnesses are called, police departments usually work together across state lines via formal and informal cooperation agreements.

Shield statutes exempt abortion providers from interstate discovery and witness subpoena laws while prohibiting state and local law enforcement agencies from cooperating with other states' investigations.[49] This only applies to abortions that are legal in the provider's state, and such an exemption does not protect providers if they travel to another state where abortion is banned. That state could try to exert jurisdiction over providers while they are within the state's borders. Even so, shield laws seek to prevent courts and law enforcement agencies in the provider's home state from becoming a cooperating arm of another state's investigation.

Third, shield laws exempt providers from the state's extradition requirements so long as the individual, consistent with Article IV of the Constitution, is not fleeing from justice.[50] Outside of constitutional requirements, some states' extradition laws permit or obligate the state to extradite accused criminals, even if they have never been in the other state, and have not fled. Again, shield laws create exceptions to those requirements.

Finally, and most relevant to this lecture, six states are attempting to protect providers who are not only providing care to those traveling to their state, but also to providers mailing medication abortion pills out of state, even to states that ban abortion.[51] Telehealth policies typically define the location of care as where the patient is located. But

47. *Id.* at 359.

48. Darrell E. White, *Subpoenaing Out-of-State Witnesses in Criminal Proceedings: A Step-by-Step Guide*, NAT'L ASS'N OF ATT'YS GEN. (May 18, 2021), https://www.naag.org/attorney-general-journal/subpoenaing-out-of-state-witnesses/.

49. Cohen, Donley & Rebouché, *supra* note 24, at 357.

50. *Id.*

51. *Id.* at 356-57.

Massachusetts, New York, California, Colorado, Washington, and Vermont have passed shield laws that define protected reproductive care "regardless of patient location."[52] The interpretation of this definition by some providers arguably shifts attention from where the patient is to where the provider is. One can avail a Massachusetts shield law so long as what one is doing is legal conduct under the shield law and per the laws of Massachusetts, no matter where the patient lives. Under shields laws like the one in Massachusetts, Aid Access works with providers to ship pills across the country.

Questions of information and resources predate *Dobbs* and have been foundational to abortion access. They are all the more important now. If we continue to live in a country in which the privileged can obtain abortions without fear of punishment but everyone else is at the mercy of the state, then the liberatory potential for abortion pills will be difficult to realize. Even as states try to police people and their providers, pills cannot be stopped. But they can be pushed underground and can "[deepen] public health and criminal justice consequences that abortion bans have catalyzed."[53] Thank you.

AUDIENCE QUESTIONS

Q: Do you have any theory about who leaked the *Dobbs* opinion and why?

A: There are competing theories. There was an article in the *New York Times* that tried to piece together the timing of how the decision was drafted and which Justice responded first to the draft, and how long they took to respond.[54] Despite the volume of comments the leaked draft generated, the majority opinion, once published, was basically unchanged from the draft but for a few additional paragraphs, which mostly focused on Chief Justice Roberts's concurrence.

So, a draft opinion is released to the public and many people

52. *See, e.g.,* Act of Sept. 27, 2023, §§ 6, 15, 16, 2023 Cal. Legis. Serv. ch. 260 (West) (codified at CAL. CIV. CODE § 1798.300(d)(1)(C) (West 2024); CAL. PEN. CODE §§ 847.5(b)-(c), 1299.02(d) (West 2024)). *See also* Act of April 14, 2023, § 5, 2023 Colo. Sess. Laws 239, 243 (codified at COLO. REV. STAT. § 12-30-121(d) (2024)); Act of July 29, 2022, § 3, 2022 Mass. Acts ch. 127 (codified at MASS. GEN. LAWS ch. 12, § 11I1/2(a) (2023)); Act of June 23, 2023, § 1, 2023 N.Y. Laws ch. 138 (codified at N.Y. CRIM. PROC. LAW § 570.17(1)(b)(ii) (McKinney 2023)); Act of May 10, 2023, § 1, 2023 Vt. Acts & Resolves no. 14 (codified at VT. STAT. ANN. tit. 1, § 150(b)(1)(B), (b)(3) (2023)); Act of April 27, 2023, ch. 193, § 13, 2023 Wash. Sess. Laws 885, 897 (codified at WASH. REV. CODE § 7.115.020(1) (2023)); *see also* Rebecca Grant, *Group Using 'Shield Laws' to Provide Abortion Care in States that Ban It*, THE GUARDIAN (July 23, 2023, 7:00 AM EDT), https://www.theguardian.com/world/2023/jul/23/shield-laws-provide-abortion-care-aid-access.

53. Cohen, Donley & Rebouché, *supra* note 24, at 322.

54. Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. Times (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html.

immediately dissect how the history of abortion regulation, for example, is presented—a history that takes up most of the majority opinion. None of that changed which suggests to me, as to others, that the leaked opinion, and resulting decision, had strong support from the majority of Justices from early in the drafting process.

Q: Could you speak more about the Alabama Supreme Court decision on the personhood of embryos, and how that might affect other aspects of healthcare, like in vitro fertilization (IVF) treatments?

A: The Alabama Supreme Court issued a decision applying the wrongful death tort to embryos that were destroyed by negligence.[55] Someone gained access to an embryo storage facility and destroyed at least three couples' stored embryos. The Alabama Supreme Court decided that people who had their embryos destroyed could sue for wrongful death.[56] In coming to this conclusion, the court held that embryos, in some respects, have the same rights as children.

Wrongful death actions have recognized interests of third parties in potential life. Under these claims, individuals who wanted to become parents have a right to be compensated for the negligent or purposeful deprivation of a potential child. In other words, the Alabama Supreme Court essentially said that "parents" of embryos should also have some kind of claim for the negligent or willful destruction of their embryos.[57] But the Alabama decision includes language about embryos being rights bearers. Under this ruling, when can embryos be discarded and is there liability depending on how embryos are stored? Legislators in Alabama already proposed laws to clarify the use of IVF in the state.

Q: My question also relates to the Alabama IVF decision. To the extent that we are talking about this idea of conferring rights onto embryos, if this is something that is tried at different levels more broadly, what does that do for things like child support, or questions around things like deportation that ask, "when does citizenship begin?" If an embryo has rights, then does citizenship begin at the moment of conception, meaning you cannot deport the pregnant person?

A: Walking out the full array of consequences for fetal personhood is a useful exercise. A story that garnered a lot of attention was the solo pregnant driver who was ticketed for using the high-occupancy vehicle lane and claimed she was not in violation of the law because there were two people in the car. I think the consequences and complications of implementing personhood laws make them unpopular and hard to enforce. For the last ten years, Mississippi, for instance, has tried to pass different versions of personhood laws, and it turns out that most people

55. LePage v. Ctr. for Reprod. Med., P.C., 2024 Ala. LEXIS 60 (Ala. 2024).

56. *Id.*

57. *Id.*

do not support them. For many people, it may not seem sensible to confer on a fetus the same rights that the people in this room hold. That said, our laws have always recognized certain rights for potential life that people can enforce, like the wrongful death example. And to be clear, we have long targeted pregnant people for their behaviors and decisions made while pregnant.[58]

Q: My question is about the creative separation of powers arguments we have seen following *Dobbs*. We all are familiar, I think, with the Fifth Circuit's battle with the FDA and the general tendency of the Supreme Court to strip power away from political branches to give to itself. But in Ohio, we are seeing the exact opposite. So, I was wondering if you have a sense of what else is going on in the states?

A: It is a great question because it gets at the importance of context and place. We have seen battles between those who seek to put abortion questions on ballots and those who seek to stop them. Abortion debates and questions can be local, context specific, and they are not just questions addressed by legislatures and courts, but by cities, medical boards, and law enforcement. At the state level, abortion law is also now about election law and voting rules, preemption between cities and states, and so many different areas of law that people, perhaps wrongly in some instances, did not think implicated abortion until *Dobbs*.

58. Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CAL. L. REV. 781 (2014).