COMMENT

REPRODUCTIVE AUTONOMY UNDER SIEGE: ANALYZING THE DUE PROCESS IMPLICATIONS OF CRIMINALIZING SELF-MANAGED ABORTION*

ABSTRACT

Having an abortion in the United States, though physically safe, is now often legally dangerous. This is especially so for those who seek abortions outside of the formal healthcare system. Whether due to abortion bans in their state or other healthcare barriers, hundreds of pregnant persons have self-managed abortions, or SMAs, every year. However, many risk prosecution and incarceration in doing so. For decades, fetal harm laws and antiquated statutes have served as tools for punishing people who end their pregnancies in ways deemed illicit by state governments. This Comment analyzes a sample of these laws across the United States, highlights their deficiencies under Fourteenth Amendment fair notice principles and the void-for-vagueness doctrine, and utilizes case studies to demonstrate how these deficiencies, coupled with prosecutorial misuse, harms real people in real ways. In addition, this Comment concludes by arguing for legislative and prosecutorial reform as well as exploring potential avenues for individual redress.

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I. INTRODUCTION

Today, using medication to terminate a pregnancy without the help or supervision of a healthcare provider is relatively safe.[1] Abortion pills like misoprostol and mifepristone are less risky than medications like penicillin or Viagra and are highly effective when taken as directed.[2] Nevertheless, while a self-induced, self-managed, or "DIY" abortion may pose little physical harm, it can lead to insidious legal consequences.[3] For decades, throughout the United States those suspected of self-managing have faced investigations, arrests, and convictions that carry some of the harshest penalties in our justice system.[4] Oddly enough, few states have ever directly prohibited self-managed abortions (SMA) by statute.[5] This means that most prosecutions occur under laws not intended to put those who self-manage behind bars.[6] This Comment explores the overcriminalization of SMA from a constitutional perspective, arguing that these unfounded prosecutions violate Fourteenth Amendment Due Process rights.

Part II distinguishes SMAs from clinical abortions, discusses the history and prevalence of SMA dating back to the eighteenth century, examines FDA regulations and pending lawsuits affecting the accessibility of abortion pills, and describes which communities are most likely to self-manage. Part III introduces the 2023 If/When/How report on incidences of SMA criminalization, which grounds and guides this Comment. This part also outlines the constitutional underpinnings of my analysis: the Fourteenth Amendment requirement of fair notice or fair warning and the void-for-vagueness doctrine. Part IV analyzes the constitutionality of fetal harm laws as applied to those who self-manage, sampling several state laws and

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1. Dana M. Johnson et al., *Safety and Effectiveness of Self-Managed Abortion Using Misoprostol Alone Acquired from an Online Telemedicine Service in the United States*, 55 PERSPS. ON SEXUAL & REPROD. HEALTH 4, 6–7, 10 (2023).

2. *See* Annette Choi & Way Mullery, *How Safe Is the Abortion Pill Compared with Other Common Drugs?*, CNN, https://www.cnn.com/health/abortion-pill-safety-dg/index.html [https://perma.cc/X7UE-W5G5] (last updated June 13, 2024, 10:49 AM).

3. FARAH DIAZ-TELLO ET AL., *ROE*'S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL 3, 5 (2018), https://ifwhenhow.org/wp-content/uploads/2023/06/19_Roes_Unfinished_Promise.pdf [https://perma.cc/Y9SU-YFEQ]; LAURA HUSS ET AL., SELF-CARE, CRIMINALIZED: THE CRIMINALIZATION OF SELF-MANAGED ABORTION FROM 2000 TO 2020, at 21 (2023) [hereinafter HUSS ET AL., CRIMINALIZATION], https://www.ifwhenhow.org/wp-content/uploads/2023/10/Self-Care-Criminalized-2023-Report.pdf [https://perma.cc/H28K-GVEF].

4. DIAZ-TELLO ET AL., *supra* note 3, at 2. *See generally* HUSS ET AL., CRIMINALIZATION, *supra* note 3 (discussing the criminalization of self-managed abortion in recent decades).

5. *See* HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 36.

6. *Id.* at 36–38.

illustrating how their deficiencies have been exploited. Part V conducts the same analysis with reference to obscure statutes, focusing on those that criminalize concealment of birth, concealment of death, and abuse of a corpse. Part VI briefly concludes the discussion of SMA prosecution. Finally, Part VII describes the difficulties those prosecuted face even when charges and convictions do not stand, and then argues for legislative and prosecutorial reform, suggesting several possible avenues for redress.

II. BACKGROUND

A. SMA: Definition and Methods

A self-managed abortion is an abortion that involves actions taken to end one's pregnancy outside of the formal healthcare system.[7] Because an SMA can take a variety of forms, a definition by distinction is useful.[8] Where legally accessible in the United States, a pregnant person who seeks an abortion through their healthcare provider will generally undergo a three-step process. First is a consultation, consisting of urine and blood tests to confirm the pregnancy and an ultrasound examination to determine gestational age.[9] Second, if eligible based on the patient's consultation, medical history, and preexisting conditions, the patient can have an in-clinic or a medication abortion.[10] An in-clinic abortion is a surgical procedure performed by a physician to evacuate the fetus.[11] A medication abortion, on the other hand, usually takes place in the patient's home with prescribed mifepristone and misoprostol pills, which induce a miscarriage.[12]

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7. Nisha Verma & Daniel Grossman, *Self-Managed Abortion in the United States*, 12 CURRENT OBSTETRICS & GYNECOLOGY REPS. 70, 70 (2023); DIAZ-TELLO ET AL., *supra* note 3, at 3–4.

8. *See Understanding and Advocating for Self-Managed Abortion*, REPROACTION, https://reproaction.org/campaign/self-managed-abortion/ [https://perma.cc/6B8U-F57M] (last visited Sept. 29, 2024).

9. *Abortion – Medication*, MEDLINEPLUS, https://medlineplus.gov/ency/article/007382.htm [https://perma.cc/4Y3F-XLR6] (last updated Nov. 10, 2022).

10. *See What to Expect Before an Abortion*, DECIDE, https://decide.org.nz/en/abortion-services/what-to-expect/what-to-expect-before-an-abortion/ [https://perma.cc/584E-KXT2] (last visited Dec. 22, 2023).

11. *What Facts About Abortion Do I Need to Know?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/considering-abortion/what-facts-about-abortion-do-i-need-know [https://perma.cc/SVE9-YZB9] (last visited Nov. 13, 2024).

12. *See Abortion – Medication*, *supra* note 9; *What to Expect Before an Abortion*, *supra* note 10; Nadine El-Bawab, *This Is How Mifepristone and Misoprostol Induce Abortions*, ABC NEWS (Aug. 18, 2022, 10:35 AM), https://abcnews.go.com/Health/mifepristone-misoprostol-induce-abortions/story?id=88490868 [https://perma.cc/6Y3D-KM2V].

Finally, a follow-up visit would then confirm that the abortion was successful and treat any potential complications.[13]

By contrast, a pregnant person who obtains an abortion outside of the healthcare system can employ a range of methods.[14] These include taking mifepristone in combination with misoprostol or misoprostol alone, using herbs, vitamins, and supplements, ingesting drugs, alcohol, or other toxic substances, and inflicting physical or intrauterine trauma.[15] However, the availability of medication abortions has reduced the popularity of less effective and potentially unsafe methods.[16] Today, SMAs increasingly occur by self-sourcing the same medications a patient would receive by attending a clinic, but without the formal assistance or direction of a clinician.[17] While they may consult a healthcare professional at some point before, during, or afterwards, a person who self-manages their abortion does so primarily without a U.S.-based healthcare provider's supervision.[18]

However, the rise of telehealth abortion care services has blurred the lines between facility-based and self-managed abortions.[19] Following recent FDA decisions, receiving abortion care and medication entirely from an out-of-state healthcare provider may not be considered SMA.[20] However, obtaining the same medication and care from providers outside of the United States could be classified as an SMA, even though both domestic

13. *See Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA, https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation [https://perma.cc/MCD3-NJ2P] (last visited Sept. 11, 2024) [hereinafter *Questions and Answers*]; *Abortion – Procedure*, MEDLINEPLUS, https://medlineplus.gov/ency/article/002912.htm [https://perma.cc/D6S2-NX85] (last updated Nov. 10, 2022); *Abortion – Medication*, *supra* note 9.

14. *See* Verma & Grossman, *supra* note 7, at 70–71.

15. Heidi Moseson et al., *Self-Managed Abortion: A Systematic Scoping Review*, 63 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY 87, 90, 96 (2020); Verma & Grossman, *supra* note 7, at 70.

16. *See* Verma & Grossman, *supra* note 7, at 71.

17. *Id.*; Carrie N. Baker, *History and Politics of Medication Abortion in the United States and the Rise of Telemedicine and Self-Managed Abortion*, 48 J. HEALTH POL., POL'Y & L. 485, 500–01 (2023); DIAZ-TELLO ET AL., *supra* note 3, at 3–4.

18. *See* Verma & Grossman, *supra* note 7, at 71.

19. *Id.*

20. *Id.*; Rachel K. Jones & Amy Friedrich-Karnik, *Medication Abortion Accounted for 63% of All US Abortions in 2023—An Increase from 53% in 2020*, GUTTMACHER INST. (Mar. 19, 2024), https://www.guttmacher.org/2024/03/medication-abortion-accounted-63-all-us-abortions-2023-increase-53-2020 [https://perma.cc/M3WB-3WVB].

and international clinics require a consultation and provide the medication by prescription.[21]

Those who cannot access or afford a consultation by either avenue often must procure the medication by other means. Some may order pills online from international pharmacies that provide the medications without prescription.[22] However, they risk receiving fake, ineffective, or expired pills by doing so.[23] Others may get the pills from a relative or friend, and some may come upon the pills with practically no knowledge as to its source at all.[24] Regardless, self-managing by any one of these methods carries the risk of criminal prosecution.[25] This Comment focuses on the legal consequences pregnant people in the United States face today when self-managing using these medications.

B. History of SMA

Self-managed abortion is not a recent phenomenon.[26] Deliberately terminating one's own pregnancy was a common practice throughout the eighteenth and nineteenth centuries in the United States.[27] The law reflected the prevalence of this practice as well. Influenced by English jurisprudence on fetal life and personhood, abortion was legal under common law during the 1700s and 1800s until the point of "quickening."[28] When fetal

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21. *See* Verma & Grossman, *supra* note 7, at 71; Megan K. Donovan, *Self-Managed Abortion: Expanding the Available Options for U.S. Abortion Care*, GUTTMACHER INST. (Oct. 17, 2018), https://www.guttmacher.org/gpr/2018/10/self-managed-medication-abortion-expanding-available-options-us-abortion-care [https://perma.cc/E3Y3-HEYU]; Spencer Kimball, *Women in States that Ban Abortion Will Still Be Able to Get Abortion Pills Online from Overseas*, CNBC, https://www.cnbc.com/2022/06/27/women-in-states-that-ban-abortion-will-still-be-able-to-get-abortion-pills-online-from-overseas.html [https://perma.cc/5MCF-PGH8] (last updated June 27, 2022, 2:16 PM).

22. KATHERINE GAMBIR ET AL., COCHRANE LIBR., SELF-ADMINISTERED VERSUS PROVIDER-ADMINISTERED MEDICAL ABORTION 7 (2020), https://www.cochranelibrary.com/cdsr/doi/10.1002/14651858.CD013181.pub2/full [https://perma.cc/Z56A-MGZL].

23. *Id.*; *see* Baker, *supra* note 17, at 501.

24. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 23.

25. Baker, *supra* note 17, at 502–03.

26. *See generally* Erin Blakemore, *How U.S. Abortion Laws Went from Nonexistent to Acrimonious*, NAT'L GEOGRAPHIC (Apr. 11, 2023), https://www.nationalgeographic.com/history/article/the-complex-early-history-of-abortion-in-the-united-states [https://perma.cc/8GSR-T98C] (discussing the prevalence of abortion throughout American history).

27. *Id.*; Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN, https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html [https://perma.cc/H8W8-278R] (last updated June 27, 2016, 10:52 AM).

28. *See Abortion: Abortion in English Law*, LAW LIBR. – AM. L. & LEGAL INFO., https://law.jrank.org/pages/445/Abortion-Abortion-in-English-law.html [https://perma.cc/964X-4B7N] (last visited Dec. 22, 2023); *Abortion Is Central to the History of Reproductive Health*

movement could be felt, usually during the second trimester, the fetus was said to have quickened, confirming the pregnancy and rendering any subsequent harm to the fetus a crime.[29]

However, before quickening, women who wished to end their pregnancies could do so in several ways.[30] They may have consulted a midwife or turned to resources such as the 1855 *Hand-Book of Domestic Medicine*, which devotes a section to substances that "promot[e] the monthly discharge from the uterus."[31] Common herbs like savin, tansy, and pennyroyal were known to cause menstruation by removing what were at the time termed "obstructions."[32] Drug stores also sold over-the-counter medicines, such as pennyroyal pills, which were advertised to affect the "restoration of the menstrual functions when suppressed by any cause."[33] These methods, though often unsafe, were widespread nonetheless, with some reports estimating that over a third of pregnancies during the nineteenth century ended in an abortion.[34]

Eventually, the tide began to turn. The earliest anti-abortion laws banned abortions after quickening and restricted access to medicines such as the pennyroyal pills, which were unregulated, available without a prescription, and openly advertised as abortifacients.[35] The Connecticut General Assembly passed the first law of this kind in 1821.[36] The law imposed a life sentence on anyone who administered poison to another with intent to murder or to cause miscarriage after quickening.[37] Many other states followed suit by passing similar laws throughout the 1830s and 1840s.[38] However, it

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Care in America, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america [https://perma.cc/6M4K-5MXH] (last visited Nov. 14, 2024).

29. *See* Blakemore, *supra* note 26; *Abortion: Abortion in English Law*, *supra* note 28.

30. *See* Blakemore, *supra* note 26.

31. *Id.*

32. *Id.*

33. *Id.*; Lauren MacIvor Thompson, *Women Have Always Had Abortions*, N.Y. TIMES (Dec. 13, 2019), https://www.nytimes.com/interactive/2019/12/13/opinion/sunday/abortion-history-women.html [https://perma.cc/6V3N-7L4W].

34. Lesley Kennedy, *Reproductive Rights in the US: Timeline*, HISTORY, https://www.history.com/news/reproductive-rights-timeline [https://perma.cc/EX5T-GHFU] (last updated May 2, 2024); Blakemore, *supra* note 26; Thompson, *supra* note 33.

35. *See* Blakemore, *supra* note 26.

36. Kennedy, *supra* note 34.

37. *Id.*; *Life Story: Asenath Smith (1797–1848)*, WOMEN & THE AM. STORY: N.Y. HIST. SOC'Y, https://wams.nyhistory.org/building-a-new-nation/american-woman/asenath-smith/ [https://perma.cc/FB5M-XHTY] (last visited Dec. 22, 2023).

38. *See Life Story: Asenath Smith (1797–1848)*, *supra* note 37.

was not until the mid-nineteenth century when anti-abortion groups began making strides as part of a movement.[39]

This movement, which would later take on the name "Physicians Campaign Against Abortion," was led by the newly formed American Medical Association.[40] The Association painted abortion as an immoral act with evil social consequences that degraded the medical profession and pushed for legislation that criminalized it as such.[41] Their efforts were successful, bringing a wave of anti-abortion reform that resulted in restrictive state laws, many of which persisted until the 1970s.[42] Within ten years of the movement's formation, over twenty states had passed laws banning the practice.[43] In 1873, Congress went a step further by passing the Comstock Act, which imposed federal criminal penalties on the distribution of "obscene, lewd, lascivious or filthy" material by mail.[44] Because informational materials and advertisement of abortion services were both classified as obscene, the law banned their distribution within and between states under threat of hefty fines and imprisonment.[45]

Despite mounting restrictions, abortion care remained widely sought after.[46] With resources made scarce and secrecy made necessity, women seeking to end their pregnancies resorted to clandestine and increasingly dangerous methods.[47] Underground surgical procedures advertised by word of mouth, attempts to physically abort by themselves, outdated home recipes, and douching with toxic chemical substances such as Lysol were some of the most common methods women resorted to, each bearing wide health risks and consequences.[48] Indeed, these methods, even if successful, often led to serious injury and infection if not death.[49]

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39. Blakemore, *supra* note 26.

40. *Id.* Some sources refer to the movement's name as the "Physicians' *Crusade* Against Abortion." *See, e.g.*, Ryan Johnson, *A Movement for Change: Horatio Robinson Storer and Physicians' Crusade Against Abortion*, 4 JAMES MADISON UNDERGRADUATE RSCH. J. 13, 19 (2017).

41. Blakemore, *supra* note 26; Kennedy, *supra* note 34.

42. *See* Kennedy, *supra* note 34.

43. *See id.*

44. *Id.*; Comstock Act, 18 U.S.C. § 1461; Thompson, *supra* note 33.

45. *See* Thompson, *supra* note 33.

46. *See id.*

47. Blakemore, *supra* note 26.

48. *See id.*; Thompson, *supra* note 33; Kristin Hall, *Selling Sexual Certainty?: Advertising Lysol as a Contraceptive in the United States and Canada, 1919–1939*, 14 ENTER. & SOC'Y 71, 78, 80, 86–87 (2013). Lehn & Fink advertised Lysol both as a household cleaner and as a feminine hygiene product, using coded language to indicate that the product would function as a spermicide to prevent pregnancy. *See id.* at 78.

49. Thompson, *supra* note 33.

Thus came about the grisly back-alley and coat-hanger imagery still associated with SMA today.[50]

C. Medication Abortion and SMA

In 2022, the Supreme Court held in *Dobbs v. Jackson Women's Health Organization* that the right to an abortion is not constitutionally recognized or protected, effectively overruling its 1973 decision in *Roe v. Wade*, which legalized abortion across the nation.[51] The popularity of and interest in SMA has certainly increased since *Dobbs*.[52] However, even with a pre-*Dobbs* constitutional right, many individuals remained unable to access abortion healthcare due to financial and physical barriers, threat of family violence, and lack of privacy.[53] Prior to the rise of medication abortion, this meant that often unsafe methods of SMA were the preferred and perhaps the only feasible way for individuals to terminate their pregnancies.[54]

The introduction of medication abortion, namely by the use of mifepristone and misoprostol, drastically improved the safety and efficacy of abortions, making medication abortion an increasingly popular way for individuals to end their pregnancies both inside and outside of the formal healthcare system.[55] Mifepristone and misoprostol, collectively termed the abortion pill, are highly effective abortifacients and are approved for use by the FDA during the first ten weeks of pregnancy.[56] The former blocks the production of progesterone, a hormone that maintains and

50. *See* Blakemore, *supra* note 26; Verma & Grossman, *supra* note 7, at 71; *see also* Donovan, *supra* note 21.

51. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.") (holding that the right to an abortion does not fall within the category of rights guaranteed by the Due Process Clause of the Fourteenth Amendment because it is not "deeply rooted in this Nation's history and tradition [nor] implicit in the concept of ordered liberty").

52. Verma & Grossman, *supra* note 7, at 71.

53. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 15.

54. Verma & Grossman, *supra* note 7, at 71.

55. *See* Donovan, *supra* note 21; Man-Wa Lui & Pak-Chung Ho, *First Trimester Termination of Pregnancy*, 63 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY 13, 14, 17 (2020); Klaira Lerma & Paul D. Blumenthal, *Current and Potential Methods for Second Trimester Abortion*, 63 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY 24, 25 (2020); Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST., https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions [https://perma.cc/9JV3-GM8G] (last updated Dec. 1, 2022).

56. *Questions and Answers*, *supra* note 13; Jones et al., *supra* note 55.

promotes gestational development.[57] The latter, taken twenty-four to forty-eight hours afterwards, induces uterine contractions to expel the pregnancy.[58] Though originally approved by the FDA in 1988 to prevent and treat gastric ulcers, the agency has since recognized the efficacy of misoprostol's off-label use as part of the medication abortion dosing regimen.[59] In 2000, the FDA approved Mifeprex, the brand name version of mifepristone, for use in conjunction with misoprostol, but with several restrictions.[60]

The FDA mandated, among other things, that prescribers provide the abortion pill directly to the patient either "in a clinic, medical office, or hospital."[61] This "in-person dispensing requirement" meant that pregnant persons could legally obtain the abortion pill only by physically travelling to one of these settings.[62] During the COVID-19 pandemic, however, the FDA suspended this requirement, allowing providers to send the abortion pill to mail-order pharmacies that would then ship the medications to patients.[63] The percentage of medication abortions skyrocketed afterwards, indicating how central this method has become to abortion care.[64] Indeed, according to the Guttmacher Institute, as of 2020, medication abortions made up over half of all abortions in the United States.[65]

57. Jessie K. Cable & Michael H. Grider, *Physiology, Progesterone*, NAT'L LIBR. OF MED., https://www.ncbi.nlm.nih.gov/books/NBK558960/ [https://perma.cc/8BCB-J4RD] (last updated May 1, 2023); Donovan, *supra* note 21.

58. *Questions and Answers*, *supra* note 13; Rebecca Allen & Barbara M. O'Brien, *Uses of Misoprostol in Obstetrics and Gynecology*, 2 REVS. OBSTETRICS & GYNECOLOGY 159, 159, 161 (2009).

59. *FDA Gives Nod to Label Change for Misoprostol*, RELIAS MEDIA (July 1, 2002), https://www.reliasmedia.com/articles/79534-fda-gives-nod-to-label-change-for-misoprostol [https://perma.cc/A8UP-XBXB]; *Off-Label Use: Licensed & Unlicensed Indications*, MISOPROSTOL.ORG, https://www.misoprostol.org/off-label-use/ [https://perma.cc/44HN-ZJKU] (last visited Sept. 8, 2024); *Questions and Answers*, *supra* note 13 (stating that the approved mifepristone dosing regimen includes ingestion of misoprostol twenty-four to forty-eight hours after the mifepristone dose).

60. *See* Baker, *supra* note 17, at 488; *Questions and Answers*, *supra* note 13. The FDA later approved a generic version of mifepristone in 2019. Jared C. Huber, Note, *Preemption Exemption: FDA-Approved Abortion Drugs After* Dobbs, 98 NOTRE DAME L. REV. 2217, 2224–25 (2023).

61. *Questions and Answers*, *supra* note 13.

62. *See FDA Announces Repeal of Outdated Restriction on Medication Abortion*, ACLU (Dec. 16, 2021, 4:45 PM), https://www.aclu.org/press-releases/fda-announces-repeal-outdated-restriction-medication-abortion [https://perma.cc/5SEX-NQHR].

63. *Questions and Answers*, *supra* note 13.

64. Jones et al., *supra* note 55.

65. *Id.*

In December of 2021, the FDA removed the in-person dispensing requirement entirely, citing a need to "minimize the burden on the health care delivery system."[66] Finally, in January of 2023, the FDA allowed retail pharmacies to carry and sell the medications.[67] However, legislative and legal action has been taken to narrow the options available to pregnant people and their healthcare providers.[68] In Texas, for example, where abortion providers faced enormous legal risk even pre-*Dobbs*, the legislature passed a law in late 2021 barring manufacturers, suppliers, physicians, and anyone else from providing "any abortion-inducing drug by courier, delivery, or mail service."[69]

More recently, a group of pro-life medical associations attempted to take mifepristone off the market entirely. The group claimed that they were injured by the FDA's approval of mifepristone because complications from medication abortion put "enormous pressure and stress" on doctors.[70] The Northern District of Texas ruled in their favor by revoking the FDA's approval of mifepristone and held that providing abortion pills by mail violates the Comstock Act.[71] On appeal, the Fifth Circuit reinstated the FDA's initial approval, but revoked subsequent amendments that made the medication more accessible, including the amendment that allowed for telemedicine care by removing the in-person dispensing requirement.[72] Ultimately, however, the Supreme Court unanimously rejected the challenge because the group lacked proper standing.[73]

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66. *FDA Announces Repeal of Outdated Restriction on Medication Abortion*, *supra* note 62; *FDA REMS Review Announcement Letter*, ACLU (Dec. 16, 2021), https://www.aclu.org/documents/fda-rems-review-announcement-letter [https://perma.cc/46AZ-LV7D].

67. *Questions and Answers*, *supra* note 13.

68. Baker, *supra* note 17, at 498–99.

69. BeLynn Hollers, *Is Self-Induced Abortion Illegal in Texas? Questions Arise in Wake of Murder Charge Being Dropped*, DALL. MORNING NEWS, https://www.dallasnews.com/news/politics/2022/04/11/is-self-induced-abortion-illegal-in-texas-4-questions-in-wake-of-a-murder-charge-now-being-dropped/ [https://perma.cc/35VW-6KEY] (last updated Apr. 11, 2022, 5:35 PM); S.B. 4, 87th Leg., 2d Spec. Sess. (Tex. 2021).

70. All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 521–24 (N.D. Tex. 2023).

71. *Id.* at 540–41, 560 ("Here, the plain text of the Comstock Act controls." "Accordingly, the Court hereby [stays] the effective date of FDA's September 28, 2000, Approval [sic] of mifepristone and all subsequent challenged actions related to that approval . . . .").

72. Pam Belluck & Abbie VanSickle, *The Abortion Pill Case: What's at Stake and What's Next*, N.Y. TIMES (Dec. 13, 2023), https://www.nytimes.com/article/supreme-court-abortion-pill-ruling.html [https://perma.cc/V9YE-HC55].

73. FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1559, 1565 (2024).

Even so, secure and sustained access to mifepristone is far from guaranteed. Similar attempts to curtail the availability of medication abortion are likely to follow, both at the state and federal levels.[74] These continued efforts will likely result in yet another roadblock to safe abortion care, with some communities suffering more than others. For example, telemedicine is particularly essential to those with limited access to traditional facility-based healthcare.[75] Aid Access, an international telemedicine provider created in 2018, reported on the most common reasons that patients turned to its services as opposed to clinics.[76] The overwhelming majority of patients cited a lack of affordability, followed by a desire for privacy and the physical distance of clinics.[77] Other reasons included difficulty taking time off from work or school, as well as the comfort and convenience of self-managing from home.[78]

Several researchers, healthcare providers, and the advocacy organization If/When/How have published reports that affirm Aid Access's findings on barriers to care.[79] These factors more often prevent people of color, those in low-income communities, and undocumented persons from engaging with healthcare providers.[80] Therefore, the movement to curtail access to medication abortion, including by means of telemedicine, will likely further diminish the ability of pregnant individuals in already disadvantaged communities to safely and legally end their pregnancies. Consequently, these same communities have and will continue to be disproportionately criminalized for self-managing with medications from non-domestic pharmacies and other illicit sources.[81]

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74. Amy Howe, *Supreme Court Preserves Access to Abortion Pill*, SCOTUSBLOG, https://www.scotusblog.com/2024/06/supreme-court-preserves-access-to-abortion-pill/ [https://perma.cc/M9ET-QPVF] (last updated June 13, 2024, 2:20 PM).

75. *See* Baker, *supra* note 17, at 500–01.

76. *Id.*

77. *Id.* at 501.

78. *Id.*

79. *See, e.g.*, Verma & Grossman, *supra* note 7, at 72; Christine Dehlendorf et al., *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH 1772, 1776 (2013); HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 15.

80. Verma & Grossman, *supra* note 7, at 71; Dehlendorf et al., *supra* note 79, at 1775; *see* HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 22.

81. DIAZ-TELLO ET AL., *supra* note 3, at 21; Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70, 74 (2015), https://www.guttmacher.org/gpr/2015/09/prosecuting-women-self-inducing-abortion-counterproductive-and-lacking-compassion [https://perma.cc/9E2L-9LWC].

III. SMA AND THE FOURTEENTH AMENDMENT

A. Introduction: "Self-Care, Criminalized"

Though only a handful of states have ever directly criminalized SMA, pregnant people who have self-managed their abortions and those who assisted have nonetheless been criminally investigated and arrested for decades across at least twenty-six states.[82] In 2023, If/When/How published a report titled *Self-Care, Criminalized* containing the results of a study on sixty-one recorded cases of investigations and arrests for SMA between 2000 and 2020.[83] The majority of these prosecutions occurred in Texas, followed by Ohio, Arkansas, South Carolina, and Virginia.[84] Medication abortion was the most common method among those who self-managed.[85] Of the forty-two cases against adults that progressed to court, only fourteen occurred in states where SMA is or was a crime.[86] Furthermore, of the thirty adults charged for self-managing, only seven of those charges were brought under statutes that explicitly banned SMA.[87] Rather, the vast majority of these cases were brought under ancillary or unrelated criminal statutes.[88] In these cases, prosecutors brought charges under (1) laws criminalizing harm to fetuses, (2) obscure statutes, and (3) antiquated criminal abortion laws.[89]

This Comment will discuss how prosecutions of SMA under fetal harm laws and obscure statutes potentially violate individual constitutional rights under the Fourteenth Amendment and go against established legal doctrines. While applying pre-*Roe* criminal

82. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 36.

83. *Id.* at 21, 36. The study reported a total of sixty-one cases. *Id.* Of these sixty-one, seven cases involved minors and could not be investigated further due to privacy protections in the juvenile court system. *Id.* at 21. Of the remaining fifty-four, forty-two cases had charges filed. *Id.* at 36. Finally, of those forty-two, thirty cases involved adults who were charged with self-managing their own abortion, while the remaining twelve were prosecutions of individuals who had helped another self-manage. *Id.*

84. LAURA HUSS ET. AL., SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS 2 (2022), https://ifwhenhow.org/wp-content/uploads/2023/06/22_08_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief_FINAL.pdf [https://perma.cc/67YZ-G2RX] [hereinafter HUSS ET AL., PRELIMINARY FINDINGS]

85. *Id.*

86. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 36.

87. *Id.* at 37–38.

88. *Id.*

89. *Id.*; DIAZ-TELLO ET AL., *supra* note 3, at 14, 17–18; *see* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 321 (2013).

abortion laws to those who self-manage likewise implicates constitutional concerns, use of fetal harm laws and obscure statutes are arguably more overt violations in comparison, particularly now that states are free to directly criminalize abortion post-*Dobbs*. Analyzing fetal harm laws and obscure statutes should provide a more straightforward illustration of why and how their misapplication conflicts with constitutional guarantees.

Of the forty-two adult cases highlighted in If/When/How's study, less than a third were eventually dismissed.[90] Most resulted in a guilty plea before trial, while the remaining cases ended with a guilty verdict at trial or some alternate outcome.[91] Despite If/When/How's comprehensive methodology, the organization admitted that the number of cases reported is likely an undercount compared to the true number of prosecutions within that twenty-year period.[92] However, even if a relatively small number of abortion-seekers faced prosecution for their alleged SMAs compared to the thousands that occur every year, these prosecutions raise significant constitutional questions that will likely become increasingly relevant as more states crack down on access to abortion care.[93]

B. The Fourteenth Amendment Due Process Clause: Fair Notice and the Void-for-Vagueness Doctrine

The Fourteenth Amendment of the Constitution provides that "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law."[94] Known as the Due Process Clause, this part of the Fourteenth Amendment protects individuals from the unlawful exercise of state power.[95] This guarantee ensures that the substance of a state law does not unlawfully interfere with "certain fundamental rights and liberty

90. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 25.

91. *Id.*

92. HUSS ET AL., PRELIMINARY FINDINGS, *supra* note 84, at 2.

93. *See* Ari Shapiro et al., *New Report Tracks Criminal Prosecutions of Self-Managed Abortions*, NPR (Aug. 9, 2022 4:21 PM), https://www.npr.org/2022/08/09/1116590982/new-report-tracks-criminal-prosecutions-of-self-managed-abortions [https://perma.cc/38G3-GJKB] (lead author of the 2023 If/When/How report Laura Huss predicts an increase in cases criminalizing people for SMA after *Roe* and *Casey* were overturned). *Compare* HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 25 (detailing the sixty-two SMAs that were prosecuted), *with* Jones & Friedrich-Karnik, *supra* note 20 (reporting that about 642,700 medication abortions occurred in the United States in 2023).

94. U.S. CONST. amend. XIV, § 1.

95. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 879 (2011) (plurality opinion); Weimer v. Amen, 870 F.2d 1400, 1405 (8th Cir. 1989).

interests" as well as ensures that the state does not abuse its power by unfairly applying such laws.[96] The criminalization of SMA under laws that do not directly prohibit it calls into question whether states pursuing such prosecutions comport with this latter requirement. That is, whether these statutes "give ordinary people fair notice of the conduct [they] punish[]."[97]

On the requirement of notice, the Supreme Court has held that a statute which deprives one of life, liberty, or property must be stated clearly, such that one of ordinary intelligence can readily discern the conduct that creates liability to its penalties.[98] At the root of this requirement, asserts the Court, are "[e]lementary notions of fairness" which require that an individual understands the content of the prohibited conduct and the severity of the penalty associated with it.[99]

An outgrowth of this notion, the void-for-vagueness doctrine, mandates that a penal statute is void if it is not sufficiently definite.[100] The doctrine rests on two principles: (1) that an individual must have the opportunity to avoid prohibited conduct and can only do so if given clear warning as to what to avoid, and (2) that vague statutes impermissibly delegate the legislature's authority to proscribe certain conduct to law enforcement and the judiciary.[101] A statute that does not provide minimal guidelines for its enforcement allows for a "standardless sweep" that enables law enforcement, prosecutors, judges, and juries to "pursue their personal predilections."[102] Such statutes therefore encourage arbitrary and discriminatory enforcement of the law.[103]

Accordingly, a court must make two inquires when evaluating a void-for-vagueness challenge.[104] First, whether the statute "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," and second, whether it "authorizes or even encourages arbitrary and discriminatory enforcement."[105] The former requires employing tools of statutory

96. *See Weimer*, 870 F.2d at 1405; Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997).
97. Johnson v. United States, 576 U.S. 591, 595 (2015).
98. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).
99. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).
100. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).
101. *Id.* at 357–58; Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).
102. *Kolender*, 461 U.S. at 357–58 (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).
103. *Id.* at 357; *Grayned*, 408 U.S. at 108–09.
104. *Kolender*, 461 U.S. at 357–58; Hill v. Colorado, 530 U.S. 703, 732 (2000).
105. *Hill*, 530 U.S. at 732.

construction.[106] The Supreme Court looks both to the statutory text and to evidence of legislative intent to determine whether the statute provides a descriptive standard for avoiding its penalties.[107]

The likelihood of arbitrary enforcement depends on the results of the Court's statutory construction. If the statute lacks particularity, the Court is likely to find that it allows for arbitrary enforcement.[108] However, there are some fine lines. While a statute cannot be so vague as to become a mechanism for discriminatory prosecution against particular groups based on personal biases, the Court acknowledges that some prosecutorial discretion is necessary to enforce any statute.[109] Therefore, the inquiry turns on whether the discretion provided is "permissible," which, once again, depends on whether the statute sufficiently defines its boundaries.[110]

Finally, the Court employs varying levels of strictness in its analysis depending on the reach of the statute and the nature of its penalties.[111] A law that encroaches upon constitutionally protected rights requires a more stringent test than one that does not.[112] Likewise, a statute that imposes criminal penalties calls for a stricter test than one that carries only civil penalties.[113] Though the Court does not precisely define the contents of this stricter test, it has stated that a law which is "sufficiently clear" as applied to the offender satisfies its requirements.[114]

106. *See e.g.*, United States v. Sullivan, 332 U.S. 689, 693–694 (1948) ("[No cases] authorize[] a court in interpreting a statute to depart from its clear meaning. . . . [Statutes] should be given their fair meaning in accord with the evident intent of Congress."); *Statutory Construction*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/statutory_construction [https://perma.cc/RXL2-4FXY] (last visited Aug. 29, 2024).

107. *Kolender*, 461 U.S. at 358–59 (holding that the challenged statute contained no such standard based on how it was drafted and how its language was construed by the lower courts); *Grayned*, 408 U.S. at 110 ("Here, we are 'relegated . . . to the words of the ordinance itself' . . . ." (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971))); *Sullivan*, 332 U.S. at 693–94 ("[Statutes] should be given their fair meaning in accord with the evident intent of Congress.").

108. *Kolender*, 461 U.S. at 361.

109. *Id.* at 360; *Grayned*, 408 U.S. at 114.

110. *Grayned*, 408 U.S. at 114.

111. Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982).

112. *See id.* at 499.

113. *See id.* at 499–500.

114. *Id.* at 500.

IV. PROSECUTING SMA: FETAL HARM LAWS

Many states indirectly criminalize SMA by imposing criminal liability for harm to fetuses.[115] These laws gained popularity after *Roe* in the late 1970s and are premised on the idea of fetal victimhood and personhood.[116] Though passed in the name of protecting pregnant individuals by allowing criminal prosecution for fetal assault and feticide, these laws can and have been used against pregnant persons instead.[117] Fetal harm laws that implicitly allow for the criminalization of SMA and laws that do not explicitly exempt the pregnant person from liability are particularly vulnerable to prosecutorial misuse.[118] If/When/How reports that 13% of adult cases included in their study were brought under such laws.[119]

A. Laws Conspicuously Incomplete

Utah is an example of a state which has laws capable of being misused in the SMA context. Utah's Criminal Code states that a person commits criminal homicide by causing the death of another, "including an unborn child at any stage of the unborn child's development."[120] However, a pregnant person who causes the death of their unborn child by criminal negligence or recklessness is not guilty of homicide as long as the death was "not caused by an intentional or knowing act" on their part.[121] Though the statute protects women who unintentionally end their pregnancies, it allows for the prosecution of those believed to have done so knowingly or willingly.[122] The National Association of Criminal Defense Lawyers posits that, while this law could apply to self-managed abortions in theory, such application in practice may be unconstitutional on grounds of vagueness.[123] Indeed, the

115. DIAZ-TELLO ET AL., *supra* note 3, at 14; HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 36. As of 2017, a total of seven states had SMA bans on the books. *Id.* Between 2017 and 2023, five of those states repealed their bans, and one state's law was deemed unconstitutional and unenforceable, though it has not been removed from that state's criminal code. *Id.* As of 2023, Nevada is the only state with an enforceable SMA ban in place. *Id.*

116. *See* DIAZ-TELLO ET AL., *supra* note 3, at 14.

117. *Id.*

118. *Id.* at 15.

119. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 37–38.

120. UTAH CODE § 76-5-201(1)(a)(ii) (2024).

121. *Id.* § 76-5-201(3)(c).

122. *Id.*

123. NAT'L ASS'N CRIM. DEF. LAWS., UTAH ABORTION LAW POST-*DOBBS*, 4 (2022), https://www.nacdl.org/getattachment/437de371-7b2b-4bc5-b690-f50a32ba38d2/utah-statutory-[https://perma.cc/P5SG-2JQW].

statute does not define the term unborn child, and its application "at any stage" of development means that one may be prosecuted for homicide as early as mere moments after conception.[124] This means that even taking emergency contraception to prevent implantation could bring a person within the statute's purview. The statute therefore puts all those capable of getting pregnant at risk of facing grave criminal penalties for knowingly ending a pregnancy, regardless of gestational age or viability.

What is also alarming is that the law does not demarcate at what point one's actions are no longer intentional or knowing, allowing liability to attach to a pregnant individual for a fetal death ultimately caused by another. The case of Marshae Jones illustrates this problem and why such ambiguity creates further opportunity for misapplication. In Alabama, Jones was involved in a fight which ended in her being shot in the abdomen, killing the fetus.[125] Upon determining that Jones instigated the fight and that the gunshot was justified out of self-defense, the grand jury dismissed the charges against the shooter but indicted Jones for manslaughter under Alabama law, a crime with a maximum sentence of twenty years.[126] Specifically, the grand jury indicted Jones for felony manslaughter by "intentionally caus[ing] the death of another person . . . by initiating a fight knowing she was five months pregnant."[127] Ultimately, in a decision applauded by the American Civil Liberties Union (ACLU) as a proper use of prosecutorial discretion to drop charges "when the law and justice demands," the prosecutor dismissed the case against Jones.[128]

Though the case arose under Alabama homicide law, applying its facts in the context of Utah's law demonstrates the vagueness concern caused by its indeterminate language. Could the fact that a pregnant person instigated an altercation, whether physical or verbal, trigger the intentional or knowing element of the statute, such that they are then held responsible if someone else inflicts deadly force that results in fetal harm or death? Even if such force is

124. *Id.*; § 76-5-201(1)(a)(ii).

125. Vanessa Romo, *Woman Indicted for Manslaughter After Death of Her Fetus, May Avoid Prosecution*, NPR (June 28, 2019, 4:49 PM), https://www.npr.org/2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-her-fetus-may-avoid-prosecution [https://perma.cc/8EK5-3EZK].

126. *Id.*; Darran Simon & Susan Scutti, *DA Drops All Charges Against a Pregnant Woman Indicted in Her Baby's Death After Shooting in Alabama*, CNN, https://www.cnn.com/2019/07/03/us/pregnant-alabama-woman-manslaughter-indictment/index.html [https://perma.cc/KK4J-WG3C] (last updated July 3, 2019, 4:16 PM).

127. Romo, *supra* note 125.

128. Simon & Scutti, *supra* note 126.

justified, should the intentional act of starting a fight negate the protection for what may otherwise be recklessness? In the context of medication abortion, could the act of taking abortion pills be considered intentional even if coerced by a parent or partner? Does one knowingly cause a fetal death by taking misoprostol pills to treat a gastric ulcer without first reading the warnings on the label?

Even in cases of true negligence or recklessness, an intentional or knowing act can likely be found at some point in the chain of causation. However, the statute sheds no light on how far back to look in this chain, resulting in prosecutions like that of Jones, where she was indicted for the death of her fetus because she was the victim of gun violence.[129] While courts typically do not consider hypotheticals that highlight a statute's potential vagueness if it is clear in the majority of its applications,[130] there is reason to find that this statute and those like it neglect to clarify the bounds of their proscribed conduct such that they are unclearly applied to pregnant persons as a class in most instances.

Other state statutes create exemptions for pregnant persons, but nonetheless leave avenues through which overzealous prosecutors may bring charges. While Oklahoma's homicide statute protects individuals who terminate their pregnancies as long as they have not "committed a crime that caused the death of the unborn child," Oklahoma also outlaws self-induced abortions without the supervision of a licensed physician.[131] The Oklahoma Attorney General has stated that, despite this second statute's own language, it cannot be used to punish women who self-induce.[132] However, the statute remains codified nonetheless.[133] In addition, it is unclear whether the second statute may be used in conjunction with the first to at least charge, if not convict. Consequently, Oklahoma residents open themselves up to legal risk by self-managing while both of these statutes are in effect. Therefore, while neither the Utah nor Oklahoma statutes target SMA outright, they provide inadequate notice for pregnant persons seeking to self-manage as to their potential liability and provide ample opportunity for prosecutorial misuse.

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129. Romo, *supra* note 125.

130. Hill v. Colorado, 530 U.S. 703, 733 (2000).

131. OKLA. STAT. tit. 21, § 691 (2022); OKLA. STAT. tit. 63, § 1-733 (2022).

132. GENTNER DRUMMOND, OKLA. ATT'Y GEN., ATTORNEY GENERAL OPINION 2023-12, at 1–2 (2023), https://oklahoma.gov/content/dam/ok/en/oag/documents/opinions/ag-opinions/2023/ag_opinion_2023-12-2.pdf [https://perma.cc/8UJQ-LRHA].

133. *See id.*

B. Laws Conspicuously Silent

State statutes that do not explicitly exempt pregnant persons from liability for feticide also pose legal dangers to those who self-manage. Washington's criminal code provides that "a person . . . [who] intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child" is guilty of manslaughter in the first degree, a class A felony.[134] The statute does not clarify whether pregnant persons who terminate their own pregnancies fall within its purview.[135] Similarly, Iowa's feticide statute applies to "[a]ny person who intentionally terminates a human pregnancy, with the knowledge and voluntary consent of the pregnant person."[136] Washington and Iowa's statutes exemplify many others that, by failing to exclude from their application those carrying said pregnancies, create uncertainty as to whether these individuals must also abstain from the proscribed conduct to avoid committing a felony. The Supreme Court's fair-notice inquiries suggests that such uncertainty renders these and similar statutes void-for-vagueness.

While these statutes describe prohibited conduct with sufficient specificity, they do not adequately clarify to which class of persons the statutes do or do not apply. A plain reading suggests they are most directly applicable to one who inflicts a fatal injury on a fetus carried by another. However, assigning liability to "a person" or "any person" without clarifying whether the language includes the person carrying the fetus casts doubt on the scope. Given that both statutes reference the pregnant person as a third party that is either victimized by or must give consent to the prohibited conduct, it can be inferred that the statutes do not police the pregnant person's actions. However, without a clear exemption, the statutes are susceptible to a reading in which the pregnant person is at once the subject and the object, meaning that they are both acting and being acted upon. Compared to homicide statutes like California's, which explicitly exempts feticide that is "solicited, aided, abetted, or consented to by the pregnant person with the fetus," these statutes lack the specificity necessary to discern their appropriate application.[137]

134. WASH. REV. CODE § 9A.32.060 (2024).

135. *See id.*

136. IOWA CODE § 707.7(1) (2024). The statute classifies both offenses resulting in the termination of the fetus as class C felonies. *Id.*

137. CAL. PENAL CODE § 187(a), (b)(3) (2024).

Looking to legislative intent only highlights this failing. For example, the 1975 legislative session—during which the Washington legislature passed its feticide law—states that its provisions should be construed according to the fair import of their respective terms and according to the general purposes provided, which include clarifying what conduct is safe from criminal liability and providing fair warning as to conduct that is not.[138] Legislative intent therefore indicates that unclear statutes should be interpreted according to a plain understanding of the language to provide fair warning for culpable conduct. Given that these statutes carry felony-level sentences, the glaring ambiguity as applied to those who self-manage calls for strict scrutinization by courts.[139]

The prosecution and punishment of Purvi Patel under Indiana's statutory equivalent illustrates the real dangers of this ambiguity. In 2015, Patel allegedly ordered abortion pills online from a pharmacy in Hong Kong to end her pregnancy.[140] After having a stillbirth and beginning to hemorrhage, she sought medical attention at an emergency room, where her doctor reported her to the police.[141] The Indiana statute under which she was charged and ultimately jailed criminalizes "a person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus."[142]

The statute was initially enacted to protect pregnant persons from aggressors, such as abusive partners.[143] Indeed, Patel argued that the feticide law was inapplicable and unconstitutional as applied to her because abortion legislation in Indiana had historically always immunized the pregnant person from liability, indicating that the feticide law should as well.[144] However, in the first verdict of its kind, the jury found Patel guilty under the

138. 1975 Wash. Sess. Laws 822, 835.

139. *See supra* notes 134–36 and accompanying text.

140. Shawna Chen, *The Little-Known Case of Purvi Patel*, YAPPIE (May 8, 2023), https://theyappie.com/purvi-patel-feticide-abortion-indiana/ [https://perma.cc/8DF3-SMX4].

141. DIAZ-TELLO ET AL., *supra* note 3, at 16.

142. *Id.* at 15–16; IND. CODE § 35-42-1-6 (2022).

143. Nicky Woolf, *Purvi Patel Found Guilty of Feticide and Child Neglect Over Unborn Baby's Death*, GUARDIAN (Feb. 4, 2015, 10:55 AM), https://www.theguardian.com/us-news/2015/feb/04/purvi-patel-found-guilty-feticide-unborn-childs-death [https://perma.cc/BY2H-WLV8].

144. Patel v. State, 60 N.E.3d 1041, 1060–61 (Ind. Ct. App. 2016); Priya Kapoor, *Communicating Gender, Race and Nation in the Purvi Patel Case: The State, Biopower, and the Globality of Reproductive Surveillance*, GENDER & WOMEN'S STUD., May 2018, at 2, https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1023&context=is_fac [https://perma.cc/S65P-T7ED].

statute and sentenced her to forty-six years in prison.[145] Ultimately, the court of appeals overturned her conviction, but only after she had served three years behind bars.[146] The court agreed that Indiana's feticide law was not intended to punish those who have SMAs, and the state's amended feticide statute now makes this exemption.[147]

In addition to the demonstrated lack of fair warning both categories of feticide statutes provide, their imprecise language also provokes selective enforcement, and often on the basis of racial animus. If/When/How found that law enforcement and prosecutors considered murder or homicide as potential charges in almost half of all the cases in their study.[148] Furthermore, they reported that people of color prosecuted for SMAs were disproportionately more likely to be charged with murder or homicide, including in the form of feticide, than white people facing prosecution.[149] Other reports confirm that economically disadvantaged Black and brown women are the usual victims of these arrests, along with low-income, rural, white women.[150]

These statutes are further misapplied to those who have spontaneous miscarriages or who seek medical help during their pregnancies.[151] For example, in 2010, Iowa resident and mother Christine Taylor tripped and fell down the stairs in her home during her second trimester.[152] Though she was cleared at the hospital, the attending medical professionals reported her to the police on the suspicion that Taylor intentionally threw herself

145. *See* DIAZ-TELLO ET AL., *supra* note 3, at 16; Chen, *supra* note 140. The jury also found her guilty of child neglect, even though this charge requires fetal death after a live birth while feticide requires fetal death in utero. Woolf, *supra* note 143.

146. DIAZ-TELLO ET AL., *supra* note 3, at 16; Kapoor, *supra* note 144, at 2.

147. DIAZ-TELLO ET AL., *supra* note 3, at 16; IND. CODE § 35-42-1-6.5.

148. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 40.

149. *Id.*

150. Purvaja Kavattur, *A World Without* Roe, INQUEST (Mar. 26, 2022), https://inquest.org/a-world-without-roe/ [https://perma.cc/68XR-9ZNC]; *see also* Editorial Board, *A Woman's Rights: Part 5. The Mothers Society Condemns*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/abortion-law-poverty.html [https://perma.cc/6A95-THKU].

151. *See* DIAZ-TELLO ET AL., *supra* note 3, at 14; Kavattur, *supra* note 150.

152. *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously*, ACLU ME. (Feb. 11, 2010, 5:04 PM), https://www.aclumaine.org/en/news/iowa-police-almost-prosecute-woman-her-accidental-fall-during-pregnancyseriously [https://perma.cc/4HJZ-VAFD]; Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands?*, CBS NEWS (Mar. 2, 2010, 6:55 AM), https://www.cbsnews.com/news/did-christine-taylor-take-abortion-into-her-own-hands/ [https://perma.cc/QAT2-D8NJ].

down the stairs to end the pregnancy.[153] The police arrested Taylor on her way home from the hospital on suspicion of her having committed attempted feticide, a felony under Iowa law.[154] The charges were eventually dismissed several weeks later once the investigation revealed that Taylor had not reached her third trimester, a requirement for conviction under the statute.[155] Otherwise, she would have been the first person prosecuted under the charge in Iowa and only on the basis of disputed statements she made to her medical provider in confidence.[156] This instance demonstrates how these statutes impermissibly sweep in noncriminal conduct. The apparent lack of protection for pregnant people permits law enforcers to (1) hurt the class of persons that the statutes are actually meant to protect and (2) further criminalize communities that are already over-criminalized by subjecting them to some of the most severe penalties available in the justice system.

V. PROSECUTING SMA: OBSCURE STATUTES

Another category of laws used to criminalize SMA is obscure statutes. These prosecutions take place under charges such as child abuse or neglect, concealment of a birth or death, mishandling and improper disposal of human remains, and abuse of a corpse.[157] This kind of prosecutorial overreach usually occurs when a prosecutor resorts to what some call "spaghetti charging," which If/When/How defines as "throwing out charges until something sticks."[158] These laws are used against those who help the pregnant person terminate their pregnancy in addition to the pregnant person themselves.[159] The organization reports that a plurality of the charges in their case study, about 40%, involved these kinds of statutes.[160] This Comment will focus on three interrelated charges individuals commonly face after pregnancy loss, whether induced or not: concealment of a birth, concealment of a death, and abuse of a corpse.

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153. *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously*, *supra* note 152.

154. *Id.*; IOWA CODE § 707.7 (2024).

155. *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously*, *supra* note 152; Hayes, *supra* note 152.

156. *Iowa Police Almost Prosecute Woman for Her Accidental Fall During Pregnancy . . . Seriously*, *supra* note 152.

157. *See* Shapiro et al., *supra* note 93; *see also* DIAZ-TELLO ET AL., *supra* note 3, at 19.

158. DIAZ-TELLO ET AL., *supra* note 3, at 19.

159. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 36.

160. *Id.* at 38.

The following case exemplifies what these prosecutions typically entail. In 2005, Arizona resident Regina Lockwood decided to terminate her pregnancy due to health and financial impediments.[161] Because she could not afford a clinical abortion without insurance, she took over-the-counter herbs along with mifepristone to end the pregnancy.[162] With the help of her partner Nicholi Grimm, they buried the fetal remains in her backyard.[163] An acquaintance then reported Lockwood and Grimm to the police, who began a criminal investigation.[164] At trial, the jury found Lockwood guilty on one count of "conspiracy to conceal a dead body," a class 5 felony in Arizona.[165]

On appeal, however, the court found that the statute failed to specify a gestational age at which point it would apply, in contrast to other penal statutes that expressly include fetuses within their purview.[166] The court held that, to protect Lockwood's due process right to fair warning, it could not interpret the statute to include fetuses absent express language indicating that the Arizona legislature intended to do so.[167] The court reversed Lockwood's conviction accordingly.[168]

A. Concealment of Birth and Death

Statutes punishing the concealment of birth and death date back to the seventeenth century colonial era.[169] Influenced by English law, the colonies passed such statutes beginning in 1696 to punish women who gave birth out of wedlock, presuming that such women were more likely to conceal the birth, kill their newborn, and then conceal the newborn's death out of shame.[170] The language of these statutes, such as the 1785 Massachusetts statute introduced as "An A[ct] to prevent the destroying and murdering of Bastard Children" reflected the legislature's concern with the difficulties of proving infanticide at the time and their

161. *Id.* at 17; State v. Lockwood, 218 P.3d 1008, 1009 (Ariz. Ct. App. 2009).

162. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 17.

163. *Id.*; *Lockwood*, 218 P.3d at 1009.

164. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 17.

165. *Id.* at 17; ARIZ. REV. STAT. ANN. § 13-2926 (2024); ARIZ. REV. STAT. ANN.§ 13-702 (2024). Class 5 felonies carry a minimum prison sentence of six months to a maximum of 2.5 years.

166. *Lockwood*, 218 P.3d at 1011.

167. *Id.* at 1010–11.

168. *Id.* at 1012.

169. Nisha Chandra, Note, *What to Expect When You're No Longer Expecting: How States Use Concealment and Abuse of a Corpse Statutes Against Women*, 40 COLUM. J. GENDER & L. 167, 169 (2021).

170. *Id.* at 170–71.

conviction to punish "lewd and dissolute women."[171] The crime indeed carried the gravest punishment, with records indicating that several women were executed during the eighteenth century under such laws.[172]

Many statutes of this kind remain codified by states today.[173] Arkansas criminalizes anyone who hides the corpse of a newborn with the purpose of "conceal[ing] the fact of the child's birth or to prevent a determination of whether the child was born alive."[174] Pennsylvania similarly prohibits one from "conceal[ing] the death of [their] child, so that it may not come to light, whether it was born dead or alive or whether it was murdered or not."[175] Wisconsin, Georgia, Nevada, Oregon, and Kentucky, among other states, also have laws to this effect.[176] Similar to earlier versions of these statutes, these laws appear intended to punish those who kill their newborns and hide the events of their birth and death from the state.[177]

These statutes, apart from their arguably malicious history towards women who engage in pre-marital sex, have deficiencies that implicate the void-for-vagueness doctrine as well. First, they do not specify at what stage of fetal development the statutes apply.[178] Women often miscarry before they even know they are pregnant, producing little to no fetal remains to speak of, but these statutes are unspecific enough that they may presumably apply to one who loses a four- or five-week pregnancy in addition to those who miscarry closer to term.[179] Second, they do not indicate how one may avoid committing concealment.[180] These statutes neither clarify what actions constitute hiding a corpse nor what procedure must be followed to avoid having concealed a birth or death.[181] Who must be notified—whether that be family, law enforcement, a hospital, or the county registrar—is not mentioned. The timeframe for providing this notification is also missing.[182]

171. *Id.* at 170.
172. *Id.*
173. *Id.* at 171.
174. ARK. CODE. ANN § 5-26-203 (West 2012).
175. 18 PA. CONS. STAT. § 4303(a) (2024).
176. Chandra, *supra* note 169, at 171 & n.21.
177. *Id.* at 171–72.
178. *Id.* at 172.
179. Stacey Colino, *What Is a Chemical Pregnancy?*, EVERYDAY HEALTH, https://www.everydayhealth.com/chemical-pregnancy/guide [https://perma.cc/GCL8-38XN] (last updated Oct. 28, 2022).
180. *See supra* text accompanying notes 174–75.
181. *See supra* text accompanying notes 174–75.
182. Chandra, *supra* note 169, at 173.

The ambiguity regarding a timeframe is especially crucial, as many women have been prosecuted under such statutes, after both induced and spontaneous miscarriages, for having waited even a few hours before reporting the birth or death.[183] For example, in 2015, when Arkansas resident Anne Bynum had a stillbirth in her home during the middle of the night after ingesting medication containing misoprostol, she wrapped up the remains and placed them in her car to conceal them from her mother.[184] Feeling too light-headed to drive to the hospital, she slept a few hours, then took the remains to the hospital that morning.[185] Days later, she was arrested and charged with concealing a birth and abuse of a corpse.[186] While the latter charge was dismissed, the jury, after deliberating for four minutes, convicted her of the former offense and sentenced her to six years in prison.[187]

Halfway through her sentence, the Arkansas Court of Appeals overturned the conviction on the grounds that the lower court abused its discretion by allowing the prosecution to introduce prejudicial evidence during trial.[188] However, the court declined to consider Bynum's void-for-vagueness challenge as to encroachment on privacy rights because it was not properly reserved for appellate review.[189] Notably, the court rejected Bynum's claim that the statute was impermissibly vague in violation of fair notice requirements.[190] Though she did not conceal the remains from her attorney or healthcare providers, and though she brought the remains to a hospital mere hours after her stillbirth, the court deemed that the statute was nonetheless clear as applied to her, rendering her unable to challenge its facial validity.[191]

Even laws that do not immediately appear concerned with feticide are susceptible to misapplication, as shown by Lockwood's prosecution in Arizona.[192] In addition to the Arizona law, which

183. Ava B., *When Miscarriage Is a Crime*, PLANNED PARENTHOOD ACTION FUND (July 29, 2019), https://www.plannedparenthoodaction.org/planned-parenthood-advocates-arizona/blog/when-miscarriage-is-a-crime [https://perma.cc/LN9W-48SB].

184. Bynum v. State, 546 S.W.3d 533, 536–37 (Ark. Ct. App. 2018).

185. *Id.* at 537.

186. Lynn M. Paltrow, *When Pregnancy Leads to a Prison Term*, OPEN SOC'Y FOUNDS. (June 24, 2015), https://www.opensocietyfoundations.org/voices/when-pregnancy-leads-prison-term [https://perma.cc/6RQY-A76F].

187. *Bynum*, 546 S.W.3d at 536.

188. *Id.* at 536, 542–44.

189. *Id.* at 539–40.

190. *Id.* at 540.

191. *Id.* at 540–41.

192. *See supra* text accompanying notes 161–68.

prohibits knowingly moving a dead human body with the "intent to abandon or conceal," North Carolina makes it a felony to fail to notify law enforcement of a human death, including a child's death, or to secretly dispose of a human body with the intent to conceal their death.[193] While neither Arizona nor North Carolina even recognize fetuses as persons for purposes of these statutes, Lockwood's prosecution shows how authorities can nonetheless stretch the statutory language beyond its original scope to capture unrelated conduct.[194]

B. Abuse of a Corpse

Abuse of a corpse charges commonly appear as part of a prosecutor's spaghetti-charging tactics as well.[195] Rooted in preventing public indignation and outrage of kin, many states criminalize the desecration of the deceased, such as necrophilia and mutilation, under abuse of a corpse statutes.[196] The Model Penal Code's (MPC) abuse of a corpse statute, upon which states have based their own, penalizes a person who handles a corpse in a way that they know would "outrage . . . family sensibilities."[197] Pennsylvania parrots the MPC's language, and in the same vein, Ohio outlaws conduct that "outrage[s] reasonable family [or] . . . community sensibilities."[198] Some states use more specific language, such as Arkansas and Texas, each describing categories of acts that violate the statute.[199] However, even these states use vague catch-all terms such as "offensive" to describe conduct.[200]

Defendants have challenged these statutes, arguing that the broad range of what may be classified as outrageous behavior renders them unconstitutionally vague, but have been met with little success.[201] For example, in applying the Iowa abuse of a corpse statute to a case involving a stillborn fetus, the Iowa court held that some of the statutory language was unconstitutionally vague, but

193. ARIZ. REV. STAT. ANN. § 13-2926 (2024); N.C. GEN. STAT. § 14-401.22 (2013).

194. PREGNANCY JUST., WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 38, https://www.pregnancyjusticeus.org/wp-content/uploads/2023/05/fetal-personhood-with-appendix-UPDATED-1.pdf [https://perma.cc/Z3EN-M5JK]; *see also* State v. Lockwood, 218 P.3d 1008, 1009–11 (Ariz. Ct. App. 2009).

195. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 42.

196. Chandra, *supra* note 169, at 174–75.

197. *Id.*; MODEL PENAL CODE § 250.10 (AM. L. INST. 1980).

198. 18 PA. CONS. STAT. § 5510 (2024); OHIO REV. CODE ANN. § 2927.01 (West 2024).

199. ARK. CODE ANN. § 5-60-101 (West 2024); TEX. PENAL CODE ANN. § 42.08.

200. ARK. CODE ANN. § 5-60-101; TEX. PENAL CODE ANN. § 42.08.

201. Chandra, *supra* note 169, at 175.

preserved the statute by severing what it deemed to be the problematic language and allowed the prosecution to proceed.[202] Other challenges in Pennsylvania, Ohio, and Arkansas have failed entirely.[203] Accordingly, those who have disposed of fetal remains, after either self-managing or miscarrying, have faced prosecution under these statutes.[204] Despite what some state courts have held, there are glaring statutory deficiencies in their application, particularly when applied to those who lose or end their pregnancies.

First, many of these statutes use the term "corpse."[205] However, laws regulating the disposal of fetal remains indicate that fetal remains are not part of the intended definition of corpse. For example, while Pennsylvania regulates the disposal of both fetal remains and corpses within the same statute, it uses the term "dead bodies" separate from "fetal remains," indicating that the two have distinct legal definitions.[206] In regulating dispositions of the dead, Arkansas provides a separate subsection specifically for "fetus and tissue" remains, and its requirements apply only to healthcare providers.[207] The same is true for the Texas code, which explicitly exempts from its disposition requirements any "embryonic and fetal tissue[] that is expelled or removed from the human body once the person is outside of a health care facility."[208] The language indicates a definitional distinction between human fetal remains and a human corpse as well as narrows the statute's scope to fetal tissue expelled within a healthcare setting.[209] Lastly, Ohio also disposes of fetal remains according to regulations specific to medical waste and provides no definition indicating that remains are included in its corpse abuse statute.[210] Despite the fact that these states have not defined the term "corpse" to include fetal remains and despite

202. *Id.*; State v. Aldrich, 231 N.W.2d 890, 895–96 (Iowa 1975).

203. Chandra, *supra* note 169, at 175 & n.53.

204. *Id.* at 175–76; HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 38.

205. *See, e.g.*, 18 PA. CONS. STAT. § 5510 (2024); OHIO REV. CODE ANN. § 2927.01 (West 2024); ARK. CODE ANN. § 5-60-101; TEX. PENAL CODE ANN. § 42.08.

206. 35 PA. STAT. AND CONS. STAT. § 450.506.

207. ARK. CODE ANN. § 20-17-801.

208. 25 TEX. ADMIN. CODE § 138.3 (2018) (Texas Department of Health Services; Scope, Exemptions).

209. *Id.*

210. Jericka Duncan et al., *Brittany Watts, Ohio Woman Charged with Felony After Miscarriage at Home, Describes Shock of Her Arrest*, CBS NEWS, https://www.cbsnews.com/news/brittany-watts-the-ohio-woman-charged-with-a-felony-after-a-miscarriage-talks-shock-of-her-arrest/ [https://perma.cc/27T9-HAXC] (last updated Oct. 21, 2024, 1:05 PM).

indications to the contrary based on their regulatory schemes, prosecutions under these statutes still continue without fair notice.[211]

Take the case of Brittany Watts, who miscarried in her home in Ohio in September 2023.[212] A hospital had previously told her that her twenty-two-week pregnancy was not viable and that induction to evacuate the fetus was necessary for her health.[213] However, the hospital delayed providing her the appropriate care due to concerns about violating Ohio's abortion ban.[214] Frustrated with the lengthy wait, she returned to her home to wait there until she could be seen.[215] The next morning, she miscarried in her bathroom, filling the toilet bowl with fetal tissue and large amounts of blood, which she subsequently attempted to empty into a bucket and place outside her home.[216]

When she returned to the hospital afterwards, her provider called the police.[217] The officers went to Watts's residence to locate the remains and bring them to the hospital for proper disposal.[218] Upon failing to locate the remains in the bucket, the police discovered that they were lodged in the trap of the toilet, unbeknownst to Watts, and had to remove the toilet to transport the remains.[219] A few days after the hospital discharged Watts, the police put out a warrant for her arrest and charged her with abuse of a corpse, a felony under Ohio law with a sentence of up to a year behind bars and a $2,500 fine.[220] Her attorney stated that the legal issue at hand was the lack of a clear definition for the term "corpse" as used in the statute, arguing that remedying the ambiguity would better deter prosecutors from using the statute in this way.[221]

In addition to this failing, the Ohio statute, among others, requires that one knowingly abuse a corpse, meaning that they must knowingly engage in conduct retroactively deemed outrageous to

211. *See* HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 37–38, 46–47; *supra* notes 205–10 and accompanying text.
212. Duncan et al., *supra* note 210.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*

ordinary sensibilities by a judge or jury.[222] As applied to those who improperly dispose of fetal remains after miscarriage, one would have to do so in a way that they know is offensive or outrageous to come within the statute's purview.[223] Nonetheless, this statute has been applied to individuals like Watts, who ultimately did not meet the requirements of the statute.[224]

In Watts's case, she attempted to remove all the blood and matter from her toilet bowl into a bucket.[225] She had not known that the bulk of the remains were in the toilet trap, nor was the miscarriage in her bathroom a knowing choice on her part.[226] Fortunately, a grand jury declined to indict Watts a few months later.[227] The prosecutor also issued a statement affirming that Watts did not violate the statute and voiced his disagreement with an application of the law that would find otherwise.[228]

VI. PROSECUTING SMA: CONCLUSION

While the specific fetal harm laws and obscure statutes discussed represent only a fraction of codified law weaponized against pregnant people who self-manage or undergo spontaneous pregnancy loss, Fourteenth Amendment Due Process violations are implicated across these and many more not mentioned in this Comment.[229] From imprecise language to indeterminate scope, these statutes are demonstrably harmful because they are ripe for misuse. Such misuse captures law-abiding conduct, creates legal uncertainty,

222. OHIO REV. CODE ANN. § 2927.01 (West 2024) ("No person . . . shall treat a human corpse in a way that the person knows would outrage *reasonable* family . . . [or] community sensibilities." (emphasis added)); ARK. CODE ANN. § 5-60-101 (West 2024) ("A person commits abuse of a corpse if . . . he or she knowingly . . . [p]hysically mistreats or conceals a corpse in a manner offensive to a person of *reasonable* sensibilities." (emphasis added)). These statutes rely on the reasonable person standard, an objective standard that is measured by what someone of reasonable sensibilities would feel, according to the trier of fact. *See generally* Counterman v. Colorado, 143 S. Ct. 2106, 2112 (2023) (discussing the reasonable person standard). Therefore, to avoid the penalties of these statutes, one would have to anticipate the results of such deliberation in advance.

223. OHIO REV. CODE ANN. § 2927.01; ARK. CODE ANN. § 5-60-101.

224. *See, e.g.*, Duncan et al., *supra* note 210.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. Other laws not discussed include those relating to "child abuse, felony assault or assault of an unborn child, practicing medicine without a license, or homicide and murder." HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 38.

and results in added surveillance and arrest within communities that are already economically disadvantaged and over-incarcerated.[230]

VII. CONSEQUENCES AND REMEDIES

A. No Harm, No Foul? The Lasting Costs of Prosecution

Even when a charge is dismissed or a conviction is overturned, the harm caused by contact with the justice system does not end once the case is closed. Those prosecuted have lost their jobs, along with employer-provided health insurance, due to investigations and arrests, even if charges were never subsequently filed.[231] Many have also been ostracized and shamed in their communities due to the social stigma surrounding abortion.[232] One woman in If/When/How's study had to change her name and leave her job, while another received threats, hateful emails, and ultimately was forced to move after her property was vandalized.[233] Some have had their reputations ruined due to negative media attention surrounding their case, with multiple stating that the media had demonized them and affected their ability to find employment.[234]

The consequences do not end there. For parents, exposure to the criminal legal system has sometimes led to loss of parental custody at the hands of child protective and welfare agencies, who can open their own investigations without a charge or arrest and even after the criminal case resolves.[235] The If/When/How study reports that twenty-seven of the fifty-four adults prosecuted in its sample were already parents.[236] Child welfare agencies got involved in about half of these cases, and 30% of parents in the study ultimately lost custody of their children, temporarily and permanently.[237] Appellate courts have also considered the accused's alleged SMA when reviewing custody outcomes.[238] For example, in 2020, a Michigan appellate court affirmed the termination of a mother's parental rights in part

230. ATARA RICH-SHEA & EM LAWLER, *DOBBS* WAS NOT THE BEGINNING: A GUIDE ON PREGNANCY CRIMINALIZATION 9 (2023), https://ifwhenhow.org/wp-content/uploads/2023/06/DobbsWasNotTheBeginning_FINAL.pdf [https://perma.cc/L58H-9WAT] ("Arrest and prosecution for SMA impacts oversurveilled and criminalized communities more often and with more serious consequences.").

231. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 54.

232. *Id.* at 57–58; DIAZ-TELLO ET AL., *supra* note 3, at 9.

233. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 58.

234. *Id.*

235. *See* RICH-SHEA & LAWLER, *supra* note 230, at 13–14.

236. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 54.

237. *Id.* at 54–55.

238. *Id.* at 55.

due to her SMA attempt, specifically citing her use of abortion pills without a prescription.[239]

SMA prosecutions create serious risk for noncitizens and undocumented individuals as well. Mere contact with law enforcement, even if no charge, prosecution, or conviction results, can trigger the notification of Immigration and Customs Enforcement.[240] This is especially true if police detain a suspect pre-trial.[241] In 2003, Texas police arrested a Mexican national identified with fetal remains left in an apartment complex.[242] Upon questioning, she told the police that she had ingested misoprostol pills from Mexico.[243] They arrested her but brought no immediate charges.[244] They then ordered an autopsy report to determine whether the fetus was born alive, stillborn, or intentionally aborted.[245] Upon a finding that the fetus was not viable, the police chose to release her from arrest.[246] However, they subsequently reported her to immigration officials for deportation.[247]

These are only some of the consequences that individuals face for engaging in private, lawful behavior. Those who receive a guilty verdict or take a guilty plea are subject to these consequences and many others.[248] These prosecutions, even if they do not get far, remain immeasurably harmful.[249] Relying on the discretion of individual police officers, prosecutors, judges, and juries is an inadequate safeguard against this injustice.

B. Remedies: Reform, Complaints, and Lawsuits

1. Reform: Vulnerable Statutes and Prosecutorial Immunity. The most effective way to prevent the harm that results from unjust prosecutions under misapplied laws is to prevent such misapplication to begin with. Legislators in states with statutes vulnerable to misuse should either amend the statutes with clearer language to prevent prosecutors from weaponizing them against legal conduct, or else repeal the statutes entirely. It should

239. *Id.*
240. RICH-SHEA & LAWLER, *supra* note 230, at 11.
241. *Id.*
242. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 54.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *See id.* at 52–54 (describing the harms arising from investigations, pre-trial detention, and sentencing).
249. *See id.* at 54.

not take the incarceration of individuals like Purvi Patel for states like Indiana to correct statutory gaps and deficiencies in response to court holdings.[250] There have been enough individuals unjustly deprived of their liberty to make clear that reform is needed. Therefore, legislatures must reexamine, reevaluate, and, where necessary, rewrite their state codes to remedy the societal ill that is the criminalization of SMA.

Although energetic and thorough legislative action is the most direct way to end, or at least substantially diminish, these problematic prosecutions, it may not be practical in the current political climate. As many states trend toward outlawing abortion in all its forms, including access to abortion pills,[251] the odds of pivoting legislative reform in the direction of stronger protections for abortion-seekers outside of the increasingly restrictive healthcare system do not immediately appear favorable.

While state legislatures must protect the Fourteenth Amendment right to fair warning by drafting statutes with sufficient particularity,[252] state prosecutors must likewise protect this right when representing the state's interests. Prosecutors are vested with wide discretion and are generally free to determine whether to prosecute and what charges to file.[253] However, as the Supreme Court has acknowledged, this freedom can become apt for individual and institutional abuse.[254] Accordingly, enforcing constitutional limits where such abuses become apparent is of the utmost importance. The government's interest "is not that it shall win a case, but that justice shall be done."[255] When opportunistic prosecutors bend susceptible statutes to bring criminal liability upon those who self-manage, and when they openly admit that these statutes are ill-suited to the criminalized conduct,[256] they are

250. *See supra* notes 140–47 and accompanying text (discussing the prosecution of Purvi Patel under Indiana law).

251. Becca Damante & Kierra B. Jones, *A Year After the Supreme Court Overturned* Roe v. Wade*, Trends in State Abortion Laws Have Emerged*, CTR. FOR AM. PROGRESS (June 15, 2023), https://www.americanprogress.org/article/a-year-after-the-supreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged/ [https://perma.cc/7XBG-2JBR].

252. Musser v. Utah, 333 U.S. 95, 97 (1948).

253. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

254. *Id.* at 365.

255. Berger v. United States, 295 U.S. 78, 88 (1935).

256. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 37; Julianne McShane, *Texas District Attorney Drops Case Against Woman Charged with Murder for Self-Induced Abortion*, NBC NEWS, https://www.nbcnews.com/news/texas-district-attorney-says-indictment-woman-charged-murder-self-indu-rcna23782 [https://perma.cc/DH75-BUZE] (last updated Apr. 11, 2022, 2:26 PM).

no longer promoting the interests of justice by bringing and pursuing the charge, but rather their own.

However, even when these abuses occur, prosecutors enjoy absolute immunity for their actions as long as they are within the scope of their prosecutorial duties.[257] While defendants may bring suit for malicious prosecution if charges were unsuccessfully brought with improper purpose and without probable cause, these suits are generally not favored by courts.[258] Plaintiffs bear a heavier burden of proof compared to most other tort actions and the elements are construed in favor of the prosecutor.[259] As a result, it is difficult to hold prosecutors accountable for misconduct. Reforming the doctrine of prosecutorial immunity to afford less insulation for prosecutors who display deliberate abuses of discretion would likely disincentivize the opportunistic use of ambiguous statutes. However, the judicial contention that protecting prosecutors from suit is essential to a smoothly functioning criminal legal system is a bar likely too heavy to lift within the foreseeable future.[260] Nevertheless, there are other measures that, while they do not go to the root of the problem, can help to deter its perpetuation.

2. Complaints: Enforcing HIPAA. In 45% of the cases in If/When/How's study, care providers were the informants.[261] Of those, 39% were health care providers and 6% were social workers who reported their patient's health information to the police.[262] However, these disclosures were likely in violation of the Health Insurance Portability and Accountability Act (HIPAA) and state law equivalents. The HIPAA Privacy Rule establishes federal regulations to protect identifiable health care information, limiting under what conditions covered entities, such as medical and clinical social worker service providers, can disclose patient information to third parties without their permission.[263] Health

257. Imbler v. Pachtman, 424 U.S. 409, 422–24 (1976).

258. McDonough v. Smith, 139 S. Ct. 2149, 2156 (2019); *Ex parte* Harris, 216 So. 3d 1201, 1215 (Ala. 2016); Arquette v. State, 290 P.3d 493, 504 (Haw. 2012).

259. *Arquette*, 290 P.3d at 503–04.

260. *See Imbler*, 424 U.S. at 422–24 (discussing the public policy rationale supporting absolute immunity).

261. HUSS ET AL., PRELIMINARY FINDINGS, *supra* note 84, at 3.

262. *Id.*

263. *The HIPAA Privacy Rule*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/privacy/index.html [https://perma.cc/5L6F-CGMC] (last updated Sept. 27, 2024); 45 C.F.R. § 164.512 (2022); 45 C.F.R. § 160.103 (2023); 42 U.S.C. § 1395x(u); 42 U.S.C. § 1395x(s).

information includes information received by the provider related to a patient's past or present physical or mental health condition.[264] This information falls under the category of protected health information (PHI) if it is individually identifiable and transmitted or maintained by any form or medium.[265] Accordingly, providers may disclose PHI only according to what the privacy rule allows or requires.[266]

Disclosure without patient authorization for law enforcement purposes is permissible if requested for judicial and administrative inquiries or proceedings, identification and location purposes, or if the PHI is related to commission of a crime.[267] Notably, the privacy rule does not permit providers to disclose information a patient shared with them about their SMA to law enforcement, unless expressly required by state law.[268] Though HIPAA does not replace state healthcare privacy laws that are more protective than the Act, HIPAA does preempt state laws that run contrary to the Act's protection requirements.[269]

While some state laws require that providers report abortion complications to their respective health departments, including whether the complication resulted from an SMA, no states currently require that providers report SMAs to law enforcement.[270] Furthermore, while a patient's SMA may be implicated in other situations where states commonly have mandatory reporting requirements, such as when a patient presents with certain injuries or drug overdose, reporting obligations do not include the act or intent to self-manage either.[271] Even so, whether due to personal beliefs and biases regarding abortion or plain misperceptions about

264. 45 C.F.R. § 160.103.

265. *Id.*

266. *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html [https://perma.cc/GW57-5H8L] (last updated June 29, 2022).

267. 45 C.F.R. § 164.512(f)(1)–(6).

268. *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care*, *supra* note 266.

269. *Does the HIPAA Privacy Rule Preempt State Laws?*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/faq/399/does-hipaa-preempt-state-laws/index.html [https://perma.cc/QW25-JR9G] (last updated Dec. 28, 2022).

270. Sarah C.M. Roberts et al., *Health Care Provider Reporting Practices Related to Self-Managed Abortion*, BMC WOMEN'S HEALTH, Mar. 2023, at 2, https://pmc.ncbi.nlm.nih.gov/articles/PMC10045784/pdf/12905_2023_Article_2266.pdf [https://perma.cc/Q3SM-QXAB].

271. IF/WHEN/HOW, PATIENT CONFIDENTIALITY AND SELF-MANAGED ABORTION: A GUIDE TO PROTECTING YOUR PATIENTS AND YOURSELF, https://providecare.org/wp-content/uploads/2022/08/PatientConfidentialityAndSMA.pdf [https://perma.cc/RDN2-LT23].

their duty to report, providers have violated HIPAA protections, harming their patients as a result.[272]

Though HIPAA does not create a private right of action against providers who unlawfully disclose PHI, patients can seek recourse through other avenues, such as by filing a complaint to the Department of Health and Human Services (HHS).[273] If the complaint is substantiated, the HHS can investigate and potentially impose fines on the provider.[274] Patients can also submit complaints to the state attorney general, who can take civil action against providers and recover monetary damages.[275] Alternatively, patients can sue for negligence, breach of implied contract, or other state privacy laws that provide an appropriate right of action.[276] Taking these measures when violations occur can deter future noncompliance, correct misinformation, and provide monetary relief to victims of unlawful disclosure.

3. Lawsuits: Fourth Amendment Arguments. Patients can also take legal action against state healthcare providers under the Fourth Amendment. Applied to the states as a component of due process, the Fourth Amendment protects individuals from unreasonable search and seizure in "their persons, houses, papers, and effects."[277] Judicial interpretations have extrapolated from the Fourth Amendment an individual right of privacy, including freedom from government intrusion.[278] Accordingly, an individual enjoys protection in that which she maintains a subjective expectation of privacy if that expectation is one that society recognizes as reasonable.[279] In *Whalen v. Roe*, the Supreme Court recognized that an individual's right of privacy also involves an interest in avoiding disclosure of personal matters.[280]

More recently, the Court held that a state hospital violated plaintiffs' constitutional rights by disclosing the results of urine

272. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 31.

273. Payne v. Taslimi, 998 F.3d 648, 660 (4th Cir. 2021); Steve Alder, *Can a Patient Sue for a HIPAA Violation?*, HIPAA J. (Dec. 2, 2024), https://www.hipaajournal.com/sue-for-hipaa-violation/ [https://perma.cc/2QS6-K9TV].

274. Alder, *supra* note 273.

275. *Id.*; *State Attorneys General*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/compliance-enforcement/state-attorneys-general/index.html [https://perma.cc/3TJF-W85S] (last updated Dec. 21, 2017).

276. Alder, *supra* note 273. However, joining a class action increases the odds of recovery. *Id.*

277. U.S. CONST. amend. IV; Mapp v. Ohio, 367 U.S. 643, 655 (1961).

278. Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

279. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

280. Whalen v. Roe, 429 U.S. 589, 598–600 (1977).

tests to police without patient authorization.[281] In *Ferguson v. City of Charleston*, the Court found that (1) the plaintiffs had a subjective and reasonable expectation of privacy in the test results, meaning that police could not access those results without consent or a warrant, and (2) the hospital's immediate objective in disclosing the patient information "was to generate evidence *for law enforcement purposes*," which did not outweigh patient privacy interests.[282] Therefore, the hospital violated the Fourth Amendment by making the disclosure without consent.[283]

Applying the jurisprudence and current case law, patients who had their SMAs disclosed to law enforcement by state healthcare providers may be able to maintain an action for the violation of their reasonable expectation of privacy under the Fourth Amendment. Similar to the plaintiffs in *Ferguson*, those who disclosed their actual or attempted SMA to their provider likely believed and expected that the information would not be shared without their consent. The existence of federal and state laws regulating disclosure of patient information indicates that this expectation is an objectively reasonable one as well.[284] Likewise, the information that providers disclosed regarding their patients' SMAs were often used as evidence for the patients' prosecution, without indication of an alternate objective on the part of the providers.[285] Therefore, victims of these unlawful disclosures can likely make a compelling constitutional argument against the providers that harmed them rather than helped them.

VIII. CONCLUSION

Though means of redress are available, those who are most often victimized also tend to be those with the least access to the courts.[286] Initiating and maintaining legal action can be incredibly expensive and drawn out, and victory is never guaranteed. Therefore, though every person who experiences these unjust invasions of liberty should seek relief, most do not.[287]

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281. Ferguson v. City of Charleston, 532 U.S. 67, 69–72, 84–86 (2001).

282. *Id.* at 78, 82–86.

283. *Id.* at 84–86.

284. *See supra* text accompanying notes 263–66.

285. HUSS ET AL., CRIMINALIZATION, *supra* note 3, at 31–32.

286. *See id.* at 25 (stating that most adult cases involved adults who lived in poverty and therefore qualified for a public defender).

287. *See How Much Does It Cost to Sue Someone?*, HIGH RISE FIN., https://www.highriselegalfunding.com/faqs/how-much-does-it-cost-to-sue-someone/ [https://perma.cc/N4JU-8GZV] (last visited Sept. 1, 2024).

What can be done as a collective is to continue to advocate for the legislative reform needed to amend dangerous laws, or else take them off the books entirely. Individual anti-abortion sentiments left uncorrected can and have bled into our governing bodies. Therefore, in addition to advocating for statutory reform, efforts to combat misinformation about abortions in our communities must not only continue but strengthen. Americans have self-managed their abortions for centuries and will continue to do so.[288] Though not everyone will experience an SMA in their lifetime, it is in the interest of Americans as a collective not to let violations of the constitutional rights of others go unnoticed or unchallenged.

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288. Blakemore, *supra* note 26.