

Editorials

Legal Challenges for Family Physicians in the Post–*Roe v Wade* Era

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On June 24, 2022, the U.S. Supreme Court released its decision on *Dobbs v Jackson Women’s Health Organization*. The Supreme Court ruled that there is no constitutional protection for abortion, overturning the precedents established in *Roe v Wade* and *Planned Parenthood v Casey* and enabling states to restrict or ban abortion with preexisting laws or new legislation.

In response, 75 health care organizations, including the American Academy of Family Physicians, released a statement emphasizing that the *Dobbs* ruling criminalizes evidence-based medicine, threatens the patient-clinician relationship, and exacerbates stark health disparities in maternal morbidity and mortality.^{1,2}

The *Dobbs* ruling has created a public health crisis. The decision has led to confusion for patients and clinicians about legal rights to abortion care that now differ substantially from state to state. There is also confusion about the legal risks for providing other reproductive health care (e.g., management of ectopic pregnancy and miscarriage, pregnancy termination for medical reasons), seeking or disseminating information, and providing funding and practical support.

Health policy analysts predict that 26 states are certain or likely to ban abortion.³ Many states had laws banning abortion that were unenforceable after the Supreme Court’s *Roe v Wade* decision in 1973, but those laws are now active. Other states enacted trigger bans, designed to outlaw abortion following any Supreme Court decision limiting or overturning *Roe v Wade*. As of January 2023, a total ban or a ban past six weeks’ gestational age was in effect in 14 states.^{4–6} Some state laws have no exemptions for rape or incest, and a number of laws have been challenged in state courts.

In the years leading up to the *Dobbs* decision, abortion restrictions accelerated on the state level. State legislatures passed 108 abortion restrictions in 19 states in 2021, the highest number in any year since 1973.⁷ Texas’ Senate Bill 8 took effect in September 2021, and similar laws emerged in Oklahoma and Idaho. These laws ban abortion at an early gestational age and are enforced by private citizens who stand to receive financial compensation for suing abortion providers and anyone who “aids or abets” abortion care.⁸

In states with abortion bans, physicians have had to reconcile the law with their clinical recommendations for ectopic pregnancy, molar pregnancy, miscarriage, previable rupture of membranes, comorbid conditions not compatible with pregnancy, and pregnancy following rape. The laws are broad without clear guidelines. For example, consider a patient experiencing previable rupture of membranes at 17 weeks’ gestation in a state with an abortion ban. Although an exemption for the patient’s life exists in her state, the law does not define when her situation becomes life-threatening. It is not clear if this determination is at the discretion of the physician or if certain parameters such as sepsis or severe anemia would be required.

There is tremendous confusion about how to reconcile new, untested laws with evidence-based guidelines from medical organizations. Between 2000 and 2020, there have been 61 cases identified where people were criminally investigated or arrested for allegedly ending their pregnancies or assisting another person to end a pregnancy.^{9,10} Self-managed abortion refers to actions that take place outside of the health care setting, such as self-sourcing mifepristone and misoprostol, consuming herbs or toxic substances, and using physical methods. Medical organizations oppose criminalization of self-managed abortion, and the safety and effectiveness of self-managed medication abortion have been established.^{11–14} However, legal and policy experts in reproductive rights anticipate a nationwide surge in criminal action against pregnant people as individuals lose access to clinical abortion care and states further restrict access.^{9–11}

On June 28, 2022, the U.S. Department of Health and Human Services released additional guidance about the Health Insurance Portability and Accountability Act (HIPAA), which protects against disclosures of protected health information. HIPAA prohibits disclosure of personal health information to law enforcement unless a court-ordered warrant or subpoena is provided or the disclosure is expressly required by law. Reporting personal health information to law enforcement regarding abortion or other pregnancy outcomes may violate HIPAA.¹⁵ An attorney with the National Advocates for Pregnant Women warns that the most common way pregnancy criminalization begins is by a health care worker reporting a patient.¹⁶

The Centers for Medicare and Medicaid Services (CMS) released updated guidance in July 2022 regarding the

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Emergency Medical Treatment and Labor Act, which requires any Medicare-participating hospital that offers emergency services to provide an examination and stabilizing treatment for emergency medical conditions. According to CMS, if a pregnant patient has an emergency

medical condition and abortion is stabilizing treatment, the Emergency Medical Treatment and Labor Act supersedes state law. However, in August 2022, a Texas court filed a temporary injunction against enforcement, and litigation is ongoing.^{17,18}

TABLE 1

Resources for Evidence-Based Medical Care and Current Health Policy

Resource	Comments
American Civil Liberties Union Reproductive Freedom Project https://www.aclu.org/issues/reproductive-freedom	Offers free legal assistance throughout the country; for local assistance, see https://www.aclu.org/contact-us or call 212-549-2500
California Women’s Law Center https://www.cwlc.org	Uses transformative litigation, policy advocacy, and education to support women and girls in California; one focus is women’s health, including access to abortion and contraception; offers training and technical assistance and occasionally represents plaintiffs in impact litigation cases
Center for Reproductive Rights https://reproductiverights.org	Global human rights organization of lawyers engaged in litigation, legal policy, and advocacy; specializes in impact litigation to challenge abortion restrictions; real-time map listing abortion bans, restrictions, and protections available at https://reproductiverights.org/maps/abortion-laws-by-state
Digital Defense Fund https://digitaldefensefund.org	Digital security for the abortion access movement; resource library to help individuals and organizations protect themselves and their digital data; digital security trainings, security evaluations, and software for volunteer application and vetting; secure text hotline
Gender Justice https://www.genderjustice.us	Focuses on strategic impact litigation, legislative advocacy, and education for gender equity, including reproductive freedom and justice
Guttmacher Institute https://www.guttmacher.org	Research and policy organization supporting global research and advocacy for sexual and reproductive health; high-quality research and evidence-based policy analysis for the United States, individual states, and international areas of interest
If/When/How: Defense Fund https://reprolegaldefensefund.org	Covers bail and legal fees for people who are unjustly targeted by police or prosecutors for self-managing abortion outside of a clinical setting
If/When/How: Repro Legal Helpline https://reprolegalhelpline.org	Free, confidential, legal information about self-managed abortion and judicial bypass; connects patients and clinicians to local resources or lawyers, depending on needs and location; training and resources for clinicians; for assistance, call 844-868-2812 or send message through a secure online form
Innovating Education in Reproductive Health: University of California San Francisco Bixby Center for Global Reproductive Health https://www.innovating-education.org	Free curricula for sexual and reproductive health, including abortion; recorded lectures and courses with continuing education credit; the series <i>When Abortion is Not Available</i> supports clinicians in states where in-clinic abortion is illegal
Legal Voice https://www.legalvoice.org	Protects and defends the civil rights of women and LGBTQ people in the northwest United States through groundbreaking litigation, legislative advocacy, and legal rights education

continues

TABLE 1 (continued)

Resources for Evidence-Based Medical Care and Current Health Policy

Resource	Comments
National Women’s Law Center https://nwlc.org/legal-help	Legal and policy network fighting for gender equity; assists abortion providers (and others who support abortion) facing employment discrimination; assists patients facing sexual discrimination or harassment in health care
New York State Attorney General’s Office Pro Bono Task Force for Reproductive Health https://ag.ny.gov/reproductivehealth	Collaboration with 24 national law firms and eight nonprofits; supports residents and nonresidents seeking abortions in New York state, people and organizations supporting these patients, and New York health care professionals; hotline available in 12 languages: 212-899-5567
Pregnancy Justice https://www.pregnancyjusticeus.org	Supports pregnant people and mothers, especially those who are more likely to be affected by criminalization of pregnancy outcomes (e.g., minorities, individuals who are poor or use drugs); provides legal assistance, policy and legislative advocacy, and education; <i>Confronting Pregnancy Criminalization: A Practical Guide for Healthcare Providers, Lawyers, Medical Examiners, Child Welfare Workers, and Policymakers</i> available at https://www.pregnancyjusticeus.org/wp-content/uploads/2022/06/1.Confronting-Pregnancy-Criminalization_6.22.23-1.pdf
Reproductive Health Access Project https://www.reproductiveaccess.org	Mobilizes, trains, and supports clinicians to make sexual and reproductive health care accessible for all; focuses on abortion, contraception, and miscarriage care; informative presentations, clinic resources, patient handouts; sign up online for email updates or join a regional cluster to network with others
Reproductive Health Education in Family Medicine: Department of Family and Social Medicine at Montefiore Medical Center https://rhedi.org	Promotes patient-centered abortion and contraceptive training in family medicine residencies; research, protocols for clinical use, training opportunities, and curricula on topics including sexual and reproductive justice, medication abortion, aspiration abortion, contraception counseling, and options counseling
Resources for Abortion Delivery https://radprogram.org	Provides grants and loans, technical support, free legal advice for compliance and regulations, and funder services
Southwest Women’s Law Center https://swwomenslaw.org	Supports women and girls in New Mexico through legal policy advocacy and legal advice; offers limited legal brief services
The Lawyering Project https://lawyeringproject.org	Two major focus areas: constitutional litigation and an access and innovation program, which offers legal assistance to abortion providers and organizations that support abortion care
U.S. Department of Health and Human Services Office for Civil Rights https://ocrportal.hhs.gov	Patients can file a complaint if a health care professional has violated their rights under HIPAA
Women’s Law Project https://www.womenslawproject.org	Provides free, confidential legal representation to young people needing judicial bypass and legal assistance and pregnant people encountering barriers to reproductive health care

HIPAA = Health Insurance Portability and Accountability Act; LGBTQ = lesbian, gay, bisexual, transgender, queer.

Experts from the medical, legal, and policy fields are working together to understand the post-*Roe v Wade* medicolegal landscape and to convey best practices to clinicians. As laws evolve, family physicians across the country should be aware of resources for evidence-based medical

care and current health policy, and legal information for themselves and patients. Resources are summarized in *Table 1*.

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