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Charging Abortion

Milan Markovic

CHARGING ABORTION

*Milan Markovic**

As long as Roe v. Wade *remained good law, prosecutors could largely avoid the question of abortion. The Supreme Court's decision in* Dobbs v. Jackson Women's Health Organization *has now placed prosecutors at the forefront of the abortion wars. Some chief prosecutors in antiabortion states have pledged to not enforce antiabortion laws, whereas others are targeting even out-of-state providers. This post-*Dobbs *reality, wherein the ability to obtain an abortion depends not only on the politics of one's state but also the policies of one's local district attorney, has received minimal scrutiny from legal scholars.*

*Prosecutors have broad charging discretion, but prevailing ethical rules and standards do not allow them to disregard laws that they regard as unjust. Nevertheless, since prosecutors do not have unlimited resources, and abortion cases are complex and sensitive, they should use their discretion to focus only on cases in which abortion care endangers women and in instances of coercion, as they did pre-*Roe*. Extraterritorial applications of antiabortion law are constitutionally suspect and are unlikely to further the public interest.*

Abortion is one of the most contentious issues in American life. In a morally pluralistic society, prosecutors must strive for neutrality in the abortion wars by relying on professional standards to guide their charging discretion rather than following public opinion and the dictates of individual conscience.

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INTRODUCTION

Justice Alito's opinion in *Dobbs v. Jackson Women's Health Organization*[1] represented the culmination of legal conservatives' nearly fifty-year battle against the constitutional right to abortion.[2] Decrying the U.S. Supreme Court's decisions in *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] as "egregiously wrong and deeply damaging,"[5] *Dobbs* ostensibly returned the question of abortion to the people. In actuality, *Dobbs* deprived millions of Americans of reproductive rights almost immediately because, in many states, antiabortion laws had never been repealed and went into force upon *Roe*'s reversal.[6]

Approximately fifteen states now prohibit abortion in almost all circumstances, and courts have temporarily enjoined bans in seven other states (collectively the "antiabortion states").[7] Penalties range from one year to life in prison.[8] Antiabortion laws focus predominately on abortion providers but also allow for accomplice liability.[9] In a few antiabortion states, pregnant women may also be subject to prosecution.[10] Even prior to

1. 142 S. Ct. 2228 (2022).
2. *See generally id.*
3. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
4. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
5. *Dobbs*, 142 S. Ct. at 2265.
6. For a thorough analysis of these laws prior to *Dobbs*, see Heidi S. Alexander, *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, 61 RUTGERS L. REV. 381, 384–88 (2009).
7. *See Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/ZN59-9QWR] (Jan. 8, 2024, 9:30 AM).
8. Megan Messerly & Alice Miranda Ollstein, *Abortion Bans and Penalties Would Vary Widely by State*, POLITICO (May 6, 2022, 4:30 AM), https://www.politico.com/news/2022/05/06/potential-abortion-bans-and-penalties-by-state-00030572 [https://perma.cc/S2EJ-N4P9] (describing the range in penalties).
9. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023); OHIO REV. CODE ANN. § 2919.195 (West 2023).
10. This is a particular concern in Georgia. *See* Bill Rankin, *Who Could Be Prosecuted Under Georgia's "Heartbeat Law,"* ATLANTA J.-CONST. (May 16, 2019), https://www

the *Dobbs* decision, prosecutors would sometimes prosecute miscarriages as homicides.[11] These cases disproportionately involved women of color, who are also more likely to seek abortion care.[12]

Dobbs faulted *Roe* and *Casey* for failing to end the "national division" over abortion.[13] But *Dobbs* has merely ushered in a new era in the abortion wars. As Professors David S. Cohen, Greer Donley, and Rachel Rebouché have described in their recent article, the new abortion battleground is characterized by fierce interstate and federal-state conflicts over the issue.[14]

Interstate conflicts arise from antiabortion states' efforts to apply their laws extraterritorially. For example, Idaho has criminalized efforts to assist minors in obtaining out-of-state abortions under its "abortion trafficking" law.[15] More generally, antiabortion states may claim that they can assert jurisdiction over abortions performed in states that protect abortion rights ("abortion-protective states").[16] Some abortion-protective states have already passed legislation that insulates their citizens from out-of-state abortion prosecutions and lawsuits.[17]

.ajc.com/news/local/who-could-prosecuted-under-georgia-heartbeat-law/sjmrBSuG3ZT4eM9kkAKPuL/ [https://perma.cc/HG34-963Z].

11. *See generally* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y & L. 299, 300 (2013) (reporting more than 400 "arrests, detentions, and forced interventions" of women nationwide who miscarried between 1973 and 2005); *see also* Michele Goodwin, *Pregnancy and the New Jane Crow*, 53 CONN. L. REV. 543, 566 (2021) ("Despite the chilling ways in which state legislators are rapidly erecting barriers to reproductive healthcare rights, the encroachment on these rights is not a new phenomenon.").

12. *See, e.g.*, Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 786 (2014); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432–36 (1991).

13. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2280 (2022) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)); *see also* Christine Dehlendorf, Lisa H. Harris & Tracy A. Weitz, *Disparities in Abortion Rates: A Public Health Approach*, 103 AM. J. PUB. HEALTH 1772, 1772 ("[T]here are substantial disparities in abortion rates in the United States, with low-income women and women of color having higher rates than affluent and White women.").

14. *See generally* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 4 (2023) ("[O]verturning *Roe* and *Casey* will create a complicated world of novel interjurisdictional legal conflicts over abortion. Instead of creating stability and certainty, it will lead to profound confusion because advocates on both sides of the abortion controversy will not stop at state borders in their efforts to apply their policies as broadly as possible.").

15. *See* IDAHO CODE § 18-623(1) (2024).

16. *See* Cohen et al., *supra* note 14, at 31 (describing the effects doctrine and the criminalization of out-of-state abortions).

17. *See, e.g.*, 2022 Conn. Acts 68 (Reg. Sess.) (codified at CONN. GEN. STAT. § 52-571m (2023)); *see also* Cohen et al., *supra* note 14, at 3; David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 8 (2022) (observing that five states have passed laws that protect citizens from providing abortion care to out-of-state patients).

Examples of federal-state conflicts over abortion include access to medical abortions[18] and the Emergency Medical Treatment and Active Labor Act[19] (EMTALA). After the Supreme Court's decision in *Dobbs*, the Biden Administration instituted measures to expand access to abortion medication.[20] However, courts have yet to determine whether federal law preempts inconsistent state regulations of abortion drugs.[21] Even before *Dobbs*, states maintained restrictions on abortion drugs that arguably conflict with federal law.[22] Abortion opponents are currently challenging the approval of one abortion medication by the Food and Drug Administration (FDA) in 2000, and the Biden Administration will eventually have to convince potentially skeptical courts that FDA approval prevents states from curtailing access.[23]

The Biden Administration has also issued guidance to hospitals on their obligations to provide emergency abortion care pursuant to EMTALA, leading to litigation with antiabortion states such as Texas and Idaho.[24] A Texas district court judge has enjoined the guidance, reasoning that Texas law does not conflict with EMTALA because the federal law does not specifically mention abortion and requires hospitals to provide emergency care to unborn children as well as mothers.[25] Conversely, an Idaho district court judge partially enjoined Idaho's antiabortion law because EMTALA requires hospitals to provide "stabilizing treatment" to pregnant women experiencing emergency medical conditions, and Idaho's law did not contain a health exception.[26]

Even if the Biden Administration prevails in these cases, abortion will be broadly legal in only a slim majority of states. Among antiabortion states, approaches differ, with some states restricting abortion to very early in

18. For an in-depth discussion of medical abortions post-*Dobbs*, see Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627 (2022).

19. 42 U.S.C. § 1395dd.

20. *See* Exec. Order No. 14,076, 87 Fed. Reg. 42053 (July 8, 2022).

21. *See, e.g.*, Glenn Cohen, Melissa Murray & Lawrence O. Gostin, *The End of* Roe v. Wade *and New Legal Frontiers on the Constitutional Right to Abortion*, 328 JAMA 325, 326 (2022); Cohen et al., *supra* note 14, at 43.

22. *See generally* Cohen et al., *supra* note 14.

23. *See* Laurie McGinley & Ariana Eunjung Cha, *Conservative Group Sues FDA to Revoke Approval of Abortion Pill*, WASH. POST (Nov. 18, 2022, 7:00 PM), https://www.washingtonpost.com/business/2022/11/18/abortion-pill-lawsuit/ [https://perma.cc/3ZCY-TUCQ]. The lawsuit is discussed in further detail in Part III.C. Even if the administration proves successful, doctors and pharmacists would have to be willing to dispense abortion medication to patients in anti-choice states. *See* Donley, *supra* note 18, at 646.

24. *See* Abigail Abrams, *Does Federal Law Protect Abortions in Medical Emergencies?: The Biden Administration Will Find Out in Court*, TIME (Aug. 18, 2022, 6:52 PM), https://time.com/6207168/idaho-texas-abortion-cases-emtala/ [https://perma.cc/GZ7W-383K].

25. *See* Texas v. Becerra, 623 F. Supp. 3d 696, 728, 739 (N.D. Tex. 2022), *aff'd*, 89 F.4th 529 (5th Cir. 2024).

26. *See* United States v. Idaho, No. 22-CV-00329, 2022 WL 3692618, at *8 (D. Idaho Aug. 24, 2022), *vacated by* 82 F.4th 1296 (9th Cir. 2023), *cert. granted*, No. 23-727, 2024 WL 61829 (2024).

pregnancy and others effectively banning it.[27] However, in all of these states, assisting a pregnant woman in obtaining abortion care is potentially a criminal act. If, as empirical research strongly suggests,[28] states cannot stop women from terminating their pregnancies, the question of how antiabortion laws will be enforced assumes paramount importance.

Prosecutors are widely regarded as the criminal justice system's most powerful actors.[29] In the immediate aftermath of *Dobbs*, a large group of chief prosecutors, hailing mostly from major urban counties in antiabortion states, pledged to not enforce antiabortion laws, castigating abortion-related prosecutions as a "mockery of justice."[30] The response to these prosecutors was predictable: antiabortion prosecutors and attorneys general pledged to fill the enforcement gap.[31] Florida's governor, Ron DeSantis, suspended one Tampa-based prosecutor for alleged neglect of duty based partly on the prosecutor's refusal to apply Florida's abortion law.[32]

A large body of literature examines prosecutors' charging discretion and its limits.[33] Although the chaos caused by *Dobbs* cannot be overstated,

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27. *See* NAT'L ASS'N. CRIM. DEF. LAWS., ABORTION IN AMERICA: HOW LEGISLATIVE OVERREACH IS TURNING REPRODUCTIVE RIGHTS INTO CRIMINAL WRONGS 31 (2021), https://www.nacdl.org/getattachment/ce0899a0-3588-42d0-b351-23b9790f3bb8/abortion-in-america-how-legislative-overreach-is-turning-reproductive-rights-into-criminal-wrongs.pdf ("If *Roe* is overturned[,] . . . even those tangentially connected to a woman's decision to terminate a pregnancy may become criminally liable . . . on accomplice/accessorial liability.").

28. *See, e.g.*, Caitlin Myers, Rachel Jones & Ushma Upadhyay, *Predicted Changes in Abortion Access and Incidence in a Post-*Roe *World*, 100 CONTRACEPTION 367, 372 (2019) (suggesting that abortion rates will fall by approximately 33 percent because of increased travel distances for women seeking abortion services); Michelle Oberman, *What Will and Won't Happen When Abortion Is Banned*, J.L. & BIOSCIENCES, Jan.–June 2022, at 1, 7–8 ("Outlawing abortion may lead to a short-term decline in US abortion rates, while people adjust to new market conditions. But as we learn from the experiences of countries around the world, this decline is unlikely to be sustained." (footnote omitted)).

29. *See, e.g.*, Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1424 (2018); John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 575 (2018) ("It is hard to understate the power of prosecutors."). *But see infra* Part V (questioning this characterization because it downplays the role of other actors, especially with respect to high-profile laws).

30. *See* J. David Goodman & Jack Healy, *In States Banning Abortion, a Growing Rift over Enforcement*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/us/abortion-enforcement-prosecutors.html [https://perma.cc/AG6A-VSCP].

31. *See* Allie Morris, *Texas AG Ken Paxton Ready to Assist Local DAs in Prosecuting Abortion Providers*, DALL. MORNING NEWS (July 27, 2022, 7:11 PM), https://www.dallasnews.com/news/politics/2022/07/27/texas-ag-ken-paxton-ready-to-assist-local-das-in-prosecuting-abortion-providers/ [https://perma.cc/34WF-NHDE].

32. *See, e.g.*, Greg Allen, *Suspended Florida Prosecutor Sues Gov. Ron DeSantis to Get His Job Back*, NPR (Aug. 17, 2022, 12:52 PM), https://www.npr.org/2022/08/17/1117892818/suspended-florida-prosecutor-andrew-warren-sues-governor-ron-desantis- [https://perma.cc/6GHF-XPZA]; Jennifer Kay, *Ron DeSantis Sued by Prosecutor He Suspended over Florida Abortion Ban*, BLOOMBERG (Aug. 17, 2022, 9:42 AM), https://www.bloomberg.com/news/articles/2022-08-17/desantis-sued-by-prosecutor-suspended-over-florida-abortion-ban [https://perma.cc/ES29-XZWP].

33. Prominent legal ethics scholarship on the topic includes: Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 307 (2014); Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993);

tradeoffs are inherent in charging.[34] Prosecutors do not have the time or resources to charge every violation of law; rather they must use their discretion to select from a large and varied "menu" of charging options.[35]

Prosecutors also commonly have personal beliefs about the laws that they are responsible for enforcing.[36] They may believe that some laws are wrongheaded or unjust or target conduct that they believe should be legal. Prosecutors' inclinations to act on these beliefs may be especially strong when their beliefs are shared by their constituents. Nevertheless, prosecutors are elected to enforce democratically enacted laws, not to question them; nonenforcement of laws can easily lead to de facto decriminalization.[37] Unless a law has fallen into desuetude such that no reasonable prosecutor would enforce it, the traditional view has been that prosecutors should be open to pressing charges in the appropriate circumstances.[38]

Professor Roger A. Fairfax, Jr. has described the general phenomenon of prosecutors refusing to charge criminal conduct, even when there is sufficient evidence of criminality, as "prosecutorial nullification."[39] Of course, prosecutors may refuse to pursue charges for any number of reasons, including the commonsense judgment that they should deploy their limited

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Kenneth J. Meulli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 674–75; *see also* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 149–50 (2016) (suggesting possible limits on prosecutors' broad charging discretion). A related debate involves the question of whether the executive can refuse to enforce certain laws. For opposing views, compare Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013), with Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 201–02 (2016).

34. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 932–33 (2006); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 598 (2001).

35. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

36. *See* Bruce A. Green & Fred Z. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 857–58; *see also* Meulli, *supra* note 33, at 674 ("[D]iscretion justifies not only eliminating unprovable cases but also protecting citizens from charges that do not advance societal interest." (footnotes omitted)).

37. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 802–06 (2012); *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 705–07 (2014) (describing prospective categorical enforcement as in tension with legislative supremacy).

38. *See, e.g.*, Green & Zacharias, *supra* note 36, at 875; Kamin, *supra* note 33, at 185 ("[T]he power to completely invalidate a criminal statute by categorically refusing to enforce a validly enacted law is clearly beyond the authority of a prosecutor."); *see also* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1260 (2011) (describing desuetude as an uncontroversial basis for prosecutorial nullification). Notable scholarship on desuetude as a defense to criminal charges includes: Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 121–22 (2022); Cass R. Sunstein, *What Did* Lawrence *Hold?: Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 50–51; Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 28 (1966).

39. *See generally* Fairfax, *supra* note 38, at 1264 ("With prosecutorial nullification, a prosecutor declines to prosecute despite having sufficient evidence to obtain a conviction").

resources elsewhere. However, in its strongest form, "prosecutorial nullification may provide the flexibility to bring criminal enforcement in line with evolving societal values, even before the legislature has a chance to do so."[40] On Professor Fairfax's account, prosecutorial nullification is best understood as a purposeful frustration of a "legislative prerogative."[41]

Professor Kerrel Murray has similarly conceived of prosecutorial nullification as a manifestation of popular sovereignty.[42] In Professor Murray's view, prosecutorial nullification should not be commonplace, but prosecutors can and should decline to enforce laws when there is a "reasonably ascertainable popular will . . . as a conduit for the wholesale achievement of what the same population might otherwise have done retail through jury control of the law."[43] Antiabortion laws would seem to be ideal candidates for nullification in light of substantial opposition to these laws in many localities.

This Article examines prosecutorial discretion and its application to abortion cases. Prosecutors wield enormous discretion in charging and will frequently decline to pursue cases in which there is sufficient evidence of criminal malfeasance. Nevertheless, prosecutorial discretion is not so boundless as to allow prosecutors to disregard antiabortion laws and other laws that they and their constituents believe should be repealed. Prosecutors, like all lawyers, are governed by ethical rules and standards. These rules and standards provide a neutral framework for assessing charges and exhort prosecutors to consider, inter alia, resource limitations, the views of victims and witnesses, and noncriminal alternatives to prosecution.[44] Prosecutors will not always agree on which cases merit prosecution, but they should strive to follow the same process in making charging decisions without regard to the underlying law at issue. A district attorneys' office need not use its limited resources on abortion-related cases but should remain open to enforcing antiabortion laws, especially when other societal interests are at stake, such as protecting women from unsafe care and coercion.

Part I of this Article sets out the current landscape of antiabortion laws and early controversies over the handling of abortion cases. Although antiabortion laws differ, these laws tend to focus on abortion providers and the aiding and abetting of abortions. It will fall to prosecutors to interpret these laws in the first instance. Chief prosecutors are entitled to speak out against *Dobbs* and to signal their offices' intentions vis-à-vis abortion-related prosecutions. However, as explained in Part II, prevailing ethical rules and standards suggest that prosecutors should not refuse to enforce antiabortion laws outright or allow their personal views of abortion or the views of their constituents to color charging decisions. Adoption of categorical

40. *Id.* at 1274.

41. *Id.*

42. *See* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 208–09 (2021).

43. *Id.*

44. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4(a) (AM. BAR ASS'N 2017).

nonenforcement policies—presumptions against prosecuting abortion cases—can be consistent with the prosecutor's responsibility to determine what and whom to charge; prosecutorial nullification exceeds the prosecutor's authority and encroaches on that of the legislature.

Part II endeavors to offer prospective guidance to chief prosecutors. Some antiabortion states have driven out all abortion providers, but women in these states will still obtain abortions, including by traveling out of state.[45] Abortion was legal for much of American history and was rarely prosecuted even after states began to criminalize the procedure in the late nineteenth century. Prosecutors in antiabortion states should focus predominately on unsafe abortions and instances of coercion, as they did in the era preceding *Roe v. Wade*.[46] Extraterritorial applications of antiabortion laws are constitutionally suspect and are unlikely to further the public interest.

The Article concludes by questioning the recent emphasis on "progressive prosecution" and prosecutorial power to forestall unjust laws.[47] Prosecutors are not the sole actors in the criminal justice system and are poor candidates to correct defects in democratic processes. Aggrandizement of prosecutors' roles and devaluation of professional norms also undermine more sustainable and transformative legal reforms.

I. STATE AND LOCAL DIVIDES POST-*DOBBS*

Justice Alito went to great lengths in *Dobbs* to emphasize that the Supreme Court had returned the question of abortion to the democratic process. Quoting approvingly from Justice Antonin Scalia's partial dissent in *Casey*, Justice Alito wrote: "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[48]

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45. *See, e.g.*, Selena Simmons-Duffin, *Doctors Who Want to Defy Abortion Laws Say It's Too Risky*, NPR (Nov. 23, 2022, 5:01 AM), https://www.npr.org/sections/health-shots/2022/11/23/1137756183/doctors-who-want-to-defy-abortion-laws-say-its-too-risky [https://perma.cc/AN9H-GPQS]; Julianne McShane, *At Least 66 Clinics in 15 States Have Stopped Providing Abortions Since* Dobbs*, Analysis Finds*, NBC NEWS (Oct. 9, 2022, 6:40 PM), https://www.nbcnews.com/news/us-news/least-66-clinics-15-states-stopped-providing-abortions-dobbs-analysis-rcna51399 [https://perma.cc/DR8R-SJY8].

46. *See infra* Part III.A.

47. Scholars have characterized progressive prosecutors in a variety of ways. *Compare* Jonathan R. Nash, *Secondary Prosecutors and the Separation-of-Powers Hurdle*, 77 N.Y.U. ANN. SURV. AM. L. 33, 54 (2022) ("Progressive prosecutors are prosecutors elected on a platform of not pursuing prosecutions of lower-level crimes, and taking steps to remedy what they perceive to be the disproportionate effects of the criminal justice system on people of color." (footnote omitted)), *with* Stephanie Holmes Didwania, *Redundant Leniency and Redundant Punishment in Prosecutorial Reforms*, 75 OKLA. L. REV. 25, 32 (2022) (claiming that a progressive prosecutor is someone "who claims to want to use the power of their office to reduce incarceration and inequality"). This Article's emphasis is on prosecutors who use the powers of their office to undermine laws that they or their constituents regard as substantively unjust.

48. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

Legal scholars have contrasted Justice Alito's extolment of democracy in *Dobbs* with his alleged disinterest in unconstitutional gerrymandering and voter suppression.[49] But equally troubling is that, although a few states have passed antiabortion laws in the wake of *Dobbs*, most have either relied on so-called trigger laws passed in anticipation of *Roe*'s reversal or antiquated pre-*Roe* statutes that were never repealed.[50] Thus, state antiabortion laws arguably do not reflect the views of contemporary state legislatures, let alone those of the public.[51] Indeed, nearly 60 percent of Americans disagree with the Supreme Court's decision to overturn *Roe v. Wade*, and 64 percent believe that abortion should be legal in most circumstances.[52] Abortion rights enjoy broad popular support even in antiabortion states.[53]

Since antiabortion laws are unpopular even in antiabortion states, some governors have pledged to offer clemency to abortion providers.[54] More controversial have been prosecutors' pledges to not enforce antiabortion laws, often made in defiance of state political officials. The remainder of this

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49. *See* Leah Litman, Melissa Murray & Kate Shaw, *The Link Between Voting Rights and the Abortion Ruling*, WASH. POST (June 28, 2022, 12:13 PM), https://www.washingtonpost.com/outlook/2022/06/28/dobbs-voting-rights-minority-rule/ [https://perma.cc/3VUR-ZFMB].

50. In politically moderate states such as Florida and Ohio, it is dubious that antiabortion laws could be passed post-*Dobbs* without significant public backlash. *See generally* Nate Cohn, *Growing Evidence Against a Republican Wave*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/upshot/midterms-elections-republicans-analysis.html [https://perma.cc/WVD6-XDKJ] (noting underperformance of Republican candidates post-*Dobbs*). This backlash is consistent with the longstanding notion that reversing *Roe* would prove to be a pyrrhic victory for the Republican party. *See* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA 92 (2021); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 76 (2020).

51. A particularly egregious example is Michigan, where a canvassing board attempted to block a constitutional referendum to override a pre-*Roe* abortion law based on deficient spacing between words. *See* Mitch Smith, *Michigan Board Says Abortion Referendum Should Not Go to Voters*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/us/michigan-referendum-abortion-ballot.html [https://perma.cc/MHX6-RZ3W].

52. *See* YOUGOV, CBS NEWS POLL – JUNE 24-25, 2022 (2022), https://docs.cdn.yougov.com/hrccnn75ps/cbsnews_20220626_recontact.pdf [https://perma.cc/CT7B-34BH]; *see also* Laura Santhanam, *Support for Abortion Rights Has Grown in Spite of Bans and Restrictions, Poll Shows*, PBS (Apr. 26, 2023, 5:00 AM), https://www.pbs.org/newshour/health/support-for-abortion-rights-has-grown-in-spite-of-bans-and-restrictions-poll-shows [https://perma.cc/H3K7-Z8A9] (reporting 61 percent of Americans support abortion rights).

53. For example, only 37 percent of Texans supported the state's trigger law banning abortion. *See* Jim Henson & Joshua Blank, *New UT/Texas Politics Project Poll: Share of Texans Saying State Is on the Wrong Track Reaches New High, While Majority Still Oppose Banning Abortion*, TEX. POL. PROJECT (July 6, 2022), https://texaspolitics.utexas.edu/blog/new-uttexas-politics-project-poll-share-texans-saying-state-wrong-track-reaches-new-high-while [https://perma.cc/XPF6-3KYD]. North Carolina's new law, which bans abortion after twelve weeks, is opposed by 54 percent of the public. *See* Russ Bowen, *POLL: Do a Majority of NC Voters Support or Oppose the 12-Week Abortion Bill?*, CBS17.COM (May 10, 2023, 4:55 PM), https://www.cbs17.com/news/north-carolina-news/poll-do-a-majority-of-nc-voters-support-or-oppose-the-12-week-abortion-bill/.

54. *See* Danielle Kurtzleben, *Democrats Face Hard Truths on Abortion Rights in Wisconsin Midterm Races*, NPR (July 17, 2022, 5:00 AM), https://www.npr.org/2022/07/17/1111748358/democrats-face-hard-truths-on-abortion-rights-in-wisconsin-midterm-races [https://perma.cc/N2QM-BGGN].

part will survey antiabortion laws and the grounds provided for prosecutorial nonenforcement.

A. State Antiabortion Laws

Antiabortion laws generally take two forms: total bans and previability gestational limits. The following states currently maintain total bans on abortion: Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin.[55] Georgia, Nebraska, and North Carolina currently prohibit abortions previability but do not ban abortion outright.[56] Courts have temporarily stayed antiabortion laws in Arizona, Florida, Iowa, Montana, Ohio, South Carolina, Utah, and Wyoming.[57]

Antiabortion laws criminalize abortion care and allow for accomplice liability. For example, under Texas's antiabortion law, a person may not "knowingly perform, induce, or attempt an abortion"[58] or "furnish[] the means for procuring an abortion knowing the purpose intended."[59] Pregnant women are exempted from prosecution under most states' antiabortion laws.[60]

Antiabortion laws also contain statutory exceptions that vary by state. All antiabortion states recognize some form of exception for the life of the mother, but the exception can only be raised as an affirmative defense in some states.[61] Most states also provide for a health exception "to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."[62] A minority of antiabortion states maintain exceptions in cases of rape or incest.[63]

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55. *See Tracking Abortion Bans Across the Country*, *supra* note 7.

56. *Id.* The distinction between bans and gestational limits may be largely illusory in some states. For example, Georgia, Idaho, and Ohio maintain antiabortion laws that only allow abortion within six weeks of pregnancy, before many women know that they are pregnant, providing them with insufficient time to find an abortion provider. *See, e.g.*, Melanie Kalmanson & Riley Erin Fredrick, *The Viability of Change: Finding Abortion in Equality After* Obergefell, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 647, 650 (2020); Louise Melling, *Lift the Scarlet Letter from Abortion*, 35 CARDOZO L. REV. 1715, 1716 (2014).

57. *See Tracking Abortion Bans Across the Country*, *supra* note 7.

58. TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023).

59. TEX. REV. CIV. STAT. ANN. art. 4512.2 (West 2023).

60. By way of example, Texas's antiabortion law precludes "the imposition of criminal, civil, or administrative liability or penalties on a pregnant female on whom an abortion is performed, induced, or attempted." TEX. HEALTH & SAFETY CODE ANN. § 170A.003 (West 2023).

61. *See State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [https://perma.cc/7SYR-JJT8] (last visited Feb. 9, 2024); Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted.* N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html.

62. *See, e.g.*, OHIO REV. CODE ANN. § 2919.195(b) (West 2023). *But see* IDAHO CODE § 18-622(3)(a)(i) (2023) (failing to except abortions performed for the health of the mother).

63. *See* Fabiola Cineas, *Rape and Incest Abortion Exceptions Don't Really Exist*, VOX (July 22, 2022, 4:20 PM), https://www.vox.com/23271352/rape-and-incest-abortion-exception [https://perma.cc/RGL7-5FSB]; *see also* Isabelle Taft, *Can Rape Victims Access Abortion*

Antiabortion laws have alarmed doctors, lawyers, and patients. Rather than providing clear guidance on when abortions are legal, many laws are vaguely worded, sowing legal chaos.[64] Statutory exceptions have been especially controversial. For example, doctors may disagree on whether a particular pregnancy's continuation poses a "serious risk of the substantial and irreversible impairment of a major bodily function."[65] In Tennessee, doctors can raise these exceptions only as affirmative defenses, meaning that doctors must be prepared to face indictment, arrest, and trial to provide lifesaving care.[66]

Unsurprisingly, many hospitals and providers in antiabortion states have refrained from providing abortion care even in situations in which such care may be lawful. Two highly publicized cases involve an Ohio hospital turning away a ten-year-old rape victim[67] and a Louisiana clinic refusing to abort a fetus whose skull had failed to develop.[68] Texas hospitals are currently refusing to provide abortion care on miscarrying women until they develop sepsis.[69] In theory, these decisions reduce the risk of criminal liability but

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in Mississippi?: Doctors, Advocates Say No., MISS. TODAY (Sept. 15, 2022), https://mississippitoday.org/2022/09/15/rape-victims-abortion-access [https://perma.cc/QKN2-VUK2] (noting that Mississippi is one of a handful of antiabortion states with a nominal rape exception but that the state has no remaining abortion providers); Sara Cline, *Rape, Incest Exceptions to Louisiana Abortion Ban Rejected by GOP Lawmakers*, AP (May 10, 2023, 8:02 PM), https://apnews.com/article/louisiana-abortion-rape-incest-ban-ed103502c56a48b96e66a3d8a7a0379c [https://perma.cc/GFJ4-86S6] (discussing failed efforts to revise Louisiana's abortion law).

64. Martha F. Davis, *The State of Abortion Rights in the U.S.*, 159 INT'L J. GYNECOLOGY & OBSTETRICS 324, 325 (2022); Jessica Winter, *The* Dobbs *Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients [https://perma.cc/HU2Y-W6PW].

65. *See, e.g.*, OHIO REV. CODE ANN. § 2919.195(b). *But see* IDAHO CODE § 18-622(3)(a)(i) (providing only for a life-of-the-mother affirmative defense).

66. *See* United States v. Idaho, No. 22-CV-00329, 2022 WL 3692618, at *8 (D. Idaho Aug. 24, 2022), *vacated by* 82 F.4th 1296 (9th Cir. 2023), *cert. granted*, No. 23-727, 2024 WL 61829 (2024).

67. *See, e.g.*, Solcyre Burga, *How a 10-Year-Old Rape Victim Who Traveled for an Abortion Became Part of a Political Firestorm*, TIME (July 15, 2022, 7:29 PM), https://time.com/6198062/rape-victim-10-abortion-indiana-ohio/ [https://perma.cc/J273-2WJX]; Aaron Blake, *What Ohio Abortion Law Says About a 10-Year-Old Rape Victim*, WASH. POST (July 14, 2022, 5:19 PM), https://www.washingtonpost.com/politics/2022/07/14/what-ohio-law-says-about-10-year-old-rape-victim-abortion/ [https://perma.cc/M4ZY-K9TB] (questioning whether the victim would have qualified for an exception under Ohio's strict antiabortion law).

68. *See, e.g.*, Jessica Schladebeck, *Louisiana Woman Will Travel out of State After She Was Denied Abortion for Fetus Developing Without Skull*, N.Y. DAILY NEWS (Aug. 27, 2022, 3:26 PM), https://www.nydailynews.com/news/national/ny-louisiana-woman-abortion-skull-20220827-lp5n553usjajlf5jptjjfehs3y-story.html [https://perma.cc/2WC8-U93W]; Ava Sasani & Emily Cochrane, *'I'm Carrying This Baby Just to Bury It': The Struggle to Decode Abortion Laws*, N.Y. TIMES (Aug. 19, 2022); https://www.nytimes.com/2022/08/19/us/politics/louisiana-abortion-law.html [https://perma.cc/KBB3-VLBX].

69. *See* Carrie Feibel, *Because of Texas' Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022, 5:04 AM), https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare [https://perma.cc/78UR-W767].

could expose hospitals to medical malpractice claims.[70] A group of women have sued the state of Texas and various government officials in connection with medical complications that they suffered when they were denied abortion care.[71] The case is currently pending before the Supreme Court of Texas, where Texas has taken the position that the women's recourse is to sue their treating physicians.[72]

Since antiabortion laws are ambiguous, state and local prosecutors generally determine the scope of these laws in the first instance.[73] For example, whereas most state antiabortion laws stipulate that they do not apply to the mother, those of, inter alia, Alabama, Georgia, and Oklahoma do not contain such a stipulation.[74] Georgia law may in fact contemplate prosecution against pregnant women because it recognizes an affirmative defense that a woman "sought an abortion because she reasonably believed that an abortion was the only way to prevent a medical emergency."[75] In Georgia and other antiabortion states, prosecutors' charging decisions will establish whether pregnant women—and not merely their providers—can be charged for terminating pregnancies.[76]

Even in states in which antiabortion laws do not seemingly apply to mothers, prosecutors retain the option of charging women under laws unrelated to abortion.[77] In one notorious case decided after the Supreme

70. *See* Claire Galofaro, *Lawyer Quits Job to Crisscross State Translating Tennessee's Bewildering Abortion Ban for Doctors*, TENNESSEAN (Sept. 9. 2022, 2:35 PM), https://www.tennessean.com/story/news/local/2022/09/09/lawyer-chloe-akers-translates-tennessees-bewildering-abortion-ban/8036691001/ [https://perma.cc/Q9QM-M6RQ] (describing a "very fine tightrope" between obeying antiabortion laws and waiting too long to provide life-saving abortion care); *see also* M. Gregg Bloche & Sarah K. Werner, *Abortion Bans Are a Threat to Patients. Doctors Can and Should Resist Them.*, WASH. POST (Aug. 18, 2022, 4:16 PM), https://www.washingtonpost.com/opinions/2022/08/18/abortion-bans-threat-doctors-standards-overcome/ [https://perma.cc/BB9E-D5DF] (suggesting that doctors should develop clinical standards for abortion care in antiabortion states).

71. *See* Plaintiff's Original Petition for Declaratory Judgment & Application for Permanent Injunction, Zurawski v. Texas, No. D-1-GN-23-000968 (Tex. Dist. Ct. March 6, 2023). In another high-profile case, the Supreme Court of Texas reversed a lower court order that enabled a Texas woman, Kate Cox, to terminate a nonviable pregnancy that threatened her life. *See In re* State, No. 23-0994, 2023 WL 8540008, at *1–2 (Tex. Dec. 11, 2023).

72. *See* Eleanor Klibanoff, *Texas Supreme Court Considers Abortion Challenge*, TEX. TRIB. (Nov. 28, 2023, 3:00 PM), https://www.texastribune.org/2023/11/28/texas-supreme-court-abortion [https://perma.cc/6FJ5-VB63].

73. *See also* Carissa Byrne Hessick, *Vagueness Principles*, 38 ARIZ. ST. L.J. 1137, 1143 (2016) ("When a statute fails to give police and prosecutors a clear indication of what conduct is legal, the statute 'vests virtually complete discretion in the hands' of law enforcement." (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983))).

74. *See also* Davis, *supra* note 64, at 325 ("While most states focus penalties on abortion providers, in nine states, vague statutory language could allow a zealous prosecutor to test the possibility of criminal charges against a pregnant person seeking an abortion, for example as an accessory or for conspiracy.").

75. *See* GA. CODE ANN. § 16-12-141(h)(5) (2023).

76. Emma Milne, *Putting the Fetus First—Legal Regulation, Motherhood, and Pregnancy*, 27 MICH. J. GENDER & L. 149, 158 (2020).

77. *See* Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J. 847, 872 (2014); *see also* Lynn M. Paltrow, Lisa H. Harris & Mary Faith Marshall, *Beyond Abortion*: *The*

Court's decision in *Roe* but before its decision in *Dobbs*, Mississippi sought to prosecute a teenager for depraved heart murder after she gave birth to a stillborn baby.[78]

Prosecutors' charging decisions will also determine the bounds of accomplice liability. Could the mere act of driving a woman to an abortion clinic make an individual an accomplice to the abortion?[79] Or paying for out-of-state abortion care via a health insurance plan?[80] Both of these acts could constitute "abortion trafficking" under Idaho's new antiabortion law.[81] South Carolina has similarly sought to criminalize routine acts such as disseminating information about abortion services via the internet.[82] If enacted in the future, prosecutions could target in-state and out-of-state actors.[83]

Some abortion-related prosecutions may be susceptible to constitutional challenges. For example, Professor Brendan S. Maher contends that the Employee Retirement Income Security Act of 1974[84] (ERISA) preempts state laws regarding insurance plans' abortion coverage decisions.[85]

Consequences of Overturning Roe, AM. J. BIOETHICS, Aug. 2022, at 3, 7 (discussing states' applications of fetal protection laws to jail women for endangering their fetuses); Alison Tsao, *Fetal Homicide Laws: Shield Against Domestic Violence or Sword to Pierce Abortion Rights*, 25 HASTINGS CONST. L.Q. 457, 478–79 (1998) (claiming "a slippery slope of unintended consequences" if fetuses are treated as persons under state law). One Alabama county recently held a woman in custody for three months because she admitted to smoking a small amount of marijuana on the day that she learned that she was pregnant. *See* Amy Yurkanin, *Pregnant Women Held for Months in One Alabama Jail to Protect Fetuses from Drugs*, AL.COM (Sept. 7, 2022, 10:13 AM), https://www.al.com/news/2022/09/pregnant-women-held-for-months-in-one-alabama-jail-to-protect-fetuses-from-drugs.html [https://perma.cc/6T3C-PNBQ].

78. *See generally* Goodwin, *supra* note 12, at 808–09 (describing the prosecution of Rennie Gibbs).

79. *See generally* Kari White, Gracia Sierra, Laura Dixon, Elizabeth Sapper & Ghazaleh Moayedi, *Texas Senate Bill 8: Medical and Legal Implications*, *in* TEX. POL'Y EVALUATION PROJECT (2021), http://sites.utexas.edu/txpep/files/2021/07/TxPEP-research-brief-SB8.pdf (discussing scope of civil liability under Texas law).

80. A group of Texas lawmakers has threatened Sidley Austin LLP with prosecution for insuring abortion-related care. *See* Meghan Tribe & Maia Spoto, *Big Law Mostly Quiet on Abortion Aid as Texas Battle Rages*, BLOOMBERG L. (July 15, 2022, 5:29 AM), https://news.bloomberglaw.com/business-and-practice/big-law-mostly-quiet-on-abortion-aid-as-texas-battle-rages [https://perma.cc/VH6A-UZUU]; Jacqueline Thomsen, *Texas Lawmakers Target Law Firms for Aiding Abortion Access*, REUTERS (July 8, 2022, 7:19 PM), https://www.reuters.com/legal/legalindustry/texas-lawmakers-target-law-firms-aiding-abortion-access-2022-07-08 [https://perma.cc/CAX8-KFPY].

81. *See* IDAHO CODE § 18-623(1) (2024).

82. S. 1373, 124th Gen. Assemb., Reg. Sess. § 44-41-860(B)(1), (2) (S.C. 2022).

83. *See* Caroline Kitchener, *Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill 'Trafficking,'* WASH. POST (Dec. 14, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe/ [https://perma.cc/B3AZ-JT3L] (discussing possible prosecution in Tyler, Texas).

84. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of the U.S.C.).

85. *See* Brendan S. Maher, *Pro-choice Plans*, 91 GEO. WASH. L. REV. 446 (2023); *cf.* Virginia Bethune, Note, *What Employers Must Consider When Paying for Abortion Travel in the Wake of* Dobbs, 17 OHIO ST. BUS. L.J. 265, 276 (2023) ("If an employer seeks to provide abortion related employment benefits and avoid legal challenges, the benefit must be encompassed in a broad benefits plan that covers many different types of medical care.").

Supreme Court precedent also seemingly forecloses prosecution of out-of-state companies for advertising or providing information about abortion services.[86] Unfortunately, the Supreme Court's opinion in *Dobbs* provides few hints on how the Court is likely to regard efforts to criminalize assistance to women in antiabortion states who are in need of abortion care.[87] This uncertain and fluid legal environment will deter individuals and entities from aiding pregnant women even if their assistance would be wholly lawful.

The next section examines how prosecutors have responded to *Dobbs* thus far, with a special focus on prosecutors who have signaled their opposition to abortion-related prosecutions.

*B. Prosecutors and Abortion Post-*Dobbs

Dobbs has led to unprecedented scrutiny of prosecutors' positions on abortion. Indeed, abortion is poised to dominate many state and local prosecutor elections.[88]

Some prosecutors in antiabortion states welcomed *Dobbs* and pledged to enforce antiabortion laws aggressively. For example, the former district attorney for Cobb County, Georgia praised his state's antiabortion law for rejecting the "depraved underpinning of *Roe* . . . that [only] some life was worth . . . protecting."[89] The same prosecutor also dismissed the notion that

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86. *See generally* Bigelow v. Virginia, 421 U.S. 809 (1975). *Bigelow* concerned an advertisement in a Virginia newspaper for a New York–based abortion provider. *See id.* at 811–12. In overturning the newspaper editor's conviction for printing the advertisement, the Supreme Court wrote:

> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.

Id. at 824–25.

87. Justice Kavanaugh's concurring opinion in *Dobbs* may be read to suggest that antiabortion laws that regulate out-of-state care will be struck down, but it focuses on a woman's right to out-of-state travel, not other individuals' facilitation of abortion-related travel. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

88. *See, e.g.*, Paul Waldman & Greg Sargent, *Attorneys General Will Be at Ground Zero in the New Abortion Wars*, WASH. POST (July 25, 2022, 5:29 PM), https://www.washingtonpost.com/opinions/2022/07/25/attorneys-general-new-abortion-wars/ [https://perma.cc/8NCE-F94Y]; Eleanor Klibanoff, *If* Roe v. Wade *Is Overturned, Texas District Attorney Offices Would Become a New Battleground*, TEX. TRIB. (Apr. 21, 2022, 5:00 AM), https://www.texastribune.org/2022/04/21/abortion-texas-lizelle-herrera-prosecutors/ [https://perma.cc/YNS4-85SK].

89. *See* John S. Melvin, *Georgia DA: Personhood Critics and the Heartbeat Bill*, MERION W. (May 24, 2019), https://merionwest.com/2019/05/24/georgia-da-personhood-critics-and-the-heartbeat-bill/ [https://perma.cc/JN5X-H6NW]; *see also* Tamar Hallerman & Greg Bluestein, *The Jolt: Cobb DA Compares Prosecutors Unwilling to Enforce 'Heartbeat' Law to Nazis, Segregationists*, ATLANTA J.-CONST. (May 28, 2019), https://www.ajc.com/news/state--regional-govt--politics/the-jolt-cobb-compares-prosecutors-unwilling-enforce-heartbeat-law-nazis-segregationists/ZK3K7iTPDiwZDV8oKJ1yMI/ [https://perma.cc/5RSX-4GMT].

the state's antiabortion law was ambiguous and would lead doctors to refuse to provide livingsaving care.[90]

Other prosecutors have vocally opposed *Dobbs*. Shortly after the decision's issuance, a group of eighty-four district attorneys from twenty-nine states released a statement that condemned the decision as a "mockery of justice."[91] The district attorneys also notably emphasized that their opposition to abortion criminalization was based not on their personal views of abortion but on resource constraints:

> [W]e stand together in our firm belief that prosecutors have a responsibility to refrain from using limited criminal legal system resources to criminalize personal medical decisions. As such, we decline to use our offices' resources to criminalize reproductive health decisions and commit to exercise our well-settled discretion and refrain from prosecuting those who seek, provide, or support abortions.[92]

The prosecutors' statement caused a media uproar even though its actual implications may be minimal.[93] Few providers remain in antiabortion states.[94] Medicine is highly regulated, and doctors who provide abortions in contravention of state laws face potential civil suits as well as the loss of their medical licenses.[95] These risks even exist for doctors located in abortion-protective states who provide abortion care via telemedicine to patients in antiabortion states.[96]

Nonenforcement pledges may be more impactful in states that maintain gestational limits on abortion. States such as Florida and Georgia limit abortion care to six weeks—the time when a fetus allegedly develops a "heartbeat."[97] In these states, a local prosecutor's pledge to not prosecute

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90. Melvin, *supra* note 89; *see also* Laura A. Bischoff, *Ohio AG Dave Yost Cast Doubt on 10-Year-Old Rape Victim Case, Now 'Rejoices' at Arrest*, COLUMBUS DISPATCH (July 13, 2022, 12:56 PM), https://www.dispatch.com/story/news/2022/07/13/ohio-attorney-general-rejoices-arrest-child-rape-suspect/10048250002/ [https://perma.cc/6U5F-P65E] (reporting Ohio Attorney General's view that Ohio law would allow for abortion in some cases of rape despite the absence of an express exception).

91. Joint Statement from Elected Prosecutors (June 24, 2022), https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf [https://perma.cc/J5ZY-G4D9].

92. *See id.*

93. *See, e.g.*, Evan Peng, *They Pledged Not to Prosecute Abortions. The Reality Is Tougher*, BLOOMBERG (Aug. 20, 2022, 9:00 AM), https://www.bloomberg.com/news/articles/2022-08-20/they-pledged-not-to-prosecute-abortions-the-reality-is-tougher#xj4y7vzkg [https://perma.cc/RDN7-D5JQ]; *see also* Goodman & Healy, *supra* note 30.

94. *See supra* note 45. For a discussion of whether antiabortion states can target out-of-state abortions, see *infra* Part IV.C.

95. *See, e.g.*, Cohen et al., *supra* note 14, at 24–25; CAROLE E. JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE V. WADE* 31 (1995) (noting that, pre-*Roe*, "[e]ven if a physician did not ultimately have to face a prison cell, the prospect of losing one's license to practice . . . was very chilling.").

96. *See* Cohen et al., *supra* note 14, at 25–25.

97. The term "heartbeat" is a misnomer because the heart is not fully developed at six weeks. *See, e.g.*, Roni Caryn Rabin, *Abortion Opponents Hear a 'Heartbeat.' Most Experts Hear Something Else.*, N.Y. TIMES (Feb. 14, 2022), https://www.nytimes.com/2022/02/14/health/abortion-heartbeat-debate.html [https://perma.cc/J4K4-DM7L]; Bethany Irvine, *Why*

abortion cases may enable providers to continue to operate. Post-*Dobbs*, determining the exact age of a fetus is a legally fraught act; doctors and clinics are unlikely to provide care if every abortion that they perform will be subject to prosecutorial scrutiny.[98]

Prosecutors' positions on antiabortion laws could also affect underground and interstate markets for abortion services. Abortion criminalization has historically driven much abortion care underground.[99] Prosecutors' pledges to not charge abortion-related cases could mean that licensed or unlicensed providers may be more willing to operate in these localities, including by dispensing abortion medication. Similarly, prosecutors' decisions to not apply antiabortion laws extraterritorially may provide assurance to providers based in abortion-protective states that they can treat residents of antiabortion states.[100]

Antiabortion politicians have not stood idly by as district attorneys stake out positions on the enforcement of antiabortion laws. Utah legislators have proposed laws that enable state prosecutors to carry out prosecutions if local prosecutors are unwilling to do so.[101] Florida Governor Ron DeSantis suspended Andrew Warren, an elected Tampa-based state attorney, partly based on Warren's public opposition to abortion criminalization.[102] According to DeSantis, the suspension was warranted because "state Attorneys have a duty to prosecute crimes as defined in Florida law, not to pick and choose which laws to enforce based on his personal agenda."[103]

"Heartbeat Bill" Is a Misleading Name for Texas' Near-Total Abortion Ban, TEX. TRIB. (Sept. 2, 2021, 4:00 PM), https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/ [https://perma.cc/XH3N-BZUS].

98. Pre-*Roe*, prosecutions often turned on whether the pregnant woman was "quick with child," meaning the fetus was sufficiently developed so that the mother could feel a kick. *See* State v. Steadman, 51 S.E.2d 91, 93 (S.C. 1948); State v. Hatch, 112 P. 149, 150 (Kan. 1910).

99. *See, e.g.*, Johanna Schoen, *Living Through Some Giant Change: The Establishment of Abortion Services*, 103 AM. J. PUB. HEALTH 416, 417 (2013); C.E. Joffe, T.A. Weitz & C.L. Stacey, *Uneasy Allies: Pro-choice Physicians, Feminist Health Activists and the Struggle for Abortion Rights*, 26 SOCIO. HEALTH & ILLNESS 775, 777 (2004) (describing the illegal market for abortion as "flourishing" pre-*Roe*).

100. As discussed in Part IV.C, providing abortion care to an out-of-state resident potentially subjects a provider to criminal liability although the risk of prosecution is remote unless the provider travels to an antiabortion state. *See* Cohen et al., *supra* note 14, at 5. ("Thus, even if supported by their home state, providers looking to engage in cross-border care would need to consider restricting future travel to avoid criminal prosecution and might still risk some civil and professional consequences.").

101. *See* Michael Houck, *Abortion Providers Are Undeterred After Receiving Republican Signed Cease-and-Desist Letters*, KSL-TV (Sept. 21, 2022, 6:57 PM), https://ksltv.com/506484/abortion-providers-are-undeterred-after-receiving-republican-signed-cease-and-desist-letters/ [https://perma.cc/YZE8-JK33].

102. *See supra* note 32. Warren contested his suspension in federal court. *See* Complaint at 26, Warren v. DeSantis, 653 F. Supp. 3d 1118 (N.D. Fla. 2023) (No. 22-CV-00302), ECF No. 1. His suit for reinstatement alleged that Governor DeSantis also violated the prosecutor's First Amendment rights and exceeded his authority under Florida's constitution. *See id.*

103. *See Governor Ron DeSantis Suspends State Attorney Andrew Warren for Refusing to Enforce Florida Law*, RON DESANTIS, 46TH GOVERNOR FLA. (Aug. 4, 2022), https://www.flgov.com/2022/08/04/governor-ron-desantis-suspends-state-attorney-andrew-warren-for-refusing-to-enforce-florida-law/ [https://perma.cc/L5AF-6N38].

Of course, since prosecutors do not have unlimited time and resources, they must always "pick and choose" which laws to enforce.[104] Indeed, the criminal code is so expansive that prosecutors have no choice but to "exercise discretion and common sense" in setting enforcement priorities.[105] In Warren's case, no abortion-related cases had even been referred to his office.[106] For these reasons, a federal judge determined that Governor DeSantis had no legitimate basis to suspend Warren even though the Eleventh Amendment precluded the court from awarding Warren relief.[107] The order was later reversed by the Eleventh Circuit and remanded for further factfinding as to whether Governor DeSantis had grounds to suspend Warren for activity that is not constitutionally protected.[108]

The next part situates the controversy over prosecutors' handling of abortion cases within the larger debate on charging discretion and prosecutorial nullification. Prosecutors need not prioritize abortion-related cases but should not refuse to enforce antiabortion laws outright.

II. CHARGING DISCRETION AND PROSECUTORIAL NULLIFICATION

Although police and legislatures play critical roles in the criminal justice system, prosecutors are widely regarded as the criminal justice system's most powerful actors.[109] This power derives from prosecutors' control over whom and what to charge.[110] In the oft-cited words of former U.S. Attorney General Robert H. Jackson, "the prosecutor has more control over life, liberty, and reputation than any other person in America."[111] This part will examine the few constraints on prosecutors' charging discretion and whether they may use this discretion to refuse to enforce antiabortion laws and other laws that they regard as unjust.

104. *See infra* Part III; *see also* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 180 (2019) ("The core prosecutorial function is deciding how to process the large number, but small percentage, of the overall population brought to their attention by police.").

105. Joshua Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision to Not Prosecute*, 110 COLUM. L. REV. 1655, 1663–64 (2010) (quoting Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967)).

106. *See* Complaint, *supra* note 102, at 25.

107. *See* Ord. on the Merits at 59, *Warren*, 653 F. Supp. 3d 1118.

108. Warren v. DeSantis, 90 F.4th 1115, 1139 (11th Cir. 2024).

109. *See, e.g.*, *supra* note 29.

110. *See, e.g.*, Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 480 (2020); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 272 (2013) (describing the "unlimited and unreviewable power to select the charges that will be brought against defendants"); Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 54 (2012) ("Courts will not question a prosecution's decision of whom and how to charge in a given case.").

111. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

A. Charging Discretion and Prosecutorial Nullification

A prodigious body of literature has documented prosecutors' broad and largely unreviewable authority to make charging decisions.[112] As Judge Richard A. Posner has written: "A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them."[113] The Supreme Court has taken a similar view.[114] Thus, although prosecutors are nominally agents of the sovereign, they are functionally "clientless" because they choose the cases that they prosecute.[115]

Ethical rules provide some constraints on prosecutorial charging discretion.[116] For example, the American Bar Association (ABA) has promulgated Model Rules of Professional Conduct, Rule 3.8, which imposes the familiar requirement that a prosecutor "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[117] This standard is easily met, notwithstanding that prosecutors are nominally "ministers of justice."[118] As Professor Bruce Green has detailed:

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112. *See, e.g.*, Barkow, *supra* note 110, at 272; Luna, *supra* note 37, at 793 (describing the breadth of prosecutorial discretion as "awe-inspiring"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor.").

113. Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 367 (2001) (quoting United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992)).

114. *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 382–83 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978).

115. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice?,"* 26 FORDHAM URB. L.J. 607, 633 (1999); Russell M. Gold, *Clientless Prosecutors*, 51 GA. L. REV. 693, 702–03 (2017) (describing prosecutors as "clientless"); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 390 (2008) ("[P]rosecutorial decisions participate in, and exemplify, the logic of sovereignty and its complex relationship to legality.").

116. *See* Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1191–92 (2020); *see also* Gershman, *supra* note 33, at 519 ("Constitutional and statutory rules merely set the outer boundaries for decision-making, requiring only that the prosecutor have sufficient evidence to convict and that she not engage in discriminatory or retaliatory behavior. Ethical rules go further, and mandate that the prosecutor seek justice." (footnote omitted)).

117. MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020); *see* Branzburg v. Hayes, 408 U.S. 665, 686 (1972). For an excellent history of the probable cause standard, see William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 519–38 (2016). As Professor William Ortman describes, the probable cause standard became ascendant in American law only in the latter part of the nineteenth century. *See id.* at 542–44.

118. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (describing prosecutors as "minister[s] of justice"); Gershman, *supra* note 33, at 519 (arguing that prevailing ethical rules are "too vague" to inform decision-making); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 284 (2007) ("The low charging standard of probable cause encourages abuse of the charging power, allowing prosecutors to charge an individual in order to intimidate, harass, or coerce a guilty plea."); *see also* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 10.04 (4th ed. 2010) (describing financial, reputational, and psychological harms to defendants even if they are ultimately acquitted of charges).

> Under the probable cause standard, it does not have to be "more likely than not" that the accused is guilty. All that is needed is a fair possibility of guilt, something more than a "reasonable suspicion." Just to illustrate how minimal this standard is, it would allow a prosecutor to charge two individuals in two separate cases with the same criminal conduct even when the prosecutor knows that only one of the two could possibly have engaged in the alleged conduct.[119]

Model Rule 3.8 does not even require prosecutors to reassess their charging determinations when new evidence comes to light[120] or to avoid bias in charging.[121] Charging a defendant in the absence of probable cause could lead to professional discipline.[122] However, state disciplinary authorities rarely impose sanctions on prosecutors and are especially unlikely to do so for discretionary charging decisions.[123] The few high-profile cases relating to abuses of charging discretion involve very unusual scenarios such as the deliberate targeting of political opponents or animus against specific defendants[124]—what the Supreme Court has termed "prosecutorial vindictiveness."[125]

Prosecutors have steadfastly resisted higher charging standards.[126] The District of Columbia is the only jurisdiction that maintains a higher standard

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119. Bruce Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588.

120. *See id.* at 1584; *see also* Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. REV. 79, 91–92 (2010) (discussing the role of psychology in prosecutors' probable cause determinations).

121. *See, e.g.*, Matt Barno & Mona Lynch, *Selecting Charges*, *in* OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 35, 42–51 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021); Christopher Robertson, Shima Baradaran Baughman & Megan Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIRICAL LEGAL STUD. 807, 815 (2019) ("[M]ost of the empirical studies on race and prosecutorial decision making have concluded that racial bias exists, particularly in the initial charging decision.").

122. *See* MODEL RULES OF PRO. CONDUCT r. 8.5 (AM. BAR ASS'N 2020). Any doubt that federal prosecutors were not subject to state ethics rules was eliminated by the McDade-Murtha Amendment, 28 U.S.C. § 530B, that subjects all government attorneys to the rules of states in which they practice; *see also* Green & Levine, *supra* note 33, at 155 (noting that courts have rejected the argument that federal prosecutors cannot be subjected to attorney discipline mechanisms).

123. *See, e.g.*, Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2150 (2021) ("The conventional wisdom in this area is that 'disciplinary authorities do not effectively regulate prosecutors.'" (quoting Green & Levine, *supra* note 33, at 144)); Green & Levine, *supra* note 33, at 155 ("[T]here is an overwhelming consensus of opinion that ethics rules are under-enforced against prosecutors."). In addition to the lax probable cause standard, lawyers and judges are reluctant to even refer prosecutors for discipline. *See* Davis, *supra* note 118, at 284, 309; *see also* Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 FORDHAM L. REV. 537, 572 (2011) (suggesting that prosecutors will only face professional discipline when judges have previously determined that they have committed willful misconduct).

124. *See* Green & Levine, *supra* note 33, at 178–79 (summarizing case law).

125. United States v. Goodwin, 457 U.S. 368, 381 (1982).

126. *See* Green, *supra* note 119, at 1584.

than "probable cause" and prohibits bias in charging expressly.[127] The little data available on charging decisions suggests that many declinations are based on nebulous "policy reasons."[128] No jurisdiction requires prosecutors to set out their reasons for pursuing—or declining to pursue—criminal charges.[129] The lack of meaningful oversight over prosecutors combined with the ubiquity of plea bargaining has led scholars to claim that prosecutors *are* the criminal justice system.[130]

In addition to drafting model ethical rules, professional associations have promulgated voluntary guidelines to inform prosecutors' decision-making. These standards recognize that charging decisions require prosecutors to balance the benefits of prosecution with its costs. For example, the ABA's Criminal Justice Standards for the Prosecution Function ("Criminal Justice Standards") exhort prosecutors to "act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances."[131] Reasons for declining to pursue charges despite strong evidence of guilt include the absence of harm, the availability of noncriminal remedies, and the likelihood that prosecution would constitute an inefficient use of resources and fail to materially advance the public welfare.[132]

The National District Attorneys Association (NDAA) has similarly promulgated standards ("NDAA Standards") that urge prosecutors to "screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest."[133] Examples include cases in which the crime has rarely been charged in the past, the criminal activity is uncharacteristic of the accused's general law-abiding life, and the costs of prosecution exceed the offense's seriousness.[134]

Although these professional standards are intended to guide prosecutors' exercises of charging discretion, they are by their own terms "aspirational," and many prosecutors are unfamiliar with them.[135] Nothing precludes prosecutors from pursuing only the most winnable or high-profile cases, even

127. *See* Green & Levine, *supra* note 33, at 152 (discussing D.C. RULES OF PRO. CONDUCT r. 3.8(a) (2018)).

128. *See* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 305–06 (1980).

129. *See, e.g.*, Wright et al., *supra* note 123, at 2203; Roth, *supra* note 110, at 481 ("[P]rosecutors generally do not explain individual declination decisions, at least to a public audience."); Frase, *supra* note 128, at 304–05.

130. *See* Luna, *supra* note 37, at 795; Erik Luna & Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010).

131. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.2(b) (AM. BAR ASS'N 2017).

132. *See id.* at Standard 3-4.4(a)(iii), (iv), (xiv).

133. NAT'L PROSECUTION STANDARDS § 4-1.3 (NAT'L DIST. ATT'YS ASS'N 2023).

134. *Id.* § 4-2.4(c), (j), (o).

135. *See* Wright et al., *supra* note 123, at 2151.

if these cases do not serve the public interest.[136] Yet the mere fact that disciplinary authorities do not enforce professional standards against prosecutors does not diminish their utility. As Judge Howard C. Bratton, one of the drafters of the ABA's first Criminal Justice Standards, expressed, professional standards aid prosecutors and other legal actors "in performing their respective functions more efficiently and more adequately."[137] When prosecutors fail to act in accordance with professional standards, they can be criticized by colleagues as well as the public at large.[138]

Professional standards urge chief prosecutors to promulgate charging policies that frontline prosecutors are supposed to apply case by case.[139] Under the NDAA Standards, chief prosecutors should "establish guidelines by which charging decisions may be implemented . . . [to] provide consistency of operation."[140] Guidelines ensure that politically accountable chief prosecutors have some control over charging decisions and that these decisions are not abdicated entirely to their subordinates.[141] These guidelines will vary by office and are tailored to the local community's perceived needs.[142] Approximately half of all district attorney's offices appear to have formal charging guidelines that draw on professional standards.[143]

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136. *See* NAT'L PROSECUTION STANDARDS § 4-1.3(q) (suggesting that a prosecutor should not pursue charges when "the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction"); *see also* Meulli, *supra* note 33, at 686 (warning that prosecutors "may become amoral technician[s] committed to winning the adversary battle") (citation omitted).

137. Howard C. Bratton, *Standards for the Administration of Criminal Justice*, 8 AM. CRIM. L.Q. 146, 148 (1970).

138. For a discussion of the importance of professional shaming, see W. Bradley Wendel, *Lawyer Shaming*, 2022 U. ILL. L. REV. 175, 182.

139. *See, e.g.*, NAT'L PROSECUTION STANDARDS § 4-2.4 cmt. ("The chief prosecutor should establish guidelines by which charging decisions may be implemented."); Ronald F. Wright, *Prosecutor Institutions and Incentives*, 18 CRIMINOLOGY CRIM. JUST. L. & SOC'Y 85, 90 (2017) ("Many chief prosecutors issue internal guidance to their assistants about the appropriate charges to file and the acceptable resolution of cases before trial."); Meulli, *supra* note 33, at 683 ("Office charging policies tend to focus on offense categories."). Professor Bowers labels the practice of translating priorities into charges in individual cases as "particularism." *See* Bowers, *supra* note 105, at 1669; *see also* Howell, *supra* note 33, at 312 ("Even when minor offenses flood the system, it is still the prosecutor's duty to decide whom to charge. Merely processing cases because they are minor is not an option.").

140. NAT'L PROSECUTION STANDARDS § 4-2.4 cmt.

141. Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 85–86 (2015); *see also* Luna, *supra* note 37, at 805 (arguing for overt decriminalization).

142. Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 826 (2020); *see* Wright, *supra* note 139, at 87 (describing prosecutors as "radically localized").

143. *See* Wright et al., *supra* note 123, at 2203. The researchers concluded, "individual prosecutors have the utmost discretion to charge defendants as they see fit." *Id.* Some scholars have called for more transparency regarding enforcement policies. *See, e.g.*, Kit Kinports, *Feminist Prosecutors and Patriarchal States*, 8 CRIM. L. & PHIL. 529, 533–34 (2014); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 594 (2014); *see also* Wright et al., *supra* note 123, at 2189 (noting that prosecutors often describe office policies as "proprietary").

The ABA Criminal Justice Standards and the NDAA Standards set out proper and improper bases for case declinations.[144] Personal opposition to a law does not provide a legitimate basis to refuse to enforce a law under either the ABA Criminal Justice Standards or the NDAA Standards.[145] Rather, when prosecutors regard laws as misguided or unjust, they should use their firsthand knowledge of the criminal justice system to advocate for reform.[146] A group of 115 legal ethics scholars, including this Article's author, expounded on this point in an amicus brief filed in the Andrew Warren case:

> Elected prosecutors' public statements on controversial questions of criminal law or procedure are not unethical or unprofessional but fulfill their professional obligation to promote law reform while enabling constituents to assess their views on policy relevant to their work. Such broad policy expressions do not dictate how a prosecutor will exercise his or her discretion in an individual case.[147]

Prosecutors' policy statements can certainly be misinterpreted and misrepresented as they were in the *Warren* case. But this should not dissuade district attorney's offices from adopting charging policies to guide their work and explaining these policies to their constituents. In larger district attorney's offices in particular, frontline prosecutors would have largely unfettered discretion to make charging decisions in the absence of office policies.[148]

The next section differentiates prosecutors' uses of charging discretion to deprioritize certain offenses from prosecutorial nullification. District attorney's offices should consider promulgating policies that promote uniformity and predictability in charging, but they should not aim to unmake or subvert democratically enacted laws.

B. Prosecutorial Nonenforcement and Nullification

Since prosecutors cannot charge every violation of law, they must determine which cases are in the public interest.[149] According to estimates, prosecutors decline to charge purported offenders in 25–50 percent of criminal cases.[150]

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144. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4 (AM. BAR ASS'N 2017); NAT'L PROSECUTION STANDARDS § 4-2.4.

145. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4; NAT'L PROSECUTION STANDARDS § 4-2.4.

146. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3.1-2(f); NAT'L PROSECUTION STANDARDS § 1-1.2 ("A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so.").

147. Legal Scholars' Amicus Curiae Brief in Support of Andrew H. Warren at 8, Warren v. DeSantis, 653 F. Supp. 3d 1118 (N.D. Fla. 2023) (No. 22-CV-00302), ECF No. 22-1.

148. *See also* Wright et al., *supra* note 123, at 2144 ("Office structure may play a role in charging variability, and overall the more centralized charging practices, the less variability between prosecutors.").

149. NAT'L PROSECUTION STANDARDS § 4-1.1; Howell, *supra* note 33, at 312.

150. Luna, *supra* note 37, at 795–96; *see also* Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439 (2004) (concluding that U.S. Attorneys declined 26–36 percent of cases from 1994–2000).

In an important article, Professor Josh Bowers grouped prosecutors' declinations of cases into three categories: legal reasons (i.e., insufficient evidence), administrative reasons (i.e., resource constraints), and equitable reasons pertaining to the perpetrator's perceived moral blameworthiness.[151] Declinations could be justified under more than one category. For example, prosecutors may choose to not focus on petty offenses such as prostitution or drug possession to preserve scarce prosecutorial resources but also because they do not perceive offenders to be morally blameworthy.[152]

Decisions to not prosecute categories of offenses—pursuant to formal policies or otherwise—can potentially lead to de facto decriminalization. As Professor Erik Luna has explained:

> In an overcriminalized world, prosecutors are already decriminalizing conduct through their discretionary decisionmaking . . . . By declining a case, the prosecutor is refusing to apply the penal code to a given suspect . . . . [P]rosecutorial decriminalization tends to be opaque, a secret law formed by the accumulation of unwritten policies, office customs, and daily practices.[153]

Politicians and law enforcement generally oppose policies that are suggestive of decriminalization.[154]

Nevertheless, categorical nonenforcement—the decision to not focus on certain categories of offenses—is inevitable and uncontroversial in many contexts.[155] Few would suggest that prosecutors should focus on offenses such as adultery that remain part of certain states' penal codes but have fallen

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151. *See* Bowers, *supra* note 105, at 1656–57.

152. *See* Fairfax, *supra* note 38, at 1261–62 (describing "hybrid" rationales for nonenforcement); *see also* Howell, *supra* note 33, at 326 (suggesting that prosecutors should consider racial disparities, resources, and blameworthiness in deciding to charge petty crimes such as marijuana possession). Professional standards encourage prosecutors to consider resource constraints in tandem with the suspect's blameworthiness. *See, e.g.*, CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4 (v), (xiv); NAT'L PROSECUTION STANDARDS § 4-2.4(c), (j).

153. Luna, *supra* note 37, at 795–97.

154. Philadelphia, under District Attorney Larry Krasner, has been a particular flashpoint. *See* Campbell Robertson, *Pennsylvania House Moves to Impeach Philadelphia's Progressive D.A.*, N.Y. TIMES (Oct. 26, 2022), https://www.nytimes.com/2022/10/26/us/larry-krasner-philadelphia-impeachment.html [https://perma.cc/ES42-4APJ]. For a good general introduction to Krasner and other "progressive prosecutors," see Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 2 (2019); *see also* Bruce Green & Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431, 1440 (2023) (suggesting that progressive prosecutors' openness provides fodder for criticism). Progressive prosecution is discussed in greater depth below. *See infra* Part III.

155. *See* Osofsky, *supra* note 141, at 85; Price, *supra* note 37, at 707; *see also* Wright, *supra* note 142, at 844 (equating categorical nonenforcement to a resource allocation presumption).

into desuetude.[156] Prosecutors risk public criticism on the rare occasions that they resurrect these "dead crimes."[157]

Other offenses may not have fallen into desuetude but are prosecuted very rarely. Even prior to the Supreme Court's decision in *Lawrence v. Texas*,[158] most people would agree that charging same-sex couples for engaging in consensual sexual relations would constitute a poor use of prosecutorial resources.[159] The same can likely be said in the present day for charging marijuana possession in states that have yet to decriminalize this conduct.[160] Contemporary debates over the prosecution of "quality-of-life offenses" in urban centers, such as San Francisco and Philadelphia, treat categorical nonenforcement as more unwise than illegitimate, with critics of nonenforcement endeavoring to reverse these policies via democratic processes.[161]

Prosecutorial nullification is sometimes used interchangeably with categorical nonenforcement, but the concepts are very distinct.[162] Properly considered, prosecutorial nullification is driven by disagreement with the underlying law; the prosecutor substitutes his or her judgment for that of the legislature to effectively unmake the law.[163] Conversely, with categorical nonenforcement, chief prosecutors determine that their offices' limited

156. Sean Keveney, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381, 394 n.73 (2002) ("Once a rule lies dormant for a sufficient period of time, it not only becomes obscure, but may also, in certain circumstances, be declared invalid by reason of the doctrine of desuetude."); *see also* Sunstein, *supra* note 38, at 65–66 ("[I]n the context of adultery, criminal prosecutions are extremely unusual . . . . This is not because adultery is thought to be morally acceptable; it is not. It is because adultery is not thought to be a proper basis for the use of the criminal law."). Twenty states maintain antiadultery laws. *See* Alyssa Miller, *Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and Their Effects on Women*, 41 FORDHAM INT'L L.J. 425, 434 (2018).

157. Johnson, *supra* note 38, at 119.

158. 539 U.S. 558 (2003).

159. *See* Green & Zacharias, *supra* note 36, at 876–77; Lawrence v. Texas, 539 U.S. 558, 605 (2002) (Thomas, J., dissenting) ("Punishing someone for expressing his sexual preference through non-commercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.").

160. For examples of de facto decriminalization of marijuana possession, see Luna, *supra* note 37, at 802–03; Murray, *supra* note 42, at 219, 249–50. *See also* Johnson, *supra* note 38, at 121 ("[A]cross the country, recreational marijuana use has become prevalent, with the result that the marijuana-use laws remaining on the books are openly disregarded and disfavored by most Americans." (footnote omitted)).

161. A high-profile example is the recall of San Francisco's progressive prosecutor Chesa Boudin. *See, e.g.*, Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html [https://perma.cc/GVT3-6EZ5]; Jeremy B. White, *San Francisco District Attorney Ousted in Recall*, POLITICO (June 8, 2022, 12:17 AM), https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002 [https://perma.cc/SY9T-UCX7].

162. Prosecutors lack the resources to charge all crimes, but this does not mean that all or most declinations are forms of prosecutorial nullification. *See generally* Bowers, *supra* note 105, at 1685 ("[T]he nullification label is not only inappropriately freighted, it is descriptively wrong as applied to the discretionary charging decision." (footnote omitted)).

163. *See* Fairfax, *supra* note 38, at 1274.

resources should not generally go to charging certain crimes.[164] The latter determinations are best understood as strong presumptions against charges without ruling out charges in exceptional circumstances.[165] Determining what and whom to charge is a core part of the prosecutor's role,[166] whereas nullification abrogates the prosecutor's traditional role by effectively rewriting the "menu" of charging options.[167]

A few scholars have sought to defend prosecutorial nullification by analogizing the phenomenon to jury nullification.[168] For example, Professor Kerrel Murray has argued that, with the decline of the jury trial, prosecutorial nullification enables the public to "equitably trim" laws.[169] Under his formulation, prosecutors who are elected on platforms to not enforce particular laws act as a "conduit for the wholesale achievement of what the [community] might otherwise have done retail through jury control of the law. This is populist prosecutorial nullification: a hydraulic descendant of strong juries."[170]

There are reasons to be skeptical that prosecutors act as conduits of the public will. For example, most prosecutor elections are uncontested, and even when they are contested, voters may be uninformed about the specifics of candidates' platforms.[171] Prosecutors are also professionals with distinctive obligations, notwithstanding that they are answerable to the public.[172] Professor Murray does not provide any normative grounds for prosecutors to jettison prevailing professional standards in order to function more like jurors in a one-off case. The ABA Criminal Justice Standards and NDAA Standards state that prosecutors should not allow personal interests and political considerations to affect their charging decisions.[173] These limitations exist because prosecutors' "unlimited and unreviewable" charging discretion can easily lead to selective justice and arbitrariness.[174]

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164. Wright, *supra* note 142, at 844.

165. *Id*. at 827.

166. *See supra* note 104; *see also* Howell, *supra* note 33, at 332 ("[T]he discretion of the prosecutor not to charge crimes is a fundamental part of the absolute power of the office.").

167. *See, e.g.*, Bibas, *supra* note 34, at 932–33; Stuntz, *supra* note 34, at 598; *see also* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 241 (2006) (describing the traditional view that "prosecutors should not second guess whether the conduct in question deserves criminal punishment. Otherwise, the prosecutors would be replacing the legislature's articulated preference for theirs.").

168. *See generally* Murray, *supra* note 42, at 193 (treating both jury and prosecutorial nullification as manifestations of "popular sovereignty").

169. *Id*. at 222.

170. *Id*. at 208–09.

171. *See* Cassandra Bryne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 45 (2023).

172. *See also* Luna, *supra* note 37, at 680 (describing the public as "largely oblivious" to prosecutorial decriminalization).

173. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standards 3-1.7(f), 3.-4.4(b)(i) (AM. BAR ASS'N 2017); NAT'L PROSECUTION STANDARDS §§ 3-1.2, 4-1.4(c) (NAT'L DIST. ATT'YS ASS'N 2023).

174. Barkow, *supra* note 110, at 272.

Marginalized groups suffer most when prosecutors view charging decisions through the prism of individual and collective conscience.[175]

Of course, prosecutors are human and cannot simply set aside their worldviews and belief systems in carrying out their duties.[176] They will inevitably vary in their assessments of, inter alia, the gravity of certain offenses, defendants' blameworthiness, and the effectiveness of noncriminal remedies. Nor can elected prosecutors flout public opinion entirely and hope to remain in office.[177] What is required of prosecutors in a morally pluralistic society is that they strive to not allow their views on the justness of the law and community pressure to cloud their professional judgments.[178] Professors Bruce Green and Rebecca Roiphe recount the example of former Manhattan District Attorney Robert Morgenthau, who, though personally opposed to the death penalty, ensured that his office considered each death penalty–eligible case on its own terms.[179] Former U.S. Attorney General Janet Reno was also a foe of capital punishment and yet secured scores of capital convictions during her tenure.[180]

The obligation to not simply follow the dictates of individual and collective conscience is most acute for prosecutors because they have largely unreviewable discretion in making charging decisions. Nevertheless, as Professor W. Bradley Wendel has explained, it is not unique to them:

> [I]n their personal capacities, lawyers are as free as any other member of the political community to criticize and campaign against the community's unjust laws. Acting in a professional role, however, the lawyer's ethical obligations are geared toward sustaining the effective functioning of a system of laws that provides a way for members of the political community to live and work alongside those with whom they disagree about matters of morality.[181]

An example will illustrate the incompatibility between prosecutorial nullification and the rule of law. Consider a hypothetical prosecutor in an abortion-protective state who strongly opposes abortion. The prosecutor is assessing a criminal case involving a protester at an abortion clinic. The jurisdiction in question has a law modelled on the Freedom of Access to

175. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981); Fairfax, *supra* note 38, at 1275.

176. *See generally* Murray, *supra* note 42, at 231 ("Prosecutors are human—it is not surprising that their nonenforcement could be influenced by individual idiosyncrasies like 'individual character traits, family background, and religious faith.'" (quoting Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1071 (2014)).

177. *See generally* Bruce A. Green, *Prosecutors in the Court of Public Opinion*, 57 DUQ. L. REV. 271, 286 (2019) ("The assumption is that prosecutors—especially elected prosecutors—must be politically accountable to the public, and that political accountability presupposes public transparency.").

178. *See* Green & Zacharias, *supra* note 36, at 855.

179. *See* Green & Roiphe, *supra* note 154, at 2023.

180. George Kannar, *Federalizing Death*, 44 BUFF. L. REV. 325, 335 (1996).

181. W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of* Modus Vivendi *Legal Ethics*, 131 YALE L.J. F. 89, 106 (2021).

Clinic Entrances Act[182] (FACE Act) that prohibits physical interference with a person seeking reproductive care.[183]

How should the prosecutor in question handle such a case? From the perspective of professional standards, the charging decision should not depend on the prosecutor's view as to the morality of abortion and the protestor's conduct.[184] Instead, the prosecutor should consider whether the evidence supports a conviction as well as such factors as the harm to patients and the likelihood that the offender will commit similar acts in the future.[185] Resource considerations may also figure into the prosecutor's calculus.[186] Reasonable prosecutors could assess these factors differently and may not come to the same charging decision in the protestor's case. Nevertheless, the charging decision would be legitimate because it is grounded in the prosecutor's exercise of professional judgment.

Prosecutorial nullification displaces considerations relating to evidence, harm caused by the protester, and specific deterrence with an assessment of whether FACE Act–related charges are just from the perspective of the prosecutor and their local community. Under Professor Murray's account, if the local community is strongly opposed to abortion and the prosecutor has previously indicated that they would not enforce the FACE Act, the prosecutor need not pursue the case.[187] The protester had the good fortune of committing the offense in this county as opposed to a neighboring one that may be more supportive of abortion rights.

The prosecutor could have conceivably declined to prosecute the protestor relying only on professional judgment. For example, no patient or clinic employee may be willing to testify against the protester, leading the prosecutor to conclude that they do not have enough evidence to obtain a conviction. Although the outcome would be the same under this scenario, the process would be entirely different. However, if prosecutorial nullification is to be taken seriously, a prosecutor must be prepared to decline a case when the evidence of criminality is compelling and when the protester has caused significant harm and is likely to reoffend. In theory, the prosecutor could reject a case that every other prosecutor in the state would accept.

Note that the prosecutor's actions in the foregoing example are very different from those of suspended Florida prosecutor, Andrew Warren. Governor DeSantis claimed that Warren was picking and choosing which

182. 18 U.S.C § 248.

183. *Id.*

184. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standards 3-1.7(f), 3.-4.4(b)(i) (AM. BAR ASS'N 2017); NAT'L PROSECUTION STANDARDS §§ 3-1.2, 4-1.4(c) (NAT'L DIST. ATT'YS ASS'N 2023).

185. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020); CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4(iii), (v), (vii).

186. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4(xiv).

187. *See* Murray, *supra* note 42, at 222–24.

crimes to enforce based on Warren's "personal agenda."[188] However, the district attorneys' statement that Warren signed was explicit that the attorneys had varying views on abortion but were united in their belief that they should not use their limited resources to prosecute personal medical decisions.[189] By signaling his disinclination to prosecute abortion care without ruling out prosecution in appropriate cases, Warren was making the kind of policy judgment that he was elected to make. Warren was not privileging his or his community's views of abortion over Florida law.

Just as prosecutors have been able to seek the death penalty while regarding the practice as deeply immoral, they should be open to enforcing antiabortion laws that they and their localities might regard as unjust. The next part surveys the enforcement of antiabortion laws prior to *Roe v. Wade* and provides prospective guidance to prosecutors in making charging decisions in abortion cases.

III. PAST AND MODERN ENFORCEMENT OF ANTIABORTION LAWS

Prosecutors must determine how to best enforce antiabortion laws. Drawing on pre-*Roe* cases and professional standards, this part argues that abortion cases will not usually warrant prosecution unless they involve unsafe care or coercion. Some prosecutors in antiabortion states may be inclined to charge all cases that are referred to them, but abortion cases are resource-intensive and will be difficult to prove. The availability of alternatives to criminal prosecution also counsels against charges. Charging out-of-state providers is especially unlikely to advance the public interest.

A. Historical Nonenforcement of Antiabortion Laws

Although a full history of the enforcement of abortion laws is beyond this Article's purview, abortion has been either legal or tolerated for most of American history. This history offers lessons for contemporary prosecutors.

Until the latter part of the nineteenth century, abortion was legal in most circumstances.[190] States followed the common law rule that a fetus had no legal status until after quickening; in Blackstone's terms, life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[191] The Supreme Court drew on Blackstone and other authorities in *Roe v. Wade* to find that "[i]t is undisputed that at common law, abortion performed before 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—

188. *See Governor Ron DeSantis Suspends State Attorney Andrew Warren for Refusing to Enforce Florida Law*, *supra* note 103.

189. *See* Joint Statement from Elected Prosecutors, *supra* note 91, at 1.

190. *See, e.g.*, Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 741 (2018); Leslie J. Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867–1940*, 77 J. AM. HIST. 1240, 1241 (1991).

191. 1 WILLIAM BLACKSTONE, COMMENTARIES 125.

was not an indictable offense."[192] The common law focused on quickening because, prior to this stage of pregnancy, the fetus was believed to be part of its mother.[193]

Although some scholars have questioned the common law rule's foundations, even *Roe*'s harshest critics have conceded that states only began to prohibit pre-quickening abortions in the latter half of the nineteenth century.[194] Justice Alito's opinion in *Dobbs* does not challenge this history but instead minimizes its significance for purposes of constitutional analysis.[195]

The newly created American Medical Association (AMA) was chiefly responsible for nineteenth century abortion restrictions.[196] The AMA's campaign against abortion was led by Horatio Robinson Storer, a Boston-based gynecologist and chair of the AMA's Committee on Criminal Abortion.[197] Professional self-interest, xenophobia, and sexism motivated Storer and the AMA.[198]

First, in Storer's time, midwives and nurses played an integral role in women's care and performed most abortions.[199] These providers advertised their services widely and had become enormously successful in urban centers

192. Roe v. Wade, 410 U.S. 113, 132–33 (1973).

193. *See, e.g.*, *id.* at 134 ("[P]rior to [the point of quickening] the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide."); Keeler v. Superior Ct., 470 P.2d 617, 639 n.21 (Cal. 1970) ("At common law, the weight of authority holds that an unborn child, in contemplation of law, has no existence as a human being separate from its mother . . . ." (quoting Scott v. McPheeters, 92 P.2d 678 (Cal. Dist. Ct. App. 1939))). Conversely, some authorities focus on the lack of evidence of life pre-quickening. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2252–53 (2022); State v. Harris, 136 P. 264, 267 (Kan. 1913) ("[M]ovement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life . . . .").

194. *See* Anthony M. Joseph, *The "Pennsylvania Model": The Judicial Criminalization of Abortion in Pennsylvania, 1838–1850*, 49 AM. J. LEGAL HIST. 284, 284 (2007) (collecting sources); John Keown, *Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 11–12 (2006) (drawing distinction between early common law's emphasis on "fetal formation" and later common law's emphasis on quickening).

195. *See Dobbs*, 142 S. Ct. at 2252 ("[T]he original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century.").

196. *See* Ziegler, *supra* note 190, at 741–42.

197. *See generally* Charles R. King, *Abortion in Nineteenth Century America: A Conflict Between Women and Their Physicians*, WOMEN'S HEALTH ISSUES, Spring 1992, at 32, 36 ("A national popularizer and leader of the physician's anti-abortion campaign was the Bostonian Horatio Robinson Storer.").

198. *See id.* at 35–36; *see also* Nicola Beisel & Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, AM. SOCIO. REV., Aug. 2004, at 498, 510 ("While the motive of controlling their profession and profits may have led physicians to agitate for laws banning abortion, the cultural frameworks available for making their case to the public led them to contest and attempt to control the reproductive practices of Anglo-Saxon women."). In deciding *Dobbs*, the Supreme Court recognized the AMA and Storers' illegitimate motives but rather remarkably—in light of the time period—asked "[a]re we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?" *Dobbs*, 142 S. Ct. at 2256.

199. *See* Joffe et al., *supra* note 99, at 777; Ziegler, *supra* note 190, at 742.

such as New York City.[200] Doctors resented these providers and were determined to bolster their professional monopoly over healthcare but did not control medical licensing.[201] Abortion became a convenient vehicle to differentiate allegedly elite professional physicians from "'irregular' health providers."[202] Storer and others marshalled misleading data to convince fellow physicians and eventually legislatures that abortion care provided by midwives and nurses was dangerous and inimical to the interests of women and society at large despite the practice's prevalence.[203]

Second, Storer and much of the AMA rank-and-file were alarmed by white Protestants' birth rates compared to those of other groups.[204] The nineteenth century saw an influx of immigration from predominately Catholic countries such as Ireland just as abortion was becoming more common among American Protestants.[205] Storer and his colleagues portrayed the perceived disparity in birth rates between Catholic immigrants and native-born Protestants as an existential threat to the United States and the "Anglo-Saxon race."[206] In Storer's words, "Shall [the United States] be filled by our own children or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation."[207] Accordingly, reproduction was a woman's civic duty, and abortion an "offense of national and political character."[208]

Lastly, the medical profession and much of the public viewed abortion and birth control as unnatural affronts to women's biological roles as mothers.[209] To Storer, a woman was "what she is in health, in character, in her charms, alike of body, mind and soul because of her womb alone."[210] Deeply ingrained sexism made it relatively easy for the AMA to convince state

200. *See* King, *supra* note 197, at 34.

201. *See id.*; Beisel & Kay, *supra* note 198, at 506; *see also* Ziegler, *supra* note 190, at 742 ("Campaigning against abortion allowed physicians to display what they framed as superior knowledge of fetal life and a better understanding of the morality of abortion.").

202. *See* Joffe et al., *supra* note 99, at 777; *see also* Beisel & Kay, *supra* note 198, at 506 ("Physicians had been denied the ability to license medical practice directly, so legislating who could perform abortion was one attempt to establish what ultimately became a firm monopoly over medical practice." (citations omitted)).

203. *See, e.g.*, Beisel & Kay, *supra* note 198, at 506; King, *supra* note 197, at 37 (describing efforts to depict abortion as inherently unsafe and unnatural).

204. *See* Ziegler, *supra* note 190, at 742; Reagan, *supra* note 190, at 1241.

205. Ziegler, *supra* note 190, at 741; *see also* Reagan, *supra* note 190, at 1241 ("In the 1840s and 1850s, abortion became commercialized and was increasingly used by married, white, native-born, Protestant women . . . .").

206. *See* Beisel & Kay, *supra* note 198, at 499 (quoting HORATIO STORER, WHY NOT?: A BOOK FOR EVERY WOMAN 85 (1867)).

207. *Id.* at 509 (quoting HORATIO STORER, WHY NOT?: A BOOK FOR EVERY WOMAN 85 (1867)).

208. *Id.* (quoting EDWIN M. HALE, THE GREAT CRIME OF THE NINETEENTH CENTURY: WHY IS IT COMMITTED?: WHO ARE THE CRIMINALS?: HOW SHALL THEY BE DETECTED?: HOW SHALL THEY BE PUNISHED? 4 (1867)).

209. King, *supra* note 197, at 32.

210. Beisel & Kay, *supra* note 198, at 506 (quoting JOHN D'EMILIO & ESTELLE FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 146 (1988)).

legislatures that women could not be trusted to make their own reproductive decisions at a time when the protestant power structure was under threat.[211]

In *Dobbs*, Justice Alito emphasized that twenty-eight out of thirty-seven states had criminalized abortion at all stages of pregnancy by 1868 without engaging with lawmakers' motivations.[212] Moreover, as Professor Aaron Tang has shown, nine of these twenty-eight states appeared to permit pre-quickening abortions.[213] To most Americans in the nineteenth century, pre-quickening abortions were "neither legally nor morally culpable."[214]

Once enacted, these new antiabortion laws were rarely and selectively enforced. Thousands of American women continued to have abortions every year.[215] Women could even buy abortifacients at drugstores.[216] Jurisdictions were generally reluctant to prosecute abortion cases because of the practice's prevalence and the difficulty of obtaining proof.[217] In particular, prosecutions would be hampered by women's unwillingness to name their abortion providers and doctors' reluctance to provide medical testimony if the defendant was a licensed physician.[218] In modern parlance, prosecutions were doomed by "case convictability."[219]

When prosecutors did investigate and charge abortion cases, they focused disproportionately on the abortions of unmarried working-class women even though abortion was as common among married women.[220] The former were forced to navigate the black market for abortion services, whereas wealthier married woman were able to receive safe abortion care in a gray market that provided "affluent white women with de facto immunities from statutory

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211. *See generally* King, *supra* note 197, at 38 ("[W]omen who practiced family limitation ignored the natural demands of duty, as defined by the nineteenth century view of womanhood, and in the process a special interest group—physicians—assumed control . . . .").

212. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).

213. *See* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1145 (2023); *see also* People v. Nixon, 201 N.W.2d 635, 638–39 (Mich. Ct. App. 1972) (suggesting that Michigan's abortion statute cannot be read to apply to pre-quickening abortions in light of the common law and lack of evidence that legislature meant to protect fetuses' interests in all stages of pregnancy).

214. Aaron Tang, *Lessons from* Lawrence*, How History Gave Us* Dobbs*—and How History Can Overrule It*, 133 YALE L.J. FORUM 65 (2023).

215. Reagan, *supra* note 190, at 1245.

216. *Id.*

217. *See id.* at 1245.

218. *See id.* at 1255–57. If women testified against their providers, some courts would require their testimony to be corroborated since they were complicit in their own abortions. *See, e.g.*, State v. Clark, 284 P.2d 700, 701 (Utah 1955); Wandell v. State, 25 S.W. 27, 28 (Tex. Crim. App. 1894) ("While the woman upon whom the abortion was attempted or produced may not be punishable, though consenting thereto, yet, being a witness, she may be an accomplice . . . .").

219. *See generally* Lisa Frohmann, *Convictability and Discordant Locals: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC'Y REV. 531, 535 (1997) (describing "convictability" as the likelihood that a jury would return a guilty verdict).

220. Reagan, *supra* note 190, at 1254; MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 42–43 (1996).

bans on abortion."[221] The goal of selective investigation and prosecution was not to vindicate the purported rights of the unborn but to enforce societal norms about premarital intercourse and incentivize marriage between "sweethearts."[222]

Even in cases involving "black market" abortions, nineteenth and twentieth century prosecutors would usually file charges only in extreme circumstances, such as when the woman was grievously injured, killed, or had been coerced into the procedure. Much of the time a de facto prerequisite was for law enforcement to secure a dying declaration.[223] Professor Leslie J. Reagan writes:

> From the late nineteenth century through the 1930s, the state prosecuted abortionists primarily after a woman died. Popular tolerance of abortion tempered enforcement of the laws. Prosecutors discovered early the difficulty of winning convictions in criminal abortion cases . . . . As a result, prosecutors concentrated on cases where they had a "victim"—a woman who had died at the hands of a criminal abortionist.[224]

Seifert v. State,[225] decided by the Indiana Supreme Court, exemplifies the type of situation that would result in criminal charges.[226] *Siefert* involved an unmarried woman whose partner had pressured her to obtain an abortion.[227] According to the woman's dying declaration, Seifert had impregnated her and then, after learning of her pregnancy, supplied her with a catheter to terminate the pregnancy.[228] The woman ultimately died after self-inducing her abortion.[229]

Prosecutors also focused on unsafe abortions provided by "'irregular' health providers."[230] In the Illinois case *People v. Hagenow*,[231] the defendant held herself out as a licensed physician who provided painless and nonsurgical abortion services.[232] In actuality, she lacked medical training and had killed several women after puncturing their uteruses.[233] To prove its case against this "professional abortionist," the prosecution introduced evidence of previous abortions that the woman had performed, including a dying declaration from another victim.[234]

In the absence of the mother's death, prosecutors would focus on cases involving coercion. An example of such a case is *Fondren v. State*,[235] in

221. GRABER, *supra* note 220, at 76.
222. Reagan, *supra* note 190, at 1260–61.
223. *See id.* at 1242.
224. *Id.* at 1247.
225. 67 N.E.100 (Ind. 1903).
226. *Id.*
227. *See id.* at 101.
228. *See id.*
229. *Id.*
230. Joffe et al., *supra* note 99, at 777.
231. 86 N.E. 370 (Ill. 1908).
232. *See id.* at 373–34.
233. *See id.* at 379–80.
234. *See id.* at 380.
235. 169 S.W. 411 (Tex. Crim. App. 1914).

which a young woman's stepfather was charged as an accomplice to her abortion.[236] The man allegedly impregnated the woman after molesting her from a young age.[237] He sought to terminate the pregnancy by providing her with abortifacients but directed her to a doctor after the drugs did not terminate the pregnancy.[238]

These cases demonstrate not only the types of extreme circumstances that would lead to charges, but also the practical difficulties facing prosecutors. The defendant's conviction in *Seifert* was reversed because the trial court had improperly excluded testimony that the woman had decided to self-induce her abortion.[239] *Hagenow* featured a powerful dissent that argued that the court should have never considered testimony regarding previous procedures performed by the "professional abortionist."[240] The stepfather in *Fondren* adamantly denied that he knew about his charge's pregnancy and his responsibility for her abortion.[241]

As set out in the next section, case convictability is likely to remain an issue for prosecutors. The costs of prosecution will far outweigh the benefits in most abortion-related cases.

B. Prosecutorial Discretion and Enforcement of Antiabortion Laws

Prosecutors may reasonably disagree on whether abortion is harmful and if the severe penalties imposed by antiabortion laws are proportionate to the crime's seriousness. Such disagreements are inevitable, which is why professional standards exhort prosecutors to also consider prudential factors such as the strength of the case, collateral impact on victims and witnesses, and potential noncriminal remedies.[242] These factors enable prosecutors to assess abortion cases without regard to the morality of the practice and should lead them to prioritize cases involving unsafe care and coercion.

Dobbs has not yet led to widespread enforcement of antiabortion laws because of the absence of criminal complaints.[243] But the mere filing of a complaint would not by itself trigger criminal charges. Rather, under the ABA's Criminal Justice Standards, "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."[244]

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236. *See id.* at 416.
237. *See id.* at 423–24.
238. *Id.* at 424.
239. Seifert v. State, 67 N.E. 100, 103 (Ind. 1903).
240. *See* People v. Hagenow, 86 N.E. 370, 382 (Ill. 1908) (Scott, J., dissenting).
241. *See id.* at 417.
242. *See id.*
243. *See* Kitchener, *supra* note 83.
244. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.3(a) (AM. BAR ASS'N 2017); *see* MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR A'SSN 2020).

In abortion cases, prosecutors will need to prove that the abortions occurred and that the defendants were directly or indirectly responsible. Since support for abortion rights is widespread and has been throughout American history, women are unlikely to cooperate with investigations and prosecutions.[245] Moreover, abortion providers and distributors of abortion drugs who operate in antiabortion states will wish to avoid detection and presumably will not keep records or otherwise document their services.[246]

When prosecutors do learn of allegedly unlawful abortions in their jurisdictions, they can endeavor to convince abortion patients to testify against their providers. If patients are recalcitrant, one option would be to subpoena their testimony. However, the use of subpoenas in analogous contexts has been widely condemned, and prosecutors would have to be willing to jail these women if they do not comply.[247] Even fervent opponents of abortion may balk at this prospect.

Before *Roe v. Wade*, women would also invoke the Fifth Amendment to avoid providing testimony against abortion providers.[248] They may seek to do so in contemporary prosecutions as well, notwithstanding that antiabortion laws may nominally exempt them from prosecution. The Supreme Court of Pennsylvania confronted this precise issue in a 1967 case and upheld the assertion of the Fifth Amendment, reasoning that if "the victim cannot be prosecuted for her part in the abortion, there is nothing in the law to prevent her prosecution for a crime unrelated to the abortion itself."[249] On the rare occasions when women did testify in abortion cases, some courts held that their testimony would have to be corroborated because they were accomplices in their own abortions.[250]

Some prosecutors might believe, notwithstanding evidentiary challenges, that they can still procure convictions against abortion providers. Yet, under

245. *See* Reagan, *supra* note 190, at 1242.

246. In states that maintain gestational bans, providers will presumably be hesitant to perform abortions that are inconsistent with the law, especially as authorities may be able to obtain medical records. *See generally* Kayte Spector-Bagdady & Michelle M. Mello, *Protecting the Privacy of Reproductive Health Information After the Fall of* Roe v. Wade, JAMA HEALTH F., June 2022, at 1, 3 (describing exceptions to the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of the U.S.C.), (HIPAA) that allow for disclosure to law enforcement).

247. *See* Courtney K. Cross, *Coercive Control and the Limits of Criminal Law*, 56 U.C. DAVIS L. REV. 195, 232–33 (2022) (describing the practice as "controversial" in domestic violence cases); Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627, 639–41 (2019) (describing controversy relating to the jailing of rape and domestic violence victims).

248. *See, e.g.*, Commonwealth v. Carrera, 227 A.2d 627, 629 (Pa. 1967); State v. Brown, 253 N.W. 836, 837–38 (Iowa 1934).

249. *See Carrera*, 227 A.2d at 629.

250. *See* State v. Clark, 284 P.2d 700, 701 (Utah 1955); Wandell v. State, 25 S.W. 27, 28 (Tex. Crim. App. 1894); *see also* Reagan, *supra* note 190. The corroboration requirement would also apply to other individuals involved in the abortion. For example, the Kentucky Supreme Court of reversed the conviction of one abortion provider because the only testimony about the abortion was provided by the woman's "paramour" who had arranged the abortion. *See* Richmond v. Commonwealth, 370 S.W.2d 399, 401 (Ky. 1963).

professional standards, this is the bare minimum.[251] Prosecutorial resources are not unlimited, and resources used on abortion cases could be devoted to other felony cases. The stakes for prosecutors are also high in abortion cases because any prosecution is likely to be scrutinized heavily, and acquittals would prove embarrassing.[252]

Separate from the difficulty of prosecuting and prevailing in abortion-related cases, the views of victims and witnesses are entitled to deference under prevailing professional standards. The ABA Criminal Justice Standards encourage prosecutors to consider both "the views and motives of victims" and "potential collateral impact on third parties, including witnesses or victims."[253] The NDAA Standards urge prosecutors to consider whether prosecution is in the victim's interest and if witnesses are available to testify.[254]

Historically, courts and legislators have treated women who obtained abortions as victims, notwithstanding that they could be prosecuted if they disclosed their abortions.[255] Regardless of the conceptualization, they are potential witnesses in any abortion-related prosecution. Few women will want to sacrifice their privacy to assist with prosecutions of their providers. Prosecutors will have to choose between abortion cases and other felony cases that have the full support of victims and witnesses.[256]

Lastly, a prosecutor may wish to decline an abortion-related case because of the availability of alternatives to criminal charges.[257] Medical boards can discipline doctors who provide abortion care in antiabortion states and even strip them of their medical licenses.[258] These boards are presumably better equipped than prosecutors and juries to address complex questions such as whether a particular abortion was medically necessary. Some antiabortion states also allow civil actions against providers and others who facilitate

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251. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3.4-4(a)(i) (AM. BAR ASS'N 2017); *see also* Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2199 (2010) ("[P]rosecutors are well-positioned to serve as front-end gatekeepers preventing weak cases from entering the litigation process at all.").

252. *See* Gershman, *supra* note 33, at 526 (describing general effects of acquittals on prosecutors' reputations).

253. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3.4-4(a)(vii), (x).

254. *See* NAT'L PROSECUTION STANDARDS §§ 4-1.3(c), 4-10.2(i) (NAT'L DIST. ATT'YS ASS'N 2023).

255. Ziegler, *supra* note 190, at 743.

256. *See generally* Medwed, *supra* note 251, at 2205 ("Prosecutorial loyalty to victims influences decision-making in ways contrary to the interests of criminal defendants.").

257. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3.4-4(x)(v)(i).

258. *See* JOFFE, *supra* note 95, at 31; *see also* Clinton Sandvick, *Enforcing Medical Licensing in Illinois: 1877–1890*, 82 YALE J. BIOLOGY & MED. 67, 73 (2009) (observing, that pre-*Roe*, "[i]f physicians performed abortions, they could lose their medical licenses.").

abortion care.[259] After Texas passed the Texas Heartbeat Act ("S.B. 8"),[260] the first of these state laws, the number of abortions performed in Texas fell by half.[261] Nearly 1,400 women a month left the state to obtain abortion care.[262] If civil mechanisms are strong enough deterrents, prosecutors may wish to refrain from pursuing criminal charges altogether.

Although district attorney's offices are unlikely to advance the public interest by pursuing charges in most abortion cases, they should not rule out abortion prosecutions entirely. For example, prosecutors should certainly charge providers who provide reckless and dangerous abortion care. Abortion is far safer than it was pre-*Roe*,[263] but the criminalization of the procedure will likely lead some women, especially low-income women, to turn to unlicensed providers.[264] Regardless of one's view of the morality of abortion, these providers should not be able to harm women with impunity. *Dobbs* has also led to a sharp increase in demand for medical abortion, and prosecutors should clamp down on manufacturers and distributors of unregulated abortifacients.[265]

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259. Scholarship on private enforcement of antiabortion law includes: I. Glenn Cohen, Rebecca B. Reingold & Lawrence O. Gostin, *Supreme Court Ruling on the Texas Abortion Law Beginning to Unravel* Roe v. Wade, 327 JAMA 621, 622 (2022); Georgina Yeomans, *Ordering Conduct yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, 131 YALE L.J.F. 513, 518–19 (2021); Richard D. Rosen, *Deterring Pre-viability Abortions in Texas Through Private Lawsuits*, 54 TEX. TECH L. REV. 115, 128 (2021) (questioning whether abortion plaintiffs would have standing). For a general critique of states' deputization of private parties to undermine constitutional rights, see Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187 (2023).

260. 2021 Tex. Gen. Laws 125 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2023)).

261. This decline is as compared to September 2020. *See* KARI WHITE, ASHA DANE'EL, ELSA VIZCARRA, LAURA DIXON, KLAIRA LERMA, ANITRA BEASLEY, JOSEPH E. POTTER & TONY OGBURN, TEX. POL'Y EVALUATION PROJECT, OUT-OF-STATE TRAVEL FOR ABORTION FOLLOWING IMPLEMENTATION OF TEXAS SENATE BILL 8 (2022), https://sites.utexas.edu/txpep/files/2022/03/TxPEP-out-of-state-SB8.pdf.

262. *See id.*

263. As Linda Greenhouse explains:

> Abortion during the first trimester of pregnancy, when eighty-nine percent of abortions take place, is extremely safe, with complications that require a hospital visit occurring in less than 0.05% of early abortions. Of this small number of complications, many are minor, presenting symptoms similar to those of early miscarriage, which is a common reason for emergency-room visits and a condition that emergency-room physicians are accustomed to treating."

See generally Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1454 (2016) (footnotes omitted).

264. In repealing New York's abortion ban in 1972, Governor Nelson A. Rockefeller observed that abortion bans ensure "that a safe abortion would remain the optional choice of the well-to-do woman, while the poor would again be seeking abortions at a grave risk to life in back-room abortion mills." Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2037 n.20 (2011) (quoting Governor Nelson A. Rockefeller, Veto Message (May 13, 1972), *reprinted in* BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING (Linda Greenhouse & Reva Siegel eds., 2010)).

265. *See* Caroline Kitchener, *Covert Network Provides Pills for Thousands of Abortions in U.S. Post*-Roe, WASH. POST (Oct. 18, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/10/18/illegal-abortion-pill-network/ [https://perma.cc/JZ6S-L8E7].

These types of cases will be easier to prove because women who are endangered by substandard care or unregulated drugs will be more apt to cooperate with investigators. Medical testimony may also be available that demonstrates the dangerous nature of the care. If the provider in question is unlicensed, they would also fall outside of the jurisdiction of medical boards.[266] Unlicensed providers and predatory distributors threaten public welfare in abortion-protective and antiabortion states alike.[267]

District attorney's offices should be open to charging cases involving coercion as well. Power imbalances between the sexes are not as pronounced as they were pre-*Roe*, and contemporary medical providers place more emphasis on patient autonomy. Nevertheless, one can certainly conceive of cases akin to *Fondren*, in which older adults exploit their charges and then pressure them to terminate their pregnancies.[268] Defendants in these cases may be willing to plead to abortion-related charges but not to rape or incest charges, potentially sparing their victims from having to testify about these crimes.[269]

Although ethical standards counsel against enforcing antiabortion laws in most cases, unsafe care and coercion are exceptions. The next section turns to another crucial consideration for contemporary prosecutors: whether to apply antiabortion laws extraterritorially.

C. Extraterritorial Enforcement of Antiabortion Laws

Since the Supreme Court's decision in *Dobbs*, states have largely been free to regulate abortion as they see fit.[270] However, interstate conflicts can arise when antiabortion states purport to criminalize care that is partly or wholly provided in abortion-protective states. The question of *where* an abortion occurred is far more complicated than it may appear at first glance,[271] creating uncertainty about, inter alia, whether women can continue to travel to abortion-protective states to obtain care.[272]

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266. For a discussion of state medical boards' roles in assuring competent care, see Timothy Stoltzfus Jost, *Oversight of the Quality of Medical Care: Regulation, Management, or the Market?*, 37 ARIZ. L. REV. 825, 859–64 (1995).

267. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4(a)(iii), (iv) (AM. BAR ASS'N 2017) (exhorting prosecutors to consider the extent of the harm and the effect of non-prosecution on the public welfare).

268. Fondren v. State, 169 S.W. 411, 423–24 (Tex. Crim. App. 1914).

269. As noted, prosecutors should consider the views of victims in making charging decisions. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3.4-4(a)(vii), (x).

270. *See* Richard H. Fallon, Jr., *If* Roe *Were Overruled: Abortion and the Constitution in a Post-*Roe *World*, 51 ST. LOUIS U. L.J. 611, 613 (2007) ("If Roe were overruled, it is true that there would be little doubt about the states' power to prohibit abortions within their territorial jurisdictions (in the absence of national legislation enacted by Congress) . . . ."); *see also* Cohen et al., *supra* note 14, at 52–64 (examining federal preemption of laws regulating medical abortion). Congress could preempt state antiabortion laws but has yet to do so, except in narrow areas that are currently being litigated. *See supra* Part I.

271. *See* Cohen et al., *supra* note 14, at 10.

272. For an empirical analysis of travel times for abortion services post-*Dobbs*, *see* Benjamin Rader, Ushma D. Upadhyay, Neil K.R. Sehgal, Ben Y. Reis, John S. Brownstein &

Consider a woman who leaves Texas to obtain an abortion in New Mexico. In the case of a surgical abortion, the abortion would presumably occur wholly in New Mexico. But several predicate acts may have taken place in Texas.[273] For example, the New Mexico clinic may have advertised in Texas, spoken to the woman in Texas, and even connected the woman to individuals or entities in Texas that could arrange travel to New Mexico for purposes of obtaining an abortion.

The situation is even more complicated with respect to medical abortion. Medical abortions generally involve two different drugs: mifepristone and misoprostol.[274] The Texas woman could take both drugs in New Mexico and remain in New Mexico until her pregnancy terminates. Or she may choose to return to Texas before the abortion is completed but after consuming one or both drugs.[275] Increasingly, women in Texas and other antiabortion states need not travel at all to obtain mifepristone and misoprostol from out-of-state providers, and this will continue to be the case as long as medical abortion is broadly legal.[276]

A few states have raised the specter of legislation expressly targeting out-of-state abortion providers.[277] Even in the absence of specific legislation, prosecutors might be able to enforce generally applicable antiabortion laws extraterritorially. Only twenty states subscribe to the presumption against extraterritoriality in the interpretation of criminal

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Yulin Hswen, *Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the* Dobbs v. Jackson Women's Health *Decision*, 328 JAMA 2041 (2022).

273. For an example of a bill criminalizing certain predicate acts, see S. 1373, 124th Gen. Assemb., Reg. Sess. § 44-41-880 (S.C. 2022) ("It is unlawful to knowingly or intentionally to recruit, harbor, or transport a pregnant minor who resides in this State to another state to procure an abortion or to obtain an abortifacient.").

274. Donley, *supra* note 18, at 634 (noting that 97 percent of medical abortions in the United States use this drug combination).

275. *See generally* Katherine Gambir, Camille Garnsey, Kelly Ann Necastro & Thoai D. Ngo, *Effectiveness, Safety and Acceptability of Medical Abortion at Home Versus in the Clinic: A Systematic Review and Meta-analysis in Response to COVID-19*, BMJ GLOB. HEALTH, Dec. 2020, at 1, 2 ("Home-based medical abortion may involve the pregnant person taking both mifepristone and misoprostol at home or misoprostol only at home after taking mifepristone at a clinic.").

276. *See generally* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 3) ("[E]ven in states that ban abortion (including medical abortion), mailed abortion pills, grassroot distribution networks, and online sources make abortion pills relatively accessible and difficult to control."). A lawsuit to enjoin the Food and Drug Administration's approvals of mifepristone was granted in part by a judge in the Northern District of Texas but was subsequently stayed by the Supreme Court. *See* All. for Hippocratic Med. v. U.S. Food & Drug Administration, 668 F. Supp. 3d 507 (N.D. Tex. 2023), *order stayed sub nom.* Danco Lab'ys L.L.C. v. All. for Hippocratic Med., 143 S. Ct. 1075 (2023).

277. For example, a Missouri bill would criminalize out-of-state abortion care when payment is made from inside the state or the provider advertised to a Missouri resident. *See* S.B. 1202, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

statutes.[278] Seventeen states reject the presumption against extraterritoriality, and thirteen states have taken no express position.[279]

The constitutionality of criminalizing out-of-state abortion care has been described as "excruciatingly challenging" and is beyond this Article's scope.[280] Although states can unquestionably exercise criminal jurisdiction over some out-of-state conduct, especially when their own residents' conduct is involved,[281] the U.S. Constitution's Due Process Clause and Full Faith and Credit Clause would protect a defendant who lacks any connection to the state.[282] According to some scholars, knowingly scheduling and performing an abortion on a citizen of an antiabortion state could provide a sufficient nexus to the state.[283] As Professor Richard H. Fallon, Jr. predicted nearly fifteen years ago, courts will have to weigh if "the [antiabortion] state's interest in the life of a fetus gave it a sufficient 'contact' to make the exercise of its regulatory jurisdiction neither 'arbitrary nor fundamentally unfair.'"[284]

Other constitutional provisions such as the Privileges and Immunities Clause and the Interstate Commerce Clause could be implicated as well. Justice Kavanaugh's concurring opinion in *Dobbs* flagged the former as providing protection to women who wish to leave their states to obtain abortion care.[285] Nevertheless, if criminal prohibitions are directed at out-of-state abortion providers and not at travel specifically, they may withstand constitutional scrutiny.[286]

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278. *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1403 (2020).

279. *See id.* at 1413, 1418.

280. Susan F. Appleton, *Gender, Abortion, and Travel After* Roe*'s End*, 51 ST. LOUIS U. L.J. 655, 682 (2007).

281. For example, the Model Penal Code provides that a state can regulate criminal conduct "outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest." MODEL PENAL CODE § 1.03(1)(f) (AM. L. INST. 2023); *see also* RESTATEMENT (SECOND) OF CONFLICT OF L. § 9 cmt. f (AM. L. INST. 1971) ("An individual State of the United States also has jurisdiction to apply its local law in certain instances to its absent citizens."); *see also* Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 875 (1993) ("States do possess the power to regulate their citizens' conduct in other states in the usual case.").

282. *See generally* Fallon, *supra* note 270, at 633 (suggesting that the defendant would be constitutionally entitled to fair notice that they are violating the law of an antiabortion state).

283. *See, e.g.*, *id.*; Appleton, *supra* note 280, at 275–76; William Van Alstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade*: An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L.J. 1677, 1685 (suggesting that abortions performed within and without a state can both be proscribed).

284. Fallon, *supra* note 270, at 633 (quoting Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985)).

285. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

286. Professor Mark Rosen has questioned both the applicability of the Privileges and Immunities Clause and Commerce Clause to antiabortion laws. *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 894–929 (2002); *see also* Appleton, *supra* note 280, at 675 (expressing skepticism that a state's punishment of an out-of-state abortion infringes on the narrow right of travel under the Constitution's Privileges and Immunities Clause).

Although these novel constitutional questions will undoubtedly captivate scholars and courts for years, prosecutors need not exercise their authority to charge cases involving out-of-state abortion care. Prevailing ethical standards once again provide a useful framework for consideration of this issue.

The ABA Criminal Justice Standards and NDAA Standards contemplate a model of prosecutorial cooperation and coordination.[287] Another jurisdiction's ability to investigate and prosecute the crime in question serves as grounds to decline to press charges.[288] Consequently, prosecutors have historically construed their power to charge conduct outside of their jurisdictions narrowly.[289] One empirical study of federal prosecutors in Illinois found that—notwithstanding substantial overlap between state and federal criminal jurisdiction—the most common reason for declinations was the possibility of state prosecution.[290] Federal prosecutors defer to their state counterparts even when state prosecutors are unlikely to charge the offenses in question and there are no precise state law analogues.[291] If prosecutors routinely decline cases in which they have unquestioned authority to prosecute, they should decline cases involving extraterritorial conduct in which their constitutional authority is very much in doubt.

The many practical impediments to successfully prosecuting abortion cases discussed in the preceding section also loom larger when the abortions occur outside of the prosecutor's jurisdiction. Providers and other potential defendants located out-of-state are unlikely to surrender to authorities of antiabortion states to face felony charges and will be reluctant to even visit antiabortion states.[292] Prosecutors will need the cooperation of abortion-protective states to extradite defendants, obtain witness testimony, and collect other evidence such as medical records.[293]

Eighteen states have specifically adopted interstate shield laws to frustrate abortion-related investigations and prosecutions.[294] For example, Connecticut law provides that:

> No judge shall issue a summons in a case where prosecution is pending, or where a grand jury investigation has commenced or is about to commence for a criminal violation of a law of such other state involving the provision

287. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-3.1(c) (AM. BAR ASS'N 2017); NAT'L PROSECUTION STANDARDS § 2-3.1 (NAT'L DIST. ATT'YS ASS'N 2023).

288. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-4.4(xv).

289. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 550–51 (2011).

290. *See* Frase, *supra* note 128, at 262.

291. *See id.* at 275–76.

292. *See* Cohen et al., *supra* note 14, at 72.

293. *See* Cohen et al., *supra* note 14 , at 95–96; Rebecca Horton, *iSpy Someone Getting an Abortion: The Use of Geolocation Data in the Post-Dobbs Era*, B.C. INTELL. PROP. & TECH. F., July 2023, at 25–27 (discussing protections for personal data in California and Connecticut in connection with abortion-related investigations); *see also* Jenia I. Turner, *Interstate Conflict and Cooperation in Criminal Cases: An American Perspective*, 4 EUR. CRIM. L. REV. 114, 122 (2014) (describing friction between states on extradition and admissibility of evidence).

294. *See* Cohen et al., *supra* note 14, at 43.

> or receipt of or assistance with reproductive health care services . . . that are legal in this state.[295]

Governors have issued executive orders that provide many of the same protections in abortion-protective states without abortion shield laws.[296] To gain custody of abortion providers and other potential defendants, antiabortion states may argue that federal law requires states to extradite defendants who are charged with abortion-related crimes.[297] But federal extradition laws apply only to "fugitives" persons who flee from one jurisdiction to another.[298] A New Mexico doctor is not a Texas "fugitive" by virtue of providing abortions in New Mexico.[299] As a result, Texas would have to rely on general principles of comity to have the doctor arrested and extradited.[300] As with earlier national struggles over civil rights, states that recognize a right to abortion are unlikely to cooperate with states that do not.[301]

A prosecutor in an antiabortion state could decide to proceed with a case against an out-of-state provider, believing that it will deter abortion-related travel. But such a case would require significant resources because of the manifold constitutional and logistical challenges—resources that could go to addressing criminal violations within the prosecutor's jurisdiction. Abortion-protective states would almost certainly retaliate by expanding abortion shield laws and passing blocking statutes to insulate their providers.[302] Without the prospect of interstate cooperation, prosecutors' attempts to hold out-of-state abortion providers accountable will fail and potentially embolden these providers. Rather than pursuing largely symbolic abortion cases involving out-of-state abortions, prosecutors would be better served to focus on cases involving unsafe care and coercion in their own jurisdictions.

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295. 2022 Conn. Acts 68 (Reg. Sess.) (codified at CONN. GEN. STAT. § 52-571m (2023)).

296. *See* Cohen et al., *supra* note 14, at 43. The Biden Administration has also taken the position that HIPAA prevents hospitals and other entities from sharing information about abortion care with investigators in antiabortion states. *See also* Alice Miranda Ollstein, *Biden's HIPAA Expansion for Abortion Draws Criticism, Lawsuit Threats,* POLITICO (July 18, 2023), https://www.politico.com/news/2023/07/18/biden-hipaa-expansion-abortion-00106694 [https://perma.cc/J8E4-836C].

297. *See* 18 U.S.C. § 3182.

298. *See id.*

299. *See id.*; *see also* Turner, *supra* note 293, at 124 (defining nonfugitive as a "wanted suspect . . . not present in the demanding state when the crime occurred").

300. The Governor of New Mexico has issued an executive order that would likely block extradition. *See* Cohen et al., *supra* note 43. Courts are very reluctant to compel governors to extradite defendants even when the requirements of 18 U.S.C. § 3182 are met. *See* Gregory K. Wanlass, *Interstate Extradition: Should the Asylum State Governor Have Unbridled Discretion*, 1980 BYU L. REV. 376, 401.

301. *See generally* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 180–81 (2013) (describing extradition and rendition controversies related to slavery); *see also* Eric W. Rise, *Crime, Comity and Civil Rights: The NAACP and the Extradition of Southern Black Fugitives*, 55 AM. J. LEGAL HIST. 119, 122 (2015) (describing the National Association for the Advancement of Colored People's efforts to block extradition in cases unrelated to slavery).

302. For a discussion of blocking statutes in response to private enforcement of antiabortion laws, *see* Michaels & Noll, *supra* note 259, at 42–43.

This Article's guidance to prosecutors allows for prosecutorial neutrality in the abortion wars. However, just as prosecutors who oppose abortion rights must be mindful of the limits of their powers, prosecutors who support these rights must not overstep their authority and subvert democratic processes.

IV. PROSECUTORS AND POLITICAL REFORM

The notion that ethical standards constrain prosecutorial decision-making in abortion-related cases may seem outmoded at a time when many commentators believe that prosecutors can transform the criminal justice system.[303] The progressive prosecutor movement in particular has drawn attention to the power of prosecutors to blunt and remake unjust laws.[304] Prosecutors in localities that strongly support abortion rights may be inclined to disregard antiabortion laws rather than relying on legislatures to change these laws.

Ethical standards are not inexorable commands.[305] But flouting these standards in abortion-related cases may have unintended consequences. Prosecutorial norms "not only ensure fair results, they also reassure the public about the legitimacy of the process."[306] These norms are especially important with respect to charging because charging decisions involve complex judgments about both facts and law that the public is ill-suited to make.[307] Ethical standards make prosecutorial exercises of charging discretion more predictable, evenhanded, and uniform.[308] A prosecutor in a locality that opposes criminalization of abortion should be open to enforcing

303. Notable works on prosecutorial responsibility for the criminal justice system's defects include: Joe, *supra* note 116, at 1211; Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305 (2017); Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1078 (2016). *See also* Milan Markovic, *The Legal Ethics of Family Separation*, 57 U. RICH. L. REV. 487, 530 (2023) ("Prosecutorial discretion is inevitable and can be deployed to dismantle the apparatus of mass incarceration and family separation instead of building upon it.").

304. *See, e.g.*, Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. L. REV. 23, 24, 30–31 (2021); Emily Bazelon, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION, at xxvi–xxvii (2019); *see also* Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 726–30 (2020) (comparing the progressive prosecutor movement to the professionalization movement in prosecutors' offices in the late 1800s).

305. The ABA Criminal Justice Standards are "aspirational" and represent "best practices." CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.1(b) (AM. BAR ASS'N 2017). The NDAA Standards are intended to be "an aspirational guide to professional conduct in the performance of the prosecutorial function." NAT'L PROSECUTION STANDARDS, introductory cmt. (NAT'L DIST. ATT'YS ASS'N 2023).

306. *See* Green & Roiphe, *supra* note 304, at 765.

307. *See id.* at 763.

308. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-2.4(a); *see also* Green & Roiphe, *supra* note 304, at 763 ("[I]ndependence from the public and the political establishment goes to the core objective of the prosecutor's role: exercising discretion on behalf of the public based on a professional commitment to assess the evidence objectively and make decisions in a fair and even-handed way.").

antiabortion laws for the same reasons that a prosecutor in a locality that opposes gun control should be open to enforcing gun control measures. The alternative is a system of hyper-localized laws.

Charging decisions can be legitimate yet unpopular. If a prosecutor's constituents oppose a particular law, they may be against efforts to enforce that law regardless of the culpability of a particular defendant. More often, constituents would prefer that a prosecutor bring charges even in cases when that prosecutor cannot proceed.[309] For example, the public would likely accept a lower charging threshold than "probable cause" for especially brutal crimes, but such prosecutions would be unethical.[310] If prosecutors commit to following the same process regardless of the law or cause at issue, their charging decisions are likely to be regarded as more legitimate.[311]

When prosecutors ignore laws that are disfavored by their constituents, they also enable other criminal justice actors to eschew responsibility for their actions. As has been frequently observed, criminal lawmaking is a "one-way ratchet."[312] If a prosecutor does not enforce antiabortion laws or interprets statutory exceptions so broadly that they cover almost all abortions, legislatures face little downside in passing draconian abortion restrictions.[313]

The progressive prosecution movement has drawn significant attention to prosecutorial discretion, but the movement's tenets remain elusive.[314] On one account, both a prosecutor who refuses to enforce antiabortion laws and one who chooses to enforce such laws against only privileged groups would qualify as a progressive prosecutor.[315] There is some question whether progressive prosecutors actually conceive of their roles differently from other prosecutors.[316] The main point of departure appears to be that progressive

309. *See generally* Stuntz, *supra* note 34, at 537 ("[M]ore prosecutions and convictions are, from voters' standpoint, a good thing, and elected officials will want to please the voters."); *see also* Barno & Lynch, *supra* note 121, at 42–51 (summarizing empirical research on bias in charging decisions).

310. MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020).

311. *See generally* Green & Roiphe, *supra* note 154, at 1461 ("[T]he means of reaching the result are important in themselves. They provide assurance to the public that prosecutors are considering their interest in justice in the broadest terms . . . .").

312. *See* Stuntz, *supra* note 34, at 508; Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007).

313. Similarly, a prosecutor's unilateral decision to apply an antiabortion law extraterritorially means that the legislature need not first consider the potential for interstate conflict on the issue.

314. Professor Paul Butler has distinguished nominally progressive prosecutors who endeavor to rein in the criminal justice system's excesses from anticarceral prosecutors who wish to dismantle it. *See* Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1993 (2022); *see also* Maybell Romero, *Moving Past "Progressive" Prosecution in the Wake of the Trump Administration*, 69 WASH. U. J.L. & POL'Y 275, 277 (2022) (describing the term "progressive prosecutor" as "vacant, meaningless, and political").

315. *See generally* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1441–42, 1446 (2021) (contrasting typologies of progressive prosecutors).

316. *See* Holmes Didwania, *supra* note 47, at 50 (suggesting that progressive prosecutors merely publicize the lenient treatment that prosecutors have traditionally afforded to nonviolent offenders); *see also* Alexandra L. Cox & Camila Gripp, *The Legitimation*

prosecutors place somewhat less emphasis on convictability for nonviolent crimes.[317]

Typological imprecision aside, prosecutors (progressive or otherwise) do not operate in a vacuum. As Professor Jeffrey Bellin has cautioned, "the criminal justice system is not a prosecutorial fiefdom."[318] Reform-minded prosecutors have clashed with police, legislatures, and their own subordinates on issues that are far less fraught than abortion.[319] After Marilyn Mosby, the former chief prosecutor for the city of Baltimore, stopped charging certain low-level crimes, the Governor of Maryland directed the Attorney General to take a "second look" at the declinations and added twenty-five prosecutors to his office for this purpose.[320] San Francisco's high-profile progressive prosecutor was recalled and replaced by a former subordinate because of his refusal to charge quality-of-life offenses.[321]

The more high-profile the prosecutor's action, the more swiftly other legal actors will tend to respond. When a Florida prosecutor announced a blanket ban on death penalty enforcement in a case involving the murder of a pregnant woman, Florida's then-governor removed the prosecutor from the case as well as from twenty-six other cases.[322] Her removal was ultimately upheld by the Supreme Court of Florida.[323] Political conditions can easily shift and undermine reform even when prosecutors believed that they have been elected on reform mandates.[324]

These dynamics are already present in abortion cases. Local prosecutors' pledges to not enforce antiabortion laws have led state legislatures to empower attorneys general to enforce them in their stead.[325] Speculation about extraterritorial enforcement of antiabortion laws has caused abortion-protective states to pass shield laws.[326] Prosecutors have unique

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Strategies of "Progressive Prosecutors,*"* 31 SOC. & LEGAL STUD. 657, 658 (2022) (finding that progressive prosecutors tended to minimize their responsibility for harsh punishments).

317. Ryan C. Meldrum, Don Stemen & Besiki Luka Kutateladze, *Progressive and Traditional Orientations to Prosecution, An Empirical Assessment in Four Prosecutorial Offices*, 48 CRIM. JUST. & BEHAV. 354, 367 (2021).

318. Bellin, *supra* note 104, at 175.

319. *See, e.g.*, Davis, *supra* note 154, at 15–22; Butler, *supra* note 314, at 1994–98; *see also* Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403, 1405 (2023) (describing the phenomenon of subordinate pushback as "mutiny").

320. *See* Butler, *supra* note 314, at 1995.

321. *See* Malathi Nayak & Joel Rosenblatt, *New San Francisco DA Vows to Fight the City's 'Lawlessness,'* BLOOMBERG (Dec. 2, 2022, 10:00 AM), https://www.bloomberg.com/news/articles/2022-12-02/new-san-francisco-da-jenkins-vows-to-fight-city-s-lawlessness [https://perma.cc/N7C4-FENM]; Michael Barba, '*They're Like Hillary's Emails': Powerhouse Behind Boudin Recall Dismisses Ethics Concerns over Brooke Jenkins*, S.F. STANDARD (Nov. 15, 2022, 5:00 AM), https://sfstandard.com/criminal-justice/theyre-like-hillarys-emails-powerhouse-behind-boudin-recall-dismisses-ethics-concerns-over-brooke-jenkins/ [https://perma.cc/39P6-BH7J].

322. Butler, *supra* note 314, at 1996.

323. *See id.* at 1998.

324. Davis, *supra* note 154, at 22–23.

325. *See* Houck, *supra* note 101.

326. *See supra* Part III.C.

insight into the criminal justice system and should advocate for needed reforms.[327] But advocacy, whether it be individual or under the auspices of professional groups, should not detract from prosecutors' duties to enforce the law as it exists in accordance with professional norms.[328]

Prosecutor-led campaigns against high-profile laws can also divert attention from the laws themselves. The Andrew Warren saga offers an illustration. Although a federal court found that Warren's criticism of *Dobbs* did not constitute a violation of Warren's professional duties,[329] Governor DeSantis was able to seize on the comments to make Warren the focus of the state's abortion debate. Florida's actual antiabortion law took a backseat to the issue of how Warren would handle abortion cases that may not ever have been referred to his office for prosecution.

The fate of *Roe v. Wade* should serve as a reminder about the perils of relying on elite legal actors over popular mobilization to secure civil rights. Conflict over abortion did not begin with *Roe*,[330] but the antiabortion movement was able to shift the debate away from criminalization to *Roe*'s alleged "exercise of raw judicial power."[331] Thus, it was able to unify disparate constituencies against the decision as part of a broader political realignment.[332] *Roe*'s impact extended far beyond conflict over abortion as conservative activists coalesced around a political agenda focused on "counter-rights" and the rolling back of precedents that allegedly short-circuited democratic processes.[333]

Since *Roe*'s reversal, the public has been forced to confront the day-to-day reality of abortion criminalization. Early reactions from states such as Kansas and Kentucky suggest that *Roe*'s compromise on abortion rights was far more sensible and well-received than Justice Alito's opinion in *Dobbs* acknowledges.[334] Now that the political tides have turned against abortion

327. *See* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-1.2(f) (AM. BAR ASS'N 2017); NAT'L PROSECUTION STANDARDS § 1-1.2 (NAT'L DIST. ATT'YS ASS'N 2023).

328. *See supra* note 304; Legal Scholars' Amicus Curiae Brief in Support of Andrew H. Warren, *supra* note 147, at 8.

329. Ord. on the Merits, *supra* note 107, at 57–58.

330. *See* Greenhouse & Siegel, *supra* note 264, at 2074–75 (discussing historical antecedents).

331. Roe v. Wade, 410 U.S. 113, 222 (1973) (White, J., dissenting), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

332. *See, e.g.*, Dahlia Lithwick, *Foreword:* Roe v. Wade *at Forty*, 74 OHIO ST. L.J. 5, 5 (2013); Greenhouse & Siegel, *supra* note 264, at 2073 ("*Roe* not only is believed by many to have ignited conflict over abortion but also is commonly represented as having single-handedly caused societal polarization and party realignment around the question of abortion.").

333. *See* Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1267–68 (2005).

334. Notably, all referenda held after *Dobbs* have blocked antiabortion laws. *See* Rachel Rebouché, *Abortion Rights Referendums Are Winning—with State-by-State Battles over Rights Replacing National Debate*, CONVERSATION (Nov. 18, 2022, 8:32 AM), https://theconversation.com/abortion-rights-referendums-are-winning-with-state-by-state-battles-over-rights-replacing-national-debate-193490 [https://perma.cc/UU26-R4UN].

criminalization, abortion opponents are wholly dependent on the judiciary to cement their gains.[335]

Some prosecutors in antiabortion states are understandably reluctant to enforce unpopular antiabortion laws. Nevertheless, prosecutors in a morally pluralistic democracy must be prepared to enforce laws that they and their constituents oppose. Whatever prosecutors' views may be, there are strong grounds to charge abortion cases involving unsafe care and coercion. Expecting prosecutors to serve as central figures in the abortion wars could lead to a loss of public confidence in prosecutors' neutrality and professional judgment while undermining more enduring reforms.

CONCLUSION

Far from resolving the abortion question, the Supreme Court's decision in *Dobbs* has given rise to fierce interstate and federal-state conflicts over abortion rights. State and local prosecutors will determine how to interpret and enforce antiabortion laws in the first instance. Although prosecutors will differ on the morality of abortion, this Article has maintained that prevailing ethical rules and standards can inform prosecutorial discretion and make charging decisions more objective and less politicized.

Prosecutors cannot simply ignore antiabortion laws and other laws that they regard as unjust. In a morally pluralistic society, prosecutors will inevitably oppose some laws that they are meant to enforce, but neither prosecutors' views nor those of their communities should dictate charging decisions. Scholarly defenses of prosecutorial nullification fail to account for prevailing ethical rules and standards that are designed to confer legitimacy and not popularity.

Abortion was legal for much of American history. The AMA's campaign to criminalize the practice in the late 1800s was motivated by professional self-interest, sexism, and xenophobia but did not lead to a surge of prosecutions. As prosecutors by and large understood pre-*Roe*, enforcement of antiabortion laws should be limited to extreme cases such as those involving unsafe care and coercion because of the sensitive nature of these cases and the inherent challenges in obtaining convictions. Extraterritorial

335. In the long term, abortion opponents are likely to argue for fetal personhood under the Constitution to trump the laws of abortion-protective states. *See, e.g.*, Lisa Lerer & Katie Glueck, *After* Dobbs, *Republicans Wrestle with What It Means to Be Anti-abortion*, N.Y. TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/us/politics/abortion-republicans-roe-v-wade.html [https://perma.cc/2ZSD-7MDT]; David Schultz, *Fetal Personhood Promises to Be Next Major Fight in Abortion War*, BLOOMBERG (Jan. 9, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/fetal-personhood-promises-to-be-next-major-fight-in-abortion-war [https://perma.cc/7HCV-BHUR]. As Professor Mary Ziegler has argued, fetal personhood has been the goal for many abortion opponents since the 1960s. Mary Ziegler, *The Next Step in the Anti-abortion Playbook Is Becoming Clear*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html [https://perma.cc/SYF2-PJB4]. For an elaboration of the fetal personhood argument under the Constitution, see John Finnis & Robert B. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 HARV. J.L. & PUB. POL'Y 930 (2022).

applications of antiabortion laws are constitutionally suspect and will only exacerbate interstate conflicts over the issue.

The Supreme Court's issuance of *Dobbs* coincided with unprecedented public interest in prosecutorial power. This Article recognizes that prosecutors can make the criminal justice system more just and humane through their charging decisions and law reform efforts. Nevertheless, prosecutors are not all-powerful, and when prosecutors eschew neutrality in the abortion wars, they divert attention away from antiabortion laws while sowing confusion about their roles. Expecting prosecutors to lead in advancing civil rights places these rights on precarious footing and neglects that prosecutors best seek justice case by case.