

# Under Pressure: The Effects of *Dobbs* on Lawyers Advising Abortion Providers

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## INTRODUCTION

Every single day I have a conversation with a patient in which I say, ‘Abortion would be a really safe and valid option for you and I’m so sorry that I can’t do it here.’”<sup>1</sup> This is what a Texas physician said, grappling with the implications of the *Dobbs* decision.<sup>2</sup> In states like Texas, doctors<sup>3</sup> are virtually powerless to determine when they may intervene in a pregnancy and not face liability.<sup>4</sup> They may feel required to tell patients—with much strife—that the patient’s symptoms are not “among the symptoms they are looking for” to allow them to provide a medically necessary abortion.<sup>5</sup> Indeed, a Colorado OB/GYN lamented that she could not render necessary care “because [the patients] are not dying yet.”<sup>6</sup> She further bemoaned, “I cannot believe I have to say, you’re not dying yet,” making clear just how personal these decisions are for doctors and their patients alike.<sup>7</sup>

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\* “Georgetown University Law Center, J.D. expected 2024; Wesleyan University, B.A. 2018. © 2023, Abigail L. Cahn-Gambino. Abigail would like to thank Michele Goodwin, Robert Tuttle, and her mother for their invaluable counsel (as it were).

1. Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an ‘Impossible Choice’ when Providing Care*, NPR (June 24, 2022, 4:26 PM), <https://www.npr.org/sections/health-shots/2022/06/24/1107316711/doctors-ethical-bind-abortion> [<https://perma.cc/YJP5-8ZSH>].

2. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

3. I use doctor, physician, medical professional, health care professional, and abortion provider interchangeably throughout this paper. This is because different state codes include different people as abortion providers. In Texas, for example, only physicians can perform abortions, and an a “physician” is defined as a “medical doctor and a doctor of osteopathic medicine.” TEX. HEALTH & SAFETY CODE § 171.061(7) (2021). In Virginia, on the other hand, both physicians and nurse practitioners may perform abortions. VA. CODE § 18.2-72 (2020).

4. The physicians’ fears are likely exacerbated by the fact that they face singular liability: “[a]bortion bans include penalties only for people involved in facilitating illegal abortions,” not the pregnant people themselves. Caroline Kitchener, *Conservatives Complain Abortion Bans Not Enforced, Want Jail Time for Pill ‘Trafficking’*, WASH. POST (Dec. 14, 2022, 7:30 AM), <https://www.washingtonpost.com/politics/2022/12/14/abortion-pills-bans-dobbs-roe/> [<https://perma.cc/EWL8-5J9T>]; see Dov Fox, *Medical Disobedience*, 136 HARV L. REV. 1030 (2023) (exploring the dilemmas of medical professionals with respect to abortions that may impose a legal risk on them).

5. 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/2022/07/26/111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare> [<https://perma.cc/7582-FSZ8>].

6. Nilo Tabrizy, Kassie Bracken, Mark Boyer, & Mariam Dwedar, “*Do No Harm*”: OB-GYNs Weigh the Legal Impact of Abortion Bans, N.Y. TIMES, Sept. 10, 2022, at 04:53, <https://www.nytimes.com/video/us/100000008489880/abortion-bans-maternal-health.html> [<https://perma.cc/9NWR-X6WK>].

7. *Id.* at 4:57.

As is evident from the stories of all the physicians above, in a post-*Dobbs* world, doctors in states with abortion bans often face a catch-22: “harm patients [or] break the law.”<sup>8</sup> Thus, doctors will enlist the help of lawyers in making such difficult decisions—lawyers in this role are the subject of this Note. These lawyers play an especially important role given that the stakes are high if a physician violates their state’s—or even another state’s—law.<sup>9</sup> Indeed, while many physicians in a pre-*Roe*<sup>10</sup> world often did not face prison time if they violated a law restricting abortion, now, doctors may be criminally convicted for doing so.<sup>11</sup> The maximum penalty in Texas is life in prison.<sup>12</sup> Jury nullification, i.e., a jury reaching a verdict that does not comport with the law, could be a feasible option for these doctors on trial.<sup>13</sup> Indeed, scholars have suggested that prosecutors facing a likely loss via jury nullification may refuse to bring criminal charges, notwithstanding the abortion bans.<sup>14</sup> Nevertheless, until jury nullification becomes more mainstream, this option will provide little comfort to doctors seeking to perform abortions in (potential) violation of state law.<sup>15</sup>

Furthermore, because physicians “are often employed in corporate systems where . . . multiple people are involved in every decision,” the decisions become messier because more minds usually means more conflicting perspectives.<sup>16</sup> This paper focuses on the lawyers who will be instrumental to making those decisions—

8. Matthew K. Wynia, *Professional Civil Disobedience — Medical-Society Responsibilities After Dobbs*, 387 NEW ENG. J. MED. 959, 959 (2022).

9. Howard Minkoff, Farah Diaz-Tello & Lauren B. Paulk, *Civil Disobedience and Abortion Services After Roe v Wade: Legal and Ethical Considerations*, 137 OBSTETRICS & GYNECOLOGY 626, 627 (2021) (“Potential penalties can include loss of medical license, misdemeanor charges, or felony charges.”).

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

11. 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/5AGH-LLUP>] [hereinafter *Doctors Who Want to Defy*]. But see Evan Hart, *Medical Exemptions in Abortion Bans Won’t Protect Women’s Health*, WASH. POST (Sept. 8, 2022), <https://www.washingtonpost.com/made-by-history/2022/09/08/medical-exemptions-abortion-bans-wont-protect-womens-health/> [<https://perma.cc/DGM9-MW7V>] (“Court records indicate, however, that many physicians, nurses and midwives were tried and convicted for performing abortions [pre-*Roe*] after the legal system rejected their claims about medical necessity.”).

12. *Doctors Who Want to Defy*, *supra* note 11.

13. In the 1990s, for instance, a Rochester jury declined to find guilty a doctor who helped a leukemia patient die by suicide. Lawrence Altman, *Jury Declines to Indict a Doctor Who Said He Aided in a Suicide*, N.Y. TIMES, July 27, 1991, at A1.

14. Peter N. Salib & Guha Krishnamurthi, *Jury Nullification in Abortion Prosecutions: An Equilibrium Theory*, 72 DUKE L.J. ONLINE 41, 51 (2022). “In this way, public opinion may constrain prosecutors beyond the ballot box.” *Id.* at 43.

15. For more on jury nullification, see German Lopez, *Jury nullification: how jurors can stop unfair and racist laws in the courtroom*, VOX (May 2, 2016, 9:00 AM), <https://www.vox.com/2016/5/2/11538752/jury-nullification-paul-butler> [<https://perma.cc/6TXX-4JP6>]; see also Paul Butler, *Jurors need to take the law into their own hands*, WASH. POST (Apr. 5, 2016, 9:00 AM), <https://www.washingtonpost.com/news/in-theory/wp/2016/04/05/jurors-need-to-take-the-law-into-their-own-hands/> [<https://perma.cc/ZM42-2QGP>].

16. *Doctors Who Want to Defy*, *supra* note 11.

they often get to be in “the room where it happens.”<sup>17</sup> Thus, regardless of whether an individual doctor may ever be called upon to consider an abortion procedure that could subject the physician to liability, lawyers can and should engage in proactive planning to discuss available options. This proactive planning should allay some of health care professionals’ worries and ensure the doctor is—at least more—comfortable taking action without fear that their medical license will be suspended.<sup>18</sup>

It is incumbent upon such lawyers to ensure their physician clients feel able to use their best judgment on how to carry out their ethical obligations.<sup>19</sup> Nevertheless, these physicians must also heavily weigh the wants and needs of the pregnant person, as client-centric care is central to being a doctor—and a lawyer—lest they “subordinat[e] women’s constitutional rights to the judgment of their healthcare providers.”<sup>20</sup> Indeed, reproductive justice scholar and law professor Reva Siegel has argued that *Roe* sought to balance the pregnant person’s rights with the medical model but gave only “confused expression” to pregnant people as rights holders, while favoring doctors.<sup>21</sup> Doctors in these post-*Dobbs* quagmires do not want to make this same mistake, and client-centered lawyers can ensure their doctor-clients know that the pregnant person’s wants and needs remain paramount.

Indeed, some scholars argue it is physicians’ duty to “stand up to champion their pregnant patients.”<sup>22</sup> This Note contends that lawyers need to stand up to champion their doctor clients, using all the tools at their disposal to do so. At the center of this contention is a salient question: “How would most lawyers view such options?”<sup>23</sup> This question is useful because it ensures lawyers do not lose sight of their ethical obligations in the wake of zealously representing their clients. Indeed, when lawyers are advising their doctor-clients, they must reconcile their roles as both zealous advocates and legal advisors. This Note explores the

17. Lin-Manuel Miranda, *The Room Where it Happens*, in *HAMILTON: AN AMERICAN MUSICAL* (Atlantic Recording Corp. 2015). Even when doctors need to make split-second decisions, they should be able to rely on previously-received guidance.

18. Tabrizy, *supra* note 6, at 03:42. An OB/GYN notes, ““There was no time for me to stop and call a lawyer, and make sure what I was doing was legal. I made a decision because she was going to bleed out in front of me otherwise.”” *Id.*

19. Indeed, “all too often, physicians are passive participants in even the most egregious medical moral lapses.” *Id.*; see also Wynia, *supra* note 8, at 960 (“Historically, physicians have rarely been radical, and most have conformed with bad laws and policies . . .”).

20. Yvette Lindgren, *When Patients are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151, 175 (2022).

21. *Id.* (citing Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1897 (2010)).

22. 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/5FPM-T8MU>].

23. Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 727 (1991).

quandary lawyers face when doing this and the potential solutions they can offer to their doctor-clients. Lawyers must figure out how to champion the wishes of their doctor-clients with reasonable, sound—and legal<sup>24</sup>—means.

In evaluating potential legal punishments, lawyers should account for an interesting phenomenon: the law penalizes acts much more severely than omissions.<sup>25</sup> But this disparity “has less purchase in medical contexts”<sup>26</sup> because health care professionals owe a duty of care to their patients.<sup>27</sup> They must not only avoid unduly harming them, but also must not be indifferent to the care they need—e.g., a life-saving or health-preserving abortion.<sup>28</sup> This distinction is worth considering because doctors who perform abortions in states with bans are really in a double-bind. If they perform an abortion, they could be prosecuted if the abortion is not deemed medically necessary; if they do not perform an abortion, they could be prosecuted for reckless indifference.<sup>29</sup> Lawyers play a critical role in ensuring doctors in states with laws banning abortion are well-equipped to make judgment calls in edge cases where it is unclear what the law would allow.

Normatively, protecting the patient should be the chief concern of all lawyers and medical professionals.<sup>30</sup> The real dilemma is when this core tenant of health-care conflicts with what the law says. Moreover, abortion bans have broader implications that provide a context for this legal advice. After all, decreasing access to abortion will exacerbate maternal mortality and morbidity, so abortion providers must double down on providing life-saving and health-preserving care.<sup>31</sup> Particularly severe will be how abortion bans impact low-income

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24. With the exception perhaps of civil disobedience.

25. Fox, *supra* note 4.

26. *Id.*

27. Sam F. Halabi, *Against Fiduciary Utopianism: The Regulation of Physician Conflicts of Interest and Standards of Care*, 11 U.C. IRVINE L. REV. 433, 449 (2020) (“[P]hysicians, like attorneys, . . . are under an obligation to perform their professional activities carefully and competently, generally as judged by the prevailing standards of professional competence in the relevant field of medicine.”).

28. *Id.*

29. Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 YALE J. HEALTH POL’Y L. & ETHICS 507, 576 n.267 (2005) (noting that physicians can be charged with “reckless indifference to the safety of the pregnant woman and her fetus”).

30. See Andis Robeznieks, *Physicians Must Be Empowered to Put Patients First*, AM. MED. ASS’N (Nov. 12, 2022), <https://www.ama-assn.org/house-delegates/interim-meeting/physicians-must-be-empowered-put-patients-first-ama-president> [<https://perma.cc/L65Y-HLS2>]. This must be lawyers’ normative lodestar as well because preserving the pregnant person’s life is paramount.

31. Elyssa Spitzer & Maggie Jo Buchanan, *Abortion Bans Will Result in More Women Dying*, CENTER FOR AM. PROGRESS (Nov. 2, 2022), <https://www.americanprogress.org/article/abortion-bans-will-result-in-more-women-dying/> [<https://perma.cc/4HDV-XYT7>]; see also Tabrizy, *supra* note 6, at 05:38 (One OB/GYN notes, “[I]t is horrific to think about watching even more patients die now because of this law, which is what’s going to happen.”); Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html> [<https://perma.cc/DQ4E-2NJV>] (“State-mandated pregnancy will exacerbate what are already alarming health and dignity harms, especially in states with horrific records of maternal mortality and morbidity.”).

women.<sup>32</sup> These bans disproportionately impact Black and Brown women.<sup>33</sup> Nevertheless, the practical considerations of lawyers and health care professionals inevitably will diverge from the normative ones.<sup>34</sup>

First, this Note considers the current legal landscape, summarizing the *Dobbs* decision and then surveying state abortion bans. In Part II, I discuss a federal law that appears poised to preempt state abortion bans in instances involving a pregnant person's life or health. Next, I provide an overview of the relevant *Model Rules of Professional Responsibility*, explaining how they relate to—and what challenges they bring up for—lawyers advising their doctor-clients. Finally, I offer potential solutions, borrowing from other fields, for how lawyers can advise their abortion-provider clients.

## I. CURRENT LEGAL LANDSCAPE

From 1973–2022, the Supreme Court repeatedly affirmed the right to an abortion recognized in *Roe v. Wade*, a decision that granted women the constitutional right to an abortion under the Due Process Clause of the Fourteenth Amendment.<sup>35</sup> While states increasingly sought to restrict access to abortion, the core constitutional right remained intact.<sup>36</sup> In *Dobbs*, however, the Court overruled *Roe*, turning responsibility over to the states to regulate abortion<sup>37</sup>—and creating considerable chaos.<sup>38</sup> This section first discusses *Dobbs* before turning to state responses to their new-found authority.

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32. Jia Tolentino, *S.B.8 and the Texas Preview of a World Without Roe v. Wade*, NEW YORKER (Sept. 5, 2021), <https://www.newyorker.com/news/news-desk/sb-8-and-the-texas-preview-of-a-world-without-roe-v-wade> [<https://perma.cc/SSW6-TSNG>] (“Many of [the] obstacles [accompanying out-of-state abortions]—the difficulty of travel, the shifting logistical restrictions, the impossibility of arranging child care—were already familiar to low-income women [seeking abortions] . . .”).

33. Robin Bleiweis, Jocelyn Frye & Rose Khattar, *Women of Color and the Wage Gap*, CENTER FOR AMERICAN PROGRESS (Nov. 17, 2021), <https://www.americanprogress.org/article/women-of-color-and-the-wage-gap/> [<https://perma.cc/9R8Y-HFTR>]; see also *Abortion After the Dobbs Decision: Q&A with RAND Researchers*, RAND (Oct. 25, 2022), <https://www.rand.org/blog/rand-review/2022/10/abortion-after-the-dobbs-decision-qa-with-rand-researchers.html> [<https://perma.cc/E389-6KKR>] (discussing *Dobbs*'s implications on pregnant people in the military and with substance use disorders).

34. See *supra* note 4 and accompanying text.

35. 410 U.S. 113, 114 (1973). For more information on the several blockbuster Supreme Court abortion cases post-*Roe* and pre-*Dobbs*, see Victoria Kim, *Here are past cases that have upheld or chipped away at Roe v. Wade*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/supreme-court-cases-roe-wade.html> [<https://perma.cc/85EB-Q2PS>].

36. David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1, 4-5 (2022) (discussing efforts of the anti-abortion movement to ban the procedure and the Court's approach to those efforts).

37. See *infra* Part I.A.

38. See generally David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023) (discussing the post-*Dobbs* abortion landscape transformation).

## A. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

*Dobbs v. Jackson Women's Health Organization* was a devastating decision—in many ways—for America.<sup>39</sup> In overturning *Roe*, *Dobbs* “usher[ed] in a new era of abortion law and access.”<sup>40</sup> As a result of *Dobbs*, pregnant people have been refused care in states with abortion bans, for example, and others have opted to stop trying for children at all.<sup>41</sup> In *Dobbs*, the Supreme Court unceremoniously overturned *Roe v. Wade*, holding that state abortion regulations would be subject to rational basis review.<sup>42</sup> The Court said its decision in *Dobbs* would “not upend concrete reliance interests.”<sup>43</sup> Ironically, even though the Due Process Clause forbids “any state” from “depriv[ing] any person of life, liberty, or property,” that is exactly what *Dobbs* permits state governments to do.<sup>44</sup> While *Dobbs* was the nail in the abortion coffin, the Supreme Court previously had upheld other abortion restrictions.<sup>45</sup>

Almost three-quarters of Americans support a pregnant person's choice to have an abortion if their life or health is in jeopardy.<sup>46</sup> Eight percent, on the other hand, approve of no exceptions whatsoever to abortion bans.<sup>47</sup> And while all states with bans provide exceptions for at least the life of the mother<sup>48</sup>—for the moment, that is<sup>49</sup>—it is unclear what that means.<sup>50</sup> The medical decision, of

39. One OB/GYN says, “I never thought that this would happen. I couldn't even have imagined it.” Tabrizy, *supra* note 6, at 05:09.

40. See *The New Abortion Battleground*, *supra* note 38, at 2; see also *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

41. Selena Simmons-Duffin, *Because of Wisconsin's abortion ban, one mother gave up trying for another child*, NPR (Dec. 9, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/12/09/1141404068/wisconsin-abortion-law-pregnancy-risk-miscarriage> [<https://perma.cc/292P-KRVR>].

42. *Dobbs*, 142 S. Ct. at 2283.

43. *Id.* at 2238.

44. U.S. CONST. amend. XIV, §1.

45. See *supra* note 35 and accompanying text.

46. Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, ATLANTIC (July 25, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582/> [<https://perma.cc/TH88-AUPT>] (“[A] recent Pew Research Center poll found that 73 percent of Americans favored legal abortion if a woman's life or health was at risk.”).

47. *Id.*; cf. Matthew K. Wynia, *supra* note 8, at 960 (“[E]ven many physicians who oppose abortion recognize that medically nuanced decisions are best left in the hands of individual patients and their physicians—not state law makers.”).

48. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> [<https://perma.cc/7FCD-XTDG>] (last visited Feb. 1, 2023).

49. Christina Pazzanese, ‘*Life of the Mother*’ is Suddenly Vulnerable, HARV. GAZETTE, (July 19, 2022), <https://news.harvard.edu/gazette/story/2022/07/life-of-the-mother-is-suddenly-vulnerable/> [<https://perma.cc/MNZ8-MTMF>].

50. Jessica Winter, *What the “Life of the Mother” Might Mean in a Post-Roe America*, NEW YORKER (May 12, 2022), <https://www.newyorker.com/science/annals-of-medicine/what-the-life-of-the-mother-might-mean-in-a-post-roe-america> [<https://perma.cc/6F6M-NVCJ>]. This will likely have a chilling effect among doctors because they do not want to be criminalized. *Id.*; see also Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Abortion foes push to narrow ‘life of mother’ exceptions*, WASH. POST (May 13, 2022), <https://www.washingtonpost.com/health/2022/05/13/abortion-ban-exceptions-mothers-life/> [<https://perma.cc/6W6C-84BF>] (“[T]he reality of medical practice is complex, and judgments must sometimes be made quickly.”); Pazzanese,

course, ultimately falls with the doctor, but the lawyer must explain the potential legal implications of that decision.

Some states have offered up a definition of a “medical emergency,”<sup>51</sup> but though politicians may find it clear, physicians—and lawyers—do not.<sup>52</sup> In other states, groups of lawyers and physicians are working together to propose guidance—ad hoc<sup>53</sup> or on committees—on just what situations pose a substantial enough threat to provide grounds for an abortion.<sup>54</sup> Indeed, the absence of clarity surrounding such exceptions means that judges and juries will decide what constitutes a medical emergency, not doctors.<sup>55</sup> And judges will likely be less lenient—and far worse-qualified—than would physicians.<sup>56</sup> Nevertheless, a Texas case implores state judges to specify what constitutes a medical emergency in the context of salvaging the life and health of the mother.<sup>57</sup>

Such confusion also existed pre-*Roe*, as, by 1910, every state had exceptions to their abortion bans (except for Kentucky) for the life of the mother.<sup>58</sup> Between 1967 and 1973, thirteen states enacted reforms that allowed for exceptions beyond the life of the mother—namely, to salvage a patient’s physical or mental health, for fetal abnormalities, or in cases of rape or incest.<sup>59</sup> Psychiatrists then

supra note 50 (“The terms, tests, and case law [regarding what the life of the mother exception means] vary significantly by state.”).

51. See, e.g., Mo. Revised Statutes § 188.015(1)(b)(7) (2019) (defining a “medical emergency” as “a condition which, based on reasonable medical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert the death of the pregnant woman or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman”); Tex. Health & Safety Code § 171.002(3) (2021) (defining a “medical emergency” as a “life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.”).

52. Hart, *supra* note 11 (“[P]hysicians could easily differ on the line between an emergency and an emergent medical situation.”).

53. See, e.g., Email from Christopher A. Yeakel, MD, to John R. McCravy, III, Chairman, Ad Hoc Committee, *Abortion Legislation Letter to Ad Hoc Committee*, S.C. MED. ASS’N (July 6, 2022), <https://www.scmcdical.org/news/abortion-legislation-letter-to-ad-hoc-committee/> [<https://perma.cc/XVVS5-FUDX>].

54. Mark Joseph Stern, *When Can Dying Patients Get a Lifesaving Abortion? These Hospital Panels Will Now Decide.*, SLATE (July 29, 2022, 11:46 AM), <https://slate.com/news-and-politics/2022/07/abortion-ban-hospital-ethics-committee-mother-life-death.html> [<https://perma.cc/D26V-8HNZ>].

55. *Id.*

56. Abigail Abrams, ‘*Am I a Felon?*’ *The Fall of Roe v. Wade Has Permanently Changed the Doctor-Patient Relationship*, TIME (Oct. 17, 2022, 7:00 AM), <https://time.com/6222346/abortion-care-after-roe-doctors-lawyers/> [<https://perma.cc/Z7BT-L43M>].

57. Ian Millhisier, *No one knows when it is legal to perform medically necessary abortions in Texas*, VOX (Mar. 12, 2023, 7:00 AM), <https://www.vox.com/politics/2023/3/12/23631278/supreme-court-abortion-texas-medically-necessary-sepsis-zurawski> [<https://perma.cc/8MAK-9LCB>].

58. Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception Right*, CENTER FOR AM. PROGRESS (Aug. 8, 2013), <https://www.americanprogress.org/article/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/> [<https://perma.cc/KRB2-USTU>].

59. *Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today> [<https://perma.cc/C72S-8QYD>].

became part of an “open secret” for middle- and upper-class women: if they knew the “‘right words,’” i.e., “‘if I have this baby I’ll kill myself,’” they could get approved for abortions.<sup>60</sup> Some doctors stretched the boundaries and “‘recommended abortion for all.’”<sup>61</sup> Others faced the same issue as physicians today—attempting to decipher the meaning of “life” and “health” of the pregnant person.<sup>62</sup>

## B. SURVEY OF STATE LAWS BANNING ABORTION

State abortion laws are currently an “emerging wild west.”<sup>63</sup> Pre-viability,<sup>64</sup> twenty-six states ban abortion.<sup>65</sup> These laws range from a complete bans to bans at viability.<sup>66</sup> At the moment, thirteen states have abortion complete bans.<sup>67</sup> All of these states have exceptions for life of the pregnant person, but only eight have one for the pregnant person’s health.<sup>68</sup> Only three have exceptions for rape, two for incest, and three for a lethal fetal anomaly.<sup>69</sup> And while, at the time of this Note’s writing, thirteen state courts have blocked abortion bans from going into effect,<sup>70</sup> it is unclear how long these blocks on the bans will last—indeed, five of them are only temporary bans.<sup>71</sup> Still other states have voted to enshrine abortion

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60. Sally Satel, *The ‘Open Secret’ on Getting a Safe Abortion Before Roe v. Wade*, N.Y. TIMES (June 7, 2022), <https://www.nytimes.com/2022/06/04/opinion/sunday/psychiatrists-abortion-roe.html?smid=url-share> [<https://perma.cc/F5UR-AH8M>].

61. *Id.*

62. *Id.* (“[P]sychiatrists did not have a strong database on which to draw to determine whether a pregnancy was likely to constitute a threat to the life and mental health of a give woman.”).

63. Carleen M. Zubrzycki, *The Abortion Interoperability Trap*, 132 YALE L.J. FORUM 197, 202 (2022).

64. Viability is somewhere around twenty-four weeks but varies from pregnancy to pregnancy; for purposes of this paper, viability is twenty-four weeks. Irin Carmon, *The End of the Viability Line*, N.Y. MAG. (Nov. 23, 2021), <https://nymag.com/intelligencer/2021/11/abortion-fetal-viability-line.html> [<https://perma.cc/MWP6-XWZ9>].

65. *State Bans on Abortion Throughout Pregnancy*, *supra* note 48.

66. *See, e.g.*, MO. ANN. STAT. §§ 188.017.2 (2022) (complete ban); 775 ILL. COMP. STAT. 55/1-25(a) (2021) (ban at viability). For a full list of state abortion laws, see *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/W38N-HWCL>] (last visited Feb. 1, 2023).

67. *Tracking the States Where Abortion is Now Banned*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [<https://perma.cc/68VP-QC8J>] (last visited Feb. 10, 2023). These states are Alabama, Arizona, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. *Id.*

68. *An Overview of Abortion Laws*, *supra* note 66.

69. *Id.*

70. *See, e.g.*, Jack Healy, *Arizona Doctors Cannot Be Prosecuted Under 1864 Abortion Ban, Court Says*, N.Y. TIMES (Dec. 30, 2022), <https://www.nytimes.com/2022/12/30/us/arizona-abortion-ban.html> [<https://perma.cc/Y5ZX-RYK2>].

71. *State Bans on Abortion Throughout Pregnancy*, *supra* note 48; *see also, e.g.*, Amy Beth Hanson, *Montana abortion laws remain blocked during legal challenge*, AP NEWS (Aug. 9, 2022), <https://apnews.com/article/abortion-health-legislature-montana-supreme-court-f7c52ab27910f14ae20e46a91cdd90df> [<https://perma.cc/H3D8-7JXY>].



rights in their constitutions, while others have passed amendments averring that their constitution does not safeguard such rights.<sup>72</sup>

Further, laws vary in whether a doctor is presumed guilty or innocent. In Tennessee and Idaho, for example, a lawyer is presumed guilty and must present as an affirmative defense that their actions were necessary to preserve their patient's health or life as an affirmative defense.<sup>73</sup> In other states, on the other hand, doctors are presumed innocent until they are prosecuted.

This hodgepodge of different laws creates a personal and legal quagmire for pregnant people. Indeed, scholars suggest that *Dobbs* will harm all pregnant people, regardless of whether they are considering an abortion.<sup>74</sup> In Louisiana, for instance, a woman was recently denied an abortion for a fetus that had a condition called acrania, meaning it had no skull and would not survive.<sup>75</sup> The hospital denied her an abortion because doctors were uncertain whether they would be prosecuted for performing an illegal procedure.<sup>76</sup> Similarly, in Wisconsin, where abortion is also banned, a woman was left to bleed for ten days after being denied care from a hospital.<sup>77</sup> These pregnant people and their doctors need lawyers to inform them of the potential courses of conduct when they find themselves in such sticky situations. For instance, lawyers could tell the doctors about the Emergency Medical Treatment and Labor Act (EMTALA), which I expound upon in the next section, under which the care of these pregnant patients in Louisiana and Wisconsin likely would have been different.<sup>78</sup>

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72. *Abortion Policy in the Absence of Roe*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe> [<https://perma.cc/V7TW-DP6Y>] (last visited Feb. 1, 2022).

73. See, e.g., TENN. CODE ANN. § 39-15-213 (2021); IDAHO CODE § 18-622 (2022). This results in a chilling effect on doctors of advising their patients of the best course of conduct and calls for a lawyer's professional guidance. Jessica Glenza, 'A severe chilling effect': abortion bans will inhibit doctors' advice to patients, experts fear, THE GUARDIAN (May 6, 2022), <https://www.theguardian.com/world/2022/may/06/abortion-bans-patient-doctor-medical-advice> [<https://perma.cc/99RL-6EQT>].

74. Sonia M. Suter, *All the Ways Dobbs Will Harm Pregnant Women, Whether or Not They Want an Abortion*, SLATE (June 29, 2022, 4:35 PM), <https://slate.com/news-and-politics/2022/06/dobbs-pregnant-women-surveillance-ivf-bans-abortion.html> [<https://perma.cc/VB2Q-82T3>] ("It [*Dobbs*] gives states and potentially Congress the authority to interfere with and surveil the entire reproductive cycle, from efforts to conceive to delivery.").

75. Ramon Antonio Vargas, *Louisiana woman carrying unviable fetus forced to travel to New York for abortion*, THE GUARDIAN (Sept. 14, 2022, 2:00 PM), <https://www.theguardian.com/us-news/2022/sep/14/louisiana-woman-skull-less-fetus-new-york-abortion> [<https://perma.cc/SRJ7-TGRS>].

76. *Id.*

77. Rachel Sharp, *Woman left to bleed for 10 days from incomplete miscarriage after being turned away by hospital post-Roe*, THE INDEPENDENT (July 17, 2022, 7:45 PM), <https://www.independent.co.uk/news/world/americas/louisiana-woman-headless-fetus-abortion-florida-b2146452.html> [<https://perma.cc/VH4K-8YE5>].

78. See *infra* Part II.

## II. EMTALA

The Emergency Medical Treatment and Labor Act (EMTALA) was passed in 1986.<sup>79</sup> It requires hospitals to admit patients who have emergency medical conditions—active labor, for example, or a pregnant person whose life or health is in danger due to their pregnancy—regardless of their ability to pay.<sup>80</sup> EMTALA was passed to avoid “patient dumping,” that is, hospitals discharging patients or moving them to another hospital because they were unable to pay.<sup>81</sup> The Supremacy Clause of the Constitution makes clear that when federal and state laws conflict, federal law is “supreme,” and thus preempts state law.<sup>82</sup> This becomes relevant here because some states have laws that are discordant with EMTALA, a federal law.

With abortion no longer a constitutional right in the United States, many people considering pregnancy reasonably have become concerned about risky pregnancies.<sup>83</sup> These people’s doctors are likewise concerned—and confused about when they can lawfully provide life-saving or health-preserving care.<sup>84</sup> In states with abortion bans, the concerns for medical professionals providing abortions are twofold (at least): (1) what the “life” and “health” of the pregnant person entails,<sup>85</sup> and (2) how to reconcile EMTALA, which requires doctors to provide emergency care, with state laws, which may prevent them from doing so.<sup>86</sup> Furthermore, their ethical obligations require them to provide such emergency care.<sup>87</sup> Indeed, in a *Dobbs* amicus brief, many medical groups asserted that

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79. Greer Donley, Kimi Chernoby & Skye Perryman, *Two Courts Ruled on Abortion in Emergency Situations. One Got It Right*, TIME, Aug. 26, 2022, <https://time.com/6208656/abortion-emtala-texas-idaho-emergency-situations/> [https://perma.cc/6EVF-QXYD].

80. *Id.*

81. Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646, 2655 (2021).

82. U.S. Const., art. VI, cl. 2; *see also* McCulloch v. Maryland, 17 U.S. 316 (1819) (affirming that federal law is supreme over state law).

83. Jack Healy, *With Roe Set to End, Many Women Worry About High-Risk Pregnancies*, N.Y. TIMES (June 20, 2022), <https://www.nytimes.com/2022/06/20/us/abortion-high-risk-pregnancy.html> [https://perma.cc/QL6X-6QEC].

84. Cha, *supra* note 50 (“[T]here is ambiguity about which decisions might be allowed and which cross the line.”).

85. *With Roe Set to End, Many Women Worry About High-Risk Pregnancies*, *supra* note 83. One doctor asks, “How almost dead does someone need to be [before she can render care]?” She wonders if she provides the care, whether she will be reported and go to jail. *Id.* This concern is all too common for medical professionals in the post-*Dobbs* world. *See* Cha, *supra* note 50; *see also* Winter, *supra* note 50.

86. Timothy S. Jost, *What Happens When Federal Laws to Provide Emergency Care Clash with State Abortion Laws?*, COMMONWEALTH FUND (Sept. 8, 2022), <https://www.commonwealthfund.org/blog/2022/what-happens-when-federal-laws-provide-emergency-care-clash-state-abortion-laws> [https://perma.cc/M9EV-BZB6] (noting the “profound dilemma” abortion providers face: “what to do when the patient’s health and federal law call for an emergency abortion,” but state law forbids it).

87. AMA CODE OF MED. ETHICS VI, Op. 1.1.2; *see also* Wynia, *supra* note 8, at 959 (“The AMA called *Dobbs* ‘an egregious allowance of government intrusion into the medical examination room, a direct attack on the practice of medicine and the patient–physician relationship, and a brazen violation of patients’ rights to evidence-based reproductive health services.’”). *Compare* Minkoff, *supra* note 9, at 627 (quoting AMA Opinion 1.02) (“In exceptional circumstances of unjust laws, ethical responsibilities should supersede legal

Mississippi's abortion ban placed them between a rock and a hard place: their ethical obligations and the law pulled them in separate directions.<sup>88</sup>

The Centers for Medicare and Medicaid Services (CMS) recently revised a memo<sup>89</sup> that should have made clear that EMTALA was a tool properly wielded to circumvent state laws that prevent abortions.<sup>90</sup> Even though CMS's guidance—asserting that EMTALA “preempts any state law that bans performing an abortion when a woman's health is at risk”<sup>91</sup>—should be comforting to medical professionals, their confusion likely will not dissipate due to the myriad complications *Dobbs* gives rise to, including what the life of the mother really means and whether doctors can transfer patients out of state to receive abortion care.<sup>92</sup>

Moreover, medical professionals can hardly look to other states for guidance on how EMTALA will affect them. After all, judges in two states issued contrary holdings.<sup>93</sup> Idaho's sole federal district court held that a doctor could not be punished for performing an abortion to protect the pregnant patient's health<sup>94</sup>—in line with the CMS memo.<sup>95</sup> The Idaho court deferred to physicians, ruling that the Supremacy Clause meant that Idaho's ban must be enjoined insofar as it

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obligations.”) with *Doctors Who Want to Defy*, *supra* note 11 (“In Missouri, hospital doctors told a woman whose water broke at 18 weeks that ‘current Missouri law supersedes our medical judgment’ . . .”).

88. Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392) (“[T]he Ban undermines longstanding principles of medical ethics and places clinicians in the untenable position of choosing between providing care consistent with their best medical judgment, scientific evidence, and the clinicians' ethical obligations or risk losing their medical licenses.”); see also Mara Buchbinder, Dragana Lassiter, Rebecca Mercier, Amy Bryant & Anne Drapkin Lyerly, *Reframing Conscientious Care: Providing Abortion Care When Law and Conscience Collide*, HASTINGS CTR. REP., Mar.-Apr. 2016, at 5-6 (“Much of the debate on conscience has considered two stark alternatives: the rights of providers to refuse to perform procedures to which they morally object, and the interests of the patients who might be harmed by such refusals. . . . [A]bortion laws or other restrictive policies may in fact constrain the ability of providers to align their clinical practice with conscience . . .”).

89. Reinforcement of EMTALA Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss, CMS (Sept. 17, 2021), <https://www.cms.gov/files/document/qso-21-22-hospital.pdf> [<https://perma.cc/9BQ4-HRCM>] (Oct. 3, 2022).

90. Greer Donley & Kimberly Chernoby, *How to Save Women's Lives After Roe*, ATLANTIC (June 13, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/roe-v-wade-overturn-medically-necessary-abortion/661255/> [<https://perma.cc/CCA9-9TKG>]; see also Reinforcement of EMTALA Obligations, *supra* note 89 (“The EMTALA statute requires that all patients receive an appropriate medical screening, stabilizing treatment, and transfer, if necessary, irrespective of any state laws or mandates that apply to specific procedures.”). Unfortunately, some scholars say that the memo was “ambiguous and tepid”; nevertheless, it was a positive step. *How to Save Women's Lives After Roe*, *supra* note 92.

91. Perry Stein, *Judge Blocks Part of Idaho's Abortion Law from Taking Effect*, WASH. POST (Aug. 24, 2022, 9:01 PM), <https://www.washingtonpost.com/national-security/2022/08/24/idaho-abortion-ruling/> [<https://perma.cc/6VN9-N5A9>].

92. Winter, *supra* note 50 (noting the “uncertainty” present in the “maternal-fetal community”).

93. *Two Courts Ruled on Abortion in Emergency Situations. One Got It Right*, *supra* note 79.

94. Stein, *supra* note 91.

95. See Reinforcement of EMTALA Obligations, *supra* note 89.

conflicts with EMTALA.<sup>96</sup> One day prior, a Texas federal district court, on the other hand, ruled that EMTALA could not preempt state law.<sup>97</sup> The court equated the pregnant person's life with that of the fetus, finding that, under EMTALA, a doctor must consider both.<sup>98</sup> Clearly, this issue is fraught and divisive, and there have been intimations that the Supreme Court might consider this issue in the future.<sup>99</sup>

Pregnancy inherently presents risks to women,<sup>100</sup> and EMTALA was designed to deal with such risks. Thus, had both courts ruled that EMTALA preempted state law, it could have provided a fruitful avenue for doctors defending their decisions to perform abortions to save the health or life of the pregnant person. Nevertheless, as long as the fetal personhood narrative of the Texas court does not take hold in other courts across the country, EMTALA is a valuable statute that lawyers must know about so that they can educate their doctor-clients on permissible actions.<sup>101</sup>

Another potential avenue for abortion providers is the Health Insurance Portability and Accountability Act (HIPAA), which forbids healthcare providers from divulging private patient information.<sup>102</sup> Unfortunately, HIPAA probably will not provide a successful path for abortion providers seeking to circumvent state laws prohibiting abortion, as it is “famously misunderstood” in that people believe it a fortress protecting patient privacy when in actuality, it allows medical records to be “shared remarkably widely and without patient

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96. *United States v. Idaho*, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at \*15 (D. Idaho Aug. 24, 2022).

97. *Texas v. Becerra et al.*, No. 5:22-CV-185-H, 2022 WL 3639525, at \*1 (N.D. Tex. Aug. 23, 2022).

98. *Id.*

99. See Jost, *supra* note 86 (“[T]he conflict between EMTALA and state abortion law may end up before the Supreme Court.”).

100. See Michelle Goodwin, *The New Jane Crow*, ATLANTIC (May 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/maternal-mortality-pregnancy-deaths-overtum-roe/629816/> [<https://perma.cc/9BLN-TLMW>] (“An American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion . . . .”); Rossa Tikkanen, Munira Z. Gunja, Molly FitzGerald & Laurie Zephyrin, *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries*, COMMONWEALTH FUND (Nov. 18, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries> [<https://perma.cc/8AWC-P8SL>] (“The U.S. has the highest maternal mortality rate among developed countries.”).

101. Worrisome is the fact that “for decades, antiabortion advocates have argued that life begins at conception and that a fetus is a person, rendering abortion illegal.” Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1649 (June 1, 2022); see also Kate Zernike, *Is a Fetus a Person? An Anti-Abortion Strategy Says Yes.*, N.Y. TIMES (Aug. 21, 2022), <https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html> [<https://perma.cc/44D3-V2KB>]. According to Mary Ziegler, a law professor and abortion historian, “Personhood has always been the ultimate ambition of the anti-abortion movement.” *Id.*

102. Maggie Jo Buchanan & Nadia Stovicek, *Using HIPAA To Protect Patient Privacy and Fight Abortion Criminalization*, CENTER FOR AM. PROGRESS (Aug. 17, 2022), <https://www.americanprogress.org/article/using-hipaa-to-protect-patient-privacy-and-fight-abortion-criminalization/> [<https://perma.cc/R88J-6DDJ>] (noting that, “absent a legally enforceable mandate,” a clinic or hospital’s disclosures referencing an abortion would violate HIPAA). The article also notes, however, that due to their fear over being prosecuted, medical professionals may provide abortion-related information to law enforcement they would not otherwise disclose under HIPAA. *Id.*

consent.”<sup>103</sup> Nevertheless, HHS regularly updates its guidance for disclosure under HIPAA, so lawyers must be familiar with the most-updated guidance when advising their doctor-patients.<sup>104</sup>

Additionally, Targeted Regulation of Abortion Providers (TRAP) laws further exacerbate medical professionals’ goals of safeguarding their pregnant patients’ health.<sup>105</sup> TRAP laws are draconian, unnecessary measures that hinder abortion providers.<sup>106</sup> Thus, medical professionals and their lawyers are facing an uphill battle. A full analysis of HIPAA and TRAP laws is not within this Note’s ambit, however.

EMTALA’s lasting impact is difficult to predict, as the federal government cannot require states to perform federal business.<sup>107</sup> Moreover, even if it is a viable—as it were—option, many medical professionals either do not know or do not understand that it “provides solid legal cover for treating pregnant patients in medical crisis.”<sup>108</sup> Further, due to the Texas decision, it might not even provide the “solid legal cover” that CMS anticipated and intended. Therefore, lawyers need to be more creative in ensuring their doctor-clients are free to use their best medical judgment without the threat of recourse.

### III. MODEL RULES OF PROFESSIONAL RESPONSIBILITY

This Part will explore five relevant *Model Rules* that pertain to lawyers advising clients on abortions: Rule 1.2(d),<sup>109</sup> Rule 2.1,<sup>110</sup> Rule 1.6,<sup>111</sup> Rule 4.1(b),<sup>112</sup> and Rule 5.7.<sup>113</sup> It will discuss in what instances these exceptions become

103. Carleen Zubrzycki, *The Abortion Interoperability Trap*, 123 YALE L.J. FORUM 197, 215 (OCT. 18, 2022).

104. As of the date of the writing of this Note, the most recent guidance was from April 2023. HIPAA Privacy Rule Notice of Proposed Rulemaking to Support Reproductive Health Care Privacy Fact Sheet, HHS, <https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/hipaa-reproductive-health-fact-sheet/index.html> [<https://perma.cc/84MF-QUBQ>] (last visited April 18, 2023). Indeed, under Model Rule 1.4, the lawyer must “keep the client reasonably informed about the status of the matter,” and because this area of the law is constantly changing, the lawyer must keep abreast of such developments. MODEL RULES R. 1.4(a)(3).

105. For detailed information on TRAP laws, see *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 22, 2020), <https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws> [<https://perma.cc/64HA-G9ZU>].

106. *After Roe Fell: Abortion Laws by State*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state/> [<https://perma.cc/94PL-2YFK>].

107. *Printz v. United States*, 521 U.S. 898, 935 (1997) (“Congress cannot compel the States to enact or enforce a federal regulatory program.”).

108. Selena Simmons-Duffin, *Her miscarriage left her bleeding profusely. An Ohio ER sent her home to wait*, NPR (Nov. 15, 2022, 12:01 PM), <https://www.npr.org/sections/health-shots/2022/11/15/1135882310/miscarriage-hemorrhage-abortion-law-ohio> [<https://perma.cc/ZD49-EKCJ>].

109. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (AM. BAR ASS’N 2020) [hereinafter MODEL RULES].

110. MODEL RULES R. 2.1.

111. MODEL RULES R. 1.6.

112. MODEL RULES R. 4.1(b).

113. MODEL RULES R. 5.7. Though the Model Rules themselves are not binding, the majority of states have adopted them. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N (Mar. 28, 2018, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/)) [<https://perma.cc/7T38-2CBX>].

relevant vis-à-vis lawyers advising abortion providers. Generally, attorneys can defend vehemently their doctor-clients and advise them of the law and likely outcomes without fear of liability.<sup>114</sup> Due to lawyers' "special duty to uphold the rule of law," however, they cannot "help clients in conduct they know to be criminal."<sup>115</sup> Nevertheless, it is important to keep in mind that lawyers do not endorse their clients' actions merely by representing them.<sup>116</sup>

Turning now to the *Model Rules*, first, Rule 1.2(d) of the *Model Rules* provides that lawyers should neither "counsel" nor "assist" a client in "conduct that the lawyer knows is criminal or fraudulent."<sup>117</sup> Lawyers are allowed, however, to discuss the legal implications of a particular course of conduct or engage in a "good faith effort" to determine the meaning of the law.<sup>118</sup> Indeed, one of lawyers' key roles is advising clients about implications of a law and what conduct it covers.<sup>119</sup> A typical Rule 1.2(d) scenario would be a lawyer counselling their doctor-client about the legal definitions regarding the "life" and "health" of the mother and how the physician should go about making decisions in these instances. The lawyer can discuss what might happen if the doctor is prosecuted and how to make it unlikely that the doctor is held liable for conduct the doctor believes is medically necessary for their pregnant patient.

Rule 2.1 works in tandem with 1.2(d), as 2.1 concerns a lawyer's role as an advisor to their client.<sup>120</sup> It gives them the autonomy to "exercise independent professional judgment and render candid advice."<sup>121</sup> 2.1 further allows lawyers to consider moral factors that are potentially relevant to the client.<sup>122</sup> Indeed, the comments explaining 2.1 encourage a lawyer to give "candid advice" even when that advice may be "unpalatable to the client."<sup>123</sup> Thus, the lawyer-as-informant can tell their client of the potential consequences of a particular course of conduct, while the lawyer-as-advisor can counsel the doctor on which course of conduct they think their client should pursue.

Rule 1.6 of the *Model Rules*, the rule of confidentiality, provides exceptions for when lawyers are permitted (but not compelled) to reveal information relating to the representation of their clients.<sup>124</sup> It lays out several exceptions to the traditional presumption of attorney-client confidentiality.<sup>125</sup> One exception allows a lawyer to disclose client information "to prevent reasonably certain death or

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114. *Id.*

115. *Id.* at 910.

116. *Id.* at 911. "Nor should that intent be inferred from mere knowledge of clients' goals and conduct." *Id.*

117. MODEL RULES R. 1.2(d).

118. *Id.*

119. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. B (2000).

120. MODEL RULES R. 2.1.

121. *Id.*

122. *Id.*

123. *Id.* at R. 2.1. cmt. 1.

124. MODEL RULES R. 1.6.

125. *Id.*

substantial bodily harm.”<sup>126</sup> In some states, however, such disclosure is not only permissible but is required.<sup>127</sup> In these states, lawyers can still discuss with their doctor-clients potential courses of action, although they may be a bit more hesitant to do so given the severity of this rule. Another potential problem could arise if an anti-abortion lawyer represented a medical professional who performed an abortion that the lawyer did not believe was medically necessary under state law, and the lawyer then disclosed the intended procedure to state authorities.<sup>128</sup>

Next, Rule 4.1(b) dictates that a lawyer should not “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”<sup>129</sup> The Comments to the *Restatement of the Law Governing Lawyers* define “counseling” as “facilitating or encouraging the client’s action.”<sup>130</sup> The existence of this Rule supports the argument of some legal ethics scholars that “assisting clients exercise their autonomy and pursue their goals will result in harsh undesirable outcomes imposed on innocent third parties.”<sup>131</sup> In this Note, the “innocent” third party at issue would be a hospital that may incur liability via the doctrine of respondeat superior, i.e., employers being held liable for conduct by their employees.<sup>132</sup> While worth mentioning, this Rule is beyond the scope of this Note, as hospital liability and advising doctors as part of an entity is quite complicated and the proper subject of a separate paper.<sup>133</sup>

Lastly, Rule 5.7 is entitled “Responsibilities Regarding Law-Related Services.”<sup>134</sup> This Rule provides that a lawyer is still subject to the Model Rules when providing “law-related services.”<sup>135</sup> Such services are those that a nonlawyer could provide lawfully<sup>136</sup> and include financial planning, legislative lobbying, and social work.<sup>137</sup> This Rule would affect a lawyer engaging in lobbying

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126. *Id.* at R. 1.6(b)(1).

127. *See, e.g.*, Fla. Rule 4-1.6(b); N.J. Rule 1.6(b)(1). Many other states require lawyers to disclose information insofar as necessary to prevent death or substantial bodily harm. *See, e.g.*, N.D. Rule 1.6(b); Wis. Rule 1.6(b). There will likely be future case law defining substantial bodily harm vis-à-vis abortion in the future, especially if fetal personhood becomes a reality in some states. *See supra* note 101 and accompanying text.

128. This could be a problem in several states. *See, e.g.*, N.C. Rule 1.6(2); N.Y. Rule 1.6(b)(2). In this case, the lawyer should probably withdraw under Rule 1.16, which provides that they can if they believe their “representation will result in violation of the rules of professional conduct or other law.” MODEL RULES R. 1.16.

129. MODEL RULES R. 4.1(b).

130. Restatement (Third) of the Law Governing Lawyers § 94 cmt. A (2000).

131. Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws Or Crusaders?*, 91 OR. L. REV. 869, 913 (2013).

132. W. Robert Thomas, *Corporate Criminal Law is Too Broad—Worse, It’s too Narrow*, 53 ARIZ. ST. L.J. 199, 199 (2021) (noting that respondeat superior is a doctrine “whereby a business organization can be convicted for virtually any crime committed by its employee”).

133. For more on entity liability, see Andrew R. Ellis, *The Responsible Corporate Officer Doctrine: Sharpening a Blunt Health Care Fraud Enforcement Tool*, 9 N.Y.U. J.L. & BUS. 977 (2013).

134. MODEL RULES R. 5.7.

135. *Id.*

136. *Id.* at R. 5.7(b).

137. *Id.* at R. 5.7 cmt. 9.

legislatures or state's attorneys general offices to prevent prosecution of medical professions who provide abortions in states with bans.

#### IV. SOLUTIONS

There are a variety of options available to lawyers advising physician-clients who provide abortions.<sup>138</sup> Lawyers in this position will primarily act either ex-ante or ex-post. In ex-ante situations, the lawyer can inform and advise their doctor-client of the implications of the client's decisions. In ex-post situations, the lawyer will be representing the doctor in either a civil or criminal suit (or both). Furthermore, lawyers can serve in advisory and policy-making capacities that do not involve a particular client or entity. This section discusses in turn lawyers' roles in both individual cases and in cases where they are reformers at large.

A lawyer must principally consider physician autonomy (within the bounds of the law) to make as certain as possible that doctors can rely on their best medical judgment (factoring in the pregnant patient's wishes and needs). Interestingly, states expansively protect providers in denials of care but offer them "next to none when they have just as conscientious reasons for treating patients in ways that a state or hospital rules out."<sup>139</sup> Lawyers ought to factor this in when rendering counsel to their doctor-clients, notwithstanding that the lawyers' advice might be "unpalatable" to doctors.<sup>140</sup> Thus, there is a possibility that the physician will not heed the lawyers' advice (which is not always a bad thing).<sup>141</sup>

##### A. LAWYERS AS ADVISORS

Lawyers are always permitted to give neutral advice to their clients, advising them of the potential outcomes and repercussions of a particular course of conduct.<sup>142</sup> Accordingly, lawyers can inform their clients of the potential legal implications of their actions, turning over the decision of just how to use that information to the clients. Such advice is especially salient post-*Dobbs*, as physicians are "often forced to consult lawyers on decisions they used to be able to make on their own."<sup>143</sup> And lawyers' advice to health care professionals has ripple effects not only on the physicians' patients<sup>144</sup> but also on other physicians,

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138. See *infra* nn. 142–84.

139. Fox, *supra* note 4.

140. MODEL RULES R. 2.1. cmt. 1.

141. See *infra* Part IV.A.

142. See *supra* Part III.D. (discussing Model Rules R. 1.2(d)).

143. Abrams, *supra* note 56.

144. Aria Bendix, *Now hovering in the background during a risky pregnancy: The doctor's legal team*, NBC NEWS (July 13, 2022, 1:24 PM), <https://www.nbcnews.com/health/health-news/risky-pregnancy-abortion-doctors-consult-lawyers-rcna37651> [<https://perma.cc/5LR6-597M>] ("‘We’ve been making sure that anything we do goes past many legal eyes because we want to make sure that patients have access to this care,’ said Dr. Maya Bass, a family physician who provides abortions in New Jersey.”).



who will likely look to their colleagues for guidance in unclear situations.<sup>145</sup>

A lawyer can also inform their doctor-client of the costs and benefits of civil disobedience,<sup>146</sup> an age-old tactic for effecting change.<sup>147</sup> Indeed, post-*Dobbs*, a Texas physician, Alan Braid, performed an abortion even though he knew it was unlawful.<sup>148</sup> Some scholars even espouse civil disobedience as the best solution to combat abortion bans.<sup>149</sup> Pre-*Roe* civil disobedience could provide a useful guide in a post-*Dobbs* universe.<sup>150</sup> Doctors are appropriately terrified by the potential risks of civil disobedience. One such doctor worries, “I would be imprisoned, I would be fined, I would lose my license and I very well could be assassinated for doing that work.”<sup>151</sup> To boot, while it might help an individual patient, the doctor’s actions may not have broader implications for other health care professionals facing similar situations.<sup>152</sup> Moreover, it could change things for the worse; not only might the physician lose their medical license or be incarcerated and unable to help other patients, but it might also create “exactly the specter of disorder and incommensurate values that defenders of the state and obedience to it would conjure up.”<sup>153</sup> Despite the drawbacks, many physicians may choose to do what Dr. Braid did, and lawyers have the flexibility to—and should—inform their doctor-clients that civil disobedience is a potential option.<sup>154</sup>

Lawyers should also advise their doctor-clients of another possible (if limited) solution regarding the doctor’s religion. A physician can assert that their religion—

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145. This sort of thing will be especially salient “if doctors can’t immediately get lawyers on the phone—on weekends or overnight, perhaps,” as one OB/GYN often frets over. *Id.*

146. See Minow, *supra* note 23, at 733 n.38 (“‘Civil disobedience’ is usually defined to mean knowing and deliberately unlawful protest undertaken in a public way with a willingness to accept official sanction.”).

147. *Civil Disobedience*, STAN. ENCYC. OF PHIL. (June 2, 2021), <https://plato.stanford.edu/entries/civil-disobedience/> [https://perma.cc/8UYT-C5CR] (tracing civil disobedience to the Boston Tea Party and Gandhi’s Salt March and attributing the term to Henry David Thoreau).

148. Alan Braid, *Why I Violated Texas’s Extreme Abortion Ban*, WASH. POST (Sept. 19, 2021, 4:01 PM), <https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/> [https://perma.cc/8RS5-CJCF] (“I acted because I had a duty of care to this patient . . .”).

149. See, e.g., Alexi Pfeffer-Gillett, *Civil Disobedience in the Face of Texas’s Abortion Ban*, 106 MINN. L. REV. HEADNOTES 203, 205 (2021) (discussing civil disobedience in the wake of Texas’s SB8). But see Minkoff, *supra* note 9, at 628 (“Civil disobedience should be . . . an act of last resort . . .”).

150. Felicia Kornbluh, *The 1960s Provide a Path for Securing Legal Abortion in 2022*, WASH. POST (JUNE 25, 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/06/25/1960s-provide-post-dobbs-path-securing-legal-abortion/> [https://perma.cc/RKM5-XDS4].

151. *Doctors Who Want to Defy*, *supra* note 11. An OB/GYN discusses the threats she and colleagues receive: “I hope someone does to you what you do to babies” and “I know where you live, and someday I might show up at your doorstep.” Diane J. Horvath-Cosper, *Being a Doctor Who Performs Abortions Means You Always Fear Your Life is in Danger*, WASH. POST (OCT. 29, 2015, 6:30 AM), <https://www.washingtonpost.com/posteverything/wp/2015/10/29/being-a-doctor-who-performs-abortions-means-you-always-fear-your-life-is-in-danger/> [https://perma.cc/3TGD-PPYR]. And these threats were pre-*Dobbs*—just think how much scarier they become when people providing threats have the law at their backs.

152. *Id.*

153. Minow, *supra* note 23, at 738.

154. Civil disobedience is likely a more feasible option in states in which a doctor is presumed innocent, and the prosecutor must prove them guilty than in a state in which a doctor is presumed guilty, and the doctor must bring up the life-or-health-of-the-mother exception as an affirmative defense. See *infra* note 73.

Judaism, for example—requires them to perform an abortion if the pregnant person’s life, health, or safety is in jeopardy.<sup>155</sup> Lawyers can explain that the First Amendment guarantees an individual’s right to freely exercise their religion, and this could thus serve as a defense for some abortion providers.<sup>156</sup> This option is especially viable—as it were—at the moment because the current Supreme Court has been gung-ho in upholding an individual’s right to freely exercise their religion.<sup>157</sup> Nonetheless, this cannot be a primary solution, as it will only work in isolated cases if it does at all, as courts would likely require detailed proof of a person’s religious practices to ensure the doctor or patient was not engaged in subterfuge.<sup>158</sup>

## B. LAWYERS AS ADVOCATES

At a federal level, lawyers should lobby the Department of Justice to issue a memorandum similar to the one it issued regarding marijuana. Marijuana law provides a good template for abortion law because lawyers in both realms must advise clients in the wake of conflicting state and federal law. Indeed, both marijuana and abortion lawyers “are simply trying to strike an effective balance between their roles as representatives of clients and their role as officers of the legal system.”<sup>159</sup> Nevertheless, marijuana law is slightly different from abortion law because marijuana remains federally illegal.<sup>160</sup> Notwithstanding the federal

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155. Marin Cogan, *Not All Religions Oppose Abortion*, VOX (July 3, 2022, 8:30 AM), <https://www.vox.com/2022/7/3/23190408/judaism-rabbi-abortion-religion-reproductive-rights> [<https://perma.cc/L94X-8H98>] (“Judaism has said again and again that the life, health, and safety of the pregnant person is paramount. Her rights come first.”); see *Judge Blocks Indiana Abortion Ban on Religious Freedom Grounds*, REUTERS (Dec. 2, 2022, 10:43 PM), <https://www.reuters.com/legal/judge-blocks-indiana-abortion-ban-religious-freedom-grounds-2022-12-03/> [<https://perma.cc/NK65-6FG8>]; Olivia Roat, *Free-Exercise Arguments for the Right to Abortion: Reimagining the Relationship Between Religion and Reproductive Rights*, 29 UCLA J. GENDER & L. 1, 2 (2022).

156. U.S. Const., amend. I, cl. 2.

157. See, e.g., *Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022); *Carson v. Makin*, 596 U.S. \_\_\_\_ (2022). This would also present a fascinating case, as it would test the theory that the Supreme Court favors some religions over others. Daniel Mach, *The Supreme Court is Playing Favorites with Religion*, ACLU (Feb. 11, 2019), <https://www.aclu.org/news/religious-liberty/supreme-court-playing-favorites-religion> [<https://perma.cc/WPM7-EY8K>].

158. In *Wisconsin v. Yoder*, for example, the plaintiffs only prevailed after adducing evidence that they “sincerely believed that high school attendance was contrary to the Amish religion and way of life and that they would endanger their own salvation and that of their children by complying with the law.” 406 U.S. 205, 205 (1972).

159. Kamin, *supra* note 131, at 931.

160. Kevin Liptak, *Biden Pardons All Federal Offenses of Simple Marijuana Possession in First Major Steps Toward Decriminalization*, CNN (Oct. 6, 2022, 5:39 PM), <https://www.cnn.com/2022/10/06/politics/marijuana-decriminalization-white-house-joe-biden/index.html> [<https://perma.cc/WFS5-79YD>]; see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (“The Court’s decision today properly returns the Court to a position of neutrality and restores the people’s authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.”). Though the House passed a bill to decriminalize marijuana federally, the Senate did not approve it. Liptak, *supra* note 151.

ban, twenty-one states have legalized recreational marijuana use.<sup>161</sup> This is permissible due to the Department of Justice’s 2013 memorandum that provided prosecution priorities.<sup>162</sup> The guidelines essentially allowed for recreational and medical marijuana use for non-minors by not prioritizing prosecution for that issue.<sup>163</sup>

The Department of Justice should issue a similar memorandum regarding abortion that is also akin to the Centers for Medicare & Medicaid Services one on EMTALA.<sup>164</sup> It would provide that doctors will not be criminalized for performing abortions when their medical judgment—plus their patient’s wishes—deems it necessary. This should substantially allay physicians’ concerns that they will be prosecuted for performing abortions.<sup>165</sup> Indeed, their lawyers can engage in a “good faith effort” per Rule 1.2(d) to help abortion providers understand how state abortion bans interact with the memorandum. Unfortunately, this measure likely will not assuage physicians’ apprehensions due to the imprecision of a word like “necessary”; it will bubble up the same concerns as do “life” and “health” of the pregnant person.<sup>166</sup>

The Department of Justice should also work with the American Medical Association to define—perhaps broadly—the term “necessary” and then advise doctors that they will not face penalties. Doctors can use as a guide EMTALA’s definition of an “emergency medical condition,” i.e., one “manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of mediate medical attention could reasonably be expected to result in placing the health of the individual . . . or her unborn child in serious jeopardy.”<sup>167</sup> Undoubtedly, the AMA’s recent guidance, counselling physicians to act in the best interest of their patients’ well-being, is a solid first step.<sup>168</sup>

Still, until the Department of Justice—or states’ attorneys general offices—ensures these doctors will not be placed in jail for violating state abortion bans,

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161. Claire Hansen, Horus Alas, & Elliott Davis Jr., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, US NEWS (Dec. 14, 2022), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> [<https://perma.cc/29VU-8XDT>].

162. James M. Cole, *Guidance Regarding Marijuana Enforcement*, U.S. DEP’T OF JUSTICE (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/4827-FHJM>].

163. *Id.*

164. *See* Reinforcement of EMTALA Obligations, *supra* note 89.

165. *See* *Doctors Who Want to Defy*, *supra* note 11.

166. Indeed, vague language is ubiquitous in both the Constitution and the common law. *See, e.g.*, U.S. Const. amend. XIV (using the nebulous term “liberty” to encompass many rights); RESTATEMENT (SECOND) OF TORTS § 652(B) (Am. L. Inst. 1977) (using the broad “reasonable person” standard as the main standard governing what conduct is allowed).

167. 42 U.S.C. § 1395(e)(1)(A)(i) (2010). Of course, this definition is also broad but at least the statute provides for one at all.

168. Kevin B. O’Reilly, *AMA Holds Fast to Principle: Reproductive Care is Health Care*, AM. MED. ASS’N (Nov. 17, 2022), <https://www.ama-assn.org/delivering-care/public-health/ama-holds-fast-principle-reproductive-care-health-care> [<https://perma.cc/3TVC-7AWB>]. As the title suggests, the AMA’s president declared, “Reproductive care is health care.” *Id.*

the AMA's proclamation that "physicians and patients should not be held civilly or criminally liable in cases where pregnancy loss results from medically necessary care" will likely provide cold comfort.<sup>169</sup> Perhaps this proclamation will alleviate somewhat patients' fears but not those of "hospitals and doctors who are not fans of liability."<sup>170</sup> Indeed, doctors or staff declare that they will not perform "potentially life-saving medical care" unless they think they are "1000% safe."<sup>171</sup> Though "convicting health professionals for saving women from serious harm is unlikely to appeal to courts and jurors—or to voters"—that does not seem to assuage such professionals.<sup>172</sup>

Federal guidance, however, cannot necessarily insulate actions at a state level. As such, state's attorneys general offices need to issue guidance "to blunt the consequences of state abortion bans" on doctors since the Department of Justice cannot immunize doctors from state court proceedings.<sup>173</sup> This guidance would provide that doctors should not be prosecuted for using their best medical judgment in situations where the pregnant person's life or health was in danger.

Lobbying coupled with advocacy and activism is another approach that could drive a "seismic change."<sup>174</sup> Lawyers could lobby state legislatures and state's attorneys general offices to issue guidance that prevents prosecution of health care professionals seeking to safeguard the life and health of their pregnant patients. Further, lawyers can work with non-governmental organizations like If/When/How and engage in pro-bono projects at law firms targeting this issue. Advocacy and activism were very effective in the pre-*Roe* era.<sup>175</sup> Activism "embodied the feminist movement's creed that the personal was political."<sup>176</sup> Just as feminist activists were successful pre-*Roe* via tactics from civil disobedience to tireless lobbying, doctors and lawyers representing them need to be vigorous in ensuring states do not prosecute them for what they deem medically necessary behavior. To boot, if the health care professionals engage in the activism themselves, they can be more certain that their conduct will be permissible, and they will hopefully then be assuaged of their fears of facing a prison sentence.

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169. *Id.*

170. Selena Simmons-Duffin, *Her Miscarriage Left Her Bleeding Profusely. An Ohio ER Sent Her Home to Wait*, NPR (Nov. 15, 2022, 12:01 PM), <https://www.npr.org/sections/health-shots/2022/11/15/1135882310/miscarriage-hemorrhage-abortion-law-ohio> [<https://perma.cc/34FN-JEFU>].

171. *Id.*

172. Bloche, *supra* note 22. Indeed, a West Virginia senator, who is also a physician, refused to back a bill with criminal penalties for doctors, warning of "massive public backlash" if the bill did so. Kitchener, *supra* note 4.

173. Maggie Jo Buchanan & Elyssa Spitzer, *How State Attorneys General Can Protect Abortion Rights*, CENTER FOR AM. PROGRESS (Aug. 22, 2022), <https://www.americanprogress.org/article/how-state-attorneys-general-can-protect-abortion-rights/> [<https://perma.cc/9HRM-PMJZ>].

174. Kornbluh, *supra* note 150.

175. Pre-*Roe*, activists "demanded that legislators support a far more ambitious [bill], one that would have removed abortion entirely from the state legal code," and thus decriminalized it. *Id.*

176. *Id.*

Moreover, the activism will mean more from the horse's mouth, i.e., from those people actually performing medically necessary abortions.

### CONCLUSION

The issues arising from *Dobbs* are not going away. The welter of state laws and the lack of clarity surrounding them has created a minefield for both doctors and lawyers. Lawyers thus play a critical role both in helping physicians live up to their healthcare obligations, but also in recognizing the implications of the physician's actions. Doctors will need lawyers to provide advice *ex-ante* and provide defense *ex-post* to help protect doctors from both civil and criminal consequences. While *Roe* emphasized that the doctor and their patient were at the center of an abortion decision, *Dobbs* interjects a lawyer into that choice almost necessarily. When patients facing these decisions say, "Get me my doctor!," doctors will now retort, "Get me my lawyer!"<sup>177</sup>

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177. Cf. Alexandra Petri, *Don't listen to the FDA. Listen to a Trump-appointed judge named Matt.*, WASH. POST (Feb. 10, 2023, 3:48 PM), <https://www.washingtonpost.com/opinions/2023/02/10/mifepristone-abortion-pill-ruling-satire/> [<https://perma.cc/85DJ-5MPX>] ("Get me my judge!").