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Pregnancy and Prosecution in a Post-Roe World

In June of 2022, during the *Dobbs v. Jackson Women's Health Organization* decision, the United States Supreme Court (SCOTUS) overturned *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992) ending a guaranteed constitutional right to an abortion. One year post-*Dobbs*, the US experienced the highest number of pregnancy-related prosecutions recorded in a single year (Bach and Wasilczuk). States are using fetal personhood laws, interpretations of the Comstock Act, family policing, HIPAA loopholes and technology surveillance to prosecute women for such "crimes," when in most of those cases, the babies were born healthy, and the women were prosecuted after giving birth. From an outsider's perspective, these rules and regulations look like they are meant to protect the life of both the mother and fetus. However, each one of these points has an undercurrent of eugenicist language, and will undoubtedly cause the subjection of all women, pregnant or not. The overturning of *Roe* and *Casey* is a dangerous stepping stone towards creating an anti-feminist nation that strips women of all rights to their bodies.

Fetal personhood laws

Fetal personhood laws grant legal personhood to a fetus, embryo or fertilized egg. These laws claim that a fetus should be recognized as a person the moment it is conceived, and it should be granted rights to life. Fetal personhood laws are popular among those who consider themselves pro-life and have been making headway in state courts around the country. Currently,

there are 17 states that recognize fetal personhood regarding all civil and criminal laws: Montana, Utah, Arizona, Kansas, Missouri, Arkansas, Louisiana, Tennessee, Alabama, Georgia and Pennsylvania. There are four states that recognize fetal personhood concerning criminal law only: South Dakota, Texas, Ohio and Kentucky. However, there are a total of 24 states that include some sort of fetal personhood language in their constitutions meant to regulate or strictly prohibit abortion. Feticide, or fetal homicide, is often part of the conversation about fetal personhood laws. Right now, 38 states could prosecute women for experiencing stillbirth or miscarriage if it is suspected that the woman attempted to self-inflict either. In “Pregnancy as a Crime: A Preliminary Report on the First Year After Dobbs,” Wendy A. Bach and Madalyn K. Masilczuk said, “fetal personhood, as manifested through pregnancy criminalization, is not about protecting fetuses from harm. It is about controlling and punishing pregnant people, particularly women, who do not conform to racialized ideals of motherhood.”

There are a plethora of consequences that come along with granting fetal personhood. One of the most glaring issues is that fetal personhood greatly complicates a pregnant woman's right to life. A statement released by the advocacy group Pregnancy Justice said, “fetal personhood ‘fundamentally changes the legal rights and status of all pregnant women’ and forces them to ‘forfeit’ their own personhood.” In many cases, the fetus’s health would take precedence over the mother’s, creating a situation where the mother's body is no longer truly her own. Fetal personhood also complicates the right to in vitro fertilization (IVF) treatment. Though an overwhelming number of adults in America (70% of women and 69% of men) support the right to IVF treatment. Fetal personhood laws in states like Alabama and Georgia are muddying the legal language. For example, in Alabama, the Supreme Court ruled that frozen, fertilized embryos legally count as children. According to Vox reporter Ian Millhiser, the decision falls

under the state's Wrongful Death of a Minor Act (qtd. in North). In most cases, a woman who undergoes IVF treatment will not use all of the fertilized embryos. Because the embryos are now legally considered children, people cannot choose to discard the leftovers. Storage is extremely expensive, and fetal personhood laws “could force patients to pay for storage indefinitely or leave clinics liable to criminal prosecution if embryos are accidentally damaged” (North).

Laws such as these have caused some clinics to halt IVF treatments out of fear of prosecution. A journal article published in the *Georgetown Journal of Gender and the Law* titled “Unintended Consequences of Fetal Personhood Statutes: Examples from Tax, Trusts, and Estates,” explains the complicated nature of a fetus becoming a dependent. In this article, Crawford et. al said that in Georgia, there was a line added to the income tax form allowing someone to claim an unborn child. This opens the door for far more surveillance of women and their condition. How will a woman prove she is pregnant to the state? What happens if a miscarriage occurs? Does this require providing sensitive health information to the state? Could claiming this deductible before birth, and then having a baby die, make you liable for a criminal penalty? There are also implications for intestacy (someone dying without a will). If a fetus is a fully recognized person, it “would have the same rights as a living child, entitled to inherit by intestacy from and through their parents (i.e., from their mother, father, aunts, uncles, grandparents, etc.)” (Crawford et. al). Again, this would require all family members of the deceased to disclose their pregnancy to the state. Also, if that fetus does not make it to birth, it could cause another estate administration to need to distribute its “owned assets.” Fetal personhood greatly complicates the rights of the mother, creates added danger to pregnancy and creates further cause for surveillance by the state.

Self-managed abortion and comstock

The National Institutes of Health define self-managed abortions as, “involv[ing] any action that is taken to end a pregnancy outside of the formal healthcare system, and could include self-sourcing medications; using herbs, plants, vitamins, or supplements; consuming drugs, alcohol, or toxic substances; and using physical methods” (Verma and Grossman). The abortion pill routine, misoprostol and mifepristone, was approved for use in September of 2000 (FDA). These medications are widely used and considered safe when taken up to 10 weeks of gestation. In “Pregnancy as a Crime: A Preliminary Report on the First Year After Dobbs,” the authors state, “very few documented prosecutions involve an explicit abortion-related charge” (Bach and Wasilczuk). Only one case contained explicit details regarding abortion, but three others contained allegations that the women possessed or attempted to obtain abortion medication. Bach and Wasilczuk said, “these cases show that even when abortion is not charged, pregnant people’s contemplation of abortion can be weaponized against them.” The Comstock Act currently poses the largest threat to abortion pill access.

The Comstock Act of 1873 is a federal law that criminalized the mailing of anything considered obscene (John Hopkins). When it was first enacted, the act was used to criminalize the shipment of oral contraception and birth control devices, as well as pornographic materials. In the 70s, the Comstock Act was repealed for contraceptives, and then when *Roe v. Wade* protected the right to abortion in 1973, it no longer restricted the mailing of abortion pills. Justices Samuel Alito and Clarence Thomas have said they “would likely uphold the enforcement of the Comstock Act,” which would effectively end abortion access across the U.S. (Sobel and Felix). Online pharmacies have been used as a loophole to abortion bans across the country. Medical professionals in states where abortion is fully legal can prescribe abortion pills to patients in states that block care. With the reinstatement of the Comstock Act, loophole access

would end, and access to the medication would become dysregulated, expensive and difficult for women in banned states.

Family policing and healthcare

Family policing and the healthcare system are leading to pregnancy-related prosecutions as well. According to the Center for Family Representation, the family policing system refers to “the system’s use of surveillance, regulation, and punishment to oppress families and communities, the majority of which are Black or Brown and low-income.” In the post-Roe world, healthcare professionals are being asked to function as their own kind of law enforcement agencies while serving pregnant women. The Health Insurance Portability and Accountability Act (HIPAA) is supposed to protect patient privacy. However, there are loopholes that allow healthcare practitioners to report incidents to the police. HIPAA can be violated when there is a “serious and imminent” threat. That clause was meant to reduce harm if a patient said they were going to hurt themselves or someone else. “Pregnant people are often drug tested without their knowledge or consent during pregnancy and/or during labor and delivery. The results of these tests are shared with family policing agencies,” (Bach and Wasilczuk). 121 of the 210 cases of pregnancy-related prosecutions that Pregnancy Justice looked at obtained information from the medical system to implicate women in a crime. In 114 cases, the family policing system was involved (Bach and Wasilczuk). This also involves crisis pregnancy centers (CPCs). CPCs are not real clinics and do not have to follow HIPAA regulations. These clinics will advertise pregnancy testing, counseling and other types of pregnancy-health related services, but they are usually run by anti-abortion activists. CPCs collect data on pregnant women, often knowing whether they are contemplating abortion, and send that data to law enforcement for further surveillance.

Tech surveillance

The rise of technology is posing a unique risk for women. Everyone has parts of their life stored on a device. Biometric data is used to unlock phones and laptops, watches track heartbeats and step counts and many people use apps to track different health conditions. In 2023, it was estimated that 50 million women worldwide use period tracking apps to monitor their menstrual cycle (Kelly and Habib). Each entry into an app is a new data point that the company holds on to. This is a massive cause for concern post-Roe. Groups called data brokers “buy, aggregate, disclose, and sell billions of data elements on Americans with virtually no oversight” (Data Brokers). Anyone can buy data from a data broker, and the brokers make an enormous profit. Health data is easily bought and sold online with no regard to HIPAA regulations. In “Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World,” Jolynn Dellinger and Stephanie Pell said there are two dimensions to the constitutional right to privacy that are often associated with the right to abortion: decisional privacy and physical privacy/bodily integrity. The implication from these two dimensions is that personal information, like health data, is private as well. However, that is not the case. Third-party data has been used by law enforcement for years. Cellphones can be used to track a person's physical location, and law enforcement goes through very little court process to obtain that information. Dellinger and Pell said, “this surveillance, in turn, compromises intellectual privacy — a fourth category of privacy — which includes the right to access information, read, and think freely and independently.” The overturning of Roe in the Dobbs decision destroys women's right to privacy because there are no protections in place regarding digital surveillance. “Most relevant here is law enforcement’s ability to engage in surveillance through the collection and use of information from personal devices and from various third parties with or without the knowledge of those

being surveilled” (Dellinger and Pell). Technological surveillance is happening all around us. Smart Home devices like Amazon’s Alexa and Google Home are constantly listening to and collecting voice data information. Search engines like Google and Bing collect data on the types of searches made and the sites visited. This surveillance may cause a chilling effect among women. David L. Hudson, Jr. wrote for the Foundation for Individual Rights and Expression, “the ‘chilling effect’ refers to a phenomenon where individuals or groups refrain from engaging in expression for fear of running afoul of a law or regulation.” Jonathan W. Penney, a lawyer and research fellow at the Citizen Lab/Canada Centre for Global Security Studies, did a comparative case study on internet surveillance, regulation and chilling effects online. Penney’s study, published in 2013, found that women on the internet were more likely to be chilled. “Due to the way in which the gender variable was coded, the positive association suggests that female respondents were ‘chilled’ in relation to all three forms of activities in this hypothetical scenario (less likely to speak or write online in certain contexts, less likely to share personally created content, and would be more careful in their online search activities)” (Penney). He also found that if a woman or one of her friends was targeted directly, there was an immediate chilling effect online, and that women feel like they are more likely to be targeted by corporations than the government. Chilling effects create a harmful self-censorship environment. Out of fear of being prosecuted for a pregnancy-related crime, women might be less likely to go to the hospital if a medical event occurs. Pregnancy Justice found that the chilling effect expanded to doctors, making them less willing to treat patients out of fear of prosecution for an abortion-related charge. Chilling effects also harm activism efforts, and stall social movements from creating change. When people, especially women, are too scared to speak, nothing changes.

The overturning of *Roe v. Wade* and *Planned Parenthood v. Casey* has opened the door to harmful regulation of the female body. Through use of fetal personhood laws, the Comstock Act, the family policing system and technological surveillance, the U.S. is creating a hostile environment for all women. The federal right to an abortion grants far more than just the ability to choose not to carry a child. These laws have nothing to do with protecting the children in this country. Rather, the overturning of *Roe* and *Casey* was a deliberate move of the patriarchy to further control women in an attempt to reverse the impacts of feminism across this country. The U.S. government must reinstate the federal right to an abortion for the betterment and protection of all women in this country, and to protect women from harmful state level legislation regarding their bodies.

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