

Countering Criminalization of Pregnancy and Abortion

A RESOURCE FOR HOSPITAL
AND HEALTH CARE ADMINISTRATORS



About the National Partnership

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group dedicated to promoting fairness in the workplace, reproductive health and rights, access to quality, affordable health care and policies that help all people meet the dual demands of work and family.

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Since the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, there has been a heightened risk of criminalization looming over patients and providers alike. Hospital and health care provider institutions have a responsibility to protect their patients and staff, including by safeguarding sensitive information related to reproductive health care under the current Health Insurance Portability and Accountability Act (HIPAA) privacy rule. This resource contextualizes privacy laws against the backdrop of pregnancy and abortion criminalization and urges disentangling from the criminal system in order to advance health outcomes and equity.

Responding to the heightened concern following *Dobbs* around disclosures of health information

Women* have long been subject to criminalization related to pregnancy and abortion. The consequences of arrests, prosecutions, detentions, and convictions are far-reaching – especially for women of color. In June 2022, the specter of criminalization increased significantly when the Supreme Court overturned *Roe v. Wade* and abruptly revoked the constitutionally protected right to an abortion. Since the *Dobbs* decision, confusion around requirements to report pregnancy-related information has led to unnecessary disclosures, which have the potential to trigger long-lasting repercussions both to patients and providers.

People must feel safe accessing needed health care, but this is not always the case for those seeking abortion care – especially for people of color. A hospital visit should never expose patients to criminal liability or civil penalties. Punitive responses to pregnancy loss, substance use, self-managed abortion, and other circumstances discourage pregnant people from seeking health care in the first place out of fear of what might happen. Yet, new analysis shows that even before *Roe* was overturned, one of the most common reasons for criminalization related to people’s pregnancy status or outcomes was **health care providers unnecessarily reporting their patients to law enforcement**.¹ Alarming – but unsurprisingly – there are significant disparities in who is criminalized.² Low-income, Black, and brown women comprise the majority of women subjected to criminal proceedings arising from their pregnancies.³

The fall of *Roe* has eroded trust between patients and providers. A December 2022 poll asked individuals about their concerns with sharing medical information while seeking reproductive care post-*Dobbs*.⁴ Alarming, 20 percent of women and 30 percent of people under 45 said **they would not feel comfortable sharing their complete information while seeking care under HIPAA**. For appropriate patient care and improved trust between providers and patients, we need greater protections against criminalization.

In recent years, hospital systems⁵ and state and local leaders⁶ have made bold, necessary commitments to health equity, including addressing bias and racism within health care settings. In order to deliver on these promises, hospital systems must protect access to comprehensive reproductive health care services so that individuals do not fear criminalization for seeking medical care.

Reporting patients to law enforcement for their reproductive health care services is neither legally required nor ethically justifiable, and it violates patients’ privacy. Hospital systems must establish comprehensive policies and provide clear directions to hospital staff – including doctors, nurses, and social workers – that people seeking or having abortions, or otherwise experiencing pregnancy loss, must not be reported to law enforcement to ensure that patients can access care without worrying that their autonomy and confidentiality will be compromised.

* We recognize and respect that pregnant and parenting people, as well as people seeking abortion care, have a range of gender identities, and do not always identify as “women” or “mothers.” In recognition of the diversity of identities, this resource uses both gendered and gender-neutral terms such as “individual,” “people,” and “pregnant people.”

Hospital systems and health care providers hold significant power, and bear great responsibility, to protect the people who seek their care. This resource will provide the background and guidance you will need to understand relevant privacy laws and the importance of disentangling your work from the criminal system. In this way, you can make strides in reducing barriers to health care access in this current moment of crisis, as well as mitigating the entrenched racial disparities in reproductive and maternal health outcomes.

HIPAA guidance following *Dobbs*

The Department of Health and Human Services (HHS) issued [new guidance](#) on June 29, 2022, to better protect sensitive information related to reproductive health care under HIPAA.⁷ Hospital administrators and health care systems should thoroughly familiarize their staff with this guidance, ensuring that protected health information (PHI) is not unnecessarily disclosed.

The examples in HHS's guidance make clear that sexual and reproductive health care PHI should not be disclosed except where it is expressly required. To illustrate, it provides the following example:

"An individual goes to a hospital emergency department while experiencing complications related to a miscarriage during the tenth week of pregnancy. A hospital workforce member suspects the individual of having taken medication to end their pregnancy. State or other law prohibits abortion after six weeks of pregnancy but does not require the hospital to report individuals to law enforcement. Where state law does **not expressly require such reporting**, the Privacy Rule would **not permit** a disclosure to law enforcement under the "required by law" permission. Therefore, such a disclosure would be impermissible and constitute a breach of unsecured PHI requiring notification to HHS and the individual affected."⁸

New Proposed Rule:

On April 12, 2023, the Office for Civil Rights at HHS issued a Notice of Proposed Rulemaking (NPRM) to modify the HIPAA Privacy Rule in order to strengthen protections for reproductive health care privacy.⁹ HHS's post-*Dobbs* guidance remains in effect while this rulemaking is underway.

The proposed rule would prohibit using or disclosing PHI for criminal, civil, or administrative investigations of or proceedings against individuals related to **seeking, obtaining, providing, or facilitating lawful reproductive health care**. It would also prohibit identification of any person for the purpose of initiating such investigations or proceedings.

The proposed rule will go through a public notice and comment period before it is finalized, and it will benefit hospitals and health systems to act now to implement stronger privacy policies aligned with the NPRM.

It is imperative that health care systems implement clear policies that PHI will be used or disclosed *only* as expressly permitted or required by the HIPAA privacy rule, unless there is signed authorization by the patient. This is foundational to building trust between patients and providers, as it gives individuals confidence that their PHI will be kept private thus facilitating access to high quality care.

Criminalization of pregnancy outcomes can cause lasting, far-reaching harm

Following *Dobbs*, there is escalating anxiety and concern surrounding the increased threat of surveillance on health information, communications, purchases, travel, and more.¹⁰ With patchwork protections for abortion care, states are attempting to criminalize both patients and providers with threats of aggressive enforcement.¹¹

Seeking access to medical care and providing appropriate care should not expose patients and providers to criminal liability or civil penalties. The well-founded fear and risk of criminalization creates dangerous barriers to access and care. Without trust or confidence that providers will keep their information safe, patients may avoid seeking medical assistance – even in

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emergencies. Providers are also increasingly reluctant to offer services that they know are necessary and meet the standard of care in a given situation for fear of legal liability. Medical and public health associations have long opposed the prosecution and punishment of pregnant people, knowing that policies and practices criminalizing individuals compromise the patient-practitioner relationship and prevent pregnant people from seeking or obtaining vital health services.¹²

What's at risk for patients

There has been a rapid acceleration in the rates of criminalization of pregnant people in recent years.¹³ Based on politically motivated misuses of fetal protection laws,¹⁴ authorities have arrested and charged pregnant people with chemical endangerment of a child, child abuse, and even homicide because of a range of health issues including miscarriages, stillbirths, self-managed abortion, and attempted suicide.

We must be clear about who is most at risk. Health care professionals and child welfare officials disproportionately report women of color, low-income women, and women who are suspected of using illicit substances or have previously used them.¹⁵ Family regulation systems are much more likely to receive reports on and investigate women and families of color, which can result in them being surveilled for years. Recent analysis indicates that there are racial inequities in how severely pregnant people of color are prosecuted for allegedly ending their own pregnancy or helping someone else to do so. Authorities are *twice* as likely to consider homicide charges for people of color compared to non-Hispanic white individuals.¹⁶

The effects of criminalization reverberate widely. Regardless of whether a person's case ends in arrest, investigation, detention, or a prison sentence, it will cost them time, money, and immeasurable emotional and psychological impact. Entanglement in the criminal legal system can have severe consequences, such as:

- Loss of employment and housing, and future difficulties in attempts to obtain these basic necessities;¹⁷
- Exposure to violence, including physical and sexual abuse;¹⁸
- Inadequate medical care for pregnancy during incarceration;¹⁹
- Unfavorable plea deals or pressure to plead guilty in order to be released from incarceration;²⁰
- Broad immigration consequences, including deportation;²¹
- Civil child welfare investigations, which may result in child removal, family separation, and even termination of parental rights – shown to harm both parents and children;²² and
- Being shamed or ostracized in one's community.

And, even if charges are ultimately dropped, any arrest or investigation can cause great harm.²³

The same communities that are already over-surveilled and over-criminalized are also the least likely to have equitable access to health care²⁴ and most likely to experience poor health outcomes.²⁵ There is already an entrenched mistrust between Black and brown patients and the health care system, stemming from the history of reproductive health care experiments and forced sterilization, and ongoing discrimination and mistreatment.²⁶ Criminalizing pregnant people exacerbates this mistrust and intensifies health inequities. Furthermore, the chilling effect of criminalization extends beyond individuals; unnecessary reporting can break trust with entire communities, risking health at the population level. A commitment to health equity and to anti-racism in health care requires disentangling from the criminal system.

What's at risk for providers

Health care providers did not enter the medical field to police their patients or to be criminalized for delivering patient-centered care. Yet, in the wake of *Dobbs*, many state laws continue to specifically target doctors for providing abortion care, undermining both medical standards of care and the basic ethical tenets of the patient-provider relationship.²⁷

Since *Roe* was overturned, many doctors have expressed anxiety about the complicated legal landscape around abortion care. Post-*Dobbs*, concerns have expanded from being primarily about patients' medical safety to also encompass worries about their legal safety and that of their patients.²⁸ Unnecessary reporting can place providers under increased scrutiny for delivering health care. Depending on the state, someone who provides an abortion can face fines of up to \$100,000 and incarceration ranging from a few months to life imprisonment.²⁹ The harms of incarceration, as described above, extend to providers as well – and stories from the pre-*Roe* era illustrate families' struggles after their relatives were incarcerated for providing abortions.³⁰

Harsh criminal and civil liabilities can make it more difficult to staff obstetrics departments, which reduces community access to quality maternal and reproductive health care.³¹ Some hospitals have already stopped labor and delivery services, citing increased criminalization of providers and inability to retain physicians.³² Now, because of the attack on reproductive health and rights, doctors and medical students in states hostile to abortion are reconsidering their career prospects,³³ with some doctors and students even moving to other states to continue practicing or to pursue their residencies.³⁴ In fact, a recent study of current and future physicians found that 82.3 percent of respondents would prefer to work or train in states with preserved abortion access, and that 76.4 percent would *not even apply* to states with legal consequences for providing abortion care or emergency contraceptives.³⁵ This is on top of existing maternity care deserts – counties where access to care is limited or absent – which affect 6.9 million women across the country.³⁶ A disproportionate physician workforce shortage in these states will only compound stress on the health care system and exacerbate health disparities.

Even prior to *Dobbs*, the physician workforce shortage was growing, with the pandemic intensifying clinician burnout.³⁷ Retaining providers in the midst of burnout and with the looming specter of criminalization requires hospital systems to provide full support of their staff—and having clear guidance protecting privacy is foundational to this effort.

Both patients and providers need strong protections against criminalization

We recommend that hospital administrators and health care systems implement policies and provide directions to their doctors, nurses, social workers, and other staff that clearly and proactively stop criminalizing pregnant people. Hospital systems can prevent unnecessary criminalization by complying with the HIPAA guidance summarized above and developing policies and practices stipulating that staff will not report patients to law enforcement unless required by law to do so. Such policies also align with leading medical and public health organizations' stances opposing prosecution and punishment of people who self-manage abortion.³⁸

It is time to recharacterize how health care systems think about risk management in this context. In implementing policies that protect pregnant people, provider institution leaders must take strong stances against criminalization, to reduce the risks of chilling effects on the patient-provider relationship, risks of reputational harm to hospitals and health care systems, risks of HIPAA complaints, risks to providers' ability to provide care, and risks to health outcomes of vulnerable populations.

Even more importantly, to deliver on their missions to provide high-quality, comprehensive health care in their communities, and deliver on commitments to health equity, health care leaders must act now to protect access to comprehensive reproductive health care services.

We recommend that hospital administrators and health care systems implement policies and provide directions to their doctors, nurses, social workers, and other staff that clearly and proactively stop criminalizing pregnant people.

ENDNOTES

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