Staying a Jane Doe Post Dobbs and Roe: The Risk Modern Technology Poses with Archaic Abortion Restrictions

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STAYING A JANE DOE POST DOBBS AND ROE: THE RISK MODERN TECHNOLOGY POSES WITH ARCHAIC ABORTION RESTRICTIONS

Grace E. Marino
ABSTRACT—Dobbs v. Jackson Women’s Health Organization sent shockwaves across the nation, overturning years of precedent and marking a pivotal moment as Roe v. Wade receded from current legal standing. This consequential abortion case immediately ignited controversy, prompting states to swiftly enact laws prohibiting abortion. Beyond the immediate implications for the health and safety of those seeking abortions, the new legal landscape poses additional risks. Since the era when abortion was last illegal, rapid technological advancements have transformed the American societal landscape, resulting in daily surveillance of its citizens. The convergence of technological progress, societal dependence on technology, and the absence of robust data privacy laws presents a distinctive challenge to reproductive rights. This paper delves into the technological landscape preceding Roe, explores significant developments since 1970, and examines the potential ramifications for reproductive freedom. The unique risks arising from data collection and easy access to information are particularly pronounced in states with recently implemented anti-abortion legislation.

I. INTRODUCTION ................................................................. 246
II. A BRIEF OVERVIEW OF RELEVANT TECHNOLOGY BEFORE 1973 .................. 248
   A. Pre-Roe Abortion Environment ....................................... 248
   B. Pre-Roe Technology Landscape ...................................... 250
III. TECHNOLOGY DEVELOPMENT BETWEEN ROE AND DOBBS ...................... 252
   A. Red Light Cameras and Automated License Plate Reader Technology...... 252
   B. Video Technology ....................................................... 255
   C. Facial Recognition Software .......................................... 256
   D. The Internet ............................................................ 258
   E. Cell Phones ............................................................. 262

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IV. THE IMPACT TECHNOLOGY DEVELOPMENTS MAY HAVE ON REPRODUCTIVE RIGHTS IF PRIVACY LAWS DO NOT ADAPT TO TECHNOLOGICAL CHANGES

A. Photographs in Public Forum and Traffic Camera Use in Prosecution

B. It is Unclear How Data Will Be Protected During a Criminal Investigation

C. Tensions Surrounding Abortion and Implemented Restrictions Show Motivation to Prosecute or Charge

V. CONCLUSION

I. INTRODUCTION

In Dobbs v. Jackson Women’s Health Organization, the Supreme Court overturned Roe v. Wade, removing constitutional protection for abortions. The majority opinion, written by Justice Alito, classifies Roe as “egregiously wrong from the start” and overturns fifty years of precedent. Now, each state holds an individual legislative power to restrict or protect abortion access. In addition to breaking infamous legal precedent, Dobbs garnered widespread attention for the unorthodox way it surfaced. For the first time in Supreme Court history, an anonymous actor leaked the opinion to the public prior to the official ruling. Arguably “the most significant abortion case in a generation,” the leaked opinion sparked immediate controversy. States acted quickly, relying on the unofficial opinion to enact “preemptive abortion bans.” At least 13 states enacted these bans, also known as “trigger laws,” to restrict abortion access immediately once Dobbs became law.

Dobbs poses countless risks to those with the ability to become pregnant today. This note addresses the risk that results from the

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2 Id. at 2243.
3 Josh Gerstein and Alexander Ward, Supreme Court has voted to overturn abortion rights, draft opinion shows, POLITICO (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/ZQ8L-DSSA].
6 Popli, supra note 4; Stanton, supra note 5.
7 "The consequences of the Dobbs decision are wide ranging. Restrictions on access to healthcare places women’s lives and health at risk, leading to increased material mortality and morbidity, a climate of fear among healthcare providers, and reduced access to all forms of care. Dobbs also enables penalization and criminalization of healthcare, with providers, patients, and third parties at risk of prosecution or civil suit for their involvement in private healthcare decisions." See Human Rights
technological advancements since Roe v. Wade. Specifically, how “the [Dobbs] decision opens the door for widespread infringement of privacy rights as digital surveillance is expanded to detect violations of new regulations.” The technological advancements from 1973 to 2022 create insurmountable obstacles for those seeking abortions. Most Americans hold incredible technological power in their pockets. Cell phones are equipped with facial recognition software, cameras, location tracking, data-tracking, and more. This technology provides law enforcement and investigators access to an unprecedented amount of personal information. The prevalence and capability of technology today demands strong privacy protections. Some states have recognized and acted on privacy concerns by passing legislation to protect their citizens’ confidential information from these new threats. While consumer protection agencies and states attempt to combat this ongoing problem, legislation continues to lag behind technological development.

Technological advancements, societal reliance on technology, and a lack of adequate data privacy laws pose a unique problem for reproductive rights. This paper discusses the technological world before Roe, the major developments in technology since 1970, and the possible consequences for reproductive freedom. For the purposes of this paper, I discuss the unique risks technology poses in states with new anti-abortion legislation. Specifically, the nature of data collection and the ease of access to information.


8 Id.

9 While police are meaningfully limited by the 4th amendment, police have lawfully obtained information from various technologies. See, generally, Neil Jacobson, How Technology is Changing Law Enforcement, CPI OPENFOX, (Nov. 14, 2022), https://www.openfox.com/how-technology-is-changing-law-enforcement [https://perma.cc/2MK7-VGPQ] (“Today, there are many incredible technologies used by law enforcement to help manage data and keep communities safe. From drones and gunshot technology to license plate scanning and surveillance cameras, IT has revolutionized the industry.”); Bernard Marr, The 5 Biggest Tech Trends In Policing and Law Enforcement, FORBES, (Mar. 8, 2022), https://www.forbes.com/sites/bernardmarr/2022/03/08/the-5-biggest-tech-trends-in-policing-and-law-enforcement [https://perma.cc/C3BK-USBQ] (“These technologies give police officers and intelligence agencies unprecedented powers to crack down on criminal activity as they attempt to keep us safe.”).

10 See INFORMATION PRACTICES ACT OF 1977, 18 CAL. CIV. CODE §§ 1798-1798.78.

II. A Brief Overview of Relevant Technology Before 1973

Before Roe, the political and technological landscape created a unique pattern of enforcement in the abortion sphere. Throughout history, “the representation of the aborting [individual] dramatically changed.”12 The judicial system struggled with the role of the abortion recipient, unsure whether to designate the recipient a “‘victim’ of the criminal abortionist” or an “‘accomplice’ in the crime of illegal abortion.”13 American culture plays a vital role in characterizing abortion. Individuals seeking abortions today face different risks than those before Roe, including a polarized political climate and unimaginable advancements in technology. In order to better understand these current risks, it is important to explore the pre-Roe abortion landscape.

A. Pre-Roe Abortion Environment

Before the Supreme Court decided Roe v. Wade in 1973, lack of abortion access led to dangerous consequences.14 “[W]omen went to extreme measures to obtain abortions.”15 Pre-Roe, Cook County, Illinois16 dedicated a 40-bed ward17 to septic abortions and treated many women after unsuccessful, self-induced abortions. Methods for self-induced abortions in the mid 1900s sound unconscionable by today’s medical standards. Women would flush themselves with “bleach or peroxide” or insert sharp objects into the cervix like “wire coat hangers” and “knitting needles.”18 These typical yet barbaric methods led to dire consequences for abortion recipients, with a common result being a perforated uterus. Quite deadly, a perforation can cause uncontrollable internal bleeding or fast-progressing, “difficult-to-treat” infections.19 While self-induced abortions seem horrific now, they were America’s grim reality pre-Roe.

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13 Id. at 312.
15 Id.
16 Which contains the city of Chicago.
19 Id.
Unsurprisingly, “the evolution of American public policy on abortion in the 19th century was closely tied to efforts by physicians to professionalize the practice of medicine.”

Doctors wanted to prevent “unqualified, unlicensed practitioners” from entering the practice. Laws restricting abortions seemed like the best way to do this. Notably, “a culture of trust in the medical profession” also motivated the abortion law movement in the 1960s. The American Law Institute led the transformation but limited the scope, suggesting carve-outs in abortion laws for medical emergencies, “when the pregnancy resulted from rape or incest, or when the fetus had a severe defect.” While a result of mixed motivations, the 1960s abortion laws ultimately centered on protecting women.

The first abortion laws similarly attempted to protect abortion seekers. In the 1820s and 1830s, poison control laws governed abortion in the United States. Dangerous abortifacient drugs led to legislation designed to protect women. The drugs often killed women who took them. The laws controlled the distribution of abortifacient drugs, but they did not criminalize the act nor “punish women for inducing abortions.” These laws viewed women as the “victim” and sought apprehension of those providing the lethal drug.

While abortion recipients often fell victim to public stigmas or other social harms, states “almost never prosecuted [individuals] who sought abortions” under these early laws. Illegal abortions were common, and in 1930, “abortion was . . . the cause of death for 2,700 women (18%) of

22 Id.
23 See Rachel Benson Gold, Lessons from Before Roe: Will Past Be Prologue?, 6 GUTTMACHER REP. ON PUB. POL’Y 8, 9 (Mar. 1, 2023) (“when the pregnant woman’s life or health would be at risk if the pregnancy was carried to term.”).
24 Id.
26 Id.
27 Id.
28 Id.
maternal deaths recorded that year.” This presence of death led to an increase of criminal prosecution of abortion providers in the 1930s.

The laws intended to protect abortion recipients, yet common enforcement tactics humiliated those women. Because survival rates for illegal abortions were low, the prosecutorial system relied heavily on death bed confessions. Women testified against providing doctors in their last moments alive. Those lucky enough to survive faced “humiliating interrogation[s] about sexual matters by male officers . . . and public exposure of their abortions.” A standard approach to apprehension included “capturing women in the midst of an abortion procedure and gynecologically examining them for evidence.” While women were not the targets of prosecution, they were still punished through tactics including capture, examinations, interrogations, occasional holds in jail, and forced testimony. Some states went as far as forcing men and women who had premarital sex into marriage. The laws that were supposed to protect women soon hummed a different tune, one of enforcing gender norms and grossly intervening in private, sexual family matters.

B. Pre-Roe Technology Landscape

A lack of available technology allowed organizations to provide illegal abortions without significant fear of prosecution. Pre-Roe, underground abortion clinics or organizations were common. The Janes is one of the most famous underground illegal abortion providers, operating out of Chicago in the 1970s. The Janes owes a lot of its success to a lack of enforcement technology.

32 Walsh, supra note 30.
33 REAGAN, supra note 25, at 114.
34 Id.
35 Id.
37 Id.
38 REAGAN, supra note 25, at 115.
39 Id.
40 Women’s rights movements gained traction in the 1960s and soon turned their focus to reproductive rights. Underground abortion services became more common to “help women find safe illegal abortions.” One, the Clergy Consultation Service was a group of “concerned pastors and rabbis.” Others were founded by women who would soon begin to provide the service themselves. Jessica Ravitz, The Surprising History of Abortion in the United States, CNN (June 27, 2016), https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html [https://perma.cc/9J7Q-4PTC].
Without the technology of today, the Janes evaded police easier. Their main forms of communication could be destroyed without leaving a digital footprint. The Janes ran advertisements which stated: “Pregnant? Don’t want to be? Call Jane at 643-3844” in various locations, including underground papers, bulletin boards, and lampposts. Potential patients left messages on an answering machine describing their situation and the Janes organized this information on index cards. The leading model of answering machines in the 1970s utilized a tape system to record messages. Both the tapes and index cards were easily destroyed after providing care. A similar operation, if ran today, would face insurmountable obstacles due to technology unthinkable to the Janes.

In addition to their communication methods, a lack of location-tracking technology assisted the Janes who utilized a two-location system to stay hidden. Volunteers drove patients to a secondary location for the procedure. They often changed cars, routes, and locations in an effort to take every precaution available. Today, with things like cell phone location tracking and high-tech red light cameras, their defensive driving tactics would be useless.

The Janes operated for around five years without detection. They were ultimately apprehended, but only after providing around 11,000 women with abortions. Lack of technology aided the Janes operation and contributed to its duration. If attempted today, as this paper demonstrates, The Janes operation would be impossible. The Janes recognized the importance of providing individuals with proper medical care and mobilized at a time when they felt most needed. Technological advancements, like precise location tracking and digital footprints would prevent a similar undertaking in this modern age.

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42 THE JANES (HBO Max 2022) 29:10-31:03.

43 Id.


45 THE JANES (HBO Max 2022) 33:00-36:00.

46 Id.

47 Id.

Before *Roe*, technology seemed like a concern for the future. For example, Internet pioneers had big dreams, but were still “design[ing] the key building blocks” in the “1970s and ‘80s.”49 The original inventors “didn’t anticipate that the Internet’s own users would someday use the network to attack one another.”50 Concerns about evolving technology arose only after engineers saw it misused.51 The problems with omnipresent technology surfaced as technology developed. Over the fifty years between *Roe* and *Dobbs*, our society focused on a technology revolution and the ways it would help advance society.

### III. TECHNOLOGY DEVELOPMENT BETWEEN *ROE* AND *DOBBS*

Technology developed rapidly from the 1970s to 2023. Information technology has since become an integral piece of our society, and its effects are unavoidable. These technological advancements provide police with effective investigative tools. While beneficial to society in many ways, new technology leaves people exposed to new risks. A lack of privacy law protection for new technology poses a unique risk to people seeking abortion care post-*Dobbs*. To better understand the effects, it is crucial to first understand the most pertinent technological changes that pose risks to those who seek abortions. Understanding these basic technologies is key to analyzing the weaknesses of current privacy laws.

#### A. Red Light Cameras and Automated License Plate Reader Technology

New York State “launch[ed] the nation’s first Red Light Program (the program) in 1994.”52 The program intended to increase safety on roads by deterring drivers from running red lights.53 Other states would soon follow suit, implementing their own Red Light Camera (“RLC”) technology. By the late 1990s and early 2000s, RLCs became widespread enough to raise alarm.54 Many Americans felt violated by the new technological intrusion.55

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50 Id.
51 Id.
53 Id. at 6.
54 Since the 1990s, hostility from traffic cams has "led to vandalism of cameras in cities across the world." People are critical of the motive behind them and question their overall effectiveness. See Corey Dade, *What’s Driving The Backlash Against Traffic Cameras*, NPR: WBEZ Citi. (Feb. 22, 2012), https://www.npr.org/2012/02/22/147213437/whats-driving-the-backlash-against-traffic-cameras [https://perma.cc/MTG9-M24D].
RLC capabilities have grown over time. These cameras are now equipped with Automated License Plate Readers (“ALPRs”) and are “high-speed, computer-controlled camera systems.”

Cameras with ALPR software can capture images of license plates on moving or stationary vehicles. ALPR follows four major steps: “(1) vehicle image capture, (2) number plate detection, (3) character segmentation, and (4) character recognition.” First, the camera takes a picture. Then, “segmentation algorithms” combine the photo with already known images of license plates to detect and complete partial pictures.

APLR cameras produce two types of data, historical data and real-time data. Historical data captures and saves the license plate numbers, location, date and time. This information is saved in “ALPR databases,” which are maintained by police departments or private companies.

Duration of storage and permitted use of information varies by state. Real-time data uses the APLR reader as an alert system. Once the plate is scanned and read, it sends an alert to local police departments. Real-time data requires police to specify the license plate that triggers the alert. Police then receive a notification from the camera whenever ALPR reads the identified plate.

ALPRs do not collect or store drivers’ personal information per se, but common police technology makes this information easy to obtain. A routine search through a law enforcement database can produce the vehicle identification number, the expiration date of the license plate, any driver suspensions, as well as “the name of the person to whom the vehicle is...”

55 Id.
58 Id.
60 Id.
61 Id.
63 Id.
64 Id.
65 Registering a plate in the state of Illinois, for example, requires information like name, social security number, and driver’s license. See, generally, OFF. IL. SEC’Y STATE https://www.ilsos.gov/departments/vehicles/title_and_registration/home.html.
registered.” Photos from different locations can be pieced together resulting in a detailed history of travel. Current plate detection and processing time is less than fifty milliseconds. Cameras with ALPR scan “thousands of plates per minute,” growing the database “at a rate of 120-million data points per month.”

ALPR data serves many uses in criminal law, including aiding in apprehension of individuals for crimes unrelated to traffic violations. For example, in Commonwealth v. McCarthy, the police used ALPR data to arrest a defendant for drug possession and distribution. Massachusetts set up and maintained four ALPR cameras, one each end of two bridges. With historical data from the ALPR, the police “generated a spreadsheet indicating every occasion that [McCarthy’s car] passed over the . . . bridges” during a 13-month time frame. The data helped corroborate the police’s “theory that [McCarthy] routinely was bringing heroin to the Cape for distribution.”

Utilizing real-time ALPR technology, the police added McCarthy’s license plate number to a “hot list.” Once added, ALPR cameras automatically notified the police upon detection of the car. McCarthy’s arrest ultimately occurred due to a real-time alert provided by the bridge’s ALPR camera. Police followed the car after receiving the alert and arrested McCarthy after observing an incriminating exchange.

In court, McCarthy argued the use of ALPR data to provide real-time location notifications invaded his constitutional right to privacy. The case challenged the constitutionality of “four cameras placed at two fixed locations on the ends of [two] bridges.” The court rejected his argument and likened the license plate reader to “traditional surveillance

67 Id.
68 Supra note 56.
69 Automated License Plate Readers (ALPRs), ELEC. FRONTIER FOUND., https://www.eff.org/pages/automated-license-plate-readers-alpr [https://perma.cc/FW8H-G9D7].
71 Id. at 494-95.
72 Id. at 496.
73 Id.
74 Id. at 495.
75 Id.
76 Id. at 496.
77 Id. at 495-96.
78 Id. at 497.
79 Id. at 508.
techniques.” There are clear differences between the use of ALPR data and what a police officer could reasonably observe. However, the court deemed the differences reasonable enhancements of what one already expects from the police.

The court held that while McCarthy does have a “constitutionally protected expectation of privacy in the whole of his public movements,” ALPR surveillance and use of the data did not invade that privacy. The result hinged on the limited location of the cameras and that the ALPR did not record “the whole of his public movements.”

APLR data from various cameras could be pieced together to detail travel information. These cameras can help police prove an individual crossed state lines to receive abortion care. The endless possibilities demonstrate the pervasiveness of these cameras. The Janes would be unable to avoid such surveillance if attempted today.

B. Video Technology

Video technology has made great advancements since its creation. Two important changes are digitization and miniaturization. “The digitization of images... allows for the easy and inexpensive reproduction and transferability of video images.” In other words, police and private companies can easily store more data for significantly longer periods of time, all with greater ease. Physical equipment has reduced in size. The minimization of camera equipment allows cameras to be virtually anywhere while remaining unseen.

Cameras poses a threat to individuals who seek abortions in states where it is illegal. Theoretically, a properly placed camera could record video of people entering an abortion clinic. Further tech developments enhance this threat. For instance, combining surveillance cameras “with

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80 Id.
81 Id. at 509.
82 Id.
83 Id. at 494.
84 Id.
86 Id.
87 Id.
88 Id. (stating that “Pinhole video cameras are now available that fit into the palm of one’s hand and can be hidden almost anywhere”).
other technologies, such as facial recognition software” creates more privacy concerns and may have large constitutional significance.\textsuperscript{89}

\section*{C. Facial Recognition Software}

Facial recognition software has been developing rapidly since its roots took hold the 1960s.\textsuperscript{90} Law enforcement, in particular, quickly developed and utilized their own versions of the technology to fit evolving needs.\textsuperscript{91} The first major breakthrough of such police-sponsored facial recognition occurred in 2002.\textsuperscript{92} Law enforcement successfully used the technology to identify people in the Super Bowl crowd.\textsuperscript{93} By 2015, police were able to identify people in protests; by 2017, the newest model of the iPhone unlocked with a facial scan.\textsuperscript{94} By 2020, public concern about the risk of privacy invasion caused Amazon, Microsoft, and IBM to cease the sale of facial recognition technology (“FRT”) and data to law enforcement agencies.\textsuperscript{95}

Facial recognition accomplishes two general tasks: verification or identification.\textsuperscript{96} Verification assures the individual is “who they declare themselves to be.”\textsuperscript{97} This software, common in smart phone technology, requires a biometric template of the face to be created.\textsuperscript{98} The technology scans the individual’s face and compares it with the template.\textsuperscript{99} “A proper match, based on accuracy score, confirms the user’s digital identity.”\textsuperscript{100} Verification is easily summed up by considering it a “one-to-one” matching

\begin{itemize}
\item \textsuperscript{89} Michael D. White, \textit{Police Officer Body-Worn Cameras: Assessing the Evidence}, OJP DIAGNOSTIC CTR. 1, 28 (2014).
\item \textsuperscript{91} See id.
\item \textsuperscript{93} Supra note 90.
\item \textsuperscript{95} Supra note 90.
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id.
Identification is considered a “one-to-many” matching technology. More common in law enforcement use, identification “compares an unknown face taken from a photo, video, or surveillance camera and compares it to known faces in a database.”

FRTs use “computer-generated filters [to] transform face images into numerical expressions.” The numerical expressions are compared to other “learned” expressions to identify a face. FRT verification technology allows a smartphone to unlock when it recognizes your certain faces. The system on phones generally stores only one face, but larger police databases can store many more. Currently, twenty-one states allow the Federal Bureau of Investigation to access their Department of Motor Vehicles database of drivers’ license photos for facial recognition purposes. A 2016 report from Georgetown Law Center on Privacy and Technology revealed “the faces of over half of all adults in the United States are in facial recognition databases that can be searched by police without a warrant.”

Similar to FRTs, biometrics are used both for identification and verification. Facial geometry is considered biometric data. The Department of Homeland Security defines Biometrics as “unique physical characteristics,” akin to “fingerprints, that can be used for automated recognition.” The three most commonly used biometrics are the retina, the iris, and the fingerprint. Fingerprints are an age-old and common mode of identification. The shapes left by the papillary ridges on the

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101 Id.
102 Id.
103 Id.
105 Id.
106 Id.
107 Id.
109 Id. at 192.
110 Id. See also Crumpler & Lewis, supra note 101, at 53.
111 See 740 ILCS § 10 which defines “Biometric identifier” to include “face geometry.”
113 Id.
114 Stephen M. Singer, Galton and Identification by Fingerprints, Perspectives by the Genetic Society of America (1995) (stating: “fingerprints as a device for personal identification ... were introduced in a district in India in the 1870s by Sir William Herschel.”)
epidermis of the skin allow for classification, and “offer an infallible means of personal identification.”\footnote{J. Edgar Hoover, Fingerprint, BRITANNICA, (Oct. 6, 2023), https://www.britannica.com/topic/fingerprint [https://perma.cc/YZZ9-65AK]} Fingertips are integral to police investigations and remain stored in databases by the government.\footnote{Jennifer Lynch, FBI Combines Civil and Criminal Fingerprints into One Fully Searchable Database, ELEC. FRONTIER FOUND., (Sept. 18, 2015), https://www.eff.org/deeplinks/2015/09/little-fanfare-fbi-ramps-biometrics-programs-yet-again-part-1 [https://perma.cc/3JVD-4JJ4]. Recently, the FBI has begun to store civil and criminal fingerprints in one searchable database.}

One concern is the potential replacement of fingerprints in police investigations by FRT.\footnote{See Jennifer Valentino-DeVries, How the Police Use Facial Recognition, and Where it Falls Short, N.Y. TIMES, (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/technology/facial-recognition-police.html [https://perma.cc/SVC4-ZLTG] (stating FRT has already been used in lieu of fingerprints by governments).} This apprehension may be rooted in the consideration of FRT replacing eyewitness testimony in court.\footnote{See Stefanie M. Bowen, Man vs. Machine: Facial Recognition Technology Replacing Eyewitness Identifications, 10 LINCOLN MEM’L U. L. REV. 21, 21 (2022) (stating the FBI used FRT on videos from the January 6th insurrection to identify individuals involved).} The possible shift toward using FRT instead of fingerprints raises concerns due to the controlled nature of fingerprints when compared to FRT. Unlike fingerprints, it is challenging to conceal one’s face from all potential cameras in public spaces. Technology has advanced to a point where FRT can bypass obstacles like masks, and unless undergoing plastic surgery, altering one’s face is nearly impossible.\footnote{APPLE, https://support.apple.com/en-us/HT213062 [https://perma.cc/N8MT-NMDM].} Furthermore, FRT can be incorporated into cameras that are imperceptible to the naked eye. This rapid evolution of cameras and their integration with other technologies prompts concerns about safeguarding privacy. Some states have acknowledge the distinct risks associated with biometric data and responded by enacting stringent legislation.\footnote{Infra Part III c.}

\section*{D. The Internet}

The creation of the internet since \textit{Roe} and the development of smartphones has transformed technology into a fundamental part of everyone’s lives. Widely used products now hold sensitive information about many people. The expansion of the internet provides benefits and drawback. The quick growth and development have made privacy laws outdated and unable to protect all citizens.\footnote{See infra notes 218, 220 (the ECPA has not been meaningfully updated since the invention of the internet).}
Improvements of internet user tracking technology illustrates one of the shortcomings of current privacy laws. In July of 2022, Google accounted for around 84% of the search engine market share, making it the most widely used search engine. Created in 1998, Google’s program model learns from its users. Google founders created a system that provides the best search results. Known as “PageRank,” the system tracks and learns from user clicks and searches, providing the best, most “relevant search results.” This technology revolutionized the way the internet is used.

Free to users, Google monetizes its platform by selling advertisement space on the results page. Those companies’ links show up as “sponsored results.” Advertisers pay Google per click on their ads; the more clicks, the more money Google receives. Google provides targeted advertising using the same information that makes PageRank so successful. Because Google gets paid per click on their ads, Google utilizes individuals data to place the most relevant ads, thus increasing their profit. Learned search history allows Google to provide the best ads to each person, increasing the likelihood of clicks and making the company more money.

Google maintains information from their users for more than just advertising. As a result, their “data collection efforts [have grown] into a system so large that the data pool it collects is now referred to by the name ‘Big Data.’” Big Data can be used in a variety of ways. One, referred to as, “intelligence collection” involves analyzing Big Data for patterns.

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126 "Search engine algorithms provide users with both ‘organic’ results . . . and ‘sponsored’ results—page listing whose owners have paid to have them displayed when a user searches certain keywords." Id. at 193.
127 Id.
128 Id.
129 Id. at 200-01.
130 Id.
131 Id. at 195.
132 Id. at 196 (quoting Brian Katz, The Collection Edge: Harnessing Emerging Technologies for Intelligence Collection, CTR. FOR STRATEGIC & INT’L STUDIES (July 13, 2020).
This process learns “normal behavior and activity” of users, and notices when individual users deviate from their “normal patterns.” Government and business entities alike have been known to use intelligence collection.

Information collected over time about Google users, called “search-query logs,” builds a comprehensive portrait of each user. “From just over a dozen search queries, it is easy to detect information concerning the user’s health and mental condition,” as well as other personal information. This information can be especially threatening to privacy when it can be traced back to a specific user. Information otherwise unknown can be determined about the user. The search history alone means almost nothing if untethered to a specific person.

Search queries can be subpoenaed and used as evidence in a trial. In January of 2023, prosecutors in Boston utilized information from a suspect’s Google searches to accuse him of murder. The search history clearly depicts his plan, and highlights the questions he thought of as he progressed through the murder plot. The prosecution's combined evidence led to an arraignment, the search history illustrates and corroborates the story. At this point, it’s unclear how the evidence will be


136 Id. at 1444.
137 See Id. at 1445.
140 Id.
laid out in the trial. The defendant has pled not guilty, and the next court date is in August of 2023.141

Just as in the murder case in Boston, search queries of individuals could potentially be used in criminal or civil prosecution. If state law allows for investigation into abortion allegations, the “specific user” is already identified. While the search-queries produced may lead to arraignment for violation of abortion laws, it’s unclear if the evidence is enough. What happens if the search information is wrongly incriminating? Suppose a woman suffered a miscarriage but happened to search for abortion-adjacent information before the miscarriage. Her search information can lead to an incorrect accusation.142 Unanswered questions remain. How will the law deal with introduction of search evidence? Will companies attempt to combat court orders requiring them to hand over user information? Does something like Google search history provide enough basis for an unfavorable ruling? These uncertainties create more fear for individuals seeking abortions.

Google is not the only company keeping tabs on its users. In-app tracking is common, and with multiple apps on a given mobile device, the amount of vulnerable data is staggering.143 For instance, TikTok’s privacy policy states that the data collected by the app includes “identifiers for advertising purposes . . . app and file names and types, keystroke patterns or rhythms . . . [and] activity across devices.”144

Historically, apps existed in their own “sandbox.”145 This meant each app on a device ran independently, sharing little or no data between each other.146 It is slowly becoming common for information to overlap.147

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142 Tene, supra note 135, at 1444 (noting that there exists the possibility that search “[q]ueries entered by users [ . . . ] appear to manifest criminal intent and may be consequently used at trial as evidence of wrongdoing”).

143 Many popular websites track information, including Google, YouTube, Amazon, and more. If none of the data are protected by privacy laws, they could theoretically be used by investigators. The sheer amount of data can lead to unknown consequences. See generally Understanding Browser Tracking, GCFGLOBAL, https://edu.gcfglobal.org/en/internetsafety/understanding-browser-tracking/1/ [https://perma.cc/62X4-8XRS].


146 Id.

147 Id.
This interconnectivity provides a more comprehensive depiction of phone users than ever before.

E. Cell Phones

The invention of the cell phone in 1973 irreversibly altered human communication. This technological advancement benefitted both users and prosecutors. By the early 1980s, law enforcement incorporated location information from cell phones into their investigations.

Cell phones communicate through cell towers placed within a given network’s service area. When making a call or sending a text message, a phone generally uses the nearest cell tower. As a phone and its user move from point to point, the transmission of the call or text transfers from tower to tower through a “hand off” procedure. Location history can therefore be determined by looking at the series of towers “pinged” by the phone. This method, known as “radiolocation,” is not perfect. Location data produced this way is imprecise and may vary somewhat due to the surroundings, terrain, and location of the towers. “By using cell tower triangulation (3 towers), it is possible to determine a phone location to within an area of about ¾ square mile.” The accuracy varies. When there are more cell towers, the accuracy increases. Radiolocation can be less effective in rural areas, where there are fewer towers. This technology has great benefits, like determining the location of someone during a 911 call.

“Ping” is a new, alternative method to tracking towers. A “ping” can occur one of two ways – with GPS data or by using cell tower

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148 See Id.
151 Id.
152 Id.
153 Id.
154 Tene, supra note 135, at 1444.
156 See Willingham, supra note 150.
157 FCC WHITE PAPER, supra note 155, at 2.
158 Id.
Both police and cell phone companies can “ping.” Cell phone companies utilize a combination of radiolocation and Global Positioning System (“GPS”) data to determine a phone’s exact location via “ping.”

It can take up to 12 pings to determine the exact position of the phone. Due to enhanced technology, pinging provides a more accurate result than the aforementioned radiolocation. This is because pings locate a phone during an immediate situation, whereas cell tower-tracing of radiolocation alone is conducted after the event in question already occurred. As new GPS technology and location-tracking has become easier, more reliable options highlight the inaccuracy of radiolocation. Some cases that previously relied on cell tower location evidence are now being overturned due to the development of new technology.

Today, people use cell phones for much more than phone calls. Location services in phones interact with other networks. Different apps allow for “geotagging.” “Geotagging is the process of appending geographic coordinates to media based on the location of a mobile device.” These geotags can be woven into different media forms, like photos, videos, and Quick Response (“QR”) codes. They “could also include time stamps or other contextual information.” Geotagging relies on exact location provided by GPS trackers within cell phones. The technology in geotagging thus provides more reliable location data.

These technologies, separately, may not seem like a threat to privacy. However, smartphones now combine these technologies and allow detailed, specific inferences to be drawn from a user’s data. U.S. Census data from 2018 indicates “smartphone ownership surpass[ed] ownership of all other

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159 See generally SAN DIEGO COUNTY SHERIFF, POLICY 49, CELL PHONE PINGS (2019).
160 Id.
161 Id.
164 Id.
165 Id.
computing devices.” People increasingly place more trust in their devices, even turning to them for medical advice. This is not a new feat. Use of computing devices to find medical information has been occurring for decades. In 2003, “80% of internet users, or about 93 million Americans, have searched for . . . at least one of the 16 major health topics online.” “More than 75 million consumers access WebMD each month for health information and to find healthcare professionals to meet their needs.” Using the internet as a medical resource can be dangerous since companies, like Google, maintain data about searches.

Data can be split into two main categories – substantive and metadata. “Metadata can be understood as ‘data about data’.” Metadata records information about a user including the websites visited, date and time of the visit and search query content. A majority of search engines log metadata, and it is used by retailers and social media platforms. When considered individually, metadata seems innocent; however, metadata with other information provides a more complete story for prosecutors.

“Aggregation” is the “gathering together of information about a person.” Metadata alone may not be enough to identify the user, but when pieced together, “can reveal new facts about a person that she did not expect would be known about her when the original, isolated data was collected.” In 2018, the Supreme Court acknowledge the uniqueness of a cell phone, stating it to be “a feature of human anatomy.”


169 Id.


173 Id.


176 Id.

amount of data it stores makes it more private. Pieces of data or information separately do not say a lot about an individuals’ personal thoughts or movements. More data and information create a more accurate depiction of the individual. The real privacy concern comes from the aggregation of many data points. Americans effectively aide investigators by storing all their information on their phones for easy access. Information that can be obtained with a warrant during investigation and subpoenaed during prosecution.

IV. THE IMPACT TECHNOLOGY DEVELOPMENTS MAY HAVE ON REPRODUCTIVE RIGHTS IF PRIVACY LAWS DO NOT ADAPT TO TECHNOLOGICAL CHANGES

If individuals can be civilly or criminally charged for obtaining an abortion, notwithstanding jurisdictional issues, individuals seeking abortions will be in a uniquely vulnerable position. Current law leaves more questions than answers about how evidence from new technology will be treated. While courts note the importance of “account[ing] [for] more sophisticated system[s] that are already in use or in development,” many unanswered questions remain. Technology has been used in the abortion context already, posing a great enough risk to warrant legislation. The polarizing nature of abortion contributes to an appetite to prosecute recipients in certain states. Without privacy laws equipped to handle the safety of data produced by new technology, those seeking abortions in certain states are left in a vulnerable position.

A. Photographs in Public Forum and Traffic Camera Use in Prosecution.

The court in Commonwealth v. McCarthy ruled the ALPR camera evidence constitutional, reasoning that McCarthy did not have a reasonable expectation of privacy while driving on a public thoroughfare. The ruling appears to be anti-privacy; however, the court still acknowledged the threat posed by rapid development of “technological surveillance of public space.” By highlighting the need to balance the use and advantages of new technology within the “realm of guaranteed” privacy, the court

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178 While it is important to acknowledge the jurisdictional challenges present, this paper focuses more on the fact that this is a largely unanswered question. Not knowing how each state will proceed with such challenges makes these issues much more threatening to women seeking abortions in states where it is criminalized.

179 Carpenter, 138 U.S. at 2218.


181 Id. at 1098.

182 Id. (citing Commonwealth v. Alomonor, 120 N.E.3d 1183 (Mass. 2019)).
recognizes associated risks. It urged congressional action, stating privacy rights cannot succumb to the “mercy of advancing technology.”\footnote{183} The proper approach would be to preserve and protect privacy “as new technologies are adopted and applied by law enforcement.”\footnote{184} Police are allowed to use technology and “electronic devices” to do their job.\footnote{185} The problem lies in the lack of “traditional checks” to overly pervasive police presence.\footnote{186} The nature of electronic surveillance makes it harder to control. Electronic surveillance lacks practical constraints, operates secretly, and “gives police access to categories of information previously unknowable.”\footnote{187} While both the \textit{McCarthy} court and the Supreme Court have recognized these issues,\footnote{188} we have yet to see substantial development to address their concerns.

Some organizations have used public photographic technology to victimize and harass abortion seekers and providers. In the early 2000s, some Christian anti-abortion organizations began using this technology against women receiving and doctors providing abortions.\footnote{189} “Abortioncams.com” posted photos of patients walking into abortion clinics online, exposing them for committing what anti-abortionists believe is a “heinous crime.”\footnote{190} Similarly, the American Coalition of Life Activists ran a website called “‘Nuremberg Files’ [which] posted the names and addresses of abortion providers.”\footnote{191} The website included a list of “roughly 200 . . . ‘abortionists’ . . . in three different fonts.”\footnote{192} The fonts had correlating meanings: “‘black font (working); greyed-out name (wounded); strikethrough (fatality).’”\footnote{193} The American Coalition of Life Activists attempted to justify the website under the First Amendment’s speech protections. Prior to this instance, courts refused to find invasion of privacy.

\footnote{183} Id.
\footnote{184} Id.
\footnote{186} Commonwealth v. McCarthy, 142 N.E.3d 1090, 1099 (Mass. 2020).
\footnote{187} Id.
\footnote{188} In \textit{Riley v. California}, the Supreme Court noted the unique nature of cell phones, the data they now store, and the technological advancements that can be used by police. \textit{See infra} notes 216-217.
\footnote{190} Id.
\footnote{193} Id.
when photos were taken in a public forum.\textsuperscript{194} Congress and the 9\textsuperscript{th} circuit limited the use of these kinds of pictures in 2002, further explained below, but in light of \textit{Dobbs}, the use of these types of pictures could return.

In the early 2000s, applying relatively new legislation the 9\textsuperscript{th} circuit departed from the general rule that public information cannot be private.\textsuperscript{195} \textit{Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists} asked whether freedom of speech protected the aforementioned “Nuremburg Files” website.\textsuperscript{196} The Freedom of Access to Clinic Entrances Act (“FACE”) limited the use of patient photos where there existed a “true threat of force.”\textsuperscript{197} Under FACE, the nature of NuermbergFiles.com combined with the personal information posted constituted a threat.\textsuperscript{198} While the case predominantly focused on the First Amendment instead of privacy law, this case highlights the importance of providing protection.

Congress enacted FACE “in response to increase violence toward providers and patients of reproductive health services,”\textsuperscript{199} so liability, unsurprisingly, requires a physical threat or intimidation.\textsuperscript{200} The “physical threat or intimidation” limitation makes it unclear which uses of technology FACE protects. A photograph taken in public may not count as physical intimidation. The courts are generally silent on whether turning over to police photos taken from afar or from a traffic camera would constitute a violation of FACE. With the overturning of \textit{Roe}, FACE’s fate is uncertain.\textsuperscript{201} Additionally, FACE does not restrict photos taken outside of the clinic, so long as they are not connected to any threats of violence.\textsuperscript{202}

\textsuperscript{195} Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002).
\textsuperscript{196} Id. at 1062.
\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Notably, FACE is not being challenged, but it’s unclear whether this protection will be upheld federally now that abortion laws are designated to the states. \textit{See generally NAT’L ABORTION FED’N, FREEDOM OF ACCESS TO CLINIC (FACE) ACT} (2006), https://prochoice.org/wp-content/uploads/face_act.pdf [https://perma.cc/6JPE-XHXT].
\textsuperscript{202} 18 U.S.C. § 248(a)(1-3); notably, under FACE, prohibited acts: threats of arson, threats of violence, stalking or harassing clinic workers, bombings or bomb threats and more. \textit{See generally NAT’L ABORTION FED’N, supra note 201.}
While it seems like there may be some legal protection from cameras or use of technology, there is no guarantee. This leaves women seeking abortions in a vulnerable place. There is no prohibition on a hidden stoplight camera equipped with facial recognition technology that happens to record the clinic entrance. Without laws regulating the information recovered by these cameras, those seeking illegal abortions remain unprotected.

B. It is Unclear How Data Will Be Protected During a Criminal Investigation

Electronic information used by police falls under the larger umbrella of Fourth Amendment jurisprudence. The Electronic Communications Privacy Act (“ECPA”) and the Supreme Court case of Katz v. United States both protect privacy in this area by requiring legal process to obtain electronic information.

The Electronic Communications Privacy Act (“ECPA”) amended portions of the U.S. Code that “primarily deal with criminal procedure and crimes, including when a search or seizure is valid.” Developments in computer technology and communication networks directly influenced these changes. The ECPA implicates the Fourth Amendment by adding specific protections to certain technological communications and storage. The ECPA amendments created a new structure with three separate Titles – (I) the Wiretap Act, (II) the Stored Communications Act (“SCA”), and (III) the Pen Register Act. In general, the ECPA restricts the government’s power to electronically surveille American citizens who are the subject of criminal investigation. While it provides some protection, the ECPA “has

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204 The Fourth Amendment protects “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.


206 DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW (ASPEN CASEBOOK SERIES) 348 (Kindle ed. 2021).


208 DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW (ASPEN CASEBOOK SERIES) 348 (Kindle ed. 2021).
not been meaningfully updated since its enactment in 1986,”

*Katz v. United States* created what’s known as the “reasonable expectations” test. In *Katz* “the Court explicitly added privacy as a protected category” of rights. Justice Harlan’s concurrence outlined this modern privacy test. The test hinges on both individual and societal expectations, requiring both the defendant and society recognize the privacy expectation at issue. The Fourth Amendment does not extend protection for expectations of privacy that only a criminal would have.

A warrant is required when a person has a subjective and objective expectation of privacy. But people often won’t have such an expectation in all data. Most notably, disclosure of information negates privacy because “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” This exception, known as the “third-party doctrine,” allows police to obtain information from a third party sans warrant. If one willingly hands information to another, it must not be that private.

The ECPA requires some additional procedural hurdles, specifically for live intercepted communications. For information covered under the Wiretap Act, the ECPA requires more than traditional warrants. Instead of probable cause, a court must find all other alternatives to obtaining the information have been exhausted or are unlikely to succeed. Additionally, only certain levels of courts can sign applications for warrants, the crime must be a felony. There is also a minimization requirement, limiting the surveillance to only matters applicable to the warrant. Currently, law enforcement need only obtain “super warrants” to conduct certain types of surveillance covered by the Wiretap Act. Law Enforcement can compel service providers to disclose customers’ information with much lower showings under ECPA’s SCA and/or PRA. Further, it’s uncommon for law enforcement to pursue “super warrants.”

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212 Id.


215 Id.

216 Id.
Law enforcement is much more likely to seek orders under the SCA and/or PRC, and the privacy threats these pose to persons seeking abortions is much higher in practice. While they add a layer of protection, these “super warrant” requirements do not apply to stored information.\textsuperscript{217} Meaning any previously stored data can be obtained with just a subpoena. Also, both the ECPA and Fourth Amendment allow information to be obtained when there is a valid warrant, as there would be in enforcing a punitive abortion law.

The real issue is not the data itself, but the amount of data. Or merely the aggregation of tiny data together to paint an incriminating picture. Piecing the metadata together is what makes this threatening.

Data holders could provide additional protection by enhancing their policies; by holding consumer information closer. Currently, “all major search engines declare in their privacy policies that they comply with legal process and government requests for information.”\textsuperscript{218} Historically, Google has been “forthcoming in complying” with requests for information from the government.\textsuperscript{219} In 2022, Google’s Transparency Report shows “some data” was produced in eighty-four percent of requests for disclosure.\textsuperscript{220} When prompted by a government request for user information, Google reviews the subpoena, makes sure it satisfies the law and try to narrow it if they determine it “asks for too much information.”\textsuperscript{221} They may even object to it.\textsuperscript{222} Their policies indicate they notify users when not prohibited by the terms of the request.\textsuperscript{223} While a generous approach, most of the policy fails under certain legal requests for information.

Despite these facts, consumers appear unaware of such privacy policies. When surveyed, most individuals believed that their web use is kept private and that they do not include identifying information.\textsuperscript{224}

\begin{itemize}
\item \textsuperscript{217} Or information classified under the Stored Communications Act.
\item \textsuperscript{219} Id.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Omer Tene, \textit{What Google Knows: Privacy, and Internet Search Engines}, 2008 UT A H L. REV. 1433, 1460.
\end{itemize}
Even with extensive policies on warrants, no law exists to stop the
government from purchasing user data. By purchasing data from
companies like Google, the government can effectively circumvent warrant
and ECPA requirements. Companies may face pressure when answering
to the government, but results vary. In 2016, Amazon “declined to share
information from its servers” when the government subpoenaed
information from a suspect’s Alexa. Amazon issued a statement that they
“will not release customer information without a valid and binding legal
demand properly served on us. Amazon objects to overbroad or otherwise
inappropriate demands as a matter of course.” A similar standoff
occurred with Apple when asked to unlock a suspect’s phone. While bills
have been contemplated by Congress to prevent purchasing data, nothing
has been passed.

Courts are privy to the advancement of technology in recent decades.
The Supreme Court referred to cell phones as “minicomputers” that differ
“quantitative[ly] and qualitative[ly]” from things previously carried.
Their “immense storage capacity” no longer limits searches to the
“physical realities” what one carries like before cell phones. Now, people
are carrying large amounts of sensitive data.

States have the power to add privacy law to the existing federal
scheme. Now that states control the right to reproductive freedom, each
may deal with the matter differently. For example, some states may have
laws that do not require compliance with out-of-state warrants. This
protection is not perfect though, due to the dimensionless nature of data.
Technology does not fall into clear state lines, so it’s unknown how
different jurisdictions will handle this complex interplay.

225 Aziz Huq & Rebecca Wexler, Digital Privacy for Reproductive Choice in the Post-Roe Era, 98
226 Alina Selyukh, As We Leave More Digital Tracks Amazon Echo Factors In Murder
227 Id.
228 Id.
229 Barbara Campbell, Government Drops Another Demand for Apple’s Help with Unlocking an
230 Aziz Huq & Rebecca Wexler, Digital Privacy for Reproductive Choice in the Post-Roe Era, 98
232 Id.
233 Huq & Wexler, supra note 241, at 604.
Enactment of state privacy legislation further illustrates the holes left by the federal ECPA. As of June 2023, nine states have enacted comprehensive data privacy laws: California, Virginia, Connecticut, Colorado, Utah, Iowa, Indiana, Tennessee, and Montana. The trend of protection for consumers is picking up, with “at least 16 states introducing privacy bills that address a range of issues” in the 2022-2023 legislative cycle.

California is widely known as passing “one of the most significant regulations overseeing data-collection practices of technology companies in the United States.” The California Consumer Privacy Act of 2018 ("CCPA") applies to businesses who, among other requirements, “control the collection of a consumer’s personal information.” While the CCPA offers robust privacy rights and protection to citizens, it contains carve-outs to allow for businesses to comply with warrants and subpoenas.

The California Electronic Communications Act (“Cal ECPA”) passed in 2015 “was heralded as a major achievement for digital privacy, because it required law enforcement to obtain a warrant in most cases before searching a suspect’s data, be it on personal device or on the cloud.” The Cal ECPA restricts government entities from compelling production of electronic information.

California has acknowledged the hole in state and federal legislation and the risk it poses to individuals seeking abortions post-Dobbs.

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235 Id.
237 See generally, Bloomberg Law, supra note 245 (The CCPA was amended in 2020 with the enactment of the California Privacy Rights Act (“CPRA”) in 2020, the amendments took effect January, 1st 2023).
238 CAL. CIV CODE § 1798.100(a).
239 CAL. CIV CODE § 1798.145 “(a) The obligations imposed on businesses by this title shall not restrict a business’ ability to: (1) comply with federal, state, or local laws or comply with a court order or subpoena to provide information . . . “; see also, Will Kaupelis v. Harbor Freight Tools USA, Inc., 2020 U.S. Dist. LEXIS 246379.
241 CAL. PEN CODE § 1546.1
California advanced a bill this spring that would “prohibit police from using warrants that compel tech companies to disclose the identities of individuals based on the location of their phone and internet search history.” The bill was introduced as part of a reproductive health package: a series of 17 abortion bills to provide easy abortion access. California recognizes the danger post-Dobbs and has responded to the threat accordingly—a sole safe haven in a divided nation.

C. Tensions Surrounding Abortion and Implemented Restrictions Show Motivation to Prosecute or Charge.

Despite past government agents apathetic attitudes about enforcing abortion bans, the last several decades have seen a major shift. As the anti-abortion efforts gained traction, major political figures prioritized abortion restrictions. This can be seen in the growth of the pro-life rhetoric in politics and the abortion restrictions passed before Dobbs such as the Texas Heartbeat Bill.

Anti-abortion efforts originated in the Catholic church and became widespread in the 1960s due to “state investigations and threats to licensure of some . . . prominent specialists in gynecology and obstetrics.” With abortion now in the public eye, the debate began to spread. By the 1970s, politicians like Richard Nixon began classifying the right-wing as the party that “emphasizes ‘family values’” and upholds societal norms including: “heterosexuality, marriage, and the stay-at-home mom.” Ronald Reagan continued to advance these policies when he took office in the 1980s.

Notably, some of today’s loudest pro-life groups were not always so vehemently opposed to abortion. The Southern Baptist Convention (“SBC”), now “abortion abolitionists,” supported abortion in some cases during the 1970s. Prior to the Roe decision, this group called for legislators to allow abortion in certain cases. The SBC and Baptists

243 Id.
245 REAGAN, supra note 25, at xxi-xxii.
246 Id. at xii.
247 Id.
249 Id.
deemed *Roe* “an appropriate articulation of the line of division between church and state, between personal morality and state regulation of individual behavior.”251 In 1980, the pro-life movement recharacterized abortion with the framing that it murders an innocent child.252 The SBC quickly reneged their previous support. By 1984, a SBC “resolution named a fetus ‘a living individual human being.’”253 Whether tied to beliefs of gender or protection of the fetus, the SBC’s change in beliefs demonstrates the change in attitude toward abortion. To the pro-life movement, the victim of abortion is the “unborn child;” the woman receiving the abortion is the criminal.

This rhetoric is echoed in the amicus curiae brief for *Dobbs*. Petitioner Thomas Dobbs, a representative of Mississippi’s Department of Public Health, articulates that Mississippi has an interest255 in “protecting unborn life.”256 The shift from protecting those with the capacity for pregnancy to protecting the fetus is blatant. The brief continues referring to the fetus as a “human form,” “unborn child,” “infant,” and “child.”257 While scientifically inaccurate, the pro-life movement internalized this terminology to further the anti-abortion cause. This otherwise innocuous language evolved into more vivid, politically charged language. *Roe v. Wade*’s characterization highlights this rhetorical shift by its focus on the harm done to those forced to carry an unwanted or unviable pregnancy to term.258

Even before *Dobbs*, states adopted policies and passed laws restricting abortion access. “Every year since *Roe*, cities, states, and Congress have passed measures to restrict or ban abortions, reaching high points in 1973, 2011, and 2021.”259 Most of these restrictions were upheld by courts. In *Planned Parenthood v. Casey*, the Supreme Court set down a new rule regarding restrictions on abortions. So long as the restriction did not pose an “undue burden” on the woman, it was allowed.260 As of July 2022, several states contemplated removing the exceptions for causes of rape or

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251 *Id.*
252 See *supra*, Section I: Part b. Previous anti-abortion efforts viewed the woman as the victim.
253 *REAGAN, supra* note 25, at xxi.
254 *Shaw, supra* note 249.
255 *Dobbs*, like *Roe* rested on substantive due process principle of constitutional law. To evaluate, the court weighs the state interest with the interests of its citizens. It asks “whether the government’s deprivation of a person’s life, liberty, or property, is justified by a sufficient purpose.” See, Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1999), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1638&context=faculty_scholarship.
257 *Id.*
259 *Id.* at xvii.
incest in their laws restricting abortion. If these laws are enacted, “Roe will be obliterated as never before: even when abortion was a crime, abortions were legal for these types of reasons.”

In 2021, the Texas Heartbeat Bill became one of the strictest abortion bans in the country. The bill defines “pregnancy” to “begin with fertilization,” and does not allow abortion once a heartbeat is detected, which can happen as early as 6 weeks into pregnancy. It also imposes “civil liability for violating or aiding or abetting violation” of the statute. The bill provides for a $10,000 civil penalty, plus court costs, and attorney’s fees. The money incentivizes individuals to get their hands on technological data of someone they believe provided or received an abortion.

Criminal and civil liability encourages people and police to charge those who obtain illegal abortions. Building a case is relatively easy, now that technological data tracks people so closely. This data could be direct, clear evidence of someone obtaining an abortion.

V. CONCLUSION

The seismic shift caused by the overturning of Roe v. Wade reverberates through the fabric of our country. States reacted quickly and aggressively, by restricting and criminalizing abortions. The landscape individuals face in their quest for privacy and autonomy looks drastically different now that society depends on technology daily. Technology offers unprecedented insights into individual’s lives while posing an existential threat to reproductive rights. The advancements since pre-Roe magnify concerns about privacy infringement, invoke constitutional concerns, and raise the stakes for individuals navigating the complexities of reproductive healthcare.

The glaring divide between states providing access to abortion and those imposing restrictions accentuates the precarious position of

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262 REAGAN, supra note 25, at xxiii.


265 Benson Varghese, What is the Texas Abortion Law? (2023), VARGHESE SUMMERSETT PLLC (Mar. 18, 2023), [https://versustexas.com/texas-abortion-law/#:~:text=This%20law%20creates%20a%20civil,court%20costs%20and%20attorney%20fees](https://versustexas.com/texas-abortion-law/#:~:text=This%20law%20creates%20a%20civil,court%20costs%20and%20attorney%20fees).
individuals seeking reproductive healthcare, exacerbated by a lack of robust data protection. The absence of amendments to federal legislation or bolstered state-level protection amplifies the urgency of addressing the intricate interplay between technology and reproductive rights.

If judges permit prosecutors to use information data, abortion recipients and providers may face detrimental consequences. The evolution of technology happened quickly, but data privacy laws are slow to follow. This leaves those seeking abortions lost navigating new and dangerous territory. An increase in subpoena requests illustrates this imminent threat. Amazon’s 2020 transparency report “shows that Amazon received 23% more subpoenas and search warrants, and a 29% increase in court orders compared to the first half of 2019.”266 Google has seen an increase in geofence warrants, receiving “8,396 in 2019, and 11,554 in 2020.”267

As the contours of technology continue to reshape society, concerns arise about the balance between technological innovation and the preservation of fundamental rights. Even for the hyper-vigilant who meticulously manage their phone data, encounters with technology in daily life persist as an inescapable reality. Whether captured on a camera or unwittingly tracked, individuals find themselves navigating a treacherous terrain where personal privacy is a scarce commodity. As we stand at this crossroads, the imperative for a comprehensive and adaptive legal framework, capable of safeguarding individual autonomy in the face of technological advancements, becomes increasingly evident. The post- Dobbs world demands not only legal evolution but a vigilant commitment to preserving the dignity and rights of those seeking reproductive healthcare in an era where technology plays an unprecedented role in our lives.