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Data Privacy and Criminalization: Policy Considerations Post-Dobbs

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Disclosure Statement

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Brief Background: HIPAA

Proposed Changes to Privacy Rule

Data Privacy and Pregnancy Criminalization

- HIPAA generally applies to medical records but the law enforcement exception potentially leaves abortion seekers vulnerable to investigation and prosecution
- The sharing of medical records for continuity of care and mandatory state reporting requirements also leave a gap in data privacy protections
- Healthcare providers and close acquaintances are most often the ones reporting alleged self-managed abortion cases to law enforcement
- Despite SMA usually not being an explicit crime, prosecutors have brought charges such as child abuse, fetal assault, murder and homicide against pregnant people

HIPAA's Privacy Rule

- Establishes national standards to protect individually identifiable health information ("protected health information" or PHI)
- Covered entities: Health Care Provider, Health Plan, or Health Care Clearinghouse (plus business associates)
- Provides safeguards to protect the privacy of PHI and sets limits and conditions on the uses and disclosures (without authorization)
- Currently permits but does not require Regulated Entities to disclose PHI when faced with a court order or other mandate

Proposed Changes to HIPAA Privacy Rule

- On April 12, 2023, OCR issued a Notice of Proposed Rulemaking to strengthen protections by **prohibiting** the use or disclosure of PHI to identify, investigate, prosecute, or sue patients, providers and others involved in the provision of legal reproductive health care, including abortion.

- Introduces a new category of PHI related to “reproductive health care,” defined to include “care, services, or supplies related to the reproductive health of the individual.”

- Comments on the Proposed Rule were due by June 16, 2023. The resulting final rule would take effect 60 days after publication, with a subsequent 180-day grace period after which Covered Entities must comply

Post-Dobbs Legal Tracking

Sentinel Surveillance of Emerging Laws and Policies

Legal Epidemiology

The scientific study and deployment of law as a factor in the cause, distribution, and prevention of disease and injury in a population.

Tracking a Post-Dobbs Legal Landscape

- State abortion laws are complex, overlapping, and changing constantly—even more challenging to track the rapid legal developments following *Dobbs*
- CPHLR and SFP conceptualized a database to serve as a resource for researchers seeking to better understand the impact of the Dobbs decision, and is a companion resource to the SFP #WeCount project
- Focus on service delivery impact as legislatures aim to increasingly criminalize anyone involved in providing, supporting, or seeking abortion care
- Important to document historical changes over time in order to support rigorous research on the effects on sexual and reproductive health, wellbeing and equity

Database Methods and Scope

- Uses sentinel surveillance methods, a type of scientific legal mapping, to collect and code key features of the law and changes over time
- Covers legal developments from June 1, 2022 (updated throughout one year) and includes state statutes, regulations, court opinions, attorney general opinions, and executive orders in all 50 states and DC
- Coding framework focused on existing areas of regulation most likely to be impacted by the decision and emerging legislative efforts to restrict or protect access
- Stakeholder interviews with researchers and experts conducted to further inform the scope and ensure key variables are included

Dataset Inclusion Criteria

- Key features of the law included:
  - Laws banning abortion, including trigger bans, total or near-total bans, gestational age limits, “fetal heartbeat” bans, method bans, and reason-based bans
  - Restrictions on medication abortion, telehealth for abortion and self-managed abortion
  - Criminal, civil, and licensing penalties for violations of certain abortion laws
  - Interstate ”shield laws” protecting providers and patients from certain legal actions
  - Abortion protections such as a codified right to abortion, expanded access, increased funding, insurance coverage, and data privacy measures
  - Ballot measures related to abortion protections and restrictions

Legal Datasets on LawAtlas

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Post-Dobbs State Abortion Restrictions and Protections

On June 24th, 2022, the US Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overturned nearly 50 years of precedent protecting the right to an abortion prior to viability. Previously under *Roe v. Wade*, the existing legal landscape of abortion was a complex patchwork of state laws and court decisions regulating access to the procedure. The *Dobbs* decision further compromised abortion access by allowing states to ban all or most abortions.

While some states moved quickly to ban abortion, others have strengthened protections for abortion as a response to *Dobbs*. New "shield laws" attempt to limit the liability of abortion providers and patients who travel to another state to receive care that is increasingly becoming criminalized.

This dataset provides a high-level overview of state abortion restrictions and protections enacted post-Dobbs, tracking key legal developments from June 1, 2022 through August 31, 2022. The dataset was conceptualized by Temple University's Center for Public Health Law Research and the Society of Family Planning to serve as a resource for researchers seeking to better understand the impact of the *Dobbs* decision, and is a companion resource to the Society of Family Planning's #WeCount project. For additional relevant data, please visit the LawAtlas State Abortion Laws database, which comprehensively tracks legal developments across state-level abortion restrictions.

PLEASE NOTE: *The information contained herein* ***does not constitute legal advice****. If you have questions regarding your legal rights or obligations, contact an attorney.*

The law on the ground is complex and changing rapidly—this resource may not be fully up to date and may contain errors. The next update to this resource is tentatively scheduled for release in February 2023. If you have media requests or other questions regarding this dataset, please reach out to Adrienne.ghorashi@temple.edu.

CREATED BY: Center for Public Health Law Research
MAINTAINED BY: Center for Public Health Law Research
VALID FROM: June 1, 2022
UPDATED THROUGH: August 31, 2022

Data | Codebook | Protocol

See all related maps

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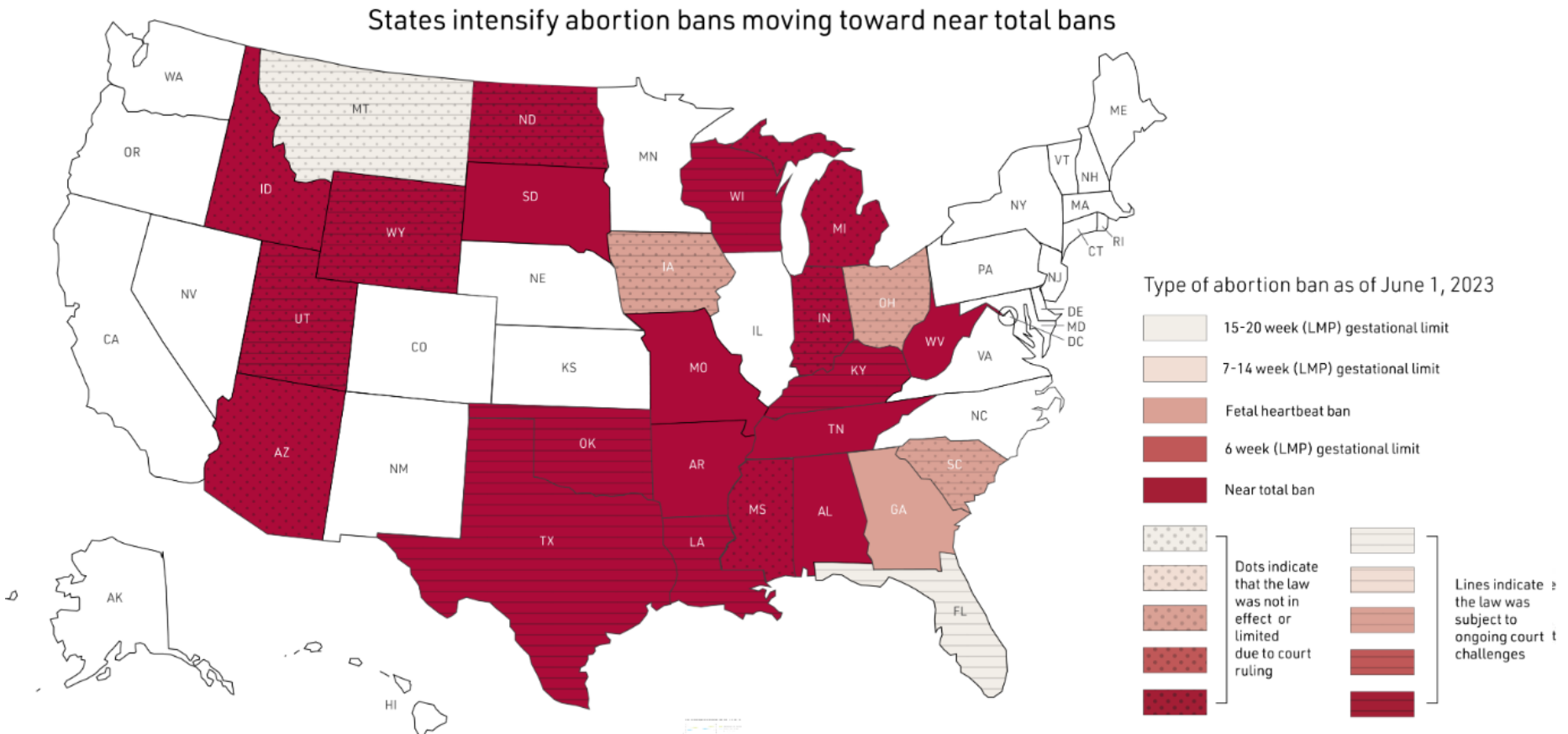
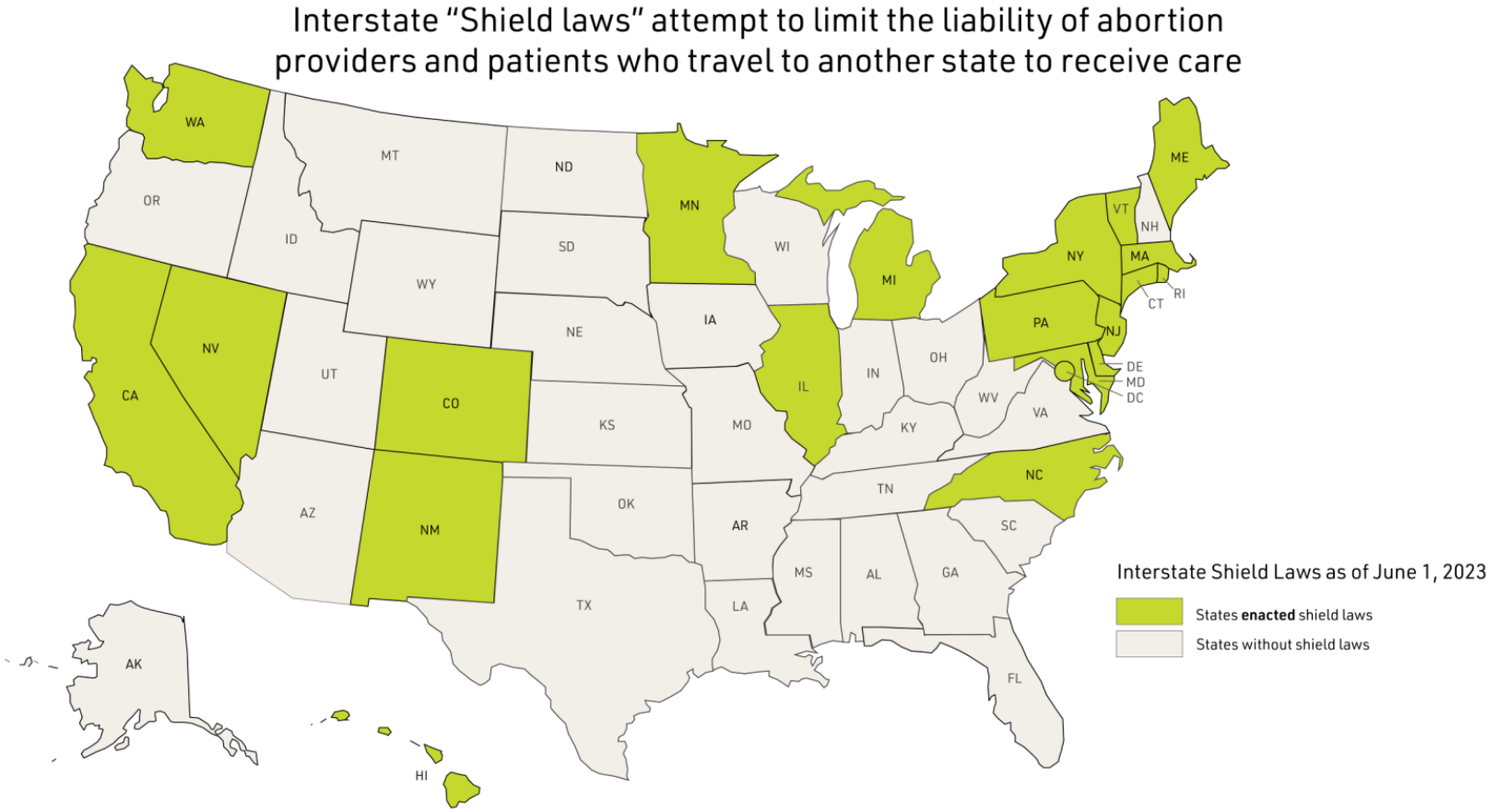
Trends in State-Level Policy Developments

June 1, 2022 – June 1, 2023

Abortion Bans Pre and Post-Dobbs



Interstate Shield Laws for Reproductive Healthcare



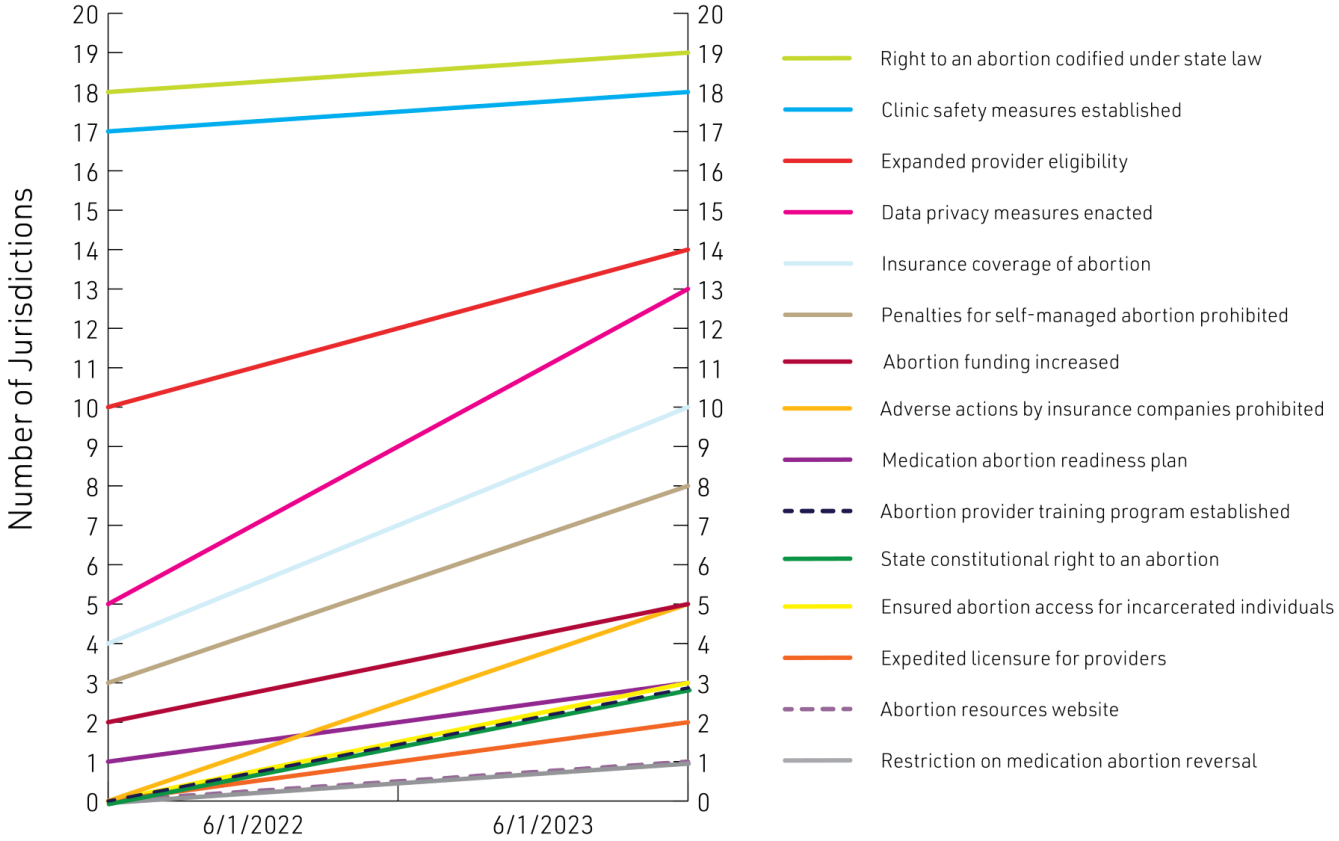
What can Shield Laws do?

- Key features of interstate shield laws prohibit:
  - Disclosure of health records and communications records
  - Issuance of a subpoena, summons to testify, or warrant
  - Enforcement of out-of-state judgments
  - Assisting investigations or proceedings, extradition, arrest
  - Applying out-of-state laws in state court
  - Imposing provider sanctions
  - Plus allowing damages to be recovered (“clawback”)

Shield Laws May Prohibit Disclosure

- E.g. Del. Code tit. 10, § 3926(b):
  - "[N]o health-care provider may disclose any of the following unless authorized in writing by the patient, the patient's guardian, or legal representative:
    - (1) Any communication made to such health-care provider relating to reproductive health services from a patient or anyone acting on behalf of the patient including a legal representative or a parent of the patient.
    - (2) Any information obtained by personal examination of a patient relating to reproductive health services…"

State Laws Protecting Access to Abortion Post-*Dobbs*, June 1, 2022–June 1, 2023



Access the Post-*Dobbs* Dataset

https://lawatlas.org/datasets/post-dobbs-state-abortion-restrictions-and-protections

SCAN TO EXPLORE THE DATA

What Can State Policymakers Do?

Additional Strategies and Considerations

Thank You!

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Keep In Touch:

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CPHLR Resources:

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- PDAPS: http://pdaps.org/
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