

She's So Exceptional: Rape and Incest Exceptions Post-*Dobbs*

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PROLOGUE

In the summer of 2023, journalist Charlotte Alter published a gripping article in *Time* magazine about “Ashley,” a rising seventh grader who became a mother a few months before the news article was published.¹ Alter explained, “Ashley just had a baby,” and as she was sitting in a relative’s apartment in Clarksdale, Mississippi, “wearing camo-print leggings,” she touched the “plastic hospital bracelets still on her wrists.”² Hours before, she was released from the hospital. Months before, she was raped.³

Rather than protecting Ashley with the moniker Jane Doe, the author has humanized the child whom she described as “13 years old,” and who will “[s]oon [] start seventh grade.”⁴ Despite the promises made for decades by anti-abortion activists and crisis pregnancy centers (CPCs) in Mississippi and throughout the United States that vast social protections and financial support are available for those who do not terminate their pregnancies,⁵ in Ashley’s case, “there are no baby presents or toys in the room, no visible diapers or ointment or bottles.”⁶ However, even if there were baby wipes, diapers, and bottles from a CPC, Ashley likely would have needed to take a parenting class to receive such assistance—to earn “so-called ‘baby bucks’” to “redeem for diapers and donated supplies.”⁷

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¹ Charlotte Alter, *She Wasn’t Able to Get an Abortion. Now She’s a Mom. Soon She’ll Start 7th Grade.*, TIME (Aug. 14, 2023) <https://perma.cc/E83M-CGQS>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Anne Flaherty & Katie Kindelan, *One Year Post-Roe, Crisis Pregnancy Centers Expand Footprint in Mississippi*, ABC NEWS (June 23, 2023), <https://perma.cc/U7BK-LUV3>.

⁶ See Alter, *supra* note 1.

⁷ Flaherty & Kindelan, *supra* note 5.

Even if Ashley could have found the words to explain what happened to her and the trauma she experienced, healthcare options for pregnant girls and women in Mississippi are deeply constrained.⁸ For years, one abortion clinic remained in the state. Now, it is shuttered.⁹ The state's notorious maternal mortality rates are among the worst in the United States.¹⁰ According to Mississippi's State Department of Health, nearly 80% of cardiac deaths during pregnancy will befall Black women.¹¹ Mississippi's state law bans abortions, with an exception for rape and incest, but only if the sexual assault is reported to law enforcement.¹² With such high maternal mortality rates and no abortion clinics in the state, pregnant girls, women, and people with the capacity for pregnancy are vulnerable. In her case, if Ashley remains in school, she will enter her senior year with a 5-year-old to care for.

INTRODUCTION

The aftermath of *Dobbs v. Jackson Women's Health Organization*¹³ reveals the fragility of reproductive freedoms in the United States. Minors, now affected by the myriad calculated anti-abortion laws that deny exceptions for rape and incest

⁸ See Complaint, *Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536 (S.D. Miss. 2018) (No. 3:18-cv-171-CWR-FKB); see also Temporary Restraining Order, *Jackson Women's Health Org. v. Currier*, 2018 WL 1567867 (S.D. Miss. Mar. 20, 2018).

⁹ Jaclyn Diaz & A. Martinez, *Mississippi's Last Abortion Clinic Shuts Down. The Owner Promises to Continue Working*, NPR (July 7, 2022), <https://perma.cc/2SBC-Q7H8> (stating that "Mississippi's last abortion clinic—and the one at the center of the Supreme Court case used to overturn *Roe v. Wade*—shut its doors for the last time," when "the Jackson Women's Health Organization lost their bid to temporarily block the state's trigger law that bans most abortions from going into effect" and that "[n]ow, they are packing up and moving out").

¹⁰ In Mississippi, between 2013 and 2016, the pregnancy-related mortality ratio for Black women was 51.9 deaths per 100,000 live births, nearly three times the white ratio of 18.9. The national legal induced abortion case-fatality rate for 2013–17 was 0.44 legal induced abortion-related deaths per 100,000 reported legal abortions. See MISS. STATE DEPT' OF HEALTH, MISSISSIPPI MATERNAL MORTALITY REPORT 2013–2016, at 5 (2019); Katherine Kortsmitt, Tara C. Jatlaoui, Michele G. Mandel, Jennifer A. Reeves, Titilope Oduyebo, Emily Petersen & Maura K. Whiteman, *Abortion Surveillance—United States, 2018*, CTRS. FOR DISEASE CONTROL & PREVENTION 7 (2020).

¹¹ MISS. STATE DEPT' OF HEALTH, MISSISSIPPI MATERNAL MORTALITY REPORT 2013–2016, at 16 (2019). See also generally Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215 (2012).

¹² *Mississippi*, CTR. FOR REPROD. RTS, <https://perma.cc/5GZK-URTM>.

¹³ 142 S. Ct. 2228 (2022).

victims, suffer foreseeable and avoidable tragedies.¹⁴ Even as rape, incest, or consensual sex may cause their pregnancies, for girls living in reproductive health deserts, where clinics have shuttered, and doctors have fled under the threat of criminal punishment and civil fines and fees, state legislatures have explicitly banned abortion in their states, preventing girls from terminating unwanted pregnancies. In other words, these are no longer private decisions, but those governed by the state.

Abortion bans now force adolescents into unwanted and unnecessary motherhood, causing them to become preteen and teen parents. These laws heighten pregnant adolescents' risks of mortality, morbidity, and predictable future social, health, economic, and legal injuries.¹⁵ Even as abortion remains legal in some states, poverty and lack of resources impose barriers that make traveling out of state for healthcare more illusory than real.¹⁶ Notably, the scale and scope of their economic deprivations, housing insecurity, education gaps, and even potential for incarceration can be intergenerational, extending to their future offspring.¹⁷ Moreover, there are serious health concerns associated with "what pregnancy and childbirth do to the bodies of young girls."¹⁸ As important research on the consequences of teen pregnancy

¹⁴ See Dana Goldstein & Ava Sasani, *What New Abortion Bans Mean for the Youngest Patients*, N.Y. TIMES (July 16, 2022), <https://www.nytimes.com/2022/07/16/us/abortion-bans-children.html>.

¹⁵ SAUL D. HOFFMAN & REBECCA A. MAYNARD, *KIDS HAVING KIDS: ECONOMIC COSTS AND SOCIAL CONSEQUENCES OF TEEN PREGNANCY* 21–22 (2d ed. 2008).

¹⁶ *Wealth Inequity Puts Abortion Out of Reach for Many Americans Living with Low Incomes*, GUTTMACHER INST. (Jan. 25, 2023), <https://perma.cc/B5MB-LDAD>.

¹⁷ For example, according to a report published by the National Conference of State Legislatures, "[t]een pregnancy and parenting contribute significantly to high school drop-out rates among teen girls. Thirty percent of teenage girls who drop out of high school cite pregnancy or parenthood as a primary reason. This rate is even higher for Hispanic and African-American teens, at nearly 40 percent." *Teen Pregnancy Prevention*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 11, 2018), <https://perma.cc/G7ZN-M4CT> ("Teen pregnancy is strongly linked to poverty, with low income level associated with higher teen birth rates."); see also JUDITH S. MUSICK, YOUNG, POOR, AND PREGNANT: THE PSYCHOLOGY OF TEENAGE MOTHERHOOD 9 (1993). See generally Elizabeth Wall-Wieler, Janelle Boram Lee, Nathan Nickel & Leslie Leon Roos, *The Multigenerational Effects of Adolescent Motherhood on School Readiness: A Population-Based Retrospective Cohort Study*, PLOS ONE, Feb. 6, 2019. But see Hoffman & Maynard, *supra* note 15, at 21–22 (finding that "the economic costs for the teenage mothers are small" although there are "nonmonetary" consequences).

¹⁸ Stephanie Nolen, *What Pregnancy and Childbirth Do to the Bodies of Young Girls*, N.Y. TIMES (July 18, 2022), <https://www.nytimes.com/2022/07/18/health/young-girls-pregnancy-childbirth.html> ("Young maternal age is associated with an increased risk of maternal anemia, infections, eclampsia and pre-eclampsia, emergency cesarean delivery and postpartum depression, according to a 2015 evaluation published in the *Journal of Neonatal-Perinatal Medicine*.").

reveals, for Black and Indigenous girls, the consequences of adolescent pregnancies are further magnified by historic patterns of racial discrimination.¹⁹ Yet, none of this is a surprise.

Nevertheless, in Louisiana, state lawmakers rebuffed efforts to add incest and rape exceptions to the state's "near-total abortion ban," despite strong public support.²⁰ According to Louisiana state representative Delisha Boyd, who authored one of the two bills to amend Louisiana's tough anti-abortion laws, her mother survived a pregnancy due to rape at 15 years old, but "never recovered," and died "before she was 28 years old, because no one took time to take care of the child that had been violated by a predator."²¹

During a hearing on the proposed legislation, for several hours, survivors of rape and incest along with physicians and psychologists testified in support of the legislation, offering gut-wrenching testimony.²² Dr. Nicole Freehill, a New Orleans obstetrician, testified about a 14-year-old girl who "became pregnant after being repeatedly raped by an uncle."²³ Another physician shared a similar story regarding an 11-year-old girl. Other testimony highlighted the rape and pregnancy of an 8-year-old child.²⁴ The compelling arguments that the bills' supporters conveyed included bringing attention to the compounding psychological traumas experienced by child-rape survivors forced to endure unwanted pregnancies, the physical stresses on their bodies, including "higher risk of preterm labor, preterm birth, preeclampsia and severe complications," and violation of their religious freedoms.²⁵

Nevertheless, in a vote along party lines, Republican legislators rejected legislation that would add exceptions in cases of rape

¹⁹ Sana Amjad, Isaiah MacDonald, Thane Chambers, Alvaro Osornio-Vargas, Sujata Chandra, Don Voaklander & Maria B. Ospina, *Social Determinants of Health and Adverse Maternal and Birth Outcomes in Adolescent Pregnancies: A Systematic Review and Meta-Analysis*, 33 PAEDIATRIC PERINATAL EPIDEMIOLOGY 88, 93 (2018); Leontine Westenberg, Karin A.M. van der Klis, Annabelle Chan, Gustaaf Dekker & Rosemary J. Keane, *Aboriginal Teenage Pregnancies Compared with Non-Aboriginal in South Australia 1995–1999*, 42 AUSTL. & N.Z. J. OBSTETRICS & GYNAECOLOGY 187, 191 (2002).

²⁰ Sarah Cline, *Rape, Incest Exceptions to Louisiana Abortion Ban Rejected by GOP Lawmakers*, AP NEWS (May 10, 2023) <https://perma.cc/TM9A-F7QH>.

²¹ Rosemary Westwood, *Rape and Incest Exceptions Voted Down Along Party Lines in Louisiana House Committee*, WWNO (May 10, 2023), <https://perma.cc/ACH9-RU2S>.

²² See Cline, *supra* note 20.

²³ Westwood, *supra* note 21.

²⁴ *Id.*

²⁵ *Id.*

and incest, and blocked proposals from coming out of committee.²⁶ Despite the fact that rape and incest survivors are crime victims, in the post-*Dobbs* landscape that seems to matter very little to anti-abortion lobbyists and conservative lawmakers in Republican-dominant legislatures.²⁷

However, Louisiana is not alone. Mere weeks before, in Arkansas, also voting along party lines, Republican lawmakers rejected House Bill 1670 that would alleviate harms to children by modifying the state's abortion ban to include exceptions for rape and incest.²⁸ The bill, which would have applied only to children under 16, nonetheless failed to garner support from Republican legislators.²⁹ In response, the bill's author, Arkansas state representative Ashley Hudson, pointed out a glaring irony,

We've [] spent an awful lot of time this session talking about things that kids aren't ready to do. We've talked about materials they're not ready to read, we've talked about materials they're not ready to see, we've talked about activities they're not ready to perform, and yet we talk about making them parents.³⁰

The concerns raised by Boyd and Hudson, as well as others, are not hypothetical or the byproduct of lofty academic musing. Rather, they reflect the harsh turn in anti-abortion legislation that also guts the constitutional rights of children and dismisses the serious physical and emotional harms inflicted on them by state laws that ban abortion against the will of a majority of

²⁶ *Id.* ("Louisiana Right to Life—which lobbied against the bills and has long fought against rape and incest exception[s] for abortion laws—celebrated the votes, saying that 'babies do not deserve to be killed because of the crimes of their biological father.'").

²⁷ *Id.*:

Ben Clapper, the executive director of Louisiana Right to Life, has suggested in the past that some of the concerns raised by physicians and reporting on the impact of the law in hospitals and on women's care has been driven by abortion-rights supporters who have "possibly manufactured concerns over the law."

²⁸ Daniel Breen, *Lawmakers Reject Child Rape, Incest Exceptions to Arkansas Abortion Ban*, KUAR, (Mar. 30, 2023), <https://perma.cc/S5UW-QTV2>.

²⁹ *Id.*

³⁰ *Id.* According to Hudson,

[w]hen we are talking about a situation in which a 10-year-old child is being forced to carry a pregnancy to term that may kill her, that may result in a dead baby or that may result in permanent, lifetime physical disabilities, then we need to take a really serious look at what we're doing and why we want the public policy of this state to sentence children to these types of issues.

Id.

Americans.³¹ These concerns are more than hypothetical. Shortly after the Court's ruling in *Dobbs*, a 10-year-old girl fled Ohio to reach Indiana to terminate her pregnancy after experiencing serial sexual assaults and rape.³² As the post-rape tragedy unfolded, a secondary harm ensued whereby to spare herself a forced pregnancy as a child, the victim needed to flee her state because Ohio outlawed abortion even in the cases of rape and incest.³³ In the confusion that resulted, state officials and anti-abortion pundits claimed that Ohio's abortion ban would not have interfered with the girl's ability to terminate a pregnancy in Ohio.³⁴ They were wrong.³⁵

In the immediate aftermath of *Dobbs*, media and academic attention understandably focused on the horrors experienced by women seeking abortions, including cases of patients bleeding nearly to death before receiving desperately needed medical interventions to terminate their pregnancies and thus save their lives.³⁶ Yet, less visible or, perhaps, contemplated were questions involving the concerns of minors who, by law, would be forced to endure pregnancies, and if they survived them, to become mothers.

³¹ Michael Scherer & Rachel Rouben, *More Republicans Push for Abortion Bans Without Rape, Incest Exceptions*, WASH. POST (July 16, 2022), <https://www.washingtonpost.com/politics/2022/07/15/abortion-exceptions-republicans/> (“Despite opposition from most Americans, many conservatives are pushing abortion bans that do not include exceptions in the wake of the Supreme Court ruling overturning *Roe v. Wade*.”).

³² David Folkenflik & Sarah McCammon, *A Rape, an Abortion, and a One-Source Story: A Child's Ordeal Becomes National News*, NPR (July 13, 2022), <https://perma.cc/38T2-92QK>.

³³ OHIO REV. CODE ANN. § 2912.195(A) (stayed by *Preterm-Cleveland v. Yost*, Case No. A2203203 (Ct. C.P. Ohio, Oct. 12, 2022) (granting preliminary injunction)). The Ohio Supreme Court has accepted an appeal on this order. *Preterm-Cleveland v. Yost*, 204 N.E.3d 564 (Ohio 2023).

³⁴ See, e.g., *Ohio Attorney General on Lack of Investigation into Alleged Child Rapist: 'Not a Whisper'*, FOX NEWS (July 11, 2022), <https://perma.cc/6HPZ-DMQC>.

³⁵ See Folkenflik & McCammon, *supra* note 32; see also Bethany Bruner, Monroe Trombly & Tony Cook, *Arrest Made in Rape of Ohio Girl That Led to Indiana Abortion Drawing International Attention*, COLUMBUS DISPATCH (July 13, 2022), <https://perma.cc/DS5G-PHVB>.

³⁶ See Rosemary Westwood, *Bleeding and in Pain, She Couldn't Get 2 Louisiana ERs to Answer: Is It a Miscarriage?*, NPR (Dec. 29, 2022), <https://perma.cc/933D-M353> (detailing Kaitlyn Joshua's life-endangering experience of being denied miscarriage care and sent home from the hospital as she bled profusely); see also Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN (Nov. 16, 2022), <https://perma.cc/8LPG-UYPC> (“Another woman has come forward with the harrowing details of how the Supreme Court's decision four months ago to overturn *Roe v. Wade* put her life in danger.”); Shirin Ali, *The Five Horrifying Near-Death Experiences Behind the New Texas Abortion Lawsuit*, SLATE (Mar. 7, 2023), <https://perma.cc/GMT9-LBCZ> (“[F]ive women [are] suing the state over its restrictive abortion law after they were denied the procedure despite their lives being in danger—and their doctors confirming their fetuses would not survive birth.”).

In Florida, Judge Jared Smith, new to the recently formed Sixth District Court of Appeals, ruled that a 17-year-old was “unfit” to terminate her unwanted pregnancy.³⁷ Judge Smith queried whether the girl possessed the capacity or “overall intelligence” to terminate a pregnancy.³⁸ In this case, Jane Doe’s 2.0 grade point average seemed to count against her.³⁹

Across the country, as states’ trigger laws that ban abortion go into effect,⁴⁰ an uneven and hostile terrain emerges that imposes inordinate obstacles in the path of vulnerable youth who seek to terminate pregnancies as well as barriers to their free speech,⁴¹ privacy,⁴² and basic human dignity and rights.⁴³ In the wake of *Dobbs*, various horrors have unfolded that challenge even lawmakers’ understandings of rape and incest exceptions and the purpose and function of judicial bypasses. Indeed, reproductive protections on matters once thought noncontroversial, including menstrual privacy, have astonishingly become matters of legislative scrutiny and interference.⁴⁴

³⁷ Maya Yang, *DeSantis Appoints Judge Who Denied Abortion to Girl Over School Grades*, THE GUARDIAN (Dec. 22, 2022), <https://perma.cc/2RQZ-L6L5>.

³⁸ See *In re* Petition for Judicial Waiver of Parental Notice & Consent or Consent Only to Termination of Pregnancy, 333 So. 3d 265, 271 (Fla. Dist. Ct. App. 2022) (describing and subsequently reversing Judge Smith’s decision to deny Jane Doe’s petition for a judicial bypass).

³⁹ See *id.*

⁴⁰ See, e.g., Juliana Kim, *3 More States Are Poised to Enact Abortion Trigger Bans This Week*, NPR (Aug. 22, 2022), <https://perma.cc/WZT7-HCQY> (“By the end of August, nearly all of the abortion trigger bans in the country will have taken effect. Thirteen states have legislation that was designed to automatically outlaw abortions once the U.S. Supreme Court overturned *Roe v. Wade*.”).

⁴¹ See Josh Funk, *Nebraska Woman Charged with Helping Daughter Have Abortion*, AP NEWS (Aug. 10, 2022), <https://perma.cc/M9VH-YWAP> (explaining the charges against a 41-year-old Nebraska mother and 17-year-old daughter for inducing a medication abortion and disposing of the fetus filed after police gained access to their Facebook messages); see also Timothy Bella, *Florida Bill Would Ban Young Girls from Discussing Periods in School*, WASH. POST (Mar. 17, 2023), <https://www.washingtonpost.com/politics/2023/03/17/florida-bill-girls-periods-school-gop/> (discussing House Bill 1069, which forbids girls in fifth grade and below from discussing menstruation).

⁴² See Victoria Bisset, *Florida Drops Menstruation Reporting from Student Sports Forms After Backlash*, WASH. POST (Feb. 10, 2023), <https://www.washingtonpost.com/nation/2023/02/10/florida-female-athletes-report-menstruation/> (reporting on the successful public outcry after Florida’s high school sports association debated making menstrual tracking mandatory for student athletes).

⁴³ See Margaret Wurth, *U.S. States Should Protect Youth Abortion Access: Forced Parental Involvement Harms Young People, Delays Care*, HUM. RTS. WATCH (June 23, 2022), <https://perma.cc/9W4C-YRXH> (discussing how, even prior to *Dobbs*, minors had to navigate the “difficult, even traumatizing” judicial bypass process).

⁴⁴ See generally Bisset, *supra* note 42; Ashley Gold & Oriana Gonzalez, *Post-Roe, Prosecutors Can Seek Unprotected Reproductive Health Data*, AXIOS (Mar. 1, 2023),

The post-*Dobbs* legal landscape exposes the hubris of lawmakers who, when given the choice to protect sexual assault, now decline to do so. Sadly, if U.S. history and political culture are guides, the efforts to double down further and enact laws that amplify threats to civil liberties, restrict civil rights, and infringe other constitutional protections will intensify in the coming months and years rather than dissipate. For this reason, all women, girls, and people capable of pregnancy are harmfully and unnecessarily exposed to risks given egregious rates of maternal mortality and morbidity in the United States.

Nor are courts safe havens for girls and women that seek exceptions. In late 2023, the Texas Supreme Court held that the state's narrow abortion-ban exception did not apply to Kate Cox, whose nonviable pregnancy (afflicted with Trisomy 18) risked her life and future infertility.⁴⁵ This left many to wonder if Ms. Cox's dangerous pregnancy could not fit the state's narrow exception, whose could?

In an effort to safeguard pregnant patients' health and prevent deaths, the Biden Administration issued guidance that under the federal Emergency Medical Treatment and Active Labor Act⁴⁶ (EMTALA), patients needing abortions to save their lives and preserve their health must be provided that emergency care at hospitals that receive Medicare funding.⁴⁷ In January 2024, the U.S. Supreme Court announced that it would hear the issue⁴⁸ after the Ninth Circuit upheld a lower court's preliminary injunction, which blocked Idaho's abortion ban from going into effect.⁴⁹ By contrast, the Fifth Circuit has ruled that the Biden Administration exceeded its authority, explaining that EMTALA has a "limited preemptive effect," and does not preempt state laws such as abortion bans.⁵⁰

<https://www.axios.com/2023/03/01/post-roe-unprotected-reproductive-health-data> ("Health privacy in the post-*Roe* digital age is fraught as prosecutors seeking to enforce anti-abortion laws are free to go after reproductive health data in mobile apps, where it is unprotected by federal law.").

⁴⁵ See generally *In re State*, 2023 WL 8540008 (Tex. Dec. 11, 2023).

⁴⁶ 42 U.S.C. § 1395dd.

⁴⁷ *Following President Biden's Executive Order to Protect Access to Reproductive Health Care, HHS Announces Guidance to Clarify That Emergency Medical Care Includes Abortion Services*, U.S. DEP'T OF HEALTH & HUM. SERVS. (July 11, 2022), <https://perma.cc/K4D6-W95W>.

⁴⁸ See generally *Idaho v. United States*, 2024 WL 61829 (Jan. 5, 2024) (mem.).

⁴⁹ See generally *United States v. Idaho*, No. 23-35450 (9th Cir. Sept. 28, 2023) (mem.).

⁵⁰ *Texas v. Becerra*, 89 F.4th 529, 535, 546 (5th Cir. 2024).

The *Dobbs* decision—a catastrophic event in U.S. law and society—leaves a path of destruction across the nation.⁵¹ And while much attention has focused on the harms to adult women, the trail of horrors channels to children as well. This Essay takes up those concerns. It proceeds by probing the social, health, and legal consequences of forced pregnancy and analyzing Part 4, Chapter 19—“Medical Decisionmaking by Minors”⁵²—of the Restatement of Children and the Law,⁵³ which as Professor Elizabeth Scott explains in an accompanying Essay, “deals with a diverse range of issues in which the relationship of children and the state is not embedded in the family, the public school or the justice system.”⁵⁴

The Essay calls for an examination of the post-*Dobbs* legal landscape and its impacts on the lives of young people as a guide for future revisions of the Restatement of Children and the Law as the governmental barriers that previously interfered with reproductive decision-making by minors have intensified. Its purpose is multifold. First, it makes visible adolescents’ interests in bodily autonomy and right to reproductive health. It draws attention to the fact that minors are affected by the *Dobbs* decision and have an interest in reproductive freedom generally, and abortion rights specifically. Second, it seeks to tell a story about teen sexuality in the wake of a void created by efforts to ban sex education in schools and censor textbooks that address human biology and sexuality. Third, it offers empirical clarity and perhaps a rebuttal to the trope that youth sexual intimacy is either nonexistent or exists only in the context of sexual violence. Fourth, the Essay contends that even as rape and incest exceptions should be in effect in each state that bans abortion, such exemptions should apply broadly

⁵¹ In Ohio, Brittany Watts was prosecuted after experiencing a miscarriage with her nonviable pregnancy and charged with abusing a corpse. Police raided Ms. Watts’s home, destroying her toilet and searching through feces in order to seek evidence of fetal remains. Remy Tumin, *Ohio Woman Who Miscarried Faces Charges That She Abused Corpse*, N.Y. TIMES (Jan 3, 2024), <https://www.nytimes.com/2024/01/03/us/brittany-watts-ohio-miscarriage-abortion.html>. Ultimately, a grand jury refused to indict. *Id.*

⁵² RESTATEMENT OF THE LAW, CHILDREN AND THE LAW pt. 4, ch. 19 (AM. L. INST., Tentative Draft No. 2, 2019) [hereinafter RESTATEMENT Draft No. 2].

⁵³ Note that this Essay cites prior drafts of the Restatement of Children and the Law. The section numbers of the Restatement have been updated since the time of publication.

⁵⁴ Elizabeth Scott, *Comment on Part 4 Essays: Goodwin and Dailey and Rosenbury*, 91 U. CHI. L. REV. 633, 634 (2024) (“Sections 19.01 and 19.02 authorize minors to consent independently to particular types of medical treatment, offering substantial protection to minors who might be unwilling or unable to seek necessary treatment if parental consent were required.”).

to all youth pregnancies given the devastating impacts of forced, unwanted teen pregnancies.

This Essay argues that abortion bans harm the dignity, health, and human rights interests of minors. Rape and incest exceptions may prove too difficult or virtually impossible for a youth to navigate, particularly given hurdles involving the filing of police reports and fear of removal from the family home. Further, judicial bypasses—perceived as a meaningful alternative for minors who fear disclosing pregnancies to their parents and obtaining parental consent to terminate pregnancies—may also be out of reach, because navigating a complex judicial process requires deftly maneuvering overwhelming legal and logistical challenges even confusing and burdensome for adults. In the case of judicial bypasses, prevailing upon a judge is yet another stage. Not all judges will be sympathetic to the concerns of young women.⁵⁵

Further, successfully overcoming those barriers means clearing only the initial hurdles—a judicial bypass does not secure funding for a pregnancy termination, travel out of state, or accommodations.

The Essay comments on the Restatement section on minors' reproductive health decisions, which may serve as a useful guide in clarifying and elevating the rights of minors in decisions affecting their reproductive healthcare. It argues that the unstable legal topography that emerges post-*Dobbs* will impose particularly onerous obstacles and burdens on the lives of young people who are often invisible in broader discussions about reproductive health and rights. Travel bans, mandated filing of police reports, restrictions on speech, and barriers to communicating with others who may be perceived as aiding or abetting a pregnancy termination will further chill their speech, ability to associate, and access to healthcare. Across the spectrum of minor-related unplanned

⁵⁵ See Niraj Chokashi, *Outrage Follows 60-Day Sentence in Incest Case Against Father of Girl, 12*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/us/montana-judge-criticized-for-60-day-sentence-for-felony-incest.html> (“A judge who sentenced a Montana man to 60 days in jail for incest with his 12-year-old daughter is facing a firestorm of criticism and an impeachment effort by those who view the sentence as far too light.”); Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, ATLANTIC (June 17, 2016), <https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/> (stating that the “main point” is that Judge Aaron Persky “believed Turner’s side of the story, that the victim gave Turner consent to have sexual contact with her,” despite “the victim’s harrowing account,” causing many to be “stunned” by Judge Persky imposing such a lenient sentence).

and unwanted pregnancies, some result from consensual sex and others manifest from sexual coercion and rape.

In the brevity necessitated by a symposium essay, this Essay proceeds in four discreet parts. Part I establishes the relevance and importance of examining concerns related to teen sexuality. It offers an empirical account and analysis of teen sexuality, highlighting research documenting the prevalence of adolescent sex.

Part II deepens this Essay's focus on adolescent reproductive health, surfacing concerns related to maternal mortality, health, and safety. Part II maintains that in the aftermath of *Dobbs*, predictably those who will suffer the most will be economically disenfranchised youth and those of color, forced to endure unintended and unwanted pregnancies. Even now, those who suffer the highest rates of maternal mortality and morbidity are Black and Brown women and girls already disenfranchised in states with active, intergenerational legacies of race, sex, and LGBTQ discrimination.

In Part III, this Essay shifts. It turns to the inflammatory and dangerous rhetoric propagated by anti-abortion politicians and activists, which unfortunately pervades the political landscape. This rhetoric suggests that teen sexual intimacy can be understood only as a byproduct of predatory sex education and grooming by lawmakers. As Part III shows, pragmatically, such rhetoric creates barriers to reproductive education and access to health services. Part IV offers pathways forward.

I. SEXUAL TABOO: TEEN SEX AND MORAL PANIC

In the United States, teen sexuality and sexual engagement remain taboo issues and as such not only are many policies related to sex education out of touch with peer nations, but U.S. youth suffer in the process.⁵⁶ As Advocates for Youth has reported, “[i]n France, Germany, and the Netherlands, two things create greater, easier access to sexual health information and services for all people, including teens. They are: 1) societal openness and comfort in dealing with sexuality, including teen sexuality; and 2) pragmatic governmental policies.”⁵⁷ As a result, advocates note the existence of “better sexual health outcomes for French,

⁵⁶ See ADVOCS. FOR YOUTH, ADOLESCENT SEXUAL HEALTH IN EUROPE AND THE UNITED STATES: THE CASE FOR A RIGHTS. RESPECT. RESPONSIBILITY. APPROACH (“Regularly since 1998, Advocates for Youth has sponsored study tours to France, Germany, and the Netherlands to explore why adolescent sexual health outcomes are more positive in these European countries than in the United States.”).

⁵⁷ *Id.*

German, and Dutch teens when compared to U.S. teens.”⁵⁸ For example, the U.S. “teen pregnancy rate is almost three times that of Germany and France, and over four times that of the Netherlands.”⁵⁹ Further, the U.S. “teen birth rate is nearly eight times higher than that of the Netherlands’, over five times higher than France’s, and over four times higher than Germany’s.”⁶⁰

Part I provides an empirical basis to support not only offering sex education that extends beyond abstinence-only curricula, but it also provides context for considering policies for youths related to contraception, pregnancy, childbearing, abortion, and treatment for sexually transmitted infections (STIs). Implicitly, it points out the follies and blind spots in efforts to ban sexual education curricula and textbooks. That is, banning sexual education or textbooks will not discourage teen sex.⁶¹ However, such censorship will prove harmful in ways that are predictable and preventable. This Part deepens understandings about why comprehending the prevalence, scope, and scale of teen sexuality might better shape social, medical, well-being, educational, and legal policy responses.

In the post-*Dobbs* era, the reproductive battleground is no longer confined to U.S. courts. Indeed, multiple reproductive rights battlegrounds dot the U.S. landscape, some hiding in plain sight, including school boards, and the concerns at play extend beyond abortion to include access to contraception and even sex education.⁶² As a result, obscured in the important debates

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Kathrin F. Stanger-Hall & David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.*, 6 PLOS ONE 1, 4 (2011) (finding that “teens in states that prescribe more abstinence education are actually more likely to become pregnant”).

⁶² Jesus Jiménez, *Miami-Dade School Board Rejects New Textbooks with Sex Education Curriculum*, N.Y. TIMES (July 21, 2022), <https://www.nytimes.com/2022/07/21/education/miami-dade-school-board-sex-ed-textbook.html> (“Facing pressure from parents empowered by a new state education law, the Miami-Dade County School Board has reversed itself on adopting two new textbooks for the coming school year, leaving students without a sexual education curriculum for the next several months.”); Tracey Tully, *Sex Ed Emerges as Core Issue for N.J. Republicans as Midterms Approach*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/nyregion/sex-ed-new-jersey-midterms.html> (“Republicans in the State Senate interrupted a summer hiatus to hold an online panel discussion—‘Sex Education, State Curriculum Mandates and Parental Rights’—on Facebook Live.”). *But see* Allyson Waller, *Texas Board Revises Sex Education Standards to Include More Birth Control*, N.Y. TIMES (Nov. 20, 2020), <https://www.nytimes.com/2020/11/20/us/texas-sex-education.html> (“For the first time in more than two decades, Texas’ Board of Education voted Friday to make major changes to the state’s sex education

regarding reproductive freedom are the implications for youths and the relevance of a reproductive health, rights, and justice discourse in the lives young people. Hidden in the larger contestation about abortion rights are masked truths and realities about youth sexuality, spread of sexually transmissible diseases, unwanted pregnancy, rape, incest, and ignorance about human biology and reproduction.

In the wake of *Dobbs* and the political rhetoric harnessed to deny abortion rights, neglected are sociolegal realities of teen sexuality. These realities include its frequency, health indicators and outcomes, rates of pregnancy, involvement with law enforcement, such as prosecutions under statutory rape laws,⁶³ and efforts to navigate legal and social systems ill-designed to address their concerns. As to the latter concern, statutory rape laws assume that all sexual activity below a specified age is coercive even if the individuals involved believe that the sexual acts were voluntary or consensual.⁶⁴ Although not explicit in all state statutes, the legal age of consent for sexual activity infers the ability of the individual to understand and recognize the potential consequences of sexual activity and intercourse, and with this understanding, the ability to make a knowing choice.⁶⁵ Unlike traditional rape laws, here the requirement of forced sexual contact is irrelevant, as it

standards, expanding the teaching of birth control beyond abstinence-only education for middle school students.”).

⁶³ See Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 318–19 (2003); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 36 (1994); Michele Goodwin, *Law's Limits: Regulating Statutory Rape Law*, 2013 WIS. L. REV. 481, 488 (2013).

⁶⁴ With this assumption comes enduring stereotypes baked into law, including statutory rape as a story about white women's vulnerability, Black men's culpability, and economic abandonment. See Goodwin, *supra* note 63, at 493–99.

⁶⁵ See, e.g., *State v. Soura*, 118 Idaho 232, 235 n.1 (1990). In this case, the Supreme Court of Idaho instructed the jury:

All persons are not mentally equal. Unsoundness of mind is a relative term. For a person to be legally capable of giving consent to an act of sexual intercourse, such person must of necessity have some knowledge of the consequences of the results that naturally flow from such act, that an unlawful act offends against the moral law, results more or less in social ostracism, and be able to make a knowing choice as to whether or not to engage in such act of sexual intercourse. Inability to understand and appreciate such results and their effect and the inability to make a knowing choice renders one incapable of giving an intelligent or legal consent to the act.

is believed that at least one person involved in the sexual relationship has no legal right to consent.⁶⁶

Despite aggressive tactics targeting legislatures and school boards to ban sex education, censor books, or restrict health and sex education instruction to “abstinence-only,” U.S. teens report themselves as sexually active—voluntarily and involuntarily, including in states hostile to abortion rights and sex education.⁶⁷ According to the Centers for Disease Control and Prevention (CDC), an estimated 55% of U.S. teens have had sexual intercourse by the time they turn 18 years old.⁶⁸ The CDC measures teen intercourse or sexual activity in two ways. The first measurement inquires “whether the respondent has ever had sex and whether he or she has had sex recently.”⁶⁹ If a respondent affirms that she, he, or they have ever had sexual intercourse, the teen is then identified as “sexually experienced.”⁷⁰ The second measurement queries under what circumstances did the teen first experience sex and under what conditions.⁷¹ In other words, did the young person know the person with whom they had sexual intercourse? Were they on a date? Was the sexual encounter associated with a first-time meeting of the other person?

Much can be gleaned and learned by studying teen sexual health. For example, investigating teen attitudes and experiences related to their sexuality provides greater clarity related to the concerns of minors and their understandings about sexual health. Such data provides an empirical basis for analyzing and responding to teen sexuality. Such research also sheds light not only on the patterns of teen sexual intimacy, but also offers important demographic content and context. And, while not the goal of the research, it happens to debunk myths related to “groomer” theories

⁶⁶ See Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1329 (2005) (explaining that historically, rape law was predicated on the belief that men are the only aggressors and women are the only victims and required two elements to prove culpability: (1) evidence of use of force or threat of physical force (where the complainant demonstrated active resistance or would be prevented from resistance out of fear of bodily harm or loss of life) and (2) evidence of non-consent).

⁶⁷ See Stanger-Hall & Hall, *supra* note 61, at 4.

⁶⁸ *Over Half of U.S. Teens Have Had Sexual Intercourse by Age 18, New Report Shows*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 22, 2017), <https://perma.cc/MA8B-VGDR>.

⁶⁹ JOYCE C. ABMA & GLADYS M. MARTINEZ, NAT'L CTR. FOR HEALTH STAT., SEXUAL ACTIVITY AND CONTRACEPTIVE USE AMONG TEENAGERS IN THE UNITED STATES, 2011–2015, at 2 (2017).

⁷⁰ *Id.*

⁷¹ *Id.* at 5–6.

that claim that sex education is the motivator for, or conduit to, teen sexual activity.

As part of the surveillance on teen sexual behavior, inquiries are also made in reference to not having sex. For example, the research measures “reasons for not yet having had sex.”⁷² To tease out the answers, researchers inquired, “[w]hat would you say is the most important reason why you have not had sexual intercourse up to now?”⁷³ Among the follow-up questions are those that inquire about religious beliefs, the desire to avoid pregnancy, awareness and effort to avoid sexually transmitted infections and diseases, and relationships.⁷⁴

The CDC’s report, *Sexual Activity and Contraceptive Use Among Teenagers in the United States: 2011–2015*, offers the most recent account of teen sexual activity from the National Survey of Family Growth (NSFG).⁷⁵ The data casts a national net, deriving data points from interviews with over four thousand female and male teens age 15–19 over a four-year period.⁷⁶ Despite its limitations, the report offers one of the most comprehensive analyses examining and comparing trends related to teen sexual activity. For example, the 2017 report provided “selected indicators” teasing out prior data from 1988, 1995, 2002, and 2006–10 to assess important trends.⁷⁷

The data published in 2017—the most recent available from the CDC—record that an estimated “55% of male and female teenagers had ever had sexual intercourse” by age 18.”⁷⁸ In the period from 2011 to 2015—one that begins a decade prior to *Dobbs*—over 42% of “never-married” female teens—roughly four million—experienced sexual intercourse “at least once” by the time they were interviewed as part of the national survey.⁷⁹ Similar trends were reported for male teens, with over 44% (about 4.4 million) having had sex “at least once by the time of the interview.”⁸⁰ Various data points derived from this research reveal a complex story.

⁷² *Id.* at 6.

⁷³ *Id.* at 2.

⁷⁴ Abma & Martinez, *supra* note 69, at 2.

⁷⁵ *Id.* at 1.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 5.

⁷⁹ Abma & Martinez, *supra* note 69, at 4.

⁸⁰ *Id.* at 1.

First, the rate of teen sexual activity remained consistent from the CDC's prior studies in 2002 as well as its 2006–10 research.⁸¹ That is, the levels of sexual experience did not decline—nor did it increase. Second, however, as a longitudinal matter, teen sexual intercourse shows a decline when compared with rates in the 1980s. In other words, “[l]onger-term trends . . . show declines in the percentage of teenagers who were sexually experienced.”⁸² Third, according to the National Center for Health Statistics (NCHS), teen use of contraception during a first sexual encounter increased “from 74.5% in 2002 to 81.0% in 2011–2015. Male teenagers’ use of a condom at first sex increased from 70.9% in 2002 to 79.6% in 2006–2010 and remained stable at 76.8% in 2011–2015.”⁸³

Fourth, despite the largely successful fight to elevate HIV/AIDS as a public health crisis in need of compassion and robust research, avoidable gaps persist along demographic lines, particularly as the focal point has been largely gay, white men.⁸⁴ In an investigative report about alarming rates of HIV among Black gay and bisexual men, author and journalist Linda Villarosa offered a comparison. Swaziland, “a tiny African nation, has the world’s highest rate of HIV., at 28.8 percent of the population. If gay and bisexual African-American men made up a country, its rate would surpass that of this impoverished African nation—and all other nations.”⁸⁵ In the teen context, “sexually active adolescents aged 15–19 and young adults aged 20–24 are at higher risk of acquiring STIs than adults.”⁸⁶ In fact, the prevalence of STIs such as chlamydia and human papillomavirus (HPV) among sexually active teen girls is one in four.⁸⁷ The health

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Linda Villarosa, *America’s Hidden H.I.V. Epidemic: Why Do America’s Black Gay and Bisexual Men Have a Higher H.I.V. Rate Than Any Country in the World?*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/magazine/americas-hidden-hiv-epidemic.html>:

In cities like New York and San Francisco, once ground zero for the AIDS epidemic, the virus is no longer a death sentence, and rates of infection have plummeted. In fact, over the past several years, public-health officials have championed the idea that an AIDS-free generation could be within reach—even without a vaccine. But in certain pockets of the country, unknown to most Americans, H.I.V. is still ravaging communities at staggering rates.

⁸⁵ *Id.*

⁸⁶ Abma & Martinez, *supra* note 69, at 2 (explaining that reasons for this trend includes, “behavior, physiology, and factors related to health care access and services”).

⁸⁷ *Id.*

consequences associated with STIs include later risks of cervical cancer, and the medical costs exceeded \$15.6 billion in 2017.⁸⁸

Fifth, irrespective of the downward trend in teen sexual intercourse, teen pregnancy rates “are still higher than those in other developed countries.”⁸⁹ For example, the teen birth rate in Canada is “less than one-half of the U.S. rate.”⁹⁰ Similarly in Germany and France, the rate was less than a quarter of that in the United States.⁹¹ Moreover, despite declines in pregnancy across race and ethnic groups, certain disparities persist. For Black teens, the rate of pregnancy is twice that of white teens.⁹²

In 2014, the CDC framed the unwanted teen pregnancy rates as a “Winnable Battle.”⁹³ Sadly, in the wake of successful efforts to dismantle abortion protections, clinics that provided reproductive health services shuttered, and what was a winnable battle, is now more of a fantasy than plausible reality given lawmakers’ policy decisions regarding reproductive health.

As prior research noted a decade ago, the CDC findings related to teen sexual intimacy are consistent over time.⁹⁴ Moreover, the data stand in stark contrast to how parents understand the sexuality of minors.⁹⁵ A study conducted by American Broadcasting Company News over fifteen years ago proves meaningful in these times. The study involves a survey investigating parental and teens attitudes related to sex. Roughly 90% of parents surveyed conveyed that they conversed with their teenagers about sex.⁹⁶ However, when the teens were surveyed, less than 50% perceived that such a conversation ever took place.⁹⁷ As one reporter wrote, “[c]learly, whatever the parents thought was a conversation about sex, the kids didn’t hear it that way.”⁹⁸

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* at 1 (“Although teen pregnancy and birth rates have been declining since the early 1990s and reached historic lows at 22.3 per 1,000 females aged 15–19 in 2015 [], U.S. rates are still higher than those in other developed countries.”).

⁹⁰ *Id.* at 1.

⁹¹ *Id.*

⁹² Abma & Martinez, *supra* note 69, at 1.

⁹³ *Id.* at 2.

⁹⁴ *Cf.* Goodwin, *supra* note 63, at 522.

⁹⁵ *Id.*

⁹⁶ See Gary Langer, *ABC News Poll: Sex Lives of American Teens*, ABC NEWS (May 19, 2006), <https://perma.cc/7XCW-BREZ>.

⁹⁷ *Id.*

⁹⁸ *Id.* But see generally Jacquelyn Tobey, Stephen B. Hillman, Claudia Anagurthi & Cheryl L. Somers, *Demographic Differences in Adolescents’ Sexual Attitudes and Behaviors, Parent Communication About Sex, and School Sex Education*, ELEC. J. HUM. SEXUALITY (Dec. 3, 2011), <https://perma.cc/WB5B-TWK7> (noting that Black parents are more

II. ADOLESCENT SEXUALITY AND THE HEALTH IMPERATIVE

The findings highlighted in Part I underscore the relevance of Part 4, Chapter 19⁹⁹ of the Restatement section on minors' reproductive health decisions and its emphasis on mature minors, capacity, and consent. At its core, the Restatement chapter "Medical Decisionmaking by Minors" properly focuses on healthcare and protecting the health and well-being of adolescents. For example, § 19.02,¹⁰⁰ "Consent by Minor to Reproductive Health Treatment," establishes (a) a mature minor may provide "legally sufficient consent to medical treatment affecting reproductive health," ranging from treatments "concerning pregnancy, childbirth," to "prevention or termination of pregnancy, without notification of the minor's parent"; (b) a mature minor possesses the capacity to give "informed consent to the proposed medical treatment[s]" involving their reproductive health, "[u]nless otherwise directed by law"; (c) a minor who is not mature is nevertheless permitted to "terminate her pregnancy without the consent or notification of the minor's parent if termination of the pregnancy without such consent or notification is in the minor's best interest"; and (d) "[p]arental consent to treatment to terminate a minor's pregnancy without the voluntary agreement of the minor ordinarily is insufficient."¹⁰¹

Notably, these guideposts of children's rights—collectively a strong statement acknowledging mature minors' capacities and honoring their privacy (as well as that of nonmature minors)—stand in stark contradiction to legislative trends in conservative state legislatures. Ironically, abortion bans obscure adolescent sexuality, problematically rendering it virtually nonexistent. That is, basic health, and social realities—adolescent menstruation, teen sex, childhood rape, incest, and pregnancy—are eclipsed or buried in the dismantling of *Roe*. Moreover, states that deny exceptions for girls that have experienced rape and incest, on some level, imply that such legal protections are not needed.

likely than their white counterparts to communicate with their children about teen sex. According to the authors, "African American adolescents received significantly more communication from their fathers than did Caucasian adolescents and Caucasian adolescents received more communication from their fathers than did Hispanic adolescents.").

⁹⁹ RESTATEMENT Draft No. 2 pt. 4, ch. 19.

¹⁰⁰ *Id.* § 1.02(d).

¹⁰¹ *Id.* § 19.02.

Not once in the *Dobbs* oral arguments were childhood rape, incest,¹⁰² or trauma associated with sexual abuse mentioned by the Justices, nor the majority in the final opinion, despite the harsh realities that would immediately affect girls with the Court's overturn of *Roe* and subsequent opinions that relied on its holding. Nor does the opinion consider decades of epidemiological and empirical research shedding light on adolescent sexuality beyond the cruel circumstances of rape and incest, such as consensual sexual activity among youth.¹⁰³

Post-*Dobbs*, the realities contemplated and addressed by the Restatement have not subsided. Instead, they have intensified for two key reasons and remain urgent—particularly for vulnerable girls in abortion-restrictive states—particularly as the future of abortion rights remain uncertain. First, consider that states with the most restrictive abortion policies also rank highest in teen birth rates: Mississippi, Arkansas, Louisiana, Oklahoma, and Alabama among them.¹⁰⁴ By contrast, “nine of the 10 states with the lowest teen birthrates voted Democratic” in the 2016 presidential election.¹⁰⁵

Professors June Carbone and Naomi Cahn captured this phenomenon and others in their illuminating book, *Red Families v. Blue Families*, as well as in their copiously detailed research on what statistically and socially distinguishes reproductive health and family planning outcomes in conservative versus more liberal states.¹⁰⁶ As the authors noted, conservative states have higher rates of teen pregnancy and “shotgun marriages.” Their young people are also younger when they marry and birth their first child.¹⁰⁷

Second, the Restatement's clear articulation regarding safeguarding reproductive decision-making for minors may also reflect the dangers and risks associated with pregnancy in the United States. The United States holds the worrisome distinction of being the deadliest nation in the industrialized world for

¹⁰² *Id.*

¹⁰³ See, e.g., Abma & Martinez, *supra* note 69, at 10; see also Goodwin, *supra* note 63, at 502.

¹⁰⁴ *Teen Birth Rate by State*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/YQ34-N592>.

¹⁰⁵ Nicholas Kristof, *Blue States Practice the Family Values Red States Preach*, N.Y. TIMES (Nov. 18, 2017), <https://www.nytimes.com/2017/11/18/opinion/sunday/blue-states-red-states-values.html>.

¹⁰⁶ See generally NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES* 21 (2010).

¹⁰⁷ *Id.* at 2.

someone to be pregnant.¹⁰⁸ In its now overturned 2016 decision in *Whole Woman's Health v. Hellerstedt*,¹⁰⁹ striking down two unconstitutional Texas abortion regulations, the Supreme Court acknowledged the deadly risks associated with pregnancy and childbirth in the United States.¹¹⁰

For example, in *Whole Woman's Health*, building from a robust and copiously detailed federal district court record citing reproductive health researchers Elizabeth Raymond and David Grimes's comparative study on the safety of legal abortions and childbirth,¹¹¹ the Court took note that "childbirth is 14 times more likely than abortion to result in death."¹¹² In their compelling reporting, journalists Nina Martin and Renee Montagne have highlighted that "[m]ore American women are dying of pregnancy-related complications than [in] any other developed country."¹¹³ In fact, "[o]nly in the U.S. has the rate of women who die been rising."¹¹⁴ As prior scholarship explains, this increase in maternal mortality and worrisome trends in maternal morbidity, overlap with aggressive anti-abortion legislating and rollbacks of historic reproductive protections such as Title X at the state level, taking shape during the decade preceding *Dobbs*.¹¹⁵ The relevance and statistical reliability of the *Whole Woman's Health*-era data had not changed by *Dobbs*. In fact, the data regarding the risks of pregnancy has worsened.¹¹⁶

As reported in the *Journal of the American Medical Association*, "[t]he US maternal mortality rate continued to increase in 2021."¹¹⁷ Notably, this increase "predated the COVID-19

¹⁰⁸ *World Factbook: Country Comparisons—Maternal Mortality Ratio*, CENT. INTEL. AGENCY (Sept. 20, 2021), <https://perma.cc/A2SY-8YLT> (presenting data from 2021); UNITED HEALTH FOUND., 2019 HEALTH OF WOMEN AND CHILDREN REPORT 47 (2019).

¹⁰⁹ 579 U.S. 582 (2016).

¹¹⁰ *Id.* at 618.

¹¹¹ Raymond & Grimes, *supra* note 11, at 216.

¹¹² *Hellerstedt*, 579 U.S. at 618.

¹¹³ Nina Martin & Renee Montagne, *U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NPR (May 12, 2017), <https://perma.cc/F96P-QRND>.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 51 (2020); Sophie Novack, *Texas' Maternal Mortality Rate: Worst in Developed World, Shrugged Off by Lawmakers*, TEX. OBSERVER (June 5, 2017), <https://perma.cc/NQ4Y-8TP5>; Amanda J. Stevenson, Imelda M. Flores-Vazquez, Richard L. Allgeyer, Pete Schekkan & Joseph E. Potter, *Effect of Removal of Planned Parenthood from the Texas Women's Health Program*, 374 NEW ENG. J. MED. 853, 858 (2016).

¹¹⁶ See Emily Harris, *US Maternal Mortality Continues to Worsen*, 329 JAMA 1248, 1248 (2023).

¹¹⁷ *Id.*

pandemic: between 2018 and 2019, the rate increased from 17.4 maternal deaths per [100,000] live births to 20.1.”¹¹⁸ Further, “[i]t then continued to rise to 23.8 in 2020 and to 32.9 in 2021. There were 1205 maternal deaths in 2021 compared with 658 in 2018.”¹¹⁹ A trend worth noting was the rise in anti-abortion legislating and the forced and coerced closure of reproductive health centers that provided counseling, contraception, abortions, and prenatal care. That too has only worsened.¹²⁰

Unlike peer nations, maternal mortality rates in the United States have increased rather than declined.¹²¹ The compounding racial disparities, whereby nationally Black women are dying at three times the rate of their white counterparts, remain stark and glaring.¹²² In other words, denying reproductive privacy to minors places their health and lives at risk. According to the World Health Organization (WHO), “[a]dolescent mothers (aged 10–19 years) face higher risks of eclampsia, puerperal endometritis and systemic infections . . . and babies of adolescent mothers face higher risks of low birth weight, preterm birth,” as well as “severe neonatal” risks.¹²³ Simply put, concerns should remain high given the well-documented risks associated with adolescent pregnancies and birth. More importantly, the Restatement’s normative position on medical decisions affecting minors’ reproductive health should continue to serve as a guide, particularly as sexually engaged adolescents are at serious risk for other health conditions.

According to recent studies, “[s]exually transmitted infection (STI) incidence is on the rise in the United States. The increase is especially pronounced in adolescents.”¹²⁴ In fact, “[d]espite making up only a quarter of the population, adolescents account for approximately half of new STIs in the United States every

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Allison McCann & Amy Schoenfeld Walker, *One Year, 61 Clinics: How Dobbs Changed the Abortion Landscape*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/interactive/2023/06/22/us/abortion-clinics-dobbs-roe-wade.html> (“[P]atients still show up, knocking on closed doors. CeeJ, 20, who asked to be identified only by her first name, recently stopped by a shuttered Montgomery, Ala., clinic because she could not afford \$50 for emergency contraception at Walmart.”).

¹²¹ UNITED HEALTH FOUND., *supra* note 108, at 47.

¹²² See *Working Together to Reduce Black Maternal Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 3, 2023), <https://perma.cc/7EEW-B2XQ>.

¹²³ *Adolescent Pregnancy*, WORLD HEALTH ORG. (June 2, 2023), <https://perma.cc/E66N-UKCL>.

¹²⁴ Chelsea L. Shannon & Jeffrey D. Klausner, *The Growing Epidemic of Sexually Transmitted Infections in Adolescents: A Neglected Population*, 30 CURR. OPIN. PEDIATR. 137, 137 (2018).

year.”¹²⁵ Indeed, close examination of otherwise ignored and neglected epidemiological literature reveals that “STI rates in adolescents have been rising since 2014, with young women and [men who have sex with men] at particularly high risk.”¹²⁶ To place this in empirical context, with nearly twenty million “new” STIs “each year in the United States,”¹²⁷ millions are youth.

Abortion bans and harsh policies related to reproductive health generally misread the realities of teen sex, sexuality, and pregnancy, and it even also misreads how conservatives perceive these matters. Abortion bans in the United States reflect intense legislative culture wars—whereby conservative lawmakers increasingly ignore the reproductive concerns, interests, and needs of their constituents and the real-life, on-the-ground realities of the people and communities they serve, including children and their reproductive health.¹²⁸ After all, states with abortion bans, including those with no exceptions for rape or incest, tend to have less comprehensive sex education policies.¹²⁹ Indeed, post-*Dobbs*, states that enacted abortion bans did not alternatively expand sex education to equip vulnerable youth on matters of sexual

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* (“It is estimated that one out of four sexually active adolescent women have an STI, most commonly *Chlamydia trachomatis* (CT) infection and human papillomavirus (HPV) infection.”).

¹²⁸ See Stephanie Perry, Marc Trussler, Josh Clinton & John Lapinski, *Vast Majority of Republicans Support Abortion Exceptions for Rape, Incest and Mother’s Health*, NBC (Oct. 17, 2022), <https://perma.cc/7BBV-SRR6>:

Nine in 10 Americans think a pregnant woman should be able to legally have an abortion if her health is seriously endangered by the pregnancy. An even larger majority of Republicans support that exception, with 86% agreeing that abortion should be legal in that circumstance, joining 95% of Democrats and 93% of independents.

See Megan Messerly & Alice Miranda Ollstein, *Republicans Turn on Each Other Amid Post-Roe Chaos*, POLITICO (Aug. 9, 2022), <https://perma.cc/53JN-A4CY>:

Now that they can, red state lawmakers are mired in partisan infighting and struggling to agree on how far to go. The most fervently anti-abortion lawmakers are accusing their colleagues of capitulating on rape and incest exceptions, while those calling for compromise or moderation believe more strident Republicans are ignoring political realities.

See Fatma Khaled, *Ann Coulter Warns Republicans Are Out of Touch on Abortion*, NEWSWEEK (Apr. 16, 2023), <https://perma.cc/NW7F-N9FD> (“Conservative pundit Ann Coulter continued to criticize Florida Governor Ron DeSantis’ latest abortion ban legislation in his state on Saturday, saying that Republicans have hurt their chances in past elections because of their stances on the medical procedure.”).

¹²⁹ Fiona M. D. Samuels, *Many States That Restrict or Ban Abortion Don’t Teach Kids About Sex and Pregnancy*, SCI. AM. (July 26, 2022), <https://perma.cc/2FBQ-VC5Q>.

health and pregnancy, or promote greater access to contraception among those most economically disenfranchised. Nor is there any evidence that abortion bans discourage sexual violence such that they reduce the incidences and rates of intimate crimes committed against children such as rape and incest. By contrast, “[s]tates that protect abortion rights tend to have more comprehensive sex ed policies.”¹³⁰

To further explicate, research and surveys confirm the “vast majority of Republicans support abortion exceptions for rape, incest and mother’s health,” despite the hardline positions taken by conservative lawmakers that neglect the concerns of adolescents.¹³¹ That is, “eighty-six percent of Americans of all parties” believe that a pregnant woman or girl “should be able to legally have an abortion if she becomes pregnant because of rape or incest.”¹³²

According to Sam Zaleski, a conservative insider, “I know numbers, and I know politics. And I know that statistically, I can’t be that rare; many women who have supported Republicans have had abortions. Many women who agree with various conservative policies, too, have had abortions.”¹³³ That said, not only in substance, but also in rhetoric and tone, the shifts in adolescent sex education and reproductive healthcare are alarming.

III. GROOMING: THE NEW REPRODUCTIVE RHETORIC

Adolescent sexuality now serves as a proxy in contemporary political rhetoric. As such, it serves to galvanize moral panic. From Texas to New Jersey, conservative lawmakers and parents claim that sex education textbooks and curricula expose children to “pedophilia and child abuse.”¹³⁴ Across the nation, school boards have capitulated and now declare textbooks and sexual education curricula to be inappropriate and remedied by banning books. According to journalist Nick Reynolds, this is the Republicans’

¹³⁰ *Id.*

¹³¹ Perry et al., *supra* note 128 (“And while the two parties are deeply divided on the issue, a new survey shows broad bipartisan support for abortion rights in cases of rape, incest and when the mother’s health is seriously endangered.”).

¹³² *Id.*

¹³³ Sam Zaleski, *More Republican Women Than You Think Have Had Abortions. Here’s How I Know*, POLITICO (July 31, 2022), <https://perma.cc/Q4CF-MQZ6>.

¹³⁴ Tracey Tully, *Sex Ed Emerges as Core Issue for N.J. Republicans as Midterms Approach*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/02/nyregion/sex-ed-new-jersey-midterms.html>; *see also* Nick Reynolds, *Republicans Declare War on Sex Education*, NEWSWEEK (Jan. 30, 2023), <https://perma.cc/W3VS-DNE8>.

“[w]ar on [s]ex [e]ducation.”¹³⁵ It is a war defined by censorship as well as serious, negative impacts on children who are denied a curriculum that explains contraception, pregnancy, childbirth, and relationships.

In Miami, Florida, the Miami-Dade County School Board, had voted 5 to 3 in April to adopt [] textbooks [with a sexual education curriculum], but its decision was met with a number of petitions opposing the move from parents citing a new state law that supporters call the Parental Rights in Education measure but that opponents refer to as the “Don’t Say Gay” law.¹³⁶

Subsequently, after blowback from a loud minority of parents, the board overturned its vote, ultimately denying approval of two editions of the *Comprehensive Health Skills* book, which otherwise would have been assigned to the district’s middle and high school students as part of their sexual education instruction.¹³⁷

Notably, the Miami-Dade County School Board reversal materialized with a vocal, but nonetheless minority outcry. As pointed out by Steve Gallon III, the vice chair of the board, of more than forty people that attended the meeting where the book’s adoption was under review, “38 were in favor of the new textbooks.”¹³⁸ Rather than advising concerned or opposed parents to remove their children from classes where the curriculum is taught—something that is permitted by most school districts—school boards concede under pressure and threats, barring instruction for *all* students in some cases. In Miami-Dade, the school board’s banned books included a curriculum on sexually transmitted infections, understanding sexuality, pregnancy prevention, relationships, stress management, and drug dependency.¹³⁹

In the post-*Dobbs* era, on one hand, a hard-right conservative agenda narrowly and unrealistically portrays teen sexuality on a fraught spectrum from seemingly nonexistent to influenced and coerced by “groomers” and pedophiles intent on interfering in the parent-child relationship and exposing children to harmful sexual

¹³⁵ Reynolds, *supra* note 134 (noting that, for example, “[i]n Texas, a school superintendent in Fort Worth recently abandoned the district’s proposed \$2.6 million adoption of a sexual education curriculum after the state’s Republican-led Legislature passed legislation in 2021 requiring a parent’s written consent for their children to receive sex education”).

¹³⁶ Jiménez, *supra* note 62.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

content.¹⁴⁰ The assumptions embedded in the latter rhetoric are fourfold. First, it assumes that minors lack the cognitive capacities to understand human biology and sexuality. Sadly, it presumes their unfamiliarity with sex and sexual content to a degree that poorly prepares minors to discern and articulate sexual harm, thereby disempowering young people who may experience sexual assault.

Second, the “groomer” trope and movement to ban sex education strangely supposes minors are not otherwise exposed to sexual content at home, in social media, films, music, television, video games, or places of worship. Third, it neglects empirical evidence that reports the frequency of consensual sexual intimacy among minors, particularly in conservative states where the rates of teen pregnancy and STIs outpace those in blue states. Finally, the post-*Dobbs* legislative campaigns to undercut abortion access overlap with efforts to deny minors access to sex education, and both should be understood within a broader context—that is, the evisceration of rights that protect minors. Problematically, conservative pundits, politicians, and activist groups have characterized sex education efforts in social media, political campaigns, floor debates, and speeches as “grooming laws.”¹⁴¹

As Professors Mical Raz and Paul Renfro compellingly explained,

[t]hese developments—alongside the panics related to critical race theory, gender-affirming care for trans children and the discussion of gender and sexual identity in the classroom—illustrate the enduring appeal of child protection politics, as well as the ease with which utterly outlandish ideas about the threats facing children migrate from the political fringe into the mainstream.¹⁴²

¹⁴⁰ Kaleigh Rogers, *Why So Many Conservatives Are Talking About ‘Grooming’ All of a Sudden*, FIVETHIRTYEIGHT (Apr. 13, 2022), <https://perma.cc/WV4L-V4GR> (“For the unfamiliar, ‘grooming’ is a term typically reserved to describe the type of behavior that child sexual abusers use to coerce potential victims without being caught.”).

¹⁴¹ Mical Raz & Paul M. Renfro, *Fringe Cries for ‘Anti-Grooming’ Measures Can Sway Policy*, WASH. POST (Apr. 4, 2022), <https://www.washingtonpost.com/outlook/2022/04/04/fringe-cries-anti-grooming-measures-can-sway-policy/> (“[W]hat begins on the ideological fringe can easily move into the mainstream and ultimately into policymaking. Although few mainstream politicians openly embrace qAnon’s radical ideology, these same ideas can be folded into the malleable language of child safety and protection as a means to promote reactionary policies.”).

¹⁴² *Id.*

And that is the point. This strategy to promote child protection politics has become “abundantly clear.”¹⁴³ Examples abound in Texas, “where Gov. Greg Abbott (R) and Attorney General Ken Paxton (R) have worked to criminalize gender-affirming care for trans children, and in Florida, where officials have portrayed recently signed legislation restricting LGBTQ discussion as an ‘anti-grooming’ measure.”¹⁴⁴

According to journalist Kaleigh Rogers, “[g]rooming” is a term that neatly draws together both modern conspiracy theories and old homophobic stereotypes, while comfortably shielding itself under the guise of protecting children.”¹⁴⁵ As Rogers queried, “Who, after all, can argue against the safety of kids?”¹⁴⁶ To Rogers’s point, a prominent conservative television host on the Fox News Channel devoted a segment to the notion that public schools are a vulnerable place for young people, because “public schools have become ‘grooming centers’ where ‘sexual brainwashing’ takes place.”¹⁴⁷ Such claims have been echoed by Republican lawmakers in Congress and state legislatures and by other conservative news pundits.¹⁴⁸ In fact, another prominent, conservative anchor at One America News—a far-right-leaning media organization—claimed that President Joe Biden is “the groomer-in-chief.”¹⁴⁹

And as such, the “groomer” and “grooming” tropes now steer and stir political discourse, deployed and weaponized against elected officials and others with no public records of harming children.¹⁵⁰ This repurposed terminology further weaponizes efforts to defeat policies, censor books, cancel sex education curricula, and influence larger political and judicial agendas related to LGBTQ equality. According to a 2022 report from the Human Rights Campaign, the “[a]nti-LGBTQ+ grooming narrative

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Rogers, *supra* note 140.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (“Congresswoman Marjorie Taylor Greene recently tweeted that the Democrats are the party of ‘grooming and transitioning children.’”).

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., Associated Press, *Michigan Lawmaker’s Forceful Speech Rebuts ‘Grooming’ Attack*, NBC NEWS (Apr. 21, 2022), <https://perma.cc/W7BW-4CGR>; Blake Hounshell, *Smeared as a Groomer, a Michigan Democrat Goes on Offensive*, N.Y. TIMES (Apr. 25, 2022), <https://www.nytimes.com/2022/04/25/us/politics/mallory-memorrow-michigan.html>.

surged more than 400% on social media following Florida's 'Don't Say Gay or Trans' Law.'¹⁵¹

The "groomer" narrative also serves to chill speech and, intentionally or not, provoke violence.¹⁵² California state senator Scott Wiener, a Democrat from San Francisco, reported that he received a bomb threat targeting his office as well as his home shortly after "conservative pundit Charlie Kirk and U.S. Rep. Marjorie Taylor Green, R-Georgia [] accused [him] of being in favor of 'mutilating children' and being a 'communist groomer.'"¹⁵³ Some might dismiss such rhetoric as having limited impact or reach, yet they would be wrong. According to the Human Rights Campaign, moral panic tactics of this sort to smear and defame have a broad reach:

In a matter of mere days, just ten people drove 66% of impressions for the 500 most viewed hateful "grooming" tweets—including Gov. Ron DeSantis's press secretary Christina Pushaw, extremist members of Congress like Marjorie Taylor Greene and Lauren Boebert, and pro-Trump activists like 'Libs of TikTok' founder Chaya Raicheck. Posts from these 10 people alone reached more than 48 million views, and the top 500 most influential "grooming" tweets all together were seen 72 million times.¹⁵⁴

Even if bomb threats targeting progressive politicians are not the objective ungirding the anti-sex education and anti-abortion "groomer" narratives, the implicit or express reach of such efforts cannot be missed. As journalist Evie Blad explains for *Education Week*, "[s]ome lawmakers and commentators have weaponized the term, trafficking in decades-old homophobic tropes and

¹⁵¹ Henry Berg-Brousseau, *Anti-LGBTQ+ Grooming Narrative Surged More Than 400% on Social Media Following Florida's 'Don't Say Gay or Trans' Law, as Social Platforms Enabled Extremist Politicians and Their Allies to Peddle Inflammatory, Discriminatory Rhetoric*, HUM. RTS. CAMPAIGN (Aug. 10, 2022), <https://perma.cc/W4GD-7XEE>:

[T]he average number of tweets per day using slurs such as "groomer" and "pedophile" in relation to LGBTQ+ people surged by 406% in the month after the Florida bill was passed, resulting in a sharp spike in online homophobia and transphobia that social media platforms not only failed to crack down on, but also profited from.

¹⁵² See *State Sen. Scott Wiener Says He Received Bomb Threat at SF Home*, ABC7 NEWS (Dec. 6, 2022), <https://perma.cc/C76B-S7T7> ("State Sen. Scott Wiener, D-San Francisco, said Tuesday he received a bomb threat targeting his home and office, the latest action targeting the politician for what he says is his support of LGBTQ issues.").

¹⁵³ *Id.*

¹⁵⁴ Berg-Brousseau, *supra* note 151 (emphasis omitted).

inaccurately equating books and discussions about LGBTQ identity with efforts to condition children for sexual exploitation.”¹⁵⁵ Serious dangers to children lurk behind groomer propaganda, which on one hand serves to influence broader political agendas that align with anti-abortion and contraception legislative efforts. On the other hand, this disturbing and homophobic rhetoric leans into anti-LGBTQ policy and lawmaking.¹⁵⁶ In the process, urgent matters related to teen sexuality have been obscured and rendered invisible.

IV. AN EMANCIPATION PROCLAMATION

In 1863, President Abraham Lincoln understood that exploitation of Black children, men, and women in the service of forced, involuntary servitude was unjust and a threat to the United States.¹⁵⁷ The maintenance of systems of intergenerational human bondage fundamentally contradicted and violated the principles on which the United States was founded, and its constitution ratified. Human bondage in service to private and state interests contradicted fundamental principles of equality and freedom—arguably principles and values on which the United States was forged.¹⁵⁸ President Lincoln found the nation at a crossroads, with an ongoing Civil War, pitting a fervent movement to maintain slavery against a strengthening abolitionist movement that was demanding freedom for enslaved Black people.¹⁵⁹ At risk was the fragmentation of a unified nation.

Now, 160 years later, new threats to U.S. democracy and constitutional freedoms emerge. And, with these new threats, an opportunity is presented in the Restatement of Children and the Law. In many ways, Chapter 19 already provides a new vision for an emancipation proclamation—one that recognizes the right to be free from government intrusion in reproductive health care decision-making, as well as a project that promotes human dignity and bodily integrity of youth.

¹⁵⁵ Evie Blad, *Why Misusing ‘Groomer’ as a Political Smear Is Especially Dangerous*, EDUCATIONWEEK (Apr. 26, 2022), <https://perma.cc/R33L-ACKZ>.

¹⁵⁶ See Raz & Renfro, *supra* note 141.

¹⁵⁷ See Manisha Sinha, *Did He Die an Abolitionist? The Evolution of Abraham Lincoln’s Antislavery*, 4 AM. POL. THOUGHT 439, 448–49 (2015).

¹⁵⁸ See *Slavery and the Constitution*, BILL OF RTS. INST., <https://perma.cc/5GRJ-3PTU>.

¹⁵⁹ See Michael Levy, *United States Presidential Election of 1860*, BRITANNICA, <https://perma.cc/2DRY-KFZ5>.

There are important reasons to support freeing children from the wild reaches of government into their reproductive lives, as well as adolescents' interests in avoiding pregnancy and premature parenthood. Those reasons—illustrated in this Essay—can also be found in the Restatement and now post-*Dobbs*. Not surprisingly, some of these reasons are obvious and even affect adults. Pregnancy can pose serious threats to the health and safety of youths as demonstrated by national trends in maternal mortality and morbidity. As discussed in Part II, maternal mortality is colored by the intersections of race and sex. And, as journalist Cecilia Lenzen's research demonstrates, notwithstanding accounting for education and income levels, Black women experience a dramatically higher maternal mortality rate than white women.¹⁶⁰ As research on teen pregnancy demonstrates, social, educational, housing, and economic hardships manifest with adolescent parenthood.¹⁶¹

Premature parenthood can stunt an adolescent's education, setting in motion intergenerational poverty, economic insecurity, stress, and strain. According to the CDC, “pregnancy and birth are significant contributors to high school dropout rates among girls. Only about 50% of teen mothers receive a high school diploma by 22 years of age.”¹⁶² Additionally, “the children of teenage mothers are more likely to have lower school achievement and to drop out of high school, have more health problems, be incarcerated at some time during adolescence, give birth as a teenager, and face unemployment as a young adult.”¹⁶³ Such serious medical harms and intergenerational social setbacks associated with adolescent pregnancy raise important questions with regard to abortion bans that affect minors and the trend among states proposing anti-abortion legislation that deny exceptions for rape and incest.

A. A Prologue Continued

In *New York State Rifle & Pistol Ass'n v. Bruen*,¹⁶⁴ the U.S. Supreme Court struck down New York's century-old handgun

¹⁶⁰ Cecilia Lenzen, *Facing Higher Teen Pregnancy and Maternal Mortality Rates, Black Women Will Largely Bear the Brunt of Abortion Limits*, TEX. TRIB. (June 30, 2022), <https://perma.cc/C9DR-QU3Q>.

¹⁶¹ See generally, e.g., Abma and Martinez, *supra* note 69.

¹⁶² *About Teen Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 15, 2021), <https://perma.cc/S539-E5PA>.

¹⁶³ *Id.*

¹⁶⁴ 142 S. Ct. 2111 (2022).

licensing law. In its landmark 6–3 decision, split along ideological lines, the Court held that New York’s longstanding Sullivan Act of 1911¹⁶⁵ violated the Fourteenth and Second Amendments by depriving law-abiding citizens from keeping and bearing arms for self-defense.¹⁶⁶ According to Justice Clarence Thomas, author of the Court’s decision, “a short prologue” was “in order” to center how Black men’s bodily integrity became vulnerable and how they suffered when denied gun ownership access.¹⁶⁷ In five paragraphs, Justice Thomas offered a passionate defense of the Court’s position through narrative accounts of Black male pain, suffering, and trauma when historically denied access to guns.¹⁶⁸ Gun ownership, according to Justice Thomas, was essential to Black men defending their bodies and personhood, during Jim Crow.¹⁶⁹ He recounted a Black male schoolteacher, a professor, and others, all denied meaningful access to guns as having suffered a fundamental injury that the Fourteenth Amendment guards against.¹⁷⁰

Ironically, in *Dobbs*, issued one day later, the Court offered no prologue.¹⁷¹ No exordium or narrative related to women or girls and their bodily autonomy, integrity, or protection surfaced in the infamously leaked draft¹⁷² survived in the final opinion. Instead, the Court took a different path, relying on the objectionable and repudiated theories of jurist Sir Matthew Hale among others—male scholars whose principles of law and treatises predated the Constitution’s ratification, formation of the United States, and ultimate Reconstruction.¹⁷³

In his *Dobbs* concurrence, Justice Thomas did not reach to the past nor canvass the present to shed light on the lives of vulnerable women or girls, despite horrific sex and race-based inequities historically embedded in U.S. law and jurisprudence that

¹⁶⁵ 1911 N.Y. LAWS 443.

¹⁶⁶ 142 S. Ct. at 2138.

¹⁶⁷ *See id.* at 2150.

¹⁶⁸ *See id.* at 2150–53.

¹⁶⁹ *See id.* at 2151.

¹⁷⁰ *See id.*

¹⁷¹ *See generally Dobbs*, 142 S. Ct. 2228.

¹⁷² Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022), <https://perma.cc/U42Q-BB69>.

¹⁷³ *See Dobbs*, 142 S. Ct. at 2249. For example, according to Hale’s 1736 treatise, *Historia Placitorum Coronae, History of the Pleas of the Crown*, a “husband cannot be guilty of a rape” because marriage conveys unconditional consent, whereby wives have entered a binding contract and “hath given up herself in this kind unto her husband, which she cannot retract.” MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (London, In the Savoy, 1736).

uniquely imposed sexual and reproductive harms on them.¹⁷⁴ By stunning contrast, neither Justice Thomas¹⁷⁵ nor Justice Brett Kavanaugh mention “*Black girls*” or “*Black women*” in their concurrences,¹⁷⁶ and neither does the lengthy decision authored by Justice Samuel Alito.¹⁷⁷ This deceit, so painfully obvious and profoundly lacking in empathy and consideration, revealed the Court’s distressing lack of regard not only for women, but also for the girls that predictably would suffer and be most affected by Mississippi’s petition to overturn *Roe v. Wade*.¹⁷⁸ Indeed, “[y]ounger individuals are at sharply increased risk of victimization.”¹⁷⁹ That is, “although persons ages 12 to 24 comprised 22% of the population, they comprised 49% of the population victimized by rape, sexual assault, robbery, aggravated assault, or homicide. Rape and other sexual assault in particular are most likely to occur to young women and children.”¹⁸⁰

Consider again the case of Ashley as she attends middle school, now a parent at 13 years old. As described earlier, at 12 years old, she was raped in the yard outside her home.¹⁸¹ Not unlike common coping responses to rape and incest,¹⁸² Ashley became withdrawn and despondent—unable to immediately verbalize the trauma she experienced and continued to endure

¹⁷⁴ *Dobbs*, 142 S. Ct. at 2300 (Thomas, J., concurring).

¹⁷⁵ *Id.* (Thomas, J., concurring).

¹⁷⁶ *Id.* at 2304 (Kavanaugh, J., concurring).

¹⁷⁷ *Id.* at 2228.

¹⁷⁸ 410 U.S. 113 (1973).

¹⁷⁹ See Heidi Resnick, Ron Acierno, Melisa Holmes, Matt Dammeyer & Dean Kilpatrick, *Emergency Evaluation and Intervention with Female Victims of Rape and Other Violence*, 56 J. CLINICAL PSYCH. 1317, 1318 (2000) (explaining that data from a landmark study “indicated that of the total 714 cases, 29% reportedly occurred when women were less than 11 years old; 32% occurred when women were ages 11 to 17, and 22% occurred between ages 18 and 24”).

¹⁸⁰ *Id.*

¹⁸¹ Alter, *supra* note 1.

¹⁸² See, e.g., Rebecca Campbell, *The Psychological Impact of Rape Victims*, 63 AM PSYCH. 702, 703 (2008) (noting that health seeking after assault can be a second victimization or assault experienced by a woman or girl that has been raped); Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors’ Help-Seeking Experiences with the Legal and Medical Systems*, 20 VIOLENCE VICT. 55, 56 (2005); Kristin E. Silver, RaeAnn E. Anderson & Amanda M. Brouwer, *Emotional Responses to Sexual Assault Threat: A Qualitative Analyses Among Women with Histories of Sexual Victimization*, 37 J. INTERPERSONAL VIOLENCE 9, 10 (2022).

in its aftermath.¹⁸³ For some girls, they develop post-traumatic stress disorder (PTSD)¹⁸⁴ or rape trauma syndrome (RTS).¹⁸⁵

Ashley stopped engaging in the activities she enjoyed before the sexual assault, including venturing outside—even to the front yard of her home.¹⁸⁶ Her bedroom, with the curtains drawn, became her “hiding place.”¹⁸⁷ On her thirteenth birthday, she refused to celebrate, and instead her mother found her “crying in her room,” and when asked “what was wrong,” she could not bring herself to recount what happened.¹⁸⁸ Even if she had some instruction in sex education, recall that Ashley lives in Mississippi¹⁸⁹ where the state requires controversial abstinence-only instruction—deemed generally by researchers to be unethical and ineffective.¹⁹⁰ Ashley’s mom believed she was too young to be taught about sex and reproduction, observing “they need to be kids.”¹⁹¹

Two months later, when Ashley experienced extreme bouts of sickness and vomiting, her mother sought emergency services for her at Northwest Regional Medical Center in Clarksdale.¹⁹² It was

¹⁸³ Alter, *supra* note 1.

¹⁸⁴ See Sandra K. Burge, *Post-Traumatic Stress Disorder in Victims of Rape*, 1 J. TRAUMATIC STRESS 193, 207 (1988).

¹⁸⁵ See Ann W. Burgess & Lynda L. Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981, 985 (1974). In this pathbreaking qualitative study, researchers followed and interviewed nearly 150 patients admitted in a one-year period to an emergency ward and documented the existence of RTS among the women. *Id.* at 981. Two variations were indicated through their study: silent reaction and compounded reaction. *Id.* at 985.

¹⁸⁶ Alter, *supra* note 1.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Mississippi*, SEX EDUC. COLLABORATIVE, <https://perma.cc/X76Q-AZUC>.

¹⁹⁰ See, e.g., John S. Santelli, Leslie M. Kantor, Stephanie A. Grilo, Ilene S. Speizer, Laura D. Lindberg, Jennifer Heitel, Amy T. Schalet, Maureen E. Lyon, Amanda J. Mason-Jones, Terry McGovern, Craig J. Heck, Jennifer Rogers & Mary A. Ott, *Abstinence-Only-Until-Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. ADOLESCENT HEALTH 273, 276, 275 (2017). The article states that

[w]hile advocates of [abstinence only until marriage] policies and programs have asserted their effectiveness, scientific evidence suggests otherwise. A 2007 systematic review by Douglas Kirby found no scientific evidence that AOUM [Abstinence-Only-Until-Marriage] programs demonstrate efficacy in delaying initiation of sexual intercourse, reducing the number of sexual partners, or facilitating secondary abstinence.

Id. at 276. As such, investigators found “little evidence suggesting that consensual sex between adolescents is psychologically harmful. Rather, psychological harm—when it occurs—appears to be the result of sexual coercion and nonconsensual experiences, including adverse childhood experiences and sexual abuse.” *Id.* at 275; Sarah McCammon, *Abstinence-Only Education Is Ineffective and Unethical, Report Argues*, NPR (Aug. 23, 2017), <https://perma.cc/G33G-E2MJ>.

¹⁹¹ Alter, *supra* note 1.

¹⁹² *Id.*

there that Ashley and her mother learned of the pregnancy. Her mother wept. As for Ashley, the attending physician, Dr. Erica Balthrop recalled, the child, “just had no clue.”¹⁹³ Ashley shut down. After receiving the news, “[s]he would not open her mouth,” verbalize, or respond to the doctor’s questions.¹⁹⁴ In her case, even though an abortion was desired, and Mississippi has a narrow rape exception, the nearest location to terminate her unwanted pregnancy was hours away, in another state, and the costs to travel, be housed, and pay for the services were more than her mother could afford.¹⁹⁵

Much can be gleaned from even one story when it reflects what predictably can happen to myriad others due to the harmful impacts of cruel laws. In Mississippi, women and girls “who give birth . . . are more likely to die here than in 45 other states, with a pregnancy-related mortality rate nearly double the national average. A whopping 86% of pregnancy-related deaths occur postpartum, including 37% after six weeks.”¹⁹⁶ According to Adam Ganuchau, a reporter for *Mississippi Today*, this is “because of the state’s high rates of poverty and uninsured people. Across Mississippi, about 65% of babies are born to mothers on Medicaid.”¹⁹⁷ Further, “because of lag times in getting approved for coverage and a 60-day cutoff of postpartum care coverage, mothers often do not receive the prenatal and postpartum care they need — care that could prevent major problems,” including death.¹⁹⁸ Strangely in *Dobbs*, women and girls exist in nonexistence in a decision that intimately affects their lives.

B. Adolescent Medical Decision-Making and Risks of Adolescent Motherhood

A reproductive justice approach to adolescent sexuality suggests that deciding if, when, and how to manage family planning and abortion should be left to the decision-making of the person that endures it. A reproductive justice approach does not dictate that all adolescent pregnancies should conclude with abortion. To

¹⁹³ *Id.*

¹⁹⁴ *Id.*; see also Resnick, *supra* note 179, at 1321 (noting that “the crime of rape itself posed an additional risk factor for PTSD after controlling for injury and threat variables”).

¹⁹⁵ Alter, *supra* note 1.

¹⁹⁶ Adam Ganuchau, *Mississippi Mothers and Babies Are Dying. One Man and His 87% Male House Are Blocking Help*, MISS. TODAY (Jan. 23, 2023), <https://perma.cc/PCY8-DPPG>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

the contrary, it posits that respect for human rights, constitutional rights, bodily autonomy, and capacities necessitates leaving the decision whether, if, or when (and under what circumstances) to endure pregnancy to the individual involved. In other words, reproductive justice does not impose normative preferences. Rather, in alignment with the Restatement, it emphasizes the right to decide.

Additionally, reproductive justice goes one step further. Reproductive justice demands that the choices to be made and the decision-making itself be meaningful and within reach. In other words, deciding to pursue motherhood in the absence of sex education, contraceptive access, prenatal care, and legal abortion services in one's state or community, diminishes the choice. Equally, abortion as a right is not sufficient if financial barriers misalign access—such as the Hyde Amendment.¹⁹⁹

That is, how are girls to make informed decisions without the benefit of being *informed* given bans on sex education? Reasonably, in light of the risks associated with pregnancy, shouldn't adolescents be informed and allowed to shoulder the risks only after being informed? A literature review surveying thirty-one studies found that the leading cause of death for girls between the ages of 15–19 worldwide is pregnancy or labor and birth-related complication.²⁰⁰ Further, Black adolescents had a 67% increased chance of having a preterm birth than their white counterparts and had a 53% increased chance of having an infant with low birthweight than their white counterparts.²⁰¹ Yet, without access to sex education, these statistics remain cabined and inaccessible those that most need knowledge of them.

Again, in 2016, in its decision, *Whole Woman's Health v. Hellerstedt*, the Supreme Court acknowledged how dangerous pregnancy can be on its own.²⁰² However, when accounting for its risks relative to other medical procedures and interventions, the data is utterly glaring and alarming, further justifying both the legal and

¹⁹⁹ EDWARD C. LIU & WEN W. SHEN, CONG. RSCH. SERV., IF12167, THE HYDE AMENDMENT: AN OVERVIEW (2022) (introduced in 1976, the Hyde Amendment prohibits the allocation of federal funds for abortions save in instances of the life of the pregnant person as well as rape and incest).

²⁰⁰ See Amjad et. al, *supra* note 19, at 89 (noting that controversy exists over whether the higher risk of adverse outcomes associated with adolescent pregnancy—preterm birth, low birthweight, eclampsia, obstetric hemorrhage, placental abruption—is the result of “biological immaturity” or socioeconomic conditions).

²⁰¹ *Id.* at 93.

²⁰² *Hellerstedt*, 579 U.S. at 618.

medical cases for preserving reproductive rights and amplifying reproductive health and justice. For example, with its horrific status as the deadliest of all industrialized nations to be pregnant, convincing justifications for abortion bans and denying rape and incest exemptions are seemingly impossible to muster.²⁰³ These concerns are magnified if the pregnancy occurs in a Black woman or girl. Consider that maternal mortality rates for “non-Hispanic Black women were significantly higher than rates for non-Hispanic white and Hispanic women. The increases from 2019 to 2020 for non-Hispanic Black and Hispanic women were significant.”²⁰⁴

There are other social considerations that underscore the importance of helping minors in their desire to avoid pregnancy—namely the risks associated with poverty, lack of education, limited and constrained employment opportunities and career paths, and the largely predictable effects on their future offspring. Children born to minors “have poorer outcomes than children of mothers who give birth in their early 20s.”²⁰⁵ According to doctor Yael Eliner’s retrospective study, published in 2022, which focuses on persons under 20 that gave birth between 2016 and 2019, “pregnancies at such a young age [] have significant socioeconomic consequences for these young patients, their children, and society.”²⁰⁶ Further, “teen pregnancies have been associated with decreased education attainment, with only 40% of pregnant teens graduating from high school and less than 2% of those who delivered before the age of 18 years finishing college by the age of 30 years.”²⁰⁷ The financial impacts of teen parenthood for girls materializes in expecting “to earn \$28,000 less in the subsequent 15 years after the birth than if they had delayed until 20 or 21.”²⁰⁸

²⁰³ Lenzen, *supra* note 160 (“Black women are three to four times more likely to experience a pregnancy-related death than white women, and the risk spans income and education levels.”); Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/XLB2-4HNA>.

²⁰⁴ Hoyert, *supra* note 203.

²⁰⁵ JESSICA TOLLESTRUP, CONG. RSCH. SERV., R45184, TEEN BIRTH TRENDS: IN BRIEF 8 (2022) (citing EMILY HOLCOMBE, KRISTEN PETERSON, & JENNIFER MANLOVE, CHILD TRENDS, TEN REASONS TO STILL KEEP THE FOCUS ON TEEN CHILDBEARING (2009)); *see also* Yael Eliner, Moti Gulerson, Amita Kasar, Erez Lechner, Amos Grünebaum, Frank A. Chervenak & Eran Bornstein, *Maternal and Neonatal Complications in Teen Pregnancies: A Comprehensive Study of 661,062 Patients*, 70 J. Adolescent Health 922, 923 (2022).

²⁰⁶ Eliner et al., *supra* note 205, at 923.

²⁰⁷ *Id.* (“Furthermore, children of adolescent individuals suffer higher rates of abuse and neglect and are more likely to have a teen pregnancy themselves.”).

²⁰⁸ Kari Huus, *A Baby Changes Everything: The True Cost of Teen Pregnancy’s Uptick*, NBC NEWS (Feb. 19, 2010), <https://perma.cc/GK2B-MZ5J>.

In Professor Ellen Lipman's study of young adult outcomes in children born to adolescent females, she and colleagues found, "[b]eing born to a teen mother (versus a nonteen mother) was associated with poorer educational achievement, life satisfaction, and personal income."²⁰⁹ For example, "the sons of adolescent mothers are 2.7 times more likely to be incarcerated than the sons of mothers who delay childbearing until their early 20's."²¹⁰

According to data from the Congressional Research Service, children born to teenagers "are generally more likely to [] have chronic medical conditions."²¹¹ Moreover, the offspring of teen girls are more likely to rely upon public healthcare.²¹² Statistically, children of teen mothers "have lower school readiness scores [and] do poorly in school."²¹³ And the intergenerational cycles become challenging to break. Teen pregnancy followed by motherhood reproduces the same; teen pregnancy begets teen pregnancy and motherhood.²¹⁴

Yet, the gaps between what parents understand and their children comprehend related to communicating about teen sexuality are reflected in American politics, society, and increasingly in U.S. law. That is, as anti-abortion laws are increasingly enacted, generally they fail to account for how such legislation will affect the lives and interests of minors. Among them are bans that make no exceptions for rape or incest. Even in states where rape and incest exceptions embed in law to protect survivors of sexual attacks, these provisions present inordinate burdens.

C. Exceptions Matter and Why All Adolescents Deserve Protection from Abortion Bans

The post-*Dobbs* political tide underscores the relevance of Part 4, Chapter 19 of the Restatement section on minors' reproductive health decisions and its emphasis on mature minors,

²⁰⁹ Ellen L. Lipman, Katholiki Gergiades & Michael H. Boyle, *Young Adult Outcomes of Children Born to Teen Mothers: Effects of Being Born During Their Teen or Later Years*, 50 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 232, 236 (2011).

²¹⁰ REBECCA A. MAYNARD & EILEEN M. GARRY, U.S. DEP'T OF JUST., ADOLESCENT MOTHERHOOD: IMPLICATIONS FOR THE JUVENILE JUSTICE SYSTEM 1 (1997).

²¹¹ See TOLLESTRUP, *supra* note 189 at 8.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*; see also Hoffman & Maynard, *supra* note 15, at 22 (noting that "adolescent childbearing . . . has significant adverse consequences for the children"); Stefanie Mollborn, *Teenage Mothers Today: What We Know and How It Matters*, 11 CHILD DEV. PERSPS., 63, 64 (2017); Anna Aizer, Paul Devereux & Kjell Salvanes, *Grandparents, Moms, or Dads? Why Children of Teen Mothers Do Worse in Life*, 57 J. HUM. RES. 2012, 2043 (2020).

capacity, and consent. As the foregoing makes clear, serious risks exist when states usurp the rights of minors to govern their reproductive health decision-making. When states deny minors the right to terminate pregnancies, they increase the likelihood that teen pregnancies will result in unintended, unwanted, and unplanned births, as well as early parenthood, and intergenerational injury and harm. Fundamentally, when abortion bans are imposed on youths, such actions amount to forced pregnancy and involuntary reproductive servitude, part of a chilling legacy in states that permitted, legalized, and ultimately defended slavery and now abortion bans.²¹⁵

As a tragic parade of glaring post-*Dobbs* harms mount,²¹⁶ the Court's negligence also emerges, particularly as predictable legal battles and avoidable medical tragedies continue to unfold. In Wisconsin, a woman denied care bled for more than ten days from an incomplete miscarriage.²¹⁷ In Louisiana, an expectant woman learned that the fetus she gestated had no skull development, and yet she was unable to terminate the pregnancy in that state

²¹⁵ See, e.g., Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 204:

Forced reproduction and involuntary reproductive servitude were wellsettled concepts and practices woven into the legal and social fabric of slavery. The existence and persistence of such was beyond debate and publicly embraced. Slavers commented on forced reproduction in letters and manuscripts, analyzing their profits, explaining the personal benefits of slavery for themselves and their families, and boasting about the profits that could be extracted from the exploitation of Black girls and women.

²¹⁶ See, e.g., Sarah McCammon, *More Women Sue Texas Saying the State's Antiabortion Laws Harmed Them*, NPR (May 22, 2023), <https://perma.cc/U4BM-ZUAC>:

[N]ew plaintiffs have added their names to a lawsuit originally filed in March by five women and two doctors who say that pregnant patients are being denied abortions under Texas law despite facing serious medical complications. The Center for Reproductive Rights, which is representing the women, is now asking for a temporary injunction to block Texas abortion bans in the event of pregnancy complications.

²¹⁷ Frances Stead Sellers & Fenit Nirappil, *Confusion Post-Roe Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2023), <https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/>:

A woman with a life-threatening ectopic pregnancy sought emergency care at the University of Michigan Hospital after a doctor in her home state worried that the presence of a fetal heartbeat meant treating her might run afoul of new restrictions on abortion. At one Kansas City, Mo., hospital, administrators temporarily required "pharmacist approval" before dispensing medications used to stop postpartum hemorrhages, because they can also be used for abortions.

without her doctors' risks of punishment.²¹⁸ In Nebraska, a mother pled guilty after helping her adolescent daughter obtain an abortion.²¹⁹ In that case, the teen daughter received ninety days of jail time in the aftermath of her pregnancy termination and disposal of the fetal remains.²²⁰ In other instances while anti-abortion lawmakers and activists champion teen births and marriages post-*Dobbs* as being "powerfully pro-life," the costs imposed on teen parents as pawns in that agenda are lifelong.²²¹

The urgency for political, legal, and healthcare solutions to the post-*Dobbs* crisis is apparent, even while pathways forward may not be uniform, fully paved, or without barriers, detours, and complications.²²² For example, in 2022, Senate Democrats could not secure sufficient votes to pass the Women's Health Protection Act²²³ (WHPA). Of course, part of the challenge was overcoming

²¹⁸ Ramon Antonio Vargas, *Louisiana Woman Carrying Unviable Fetus Forced to Travel to New York for Abortion*, THE GUARDIAN (Sept. 14, 2022), <https://perma.cc/DC84-N2VN> ("An expectant Louisiana woman who was carrying a skull-less fetus that would die within a short time from birth ultimately traveled about 1,400 miles to New York City to terminate her pregnancy after her local hospital denied her an abortion amid uncertainty over the procedure's legality.").

²¹⁹ Dean Welte, *Mother Charged in Northeast Nebraska Illegal Abortion Case Pleads Guilty*, KTIV (July 7, 2023), <https://perma.cc/J5DJ-CX8C> ("Investigators also uncovered social media conversations between the daughter and mother where they discussed getting the abortion pills on the internet to terminate the pregnancy.").

²²⁰ Chelsea Bailey, *Nebraska Teen Jailed for Illegal Disposal of Her Aborted Foetus*, BBC (July 21, 2023), <https://perma.cc/T6Q9-BFQH> (reporting that the teen "was sentenced to 90 days in prison after taking abortion pills to end her pregnancy and disposing of the foetus with her mother's help").

²²¹ Caroline Kitchener, *An Abortion Ban Made Them Teen Parents*, WASH. POST (Aug. 1, 2023), <https://www.washingtonpost.com/politics/interactive/2023/texas-abortion-law-teen-parents/> (tracking a teen couple, now married with twins, reporting, "[i]f they didn't have the babies, Brooke and Billy both concede that they probably wouldn't still be together" because "[t]heir teen romance would have flamed and faded, remembered by a few Instagram posts and the pink-wheeled skateboard Billy chose for Brooke at the skate shop by the bay").

²²² See Deepa Shivaram, *A Bill to Codify Abortion Protections Fails in the Senate*, NPR (May 11, 2022), <https://perma.cc/HT28-2XHR>:

The Women's Health Protection Act, a Democrat-led bill that would effectively codify a right to an abortion, failed to pass, as expected, after it did not reach the Senate's 60-vote threshold. All Democrats voted for the legislation except Sen. Joe Manchin of West Virginia, and all Republicans opposed the bill.

See also Michael Wines, *Ohio Voters Reject Constitutional Change Intended to Thwart Abortion Amendment*, N.Y. TIMES (Aug. 8, 2023), <https://www.nytimes.com/2023/08/08/us/ohio-election-issue-1-results.html> ("Ohio voters rejected a bid on Tuesday to make it harder to amend the State Constitution, according to The Associated Press, a significant victory for abortion-rights supporters trying to stop the Republican-controlled State Legislature from severely restricting the procedure.").

²²³ Women's Health Protection Act of 2022, S. 4132, 117th Cong. (2022).

the filibuster, which would have thwarted Democrats' efforts even had they secured a majority of the WHPA vote. That said, the party could not prevail upon Senator Joe Manchin, a Democrat from West Virginia, to vote along party lines to support the legislation as Republicans had in opposing it, resulting in a 49–51 vote, presided over by Vice President Kamala Harris.²²⁴

So, what should be the priority moving forward? Ballot initiatives show promise and have become a powerful arsenal in the battle to overcome abortion bans and secure abortion rights in states' constitutions.²²⁵ Since *Dobbs*, a handful of states further strengthened abortion rights through successful ballot initiatives, such as California, Michigan, and Vermont, or through the same tool strategists thwarted efforts to modify state constitutions to include or permit abortion bans, such as in Kansas.²²⁶ As a result, following *Dobbs*, as efforts to protect abortion rights centered on ballot state referenda, abortion rights are now inscribed in states' constitutions.²²⁷ However, there may be limits to ballot initiatives securing reproductive rights and justice in states where voter suppression and gerrymandering impede voting rights.

Part 4, Chapter 19 of the Restatement section on minors' reproductive health decisions, § 19.02, "Consent by Minor to Reproductive Health Treatment," provides a thoughtful model for states' adoption, because it recognizes the capacities of adolescents. It establishes that (a) a mature minor may provide "legally sufficient consent to medical treatment affecting reproductive health," ranging from treatments "concerning pregnancy, childbirth," to "prevention or termination of pregnancy, without the notification of the minor's parent"; (b) mature minors possess the capacity to give "informed consent to the proposed medical treatment[s]" involving their reproductive health, "[u]nless otherwise

²²⁴ See Shivaram, *supra* note 222 ("Within minutes of the vote, President Joe Biden released a statement that 'this failure to act comes at a time when women's constitutional rights are under unprecedented attack—and it runs counter to the will of the majority of American people.'").

²²⁵ See Poppy Noor & Gabrielle Canon, *US States Vote to Protect Reproductive Rights in Rebuke to Anti-Abortion Push*, THE GUARDIAN (Nov. 9, 2022), <https://perma.cc/VFD8-NYNW> (reporting that "[v]oters in multiple US states passed measures to enshrine the right to abortion during [the 2022] midterm elections, or knocked down attempts to further curtail such rights, in a stinging rebuke to the crackdown on reproductive freedoms taking place across the US").

²²⁶ *Id.*

²²⁷ Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 29, 2023), <https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html>.

directed by law”; (c) a minor who is not mature is nevertheless permitted to “terminate her pregnancy without the consent or notification of the minor’s parent if termination of the pregnancy without such consent or notification is in the minor’s best interest”; and (d) “Parental consent to treatment to terminate a minor’s pregnancy without the voluntary agreement of the minor ordinarily is insufficient.”²²⁸ Notably, this strong statement acknowledging mature minors’ capacities and honoring their privacy (as well as that of nonmature minors) stands in stark contradiction to legislative trends in conservative legislatures that ban abortion and deny exceptions for rape and incest.

CONCLUSION

Multiple approaches to securing reproductive justice to protect the reproductive decision-making of youth could exist, but only exceptions for rape or incest have largely been articulated and pursued. No specific federal or state legislation—specifically focused on adolescents—has been proposed or enacted at the federal or state levels in the *Dobbs*’s aftermath. Nevertheless, novel legal strategies that center youth are long overdue substantively and symbolically and the models already exist to bring such efforts about—through referenda, federal legislation, state legislation, and executive orders. An emancipation proclamation for reproductive health is a vision that should be brought to life.

As an initial matter, risks can and should be mitigated in all instances of rape and incest. Most immediately, legislatures can and should act by enacting laws that grant exceptions for pregnancies that result from rape and incest. However, there are important reasons for an expansive path and avoiding exceptionalism such as to nullify all abortion bans that deny adolescents’ reproductive decision-making, including in deciding to terminate a pregnancy when rape or incest have not occurred.

²²⁸ RESTATEMENT Draft No. 2 § 19.02.