

Murky Waters: Exploring the Future of Criminal Law Liability in State Territorial Waters off the American Coast in Light of the Overturning of *Roe v. Wade*

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ABSTRACT: Since the recent overturning of the landmark Roe v. Wade case, which granted the right to abortion through the right of privacy, a flood of creative solutions to help patient access to abortion care have taken center stage. Amongst those solutions is PRROWESS, Protecting Reproductive Rights of Women Endangered by State Statutes, a proposal for a ship docked in federal waters that would provide abortion care and other healthcare to patients from states along the Gulf of Mexico. Each of the states bordering the Gulf have banned or restricted abortion as of January 2023, including Texas, Louisiana, Mississippi, Alabama, and Florida. As a result, the question of state and federal jurisdiction off the American coast for the purposes of criminal law comes into view. While maritime jurisdiction is relatively well developed and outlined with reference to natural resource protection, the same cannot be said about criminal jurisdiction. Venturing into murky waters, the delineations of state and federal jurisdiction create a pool of problems for PRROWESS. This Note argues that the success of PRROWESS, like other creative solutions meant to ensure the right to abortion, depends on federal preemption defenses to the right to abortion and administrative subversive resistance.

INTRODUCTION 1289

I. DIVING INTO THE PAST, PRESENT, AND FUTURE OF
ABORTION 1292

A. STEERING THE WAY IN ABORTION CARE ADVOCACY 1292

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- 1. We Have Been Here Before in the Pre-*Roe* United States 1292
- 2. Now Entering the Post-*Roe* United States 1293
- 3. Cars and Planes and Boats, Oh My: International Solutions with Women on Waves 1297
- B. *FACING THE TEMPEST WITH PRROWESS*..... 1299
 - 1. Criminal Liability: A Matter of When, Not If 1299
 - 2. Mapping Out the Plan for the American Vessel 1303

- II. IN DEEP WATER: NAVIGATING THE BOUNDARIES OF COASTAL JURISDICTION FOR STATES, THE FEDERAL GOVERNMENT, AND LAW ENFORCEMENT 1304
 - A. *THE MURKY WATERS OF STATE AND FEDERAL JURISDICTION* 1304
 - 1. Texas State Coastal Boundaries, Laws, and Extent of Jurisdiction..... 1307
 - 2. Louisiana State Coastal Boundaries, Laws, and Extent of Jurisdiction..... 1308
 - 3. Florida State Coastal Boundaries, Laws, and Extent of Jurisdiction..... 1310
 - 4. Alabama and Mississippi Coastal Boundaries, Laws, and Extent of Jurisdiction 1311
 - 5. Limited Non-Preempted State Criminal Claims 1312
 - B. *OH BUOY! THE ROLE OF STATE AND FEDERAL LAW ENFORCEMENT* 1313
 - 1. U.S. Coast Guard and State Assistance 1315
 - 2. U.S. Customs and Border Patrol and Potential Setbacks with Immigration..... 1317
 - 3. The Role of State, Municipal, Marine, and Water Police..... 1320

- III. A LIGHTHOUSE IN THE DISTANCE: EXPLORING SOLUTIONS FOR PRROWESS..... 1324
 - A. *CONGRESS’S ALBATROSS: FEDERAL CODIFICATION OF RIGHT TO ABORTION* 1325
 - B. *LAND HO! GROUNDING FEDERAL PREEMPTION IN AN EXISTING STATUTE*..... 1327
 - C. *THE WIND IN THE SAILS: ADMINISTRATIVE SUBVERSIVE RESISTANCE* 1329

- CONCLUSION 1332

INTRODUCTION

On September 1, 2021, Senate Bill 8 was signed into law by Governor Greg Abbott in the State of Texas: the law bans abortion at all stages of pregnancy with the narrow exception for patients who are experiencing a life-threatening medical emergency.¹ Following the implementation of the bill, its consequences came flooding in. Marlena begged her doctor for help after suffering a miscarriage in Texas.² Instead of getting help, she “was forced to go for weeks with fetal remains inside of her.”³ Madi, a twenty-one-year-old college student, described herself as “not in a place to have a baby.”⁴ She found out she was about ten weeks along, but because of the Texas law, “Madi’s personal choice turned into an arduous journey, traveling hundreds of miles and crossing state lines for the procedure.”⁵ At twenty-four weeks, Elizabeth, also a resident of Texas, was told that the “protective cushion of amniotic fluid was gone,” and that “[t]here was still a fetal heartbeat, but it could stop at any moment.”⁶ After making the most difficult decision to choose to terminate her pregnancy, her doctor tried to make the necessary arrangements but could not. Her doctor “start[ed] to cry . . . [saying] ‘[t]hey’re not going to touch you . . . you can either stay here and wait to get sick where we can monitor you, or we discharge you and you monitor yourself. Or you wait till your baby’s heartbeat stops.’”⁷ Their stories go on and on, and, under the current state of the law, they are not going to stop any time soon.⁸

1. *Abortion in Texas*, ACLU OF TEX. (Aug. 29, 2022), <https://www.aclutx.org/en/know-your-rights/abortion-texas> [<https://perma.cc/2GDW-6H65>]; Shannon Najmabadi, *Gov. Greg Abbott Signs Into Law One of Nation’s Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy*, TEX. TRIB. (May 19, 2021, 11:00 AM), <https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortion-law> [<https://perma.cc/RS2A-6KLT>]; TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West Supp. 2022).

2. Geoff Bennett, *Texas Woman Describes Ordeal with State Abortion Law After Miscarriage*, PBS (July 30, 2022, 5:40 PM), <https://www.pbs.org/newshour/show/texas-woman-describes-ordeal-with-state-abortion-law-after-miscarriage> [<https://perma.cc/YH4Q-YXGN>].

3. *Id.*

4. Rachel Scott, Knez Walker, Katie Muldowney, Laura Coburn & Haley Yamada, ‘My Body Is Not Their Property’: Texas Woman’s Journey Across State Lines for an Abortion, ABC NEWS (Oct. 15, 2021, 5:30 PM), <https://abcnews.go.com/US/body-property-texas-womans-journey-state-lines-abortion/story?id=80602289> [<https://perma.cc/G29L-29YY>].

5. *Id.*

6. Carrie Feibel, *Because of Texas’ Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022, 5:04 AM), <https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare> [<https://perma.cc/E4MH-QVQ3>].

7. *Id.*

8. See generally Jessica Valenti, *I Write About Post-Roe America Every Day. It’s Worse than You Think.*, N.Y. TIMES (Nov. 5, 2022), <https://www.nytimes.com/2022/11/05/opinion/election-abortion-roe-women.html> (on file with the *Iowa Law Review*) (providing an overview of more stories as of November 2022).

These stories come at a time in a post-*Roe v. Wade* world. On June 24, 2022, the U.S. Supreme Court released its decision in the case *Dobbs v. Jackson Women's Health Organization*, where it decided to overturn the constitutional right to abortion.⁹ At the end of the day, the *Dobbs* decision has very real “long-term consequences [that] will not only include health and political impacts but will also have implications for economic mobility as well as for state fiscal spending.”¹⁰ And it is no surprise that “[i]n states restricting access to abortions, the women most likely to face immediate negative health and socioeconomic consequences are low-income women and/or women of color.”¹¹ The reality is that while “[eighty-five percent] of Americans believe that there are circumstances that should allow women to have access to an abortion,” as of August 2023, “about 20.9 million women have lost access to nearly all elective abortions.”¹² This number is equal to one in three American women losing their access to abortion.¹³

Looking up from the bottom of an uphill battle for advocates of the right to abortion, a wave of creative solutions has taken center stage: mail abortion pills,¹⁴ city abortion funds to help pay for travel and lodging,¹⁵ major companies offering to pay for abortion-related travel,¹⁶ and hundreds of volunteer pilots ready to fly patients across state lines to help.¹⁷ One solution in particular, PRROWESS, is a ship that will provide abortion and general healthcare to patients while docked in the Gulf of Mexico off of the coast of the southern states that surround it, namely Texas, Louisiana, Mississippi,

9. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284–85 (2022).

10. Keon L. Gilbert, Gabriel R. Sanchez & Camille Busette, *Dobbs, Another Frontline for Health Equity*, BROOKINGS (June 30, 2022), <https://www.brookings.edu/blog/how-we-rise/2022/06/30/dobbs-another-frontline-for-health-equity> [<https://perma.cc/5QTZ-LLLG>].

11. *Id.*

12. *Id.*; Katie Shepherd, Rachel Roubein & Caroline Kitchener, *1 in 3 American Women Have Already Lost Abortion Access. More Restrictive Laws Are Coming*, WASH. POST (Aug. 22, 2022, 3:36 PM), <https://www.washingtonpost.com/nation/2022/08/22/more-trigger-bans-loom-1-3-women-lose-most-abortion-access-post-roe/> (on file with the *Iowa Law Review*).

13. Shepherd et al., *supra* note 12; see Geoff Mulvihill, Kimberlee Kruesi & Claire Savage, *A Year After Fall of Roe, 25 Million Women Live in States with Abortion Bans or Tighter Restrictions*, AP NEWS (June 21, 2023, 11:01 PM), <https://apnews.com/article/abortion-dobbs-anniversary-state-laws-51c2a83899f133556e715342abfcface> [<https://perma.cc/CE7W-QAA2>].

14. Meg O'Connor, *How to Get an Abortion by Mail in Your State*, APPEAL (Aug. 2, 2022), <https://theappeal.org/how-to-get-an-abortion-by-mail-in-your-state> [<https://perma.cc/WBK9-KBJU>].

15. Jim Salter, *St. Louis to Help Women Get Out-of-State Abortion Access*, AP NEWS (July 22, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-st-louis-missouri-cab307afaf66ce9b5d58d3be191b532e> [<https://perma.cc/W3R7-USR8>].

16. Kate Gibson, *These Companies Are Paying for Abortion Travel*, CBS NEWS (July 2, 2022, 9:18 AM), <https://www.cbsnews.com/news/abortion-travel-companies-paying-benefits-amazon-starbucks-target> [<https://perma.cc/WS9K-GRXD>].

17. Joshua Zitser, *Hundreds of Pilots Are Volunteering to Use Their Small Planes to Fly Patients Across State Lines for Abortions, Report Says*, INSIDER (Oct. 30, 2022, 9:56 AM), <https://www.businessinsider.com/pilots-volunteer-to-fly-abortion-patients-across-state-lines-report-2022-10> [<https://perma.cc/496F-W94V>].

Alabama, and Florida.¹⁸ The ultimate goal of this endeavor is to facilitate access to abortion care for patients who need it the most: people who cannot afford the time off or childcare to get an abortion out of state, people who are undocumented, and people who cannot afford to fly across state lines.¹⁹ With estimates to provide care “for about 20 patients a day, . . . roughly 1,800 people in six months,” the plan for PRROWESS seems ready to set sail . . . almost.²⁰

While there are many lingering issues, such as provider liability, ship insurance, and potential threats or actual actions of violence against PRROWESS, this Note focuses on the legal premise that the nonprofit is banking on, that is, that if the vessel is anchored far enough from the coast of the southern states around the Gulf of Mexico, likely three to twelve miles offshore, then the vessel “wouldn’t be restricted by state laws.”²¹ But, that is not exactly true.

The current trajectory of conservative-run states, which is testing the limits of not only restrictions to abortion but also the criminalization of it, has created the need for another look at the boundaries of state jurisdiction.²² In fact, while maritime jurisdiction is relatively well defined for natural resource law and protection, given the advancements in technology that have prompted its development, the same cannot be said about the boundaries for state and federal criminal jurisdiction.²³ Venturing into murky waters, the delineations of state and federal jurisdiction create a pool of problems for PRROWESS.

This Note argues that the success of PRROWESS, like other creative solutions to ensure the right to abortion, depends on the careful analysis of the limits of state law jurisdiction. In Part I, this Note explores the past, present, and future of abortion through a brief survey of history and a look at the inspiration for PRROWESS, Women on Waves. Then, Part II navigates the coastal jurisdiction boundaries for states, the federal government and law enforcement to pinpoint the problems PRROWESS is likely to face. Next, Part III argues that to continue on its path toward accessible abortion, PRROWESS must depend on federal preemption defenses and administrative subversive resistance. Finally, this Note concludes by reflecting on the journey ahead for abortion access, which will require all hands on deck.

18. FAQ PRROWESS, <https://www.prowess.org/faq> [<https://perma.cc/N8BC-8V9G>].

19. Rachel Treisman, *A Floating Abortion Clinic Is in the Planning Stage, and People Are Already on Board*, KCRW (July 20, 2022, 11:21 AM), <https://www.kcrw.com/news/shows/morning-edition/npr-story/1112219566> [<https://perma.cc/ED7Y-4S6V>].

20. *Id.*

21. *Id.*

22. *See Tracking Abortion Bans Across the Country*, N.Y. TIMES (Sept. 29, 2023, 9:30 AM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (on file with the *Iowa Law Review*).

23. *See infra* notes 111–15 and accompanying text.

I. DIVING INTO THE PAST, PRESENT, AND FUTURE OF ABORTION

To understand the context of PRROWESS and appreciate the legal storm it faces, this Part briefly surveys the history of abortion restrictions and activism in the United States both pre-*Roe* and post-*Roe*, with a particular focus on creative initiatives that have paved the way for abortion advocacy in history. This Part then turns to the innovative wave of solutions that have sparked from the 2022 *Dobbs v. Jackson Women's Health Organization* decision, and the considerations they necessarily warrant in the face of increasing regulations and criminal scrutiny by antiabortion states.²⁴

A. STEERING THE WAY IN ABORTION CARE ADVOCACY

As the *Dobbs* decision notes, at the time *Roe* was passed, “30 States still prohibited abortion at all stages” with limited exceptions, and one-third of “those States still criminalized some abortions.”²⁵ With that said, it is worth looking at what creative solutions were being used at the time just before *Roe* was decided. After looking at the past, this Section looks at the survey of new ideas in light of modern transportation, advances in healthcare, and updated technologies that are informing creative solutions today after *Dobbs*. Last, this Section looks at how one international project to create access to abortion inspired PRROWESS.

1. We Have Been Here Before in the Pre-*Roe* United States

The overturning of *Roe v. Wade* is a frigid reminder of how quickly centuries-long advocacy for access to legal abortion care can change.²⁶ When looking at access to legal abortion care from a global perspective, even in 2023, perhaps its overturning should not be so surprising. Around the world, forty percent of women of reproductive age still live in countries with restrictive abortion laws.²⁷ Additionally, there are “39,000 deaths per year from unsafe abortion.”²⁸ It is no secret that bans and restrictions on legal abortion care do not stop abortions: just the opposite, they “force[] people to seek out unsafe abortions.”²⁹

Picturing those numbers, then, it should be equally unsurprising that in the face of such adversity, initiatives have organized and prevailed just as quickly. In the United States, a group of activists fifty-five years ago known as

24. See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overturning the federal right to abortion).

25. *Id.* at 2241, 2253.

26. See *id.* at 2242.

27. *The World's Abortion Laws*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/worlds-abortion-laws> [<https://perma.cc/Q66V-RDQH>].

28. *Id.*

29. *Key Facts on Abortion*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts> [<https://perma.cc/LT8E-DSBV>].

the Jane Collective worked tirelessly to help approximately eleven thousand women access abortion care from 1969 to 1973 while it was still illegal.³⁰ Although the Jane Collective, which was based in Chicago, is one of the more well-known initiatives because of the activists who were arrested and charged for their roles in it, it was only a drop in an ocean of the underground network for abortion care nationwide at a time when abortion was a felony in the vast majority of the United States.³¹

In some places, networks to facilitate access to abortion before *Roe* were run by religious leaders.³² New York City, for instance, was home to the Clergy Consultation Service on Abortion, made up of a “group of more than 1,000 mostly Protestant pastors as well as some priests and rabbis.”³³ And, even more centralized and local groups, like the one established at Indiana University, the Midwest Abortion Counseling Services, “helped women navigate through [a] maze of ill-intentioned providers, to ones who could provide a more safe abortion” in college towns.³⁴

Today, as grim as the outlook might be, with the 1960s seeming more and more familiar, there is an extensive history of not just persistence but also unfathomable creativity that has paved the way for next steps to ensure safe access to abortion care in the United States.

2. Now Entering the Post-*Roe* United States

Even before the 2022 decision in *Dobbs*, academics and professionals alike had contemplated the possibility of the Court overturning *Roe* as well as its effect on state territorial jurisdiction. Naturally, “states would impose further restrictions, including prohibitions against travel by their citizens for

30. Fernando Alfonso III, *The Abortion Underground and What Lessons Can Be Learned from the Jane Collective*, NPR (May 4, 2022, 12:30 PM), <https://www.npr.org/2022/05/04/1096149129/abortion-underground-jane-collective-heather-booth-scotus-roe-wade> [https://perma.cc/73PN-WK77].

31. *See id.*; Carrie N. Baker, *The History of Abortion Law in the United States*, OUR BODIES OURSELVES TODAY (Aug. 2022), <https://www.ourbodiesourselves.org/health-info/u-s-abortion-history> [https://perma.cc/LS3K-EJ5X] (mentioning, for example, “the Clergy Consultation Service on Abortion—a network of concerned pastors and rabbis—who set up referral services to help women find safe” abortion care).

32. Sarah McCammon, *50 Years Ago, A Network of Clergy Helped Women Seeking Abortion*, NPR (May 19, 2017, 4:36 PM), <https://www.npr.org/2017/05/19/529175737/50-years-ago-a-network-of-clergy-helped-women-seeking-abortion> [https://perma.cc/62QH-ZALH].

33. *Id.*; *see also* Becca Andrews, *How an Underground Network of Ministers and Rabbis Helped Women Get Abortions Before Roe*, NEW REPUBLIC (Oct. 3, 2022), <https://newrepublic.com/article/167624/clergy-abortion-network-ministers-rabbis-roe> [https://perma.cc/5UNX-8CSN] (providing additional information on the Clergy Consultation Service on Abortion).

34. Madison Stacey, *‘It Was Hidden, You Had to Hunt’ | How Covert Networks Helped Women Access Abortions Before Roe v. Wade*, 13WTHR (Aug. 24, 2022, 11:31 PM), <https://www.wthr.com/article/features/how-covert-networks-helped-women-access-abortions-before-roe-v-wade/531-8839cfb4-8eff-475f-bd6a-27643cea675b> [https://perma.cc/R49T-P5MQ].

the purpose of obtaining out-of-state abortions.”³⁵ In light of the *Dobbs* decision, it is expected that half of U.S. states will ban abortions, “denying the 36 million women and other people who can become pregnant . . . the fundamental right to decide for themselves if and when to have a child.”³⁶ Now, with no federal constitutional right to abortion, the floodgates for liability have broken, prompting reactive solutions in both the private and government sectors.

Such solutions, while laudable, are not always the most comprehensive in addressing the heart of the problem of creating access for patients who are low-income and do not have the option of spending time and money traveling for healthcare. Immediately after *Dobbs*, for instance, major companies, including Uber, Airbnb, Amazon, Microsoft, and Apple, vowed that their employee healthcare “would continue to cover travel expenses for employees who seek medical treatment outside their home states.”³⁷ However, putting aside the issues with privacy and confidentiality, the fact remains that “[seventy-five percent] of people in this country who get abortions are poor and low-income and they don’t work for major corporations.”³⁸ Health information apps, such as period tracker apps,³⁹ have tried to bring healthcare

35. Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 613–14 (2007) (“No matter how narrowly a decision overruling *Roe* might be written, there could be no guarantee against ripple effects in future cases challenging other Supreme Court precedents.”).

36. *Dobbs v. Jackson Women’s Health Organization*, ACLU (June 27, 2022), <https://www.aclu.org/cases/dobbs-v-jackson-womens-health-organization> [<https://perma.cc/FXF6-C7YX>].

37. Preetika Rana, *Uber, Lyft, Others to Support Employees Traveling Out-of-State for Abortion*, WALL ST. J. (June 24, 2022, 3:08 PM), <https://www.wsj.com/livecoverage/supreme-court-decision-roe-v-wade-6-24-2022/card/uber-lyft-others-to-support-employees-traveling-out-of-state-for-abortion-vYQJSQ5KFZppFnOXQGF> (on file with the *Iowa Law Review*); Andrew Marquardt, *With Roe v Wade Overturned, Major Firms from Starbucks to Tesla Will Cover Employees’ Abortion Travel Costs. Here Are the Major Employers Who Have Promised to Cover It*, FORTUNE (May 16, 2022, 4:26 PM), <https://fortune.com/2022/05/16/starbucks-apple-microsoft-amazon-employee-abortion-travel-expenses> (on file with the *Iowa Law Review*).

38. Kiera Feldman, *On Abortion Access, Employers Have Promises. They Need Plans.*, L.A. TIMES (June 30, 2022, 1:22 PM), <https://www.latimes.com/business/story/2022-06-30/companies-promise-abortion-access-are-they-serious> [<https://perma.cc/3R26-5WLH>].

39. Some of these period tracker apps include “Flo, which bills itself as the most popular period and cycle tracking app,” and Clue which “claims 12 million monthly active users.” Rina Torchinsky, *How Period Tracking Apps and Data Privacy Fit into a Post-Roe v. Wade Climate*, NPR (June 24, 2022, 3:06 PM), <https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps> [<https://perma.cc/HXC4-S75A>]. The real issue with period tracking apps is that not only do they store personal health data of some of “the most intimate types of information a person can share” but they are also meant to track when a person’s menstruation cycle starts and stops, and potentially, “when a pregnancy stops and starts.” *Id.* As a result, “[t]hat has privacy experts on edge because this data—whether subpoenaed or sold to a third party—could be used to suggest that someone has had or is considering an abortion.” *Id.* Even though the overturning of *Roe* precipitated the scrutiny these apps are coming under, they have actually been involved in scandals before, like a 2021 settlement between the Federal Trade Commission

monitoring literally to their users' fingertips in an effort to make it more accessible to the everyday person.⁴⁰ But in light of *Dobbs*, there are serious concerns about the reach of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule: the U.S. Department of Health and Human Services Office for Civil Rights recently clarified that "the Privacy Rule does not apply to information that individuals download or enter in mobile apps for their personal use."⁴¹

On a federal level, hearings for the Women's Health Protection Act, which would codify *Roe*, and the Ensuring Access to Abortion Act, which would protect the right of interstate travel for access to abortion care, have failed to pass the congressional threshold.⁴² And the reality of President Biden's 2022 Executive Orders, to help ensure access to abortion care and contraceptives, is that they are likely only temporary: "[u]ltimately . . . there is no action the President can take to restore the nationwide right to an abortion."⁴³ This is not to say all hope is lost: only by pinpointing these

and Flo because "Flo disclosed sensitive health information, such as the fact of a user's pregnancy, to third parties in the form of 'app events,' which is app data transferred to third parties for various reasons. In addition, Flo did not limit how third parties could use this health data." Press Release, Fed. Trade Comm'n, Developer of Popular Women's Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of Their Health Data (Jan. 13, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc-allegations-it-misled-consumers-about> [<https://perma.cc/W64ML47U>]; see also Katherine Yao & Megan L. Ranney, *Opinion: The Danger of Period-Tracking Apps in a Post-Roe World*, CNN (June 16, 2022, 5:51 PM), <https://www.cnn.com/2022/06/16/opinions/period-trackers-app-roe-abortion-ranney-yao> [<https://perma.cc/Y2HQ-8ZK6>] ("Most digital health apps, including period-tracking apps, are exempt from the federal health information privacy laws that govern healthcare providers. Period-tracking apps therefore have essentially free rein in who they share your health data with—as long as they inform you of their privacy policies.").

40. Bridget G. Kelly & Maniza Habib, *Missed Period? The Significance of Period-Tracking Applications in a Post-Roe America*, 31 SEXUAL & REPROD. HEALTH MATTERS, no. 4, 2023, at 1, 1 ("Period-tracking applications (apps) have been perceived positively as a health literacy tool that increases menstrual and bodily awareness, thereby empowering users to better prepare for future periods, engage in conversations with healthcare providers, and monitor their bodies and sexual activity to be able to achieve their family planning goals.").

41. Jeremy Burnette, Martin R. Dix, Noam B. Fischman & Elizabeth F. Hodge, *Providing Healthcare in a Post-Dobbs America Presents Evolving Challenges*, AKERMAN (Aug. 18, 2022), https://www.akerman.com/en/perspectives/providing-healthcare-in-a-post-dobbs-america-presents-evolving-challenges_.html [<https://perma.cc/P5XJ-66BE>].

42. Pamela Mejia, Ellen L. Janos & Kaitlyn C. Sprague, *ML Strategies Outlook: Federal Action Post-Dobbs Decision*, NAT'L L. REV. (July 25, 2022), <https://www.natlawreview.com/article/ml-strategies-outlook-federal-action-post-dobbs-decision> [<https://perma.cc/qJSH-EXY3>].

43. Donald Judd & Kate Sullivan, *Biden Signs New Executive Order on Abortion Rights: 'Women's Health and Lives Are on the Line'*, CNN (Aug. 3, 2022, 5:31 PM), <https://www.cnn.com/2022/08/03/politics/joe-biden-abortion-executive-order> [<https://perma.cc/3RLF-F2K2>]; see *Fact Sheet: President Biden Issues Executive Order at the First Meeting of the Task Force on Reproductive Healthcare Access*, THE WHITE HOUSE (Aug. 3, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/03/fact-sheet-president-biden-issues-executive-order-at-the-first-meeting-of-the-task-force-on-reproductive-healthcare-access-2> [<https://perma.cc/NHB9-2S2j>].

concerns—whether about accessibility, privacy, or feasibility—can initiatives truly help people who need abortion care the most.

The uptick in popularity for telemedicine and accessibility of mifepristone are also important avenues for expanding access to abortion. The biggest differences between the current situation and that of 1960s America stems from the technological advancements catalyzed by the expanded U.S. Food and Drug Administration (“FDA”) regulations because of the COVID-19 pandemic.⁴⁴ Healthcare by telemedicine and mail have revolutionized access to medical care for low-income patients.⁴⁵ And the demand for telemedicine has only increased since *Dobbs*: one private initiative, Aid Access, which provides medical consults online and abortion pills through the mail, saw an increase of 2,800 percent in their website traffic in the twenty-four hours after the draft *Dobbs* decision had been leaked.⁴⁶ Other services, like Hey Jane and Abortion on Demand have similarly facilitated access to safe, at-home abortions.⁴⁷ Still, these forms of healthcare remain under attack: on April 7, 2023, a federal judge in Texas suspended the FDA’s approval of mifepristone, which is a medication that has been approved for use to induce first trimester abortions since 2000.⁴⁸ The Fifth Circuit ruled that “mifepristone can no longer be sent in the mail at least for now,” pending an appeal to the Supreme Court.⁴⁹ With that said, there remains the question of what can be done to facilitate services that can only really be provided in

44. See Pien Huang & Mara Gordon, *Telehealth Abortion Demand Is Soaring. But Access May Come Down to Where You Live*, NPR (May 20, 2022, 6:34 AM), <https://www.npr.org/sections/health-shots/2022/05/20/1099179361/telehealth-abortion-are-simple-and-private-but-restricted-in-many-states> [<https://perma.cc/L2B6-7NRK>].

45. Arielle Kane, *Telehealth Helps Low-Income Individuals Access Care, but Disparities Persist with Video Use*, PROGRESSIVE POL’Y INST. (Feb. 3, 2022), <https://www.progressivepolicy.org/blogs/tele-health-helps-low-income-individuals-access-care-but-disparities-persist-with-video-use> [<https://perma.cc/5DME-DXLF>] (“A new study found low-income people were more likely than other groups to use telehealth services during the pandemic, proving that telehealth does increase access to needed care for underserved people.”).

46. Huang & Gordon, *supra* note 44.

47. *Id.*

48. Elise Hammond, Matt Meyer, Tori B. Powell & Amir Vera, *April 7, 2023 - Texas Judge Suspends Approval of Medication Abortion Pill*, CNN (Apr. 7, 2023, 11:53 PM), https://www.cnn.com/politics/live-news/texas-abortion-pill-mifepristone-ruling/h_113eco15d194c7a27192cee6a215f51c [<https://perma.cc/8DP2-TFVS>]; Sarah McCammon, *Generic Abortion Pill Manufacturer Sues FDA in Effort to Preserve Access*, NPR (Apr. 19, 2023, 1:49 PM), <https://www.npr.org/2023/04/19/1170806176> [<https://perma.cc/Z796-SKJ6>].

49. Sarah McCammon, *U.S. Appeals Court Preserves Partial Access to Abortion Pill, but with Tighter Rules*, NPR (Apr. 13, 2023, 6:33 PM), <https://www.npr.org/2023/04/13/1169217172> [<https://perma.cc/WYD8-SCJW>]; Abbie VanSickle, *Supreme Court Delays Decision on Abortion Pill, Preserving Access for Now*, N.Y. TIMES (Apr. 19, 2023), <https://www.nytimes.com/2023/04/19/us/politics/abortion-pill-supreme-court.html> (on file with the *Iowa Law Review*).

person, like ultrasounds and other follow-up care.⁵⁰ And the answer to that lies in the legal set up and sustainability of initiatives through travel.⁵¹

3. Cars and Planes and Boats, Oh My: International Solutions with Women on Waves

With headlines about organizations “recruiting pilots to fly patients out of restrictive states,” and funding vans and buses to help patients access abortion care, it is worth reviewing how other initiatives before faced the travel problem, specifically concerning the oceangoing option.⁵² Most notably similar to the project at hand is Women on Waves, the Amsterdam-based organization that launched the world’s first floating abortion clinic in 1999 in response to abortions becoming illegal in Ireland.⁵³ Despite not obtaining their Dutch license to perform abortions, threats of violence against their organization, and the public declaration by the Dutch Parliament that they could face jail time if they continued their endeavors, they are still up and running today.⁵⁴ Their solution to circumventing legal peril is grounded in the international law that limits a nation’s territorial waters.⁵⁵

The biggest problem that Women on Waves encountered in the launch of their initiative was the potential for international criminal liability they could face as an organization, as well as for their patients, providers, and other staff.⁵⁶ In the development stage for Women on Waves, Rebecca Gomperts, the founder, “learned that twelve miles is the limit of a nation’s territorial waters and, beyond this boundary, a nation’s laws and regulations are void.”⁵⁷ At least, that is the traditional view per Article 3 of the United Nations Convention on the Law of the Sea (“UNCLOS”).⁵⁸ In other words, nation states that have adopted the UNCLOS assert their jurisdiction for criminal law based on the territoriality principle: if an incident happens within their

50. See VanSickle, *supra* note 49.

51. See Olivia Olander, *Boats, Planes and Automobiles: Projects Aim to Travel Around Restrictive State Abortion Laws*, POLITICO (Aug. 12, 2022, 11:00 AM), <https://www.politico.com/news/2022/08/12/restrictive-state-abortion-laws-workaround-access-00051373> [<https://perma.cc/QCG5-C5VN>].

52. *Id.*; see Robin Marty, *The Road to Abortion Is Paved with Bad Bus Routes*, TALK POVERTY (July 1, 2019), <https://talkpoverty.org/2019/07/01/abortion-transit-access-cost/> [<https://perma.cc/JQV7-VLB7>].

53. *Who Are We?*, WOMEN ON WAVES, <https://www.womenonwaves.org/en/page/650/who-are-we> [<https://perma.cc/77T9-ST47>]; Carly Rosen, *Women on Waves, Ireland, and the Abortion Ship Pilot Mission*, WOMEN LEADING CHANGE, Oct. 15, 2016, at 28, 32–34.

54. Rosen, *supra* note 53, at 34–35.

55. See *id.* at 30.

56. See M.J. Findlay, *Criminal Liability for Complicity in Abortions Committed Outside Ireland*, 15 IRISH JURIST 88, 91–92 (1980).

57. Rosen, *supra* note 53, at 30.

58. Adam Newman, *Abortions on the High Seas: Can the Coastal State Invoke Its Criminal Jurisdiction to Stop Them?*, 17 OCEAN Y.B. 512, 513 (2003).

general twelve nautical miles,⁵⁹ they have the right to criminally prosecute it under their law.⁶⁰ But there are limits to this authority. Generally, “the principle of territoriality cannot be invoked to assert jurisdiction over alleged crimes that occur beyond territorial boundaries.”⁶¹ Putting aside nuances, of course, this meant that for Women on Waves, as long as they provided abortion care beyond the territorial sea of a given nation state, they could escape criminal liability and prosecution both for providing care and for travel from the nation state’s mainland to their vessel; unless the specific acts, such as providing abortion care, occurred during passage through the twelve miles of the territorial sea, a nation state could “not interfere with the right . . . to innocently pass through territorial waters as guaranteed by [the UNCLOS].”⁶²

The American counterpart to Women on Waves would then seemingly have a straightforward answer to avoiding criminal liability: dock the vessel beyond the twelve nautical miles per the UNCLOS. After all, the effect of the United States ratifying the UNCLOS would rework the current coastal jurisdiction delineation entirely; for instance, it could be that ratification would strip the states of their coastal jurisdiction, leaving the federal government in charge of law enforcement for the first twelve nautical miles, and actions beyond that outside of the U.S.’s criminal jurisdiction. But, there is one major problem with transferring the principle of territoriality in the UNCLOS as Women on Waves applied it: while the United States signed the UNCLOS, it has not yet ratified the treaty.⁶³ As a result, the levels of territorial jurisdiction off of the American coast are not solely defined by the federal limits of the United States as a state actor to the rest of the world; these levels also include staggered U.S. state jurisdiction to the extent of twelve nautical miles off the coast.⁶⁴ This creates a series of problems that are unique to the American endeavor: while docking an American vessel that would provide abortion care in federal waters beyond the twelve nautical mile limit could

59. Throughout this Note, I will be using the measurement terms of “nautical miles” and at times “marine leagues,” so it is worth disclosing their meanings. A nautical mile is a measurement of distance; this is not to be confused with a “knot” which measures speed. *What Is the Difference Between a Nautical Mile and a Knot?*, NAT’L OCEAN SERV. (Oct. 8, 2021), <https://oceanservice.noaa.gov/facts/nautical-mile-knot.html> [<https://perma.cc/4HF6-UBSW>]. “Nautical miles are used to measure the distance traveled through the water.” *Id.* A nautical mile is equal to about 1.1508 land-measured miles. *Id.* A marine league is “[a] geographical measure of distance equal to one-twentieth part of a degree of latitude, or three nautical miles.” *Marine League*, BLACK’S LAW DICTIONARY (11th ed. 2019).

60. See Newman, *supra* note 58, at 516–17.

61. *Id.* at 525.

62. *Id.* at 531.

63. William Gallo, *Why Hasn’t the US Signed the Law of the Sea Treaty?*, VOA (June 6, 2016, 7:00 PM), <https://www.voanews.com/a/united-states-sign-law-sea-treaty/3364342.html> [<https://perma.cc/2TK5-N4WZ>].

64. See U.S. COMM’N ON OCEAN POL’Y, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 70–73 (2004), https://oceanconservancy.org/wp-content/uploads/2015/11/000_ocean_full_report-1.pdf [<https://perma.cc/9YHD-AZSC>].

legally operate, given that “[f]ederal laws don’t currently prohibit abortion,”⁶⁵ the transportation to and from the vessel would not be seen as merely “innocent” travel, especially if U.S. states were to begin criminalizing helping people access abortion care and travel to abortion care.

B. FACING THE TEMPEST WITH PRROWESS

The implications of new or renewed criminal liability imposed by States after *Dobbs* are by no means a minor issue, especially with the limbo of legal support on the federal level. At least for the Gulf states,⁶⁶ PRROWESS aims to be a potential solution for comprehensive healthcare, relying on its location in federal waters, but this reliance glosses over state jurisdiction off the American coast.

1. Criminal Liability: A Matter of When, Not If

It may be the case that even up to a few years ago, the thought of abortion being criminalized was deemed more like misplaced fearmongering than a legitimate concern, but it would be plainly naïve to say the same now. State willingness to push back against the fundamental right to travel presages further criminalization of abortion access. To start, Congress failed to pass the Freedom to Travel for Health Care Act in July of 2022,⁶⁷ which “would [have] guarantee[d] a right to travel across state lines to obtain an abortion.”⁶⁸ While “[t]he right to travel is generally seen as protected by the Fourteenth Amendment,”⁶⁹ so too was the right to privacy; that is, until *Roe* was overturned.⁷⁰ The attack on the right to travel for healthcare is already in action. Missouri, for example, is the first state to propose “allow[ing] private citizens to sue anyone who helps a Missouri resident have an abortion—from the out-of-state physician who performs the procedure to whoever helps

65. Christina Cauterucci, *If You Can’t Get an Abortion on Land, Can You Get One on a Boat?*, SLATE (July 14, 2022, 5:45 AM), <https://slate.com/news-and-politics/2022/07/abortion-care-boat-gulf-of-mexico.html> [<https://perma.cc/GP6R-JFFV>].

66. The scope of this Note will focus on the states that have coastal borders with the Gulf of Mexico, namely Texas, Louisiana, Mississippi, Alabama, and Florida, because this is an analysis of the implications of territoriality and a state’s ability to reach into federal waters.

67. Sahil Kapur, Frank Thorp V & Julie Tsirkin, *Republicans Block Bill to Protect Women Who Travel to Other States for Abortions*, NBC NEWS (July 14, 2022, 5:00 PM), <https://www.nbcnews.com/politics/congress/republicans-block-bill-protecting-women-travel-states-abortion-rcna38301> [<https://perma.cc/P7ZQ-ADQH>].

68. Thor Benson, *Interstate Travel Post-Roe Isn’t as Secure as You May Think*, WIRED (July 25, 2022, 7:00 AM), <https://www.wired.com/story/insterstate-travel-abortion-post-roe> [<https://perma.cc/CD3W-Y78N>].

69. *Id.*

70. See generally Caitlin Chin-Rothmann, *What Privacy in the United States Could Look Like Without Roe v. Wade*, CTR. FOR STRATEGIC & INT’L STUD. (May 25, 2022), <https://www.csis.org/analysis/what-privacy-united-states-could-look-without-roe-v-wade> [<https://perma.cc/2Y8G-gNP6>] (describing the potential future of the right to privacy after *Dobbs*).

transport a person across state lines.”⁷¹ With Missouri being the first, but unlikely the last, state to push the limits of cross-jurisdictional abortion access, the United States now faces uncharted waters.⁷² Moreover, while the overturning of “Roe ‘does not eliminate the ability of states to keep abortion legal within their borders,’” nothing prevents states from criminalizing abortion within their borders either.⁷³ Indeed, several states have criminalized the procedure since then: as of September 2023, abortion is illegal in nearly all circumstances in the following fourteen U.S. states and counting: Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia.⁷⁴

Examining the states around the Gulf of Mexico sheds some light onto state hostility toward abortion access. Louisiana has a trigger law⁷⁵ that bans providing abortion care even in cases of rape or incest unless the patient’s life is at risk, with violators subject to “fine[s] not more than one thousand dollars per incidence or occurrence, or imprison[ment] for not more than two years,

71. Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow.*, POLITICO (Mar. 19, 2022, 7:00 AM), <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539> [<https://perma.cc/BR3HJTRX>].

72. *See id.*

73. Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022, 8:30 AM), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines> (on file with the *Iowa Law Review*).

74. *Tracking Abortion Bans Across the Country*, *supra* note 22; see Elyssa Spitzer, *Some States Are Ready to Punish Abortion in a Post-Roe World*, CTR. FOR AM. PROGRESS (June 24, 2022), <https://www.americanprogress.org/article/some-states-are-ready-to-punish-abortion-in-a-post-roe-world> [<https://perma.cc/PGV4-SXYJ>]; Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), <https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-to-do-so-roundup> [<https://perma.cc/2Y6T-P6G2>]; Megan Messerly & Beatrice Jin, *Abortion Laws by State: Where Abortions Are Illegal 1 Year After Roe v. Wade Was Overturned*, POLITICO (June 22, 2023, 4:30 AM), <https://www.politico.com/news/2023/06/22/abortion-laws-roe-00099270> [<https://perma.cc/4RKQ-9WCB>].

75. A trigger law is “[s]lang. A statute that is unconstitutional and unenforceable when enacted but contains a provision deferring the law’s effective date until the substantive provisions actually become constitutional.” *Trigger Law*, BLACK’S LAW DICTIONARY (11th ed. 2019). Across the United States, thirteen states “have signaled their readiness to ban abortion by passing so-called trigger laws, which would effectively ban abortions almost immediately after a decision from the Supreme Court to overturn *Roe v. Wade*.” Jesus Jiménez, *What Is a Trigger Law? And Which States Have Them?*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html> (on file with the *Iowa Law Review*). The way most of the abortion trigger laws came to be was that “[b]efore the Supreme Court ruled that women had a constitutional right to abortion in 1973, the procedure was illegal in more than half of the country. Some of those States, including Wisconsin, never repealed their pre-*Roe* abortion bans and are allowing them to take effect again.” Amanda Robert, *What Are Abortion Trigger Laws, and Where Do They Stand?*, ABA (June 30, 2022, 2:52 PM), <https://www.abajournal.com/web/article/what-are-abortion-trigger-laws-and-where-do-they-stand> [<https://perma.cc/Q5T2-5P62>].

or both.”⁷⁶ Mississippi has a trigger ban on providing abortion care with a medical and rape exception, where “[v]iolators are punishable by between one and 10 years’ imprisonment.”⁷⁷ Texas enacted a trigger ban in 2021 that bans abortion care with a high-threshold medical exception; “[v]iolators are subject to imprisonment for ‘not more than 20 years or less than 2 years’ and to a fine of at least \$100,000 per violation for attempting an abortion, or a fine and imprisonment of ‘not more than 99 years or less than 5 years’ for performing an abortion.”⁷⁸ The tone of these state laws is clear: coming after healthcare providers is only the beginning.

In Texas, lawmakers are already working on creating liability for patients and anyone who helps them.⁷⁹ In July of 2022, a “white-shoe law firm,” Sidley Austin LLP, received a letter from elected Texas officials threatening the law firm “with criminal prosecution and the disbarment of its partners, among

76. LA. STAT. ANN. §§ 40:1061, 40:1061.1.3(D) (2023); *Louisiana*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/state/louisiana> [<https://perma.cc/PC3L-gK2B>]; Spitzer, *supra* note 74. After the Louisiana Supreme Court upheld the state’s ban, the last abortion clinics in Louisiana decided to close and “relocate to other states.” Rosemary Westwood, *All Three Louisiana Abortion Clinics Are Leaving the State, Staff Say*, WWNO (Aug. 15, 2022, 2:38 PM), <https://www.wwno.org/public-health/2022-08-15/all-three-louisiana-abortion-clinics-are-leaving-the-state-staff-say> [<https://perma.cc/6BFY-ULA7>].

77. Spitzer, *supra* note 74.

78. *Id.* (quoting TEX. PENAL CODE ANN. §§ 12.32, 12.33 (West 2021)).

79. Texas Senate Bill 8 holds that:

Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who:

- (1) performs or induces an abortion in violation of this subchapter;
- (2) knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter; or
- (3) intends to engage in the conduct described by Subdivision (1) or (2).

TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West Supp. 2022). In other words:

S.B. 8 invites lawsuits against anyone who performs or “abets” an abortion. That could mean an array of people and groups, including clinics and their employees, from doctors to receptionists; friends, relatives or strangers who pay for an abortion, including people who donate to or administer abortion funds; insurers that approve a claim; ride-share drivers who drive a patient to a clinic; and anyone who shares information about abortion options.

People can be held liable whether or not they knew, or even “should have known,” that they were helping someone obtain a prohibited abortion. They can also be liable if they “intend” to take such action, whether or not they ever follow through.

Maggie Astor, *Here’s What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/article/abortion-law-texas.html> (on file with the *Iowa Law Review*).

other penalties, over its pledge to reimburse ‘abortion-related travel and, if necessary, related legal-defense expenses’ for its employees.”⁸⁰

Texas-based abortion advocacy groups, like the North Texas Abortion Fund, “ha[ve] been identified as . . . ‘criminal organization[s]’ in local abortion ban ordinances and received cease-and-desist letters from an anti-abortion lawmaker.”⁸¹ North Texas Abortion Fund “was one of two abortion funds named in a legal petition alleging that it had ‘aided and abetted’ in prohibited abortions.”⁸² Other groups, like the

Fund Texas Choice, the Lilith Fund for Reproductive Equity, [and] Frontera Fund . . . claim in a lawsuit . . . that they, their staffs and donors have been threatened with criminal charges—including murder—by some state lawmakers, who say helping Texas women get abortions outside the state violates a pair of anti-abortion statutes.⁸³

And other States are not far behind. Lawmakers in the Louisiana House proposed a bill in 2022 “that would classify abortion as homicide and allow prosecutors to criminally charge patients” under the explanation that civil fines and penalties are not punishment enough.⁸⁴ Lawmakers in states like Mississippi also have a history of pushing legislation that would find patients “who attempt[] to ‘procure or produce’ an abortion or miscarriage . . . guilty of a felony” and punish such patients with “a maximum of 10 years in jail.”⁸⁵ More recently, in 2023, the Alabama attorney general stated “that he has the right to prosecute people who make travel arrangements for pregnant women to have out-of-state abortions” under the justification that aiding with transportation would be “criminal conspiracy.”⁸⁶ With these proposals providing a window into

80. Tessa Stuart, *Republicans Took a Woman’s Right to Choose. Now They’re Threatening Her Right to Travel*, ROLLING STONE (July 20, 2022), <https://www.rollingstone.com/politics/politics-news/abortion-travel-restrictions-texas-republicans-1385437> [<https://perma.cc/BAL4JTWF>].

81. Erin Douglas & Eleanor Klibanoff, *Abortion Funds Languish in Legal Turmoil, Their Leaders Fearing Jail Time if They Help Texans*, TEX. TRIB. (June 29, 2022, 4:00 PM), <https://www.texastribune.org/2022/06/29/texas-abortion-funds-legal> [<https://perma.cc/7ZZ3-XTXC>].

82. *Id.*

83. Laurel Brubaker Calkins, *Abortion Funds Sue to Block Criminal Charges Before Texas Ban Starts*, BL (Aug. 23, 2022, 7:04 PM), <https://www.bloomberg.com/news/articles/2022-08-23/abortion-funds-sue-to-block-criminal-charges-as-texas-ban-set> (on file with the *Iowa Law Review*).

84. Caroline Kitchener, *Louisiana Republicans Advance Bill That Would Charge Abortion as Homicide*, WASH. POST (May 5, 2022, 10:53 AM), <https://www.washingtonpost.com/politics/2022/05/05/louisiana-republicans-advance-bill-that-would-charge-abortion-homicide> (on file with the *Iowa Law Review*).

85. Ewan Palmer, *Mississippi Bill Classifying Abortions as ‘Murder’ Introduced by GOP Lawmaker Dan Eubanks*, NEWSWEEK (Jan. 20, 2021, 6:43 AM), <https://www.newsweek.com/mississippi-abortion-ban-murder-dan-eubanks-1562960> [<https://perma.cc/B23H-26JR>].

86. Andy Rose, *Alabama Attorney General Says He Has Right to Prosecute People Who Facilitate Travel for Out-of-State Abortions*, CNN (Aug. 31, 2023, 7:39 AM), <https://www.cnn.com/2023/08/31/politics/alabama-attorney-general-abortion-prosecute/index.html> [<https://perma.cc/E9PY-685F>]; see Motion to Dismiss at 17, *Yellowhammer Fund v. Marshall*, No. 23-cv-00450 (M.D. Ala. Aug. 28, 2023).

the future ahead, the problem remains: where does this leave patients seeking access to abortion care and the people who help them?

2. Mapping Out the Plan for the American Vessel

For Meg Autry, a gynecologist, obstetrician, and professor at the University of California at San Francisco, the answer to that question will be docked in federal waters.⁸⁷ Autry is the founder of Protecting Reproductive Rights of Women Endangered by State Statutes, or PRROWESS, the nonprofit organization similar to Women on Waves.⁸⁸ The idea involves a ship that “would offer surgical abortions and other reproductive health services.”⁸⁹ “PRROWESS will be a comprehensive floating reproductive health clinic offering surgical abortions up to 16 weeks and contraception including emergency contraception, on site testing for sexually transmitted infections (“STI”s), STI treatment, and vaccination.”⁹⁰ The whole venture is expected to cost around \$20 million.⁹¹

Accessibility was the driving force behind PRROWESS. In the words of Autry, a floating clinic would be “closer and quicker. The biggest thing behind this idea really is that wealthy people in our country will be able to get the services they want The people that are impacted by these practices are poor people, people of color, marginalized communities.”⁹² While there are other projects that enable flying out of state, as PRROWESS explains, “[f]lying out-of-state often requires patients to secure child care and time off work for multiple days, and may not be an option at all for people who are undocumented. PRROWESS will offer easier and faster access to services for those individuals.”⁹³ Additionally, PRROWESS plans on offering healthcare “at little to no cost to the patient, depending on need.”⁹⁴

As far as the legalities go, PRROWESS holds that because it “will operate in federal waters so its activities will not be restricted by state laws.”⁹⁵ But there are still logistical problems with the idea. Even if providing services in federal waters provides a shield to the happenings on the ship, the patients still need to be transported from the mainland, which could be another source for

87. Brittany Shammas, *Doctor Proposes Floating Abortion Clinic in Gulf of Mexico to Avoid Bans*, WASH. POST (July 12, 2022, 4:06 PM), <https://www.washingtonpost.com/politics/2022/07/12/floating-abortion-clinic-gulf-mexico> (on file with the *Iowa Law Review*).

88. *Id.*

89. *Id.*

90. *FAQ*, *supra* note 18.

91. R.A. Schuetz, *A Floating Abortion Clinic? Medical Team Plans to Launch Ship in Gulf of Mexico*, in *Federal Waters*, HOUS. CHRON. (July 10, 2022, 8:08 AM), <https://www.houstonchronicle.com/news/houston-texas/health/article/A-floating-abortion-clinic-Medical-team-plans-to-17294790.php> [<https://perma.cc/8P63-MWSW>].

92. Shammas, *supra* note 87.

93. *FAQ*, *supra* note 18.

94. *Id.*

95. *Id.*

potential liability.⁹⁶ PRROWESS has planned to arrange transport for patients to and from their respective states,⁹⁷ but what if they are detained within that state's territorial waters? As Part II explains, the answer is murky to say the least.

II. IN DEEP WATER: NAVIGATING THE BOUNDARIES OF COASTAL JURISDICTION FOR STATES, THE FEDERAL GOVERNMENT, AND LAW ENFORCEMENT

This Part will discuss issues that arise following *Dobbs* in relation to the practical questions about what laws and what law enforcement power a floating abortion clinic could be subject to. First, this Part will explain the role of federal maritime jurisdiction. Second, this Part will discuss the issues concerning territorial water boundary lines, distinguishing the more-developed boundaries for marine resources and energy production from the less-developed boundary lines for state criminal jurisdiction. Third, this Part will address the role that various law enforcement agencies play in the enforcement of state criminal law, and how their jurisdiction could critically affect any endeavor like that of PRROWESS.

A. THE MURKY WATERS OF STATE AND FEDERAL JURISDICTION

The jurisdictional boundaries of the states around the Gulf of Mexico, as well as of the federal government, do not yield a straightforward and clear map for determining their respective jurisdictions. But by piecing these jurisdictions together, the map of potential contention becomes abundantly clear. Per the UNCLOS, the area off of a nation state's coast is split into roughly four areas: the territorial sea,⁹⁸ the contiguous zone,⁹⁹ the exclusive

96. See Maddie Bender, *Meet the Doctors Taking to the High Seas to Perform Abortions*, DAILY BEAST (July 24, 2022, 3:00 AM), <https://www.thedailybeast.com/meet-the-doctors-taking-to-the-high-seas-to-perform-abortions> [<https://perma.cc/XC5D-RKTC>].

97. Alyssa Goard, *Bay Area Doctor Plans to Offer Abortions via Boat off the Gulf of Mexico*, NBC BAY AREA (July 9, 2022, 3:08 PM), <https://nbcbayarea.com/news/local/floating-abortion-clinic-meg-auntry/2940013> [<https://perma.cc/L8GB-UZAG>] (“PRROWESS will arrange for patients to be transported to the ship, which will vary depending on where they are coming from, once they pass a pre-screening process.”).

98. U.N. Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397, 400 (“Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles”); *id.* art. 2, at 400. (“The sovereignty of a coastal State extends[] . . . to an adjacent belt of sea, described as the territorial sea.”).

99. *Id.* art. 33, at 409 (“In . . . the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea[] The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”).

economic zone,¹⁰⁰ and the high seas.¹⁰¹ Although the UNCLOS defines the extent of a state's sovereignty in each of these zones, the United States does not follow those definitions in their entirety. Section 7 of Title 18, for instance, explains that "special maritime and territorial jurisdiction of the United States" includes "[t]he high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States."¹⁰² The case *United States v. Postal* marked the shift of the term "high seas" in U.S. law by indicating that even though in international law the high seas are those which are "subject to the sovereignty of no state[,] . . . [the U.S. territorial sea] is not delimited by these conventions."¹⁰³ Furthermore, in that case, the Court outlined that "[i]n a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to . . . [p]unish infringement of the . . . regulations committed within its territory or territorial sea."¹⁰⁴ This means that unlike coastal waters that are neatly defined by the UNCLOS, there is an ocean of problems for jurisdiction delineation which must be pieced together bit by bit.

The United States loosely bases the areas off its coast by the UNCLOS, but those areas still have many differences. Beyond the twelve nautical miles of the territorial sea lies the contiguous zone: this zone extends to twenty-four nautical miles from the U.S. coast baseline.¹⁰⁵ In the contiguous zone, the United States has stated that it "may exercise the control necessary to prevent and punish infringement of its customs," which includes broad federal criminal jurisdiction.¹⁰⁶ But even with this explanation, in reality, the federal government has federal agents that can actually extend federal law enforcement power beyond the contiguous zone, at least to two hundred nautical miles from the U.S. shore, such as exercise of power by the U.S. Coast Guard ("Coast Guard").¹⁰⁷

100. *Id.* art. 56, at 418 ("In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources . . ."); *id.* art. 57, at 419 ("The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.").

101. *Id.* art. 86, at 432 (explaining the "high seas" as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State"); *id.* art. 87, at 432 ("The high seas are open to all States, whether coastal or land-locked.").

102. 18 U.S.C. § 7 (2018).

103. *United States v. Postal*, 589 F.2d 862, 868–69 (5th Cir. 1979).

104. *Id.* at 869 (quoting U.N. Convention on the Territorial Sea and the Contiguous Zone art. 24, Apr. 29, 1958, 513 U.N.T.S. 205, 220).

105. *U.S. Maritime Limits & Boundaries*, OFF. OF COAST SURV., <https://nauticalcharts.noaa.gov/data/us-maritime-limits-and-boundaries.html> [<https://perma.cc/U2KG-M8SE>].

106. *See id.*

107. *Id.*; *see* 14 U.S.C. § 102 ("The Coast Guard shall . . . enforce or assist in the enforcement of all applicable Federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States . . ."). *See generally* *United States v. Odom*, 526 F.2d 339 (5th

The Coast Guard may board any vessel subject to the jurisdiction of the United States, whether on the high seas, or on waters over which the United States has jurisdiction, to make inquiries, examinations, inspections, searches, seizures, and arrests for the prevention, detection, and suppression of violations of U.S. laws.¹⁰⁸

These nautical limits should not be confused with the exclusive economic zone, which extends strictly from twelve nautical miles to two hundred nautical miles from the U.S. coast.¹⁰⁹ The exclusive economic zone pertains to, amongst other areas, the U.S. federal “sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources” as well as “international and domestic laws with regard to . . . the protection and preservation of the marine environment.”¹¹⁰ The exclusive economic zone boundaries are outside of the scope of this Note as they do not impact state and federal criminal jurisdiction: this Note only focuses on the state seaward boundaries of coastal states along the Gulf of Mexico and how that interplays with federal jurisdictional limits.¹¹¹ This is all to say that the federal government’s criminal jurisdiction extends well into the high seas.

Cir. 1976) (finding it was permissible for Coast Guard to search a vessel approximately two hundred miles from the United States); *United States v. Thompson*, 928 F.2d 1060 (11th Cir. 1991) (finding that Coast Guard could search a boat five hundred miles from the United States).

108. *Authorities*, U.S. COAST GUARD (June 12, 2018), <https://www.uscg.mil/readings/Article/1548177/authorities> [<https://perma.cc/CP5X-CDYU>]; 14 U.S.C. § 522.

109. *U.S. Maritime Limits & Boundaries*, *supra* note 105.

110. *Id.*

111. For a better visualization of the general limits of the territorial sea, contiguous zone, and exclusive economic zone, please see U.S. COMM’N ON OCEAN POL’Y, *supra* note 64, at 71. Note, however, that in that image, it marks state limits at three nautical miles, but this is not exactly consistent across the U.S. coast, as will be further explained in this Note. While the limits of the exclusive economic zone are not helpful in delineating criminal federal jurisdiction, the contentious history of the establishment of the exclusive economic zone does inform the long and constantly changing history of jurisdiction off of the U.S. coast. In the history of the United States’s development of submerged lands for offshore energy production, the federal government has balanced the various interests of state and local governments, industry groups, and stakeholders, to name a few. Payton A. Wells, Note, *Choose Your Laws Carefully: Executive Authority to Unilaterally Withdraw the United States Outer Continental Shelf from Leasing Disposition*, 67 DUKE L.J. 863, 869–70 (2018). In *Martin v. Waddell*, an 1832 case, the Supreme Court found that “states held title to their submerged lands, not the federal government.” *Id.* at 869–70 (emphasis omitted) (citing *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842)). In 1947, the Supreme Court took a sharp turn in establishing jurisdictional limits in *United States v. California*, deciding that the federal government had “full dominion . . . over[] the lands, minerals, and other things . . . extending seaward three nautical miles.” *Id.* at 870 (quoting *United States v. California*, 332 U.S. 804, 805 (1947)). Nonetheless, by 1952, not even ten years later, President Eisenhower signed the Submerged Lands Act into law which in effect returned the rights of authority over the territorial sea and the land beneath it beyond three nautical miles back to the states. *Id.* at 870–71. But this did not last long, as Congress then established the Outer Continental Shelf Lands Act which once again limited state jurisdiction over submerged lands to the three nautical mile line. *Id.* at 871. This back and forth, as aforementioned, is a result of international policy as

1. Texas State Coastal Boundaries, Laws, and Extent of Jurisdiction

Some States have different seaward boundaries for actions like mining and drilling, and, importantly, for criminal jurisdiction. Because the latter is a lesser developed area in these States, they end up crossing over sometimes.¹¹² For instance, Texas law is clear when it comes to natural resources: “[t]he gulfward boundary of each county located on the coastline of the Gulf of Mexico is the Three Marine League line,” which translates to roughly nine nautical miles.¹¹³ Further clarification for jurisdiction over natural resources provides that “[t]he State of Texas has full sovereignty over the water, the beds and shores, and the arms of the Gulf of Mexico . . . at low tide or high tide.”¹¹⁴ However, the definitions for Texas criminal territorial jurisdiction is less defined in the Texas law. As far as general jurisdiction goes, Texas law holds that the State of Texas “has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible” including if the conduct was committed on “the land and water and the air space above the land and water over which this state has power to define offenses.”¹¹⁵

Beyond that, the only guidance on the extent of the State of Texas’s criminal jurisdiction reach is a 2002 Official Opinion from the Office of the Texas Attorney General.¹¹⁶ There, the Office of the Texas Attorney General starts with referring to Section 7 of Title 18, the statute whereby Congress “extended the United States’ seaward boundary [to] twelve nautical miles from the coast,” as informing state jurisdictional boundaries as well; then the

much as it is a result of domestic economic interests and for U.S. self-sufficiency in energy development with oil and gas production. *See id.* at 865. This is to say that the catalyst for intensive involvement of the federal and state governments in the exclusive economic zone was a direct response to technological development and investment interests. *See id.* at 869. This could potentially explain why the development of clear jurisdictional boundaries for criminal coastal jurisdiction is not as developed beyond case law from the 1970s and 1980s at the height of the War on Drugs, namely, because there was little need for it.

112. Congress has codified that “[t]he seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line.” 43 U.S.C. § 1312. That seaward boundary is specifically for “coastal energy activity” which refers to activities such as the “construction, expansion, or operation of any equipment or facility.” 16 U.S.C. § 1453(5). *See generally* United States v. Louisiana, 363 U.S. 1 (1960) (holding that each coastal state was limited to exclusive possession to the extent of three geographical miles from their coasts); Bruce E. Alexander, *The Territorial Sea of the United States: Is It Twelve Miles or Not?*, 20 J. MAR. L. & COM. 449, 472 (1989) (providing a good overview of the Supreme Court’s holding in *United States v. Louisiana* “that Texas and Florida’s Gulf coast boundaries satisfied the requirements stated in the Submerged Lands Act, and also held that the maritime boundaries of Louisiana, Mississippi and Alabama did not satisfy the requirements”).

113. TEX. NAT. RES. CODE ANN. § 11.013 (West 2011).

114. TEX. NAT. RES. CODE ANN. § 11.012(c) (West 2011).

115. TEX. PENAL CODE ANN. § 1.04 (West 2022).

116. Opinion Letter No. JC-0466 from John Cornyn, Texas Att’y Gen., to Jeri Yenne, Brazoria Cnty. Crim. Dist. Att’y 2–3 (Feb. 21, 2002), <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2002/jc0466.pdf> [<https://perma.cc/E6M7-RLYN>].

opinion moves on to borrow from the Natural Resources definition for jurisdiction.¹¹⁷ The opinion plainly states that the criminal jurisdiction of the State of Texas and its coastal counties extends to the three marine league line.¹¹⁸ “Although the U.S. Constitution grants federal courts exclusive admiralty and maritime jurisdiction, states may exercise concurrent criminal jurisdiction within their territorial waters provided that there is no conflict with federal law or the rights of foreign nations.”¹¹⁹ The opinion doubles down on its conviction that Texas criminal jurisdiction extends at least nine nautical miles by gesturing to existing law, like the Texas antigambling law that defines its scope as “extend[ing] three marine leagues, or nine nautical miles, into the Gulf of Mexico.”¹²⁰ Moreover, the opinion also points to the subsequent authority of peace officers in the state, explaining that a “peace officer has the same authority on the state’s territorial waters that she or he has on land within the state, provided that there is no conflict with federal law or the rights of foreign nations.”¹²¹

2. Louisiana State Coastal Boundaries, Laws, and Extent of Jurisdiction

Other Gulf Coast states tend to follow similarly attenuated analyses to establish the guidelines for the boundaries of their respective State jurisdiction. For instance, Louisiana law holds that “[t]he historic gulfward boundary of the state of Louisiana extends a distance into the Gulf of Mexico three marine leagues from the coastline. For [Louisiana law], ‘three marine leagues’ is equal to nine geographic miles or 10.357 statute miles.”¹²² Additionally, Louisiana law explains the reach of its jurisdiction per the last section of the statute that reads “[n]o provision of this Section shall be construed to relinquish any dominion, sovereignty, territory, property, or rights of the state of Louisiana or its political subdivisions otherwise provided by law.”¹²³ Further, the only other source that gives an exact number for Louisiana’s boundary is the Louisiana “Act 55 of 1938[,] which fixes the territorial limits of the State of Louisiana 27 miles out into the Gulf of Mexico.”¹²⁴ This boundary, that is twenty-seven miles from the Louisiana

117. *Id.*; see 18 U.S.C. § 7.

118. Opinion Letter No. JC-0466, *supra* note 116, at 2.

119. *Id.* at 4.

120. *Id.* at 3.

121. *Id.* at 6.

122. LA. STAT. ANN. § 49:1(A) (2019).

123. *Id.* § 49:1(C). For a drawn chart of Louisiana’s nautical jurisdiction limits, see *id.* § 49:1.

124. Paul M. Hebert & Carlos E. Lazarus, *The Louisiana Legislation of 1938*, 1 LA. L. REV. 80, 137 (1938). It is worth pointing out that the only reason why Act 55 of 1938 has ever been contested has been for natural resources in light of the rich oil reserves found since 1938 off of the Louisiana coast, but it has never been challenged for the sake of criminal state jurisdiction. *Id.* In all fairness, there is a statute that specifies Louisiana’s boundary for conservation and

coast, is the standard, default territorial boundary number for many Louisiana statutes that do not specifically list the nautical mileage, such as the Wildlife and Fisheries boundary definition that holds that “[i]f any offense . . . is alleged to have been committed in the Gulf of Mexico within the waters of the state, any district court in any parish bordering on the gulf shall have territorial jurisdiction.”¹²⁵

Act 55 was most recently construed in 1942 when the Louisiana Supreme Court decided *Louisiana v. Farroba*.¹²⁶ There, the state supreme court considered the extent of state and parish¹²⁷ criminal jurisdiction in reviewing a conviction for unlawful shrimping under a state statute that criminalized unlawfully catching “salt water shrimp in the waters of [Louisiana] not having had a continuous residence in the State of Louisiana for two years prior.”¹²⁸ As parochial as that law sounds, the state supreme court’s analysis sheds some light on the still upheld case law for the state’s statutes.¹²⁹ Where the defendants in that case were caught breaking the Louisiana law at about twenty-five nautical miles from the Louisiana coast, the prosecution brought up Section 1 of Louisiana Act 55 of 1938 which states that:

economic development that is not relevant to its criminal jurisdiction: “The state of Louisiana shall be entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico, extending seaward from its coastline for a distance of three marine leagues.” LA. STAT. ANN. § 49:2(B) (2019). Interestingly enough, the State of Louisiana, in 2011, expressed the inequality of its gulfward boundary for the purposes of protecting and exploiting natural resources, so its boundary does remain subject to conflict in present time. LA. STAT. ANN. § 49:3.1(B) (2019) (“The unequal gulfward boundaries of Gulf Coast states set forth by the United States Supreme Court . . . have resulted in (1) economic disparity and hardship for Louisiana citizens and entities; (2) economic loss to the state of Louisiana and its political subdivisions; and (3) the inability of the state of Louisiana and its political subdivisions to fully exercise their powers and duties under the federal and state constitutions and state laws and ordinances, including but not limited to protection and restoration of coastal lands, waters, and natural resources, and regulation of activities affecting them.”).

125. LA. STAT. ANN. § 56:48 (2020). Granted, this statute is under the Wildlife and Fisheries section of the Louisiana Revised Statutes, but it includes information about criminal consequences for illegal activity under state law. LA. STAT. ANN. § 56:54 (2020). Some of the crimes under the Department of Wildlife and Fisheries punishable by state law include careless operation of a vessel and operation of a vessel or similar device while intoxicated. See *Boating Regulations*, LA. DEP’T OF WILDLIFE & FISHERIES, <https://www.wlf.louisiana.gov/page/boating-regulations> [<https://perma.cc/JW9A-Q266>]. Similarly, the Louisiana Navigation and Shipping Statute defines “[w]aters of the state” to “mean[] any waters within the territorial limits of this state and the marginal sea adjacent to this state and the high seas when navigated as a part of a journey or ride to or from the shore of this state” without a nautical mile indication because the state assumes the twenty-seven-mile line. LA. STAT. ANN. § 34:851.2(13) (2020).

126. *State v. Farroba*, 9 So. 2d 539, 546 (La. 1942).

127. It is important to note that “[t]he state of Louisiana is divided into 64 parishes, which are analogous to counties in other states. There are various forms of government being used within the parishes.” *Louisiana Parishes*, LOUISIANA.GOV, <https://www.louisiana.gov/local-louisiana> [<https://perma.cc/S44Y-PPBN>].

128. *Farroba*, 9 So. 2d at 544.

129. See *id.* at 546–47.

[T]he gulfward boundary of the State of Louisiana, is hereby fixed and declared to be a line located in the Gulf of Mexico parallel to the three-mile limit as determined according to said ancient principles of international law, which gulfward boundary is located twenty-four marine miles further out in the Gulf of Mexico than the said three-mile limit.¹³⁰

The State argued that the Louisiana state law jurisdiction defined in the Act, as reaching essentially twenty-seven miles off of the coast, also applied to the Parish of St. Mary.¹³¹

The relevance of this case is not so much in the distinction between parish and state law,¹³² rather it is that the state supreme court's main concern was about the administrability of determining whether a state law applies based on the location of the crime committed.¹³³ The court feared that attempting to approximate location and determining applicability of state law would create "a most confusing, if not inexplicable, problem."¹³⁴ With that said, in this case, the state supreme court established that Louisiana parish law as well as Louisiana state law had territorial jurisdiction up to twenty-seven miles off of the coast.¹³⁵

3. Florida State Coastal Boundaries, Laws, and Extent of Jurisdiction

The State of Florida has a shifting state boundary statute for its "territorial sea" that is similar to the Texas statute in that it has the one boundary defined for marine resource purposes, and one for all other purposes, making it, in the words of a state court, "a term of art."¹³⁶ Its state statutes specify that Florida's state boundaries extend

[E]ast to the edge of the Gulf Stream or a distance of three geographic miles whichever is the greater distance; thence in a southerly direction along the edge of the Gulf Stream or along a line three geographic miles from the Atlantic coastline and three leagues distant from the Gulf of Mexico coastline, whichever is greater.¹³⁷

Additionally, Florida case law has determined, based on the premise that "it appears that any state by approval of Congress has a right to fix its marine

130. *Id.* at 546 (quoting Act of June 30, 1938, No. 55, § 1, 1938 La. Acts 169, 170).

131. *Id.*

132. Ultimately, the Louisiana State Legislature enacted a statute that says that "[i]f any offense is alleged to have been committed in the Gulf of Mexico within the waters of the state, any court in any parish bordering on the Gulf has territorial jurisdiction if otherwise competent as provided herein." LA. STAT. ANN. § 56:136 (2020).

133. *See Farroba*, 9 So. 2d at 546.

134. *Id.*

135. *Id.* at 546.

136. *State v. Kirvin*, 718 So. 2d 893, 900 (Fla. Dist. Ct. App. 1998); FLA. CONST. art. 2, § 1.

137. FLA. CONST. art 2, § 1.

boundaries [T]he western boundary of Florida as defined in its Constitution at three marine leagues from shore is conclusive.”¹³⁸ The book on Florida Boating Law further confuses the definition, by describing that while most States have a maritime boundary of three nautical miles, Florida’s boundary “moves with the vagaries of wind and current—sometimes fairly close to shore, other times more than 40 miles off the coast.”¹³⁹

Although it seems like Florida’s jurisdiction would tend to fluctuate, subsequent case law has simplified Florida law to a slightly more straightforward standard compared to Louisiana and Texas law: “[Florida] may . . . exercise criminal jurisdiction over acts committed beyond this three mile limit [of a state’s boundaries], at least where such acts have an effect in this state and there is no conflict with federal law and no foreign nation has criminal jurisdiction over said acts.”¹⁴⁰

For instance, the defendants in *United States v. Hernandez*, were detained by the Florida Marine Patrol at about twenty-five miles from the Floridian coast and later convicted for conspiracy to possess marijuana.¹⁴¹ The Eleventh Circuit explained that “Florida law can only be applied to acts that occur within the boundaries of the State of Florida, which with regard to the west coast of Florida, extends three marine leagues or approximately nine geographical miles seaward of the Gulf of Mexico coastline.”¹⁴² Furthermore, in that case, because the defendants’ conduct took place outside of that scope, the court held that it could not “apply Florida law” and instead “must apply federal law.”¹⁴³ However, “[w]here, as here, . . . there is no specific federal law to govern this situation, a federal court may resort to and apply the common law” which was the relevant law that Florida recognized at the time of the case.¹⁴⁴

4. Alabama and Mississippi Coastal Boundaries, Laws, and Extent of Jurisdiction

Alabama has differently defined boundary lines for its jurisdiction concerning its rights over marine resources and concerning all other state matters. On the one hand, Alabama has claimed “[t]he limits and boundaries of the territorial waters of the State of Alabama for management and protection of marine resources . . . extending seaward to a distance of three

138. *Skiriotes v. State*, 197 So. 736, 738–39 (Fla. 1940).

139. Alan S. Richard, *Florida Boating Law*, in 1 FLORIDA MARITIME LAW AND PRACTICE § 15.2 (7th ed. 2022).

140. *State v. Stepansky*, 761 So. 2d 1027, 1035 (Fla. 2000) (second alteration in original); see *United States v. Collins*, 523 F. Supp. 239, 242–43 (S.D. Fla. 1981) (holding that the Florida Constitution does not make a distinction about the extent of general state law enforcement authority being only up to three geographic miles, therefore “Florida [is] entitled to exercise its criminal jurisdiction . . . to the full extent of its boundaries as defined by the Florida Constitution”).

141. *United States v. Hernandez*, 715 F.2d 548, 549–50 (11th Cir. 1983).

142. *Id.* at 550–51.

143. *Id.* at 551.

144. *Id.* (quoting *Collins*, 523 F. Supp. at 243).

Marine Leagues,” or roughly nine nautical miles.¹⁴⁵ But for all other state matters, Alabama relies on its state boundaries as described in its state constitution: “[t]he boundaries of this state are established and declared to be as follows . . . along the line of the State of Mississippi, to the Gulf of Mexico; thence eastwardly, including all islands within six leagues of the shore, to the Perdido river.”¹⁴⁶ The six leagues translate to about eighteen nautical miles.

Relying on Alabama’s boundary, the State of Mississippi’s coastal jurisdiction has also wavered. On the one hand, the Mississippi state constitution sets “[t]he limits and boundaries of the territorial waters of the State of Mississippi” as including up to “three (3) miles of Cat Island, Ship Island, Horn Island and Petit Bois Island off shore to three (3) Marine Leagues,” which, again, translates to about nine nautical miles.¹⁴⁷ However, in a 1906 case, *Louisiana v. Mississippi*, the U.S. Supreme Court interpreted Mississippi’s state constitution as indicating that Mississippi’s

Congress intended that the southern boundary line of the State of Mississippi, beginning at the point dividing it from the State of Alabama, should run westwardly till it joined the Louisiana eastern boundary line, and that in doing so, the said southern boundary would in effect start westward from a point eighteen miles south of the coast line

thus giving Mississippi the same eighteen nautical mile boundary as Alabama.¹⁴⁸

5. Limited Non-Preempted State Criminal Claims

Although the two main responsibilities that the United States focuses on when it comes to its shores are “defending the homeland, or authorizing use and extraction of its natural resources, including oil and gas,” the lack of discussion on potential federalism issues can quickly become a problem.¹⁴⁹ Looking at solely the states along the Gulf of Mexico—namely Texas, Louisiana, Florida, Alabama, and Mississippi—the picture of state jurisdiction along the Gulf Coast is clearly a jagged one. This is to say a comprehensive analysis of the extent of state jurisdiction depends not only on how the boundaries may vary based on whether the issue is one of energy and

145. ALA. CODE § 41-1-1 (LexisNexis 2019). When Alabama enacted this provision, in 2014, its legislature stated that “[the] purpose of the State of Alabama by this section [is] to place itself on an equal footing with the other Gulf Coast States with regard to the limits and boundaries of the territorial waters of the State of Alabama for management and protection of marine resources.” *Id.*

146. ALA. CONST. art. II, § 37.

147. MISS. CODE ANN. § 3-3-1 (2019).

148. *Louisiana v. Mississippi*, 202 U.S. 1, 6 (1906).

149. Kristina Alexander, *Jurisdiction on the Coast and at Sea*, WATER LOG, March 2018, at 3, 5.

resources, or one of other state law, or on the disposition of the wind, current, and tides. It can also depend on whether the state is trying to exercise jurisdiction over some issue that is already preempted by federal law.

Federal preemption is grounded in the Supremacy Clause, whereby federal law is “the supreme Law of the Land.”¹⁵⁰ The Supreme Court has held that there are “two general ways in which federal law can preempt State law. . . . [*E*]xpressly. . . . [or] *impliedly*.”¹⁵¹ Along the Gulf of Mexico, questions of federalism are sparse because oftentimes, the illegal and criminal activity that occurs along the coast is already covered, and preempted, on a federal level, through criminal laws regarding common occurrences like oil spills,¹⁵² unauthorized immigration,¹⁵³ and drug smuggling.¹⁵⁴ This lack of preemption precedent is especially important for the PRROWESS endeavor: before the overturning of *Roe v. Wade*, there was federal preemption protection against conflicting state laws such that PRROWESS could have been docked in federal waters free of conflicting state antiabortion laws. Although there may be other ways to preempt antiabortion state laws on a federal level, those challenges are yet to be made. Accordingly, PRROWESS’s problem is not only limited to the amorphous nautical mile jurisdiction of the states along the Gulf, but it could also potentially face the reach of state law beyond those markers, so long as those laws are not preempted by federal law.

B. OH BUOY! THE ROLE OF STATE AND FEDERAL LAW ENFORCEMENT

With the cohort of States along the coast primed to enact legislation to criminalize abortion that would reach not only medical providers but also any person involved in transporting or advising a person seeking to get an abortion,¹⁵⁵ there is another question of whether a state has the power to use

150. U.S. CONST. art. VI, cl. 2.

151. JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 2 (2019), <https://crsreports.congress.gov/product/pdf/R/R45825/1> [<https://perma.cc/5AHE-V469>].

152. *Factbox: Laws That Could Be Used in Oil Spill Prosecution*, REUTERS (June 1, 2010, 4:21 PM), <https://www.reuters.com/article/us-oil-spill-laws-factbox/factbox-laws-that-could-be-used-in-oil-spill-prosecution-idINTRE6506J820100601> [<https://perma.cc/A2BB-BQ7K>] (explaining that the federal government can pursue criminal misdemeanor or felony charges for the illegal discharge of any pollutants under the Clean Water Act).

153. 8 U.S.C. § 1324(a) (governing criminal penalties for bringing or attempting to bring an alien into the United States “other than [by] a designated port of entry or place”).

154. 21 U.S.C. § 846 (criminalizing conspiracies to commit any of the offenses defined within the Controlled Substances Act).

155. Spitzer, *supra* note 74 (providing an overview of all states that have pending or actual statutes ready “for politically motivated prosecution but also as deterrents to the provision of abortion care. Many providers may not be willing to risk providing care even under the narrow exceptions that exist in some states due to the extreme nature of the penalties”). See generally *Is Abortion Still Accessible in My State Now that Roe v. Wade Was Overturned?*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/abortion-access-tool/US> [<https://perma.cc/X85F->

state law enforcement and/or federal law enforcement to exercise that legislation in the Gulf of Mexico. This Section dives into what that exercise would look like with Coast Guard authority and U.S. Customs and Border Patrol, as well as state and municipal marine and water police.¹⁵⁶

A basic principle of federalism to keep in mind is the Supreme Court's use of a presumption against preemption when construing statutes.¹⁵⁷ In a recent 2016 case, the Court held that in express preemption cases, the Court "do[es] not invoke any presumption against pre-emption but instead 'focus[es] on the plain wording of the clause, which necessarily contains the best

2FSJ?type=image] (providing interactive map with actualized updates on civil and criminal statutes restricting abortion); Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs, but Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-weren-considered-in-dobbs-but-now-theyre-on-abortion-legal-front-lines> [https://perma.cc/8T3C-4KKA] ("Yet doctors and patients are all but absent from the latest Supreme Court majority opinion on abortion in *Dobbs v. Jackson Women's Health Organization*. In fact, in the opinion, Justice Samuel Alito uses the derogatory term 'abortionist' instead of physician or doctor or obstetrician-gynecologist. Legal experts say that signals a major shift in how the court views abortion, and creates a perilous new legal reality for physicians. In States where abortion is restricted, health care providers may be in the position of counseling patients who want an abortion, including those facing pregnancy complications, in a legal context that treats them as potential criminals. . . . Those restrictions have included informed consent laws, waiting periods, telemedicine restrictions, clinic regulations, hospital admitting requirements for providers, insurance restrictions and more."); Summer Ballentine & John Hanna, *Missouri Considers Law to Make Illegal to 'Aid or Abet' Out-of-State Abortion*, PBS (Mar. 16, 2022, 2:45 PM), <https://www.pbs.org/newshour/politics/missouri-considers-law-to-make-illegal-to-aid-or-abet-out-of-state> [https://perma.cc/T96U-TDFG] ("First-of-its-kind Missouri legislation shows that anti-abortion lawmakers in Republican-led states aren't likely to stop at banning most abortions within their borders but also could try to make it harder to go out of state to end pregnancies.").

156. Under the Posse Comitatus Act,

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (2018 & Supp. 2021). It is worth noting, in anticipation for the discussion in this Part, that although the Coast Guard is part of the federal armed forces, it "has express statutory authority to perform law enforcement and is not bound by the Posse Comitatus Act." Joseph Nunn, *The Posse Comitatus Act Explained*, BRENNAN CTR. FOR JUST. (Oct. 14, 2021), <https://www.brennancenter.org/our-work/research-reports/posse-comitatus-act-explained> [https://perma.cc/6A96-LYCZ]. Additionally, U.S. Customs and Border Patrol, as part of the Department of Homeland Security, is bound to the Posse Comitatus Act, meaning it can provide "civilian law enforcement information acquired in the normal course of military training or operations; equipment, training, and advice; and military personnel to maintain and operate equipment." Military Support for Customs and Border Protection Along the Southern Border Under the Posse Comitatus Act, 45 Op. O.L.C., slip op. at 4 (Jan. 19, 2021), <https://www.justice.gov/dg/opinion/s/attachments/2021/01/19/2021-01-19-milit-support-cbp.pdf> [https://perma.cc/Q56X-MCVC].

157. SYKES & VANATKO, *supra* note 151, at 3 (explaining that the canon of construction of presumption against preemption "instructs that federal law should not be read to preempt State law 'unless that was the clear and manifest purpose of Congress'" (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

evidence of Congress' pre-emptive intent."¹⁵⁸ In keeping with this, "the Court has declined to apply the presumption in cases involving . . . areas in which the federal government has traditionally had a 'significant' regulatory presence," like in *United States v. Locke*.¹⁵⁹ In that case, the State of Washington had established state laws concerning navigation watch procedures, but because "the state laws concerned maritime commerce—an area in which there was a 'history of significant federal presence,'" the Court held that it was preempted by federal law.¹⁶⁰ Then again, *Locke* was not a case involving a criminal state statute. After *Locke*, the Court applied the presumption against preemption construction in *Wyeth v. Levine*, when "it held that federal law did not preempt certain state law claims concerning drug labeling."¹⁶¹ What this means is that whether state antiabortion statutes will be ruled to extend to the Gulf of Mexico, within the murky boundaries described in Section II.A, is really up in the air, which is why it is worth turning to law enforcement hierarchy and arrest power.

1. U.S. Coast Guard and State Assistance

Because the United States has not ratified the UNCLOS, it "has a long arm when it comes to law enforcement off its shores."¹⁶² The primary law enforcement actor in cases involving the waters off the U.S. coast is the Coast Guard.¹⁶³ The Coast Guard is "a branch of the U.S. Armed Forces, a law enforcement organization, a regulatory agency, a member of the U.S. Intelligence Community, and a first responder . . . responsible for maritime safety, security, and environmental stewardship."¹⁶⁴ The Coast Guard has the authority to exercise its jurisdiction in state waters, by "provid[ing] rescue, defense, and law enforcement on the seas. A primary duty of the Coast Guard is described as 'the enforcement of all applicable Federal law on, under, and over the high seas and waters subject to the jurisdiction of the United States.'"¹⁶⁵ For example, under certain federal statutes like the Maritime Drug

158. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting Chamber of Com. of the U.S. v. Whiting, 563 U.S. 582, 594 (2011)).

159. SYKES & VANATKO, *supra* note 151, at 5; *United States v. Locke*, 529 U.S. 89, 108 (2000) ("The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.").

160. SYKES & VANATKO, *supra* note 151, at 5–6 (quoting *Locke*, 529 U.S. at 108); *Locke*, 529 U.S. at 99, 108.

161. SYKES & VANATKO, *supra* note 151, at 6 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009)).

162. Alexander, *supra* note 149, at 5.

163. *General Information*, U.S. COAST GUARD AUXILIARY, <https://wow.uscgaux.info/content.php?unit=A-DEPT&category=general-information> [<https://perma.cc/5FMX-7TMS>].

164. *United States Coast Guard*, U.S. COAST GUARD, <https://www.uscg.mil/About> [<https://perma.cc/EU42-BXHV>].

165. Alexander, *supra* note 149, at 5 (quoting 14 U.S.C. § 102 (2018)).

Law Enforcement Act¹⁶⁶ and the Customs-Enforcement Area Statute,¹⁶⁷ the Coast Guard has the authority to approach, search, and seize boats and vessels that are thirty-five nautical miles,¹⁶⁸ 120 nautical miles,¹⁶⁹ two hundred nautical miles,¹⁷⁰ or even one thousand nautical miles¹⁷¹ out from the U.S. coast. Furthermore, “[t]he Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction.”¹⁷²

Even though the Coast Guard is supposed to enforce federal law, if it is requested to do so by the proper authority, it can “utilize its personnel and facilities (including members of the Auxiliary and facilities governed under chapter 39) to assist any Federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia, to perform any activity for which such personnel and facilities are especially qualified.”¹⁷³ The Coast Guard’s aid of a state requires an element of consent by the state, meaning that a qualified state actor such as a chief of police, must actually ask for the Coast Guard’s help, but, in a 2002 Ninth Circuit case that has paved the way for similar circuit interpretations, the court held that the Coast Guard can actually act in a way that assists a state even under implied consent of the qualified authority.¹⁷⁴ In other words, as long as the Coast Guard is aware of the state law that is being broken, it can act in a way that falls under its statutory jurisdiction as “assisting a State” in enforcing their laws, specifically criminal laws. And, in practice, the Coast Guard does help coastal states all the time.¹⁷⁵

166. 46 U.S.C. § 70501.

167. 19 U.S.C. § 1701.

168. *United States v. Davis*, 905 F.2d 245, 247, 251 (9th Cir. 1990).

169. *United States v. Hernandez*, 864 F.3d 1292, 1297–99 (11th Cir. 2017).

170. *United States v. Cadena*, 585 F.2d 1252, 1256 (5th Cir. 1978), *overruled on other grounds* by *United States v. Michelena-Orovio*, 719 F.2d 738, 757 (5th Cir. 1983) (en banc).

171. *United States v. Orozco-Prada*, 732 F.2d 1076, 1087–88 (2d Cir. 1984).

172. 14 U.S.C. § 522(a).

173. *Id.* § 701(a).

174. *United States v. Todhunter*, 297 F.3d 886, 889–90 (9th Cir. 2002).

175. See, e.g., Priscilla Aguirre, *Coast Guard Seizes Over 2,000 Pounds of Red Snapper Caught in Texas Waters*, MY SAN ANTONIO (Aug. 31, 2022, 11:50 AM), <https://www.mysanantonio.com/news/local/article/coast-guard-illegal-shark-red-snapper-17409835.php> [<https://perma.cc/B68N-FWER>] (describing the Coast Guard as “[w]orking collaboratively with our federal, state and local partners”); Erica Ponder, *Coast Guard Seizes 155 Pounds of Marijuana Near South Padre Island, Officials Say*, CLICK2HOUSTON.COM (Apr. 8, 2022, 9:55 AM), <https://www.click2houston.com/news/local/2022/04/08/coast-guard-seizes-155-pounds-of-marijuana-near-south-padre-island-officials-say> [<https://perma.cc/CC8B-WCZ8>] (describing the Coast Guard as at the request of Marine Operations in Port Isabel, Texas); Amanda Alvarado, Ken Daley & Amanda Roberts, *Coast Guard Suspends Search for 3 Children Missing in Mississippi River*, KCRG (Apr. 25, 2022, 12:09 AM), <https://www.kcrg.com/2022/04/24/coast-guard-3-children-missing-after-plunging-into-mississippi-river> [<https://perma.cc/P35T-9XWW>] (describing Coast Guard’s aid of New Orleans police and New Orleans Fire Department in the search for three missing children). It is important to note

What this means for coastal states that are considering implementing antiabortion statutes is that so long as the Coast Guard is on notice of them, and the statutes are not preempted by federal law, the Coast Guard can either act on enforcing those statutes per the state's explicit consent and request, but it can also act per its implicit request, given the very permissive precedent. And for PRROWESS, this creates a major problem, given the far reach of the Coast Guard's statutory jurisdiction.

2. U.S. Customs and Border Patrol and Potential Setbacks with Immigration

The U.S. Customs and Border Protection is a part of the Department of Homeland Security that “enforces federal customs and immigration laws at or near the international border and at U.S. ports of entry.”¹⁷⁶ U.S. Customs and Border Patrol describes its authority as being “nearly 6,000 miles of Mexican and Canadian international land borders and over 2,000 miles of coastal waters surrounding the Florida Peninsula and the island of Puerto Rico.”¹⁷⁷ However, its authority is actually broader than this: recall the contiguous zone which is the area between twelve nautical miles and twenty-four nautical miles from the U.S. coast.¹⁷⁸ As it turns out, “[t]he U.S. exercises the ‘control necessary to prevent infringement on its customs, fiscal, immigration or sanitary laws, and regulations within its territory or territorial sea’” within that zone as well, all around the U.S. coast.¹⁷⁹ While U.S. Customs and Border Patrol agents are still subjected to the limits of the Fourth Amendment for their primary responsibility of immigration and customs enforcement, they also have more flexible authority under the Immigration and Nationality Act because of the deference to agents through “reasonable” thresholds.¹⁸⁰ In

that when the Coast Guard assists a state, they do just that and nothing more; this is to say, courts have held that the Coast Guard's assistance does not make them an agent of the state when helping “a state or local authority in enforcing its ordinances,” rather, it is working as an entity that is separate and ruled by separate rules. *State v. Prior*, 662 A.2d 225, 227 (Me. 1995).

176. HILLEL R. SMITH, CONG. RSCH. SERV., LSB10559, U.S. CUSTOMS AND BORDER PROTECTION'S POWER AND LIMITATIONS: A PRIMER 1 (2021), <https://crsreports.congress.gov/product/pdf/LSB/LSB10559> [<https://perma.cc/K86V-BNY2>].

177. *Border Patrol Overview*, U.S. CUSTOMS & BORDER PROT. (May 17, 2023), <https://www.cbp.gov/border-security/along-us-borders/overview> [<https://perma.cc/FNH3-CFGH>].

178. *Gulf of Mexico Data Atlas*, NAT'L CTRS. FOR ENV'T INFO., <https://www.ncei.noaa.gov/maps/gulf-data-atlas/atlas.htm?plate=Marine%20Jurisdictions> [<https://perma.cc/ELG6-DDLS>].

179. *Id.*

180. SMITH, *supra* note 176, at 2 (“INA § 287(a)(2) authorizes designated immigration officers (including, by regulation, inspectors at ports of entry and Border Patrol agents) to arrest without a warrant, however, if (1) the alien is entering the United States unlawfully in the presence or view of the officer; or (2) there is ‘*reason to believe*’ the alien is unlawfully in the United States and likely to escape before a warrant can be obtained. . . . INA § 287(a) also permits designated immigration officers to make warrantless criminal arrests in some cases (e.g., when an offense is committed in the officer's presence, or there are ‘*reasonable grounds*’ to believe the

fact, a U.S. Customs and Border Patrol agent can make an arrest if they have a “reasonable suspicion” that a person has committed a violation of immigration or federal law.¹⁸¹ Additionally, U.S. Customs and Border Patrol agents “can board vehicles and vessels and search for people without immigration documentation ‘within a reasonable distance from any external boundary of the United States’” which is another very permissive standard.¹⁸² Further, “Title 19 of the U.S. Code . . . authorize[s] an ‘officer of the customs’ . . . to inspect . . . and . . . board a vehicle or vessel within the United States or ‘customs waters’ (i.e., within 12 nautical miles of the U.S. coast) to examine documentation, and to inspect and search the vehicle or vessel.”¹⁸³ And, in *United States v. Villamonte-Marquez*, the Supreme Court decided that because “the ‘nature of waterborne commerce’” made it difficult to establish maritime checkpoints, “federal officers may board vessels . . . for routine document checks with no suspicion of unlawful activity.”¹⁸⁴ This authority, to inspect and search, is shared with the Coast Guard.¹⁸⁵

U.S. Customs and Border Patrol authority affects PROWESS in two ways. First, like the Coast Guard, U.S. Customs and Border Patrol works closely with local and state law enforcement agencies “to help them combat transnational criminal organizations.”¹⁸⁶ When U.S. Customs and Border Patrol agents collect evidence during a search and seizure, for instance, it can turn that evidence over to local police officials for state prosecution.¹⁸⁷ Unfortunately, it is no secret that “local law enforcement agencies often collaborate with Border Patrol,” and vice versa: “Border Patrol agents for their part often solicit informal ‘assistance’ or ‘cooperation’ from local law enforcement agencies without regard to agencies’ lack of authority to engage

suspect committed a felony and would likely escape). Title 19 of the U.S. Code, which confers federal customs authority on CBP, also permits warrantless criminal arrests in similar circumstances.” (emphasis added)).

181. Adriana Piñon, *Your Rights in the Border Zone*, ACLU (Feb. 13, 2018), <https://www.aclu.org/news/immigrants-rights/your-rights-border-zone> [<https://perma.cc/3QZ7-2K4E>].

182. *Id.*

183. SMITH, *supra* note 176, at 3. For a look inside the U.S. Customs and Border Protection National Marine Training Center, see Paul Koscak, *Marine Life*, U.S. CUSTOMS & BORDER PROT. (Jan. 4, 2022), <https://www.cbp.gov/frontline/marine-life> [<https://perma.cc/CN4R-F4UH>].

184. SMITH, *supra* note 176, at 4; see *United States v. Villamonte-Marquez*, 462 U.S. 579, 593 (1983).

185. SMITH, *supra* note 176, at 3.

186. *Local Law Enforcement, Feds Work Together*, U.S. CUSTOMS & BORDER PROT. (Feb. 3, 2021), <https://www.cbp.gov/newsroom/local-media-release/local-law-enforcement-feds-work-together> [<https://perma.cc/2FGQ-6667>]; see *Border Patrol and Partner Agencies Work Together to Stop Human Smuggling*, U.S. CUSTOMS & BORDER PROT. (Sept. 14, 2021), <https://www.cbp.gov/newsroom/local-media-release/border-patrol-and-partner-agencies-work-together-stop-human-smuggling> [<https://perma.cc/Q53Z-DPJ4>].

187. *Morales v. State*, 407 So. 2d 321, 329 (Fla. Dist. Ct. App. 1981).

in such conduct.”¹⁸⁸ The result of these collaborations is the overwhelming reports of U.S. Customs and Border Patrol abuse of arrest and search and seizure authority, which has only increased with recent case law.¹⁸⁹ For instance, Justice Sotomayor’s concurrence in part in *Egbert v. Boule* described that “[c]ertain CBP agents exercise broad authority to make warrantless arrests and search vehicles up to 100 miles away from the border.”¹⁹⁰ Second, the threat of a search and seizure with such a low threshold by U.S. Customs and Border Patrol is high enough to place in jeopardy any consideration for providing medical care to undocumented immigrants in need of

188. *Cooperation with Local Police*, HOLD CBP ACCOUNTABLE, <https://holdcbpaccountable.org/abuses/cooperation-with-local-police> [<https://perma.cc/K2B6-FXC2>]; *Border Patrol Agent*, POLICEOFFICER.ORG, <https://policeofficer.org/careers/border-patrol-agent> [<https://perma.cc/A3PQ-P45V>] (“Border Patrol offices frequently collaborate and share resources with other federal, state, and local agencies including the DEA, the FBI, the CIA, Homeland Security Investigations and State Police.”).

189. *Arrests/Searches & Seizures*, HOLD CBP ACCOUNTABLE, <https://holdcbpaccountable.org/abuses/arrests-2> [<https://perma.cc/Z7BN-XZYM>]; see *Abuse of Power and Its Consequences*, SBCC, (Sept. 12, 2023), https://www.southernborder.org/border_lens_abuse_of_power_and_its_consequences [<https://perma.cc/U6RK-FJV6>]; Kyle Sammin, *When Border Searches Become Unreasonable*, NAT’L REV. (Feb. 12, 2018, 9:00 AM), <https://www.nationalreview.com/2018/02/border-patrol-warrantless-searches-often-unconstitutional> [<https://perma.cc/4A3B-USV8>] (“Even among supporters of strict immigration-law enforcement, warrantless searches within the United States should be troubling as an infringement of our ancient freedoms. That they are occurring deep within the United States and without a reasonable connection to border crossing also means, taken in conjunction with more recent Fourth Amendment rulings, that the policy must be seen as increasingly unlikely to pass constitutional muster. Under a law passed in 1946 (now codified as 8 U.S.C. §1357), the CBP claims the right to search people and places without a warrant if the purpose of the search is to find illegal aliens and the search occurs within a ‘reasonable distance’ of an international border. In regulations passed in 1953, that ‘reasonable distance’ was defined as 100 miles from any land border or sea coast. Almost without comment, Congress made large swathes of the United States into a region where the Fourth Amendment is seriously weakened. As the ACLU has noted, roughly two-thirds of Americans live within 100 miles of the oceans or the borders. And while the law in question specifically exempts dwellings from warrantless searches, that is the only exception. If you find yourself anywhere else in the warrantless zone, including cars, boats, trains, backyards, and (as we have seen) buses, and you are liable to be stopped and searched if CBP suspects you may be an illegal immigrant.”).

190. *Egbert v. Boule*, 142 S. Ct. 1793, 1821 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part); accord Hassan Kanu, *U.S. Supreme Court Insulates Federal Agents from Accountability*, REUTERS (June 10, 2022, 12:46 PM), <https://www.reuters.com/legal/government/us-supreme-court-insulates-federal-agents-accountability-2022-06-10> [<https://perma.cc/L98G-RX4G>].

PRROWESS's services,¹⁹¹ especially if the endeavor will already be scrutinized under state criminal law.¹⁹²

3. The Role of State, Municipal, Marine, and Water Police

At the bottom of the law enforcement hierarchy is of course the state or municipal marine or water police of each of the Gulf Coast states. Local and State police are most likely to be the first line of enforcement for any antiabortion criminal legislation that comes out of these states, and each state grants law enforcement the power to do so. For instance, Texas confers the power of coastal patrol to the Texas Parks & Wildlife Service who have the “authority granted under the Texas Water Safety Act to provide law enforcement, boating safety and education, and resource protection for . . . the Gulf of

191. Sofia Ahmed, *Abortion Worries Heightened for Unauthorized Immigrants in the U.S.*, REUTERS (July 5, 2022, 11:50 AM), <https://www.reuters.com/world/us/abortion-worries-heightened-unauthorized-immigrants-us-2022-07-05> [<https://perma.cc/YD2B-UCHF>] (“[W]omen without legal immigration status are more likely to face difficulties crossing state lines to access abortions if the procedure is banned where they live, said Lupe Rodriguez, executive director of the New York-based advocacy organization the National Latina Institute for Reproductive Justice. . . . The U.S. Border Patrol maintains a network of some 110 checkpoints along U.S. roads, the majority of which are located 25 to 100 miles (40–160 km) inland of the country’s borders. Fear of being caught at a [sic] immigration checkpoint and possibly being deported makes it ‘virtually impossible’ for many people living in the country illegally to travel across state lines”); Amanda Su, *Challenges Increase for Immigrants Accessing Abortion After Roe Reversal*, ABC NEWS (July 17, 2022, 6:00 AM), <https://abcnews.go.com/US/challenges-increase-immigrants-accessing-abortion-roe-reversal/story?id=86404717> [<https://perma.cc/3QEP:JM6S>] (“But this option provides little comfort to immigrants navigating the complex maze of reproductive health care. Organizers and physicians say barriers to accessing abortions—an already convoluted process in a post-Roe world—are exacerbated by limited English proficiency and immigration status, which may hinder or completely bar immigrants from traveling across state lines, leaving them to slip through the cracks.”); Alexandra Martinez, *Undocumented People Have Already Been Living in a Post-Roe World*, PRISM (June 3, 2022), <https://prismreports.org/2022/06/03/undocumented-people-already-living-post-roe> [<https://perma.cc/3Z7F-CGXD>] (“Given all of the restrictions and bans in over half of the states in this country that are so hostile toward abortion care, we see that the most vulnerable people in our communities, and that certainly includes folks without documentation, have to navigate through a multitude of obstacles that the rest of the folks in this country don’t have to deal with”).

192. *How Can Physicians Care, and Advocate for, Undocumented Immigrants?*, AM. MED. ASS’N (Jan. 11, 2019), <https://www.ama-assn.org/delivering-care/ethics/how-can-physicians-care-and-advocate-undocumented-immigrants> [<https://perma.cc/PG7B-FC6H>] (“About 11 million undocumented people are living in the U.S. today. This is one of the country’s most vulnerable populations because they frequently do not have access to health insurance and can be afraid to present for care. Physicians should understand the ethical issues that arise when supporting and caring for undocumented immigrants, refugees and asylees.”); Ruben Castaneda, *Where Can Undocumented Immigrants Go for Health Care?*, U.S. NEWS (Nov. 2, 2016, 1:01 PM), <https://health.usnews.com/wellness/articles/2016-11-02/where-can-undocumented-immigrants-go-for-health-care> [<https://perma.cc/YF92-WK4L>] (“None of the 11.2 million undocumented immigrants who the government estimates are in the country are eligible for health insurance under the Affordable Care Act. Neither are the 728,000 young unauthorized immigrants – commonly known as ‘Dreamers’ – who are protected from deportation under the Deferred Action for Childhood Arrivals program.”).

Mexico out to nine nautical miles.”¹⁹³ In addition to their primary responsibilities, Texas Parks and Wildlife Service has broad statutory authority to make arrests and seizures of individuals violating the law.¹⁹⁴ Even though the Texas Parks & Wildlife Service has a statutory authority boundary of nine nautical miles into the Gulf, “[t]he state’s game wardens can work up to 200 miles into the Gulf through an agreement with the National Oceanic and Atmospheric Administration (NOAA).”¹⁹⁵ Not only this, but the game warden through the Texas Parks & Wildlife Service has the authority to search and inspect any “vehicle, vessel, or other receptacle” within its authority boundaries, and “have the full authority to enforce all other Texas criminal laws, including the penal code.”¹⁹⁶ Texas also has county marine safety patrol, like the Jefferson County Marine Safety Patrol, whose duties “are not limited to just boating safety but . . . all types of offenses.”¹⁹⁷ One last source of law enforcement that does not seem too far-fetched given the state’s abortion bounty provisions is Texas’s statutory power to “establish a volunteer police reserve force.”¹⁹⁸ Members of a volunteer Texas reserve force are allowed to carry and use a weapon as long as they are authorized by the chief of police and have the authority to act as a Texas state peace officer would.¹⁹⁹

Similarly, Alabama has its marine patrol division of its law enforcement that “patrols Alabama’s public waterways, oversees the registration of all pleasure boats and the licensing of all boat operators, and operates a statewide

193. LAW ENF’T DIV., TEX. PARKS & WILDLIFE DEP’T, MARINE ENFORCEMENT SECTION: VESSEL ASSETS 4, https://tpwd.texas.gov/publications/pwdpubs/media/pwd_bk_l2000_1168.pdf [http://perma.cc/58EY-NP9C]; Parks and Wildlife Code, ch. 545, 1975 Tex. Gen. Laws 1405 (codified as amended at TEX. PARKS & WILD. CODE ANN. § 31.001).

194. TEX. PARKS & WILD. CODE ANN. § 11.019(d) (West 2018).

195. *Texas Game Warden Gain Crime-Fighting Advantage in the Gulf of Mexico*, PRO. MARINER (Nov. 22, 2020), <https://professionalmariner.com/texas-game-wardens-gain-crime-fighting-advantage-in-the-gulf-of-mexico> [https://perma.cc/7C55-XQLB]; *accord 80’ Patrol Vessel for the Texas Parks & Wildlife Department*, ALL AM. MARINE, <https://www.allamericanmarine.com/vessels-gallery/patrol-vessel-for-texas-parks-wildlife-department> [https://perma.cc/K24G-GTXB].

196. TEX. PARKS & WILD. CODE ANN. § 12.104 (West 2018); Richard Hayes, *Texas Game Wardens: What You Need to Know*, U.S. L. SHIELD (Sept. 4, 2017), <https://www.uslawshield.com/game-wardens-texas-immense-police-power/#> [https://perma.cc/VM35-FGKW].

197. *Marine Safety Patrol*, SHERIFF’S OFF. JEFFERSON CNTY., <https://co.jefferson.tx.us/Sheriff/1awenforcement/marine-safety-patrol> [https://perma.cc/MC7J-MEPG].

198. TEX. WATER CODE ANN. § 60.0775 (West 2022); see Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [https://perma.cc/2D4J-DFJR] (providing an example of an existing bounty provision: “[SB 8] allows private citizens to file a civil lawsuit against anyone who knowingly ‘aids or abets’ an abortion. If successful, the law instructs courts to award plaintiffs at least \$10,000 in damages from defendants. Doctors and abortion providers, drivers who provide transportation to a clinic, or those who help fund an abortion, for example, could all be liable to incur legal fees if they are sued. People who receive an abortion cannot be sued under the law”).

199. TEX. WATER CODE ANN. § 60.0775(g) (West 2022).

education program.”²⁰⁰ The Alabama Marine Police Division “is vested with all functions of the Marine Police Division of the Department of Conservation and Natural Resources” under the Alabama Department of Public Safety.²⁰¹ It also has coastal police departments that can exercise jurisdiction up to three miles off of the Alabama coast.²⁰² Mississippi relies on the Department of Marine Resources Office of Marine Patrol as its “leading [state] maritime law enforcement authority” in the Gulf of Mexico.²⁰³ The Marine Patrol officers are “statutorily charged with enforcing conservation, boating safety, and all other criminal laws” in collaboration with the NOAA’s Office of Law Enforcement (“NOAA OLE”).²⁰⁴ As part of their responsibilities, “Marine Patrol officers routinely stop and inspect vessels,” and through their partnership with the NOAA OLE, they can do so as far as “200 miles into the Gulf of Mexico.”²⁰⁵

The Louisiana Department of Wildlife and Fisheries Law Enforcement Division is, “in addition to the authority otherwise conferred by law upon such officers, . . . vested with the same authority and powers conferred by law upon other law enforcement officers of th[e] state.”²⁰⁶ It also claims authority over its territorial seas—recall this extends to the twenty-seven nautical mile line²⁰⁷—and “is responsible for providing public safety services . . . and enforcement of criminal statutes[] . . . includ[ing] maintaining and improving public compliance with boating safety laws, investigating all reportable recreational boating fatalities and crash incidents, enforcing laws restricting the operation of vessels under the influence of alcohol or drugs.”²⁰⁸

Louisiana wildlife enforcement, by statute, “may visit, inspect, and examine, with or without search warrant, . . . any . . . boat, store, car, conveyance, automobile or other vehicle” if they have probable cause that Louisiana law is

200. *Marine Patrol*, ALA. L. ENF’T AGENCY, <https://www.alea.gov/dps/marine-patrol> [https://perma.cc/Z6KD-3RTG].

201. ALA. CODE § 41-27-6 (LexisNexis 2019); *see also* ALA. CODE § 33-5-5 (LexisNexis 2022) (“[M]arine police officers . . . shall have the power of peace officers in this state and may exercise such powers anywhere within the state.”).

202. Blake Brown, *New Alabama Law Limits Police Enforcement and Other Ordinances Outside City Jurisdictions*, WKRG NEWS 5 (July 28, 2021, 1:52 PM), <https://www.wkrg.com/local-news/new-alabama-law-limits-police-enforcement-and-other-ordinances-outside-city-jurisdictions> [https://perma.cc/8NN7-Z72K].

203. Will Freeman, *MDMR Office of Marine Patrol: Keeping Mississippi’s Marine Resources Safe*, WATER LOG, June 2022, at 3, 3.

204. *Id.*; *Marine Patrol*, MISS. DEP’T OF MARINE RES., <https://dmr.ms.gov/marine-patrol> [https://perma.cc/ZS6H-AgL4].

205. Freeman, *supra* note 203, at 3–4.

206. LA. STAT. ANN. § 56:55.2 (2020).

207. *See supra* note 124 and accompanying text.

208. LAW ENF’T DIV., LA. DEP’T OF WILDLIFE & FISHERIES, BOATING SAFETY AND WATERWAY ENFORCEMENT FIVE YEAR STRATEGIC PLAN 2016-2020, at 2 (2016), <https://www.wlf.louisiana.gov/assets/Resources/Publications/Boating/ldwfboatingsfty-wtrwy5yrstratplan-final2016-2020.pdf> [https://perma.cc/4YFY-ZQR4].

being violated.²⁰⁹ And the arrest power of the Louisiana wildlife enforcement need only be done in “good faith” so as not to incur legal liability.²¹⁰ Louisiana also counts on the support of local port security²¹¹ and water patrol²¹² to enforce state criminal law.

Likewise, the Florida Fish and Wildlife Conservation Commission is a section of Florida law enforcement that “ha[s] full police powers and statewide jurisdiction” that is responsible for the offshore areas of Florida.²¹³ As far as coastal jurisdiction goes, the Florida Fish and Wildlife Conservation is responsible for “more than 8,400 miles of coastline, [and] 13,200 square miles of offshore waters.”²¹⁴ Like the aforementioned states, Florida also counts on the help of its state Marine Patrol in various counties that have a set jurisdiction of twenty-three nautical miles from the Floridian coast.²¹⁵

The fact is that the use of police force is being eyed by state legislatures who are looking to criminalize abortion.²¹⁶ Although Texas Senate Bill 8 does not quite criminalize abortion, rather it provides civil penalties, that did not stop police from arresting a twenty-six-year-old woman “on murder charges in connection to a ‘self-induced abortion.’”²¹⁷ Although the charges were issued pre-*Dobbs* and were dropped, “the incident highlighted the ways in which zealous law enforcement already polices and criminalizes abortion.”²¹⁸ Some experts have questioned whether state police would actually enforce antiabortion state law, given that “[s]ome police agencies and officials have said they would not enforce such laws,” but such refusal would have to be on moral grounds; ultimately, “[f]ew officers would be willing to risk their own livelihood over principle.”²¹⁹ More likely than not, how state law enforcement reacts to state antiabortion criminal statutes will depend on the county district

209. LA. STAT. ANN. § 56:55 (2020).

210. *Id.* § 56:65.

211. *See, e.g., Harbor Police Department*, PORT NOLA, <https://portnola.com/info/harbor-polices-security> [<https://perma.cc/8SAY-9N6M>].

212. *E.g., Water Patrol*, TERREBONNE PAR. SHERIFF’S OFF., <https://www.tpsso.net/water-patrol> [<https://perma.cc/6VCF-CJAE>].

213. *What We Do*, FLA. FISH & WILDLIFE CONSERVATION COMM’N, <https://myfwc.com/about/inside-fwc/le/what-we-do> [<https://perma.cc/8MGJ-9NT5>].

214. *Id.*

215. *See Marine Patrol*, BROWARD CNTY. SHERIFF’S OFF., <https://www.sheriff.org/LE/Page/s/SpecialUnits/Marine-Patrol.aspx> [<https://perma.cc/N99X-NY78>].

216. *See* Meg O’Connor, *Cops and Republicans Are Criminalizing Pregnant People Without Roe*, APPEAL (June 21, 2023), <https://theappeal.org/police-republicans-criminalize-pregnant-people-ro-roe-abortion> [<https://perma.cc/L62G-D4RU>].

217. Natasha Lennard, *With the Corpse of Roe Still Warm, Far Right Plots Fascistic Anti-Abortion Enforcement*, INTERCEPT (June 24, 2022, 3:35 PM), <https://theintercept.com/2022/06/24/roe-anti-abortion-enforcement-criminalize> [<https://perma.cc/SJ9E-G92H>].

218. *Id.*

219. Alan Cunningham, *Can Police Officers Refuse to Enforce Abortion Laws?*, CRIME REP., (July 14, 2022), <https://thecrimereport.org/2022/07/14/can-police-officers-refuse-to-enforce-abortion-laws> [<https://perma.cc/KZ3H-8E7X>].

attorneys that are already deeply split: “[t]he split among district attorneys could likely affect how the law is enforced by the local police, for whom the situation is fraught and evolving.”²²⁰

For PRROWESS, the issues are overwhelming: while state coastal jurisdiction remains uncertain, there is no doubt it is extensive. Not only that, but the Coast Guard and U.S. Customs and Border Patrol can assist in the enforcement of state law within and beyond the state’s jurisdiction. Additionally, U.S. Customs and Border Patrol’s expansive jurisdiction makes access to abortion care for undocumented immigrants more challenging, and, generally, patients have to travel through state criminal jurisdictions even if PRROWESS itself is not within that jurisdiction. This places the prospect of PRROWESS in increasing jeopardy, which leaves one question: what is there left to do?

III. A LIGHTHOUSE IN THE DISTANCE: EXPLORING SOLUTIONS FOR PRROWESS

While the outlook for PRROWESS may be grim, there might be some solutions worth trying before all hope is lost. First, this Part will explain the ideal solution of codifying the right to abortion on a federal level, and its potential drawbacks. Second, this Part will address turning to federal statutes under which potential state criminal antiabortion statutes can be federally preempted so that even if PRROWESS staff that help transport patients from the

220. J. David Goodman & Jack Healy, *In States Banning Abortion, a Growing Rift Over Enforcement*, N.Y. TIMES (June 29, 2022), <https://www.nytimes.com/2022/06/29/us/abortion-enforcement-prosecutors.html> (on file with the *Iowa Law Review*) (“I don’t foresee anyone, any law enforcement agency striking out on their own to take overt, aggressive actions,” said Chief Perdue, who is also president of the Texas Police Chiefs Association. “I think it will be a very slow, wait-and-see the landscape of what guidance we’re given.”). Interestingly enough, some major cities have tried to slow down the watershed of antiabortion state law enforcement:

In the case of Cincinnati, Ohio, Mayor Aftab Pureval has stated that the hundreds of millions of dollars dedicated to the city’s police department will be directed away from abortion restriction enforcement. Pureval is also exploring a program that would reimburse Cincinnati residents who get abortions out of the state, potentially linking up with the pro-choice city of Chicago. Similarly, the city council in Tucson, Arizona, voted to forbid its police department from arresting anyone involved in an abortion.

Unfortunately, though, these cities and others will not be able to protect their residents from criminal prosecution, should such a practice be permitted by state law, nor from digital surveillance.

Toby Jaffe, *How Much Will the Abortion Police State Cost?*, AM. PROSPECT (July 5, 2022), <https://prospect.org/justice/how-much-will-the-abortion-police-state-cost> [<https://perma.cc/8TCX-53CF>]; see Jessica Niewohner & Colleen Healy Boufides, *Using Local Ordinances, Resolutions, and Non-Prosecution Measures to Protect Reproductive Health*, NETWORK FOR PUB. HEALTH L. (Sept. 1, 2022), <https://www.networkforphl.org/news-insights/using-local-ordinances-resolutions-and-non-prosecution-measures-to-protect-reproductive-health> [<https://perma.cc/R2V5-TNYP>] (explaining models for deprioritization for police on antiabortion matters and the role of prosecutorial discretion in this conversation).

mainland to the ship are detained and charged, the charges will not be successful. And third, this Part will look to subversive administrative resistance, or in other words, a way for local governments to take matters into their own hands.

A. CONGRESS'S ALBATROSS²²¹: FEDERAL CODIFICATION OF RIGHT TO ABORTION

The ideal solution to address the heart of what PRROWESS aims to do would be to create a congressionally protected right to abortion, which would likely eliminate the need for PRROWESS in the first place, but it would do so for the better. To codify the right to privacy, “Congress would need to pass a law that would provide the same protections *Roe* did—so a law that says women have a right to abortion without excessive government restrictions” so that it would be applicable to all states.²²²

But there are many practical obstacles to codification. For one, the U.S. House of Representatives tried to pass federal legislation to protect the right to abortion through the Women’s Health Protection Act, which was “introduced in Congress by U.S. [Representative] Judy Chu and sponsored by [Senator] Richard Blumenthal in 2021. It was passed in the House, but [was] blocked in the Senate.”²²³ “Republican [Senators] Susan Collins and Lisa Murkowski introduced legislation earlier this year that would codify *Roe* into law, but that bill isn’t as expansive as the Women’s Health Protection Act. It, too, failed.”²²⁴ On the one hand, the language of the bill claims “[t]o guarantee that Americans have the freedom to make certain reproductive decisions without undue government interference,”²²⁵ but on the other hand, the practical effects are much more restrictive: “[t]o appeal across the aisle, it would also allow health-care workers to refuse to provide abortions on religious grounds.”²²⁶ Although such a statute would not restore the protection of *Roe*, it would at least seem to protect the scope of PRROWESS’s

221. The back-and-forth efforts to codify the right to abortion are much like the poem “The Rime of the Ancient Mariner” by Samuel Taylor Coleridge: “Ah! well a-day! what evil looks / Had I from old and young! / Instead of the cross, the Albatross / About my neck was hung.” Samuel Taylor Coleridge, *The Rime of the Ancient Mariner*, POETRY FOUND., <https://www.poetryfoundation.org/poems/43997/the-rime-of-the-ancient-mariner-text-of-1834> [<https://perma.cc/RUN9-V3AC>].

222. Linda C. McClain, *What Would It Mean to Codify Roe into Law?*, YES! (July 1, 2022), <https://www.yesmagazine.org/democracy/2022/07/01/codify-roe-v-wade-law> [<https://perma.cc/D5M5-DBJ5>].

223. *Id.*

224. *Id.*

225. S. 4688, 117th Cong. § 2 (2022).

226. *Biden Wants to Codify Roe v. Wade. A Bipartisan Bill Would Do Just That.*, WASH. POST (Oct. 24, 2022, 1:00 PM), <https://www.washingtonpost.com/opinions/2022/10/24/reproductive-freedom-act-roe-v-wade-abortion> (on file with the *Iowa Law Review*).

services. However, efforts on the conservative side of Congress to thwart codification of *Roe* also make it so that this option is likely not realistic.²²⁷

Even on the off chance²²⁸ that Congress does pass a bill that is signed into law by the President, the question of whether Congress has the constitutional authority to codify *Roe* in a way to avoid being struck down by the judiciary is still a problem. It is true that “the dissenters [in *Dobbs*] warned that there was nothing in the *Dobbs* majority opinion that limited passing federal legislation to restrict or ban abortion throughout the United States.”²²⁹ Some scholars argue Congress could ground a right to abortion statute in the Fourteenth Amendment through the congressional power to enforce guaranteed liberties, “[b]ut the Supreme Court has previously distinguished between legislation to enforce constitutional rights and legislation to define those rights. The first is a job for Congress, the second is not. Defining constitutional rights is the job of the courts.”²³⁰ Another option is grounding a right to abortion in the congressional authority of interstate commerce, “[b]ut insofar as Congress may seek to trump state abortion restrictions, applicable within the state’s own borders, the Supreme Court may view any such federal statute as unconstitutional. By the same reasoning, . . . Congress would have no Commerce Clause authority to enact a law banning all abortions nationwide.”²³¹ While relying on the federal government to resolve

227. See Amy B. Wang & Caroline Kitchener, *Graham Introduces Bill to Ban Abortions Nationwide After 15 Weeks*, WASH. POST (Sept. 13, 2022, 5:14 PM), <https://www.washingtonpost.com/politics/2022/09/13/abortion-graham-republicans-nationwide-ban/> (on file with the *Iowa Law Review*) (“[The] bill . . . would ban abortions after 15 weeks of pregnancy nationwide, the most prominent effort by Republicans to restrict the procedure since the Supreme Court overturned *Roe v. Wade* in June. ‘I think we should have a law at the federal level that would say, after 15 weeks, no abortion on demand except in cases of rape, incest or to save the life of the mother,’ [Senator Lindsey] Graham said at a news conference. ‘And that should be where America is at.’”); Maggie Jo Buchanan, *What You Need to Know About the Bill to Ban Abortion Nationwide*, CTR. FOR AM. PROGRESS (Sept. 16, 2022), <https://www.americanprogress.org/article/what-you-need-to-know-about-the-bill-to-ban-abortion-nationwide> [<https://perma.cc/D4F8-L4KR>] (“The proposed ban is part of a far-right attack on civil rights and liberties that is playing out across the country. At the federal level, extremist lawmakers have made clear that their quest to deny such rights is not limited to abortion: As just one example, all but 10 Republicans in both the U.S. House voted against codifying the right to contraception and Sen. Joni Ernst (R-IA) blocked the measure from being even considered in the Senate.”).

228. Before the 2022 midterm elections, there was still some hope that the U.S. Congress could codify abortion rights so long as the Democratic party retained control, however, they did not. Emma Kinery, *Biden to Ask Congress to Codify Roe v. Wade Abortion Rights Protections if Democrats Keep Control*, CNBC (Oct. 18, 2022, 4:28 PM), <https://www.cnbc.com/2022/10/18/joe-biden-to-ask-congress-to-codify-roe-v-wade-abortion-protections.html> [<https://perma.cc/VX9B-ZMXQ>]; see *2022 Election Results*, POLITICO (Nov. 26, 2023, 8:56 AM), <https://www.politico.com/2022-election/results/house> [<https://perma.cc/5MVE-28MA>].

229. McClain, *supra* note 222.

230. William H. Hurd, *Does Congress Have the Constitutional Authority to Codify Roe?*, BL (May 17, 2022, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/does-congress-have-the-constitutional-authority-to-codify-roe> [<https://perma.cc/Y4SZ-BUDN>].

231. *Id.*

the right to abortion is untenable, it could be that the solution is grounded in federal preemption through a different angle.

B. *LAND HO! GROUNDING FEDERAL PREEMPTION IN AN EXISTING STATUTE*

Notwithstanding the improbability of Congress passing a right to abortion statute any time soon, federal law still preempts state law if there is a conflict. Although there is not a direct statute that PRROWESS can point to for the right to abortion, there may be some indirect federal powers that can hold the fort.²³² For instance, the Department of Health and Human Services (“HHS”) issued a statement to clarify the scope of the Emergency Medical Treatment and Labor Act (“EMTALA”), where it said that if a patient goes to

[A]n emergency department, EMTALA requires hospitals to: (i) have a qualified person provide a medical screening examination . . . to determine the existence of an emergency medical condition; and (ii) stabilize any emergency medical condition found, or appropriately transfer the patient to the extent that the emergency department does not have the requisite expertise to handle the medical emergency or the patient requests transfer.²³³

At the very least, the EMTALA makes it so that emergency medical conditions preempt state laws that directly conflict with the EMTALA, which could limit the reach of more restrictive antiabortion statutes that do not allow exceptions for conditions like “ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders.”²³⁴ With that said, if PRROWESS is able to obtain status as a qualifying emergency medical provider, even if its staff is approached by any level of law enforcement, the patient will be allowed to legally receive medical care because any state law that limits the patient’s access would directly conflict with federal law.

The fact that PRROWESS not only plans to offer surgical abortions but also nonsurgical abortions, could also help with federal preemption to state law. There are states, like Texas, “that [have] ban[ned] medication abortion after seven weeks of pregnancy.”²³⁵ However, the Food and Drug

232. See Alan B. Morrison & Sonia M. Suter, *Congress Can’t Codify Roe: Here’s What It Can Do*, HILL (Aug. 8, 2022, 12:30 PM), <https://thehill.com/opinion/white-house/3592514-congress-cant-codify-roe-heres-what-it-can-do> [<https://perma.cc/KN2S-U8U9>].

233. Joan W. Feldman, *EMTALA Preempts State Law Abortion Bans*, SHIPMAN & GOODWIN LLP (July 12, 2022), <https://www.shipmangoodwin.com/insights/emtala-preempts-state-law-abortion-bans.html> [<https://perma.cc/5CNY-WDAR>].

234. *Id.*; Vanessa Etienne, *Biden Administration Says Federal Law Requires Doctors to Provide Abortion When Mother’s Life Is at Risk*, PEOPLE (July 12, 2022, 12:33 PM), <https://people.com/health/biden-administration-says-federal-law-preempts-trigger-laws-on-abortion-in-medical-emergencies> [<https://perma.cc/56YS-AEN4>].

235. Greer Donley, Rachel Rebouché & David S. Cohen, *Existing Federal Laws Could Protect Abortion Rights Even if Roe Is Overturned*, TIME (Jan. 24, 2022, 3:21 PM), <https://time.com/6141517/abortion-federal-law-preemption-roe-v-wade> [<https://perma.cc/2GBP-Z5N6>].

Administration (“FDA”) has approved mifepristone as the only drug to terminate a pregnancy “through the first 10 weeks” of pregnancy.²³⁶ All five states discussed in this Note, namely Texas, Louisiana, Mississippi, Alabama, and Florida, have laws that restrict the use of mifepristone in ways that conflict with the FDA’s safety decisions, meaning that those “state statutes may be preempted, and a legal challenge on that theory could therefore invalidate them.”²³⁷ This form of preemption has been successful with other challenges.²³⁸ It is worth noting, however, that this may not be a long-term solution, given that the Justice Department appealed the Fifth Circuit ruling that paused the FDA’s approval of mifepristone in April of 2023.²³⁹ At least until the Supreme Court decides what to do with that appeal, mifepristone remains temporarily available in thirty-seven states.²⁴⁰

As far as travel from the mainland to the main PRROWESS ship is concerned, there is also embedded in federal law the right to travel: “a foundational political liberty that precedes the adoption of the U.S. Constitution The Constitution and the U.S. Supreme Court recognize and protect the right to interstate travel.”²⁴¹ Furthermore, “the expansive nature of the travel right drives the construction of privacy provisions.”²⁴² This is to say, “[t]he right to travel entails the right to privacy in its fundamental elements of individual choice regarding when, where, and how to move.”²⁴³

236. *Id.*

237. *Id.*; see *Medication Abortion*, GUTTMACHER INST. (Aug. 31, 2023), <https://www.guttmacherr.org/state-policy/explore/medication-abortion> [<https://perma.cc/8YXB-6VS5>].

238. Donley et al., *supra* note 235 (“The blueprint for this preemption challenge has already been successful against a state’s attempt to ban, and then regulate, a new opioid more stringently than the FDA. In a 2014 case, a court invalidated the State’s regulation as preempted even though the State was acting with an established, evidenced-based safety interest. The different trajectories of opioid and abortion regulation—the former entering the market with less stringent control and the latter subject to the most restrictive measures—makes the preemption argument stronger for abortion, as do the decades of research providing mifepristone’s safety.”).

239. Aria Bendix, *What the Supreme Court’s Decision in the Legal Fight Over Abortion Pills Means for Access to Mifepristone*, NBC NEWS (Apr. 21, 2023, 7:18 PM), <https://www.nbcnews.com/health/womens-health/abortion-pill-lawsuit-mifepristone-questions-future-access-rcna79455> [<https://perma.cc/4494-5LDQ>].

240. *Id.*

241. Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. MARSHALL J. INFO. TECH. & PRIV. L. 639, 640 (2014).

242. *Id.* at 650.

243. *Id.* at 651 (“The right to travel in anonymity, without having to identify oneself or carry identification documents, was articulated clearly in *Kolender v. Lawson*. Edward Kolender was an African-American who frequently walked in white California neighborhoods where police repeatedly stopped, asked him for identification, and at times arrested him, even though he was pursuing legal activity. In *Kolender*, the Court struck down the California statute that required ‘persons who loiter or wander on the streets to provide a “credible and reliable” identification and to account for their presence when requested by a peace officer.’ The Court invalidated the statute on the basis that it was ‘constitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the

PRROWESS plans on providing, in addition to abortion assistance, emergency contraception, general contraception, on site testing for sexually transmitted infections, STI treatment, and vaccinations as well as general care, which means that even if state or federal law enforcement properly stopped a water taxi or motor boat kind of vehicle used to transport patients, not only would the law enforcement agent presumably have no idea as to the patient's purpose for visiting PRROWESS, but neither the patient nor the PRROWESS staff driving the patient need disclose that reason per the right to privacy. In the same vein, if PRROWESS transportation vehicles are challenged, the best argument PRROWESS could make would be, similar to *United States v. Locke*.²⁴⁴ Given that two out of the three major law enforcement overseers of the Gulf of Mexico are federal agencies, namely the Coast Guard and U.S. Customs and Border Patrol, the federal government's significant regulatory presence in the Gulf should preempt state police inspections of water vehicles all together.²⁴⁵ At least for the purposes of docking PRROWESS, as long as the vessel is in the "high seas" under 18 U.S.C. § 7, or roughly about two hundred nautical miles from the shore, the Federal Bureau of Investigations takes over and prosecutes the case.²⁴⁶ This means that the main ship, so long as it is two hundred nautical miles from a state shore, would be subject to federal law, but because there is not federal law that criminalizes abortion, it would be free to offer its services.

C. *THE WIND IN THE SAILS: ADMINISTRATIVE SUBVERSIVE RESISTANCE*

Apart from enacting a federal right to abortion or developing federal preemption strategies, there are ways that PRROWESS can function through administrative subversive resistance; subversive resistance refers to the simultaneous act of "stag[ing] compliance and backstage resistance."²⁴⁷ Combining it with administrative procedures, for PRROWESS, administrative subversive resistance would mean ways to make criminal statutes more

requirement that a suspect provide a "credible and reliable" identification.'" (footnotes omitted) (quoting *Kolender v. Lawson*, 461 U.S. 352, 353–55 (1983))).

244. See *supra* Section II.B.

245. See *supra* Section II.B.

246. See 18 U.S.C. § 7; 33 C.F.R. §§ 2.20, 2.32(a) (2023); *Crimes Against Americans on Cruise Ships: Hearing Before the Subcomm. on Coast Guard & Mar. Transp. of the H. Comm. on Transp. & Infrastructure*, 110th Cong. 186 (2007) (statement of Salvador Hernandez, Deputy Assistant Director, Federal Bureau of Investigation) ("The FBI traditionally focuses its investigative efforts on specified serious crimes for which penalties are provided for under Title 18 when the crimes are committed within the special maritime and territorial jurisdiction of the United States."). Logistically speaking, the average speedboat can travel about seventy miles an hour, meaning that a round trip to and from PRROWESS would take about six hours, which raises questions about the practicality of PRROWESS. See Anthony Roberts & Jonathan Larson, *How Fast Can a Boat Go? – Know the Boat Maximum Speed*, RIDE THE DUCKS OF SEATTLE (Oct. 2, 2022), <https://www.ridetheducksofseattle.com/how-fast-can-a-boat-go> [<https://perma.cc/S444-TPNH>].

247. See Sierk Ybema & Martha Horvers, *Resistance Through Compliance: The Strategic and Subversive Potential of Frontstage and Backstage Resistance*, 38 ORG. STUD. 1233, 1249 (2017).

difficult to enforce for the coastal states surveyed in this Note. This is not a proposal to break laws or procedures, rather it is a proposal for looking to ways to slow down the ever-piling odds against PRROWESS.

In the face of the *Dobbs* decision, certain local governments have taken the opportunity to “adopt[] local de-prioritization and funding restriction measures designed to mitigate the potential harm of state abortion bans.”²⁴⁸ “[D]e-prioritization ordinances and resolutions establish the criminal enforcement, arrest, and investigation of abortions as law enforcement’s lowest priority,”²⁴⁹ which makes sense given that “[p]olice departments across the nation are raising concerns about current and future staffing levels.”²⁵⁰ As a result, “[f]unding restriction ordinances and resolutions prevent or discourage local officials from using local funds to support abortion investigations or to collect, store, catalogue, or share abortion-related data.”²⁵¹ These ordinances are directly related to local advocacy, like in the case of the Austin, Texas’s Guarding the Right to Abortion Care for Everyone Act, or GRACE Act, that passed in July of 2022.²⁵² The city of Austin had actually adopted a similar model in 2020 in order to decriminalize marijuana: the city council voted to decriminalize marijuana and even though it took the local police a few months to comply, they eventually “stopp[ed] making arrests for small amounts of marijuana.”²⁵³

And other cities, like Atlanta, Georgia, and New Orleans, Louisiana, have similarly passed resolutions for the right to abortion.²⁵⁴ Despite political divisions at the state level, these resolutions demonstrate the power of local

248. See Niewohner & Boufides, *supra* note 220.

249. *Id.*

250. Ryan Young & Devon M. Sayers, *Why Police Forces Are Struggling to Recruit and Keep Officers*, CNN (Feb. 3, 2022, 12:03 PM), <https://www.cnn.com/2022/02/02/us/police-departments-struggle-recruit-retain-officers/index.html> [<https://perma.cc/TG6A-JETW>]; Kris Maher, *Police Departments Are Losing Officers and Struggling to Replace Them*, WALL ST. J. (Jan. 27, 2022, 8:00 AM), <https://www.wsj.com/articles/police-departments-are-losing-officers-and-struggling-to-replace-them-11643288401> (on file with the *Iowa Law Review*) (“Across the country, police chiefs say they are struggling to keep departments fully staffed as resignations increase and hiring gets tougher in a tight labor market. At the same time, officers describe the job as more stressful and less rewarding than it was in the past.”).

251. Niewohner & Boufides, *supra* note 220.

252. *Id.*; Morgan Severson, *Austin City Council Passes GRACE Act to Decriminalize Abortion Despite Statewide Ban*, DAILY TEXAN (July 25, 2022), <https://thedailytexan.com/2022/07/25/austin-city-council-passes-grace-act-to-decriminalize-abortion-despite-statewide-ban> [<https://perma.cc/4A94-37QD>].

253. Emma Williams, *Austin City Council Votes to Decriminalize Abortion*, KUT 90.5 (July 21, 2022, 11:38 AM), <https://www.kut.org/health/2022-07-21/austin-city-council-votes-to-decriminalize-abortion> [<https://perma.cc/N4JL-QSXV>].

254. Atlanta City Council Res. 22-R-3711, Reg. Sess. (Ga. 2022), https://atlantacityga.igm2.com/Citizens/Detail_LegiFile.aspx?Frame=None&MeetingID=3613&MediaPosition=&ID=30067&CssClass= [<https://perma.cc/NVK9-UWFR>]; New Orleans City Council Res. R-22-310, Reg. Sess. (La. 2022), https://library.municode.com/la/new_orleans/munidocs/munidocs?nodeId=4e9082de8gdeb [<https://perma.cc/6JCX-TJ3H>].

government to spark administrative subversive resistance in the Gulf states. For PRROWESS, it could be that the solution to safe passage could be ensured by coastal city subversive resistance, for instance, through such deprioritization and decriminalization ordinances. Similarly, if local governments do not allocate the funds needed to enforce the State bans on abortion, especially for such costly endeavors like using motorboats and other water patrol vehicles, then implementing the state laws would be rendered unsustainable.²⁵⁵

Not only do constituents impact local governments passing these kinds of ordinances, but they also elect public prosecutors, which is an action that carries much power, especially because “[s]ome prosecutors use discretion to refuse to prosecute in instances that could exacerbate the harm already caused by the criminal legal system.”²⁵⁶ One of the ways this impacts the right to abortion is that,

Immediately following the *Dobbs* ruling, 84 district attorneys and other prosecutors from 29 states and territories and the District of Columbia . . . pledged not to press charges against people seeking abortion care or their providers, citing the potential harm to people who are “often the most vulnerable and least empowered.”²⁵⁷

There are nonprofit organizations that compile and “support[] elected prosecutors who are looking to reimagine the justice system,”²⁵⁸ like Fair and

^{255.} It is worth mentioning that there are situations where local ordinances have made a difference, resulting in state government laws being enacted specifically to thwart the local government’s efforts. For instance, “[i]n January 2017, Iowa City’s city council unanimously passed a resolution declaring the city would not commit local resources or take law enforcement action toward federal immigration law—with exceptions for violent offenders or cases of public safety.” Will Greenberg, *Johnson County Officials Bash Sanctuary City Law, Plan to Fight It*, IOWA CITY PRESS-CITIZEN (Apr. 11, 2018, 6:53 PM), <https://www.press-citizen.com/story/news/2018/04/11/iowa-sanctuary-cities-immigration-bill-enforcement-ice/508523002> [<https://perma.cc/WEGG-XEUS>]. It only took about one year for the State of Iowa to pass legislation whereby “Iowa cities and counties that intentionally violate federal immigration law will have their state funding revoked” Brianne Pfannenstiel, *Iowa ‘Sanctuary’ City Ban Signed into Law*, DES MOINES REG. (Apr. 11, 2018, 9:24 AM), <https://www.desmoinesregister.com/story/news/politics/2018/04/10/iowa-sanctuary-city-ban-becomes-law-sf-481-reynolds-signs/504176002> [<https://perma.cc/2SYU-TH22>]; see also Tim Henderson, *Cities, States Resist – and Assist – Immigration Crackdown in New Ways*, STATELINE (Aug. 3, 2018, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/03/cities-states-resist-and-assist-immigration-crackdown-in-new-ways> [<https://perma.cc/D2C9-HJQP>] (“Meanwhile, Iowa, North Carolina and Tennessee enacted anti-sanctuary laws requiring cities to cooperate with immigration authorities . . .”).

^{256.} Sam McCann, *The Prosecutors Refusing to Criminalize Abortion*, VERA (Sept. 19, 2022), <https://www.vera.org/news/the-prosecutors-refusing-to-criminalize-abortion> [<https://perma.cc/L82C-VXSC>].

^{257.} *Id.*

^{258.} Lauren-Brooke Eisen, *The Prosecutors Pledging Not to Enforce Abortion Bans*, BRENNAN CTR. FOR JUST. (May 16, 2022), <https://www.brennancenter.org/our-work/research-reports/prosecutors-pledging-not-enforce-abortion-bans> [<https://perma.cc/R9GH-4ZDY>] (“Prosecutors will inevitably be the last line of defense when it comes to abortion bans, and elected prosecutors who

Just Prosecution.²⁵⁹ With that said, it may be in the interest of PRROWESS to partner with similar organizations and causes that are involved in local elections to provide information to the public about the importance and impact of voting for local officials. The greatest limit to this solution is the fact that prosecutors and district attorneys do not hold a public office for life, and once they get replaced, or fired, their replacement “can come in and decide to prosecute an old case, and depending on the state’s statute of limitations, a provider could be charged for a procedure that took place four, five, six years ago.”²⁶⁰ As far as solutions go, this option really has to be a kind of “last line of defense for women to have the comfort that their own choices aren’t going to land them in the criminal justice system,” which is not a very comforting thought.²⁶¹

CONCLUSION

The stories of patients denied access to abortion care will not slow down anytime soon, but neither will the creative solutions and unwavering desire to help them.²⁶² While the present harkens a familiar story, one that lived in the

work in states that criminalize pregnancy outcomes and abortions will have a choice to make in the wake of any Supreme Court decision eviscerating the protections established in *Roe v. Wade*. They will be required to decide whether to use their discretion and limited resources to police and prosecute healthcare decisions and thereby criminalize patients, medical care providers, and others who facilitate these deeply personal choices. . . . We know that outlawing abortion will not end abortions. It will compromise the ability to obtain *safe* abortions, forcing the most marginalized among us—as well as medical providers—into impossible decisions. Enforcing abortion bans also strains limited resources that could instead be used to address serious violent crime. And criminalizing these decisions will erode trust in law enforcement, adversely impacting reporting by victims of abuse, rape, and incest. Prosecutors who use their discretion and commit to *not* prosecuting abortion cases will inevitably help save lives, protect their communities, and promote justice.”).

259. *About FJP/Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision> [<https://perma.cc/P3PL-RJNU>].

260. Christine Vestal, *Liberal Prosecutors in Red States Vow Not to Enforce Abortion Bans*, STATELINE (June 24, 2022, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/06/24/liberal-prosecutors-in-red-states-vow-not-to-enforce-abortion-bans> [<https://perma.cc/E8BG-R454>].

261. Kery Murakami, *The Prosecutors Not Planning to Enforce Post-Roe Abortion Laws*, ROUTE FIFTY (May 20, 2022), <https://www.route-fifty.com/health-human-services/2022/05/prosecutors-who-wont-enforce-post-roe-v-wade-state-abortion-trigger-laws/367244> [<https://perma.cc/9KM-X-2MTA>]. The role of prosecutors is defined by the American Bar Association in a way that not only allows prosecutorial discretion but also in a way that demands it:

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances.

Id. (quoting CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.9(a) (AM. BAR ASS’N 2017)).

262. See *supra* text accompanying notes 1–23.

not so distant yesterday of pre-*Roe*, solutions like PRRWESS lead the way for a fight that belongs to a new generation.²⁶³ After looking at the murky state and federal jurisdiction of the states bordering the Gulf of Mexico, and the capabilities of those states to enforce their state criminal laws, this Note surveyed potential solutions looking ahead.²⁶⁴ In the broader context of the fight for the right to abortion, there is no easy way forward, but there is also no other option: resistance, whether on a federal, state, local, or even individual level is not a choice but a necessity for human rights.

263. See *supra* Part I.

264. See *supra* Part III.