UNINTENDED CONSEQUENCES: NORTH CAROLINA VICTIM NOTIFICATION LAWS AFTER *DOBBS*[*]

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When the United States Supreme Court rendered its decision in Dobbs v. Jackson Women's Health Organization*, the Court restricted a pregnant person's right to make choices regarding their own bodily autonomy, a restriction that has no parity in the law as it pertains to biologically male persons. In* Dobbs*, the Court eliminated the distinctions between pre- and post-viability in an unborn fetus, thus inherently determining that all unborn persons are persons for purposes of abortion regulation. This decision effectuates a fundamental change in our understanding of legal personhood which will have multiple effects. For example, states with victim rights laws will need to consider the practical implications of victim notification in cases involving abortions performed in violation of state law. In those cases, states must determine who is the victim for purposes of victim notification. North Carolina's victim rights laws were codified into a state law titled the Crime Victims' Rights Act ("CVRA"). The intention of the CVRA was to provide victims with guaranteed rights while involved in the justice system. However, the CVRA was enacted without careful examination of who is the crime victim, a particularly complex issue in cases involving abortion-related crimes.*

Since Dobbs*, North Carolina and other states have been legislating partial and full abortion bans, consequently criminalizing the actions of pregnant persons who end their pregnancies illegally, without also establishing clarity on which persons are the victims of an abortion-related crime. For instance, if the victim of an illegal abortion is an unborn child, who serves as that child's family*

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member or guardian for purposes of victim notification? What if the victim of an abortion-related crime is an unborn child's biological father or other family member? Can victim notification laws create a complex situation wherein the biological father of an unborn child has greater rights under the law than the pregnant person? Victim notification laws like North Carolina's CVRA may inadvertently transport the complex issue of female bodily autonomy into a further perverted universe wherein the mother of an unborn child not only has limited freedom to choose her reproductive path, but an unborn child's father has legal rights as the victim of an abortion-related crime.

INTRODUCTION

The United States Supreme Court restricted a woman's right to choose in *Dobbs v. Jackson Women's Health Organization*.[1] That restriction alone has no comparator in the law for biologically male persons. But *Dobbs* did even more: it redefined personhood. By overturning *Roe v. Wade*,[2] the Court eliminated the distinctions between pre- and post-viability in an unborn fetus while rescinding the fundamental federal right to an abortion, returning the decision of whether abortion is legal to the states.[3] This fundamental change in our understanding of abortion rights will have many effects, legal and otherwise. Among those changes, the law should now consider the utility of state laws that criminalize the destruction of a nonviable unborn fetus and address whether those laws provide remedies in addition to and duplicative of other laws criminalizing the

1. 142 S. Ct. 2228 (2022).

2. 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. at 2284.

3. *Dobbs*, 142 S. Ct. at 2259, 2268 ("We thus return the power to weigh those arguments to the people and their elected representatives.").

destruction of another human being.[4] States with victim rights acts will also need to consider the practical implications of victim notification in cases involving abortions performed in violation of state law. In those cases, states must determine who is the victim for purposes of victim notification.

North Carolina's victim rights laws were codified into a state law titled the Crime Victims' Rights Act ("CVRA").[5] The CVRA was intended to guarantee victims' rights, chiefly ensuring victims are notified of important events throughout their involvement in the criminal justice process.[6] However, the CVRA was enacted without regard to who specifically is the crime victim, referring instead to the category of crime alleged,[7] which creates a particularly complex issue in cases involving abortion-related crimes. Since the United States Supreme Court's decision in *Dobbs*, states have been legislating partial and full abortion bans, criminalizing the actions of pregnant persons who end their pregnancies illegally, and potentially making the family member of a fetus the victim of an abortion-related crime.

Victim notification laws raise unique issues related to the criminalization of abortion. If the victim of an illegal abortion is an unborn child, who serves as that child's family member or guardian for purposes of victim notification?

4. See, for example, N.C. GEN. STAT. § 90-21.81A(a)–(b) (2024), which provides "[i]t shall be unlawful" to "procure or cause a miscarriage or abortion" in a pregnant person "after the twelfth week of pregnancy" and "it shall be unlawful" for a healthcare provider to "perform a partial-birth abortion at any time." *Cf. id.* § 14-44 (providing that the act of using drugs or instruments to destroy an unborn child "shall be punished as a Class H felon[y]"). The overlap between the chapter 90 post-twelve-week abortion ban and the chapter 14 section criminalizing the destruction of an unborn child was not addressed in the July 2023 enactment of the twelve-week ban. *See* Act of May 16, 2023, ch. 14, 2023 N.C. Sess. Laws __ (codified as amended in scattered sections of N.C. GEN. STAT. chapters 7B, 14, 48, 90, 108A, 115C, 126, and 131E).

5. Crime Victims' Rights Act, ch. 212, 1998 N.C. Sess. Laws 1215 (codified as amended at N.C. GEN. STAT. §§ 15A-830 to -839). The CVRA evolved as part of a national effort to enact victims' rights laws across the United States. *See State Efforts*, MARSY'S L., https://www.marsyslaw.us/states [https://perma.cc/KK87-6DDX (staff-uploaded archive)]. Following the example of California's Marsy's Law, North Carolina amended its state constitution to include a declaration of rights for crime victims and then enacted section 15A-830.5 of the General Statutes of North Carolina codifying victims' rights through the CVRA. *See infra* note 6 and accompanying text.

6. *Marsy's Law for North Carolina Was Passed by Voters on November 6, 2018*, MARSY'S L. FOR N.C., https://www.marsyslawfornc.com/ [https://perma.cc/JP6C-95D3 (staff-uploaded archive)]. Marsy's Law for North Carolina was an advocacy group that organized to amend the North Carolina Constitution to provide stronger protections to victims of crime. *Id.* The North Carolina Constitution Declaration of Rights now reads, "[v]ictims of crime or acts of delinquency shall be treated with dignity and respect by the criminal justice system." N.C. CONST. art. I, § 37. Based on the amendments expanding the rights to victims approved by voters in 2018, the General Assembly passed a bill to implement the changes and amend the General Statutes of North Carolina to comply. Act of September 4, 2019, ch. 216, § 3, 2019 N.C. Sess. Laws 994, 999 (codified at N.C. GEN. STAT. § 15A-830.5).

7. *See* § 15A-830 (defining "victim" as "a person against whom there is probable cause to believe an offense against the person or a felony property crime has been committed" without refining the definition to apply to a particular crime or type of crime).

If the victim of an abortion-related crime is an unborn child's biological father or other family member, can victim notification laws create a complex situation wherein the biological father of an unborn child has greater rights under the law than the pregnant person? Victim notification laws like North Carolina's CVRA inadvertently transport the complex issue of female bodily autonomy into a further perverted universe wherein the carrier of an unborn child not only has limited freedom to choose her reproductive path, but an unborn child's father has legal rights as the victim of an abortion-related crime.

This Article proceeds in two parts. Part I examines North Carolina abortion law, exploring the history of abortion-related crimes in North Carolina and examining the current post-*Dobbs* legislation. Part II then examines victim notification laws through the lens of North Carolina's CVRA. The Article focuses on North Carolina law as North Carolina provides an opportunity to consider the interaction between a recently enacted twelve-week abortion ban and a robust victim notification law. The Article then queries the possible structure of victim notification after an abortion-related crime based on what the CVRA requires and argues that laws like the CVRA de facto empower others, particularly fathers, in the pregnant person's battle for control over their own body.

I. NORTH CAROLINA ABORTION-RELATED CRIME

It is beyond the scope of this Article to fully analyze the complex and extensive history of abortion jurisprudence and enacted law before and after the landmark case of *Roe v. Wade*.[8] However, to understand the interplay between the CVRA and abortion-related crime, it is important to consider the full history of abortion-related criminal law in North Carolina.

A. *North Carolina Abortion Law Before* Roe v. Wade

It would be nearly impossible to pinpoint the beginning of abortion as a remedy for unwanted pregnancy because individuals, on their own and with the support of others, have sought high-risk and often illegal alternatives to live childbirth for centuries.[9]

8. *See* Roe v. Wade, 410 U.S. 113, 154, 164–66 (1973) (holding that the implied right to privacy in the Fourteenth Amendment, *inter alia*, provided protection for abortion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (upholding the constitutional right to abortion and creating the undue burden standard applied in evaluating legal restrictions on abortion), *overruled by Dobbs*, 142 S. Ct. at 2228.

9. *See Dobbs*, 142 S. Ct. at 2249 (discussing Henry de Bracton's thirteenth-century treatise and William Blackstone's eighteenth-century commentary on the treatment of abortion as homicide or manslaughter by "ancient law" (first citing 2 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE LIBRI QUINQUE 279 (T. Twiss ed., 1879); and then citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129–30 (7th ed. 1775))).

However, Joseph Dellapenna has exhaustively traced the history of state abortion legislation in *Dispelling the Myths of Abortion History*. Dellapenna began his chronicling of state abortion legislation in the 1800s, noting that many states, including North Carolina, enacted laws that punished pregnant persons and abortion providers for procuring or providing abortions.[10] By 1841, ten states had passed statutes that criminalized abortion.[11] These laws were similar to common law era laws against abortion, meaning some included a distinction based on quickening (when the mother first feels the child move in the womb) and some did not.[12] In 1840, Maine "became the first state to outlaw all abortions," and, in 1851, California outlawed all advertising by abortion providers.[13] These laws led to more laws criminalizing abortion, with some states criminalizing all abortions without a quickening requirement and allowing prosecution of not just the abortion provider, but also the pregnant person who underwent the procedure.[14] At the time the Fourteenth Amendment was ratified in 1868, thirty of the thirty-seven states had statutes that criminalized abortions with three states criminalizing abortion only after quickening.[15] Twenty states punished all abortions regardless of the stage of the pregnancy[16] and "seven states punished abortion less severely before quickening."[17] Seven other states, including North Carolina, did not have any abortion-related crime statutes in 1868,[18] relying instead on the common law of homicide. It was not until 1881 that North Carolina adopted its first statute criminalizing abortion, which allowed prosecution of an abortion provider and made no distinction between abortion before and after quickening.[19]

10. JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 317–20, 318 n.13 (2006) (citing An Act to Punish the Crime of Producing Abortion, ch. 351, §§ 1–2, 1881 N.C. Sess. Laws 584, 584–85 (codified as amended at N.C. GEN. STAT. §§ 14-44 to -45)).

11. *Id.* at 315 & n.3 (recording the relevant laws for Arkansas, Connecticut, Illinois, Indiana, Maine, Mississippi, Missouri, New York, Ohio, and Iowa (as a territory)).

12. *See id.* at 315. The United States Supreme Court defined "quickening" as "the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy." *Dobbs*, 142 S. Ct. at 2249. *But see id.* at 2249 n.24 (noting some historical controversy over the actual meaning of the term as applied in abortion regulation).

13. DELLAPENNA, *supra* note 10, at 315.

14. *Id.* at 298 & n.295 (recording the relevant laws for Arizona, California, Connecticut, Delaware, Idaho, Minnesota, Montana, Nevada, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming).

15. *Id.* at 315–17.

16. *See id.* at 316 & n.11 (recording the relevant laws for Alabama, California, Connecticut, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nevada, New Jersey, New York, Ohio, Oregon, Texas, Vermont, Virginia, and West Virginia).

17. *Id.* at 316–17, 317 n.12 (recording the relevant laws for Florida, Kansas, Michigan, Nebraska, New Hampshire, Pennsylvania, and Wisconsin).

18. *Id.* at 317–18, 318 n.13 (recording the relevant laws for Delaware, Georgia, Kentucky, North Carolina, Rhode Island, South Carolina, and Tennessee).

19. *Id.*; *see also* An Act to Punish the Crime of Producing Abortion, ch. 351, §§ 1–2, 1881 N.C. Sess. Laws 584, 584–85 (codified as amended at N.C. GEN. STAT. §§ 14-44 to -45).

During the nineteenth century, states approached prosecution and punishment for abortions and attempted abortions differently. Some states classified anti-abortion laws as crimes of "manslaughter" or "murder" of an unborn child and generally classified abortion as a crime against a person, such as homicide.[20] State laws also varied in their focus on the abortion provider, the pregnant person, and the unborn child.[21] Some states provided a harsher punishment for abortion providers who caused the death of a pregnant person and a lesser punishment for the abortion provider who caused the death of an unborn child.[22] In other jurisdictions, the punishment for the death of either the pregnant person or unborn child were the same, with some states assigning lesser punishments to abortion-related crimes and some states punishing abortion equally with homicide.[23] Inherent in all state statutes of this time was the question of fetal personhood because the common justification for abortion statutes was to protect fetal life.[24]

In 1921, the Supreme Court of North Carolina ruled on an appeal of a criminal conviction under the then-existing anti-abortion statute in *State v. Powell*.[25] The court held that the State needed to prove the defendant had advised a woman to take a drug with the intent of causing the woman to destroy

20. *See id.* at 319 (citing James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 42–44 (1985)); *see, e.g.*, Act of Aug. 6, 1868, ch. 1637, § 11, 1868 Fla. Laws 61, 64 (repealed 1972) (designating the act of abortion that causes the death of a child as manslaughter in the second degree).

21. DELLAPENNA, *supra* note 10, at 319–20; *see also* State v. Powell, 181 N.C. 515, 515, 106 S.E. 133, 133 (1921).

22. DELLAPENNA, *supra* note 10, at 319 (identifying that Kentucky, Texas, and West Virginia "provided expressly for a heavier punishment for the death of the mother than the death of the unborn child" (citing Witherspoon, *supra* note 20, at 40–42)).

23. *See id.* ("In 1868, nine statutes expressly provided punishment for attempted abortion that increased identically should either the mother or the unborn child die."); *see also id.* at 319 n.22 (recording the relevant laws for Florida, Michigan, Minnesota, Missouri, New York, Ohio, Oregon, Pennsylvania, and Wisconsin).

24. *See id.* at 320–21 ("When placed against the backdrop of reduced recourse to the death penalty and the gradual abandonment of torture and corporal punishment in criminal processes, . . . the steady expansion of the legal protection afforded a fetus is . . . entirely consistent with 'the broad canvas of humanitarian thought and practice in Western society from the 17th to the 20th century.'" (alteration omitted) (quoting CARL DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 247 (1980))).

25. State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921). The statute in *Powell* stated:

> If any person shall willfully 'prescribe for' any woman, either pregnant or quick with child, . . . or advise or procure any such woman to take any medicine, drug or substance whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, he shall be guilty of a felony . . . .

Id. at 515, 106 S.E. at 133. The defendant was accused of advising a pregnant woman to take a drug for the purpose of aborting her unborn child. *Id.* The court clarified that the defendant's act was not an attempt to commit a crime but a crime in and of itself under the applicable statute. *Id.*

the child.[26] The court held that "it is the intent with which the drug is administered, and the purpose to destroy the child" that would make the defendant's actions punishable under the statute.[27] The court also held that the State did not have to prove the defendant procured the drug himself or that the woman actually used the drug.[28] Rather, "[a]ll that [was] necessary [was] to prove that he prescribed it or advised its use with illegal intent."[29] Not only did this opinion clarify the necessary proof under the statute by aligning the criminal act with the interests of the unborn child, but it also affirmed that the purpose of the abortion-related crime statutes in North Carolina was to protect fetal life. This brief decision clarified that the focus of North Carolina law criminalizing abortion was to protect the unborn child rather than to protect maternal life.[30]

There is no reported decision from a North Carolina court in the years before *Roe v. Wade* wherein a pregnant person was prosecuted for an abortion-related crime and an unborn child was identified as the victim of the abortion-related crime.[31] Between 1880 and 1972, North Carolina appellate courts heard appeals in twenty-three cases where individuals were prosecuted for abortion-related crimes.[32] Of those cases, seventeen were prosecutions for abortion as defined by the statute;[33] three were prosecutions for murder by illegal

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *See* DELLAPENNA, *supra* note 10, at 320; *see also Powell*, 181 N.C. at 515, 106 S.E. at 133 ("It is the intent with which the drug is administered, and the purpose to destroy the child, that is made indictable under our statute . . . .").

31. *See generally* Paul Benjamin Linton, *Abortion Convictions Before* Roe, 36 ISSUES L. & MED. 77 (2021) (providing a detailed analysis of state law prosecutions of abortion-related crimes prior to the legalization of abortion under *Roe v. Wade*).

32. *See id.* at 101.

33. *See id.* (first citing State v. Slagle, 83 N.C. 630 (1880); then citing State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901); then citing State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914); then citing State v. Brady, 177 N.C. 587, 99 S.E. 7 (1919); then citing *Powell*, 181 N.C. at 515, 106 S.E. at 133; then citing State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921); then citing State v. Russell, 185 N.C. 611, 117 S.E. 807 (1923); then citing State v. Geurukus, 195 N.C. 642, 143 S.E. 208 (1928); then citing State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937); then citing State v. Baker, 212 N.C. 233, 193 S.E. 22 (1937); then citing State v. Thompson, 216 N.C. 800, 4 S.E.2d 615 (1939); then citing State v. Manning, 225 N.C. 41, 33 S.E.2d 239 (1945); then citing State v. Furley, 245 N.C. 219, 95 S.E.2d 448 (1956); then citing State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); then citing State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960); then citing State v. Brooks, 267 N.C. 427, 148 S.E.2d 263 (1966); and then citing State v. Coleman, 17 N.C. App. 11, 193 S.E.2d 395 (1972)).

abortion;[34] and three were prosecutions for manslaughter by illegal abortion.[35] Prior to 1933, there were eleven prosecutions of people, primarily men, who had assisted women in procuring abortions by either providing drugs or transporting women to locations where they could access an illegal abortion procedure.[36] In six of the nine cases spanning 1946 to 1972, the defendants were medical providers, some with M.D. credentials, each of whom performed an illegal abortion procedure on a pregnant person who died or became ill after the procedure.[37] In three of those cases involving medical provider defendants, the abortion provider was a woman.[38]

In 1967, legislators in North Carolina began discussing a reformed abortion statute in North Carolina that allowed for therapeutic exceptions.[39] The model for a proposed reform statute originated from conversations in 1959 between members of the American Law Institute ("ALI").[40] Several influential academics sought to persuade the ALI to draft a standard abortion statute for comprehensive state adoption in keeping with the ALI's work on the Model Penal Code and other model laws.[41] The reform statute permitted therapeutic exceptions to the criminalization of abortion (1) "if two doctors agreed that there was a 'substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother,'" (2) "if the fetus had itself

34. *See id.* (first citing State v. Mills, 116 N.C. 992, 21 S.E. 106 (1895); then citing State v. Layton, 204 N.C. 704, 169 S.E. 650 (1933); and then citing State v. Gardner, 227 N.C. 37, 40 S.E.2d 415 (1946)).

35. *See id.* (first citing State v. Summers, 173 N.C. 775, 92 S.E. 328 (1917); then citing State v. Stroud, 254 N.C. 765, 119 S.E.2d 907 (1961); and then citing State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962)).

36. Specifically, prior to 1931, nine of the eleven people prosecuted in North Carolina for assisting a woman in procuring an abortion were men. *Slagle*, 83 N.C. at 631; *Mills*, 116 N.C. at 992, 21 S.E. at 106; *Crews*, 128 N.C. at 581, 38 S.E. at 293; *Summers*, 173 N.C. at 776, 92 S.E. at 329; *Brady*, 177 N.C. at 587, 99 S.E. at 7; *Powell*, 181 N.C. at 515, 106 S.E. at 133; *Martin*, 182 N.C. at 847, 109 S.E. at 75; *Russell*, 185 N.C. at 611, 117 S.E. at 807; *Geurukus*, 195 N.C. at 643, 143 S.E. at 208. Only two of those eleven people were women. *Layton*, 204 N.C. at 704, 169 S.E. at 650 (upholding the conviction of a female abortion provider who prosecuted and sentenced to five years imprisonment for murder when a pregnant woman died from complications caused by an illegal abortion procedure); *Shaft*, 166 N.C. at 408, 81 S.E. at 932 (upholding the conviction of woman who was prosecuted and sentenced to three years imprisonment for advising a pregnant woman to take a certain drug to procure an abortion).

37. Linton, *supra* note 31, at 101 (first citing *Gardner*, 227 N.C. at 37, 40 S.E.2d at 415; then citing *Furley*, 245 N.C. at 219, 95 S.E.2d at 448; then citing *Lee*, 248 N.C. at 327, 103 S.E.2d at 295; then citing *Hoover*, 252 N.C. at 133, 113 S.E.2d at 281; then citing *Mitchner*, 256 N.C. at 620, 124 S.E.2d at 831; and then citing *Coleman*, 17 N.C. App. at 11, 193 S.E.2d at 395).

38. *See Furley*, 245 N.C. at 219, 95 S.E.2d at 448; *Hoover*, 252 N.C. at 133, 113 S.E.2d at 281; *Coleman*, 17 N.C. App. at 11, 193 S.E.2d at 395.

39. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 327–29 (1998).

40. *Id.* at 277.

41. *Id.*

a 'grave physical or mental defect,'" or (3) "if the pregnancy was the result of rape or incest."[42]

Legislative proponents of an ALI-style reform statute were able to negotiate its "successful transit" through the North Carolina Senate in 1967 without any significant public attention or resistance.[43] Within a month of senate approval, the bill reached and was passed by the house, subject to minor amendments.[44] Some lawmakers contended North Carolina's bill was "somewhat narrower" than a similar ALI-style bill passed in Colorado because North Carolina's statute included a residency requirement and did not expressly authorize abortions on mental health grounds.[45] Despite these differences, North Carolina's adoption of the ALI-style bill was part of a larger push for states to liberalize their approach to criminalized abortion.[46]

The ALI-style law in North Carolina essentially eliminated the prosecution of medical providers offering therapeutic abortions to women in the state. Prior to the enactment of the ALI-style law, prosecutions of medical providers in North Carolina often raised credibility questions between the state's witnesses and medical providers who credibly argued, based on their medical expertise, abortions were performed due to therapeutic needs.[47] The new ALI-style law, which required medical authorization in advance of the procedure, effectively decriminalized abortions conducted in a medical facility

42. *Id.* (quoting MODEL PENAL CODE § 230.3(1) (AM. L. INST., Proposed Official Draft 1962)); *see also* Alan F. Guttmacher, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, 23 CASE W. RES. L. REV. 756, 761–62 (1972).

43. GARROW, *supra* note 39, at 327–30, 330 n.87 (citing SAGAR C. JAIN & STEVEN W. SINDING, CAROLINA POPULATION CENTER, NORTH CAROLINA ABORTION LAW 1967: A STUDY IN LEGISLATIVE PROCESS *passim* (1968)); *see also* H. Hugh Stevens Jr., Comment, *Criminal Law-Abortion-The New North Carolina Abortion Statute*, 46 N.C. L. REV. 585, 586–87 (1968) ("The only organized opposition to the recent abortion law reforms has been conducted by the Catholic spokesmen; their efforts stimulated heated public controversies which delayed reform in both Colorado and California. Public uproar was notably absent from the North Carolina experience, however.").

44. GARROW, *supra* note 39, at 328–29; *see also* Act of May 9, 1967, ch. 367, 1967 N.C. Sess. Laws 394 (codified as amended at N.C. GEN. STAT. §§ 14-44, -46) (adopting the essential provisions of the Model Penal Code's section 230.3 from the 1962 Proposed Official Draft).

45. GARROW, *supra* note 39, at 328–29; *see also* Stevens Jr., *supra* note 43, at 591–92. *Compare* Act of April 25, 1967, ch. 190, 1967 Colo. Sess. Laws 284 (repealed 2013) (making special reference to the "mental health" of pregnant woman), *with* Act of May 9, 1967, ch. 367, 1967 N.C. Sess. Laws 394 (codified as amended at N.C. GEN. STAT. §§ 14-44, -46) (rejecting a mental health provision, demonstrating the North Carolina General Assembly's support for the medical professional's ability to assess the mental health of the pregnant woman without a specific requirement in the law).

46. North Carolina joined California and Colorado, which were held out as early victories in the national abortion reform movement, even though the effect of the North Carolina bill would be to provide legal abortions to less than five percent of the women seeking abortions. *See* GARROW, *supra* note 39, at 332 n.88. "The North Carolina law reform sponsor Art Jones complained that 'the net result of the new law was merely to make legal what doctors actually had been doing previously.'" *Id.* at 375.

47. *See* GARROW, *supra* note 39, at 327–29.

under a doctor's care, meaning prosecution under abortion-related crime statutes would now be limited to unskilled providers or pregnant persons.

In sum, prior to *Roe*, the criminalization of abortion in North Carolina was focused on providers engaged in illegal activity and persons who helped a pregnant person procure an abortion either through some form of self-administration, like ingestion of a drug, or through an illegal, unsafe procedure.[48] North Carolina does not have a history of prosecuting pregnant persons for the act of aborting their own unborn children.[49] Furthermore, North Carolina has previously identified the purpose of abortion-related crime legislation as protection of the unborn child, not protection of the rights of others who claim legal relationships to the unborn child.[50]

B. *North Carolina Abortion Law After* Roe v. Wade

After *Roe*, it was not unlawful in North Carolina to advise, procure, or produce a miscarriage or perform an abortion in the first twenty weeks of a person's pregnancy as long as certain statutorily prescribed conditions were met.[51] Specifically, the abortion procedure must have been performed "by a qualified physician licensed to practice medicine in North Carolina in a hospital or clinic certified by the Department of Health and Human Services [as] a suitable facility for the performance of abortions."[52] At the same time, however, another North Carolina law that criminalized the use of drugs or instruments to destroy an unborn child remained on the books.[53] That statute provides that "any person [who] shall willfully administer [prescribe, advise, or procure] to any woman, either pregnant or quick with child" any drug, instrument, or other means with intent to destroy a child "shall be punished as a Class H felon."[54] North Carolina also did not repeal a statute that subjected "any person" to punishment as a Class I felon who intentionally used drugs or instruments to produce a miscarriage or injury to any pregnant woman.[55]

48. *See* Linton, *supra* note 31, at 101.

49. *See id.*

50. *See* State v. Powell, 181 N.C. 515, 515, 106 S.E. 133, 133 (1921).

51. Prior to the enactment of the twelve-week ban in July 2023, an abortion was not unlawful in North Carolina during the first twenty weeks of a woman's pregnancy when performed by a qualified physician. Act of June 4, 2015, ch. 62, sec. 7.(a), § 14-45.1, 2015 N.C. Sess. Laws 143, 143–44, *repealed by* Act of May 16, 2023, ch. 14, sec. 1.1, § 14-45.1, 2023 N.C. Sess. Laws __, __. Excluded from this time frame was an abortion in the case of a medical emergency. *Id.*

52. *Id.*

53. N.C. GEN. STAT. § 14-44 (2024).

54. *Id.*

55. *Id.* § 14-45. Article 11 of chapter 14 of the General Statutes of North Carolina contains other abortion and kindred offenses that have been effective since *Roe* through to the present. "Concealing birth of child," which criminalizes "secretly burying or otherwise disposing of the dead body of a newborn," is punished as a Class I felony. *Id.* § 14-46. The crime of aiding and abetting "concealing the

Notably, this suite of laws assumes the vulnerable person in an illegal abortion is the pregnant person themself.[56] North Carolina abortion laws also included common law interpretations clarifying that death resulting from an unlawful abortion is culpable homicide unless the abortion is necessary to save the life of the pregnant person or unborn child or to protect the health of a pregnant person.[57] Similarly, North Carolina murder prosecutions resulting from abortion-related crimes have identified the victim as the pregnant person even in cases where the child dies and the pregnant person survives.[58] In fact, a North Carolina appellate court has never identified the unborn child or the nonpregnant parent as the victim of the criminal act in any of the twenty-three abortion-related criminal cases they decided between 1880 and 1972.[59]

C. *North Carolina Abortion Law After* Dobbs

During the summer of 2022, the United States Supreme Court announced its decision in *Dobbs v. Jackson Women's Health Organization*.[60] In *Dobbs*, the

birth of a child" is a Class 1 misdemeanor. *Id.* Before July 2023, no other crime existed in North Carolina that criminally punished a person who obtained for herself or performed an abortion within or past the twenty-week gestational time frame.

56. *See* State v. Mitchner, 256 N.C. 620, 622, 124 S.E.2d 831, 832 (1962) (prosecuting a male abortion provider for causing the death of a woman); State v. Layton, 204 N.C. 704, 705, 169 S.E. 650, 650 (1933) (prosecuting a female abortion provider for murder when a pregnant woman died as a result of an abortion procedure); State v. Gardner, 227 N.C. 37, 37–38, 40 S.E.2d 415, 415–16 (1946) (prosecuting a male medical doctor and abortion provider for murder after a pregnant woman died as a result of an illegal abortion); State v. Stroud, 254 N.C. 765, 765–67, 119 S.E.2d 907, 907–09 (1961) (prosecuting two men for manslaughter for an illegal abortion when a pregnant woman died after being taken by the unborn child's father to an illegal abortion provider); State v. Mills, 116 N.C. 992, 995–96, 21 S.E. 106, 108 (1895) (prosecuting a man for homicide after taking a pregnant woman for an unsuccessful illegal abortion then killing her).

57. § 14-23.2. That statute provides that a person who "[w]illfully and maliciously commits an act with the intent to cause the death of the unborn child" or "[c]auses the death of the unborn child in perpetration or attempted perpetration of" murder in the first and second degree shall be guilty of a Class A felony and be subjected to a punishment of life imprisonment without parole. *Id.* § 14-23.2(b)(1). An offender who "[c]ommits an act causing the death of the unborn child that is inherently dangerous to human life and is done so recklessly and wantonly that it reflects disregard of life" is subjected to the same sentence as a second-degree murder conviction. *Id.* § 14-23.2(b)(2). However, "[n]othing in this Article shall be construed to permit the prosecution [of] [a]cts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment." *Id.* § 14-23.7.

58. *See, e.g.*, State v. Furley, 245 N.C. 219, 95 S.E.2d 448 (1956). The defendant was accused of performing an unlawful abortion on an eighteen-year-old woman, resulting in the young woman's illness and injury and the destruction of her two to three months old fetus. *Id.* at 219–20, 95 S.E.2d at 448. The focus of the prosecution was evidence of the illegal procedure and harm to the pregnant person, not on the destruction of the unborn child. *See id.* The defendant argued that the cause of the child's death was a miscarriage, not an abortion. *Id.* at 220, 95 S.E.2d at 449. A jury returned a guilty verdict on the charge of using instruments to produce an abortion. *Id.* There is no indication she was charged with a crime related to the death of the unborn child. *See id.*

59. *See* Linton, *supra* note 31, at 101.

60. 142 S. Ct. 2228, 2228 (2022).

Court held that "*Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment."[61] The Court's opinion granted states the full authority to determine legislation relative to abortion.[62] Following the *Dobbs* decision, thirteen states have banned almost all abortions.[63] Seven states have banned abortion after a set gestational limit spanning between six to eighteen weeks of pregnancy.[64] North Carolina is one of those eight states, setting a post-*Dobbs* gestational limit of twelve weeks, as compared to a pre-*Dobbs* gestational limit of twenty weeks.[65] Two states have blocked attempts to ban abortions.[66] Twenty-eight states and the District of Columbia have legalized abortion, with some states imposing no gestational limit,[67] others imposing a *Casey*-based gestational limit at viability,[68] and yet others imposing a limit at twenty-two or twenty-four weeks of pregnancy.[69]

North Carolina has used a broad approach to its statutory enactments regarding abortion.[70] The pre-*Dobbs* abortion statute, which made abortions past twenty weeks of gestational age unlawful, was part of chapter 14 of the General

61. *Id.* at 2242.

62. *Id.* at 2243.

63. Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia have banned almost all abortions. Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/FLN8-2S2E (dark archive)] (last updated Dec. 3, 2024, 3:44 PM) (tracking abortion bans across the country and updating periodically based on changing laws).

64. Florida, Georgia, Iowa, and South Carolina have partial bans subject to a six-week gestational limit. *Id.* Nebraska and North Carolina have partial bans subject to a twelve-week gestational limit. *Id.* Utah has a partial ban subject to an eighteen-week gestational limit. *Id.*

65. *Id.*; *see also* Act of May 16, 2023, ch. 14, sec. 1.2 § 90-21.81A, 2023 N.C. Sess. Laws __ (codified at N.C. GEN. STAT. § 90-21.81A) (imposing a partial abortion ban with a twelve-week gestational limit). The law enacted in North Carolina that imposed a twelve-week gestational limit was modified in other respects by a district court judge's restraining order that blocked the implementation of restrictions that would interfere with the administration of abortion pills to women in the initial weeks of pregnancy. *See infra* notes 89–98 and accompanying text.

66. Montana and Wyoming have blocked attempts to ban abortion. McCann & Walker, *supra* note 63.

67. Alaska, Colorado, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Vermont, and Washington, D.C. have legalized abortion with no gestational limit. *Id.*

68. Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Nevada, New York, North Dakota, Rhode Island, Virginia, and Washington have legalized abortion with a *Casey*-based gestational limit at viability. *Id.*

69. Kansas, Ohio, and Wisconsin have legalized abortion with a twenty-two-week gestational limit. *Id.* New Hampshire and Pennsylvania have legalized abortion with a twenty-four-week gestational limit. *Id.*

70. North Carolina statutory amendments and additions have been codified into chapter 14 of the General Statutes of North Carolina, which addresses criminal law, N.C. GEN. STAT. §§ 14-23.1 to .8, 14-44 to -46.1 (2024), and chapter 90, which addresses the practice of medicine, *id.* §§ 90-21.80 to .93, 90-21.140 to .146.

Statutes of North Carolina—the criminal code.[71] The revised post-*Dobbs* abortion statute in article 11 of chapter 14 titled "Abortion and Kindred Offenses,"[72] maintained the subsections that make it a felony to use drugs to destroy an unborn child and the use of drugs or instruments to produce a miscarriage or injure a pregnant person.[73]

The most significant changes, however, occurred in section 45.1 of the General Statutes of North Carolina, which repealed the pre-*Dobbs* version of North Carolina abortion law.[74] The post-*Dobbs* statute expressly provides for the twelve-week gestational age restriction for lawful abortion, making it illegal for a healthcare provider to perform an abortion after the fetus reaches twelve weeks of gestational age.[75] The statute goes on to provide detail on the inspection of clinics, the exception for abortion past twelve weeks in the event of medical emergency, and the record a healthcare provider must keep when performing an abortion on a fetus with a gestational age over sixteen weeks.[76] The statute also provides specific protections for healthcare providers who "shall state an objection to abortion on moral, ethical, or religious grounds [who] shall be required to perform or participate in medical procedures that result in abortion."[77]

The statute enacted post-*Dobbs* in North Carolina cross-references law codified in the statutory sections of chapter 90 of the General Statutes of North Carolina, which regulates "Medicine and Allied Occupations."[78] The relevant subsections of chapter 90 include, among other provisions, liability-related

71. Act of June 4, 2015, ch. 62, sec. 7.(a), § 14-45.1, 2015 N.C. Sess. Laws 143, 143–44, *repealed by* Act of May 16, 2023, ch. 14, sec. 1.1, § 14-45.1, 2023 N.C. Sess. Laws __, __.

72. §§ 14-44 to -46.1.

73. *Id.* § 14-44 (discussing the use of drugs or instruments to destroy an unborn child); *id.* § 14-45 (discussing the use of drugs or instruments to produce miscarriage or injure a pregnant woman).

74. Former section 14-45.1 was repealed by North Carolina Session Law 2023-14, effective July 1, 2023. Act of June 4, 2015 § 7.(a), *repealed by* Act of May 16, 2023 § 1.1.

75. Act of May 16, 2023 § 1.2.

> Notwithstanding any of the provisions of G.S. 14-44 and G.S. 14-45 . . . it shall not be unlawful to advise, procure, or cause a miscarriage or an abortion . . . [d]uring the first 12 weeks of a woman's pregnancy, when the procedure is performed by a qualified physician licensed to practice medicine in this state in a hospital, ambulatory center, or clinic certified by the Department of Health and Human Services to be a suitable facility for the performance of abortions.

Id. The statute further states that after the twelfth week of pregnancy and through the twentieth week of pregnancy, abortion is permitted when it is the result of rape or incest, and abortion until the twenty-fourth week of pregnancy is allowed only when there is a "life-limiting anomaly" as defined by the statute. *Id.*

76. *Id.*

77. *See id.* ("The refusal of a physician, nurse, or healthcare provider to perform or participate in these medical procedures shall not be a basis for damages for the refusal or for any disciplinary or any other recriminatory action against the physician, nurse, or healthcare provider.").

78. *See* N.C. GEN. STAT. §§ 90-21.140 to .146 (Born-Alive Survivors Protection Act).

exclusions for medical providers and patients.[79] For example, section 90-21.142 sets forth the requirements for healthcare practitioners when an attempt to perform an abortion results in a child born alive.[80] Another, section 90-21.144, explicitly bars "prosecution of mothers of infants born alive," stating that "[t]he mother of a child born alive may not be prosecuted for a violation of, or attempt to or conspiracy to commit a violation of, [section] 90-21.142 . . . involving the child who was born alive."[81]

This section is the North Carolina General Assembly's first overt reference to the pregnant person as the possible wrongdoer with regards to criminal acts of abortion. Section 90-21.141 records the General Assembly's findings that if an abortion results in a live birth, the infant is a legal person for all legal purposes and has the same protection of law that would arise for any newborn person.[82] This section, positioned as it is within the larger article titled as the Born-Alive Abortion Survivors Protection Act ("BAASPA"), represents not only a legislative concern that abortions would render the live birth of a child in critical need of healthcare but also inherently maps out the roles of the pregnant person and the healthcare provider.[83] The BAASPA gives legal protection to the healthcare provider while imposing a duty to care for a child born because of a failed abortion procedure.[84] For the same reason, the

79. *Id.*

80. *Id.* § 90-21.142. The statute states:

> In the case of an abortion or an attempt to perform an abortion that results in a child born alive, any healthcare practitioner present at the time the child is born alive shall do all of the following:
>
> (1) Exercise the same degree of professional skill, care, and diligence to preserve the life and health of the child as a reasonably diligent and conscientious healthcare practitioner would render to any other child born alive at the same gestational age.
>
> (2) Following the exercise of skill, care, and diligence required under subdivision (1) of this section, ensure that the child born alive is immediately transported and admitted to a hospital.

Id.

81. *Id.* § 90-21.144.

82. *Id.* § 90-21.141. The statute states:

> The General Assembly makes the following findings:
>
> (1) If an abortion results in the live birth of an infant, the infant is a legal person for all purposes under the laws of North Carolina and entitled to all the protections of such laws.
>
> (2) Any infant born alive after an abortion or within a hospital, clinic, or other facility has the same claim to the protection of the law that would arise for any newborn, or for any person who comes to a hospital, clinic, or other facility for screening and treatment or otherwise becomes a patient within its care.

Id.

83. *See id.*

84. *See id.* § 90-21.142.

BAASPA also gives immunity from prosecution to a pregnant person whose child is injured during a failed abortion procedure.[85]

In pre-*Roe* prosecutions of abortion-related crimes, North Carolina did not prosecute the pregnant person; rather, the prosecutorial focus was on the providers and others who assisted the pregnant person in procuring the abortion.[86] In contrast, the current North Carolina law seems to envision a pregnant person's potential liability for an abortion-related crime. A legislative grant of immunity from prosecution when a legal abortion results in a live birth implies criminal liability when an abortion leads to fetal death.[87] This section, when read with other sections of the BAASPA, which provide liability protection to healthcare providers when an abortion results in a live birth,[88] suggests a change in focus from abortion provider liability to abortion patient liability.

North Carolina's post-*Dobbs* legislative action was met with resistance from healthcare providers.[89] Planned Parenthood South Atlantic and Beverly Gray, M.D. sued in the United States District Court for the Middle District of

85. *See id.* § 90-21.144 (barring the prosecution of mothers of infants born alive).

86. *See supra* note 31–38 and accompanying text.

87. *See* § 90-21.144 ("The mother of a child born alive may not be prosecuted for a violation of or attempt to or conspiracy to commit a violation of G.S. 90-21.142 or G.S. 90-21.143 involving the child who was born alive."). Note that the following two sections of the Born-Alive Abortion Survivors Protection Act ("BAASPA") address the actions of healthcare providers specifically and do not apply to pregnant women seeking abortion services. Section 90-21.142 sets out mandatory requirements for "any healthcare practitioner present at the time the child is born alive." *Id.* § 90-21.142. Section 90-21.143 requires any healthcare practitioner or employee of a hospital, physician's office, or abortion clinic to report noncompliance of any section of the BAASPA. *Id.* § 90-21.143.

88. *Id.* § 90-21.142; *cf.* Act of May 16, 2023, ch. 14, sec. 1.2 § 90-21.81C, 2023 N.C. Sess. Laws __ (codified at N.C. GEN. STAT. § 90-21.81C) ("No physician, nurse, or any other healthcare provider who shall state an objection to abortion on moral, ethical, or religious grounds shall be required to perform or participate in medical procedures which result in an abortion. The refusal of a physician, nurse, or healthcare provider to perform or participate in these medical procedures shall not be a basis for damages for the refusal or for any disciplinary or any other recriminatory action against the physician, nurse, or healthcare provider.").

89. *See* Brief for Summary Judgment at 13–14, Planned Parenthood S. Atl. v. Stein, 680 F. Supp. 3d 595 (M.D.N.C. 2023) (No. 1:23-CV-480). Senate Bill 20 was opposed by the North Carolina Medical Society, the North Carolina Obstetrical and Gynecological Society, the North Carolina Academy of Family Physicians, and the Governor, who argued the Bill would make abortion unavailable to many women, particularly those with lower incomes, those who live in rural areas, and those who already have limited access to healthcare. Anne Blythe, Rachel Crumpler & Rose Hoban, *Governor Stamps Veto on Hastily Passed New Abortion Restrictions*, N.C. HEALTH NEWS (May 15, 2023), https://www.northcarolinahealthnews.org/2023/05/15/governor-stamps-veto-on-hastily-passed-new-abortion-restrictions/ [https://perma.cc/5WPX-NRMG]. Various legislators campaigned on promises to protect abortion rights yet voted for the adoption of the Bill. *Id.* Critics of the Bill expressed concern at the speed with which the legislation was adopted, noting "[i]t took a mere 48 hours for the legislature to consider and pass a bill that forces a 72-hour waiting period on women seeking an abortion after they've consulted with a doctor." Cap. Broad. Co., Editorial, *N.C. Senate Bill 20. How Not to Make a Law*, WRAL NEWS, https://www.wral.com/story/editorial-nc-senate-bill-20-how-not-to-make-a-law/20864391/ [https://perma.cc/WJ25-LKVS] (last updated May 31, 2023, 10:35 PM).

North Carolina to enjoin enforcement of certain portions of the post-*Dobbs* North Carolina abortion law.[90] They challenged the subsections that addressed the hospitalization requirement for surgical abortions after twelve weeks and the ban on advising, procuring, or causing abortions after twelve weeks.[91] In ruling on the motion, the federal district court enjoined the enforcement of sections requiring physicians prescribing an abortion-inducing drug to document the existence of an intrauterine pregnancy.[92] The plaintiffs argued that this provision would prevent physicians from being able to prescribe medications like Plan B to women absent a diagnosis of intrauterine pregnancy.[93]

The court denied the request to restrain enforcement of the hospitalization requirement as the provision was not scheduled to go into effect until a later date, rendering a temporary restraining order inappropriate.[94] The court also denied the plaintiffs' petition as to the provision of North Carolina's post-*Dobbs* abortion law that made it illegal to "advise, procure, or cause" a pregnant person to have a miscarriage or abortion after twelve weeks of pregnancy because the amended law did not present a First Amendment problem.[95] The plaintiffs argued that the original provision, if enforced, would violate their free speech rights.[96] As the petition was pending, however, the North Carolina General Assembly amended this provision, removing prohibition on advising a pregnant person to have an abortion, and the court then construed the revised provision as "not impos[ing] civil, criminal, or professional liability on an individual who advises, procures, causes, or otherwise assists someone in obtaining a lawful out-of-state abortion."[97] This amendment is noteworthy as it again reveals the General Assembly's contemplation of a pregnant person's liability—both civilly and criminally—if they terminate a pregnancy outside of the narrow contours of North Carolina's post-*Dobbs* legal scheme. By amending the statute to exempt from liability third parties who assist a pregnant person in procuring an out-of-state abortion, the General Assembly has narrowed the universe of

90. *See* Brief for Summary Judgment at 24–25, *Stein*, 680 F. Supp. 3d at 595 (No. 1:23-CV-480).

91. *Stein*, 680 F. Supp. 3d at 597.

92. *Id.* at 600 ("Upon receipt of this Order, each and every defendant, their agents, and successors in office are restrained, enjoined and forbidden from enforcing the requirement . . . that a 'physician prescribing, administering, or dispensing an abortion-inducing drug' shall '[d]ocument in the woman's medical chart the . . . existence of an intrauterine pregnancy." (first omission added) (quoting N.C. GEN. STAT. § 90-21.83B(a)(7) (2023))).

93. *See id.* at 599–600 (discussing why the requirement would function as an abortion ban in all but a very small number of cases).

94. *Id.* at 597, 600.

95. *Id.* at 598, 600–01.

96. *Id.* at 598 ("To the extent that the advising ban did prohibit people from helping others obtain lawful out-of-state abortions, the ban was also highly likely to violate the First Amendment.").

97. *Id.* at 598, 600–01; *see* Act of June 27, 2023, ch. 65, sec. 14.1(b), § 90–21.81A, 2023 N.C. Sess. Laws __ , __ (codified at N.C. GEN. STAT. § 90–21.81A).

persons potentially criminally and civilly liable for an unlawful abortion, thereby focusing the abortion restriction and potential punishment on the pregnant person.[98]

II. NORTH CAROLINA'S CRIME VICTIMS' RIGHTS ACT

A nagging question since *Dobbs* is whether abortions will create criminal or civil liability for pregnant persons.[99] One circumstance in which this question arises is where a pregnant person leaves their home state that has abortion restrictions, to procure an abortion in another state. Another involves self-administration of Plan B or a legal abortion-inducing drug.[100] Prior to *Dobbs*, abortion-related homicide prosecutions were focused on cases involving the death of the pregnant person, not the death of the unborn child.[101] However, as the focus shifts from protection of pregnant persons to the protection of fetal

98. *Id.*

99. *See, e.g.*, Sarah McCammon, *Texas Man Sues Ex-Wife's Friends for Allegedly Helping Her Get Abortion Pills*, NPR, https://www.npr.org/2023/03/11/1162805773/texas-man-sues-abortion-pills [https://perma.cc/UNB9-UWDX] (last updated Mar. 11, 2023, 3:13 PM). A male plaintiff, Marcus Silva, filed a wrongful death lawsuit against three of his ex-wife's friends for allegedly helping his ex-wife obtain pills to induce an abortion. *Id.* Silva sued based on Texas's wrongful death, murder, and anti-abortion statutes. *Id.* Because the abortion took place after the Supreme Court's ruling in *Dobbs*, the suit alleged the abortion was an "act of murder" and "not protected by any federal precedent." *Id.* Most recently, the district court granted a motion to compel Silva's ex-wife to produce potentially incriminating communications involving the abortion. *In re* Silva, No. 14-23-00834-CV, 2024 WL 1514565, at *1 (Tex. App. Apr. 9, 2024). The order was appealed to an intermediate court, which reversed the order and ordered the district court to vacate its order granting Silva's motion to compel. *Id.* at *5. The court of appeals noted,

> Even if [Silva's ex-wife] solely produced evidence showing that she received abortion-facilitating medication without any indication of how she received them, it would still furnish a link to the chain to prosecute her for violations of either statute upon a separately obtained showing of evidence regarding how she received them.

Id. at *3. Silva's appeal of the Texas Court of Appeals ruling to the Supreme Court of Texas was denied. *In re* Silva, 692 S.W.3d 324, 324 (Tex. 2024) (mem.).

100. *See, e.g.*, Nadine El-Bawab, *A Woman Who Took an Abortion Pill Was Charged with Murder. She Is Now Suing Prosecutors*, ABC NEWS (July 26, 2024, 2:23 PM), https://abcnews.go.com/US/woman-abortion-pill-charged-murder-now-suing-prosecutors/story?id=112300737 [https://perma.cc/5Y3V-TD5H]. A woman who took an abortion-inducing drug was admitted to the hospital after an emergency room visit. *Id.* At that visit, a fetal heart rate was found, and the woman was discharged from the hospital with instructions to follow up days later. *Id.* She returned to the hospital less than one hour after her discharge. *Id.* During this second visit, no fetal cardiac activity was detected, and a cesarean section was performed. *Id.* As a result, the woman delivered a stillborn child. *Id.* She now alleges that prosecutors and the sheriff department were given her private information in violation of federal privacy laws. *Id.* According to her, that information is what led to her arrest for murder—a charge that was later dismissed. *Id.*

101. North Carolina criminal law has always allowed for the prosecution of individuals who take the life of another individual. However, in pre-*Roe* prosecutions for abortion-related crimes, the crime was only styled as a homicide when the abortion act resulted in the death of the pregnant woman. *Compare supra* note 33 and accompanying text, *with supra* note 34–35 and accompanying text.

life,[102] concerns continue to grow that pregnant persons will become the focus of a new era of abortion-related criminal prosecutions.[103] If we are entering an era of enhanced prosecution for abortion-related crimes, we therefore need to ask who—if *not* the pregnant person—is the victim of an abortion-related crime and what is law enforcement's obligation to that alternative victim? Furthermore, if the victim is not alive, who can then assert the rights of that victim?

A. *Origins of the Movement Promoting Victim Notification Laws in the United States*

Marsalee "Marsy" Nicholas was a college student who was murdered by her ex-boyfriend in 1983.[104] Although the person accused of Marsy's murder was arrested and jailed, her family was confronted by him in a grocery store only one week after the murder, having no idea that he had been released from jail.[105] Marsy's family was not informed of her accused murderer's release because, at the time, law enforcement had no legal obligation to keep a victim's family informed of the confinement status of an accused person.[106] This experience led Marsy's family to organize efforts in their home state of California to enact laws that "consider the safety of victims and families when setting bail and release conditions."[107] As a result, the State of California passed the Victims' Bill of Rights, which was the beginning of "Marsy's Law."[108] The family's ongoing goal is to organize efforts in every state to enact a uniform crime victim rights law based on the California model, ultimately leading to an amendment to the United States Constitution protecting the rights of crime victims.[109] The aim of these laws is to ensure law enforcement take victims and their families into consideration in bail, release conditions, pleas, sentencing, and parole hearings for criminal defendants.[110]

102. *See supra* Section I.C.

103. *See supra* notes 98–99.

104. *See Marsy's Story*, MARSY'S L. FOR N.C., https://www.marsyslawfornc.com/marsys_story/ [https://perma.cc/E99G-U989 (staff-uploaded archive)]; *see also Victims' Rights*, NC PROSECUTORS' RES. ONLINE, https://ncpro.sog.unc.edu/manual/107 [https://perma.cc/SWN9-MLBF] (last updated Dec. 1, 2023); *Victim's Rights*, N.C. CONF. DIST. ATT'YS, https://www.ncdistrictattorney.org/victims/victims-rights/ [https://perma.cc/2STJ-RWBQ]; *NC Crime Victims' Rights Act Summary*, N.C. VICTIM ASSISTANCE NETWORK, https://nc-van.org/support/crime-victims-rights-marsys-law/ [https://perma.cc/QRJ8-B7D6].

105. *Marsy's Story*, *supra* note 104.

106. *Id.*

107. *Id.*

108. CAL. CONST. art. I, § 28; *see also Victims' Rights Under Marsy's Law*, CAL. DEP'T JUST., OFF. ATT'Y GEN., https://oag.ca.gov/victimservices/marsys_law [https://perma.cc/Z3SW-NNCN].

109. *Marsy's Story*, *supra* note 104.

110. *Id.*

B. *North Carolina's Crime Victims' Rights Act*

North Carolina's Crime Victims' Rights Act ("CVRA"),[111] which is based on the Marsy's Law model, was adopted by voters as an amendment to the state's constitution in the fall of 2018.[112] The law was described as a "bipartisan victims' rights initiative that seeks to amend state constitutions [in states] like North Carolina that lack guaranteed enforceable protections to crime victims."[113] The law was intended to guarantee the victim's right to be informed and give the opportunity to attend court proceedings, like bail hearings, plea agreements, and other major events.[114] For example, the law requires the accused's custody status to be reported to the victim.[115]

The CVRA imposes broad victim notification responsibilities on a host of government actors: law enforcement agencies,[116] district attorney's offices,[117] judicial officials,[118] the agency that has custody of the defendant,[119] and the Division of Community Supervision and Reentry.[120] The CVRA requires the district attorney's office to provide the victim with written material that explains the victim's rights, the responsibilities of the district attorney's office, the victim's eligibility for compensation under the Crime Victims Compensation Act, the steps taken by the district attorney's office when prosecuting, and suggestions for the victim should threats or intimidation

111. Crime Victims' Rights Act, ch. 212, 1997 N.C. Sess. Laws 1215 (codified as amended N.C. GEN. STAT. §§ 15A-830 to -839).

112. N.C. CONST. art. I, § 37; *see also* Press Release, Marsy's L. for North Carolina, North Carolina Voters Approve Stronger Constitutional Rights for Crime Victims (Nov. 6, 2018), https://www.marsyslawfornc.com/_north_carolina_voters_approve_stronger_constitutional_rights_for_crime_victims [https://perma.cc/8TT2-6HST (staff-uploaded archive)] ("Marsy's Law for North Carolina will amend the state constitution to provide an equal level of constitutional protection to victims of crime that is already afforded to the accused and convicted. . . . While there were some victims' rights protections currently in North Carolina's constitution, they are not applied the same way from county to county and there is not currently broad, statewide, enforceable language equally outlined across the state. The Marsy's Law for NC amendment will give victims of crime a voice they do not have by law in the criminal justice process . . . .").

113. *What Is the Victims' Rights Amendment Known as Marsy's Law that Passed in November, 2018?*, MARSY'S L. FOR N.C., https://www.marsyslawfornc.com/what_is_the_victims_rights_amendment_known_as_marsy_s_law_that_passed_in_november_2018 [https://perma.cc/9H39-W6E7 (staff-uploaded archive)].

114. *How Will Marsy's Law NC Provide These Rights to Victims?*, MARSY'S L. FOR N.C., https://www.marsyslawfornc.com/how_will_marsy_s_law_nc_provide_these_rights_to_victims [https://perma.cc/2ZKQ-FR32 (staff-uploaded archive)].

115. N.C. GEN. STAT. § 15A-830.5(3)–(4) (2024) (identifying nine specific victims' rights including "[t]he right to be reasonably heard at court proceedings involving a plea that disposes of the case or the conviction, sentencing, or release of the accused" and "[t]he right to receive restitution in a reasonably timely manner, when ordered by the court").

116. *Id.* § 15A-831.

117. *Id.* § 15A-832.

118. *Id.* § 15A-832.1

119. *Id.* § 15A-836.

120. *Id.* § 15A-837.

occur.[121] Relevant information must be provided to the victim within twenty-one days of the accused's arrest, and not less than twenty-four hours before the defendant's first probable cause hearing.[122]

Upon receipt of those materials, the victim can then opt in or out of victim notifications.[123] When a victim opts in to notifications, the district attorney's office must "notify [the] victim of the date, time, and place of all court proceedings of the type that the victim has elected to receive notice."[124] The notifications must be reasonable, accurate, and timely, and may be distributed electronically or via telephone.[125] The victim is also entitled to an opportunity to "confer with an attorney" from the district attorney's office to discuss the victim's opinions as to pleas, dismissals, negotiations, sentencing, and pretrial diversion programs.[126] Additionally, the victim's election as to further notices must be submitted by the district attorney's office to the court at the sentencing hearing.[127]

C. *Application of North Carolina's Crime Victims' Rights Act*

North Carolina's CVRA applies broadly to felony property crimes and offenses against a person.[128] The personal offenses identified in the CVRA include a broad range of offenses that include crime victims beyond the legislative intent of the CVRA. For example, subchapter I of chapter 14 of the General Statutes of North Carolina refers to laws that criminalize "misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud or with ethnic animosity"[129] and "accessories after the fact."[130] Another example of the CVRA's broad range is crimes contained in article 39 of chapter 14, which includes laws with respect to the protection of minors and includes, *inter alia*, felony offenses like permitting young children to use dangerous firearms.[131] The CVRA also includes enforcement of a valid domestic violence protective order and the criminal

121. *Id.* § 15A-832(a).
122. *Id.*
123. *Id.* § 15A-832(b).
124. *Id.* § 15A-832(c).
125. *Id.*
126. *Id.* § 15A-832(f).
127. *Id.* § 15A-832(g).
128. *Id.* § 15A-830(a)(7) (defining the victim as a "person against whom . . . an offense against the person or a felony property crime has been committed").
129. *Id.* § 14-3.
130. *Id.* § 14-7.
131. *Id.* §§ 14-313 to -321.2 (amended 2024).

offense of violating that order[132] as well as laws that criminalize "Offenses Against the Public Peace."[133]

Persons identified as crime victims under the CVRA are entitled to victim rights related to all crimes identified in the CVRA. The CVRA defines a victim as a "person against whom there is probable cause to believe an offense against the person or a felony property crime has been committed."[134] The CVRA does not carve out any exceptions based on the particular nature of the crime, and it effectively contains a catchall provision that covers any offense involving the person of the victim that entitles the victim to rights under the CVRA.[135] This provision creates a confusing circular process wherein the determination of who is the crime victim relies on what crimes the CVRA covers. And as a result, it fails to clarify what is meant under the CVRA by the language "the person," which echoes the core issue in modern abortion debate.[136]

The CVRA further provides that when the victim is deceased, "a family member . . . may assert the victim's rights."[137] The limitations for a family member asserting the victim's rights specify that the "guardian or legal custodian of a deceased minor" has priority, and the right may "only be exercised by the personal representative of the victim's estate."[138] An additional wrinkle is that the person who qualifies as the victim under the CVRA can designate someone else to act on the victim's behalf.[139]

Families of murder victims should receive the rights and protections of the CVRA. But should the same rights be granted to victims of solicitation of prostitution[140] and victims of tattooing of a person under eighteen?[141] To put an even finer point on the issue, in its current form, the CVRA's protections apply equally to victims of the "[l]arceny of pine needles or pine straw" and those of the "[m]urder of an unborn child."[142] This lack of clarity in the CVRA is on a

132. *Id.* § 50B-1, *invalidated in part by* M.E. v. T.J. 380 N.C. 539, 869 S.E.2d 624 (2022).

133. *See id.* §§ 14-269 to -277.8 (including in article 35 of chapter 14 such offenses as "[c]arrying concealed weapons," "[d]isorderly conduct at bus or railroad station or airport," and "[o]bstruction of health care facilities").

134. *Id.* § 15A-830(a)(7).

135. *See* Jamie Markham, *Crimes Covered Under the New Victims' Rights Laws*, N.C. CRIM. L.: UNC SCH. GOV'T BLOG (Sept. 27, 2019), https://nccriminallaw.sog.unc.edu/crimes-covered-under-the-new-victims-rights-law/ [https://perma.cc/U72J-B53Q].

136. *Id.*

137. § 15A-830(b).

138. *Id.* § 15A-830(b)(1)–(2).

139. *Id.* § 15A-830(c) (allowing a designation of a family member to act on the victim's behalf). However, "[a]n individual who, in the determination of the district attorney, would not act in the best interests of the victim shall not be entitled to assert or exercise the victim's rights. An individual may petition the court to review this determination by the district attorney." *Id.* § 15A-830(d).

140. *Id.* § 14-205.1 (effective until Dec. 1, 2024) (defining solicitation of prostitution).

141. *Id.* § 14-400(a) (defining the crime as tattooing another person under eighteen years of age).

142. *See, e.g.*, *id.* §§ 14-79.1, -23.2(A).

collision course with abortion-related crimes where the question of who a victim is, or who is a person, raises anomalous complexities.

D. *Identifying the Victim of an Abortion-Related Crime*

The connection between the CVRA and abortion law in North Carolina is limited to cases where abortion is conducted illegally, because the current North Carolina law allows legal abortion before the unborn child reaches a gestational age of twelve weeks.[143] A legal abortion does not constitute a crime, and thus no victim with rights is identified by the CVRA.[144] However, it is a felony in North Carolina to obtain an illegal abortion.[145] The current post-*Dobbs* statutes do not contain an exception by which pregnant persons would be excluded from prosecution for this offense.[146] Under other statutes, pregnant persons are specifically excluded from prosecution.[147] Those statutes include North Carolina's prohibition on murder of an unborn child, among others.[148] Section 14-23.7 identifies the exception for pregnant persons in stating that the article shall not "be construed to permit the prosecution . . . with respect to her own unborn child."[149] In contrast, the statute that makes it a felony to obtain an abortion contains no language that creates an exception preventing the prosecution of pregnant persons, distinguishing these criminal acts from procuring or performing a legal abortion.[150] As a result, the omission of that exception indicates that pregnant persons are not protected from prosecution for the felony crime of obtaining an abortion.[151] These crimes, which are included under the CVRA as crimes against "the person," raise the question of

143. *See id.* § 90-21.81B(2).

144. Based on the post-twelve-week ban, it can be argued that North Carolina does not recognize an unborn person as a person until after reaching a twelve-week gestational age. However, recent decisions from other states have recognized a fertilized embryo, which has a gestational age of zero, as a person for purposes of state law. *See, e.g.*, LePage v. Ctr. for Reprod. Med., No. SC-2022-0515, 2024 WL 656591 (Ala. Feb. 16, 2024), *reh'g denied*, 2024 WL 1947312 (Ala. May 3, 2024), and *cert. denied sub nom.* Ctr. for Reprod. Med. v. Burdick-Aysenne, No. 24-127, 2024 WL 4427233 (U.S. Oct. 7, 2024). If North Carolina follows suit, the current law, which legalizes abortion up to twelve weeks, will generate a question of whether a legally defined abortion involves an offense against a person under the Crime Victims' Rights Act ("CVRA").

145. N.C. GEN. STAT. § 14-44 ("If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be punished as a Class H felon.").

146. *See id.* § 14-44 to -46.1.

147. *Id.* § 14-23.7 ("Nothing in this Article shall be construed to permit the prosecution under this Article of . . . [a]cts committed by a pregnant woman with respect to her own unborn child, including, but not limited to, acts which result in miscarriage or stillbirth by the woman.").

148. *Id.* § 14-23.1 to .8.

149. *Id.* § 14-23.7.

150. *Id.* §§ 14-44 to -46.

151. *Id.*

who is "the person" for purposes of identifying the crime victim protected under the CVRA.[152]

Because the CVRA self-defines crime victims by the criminal laws included under the CVRA, the question of who is the victim relies on the definitions within the statutory sections of the underlying crimes.[153] To demonstrate the complication created by the CVRA's absence of clarity, consider that under the statute criminalizing murder of an unborn child, there is no definitional reference as to who is the victim of the crime.[154] The law targets a "person who unlawfully causes the death of an unborn child" without specifying the age of the unborn child or addressing any harm to the pregnant person.[155] On its face then, it would seem the victim is an unborn child. But since a deceased victim cannot assert their own rights, could a parent of an unborn child then assert the rights of that victim?[156] The responsibility of law enforcement as to victim's rights in abortion-related crimes is also unclear. Is a district attorney's office required to notify an unborn child's survivors, including a father, of a defendant's custodial status?[157]

Similar questions arise under abortion-related laws that criminalize using drugs or instruments to destroy an unborn child.[158] North Carolina case law demonstrates the prosecutorial focus of this law as being on living persons, most commonly putative fathers, who assist a pregnant person in aborting an unborn child either by ingesting a toxin said to induce an abortion or accessing an illegal

152. There are extensive scholarly materials on the question of fetal personhood. This Article is not intended to develop that discussion further but rather relies on the current literature to identify the issues of fetal personhood arising from the abortion rights discussion. *See generally* Amanda Gvozden, *Fetal Protection Laws and the "Personhood" Problem: Toward a Relational Theory of Fetal Life and Reproductive Responsibility*, 112 J. CRIM. L. & CRIMINOLOGY 407 (2022) (arguing that the mother and fetus should be viewed as one legal entity with the mother's rights applying); Valena E. Beety & Jennifer D. Oliva, *Policing Pregnancy "Crimes*," 98 N.Y.U. L. REV. ONLINE 29 (2023) (predicting that an increase in the fetal personhood movement will allow prosecutors to wrongfully convict pregnant people who lose fetuses due to medical reasons); Cynthia Soohoo, *An Embryo Is Not a Person: Rejecting Prenatal Personhood for a More Complex View of Prenatal Life*, 14 CONLAWNOW 81 (2023) (discussing how the rise of fetus personhood will expand state power while individual protections and rights are lost).

153. *See supra* notes 134–36 and accompanying text.

154. *See* § 14-23.2(a).

155. *Id.*

156. See, for example, State v. Brown, 270 N.C. App. 821, 839 S.E.2d 874, 2020 WL 1685584 (Apr. 7, 2020) (unpublished table decision), for a post-CVRA case involving murder of a pregnant woman in which the question of who was the victim of the crime charged was not discussed. *Id.* at *1–2.

157. *See* N.C. GEN. STAT. § 15A-832. Although beyond the scope of this Article, the authors note that the duty imposed on district attorneys and their staff under the CVRA is undue. The CVRA expanded the scope of victims' rights in North Carolina without regard to functionality or cost, thus undermining the overall goal of elevating victims' rights.

158. *See id.* § 14-44.

abortion procedure.[159] Article 11 of chapter 14 does not, on its face, limit prosecution to persons assisting a pregnant person; however, North Carolina has enacted an exception from criminal prosecution for "[a]cts committed by a pregnant woman with respect to her own unborn child" that only covers article 6A of chapter 14.[160] If changes in culture lead North Carolina to modify the prosecutorial exception for pregnant persons, prosecutors could charge pregnant persons who abort their own pregnancies under the state's abortion-related criminal laws.[161] Regardless of what might be a complex future involving the criminalization of pregnant persons seeking legal or illegal abortions, when the state prosecutes an abortion provider or someone who assists a pregnant person in procuring an abortion, law enforcement will be required to identify a victim for purposes of the CVRA and enforce the victim's rights accordingly.

One possible outcome is that an unborn child is determined to be the victim, in which case a child's "family member" or "guardian" would be the victim under the CVRA.[162] This construction could lead to an unborn child's father being the designated victim under the CVRA. Another scenario is one where an unborn child's father is deemed to be the crime victim without designation as the child's "family member" or "guardian."[163] In either case, a pregnant person who acts unilaterally to terminate an unwanted pregnancy when a legal option is not available to them becomes further subjugated to legal constraints that sublimate a pregnant person's autonomy and further elevates the role of men in regulating reproductive decisions.[164] As a result, law

159. *See supra* Section I.B.

160. *See* N.C. GEN. STAT. §§ 14-44 to -46.1; *see id.* § 14-23.7.

161. *See* Blake Ellis & Melanie Hicken, *These Male Politicians Are Pushing for Women Who Receive Abortions to Be Punished with Prison Time*, CNN, https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html [https://perma.cc/KX9H-H8JQ] (last updated Sept. 21, 2022, 12:33 AM); Lalee Ibssa & Soo Rin Kim, *Trump Says It's Up to Individual States Whether They Want to Prosecute Women for Abortions*, ABC NEWS (Apr. 30, 2024, 9:50 AM), https://abcnews.go.com/Politics/trump-individual-states-prosecute-women-abortions/story?id=109783701 [https://perma.cc/S5HS-5PDL]; *see also* Elizabeth Dias, *Inside the Extreme Effort to Punish Women for Abortion*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/abortion-abolitionists.html [https://perma.cc/PU5G-Q4M2 (staff-uploaded, dark archive)].

162. *See* N.C. GEN. STAT. § 15A-830(c).

163. For arguments focused on the truncated rights of fathers in the abortion process, see generally Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1, 2–5 (1998) (discussing a potential inequity between a pregnant woman's (pre-*Dobbs*) right to abortion access and a putative father's lack of legal recourse after a child is aborted despite his legal obligation to provide support to living children).

164. It is not outside the realm of possibility that crime legislation could include criminal liability for women who ingest drugs, like Plan B which stops or delays the release of an egg from the ovary, or other abortion-inducing drugs procured from an out-of-state source. *See* Pam Belluck, *Abortion Shield Laws: A New War Between the States*, N.Y. TIMES, https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html [https://perma.cc/49Z9-H45A (staff-uploaded, dark archive)] (last updated Feb. 22, 2024). If use of such drugs to terminate a pregnancy became illegal, the logical

enforcement would notify the man that he is a victim of a crime, since the actual victim (the unborn child) would be deceased and he could adopt the rights of that victim. The district attorney's office would then maintain contact with the father and would continue to notify him of his rights as a "victim."

E. *Other Flaws in North Carolina's CVRA in the Context of Abortion-Related Crimes*

Difficulties in identifying who exactly is the victim are not the only risk to pregnant persons generated by the interaction between the post-*Dobbs* abortion law and the CVRA. Civil liability is another concern raised by this new abortion law.[165] The new legislation in North Carolina allows a deceased person's personal representative to sue for wrongful death when the legal abortion results in the pregnant person's death.[166] The newly enacted law also addresses the potential civil recovery of persons other than the pregnant person. For example, the relevant section provides, "any father of an unborn child that was the subject of an abortion may maintain an action for damages against the person who performed the abortion in knowing or reckless violation of this Article."[167] Inclusion of this subsection specifically allows a father to recover civil damages when a legal abortion leads to the death of the person carrying his child.[168] Including an express father's right in the abortion law forecasts a focus on the father as the victim of abortion-related crimes and sets the groundwork for fathers to assert their rights under the CVRA as abortion-related crime victims.

Also, North Carolina abortion-related criminal law adopts a binary approach to issues of pregnancy and parenthood. The newly enacted law lacks any reference to the LGBTQ+ community, thus failing to address the impact an abortion restriction will have on persons other than, "[a] female human, whether or not she is an adult."[169] This language, along with the language

victim would be the paternal parent. In *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), the United States Supreme Court acknowledged the potential prosecution of women for abortion crimes in the majority decision. *Id.* at 157 n.54 ("There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out . . . that, in Texas, the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?").

165. Act of May 16, 2023, ch. 14, sec. 1.2, § 90-21.88, 2023 N.C. Sess. Laws __, __ (codified at N.C. GEN. STAT. § 90-21.88).

166. *Id.*; *see also* Yvonne Lindgren, *The Father's Veto and Fatherhood as Property*, 101 N.C. L. REV. 81, 88 (2022) (reviewing tort-based civil liability for abortion and how the elevation of a father's rights in such cases expands a father's rights to an unborn child and, by extension, his female partner).

167. Act of May 16, 2023 § 1.2.

168. *Id.*

169. *Id.* § 90-21.81(11).

identifying fathers as potential victims of abortion-related crimes, highlights the legislature's lack of understanding about pregnancy in the LGBTQ+ community, since "LGBTQ women statistically seek abortion at higher rates than their heterosexual peers," and "[m]any transgender men, nonbinary people, and intersex people can get pregnant and do need abortions."[170] With its focus on binary designations such as "father" and "mother," North Carolina law further complicates the potential issues that may arise when law enforcement must identify victims under the CVRA since the law is written in terms of "mothers" and "fathers," rather than more inclusive language.

Although the CVRA was designed to protect crime victims, it does not consider how an abuser may be empowered under the CVRA in a way that compromises the safety of the accused. If an abortion provider or other person is prosecuted for an abortion-related crime that leads to the death of an unborn child, the father is arguably the victim under the CVRA.[171] Assuming the pregnant person acted to terminate the pregnancy after the twelve-week limit because they were in an abusive relationship with the child's father, the person who assisted them in procuring an illegal abortion could be prosecuted under current North Carolina law. The putative father is then arguably a victim under the CVRA and entitled to the rights prescribed for crime victims, including notifications. And if the pregnant person's abuser becomes the CVRA victim, he will be notified of the whereabouts of individuals connected to the case. He will be involved in plea negotiations. He will have access to the district attorney's office for purposes of the prosecution. His legal rights under the CVRA may very well be elevated over their rights as a victim of abuse. And, in the frightening but possible scenario where the pregnant person can be prosecuted for procuring an abortion, the putative father, as the crime victim, can become directly involved in the prosecution of his abused partner.

These scenarios may seem remote possibilities, but the examples demonstrate the perverse consequences that can flow from the CVRA when its overinclusiveness intersects with highly nuanced criminal law. The initiative behind Marsy's Law and the North Carolina adoption of the CVRA is well-intentioned and may very well fill a need for crime victims, but the CVRA enactment was in error. The error was not in enacting a law that facilitates victim rights. The error lies in the North Carolina General Assembly's overbroad construction of the CVRA's application to North Carolina criminal law. By giving rights to victims of most felony crimes, the CVRA carelessly imposes a duty of notification in settings where such notice is impractical and potentially dangerous to the very individuals it is designed to protect. A better

170. *Media Guide: Abortion as an LGBTQ Issue*, GLAAD (July 6, 2022), https://glaad.org/lgbtqabortionfacts/ [https://perma.cc/4V2G-W8GU] (emphasizing that anyone who has the ability to become pregnant must be included in legislation regarding abortion).

171. *See* Lindgren, *supra* note 166, at 88.

version of the CVRA would have involved a more careful review of the potential application to felony crimes so that crimes like larceny of pine straw, murder of an unborn child, and first-degree murder do not all require the same law enforcement action under the CVRA.

Furthermore, the daily reality of the CVRA is an unduly burdensome workload for legal assistants. For every victim of every crime included under the CVRA, the legal assistant must obtain accurate contact information from law enforcement or the private warrant.[172] The legal assistants then must attempt to call the victims of each case and mail to the victims several documents advising them of their rights. Then, after each court date, the legal assistant must update the victims as to the case status, for example, the next court date.[173] If the victim does not opt out of updates, they must be kept up-to-date, which means that even when victims are unresponsive, the legal assistant's workload does not lessen. If the defendant wants to plead guilty when the case is in court, the legal assistant must first contact the victim, unless the victim has opted out of notifications, to ensure the victim does not want to be present when a plea is entered.[174] If the victim does want to be present, the plea will have to be continued, because the victim is guaranteed the right to be present for a plea.[175]

Lastly, the potential prosecution of abortion-related crimes imposes additional challenges on prosecutors when exercising prosecutorial discretion in a complex political context. At a glance, it may seem that prosecutorial discretion can be exercised to remedy issues that can arise when administering the CVRA in relation to victims of abortion-related crimes. District attorneys in North Carolina have the option to exercise prosecutorial discretion.[176] As a general principle, district attorneys can refuse to prosecute an individual case.[177] However, it is a more complicated issue when and if a district attorney refuses to prosecute an entire category of cases, such as the category of abortion-related crimes.

Moreover, if one district attorney declines to prosecute abortion-related crimes, the remedy can be short-lived. If the statute of limitations has not run out on a crime the district attorney decided not to prosecute, the next elected

172. *See* N.C. GEN. STAT. §§ 15A-831 to -832 (2024); ADMIN. OFF. OF THE CTS., AOC-CR-180B, CRIME VICTIMS' RIGHTS ACT VICTIM INFORMATION SHEET (2023).

173. §§ 15A-831 to -832.

174. *Id.*

175. *See id.*

176. N.C. CONST. art. IV, § 18(2); *see also* Paul L. Whitfield, P.A. v. Gilchrist, 126 N.C. App. 241, 246, 485 S.E.2d 61, 65 (1997), *rev'd*, 348 N.C. 39, 497 S.E.2d 412 (1998) (reversing on an unrelated issue pertaining to a district attorney's prosecutorial discretion).

177. *See* N.C. CONST. art. IV, § 18(2).

district attorney may exercise that discretion to prosecute the same case.[178] Furthermore, some state legislatures have enacted bills to permit removing a district attorney from office or to allow higher ranking officials to prosecute in place of the prosecutor for that district, effectively nullifying the discretion of individual prosecutors.[179] If prosecutors cannot exercise their discretion for abortion-related crimes, then criminal prosecutions for abortion-related crimes will persist, setting the stage for the scenario addressed in this Article.

CONCLUSION

With the criminalization of abortion alongside the overreach of the CVRA, North Carolina has turned from the paternalism of pre-*Roe* abortion laws, which treated the pregnant person as the victim, to a law that could be perceived as misogynism exemplified by elevating the rights of an unborn child and its father over the rights afforded to the pregnant person. The criminalization of abortion raises the question of who is the victim of an abortion-related crime. Under the CVRA, law enforcement must observe the rights of victims as specified by the CVRA. But neither the CVRA nor the abortion-related criminal laws clarify who is the victim of an abortion-related crime. If a pregnant person is unable to access a legal abortion within the twelve-week time frame, and therefore accesses an alternative termination procedure, possibly in another state, they could be prosecuted criminally, and the child's father could be deemed a victim for purposes of the CVRA.

The CVRA serves a clear purpose in codifying victim rights in certain crimes, such as the murder of Marsalee "Marsy" Nicholas. However, without more reform of North Carolina's criminal law that provides greater nuance, the outcome of the CVRA in North Carolina is that victims' rights apply to an expansive list of crimes against people and property, including abortion-related crimes, raising complex and nuanced questions of who is the victim and how their rights can be enforced. By rushing to pass post-*Dobbs* abortion legislation, North Carolina created a limitless problem. Pregnant persons' abortion rights

178. *See* Jeff Welty, *Abortion and North Carolina Criminal Law After Dobbs*, N.C. CRIM. L.: UNC SCH. GOV'T BLOG (June 30, 2022), https://nccriminallaw.sog.unc.edu/abortion-and-north-carolina-criminal-law-after-dobbs/ [https://perma.cc/PU7X-SGRD] (identifying that North Carolina has no statute of limitations for felonies); *see also* Shea Denning, *The Duties and Discretionary Powers of District Attorneys*, N.C. CRIM. L.: UNC SCH. GOV'T BLOG (Jan. 9, 2019), https://nccriminallaw.sog.unc.edu/the-duties-and-discretionary-power-of-district-attorneys/ [https://perma.cc/LL7U-2UUU].

179. *See* Alice Miranda Ollstein & Megan Messerly, *Republicans Clash with Prosecutors over Enforcement of Abortion Bans*, POLITICO (Feb. 12, 2023, 7:00 AM), https://www.politico.com/news/2023/02/12/republicans-target-abortion-local-prosecutors-00082386 [https://perma.cc/AS57-Y838 (staff-uploaded archive)].

are curtailed based on a restrictive time frame, pregnant persons are at risk for criminal prosecution and civil liability if they act outside the specific parameters of North Carolina's legal abortion law, and law enforcement is prompted to identify the abortion victim in times when the context for such questions is at its most politically complex.