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KELLY KEGLOVITS: Hello I'm Kelly Keglovitz. I'm a third-year student here at Duke Law School, a member of our student chapter's of The Coalition Against Gendered Violence, and If/When/How-- Lawyering for Reproductive Justice. And I'm your host for this episode of the Duke Law Podcast. In the wake of the Supreme Court's decision in June to overrule Roe v. Wade, effectively ending the constitutional right to abortion, the fight over reproductive rights has escalated. In particular, many people are worried about how law enforcement could use big-tech data and surveillance as tools in enforcing state laws prohibiting abortion. In this episode, we'll be examining these issues through the lens of a new readings class being taught at Duke Law this fall. Senior lecturing fellow Jolynn Dellinger created this class in direct response to the high court's decision, and she is our guest for this episode of the Duke Law Podcast.

A privacy and ethics scholar, Dellinger is a senior lecturing fellow here at the Law School and is the Stephen and Janet Bear Visiting Lecturer at the Kenan Institute for Ethics. Dellinger recently served as special counsel for privacy policy and litigation for the North Carolina Department of Justice. Please enjoy this episode.

Professor Dellinger, it's wonderful to be speaking with you today. Thank you for being on the podcast.

JOLYNN DELLINGER: Thanks so much for having me.

KELLY KEGLOVITS: So this fall, you'll be teaching a new readings class at Duke Law called Privacy in a Post-Dobbs World-- Dobbs, of course, referring to the Dobbs v. Women's Health Organization abortion case that was heard by the Supreme Court this summer. The case ended with a historic and far-reaching 5-4 ruling from the court that overruled Roe v. Wade and ended a nearly 50-year constitutional right to an abortion.

The ruling and its potential impact also prompted you to quickly start working on this new class for the Fall semester. Why did you want to teach this class to law students?

JOLYNN DELLINGER: Well, the opportunity to teach this class actually came up in a conversation that I had with Dean Gustafson. And this was early June, so it was after the leaked opinion written by Justice Alito but before the Dobbs official opinion had come down. And I had, basically, done nothing but study this topic since the leaked opinion. And we just got into this conversation, and she actually suggested, what if we had a reading class on this? Because I think students would really be interested in it. And honestly, as a Duke Law student back in the '90s, if this had happened then, this is exactly what I would have wanted-- the opportunity to talk with professors and my peers about such a huge change in the law. But also, a lot of what I was hearing at the time back when that leaked opinion came out is, we're going back to pre-1973 law. And granted, some of these laws are from the 1800s, but, yes, it's true. We are going back to pre-1973 law in some ways, but we're not just going back. And what I think is fascinating is the intersection of that pre-1973 law with 21st century surveillance. And that is the focus in my class.

KELLY KEGLOVITS: So let's dig into the class itself. Could you give me a high-level view of the curriculum and how you chose the readings and other materials?

JOLYNN DELLINGER: Definitely. It was so interesting because there are so many topics that you could cover, so it was very hard to narrow down and think about the narrative arc. But first of all, I wanted to start with history. In teaching privacy, for example, I will often teach the Katz case about reasonable expectations of privacy. And I find myself having to tell my students what a phone booth is. So it's kind of hard to understand whether you have a reasonable expectation of privacy in a phone booth if you've never seen a phone booth.

So things like "the personal is political", a slogan that used to be common knowledge for people-- people have less understanding of that now. And I think understanding history-- how we got here-- is incredibly important to understanding where we're going in the future. So I'm starting with history, generally speaking, and history of the right to privacy in the context of abortion and contraception cases, in particular.

Then we'll go into a very close reading of the Dobbs opinion itself, trying to understand what it means from a legal-doctrine perspective, and go from there into the implications of this decision for privacy, broadly, and for surveillance. So in one sense, as I mentioned, we've been here before-- pre-1973 laws and enforcement of criminal laws in this area. We'll talk about that.

We're going to look at the criminalization of pregnancy and pregnancy outcomes during Roe. So after 1973, how have women been prosecuted for abortion-related issues? And then we're also going to talk about-- in both of those contexts-- the role that health care providers have played in this surveillance-- and been forced to play, actually, by law enforcement. And the consequences, overall, for access to health care and the vast disparities for women of color in all of these surveillance contexts.

And then we'll move on to our current environment. We're going to look at the fact that these laws are going to be enacted in states that are part of our vast national data economy with virtually no regulation. So the United States does not have a federal comprehensive privacy law, and that has tremendous implications for the consequences of Dobbs. So we're going to look at how that data is accessible to law enforcement. We're going to look at laws that criminalize abortion, personhood laws that make a state's criminal laws more broadly applicable to pregnant women, and the bounty hunter laws that you've seen, for example, in Texas.

And then finally, going forward, we're going to talk about what does all that mean for the right to privacy more broadly and other privacy rights that might be endangered by the Dobbs decision. In addition to the Dobbs class, which is focused on privacy, I will be doing a privacy session for another class that Duke Law School is offering. And this is a readings class based on reproductive justice more broadly. It's put together by Anne Gordon, and a number of different professors at the Law School will be contributing.

KELLY KEGLOVITS: I'm so glad you mention that course. Professor Gordon reached out to me right after the Dobbs opinion dropped and a couple of other student leaders from If/When/How, wanting to just see what we thought Duke could do because I think we all saw it coming right when the Dobbs opinion dropped. And we let her know that last semester, we did a student-led repro readings class, and I think that she was kind of inspired by that readings class and maybe people who wouldn't go to the efforts of making their own class on reproductive issues but would really be interested in learning about it, especially since we'd expected, and it is the reality that we are coming into the school year without the Roe right.

As a privacy and ethics scholar yourself, what's your point of view on the emergence of digital surveillance and data mining and how it has or hasn't already been used in criminal cases regarding abortions, miscarriages, and infant deaths?

JOLYNN DELLINGER: Well, this is where the privacy environment generally comes in-- so the privacy that we talk about in my Privacy Law and Policy class here at the law school. So we want to look at how the data that we all inevitably generate on a hourly, minute-by-minute basis, going through a regular day-- how that data can and will be used against people in this new climate.

So we have an information economy. Again, there's not a comprehensive privacy law. We do have laws that regulate certain areas like financial privacy, health privacy, student privacy. But actually, people think there's a lot more protection for health privacy than there really is, and that's something that will come up in the course of this class. Data mining and data brokerage are two topics that we'll talk about-- the inferences that can be drawn from all the data about us that's out there to make predictions about people and direct actions towards those people-- even, for example, knowing who's pregnant and not.

Almost all the data that we generate is in the hands of a third party, and a lot of it is held on our personal devices like our phones. So we want to think about, what kind of data is that? Communications, texts, messaging-- I think you've probably seen the recent case where there was a request from Facebook for messages that had to do with a mother procuring mifepristone and misoprostol for a teenage daughter. And those texts were turned over to law enforcement.

We'll look at internet searches, location information, which is incredibly sensitive and very revealing information. We'll look at the health data. Again, not the health data that's necessarily covered by HIPAA-- there is some protection there with the privacy rule-- but data we might share with femtech apps or health conditions that can be inferred from our search history or that could be inferred from our purchase history. So why would all this data matter? I'm going back to your question. With criminalization, we need to be concerned about law enforcement's access to that data. So all types of pregnancy outcomes are going to subject women and people who can become pregnant to suspicion in this new environment. And in fact, this data has already been used in prosecutions of women for abortions banned by certain states, for child endangerment and abuse, feticide, performing abortions, and aiding and abetting abortions. So I think that the pervasive collection and use of data in our current economy is something that we really have to be focused on, going forward with the criminalization that's happening in a number of states.

KELLY KEGLOVITS: I also see several sessions are tackling what's at the heart of so much national debate right now-- equal protection, and the right to privacy, and differing state abortion laws, and how the Dobbs decision may impact other rights, including the right to travel to procure an abortion. How are you covering those in your course?

JOLYNN DELLINGER: My focus is definitely going to be on the right to privacy. We want to talk about whether it is fatally compromised, whether it's still necessary, and how equal protection comes into play, whether we really need both of these theories, going forward. And folks have been making the equal protection argument since day one-- since Roe-- and it has received less attention from the courts, and I think, in part, because in the '70s, the concepts that would have allowed people to rely on that just weren't as developed as they are today. And there are so many great scholars working in this area. And I think that we really want to rely on equal protection theories, but at the same time, I think it would be a huge mistake to walk away from the right to privacy.

So we'll really be focused on the right to privacy. And we'll be looking at, frankly, Justice Alito's reasoning in Dobbs. There's a very substantial focus on history and tradition. And without question, that focus compromises other privacy rights. Now, whether or not states are going to take up the opportunity to go after contraception or same-sex marriage or same-sex intimacy, we have to wait and see. But there is no question that Justice Alito focuses on history and tradition. And for the majority to suggest that these other rights that have been historically encompassed in the right to privacy are not in danger is, frankly, disingenuous. Justice Thomas is far more honest in his approach.

And then we also want to think about the issue of returning this question to the state and the patchwork that that's going to create. So this is going to throw women's ability to travel from one state to another into question. Some states are talking about-- or proposals have been made to say that abortion is illegal, and you can't go somewhere else to get what you can't get here. Can a state do that? So Justice Kavanaugh has suggested-- in the context of his opinion in Dobbs, no-- that there is that right to travel, but I would point out-- that's an unenumerated right.

So we do have to think about what's going to happen with states as they each pursue their own public policy goals, and as their laws come into conflict with each other, what's going to happen there? Also, though, another thing that I think is interesting and raised by your question about other rights-- and this isn't necessarily a privacy right, particularly, although it certainly does have to do with autonomous decision making, which is part of privacy-- is your right to live and work where you want to live and work within the United States.

And I think for young people today, for law students today, for anyone with reproductive capacity today, what the laws are in different states is going to be a significant consideration for where you want to live and work. And if that's the case, that pretty dramatically circumscribes your options. And it'll be interesting to see as we talk to people and hear how they're making decisions. And of course, a lot of people don't have the privilege of choosing. So those are a variety of other types of rights that we will be looking at.

KELLY KEGLOVITS: Based on these rights at stake and all of the discussion beforehand, we know people have strong opinions about the right to abortion, especially heightened since the Supreme Court's decision in June. How are you going into keeping class discussions respectful and substantive?

JOLYNN DELLINGER: Well, so with respect to substantive, as we were talking about, there's so much to cover. There'll be plenty of substance to talk about. But I think that it is important to keep in mind that a good number of students may be walking into this class as women or people who can become pregnant who feel that their rights as an American citizen have been eviscerated. That is a difficult thing to deal with. That's difficult just being a person, and it's difficult being a person who's chosen to devote your life to the law.

And so I will provide opportunities outside of class to talk about how Dobbs is affecting people personally because I think that's a really important thing to do. In class, I think looking at the legal doctrine and really focusing on how did the right to privacy develop, what does Dobbs do to it, and what does this opinion do to privacy writ large in our society given our current environment will be the focus.

And honestly, although many people have differing views on abortion from whether they, personally, would have one or-- regardless of that-- whether they think people should impose their views on others through laws, privacy is often a more nonpartisan issue. Privacy is something that, often, people from very different walks of life will value and agree upon. And one thing that I think is going to be helpful in this class is having people understand how a decision that appears to be about their right to abortion is

actually about so much more and is actually about so much of what we take for granted as our privacy rights. And there will be some agreement on that.

With respect to being respectful, I think it's a challenge. And I think that challenge is evidenced by Justice Alito's majority opinion in *Dobbs*, which talks about previous members of the court as abusing judicial authority and being egregiously wrong and lacking reason-- not exactly a respectful approach from the *Dobbs* majority.

KELLY KEGLOVITS: You've compiled a pretty impressive reading list, featuring many of today's leading thinkers on reproductive rights, the criminalization of abortion, and the right to privacy and surveillance. Could you talk a bit about this?

JOLYNN DELLINGER: I have loved, frankly, the opportunity to really dive deeply into this material this summer and try to focus on and bring attention to some of the amazing scholarship that's out there. The things that I've chosen to focus on for our main texts are the book *Sex and the Constitution* by Geoffrey Stone, who's at the University of Chicago's Law School and is one of the preeminent constitutional scholars in the country. His focus on *Sex and the Constitution* also brings in the history of religion and the role that religion has played in this context.

But I also am bringing in Michele Goodwin, who wrote *Policing the Womb* about race, and reproductive justice, and criminalizing pregnancy and motherhood itself. It's an amazing book. Whether you're in my class or not, I highly recommend people to read *Policing The Womb*.

Also, we'll be using Leslie Reagan's *When Abortion Was a Crime*. And again, I like to have that historical focus. We have been here before. It wasn't the same. It's different now. We have medication abortion. We have surveillance. But we have, in part, been here before, and we should be learning those lessons.

Leslie Reagan's book is, again, really great, and it's a focus on history.

Also, Khiara Bridges with *The Poverty of Privacy Rights* and the very important role that poverty and race play in our access to both privacy and reproductive justice. And then in addition to those books, we'll be looking at other people who have contributed to this space-- Cynthia Conti-Cook, Elizabeth Joh, Melissa Murray, Jia Tolentino. There is a group of scholars-- David Cohen, Greer Donley, and Rachel Ray Boucher-- who've talked about the jurisdictional issues and what happens when we go from state to state. So those are some of the readings. And then I also have attempted to include-- we'll use a lot of newspaper articles, current events, podcasts like *Strict Scrutiny* and *Supreme Myths*. We will use references to movies, documentaries-- fiction and nonfiction-- throughout because this is a very cultural issue. So it has been great to have this deep dive, and I feel like if they don't have time to read it all during the semester they'll have it, going forward.

KELLY KEGLOVITS: Ultimately, what would you say is your goal for teaching this class? What are you hoping the students-- aspiring lawyers-- will take away from it?

JOLYNN DELLINGER: I hope they will take away that *Dobbs* is not only about the right to decide whether to terminate a pregnancy. The majority tried to make it sound like that's what it's dealing with, and that's just a vast understatement. This is about privacy, and the privacy issues here are multidimensional, so we are talking about physical privacy-- our actual bodily integrity, decisional privacy-- our ability to make autonomous decisions as moral agents, and, importantly, informational privacy.

So the laws that are being enforced and enacted across this country are also going to affect a right to intellectual privacy, associational privacy, and practical obscurity. And just going back to this intellectual privacy idea-- think about if you're a 15-year-old in Mississippi, and you find yourself pregnant. What's the

first thing you're going to do? Hopefully, you why you're pregnant, but that's not a given. You then try to find out the information that you need to help you make an important decision about your life. You might go to Google. If people have to be concerned-- and in this, I will say women and people who can become pregnant, in particular-- have to be concerned that all of their data is subject to disclosure to law enforcement on these very personal, intimate issues, that will absolutely chill intellectual privacy, our ability to learn, our ability to gain the information we need to gain to make intelligent decisions.

So understanding the far reaching consequences-- the implications-- of Dobbs is part of what I want people to take away from this. Also, the understanding that privacy is not just an individual right. It is an individual right, and it's a very important individual right, but privacy is also a social value. It's a public good. So if you think about the natural consequences of bounty hunter laws like the one in Texas, where they're basically encouraging citizens to surveil each other, what does that do to society? It is not a society that I, personally, want to live in.

So from a privacy perspective, we need to understand the ways that privacy enables us to live lives we're accustomed to living and to preserve that type of interaction. So along with those things about privacy, I would really like people to start to consider, OK, in this new landscape, how can we make a difference? Many people have spent the past couple of months, really, in shock.

But the extent, the magnitude, and, again, the fact of 21st-century surveillance-- it just really is overwhelming, but we need to start thinking about how we can fix it. How do we be part of the solution? And to be part of the solution, I think you have to truly understand the problem, and this class-- the goal is to try to illustrate and illuminate the vast scope of that problem.

KELLY KEGLOVITS: Well, Professor Dellinger, it has been so wonderful to speak with you today.

JOLYNN DELLINGER: Thank you so much. It was fun to be here.

KELLY KEGLOVITS: Do you want to let our listeners know where they can find you on Twitter?

JOLYNN DELLINGER: On Twitter, I'm @MindingPrivacy. And that is pretty much an all-things-privacy Twitter feed, so not just about Dobbs but also about corporate surveillance, government surveillance, and how we are responding, currently, to the data economy.

KELLY KEGLOVITS: Great. Well, again, such a joy to speak with you today, and thank you for being our guest on this episode of the Duke Law Podcast.

JOLYNN DELLINGER: Thank you so much.

KELLY KEGLOVITS: Thank you for listening to this episode of the Duke Law Podcast. Please be sure to subscribe to us on Apple Podcasts, Google Podcasts, Spotify, and YouTube to be automatically updated when new episodes are available. Until next time.