

SECOND MIDDLE PASSAGE:¹ HOW ANTI-ABORTION LAWS PERPETUATE STRUCTURES OF SLAVERY AND THE CASE FOR REPRODUCTIVE JUSTICE

Halley Townsend

ABSTRACT

“To celebrate freedom and democracy while forgetting America’s origins in a slavery economy is patriotism à la carte.”²

*In the 1850s, a slave woman named Celia was raped by her owner and forced to bear his children. The same situation is playing out in present-day abortion prohibition states thanks to the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health* overturning *Roe v. Wade*. In our country, neither a nineteenth-century enslaved woman nor a present day woman of color in many of the former slave states could seek an abortion. This Article argues that anti-abortion laws in the former slaveholding states perpetuate structures of slavery in the form of state control over the Black female body.*

By centering Black women, this Article shifts our constitutional and political discourse on reproductive justice in important ways. The rationales that propped up maternal bloodline codes and laws enabling forced reproduction in the 1800s persisted through the Jim Crow period to the present day. States have always exercised control over Black women’s bodies, whether through slavery, abortion bans, medical experimentation, gendered lynching, or forced sterilization and eugenics. Anti-abortion laws are no different. The conversation around reproductive choice has,

* Copyright © 2023 by Halley Townsend, Associate, Holland & Knight, J.D., Washington and Lee University School of Law. First and foremost thanks goes to Professor Brandon Hasbrouck and his Critical Race Theory seminar for inspiring and challenging me to write this as a seminar paper *before Dobbs*. This is why CRT is important! Thank you also to Professor Hasbrouck for pushing me to submit this to the American Constitution Society’s Constance Baker Motley National Student Writing Competition. To ACS: I was humbled and honored to be selected as the winner. Thank you to Professor Hasbrouck, Elena Schiefele, Margot Hughes Pavone, and Lauren Lanzon for pushing this Article to be better with their edits and comments. Thank you also to my family for their unwavering support. Thank you to the amazing editors and staff writers at Penn Journal of Constitutional Law for the publication opportunity and for their epic Bluebooking skills. Thank you to Justice Sotomayor for her fiery dissents. Finally, thank you to my husband Peter Redgrave, for the late night conversations about this topic, encouraging me to have empathy for everyone, for reading the leaked *Dobbs* decision with me while we were on our honeymoon, and supporting me in a multitude of other ways while I wrote this Article. This Article’s last substantive update was on March 22, 2023. I am aware there have been several new restrictions on abortion since then. This is an area of law that will not be settled any time soon. All I can say is, keep calling your state and federal lawmakers and supporting women, especially in our most vulnerable communities.

¹ See Shyrisa Dobbins-Harris, *The Myth of Abortion as Black Genocide: Reclaiming Our Reproductive Choice*, 26 NAT’L BLACK L.J. 85, 101 (2017) (describing female slaves’ pregnancies as “a middle passage of sorts”).

² Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/9YVG-97JF>].

however, always been overwhelmingly white. If we want to truly eradicate slavery and all its vestiges, we must admit the fact that the current trend in the former slave states of outlawing abortion reproduces structures of slavery. This Article exposes the connection between forced birth and slavery, recognizing that there are constitutional pathways to resist anti-abortion laws and support reproductive justice.

TABLE OF CONTENTS

ABSTRACT	185
INTRODUCTION	187
I. ROOTED IN SLAVERY: THE FORGOTTEN HISTORY OF THE PRO-LIFE LEGAL MOVEMENT	190
A. <i>“According to the Condition of the Mother:” The Maternal Bloodline Codes</i>	191
B. <i>“A Gendered Form of Racial Oppression:” Forced Reproduction After 1808</i>	192
C. <i>How Much a Womb Is Worth: The Warranty of “Soundness” as told Through Sally, Hannah, Jenima, Lucy, Charity and Countless Unnamed Others</i>	196
D. <i>“The Blacks Are Possessed of a Secret:” Reproductive Resistance</i> . 201	
E. <i>Exploitation of the Black Female Body: Antebellum Period to the Present</i>	203
1. <i>The Racist History of Abortion Bans & Medical Experimentation</i>	203
2. <i>Excluding Black Women from the Medical Field to Deny Bodily Autonomy</i>	204
3. <i>Gendered Lynching</i>	205
4. <i>Forced Sterilization & Eugenics</i>	205
II. POST-ROE AMERICA.....	207
A. <i>Mississippi</i>	208
B. <i>Texas</i>	210
III. THE CASE FOR REPRODUCTIVE JUSTICE	218
A. <i>The Structures of Slavery Reproduced by Anti-Abortion Laws</i>	218
1. <i>Lack of Exceptions for Rape and Incest Parallels the Lack of Legal Remedies for Female Slave Survivors</i>	219
2. <i>Anti-Abortion Laws Will Exacerbate Existing Disparities in Black Maternal Mortality</i>	222
3. <i>Anti-Abortion Laws’ Private Means of Enforcement Parallels Slave Patrols and Slave Catchers</i>	223

4. <i>Pseudoscientific Justifications for Anti-Abortion Laws Parallel Justifications for Slavery and Eugenics</i>	225
5. <i>Anti-Abortion Laws Exacerbate Existing Financial Barriers to Abortion and Childrearing that Disproportionately Impact Women of Color</i>	226
B. <i>Access to Abortion Is “[I]ndispensable to Bodily and Political Self-Determination” for Black Women</i>	229
CONCLUSION.....	232

INTRODUCTION

From ages fourteen to nineteen, Celia, a slave, endured five years of horrific rapes at the hands of her owner, Robert Newsom.³ Celia was forced to bear two of her rapist’s children.⁴ When she became pregnant and ill a third time, she warned him that the abuse had to stop.⁵

But on the night of June 23, 1855, Newsom crept into her cabin and tried to force her to have sex with him. Celia took a stick and bashed his head with it, killing him . . . Then she pushed his body into a roaring fire in her cabin’s fireplace. The next day, his bones were carried out in the embers.⁶

Celia claimed self-defense at her trial, *Missouri v. Celia, a Slave*, arguing that Missouri law protected “any woman” from “attempts to ravish, rape, or defile.”⁷ The Court held that Celia was a slave, not a woman, and sentenced her to death.⁸ She escaped, but was captured a few days later.⁹ The Missouri Supreme Court delayed her execution to allow her to give birth to her rapist’s

³ DeNeen L. Brown, *Missouri v. Celia, a Slave: She Killed the White Master Raping Her, then Claimed Self-Defense*, WASH. POST (Oct. 19, 2017, 4:00 AM), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/19/missouri-v-celia-a-slave-she-killed-the-white-master-raping-her-then-claimed-self-defense/> [https://perma.cc/D7LR-UR6Z]; Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice as Resistance to the State’s Property Interest in Black Women’s Reproductive Capacity*, 31 YALE J.L. & FEMINISM 35, 50 (2019).

⁴ Brown, *supra* note 3.

⁵ A. Leon Higginbotham Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L. REV. 673, 681 (1989); Brown, *supra* note 3.

⁶ Brown, *supra* note 3.

⁷ Evelyn Brooks Higginbotham, *African-American Women’s History and the Metalanguage of Race*, 17 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 251, 258 (1992); see A. Leon Higginbotham, *supra* note 5, at 682–83 (describing the statutes in detail).

⁸ A. Leon Higginbotham, *supra* note 5, at 684.

⁹ Brown, *supra* note 3.

third child, who was born dead.¹⁰ The State of Missouri hanged Celia for first degree murder at the age of nineteen.¹¹

Abortion was not an option for Celia, and her master Robert Newsom had every interest in forcing Celia to bear as many children as possible.¹² Because the international slave trade was prohibited after 1808, the only way to increase the slave labor force was to control the wombs of enslaved women.¹³ It was economically profitable for seventy-year-old¹⁴ Robert Newsom not only to rape his teenage slave, but to force her to carry the pregnancies to completion.

Celia's story is not unusual.¹⁵ This Article will trace the regulation of the Black female body back to the days of chattel slavery. I will argue that the pro-life legal movement began in America as a way for white slaveholders to profit from the exploitation of Black female bodies.¹⁶ After the African slave trade ceased, white slaveholders had a direct financial incentive to force Black women to bear as many children as possible.¹⁷ The slave *trade* became more economically valuable than slave labor itself.¹⁸ Once the states ratified the Thirteenth Amendment, slavery became formally illegal.¹⁹ But the regulation and subjugation of Black bodies by the white people in power never ceased. Slavery turned to Jim Crow, which turned to the various examples of structural racism that we see today.²⁰ But while historians and legal scholars have written about these injustices at length, they have paid comparatively little attention to the disproportionate impact anti-abortion laws have on Black and Brown women.

One and a half centuries after Celia's death, the Supreme Court overruled the constitutionally protected right to an abortion in *Dobbs v. Jackson*

¹⁰ A. Leon Higginbotham, *supra* note 5, at 684–85.

¹¹ *Id.*

¹² Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2034 (2021).

¹³ See An Act to Prohibit the Importation of Slaves, ch. 22, 2 Stat. 426 (1807) (banning the international slave trade starting January 1, 1808).

¹⁴ A. Leon Higginbotham, *supra* note 5, at 681.

¹⁵ See *id.* at 686 (noting that the holding in Celia's case "was typical of American slavery jurisprudence").

¹⁶ Murray, *supra* note 12, at 2033–35.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.S. CONST. amend. XIII.

²⁰ See Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1118–21 (2020) [hereinafter Hasbrouck, *Abolishing*] (discussing post-Thirteenth Amendment policing, Jim Crow, and mass incarceration as the new Jim Crow).

*Women's Health Organization.*²¹ Justice Alito, writing for the conservative majority, argued that abortion legislation should be left up to the states.²² This decision came as trigger bans and highly restrictive abortion bills passed in many of the former slave states and around the country. An example is the Texas Heartbeat Act, or SB8.²³ SB8 nests with Texas's total abortion ban²⁴ to allow any private citizen to sue providers who violate the law.²⁵ There is no exception to Texas's ban if the woman is a survivor of rape or incest.²⁶ Legislators specifically designed SB8 to avoid federal constitutional review.²⁷ This Article will argue that anti-abortion laws in the former slave states, like SB8 in Texas, will perpetuate structures of slavery in the form of state control over the Black female body.²⁸ At worst, like during the days of slavery, these laws will force Black women to carry pregnancies resulting from rape or incest to term, taking on all the risks and costs that pregnancy and childrearing entail.²⁹ In the best case scenario, abortion bans will compel Black women to

²¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²² *See id.* at 31 (describing how, in some states, voters may want access to abortion to be more or less extensive than the scheme imposed by *Roe* and *Casey*).

²³ Shannon Najmabadi, *Gov. Greg Abbott Signs into Law One of Nation's Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy*, TEX. TRIB. (May 19, 2021), <https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortion-law/> [https://perma.cc/JT54-2RUA].

²⁴ H.B. No. 1280, 87th Leg., § (a) (Tex. 2021).

²⁵ TEX. HEALTH & SAFETY CODE ANN. § 171.207 (West 2021).

²⁶ Najmabadi, *supra* note 23.

²⁷ *See* Mary Ziegler & Rachel Rebouché, *The Federal Suit Against Texas's Abortion Law May Fail. It's Still Worthwhile*, WASH. POST (Sept. 11, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/09/11/texas-abortion-lawsuit-doj/> [https://perma.cc/QUJ8-MCHV] (describing how the doctrine that “[i]ndividuals can enforce their constitutional rights only against the government and its agents” allowed SB8 to go into effect despite the law preventing women from exercising their constitutional right to abortion).

²⁸ Compare this argument to Brandon Hasbrouck's contention that the Thirteenth Amendment can redress the badges and incidents of slavery by guaranteeing “reproductive autonomy.” Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 148–50 (2022) [hereinafter Hasbrouck, *Antiracist*]. Hasbrouck writes, “[i]f abolition eliminated not just slavery itself but also the structures that had perpetuated it and would be necessary to enable its return, it must include the recognition that free people inherently need control over their own reproductive decisions.” *Id.* at 148.

²⁹ *See Infant Health Mortality and African Americans*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. OF MINORITY HEALTH, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23> [https://perma.cc/CET5-BXTA] (finding the infant mortality rate among non-Hispanic Blacks/African Americans to be 2.3 times the infant mortality rate among non-Hispanic whites); Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1257–65 (2020) (providing an overview of three possible explanations for racial disparities in maternal mortality).

carry unwanted pregnancies to completion, increasing their expenses and making it more likely that more Black women will fall below the poverty line.³⁰

This Article proceeds in three Parts. Part I explains how state control over the reproductive rights of Black women is rooted in slavery. After slavery formally ended, states and their white citizens continued to exploit Black women's bodies through abortion criminalization campaigns, the Jim Crow era, forced sterilization, and eugenics.³¹ Part II discusses the state of America after the death of *Roe*, with a specific focus on abortion laws in Mississippi and Texas. These laws are modern examples of states denying Black women agency over their own bodies. Finally, Part III makes the case for reproductive justice³² by specifying the structures of slavery perpetuated by anti-abortion laws.

I. ROOTED IN SLAVERY: THE FORGOTTEN HISTORY OF THE PRO-LIFE LEGAL MOVEMENT

The horror began when African women were forced aboard slave ships, where white “officers [were] permitted to indulge their passions” in ways that “disgrace human nature.” It continued unabated on American plantations, where Black women were made “victim of the grossest passions” of their masters. Enslaved Black women had no power to refuse; it was the white “owner of the woman who decided when and with whom she would have sexual relations.” . . . The value of enslaved Black women rested on their reproductive abilities.³³

³⁰ See DIANA GREENE FOSTER, *THE TURNAWAY STUDY: THE COST OF DENYING WOMEN ACCESS TO ABORTION* 149 (2020) (“It took four years for women who were turned away and gave birth to catch up to the level of employment experienced by women just under the limit who received their abortion.”) (ebook); Sarah Miller, Laura R. Wherry, and Diana Greene Foster, *What Happens After an Abortion Denial? A Review of Results from the Turnaway Study*, 110 *AEA PAPERS & PROC.* 226, 229 (2020) (finding that women who sought but did not receive an abortion “experienced worse health, higher poverty rates, and higher levels of public assistance receipt over the next five years”).

³¹ See *infra* Part I.E.

³² See Loretta Ross, *What Is Reproductive Justice?*, in *REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE & SOCIAL CHANGE* 4, 4 (SisterSong Women of Color Reproductive Justice Collective ed., 2007).

³³ Brief for The Howard University School of Law Human and Civil Rights Clinic as Amicus Curiae Supporting Respondents at 5–6, *Dobbs v. Jackson’s Women’s Health Org.*, 141 S. Ct. 2619 (2021) (No. 19-1392) [hereinafter *Howard Law Brief*] (quoting HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 50-4 (2008) (ebook); BEVERLY GUY-SHEFTALL, *DAUGHTERS OF SORROW: ATTITUDES TOWARD BLACK WOMEN, 1880-1920* 60 (1990)).

This Part exposes the structures states put into place during slavery that ensured state control over the Black female body for the coming centuries. Beginning in the days of chattel slavery, this Part discusses how maternal bloodline codes laid the groundwork for forced reproduction after the international slave trade ceased.³⁴ Childbearing women had more pecuniary value than their barren counterparts, and sales came with a warranty of soundness that invaded enslaved women’s wombs.³⁵ Although slave women resisted, using herbal remedies to prevent and abort unwanted pregnancies, states began to ban abortion after the Civil War because it was associated with Black women’s folk medicine.³⁶ After slavery ended, Black women continued to enjoy less control over their bodies than their white counterparts, suffering through medical experimentation, gendered lynching, forced sterilization, and eugenics.³⁷

A. “According to the Condition of the Mother:”³⁸ *The Maternal Bloodline Codes*

Virginia’s colonial assembly passed Act XII in 1662, which provided that “[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother.”³⁹ Virginia became the first colony to reject the English doctrine that tied a child’s status to the child’s father.⁴⁰ Historian and former federal Judge A. Leon Higginbotham, Jr. points out that, as used in this statute, Englishmen meant white men in general.⁴¹

In *Fulton v. Shaw*,⁴² an 1827 Virginia case, the Court emphasized the matrilineal status of the children of a *freed* Black woman. The slaveholder freed his slave, Mary Shaw, by deed; however, he attempted to reserve for his descendants a right to own Mary’s children.⁴³ The Court found that “[t]he

³⁴ See *infra* Parts I.A.–B.

³⁵ See *infra* Part I.C.

³⁶ See *infra* Parts I.D.–E.1.

³⁷ See *infra* Parts I.E.2.–4.

³⁸ A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: THE COLONIAL PERIOD 43 (1978) (citing the Virginia colonial assembly’s Act XII from 1662).

³⁹ *Id.*

⁴⁰ Just as *Dobbs* demolished 50 years of Supreme Court precedent, this change obliterated British precedent. See *id.* at 44 (stating that the normal English doctrine was “that the status of a child would be dependent upon the status of the child’s father”).

⁴¹ *Id.* at 43.

⁴² *Fulton v. Shaw*, 25 Va. 597–600, 4 Rand. 597–600 (1827).

⁴³ *Id.* at 598.

deed bestows present freedom on Mary Shaw. The reservation has no present effect.”⁴⁴ The Court noted the power of the matrilineal bloodline rule: “[a] free mother cannot have children who are slaves. Such a birth would be monstrous both in the eye of reason and of law.”⁴⁵ The Court remained committed to the maternal bloodline rule, even when it resulted in free Black children from whom white plantation owners might otherwise have profited. By aligning the results in *Fulton* to Act XII, the Virginia court ensured that its converse became precedent: all children born to slaves would remain enslaved for life.

The maternal bloodline rule laid the groundwork for white slaveholders to compel Black women to reproduce during chattel slavery. Judge Higginbotham notes that the maternal bloodline codes gave the “master class . . . a crucial economic advantage—its labor force reproduced itself.”⁴⁶ By forcing his female slaves to submit to sexual relations, “a white male could eliminate the cost of purchasing an infant slave; by agreeing to enslave his progeny he became a breeder of slaves.”⁴⁷ The law legitimated the white use of the Black woman’s body to increase the property owned by white men.⁴⁸

B. “A Gendered Form of Racial Oppression:”⁴⁹ Forced Reproduction After 1808

The formal legal codification of the maternal bloodline rule became economically significant when the states ratified the Constitution in 1788.⁵⁰ Article I of the Constitution provides that “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”⁵¹ The Constitution ensured that the federal government

⁴⁴ *Id.*

⁴⁵ *Id.* at 599.

⁴⁶ HIGGINBOTHAM, *supra* note 38, at 44.

⁴⁷ *Id.*

⁴⁸ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1719 (1993) (“The cruel tension between property and humanity was also reflected in the law’s legitimation of the use of Black women’s bodies as a means of increasing property.”).

⁴⁹ Dobbins-Harris, *supra* note 1, at 102.

⁵⁰ See *The Day the Constitution Was Ratified*, NAT’L CONST. CTR., <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified> [<https://perma.cc/C6YT-EWZJ>] (“On June 21, 1788, the Constitution became the official framework of the government of the United States of America when New Hampshire became the ninth of 13 states to ratify it.”).

⁵¹ U.S. CONST. Art. I, § 9, cl. 1.

could not prohibit the international slave trade for twenty years after the states ratified the founding document.⁵² Scholar and professor Melissa Murray explains that, “[a]lthough the clause does not specifically invoke the term ‘slave,’ it was understood to be a compromise between the Southern states, which depended on slavery for their economies, and those states that had abolished slavery or were considering abolition.”⁵³ In 1807, Congress passed a statute that prohibited the “import . . . [of] any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such [person] . . . as a slave, or to be held to service or labour.”⁵⁴ The act went into effect on January 1, 1808.⁵⁵

Accordingly, beginning in 1808, the only way to obtain new slaves was to force Black women to breed. The maternal bloodline codes ensured that successful Black pregnancies would result in more slaves, lining the pockets of their enslavers.⁵⁶ Dorothy Roberts notes that “[t]he ban on importing slaves after 1808 and the steady inflation in their price made enslaved women’s childbearing even more valuable.”⁵⁷ One Virginia case cited the proposition that “[w]hen a slave is given to one, and her future increase to another, such disposition is valid, because it is permitted to a man to exercise control over the increase and issues of his property . . .”⁵⁸ “Her future increase,” is a dehumanizing phrase for an enslaved woman’s children.⁵⁹ Breeding slaves became more economically efficient than profiting from their labor.

Despite the fact that President Thomas Jefferson signed the Act to Prohibit the Importation of Slaves into law in 1807, he understood the economic reality that slave reproduction was more efficient than slave labor.⁶⁰ He wrote in 1805 that “I consider the labor of a breeding woman as no object, and that a child

⁵² Murray, *supra* note 12, at 2033–34.

⁵³ *Id.*

⁵⁴ An Act to Prohibit the Importation of Slaves, ch. 22, 2 Stat. 426 (1807).

⁵⁵ *Id.*

⁵⁶ Morrison, *supra* note 3, at 50–51.

⁵⁷ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 24 (2d ed. 2017).

⁵⁸ *Fulton v. Shaw*, 25 Va. 597, 599, 4 Rand. 597, 599 (1827).

⁵⁹ *Id.*

⁶⁰ Harris, *supra* note 48, at 1719–20; see also *Act to Prohibit the Importation of Slaves*, VA. COMMONWEALTH UNIV. SOC. WELFARE PROJECT (last modified Mar. 30, 2022), <https://socialwelfare.library.vcu.edu/eras/colonial-postrev/act-to-prohibit-the-importation-of-slaves-1807/#:~:text=Welfare%20History%2C%20Slavery-,Act%20to%20Prohibit%20the%20Importation%20of%20Slaves%201807,the%20act%2C%20making%20it%20law> [https://perma.cc/DFV7-U6NT].

raised every 2 years is of more profit than the crop of the best laboring man.”⁶¹ Margaret Burnham notes that “[t]he law treated the birth of a slave child not as a social, but as a commercial event.”⁶² One slaveholder strategy to ensure and increase the number of new slave births was to prohibit slave men from marrying outside of the plantation to guarantee that their owners would realize all the resulting value from the couple’s children.⁶³

As Ta-Nehisi Coates explains:

[t]he wealth accorded America by slavery was not just in what the slaves pulled from the land but in the slaves themselves. “In 1860, slaves as an asset were worth more than all of America’s manufacturing, all of the railroads, all of the productive capacity of the United States put together,” the Yale historian David W. Blight has noted. “Slaves were the single largest, by far, financial asset of property in the entire American economy.” The sale of these slaves—“in whose bodies that money congealed,” writes Walter Johnson, a Harvard historian—generated even more ancillary wealth. Loans were taken out for purchase, to be repaid with interest. Insurance policies were drafted against the untimely death of a slave and the loss of potential profits. Slave sales were taxed and notarized. The vending of the black body and the sundering of the black family became an economy unto themselves, estimated to have brought in tens of millions of dollars to antebellum America. In 1860 there were more millionaires per capita in the Mississippi Valley than anywhere else in the country.⁶⁴

Just as slave reproduction filtered into every other aspect of nineteenth century American life, the economic rationale for slave breeding permeated judicial decisions. When freed slaves sued the descendants of their emancipator for lost profits after the descendants refused to release the slaves in 1848, the Court found that their freedom was recovery enough.⁶⁵ Virginia Judge Baldwin wrote that “the scantiness of net profit from slave labour has become proverbial, and that nothing is more common than an actual loss, or a benefit merely in the slow increase of capital from propagation.”⁶⁶ Judge

⁶¹ Harris, *supra* note 48 at 1720 (quoting letter from Thomas Jefferson to John Jordan (Dec. 21, 1805)).

⁶² Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187, 203 (1987).

⁶³ See Dobbins-Harris, *supra* note 1, at 102 (writing that the purpose of the prohibition on interplantation-marriage was “to avoid ‘so much seed spewed on the ground’”) (quoting Eugene D. Genovese, *ROLL, JORDAN ROLL: THE WORLD THE SLAVES MADE* 473 (1976)).

⁶⁴ Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/TW4M-N1JT>].

⁶⁵ *Peter v. Hargrave*, 46 Va. (5 Gratt.) 12, 13 (1848).

⁶⁶ *Id.* at 19.

Baldwin denied the slaves recovery, concluding that any monetary amount owed was “nominal.”⁶⁷ The Court found that to hold otherwise would “operate harshly and often ruinously in regard to the master” because the owner of slaves was “condemned to a constant, permanent and anxious burthen [sic] of care and expenditure.”⁶⁸ Judge Baldwin failed to mention the condemnation of Black women to a life of rape and forced reproduction.⁶⁹

The female slave was considered sexual property of her owner, “not just as an instrument of reproduction, but along the full range of her sexuality. She was owned as both a procreative and a sexual object.”⁷⁰ Many enslavers raped their Black female slaves, like Robert Newsom raped Celia, and compelled them to carry these pregnancies to completion to profit from the children.⁷¹ The impunity of rape extended not only to the slaveholder, but also “his sons, the overseer, or any other white man.”⁷² Black women had no legal remedy when white men raped them.⁷³ By the time the Civil War broke out, ten percent of the slave population was legally deemed “mulatto,” emphasizing the prolific nature of interracial sexual activity, most of which was most likely not consensual.⁷⁴

⁶⁷ *Id.* at 13.

⁶⁸ *Id.* at 19.

⁶⁹ See Hasbrouck, *Antiracist*, *supra* note 28, at 148 (citing William Spivey, *The Truth About American Slave Breeding Farms*, MEDIUM (Dec. 30, 2022), <https://medium.com/recycled/the-truth-about-american-slave-breeding-farms-317390bc98a3> [<https://perma.cc/Y4NA-MWU2>]) (“[W]hen explicit lists of the badges and incidents of slavery were given in Congress, [they] included a lack of control over a person’s marriage and family. This lack of control included forced reproduction, which allowed enslavers to ensure the birth of a new generation of people to subject to slavery.”).

⁷⁰ Burnham, *supra* note 62, at 199.

⁷¹ Morrison, *supra* note 3, at 50–51; see A. Leon Higginbotham, *supra* note 5, at 684 (“[U]nder Missouri law a slave woman had no sexual rights over her own body and thus had to acquiesce to her master’s sexual demands.”).

⁷² Burnham, *supra* note 62, at 199 (citing *Alfred v. State*, 37 Miss. 296 (1859), in which the court refused to allow the defendant-slave’s wife to testify that her husband killed the overseer because the overseer raped her).

⁷³ See Dobbins-Harris, *supra* note 1, at 103 (explaining that “raping your own slave was not a recognizable crime”).

⁷⁴ *Id.* at 102. Indeed, this act would not be considered consensual by today’s standards in most jurisdictions because of the severe imbalance of power. How could a sexual act between a slave woman and a white man be considered a “freely given agreement?” See, e.g., D.C. CODE § 22-3001(4) (2023) (defining “consent” as “words or overt actions indicating a freely given agreement to the sexual act or contact in question” and noting that “(l)ack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent”).

C. How Much a Womb Is Worth: The Warranty of “Soundness” as told Through Sally, Hannah, Jemima, Lucy, Charity and Countless Unnamed Others

Auctioneers priced female slaves according to their reproductive ability.⁷⁵ Black women who carried a reputation of fertility sold for more money than men or other women.⁷⁶ An 1848 poster advertising slaves for sale from an auction house in Charleston, South Carolina went viral on Twitter after the Court overruled *Roe*.⁷⁷ The poster advertises “6 girls—comely, quite, bud’n out, not headstrong, manageable.”⁷⁸ If you’ve never heard the phrase “bud’n out,” it means the girls were going through puberty.⁷⁹ The auctioneers were making it known that the girls were available for their owners’ personal and pecuniary pleasure.⁸⁰ Puberty in girls occurs from ages eight to thirteen in general, and can occur even earlier for Black girls.⁸¹ The auctioneers were advertising the availability of young children for rape and forced reproduction.

⁷⁵ Burnham, *supra* note 62, at 198.

⁷⁶ See *id.* (noting that “the female slave was priced for both her labor-producing and reproducing ability”); see also *Wynne v. Warren*, 49 Tenn. (2 Heisk.) 118, 120–21 (1870) (describing a scenario where the slaveholding parties were unable to exchange a boy slave for a young woman because of the greater cost of females of childbearing age).

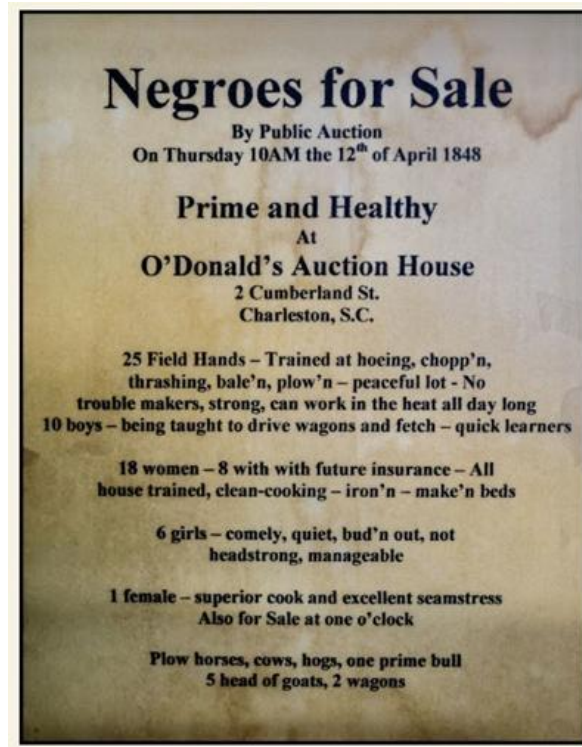
⁷⁷ Michael Coard, *Free White Women’s Bodies Have It Bad in US, Enslaved Black Girls’ Bodies Had It Worse*, PHILA. TRIB. (June 24, 2022), https://www.phillytrib.com/commentary/michaelcoard/michael-coard-free-white-womens-bodies-have-it-bad-in-us-enslaved-black-girls-bodies/article_ce360ee2-c832-590c-a6af-21c6f1885d83.html [https://perma.cc/4M85-W5CU].

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Puberty*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/22192-puberty> [https://perma.cc/8WCF-ZCJR] (last updated Dec. 5, 2021).



In Arkansas and many other states, if a purchaser incorrectly believed a female slave was fertile, he could rescind the sale.⁸² There are a slew of contract cases deciding the issue of whether “unsoundness” entitled the purchaser to this remedy. One Arkansas case declared that because the “negro girl” had “a malformation of the pelvis” rendering her “incapable of bearing children without endangering her life,” she was “of little or no value” to the purchaser.⁸³ The parties disputed the seller’s representation of “the girl to be sound and without deformity.”⁸⁴ Another Arkansas case discussed the right “to rescind the contract of [a slave] sale on account of the breach of the warranty of soundness.”⁸⁵

⁸² Burnham, *supra* note 62, at 198 n.45 (citing Hooper v. Chism, 13 Ark. 496, 497 (1853)).

⁸³ Hooper v. Chism, 13 Ark. 496, 497 (1853).

⁸⁴ *Id.* at 498.

⁸⁵ Williams v. Miller, 21 Ark. 469, 471 (1860).

A Supreme Court of Missouri case considered “false and fraudulent representations” that a deceased, pregnant slave woman was “sound” at the time of sale.⁸⁶ The Court had to decide an evidentiary issue: whether the woman’s previous statements about her symptoms were admissible to prove she was diseased at the time of sale.⁸⁷ The court found that “[t]he mere declaration of a slave that he or she was in bad health . . . would be clearly inadmissible . . .” because a slave woman was not a person who could make valid statements in the eyes of the law.⁸⁸ The Court noted that the statements were nevertheless admissible, because she made them to her white slaveholders who “were disposed, in a good-humored way to rally her upon her supposed situation” of pregnancy.⁸⁹ In other words, the Court trusted the out-of-court statements⁹⁰ of the slave woman’s white slaveholders because they would have every financial incentive to keep her alive as long as possible so that they could profit from breeding her.

A North Carolina case waded into a dispute over the slave woman Sally’s womb.⁹¹ The plaintiff argued that the defendant concealed Sally’s “cancer or other disease of the womb” before her sale.⁹² Sally gave birth to three children “while in possession of the defendant,” but only one survived: her four-year-old daughter Hannah.⁹³ The Court noted that at the time of her sale she was six months pregnant, but after her sale “was attacked with faintness when working in the harvest field of the plaintiff . . .” This was evidence that

⁸⁶ *Marr v. Hill & Haynes*, 10 Mo. 320, 321 (1847); see *Gerkins v. Williams*, 48 N.C. (3 Jones) 11 (1855) (finding that “[o]ne is not guilty of a fraudulent concealment, so as to subject him to an action for a deceit, who fails to disclose information which he has received as to unsoundness in the article [a slave woman] sold, if he disbelieves such information”); *Crabtree v. Cheatham*, 10 Tenn. (2 Yer.) 138 (1826) (noting that plaintiff could not recover because “[t]he wench was unsound when [defendant] sold her to [the plaintiff]; but the latter knew of her situation before the sale . . . had seen her swelled with the dropsy, and had been told that she could not recover.”).

⁸⁷ *Marr*, 10 Mo. at 322-323. A similar evidentiary issue was before the Supreme Court of Texas, see *Walton v. Cottingham*, 30 Tex. 772 (1868). There, the Court upheld the exclusion of evidence that tended to show that the slave woman was “sound” after, but not before her sale. *Id.* The evidence showed that “she had been diseased (of the womb) for some time—‘months or years[,]’ . . . [but] no one could tell by examination how long it had existed.” *Id.*

⁸⁸ *Marr*, 10 Mo. at 323.

⁸⁹ *Id.*

⁹⁰ See FED. R. EVID. 801(c) (defining inadmissible hearsay as an out-of-court statement offered for the truth of the matter asserted).

⁹¹ *Cobb v. Fogalman*, 23 N.C. (1 Ired.) 440 (1841).

⁹² *Id.* at 441.

⁹³ *Id.*

supported the theory of unsoundness.⁹⁴ The Court did not discuss the fact that any women, sound or not, compelled to slave labor in a summertime North Carolina field while in the third trimester of pregnancy would likely feel faint. Sally subsequently died after giving birth to her child, who was also delivered dead.⁹⁵

The case turned on whether the plaintiff “knew of the unsoundness at the time of the sale, or had reason to believe its existence, or there was sufficient ground to put an ordinary man upon enquiry;” if any of the foregoing was true, he was not entitled to rescind the sale.⁹⁶ Because Sally’s uterine tumor was not visibly distinguishable from pregnancy, “there was no evidence that the plaintiff could by ordinary inspection . . . have detected the unsoundness”⁹⁷ On the flip side, the Court noted that Sally’s youngest child was “four years old” at the time the plaintiff bought her.⁹⁸ Accordingly, the plaintiff “was necessarily apprized that either she had ceased to breed, or had been unfortunate with her subsequent children.”⁹⁹ Sally’s economic value depended on her giving birth to as many children as possible. The advanced age of her daughter Hannah—four years—was used as evidence to indicate to the white slaveholders, and the judge, that Sally could not possibly be a good breeder.

A Tennessee case held that rescission of a sale based on the warranty of soundness turned on the slave seller’s knowledge of the slave’s disease.¹⁰⁰ Slave traders brought Jemima, a fifteen-year-old slave, and Lucy, a twelve-year-old slave, by river to a slave market.¹⁰¹ When they arrived, Jemima was “somewhat indisposed” which caused the buyer to refuse to purchase her.¹⁰² The sellers represented “that she was not diseased, except a cold she had contracted on the river,” which induced the buyer to go through with the purchase.¹⁰³ It

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 442. The Court’s analysis here looks like any case discussed during the *caveat emptor* portion of a first-year contracts course. The possible use of contract law to uphold slave sales is an entirely separate topic, worthy of its own Article, and beyond the scope of this Article.

⁹⁷ *Id.* at 441–43.

⁹⁸ *Id.* at 445.

⁹⁹ *Id.*

¹⁰⁰ *See* *Shenault v. Eaton*, 12 Tenn. (4 Yer.) 98 (1833) (“If the party selling a slave do[es] not know that the slave is laboring under any other disease than such as he discloses, he is not guilty of a fraud.”).

¹⁰¹ *See id.* at 98–99, 103 (noting that slave traders brought “two negro girls, one named Jemima, about fifteen years of age, the other named Lucy, about twelve years of age”).

¹⁰² *Id.* at 99.

¹⁰³ *Id.* at 103.

turned out “that Jemima was afflicted with a disease of the liver and womb, which produced her death in two or three months after the purchase.”¹⁰⁴ The Court found that Jemima “was utterly useless to the complainant, but if sound would have been worth from \$375 to \$400.”¹⁰⁵ Because the sellers did not know about Jemima’s diseased womb, the Court did not rescind the sale.¹⁰⁶

An 1834 decision by the Supreme Court of Alabama similarly emphasized the increased value of childbearing, but not diseased, female slaves.¹⁰⁷ A slaveholder recovered the value of a slave woman named Charity, but while the case was pending Charity gave birth to two children.¹⁰⁸ The slaveholder initiated a second lawsuit to recover the value of Charity’s two additional children.¹⁰⁹ The Court found that the plaintiff was entitled to only one cause of action for the economic value of Charity.¹¹⁰ Charity “proved the issue, between the conversion and the trial,” which the jury was entitled to consider when assessing Charity’s worth.¹¹¹ Because “a jury would place a higher value on a female slave promising issue, than on one of a contrary description,” the slaveholder was not entitled to recover for the value of the children.¹¹² Besides, Charity’s increased value “on account of the development of [her] prolific nature” may have been offset by “the expense of nurturing and raising the offspring.”¹¹³

These cases show the economic realities the American South used to not only justify but profit from a system of terror in the form of rape and forced reproduction after the international slave trade ceased. At the same time, the dehumanizing way in which white slaveholders treated Black women led to resistance by Black women attempting to control their own bodies.

¹⁰⁴ *Id.* at 102.

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 103 (explaining that the court did not have equity jurisdiction over the matter).

¹⁰⁷ *White v. Martin*, 1 Port. 215 (Ala. 1834).

¹⁰⁸ *Id.* at 216.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 220.

¹¹¹ *Id.* at 221.

¹¹² *Id.*

¹¹³ *Id.*

D. “The Blacks Are Possessed of a Secret:”¹¹⁴ Reproductive Resistance

Black women in this country have always tried to exercise agency over their bodies. In response to efforts by white slaveholders to force their slaves to breed, “[s]ome enslaved Black women chose to avoid pregnancy through abstinence, medicines, or termination of their pregnancies through abortifacients.”¹¹⁵ Black women utilized many herbal remedies as birth control, including “the infusion or decoction of tansy, rue, roots and seed, pennyroyal, cedar gum, and camphor,”¹¹⁶ “drinking concoctions such as gunpowder mixed with milk, swallowing nine pellets of birdshot, consuming a teaspoon of turpentine for nine days following intercourse, and using a mixture of tea from cocklebur roots and bluestone as a douche.”¹¹⁷ Shyrisa Dobbins-Harris explains that:

[b]y using these . . . methods . . . Black women attempted to control their own reproduction regardless of their owner’s wishes. These acts of resistance were in direct opposition to the economic powerhouse of American slavery, but did not occur often enough to lower the high birth and reproduction rates of the slave population. By attempting to control their fertility, and the lives of their children, Black women presented a unique and gendered resistance to slavery with varying results.¹¹⁸

As can be expected, the home remedies female enslaved women used to prevent pregnancy were not always effective. Accordingly, they used herbal remedies for aborting, in addition to preventing, unwanted pregnancies. A doctor from Georgia wrote in 1849 that “the blacks are possessed of a secret by which they destroy the fetus at an early stage of gestation.”¹¹⁹ Enslaved women turned to the cotton plant to abort unwanted pregnancies by chewing the plant or brewing it into a tea.¹²⁰ Glenda Sullivan explains that, “[b]y terminating a pregnancy that would have resulted in an additional worker for

¹¹⁴ ROBERTS, *supra* note 57, at 47.

¹¹⁵ Dobbins-Harris, *supra* note 1, at 103 (citing ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 3 (1st ed. 1981)). *See also* Genovese, *supra* note 63, at 504-05.

¹¹⁶ *See* Howard Law Brief, *supra* note 33, at 8 (quoting ROBERTS, *supra* note 57, at 47) (stating that Black women used these techniques, probably brought from Africa, to “effect an abortion or to derange menstruation”).

¹¹⁷ Glenda Sullivan, *Plantation Medicine and Health Care in the Old South*, 10 *LEGACY* 17, 27 (2010) (citing MARIE JENKINS SCHWARTZ, *BIRTHING A SLAVE: MOTHERHOOD AND MEDICINE IN THE ANTEBELLUM SOUTH* 101 (2006)).

¹¹⁸ Dobbins-Harris, *supra* note 1, at 103-04 (citing Sullivan, *supra* note 117, at 27; GENOVESE, *supra* note 63, at 497).

¹¹⁹ ROBERTS, *supra* note 57, at 47.

¹²⁰ Sullivan, *supra* note 117, at 27 (citing SCHWARTZ, *supra* note 117, at 97).

the slave owner, and by utilizing the plant that provided him income, the female slave was exercising some control over her body and her enslaved situation.”¹²¹ When the herbal remedies failed, slave women used “mechanical” means of abortion, such as “violent exercise” and “external and internal manipulation.”¹²² Dorothy Roberts points out that, “[d]espite these birth control practices, slave women were less successful at avoiding pregnancy than white women, whose birth rate declined throughout the nineteenth century.”¹²³

Even the best efforts of Black women to prevent pregnancy or effect an abortion sometimes failed. Some Black women, such as Margaret Garner, resorted to infanticide.¹²⁴ Margaret attempted to escape her Kentucky plantation with her four children.¹²⁵ When slave catchers discovered Margaret and her children in an Underground Railroad safehouse, Margaret attempted to kill all four of her children rather than allow them to return to slavery.¹²⁶ She was successful in killing her two-year-old daughter Mary.¹²⁷ Rather than convicting Margaret for her daughter’s murder, the court convicted her of destruction of her master’s property.¹²⁸

In 1831, Jane, an enslaved woman, attempted to kill her infant child Angeline by feeding her laudanum, an alcoholic solution containing morphine.¹²⁹ When that did not work quickly enough, Jane suffocated Angeline with bedclothes.¹³⁰ The Missouri Court convicted Jane of murder.¹³¹ Judge Higginbotham questioned Missouri’s reasoning for the murder conviction:

¹²¹ *Id.*

¹²² ROBERTS, *supra* note 57, at 47 (quoting a paper read by a Tennessee physician before the Rutherford County Medical Society in 1860).

¹²³ *Id.*

¹²⁴ Dobbins-Harris, *supra* note 1, at 104 (citing Janell Hobson, *Black Herstory: Haunted by Margaret Garner*, MS. MAG. (Feb. 18, 2012), <https://msmagazine.com/2012/02/18/black-herstory-haunted-by-margaret-garner/> [<https://perma.cc/C5L7-2HKS>]).

¹²⁵ Dobbins-Harris, *supra* note 1, at 104.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Bruce Scott, *A Mother’s Desperate Act: ‘Margaret Garner,’* NPR (Nov. 19, 2010, 3:06 PM), <https://www.npr.org/2010/11/17/131395936/a-mother-s-desperate-act-margaret-garner> [<https://perma.cc/4CA9-ZFHY>].

¹²⁹ Jane v. State, 3 Mo. 45, 61 (1831).

¹³⁰ *Id.*

¹³¹ *Id.*

Did the state prosecute because it cared about the dignity and life of a child born into lifetime slavery with the concomitant disadvantages of Missouri's law? Or did the state prosecute because Jane's master was denied the profit that he would have someday earned from the sale or exploitation of Angeline? Was the state fearful that if mothers started to kill their slave infants it might jeopardize the potential wealth of slave masters?¹³²

Connecting Jane's case to Celia's, Judge Higginbotham mused that:

[p]erhaps . . . Jane[] anticipated that her daughter would be as devoid of human rights as Celia was later held to be by the Missouri courts. Perhaps the mother recognized that someday her daughter would be snatched from her and put on the auction block and that a master would use Angeline as a breeder to increase his economic wealth. Perhaps the mother anticipated that someday her daughter's body would be laced with scars from the whips of brutal overseers and masters, with the type of vengeance that Missouri law sanctioned against blacks. *Perhaps the mother felt that the taking of her daughter's life was an act of mercy compared to the cruelty she might confront in Missouri's jurisprudence.*¹³³

Dorothy Roberts points out that "Judge Higginbotham does not ask a more troubling question: What if Jane sacrificed her child as an act of defiance, one small step in bringing about slavery's demise?"¹³⁴ Whatever the reason, it is clear that Margaret and Jane turned to infanticide in moments of true desperation.

E. Exploitation of the Black Female Body: Antebellum Period to the Present

1. The Racist History of Abortion Bans & Medical Experimentation

After the Civil War, states began to criminalize abortion.¹³⁵ Reva Siegel documents that, "[a]lthough statutes varied in form and severity, the cumulative effect of the new legislation was to prohibit abortion from conception."¹³⁶ Many states likewise banned the advertising or distribution of abortifacients and contraceptives.¹³⁷ Does this sound at all familiar? Melissa Murray points out that the "criminalization campaign was spearheaded largely

¹³² A. Leon Higginbotham, *supra* note 5, at 695.

¹³³ *Id.* (emphasis added).

¹³⁴ ROBERTS, *supra* note 57, at 48.

¹³⁵ JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* at 200-25 (1978).

¹³⁶ Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 282 (1992).

¹³⁷ *Id.*

by physicians, who associated contraception and abortion with the lay ‘folk medicine’ of homeopaths and midwives, many of whom were Black and Indigenous women.”¹³⁸ Physicians led the first “right-to-life” movement, seeking to push out healers and midwives who competed with them for business in the reproductive healthcare field.¹³⁹ Physicians were successful in lobbying states to begin licensing physicians to practice; healers and midwives were not allowed to obtain a license.¹⁴⁰ Physicians then “used anti-abortion laws, pushed in state legislatures, to increase their own stature and undermine their opponents.”¹⁴¹ Dr. James Marion Sims, lauded as the father of gynecology, perfected his techniques by lacerating, suturing, and cutting enslaved women with no anesthesia or pain relief.¹⁴² The entire field of gynecology, traditionally dominated by enslaved women, was instead developed on their backs.¹⁴³

2. Excluding Black Women from the Medical Field to Deny Bodily Autonomy

The crusade against abortion continued with gynecologists ousting women from their field.¹⁴⁴ These early male doctors “were attempting to build a professional practice in a field traditionally dominated by women.”¹⁴⁵ Physicians were endeavoring to establish medicine as a profession, and the graduates of the top medical schools had a direct financial incentive to push the “irregulars,” or Black women, from the practice.¹⁴⁶ An 1881 professional manual by D.W. Cathell, entitled *The Physician Himself*, cautioned doctors

¹³⁸ Murray, *supra* note 12, at 2035 (quoting Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, ACLU (July 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans> [https://perma.cc/G7VL-ESN2]).

¹³⁹ Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, ORG. AM. HISTORIANS, <https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/> [https://perma.cc/T5Q2-CXNA] (last visited Sept. 21, 2022).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (citing JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTIONS OF NATIONAL POLICY, 1800-1900* (1978)).

¹⁴² Goodwin, *supra* note 138.

¹⁴³ See DEIRDRE COOPER OWENS, *MEDICAL BONDAGE: RACE, GENDER, AND THE ORIGINS OF AMERICAN GYNECOLOGY* 1-14 (2017) (describing how, at the first women’s hospital in the United States, Dr. James Marion Sims fathered gynecology by experimenting on enslaved women without their consent).

¹⁴⁴ *Id.*

¹⁴⁵ Siegel, *supra* note 136, at 283.

¹⁴⁶ *Id.*; Goodwin, *supra* note 138.

to ignore the rumors of “jealous midwives, ignorant doctor-women and busy neighbors.”¹⁴⁷ The early medical field excluded Black and Indigenous women from practice or admission.¹⁴⁸ Physicians used the fetus as “a stand-in for a broader cultural project. Here, the movement tapped into concerns over women’s increasing education, autonomy, and the extension of rights, as it reasserted women’s connection to and limitation by their own reproductive anatomy.”¹⁴⁹ Michele Goodwin summarizes: “[a]bortion was an expedient way to frame the[] campaign to create monopolies on women’s bodies for male doctors. The American Medical Association explicitly contributed to this cause through its exclusion of women and Black people.”¹⁵⁰

3. Gendered Lynching

Lynching was prolific during the Jim Crow era. Black women suffered horrifically in addition to Black men. Many Black women endured public gang rape and genital mutilation before being lynched.¹⁵¹ Mary Turner and her unborn child were killed in an unspeakable manner¹⁵² for Mary’s “unwise remarks” about her husband’s lynching the previous day. The lynch mob murdered Mary and forcibly aborted and murdered her unborn child.¹⁵³

4. Forced Sterilization & Eugenics

Also beginning in the Jim Crow period, eugenics, or the theory of who should reproduce, became popular, and programs to control the size of the

¹⁴⁷ Siegel, *supra* note 136, at 284 (quoting PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 87 (1982)).

¹⁴⁸ Goodwin, *supra* note 138.

¹⁴⁹ Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, ORG. AM. HISTORIANS, <https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/> [https://perma.cc/T5Q2-CXNA] (last visited Sept. 21, 2022).

¹⁵⁰ Goodwin, *supra* note 138.

¹⁵¹ Cynthia Prather et al., *Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity*, 2 HEALTH EQUITY 249, 252 (2018) (citing JULIE BUCKNER ARMSTRONG, *MARY TURNER AND THE MEMORY OF LYNCHING* (2011); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1st ed. 1997); Christopher C. Meyers, “Killing Them by the Wholesale:” *A Lynching Rampage in South Georgia*, 90 GA. HIST. Q. 214 (2006)).

¹⁵² Meyers, *supra* note 151, at 224–25.

¹⁵³ *Id.* at 224.

Black population were developed.¹⁵⁴ State-backed sterilization programs prevented Black women from having children ever again without their full knowledge that the surgery was permanent.¹⁵⁵ From the early 1900s to at least the 1970s, thirty states supported official eugenics programs that administered non-consensual sterilization.¹⁵⁶ The shameful practice of non-consensual sterilization “of anyone deemed to be a burden on society” continued on a widespread basis until at least 1981 in the United States but probably much later.¹⁵⁷ Vernellia Randall documents how “[i]n a case brought by poor teenage African American women in Alabama, a federal district court found that an estimated 100,000 to 150,000 poor women were sterilized *annually* under federally funded programs.”¹⁵⁸ Some Black women “were threatened with denial of medical care or termination of welfare benefits if they did not undergo sterilization.”¹⁵⁹

In 1972, twenty mostly young, Black women underwent an experimental medical procedure using the “Super Coil” to induce abortion.¹⁶⁰ Barbara Bernier writes, “[o]ne complication from use of the Super Coil was uncontrollable bleeding that eventually led to shock and required a total abdominal hysterectomy At the time, there was a general consensus

¹⁵⁴ Prather et al., *supra* note 151, at 252; see Dobbins-Harris, *supra* note 1, at 106–12 (describing eugenics, sterilization, and the Black woman’s body); Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTHCARE POOR & UNDERSERVED 274, 278–80 (1992) (discussing how population “time bomb” theorists used brochures showing “hordes of black and brown faces spilling over a tiny earth” to offer “a newer approach to eugenics”).

¹⁵⁵ Prather et al., *supra* note 151, at 252 (citing JOHANNA SCHOEN, CHOICE & COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE (2005)); Anietie Maureen-Ann Akpan, *Dark Medicine: How the National Research Act Has Failed to Address Racist Practices in Biomedical Experiments Targeting the African-American Community*, 11 SEATTLE J. SOC. JUST. 1123 (2013).

¹⁵⁶ *Id.* (citing REBECCA M. KLUCHIN, FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950–1980 (2009)).

¹⁵⁷ See Dobbins-Harris, *supra* note 1, at 106–12 (discussing eugenics and the Black woman’s body); Tom Head, *Forced Sterilization in the United States*, THOUGHT CO. (Aug. 9, 2021), <https://www.thoughtco.com/forced-sterilization-in-united-states-721308> [https://perma.cc/2TY5-R4HR] (pointing out that, although “1981 is commonly listed as the year in which Oregon performed the last legal forced sterilization in U.S. history . . . forced sterilizations have continued in more recent years”).

¹⁵⁸ Vernellia R. Randall, *Slavery, Segregation and Racism: Trusting the Health Care System Ain’t Always Easy!—An African American Perspective on Bioethics*, 15 ST. LOUIS U. PUB. L. REV. 191, 203 (1996) (emphasis added).

¹⁵⁹ Prather et al., *supra* note 151, at 252.

¹⁶⁰ Barbara L. Bernier, *Class, Race, and Poverty: Medical Technologies and Socio-Political Choices*, 11 HARV. BLACKLETTER L.J. 115, 122 (1994).

among physicians that the Super Coil should not be used. It was nevertheless used on . . . Black women.”¹⁶¹ Black women routinely underwent unnecessary hysterectomies as practice for medical students at teaching hospitals.¹⁶²

After diving deeply into the Black female experience during chattel slavery, this Part has discussed the exploitation of the Black woman’s body during the Jim Crow era and beyond. Although Black women were technically no longer enslaved, lynch mobs and the medical field continued to exploit and mutilate Black female bodies.¹⁶³ States criminalized abortion because it was associated with Black and Indigenous herbal remedies.¹⁶⁴ The various methods of exploitation of Black women’s bodies throughout American history have a common denominator: state and federal governments disallowing Black women control over their bodies.

Tying the history to the present, Cynthia Prather writes that, “[t]aken together, . . . historical experiences of sexual violence, experimentation, and healthcare disenfranchisement support the intergenerational transmission of poor sexual and reproductive health outcomes among African American women in the United States.”¹⁶⁵ The next Part turns to the present reality Prather describes, laying out the background of anti-abortion laws in Mississippi and Texas. Then, using these laws as indicative of the overall legislative attitude in the former slave states, Part III will demonstrate how states are still taking agency away from Black women by describing the disproportionate sexual and reproductive health consequences prohibiting abortion will have for Black women. Celia’s case is now. Thanks to the Court’s ruling in *Dobbs*, it’s already begun.

II. POST-*ROE* AMERICA

Women in America are no longer guaranteed the constitutional right to receive an abortion.¹⁶⁶ In June 2022, the Court wiped out almost fifty years of precedent when it summarily overruled *Roe v. Wade* and *Planned*

¹⁶¹ *Id.*

¹⁶² Prather et al., *supra* note 151, at 252 (citing DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997)).

¹⁶³ *See supra* Part I.E.2.-4.

¹⁶⁴ *See supra* Part I.E.1.

¹⁶⁵ Prather et al., *supra* note 151, at 252.

¹⁶⁶ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2236 (2022).

Parenthood v. Casey.¹⁶⁷ This Part examines abortion laws in Mississippi, where the law that ultimately overturned *Roe* and *Casey* originated, and Texas, which crafted a heartbeat ban specifically to evade constitutional review by employing a vigilante-style enforcement mechanism. This Part also discusses how the Court's anti-abortion conservative majority directly paved the way for trigger laws completely banning abortion to immediately take effect once *Roe* was overturned. Celia's tragedy may have happened in the 1850s. But criminalizing abortion, like the laws discussed below do, will have the same effects today: denying Black, Brown, and poor women control over their bodies, forcing them to take on all the risks pregnancy entails, and compelling reproduction.

A. Mississippi

If you've read the news, it's a familiar story by now: on May 3, 2022, *Politico* published a leaked draft opinion authored by Justice Alito in *Dobbs v. Jackson Women's Health Organization*.¹⁶⁸ The leaked draft indicated that the Supreme Court was about to overturn *Roe* and *Casey*, the foundational decisions anchoring the right to an abortion in substantive due process jurisprudence.¹⁶⁹ The law at issue in *Dobbs* was Mississippi's fifteen-week abortion ban, the Gestational Age Act.¹⁷⁰ The Gestational Age Act was specifically designed to present the opportunity for the Court to overturn *Roe* and *Casey*; Mississippi explicitly asked the Court to do so in its brief.¹⁷¹ And that's exactly what the Court did: it upheld the Gestational Age Act as constitutional in a majority opinion that looked pretty much the same as the leaked draft.¹⁷² Despite the fact that the Court could have merely vindicated

¹⁶⁷ *Id.* at 2242.

¹⁶⁸ Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/HGK6-SEG2>].

¹⁶⁹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (reaffirming *Roe* and setting out the viability framework for abortion laws).

¹⁷⁰ MISS. CODE ANN. § 41-41-191(4) (2018).

¹⁷¹ Brief for Petitioners at 14–31, *Dobbs v. Jackson Women's Health Org.*, 42 S. Ct. 2228 (2022).

¹⁷² See John Keefe et al., *Track Changes Between the Abortion Decision and the Leaked Draft*, CNN (June 27, 2022), <https://www.cnn.com/interactive/2022/06/us/supreme-court-abortion-dobbs-decision-changes/> [<https://perma.cc/EZC4-9FTB>] (“Overall, most of the leaked draft remained as written in the final ruling. While some parts were taken out, Alito’s opinion added more to the final ruling — including a critique of the dissenting opinions — than he removed.”).

Mississippi's fifteen-week ban without overturning the entire constitutional framework guaranteeing abortion rights,¹⁷³ the Court granted Mississippi's request to burn it all down, thereby ending the federally protected right to receive an abortion in this country.¹⁷⁴

To see why it was highly hypocritical for the Court to hear the *Dobbs* case in the first place and for Mississippi to argue solely on the merits of its fifteen-week ban, it's necessary to take a trip back to 2007. At that time, Democrats in Mississippi, tired of the repeated anti-abortion bills Republicans were introducing before the Mississippi Legislature, joined with those same Republicans to propose legislation to ban abortion if *Roe v. Wade* was overturned.¹⁷⁵ The law banned all abortions—including medication abortion¹⁷⁶—except to save the mother's life and in cases of rape (but only in cases of rape in which the survivor reported the rape and filed a formal charge of rape with the correct law enforcement official).¹⁷⁷ Subsection (6) of the bill text stated that the abortion ban

shall take effect and be in force from and after ten (10) days following the date . . . that the Attorney General has determined that the United States Supreme Court has overruled the decision of *Roe v. Wade*, 410 U.S. 113

¹⁷³ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring) (arguing that deciding the constitutionality of the Mississippi abortion law did not require the Court to overrule *Roe* and *Casey*).

¹⁷⁴ See *id.* at 2242 (majority opinion) (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”).

¹⁷⁵ Bobby Harrison, *Key Democrats Helped Pass 2007 Law to Ban Abortions if Roe Is Overturned*, MISS. TODAY (Dec. 8, 2021), <https://mississippitoday.org/2021/12/08/mississippi-abortion-trigger-law-supreme-court-roe-v-wade/> [<https://perma.cc/NLY9-3E3P>]; see also MISS. CODE ANN. § 41-41-45 (West 2007).

¹⁷⁶ Medication abortion is an abortion via prescribed drug regimen. See Rachel Rebouché, *The Public Health Turn in Reproductive Rights*, 78 WASH. & LEE L. REV. 1355, 1362 (2021) (explaining medication abortion in detail). Taking two pills at home, behind closed doors, has parallels to the reproductive resistance of slaves using natural remedies discussed in Part I.D. However, a lot of women don't know about abortion pills as an option, and abortion prohibition states like Mississippi are beginning to ban medication abortion as well as other forms of the procedure. See MISS. CODE ANN. § 41-41-45(1) (West 2007) (defining abortion as “the use or prescription of any . . . medicine . . . to terminate the pregnancy”).

¹⁷⁷ MISS. CODE ANN. § 41-41-45(2)-(3) (West 2007).

(1973), and that it is reasonably probable that Section 2 of this act would be upheld by the court as constitutional.¹⁷⁸

This was one of the nation's first abortion trigger laws. The existence of this 2007 law means that when Mississippi was arguing that the Court should uphold its fifteen-week ban *by overturning Roe* with a straight face, it knew that a total abortion ban would kick in ten days after a decision in its favor. And that's exactly what happened: the Court gave Mississippi the decision it wanted regarding its fifteen-week ban, and because the Court did so by going one step further and overturning *Roe*, abortion is now completely banned in Mississippi.¹⁷⁹ The implementation of trigger laws, which don't really exist in any context other than abortion,¹⁸⁰ specifically hinge on the conservative majority of the Court undoing something the other side has done in the past. Some trigger bans required a process step by the state legislature, while others kicked in automatically when Justice Alito handed down the Court's opinion in *Dobbs*.¹⁸¹

B. Texas

Texas's six week ban was on the Supreme Court's docket at the same time as Mississippi's fifteen-week ban.¹⁸² On May 19, 2021, the Republican Governor of Texas, Greg Abbott, signed the Texas Heartbeat Act (SB8) into law.¹⁸³ The Texas legislature found "that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger."¹⁸⁴ The statute defines "unborn child" as

¹⁷⁸ S.B. 2391, 2007 Leg., Reg. Sess. (Miss. 2007).

¹⁷⁹ See Katie Shepherd, *Mississippi's Last Abortion Clinic Will Shutter as Trigger Ban Begins*, WASH. POST (July 6, 2022, 6:26 PM), <https://www.washingtonpost.com/nation/2022/07/06/mississippi-abortion-clinic-closure/> [<https://perma.cc/F98Y-QX8P>] (reporting that the law became effective on July 7, 2022).

¹⁸⁰ I haven't been able to find any other state laws in which the text explicitly states they will not come into effect until the Supreme Court overrules a decision.

¹⁸¹ See Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [<https://perma.cc/LB8S-2UQ7>] (summarizing the trigger bans in place in thirteen states).

¹⁸² *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021); *United States v. Texas*, 142 S. Ct. 522 (2021).

¹⁸³ Najmabadi, *supra* note 23.

¹⁸⁴ S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

“a human fetus or embryo in *any* stage of gestation from fertilization until birth.”¹⁸⁵ Before *Dobbs* overturned *Roe* and the Texas Legislature passed a complete ban, SB8 prohibited abortions after a provider could detect a fetal heartbeat.¹⁸⁶ Providers can detect what sounds like a fetal heartbeat before the individual would know that they are pregnant.¹⁸⁷ SB8 contained no exception for rape or incest.¹⁸⁸

Like the authors of other highly restrictive abortion laws, the mostly white male legislators¹⁸⁹ were careful to couch their intent for SB8 in medical science and alleged concern with the woman’s health and wellbeing:

The legislature finds, according to contemporary medical research, that . . . Texas has compelling interests from the outset of a woman’s pregnancy in protecting the health of the woman and the life of the unborn child; and to make an informed choice about whether to continue her pregnancy, the pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity.¹⁹⁰

SB8 cited no “contemporary medical research.”¹⁹¹ Doctors have instead called reliance on the fetal heartbeat as an indicator that the fetus will reach live birth “misleading.”¹⁹² In fact, the term fetal heartbeat “is not widely used in medicine” because, as OB-GYN Dr. Jennifer Kerns explains, what sounds

¹⁸⁵ TEX. HEALTH & SAFETY CODE ANN. § 171.201(7) (West 2021) (emphasis added).

¹⁸⁶ § 171.204 (West 2021).

¹⁸⁷ See Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on ‘Fetal Heartbeat.’ Doctors Call That Misleading*, NPR (May 3, 2022, 4:55 PM), <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion> [<https://perma.cc/5BPM-4U4X>] (explaining that at six weeks, the ultrasound machine begins picking up “electrical activity from cells that aren’t yet a heart”).

¹⁸⁸ Najmabadi, *supra* note 23. The only statutory exception is for a medical emergency and requires the provider to keep strict records of the emergency. §§ 171.205, .008.

¹⁸⁹ See *Texas Senators of the 87th Legislature*, SENATE OF TEX., <https://senate.texas.gov/members.php?sort=name> [<https://perma.cc/6PWE-XFXN>] (including photos of each member of the Texas Senate); Najmabadi, *supra* note 23 (“Senate Bill 8 was a top priority for Republican lawmakers, nearly all of whom signed on as an author or sponsor of the measure.”).

¹⁹⁰ § 171.202(3)-(4).

¹⁹¹ See Casey Michelle Haining, Louise Anne Keogh, & Julian Savulescu, *The Unethical Texas Heartbeat Law*, 42 *Prenatal Diagnosis* 535, 536 (Apr. 24, 2022) (noting that SB8’s findings state that the law was drafted “according to contemporary medical research,” but that the use of heartbeat is contested, misleading, and medically inaccurate).

¹⁹² See Simmons-Duffin & Feibel, *supra* note 187 (statement of Dr. Nisha Verma) (“The flickering that we’re seeing on the ultrasound that early in the development of the pregnancy is actually electrical activity, and the sound that you ‘hear’ is actually manufactured by the ultrasound machine.”).

like a heartbeat is instead electrical activity made by the ultrasound machine.¹⁹³

SB8 was designed to evade constitutional review.¹⁹⁴ The law has a unique means of enforcement: it specifically prohibits state actors from prosecuting those who violate the law, instead deputizing private citizens to sue abortion providers and anyone else who aids the woman seeking the abortion.¹⁹⁵ These abortion catchers are able to collect a *minimum* of \$10,000 in damages per abortion if they win at trial.¹⁹⁶ The statute explicitly states that a defendant's belief that SB8 is unconstitutional is not a defense, nor is "a defendant's reliance on any court decision that has been overruled on appeal or by a subsequent court, even if that court decision had not been overruled when the defendant engaged in conduct that violates [SB8]."¹⁹⁷ In other words, the law prohibited abortion providers or those aiding the woman seeking the abortion from relying on district court decisions enjoining the enforcement of SB8 as a defense. During the litigation, Justice Sotomayor exposed SB8 for imposing "retroactive liability for services provided while the Act is enjoined if the injunction is later overturned."¹⁹⁸ SB8's novel means of enforcement was a clear attempt by the Texas Legislature to evade constitutional enforcement. The law was set to take effect on September 1, 2021.¹⁹⁹

Litigation involving SB8 was long and complex. Two cases involving SB8 made it to the Supreme Court: *Whole Woman's Health v. Jackson*²⁰⁰ and *United States v. Texas*.²⁰¹ Abortion providers, advocacy organizations, and counselors brought *Whole Woman's Health* to attempt to prevent SB8 from going into effect.²⁰² The Department of Justice (DOJ) brought *United States v. Texas* against the state for openly defying the Constitution by enacting a law with an enforcement mechanism designed to simultaneously violate women's

¹⁹³ *Id.*

¹⁹⁴ See Ziegler & Rebouché, *supra* note 27 (describing how the doctrine that "[i]ndividuals can enforce their constitutional rights only against the government and its agents" allowed SB8 to go into effect despite the law preventing women from exercising their constitutional right to abortion).

¹⁹⁵ §§ 171.207–.208.

¹⁹⁶ § 171.208(b)(2).

¹⁹⁷ § 171.208(e)(2)–(3).

¹⁹⁸ *United States v. Texas*, 142 S. Ct. 14, 15 (2021) (Sotomayor, J., concurring in part and dissenting in part) (citing § 171.208(e)(3)–(5)).

¹⁹⁹ S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

²⁰⁰ 141 S. Ct. 2494 (2021).

²⁰¹ 142 S. Ct. 522 (2021).

²⁰² *Whole Woman's Health*, 141 S. Ct. at 2495.

constitutional rights and evade constitutional review.²⁰³ While there were some great lines by great judges and justices throughout the process of deciding the law’s constitutionality, most of them were in dissent²⁰⁴ with the exception of the decision in *United States v. Texas* at the district court level that temporarily blocked enforcement of SB8.²⁰⁵

In *United States v. Texas*, the Supreme Court issued a single paragraph per curiam opinion dismissing the writ of certiorari “as improvidently granted.”²⁰⁶ Justice Sotomayor dissented.²⁰⁷ In *Whole Woman’s Health*, the Court dismissed the most significant part of the case, finding that abortion providers could not sue state judges and clerks or the state Attorney General.²⁰⁸ Only the Texas Medical Board and other licensing authorities—in other words, state officials explicitly excluded from SB8’s enforcement mechanism—remained as defendants as the Court remanded the case to the Fifth Circuit.²⁰⁹ On January 17, 2022, the Fifth Circuit certified the case to the Texas Supreme Court because of outcome determinative “overarching questions of state law,” exacerbating the delay of a final determination.²¹⁰ This delay was catastrophic.

²⁰³ Complaint at 1-2, *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021) (Civil No. 1:21-cv-796).

²⁰⁴ See, e.g., *Whole Woman’s Health*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting) (“Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.”); *United States v. Texas*, 142 S. Ct. 14, 14 (2021) (Sotomayor, J., dissenting) (“For the second time, the Court is presented with an application to enjoin a statute enacted in open disregard of the constitutional rights of women seeking abortion care in Texas. For the second time, the Court declines to act immediately to protect these women from grave and irreparable harm.”); *id.* at 16 (“[M]any patients are unable to seek out-of-state care based on financial constraints, dangerous family situations, immigration status, or other reasons. These individuals ‘are being forced to carry their pregnancy to term against their will or to seek ways to end their pregnancies on their own.’” (citing *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021) (citation omitted))).

²⁰⁵ Judge Pitman wrote that from the moment SB8 went into effect, “women have been unlawfully prevented from exercising control over their lives in ways that are protected by the Constitution.” *United States v. Texas*, 566 F. Supp. 3d 605, 693 (W.D. Tex. 2021). Clearly referencing the Supreme Court’s previous inaction, the judge pointed out that while “other courts may find a way to avoid this conclusion . . . this Court will not sanction one more day of this offensive deprivation of such an important right.” *Id.*

²⁰⁶ *United States v. Texas*, 142 S. Ct. 522, 522 (2021).

²⁰⁷ *Id.* (Sotomayor, J., dissenting).

²⁰⁸ *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 539 (2021).

²⁰⁹ *Id.*

²¹⁰ *Whole Woman’s Health v. Jackson*, 23 F.4th 380, 388 (5th Cir. 2022), *certified question accepted* (Jan. 21, 2022), *and certified question answered*, 642 S.W.3d 569 (Tex. 2022).

As Justice Sotomayor wrote in dissent when the Court failed to temporarily prevent enforcement of SB8 pending oral argument, the law is causing women “grave and irreparable harm:”

There are women in Texas who became pregnant on or around the day that S.B. 8 took effect. As I write these words, some of those women do not know they are pregnant. When they find out, should they wish to exercise their constitutional right to seek abortion care, they will be unable to do so anywhere in their home State. Those with sufficient resources may spend thousands of dollars and multiple days anxiously seeking care from out-of-state providers so overwhelmed with Texas patients that they cannot adequately serve their own communities. Those without the ability to make this journey, whether due to lack of money or childcare or employment flexibility or the myriad other constraints that shape people’s day-to-day lives, may be forced to carry to term against their wishes or resort to dangerous methods of self-help. None of this is seriously in dispute. These circumstances are exceptional. Women seeking abortion care in Texas are entitled to relief from this Court now. Because of the Court’s failure to act today, that relief, if it comes, will be too late for many.²¹¹

Unsurprisingly, the Texas Supreme Court ultimately held that only private civil actions could be used to enforce SB8, and that no state official could bring the action or participate as a party.²¹² And because only state officials were left as defendants, SB8 litigation finally concluded with the six-week abortion ban, together with its enforcement mechanism, remaining on the books.²¹³ In summary, our nation’s courts blessed Texas’s private, bounty-hunter mechanism for enforcing a six-week ban on abortion, a law successfully designed to leave women with no recourse at the federal level.

But that’s not all. In June of 2021, just before advocates filed suit in *Whole Woman’s Health*, the Texas Legislature passed its trigger ban criminalizing abortion altogether.²¹⁴ Under the law, anyone who provides or attempts to provide an abortion can be charged with a first- or second-degree felony and will be subject to a civil penalty of at least \$100,000 for each violation.²¹⁵

²¹¹ United States v. Texas, 142 S. Ct. 14, 17 (2021) (Sotomayor, J., concurring in part and dissenting in part).

²¹² *Whole Woman’s Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022).

²¹³ Shefali Luthra & Barbara Rodriguez, *Abortion Providers’ Main Legal Challenge to Texas’ Six-Week Abortion Ban Is Effectively Over*, 19TH (Mar. 11, 2022, 12:01 PM), <https://19thnews.org/2022/03/senate-bill-8-texas-abortion-ban-remains-enforced-supreme-court/> [<https://perma.cc/922P-4LMP>].

²¹⁴ H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

²¹⁵ H.B. 1280, 87th Leg., Reg. Sess. § 170A.002-170A.005 (Tex. 2021).

First-degree felonies carry a prison term of five to ninety-nine years,²¹⁶ and second-degree felonies carry a prison term of two to twenty years.²¹⁷ There is no rape or incest exception.²¹⁸ The only way women can receive an abortion is if they are at risk of death, which the statute, of course, does not define.²¹⁹ Five women and two OB-GYNs have recently filed suit seeking clarification of exactly what circumstances qualify as risk of death.²²⁰ The trigger ban went into effect after the Court handed down its decision in *Dobbs* per statutory language that explicitly hinged the law's start date on the Court overruling *Roe* and *Casey*:

[The Act] takes effect . . . on the 30th day after: the issuance of a United States Supreme Court judgment in a decision overruling, wholly or partly, *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), thereby allowing the states of the United States to prohibit abortion.

The trigger law was careful to leave SB8's enforcement mechanism in place.²²¹ And, in litigation over certain Department of Health and Human Services' (HHS) guidance reminding healthcare providers that a federal statute protects them in the case of providing abortion care to save the woman's life,²²² a Texas district court recently ruled in favor of Texas, enjoining enforcement of the guidance.²²³ HHS and healthcare providers appealed to the Fifth Circuit—the same Court that upheld SB8.²²⁴ The upshot is that while litigation is ongoing over the trigger ban and the HHS guidance, the court has granted Texas permission to let women die rather than providing them with a life-saving abortion.

Unfortunately, that's still not all. Fourteen Texas lawmakers recently stated that they were planning to introduce bills in the next legislative session

²¹⁶ TEX. PENAL CODE ANN. § 12.32 (West 2009).

²¹⁷ § 12.33.

²¹⁸ *See Abortion Policy in the Absence of Roe*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe> [<https://perma.cc/TZ9G-YLZ4>] (Sept. 1, 2022) (tracking abortion policy in post-*Roe* America with a helpful table of results showing the absence of exception for rape in Texas).

²¹⁹ H.B.1280, 87th Leg., Reg. Sess. (Tex. 2021).

²²⁰ *Zurawski v. Texas*, No. D-1-GN-23-000968 (Tex. Dist. Travis Cty Mar. 6, 2023).

²²¹ *See id.* at § 170A.006 (“The fact that conduct is subject to a civil or criminal penalty under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.”).

²²² Letter from Xavier Becerra, Sec’y, Dep’t of Health & Hum. Serv., to Healthcare Providers (July 11, 2022), <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf> [<https://perma.cc/28A6-TEWK>].

²²³ *Texas v. Becerra*, No. 5:22-cv-00185 (N.D. Tex. Jan. 13, 2022) (ECF 109).

²²⁴ *Texas v. Becerra*, No. 23-10246 (5th Cir. Mar. 10, 2023).

that would ban businesses from operating in the state if the businesses offer to assist employees in receiving abortion care in other states.²²⁵ Members of the Texas Freedom Caucus²²⁶ said it will introduce legislation in the next legislative session that would impose “additional civil and criminal sanctions on law firms that pay for abortions or abortion travel”²²⁷ Because the right to travel between states is a fundamental right protected by the Constitution,²²⁸ lawmakers know they cannot directly ban women from traveling out of state to seek an abortion. But their proposed laws erect yet another financial burden in front of women who now must travel out of state to receive abortion care, a burden whose effects will be felt most by Black, Brown, and poor women.

The two states discussed above are by no means alone in passing either extreme restrictions or outright bans on abortion. In 2021 alone, more states enacted abortion restrictions than in any year since 1973, the year the Court handed down *Roe*.²²⁹ Eleven states in addition to the two previously mentioned had trigger laws on the books designed to immediately restrict the right to abortion when *Roe* was overturned.²³⁰ Trigger laws illustrate that the overall legislative attitude in the former slave states is to prevent women from being able to control their own bodies.

²²⁵ Zach Despart, *Businesses that Help Employees Get Abortions Could Be Next Target of Texas Lawmakers if Roe v. Wade Is Overturned*, TEX. TRIB. (May 23, 2022, 5:00 AM), <https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions/> [https://perma.cc/YK7C-CD6P].

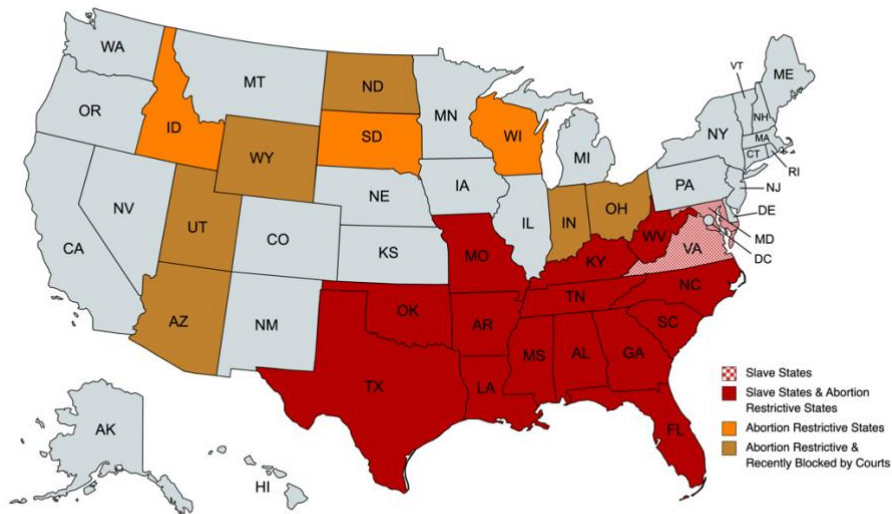
²²⁶ No, I’m not making that up. A group named the Texas Freedom Caucus is actually planning on restricting—albeit indirectly—individuals’ fundamental right to interstate travel.

²²⁷ Justin Wise, *Sidley Targeted as Republicans Warn Firms on Abortion Pledges*, BLOOMBERG L. (July 8, 2022, 4:08 PM), <https://news.bloomberglaw.com/us-law-week/sidley-targeted-as-republicans-warn-firms-on-abortion-pledges> [https://perma.cc/7C9X-6ZSM]; Texas Freedom Caucus (@TxFreedomCaucus), TWITTER (July 7, 2022, 2:54 PM), <https://twitter.com/TxFreedomCaucus/status/1545118985959575554?cxt=HHwWhMCo3YD> irvEqAAAA [https://perma.cc/VG5H-HCEB].

²²⁸ See, e.g., *Crandall v. Nevada*, 73 U.S. 35 (1867) (overturning Nevada’s travel tax because it infringed on the constitutional right to travel).

²²⁹ Elizabeth Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century*, GUTTMACHER INST. (Jan. 5, 2022), <https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century> [https://perma.cc/Z8QS-5UVU].

²³⁰ Nash & Guarnieri, *supra* note 181.



Created with mapchart.net

Map: comparing the former slave states²³¹ with the states restricting abortion.²³²

The next Part examines the disproportionate impact abortion-restrictive laws have on Black and Brown women. Protecting the right to choose whether to bear children is critical for Black women to regain and retain control of their bodies.

²³¹ See History, <https://www.history.com/topics/black-history/slavery> [<https://perma.cc/8LAS-JCMG>] (last visited May 19, 2022) (showing the “slave states” as of 1857 from *Slavery in America*).

²³² See Caroline Kitchener, Kevin Schaul, N. Kirkpatrick, Daniela Santamariña, & Lauren Tierney, *Abortion Is Now Banned in These States*. See *Where Laws Have Changed*, WASH. POST (June 24, 2022, 10:23 AM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/> [<https://perma.cc/8VAW-4L7S>] (explaining that restricting abortion refers to states that ban or mostly ban abortion and recently blocked by courts refers to states that are trying to ban or mostly ban abortion but the courts have intervened for now).

III. THE CASE FOR REPRODUCTIVE JUSTICE

*We're not trying to advance rights so much as we're trying to prevent white people from taking away rights we've already won.*²³³

This Part argues that we should all be resisting anti-abortion laws—not because they are arguably unconstitutional, although that is an independent ground for overturning these laws—but because anti-abortion laws perpetuate several structures of slavery. First, because Black women are three times more likely to die in childbirth than white women, anti-abortion laws will cause Black women to die in forced childbirth, just like the deaths caused by compelled reproduction during chattel slavery.²³⁴ Second, many of these laws contain no meaningful exception for rape or incest, which parallels the lack of a legal remedy for enslaved women who were sexually assaulted.²³⁵ Third, the deputization of enforcement powers to private citizens contained in SB8 and many of its counterparts resembles state delegation of policing powers to private slave patrols and slave catchers.²³⁶ Fourth, legislators used pseudoscientific justifications for anti-abortion laws, similar to pseudoscientific theories about the inferiority of the Black race during slavery, Jim Crow, and the eugenics movement.²³⁷ Fifth, anti-abortion laws will exacerbate existing financial barriers to abortion and childrearing that already disproportionately affect Black women.²³⁸ Finally, this Part argues that access to abortion is indispensable for self-determination for Black women.²³⁹

A. *The Structures of Slavery Reproduced by Anti-Abortion Laws*

As discussed in Part II.A. *supra*, the basic effect of anti-abortion laws are to force reproduction. Forcing women to reproduce against their will is itself a horrific structure of slavery.²⁴⁰ The following sections break down what

²³³ Elie Mystal, *My Black Generation Is Fighting Like Hell to Stop the Whitelash*, NATION (July 13, 2021), <https://www.thenation.com/article/activism/voting-rights-black-heroes/> [https://perma.cc/C885-K49K].

²³⁴ See *infra* Part III.A.1.

²³⁵ See *infra* Part III.A.2.

²³⁶ See *infra* Part III.A.3.

²³⁷ See *infra* Part III.A.4.

²³⁸ See *infra* Part III.A.5.

²³⁹ See *infra* Part III.B.

²⁴⁰ See *supra* Part I.B.

forced reproduction means for Black women in 2022, and how this compares to forced reproduction during the days of chattel slavery.

1. Lack of Exceptions for Rape and Incest Parallels the Lack of Legal Remedies for Female Slave Survivors

When Celia’s owner, the septuagenarian Robert Newsom, raped her as a teenage girl, she had no legal remedy.²⁴¹ According to the state of Missouri, Celia was a slave, not a woman, and therefore fell outside the statutory definition of self-defense that protected “any woman.”²⁴² It was economical for slaveholders, their sons, overseers, or any other white man to rape their slaves and profit from the children these women were forced to bear.²⁴³ The lynching of Black women during Jim Crow included public gang rape.²⁴⁴

Many anti-abortion laws continue in this tradition. Texas abortion laws contain no exception for rape or incest.²⁴⁵ Mississippi’s rape exception is not meaningful, because it only applies to pregnancies resulting from a rape that the survivor not only must report, but also for which the survivor must file formal criminal charges.²⁴⁶ Filling in some of the “contemporary medical research”²⁴⁷ that antiabortion laws do not cite, we know that it often takes rape survivors time to come to terms with what happened to them.²⁴⁸ It takes survivors time to define the incident as rape.²⁴⁹ We know that Black women are less able to rely on the criminal justice system to hold their sexual abusers

²⁴¹ See Dobbins-Harris, *supra* note 1, at 103 (explaining that “raping your own slave was not a recognizable crime”).

²⁴² See Brooks Higginbotham, *supra* note 7, at 258. (explaining how a slave did not have the right to self-defense in cases of rape by their master).

²⁴³ See Morrison, *supra* note 3, at 50–51; see also Leon Higginbotham, Jr., *supra* note 5, at 684 (“[U]nder Missouri law a slave woman had no sexual rights over her own body and thus had to acquiesce to her master’s sexual demands.”).

²⁴⁴ Prather et al., *supra* note 151, at 252.

²⁴⁵ See Najmabadi, *supra* note 23 (explaining that the only statutory exception is for a medical emergency and requires the provider to keep strict records of the emergency); see also TEX. HEALTH & SAFETY CODE ANN. § 171.205 (West 2021).

²⁴⁶ MISS. CODE ANN. § 41-41-45(3) (2007).

²⁴⁷ TEX. HEALTH & SAFETY CODE ANN. § 171.202 (West 2021).

²⁴⁸ See Laura C. Wilson & Katherine E. Miller, *Meta-Analysis of the Prevalence of Unacknowledged Rape*, 17(2) TRAUMA, VIOLENCE, & ABUSE, 149, 154 (2016) (finding, from an examination of 28 studies and 5,917 female rape survivors, that “more than half of the survivors (60.4%) did not acknowledge that they had been raped, despite the fact that their experiences could be defined as rape. This suggests that unacknowledged rape among survivors is a common occurrence”).

²⁴⁹ *Id.* at 155.

accountable.²⁵⁰ We know that Black women are the least likely to report rape, but the most likely to be raped.²⁵¹ And we know that Black women are most likely to seek an abortion.²⁵²

Michele Goodwin, a Black professor and scholar at the University of California, Irvine School of Law, recently told the story of how she was repeatedly raped by her father while she was growing up.²⁵³ In addition to the physical and mental symptoms this trauma caused her, Michele became pregnant when she was just twelve years old.²⁵⁴ She had an abortion.²⁵⁵ She wrote how, for many years, she experienced shame based on “the stereotype embedded in the narrative of the risky, hypersexualized Black girl.”²⁵⁶ However, she writes that her shame

was never about the abortion. I will forever be grateful that my pregnancy was terminated. I am fortunate that my body was spared an additional trauma imposed by my father—one that today would be forced by some state legislatures and courts. No child should be pressured or expected to carry a pregnancy and give birth or to feel remorse, guilt, doubt or unease about an abortion under any circumstances, let alone rape or incest.²⁵⁷

In Ohio, which has a heartbeat ban very similar to SB8 that is ironically named the Human Rights and Heartbeat Protection Act,²⁵⁸ a ten year old survivor of rape was recently forced to travel to Indiana for abortion care.²⁵⁹

²⁵⁰ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) (noting that “rapes of Black women are less likely to result in convictions and long prison terms than rapes of white women.”).

²⁵¹ See *id.* at 1251 n.35 (explaining how “Black women are more likely to be victimized than white women, [but] Black women are less likely to report their rapes, less likely to have their cases come to trial, less likely to have their trials result in convictions, and, most disturbing, less likely to seek counseling and other support services.”).

²⁵² See *supra* notes 313–315 and accompanying text (explaining how abortion restrictions have the greatest effect on people of color, specifically black women).

²⁵³ Michele Goodwin, Opinion, *I Was Raped by My Father. An Abortion Saved My Life*, NY TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/opinion/abortion-texas-mississippi-rape.html> [<https://perma.cc/2DRK-F3AQ>].

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Sub. S.B. 23, 133d Gen. Assemb., Reg. Sess. (Ohio 2019). On September 14, 2022, an Ohio court temporarily blocked enforcement of the ban that was in effect since June 2022. *Preterm-Cleveland v. Yost*, No. A2203203 (Ohio Ct. Cl. Sept. 14, 2022). The Legislature is Republican-controlled.

²⁵⁹ Alex Woodward, *10-Year-Old Ohio Rape Victim Was Denied an Abortion. Under post-Roe Laws, Her Case Might Not Be the Last*, INDEPENDENT (July 6, 2022), <https://www.independent.co.uk/news/world/americas/us-politics/ohio-abortion-trigger-law-rape-roeb2116375.html> [<https://perma.cc/FR6D-WY7U>].

She discovered she was pregnant at six weeks, and because cells in her barely-developed womb were conducting electricity mimicking a heartbeat,²⁶⁰ and because Ohio's law contains no exception for rape,²⁶¹ she could not receive an abortion in her home state. The Ohio Legislature introduced a total ban days before the leak in *Dobbs* that would fully ban and criminalize abortion.²⁶² The sponsoring lawmaker called a pregnancy resulting from rape an "opportunity" for the survivor, "no matter how young or old she is."²⁶³

So, picture a Black woman or girl who has been raped by a white man in one of the former slave states. This is not a hypothetical: Texas has one of the highest rape rates in the country.²⁶⁴ She becomes pregnant. Picture further that she reports the rape, putting her in the vast minority of Black women.²⁶⁵ Because of institutionalized racism and sexism, the authorities never follow up on her case.²⁶⁶ For one reason or another, whether that be her lack of resources or because her period is not precisely on time every month, she does not discover that she is pregnant until a month and a half after the rape. If this woman lived in another state, her only remedy may now be to seek an abortion, to not have to live with any part of her rapist in her life. But because she lives in a state that fully bans abortion, the mostly white male legislature²⁶⁷ has taken that remedy away from her too. Tell me, what does a Black woman being forced to bear her white rapist's child sound like?

²⁶⁰ See *supra* note 187 and accompanying text.

²⁶¹ See Sub. S.B. 23, 133d Gen. Assemb., Reg. Sess. (Ohio 2019) (explaining that Ohio has no abortion exception for cases of rape).

²⁶² H.B. 598, 134th Gen. Assemb., Reg. Sess. (Ohio 2022),

²⁶³ Morgan Trau, *Ohio Bill Would Ban Abortion Without Rape Exemption*, OHIO CAPITAL J. (Apr. 29, 2022, 4:00 AM), <https://ohiocapitaljournal.com/2022/04/29/ohio-bill-would-ban-abortion-without-rape-exemption/> [<https://perma.cc/5TFG-73S7>].

²⁶⁴ See Aziza Ahmed & Michele Goodwin, *Coercing Rape Survivors to Be Pregnant for the State—The Texas Way*, Ms. (Oct. 1, 2021), <https://msmagazine.com/2021/10/01/texas-abortion-ban-rape-exception-greg-abbott-crime-control/> [<https://perma.cc/LV72-39CN>] ("When asked about the lack of a rape exception to [SB8], Republican Governor Greg Abbott claimed that he was planning to eliminate rape in Texas. . . . Given that Texas has one of the nation's highest rape rates, Abbott's track record thus far falls alarmingly short.")

²⁶⁵ Crenshaw, *supra* note 250, at 1251 n.35.

²⁶⁶ See *id.* at 1271 ("Black women are essentially prepackaged as bad women within cultural narratives about good women who can be raped and bad women who cannot. The discrediting of Black women's claims is the consequence of a complex intersection of a gendered sexual system, one that constructs rules appropriate for good and bad women, and a race code that provides images defining the allegedly essential nature of Black women.")

²⁶⁷ See *Texas Senators of the 87th Legislature*, *supra* note 189 (showing that Texas Senators of the 87th legislature are majority white).

2. Anti-Abortion Laws Will Exacerbate Existing Disparities in Black Maternal Mortality

Not giving pregnant Black women the choice to terminate their pregnancies is deadly. Nationwide, non-Hispanic Black women experience a maternal mortality rate of 69.9, as compared to 26.6 for non-Hispanic white women.²⁶⁸ In Texas, Black women account for 31% of maternal deaths despite giving only 11% of live births.²⁶⁹ These statistics are on track with the national averages.²⁷⁰ Diana Greene Foster describes what she calls a “crisis in maternal mortality.”²⁷¹ Deaths related to pregnancy and birth are increasing, rather than decreasing as the rate is in almost every other country.²⁷² Maternal mortality is currently twice as high as it was in 1987, over three decades ago.²⁷³

Public health scholars have attributed the disproportionately worse maternal outcomes for Black women to institutionalized racism. In the OB/GYN field, racism “can take the form of doctors and health providers ignoring their patients’ serious symptoms and complaints of pain.”²⁷⁴ Black women are less likely to be believed by their healthcare providers, and they are undertreated and underdiagnosed as a result.²⁷⁵ Second on the list of ten recommendations from the Texas Maternal Mortality and Morbidity Review Committee’s Biennial Report was to “[e]ngage Black communities and apply health equity principles in the development of maternal and women’s health

²⁶⁸ Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2021* (Mar. 16, 2023), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2021/maternal-mortality-rates-2021.pdf> [<https://perma.cc/B4QP-L2BU>] (showing maternal mortality rate expressed as the number of deaths per 100,000 live births).

²⁶⁹ TEXAS HEALTH & HUM. SERVS., TEXAS MATERNAL MORTALITY AND MORBIDITY REVIEW COMMITTEE AND DEPARTMENT OF STATE HEALTH SERVICES JOINT BIENNIAL REPORT 9, TEXAS HEALTH & HUM. SERVS. (2020).

²⁷⁰ See FOSTER, *supra* note 30, at 234 (citing *Pregnancy Mortality Surveillance System*, CDC, <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> [<https://perma.cc/MU7P-HFGK>]).

²⁷¹ *Id.*

²⁷² See *id.* (describing how maternal mortality “[t]rends are going in the wrong direction”).

²⁷³ *Id.*

²⁷⁴ *Id.* (citing Monica R. McLemore & Valentina D’Efilippo, *To Prevent Women from Dying in Childbirth, First Stop Blaming Them*, SCI. AM. (May 1, 2019), <https://www.scientificamerican.com/article/to-prevent-women-from-dying-in-childbirth-first-stop-blaming-them/> [<https://perma.cc/7EQ7-7RD3>]).

²⁷⁵ Sarah Green Carmichael, *Opinion Criminalizing Abortion Will Hurt Black Women Most*, BLOOMBERG (June 25, 2022, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2022-06-25/abortion-bans-will-disproportionately-affect-black-women> [<https://perma.cc/8UZE-SYGG>].

programs.²⁷⁶ Health equity principles include centering the patient’s healthcare decisions.²⁷⁷ The former slave states must respect a women’s right to choose whether to give birth. In summary, “[n]ot only is abortion a safe medical procedure; its alternative—continuing pregnancy and giving birth—is far riskier,” especially for Black women who may not be listened to or treated until it is too late.²⁷⁸

*3. Anti-Abortion Laws’ Private Means of Enforcement Parallels Slave Patrols and Slave Catchers*²⁷⁹

When Celia escaped, pregnant with her rapist’s third child and awaiting execution for his murder, slave catchers took her captive and dragged her back to prison.²⁸⁰ Slave catchers formed slave patrols made up of private citizens.²⁸¹ Developed in the 1700s, “[t]he principal tasks of slave patrol policing were to terrorize enslaved Blacks to deter revolts, capture and return enslaved Blacks trying to escape, and discipline those who violated any plantation rules.”²⁸² These private citizens “had significant and unfettered power within their communities that derived from Slave Codes. Slave patrols would forcefully enter homes to look for criminal activity—such as harboring enslaved Blacks seeking freedom—or simply because they could.”²⁸³

The private enforcement method in Texas and other states²⁸⁴ rewards private vigilante tactics, just like the incentive structures in the slave states that

²⁷⁶ TEXAS REPORT, *supra* note 269, at 2.

²⁷⁷ *Id.* at J-1.

²⁷⁸ FOSTER, *supra* note 30, at 130-31.

²⁷⁹ I want to credit classmate Anne Rodgers for inspiring me to dig deeper into this idea.

²⁸⁰ Brown, *supra* note 3.

²⁸¹ See Connie Hassett-Walker, *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, *The Conversation* (June 4, 2019, 8:42 AM), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816> [https://perma.cc/AHA7-CAFJ] (“Squadrons made up of white volunteers [were] empowered to use vigilante tactics to enforce laws related to slavery.”).

²⁸² Hasbrouck, *Abolishing*, *supra* note 20, at 1114 (citing Olivia B. Waxman, *How the U.S. Got Its Police Force*, *TIME* (May 18, 2017, 9:45 AM), <https://time.com/4779112/police-history-origins> [https://perma.cc/95RV-K9F7]; RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 28 (2014); GARY POTTER, *THE HISTORY OF POLICING IN THE UNITED STATES*, *EKU ONLINE* 3 (2013), <https://perma.cc/YF8C-Y3MV> (PDF)).

²⁸³ Hasbrouck, *Abolishing*, *supra* note 20, at 1114.

²⁸⁴ See, e.g., Alison Durkee, *Idaho Enacts Law Copying Texas’ Abortion Ban—and These States Might Be Next*, *FORBES* (Mar. 23, 2022, 4:22 PM), <https://www.forbes.com/sites/alisondurkee/2022/03/23/idaho-enacts-law-copying-texas-abortion-ban--and-these-states-might-be-next/?sh=1ebfd3d325c0> [https://perma.cc/QJV9-UBLH].

delegated police powers to slave patrols made up of private citizens. These laws prohibit state actors from filing lawsuits against abortion providers.²⁸⁵ The laws instead rely on deputized private citizens to sue providers as well as anyone else in the chain of causation created by the woman seeking to exercise reproductive choice, such as her Uber driver.²⁸⁶ In Texas, the state offers abortion catchers (SB8 plaintiffs) a \$10,000 bounty per abortion if they prevail.²⁸⁷ The argument Texas Solicitor General Judd Stone II made in favor of SB8’s constitutionality—that Texas state officials are improper defendants²⁸⁸—is simply a rehashing of the old argument used to uphold slavery and racism for centuries: “states’ rights.”²⁸⁹ “It is our right to legislate clearly unconstitutional laws within our borders,” the former slave states seem to say.²⁹⁰ Relying on private citizens to enforce a state law that has a disproportionate effect on Black women is perpetuating a vestige of slavery.

Additionally, laws like the one proposed by the Texas “Freedom” Caucus²⁹¹ parallel restrictions on slaves’ movements during slave times. During slavery, plantation owners would prohibit slave men from moving outside of the plantation, to ensure that any slave woman they impregnated would give birth on the plantation and the owner would reap all the resulting profit from the slave children.²⁹² Laws that would penalize private businesses who offer to reimburse female employees for out-of-state abortion care²⁹³ will have a similar effect: restricting the movement of women (mostly Black, Brown, and poor) who cannot afford to travel to receive an abortion on their own.

²⁸⁵ TEX. HEALTH & SAFETY CODE ANN. §§ 171.207(a), 171.208(a) (West 2021).

²⁸⁶ *Id.* at §171.208(a).

²⁸⁷ *Id.* at § 171.208(b)(2); see Transcript of Oral Argument at 34, *United States v. Texas*, No. 21-588 (Oct 22, 2021), ECF No. 127 (statement of Solicitor General Elizabeth Prelogar) (referring to the \$10,000 minimum statutory damages award as a “bounty”).

²⁸⁸ Transcript of Oral Argument at 53, *United States v. Texas*, No. 21-588 (Oct 22, 2021), ECF No. 127.

²⁸⁹ See Lynn Adelman, *Laundering Racism Through the Court: The Scandal of States’ Rights*, *DISSENT* (Summer 2018), <https://www.dissentmagazine.org/article/laundrying-racism-through-court-scandal-states-rights-federalism> [<https://perma.cc/5HQQ-RDUJ>] (describing how, “[i]n critical decisions on issues like voting rights and healthcare, the Supreme Court is using the guise of ‘federalism’ to claw back hard-won progress toward racial justice”).

²⁹⁰ See Ziegler & Rebouché, *supra* note 27 (“[B]efore Texas, no state had ever successfully enacted an unconstitutional law that made its enforcement mechanism—private citizens suing for money damages—a shield against court scrutiny.”).

²⁹¹ See *supra* note 227 and accompanying text.

²⁹² See *supra* note 63 and accompanying text.

²⁹³ See *supra* notes 225–228 and accompanying text.

*4. Pseudoscientific Justifications for Anti-Abortion Laws Parallel
Justifications for Slavery and Eugenics*

Whites used pseudoscientific theories about the inferiority of the Black race to justify the horrors of slavery and eugenics.²⁹⁴ Similarly, when states began to criminalize abortion, white men othered Black women using unscientific rationales to promote their own status in the newborn field of gynecology.²⁹⁵ Anti-abortion laws perpetuate these structures of slavery by using pseudoscientific justifications for state control over women's bodies. The legislative findings for SB8 include a conclusory and sweeping reference to "contemporary medical research," but cite to no actual medical research.²⁹⁶ In passing one of the most restrictive abortion laws in the country, Texas was allegedly concerned with "the health of the woman."²⁹⁷ The opposite is true; as discussed above, Black women forced to carry a pregnancy to term face a much greater risk of death than women who receive an abortion.²⁹⁸ Even if they do survive, as discussed below, women compelled to give birth face much worse financial outcomes for almost every indicator than women who received an abortion.²⁹⁹

The legislative findings for SB8 state that "to make an informed choice about whether to continue her pregnancy, the pregnant woman has a compelling interest in knowing the likelihood of her unborn child surviving to full-term birth based on the presence of cardiac activity."³⁰⁰ But doctors have pointed out that the "cardiac activity" heard as early as six weeks is instead coming from the ultrasound machine picking up electrical activity from cells that have not yet formed a heart.³⁰¹ The term "fetal heartbeat" is not widely used in medicine.³⁰² Many other former slave states use defense-of-women-type arguments to justify ever more restrictive abortion laws.³⁰³ But these laws have never been about protecting women. They have always been concerned with the right to control bodies, going back to the days

²⁹⁴ See *supra* note 154 and accompanying text.

²⁹⁵ See *supra* Parts I.E.1.-2.

²⁹⁶ TEX. HEALTH & SAFETY CODE ANN. § 171.202 (West 2021).

²⁹⁷ *Id.*

²⁹⁸ See *supra* Part III.A.2.

²⁹⁹ See *infra* Part III.A.5.

³⁰⁰ TEX. HEALTH & SAFETY CODE ANN. § 171.202 (4) (West 2021).

³⁰¹ Simmons-Duffin & Feibel, *supra* note 187 (statement of Dr. Nisha Verma).

³⁰² See *id.* ("This is a term that is not widely used in medicine . . .") (statement of Dr. Jennifer Kerns).

³⁰³ FOSTER, *supra* note 30, at 151.

during which those bodies were owned.³⁰⁴ For Black women, these laws have always been about a lack of agency over their own bodies. Just like during the times of slavery, eugenics, and the first abortion bans, legislators are still using unscientific justifications for laws restricting Black women's ability to choose whether to procreate.

The effect of anti-abortion laws will likewise parallel slave times. As Justice Sotomayor pointed out in dissent as the Supreme Court continued to delay granting impacted women injunctive relief from SB8, these laws will cause women "to carry to term against their wishes or resort to dangerous methods of self-help."³⁰⁵ How is this result any different than enslaved women using the cotton plant to abort unwanted pregnancies?³⁰⁶ Do "dangerous methods of self-help" refer to the "violent exercise" and "external and internal manipulation" enslaved women had to employ to avoid condemning their children to a lifetime of enslavement?³⁰⁷ How do these laws treat Black women any better than the nineteenth century Missouri jurisprudence that doomed Margaret Garner, Jane, and their children?³⁰⁸

5. Anti-Abortion Laws Exacerbate Existing Financial Barriers to Abortion and Childrearing that Disproportionately Impact Women of Color

From 2010 to 2016, researchers directed by Diana Greene Foster interviewed nearly 1,000 women seeking an abortion from thirty facilities across the country.³⁰⁹ The results formed the Turnaway Study, which compared outcomes of women who received an abortion to those who were turned away because they were past the facility's gestational age limit.³¹⁰ The study demonstrated that people who sought, but did not receive, an abortion "experienced worse health, higher poverty rates, and higher levels of public assistance receipt over the next five years."³¹¹ Additionally, "women who were

³⁰⁴ See *supra* Part I.A.

³⁰⁵ United States v. Texas, 142 S. Ct. 14, 17 (2021) (Sotomayor, J., dissenting in part).

³⁰⁶ Sullivan, *supra* note 117, at 27 (citing SCHWARTZ, *supra* note 117, at 96-97).

³⁰⁷ ROBERTS, *supra* 57, at 47 (quoting HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* 81 (1977)).

³⁰⁸ See *supra* Part I.D.

³⁰⁹ *The Turnaway Study*, ANSIRH, <https://www.ansirh.org/research/ongoing/turnaway-study> [https://perma.cc/39VT-JBR5].

³¹⁰ *Id.*

³¹¹ Sarah Miller, Laura R. Wherry, & Diana G. Foster, *What Happens After an Abortion Denial? A Review of Results from the Turnaway Study*, 110 AEA PAPERS & PROC. 226, 229 (2020).

denied abortions experienced large and persistent increases in markers of financial distress, even when accounting for pre-existing differences in the characteristics of women seeking an abortion at later gestational ages.³¹² As of 2019, non-Hispanic Black women had the highest rate of seeking an abortion.³¹³ Foster found that “[t]hose seeking abortions are disproportionately low-income people, people of color, and people in their early twenties.”³¹⁴ Accordingly, laws prohibiting or restricting abortion will have a disproportionate effect on women of color.

The Turnaway Study likewise demonstrates that the most substantial obstacle to abortion in this country is cost.³¹⁵ The average price of a first-trimester abortion in the Turnaway Study was about \$500.³¹⁶ If the woman was

[b]etween 14 and 20 weeks, the average price was about \$750, and after 20 weeks, it was about \$1,750. And these estimates do not include transportation, lodging, and childcare costs, not to mention lost wages from time off work. But public and even private insurance is less likely to cover the cost of an abortion than most other medical procedures. This is no coincidence. It is the result of anti-abortion laws. . . . [T]hese laws seem to be about making sure women literally pay the price³¹⁷

These prices will only go up in post-*Roe* America. For impoverished households, Foster points out that “raising hundreds or thousands of dollars in a few days may be impossible.”³¹⁸

At the same time, the reason most women seek an abortion in the first place is also financial. Most women who seek an abortion already have

³¹² *Id.*

³¹³ See Katherine Kortsmit et al., *Abortion Surveillance—United States, 2019*, 70 SURVEILLANCE SUMMARIES, 20 <https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf> [<https://perma.cc/88QM-7SP4>] (reporting that non-Hispanic Black women represented 38.4% of total abortions broken down by race/ethnicity, the highest of any group).

³¹⁴ See FOSTER, *supra* note 30 at 251.

³¹⁵ *Id.* at 62.

³¹⁶ *Id.* at 63 (citing Sarah C.M. Roberts et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24-2 WOMEN’S HEALTH ISSUES e211, e215 (2014)).

³¹⁷ *Id.* at 62-64.

³¹⁸ *Id.*

children.³¹⁹ Raising a child is expensive.³²⁰ For a majority of women seeking an abortion, therefore, abortion may be the only option—a last resort. Foster found that “[h]alf of all women seeking abortion in the U.S. live below the federal poverty level, which is about \$12,000 a year for a woman living alone and \$25,000 for a family of four.”³²¹ States that have banned abortion after *Dobbs* have taken this last resort away from Black, Brown, and poor women.

While white women are more likely to be able to afford to travel out of state to receive an abortion, Black women and other women of color are less likely to be able to indulge in this luxury.³²² Taking enough time to come up with the money to travel to another state to receive an abortion only increases the abortion cost, because then the abortion will necessarily occur at a later gestational stage.³²³ In addition to money for the abortion itself and for travel, women seeking an abortion in another state must take time off of work and figure out childcare.³²⁴ The Turnaway Study demonstrates that anti-abortion laws, “supposedly intended to make abortion safer or reduce the chance of abortion regret, instead put abortion out of reach for some and vastly disproportionately affect the already disadvantaged—low-income women, women of color, women with chronic health conditions, women with very young children, and teenagers.”³²⁵

³¹⁹ See Jessica D’Argenio Waller, *The Majority of Women Who Seek Abortions Are Already Mothers*, MOTHERLY (June 24, 2022), <https://www.mother.ly/health-wellness/womens-health/women-seeking-abortion-are-mothers/> [<https://perma.cc/S3MV-2PXX>] (citing Katherine Kortsmitt et al., *Morbidity and Mortality Weekly Report*, CDC (Nov. 26, 2021), <http://dx.doi.org/10.15585/mmwr.ss7009a1> [<https://perma.cc/639Q-2GVK>]) (finding that 60% of abortion patients already have already given birth to at least one child).

³²⁰ See e.g., *id.* (“Mothers . . . likely already know that at a time when women have no paid parental leave, no universal healthcare, no universal pre-K, a childcare worker shortage and skyrocketing childcare expenses, the cost of raising a child—both financially and emotionally—is a huge burden to bear.”).

³²¹ FOSTER, *supra* note 30, at 66.

³²² See Karen Brooks Harper, *Wealth Will Now Largely Determine Which Texans Can Access Abortion*, TEX. TRIB. (June 24, 2022, 3:00 PM), <https://www.texastribune.org/2022/06/24/texas-abortion-costs/> [<https://perma.cc/HM25-KSCZ>] (describing how the burdens of abortion bans will fall most heavily on socio-economically disadvantaged people of color because they are the least likely to be able to travel out of state to receive care).

³²³ Ayanna Alexander, *Texas Abortion Ban Sends Women Out of State, Draining Aid Funds*, BLOOMBERG LAW (Sept. 10, 2021, 5:51 AM), <https://news.bloomberglaw.com/social-justice/texas-abortion-ban-sends-women-out-of-state-draining-aid-funds> [<https://perma.cc/QFY8-D6TC>].

³²⁴ *United States v. Texas*, 142 S. Ct. 14, 17 (2021) (Sotomayor, J., dissenting in part).

³²⁵ See FOSTER, *supra* note 30, at 65.

*B. Access to Abortion Is “[I]ndispensable to Bodily and Political Self-Determination” for Black Women*³²⁶

The previous sections have demonstrated that now, as then, some people have more control over their bodies than others. During slave times, the white male slaveholder had all the autonomy when he was raping his Black female slaves and forcing reproduction to profit from the slave children.³²⁷ During Jim Crow and the eugenics movement, it was white lynch mobs and white doctors relying on pseudoscience to experiment on Black women and manipulate who could reproduce.³²⁸ Today, it is the mostly white male legislature of Texas³²⁹ and the other former slave states controlling Black women’s access to abortion and their decision whether to bear children.

Diane Greene Foster points out that Black women have “a historically justifiable suspicion of health care institutions and providers.”³³⁰ For example, “[b]irth control advocacy in the United States has been tainted by its association with eugenicist ideas about who should reproduce. There is a lengthy history in the U.S. of forced contraception and sterilization, and unethical birth control trials, all targeting women of color” and other disadvantaged individuals.³³¹ Ensuring that all women have equal access to abortion—especially Black women—is an important step toward remedying past reproductive injustices. But real reproductive justice will exist when women are able to choose what they want to do with their own bodies, without having to justify their decision to a hostile society.³³²

Diana Greene Foster gives examples of political reasoning used by proponents of abortion:

“Legalize abortion because otherwise, women will die of illegal abortions” comes from a public health rationale. “Fund contraception and abortion to lower population growth” is a demographic argument. “Every dollar spent on

³²⁶ Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTHCARE FOR THE POOR & UNDERSERVED 274, 275 (1992).

³²⁷ See *supra* Part I.A.-D.

³²⁸ See *supra* Part I.E.

³²⁹ See *Texas Senators of the 87th Legislature*, SENATE OF TEX., <https://senate.texas.gov/members.php?sort=name> [<https://perma.cc/G46W-ZQ2B>] (including photos of each member of the Texas Senate).

³³⁰ FOSTER, *supra* note 30, at 54 (citing ROBERTS, *supra* note 57).

³³¹ *Id.* at 281 (citing ROBERTS, *supra* note 57; Cynthia Prather et al., *supra* note 151).

³³² See *id.* at 280 (explaining “alternate justifications for abortion rights still predominate . . . because the radical idea of providing abortion care because *that is what women want for their lives* is not politically feasible”).

family planning reduces public expenditures on medical care for unwanted pregnancies” is a fiscal argument. “Legalize abortion to reduce carbon emissions” is an environmental argument.³³³

She goes on to point out that “none of these were mentioned as reasons for wanting an abortion by the women in [the Turnaway] study.”³³⁴ Instead, we need to give women access to abortion because access gives women choice, full stop. When Black women want to exercise control over their own bodies by choosing not to procreate, we should trust them, without requiring a reason.³³⁵

If you’ve read and accepted this Article up to this point, you might be wondering about the constitutional solution. After all, the crux of Justice Alito’s argument in *Dobbs* was that the right to abortion was not established at the time of the founding.³³⁶ And it is a basic notion taught in every constitutional law class that there is no explicit right to privacy in the Constitution.³³⁷ One potential solution is found in the Thirteenth Amendment’s commitment to eradicate the “badges and incidents” of slavery.³³⁸ This is especially helpful because it reaches private conduct, unlike much of the rest of the Constitution.³³⁹ Others have proffered that the Ninth

³³³ *Id.* at 281.

³³⁴ *Id.*

³³⁵ See Jia Tolentino, *We’re Not Going Back to the Time Before Roe. We’re Going Somewhere Worse*, THE NEW YORKER (June 24, 2022), <https://www.newyorker.com/magazine/2022/07/04/we-are-not-going-back-to-the-time-before-ro-ue-we-are-going-somewhere-worse> [<https://perma.cc/62K7-U5UJ>] (“We will need to be full-throated and unconditional about abortion as a necessary precondition to justice and equal rights if we want even a chance of someday getting somewhere better.”).

³³⁶ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2248 (2022) (pointing out that, “[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion.”). I note that my right, as a woman, to vote or enter into contracts was also not established at the founding, but for Justice Alito, someone who physically cannot be impacted by his decision in *Dobbs*, that is neither here nor there.

³³⁷ See *id.* at 2245 (noting that the right to privacy is not mentioned in the Constitution).

³³⁸ See Hasbrouck, *Antiracist*, *supra* note 28, at 51 (citing U.S. CONST. amend. XIII); Carrie N. Baker, *Forced Pregnancy Is Involuntary Servitude, Violates the 13th Amendment*, MS. MAG. (May 23, 2022), <https://msmagazine.com/2022/05/23/abortion-bans-13th-amendment/> [<https://perma.cc/SWL2-6K6Z>].

³³⁹ See George Rutherford, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1367 (2008) (“Unlike [other provisions of the Constitution], the Thirteenth Amendment restrains not only government actors, but also private individuals.”); see also Hasbrouck, *Antiracist*, *supra* note 28, at 137 n.361 (citing Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 546 (1991)) (stating that “the debates in

Amendment's guarantee that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"³⁴⁰ should protect women's reproductive choice.³⁴¹ Like some state counterparts, women's reproductive choice could also stem from basic concepts of liberty and the pursuit of happiness.³⁴² Wherever the source, to survive attack by the current textualist Court, advocates should ground reproductive rights in the history and text of the Constitution.³⁴³ The Ninth and Thirteenth Amendments are just two possible places in which a woman's right to choose could find a more permanent home.

Loretta J. Ross wraps this Part up the best:

African-American women were never the passive victims of eugenics (the "improvement" of humankind through selective breeding), forced sterilization, and other medical, commercial, and state policies of reproductive control. Even before slavery, African-American women were intimately concerned about fertility. When legal birth control and abortion were available, African-American women used them. When they were not, women resorted to dangerous methods limited only by available technology and imagination.

Abortion, in and of itself, does not automatically create freedom for African-American women. But it does allow some control over our biology, freeing us from the inevitability of unwanted pregnancies, and is therefore indispensable to bodily and political self-determination. . . . The question is not *if* we support abortion, but how, and when, and why. But it was neither persuasive analysis nor arguments nor ideology that influenced African-American women to have abortions or to support abortion and birth

the Thirty-Ninth Congress over the Fourteenth Amendment and the Civil Rights Act of 1866 confirm that the constitutional right to protection was understood to include protection against private violence.").

³⁴⁰ U.S. Const. amend. IX.

³⁴¹ See Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 38-39 (1988) ("[T]he worst way

to address the problem of judicial abuse is to deny that courts may protect unenumerated rights. This would amount to a preemptive surrender of these rights to the far greater threat of legislative or executive abuse.").

³⁴² See *Hodes v. Schmidt*, 440 P.3d 461, 483 (Kan. 2019) (grounding the right to personal autonomy, including the right to reproductive choice, in the natural rights and included concepts of liberty and the pursuit of happiness found in the Kansas Constitution).

³⁴³ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244-45 (2022) ("Constitutional analysis must begin with 'the language of the instrument,' ...which offers a 'fixed standard' for ascertaining what our founding document means." (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 186-189 (1824); J. Story, *Commentaries on the Constitution of the United States* §399, p. 383 (1833)).

control. We did so because we needed to. Necessity was the midwife to our politics.³⁴⁴

CONCLUSION

In 1850, at age fourteen, Celia began the last five years of her life: five years of rape and abuse at the hands of her owner, a white man five times older than her.³⁴⁵ She bore three of his children.³⁴⁶ Nearly two hundred years later, sixteen-year-old Margaret³⁴⁷ was trafficked for sex by her older cousin in Texas.³⁴⁸ Strangers raped Margaret multiple times a day.³⁴⁹ Margaret dissociated from her life of coerced sex, and “was so disconnected from her body and her tortuous reality” that she did not know she was pregnant until well after the six week deadline in SB8.³⁵⁰ On April 7, 2022, Texas police arrested 26-year old Lizelle Herrera for self-inducing an abortion using the abortion pill and charged her with murder.³⁵¹ Celia could not seek an abortion. Margaret could not seek an abortion. Celia was charged with murder for protecting herself from her rapist. Lizelle was charged with murder for seeking an abortion.

Two hundred years later, abortion laws in the former slave states perpetuate structures of slavery by controlling Black women’s reproductive decisions. Two hundred years later, states are still controlling Black women’s bodies. Now, more than ever, it is critical that we call out the disproportionate impact anti-abortion laws have on Black women. Now more than ever, it is crucial that we resist anti-abortion laws for the sake of the many millions of people in America who can be forced to bear children without the fundamental constitutional protection of choice.³⁵²

³⁴⁴ Ross, *supra* note 154, at 275.

³⁴⁵ *See supra* Part I.

³⁴⁶ *See supra* Part I.

³⁴⁷ This survivor’s name has been changed.

³⁴⁸ Kelly White & Julia Spann, *SAFE Statement: SB 8 Is Another Traumatic Attack on Survivors of Rape and Incest*, SAFE AUSTIN, <https://www.safeaustin.org/sb8/> [<https://perma.cc/YK9J-BB3R>].

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ Carrie N. Baker, *Woman Arrested for Abortion in Texas, Held on Half-Million-Dollar Bond: ‘This Arrest Is Inhumane,’* MS. MAG. (Apr. 9, 2022), <https://msmagazine.com/2022/04/09/woman-arrested-abortion-texas-mexico-murder-lizelle-herrera/> [<https://perma.cc/J345-CC4L>] (last updated Apr. 10, 2022, 3:07 PM).

³⁵² *See* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2323 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).