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Bound Labor:

Challenging the "History and Tradition" in *Dobbs v. Jackson* (2022)

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ABSTRACT

Bound Labor: Challenging the "History and Tradition" in *Dobbs v. Jackson* (2022)

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On June 24, 2022, the United States Supreme Court released their decision for the case *Dobbs v. Jackson*, which overturned the constitutional right to an abortion established in *Roe v. Wade* (1973). The decision cites that the right to an abortion is not a part of the nation's "history and tradition," therefore making it exempt from being protected by the Fourteenth Amendment. However, the Court uses a selective use of "history and tradition," leaving out the important context of abortion and reproductive health discourse in the US, which is deeply tied to the legacy of slavery. This honors thesis explores the connection between how southern slave owners created and exploited enslaved women's role as sexual and reproductive laborers in antebellum America to the control over women's reproductive autonomy exhibited in southern abortion bans. Analyzing interviews, health data, court cases, and legal statutes from both the antebellum era and the twenty-first century illustrates that not only does the *Dobbs* decision consciously ignore the history of slavery in its rationale for overturning *Roe*, but that with no constitutional protection for an abortion, states are able to use abortion bans to limit reproductive healthcare as a whole and also enacting similar strategies to maintain control over women today, as were used on enslaved

people. In ignoring this history, SCOTUS allows states to invoke similar conditions to those they have erased from the *Dobbs* decision, opening up discussions about the intersectionalities of race, gender, and reproduction in modern day United States.

CONTENTS

ABBREVIATIONS

ASC	Ambulatory Surgical Center
D&E	Dilation and Evacuation
D&X	Dilation and Extraction
HIPAA	Health Insurance Portability and Accountability Act
HLPA	Human Life Protect Act of 2021
ICU	Intensive Care Unit
IVF	In Vitro Fertilization
LMP	Last Menstrual Period
OB-GYN	Obstetrician-gynecologist
PPROM	Preterm Prelabor Rupture of Membranes
SCOTUS	Supreme Court of the United States
SIDS	Sudden Infant Death Syndrome
TRAP	Targeted Legislation of Abortion Provider
VVF	Vesico-Vaginal Fistula

Introduction

I[']s seen a n—r women dat was fixin' to be confined do somethin' de white folks didn't like. Dey would dig a hole in de ground just big' nuff fo' her stomach, make her lie face down an whip her on de back to keep from hurtin de child.[1]

— Lizzie Williams

The whipping of pregnant enslaved women by laying them in a hole, as depicted by enslaved woman Lizzie Williams, was not an uncommon practice among antebellum slave holders. While being so violent towards a person who reproduced the institution of slavery with her womb might seem contradictory to the interest of enslavers, the practice illustrates that enslavers saw the pregnant woman and fetus as two separate entities whose interests could be separated. Referred to by scholars as the maternal fetal conflict, this theory examines "the way in which law, social policies, and medical practice sometimes treat a pregnant woman's interests in opposition to those of the fetus she is carrying."[2] The case of whipping pregnant enslaved women, as Historian Dorothy Roberts explains, "created such a conflict between Black women and their unborn children to support their [slave owners] own economic interests."[3] Slave owners saw the whipping of the slave as a way to incentivise their labor, which would increase their profits. However, the birth of another piece of property would also increase their profits, whether through sale or labor. The fetus

[1] Michael P. Johnson, "Smothered Slave Infants: Were Slave Mothers at Fault?" *The Journal of Southern History* 47, no. 4 (1981): 513. https://doi.org/10.2307/2207400.
[2] Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, (Second Vintage Books Edition, 2017), 40.
[3] *Id.* at 41

and mother were treated in opposition to one another to meet the needs of the enslaver who had ultimately authority over both.

Scholars typically describe the maternal fetal conflict as a phenomenon of the twentieth century, reflecting growing reproductive technology and an increase in explicit debates about reproductive health. The whipping of pregnant enslaved women however, shifts the chronology of this issue back in time, and suggests that it must be understood as endemic to, and perhaps birthed from, American slavery. Until recently, the experience of enslaved women and their lack of reproductive autonomy have been largely ignored, especially within mainstream discussions of reproductive autonomy. has been discussed by scholars for many years, and s, the parallels between bondage and control are lost by many. Most recently, this history was completely ignored in the Supreme Court case *Thomas E. Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization, et al*, more commonly referred to as *Dobbs v. Jackson.*

Dobbs v. Jackson (2022) called into question the constitutionality of Mississippi's Gestational Age Act, which restricted abortions after 15 weeks of gestation. The case threatened the precedent of *Roe v. Wade* and *Planned Parenthood v. Casey*, which since 1973, had upheld a constitutional right to an abortion in the first two trimesters of pregnancy. In a 6-3 decision, the Court sided in favor of Dobbs, effectively overturning both cases. The Court's majority opinion, written by Justice Samuel Alito, alongside the concurrences of Justice Brett Kavanaugh and Justice Clarence Thomas determined that the right to an abortion is not "deeply rooted in [the] Nation's history and tradition," nor is it

"essential to this Nation's 'scheme of ordered liberty.'"[4] However, to come to this decision, the Court used a very particular use of "history and tradition" to support its argument.

The Court tracked the "history and tradition" of abortion in English Common Law dating back to the 13th century, stating that until *Roe*, most governments either did not protect a right to an abortion or restricted the practice.[5] Also supporting this argument is that at the time of the ratification of the Fourteenth Amendment, most states had either criminalized abortion or would in the following years.[6] Consequently, the Court's "history and tradition" is a statement that abortion had not been protected until more modern times and, therefore, should not be protected.

Dobbs v. Jackson has been detrimental to women's health and autonomy in states that have chosen to ban or limit abortion rights. Maternal mortality rates are rising, especially within non-white and low-income communities.[7] Women are unable to receive life-saving care as state abortion restrictions have led to confusion among medical professionals as to when intervention is allowed, and, in more extreme cases, states, rather than doctors, have seized the authority to dictate what a life-threatening medical condition is by being able to contradict physicians' judgment.[8] Pregnant people experiencing miscarriages are unable to obtain care due to physicians fearing that providing care could result in them going to jail.[9] Women are afraid to even seek reproductive medical care at the

[4] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___, 2 (2022).
[5] *Id.* at 17.
[6] *Id.* at 23.
[7] Anna Kheyfets, Shubhecchha Dhaurali, Paige Feyock, Farinaz Khan, and April Lockley, "The Impact of Hostile Abortion Legislation on the United States Maternal Mortality Crisis: A Call for Increased Abortion Education," *Frontiers in Public Health*, December 2023, https://doi.org/10.3389/fpubh.2023.1291668.
[8] *Cox v. Texas*, 597 U.S. ___ (2023).
[9] Preetha Nandi, Danielle M. Roncari, Erika F. Werner, Allison L. Gilbert, and Sebastian Z. Ramos, "Navigating Miscarriage Management Post-Dobbs: Health Risks and Ethical Dilemmas," *Women's Health Issues* 34, no. 5 (2024): 450–53, https://doi.org/10.1016/j.whi.2024.05.004.

risk of either being turned away or turned into law enforcement.[10] Even individuals' most private and intimate details of their reproductive and sexual lives can be used as evidence against them in court.[11]

The consequences of *Dobbs* illustrate how a ruling that on the surface appears to be about allowing states to make decisions about abortion legislation, in practice, is about much more than abortion. It is about the controlling of women's reproductive autonomy, regardless of whether it creates negative health outcomes for women *and* children. To come to this conclusion, he Court ignored essential pieces of the "history and tradition" of reproductive control, despite having multiple examples to draw on—the most prominent being the ownership of enslaved women's bodies and reproductive capacity within the confines of American slavery.

Regarded as the peak of the institution of slavery, the antebellum era of the United States brought forth increased horrors for the life of enslaved people, especially enslaved women. Enslaved women were viewed as both laborers and reproducers for their enslavers, solidifyed after the implementation of the "Act Prohibiting the Importation of Slaves" in 1808, which banned the international slave trade. The lack of importation of new laborers meant that the current enslaved women would bear the burden of creating an enslaved labor force, something that was often accomplished through sexual abuse, assault, and exploitation of enslaved women's bodies. This exposed women to violence, both in regards to their labor, consisting of whippings and beatings, often done naked to increase humiliation, and in regards to their reproductive expectations, facing rape and assault, many

[10] Cynthia Conti-Cook, "Surveilling the Digital Abortion Diary," *University of Baltimore Law Review* 50, no. 1 (2020): Article 2, 48. https://scholarworks.law.ubalt.edu/ublr/vol50/iss1/2.
[11] *Act Prohibiting the Importation of Slaves*, 2 Stat. 426 (1807).

of which coming from white men, especially their own enslavers. Pregnant enslaved women were still expected to work in the fields, though may have potentially received more food and less strenuous work towards the very end of their pregnancy. This was not always the case. Some pregnant enslaved women were not exempt from field work or the physical violence subjected to them as a consequence of slowed labor production. Recall that pregnant women were often whipped while lying down, with their stomachs in a hole, to protect an enslaver's "investment"—the unborn child. Enslaved women were consistently subjected to violence and control over their bodies, and had to find their own ways to use reproductive agency.

Enslaved women used various methods of contraception and abortifacients to have control over their reproduction against the wishes of their masters. In certain cases, enslaved women committed infanticide as a form of reproductive agency or in an act of compassion to save their children from the horrors of slavery. The lack of access to reproductive care and exploitation by enslavers hold eerie similarities to the lack of options and control by southern and conservative states following the *Dobbs* decision, taking away the federal protection of abortion established in *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). Despite the potential relationship with the legacy of slavery, the *Dobbs* decision consistently states that abortion is not a part of the "history and tradition." However, the historical record suggests otherwise. This paper will answer the following questions: What happens when we take more than a selective view of history, in this case, the Court's view, into account? Why are the similarities between the antebellum period's reproductive control

of enslaved women and current state restrictions of women's bodily autonomy important for law and policy? In answering these questions, this paper makes three core arguments.

First, the Roberts Court completely ignores essential aspects of the history of abortion and reproductive autonomy discourse in the United States. Adding the context of antebellum slavery back into the conversation, challenges the fundamental underpinning of the Court's historical claims. This paper uses antebellum slavery as a case study to examine what *has* happened in American history when individuals were not allowed autonomy over their bodies. Why does the history of women whose autonomy was taken from them matter when analyzing *Dobbs*? The first chapter answers this question by examining the violence, abuse, and exploitation that slave owners inflicted upon enslaved women to control all aspects of their reproductive bodies and lives. The second chapter will discuss how bondswomen resisted this exploitation and took back their power in exercising autonomy over their reproduction.

The second argument is that by allowing individual states to dictate who has the ultimate control over women's bodies, *Dobbs* grants direct access to women's wombs in a way that echoes slaveholders' ownership of enslaved women's bodiesFurthering this parallel is the fact that the majority of states that have banned or limited abortion access under *Dobbs* are located in the same southern States that practiced slavery. The third chapter of this paper will explore the use of fetal personhood in southern abortion bans, evoking themes of the maternal fetal conflict, and compare how ideas of control over women's bodies are at the center of both slavery and modern-day reproductive health jurisprudence.

Finally, this paper argues that since southern abortion bans are deeply embedded with the legacy of bondage, protecting the right to an abortion and, consequently, reproductive freedom is an essential part of modern-day abolitionism. Abolitionism refers to the "eliminat[ion of] slavery's continued influence of the law," therefore requiring a reconstruction of the legal and political systems that make up the United States, something that has never been achieved.[12] This is often confused with emancipation, which only ended the legal relationship of bondage between slave and master. W.E.B Du Bois differentiated the two terms, stating, "The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States."[13] This paper seeks to explain how abortion restrictions and ideas of slavery are deeply intertwined, even if the two seem completely unrelated. As legal historian Giuliana Perrone writes, abolition means that "we must scour the American legal system for vestiges of slavery – those that are obvious and those that masquerade as race neutral in areas of law seemingly untouched by the peculiar institution."[14] This paper will illustrate that pieces of slavery are maintained through *Dobbs* and the abortion bans that the decision permits, thereby exposing the lack of abortion protection as a perpetuation of the institution of slavery.

Ultimately, the evidence in this thesis makes it clear that the *Dobbs* case was about more than overturning the constitutional right to abortion and returning the right to the States. It was about maintaining the ability for women's bodies and reproductive capacity to

[12] Giuliana Perrone, *Nothing More than Freedom : The Failure of Abolition in American Law*, (Cambridge University Press, 2023), 4.
[13] W. E. B. Du Bois, *Black Reconstruction* (The Free Press, 1935), 189.
[14] Perrone, *Nothing More than Freedom*, 281.

be controlled and exploited by an entity other than themselves. Whether it be an individual or the State, the ability for someone to own an individual's body and autonomy threatens the very freedom and rights that the U.S. claims is its ultimate goal to protect.

Chapter 1

Reproducing in Bondage

Her [Anarcha's] life was one of suffering and disgust. Death would have been preferable. But patients of this kind never die; they must live and suffer.[15]

— Dr. James Marion Sims

In 1662, the Colony of Virginia passed Act XII, establishing *partus sequitur ventrem* or "that which is born follows the womb." This meant that "[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother."[16] By legalizing that any children born of enslaved women would also be bound, Virginia and other colonies ultimately created an economic incentive for slaveholders to rape their enslaved women.[17] Enslaved women were sometimes expected to exercise reproductive and physical labor, but this was not yet cemented as a part of the expectations of bound women. This changed in 1808, when the United States Congress passed the "Act Prohibiting the Importation of Slaves," thereby legally ending the United States' involvement in the international slave trade, as enslavers were no longer able to purchase cheap labor internationally to increase the enslaved population.[18] While the domestic slave trade

[15] J. Marion Sims, *The Story of My Life*, (Da Capo Press, 1968), 240.
[16] A. Leon Higginbotham, Jr., *In the Matter of Color: The Colonial Period* (Oxford University Press, 1978), 48 (citing the Virginia colonial assembly's Act XII from 1662). Though, the colonial period did not rely on enslaved women exclusively, as the Trans-Atlantic Slave Trade allowed for the importation of cheap enslaved labor.
[17] This almost meant that white men would not be punished for raping or having sex with enslaved people or be responsible for any children born as a result.
[18] "The Act Prohibiting the Importation of Slaves," 2 Stat. 426. http://hdl.loc.gov/loc.rbc/rbpe.22800200.

continued, there would still be a finite amount of enslaved bodies to trade around. So, enslavers decided to take matters into their own hands and create their own slaves, using enslaved women's wombs to carry and grow the institution.

The purpose of this chapter is to illustrate how slaveholders treated enslaved women and the various capacities they used to maintain control over enslaved women's bodies during the antebellum era. This chapter argues that the exploitation of enslaved women's reproductive capacities underscores the systematic denial of their autonomy, reflecting broader patterns of control and coercion in the antebellum South. Looking specifically at how enslavers exploited and controlled the reproduction of enslaved women shows the most extreme case in the nation's history of what happens when women's reproductive capacity is owned by anyone other than themselves, showing that the Roberts Court's usage of "history and tradition" in the *Dobbs* decision is at *best*, incomplete.[19] The chapter is split into 3 major parts, (1) a comprehensive look at the various ways enslavers used enslaved women's gender and reproductive capacity, split into the categories of: forced coupling, slave relationships, concubines, and wet nurses, (2) a description of the understanding of gynecological health in the antebellum era and how enslaved Black women's bodies were used in the production of this knowledge, and (3) an analysis of the views and treatment of enslaved women during the different phases of their reproductive capacity: menstruation, pregnancy, and postpartum.

Forced Coupling

[19] As stated, this chapter focuses on the experience and actions of enslaved women. It is important to note that I am using "enslaved women" to encompass enslaved females of child bearing age. This includes enslaved girls and teens. However, I chose to use the term "enslaved women," as the enslaved girls who had hit puberty were treated the same as older women who were also able to have children.

To maximize their profits, slaveholders engaged in slave breeding, employing various tactics to increase the likelihood that their enslaved women would produce children. The term "slave breeding" often refers to forced coupling, in which enslavers would force relationships between enslaved people with the explicit intent for the couple to produce children. Despite being people, slaves were "bred like livestock."[20] Historian Daina Ramey Berry labels this "third party rape," highlighting the inherent abuse of the slaveholders, despite the enslaver not physically participating in the sexual act.[21]

In 1860, Hall Hawkins purchased Rose Williams for $525 at a slave auction in Bell County, Texas.[22] Adjusted to rates of inflation, in 2024, Williams would have sold for $19,966.70. Sixteen-year-old Rose was made to share her quarters with fellow enslaved man Rufus, not knowing that Hawkins instructed Rufus to impregnate her. After fighting Rufus out of her bed multiple times, Hawkins confronted Rose about her unwillingness to comply with Rufus' advances: "Woman, I'd pay big money for you and I'd done dat for de cause I wants yous to raise me chillens. I'd put you to live with Rufus for dat purpose. Now, if you doesn't want whippin' at de stake, you do want I wants."[23]

After these threats of physical violence, Rose gave in to her master's demands and had two children with Rufus. 70 years later, Rose spoke of her decision to face sexual violence rather than the whipping post and the lasting effect the relationship with Rufus had on her. When asked about her life post emancipation, Rose replied, "I never marries, 'cause one 'sperience am 'tough for dis n—r. After what I does for de masse, I'd never wants no

[20] Lulu Wilson, *Slave Narratives, Texas,* vol. 16, pt. 4 (LOC/WPA, 1941), 190.
[21] Daina Ramey Berry, *The Price for Their Pound of Flesh : The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Beacon Press, 2017), 79.
[22] Rose Williams, *Slave Narratives, Texas Narratives*, vol. 16, pt. 4 (LOC/WPA, 1941), 175.
[23] *Id.* at 177.

truck with any man. De Lawd forgive dis cullud woman, but he have to 'scuse me and look for some others for to 'plenish de earth."[24] Williams' unwillingness to be with a man after emancipation highlights the lasting trauma of forced coupling and the institution of slavery as a whole. For Rose, exercising her reproductive autonomy after slavery meant that she would not be with a man ever again.

There were instances where forced couples stayed together after emancipation, though this does not take away from the traumatic and exploitative nature of their relationship. Sam and Louisa (called Nor prior to emancipation) were forced to perform sexual acts in front of their enslaver "Big Jim" McClain. McClain was notorious for forced coupling, disregarding any family unions created within enslaved communities. If he thought that an enslaved woman and an enslaved man would have strong and healthy children,he would call for them and force them to have sex in front of him. Sometimes this spectacle would be witnessed by McClain's friends, who could opt to participate and rape any enslaved woman of their choosing. Louisa Everett spoke of her and her husband, Sam's, experience on the McClain plantation:

> Marse Jim called me and Sam ter him and ordered Sam to pull off his shirt—that was all the McClain n—s wore– and he said to me: "Nor, 'do you think you can stand this big n—r?" He had that old bull whip flung acrost his shoulder, and Lawd, that man could hit so hard! So I jes said "yassur, I guess so," and tried to hide my face so I couldn't see Sam's nakedness, but he made me look at him anyhow. Well, he told us what we must git busy and do in his presence, and we had to do it. After that we were considered man and wife. Me and Sam was a healthy pair and had fine, big babies, so I never had another man forced on me, thank God. Sam was kind to me and I learnt to love him.[25]

[24] *Id.* at 178.
[25] Sam and Louisa Everett, *Slave Narratives, Florida Narratives*, vol. 3 (LOC/WPA, 1941), 128.

Similar to Rose, Louisa was forced to face either the whip or rape. It is clear that McClain used his position of power to exploit his enslaved women and men to create more slaves with no regard for the well-being or wishes of the people he was exploiting. What would "Big Jim" have done to Louisa if she and Sam had not produced the quantity or quality of children he desired? Would he have forced other men upon Louisa? Would McClain have used the same whip on her that he held as he watched her and Sam? While we will never know a definitive answer to these questions, Louisa's statement illustrates some possibilities. Her relief in not having another man forced on her suggests the real possibility that despite already being paired with Sam, there was always a chance that McClain would call for her at his will, with a new body to be forced upon her. It is impossible to know what exactly McClain would do, but the fear Louisa expressed is telling. It is important to acknowledge that enslaved men like Sam were also subjected to sexual exploitation. The very nature of third party rape is that both parties in the sexual act are being exploited. This paper does not aim to diminish the experiences of enslaved men who were sexually abused, rather, it seeks to highlight that in situations of forced coupling, enslaved men were used against their will to exploit enslaved women's reproductive capacity by impregnating them.

Just as enslavers would create marriages based on the qualities of their "stock," they were also unopposed to breaking up marriages in order to create their own pairings. Unions of enslaved people by their own fruition, which will be discussed further in the next section, were still at the whims and control of their enslavers, who could choose whether or not to recognize and respect the pairing. Many did not. Formerly enslaved man Elige Davidson, who was owned by George Davidson, experienced this, being forced to have sexual relations

with numerous enslaved women despite having a wife: “Massa, he bring some more women to see me. He wouldn’t let me have jus’ one woman. I have ‘bout fifteen and I don’t know how many chillen. Some over a hunerd, I’d sho’.”[26] Davidson’s marriage did not prevent him from being a breeder. Not only does this indicate that Davidson was forced to be with other women, but that countless enslaved women on the plantation were exposed to sexual violence through this third party rape. We do not know the identities of these women or the children that they bore. How many women’s bodies were used to increase George Davidson's wealth? How did they feel about Elige or other potential male “breeders” they were forced to have sex with? Did these women have spouses of their own?

Slave Relationships

Rather than enslavers like Jim McClain and Hall Hwakins who forced sexual unions at their will, some chose to promote and recognize slave made unions. Many slaveholders encouraged this in an attempt to make their slaves more submissive and docile, as it was believed this would increase happiness among the enslaved people, leading to more productivity in the fields, fewer runaways, and most importantly, the production of children. Historian Brenda E. Stevenson argues that often, allowing marriages was just a tactic to increase one's slave population, writing, “Some slaveholders promoted high birth rates among their slave property through marriage, even if they refused… to guarantee that a woman, or man, could… keep and raise the children that they bore.”[27] Marriage was not about allowing enslaved people to foster community, create families, or have a semblance of

[26] Elige Davidson, *Slave Narratives, Texas Narratives*, vol. 16 pt. 1 (LOC/WPA, 1941), 299.
[27] Brenda E. Stevenson, *What Sorrows Labour in My Parent's Breast? : A History of the Enslaved Black Family* (Rowman & Littlefield, 2023), 196.

autonomy. Rather, it functioned as another way for enslaved women, especially, to be manipulated, controlled, and exploited.

Lulu Wilson shares how her mistress, Mrs. Hodges, promised her a big wedding if she agreed to marry. It is highly likely that her mistress did this with the sole intention of Wilson getting pregnant as a result of the union, as shortly after her wedding, Hodges brought a physician to Wilson, who told her "less'n [she] had a baby, old as [she] was and married, [she]'d start in on spasms."[28] Based on the growing knowledge doctors had on the female reproductive system, it is likely that the physician lied to Wilson in an effort to pressure her to have children at the wishes of Mrs. Hodges. The malice behind the doctors and Hodges' urgency for Lulu to have a child is further exposed as coercive as at this time, Lulu was only thirteen or fourteen years old.

Lulu is not the only one to have been pressured to get married with the bribe of an extravagant wedding. Tempie Herndon Durham wed an enslaved man, Exeter Durham, in a large wedding thrown by her enslavers, George and Betsy Herndon. Tempie wore a white dress, with matching shoes, gloves, and a veil made out of a window curtain. The couple were wed by an enslaved pastor on an altar which Ms. Betsy made with various flowers and candles. "Marse George" and "Mis Betsy," as their slaves called them, hosted a large party following the ceremony, which included a feast, wedding cake, music, dancing, and the jumping of the broom. While Tempie may have viewed her enslavers fairly positively and remembered them and her wedding fondly, it is clear that the Herndons were well aware of the financial benefits that would come from facilitating the marriage. As Tempie explains:

[28] Lulu Wilson, *Slave Narratives, Texas,* vol. 16, pt. 4 (LOC/WPA, 1941), 193.

> We [Tempie and Exeter] had eleven chillun. Nine was bawn before' surrender an' two after we was set free. So I had two chillun dat wuzn' bawn in bondage. I was worth a heap to Marse George kaze I had so many chillun. De more collin a slave had de more dey was worth. Lucy Carter was de only n—r on de plantain dat had more chillun den I had. She had twelve, but her chillun was sickly an' mine was muley strong an' healthy. Dey never was sick.[29]

Tempie's description of her children is interesting, as she appears to be aware of the monetary value herself and her children added to the Herndon's, though she seems to speak about it with pride, especially when comparing the health of her children to that of Lucy Carter. Is it possible that in having nine "muley strong an' healthy" children, she earned special privileges from her masters? Was the celebration of her marriage a part of a larger hope in creating a loving union that would produce the number of children it did? It is also possible that George and Betsy Herndon truly cared for Tempie and her marriage. What is important though, is that even within the possibility of care, Tempie was still property and so were the nine healthy children which lent themselves to the enslaved labor force - and financial value - of the plantation, as a result of Tempie's reproductive capacity. Even within a marriage that Tempie was seemingly happy in and with masters whom she speaks highly of, her children were not hers. They were not even children in the eyes of the law and potentially her masters. Rather, they were objects of financial value and an increase of laborers for the Herndons.

Concubines

So far, this paper has focused on enslavers' use of enslaved women's reproduction to expand the population of enslaved laborers. Slaveholders, however, began to extract reproductive labor in ways that did not always have the sole purpose of increasing the

[29] Tempie Herndon Durham, *Slave Narratives, North Carolina,* vol 11. pt. 1 (LOC/WPA, 1941), 288.

number of enslaved children. It was not uncommon for enslavers to use female slaves for the sole purpose of sex. In this way, enslaved women were viewed for their body's ability to please the enslaver, but was nevertheless, still an act of reproductive labor and sexual exploitation.

Enslaved women in the sex slave market were referred to as "fancy girls," often with a very light complexion and seen as the pinnacle of the Jezebel stereotype: promiscuous, primitive, and sexual.[30] While what a "fancy girl" was exactly was often loosely defined and up to the interpretation of slaveholders and traders, historian Alexandra J Finely explained the general idea of what most understood a "fancy girl" to be:

> To the buyers and sellers of "fancy girls" or "fancy maids," then, these were women who were expensive, ornamental, and rare. They showed off a man's wealth and good taste but were of little true value. "Fancy" referenced the gamble and thrill of purchasing such a woman; the "fancy girl" was, to her purchaser, the embodiment of all those "images" of the mind, a combination of the presumed sexual availability of black women with the privileging of white skin in a pretty "imitation" of a white woman who could be "readily and happily" recalled— and then discarded— "for the purpose of amusement" with little thought to the woman herself.[31]

One did not need to be bought as or even originally be considered a "fancy girl" to be forced into concubinage or to be the sexual object of their master. It was common for enslavers to force their female slaves into sexual relationships,often resulting in the production of children. Enslaved women who attempted to resist the assaults were threatened with physical or psychological violence, including whippings, public humiliation, threats to family, and even death.[32] Henry Gerald remembered how his mother would be

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[30] Deborah Gray White, *Ar'n't I a Woman? : Female Slaves in the Plantation South,* Rev. ed. W.W. (Norton, 1999), 29, 37.
[31] Alexandra J. Finley, *An Intimate Economy: Enslaved Women, Work, and America's Domestic Slave Trade.* The University of North Carolina Press, 2020: 22, https://muse.jhu.edu/book/76798.
[32] Brenda E. Stevenson, "What's Love Got to Do with It?: Concubinage and Enslaved Women and Girls in the Antebellum South," in *Sexuality and Slavery: Reclaiming Intimate Histories in the Americas,* edited by Daina

whipped by his master, who was also his father, when she refused his sexual advances: "He beat my mama. He beat her until the blood ran down her back. . . . He beat her because she refused to have relations with him."[33] Though she reused this time, Gerald himself is evidence that his enslaver had been successful before in raping his mother. Harriet Jacobs was tormented by her enslaver, Dr. James Norcom[34] who spent years making sexual advances towards her and ultimately decided to run away, hiding in an attic crawl space for seven years to avoid her vicious master.[35] Throughout this time, Norcom threatened and hurt Jacobs family, including her children, whom she had by another man just to avoid Norcom, and in doing so actively used her own bodily autonomy to fight against the control and abuse Norcom was attempting to subject her to.[36]

Oftentimes, concubinage was a sign of wealth and status, as it required a certain amount of money to justify purchasing or having an enslaved woman or women for the purpose of sex. This is true for families like the Jeffersons. Thomas Jefferson married Martha Wayles, whose father, John Wayles, kept a slave named Elizabeth. Elizabeth would birth six of Wayles' children, including a daughter named Sally Hemings, who would later become Jefferson's concubine, making Thomas Jefferson's wife and enslaved concubine, half-sisters.[37] Sally Hemings was thirteen or fourteen when Jefferson, who was around fourty-four, began to pursue her. Not only does the story of Sally Hemings illustrate the

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Ramey Berry and Leslie M. Harris (University of Georgia Press, 2018), 176. https://dio.org/10.2307/j.ctt22nmc8r.14.

[33] *Id*. at 78

[34] In her narrative, *Incidents in the Life of a Slave Girl*, Jacobs refers to Norcom under the name "Dr. Flint."

[35] Harriet A. Jacobs, *Incidents in the Life of a Slave Girl: Written by Herself,* Edited by Lydia Maria Child (Project Gutenberg, 2004) https://www.gutenberg.org/cache/epub/11030/pg11030-images.html.

[36] *Id.*

[37] Annette Gordon-Reed, *Thomas Jefferson and Sally Hemings : An American Controversy*, (University Press of Virginia, 1997), 1.

control enacted by enslavers over slaves who were still children, but the context of Hemings as a daughter of a slave owner and his concubine, underscores how these ideas about concubinage persisted throughout family lines. As historian Brenda E. Stevenson writes, "The sexual double standard in slaveholding families that rewarding patriarchs and their male heirs with the right to demand sexual favors of bonded girls, teens, and women was a tradition passed down from one generation of enslavers to the next."[38]

Unfortunately, in certain cases, it was not only the idea of concubinage that was shared throughout the families. The most extreme instances of concubinage were intertwined with incest.[39] A notable case of this is that of Celia, an enslaved woman from Florida. Celia was the daughter of her enslaver, Jacob Bryan, and one of his slaves, Susan. Between 1835 and 1847, Celia had four children, all of which were fathered by Bryan, making him both the father and grandfather, as well as Celia a mother and sister to her own children. The story of Celia and others who had similar stories expose what happens when the ideology of slavery, specifically the expectation of sexual availability of enslaved women, as well as the need for complete domination and control, is taken to the extreme and emphasized over any other considerations. Celia, despite being his daughter, still fell under the realm of property of Bryan and, therefore, an object for sexual exploitation. That is, the notion of ownership and possession that the enslaver held over enslaved girls and women, including their own daughters, were so extreme that incest could be tolerated.

Wet Nurses

[38] Stevenson, *What Sorrows Labour in My Parent's Breast?*, 240.
[39] *Id.* at 241

The trade of enslaved wet nurses illustrates that enslavers could extract reproductive labor from enslaved women without necessarily gaining the labor or value of their children. John Street of Kentucky made his living "collecting" and then selling enslaved people, hiring out those whom he was waiting to sell.[40] The one enslaved person Street kept for himself was a woman named Louisa. While the exact nature of the sexual relationship between Louisa and her enslaver is unknown, Louisa gave birth to John Street's child, Amy Elizabeth Patterson. When speaking about her mother and enslavers relationship, Patterson stated, "that was the greatest crime ever visited on the United States," implying that her mother way raped by Street.[41] Interestingly, Louisa gave birth around the same time as Mrs. Street, John Street's wife. As a result of this advantageous timing for the Streets, Louisa became a wet nurse for their child.

It is intriguing that John Street would hold onto an enslaved person, as his business was in the trading and renting of bound labor. With no plantation or agricultural land to be worked, and with an explicit business in the trade and not the collection of slaves. It is curious that John Street decided to keep Louisa instead of trading her elsewhere, and more interesting that she happened to become pregnant around the same time as his wife. This supports theories by historians that somehow, enslavers and their wives would plan their pregnancies with enslaved women to ensure that there would be a wet nurse available for use.[42] With the knowledge that other enslaved women reported their mistresses planning

[40] Lauana Creel, "Amy Elizabeth Patterson," *Slave Narratives, Indiana Narratives,* vol. 5 (LOC/WPA, 1941), 150.
[41] Amy Elizabeth Patterson, *Slave Narratives, Indiana Narratives,* vol. 5 (LOC/WPA, 1941), 151.
[42] Knight, R. J. "Mistresses, Motherhood, and Maternal Exploitation in the Antebellum South," *Women's History Review* 27 no.6 (2017): 994, https://doi.org/10.1080/09612025.2017.1336847.

their pregnancies around them, it is a strong possibility that John Street did in fact rape Louisa for the sole purpose of her becoming a wet nurse for his newborn child.

While Louisa was able to keep her child, many enslaved had theirs torn away from them.. An advertisement in the June 17, 1813, *City Gazette and Commercial Daily Advertiser* was placed by someone trying to hire a wet nurse who had "just lost her first child."[43] For enslavers, it likely did not matter how the woman lost her child, whether through death or being sold. It only mattered that they had been in some way separated from them. One reason for this was that having more children to nurse would lead the wet nurses to give less attention and breast milk to the white children they were hired to care for, illustrating the value a breast feeding slave had on her own.[44]

Foundations of Gynecology

There is no coincidence that the field of gynecology began to establish itself during the antebellum period. This occurred for two main reasons. First of all, because of the monetary incentive of growing one's slave population through enslaved women's bodies, enslavers needed to maintain the health of women's bodies to fix any issues hindering the ability to produce offspring. The second reason was that because enslavers were willing to bring in doctors to try and treat ailments hindering reproductive labor, medical practitioners were given easy access to enslaved women's bodies to experiment and research on.

The most famous of these doctors was James Marison Sims. Sims was born and raised in South Carolina attending Charleston Medical College after his undergraduate education. He spent the majority of the 1840s doing experiments and medical research on

[43] "A Wet Nurse to Be Hired," *City Gazette and Commercial Daily Advertiser*, June 17, 1813.
[44] Stephanie E. Jones-Rogers, *They Were Her Property* (Yale University Press, 2019), 119.

enslaved women in the South. The number of enslaved women Sims experimented on is unknown, largely due to the fact that he often did not record the identities of those he was experimenting on. Only three names made it into Sims records. Now called "the mothers of gynecology," Sims experimented on: Anarcha, Betsy, and Lucy. Anarcha, who was seventeen at the time of meeting Sims, was suffering from vesico-vaginal fistula (VVF) after giving birth, a condition where an opening between the bladder and the vagina forms, allowing urine to leak into the vagina.[45] Betsy and Lucy, similarly, faced vaginal health conditions following giving birth. Over the span of five years, Sims experimented on all the enslaved women, and as historian Deidre Cooper Owens explains, rotated "work and healing shifts for his slave patients," cyclically rotating their surgeries, allowing the women healing to take care of the others who were being operated on.[46] On his thirtieth surgery of Anarcha, Sims succeeded in curing her VVF. At this point, he sent her and the other enslaved women back to their enslavers as, "from their slave masters' perspective, they had retained their value as breeding women" and were also able to resume their duties as physical laborers.[47]

The production of medical knowledge like a cure for VVF was made possible by Sims among others having access to test subjects whose bodies were human enough to conduct research on but not human enough to be seen as anything more than a body. The enslaved women put in these positions likely did not get a say as to whether or not they wanted to participate in the experiments. In slavery's eyes, they did not have a right to their

[45] H. Pandit, A. Tajane, H. Wagholika, and A. Shaikh, "Vesico Vaginal Fistula," in *Complex Total Laparoscopic Hysterectomy (TLH) with Newer Approaches in Bladder Dissection*, ed. N. Jain (Springer, 2024), 233, https://doi.org/10.1007/978-981-97-3226-5_23.
[46] Deirdre Cooper Owens, *Medical Bondage : Race, Gender, and the Origins of American Gynecology*, (University of Georgia Press, 2017), 38.
[47] *Id.*

own bodies, and therefore, consent was deemed unnecessary. Not to mention, the experimentation on their bodies not only benefited Sims and furthered the field of gynecology but financially benefited the slaves' masters. Most of the enslaved women were leased out to Sims, meaning that while they were absent, their enslavers would receive payment, which was a financial gain compared to them being incapacitated and unable to perform labor, reproductive or otherwise, due to their ailments. With Sim's success, the women were able to return to their masters as full-functioning laborers, allowing them to be agents again in producing wealth for their enslavers. These ties directly link gynecology, slavery, and the denial of the reproductive autonomy of enslaved women together. As historian Dierdra Cooper Owens states, "the repair of any medical condition that could render an otherwise healthy slave woman incapable of bearing children further strengthened the institution of slavery."[48]

Sims was not the only doctor to do experiments on the bodies of slaves. However, his experiments specifically highlight how unimportant the personhood of the bodies he operated on was. As mentioned before, it is unknown how many enslaved women were operated on, though we know it was much more than the three that were named. Sims valued the women exclusively for their bodies, for their scarred and bleeding bladders and vaginas which he operated on without anesthesia or consent from the women themselves. It was Black enslaved women's bodies who built the field of gynecology–a set of knowledge that resulted in the further exploitation of their bodies due to the widening of understanding of what women's bodies could endure and how reproduction and profit could be maximized.

[48] *Id.* at 39.

The medical exploration of enslaved women was also used as evidence to support the weird racist views of their bodies, which acted in part as justifications for their enslavement. Black women were thought to be unable to feel pain, justifying their harsh treatment in the fields and ability to withstand whippings and other forms of physical violence.[49] In Sims' autobiography, he makes note of Lucy's lack of response to the medical experiments being done on her: "The poor girl, on her knees, bore the operation with great heroism and bravery."[50] Historian C. Riley Snorton notes that only Lucy receives this acknowledgement of painlessness in Sims records, which "leaves room to imagine how Betsey [and the other enslaved women] might have somehow resisted the performance of stoic bravery or willing subjectivity that she was compelled to produce."[51] Perpetuating the image that Black women's inability to feel pain even with a severe case of VVF, indicates that this concept could also be applied to other uterine and vaginal experiences, greatly affecting how bonds women were treated during various stages of their reproductive lives.

Stages of Reproduction: Menstruation, Pregnancy, and Postpartum

Menstruation, often referred to as the "menses," was a fairly taboo topic within white society in the antebellum era. White slaveholders were particularly concerned about the topic when it was related to fertility and reproductive capacity of enslaved girls and women. Though the field of gynecology was still in its infancy, growing with the help of Dr. James Marison Sims' experiments on enslaved women, enslavers still had the basic understanding

[49] Despite already being seen in the eyes of slaveholders as property, enslaved women's bodies were further "othered" in order to justify their treatment. These ideas placed Black women on the opposite side of white femininity, as the only way to justify this harsh treatment of women, who white southerners were supposed to protect, was to disqualify Black women from holding the title.
[50] J. Marion Sims, *The Story of My Life*, (Da Capo Press, 1968), 237.
[51] C. Riley Snorton, *Black on Both Sides : A Racial History of Trans Identity*, (University of Minnesota Press, 2017), 25.

that the menstrual cycle was related to pregnancy, meaning that to continue the growth of the enslaved population, enslaved women would need to have their periods.

While we now know that the ability to conceive is much more complex than whether or not one bleeds once a month, slaveholders wanted to know whether enslaved women were having their periods, because it was an indicator of the potential to grow one's wealth. Thomas Jefferson "consider[ed] a woman who brings a child every two years as more profitable than the best man on the farm," indicating the value and therefore interest there would be in the gynecological health of enslaved women.[52] Because knowing whether or not an enslaved woman would be profitable in terms of bearing children, slave traders emphasized their reproductive health at auctions, specifically if they had irregular menstrual cycles or were considered "barren." In one broadside announcing a slave auction from 1859, an enslaved girl's menstrual cycle was described as "irregular, otherwise fully guaranteed."[53] Enslaved women were expected to perform reproductive and physical labor; women identified as "barren" or who had irregular menstrual cycles were a worse investment for slaveholders. While it may seem that there would be an incentive for slave traders to lie about the reproductive health of enslaved women and girls in order for them to sell them, when it did happen, slaveholders sued the traders and more often than not won their cases.[54] Not all instances of this ended in a lawsuit. However, many slave traders offered a return policy on their enslaved women. If slaveholders purchased an enslaved woman classified as

[52] Thomas Jefferson, *The Papers of Thomas Jefferson: Retirement Series, Volume 16: 1 June 1820 to 28 February 1821*, ed. Jefferson J. Looney (Princeton University Press, 2020), 66, https://muse.jhu.edu/book/72614.
[53] Broadside announcing the sale of "Choice Slaves" as cited in Berry, *The Price for Their Pound of Flesh*, 69.
[54] White, *Ar'n't I a Woman?,* 101.

a breeder at auction who then did not bear children, the enslaver was able to return the enslaved woman to the slave trader and receive a refund.[55]

As discussed earlier in the case of Elige Davidson, enslavers often did not care about couples when facilitating slave breeding. Slaveholders would also break up married couples if the enslaved woman was "barren." Berry Clay observed that "He [the master] always requested, or rather demanded, that they be fruitful. A barren woman was separated from her husband and usually sold."[56] A woman being sold for her inability to produce children directly shows how valued reproductive labor was to enslavers. A woman who was barren could be deemed worthless, with her only value coming from the money made through selling her.

Enslaved women's bodies were commodified to the point that they were as easy to return as a piece of clothing demonstrates how enslavers often refused to acknowledge the conditions that may have hindered enslaved women's ability to reproduce or menstruate. Returning them was an easy solution. There are many reasons why some enslaved girls and women may have had irregular periods. The hard labor, malnutrition, and constant encounters with physical, emotional, and sexual trauma are all factors that could have led to amenorrhea, not to mention underlying health conditions the women may have experienced. More often than not, slaveholders were only concerned with extracting as much labor and value out of their bonds as possible. It was cheaper to work enslaved women both reproductively and physically, returning those who could not achieve both of their responsibilities, than it was to view and treat the enslaved women as human beings.

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[55] *Id.*
[56] Berry Clay, *Slave Narratives, Georgia.* vol 4. pt. 1 (LOC/WPA, 1941), 191.

Still, enslavers did, in fact, have a basic understanding that in order to have enslaved women healthy enough to work and bear children, there was a need to understand and prioritize, to a limited extent, women's health, including menstruation. Enslavers partook in tracking menstruation, not only to for their own exploitative reasons, but so that if there seemed to be menstrual and sexual health issues arising a doctor, like James Marion Sims, would have information to best cure any vaginal disorders that would prevent productivity or pregnancy.

As touched on above, enslaved women were not sometimes seen as reproducers and sometimes as laborers. Bondswomen were seen as both at all times. But with this, the ability to extract value from enslaved women in these roles was a sliding scale. Pregnant enslaved women worked slower in the fields and with other physically laborious tasks. Women who developed health issues due to their pregnancy could be unable to work completely, which ultimately made them less valuable in the eyes of the enslaver. Yes, they were going to give birth to a new enslaved person, but their reproductive labor hindered their ability to produce the expected levels of other types of labor. This was unacceptable to enslavers who wanted to have reproductive labor and physical labor all in one.

Because of this, pregnant bondswomen were expected to complete the same amount of labor in the fields or their housework as women who were not pregnant. Inability to do so resulted in violence as punishment for lack of production. However, the type of violence was altered to try to protect the investment held in the womb of the pregnant mother. As mentioned in the introduction, to both punish the mother and, with the enslaver's lack of medical knowledge, protect the child, enslaved women would be forced to lay on the ground

with their stomachs in a hole dug by the enslaver. Former slave Lizzie Williams recalls, “Is seen a n—r women dat was fixin’ to be confined do somethin’ de white folks didn't like. Dey would dig a hole in de ground just big’ nuff fo’ her stomach, make her lie face down an whip her on de back to keep from hurtin de child.”[57] Slaveowners did not care about the enslaved women, their bodies, or their health. They only saw them as a vessel carrying financial gain. As long as the investment stayed intact, which they viewed the “same way they appreciated the value of a newborn calf,” it did not matter what happened to the one carrying it.[58] In his slave narrative, Moses Grandy wrote about his experience witnessing this type of violence. Grandy witnessed his own sister slow down in the fields while she was in late-stage pregnancy and was beaten so badly in this manner that it sent her body into labor. She gave birth in the fields as the whip continued to break the skin on her back.[59]

Enslaved women were not allowed nearly enough time to recover from childbirth before being told to return to the fields. At most, enslaved women were given three weeks off field work, often instead working in the master's home as a seamstress or, as previously discussed,a wet nurse. At minimum, though, slaves were given merely a few hours before being expected to return to the fields. This made it incredibly difficult for enslaved women to nurse their children. Some had to leave their newborn infants at home and are not allowed to return to nurse them throughout the day. Enslaved women who were nursing and were able to stay home would often try to nurse as many infants as possible, knowing that their own mothers would not be able to. This did not only harm the children who were unable to

[57] Johnson, “Smothered Slave Infants: Were Slave Mothers at Fault?,” 513.
[58] Angela Y. Davis, *Women, Race, & Class* (Random House, 1981), 10.
[59] Moses Grandy, *Narrative of the Life of Moses Grandy; Late a Slave in the United States of America* (O. Johnson, 1844), 18.

nurse but the mothers as well. Enslaved women who were unable to nurse would experience extreme pain from their breasts being full of milk for long periods of time.

Like with bondswomen in late pregnancy, postpartum women were not exempt from physical violence and torture while working in the fields. Women who were not seen as productive enough were whipped. Moses Grandy witnesses this, writing: "I have seen the overseer beat them with raw hide, so that blood and milk flew mingled from their breasts."[60] The growing scientific racism through Sims and other physicians' experiments on enslaved women led to the idea that Black women did not need recovery time after birth, exposing them to the fields and the violence that came with that. Even during times of mensuration, pregnancy, and postpartum, enslaved women were commodified and treated as property, despite being valued for their human ability to reproduce.

The various methods of sexual abuse and exploitation used on enslaved women by enslavers illustrates what can happen when women do not have ownership of their own bodies. While the consequences of control may not always look the same, the antebellum era depicts what *historically* has occurred to women when their wombs, along with the rest of their body, is held in bondage. Furthermore, knowledge of women's bodies and understanding of female reproductive health became increasingly important during this time period due to the financial incentive to exploit their bodies. Because of these factors the ownership of enslaved women's bodies and reproduction is vital to understanding the history of reproductive health care in the United States. Therefore, through discounting this history

[60] *Id.*

and silencing these experiences in the *Dobbs* decision, the Court misrepresents and misconstrues the history of reproductive health in the United States.

Chapter 2

More Than a Price Tag

Madeline, who valued herself more than the price tag on her body, tried to escape... While being sought, she ran to the wharf and jumped in the river to her death. Her last words were, "Adieu, cher Raimond!" Madeline preferred death to enslavement. She valued her soul enough to die.[61]

— Daina Ramey Berry

Even when faced with some of the most horrific forms of violence and exploitation, enslaved women found ways to resist their enslavement. One of the most well known forms of resistance to slavery was by escaping and running away. Some enslaved women did run away, however there were often boundaries, such as children, that prohibited women from running away, resulting in enslaved women finding other ways to resist.[62] The purpose of this chapter is to analyze the various ways in which enslaved women took control of their bodies and reproductive autonomy in order to fight the oppressive regime of slavery. It is imperative to understand the lived experiences of enslaved women and the greater context around their enslavement when discussing methods of reproductive resistance, as, after all, abortion can be seen as said resistance. This section is split into four categories of resistance: abortion, infanticide, murder, and suicide. Each section analyzes how these different acts

[61] Berry, *The Price for Their Pound of Flesh*, 83.
[62] "Escaping Slavery," *Hidden Voices: African Americans in the Lowcountry,* last modified 2025, College of Charleston Library Digital Collections, https://ldhi.library.cofc.edu/exhibits/show/hidden-voices/resisting-enslavement/escaping-slavery#:~:text=Newspaper%20advertisements%20placed%20by%20enslavers,the%20South%20as%20a%20whole.

functioned as resistance from slavery, specifically from the sexual violence and reproductive exploitation illustrated earlier in this paper.

Abortion

Abortion has always been a topic of debate. *Dobbs* uses this contention to support its position that it should not be Constitutionally protected. The antebellum era was no different. Some did have various objections to the procedure, however, compared to the present day it was largely seen as a medical issue, not a legal one.[63] Some slaveholders were in favor of abortions for their enslaved women if the women's health or life was in danger. For instance, in 1848, Jane, an enslaved woman who was six months pregnant, experienced a life-threatening internal hemorrhage. After various attempts to save her life, physician W. W. Harbert attempted an abortion to try to save her life.[64] Although Jane died nine days after her abortion, the actions by the physician illustrated the willingness to provide abortions and that a woman's life could outweigh that of the unborn child. It is imperative to distinguish medical care from care for their personhood. Enslavers saw giving their enslaved women abortions as protection of property, as from a financial perspective, it was a greater loss to lose both a woman and child. As discussed in chapter 1, slaveholders often did not actually care about the health or well-being of enslaved women unless it profited them.

Enslavers, however, were firmly opposed to abortion if it was conducted at the will of an enslaved woman, as it directly challenged the will and authority of the slaveholder. It is in these cases that enslaved women could and did end their pregnancies out of resistance

[63] Jolynn Dellinger and Stephanie Pell, "Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World," *Duke Journal of Constitutional Law & Public Policy* 19 (2024): 30, https://scholarship.law.duke.edu/djclpp/vol19/iss1/1.
[64] W.W. Harbert, "A Case of Extra-Uterine Pregnancy," *Western Journal of Medicine and Surgery*, 3d ser., 3 (February 1849): 110-112.

and defiance of their masters. Evidence from the antebellum era illustrates that it was incredibly difficult to differentiate between a "natural" miscarriage and a self-induced abortion, which remains the same today. This makes the number of bonds women who obtained abortions in the South unknown. Regardless of the limited statistics, the discussions between enslavers, medical practitioners, and Black herbal knowledge provide evidence of abortions that occurred.

Various medical and botanical publications in the antebellum era depict that slave owners were aware of enslaved women's capacity to induce an abortion, specifically through the use of medicinal plants– namely, cotton root and pennyroyal.[65] In 1863, the Confederate physician and botanist Francis Peyre Porcher described cotton root in his *Resources of the Southern Fields and Forests* as able to produce "a specific action on the uterine organs," alluding to the use of the plant as an abortifacient.[66] The article, "An essay on the Causes of the Produciton of Abortion among our Negro Population," by Dr. John H. Morgan details enslavers' fear of abortions produced through cultural herbal abortifacients, writing:

> The master suspected one of his negro men and one of his negro women for producing abortion for the women, and sold the suspected ones. He continued to buy other women... After they came into his possession every conception was aborted by the fourth month. The negroes finally confessed that they did take medicine for this purpose; showed their master the weed which was their favorite remedy."[67]

Not only does this illustrate that enslaved people were attempting to access abortions, but it also indicates that slaveholders were actively attempting to suppress it.

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[65] American Philosophical Society, "Cotton Root," accessed February 10, 2025, https://www.amphilsoc.org/item-detail/cotton-root.Kathleen Crowther, "Pennyroyal, Mifepristone, and the Long History of Medication Abortions," *Nursing Clio*, April 26, 2023, https://nursingclio.org/2023/04/26/pennyroyal-mifepristone-and-the-long-history-of-medication-abortions/.
[66] Francis Peyre Porcher, *Resources of the Southern Fields and Forests*, (Arno, 1970), 94.
[67] An Essay on the Causes of the Production of Abortion among our Negro Population, Morgan, 122.

While not every miscarriage that was suspected by slaveholders was a self-induced abortion, interviews with formerly enslaved individuals indicate that there was a basis to these fears. One of the most well-known instances of this comes from an interview with Mary Gaffney, who shared how she used cotton root to avoid pregnancies while she was enslaved in Texas:

> I just hated the man I married but it was what Maser said do … . I would not let that negro touch me and he told Maser and Maser gave me a real good whipping, so that night I let that negro have his way … but still I cheated Maser, I never did have any slaves to grow and Maser he wondered what was the matter. I tell you son, I kept cotton roots and chewed them all the time but I was careful not to let Maser know of catch me, so I never did have any children while I was a slave.[68]

Gaffney also shared that after emancipation, she had five children, implying that it was the cotton root that had prevented any pregnancy from occurring while she was enslaved.[69] Other formerly enslaved individuals shared stories they had heard about women who used herbs' medicinal qualities, similarly to Gaffney. Lu Lee shared that enslaved women would use turpentine, which is made from pine trees, to end pregnancies until slaveholders became aware of what they were being used for and, in response, "changed the way of making turpentine" to prevent pregnancies from being terminated.[70]

The stories of Jane and Mary illustrate that to the enslaver, the act of abortion may not have been the issue. It was the ability for enslaved women to make an autonomous decision about their bodies and reproduction at the expense of their owners, stripping their

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[68] Mary Gaffney, *Texas Slave Narratives*. Accessed March 12, 2025. https://freepages.rootsweb.com/~ewyatt/genealogy/_borders/Texas%20Slave%20Narratives/Texas%20G/Gaffney,%20Mary.html.
[69] *Id.*
[70] Lu Lee and Rawick, *The American Slave: Supplement Series 2, Vol. 6. Texas Narratives, Pt. 5* (Greenwood Press, 1979), 2299.

owners of the authority which they believed they owned. Even in cases where abortion was permitted, it was not at the will of enslaved women like Jane, but rather under the direction of a slaveholder. Tracking and understanding self-induced abortions of enslaved women is incredibly difficult, as previously stated, but this also shows that it was likely incredibly difficult for slaveholders to have tangible proof that an abortion occurred. Enslavers' suspicions and attempts to prevent enslaved women from giving themselves an abortion tied with accounts of the events shows that even slave owners may not have been able to detect or know when an abortion occurred, allowing for this method of reproductive resistance to be the least controllable. This is corroborated by the fact that women were not often charged in court for an abortion, which may be due to the lack of evidence that one had occurred. As a result, abortions appear to have been an effective way for bondswomen to exercise their bodily autonomy and do so in a discreet and undetectable manner.

Infanticide

Similar to abortion and miscarriages, it is difficult to distinguish the rates of infanticide from a medical incident such as sudden infant death syndrome (SIDS), as the medical understanding of pregnancy and postpartum health for both mother and child were limited.[71] Despite not knowing the rate of the practice, stories of women committing infanticide have survived.

Arguably, the most famous case of infanticide committed by an enslaved mother is that of Margaret Garner. Garner, her husband, and her four children fled enslavement in Kentucky for freedom in Ohio in 1856. The family was quickly captured by her master and

[71] Tamika Y. Nunley, *The Demands of Justice: Enslaved Women, Capital Crime & Clemency in Early Virginia*, (University of North Carolina Press, 2023), 122.

federal marshals and were headed back to the Kentucky Plantation. Before the entire family could make it back, Garner killed her youngest child, attempting to kill the others. While we will never really know how Margaret Garner felt or know exactly why she killed her child, it is widely suspected that she committed infanticide, because she believed death was a better fate for her children than slavery. At Margaret's trial, anti-slavery activist Lucy Stone gave a testimony off of an interview with Garner, stating:

> The faded faces of the negro children tell too plainly to what degradation female slaves must submit. Rather than give her little daughter to that life, she killed it. If in her deep maternal love she felt the impulse to send her child back to God, saving it from coming woe, who shall say she had no right to do so.[72]

It is important to note, as Stone points out, that the child she did successfully kill was a girl. Garner herself had lived the horrors of being an enslaved woman, including sexual violence, with the two oldest children of Garner being fathered by her master not her husband. Did Garner kill her daughter, rather than her sons, because she knew the horrors her daughter might grow up to face?

Margaret Garner is not the only woman who is suspected of having committed infanticide out of love. An enslaved woman named Sylva was said to have "been the mother of thirteen children, every one of whom she destroyed with her own hands, in their infancy, rather than have them suffer in slavery!"[73] Lou Smith spoke about a woman on her plantation who decided to kill her fourth child after her owner had sold her previous three infants.

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[72] Lucy Stone, quoted in Tamika Y. Nunley, *The Demands of Justice: Enslaved Women, Capital Crime & Clemency in Early Virginia*, (University of North Carolina Press, 2023), 130.
[73] C. G. (Charles Grandison) Parsons and Harriet Beecher Stowe, *An inside View of Slavery : Or, A Tour among the Planters*, (J.P. Jewett and Co., 1855), 212.

> She just studied all the time about how she would have to give it up, and one day she said,"'I just decided I'm not going to let ol' master sell this baby; he just aint going to do it." She got up and give it something out of a bottle and pretty soon it was dead.[74]

In this case, the act of infanticide functioned as a protest to her master's choice to sell her children. By killing her child, she not only prevented her owner from taking her child away from her but financially disadvantaged him, as he lost out on the value of the child if sold and its potential labor if he had chosen not to sell. It is interesting that the unnamed woman would continue to have children, knowing and dreading that she would one day be separated from them. This begs the question: Was this enslaved woman raped in order to produce children? Did the enslaver want to continue to increase his slave labor in order to participate in the market?

It was also not uncommon for enslaved women to attempt suicide and to take their children with them, thereby also committing infanticide. In 1858, the *Alexandria Gazette* reported the following:

> A negro woman belonging to Mr. James Thornton, of Rappahannock County, was committed to jail on Monday last charged with drowning her child. She confesses the crime, but says she intended to drown herself also, and jumped in the river with the child in her arms, but floated to the bank.[75]

It is likely that the woman was seeking to end the suffering of slavery for both her and her child. With this, it was likely seen as an act of love, similar to Garnder. While we do not know the religious beliefs of the woman, many enslaved Africans and African Americans believed that death brought both freedom from bondage and the ability to reconnect with

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[74] Jilius Lester, *To Be a Slave* (Dial Press, 1968), 40.

[75] "Drowned Her Child," *Alexandria (Va.) Gazette*, August 7, 1858, Library of Congress, https://chroniclingamerica.loc.gov/lccn/sn85025007/1858-08-07/ed-1/seq-3/.

loved ones.[76] It may have been that the woman sought to end her and her child's suffering both to end their enslavement and also achieve spiritual release.

An enslaved woman named Jenny was accused of a similar crime. In 1815, Jenny was found in a creek by the Virginia plantation she resided on surrounded by the floating bodies of three children whom she had drowned. She was discovered moments before she planned to drown herself as well, also ending her pregnancy, which she was carrying at the time.[77] Jenny was sentenced to death for her actions, though her execution was delayed until she gave birth. During the delay, her sentence was commuted to transportation, notably because the court saw her as valuable for her ability to produce children (having had three and pregnant with a fourth) as well as being skilled in weaving. However, historian Tamika Nunley suspects that Jenny may not have been happy with this, as the sentence "relegat[ed] her life to more of what she tried to end."[78] We do not know which fate Jenny would have preferred, but we do know that transportation meant "more weaving, more sexual labor, more children, and endless bondage."[79]

Some enslaved women were suspected to have killed their children as a protest to the assault which led to their impregnation. This is the case for Letty, an enslaved woman who was accused of killing her newborn daughter by crushing her skull hours after she was born. In court, Letty said that, "If the child had been one of her own colour, she would not have done as she did."[80] Letty stating that the child was the product of an assault of a white man,

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[76] Daina Ramey Berry, "Soul Values and American Slavery," *Slavery & Abolition* 42, no. 2 (2021): 205, https://doi.org/10.1080/0144039X.2021.1896188.
[77] Nunley, *The Demands of Justice*, 122.
[78] *Id.* at 123.
[79] *Id.*
[80] *Commonwealth v. Letty*, July 24, 1822, Auditor of Public Accounts, Condemned Blacks Executed or Transported, Records—Condemned Slaves, Court Orders, and Valuations, 1810-1822, Reel 2251, LOV;

potentially her own enslaver, is clear. Her body had been exploited and abused for the purpose of reproduction, and Letty was not willing to let her enslaver reap the benefits of her reproductive labor. Similar to Jenny, Letty's execution was commuted to transportation, and she was sold by the court for $300.

While the reasons for their actions may have varied, enslaved women were aware of how a loss of a child could hurt slaveholders and any intended plans for the children. Oftentimes, it was believed that in the afterlife, the children would be safe and free from the suffering and horrors of slavery, highlighting that alongside making a decision that resists the slaveholder's authority over the enslaved child. However, in ending their child's life, enslaved women were able to claim their right as a mother in protecting and making a choice for a child that, under slavery, was not seen as her own.

Murder

Unwilling to be abused, exploited, and assaulted any longer, some enslaved women killed their own enslavers. Celia was fourteen when Robert Newsome purchased her at a Missouri slave market and raped her on their way back to his home. After five long years of Newsome assaulting her, producing two children and one on the way, Celia decided that she would take action to ensure his abuse would end. When Newsome entered her cabin to rape her, Celia, in defense of herself, hit him on the head with a large club twice, killing him. Ceclia confessed that "she did not intend to kill him when she struck him, but only wanted to hurt him," highlighting that she was doing what she felt was needed to protect herself

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Virginia Governor's Office, Thom a Mann Randolph Jr. (1819-1822), Executive Papers, Misc. Reel 6282, State Government Records Collection, LOV.

from further abuse.[81] The story of Celia highlights the inherent contradictions of enslavement. She was property in the eyes of the law, so she could not be raped nor testify at her own trial, but was enough of a person to be convicted of first-degree murder and hung at the gallows.[82] It is important to remember that despite the view of slaves as property, enslaved people were valuable because of their personhood, i.e. their ability to produce labor that only a human being could.

Celia's execution was scheduled a few months after the trial to allow time for her to give birth. While it was standard practice to allow pregnant convicts to give birth prior to their executions, under slave law, this also allowed for the state to obtain a new laboring body to sell into the market of slavery. Celia's body was used to extract wealth and labor till the moment she was hanged. Her child was a stillborn, which prohibited them from being assigned a value by the state of Missouri and sold, which was the fate of Celia's other children.

Actions by Celia and enslaved women like her participated in one of the most direct forms of resistance in killing their enslavers. Even if we believe Celia's statement that she intended simply to harm her perpetrator rather than end his life, Celia was actively resisting her own rape and exploitation. These acts of resistance show us that denying bodily autonomy to women only prohibits the legal protection to enact autonomy and not the ability to act itself.

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[81] Douglas O. Linder, "Celia, A Slave, Trial (1855): An Account," 2011, http://law2.umkc.edu/faculty/projects/ftrials/celia/celiaaccount.html.

[82] In the eyes of the law, Black women could not be raped. Protection from sexual assault was reserved only for white women.

Let us return to the story of another enslaved woman, also named Celia, from Florida, who was discussed in Chapter 1 in the context of incestuous concubinage. In 1847, after years of the suspected rape by her father and master, Celia murdered him. A local newspaper described the act as follows:

> It appears that he [Jacob Bryan] attempted to punish her [Celia], and being at the time engaged in making a hoe-handle with a drawing-knife, she at first resisted with the hoe-handle and then used the drawing knife, with which she cut open his skull so as to produce instant death.[83]

Her execution made her the first woman executed in the State of Florida, and in recent years has led to scholarship about her amongst lawyers. The main pieces of said scholarship on Celia (Florida) ignorantly and incorrectly speak for her and her actions. Lawyers Franklin Robbins and Steven Mason boldly claimed in an article about Celia that "If Celia had known what was going to happen to her children, her brothers, her sisters, her nephew, and even her mother, she would never have killed her father. She would have let him do whatever he was doing to her, and persevered."[84] In making this statement, Robbins and Mason further contribute to the harm surrounding this topic. Perpetuating the idea that Celia lacked knowledge about what would happen if she killed her father implies that she was unaware of the consequences of an enslaved person killing their white enslaver. Assuming that Celia did not know and projecting that she would have made a different decision ignores the fact that no enslaved person would have been ignorant to the consequences of resistance. Enslaved people heard what happened to those who resisted their enslavement. As illustrated in the

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[83] *Murder*, THE NEWS (Jacksonville), December 10, 1847 as quoted in Franklin H. Robbins and Steven G. Mason, "Florida's Forgotten Execution: The Strange Case of Celia and the Unfortunate Fate of her Family," *Florida Supreme Court Historical Review Magazine,* Spring/Summer Issue 2014, 7. https://www.flprobatelitigation.com/wp-content/uploads/sites/837/2018/11/Execution.pdf.
[84] Robbins and Mason, "Florida's Forgotten Execution," 7.

previous chapter, the threat of violence and violence itself was commonly used in order to ensure the submission of slaves, and these experiences and stories were widely shared. Because of this, it is actually highly likely that Celia *did* know the potential consequences of her actions, not only for herself but for her family as well. Insinuating that Celia was unaware not only discounts her understanding of her situation but also minimizes Celia's autonomy and choice in her decision to kill Bryan. There is power in knowing that Celia knew the potential fate she would (and ultimately did face) as a result of killing her enslaver and still acted in defense of herself and resistance to the system of bondage in which she was held.

Celia (Missouri) and Celia (Florida) are two of many enslaved women who killed their assailants. While we will never know the exact thoughts, feelings, or intentions of these women, it is clear that their actions indicate how killing an enslaver not only could physically protect them from harm in the moment, but also reject the idea that they did not possess agency over their reproductive autonomy or their actions in general.

Suicide

Sometimes, enslaved women chose to complete what they saw as the ultimate act of resistance: self-destruction. Just as some women believed that killing their children was a better alternative to slavery, others believed the same for themselves. After being raped and sold at auction, sixteen year old Madeline ultimately decided to commit suicide. Historian Daina Ramey Berry writes about how Madeline, a "beautiful quadroon," was bought for $1,900, likely for the sole purpose of being a concubine.[85] When there was a chance of her

[85] Berry, *The Price for Their Pound of Flesh*, 83.

being sold, Maledine, having endured sexual violence, planned her escape. Berry writes, "Madeline, who valued herself more than the price tag on her body, tried to escape the next day. While being sought, she ran to the wharf and jumped in the river to her death. Her last words were, 'Adieu, cher Raimond!' Madeline preferred death to enslavement. She valued her soul enough to die."[86] Through suicide, Madeline found freedom, something she was aware she would never possess in bondage. As Berry powerfully explains, for enslaved women, self-destruction was actually a method of self-preservation, as it served as protection from the horrors that they had to endure.

One enslaved girl, who the record does not name, attempted to drown herself following countless advances by her overseer. The encounters led to the girl running away for days to avoid the overseer before she had to return, which resulted in a whipping that "knocked her plum crazy."[87] At this point, she ran for the lake and would have "walked right in it and drowned," if her mother had not caught her.[88] It is clear that the girl was likely fleeing the sexual violence that was being targeted towards her, future corroborated by the fact that her mother had warned her to "not let any of 'em go with her," showing that her mother was trying to guide her daughter in protecting herself.[89] What is unclear, though, is what happened to her after her mother kept her from entering the lake, as there is no further record of her after that event. The possibilities of her life are endless. What punishments did she face in trying to end her life? Was she able to evade the overseer, or was she forced to face the same sexual violence that many other women and girls did? Did she ever attempt to

[86] *Id.*
[87] Unnamed Former Slave, *Slave Narratives, Georgia.* vol 4. pt. 1 (LOC/WPA, 1941), 292.
[88] *Id.*
[89] *Id.*

take her life again? While these questions remain unanswered, they illustrate the type of situations that she was looking to escape from in the lake. Even though the enslaved girl did not succeed in killing herself, her story illuminates that of others who attempted and did end their lives in order to end their suffering as women in bondage.

Scholarship focusing on enslaved women's suicide is minimal for multiple reasons. As historian Diane Miller Sommerville explains, suicides as a result of sexual abuse are "greatly undercounted" due to the limited records regarding enslaved women's suicides and the specific circumstances surrounding their deaths.[90] However, Sommerville believes that while evidence is often limited by "reading between the lines… we can sometimes deduce that sexual mistreatment drove some enslaved females to kill themselves."[91] Even if their lives (and deaths) are recorded in a single line, their stories and resistance persist. These women prove that within bondage, even when related specifically to reproductive and physical ownership, women will find ways to be autonomous, even if that means their choice is death.

Resistance, whether it be in the form of infanticide, abortion, murder, or suicide, represent the lengths enslaved women were willing to go to in order to maintain their own autonomy. Ultimately, autonomy could not be completely stripped from them, as women found a way to use their power and fight back. It is vital to recognize that this history of reproductive resistance and autonomy includes abortion, defying the depiction of history and tradition of abortion in the *Dobbs* decision.

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[90] Diane Miller Sommerville, *Aberration of Mind : Suicide and Suffering in the Civil War-Era South*, (University of North Carolina Press, 2018), 113
[91] Somerville, *Aberration of Mind*, 113-14.

Chapter 3

Who Owns the Womb?

Is a woman a member of the Human Race, a Human Being, A child of God, and a citizen of Democracy? Or, os [sic] she a slave, a chattel, a piece of merchandise which can be owned and manipulated by any man or group of men, to suit his/their purpose? Take your choice.[92]

— Lois Gronberg

With the understanding that *Dobbs* inaccurately uses the "history and tradition" of abortion and reproductive rights in the US, it is important to shift focus on why this matters. Not only does the Court ignore important history in the decision, but in doing so, southern states are able to enact abortion bans that evoke a legacy of slavery, both in it's language and methods of control. While every state has a different abortion law, common themes throughout the South's bans illustrate how the government is using abortion bans as a method to control women's reproductive health as a whole. This chapter will argue that state representatives are using legislation justified by current jurisprudence to block medical professionals from providing access to abortions even when they are necessary, life-saving care. In turn, they are granting themselves full control and power over what women can and can not do with their reproductive labor. This directly parallels how enslavers had full control over enslaved women's reproductive labor and its regulation. This chapter will be

[92] Lois Gronberg, *Re: Right-To-Life Proposal,* letter to the Chairman, House Judiciary Committee, House of Representatives, Washington, D.C., March 9, 1974, Records of the House of Representatives, Judiciary Committee, 93rd Congress, Subcommittee on Civil and Constitutional Rights, Abortion File: H.J. Res. 261, Letters and Petitions, RG 233, National Archives.

split into three sections. Section one will provide an overview of common aspects of abortion bans to paint a general picture of what restrictions are being implemented by many southern States. Secondly, this chapter will examine specific language used in abortion related laws in the South related to fetal personhood, connecting it to ideas about the fetus and property in the antebellum era. Lastly, the Texas abortion ban, alongside two challenges to legislation, *Zurawski v. State of Texas* and *Cox v. State of Texas*, will be analyzed through the lens of antebellum slavery.

The South's Abortion Bans

While each abortion ban is unique, there are some common themes throughout the bans which act as the primary aspects of southern abortion jurisprudence. One theme of these abortion bans is the maintenance of TRAP or "targeted legislation of abortion provider" laws, which were passed after the *Roe* decision to legally restrict abortion access. This was done under the guise that said restrictions would make abortion procedures safer.[93] In reality, these laws "went beyond what was necessary to ensure patient safety" with the intent of shutting down abortion centers and making abortions, in general, harder to obtain.[94] A common tactic in increasing the difficulty of complying with TRAP laws is forcing abortion clinics to abide by the state standards for ambulatory surgical centers (ASCs), making it increasingly difficult for smaller clinics to comply with such strict regulations, forcing them out of business. Requiring ASCs also established standards far higher than were required for many abortion procedures, which were medical abortions and did not require surgery. For instance, a 2019 CDC study concluded that over half of abortions

[93] Johanna Schoen, ed, *Abortion Care as Moral Work: Ethical Considerations of Maternal and Fetal Bodies*, 1st ed, (Rutgers University Press, 2022), 53. https://doi.org/10.36019/9780813597300.
[94] *Id.*

conducted in the US that year were early medical abortions.[95] Given that abortion was able to be restricted beginning in the second trimester and banned completely in the third under *Roe*, this indicates that overall, legal abortions, which tended to occur in the first trimester, were conducted by means that did not need to meet the standards that ASCs do. Furthermore, many southern states banned the most common forms of surgical abortion procedures outright, namely dilation and evacuation (D&E) and dilation and extraction procedures (D&X), the very procedures that would have required abiding by ASC standards.[96] The banning of D&E and D&X procedures also limited the options for abortions in the second and third trimester, which is when they are typically conducted.

Even SCOTUS agreed that TRAP laws went beyond the scope of patient safety and were aimed at limiting access to abortions. In the 2016 case *Whole Woman's Health v. Hellerstedt*, the Court held that two Texas TRAP laws, one of which enforced ASC standards and one that imposed a hospital admittance requirement, had "place[d] a substantial obstacle in the path of women seeking a previability abortion, each constitut[ing] an undue burden on abortion access" and "that neither of these provisions offer[ed] medical benefits sufficient to justify the burdens upon access that each imposes."[97] While the *Dobbs*

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[95] Centers for Disease Control and Prevention, "Abortion Surveillance — United States, 2019," *Morbidity and Mortality Weekly Report* 70, no. 9 (November 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm.

[96] Guttmacher Institute, "The DE Abortion Bans: Implications of Banning the Most Common Second-Trimester Procedure," *Guttmacher Policy Review*, February 2017, https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure.

[97] ASC Law was Tex. Health & Safety Code Ann. §245.010(a) which as cited in the Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016). Stated: "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers."
Hospital Admittance Requirement was Tex. Health & Safety Code Ann. §171.0031(a) (West Cum. Supp. 2015) which as cited in Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016): "[a] physician performing or inducing an abortion . . . must, on the date the abortion is performed or induced, have active admitting

decision overturned *Health v. Hellerstedt*, allowing Texas to reimplement the two laws, the decision still provides recognition that TRAP laws create an "undue burden to abortion access."[98]

Many states also have laws which focus more on limiting access for pregnant women rather than the abortion providers. It is common for states to have banned the use of public or private insurance, including Medicaid, from covering abortion services, creating the financial burden of receiving care.[99] In November 2022, Planned Parenthood estimated that without insurance, a medical abortion cost on average $800, with a surgical abortion costing on average $1,500-2,000.[100] Because of the price, this type of abortion restriction specifically blocks abortions for those that are low income and others who cannot afford to pay for healthcare without insurance. States also have implemented mandatory waiting times and counseling requirements. All of the southern States, as defined by this paper, with the exception of Virginia, have a mandatory waiting period, ranging from 24 to 72 hours, which dictates the amount of time a patient must wait to receive an abortion after having received the mandatory counseling.[101] According to the Guttmacher Institute, a sexual and reproductive health research and policy NGO, Arkansas, Kentucky, Louisiana, and West

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privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced."
Whole Woman's Health v. Hellerstedt, 579 U.S. ___ (2016).

[98] *Id.*

[99] National Women's Law Center, "States Banning or Providing Insurance Coverage of Abortion Can Determine a Person's Health and Future," accessed March 2, 2025, https://nwlc.org/resource/states-banning-or-providing-insurance-coverage-of-abortion-can-determine-a-persons-health-and-future/.

[100] Planned Parenthood, "How Much Does an Abortion Cost?" *Planned Parenthood*, April 29, 2022, updated November 2022, https://www.plannedparenthood.org/blog/how-much-does-an-abortion-cost.

[101] Guttmacher Institute, "Counseling and Waiting Periods for Abortion," accessed January 18, 2025, https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion.

Virginia's mandatory counseling includes "misinformation on medication abortion."[102] The 13 southern states with mandatory waiting periods all include counseling on abortion risk, pregnancy and childbirth risks, and abortion alternatives, assistance, and parental support.[103] The goal of intensive counseling and a long waiting period is to deter individuals from obtaining an abortion. The need for counseling and waiting can also cause other barriers. For instance, Arkansas, Florida, Kentucky, Louisiana, Mississippi, Tennessee, and Texas all require counseling to occur in person at a facility, requiring potential patients to be in person at the clinic two separate times. This functions as a barrier to care "especially for people who must travel long distances to reach a provider, take time off from work, or secure child care or lodging," and also presents extra costs for travel or lodging for those that need to travel far.[104]

However, while these laws are still in practice, after *Dobbs,* many states instituted new bans. Nine of the fourteen southern states have passed total abortion bans: Alabama, West Virginia, Tennessee, Kentucky, Mississippi, Arkansas, Oklahoma, Louisiana, and Texas.[105] South Carolina, Georgia, and Florida all have a six-week LMP (last menstrual period) ban, while North Carolina has a twelve-week LMP ban.[106] Virginia has the least restrictive abortion laws of the South, with a ban beginning after viability, though the State's TRAP laws create barriers.[107] All bans include an exception in order to save the life of the

[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Ala. Code § 26-23H-4; W. Va. Code §16-2R-3; Tenn. Code Ann. § 39-15-213; Ky. Rev. Stat. § 311.772; Miss. Code Ann. § 41-41-45; Ark. Code Ann. § 5-61-301 to – 5-61-304; S.B. 1555, 58th Leg., 2nd Reg. Sess. (Ok. 2022); LA. Stat. Ann. §§ 40.87.7, 14.87.8, 40:1061; Tex. Health & Safety Code §§ 170A.001-7.
[106] S. 474, 125th Gen. Assemb., Spec. Sess. (S.C. 2023); Ga. Code § 16-12-141; FLA. STAT. § 390.0111; S.B. 20, 2023 Leg., Reg. Sess. (N.C. 2023) to be codified at N.C. Gen. Stat. § 90-21.81B(2).
[107] Va. Code Ann. §§ 18.2-73, 18.2-76.

mother, though other exceptions vary. For instance, Mississippi, Florida, Georgia, South Carolina, North Carolina, and West Virginia all have an exception for pregnancies as a result of rape or incest, though the limits of the exceptions vary.[108]

When combining states' post-*Roe* trigger bans with pre-existing TRAP laws, among other restrictions, it is clear that the state of reproductive health care in these areas is in jeopardy. As stigmatized and villainized it can be, abortion is ultimately a medical procedure, which a physician may recommend or be asked to perform for a multitude of reasons. These restrictions require doctors to "'practic[e] to the law' instead of 'to the patient.'"[109] Now, the ultimate authority over whether or not an abortion can be performed has been stripped from medical professionals and given to the state. The state now holds the power to restrict not only abortion but elements of women's reproductive care as a whole. Post-*Dobbs*, the state owns the womb.

Fetal Personhood

Historian Sara Dubow examines how the *Roe* decision opened up questions about the legal status of fetuses at different points in gestation. This conversation was largely impacted by views of research and medical testing being performed on aborted fetuses, as questions of ethics and consent were debated. Not only were ethical concerns discussed, but so was whether or not the mother possessed the right to consent to experiments. The experiments brought up two main questions: Is a fetus a human, and if so, who possesses the power to exercise the rights of the unborn? This section will examine how southern States

[108] Miss. Code Ann. § 41-41-45; Mabel Felix, Laurie Sobel, and Alina Salganicoff, "A Closer Look at Rape and Incest Exceptions in States with Abortion Bans and Early Gestational Restrictions," *KFF*, August 7, 2024, https://www.kff.org/policy-watch/rape-incest-exceptions-abortion-bans-restrictions/.
[109] Schoen, *Abortion Care as Moral Work Abortion as moral work*, 65.

have answered these questions and how the idea of fetal personhood relates to what I call antebellum slavery's "fetal propertyhood."

While fetal experiments sparked the idea, fetal personhood officially entered the legal landscape in *Commonwealth v. Edelin*, the first criminal abortion suit after *Roe v. Wade*. In 1973, Dr. Kenneth Edelin performed an abortion on 17-year-old Alice Roe in the second trimester.[110] Edelin was charged with manslaughter, or more specifically, "assaulting and beating a certain person, to wit a male child… and by such assault and beating did kill said person."[111] By charging him with manslaughter, the Commonwealth of Massachusetts was alleging that the second trimester fetus was a person and, therefore, had the same rights and protections as any other living and breathing human. However, because of the unexplored nature of fetal personhood, it was unclear whether or not there was an actual victim in the case. Edelin's lawyer, William Homans, argued that "a fetus must be born alive in order to be subject to the protection of criminal and civil law," and since the fetus was not alive when removed from Roe's uterus, "no person ever existed and no person was ever killed.[112] In return, Assistant District Attorney (ADA) Newman Flanagan argued that the fetus was a "victim, a viable child…genotypically, actually, and legally a human being and had a right to not be killed. The defendant unlawfully caused the death of this human being and is now answerable to manslaughter."[113] Ultimately, Edelin was acquitted when the Massachusetts Supreme Court overturned his guilty verdict from the lower court. Despite

[110] Alice Roe is a pseudonym used to protect the identity of the patient. Not to be confused with the "Jane Roe" of *Roe v. Wade*.
[111] Commonwealth of Massachusetts, "A True Bill for the Indictment of Kennth Edelin," April 11, 1975.
[112] Sara Dubow, *Ourselves Unborn : A History of the Fetus in Modern America*, (Oxford University Press, 2011), 82. Trial transcript, January 10, 1975, 37.
[113] Newman Flanagan, "Affidavit of the Commonwealth Opposing the Defendants Motion for an Order of Dismissal of the Indictment," Commonwealth v. Kenneth Edelin, submitted to the superior court, No. 81823, October 10, 1974.

this, the case birthed the beginning of fetal personhood, which continued to be an element of anti-abortion rhetoric and legislature. It cements itself as a response to *Roe,* attempting to minimize women and doctors legal rights and "returning" them to the States.

Similar to how ADA Flanagan argued that the fetus was a person despite not being born, slave owners appear to have seen the fetus of enslaved women as property, even when in the womb. This is illustrated in a common phrase that appeared in slaveholders' wills. Bequeathed enslaved women were often accompanied by the phrase "and their natural increase."[114] The term was even used in the 1845 SCOTUS case, *Price v. Sessions*, which ruled on white women's property rights under coverture.[115] Even though *partus sequitur ventrem* had long established that servile condition was inherited matrilineally, the inclusion of "and their natural increase" reinforced that any children that were to be born of the women were property. Legal documents like these illustrate that in the eyes of the slaveholder, *potential lives* could be bequeathed as property before they were even born.

Fetal propertyhood was reinforced through slaveholders attitudes and treatment of their pregnant enslaved women. In the example of violent beatings of the pregnant bondswomen, the hole acted as protection for the womb while the woman was beaten, indicating that the fetus was seen as a separate entity from the woman, worthy of separate protection. By this logic, the fetus' master "protected" the fetus from the whipping so that the child and its financial value would be harmed when the slaveholder meted out punishment to its mother.

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[114] Reclaiming Kin, "And Her Increase," *Reclaiming Kin*, accessed February 28, 2025, https://reclaimingkin.com/and-her-increase/.
[115] "Price v. Sessions" 44 U.S. (3 How.) 624 (1845).

The idea that the state possesses the power to enforce the rights of the unborn comes from a history of slaveholders possessing a similar ability to enforce bondage and ownership of the unborn. Both concepts come back to the entity in power being able to have full control over the fetus and, as a result, the woman who carries it.

The state's ability to possess power over fetuses through fetal personhood is evident with the inclusion of personhood language included in the statutes enacted following the overturning of *Roe*. Nineteen states include some form of personhood status granted to fetuses by state or case law, with 10 states having legislature that grants fetuses personhood status in every stage of pregnancy, 7 which are located in the South.[116] Texas, Louisiana, and Kentucky, in particular, use similar wording to define and grant personhood. Kentucky legislature states that a "'Human being' means any member of the species homo sapiens from fertilization until death," whereas Louisiana uses the term "person" which "includes a human being from the moment of fertilization and implantation."[117] In a separate pre-*Dobbs* bill, Kentucky already uses particular phrasing, writing, "Children, whether born or unborn, are the greatest natural resource in the Commonwealth."[118] The use of the word "resource" evokes language from antebellum slavery, as unborn enslaved fetuses were seen as a resource and tool for financial growth. Texas declares that unborn children are alive, stating that "'Individual' means a human being who is alive, including an unborn child at every stage of gestation from fertilization to birth."[119] These uses of personhood are more subtle

[116] Pregnancy Justice, "When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond," *Pregnancy Justice*, December 2022, https://www.pregnancyjusticeus.org/wp-content/uploads/2022/12/fetal-personhood-with-appendix-UPDATED-1.pdf.
7 southern States: Louisiana, Texas, Arkansas, Missouri, Kentucky, Tennessee, and Alabama.
[117] Ky. Rev. Stat. Ann. § 311.720. La. Stat. Ann. § 14:2.
[118] H.R. 96, 152nd Gen. Assemb., Reg. Sess (Ky.2018).
[119] Tex. Penal Code Ann. § 1.07

than that of Tennessee, which explicitly states, "At conception, a new and genetically distinct human being is formed...The state has a legitimate, substantial, and compelling interest in protecting the rights of all human beings, including the fundamental and absolute right of unborn human beings to life, liberty, and all rights protected by the Fourteenth and Ninth Amendments to the United States Constitution."[120] Laws defining the personhood of the fetus are dangerous, as they grant the fetus the same amount of rights and protection as the pregnant mother. In practice the fetus possesses *more* rights than that of the mother through the criminalization of abortion. Since the unborn do not have the ability to exercise their rights independently, states can take on the role of doing so wielding the power of "protecting the unborn," which in reality, justifies the state's ability to control women's reproduction and bodies and override their rights.

While many states use personhood language, the state of Texas, in particular, illustrates how fetal personhood in tandem with abortion bans allows the State to limit women's reproductive medical care under the guise of "protecting the fetus." The next sections will examine the entirety of Texas' abortion bans, followed by an analysis of two court cases to come out of Texas post-*Dobbs*.

Texas' Abortion Bans

Texas, like many other states, has multiple legislative abortion restrictions in effect at one time. The Texas ban is comprised of a pre-*Roe* criminal ban[121], Senate Bill 8 (S.B. 8)[122], and a trigger ban[123] that would go into effect 30 days after *Roe* was overturned.

[120] Tenn. Code Ann. § 39-15-214.
[121] 1925 Tex. Penal Code arts. 1191-96.
[122] Tex. Health & Safety Code §§ 171.002(3), 171.201-208.
[123] Tex. Health & Safety Code §§ 170A.001-002.

The 1925 pre-*Roe* ban made abortion illegal and criminalized anyone who "furnishes the means" of the procedure and the individual who performs the procedure.[124] In the case where an abortion leads to the death of the mother, the person who performed the abortion would be tried for murder.[125] The law did, however, legalize abortion in the case that the procedure is attempted to save the life of the mother if medically advised.[126] While this law is technically still in effect, the following two laws discuss abortion more directly, rendering this piece of legislation functionally useless.

S.B. 8, also known as the Texas Heartbeat Act, went into effect in 2021, before the *Dobbs* decision. It sought to limit the ability for women to access abortions without taking away one's constitutional right to the procedure under *Roe.* The act states that with the exception of medical emergencies, "a physician may not knowingly perform or induce an abortion on a pregnant woman unless the physician has determined… whether the woman's unborn child has a detectable fetal heartbeat."[127] Another important section of this Bill explains that individuals who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion" are also in violation of the law, putting not only physicians at risk but anyone remotely involved or aware of the procedure.[128] Furthermore, S.B. 8 requires all physicians to report detailed records of any abortion performed under the Emergent Medical Condition Exception to the state.[129]

[124] 1925 Tex. Penal Code arts. 1192, 1193, 1195.
[125] 1925 Tex. Penal Code arts. 1194.
[126] 1925 Tex. Penal Code arts. 1196.
[127] Tex. Health & Safety Code §§ 171.203b, 171.204.
[128] Tex. Health & Safety Code §§ 171.208.
[129] Tex. Health & Safety Code §§ 245.011.

Texas's abortion trigger ban was also passed in 2021 and went into effect shortly after *Dobbs* in 2022. Referred to as the Human Life Protect Act (HLPA), the ban dictates that "a person may not knowingly perform, induce, or attempt an abortion."[130] The only exceptions provided requires that:

> (1) the person performing, inducing, or attempting the abortion is a licensed physician; (2) in the exercise of reasonable medical judgement, the pregnant female on whom the abortion is performed, induced, or attempted has a life-threatening physical condition aggravated by, caused by or assisting from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced.[131]

HLPA effectively bans all abortions except for those that meet the criteria for being a life threatening physical condition.

The next section of this chapter will look at two major court cases in Texas that have attempted to challenge and clarify the abortion bans, specifically S.B. 8 and its ability to prosecute physicians and accomplices to an abortion, along with HLPA's concept of "medical exemptions."

Zurawski v. Texas

On March 6, 2023, the Center for Reproductive Rights filed a lawsuit against the state of Texas on behalf of seven plaintiffs: five Texas women who were denied abortion care and two Texas obstetrician-gynecologists (OB-GYN). It was the first abortion lawsuit since the *Dobbs* decision.[132] The Center hoped that by challenging Texas' abortion bans, the

[130] Tex. Health & Safety Code §§ 170A.001.
[131] Tex. Health & Safety Code §§ 170A.002.
[132] To better understand the stakes of the case, here are two of the original plaintiffs testimonies: 1) Amanda Zurawski. At 17 weeks and 6 days into her pregnancy, Zurawski was diagnosed with an incompetent cervix (weakening of the cervical tissue that causes premature dilation of the cervix). Zurawski asked for a cerclage (cervix is stitched closed to prevent preterm birth) but was informed that her membranes were prolapsing, making a cerclage too risky of a procedure. The same night, Zurawaski returned to the emergency room and received a diagnosis of preterm prelabor rupture of membranes (PROMM). A few days later, Zurawski was diagnosed with sepsis and only then was she "sick enough" to induce labor. Following the delivery and passing

Court would "clarify the scope of the 'medical emergency' exceptions" present in the laws.[133] By November 14, 2023, the number of plaintiffs had risen to 22, with 13 other women who were denied abortion care joining the suit. The suit claims that "inconsistencies in the language of these provisions, the use of non-medical terminology, and sloppy legislative drafting have resulted in understandable confusion throughout the medical profession regarding the scope of the exception."[134] Because of this, the plaintiffs hoped that challenging the current view of the medical emergency exception would force the State of Texas to make specific changes to the language of the law and detail further what does and does not qualify as a medical exception. All of the plaintiffs were denied abortion care due to physicians being fearful of the repercussions of the law, as it is difficult for physicians to know when their decision to provide an abortion, as the medical experts, are protected by the law. Even if they have determined that their patient was in a medical emergency, it was unclear as to if the law would agree, leading doctors to deny abortions they felt were in fact necessary, out of fear of prosecution. The Center, therefore, hoped that the court would

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of her child, Willow, Zurawski developed a secondary infection, chorioamnionitis, and septic shock, and was moved to the intensive care unit (ICU). After discharge from the ICU over three days later, Zurawski still suffered from severe scar tissue in her uterus and fallopian tubes, leading to one of her fallopian tubes closing permanently. Zurawski hopes to become pregnant again and is attempting in vitro fertilization (IVF), though she is aware that she has a high risk of developing an incompetent cervix in future pregnancies. 2) Lauren Miller. Less than 8 weeks into her second pregnancy, Miller discovered that she was pregnant with twins. Early on, she was diagnosed with hyperemesis but did not respond to treatment. Shortly after her 12-week ultrasound, Miller was informed that one of her twins (Baby B) had trisomy 18 and would likely not survive birth. Miller and her husband visited a maternal-fetal medicine (MFM) specialist who stated explicitly stated that before S.B.8 they would have offered to abort Baby B (fetal reduction) in order to ensure the health of Miller and Baby A, but would be unable to provide any care other than suggest they travel out of state for the procedure. Ultimately, after having to be hospitalized due to hyperemesis gravidarum complications, Miller traveled out of state and obtained a fetal reduction and was able to carry her pregnancy with Baby A to term.

[133] Center for Reproductive Rights, "Zurawski v. State of Texas," *Center for Reproductive Rights*, accessed January 14, 2025, https://reproductiverights.org/case/zurawski-v-texas-abortion-emergency-exceptions/zurawski-v-texas/.

[134] Zurawski v. Texas, 690 S.W.3d 644, 4-5 (Tex. 2022).

provide "(1) an interpretation of the Texas law that permits life-saving abortions and (2) to rewrite that law to change the circumstances in which Texas law must permit an abortion."[135]

In their decision the Court stated that, "The State does not contest that at least some of these complications present life-threatening conditions for which an abortion may be indicated"[136] However, the Court does not state which of the plaintiffs experiences or at what point the plaintiffs' medical emergency would have qualified as a life-threatening condition. Ultimately, the Court upheld all three abortion laws without providing any additional interpretation or clarifying the "medical exception clause." The Court consistently restates the laws in the decision, saying that, "Texas permits a life-saving abortion" and that "A physician cannot be fined or disciplined for performing an abortion when the physician, exercising reasonable medical judgment, concludes (1) a pregnant woman has a life-threatening physical condition, and (2) that condition poses a risk of death or serious physical impairment unless an abortion is performed."[137] However, the Court refuses to acknowledge that even if they "believe" that the laws are clear, that does not mean that the physicians in practice agree.

The Court restating the same laws over and over again does not solve the problem that physicians fear providing necessary care to pregnant patients. No matter how clear Texas judges or representatives believe the law to be, it clearly does not provide clear guidelines suitable for medical practitioners, leading to negative health outcomes for pregnant women. The abortion laws, particularly S.B.8, have been proven to negatively affect maternal health outcomes. Between 2019 and 2022, the maternal mortality rate

[135] *Id.* at 4.
[136] *Id.* at 2.
[137] *Id.*

(MMR) rose 56 percent.[138] While the Covid-19 pandemic may have been a contributing factor, it is likely that the steep increase is linked to the passage of S.B. 8 in 2021, as the national MMR only rose 11 percent during the same period.[139] The Texas Health and Human Services Department has not released MMR data since 2022, meaning there are no official statistics from the government about how MMR has been affected post-*Dobbs.* However, the fact that S.B. 8 was likely a large contributing factor to the 56 percent increase indicates that that increase has likely continued with the adoption of stricter abortion bans.

This decision maintained the ability for the State to have full control over women's bodies. As the Court stated, "The State does not contest that at least some of these complications present life-threatening conditions for which an abortion may be indicated," which implies that the Court interpreted the abortion bans, applied it to the plaintiffs, and were able to establish certain medical emergencies that would have been legal under the medical emergency exception.[140] Yet, the Court refused to say who or what medical condition would have qualified. By keeping the abortion bans vague, the State of Texas uses the fear of prosecution to create barriers to abortion care. In doing so, the Court is able to withhold reproductive care to women who need it. The MMR increase post-S.B. 8 indicates that it is not just women who may want or are seeking out an abortion for non-life threatening reasons that suffer, but all pregnant people as a whole, supporting the idea that these bans are about more than abortion. Bans like this one are about controlling reproductive health care as a whole, even if that means negative outcomes for women in

[138] Patrick M. Davis, "New Study Finds Maternal Mortality in Texas Rose Faster Than National Rate," *Texas Standard*, September 24, 2024, https://www.texasstandard.org/stories/texas-maternal-mortality-rate-rises-abortion-ban/.
[139] *Id.*
[140] Zurawski v. Texas, 690 S.W.3d 644, 2 (Tex. 2022).

general. The State *could* put parameters on their medical exceptions, but they recognize they benefit from the ambiguous nature of their restrictions.

Cox v. Texas

Before *Zurawski v. Texas* was decided, Kate Cox, who was pregnant with her third child, believed she required an abortion as a medical necessity and personally sued the State of Texas. On December 5, 2023, Kate Cox, Justin Cox, and Damla Karsan, M.D., filed suit against the State of Texas, the Attorney General of Texas Ken Paxton, the Texas Medical Board, and the Executive Director of the Texas Medical Board, Stephen Brint Carlton. Ms. Cox was 20 weeks along when she filed the complaint. She had a history of traumatic pregnancies and births, with two children being born by cesarean surgeries (C-sections). Her current pregnancy had been even more complicated; Ms. Cox had been admitted to multiple emergency rooms for pregnancy complications, and the fetus was diagnosed with full trisomy 18. Physicians informed Ms. and Mr. Cox that her pregnancy was "unlikely to end with a healthy baby."[141] It was highly likely that her pregnancy would "not survive to birth, and if it does, her baby would be stillborn or survive for only minus, hours, or days."[142] With her history of pregnancy complications, physicians told Ms. Cox that if she did carry to term, vaginal induction put her at risk of a uterine rupture and hysterectomy. Alternatively, if she had a C-section, she would face a high risk for future fertility issues and even severe life-threatening complications. Given this information, the Cox's decided she wanted to receive an abortion to "protect her life, health, and future fertility."[143]

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[141] Center for Reproductive Rights, *Cox v. Texas: Original Petition*, December 2023, 2. https://reproductiverights.org/wp-content/uploads/2023/12/Cox-v.-Texas-original-petition-FINAL.pdf.
[142] *Id.*
[143] *Id*. at 7.

When describing her decision to receive an abortion, Cox said:

> It is not a matter of *if* I will have to say goodbye, but *when*. I do not want to continue the pain and suffering that has plagued this pregnancy. I do not want to put my body through the risks of continuing this pregnancy. I do not want to continue until my baby dies in my belly or I have to deliver a stillborn baby or one where life will be measured in hours or days, full of medical tubes and machinery. Trisomy 18 babies that survive birth often suffer cardiac or respiratory failure. I do not want my baby to arrive in this world only to watch her suffer a heart attack or suffocation. I desperately want the chance to try for another baby and want to access the medical care now that gives me the best chance at another baby.[144]

Despite wanting and, by many doctors' standards, needing an abortion, physicians were unwilling to provide the service to Ms. Cox as they feared the legal consequences. As discussed in *Zurawski*, which was pending at the time of *Cox*, the State was unwilling to clarify the bounds of "medical exemption," leading many physicians to refuse to perform abortions, even if they did believe the individual met the medical exemptions, out of fear of being prosecuted. Without the certainty that they would 100% be safe from prosecution, many doctors opted to refer patients to out-of-state abortion care. Dr. Damla Karsan believed that for Kate Cox, an "abortion is the best medical option to preserve Ms. Cox's life, health, and fertility."[145]

The plaintiffs filed to seek a temporary restraining order and permanent injunction against the Texas Trigger Ban, S.B. 8, and the pre-Roe Ban, in hopes that this would allow Kate Cox to receive the life saving abortion, prevent Justin Cox from being held liable for assisting his wife in obtaining an abortion, and prevent Dr. Damla Karsan from being prosecuted for providing Ms. Cox with an abortion. Again, since the Court had not ruled in

[144] *Id*. at 6-7.
[145] *Id*. at 36.

Zurawski, it was still unknown as to whether the abortion laws would be clarified and if Cox would meet the requirements.

In the lower court, Cox was granted her request to obtain an emergency abortion—a decision that was quickly halted by Attorney General Ken Paxton, who took the case to the Texas Supreme Court after he "threatened hospitals with prosecution if they allowed Kate to access abortion care at their facilities."[146] The Texas Supreme Court then reversed the decision, denying Kate from obtaining an abortion, stating that she did not meet the medical emergency exception. In denying her request, the Court asserted that, "Some difficulties in pregnancy, however, even serious ones, do not pose the heightened risks to the mother the exception encompasses."[147] Similar to *Zurwaski*, the Court restated the abortion bans and hypocritically said that "The law leaves *to physicians*—not judges—both the discretion and the responsibility to exercise their reasonable medical judgment, given the unique facts and circumstances of each patient."[148] Yet, these two statements contradict one another, as the latter declares that doctors are allowed to use their own professional and medical judgement to use the law, while the former proves that the Court has the power to overturn medical practitioners decisions. This further underscores the fear and confusion that led to both cases, as doctors not only are unsure as to what the Court believes the exception means, but

[146] Center for Reproductive Rights, "Texas Supreme Court Says Kate Cox Can't Get An Abortion in Texas," *Center for Reproductive Rights*, December 12, 2023, https://reproductiverights.org/texas-supreme-court-says-kate-cox-cant-get-an-abortion-in-texas/. Office of the Attorney General of Texas, "Attorney General Ken Paxton Responds to Travis County TRO," *Texas Attorney General*, December 7, 2023, https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-responds-travis-county-tro.
[147] *Cox v. Texas*, 597 U.S. ___, 2-3 (2023).
[148] *Id.* at 4.

are aware that the Court can disregard their judgements. Doctors, like Karson, are denied the ability to provide adequate care.

The cases of *Zurawski* and *Cox* illustrate how State abortion bans are used to control and dictate the reproductive health of women, holding the ultimate authority even over medical professionals. From the increase in MMR and the increase in infant mortality during the same time period (rising 8 percent in Texas while only rising 2 percent nationally), it is clear that the goal is not to protect women or even children.[149] The goal is control.

With this clear intent in mind, the comparison between the State and the slaveholder becomes much clearer. Even though the outcome of said control may have varied, the intent remained the same. The case of the enslaved woman Jane from Chapter 2 depicts this. Jane's master had a physician perform an abortion in order to try and save her life. We know, however, it was not her life, in terms of her soul, that he valued, but rather the monetary value from her physical and reproductive labor. It was an act to protect his investment. Jane did not get to make her decision as to whether or not she received an abortion. We do not know how Jane felt about her pregnancy, about the unknown conditions surrounding it, or whether she would have chosen an abortion if given the choice. Dr. Harbert answered to the slave owner, who held the ultimate authority over Jane and her body. Similarly, the State had the ultimate authority in denying Kate Cox's abortion, rather than medical professionals or Cox herself. Southern abortion bans, and therefore the *Dobbs* decision, make it so, as stated

[149] Steven Ross Johnson, "Infant Mortality Rose After Texas Abortion Law, Study Says," *U.S. News & World Report*, June 24, 2024, https://www.usnews.com/news/healthiest-communities/articles/2024-06-24/infant-mortality-rose-after-texas-abortion-law-study-says.

by the Center's president and CEO Nancy Northup, "women are forced to beg for urgent healthcare in court."[150]

The comparison of Jane to Kate, however, illustrates a sad yet apparent conclusion: even though Jane's value was an investment and commodity that was endlessly exploited, Jane held enough value to warrant her life worth saving. Kate did not.

The use of fetal personhood echoes fetal propertyhood, as Texas' control of women's reproduction reflects antebellum enslavers. Historically, within the southern states, women have not and do not have ownership over their own bodies and reproduction. Furthermore, the idea of bondage of the womb comes directly from the experiences of enslaved women. Even the field of medicine, established off of experiments and testing on enslaved women's bodies, is the same field whose developments are now used in law to deny women healthcare. Ultimately, a true conversation of women's reproductive rights and autonomy can not be had without the inclusion of slavery.

[150] Center for Reproductive Rights, "Cox v. Texas: The Case in Depth," *Center for Reproductive Rights*, last modified December 12, 2023, https://reproductiverights.org/case/cox-v-texas/cox-v-texas-case-in-depth/.

Chapter 4

Surveilling Reproduction

The wealth of information collected by digital devices and the power of police and other state agencies to conduct digital surveillance, combined with the dearth of resources in public defender offices to analyze such evidence, will result in a failure to protect many people from being convicted and incarcerated as a result of their pregnancy outcomes.[151]

— Cynthia Conti-Cook

In 1973, the Burger Court issued its decision on the landmark case *Roe v. Wade*, stating that the Due Process Clause of the Fourteenth Amendment provides the Constitutional right to privacy, which protects a pregnant person's ability to obtain an abortion before the third trimester.[152] Until being overturned by *Dobbs* in 2022, legal scholars and historians have criticized the opinion's use of the right to privacy as a weak way of protecting abortion at the federal level instead of explicitly stating the right to abortion or bodily autonomy.[153] In the overturning of the decision, they were proven right. However, despite being a fairly weak Constitutional protection of abortion, the overturning of the *Roe* decision does not take away privacy's place in the context of abortion rights. The idea that abortion access could fall under a right to privacy calls back to the history of slavery, as to be in bondage meant that one had no right to their body, thereby making

[151] Conti-Cook, "Surveilling the Digital Abortion Diary," 38.
[152] *Roe v. Wade*, 410 U.S. 113 (1973).
[153] Lorna Smith, "In History, Ruth Bader Ginsburg Foresaw Threat to U.S. Abortion Access," *BBC Culture*, March 15, 2024, https://www.bbc.com/culture/article/20240315-in-history-ruth-bader-ginsburg-foresaw-threat-to-us-abortion-access.

privacy obsolete. After emancipation, the power of the slave masters was transferred to the state. The *Roe* decision attempted to take back this power from the states and protect abortion under the umbrella of privacy. In turn, the *Dobbs* decision returned the power to restrict or allow privacy in terms of abortion to the state. This leaves us with the antebellum masters and present southern States wielding the same power to restrict individuals' privacy, which extends beyond, but very much includes, issues of reproductive autonomy.

In terms of abortion and reproductive rights, this allows southern legislatures and prosecutors to invade women's privacy through various means of surveillance, mirroring how antebellum enslavers would surveil their enslaved women's reproduction. While the intent of the enslavers may have been different than today's state legislatures, the technologies of surveillance are eerily similar. This chapter argues that the main technologies of control for southern states today are the same that were used in the antebellum era, further illustrating how post-*Dobbs* abortion bans perpetuate legacies of slavery, allowing States to assume an enslaver role in owning and controlling women's bodies. This chapter is separated into two sections: surveillance of the individual and surveillance of the community. Both outline the antebellum tactics before comparing them to the current methods employed by States. While some of the methods discussed have yet to be used post-*Dobbs*, this paper examines tactics that have been used in recent years in relation to women's reproduction, underscoring the capacity to be used to police abortion post-*Dobbs.*

Surveillance of the Individual

This section refers exclusively to surveillance techniques between the "owner," which could be the enslaver or State, respectively, and the "owned," referring to either the enslaved woman or pregnant person today. The subsections will highlight menstrual tracking, suspicion of miscarriages, and invasive medical procedures. All were methods used in the 1800s and currently by the owners to control and monitor the owned's bodies and have led to consequences in the modern context.

So far, this paper has illustrated why enslavers have been so preoccupied with the fertility of their female slaves. Slave auction pamphlets, which specified fertility status and the threat of sale being voided, discussed in chapter 1, revealed that slave traders knew the importance of specifying if an enslaved woman had an irregular menstrual cycle. The story of Louisa Street's enslavement as a wet nurse highlights the possibility that enslavers were able to engage in a level of planning conceptions. Enslavers were also aware of when to call the doctor when an enslaved woman was not having her period. The fact that enslavers were aware of these intimate details of enslaved women's reproduction supports the idea that enslavers were actively tracking their enslaved girls and women's menstrual cycles in order to maximize the exploitation of their reproductive capacity and assess their monetary value. Historian Marie Jenkinds Schwartz speculates that enslavers tracked their female slaves bleeding through the "distribution and storage of rags used to absorb monthly flow."[154] While there may have been other methods implemented to monitor the enslaved women's cycles, it is clear that slave owners did track slaves menstrual cycles and that they greatly valued knowing that intimate information.

[154] Marie Jenkins Schwartz, *Birthing a Slave : Motherhood and Medicine in the Antebellum South*, (Harvard University Press, 2006), 80.

The preoccupation with enslaved women's menstrual cycle was further echoed among antebellum physicians who encountered and sought to cure various menstrual conditions such as dysmenorrhea (difficult and painful menstruation), amenorrhea (suppressed menstruation), and menorrhagia (excessive menstruation). Because of enslavers' tracking and some enslaved women reporting menstrual disorders, slaveholders would seek out physicians for cures. It is very important that, as with the prior discussion of James Marion Sims and his colleagues, this was rarely out of care for the enslaved women themselves. The medical understanding at the time was that a “regular” menstrual cycle indicated fertility, so enslaved women who had “irregular menses,” a term seen in slave auction pamphlets and plantation records, would be monetarily devalued because they were assumed to struggle with becoming pregnant. Enslaved women were valued because of their ability to reproduce and grow the institution, so slaveowners understood that finding a treatment for enslaved women with irregular menstrual cycles would still be profitable if the enslaved women would bear children.

Some medical conditions, specifically dysmenorrhea, were incredibly painful, leading many enslaved women to be unable to work for the duration of their bleeding. This also financially disrupted the plantation system in terms of physical labor. While having to bear the burden of reproductive labor, enslaved women were also coerced to perform physical labor, which could vary between being a housemaid to a field hand. Finding a cure for an enslaved woman’s menstrual conditions that hindered her ability to labor in either capacity was a financial necessity.

Knowledge of a woman's cycle has often been an important signal of health, leading to many women tracking their own cycles even during the antebellum era. Historian Cheryll Ann Cody found evidence that around one-third of enslaved births took place in the late summer and fall, which may relate to the less physically tenuous agricultural months in which "labor requirements… reduced, [and] plantation couples possessed both greater energy and time for their families."[155] Evidence such as this makes it clear that enslaved women used an awareness of their own menstrual cycle to control their reproduction. The menstrual cycle has continued to be a fundamental part of girls and women's lives, and the tradition of tracking one's own cycle is a historical constant. However, with the new age of technology, tracking has moved from mental notes or pen and paper into the digital space.

The feminine technology (FemTech) industry became increasingly entwined with digitization in the early 2010s as various menstrual cycle applications (apps) were released, allowing individuals to track their cycles on their smartphones.[156] Menstrual tracking apps offered a unique ability for people with periods to monitor their own cycles with access to other health information and sometimes forum spaces to interact with others using the apps. As of 2019, a Henry J. Kaiser Family Foundation study estimated that a third of the US population uses a digital app to track their periods and/or fertility, and while we don't know whether this number has changed after *Dobbs*, the statistic illustrates how widely used these applications are.[157] These apps have allowed many women to better understand their cycles,

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[155] David Barry Gaspar and Darlene Clark Hine, eds., *More than Chattel : Black Women and Slavery in the Americas*, (Indiana University Press, 1996), 69.
[156] Catriona McMillan, "Monitoring Female Fertility Through 'Femtech': The Need for a Whole-System Approach to Regulation," *Medical Law Review* 30, no. 3 (2022): 414-5. https://doi.org/10.1093/medlaw/fwac006.
[157] Kaiser Family Foundation, *Topline Health Apps and Information Survey: September 2019,* September 2019, https://files.kff.org/attachment/Topline-Health-Apps-and-Information-Survey-September-2019.

and consequently, their health and fertility, helping to make decisions about their sexual and reproductive lives. In the post *Dobbs* world, there is growing concern that health data in these apps could be used against individuals in an abortion case.

Many sexual and reproductive health apps allow individuals to track their cycle and any symptoms that arise, which allows the app to predict one's ovulation window. Apps also allow individuals to keep track of their birth control and any symptoms of the medication. Under *Roe,* these apps did not pose as much of a threat to women, as the right to an abortion was deemed to be constitutionally protected. States that did have restrictions were minimal as they had to abide by *Roe v. Wade*. Now, however, women have been increasingly cognizant of the fact that these apps have saved large amounts of sexual and reproductive health information that has been self-reported by an individual, making the apps' ability to "potentially become criminal evidence," by indicating a likely pregnancy - or the end of one.[158]

While in this specific case, the government would be obtaining health records that were reported and tracked by the individual themselves, the U.S. government has engaged in menstrual and pregnancy tracking in order to block abortion access, even pre-*Dobbs*. In 2017, under the Trump Administration, the director of the Office of Refugee Resettlement (ORR), Scott Lloyd, was found to have been tracking the pregnancy status and often menstrual cycles of immigrant adolescents between the ages of 12 and 17.[159] While this does

[158] Rachel Torchinsky, "Missed Period? The Significance of Period-Tracking Applications in a Post-Roe America," *PubMed Central*, February 23, 2023, https://pmc.ncbi.nlm.nih.gov/articles/PMC10494721/#CIT0015.
[159] David A. Graham, "Trump Official Scott Lloyd Accused of Blocking Pregnant Minors from Getting Abortions," *CNN*, March 22, 2019, https://edition.cnn.com/2019/03/22/politics/scott-lloyd-pregnant-minors/index.html.

not mean that southern State governments would engage in menstrual tracking on their own, it does illustrate that governments have claimed a vested interest in tracking women's fertility status in order to police and control their decisions. In the case of the ORR, Lloyd was tracking the status of these girls in order to block them from obtaining an abortion, despite them having the constitutional right to obtain one.[160] Ultimately, Lloyd's actions reflect that he believed that his authority as ORR director gave him the right to not only collect this information but to do whatever he wanted with it. This relationship echoes the power dynamics present within slavery. The master could do whatever he or she wanted and were under no obligation to respect the wishes of their enslaved people.

With the understanding that in recent years, government entities have used women's fertility information as a means of control, the thought of a state obtaining private fertility and sexual health data is a valid concern, especially because this evidence can be used in court. There are various ways that state prosecutors could obtain information from menstrual tracking apps. Whether it be through a warrant to search one's phone for evidence, a subpoena to get access to the app's records, or obtaining records by buying data from a third party, the state now has a vested interest in obtaining and recording personal menstrual health information. The methods of tracking vary between the antebellum period and the present day, but the use of the information, and the purpose for collecting it, remains constant.

As civil rights lawyer Cynthia Conti-Cook explains, menstrual health apps are not the only way that pregnant people can be surveilled. "Search browsing history, unencrypted

[160] American Civil Liberties Union, *Scott Lloyd, Esq. (Mini Redacted)*, 64, accessed March 2, 2025. https://www.aclu.org/sites/default/files/field_document/pages_from_scott_lloyd_esq._mini_redacted.pdf.

communications, location history, purchasing history, databases for state police, welfare, and child protective services, social media activity, smart home devices, wearable devices, and menstrual tracking apps all store information relevant to pregnant people's reproductive health and decisions."[161] Not only is government surveillance an ever-growing concern, but there is a precedent in using these types of materials in court, even pre-*Dobbs*. In January 2018, Latic Fisher was indicted in Mississippi on second-degree murder charges after giving birth at home. Authorities suspected that the fetus died due to asphyxiation after being born alive. Conti-Cook reveals that:

> The state's evidence in its first presentation included that in her third trimester, Ms. Fisher "conduct[ed] internet searches, including how to induce a miscarriage, 'buy abortion pills, mifepristone online, misoprostol online,' and 'buy misoprostol abortion pill online,'" and purchased misoprostol online. Without the information in her phone, it seemed clear that the State would have insufficient evidence to sustain a prosecution. Her digital data gave prosecutors a "window into [her] soul" to substantiate their general theory that she did not want the fetus to survive even if the abortion medication she pursued would have been unable to terminate her pregnancy in the third trimester.[162]

The ability to access personal information and make assumptions about women and their pregnancies has also led authorities to suspect women who have experienced a miscarriage, also referred to as a "spontaneous abortion" if the pregnancy loss occurs before the first 20-weeks. Many medical professionals are moving away from this term, specifically because of the stigma and fear of using the term "abortion" in any context.[163]

In November 2022, Amari Marsh was shocked by a positive at-home pregnancy test. However, Marsh continued to get her period, believing that the pregnancy test was wrong,

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[161] Conti-Cook, "Surveilling the Digital Abortion Diary," 48.
[162] *Id.* at 49.
[163] C. Alves, S. M. Jenkins, and A. Rapp, "Early Pregnancy Loss (Spontaneous Abortion)," updated October 12, 2023, in *StatPearls* [Internet], StatPearls Publishing, 2025, https://www.ncbi.nlm.nih.gov/books/NBK560521/.

also influencing her decision not to seek prenatal care. She began experiencing extreme stomach pain on February 28, 2023 and went to the ER. Marsh left after a few hours but returned later that night by ambulance where it was confirmed she was pregnant and released. When she went home that night, she miscarried in her toilet. Her boyfriend called 911 and Marsh returned to the ER. Following her miscarriage, law enforcement informed her that they were making a report related to the incident, though she was not informed that she was being criminally investigated. Three months later, Marsh was charged with murder/homicide by child abuse, spending 22 days in jail without bond, and "facing 20 years to life in prison."[164] Then, she was released to house arrest, where 13 months later, she was cleared by a grand jury.

Similar to Fisher, Marsh was believed to have thought about obtaining an abortion. In January 2023, Marsh made an appointment with a Planned Parenthood clinic to inquire about abortion pills. Despite this, there is no evidence that she ever obtained or took an abortion pill. Conti-Cook notes that "Miscarriages naturally terminate up to 21% of pregnancies after week five and as many as 75% of pregnancies before week five; thus, it is not uncommon for a woman contemplating an abortion to coincidentally suffer a miscarriage."[165] Ultimately, Marsh was not prosecuted for an abortion, however, just as in Fisher's case, it was used against her as evidence that she would not have wanted her fetus to survive. When on the phone with 911 after her miscarriage, the emergency dispatcher "kept telling [her] to take the baby out" of the toilet and Marsh did not. Marsh explained that

[164] Lauren Sausser, "South Carolina Abortion Access Under Threat, New Report Finds," *CNN*, September 23, 2024, https://www.cnn.com/2024/09/23/health/south-carolina-abortion-kff-health-news-partner/index.html.
[165] Conti-Cook, "Surveilling the Digital Abortion Diary," 51.

"I couldn't because I couldn't even keep myself together."[166] Between her supposed interest in an abortion and her inability to take the miscarried fetus out of the toilet while in distress, police found it plausible that Marsh had committed homicide, arresting her. While she was eventually released, Marsh and her loved ones have to live with the traumatic experience of not only losing her pregnancy but being prosecuted for it. Amari Marsh is not the only woman to have had this experience, and scholars are worried that with increasing abortion bans, stories like hers will become more common. Madalyn Wasilczuk, a professor of law at the University of South Carolina, speaks to this issue stating, "It is not satisfying to us that a baby could just die for no reason, or an unknown reason … and so we reach for someone to blame and especially when women are not performing motherhood as we think they should, or they're not upholding the standards that we set out for mothers — we're happy to blame them."[167]

Individual pregnant women are not the only ones being surveilled in order to control reproduction. As discussed in chapter 2, enslaved women engaged in joint networks of care, meaning surveillance applied to their loved ones as well. The same is true today. Law enforcement is aware that evidence can be obtained by people other than the one who is pregnant, expanding surveillance tactics to a larger group of people.

Surveillancing Community

Enslavers were aware that individual surveillance alone was not capable of having a complete understanding of what enslaved women were experiencing or doing in regard to

[166] *Id.*
[167] Cary Aspinwall, "Stillbirth in Oklahoma and Arkansas: Women Investigated for Pregnancy Loss," *The Marshall Project*, October 31, 2024, https://www.themarshallproject.org/2024/10/31/stillbirth-oklahoma-arkansas-women-investigated.

their reproductive labor. Sometimes, slaveholders would threaten enslaved individuals for information on each other, including one's reproductive choices. One formerly enslaved woman spoke of her decision to stay silent about a fellow enslaved woman's abortion, even when threatened with physical violence. Mrs. John Little states, "Before striking me, master questioned me about the girl…. I only knew that she had been with child, and that now she was not, but I did not tell them even of that."[168] Her experience illustrates how slaveholders attempted to use members of various communities as informants. This section will discuss how in a post-*Dobbs* world, surveillance of information obtained through people close to the individual suspected of obtaining an abortion, can aid in a prosecution.

In the technological world we now live in, the manner in which people connect and communicate with each other has expanded. Whereas in the antebellum era, it would be impossible to have a record of conversations individuals had or their whereabouts in every waking moment, technology, specifically smartphones, computers, and tablets, can be used to not only track what a pregnant person does, but who they talk to and what about. For instance, in 2015, Purvi Patel was convicted of "neglect of a dependent and feticide" after purchasing and taking abortion pills online.[169] At her trial, prosecutors presented text messages between Patel and a friend about details regarding her pregnancy and abortion, alongside online research and emails from the site where she purchased the pill.[170] Without gathering the proof that Patel had taken the abortion pill from the interactions between her and her friend, it would have been more difficult to convict her. Prosecutors are also looking

[168] Nancy F. Cott, *The Bonds of Womanhood : "Woman's Sphere" in New England, 1780-1835*. (Yale University Press, 1977), 193.
[169] Conti-Cook, "Surveilling the Digital Abortion Diary," 49.
[170] *Id.* at 51.

to use social media as evidence in abortion cases. Posts, shares, likes, and comments can all be used against people in court, and unlike text messages that may have to be subpoenaed, social media is public, allowing for any indication of interest or thoughts of abortion to be easily obtained. People's thoughts and feelings can now be used against them.

Many of the South's trigger bans do not target the individual receiving an abortion; for example. Instead, the physicians who would perform the abortion or individuals who assist the pregnant woman in question are those at risk of being prosecuted. Individuals assisting a woman obtain an abortion could be tracked through "digital device extractions and subpoenas to cell phone tower companies," in order to see where a suspect has traveled. Conti-Cook also highlights geofencing, which she describes as "an advertising tool used to market producers based on the consumer's location," as a threat as individuals around Planned Parenthood clinics have been sent anti-abortion advertisements.[171] Through this, having a piece of technology on one's person while helping someone obtain an abortion has the potential to track one's location to a clinic or, to a court of law, a scene of a crime. Similar tactics, such as obtaining text messages or emails, could be used to see if someone is helping an individual obtain an abortion. Credit card purchases and online payments also act as a method to not only see what someone is purchasing but also where someone is located. All of this could be used as evidence to convict someone.

Another major community threat is to doctors and other medical practitioners whose ethical duty is to provide healthcare to their patients. State prosecutors are able to subpoena information, including medical records, or the individual to appear in court. Legislation that

[171] *Id.*

typically protects patient confidentiality, such as the Health Insurance Portability and Accountability Act (HIPAA), does not protect individuals from a court order requesting their records. The intent to use this medical data as evidence is further exhibited by the fact that warrants and subpoenas can only be issued by a court if there is a possibility that the information can be used as evidence—highlighting the court's intent to use sensitive health data as criminal evidence to convict individuals.

Another form of surveillance is through doctors reports, as most abortion bans require physicians to submit reports of all abortions they perform under the exceptions. In doing so, the government is surveilling the medical decisions doctors make when providing emergency care, so if the state decided that they did not believe a patient met the law's exceptions, the state has all of the evidence needed to prosecute the physician. This amount of fear has led to physicians denying abortion care, as discussed in chapter 3. Fear itself acts as a method to enforce abortion bans to the detriment of women's health and livelihoods.

Some medical professionals go even further with individuals they suspect may have engaged in an illegal abortion, refusing to offer "miscarriage management" out of a fear that authorities may think they're performing illegal abortions. Even if a patient's pregnancy is over, they might be unable to get the miscarriage care they need. Some medical providers even report their own patients if they believe that a person's pregnancy conditions are suspicious. It is estimated that between 2006 and 2022, "one in three cases [where people were criminalized for their pregnancies] were instigated by a medical professional."[172] There have not been statistics collected post-*Dobbs,* but there is now an incentive to report and

[172] Carter Sherman, "U.S. Miscarriage Laws: What You Need to Know About Abortion Rights and Options," *The Guardian*, January 24, 2024, https://www.theguardian.com/society/2024/jan/24/us-miscarriage-laws-abortion-rights-options.

turn in patients whom they deem suspicious. If not, practitioners risk losing their license and spending years in jail if they appear to be an accomplice.

These surveillance methods lead to increasingly negative health outcomes, especially when it comes to the surveillance of medical professionals. If women do not feel that they can go to a medical professional to seek help in fear that they will be prosecuted like Amari Marsh and Latic Fisher, women will stop seeking care, leading to increased risk to women's health. It should not be lost that the use of surveillance and monitoring of both pregnant people and members of their communities in order to control reproduction was also a factor of antebellum slavery. Fear and surveillance in tandem have been used throughout history to control various individuals, in this case pregnant women. In ignoring the history of surveillance and control of enslaved women's bodies, SCOTUS has allowed for similar tactics to be implemented today, leading to detrimental health effects for all women.

Conclusion

God will punish, old ones / say in unison. They sing,
"Genocide." A man / with a Santa beard and a long gun
enters a clinic in Indiana.
In Mississippi, it's day-glo / signs, floppy hats, tiny
peachy fetus dolls.
Their lawn chairs / too near Women's Health,
their flesh sunscreen white.
Metal-detectors- / as-framing-devices.
Surveillance cameras as / glass birds.
In a place like this, in America, a long gun.
Women afraid of dying while / they are trying to find their life.[173]

— Alissa Quart

When we include the voices of enslaved women in conversations regarding reproductive health and autonomy, it becomes apparent that *Dobbs v. Jackson's* use of "history and tradition" purposefully ignored vital elements of said history, not only in terms of abortion, but women's reproduction as a whole. The six justices who supported the *Dobbs* decision knew that an argument for overturning the constitutional right to an abortion could not be made if they included the history of controlling women's bodies, especially the context of the deeply entrenched nature of slavery. Not including this discourse was a deliberate decision made to provide a guise of historical basis for the control of women's bodies.

The Court very clearly knew what would happen if *Roe* was overturned. Trigger bans that would go into effect in the event *Roe* were to be overturned had been passed in the

[173] Alissa Quart, "Women Afraid of Dying While They Are Trying to Find Their Life: Poetry of Abortion," *Literary Hub*, March 16, 2023, https://lithub.com/women-afraid-of-dying-while-they-are-trying-to-find-their-life-poetry-of-abortion-by-alissa-quart/.

South since 2006, making the subsequent bans and predicted consequences an unsurprising result of *Dobbs*.[174] The Court was therefore also consciously aware of the power they were granting states who already had a history of controlling individual's bodies, notably southern states.

Southern states jumped at the opportunity post-*Dobbs* to restrict abortion care, mirroring ideas of ownership over one's body and womb that were present in the antebellum South. Whether it be through methods of technology, language used to talk about the fetus, or the denying of care in court, the South has become the ultimate authority over women's bodies, just as the slaveholder was once the ultimate authority to the enslaved woman.

The manner in which states are able to act post-*Dobb* illustrates how the legacy of slavery is entrenched in abortion and reproductive law, but still remains hidden to many. The relationship between enslaved women's exploitation and women's reproduction today highlights how abortion law is one of many areas of the law that is deeply embedded with the legacy of slavery. However, the future of reform for abortion law appears bleak based on recent events.

Post-*Dobbs*, discourse surrounding the future of abortion restrictions in the US has turned to fears of a total national abortion ban. While this was thought to be incredibly difficult to achieve, as it would likely require the ban being implemented by Congress, the possibility of a total ban has become more realistic since the 2024 election of President Donald Trump. While Trump has made remarks about not actively planning on attacking

[174] Guttmacher Institute, "13 States Have Abortion Trigger Bans: Here's What Happens When Roe Is Overturned," last modified June 13, 2022, https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

states that have legalized abortion, it is clear from both his 2016 administration, specifically with individuals such as Scott Lloyd, that even if Trump himself is focussed on other issues, there are individuals working for the President that are in support of a national ban.[175] One looming concern with the Trump presidency is the Heritage Foundation Project 2025. During his campaign, Trump claimed that he was not aligned with the document, which explicitly named banning abortion to be one of its targets.[176] However, many of his policies appear to mirror the plan, and knowing that members of his administration are those who were involved in Project 2025, leaves the threat to maintain or even extend abortion restrictions.

It is vital to note that the Project 2025 plan to restrict abortion nationally would use the infamous zombie law, the Comstock Act. The 1873 Comstock Act was an anti-obscenity act which has been limited over its 150 year existence. However, while previous administrations have not used the act to prohibit abortion information or medication from being mailed, the Trump administration could potentially use the Act to do just that.

The ability to further limit abortion access by challenging the ability for medication to be mailed has invoked constitutional questions of interstate commerce. For instance, both the state of Texas and Louisiana have sued New York Physician, Dr. Margaret Daley Carpenter for providing abortion care to citizens via mail.[177] These cases will likely make it to the Supreme Court, who will ultimately decide if individual state abortion bans are able to

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[175] Rebecca Klar, "Trump Says He Would Veto National Abortion Ban," *Politico*, October 1, 2024, https://www.politico.com/news/2024/10/01/trump-abortion-veto-national-ban-00182091.
[176] Dan Friedman, "Trump's Project 2025 Playbook: A Look at His Policy Plan for a Second Term," *CBS News*, March 18, 2025, https://www.cbsnews.com/news/trump-project-2025-playbook/.
[177] Texas Attorney General, *Dr. Carpenter Filed Petition*, accessed March 16, 2025, https://www.texasattorneygeneral.gov/sites/default/files/images/press/Dr%20Carpenter%20Filed%20Petition.pdf.

be the regulators of interstate commerce, ultimately making abortion care far more difficult to access, especially for those in states with total bans already.

Questions about what comes next with abortion rights in the US are still being asked, and will start being answered within the next few years. Alongside the lawsuit against Dr. Carpenter, on March 17, 2025, a midwife and their associate were arrested for providing illegal abortion services in Texas.[178] This is the first abortion arrest to happen in the State of Texas post *Dobbs*, making it a highly visible case, especially after the rulings in *Zurawski* and *Cox*. There is no way to know exactly what will happen next, but there is more than enough evidence to warrant growing anxiety in fears for not only women in states like Texas, but for women around the nation.

Abortion is a topic that will always be unanswerable. Opinions and ideas about the legality and morality of abortion have always been present. Even during the period of legal history which the Court cites in *Dobbs* was full of different ideas about abortion. It is for these complexities and various opinions that this paper purposefully avoided any discussions of the grey area that is abortion's morality. There is not and will never be a single clear cut answer or general consensus as to whether or not abortion is moral. Questions regarding the most basic and fundamental questions about what life is and understandings of human existence can not be answered for all, especially not by a court of law.

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[178] Texas Attorney General, "Attorney General Ken Paxton Announces Arrest of Houston-Area Abortionist and Crackdown on Clinics," *Texas Attorney General*, March 17, 2025, https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-announces-arrest-houston-area-abortionist-and-crackdown-clinics; Texas Attorney General. "Attorney General Ken Paxton Announces Additional Arrests for Illegal Abortion and Unlicensed Medical Procedures." *Texas Attorney General*, March 18, 2025. https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-announces-additional-arrests-illegal-abortion-and-unlicensed-medical.

So, this leaves us with the question: What should the Court do? What is the best answer to an unanswerable legal question?

Ultimately, the best any legal system can do is establish a legal framework that protects people, which in this case, would be the legalization of abortion. No matter how immoral an individual may believe abortion to be, as discussed, in practice, bans harms women on all ends of the spectrum: those who support abortion and those who oppose it, women that feel it is best to obtain an abortion and women who never imagined they would be faced with the need to procure one, and women who did not receive an abortion but are simply seeking health care for the complex medical situations that come with being pregnant. The consequences of southern abortion bans illustrate that anyone's life can be at risk when abortion is criminalized, as banning abortions inherently limits women's reproductive health care as a whole.

Legalizing abortion, on the other hand, both protects women in allowing them to obtain necessary health care, as well as allows individuals to make their own moral decisions for themselves. Individuals have the right to have an opinion about abortion, whether that be for or against. However, that personal moral view does not give anyone a right to limit women's reproductive health care as a whole.

Banning abortion does not stop abortions, it simply stops safe and legal ones. There is nothing anyone can do to fully ban abortion. As enslaved women illustrated with their various methods of reproductive control,women will find a way if that is what they believe is best for them. Abortions will continue to happen regardless, so the best the law can do is make steps to ensure that women who do get abortions can obtain them safely, and that

women's healthcare as a whole are not impaired by this ability. If not, women sentenced to die when all they are doing is "trying to find their life."[179]

[179] Alissa Quart, "Women Afraid of Dying While They Are Trying to Find Their Life: Poetry of Abortion," *Literary Hub*, March 16, 2023, https://lithub.com/women-afraid-of-dying-while-they-are-trying-to-find-their-life-poetry-of-abortion-by-alissa-quart/.

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