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The Impact of the Supreme Court's *Dobbs* Decision on Abortion Rights and Access Across the
United States

Committee Chairwoman Maloney, Ranking Member Comer, and distinguished members of the House Committee on Oversight and Reform, thank you for inviting me to participate in today's hearing on The Impact of the Supreme Court's *Dobbs* Decision on Abortion Rights and Access Across the United States. I join you and fellow witnesses today to explain the dire consequences of the current reproductive landscape in the United States in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, including its horrifically high rates of maternal mortality and morbidity; chilling racial disparities in rates of death associated with pregnancy; the grave incidents of punishment against girls and women in antiabortion states; and the importance of centering the Thirteenth Amendment and Fourteenth Amendment in pathways forward.

My name is Michele Bratcher Goodwin. I am a Chancellor's Professor at the University of California, Irvine, Senior Lecturer at Harvard Medical School, and the Founding Director of the Center for Biotechnology & Global Health Policy. I write and teach in the areas of constitutional law and tort law, bioethics, biotechnology, and health law. My scholarship is published in the *California Law Review*, *Cornell Law Review*, *Harvard Law Review*, *Michigan Law Review*, *NYU Law Review*, *Texas Law Review* and *Yale Law Journal*, among others and in books, most recently, *Policing The Womb: Invisible Women and The Criminalization of Motherhood*. Over the past twenty years, I have written about health inequities and disparities, and reproductive health, rights, and justice. This work has involved detailed research of domestic laws, policies, and cases, as well as international field research on matters of reproductive health and the rights of girls and women in India, the Philippines, Europe, Africa, and Asia.

Legal and Historical Analysis

Three weeks ago, the Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade*, *Planned Parenthood v. Casey*, and a legacy of abortion cases that followed, which upheld the fundamental right to an abortion in the United States. As recently as the 2019-2020 term, the Supreme Court affirmed the fundamental principles of *Roe* and *Planned Parenthood v. Casey* in *June Medical v. Russo*. In that case, Chief Justice John Roberts emphasized the importance of stare decisis and integrity of the rule of law.

The *Dobbs* case involved a Mississippi abortion ban at 15 weeks of pregnancy and an unusual, alarming provision that provided no exceptions for cases of rape or incest. In an opinion written by Justice Alito, the Supreme Court's conservative majority endorsed Mississippi's solicitation to overturn *Roe v. Wade* and *Planned Parenthood v. Casey*, the two cases underpinning the constitutional right to abortion in the U.S. In this opinion, the Court shatters eighty years of

precedent related to reproductive autonomy and liberty dating back to *Skinner v. Oklahoma*.¹

By overturning *Roe v. Wade* and its legacy of jurisprudence, and gutting privacy as a fundamental concept in constitutional jurisprudence, this decision manifests and invites significant harms to all women and all people capable of pregnancy in antiabortion states, and given federal and state health data, imposes a death sentence for Black and Brown women.

Now, in the wake of the Supreme Court’s decision in *Dobbs*, the integrity of the rule of law, adherence to stare decisis, a commitment to the constitutional protection of privacy, and confidence in the Supreme Court are weak and vulnerable. The *Dobbs* opinion reflects a serious threat not only to abortion rights, but to privacy overall related to contraception access, marriage, adoption, and family planning. It is a decision rife with omissions and errors in law, history, and healthcare. The opinion exudes a chilling level of partiality and selective if not opportunistic reasoning, citing as persuasive authority the discredited writings of scholars who showed such contempt for women’s personhood that they published treatises condemning girls and women to centuries of domestic violence and rape unpunished by law., Meanwhile, the opinion does not engage with empirical evidence and data provided in amicus briefs submitted by leading legal and medical organizations.

This includes the Court’s highly suspect referencing and seeming reliance on the legal theories of Sir Matthew Hale. His 1736 treatise, *Historia Placitorum Coronae, History of the Pleas of the Crown*, theorized that a “husband cannot be guilty of a rape” because marriage conveys unconditional consent.² According to Hale, the fulfillment of men’s sexual desires is a part of the marital contract and a married woman “hath given up herself in this kind unto her husband, which she cannot retract.”³

Similarly, William Blackstone, also cited in *Dobbs*, claimed married women’s identities and legal rights should be subsumed under the broader scope of their husbands’ identities.⁴ This ill-conceived legal reasoning helped to forge a legal culture that tolerated and amplified misogyny and violence against girls and women in American households. It is with this backdrop that you should understand the Court’s purposeful referencing of these scholars—not for the values of equality and civil rights enshrined in the United States Constitution, or articulated in the 1964 Civil Rights Act, or expressed in landmark Supreme Court jurisprudence, but rather unenlightened, arcane, dark-era thinking—long discredited and condemned. According to Blackstone, “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing...”⁵

¹ *Skinner v. State of Oklahoma, ex rel. Williamson*, 316 U.S. 535 (1942).

² Matthew Hale, *The History of the Pleas of the Crown* 628 (1736).

³ *Id.*

⁴ See 2 William Blackstone, *Commentaries* *442–45 (discussing the “chief legal effects of marriage during coverture”).

⁵ *Id.* at *442 (“Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage For this reason, a man cannot grant any thing [sic] to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.”) (citations omitted).

Three hundred years ago, relegating women to second-class citizenship, vulnerable to involuntary reproductive servitude, forced motherhood, sexual assault, rape, and state-sanctioned violence, without hope for legal sanctuary was unjust and today this is no different.⁶

In prior testimony before the Senate and House Judiciary Committees, I spoke to the harms of the Supreme Court allowing the Texas abortion ban, S.B. 8 to go into effect. S.B. 8 bans abortion after six weeks of pregnancy, before many people even realize they are pregnant. It ripped a page from the darkest annals of American history, with its bounty provision that allows local residents to sue individuals who aid, abet, or assist individuals seeking to terminate a pregnancy.⁷ As with its shameful predecessors, the Fugitive Slave Acts, the bounty provision incentivizes private individuals to spy upon, surveil, and interfere with individuals asserting fundamental human and constitutional rights such as bodily autonomy, privacy, and freedom.

In bringing attention to the fact that the current crops of abortion bans provide no exceptions for cases of rape or incest, my testimony pointed out the illogic and cruel political calculations of these bans, which prioritize the dismantling of democratic norms and principles at all costs, including forced pregnancies of ten-year-old children and deaths of patients. These bans cause irreparable harms in the lives of the girls, women and people affected by them.

When states coerce and force women, girls, and people with the capacity for pregnancy to remain pregnant against their will, they create human chattel and incubators of them. By doing so, state lawmakers force their bodies into the service of state interests, something outlawed years ago with the dismantling of the draft for state and military services. In the end, they are coerced to fulfill the private fascinations of lawmakers whose personal interests and religious beliefs become directly and impermissibly entangled and intertwined in their service to the state. There is an insidious and odious irony to this, because Congress abolished human slavery in the U.S., and repealed draft laws that forced young men to surrender their bodies to the state in order to protect our nation. Today, with two dozen “trigger” bans going into effect, involuntary reproductive servitude has returned, but only for women, girls, and pregnant capable people.

Neglectful Reading of Enumerated Rights In The Constitution

The *Dobbs* decision reveals the Supreme Court’s neglectful reading of history and its own jurisprudence. It is not that the Court ignores legal history altogether. Rather, the Court “cherry-picks” facts, only referencing timelines and archives that serve an outcome determinative purpose, ignoring prior precedents, medical data related to maternal mortality and morbidity, and facts

⁶ The “marital exception,” for example, shielded husbands from criminal liability for the sexual assaults and rapes perpetrated against their wives. According to the American Law Reports 4th Edition on marital rape, “Until very recently, the courts were nearly unanimous in their view that a husband could not be convicted of rape, or assault with intent to commit rape, upon his wife as the result of a direct sexual act committed by him upon her person.” See Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105, at § 2[a] (2009) (explaining that the exception was said to “serve a legitimate state interest in encouraging the preservation of family relationships”). See also MISS. CODE ANN. § 97-3-99 (Supp. 1991) (“A person is not guilty of any offense under sections 97-3-95 through 97-3-103 if the alleged victim is that person’s legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart . . .”).

⁷ See Fugitive Slave Act of 1793, 2nd Cong. (1793); Fugitive Slave Act of 1850, 31st Cong. (1850).

crucial to a rigorous review of Mississippi's abortion ban. The result is that the Court misinforms the American public who most rely on it to be impartial, non-partisan, and principled. For example, the majority claims to value constitutional and statutory text as well as a fidelity to originalism. To be clear, these are approaches to legal review which were not enshrined in the Constitution by its framers. Nevertheless, the majority dispenses with textualism and originalism inconvenient to its efforts to dismantle *Roe*.

Justice Samuel Alito's assertion that there is no enumeration and original meaning in the Constitution related to compulsory or involuntary sexual subordination and reproduction misinterprets and misunderstands American history and law, namely the Antebellum chattel-era otherwise known as slavery. It disregards the social conditions leading to the Thirteenth and Fourteenth Amendments. It misconstrues how slavery was abolished, overlooks the deliberation and debates within Congress, and opaquely renders Black women and their bondage invisible.

Most glaringly, the Supreme Court ignores the constitutional prohibition on involuntary servitude and the meaning and debates on the Thirteenth and Fourteenth Amendments, which directly related to reproductive privacy, liberty, and autonomy. Strangely, the Supreme Court ignores these debates even while central to the ratification of the Thirteenth and Fourteenth Amendments were matters of Black women being forced to bear pregnancies against their will, compelled under threats of punishment into the status of reproductive chattel, including in states like Mississippi, Kentucky, Alabama, and Texas—with notorious histories of slavery, Jim Crow, and now Jane Crow. In these states there have been uninterrupted patterns of invidious lawmaking and discrimination that harm the interests of Black women and children—only countered by necessary federal enactments, review, and protection.

Specifically, ending the forced sexual and reproductive servitude of Black girls and women was a critical part of the passage of the Thirteenth and Fourteenth amendments. The overturning of *Roe v. Wade* reveals the Supreme Court's neglectful reading of the amendments that abolished slavery and guaranteed all people equal protection under the law. It means the erasure of Black women from the Constitution.

Mandated, forced or compulsory pregnancy contravenes enumerated rights in the Constitution, namely the Thirteenth Amendment's prohibition against involuntary servitude and protection of bodily autonomy as well as the Fourteenth Amendment's defense of privacy and freedom. This Supreme Court demonstrates a selective and opportunistic interpretation of the Constitution and legal history, which disregards the intent of the Thirteenth and Fourteenth Amendments, specifically framed to abolish slavery and all of its vestiges. It ignores the campaign of the abolitionist framers, especially their concerns about Black women's bodily autonomy, liberty and privacy which extended beyond freeing them from labor in cotton fields to shielding them from rape and forced reproduction.

At the heart of abolishing slavery and involuntary servitude in the Thirteenth Amendment was the forced sexual and reproductive servitude of Black girls and women. Senator Charles Sumner of Massachusetts who led the effort to prohibit slavery and enact the Thirteenth Amendment was nearly beaten to death in the halls of Congress two days after giving a speech that included the

condemning of the culture of sexual violence that dominated slavery.⁸ These issues were widely debated and part of common discourse.⁹

What the Supreme Court majority in *Dobbs* strategically overlooks, legal history reminds us with stunning clarity, specifically the terrifying practices of American slavery, including the stalking, kidnapping, confinement, coercion, rape and torture of Black women and girls. In a commentary reprinted in *The New York Times* on Jan. 18, 1860, slavery was described as an enterprise that “treats” a Black person “as a chattel, breeds from him with as little regard for marriage ties as if he were an animal.”¹⁰

These were the common markers of chattel slavery throughout the United States, especially associated with the American South as reported in newspapers,¹¹ abolitionist pamphlets,¹² daguerreotypes,¹³ and autobiographies,¹⁴ including those written by slaveholders.¹⁵ In other words, within reach of the Supreme Court were the various tools to unpack history, examine the debates and the constitutional origins of protecting women from involuntary reproductive servitude.

Black women were not silent about these conditions and spoke out about their reproductive bondage and forced pregnancies. In 1851, in her compelling speech known as *Ain't I A Woman*, Sojourner Truth implored the crowd of men and women gathered at the Women's Rights Convention in Akron, Ohio to understand the gravity and depravity of American slavery on Black women's reproductive autonomy and privacy. Reported by newspapers and recorded through history, Ms. Truth stated that she had borne 13 children and seen nearly each one ripped from her arms, with no appeal to law or courts. Wasn't she a woman too?

⁸ https://www.senate.gov/artandhistory/history/minute/The_Canining_of_Senator_Charles_Sumner.htm The Canining of Senator Charles Sumner, United States Senate, https://www.senate.gov/artandhistory/history/minute/The_Canining_of_Senator_Charles_Sumner.htm

⁹ See Farah Stockman, *Monticello Is Done Avoiding Jefferson's Relationship with Sally Hemings*, *N.Y. Times*, June 16, 2018, <https://www.nytimes.com/2018/06/16/us/sally-hemings-exhibit-monticello.html>

¹⁰ *The Issue in the United States—The North and Slavery*, *N.Y. Times*, Jan. 18, 1860, <https://www.nytimes.com/1860/01/18/archives/the-issue-in-the-united-states-the-north-and-slavery.html>.

¹¹ *The Slave-Trade Still Prosperous*, *N.Y. Times*, Feb. 1, 1860, at 4 (“For more than half a century this odious commerce has withstood the denunciations of successive philanthropists; the proscriptive legislation of mighty States; the incessant surveillance, and destructive attacks of hostile squadrons—yet it is still prosperous, still flourishing.”); *The Issue in the United States—The North and Slavery*, *N.Y. Times*, Jan. 18, 1860, at 2 (“The man who holds his fellow-man in slavery, treats him as a chattel, breeds from him with as little regard for marriage ties as if he were an animal, is a moral outlaw; society may find, or fancy it finds, its interest in protecting his life and his ‘property’ but it does so at its own peril. Before long a certain retribution overtakes it. In all ages of the world men have acknowledged rights which are older than civil society, and immutable . . .”); *The United States and the Slave-Trade*, *London Post*, Sept. 7, 1860, reprinted in *N.Y. Times*, Sept. 22, 1860, at 1.

¹² See *The African-American Mosaic: Influence of Prominent Abolitionists*, Lib. Cong., <https://www.loc.gov/exhibits/african/afam006.html> [https://perma.cc/Q7AA-8NHC]; see also *Anti-Slavery Tracts. First Series*, Nos. 1-20 (David M. Hart ed., New York, Am. Anti-Slavery Soc’y 1855–1856).

¹³ See Anthony Burns, Illustration of Fugitive Slave Anthony Burns Drawn from a Daguerreotype, in Lib. Cong., www.loc.gov/item/2003689280/ [https://perma.cc/L8DP-53M4].

¹⁴ Among some of the better known are Solomon Northup, *Twelve Years a Slave* (David Wilson ed., New York, Derby & Miller 1853), Frederick Douglass, *Narrative of the Life of Frederick Douglass* (Harvard Univ. Press 2009) (1853), and Harriet Jacobs, *Incidents in the Life of a Slave Girl* (1861).

¹⁵ See, e.g., Thomas Jefferson, *Notes on the State of Virginia* 143 (William Peden ed., Univ. of N.C. Press 1996) (1785).

Similarly, Harriet Jacobs wrote of the sexual predations experienced by Black girls and her personal efforts to escape the vile sexual reaches of her captor. She wrote, “I saw a man forty years my senior daily violating the most sacred commandments of nature. He told me I was his property; that I must be subject to his will in all things.” Today, antiabortion legislators have returned to exploiting women’s reproductive capacities for coercive purposes.

The sexual terrorism inflicted on Black girls and women during slavery, especially sexual violations and forced pregnancies, have been all but wiped from cultural and legal memory. Yet they remain relevant today. This erasure by the Supreme Court disserves all women and is an urgent reminder why these amendments were ratified.

Impact of Abortion Bans and Restrictions

Overturing *Roe v. Wade* foreshadows maternal mortality, maternal morbidity, forced pregnancy, threats to contraceptive access, bans on sex education in schools, and attacks on LGBTQ rights, marriage equality for LGBTQ couples, and discrimination related to who may adopt.

Privacy

Now that the Court has ruled that the right to abortion as recognized in *Roe* should be left to the political process, harms will result and prior precedents will be vulnerable. This includes the rights to family and child-bearing first recognized in *Meyer v. Nebraska* (1923) and strengthened in subsequent cases including *Moore v. City of East Cleveland* (1977), the right to use contraception first recognized in *Griswold v. Connecticut* (1965) and strengthened in *Carey v. Population Services* (1977), and the right to marry recognized in *Loving v. Virginia* (1967) and subsequently extended to same-sex couples in *Obergefell v. Hodges* (2015).¹⁶ Now that the Court has overturned *Roe*, these essential liberty rights that Americans rely on are threatened.

Despite the majority’s promise that guardrails will protect other privacy rights, Justice Thomas’s concurrence contradicts that, suggesting that if given enough votes, privacy protections related to contraception and even marriage will be vulnerable. These matters cannot adequately be resolved at the state level through voting, particularly when voting rights are unprotected and voter suppression dominates the political process, especially in states with long and enduring histories of slavery, Jim Crow, and now Jane Crow.

Interstate Travel

For example in Missouri, State Rep. Mary Elizabeth Coleman (R) proposed a measure that imposes liability on anyone who “manufactures, distributes, transports, provides, or aids or abets the

¹⁶ See Ctr. for Repro. Rights, *Roe and Intersectional Liberty Doctrine* (2018), <https://reproductiverights.org/wp-content/uploads/2020/12/Liberty-Roe-Timeline-spread-for-print.pdf>.

manufacture, distribution, transportation, or provision of abortion-inducing drugs.”¹⁷ And even while Coleman’s proposal to further restrict access to abortions by banning interstate travel for abortion care purposes in Missouri was blocked through procedural maneuvering, proposals such as this reflect the seriousness of civil rights and civil liberties at stake.¹⁸ South Dakota Governor Kristi Noem has also suggested that there will be a “debate” about whether her state will ban interstate travel for the purposes of obtaining an abortion.¹⁹

While bans on interstate travel for the purpose of obtaining an abortion are unconstitutional, given the constitutional protections for the right to travel, it remains alarming that such prohibitions are being debated. Notably, in his concurring opinion in *Dobbs*, Justice Kavanaugh wrote in response to the question “may a State bar a resident of that State from traveling to another State to obtain an abortion,” that “the answer is no based on the constitutional right to interstate travel.”²⁰ Although there are currently no laws that have passed state legislatures banning interstate travel for obtaining an abortion, that does not mean Justice Kavanaugh’s concurrence does not touch on an important disputed issue in the wake of *Dobbs*.²¹

Maternal Mortality and Morbidity

Already, women are fourteen times more likely to die by carrying a pregnancy to term than by having an abortion.²² In Mississippi, a woman is 118 times more likely to die by carrying a pregnancy to term than by having an abortion.²³ According to the Mississippi Maternal Mortality

¹⁷ H.B. 1854, Amend., 101st Gen. Assem., Reg. Sess. (Mo. 2022). See also Alice Ollstein & Megan Messerly, *Missouri wants to stop out-of-state abortions. Other states could follow.*, *Politico*, Mar. 19, 2022 (<https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539>); see also Tessa Weinberg, *Missouri legislature may limit access to birth control after Roe falls: ‘Anything’s on the table,’* *KCUR*, May 20, 2022 (<https://www.kcur.org/politics-elections-and-government/2022-05-20/missouri-legislature-limit-birth-control-after-roe-v-wade-abortion>). (Coleman’s proposal relied on litigation by private citizens, rather than criminal prosecution, to enforce abortion restrictions).

¹⁸ Tessa Weinberg, *Missouri House Blocks Effort to Limit Access to Out-of-State Abortions*, *Missouri Independent*, Mar. 29, 2022. (<https://missouriindependent.com/2022/03/29/missouri-house-blocks-effort-to-limit-access-to-out-of-state-abortions/>).

¹⁹ Melissa Repko, *Anti-Abortion States Split on How to Enforce Ban, Whether to Prosecute Doctors, Surveil Women*, *CNBC*, Jun. 26, 2022 (<https://www.cnn.com/2022/06/26/anti-abortion-states-split-on-how-to-enforce-ban-whether-to-prosecute-or-surveil-doctors.html>). See also Alan B. Morrison, *No, South Dakota Can’t Ban Its Residents From Traveling to Get an Abortion*, *Slate*, Jun. 28, 2022 (<https://slate.com/news-and-politics/2022/06/brett-kavanaugh-abortion-travel-ban-dobbs.html>)

²⁰ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 1 (2022) (the decision empowers states to set their own abortion regulations, and overturns *Roe v. Wade*). (Justice Kavanaugh does not cite a case establishing the right of interstate travel in his concurrence).

²¹ Ava Sasani, *Is it Legal for Women to Travel out of State for an Abortion?*, *NYTimes*, June 24, 2022 (<https://www.nytimes.com/2022/06/24/us/abortion-travel-bans.html>)(Based on Kavanaugh’s own concurrence, along with guidance by the President, the Department of Justice, and past Supreme Court precedent, there is a strong evidence that a state cannot ban interstate travel even for the purposes of obtaining an abortion.

²² See, e.g., Elizabeth G. Raymond et. al., *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *Obstetrics & Gynecology* 215 (2012).

²³ In Mississippi, between 2013-2016, the pregnancy-related mortality ratio for Black women was 51.9 deaths per 100,000 live births, nearly three times the White ratio of 18.9. The national legal induced abortion case-fatality rate for 2013–2017 was 0.44 legal induced abortion-related deaths per 100,000 reported legal abortions. Miss. State Dep’t of Health, Miss. Maternal Mortality Report 2013-2016 (Apr. 2019),

Report,²⁴ Black women accounted for “nearly 80% of pregnancy-related cardiac deaths” in that state.²⁵ Prior to *Dobbs* there was only one clinic in the entire state of Mississippi to serve a population of 1.538 million women that might need to terminate a pregnancy.²⁶ Given this, and the state’s notorious history of racial inequality, discrimination, maternal mortality, and maternal morbidity, when Mississippi Attorney General Lynn Fitch defended the law, stating that “the Mississippi Legislature enacted this law ... to promote women’s health and preserve the dignity and sanctity of life,”²⁷ it is difficult to conclude that Black women were included among those the state seeks to protect.

Simply put, in antiabortion states—now non-free states—women and girls cannot trust lawmakers with their lives, and state and national health data explain why. In the past decade, with the chilling rise of extremism in American state legislatures, buttressed by the former President’s alarming promise to only nominate antiabortion judges, a dramatic proliferation in antiabortion legislation in the United States has coincided with this nation becoming the deadliest in the “developed world” to be pregnant and attempt to give birth. This crisis in America affects all women, girls, and people of reproductive age and capacity. Yet, this crisis does not affect all women equally. For Black women, they are 3.5 times more likely to die due to maternal mortality than their white counterparts.²⁸ Notably, that is the national average. In states such as Mississippi and Louisiana, these disparities horrifically compound and multiply.²⁹

Thus, despite claims to the contrary, banning abortion will not and does not help Black women or any women in the United States. To the contrary, many will suffer and die. It is no coincidence that the states with the highest maternal mortality rates also lead the nation in antiabortion legislation.³⁰

Currently, the United States ranks 55th globally in the rate of maternal mortality.³¹ Rather than being in the company of peers such as Germany, France, Spain, or England, the United States ranks alongside Saudi Arabia, Bosnia, and Russia, nations marked by the oppression of women, violations of fundamental human rights, and in the case of Bosnia “the worst genocide in Europe

https://msdh.ms.gov/msdhsite/_static/resources/8127.pdf; Katherine Kortsmitt et al., *Abortion Surveillance—United States, 2018*, 69 MMWR Surveillance Summaries 1 (Nov. 2020), <https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6907a1-H.pdf>.

²⁴ Miss. State Dep’t of Health, *Miss. Maternal Mortality Report 2013-2016* (2019), https://msdh.ms.gov/msdhsite/_static/resources/8127.pdf.

²⁵ *Id.*

²⁷ Lawrence Hurley, *U.S. Supreme Court Takes Up Major Challenge To Abortion Rights*, Reuters, May 17, 2021, <https://www.reuters.com/world/us/us-supreme-court-takes-up-case-that-could-limit-abortion-rights-2021-05-17/>.

²⁸ See News Release, Nat’l Insts. of Health, *NIH-funded study highlights stark racial disparities in maternal deaths* (Aug. 12, 2021), <https://www.nih.gov/news-events/news-releases/nih-funded-study-highlights-stark-racial-disparities-maternal-deaths>.

²⁹ America’s Health Rankings United Health Found, *2019 Health of Women and Children Report – Public Health Impact: Maternal Mortality*, https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality_a/state/ALL?edition-year=2019 (last visited May 13, 2022).

³⁰ *Id.*

³¹ Cent. Intelligence Agency, *World Factbook: Country Comparisons – Maternal Mortality Ratio*, <https://www.cia.gov/the-world-factbook/field/maternal-mortality-ratio/country-comparison>.

since the second world war,”³² nations where women have been stoned to death,³³ received public lashings, and experienced the cruelest sexual violations.³⁴ This is the company that the United States now keeps on matters of women’s reproductive health and affairs. A review of data collected the United States Central Intelligence Agency provides evidence that it is safer to be pregnant and give birth in Bahrain, Iran, and Tajikistan than in the United States.³⁵

According to the Texas Observer in 2017, Texas’ maternal mortality was the “worst in the developed world,” even while it was noted that the grave rates of death in that state after severe attacks on abortion access were “shrugged off by lawmakers.”³⁶ Texas competes with Mississippi and Louisiana as being the most dangerous places in the developing world for a woman to be pregnant. Louisiana has the worst maternal mortality rate (2013-2017, most recent for all states) among states at 72.0 deaths per every 100,000 live births, nearly two-and-a-half times higher than the national average.³⁷ No word better describes the toxic mixture of antiabortion and maternal mortality than devastation—already felt in Tennessee,³⁸ Wyoming,³⁹ Kentucky,⁴⁰ and other states. This is an active problem, for the maternal mortality rate in the United States is worse than it was in 2019.⁴¹

Civil Punishment

Some of the laws being considered or enacted by in states hostile to abortion rights and reproductive healthcare permit persons who “aid and abet” an abortion to be sued (e.g., Oklahoma and Texas). Based on this language, employers, medical providers, family members, taxi drivers and more could be pursued and punished in violation of these laws. In the case of employers, they could be implicated for subsidizing or paying for employees to travel out-of-state to receive an abortion related service. Because some of these laws are styled on the Texas SB 8 law, using enforcement by private citizens rather than the state, they will be harder to challenge in court given that legislation’s success in the courts, including at the Supreme Court. Importantly, these issues also implicate the First Amendment and freedom of speech.

³² Kim Willsher, *How the ‘Hanging Woman’ Revealed Truth of Bosnia’s Mass Killer*, The Guardian, June 13, 2021, <https://www.theguardian.com/world/2021/jun/13/how-the-hanging-woman-revealed-truth-of-bosnias-mass-killer>.

³³ Sophie Jane Evans, *Saudi Arabia Sentences Maid to Death By Stoning For Adultery—But the Man She Slept with Will Escape with 100 Lashes*, Daily Mail, Nov. 28, 2015, <https://www.dailymail.co.uk/news/article-3337297/Saudi-Arabia-sentences-married-maid-death-stoning-adultery-man-slept-escape-100-lashes.html>.

³⁴ Jerome Socolovsky, *Bosnian ‘Rape Camp’ Survivors Testify in The Hague*, Women’s eNews, July 19, 2000, <https://womensenews.org/2000/07/bosnian-rape-camp-survivors-testify-the-hague/>.

³⁵ Cent. Intelligence Agency, *World Factbook: Country Comparisons – Maternal Mortality Ratio*, <https://www.cia.gov/the-world-factbook/field/maternal-mortality-ratio/country-comparison>.

³⁶ Sophie Novack, *Texas’ Maternal Mortality Rate: Worst in Developed World, Shrugged Off By Lawmakers*, Tex. Observer, June 5, 2017, <https://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities/>.

³⁷ America’s Health Rankings United Health Found., *2019 Health of Women and Children Report – Public Health Impact: Maternal Mortality*, https://www.americashealthrankings.org/explore/health-of-women-and-children/measure/maternal_mortality_a/state/ALL?edition-year=2019 (last visited May 13, 2022).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, NCHS Health E-Stats (Feb. 2022), <https://stacks.cdc.gov/view/cdc/113967>.

Criminal Punishment

Today, there is a creeping criminalization and punishment of pregnant women through various legislation and abuse of prosecutorial discretion. This will further harm patient health. Such legislation includes feticide laws,⁴² drug policies,⁴³ statutes criminalizing maternal conduct,⁴⁴ and statutes authorizing the confinement of pregnant women to protect the health of fetuses.⁴⁵ In some instances, existing laws intending to protect children from physical abuse have been interpreted to apply to fetuses—and thus fall within the category of fetal protection laws.⁴⁶ Antiabortion lawmakers claim fetal protection laws are intended to promote the health and safety of fetuses by criminalizing actual or intended harm to them.⁴⁷ These laws create bright line rules that are intended to place pregnant women (who know about them) on notice.

Today, the full scope of liberty-infringing pregnancy interventions, including threats of arrest and other coercive conduct that does not necessarily lead to criminal punishment is unknown. There is no national database and any state-level record keeping related to pregnant patients prosecuted under the guise of fetal protection can be difficult to access. Reporter Nina Martin has filed “multiple information requests to identify” those arrested under child endangerment laws and child abuse statutes, which now apply to fetuses in a number of states. Vigilant investigation in Alabama revealed dramatic undercounting by “more than three times the number previously identified.”⁴⁸

Evidence of arrests and prosecutions gathered by Martin as well as national and international advocacy organizations such as National Advocates for Pregnant Women and Amnesty International indicate the numbers of women vulnerable to pregnancy policing are on the rise.⁴⁹ New prosecutions of pregnant women for acts of feticide and attempted feticide illustrate this shift; such prosecutions simply did not occur before. These concerns existed before *Dobbs*. Now, with legislators promising aggressive policing and surveillance of pregnancy to enforce antiabortion

⁴² See, e.g., ALA. CODE § 13A-6-1 (2006); ARIZ. REV. STAT. ANN. § 13-1102–05; FLA. STAT. ANN. 782.09 (West 2005); MISS. CODE ANN. § 97-3-19 (2013).

⁴³ See, e.g., ALA. CODE § 26-15-3.2 (West 2006). The term “child” as used in this statute has been interpreted to encompass fetuses. *Ex parte Ankrom*, 2013 WL 135748, at *11 (Ala. Jan. 13, 2013).

⁴⁴ Utah’s House and Senate passed a “Criminal Miscarriage” law, presumptively exposing pregnant women to criminal prosecution for miscarrying. See H.B. 12, 58th Gen. Sess. (Utah 2010), <https://le.utah.gov/~2010/bills/static/HB0012.html>.

⁴⁵ WISC. STAT. ANN. § 48.133 (West 2013) (granting the court “exclusive original jurisdiction” over an unborn child in need of protection when the expectant mother “habitually lacks self-control in the use of alcohol beverages, controlled substances . . .”). The Wisconsin law allowed State authorities to incarcerate Alicia Beltran at 14-weeks pregnant after she told a health care provider about a past (but not current) pill addiction. Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES, Oct. 24, 2013, at A1

⁴⁶ See, e.g., *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997) (holding that a viable fetus is a “child” within the meaning of the state’s child abuse and endangerment laws).

⁴⁷ See Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin’s Revised Child Abuse Law: Right Goal, Wrong Remedy*, J. OF L., MED. & ETHICS 332, 332 (1999) (discussing laws in Wisconsin and South Dakota allowing confinement of pregnant women for drugs or alcohol use and how they are motivated by “the state’s interest in promoting the health of future citizens”).

⁴⁸ Nina Martin, *The State That Turns Pregnant Women Into Felons*, ProPublica, Sept.23, 2015.

⁴⁹ Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. OF HEALTH POL. & L. 299, 300 (2013).

policies, likely arrests for miscarriages and stillbirths will result.

Economic Hardship

Research shows that being denied an abortion has serious consequences for a woman’s well-being and financial security. According to The Turnaway Study, being denied an abortion results in “an almost four-fold increase in odds that a woman’s household income is below the Federal Poverty Level compared to those who receive an abortion.”⁵⁰ Women denied abortion care are also at increased risk of experiencing ongoing financial distress, including rising debt and eviction proceedings. Many of the states with “trigger” bans that will go into effect if *Roe v. Wade* is overturned already have disproportionately high poverty rates.

Across the United States, women of color experience the intergenerational burn of policies and practices that result in unequal wages, inequitable living conditions, the economic strains of childcare, and the inability to afford basic necessities for their families. For example, in North Dakota, Native American/ Alaska Native people are nearly four times more likely to live in poverty than White people.⁵¹ One third of the Native American/ Alaska Native population in North Dakota live in poverty.⁵² In South Dakota, Hispanic people are over five and a half times more likely to live in poverty than White people, and Native American/ Alaska Native people are eleven times more likely to live in poverty than White people, with nearly 60% of the Native American/ Alaska Native population living in poverty.⁵³ In Kentucky, Black people are nearly three times more likely to live in poverty than White people.⁵⁴ In Louisiana, the state with the highest maternal mortality rate, Black and Hispanic/Latinx people are nearly two and a half times more likely to live in poverty than White people.⁵⁵

In light of the foregoing, Congress must be vigilant in protecting the fundamental reproductive freedoms of all Americans and especially women, girls, and people capable of reproduction. It is clear already that the impacts of abortion bans are not equally felt or experienced in the U.S. Abortion bans and restrictions create significant burdens and barriers for people seeking care and disproportionately impact communities that already experience higher rates of maternal mortality and poverty due to systemic racism and misogyny.

Pathways Forward

⁵⁰ *The Harms of Denying a Woman a Wanted Abortion: Findings from the Turnaway Study*, ANSIRH, <https://sixrepro.org/wp-content/uploads/2020/10/The-Harms-of-Denying-a-Woman-a-Wanted-Abortion-Findings-from-the-Turnaway-Study.pdf>.

⁵¹ Kaiser Family Found., *State Health Facts - Poverty Rate by Race/Ethnicity (CPS) Timeframe: 2020*, <https://www.kff.org/other/state-indicator/poverty-rate-by-race-ethnicity-cps/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited May 14, 2022).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

The Thirteenth Amendment and Fourteenth Amendment protect women, girls, and people with the capacity for pregnancy from involuntary reproductive servitude or forced pregnancies. Since 1865, the Congress of the United States has considered the question of Black women’s freedom from coercion and condemned bodily exploitation. The specific text of the Thirteenth Amendment that abolished slavery reads “Neither slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction.”⁵⁶ Lawmakers were neither naïve to the sexual exploitation and forced pregnancies of Black women nor intended that only Black men would become freed from the bowels of slavery. It is beyond dispute that the Thirteenth Amendment applied equally to Black women as men. Further, the original and intended meaning of the Thirteenth Amendment was to abolish all forms of involuntary servitude inflicted on Black women. The framers did not make an exception for involuntary or coercive reproductive servitude.

When slavery’s vestiges persisted in Southern states, including within the domains of privacy, child rearing, and marriage, Congress again took action with the passage of the Fourteenth Amendment, ratified in 1868. Congress responded to the egregious infringements on family privacy taking place in states like Mississippi where the Bureau of Refugees, Freedmen, and Abandoned Lands better known as the “Freedmen’s Bureau,” founded March 1865, reported on the letters it collected from Black mothers despairing over vile “apprenticeships” whereby their children were kidnapped and returned to bondage under the guise of traineeships.

Thus, Congress followed in 1868 with the ratification of the Fourteenth Amendment which further secured the interests of Black women who had been subjected to cruelties inflicted on them physically, reproductively, and psychologically. The Fourteenth Amendment opens with the sentence “All persons born or naturalized in the United States ... are citizens of the United States and of the State wherein they reside” and as such would be protected by the laws of the United States. Such language applied to infants born to Black women, changing the provisions of law that had long denied Black children citizenship and the protection of laws. Lawmakers were understandably concerned about overturning states laws that had denied born, living children the dignity of personhood.

Moving forward centering the Thirteenth and Fourteenth Amendments to defend health, safety, and bodily autonomy from involuntary servitude will be important as these constitutional protections already exist, but will require enforcement. Further, now that thirty-eight states have ratified the Equal Rights Amendment, it is now time that this constitutional amendment is realized and the necessary administrative steps taken such that it can become law.

Administrative Protections

It is important that Secretary Xavier Becerra issued an online statement to all providers, “if a patient faces serious jeopardy to life or health, and an abortion is necessary to prevent that harm, federal laws preempt any and all state laws prohibiting an abortion.”⁵⁷ Under federal law, as Secretary Becerra noted, “women have the right to emergency care—including abortion care. In

⁵⁶ U.S. Const. amend. XIII.

⁵⁷ See Secretary Xavier Becerra, *Social Media Statement on Abortion via Twitter*, July 11, 2022, https://twitter.com/SecBecerra/status/1546587520443482113?s=20&t=oXMHD2LWtQ_mPn4TLcrgfw

no uncertain terms.”⁵⁸ This should not be overlooked or forgotten. Federal enforcement will matter in a political climate similar to Jim Crow where state legislatures now demonstrate a brazen disregard for federal law and principles of justice related reproductive health, rights, and justice.

Congressional Actions

Another step toward preserving women’s health and protecting their constitutional interests, will be congressional enactment of the Women’s Health Protection Act (WHPA). This Act would codify protections for abortion access in federal law and guarantee that even in a state such as Mississippi, a woman who needed an abortion could have one.

Further, Congress can enact a reproductive justice “New Deal,” spurring a Third Reconstruction through legislation that centers the concerns of girls, women, LGBTQ communities, and individuals with disabilities. This would protect women, girls, and members of LGBTQ communities from potential future laws that would seek to ban abortion and punish pregnant people who seek to terminate a pregnancy. It would also proactively address poverty, which tethers the most vulnerable Americans to poor housing, education, and health.

Conclusion

The Supreme Court’s decision in *Dobbs* places it in the company of the Court that issued *Plessy v. Ferguson*, which introduced “separate but equal” and established Jim Crow policies as the laws of the land. Today, with the Court’s imprimatur on antiabortion legislation, there are now “free states” and “non-free states” in the United States just as prior to the Thirteenth Amendment. This, however, should not be the last word on the freedom, equality, autonomy, and privacy for girls, women, and people with the capacity for pregnancy. Rather, Congress can and should act as what is at stake relates not only to abortion, but the very principles of the rule of law and American democracy.

⁵⁸ *Id.*