

SANCTIMONIOUS BARBARITY: THE FORCED PREGNANCY ALITO *DOBBS* OPINION

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“[International Law will] follow you down ‘til the sound of its voice will haunt you.

[You’ll] Never get away.”

– Adapted from Silver Springs, Fleetwood Mac and apologies to Stevie Nicks.

I. INTRODUCTION

The Alito Opinion in the United States Supreme Court case *Dobbs v. Jackson Women’s Health Organization* overruling *Roe v. Wade* encourages forced pregnancy and, therefore, encourages barbarity.¹ The central cruelty of the *Dobbs*

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1. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022); Georgi Boorman, *The Left’s ‘Forced Birth’ Motif is Just a Projection of Its Own Lethal Force*, THE FEDERALIST (July 11, 2022), <https://thefederalist.com/2022/07/11/the-lefts-forced-birth-motif-is-just-a-projection-of-its-own-lethal-force/> [https://perma.cc/TU4X-UWGE] (distinguishing the forced birth concept); Michael Moore, *The Forced Birth Ruling*, MICHAEL MOORE (May 4, 2022), <https://www.michaelmoore.com/p/forced-birth-ruling> [https://perma.cc/Y2CA-GXUU]; Tierney Sneed, *Judge Blocks Enforcement of Idaho’s Abortion Ban in Medical Emergencies Day Before it Was Set to Take Effect*, CNN POL. (Aug. 24, 2022, 10:20 PM), <https://www.cnn.com/2022/08/24/politics/idaho-abortion-ban-doj/index.html> [https://perma.cc/B696-KWMZ] (“In short, given the extraordinarily broad scope of Idaho Code § 18-622, neither the State nor the Legislature have convinced the Court that it is possible for healthcare workers to simultaneously comply with their obligations under EMTALA and Idaho statutory law,” the judge wrote. “The state law must therefore yield to federal law to the extent of that conflict.”); *United States v. Idaho*, No. 1:22-cv-00329-BLW, 2022 WL 3692618 (D. Idaho Aug. 24, 2022); Jorie Dugan & Emma Stoskopf-Ehrlich, *The U.S. Is Breaking International Human Rights Law With Roe Decision*, MS. MAG. (July 13, 2022), <https://msmagazine.com/2022/07/13/us-abortion-breaking-international-human-rights-law-united-nations-cedaw/> [https://perma.cc/TK2F-7J7C] (“Make no mistake: Forced pregnancy—when someone becomes pregnant without having sought or desired it—and denied, delayed or inaccessible abortions are wrong under any circumstance. But when it comes to rape or incest (although, in reality, nearly all instances of incest are also instances of rape), forcing a victim to carry a pregnancy to term by denying them access to abortion is nothing short of cruel and inhumane treatment.”)

opinion is what it means in the period between conception until birth or other ending of the pregnancy before birth. This underlying situation can make any pregnancy a pregnancy continued against the will of the pregnant person:² a forced pregnancy. And this unwilling or forced pregnancy affects both minors incapable of consent and adults not wanting to be pregnant.

It takes only modest effort to capture the universe of potential forced pregnancies. These may include (1) an unwanted pregnancy, (2) a pregnancy from rape, (3) a pregnancy from incest, and (4) a pregnancy continued against the will of the mother, as may be the case for a pregnancy that the state compels to continue against medical advice. Forced pregnancy for these cases seems to be the most accurate description of the situation where the pregnant person is experiencing the physical and mental trauma of being pregnant in an unwanted manner, and also the physical and mental trauma of carrying that pregnancy to term in an unwanted manner.³ The *Dobbs* opinion, then, can be understood as placing pregnant persons, and potentially pregnant persons, at the mercy of our federalism of fifty states' varied approaches to forced pregnancy.

The range of issues confronting those pregnant persons or potentially pregnant persons include:

2. The term pregnant person is used to capture both women and transgender persons who may get pregnant. As certain treaties or proposed statutes speak of women only, in those cases reference will be made to women in line with the language of those treaties or proposed statutes. However, to the extent they do not encompass this broader group of potentially pregnant or pregnant persons, those treaties or proposed statutes remain deficient in not addressing the other situations of pregnant persons.

3. This description does not seek to minimize in any manner the post-birth physical and mental trauma for such a person once the baby is born and the decisions about raising a child that are entailed, including adoption and foster care. Obiter dicta in the Alito opinion speaks to that, and Justice Amy Coney Barrett waxed extensively on that at oral argument:

Why don't the safe haven laws take care of that problem? It seems to me that it focuses the burden much more narrowly. There is, without question, an infringement on bodily autonomy, you know, which we have in other contexts, like vaccines. However, it doesn't seem to me to follow that pregnancy and then parenthood are all part of the same burden. And so it seems to me that the choice more focused would be between, say, the ability to get an abortion at 23 weeks or the state requiring the woman to go 15, 16 weeks more and then terminate parental rights at the conclusion. Why -- why didn't you address the safe haven laws and why don't they matter?

Transcript of Oral Argument at 56-57, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392). Nor does it minimize the post-birth impact of not having abortion available. See Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray, & Reva Siegel as Amici Curiae in Support of Respondents at 6, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392). The point in using the term forced pregnancy is to foreground the crucial period of the pregnancy that the *Dobbs* opinion directly impacts—and undermines—in a manner that the term “forced birth” does not.

- total indifference to the autonomy of the pregnant person in a total ban state,
- time limits on that autonomy,
- whether and to what extent a person may fall into a temporal or substantive exception to a ban and how that is proved in a timely manner,
- accessing appropriate accurate medical information and care with respect to all medical possibilities where the pregnant person resides,
- the pregnant person having the capacity to seek such information and care in another state or country with less restrictive rules that permit abortion or other types of medical treatment that will end the pregnancy before term,
- how to pay for care, and
- the health risk of pregnancy as opposed to abortion for the pregnant person.⁴

In addition, a further set of concerns arise for any person who is of child-bearing age in a state operating in the shadow of the abortion restrictions or bans, to wit: (1) the impact of the abortion restrictions or bans on the availability of treatments that use the same drugs or medical approaches in non-abortion procedures,⁵ and 2) the impact on the manner any person of child-bearing age is treated by the public or medical personnel for any ailment that arises when in a state where abortion bans or restrictions are in place.⁶

4. Elizabeth Raymond & David Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215, 215-19 (2012) (“Legal induced abortion is markedly safer than childbirth. The risk of death associated with childbirth is approximately 14 times higher than that with abortion. Similarly, the overall morbidity associated with childbirth exceeds that with abortion.”).

5. This is from the Bush years—attempts to block Mifepristone, a medical choice for an abortion at ten weeks or a treatment for type II diabetes. *Potential Legal Flaws in State Restrictions Targeting Mifepristone*, ACLU, <https://www.aclu.org/other/potential-legal-flaws-state-restrictions-targeting-mifepristone> [https://perma.cc/L43D-NN88]; *Advocacy Alert: Abortion Bans Threaten Patient Access to Their Medications*, GLOB. HEALTHY LIVING FOUND. (June 30, 2022), <https://ghlf.org/advocacy/advocacy-alert-abortion-bans-threaten-patient-access-to-their-medications/> [https://perma.cc/LX3G-KV3M]; Elisabeth Mahase, *US Anti-Abortion Laws May Restrict Access to Vital Drug for Autoimmune Diseases, Patient Groups Warn*, *BRIT. MED. J.* (Jul. 6, 2022), <https://www.bmj.com/content/378/bmj.o1677> [https://perma.cc/95JQ-ZWMV]; Kate Baggaley, *Abortion Bans are Impeding Access to Ulcer, Arthritis, and Cancer Medications*, *POPULAR SCI.* (Aug. 1, 2022), <https://www.popsoci.com/health/abortion-ban-impeding-medication-access/> [https://perma.cc/76NK-44AH]; Katie Shepherd & Francis Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, *WASH. POST* (Aug. 8, 2022), <https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/> [https://perma.cc/NCD4-6XNY].

6. I know of a person who was pregnant who did not travel to Texas for fear of what would happen if they needed hospitalization for any reason. I know of another person who was not pregnant who feared traveling to Arizona if on the happenstance they had a health incident. One can imagine the hesitancy of hotel staff to use a defibrillator on someone having a heart attack when

A range of coercive/compulsory state rules are now inflicted on the pregnant person in an unwanted pregnancy in the absence of a constitutional right like *Roe* or a federal law pre-empting contrary state rules. Rights are taken away again.⁷ Aspiration for some compensating gain is illusory.⁸ The United States is retreating from women's health.⁹

This Article is organized as follows:

II. SANCTIMONIOUS BARBARITY: THE *DOBBS* OPINION AS AN AFFRONT TO HUMAN DIGNITY

III. SANCTIMONIOUS BARBARITY: ENTER COMPARATIVE LAW THROUGH AN ANALYSIS OF THE POST-*DOBBS* UNITED STATES AND FRANCE

IV. SANCTIMONIOUS BARBARITY: ENTER INTERNATIONAL LAW ANALYSIS THROUGH TREATIES AND CONVENTIONS RELATING TO INTERNATIONAL CRIME, DISCRIMINATION, WOMEN, CHILDREN, AND TORTURE

V. SANCTIMONIOUS BARBARITY

This Article analyzes the *Dobbs* opinion and its import through three distinct,

they knew the person was of child-bearing age but not whether they were pregnant. Or if a pregnancy were discovered after the health incident, the question would be whether the medical team would provide the appropriate care or only the care that would not run afoul of the abortion bans or restrictions. A third possibility would be that the treatment regime would be less available because of concern by the medical practitioner about the treatment regime also applying to the setting of abortion.

7. For those who think this is the first time a right is taken away, remember *Bakke* and its progeny on affirmative action, *Shelby Co.* and voting rights, *Rodriguez* on education as a fundamental right, *Plessy*, the Reconstruction cases, and *Dred Scott* that elided the experience of free Blacks then. For those who might think that the post-*Roe* period was particularly divisive, might I point to the post-*Dred Scott* period leading to the Civil War, or, within many of our lifetimes, the post-*Brown* massive resistance to the integration of Blacks in America. Names like Emmett Till, Medgar Evers, Goodman, Schwerner and Chaney, and Viola Liuzzo cry out from their murdered graves to not be simply ignored by an opinion dripping with sanctimony.

8. For those who think overruling *Roe* will lead to more being done for the status of poor Black and brown women (housing, job opportunities, childcare, etc.), recall the Affordable Care Act fight. There is little credible evidence that the legislative branches at the state or federal level would do anything to ease the plight of the poor and working class forced to be pregnant, given their appalling record so far. We should not delude ourselves that the United States will care enough about poor, working class, Black and brown women. History has shown us the sad truth. Nothing new under the sun.

9. Adebayo Adesomo, *Pregnancy is Far More Dangerous to Women Than Abortion*, *Sci. Am.* (May 30, 2022), <https://www.scientificamerican.com/article/pregnancy-is-far-more-dangerous-to-women-than-abortion/> [<https://perma.cc/KEH3-U5KQ>]; Amy Roeder, *The Negative Health Implications of Restricting Abortion Access*, *HARV. T.H. CHAN SCH. PUB. HEALTH* (Dec. 13, 2021), <https://www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications/> [<https://perma.cc/TSV7-ZAV4>]; Megan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, 20 *GUTTMACHER POL'Y REV.* 35 (2017).

but interrelated lenses embedded in both comparative and international law. In Section II, the opinion is evaluated as an affront to human dignity in that it directly undermines the central tenet of the Universal Declaration of Human Rights, to wit: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹⁰ Men, women, boys and girls and transgender people are to be understood as both free and equal in dignity and rights. The *Dobbs* opinion is an affront to that human rights vision.

The analysis in this section starts with a specific focus on the situation of African-American women under the traditions of “ordered liberty,”¹¹ selectively analyzed, ignored or dismissed in the *Dobbs* opinion. One central reason for this initial focus is that the Respondent in the case is from Jackson, Mississippi whose population is 82.5% African-American and 54.1% female.¹² African-American Jacksonian women, girls and other pregnant persons¹³ are directly referenced and impacted by the consequence of the decision. Second, on the streets of Jackson, the long- complicated history of slavery, segregation and the general oppression of African-Americans in the battle for freedom is eloquently enshrined in memorials to the Civil Rights movement, but also in statues of the great Mississippi born writers. One of those statues is of Richard Wright who was famously quoted on freedom, “Why have I decided to live beyond the shores of my native land? It is because I love freedom, and I tell you frankly that there is more freedom in one square block of Paris than there is in the entire United States of America!”¹⁴ Another statue is of William Faulkner who wrote quite movingly that, “The past is never dead. It’s not even past.”¹⁵

The streets of Jackson insist that we keep in our minds both the struggle for freedom and the complete history of the oppression in various periods that the *Dobbs* opinion omits, elides, ignores and/or dismisses.

A third reason comes from my experience as a participant in the Women’s Convention from August 12 to 14, 2022 in Houston, Texas.¹⁶ One of the central

10. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948).

11. See *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2242 (2022).

12. *QuickFacts: Jackson City, Mississippi*, U.S. CENSUS BUREAU (July 21, 2021), <https://www.census.gov/quickfacts/jacksoncitymississippi> [<https://perma.cc/J9EW-LHYE>].

13. Transgender persons may become pregnant. Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 *OBSTETRIC MED.* 4, 5 (2016).

14. Richard Wright, *I Choose Exile* (1951), https://uploads-ssl.webflow.com/5c54c9afc8a5790510b95009/5d58141d83100b29bb005da9_Richard%20Wright%20-%20I%20Choose%20Exile.pdf [<https://perma.cc/N8GF-CADH>]. A commemorative plaque by the French government in his honor adorns the building at 15 rue monsieur le Prince in the 6th district where he and his family resided from 1949 until his death in 1960. Photograph of the Richard Wright Plaque in *File: Plaque Richard Wright, 14 Rue Monsieur-le-Prince, Paris 6.jpg*, WIKIMEDIA COMMONS, https://commons.wikimedia.org/wiki/File:Plaque_Richard_Wright,_14_rue_Monsieur-le-Prince,_Paris_6.jpg [<https://perma.cc/DB4Q-XU7X>].

15. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 73 (1973).

16. Women’s March, *Bigger Than Roe*, <https://www.womensmarch.com/> [<https://perma.cc/>]

tenets of that meeting was to break down silos between various parts of the women's movement and join forces to address these concerns. Repeatedly in the presentations made, recognition was given to the longstanding and vanguard role of African-American women in the women's movement, the heavy lifting that they have and continue to do, and the debt owed to those who, while exhausted from the struggle, have worn that mantle with courage.

Fourth, there is an intersection between the replacement theory movement on the one hand, and the anti-abortion movement on the other. This is referenced in the *Dobbs* opinion, when Justice Alito through his citation strategy implies that abortion is a genocide of Black babies.¹⁷ What he fails to mention is that forced pregnancy could affect the same for Black women, who are twice as likely to die in childbirth as white women.¹⁸ This is why there is such overlap between white supremacy and replacement theory adherents and those who are in favor of forced pregnancy: as was argued in the case, forced pregnancy without a right to medical care is another way to reduce the Black population. Finally, building on this focus on African-American women, the analysis then broadens to critique the *Dobbs* opinion as an affront to all American women as described below.

In Section III, the *Dobbs* opinion is examined in a comparative law vision based on the state of the current and prospective abortion law in the United States and France. The contrasts between the two systems in which I have lived could not be more significant and what they suggest about approaches to human dignity, or the lack thereof, will inform this analysis.

In Section IV, the United States situation post-*Dobbs* is examined under international law more broadly.

G65F-5FQU; WOMEN'S CONVENTION, <https://www.thewomensconvention.com/> [https://perma.cc/Y956-CYLM].

17. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 n.41 (2022). Justice Alito cites to an Amicus Curiae which argues for the view of abortion as Black genocide. By his choice to cite that Amicus Curiae in contrast with others, he is clearly raising the profile of this appalling false narrative.

18. Evelyn J. Patterson, Andréa Becker & Darwin A. Baluran, *Gendered Racism on the Body: An Intersectional Approach to Maternal Mortality in the United States*, 41 POPULATION RSCH. POL'Y REV. 1261 (2022) ("Black women's maternal mortality rates were typically double that of white women. Further, Black women's maternal mortality rates in their early twenties aligned with the maternal mortality rates of white women in their mid-thirties or older"). And then there is the deliberate dissimulation of mortality data by states. Julian Gill & Jeremy Blackman, *Texas Delays Publication of Maternal Death Data Until After Midterms, Legislative Session*, HOUSTON CHRONICLE (Sept. 13, 2022), <https://www.houstonchronicle.com/politics/texas/article/Texas-delays-publication-of-maternal-death-data-17439477.php> [https://perma.cc/TJD2-SGHK].

II. SANCTIMONIOUS BARBARITY: THE *DOBBS* OPINION AS AN AFFRONT TO HUMAN DIGNITY

A. Reframing Dobbs; The Sad Sanctimonious Failure to Address Slavery and Segregation

The *Dobbs* opinion's domestic law review focuses on tradition in the United States post-1607 and an external review of pre-1607 Anglo-American legal history.¹⁹ Yet, in both of those reviews, the *Dobbs* opinion is glaringly obtuse.

B. The Selective Domestic Post-1607 Review Without Mentioning Slavery

In its selective history and tradition, the *Dobbs* opinion simply does not discuss meaningfully the rape and forced pregnancy of millions of Black women and their means of resistance during slavery.²⁰ This horror, well-known at the

19. First an agreement on terms should be provided. In this section we refer to the *Dobbs* opinion providing a domestic law analysis. This term domestic law (which might also be termed internal law in the sense that international lawyers use that) means that the analysis of the *Dobbs* opinion focuses on the Constitutional, federal, and state law. On the other hand, the external view would be analyses referring to matters that did not arise within the United States. A domestic law view could examine relevant materials in the period from 1607 to the present. Under an external view, one would analyze materials from prior to 1607 before the first Europeans arrived in what was to become the United States. The external view could also include experience in other countries during the period from 1607 forward.

20. As an enslaved person has no agency to consent, every pregnancy of an enslaved woman in slavery is rape and forced pregnancy whether done with the master class or between enslaved persons. The sickness of the ante-bellum period in class, gender, and racial terms is aptly described in CAROL LEMLEY MONTGOMERY, CHARITY SIGNS FOR HERSELF, GENDER AND THE WITHDRAWAL OF BLACK WOMEN FROM FIELD LABOR, ALABAMA 1865-1876, (1991): No finer example of the southern patriarch in all his power and arrogance may be found than Josiah Collins III. He stood at the apex of a society where only a combination of material wealth, an overweening sense of personal honor, absolute sway over a large body of subordinate persons, which included his wife and children, made the man. *Id.* at 79. "As slaves, African-American women were subject to performing any type of productive or reproductive labor for master or mistress or their own men and families." *Id.* at 171. The enslaved women's resistance and resilience has to be understood in a context where ultimate power was retained by the Master over them in every aspect of family creation or destruction. "Masters had the ultimate power to create or destroy the outwards structures of a slave family or marriage, but even their authority could not direct the slaves' most intimate sense of marital and familial commitment." *Id.* at 109. This book describes in detail life on the Somerset Plantation in Edenton, North Carolina and the Stickney Plantation in Faunsdale, Alabama where my ancestors were enslaved. The book describes the class, gender and racial complexities in the ante-bellum and early post-Civil War period where the patriarchal structures of slavery were morphed into patriarchal structures and practices in the post-Civil War period. A further excellent description of these complex structures and the violence at the turn of the 20th century prior to white women getting the right to vote in 1920 let alone women of color through the Voting Rights Act of 1965 is the historical novel set at the time and portraying a fictional account of the Wilmington

time and permitted by the state and state actors, is not addressed in Justice Alito's selective discussion of tradition. The fight for agency and control over their own bodies done by enslaved Black women echoes loudly with today's pregnant persons.²¹ The nuanced, subtle, and overt ways in which enslaved Black women resisted their oppression by contraceptives, abortifacients, abortions, and/or infanticide in order to deny the slaveowner the return on investment through their offspring is a remarkable story that the *Dobbs* opinion ignores.²²

C. A Perverted Analysis of Black Women's Agency Post Slavery

The *Dobbs* opinion cites to a stream of arguments that denies Black women's agency and the manner in which they sought control over their bodies. The amicus regarding Black women that the *Dobbs* opinion does cite²³ takes the standard historical approach one finds in the current anti-abortion movement as describing abortion as a form of Black genocide.²⁴ The amicus gives the

Insurrection of 1898 in Wilmington, North Carolina. See generally CHARLES W. CHESNUTT, *THE MARROW OF TRADITION* (1901) <https://cdn.fulltextarchive.com/wp-content/uploads/wp-advanced-pdf/1/The-Marrow-of-Tradition.pdf> [<https://perma.cc/Q4RF-EAD4>].

21. Loretta J. Ross, *African-American Women and Abortion: A Neglected History*, 3 J. HEALTH CARE FOR POOR & UNDERSERVED 274 (1992). See also Lisa Perrin, *Resisting Reproduction: Reconsidering Slave Contraception in the Old South*, 35 J. AM. STUD. 255, (2001); Michele Goodwin, *The Racist History of Abortion and Midwifery Bans*, ACLU (July 1, 2020), <https://www.aclu.org/news/racial-justice/the-racist-history-of-abortion-and-midwifery-bans> [<https://perma.cc/5RNB-G6QQ>]; Lucy Phelps Hamilton, "If De Babies Cried": Slave Motherhood in Antebellum Missouri (May 2015) (M.A. thesis, Pittsburg State University) (on file with the Pittsburg State University Digital Commons), <https://digitalcommons.pittstate.edu/cgi/viewcontent.cgi?article=1046&context=etd>; Emily West & Erin Shearer, *Fertility Control, Shared Nurturing, and Dual Exploitation: The Lives of Enslaved Mothers in the Antebellum United States*, 27 WOMEN'S HIST. REV. 1006 (2018).

22. Ross, *supra* note 21, at 274 ("The history of African-American women's efforts to control their fertility is largely unknown. From slavery to the present, the growth rate of the African-American population has been cut in half. Demographers and historians frequently attribute this change to external factors such as poverty, disease, and coerced birth control, rather than the deliberate agency of African-American women. This essay assembles a brief historical record of the ways-African-American women have sought to control their fertility through the use-of abortion and birth control. It also examines the activism of African-American women in the establishment of family planning clinics and in defense of abortion rights.").

23. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228,2256 n.41 (2022) (citing Brief for Amici Curiae African-American, Hispanic, Roman Catholic & Protestant Religious and Civil Rights Organizations and Leaders Supporting Petitioners).

24. Brief for Amici Curiae African-American, Hispanic, Roman Catholic & Protestant Religious and Civil Rights Organizations and Leaders Supporting Petitioners, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392). Having had to address the arguments about abortion as a kind of "Black genocide" with anti-abortion speakers back in the 70's and as recently as a year or two ago at Toledo, it is particularly galling that this canard of tired reasoning gets cited in an opinion.

impression of Black women passively submitting to having an abortion and being preyed on by nefarious, eugenicist minded entities—seeming to deny Black women any agency in making that difficult decision. As such, the opinion infantilizes Black women. At most, the court attempts what can only be described as a perverted analysis of the situation of Black women post-slavery.

The *Dobbs* opinion citing to an amicus²⁵ states in a footnote:

Other amicus briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African American population. See Brief for Amici Curiae African American, Hispanic, Roman Catholic and Protestant Religious and Civil Rights Organization and Leaders Supporting Petitioners 14.21; see also *Box v. Planned Parenthood of Indiana and Kentucky*, 139 S. Ct. 1780, 1783-84 (2019) (THOMAS J, dissenting from the denial or certiorari). And it is beyond dispute that *Roe* has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black. See, e.g., Center for Disease Control, Abortion Surveillance—United States, 2019, 70 Surveillance Summaries at 20, tbl. 6 (Nov. 26, 2021). For our part, we do not question the motives of either those who have supported and those who have opposed laws restricting abortions.²⁶

The *Dobbs* opinion makes no citation to the other amici specifically discussing Black women's agency and efforts to have control over their bodies.²⁷ In no manner can these Black women's decisions be construed as them being genocidal actors in the way these briefs somewhat cavalierly argue. The brief cited to in the opinion goes on to discuss the eugenics movement—Margaret Sanger, founder of Planned Parenthood allying with that movement, and therefore her family planning work being considered an effort at Black genocide but completely misses the succinct point:

African-American women supported birth control and abortion, but they offered a strong critique of the eugenicists. A clear sense of dual values emerged among African-American women: to want individual control over their bodies while simultaneously resisting government and private depopulation policies that blurred the distinction between incentives and coercion. The Pittsburgh Courier, which favored family planning, suggested in 1936 that African-Americans should oppose sterilization programs being advanced by eugenicists because the burden would “fall upon colored people and it behooves us to watch the law and stop the

25. *Id.*

26. *Dobbs*, 142 S. Ct. at 2256 n.41.

27. Brief for The Howard University School of Law Human and Civil Rights Clinic as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief for Organizations Dedicated to The Fight For Reproductive Justice—Mississippi In Action, Et Al. Supporting Respondents, *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (No. 19-1392).

spread of [eugenic sterilization].”²⁸

The opinion speaks to tradition but not once does it discuss the traditions in the 250 years of slavery and 100 years of segregation of Black women fighting for control over their bodies. During slavery, Black women being raped, suffering forced pregnancies, without consent and with no recourse—being put on breeding farms to breed enslaved people for the Deep South slavery. Nor does it discuss the precarious situation of Black women risking rape from their employer during segregation without any legal recourse available. Forced pregnancies among Black women were a particularly horrific aspect of those traditions. Moreover, he might speak to the gruesome father of American gynecology, J. Marion Sims, who developed his instruments on enslaved Black women without their consent.²⁹ This was the kind of inhumane act intentionally causing great suffering or serious injury to body or to mental or physical health that also falls within the traditions.³⁰ The opinion not addressing these barbarities that infect the traditions and disordered liberty it describes with great sanctimony is appalling.

D. Ignoring The Lack of Women’s Meaningful Participation in the Political Process Through Voting Up to the Voting Rights Act of 1965

The implications of meaningful participation or lack of meaningful participation in the political process of a polity are a significant concern of international law since at least the early twentieth century pre-United Nations and under the Charter of the United Nations when addressing situations that arise within states that concern the international community.³¹ Discussed in the

28. Ross, *supra* note 21, at 279. *But cf., e.g.,* Chloe Flomar, *Remembering Black Suffragists, FEMINISTS FOR LIFE*, <https://www.feministsforlife.org/remembering-Black-suffragists/> [https://perma.cc/B4GX-5UZ8] (seeing the intersectionality of sex and race on abortion consistent with the Black genocide trope). I prefer Ross simply because her analysis englobes both that view and other views and highlights Black women’s agency and seeking control over their bodies whether with respect to conception, abortion, or birth.

29. See Durrenda Ojanuga, *The Medical Ethics of the ‘Father of Gynaecology’, Dr J Marion Sims*, 19 J. MED. ETHICS 28 (1993).

30. Even with the traditional American animus to human rights law, remembering and addressing, in a historical record, the awful and horrific experience of Black women during slavery and segregation in the United States is the least one could ask of an opinion on women’s bodily autonomy that tries to discuss traditions of ordered liberty. After all, ten out of the first thirteen Presidents of the United States were slaveholders, as were many Supreme Court Justices including Chief Justice John Marshall, whose Black statue greets those who enter the grounds of the Supreme Court. STATISTA, *Reported Number of Slaves Owned By U.S. Presidents Who Served From 1789 to 1877*, <https://www.statista.com/statistics/1121963/slaves-owned-by-us-presidents/> [https://perma.cc/BJK3-XH4D]. One can observe the portraits of those Justices that hang on the walls in the Supreme Court and ask which ones were slave owners, and which practiced forced pregnancy.

31. Pre-United Nations, the importance of a state enacting and applying just and effective guarantees for minority protection was an early version of this concept of meaningful participation.

admittedly distinguishable context of secession, the concept nevertheless has salience in helping us see the distress a relevant population may be under within a state. The *Dobbs* opinion simply ignores this lack of meaningful participation in the political process for women almost in its entirety. And when it does address political participation, it is done in a most ironic fashion.

The *Dobbs* opinion proceeds in its analysis from the idea that the Court is to be “. . . guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty . . .”³² and then promptly ignores the specificities of women’s roles in that history. The *Dobbs* opinion’s analysis of tradition is suspect, as it examines those periods during which women lacked the ability to meaningfully participate in the form of government in Anglo-Saxon antiquity and in democracy in U.S. history in the years prior to the Nineteenth Amendment’s adoption in 1920 (and, as we will discuss here, the Voting Rights Act of 1965). Each pre-Nineteenth Amendment rule reviewed by the *Dobbs* opinion has the internal flaw that women were not meaningfully participating in the elaboration of any rule on this topic so central to their being.³³

One can go further, with respect to Black women and other women of color and argue that the Voting Rights Act of 1965 is the only point in time where the possibility of meaningful participation in the political process was extended to all women, the primary persons at risk of forced pregnancy. That leaves 8 years until *Roe* being decided, and 50 years since then as a period when one could say – somewhat optimistically given the travails of women over that period – that women of all colors had at least a meaningful chance to participate in the political process.

The irony of the opinion is that after overturning *Roe*, the *Dobbs* opinion goes on to laud the presence in the current political processes within the states of significant numbers of women voters and their ability to influence the legislative

See The International Committee of Jurists of the Council of the League of Nations, *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations Doc. B7/21/68/106 (1921) (“The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.”); Post-United Nations, *see* Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.) (“A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance [other than colonialism or foreign conquest]. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. . . .”); U.N. Charter art. 1, ¶¶ 2-3; *id.* ch. XI-XII (addressing self-governance more obliquely).

32. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228,2248 (2022).

33. Whether the women at the time supported or did not support such laws is a topic of speculation. That they did not participate in voting in or for the legislators who made such laws is without doubt.

approaches in the several states.³⁴ Put another way, the Court anchors its analysis in a review of tradition during periods dating back to the 13th Century when women had no meaningful ability to participate in the political process.³⁵ Those politically disenfranchised women who had no say in the political process in all those periods as to the development of the rules that would affect their body or any other political matter are voiceless in those rules made almost entirely by men. At the same time, once *Roe* was overturned, the *Dobbs* opinion lauds women's current political participation at the state level as suggesting they can meaningfully participate in determining the state legislative approaches to this issue in the future.

This ignoring, or lack of addressing, in the historical analysis the experience of Black women during slavery and the political disenfranchisement for vast periods up to 1965 of women by the Court is a profound disregard for the human dignity of these women. This failure makes the opinion a form of cruel insanity with respect to the dignity of women. This cruel insanity enshrines a regime of forced pregnancy as discussed below³⁶ and other oppression.³⁷ With *Dobbs*, the Madisonian structure of separation of powers and federalism³⁸ in this context would operate to burden Black women in a particularly severe manner given the intersectionalities of oppression while burdening other minority women, white women, and other pregnant persons in a different manner. As such, it would not provide a double security to the rights of these people and, as we will see below, would likely fail to protect their human rights.³⁹

34. *Dobbs*, 142 S. Ct. 2228 at 2277.

35. In Anglo-American history and post-1607 prior to the 19th Amendment in 1920 for white women, and prior to the Voting Rights Act of 1965 for Black women and other women of color.

36. The fact that the *Dobbs* opinion dismisses any evidence as to the discriminatory reasons that certain laws were passed in the 19th or 20th century brings up a further point which is beyond the scope of this paper but should be noted. Given that anti-discrimination law in the United States focuses on intent or purpose, if statements of politicians inartful enough to be caught red-handed in their animus are “not enough,” then their intent could never be proved. This ushers in again the world of de jure discrimination with masked intent.

37. It is therefore certain that if abortion is criminalized, if past is prologue, the system will go after Black and brown women. If they are convicted with felonies, those states that disenfranchise felons and make difficult voting rights reinstatement, will now have erased these women from the voter rolls. Taken along with the gerrymandering, voter suppression, and the *Citizen's United* bankrolling by conservative corporate interests, the end result of *Dobbs* is minority rule by a possible slim majority of whites but a minority of Americans. And there being no limiting principle—as we can see with Oklahoma criminalizing termination of pregnancies from fertilization—one can expect further criminalization of contraceptives, etc., to ensure this dominance is maintained by eliminating voters who are not deemed of interest or to even about whom we are to be cared. This time the combination of “principles” is federalism and the sanctity of life of the unborn child.

38. THE FEDERALIST NO. 51 (James Madison).

39. This statement is not to say that there is some other structure that would better protect those human rights. This statement is only to recognize this likely failure.

III. SANCTIMONIOUS BARBARITY: ENTER COMPARATIVE LAW THROUGH AN ANALYSIS OF THE POST-*DOBBS* UNITED STATES AND FRANCE

Many have commented on the *Dobbs* opinion but perhaps not enough on the broader point about our America's failing of women, children, and other pregnant persons. While focused on this right to abortion that the *Dobbs* opinion overturns, one part of the discussion might more broadly note just how truly backward we are as a country on women's and children's health. To help think this point through, I take a comparative approach now paralleling the pregnancy period from conception to termination of a pregnancy or birth in France with the American system.⁴⁰

A. France

According to the current state of French law, contraceptives are substantially subsidized under universal health care. As to abortion, there are two types of abortion: *interruption volontaire de grossesse (IVG)* or Voluntary Termination of a Pregnancy ("VTP"), *interruption médicale de grossesse (IMG)* or Médical Termination of a Pregnancy ("MTP") also substantially covered by the universal health care.⁴¹

VTP is permitted within the first 14 weeks of pregnancy or what is 16 weeks from the absence of a menstrual period. The procedure—whether through pills (within the first 7 weeks) or a medical intervention (at any time as needed medically during those 14 weeks)—may be done by oneself (for pills), or with doctors and midwives. There are currently no limits during that period as to the basis for which such an abortion is done.⁴²

MTP is permitted at any time during the pregnancy and is based on whether continuing the pregnancy poses a grave risk to the health of the woman or there

40. I lived in France from 1983 to 2000 and also find its approach to the same questions an interesting contrast with the United States approach.

41. *Quelle Est la Différence Entre IVG et IMG?* [What is the difference between IVG and IMG?], MINISTÈRE DE LA SANTÉ ET DE LA PRÉVENTION (2013) (Fr.), <https://ivg.gouv.fr/quelle-est-la-difference-entre-ivg-et-img.html> [<https://perma.cc/M8PF-DJA9>]. Thus, initial legal restrictions on abortion that were present in the Voluntary Interruption of Pregnancy Act adopted on January 17, 1975 (the Veil Law named after the Minister who introduced it Simone Veil) have been removed progressively over the past 47 years. For a discussion of the history of the liberalization of abortion in France, see Claire de la Hougue, *The Deconstruction of the Veil Law on Abortion*, EUR. CTR. FOR LAW AND JUST. (2017), <https://eclj.org/la-dconstruction-de-la-loi-veil/french-institutions/la-dconstruction-de-la-loi-veil> [<https://perma.cc/4V5M-3EGL>]; see also Benedicte Lutaud, *IVG: de la loi Veil à Aujourd'hui, 40 Ans de Bataille Juridique pour Élargir L'accès à L'avortement* [Abortion: From the Veil Law to Today, 40 Years of Legal Battle to Expand Access to Abortion], LE FIGARO (Jan. 19, 2022), <https://www.lefigaro.fr/actualite-france/ivg-de-la-loi-veil-a-aujourd-hui-40-ans-de-bataille-juridique-pour-elargir-l-acces-a-l-avortement-20220119> [<https://perma.cc/9BH3-J3TC>].

42. *Quelle Est la Différence Entre IVG et IMG?*, *supra* note 41.

is a grave anomaly in the foetus. The grave risk to the health of the pregnant person is not only physical health but also includes mental and psychological health. The MTP is requested by the woman and can only occur after a multidisciplinary medical team (doctor, nurses, psychologist, etc.) examines the medical file and there is an attestation by two of these professionals that one or the other of these conditions is present.⁴³

As applied, there are significant nuances or disparities that may work. First, while universal health insurance essentially covers the costs of conception, termination of pregnancy, or pregnancy, the availability of appropriate medical personnel and facilities varies across France. Second, the attitude towards abortion of a given OBGYN is not uniformly in favor of allowing such an act. Thus, a woman who had sought counseling in week two of her pregnancy when a pill might be used to abort might find delays in her second appointment put her in week nine when only a surgical form of VTP can occur with the attendant distresses.⁴⁴

In addition, these national laws can be amended or changed to return various restrictions to abortion. There is a pro-life/anti-abortion movement in France that appears well-funded. At the same time, there is a pro-choice movement also which includes a key demand the constitutionalization of the right to abortion, making it a fundamental right.⁴⁵

The key takeaways from this comparison are the successive restrictions on the right to terminate a pregnancy have been relaxed, the health care needs of the pregnant person are covered by the universal health care system (helping to assure health care and prenatal care for those who want to go to term), and there is a current debate about enshrining these rights in the French Constitution.

B. United States

A summary of the American hodge-podge on abortion post-*Dobbs* is presented by the Guttmacher Institute,⁴⁶ with a state-by-state breakdown also presented, of the enormous variations with respect to Physician and Hospital Requirements, Gestational Limits, so-called “Partial-Birth” Abortion, Public Funding, Coverage by Private Insurance, Refusal to Perform, State-Mandated Counseling, Waiting Periods, and Parental Involvement.⁴⁷

43. *Id.*

44. FRANCE 24 English, *Having an Abortion in France, Not Always an Easy Road* • FRANCE 24 English, YOUTUBE (July 15, 2022), <https://www.youtube.com/watch?v=Mte2PGNrR6A>. [<https://perma.cc/PTS3-TA87>].

45. Barbara Surk & Jade Le Delay, *French Women Push to Cement Abortion Rights After US Ruling*, U.S. NEWS (July 9, 2022), <https://www.usnews.com/news/world/articles/2022-07-09/french-women-push-to-cement-abortion-rights-after-us-ruling> [<https://perma.cc/9XG4-C463>].

46. *An Overview of Abortion Laws*, GUTTMACHER INST. (Oct. 6 2022), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/GXF9-NMK7>].

47. For another manner of understanding the American hodge-podge of abortion bans, see *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> [<https://perma.cc/W2MF-SPAU>].

C. Comparison of France and the United States

The contrast is striking between the two countries even though significant majorities of both countries' populations support the right to abortion. The French are relaxing legal rules, contraceptives are widely available to anyone, voluntary and medical abortion are available, and there is universal health care. In contrast, in the United States the *Dobbs* opinion overturned the modest Constitutional right to abortion, state and federal level efforts to severely limit abortion continue apace, health care is location, income and employment status.

On the legislative and constitutional front, in France, the current effort concerns passing a constitutional amendment enshrining abortion as a fundamental right. In the United States, state legislative, state constitutional, and federal legislative decisionmakers are battling about the state of abortion in those states and the nation, and litigation is resplendent. On comparative health care, universal health care in France means that prior to and when a person finds they are pregnant, they are entitled to medical care at little to no cost. That means that the decisions on whether to terminate the pregnancy occur with access to universal health care.⁴⁸

There is a holistic vision from conception to eighteen years of age that forms the most direct contrast between how the French approach the concerns the *Dobbs* opinion only partially addresses. And what the *Dobbs* opinion does address in its cold indifference to context in turning back the issue to the states (with their hodge-podge of approaches and the thin social safety net) contrasts negatively with the relative uniformity of approach of the French from conception to termination/birth to eighteen years of age.

Past 14 weeks, the contrast could not be more striking between France and the United States. In France, the medical termination of a pregnancy process contains some limits through the multi-disciplinary medical review of the medical file where one could see a disagreement between the pregnant person and the results of the multi-disciplinary review. Yet, it is to be noted that the focus of that medical review is on the grave risk to the health of the pregnant person *or* grave risk of anomaly in the fetus.⁴⁹ Of significance in contrast with the American hodge-podge is the exclusive focus on the medical issues involved rather than any

48. Prenatal care that helps limit the risks of that pregnancy is substantially, if not fully, covered in the universal health care system in France. Even if the pregnancy was not followed by a medical professional initially it can come into the system at any stage. This prenatal medical supervision at little or no costs continues postnatal when it may include the possibly significant costs of any post-natal care (premature births, children with anomalies in hearts) that have to be addressed up to 18 years of age. This was my personal experience as a parent in France. *See also* Joseph Shapiro, *France's Model Health Care for New Mothers*, N.P.R. (July 10, 2008) <https://www.npr.org/templates/story/story.php?storyId=92116914> [<https://perma.cc/734Z-88MB>].

49. What we do know is that the pregnant person who disagrees with the medical professional decision not to terminate retains an option to leave France and go to another state that would permit such a termination of the pregnancy after 14 weeks under even more liberal laws (Spain, the Netherlands). FRANCE 24 English, *supra* note 44.

other civil or criminal liabilities for any involved for whatever action to terminate the pregnancy envisaged.⁵⁰ As a consequence, while far from ideal,⁵¹ one does discern a distinct effort to reduce the risk of forced pregnancies in the French setting with the right to abort being broad in the first 14 weeks, facilitated by universal health care, and the medical focus limitations coming into play at any time.

D. Looking Forward: Convergence or Divergence Between France and the United States What Proposals Are on the Table for the Near Future and How Do They Address Forced Pregnancy

1. A Constitutional Amendment or Equal Rights Amendment (“ERA”) as a Solution

As noted above, there is a movement for constitutionalization of the right to abortion in France through amending of the French Constitution. Interestingly, for the United States, the question of whether there is such a Constitutional Amendment is before the courts. A motion by ERA-NC Alliance for leave to file an amicus dated May 16, 2022 was submitted to the Supreme Court in the *Dobbs* case after the oral arguments, and after the Alito opinion had been leaked on May 2, 2022, but prior to the decision being rendered on June 24, 2022. The motion argued that the leaked opinion was in error in stating that “. . . no such right to abortion is implicitly protected by any constitutional provision”⁵² The reason the leaked opinion was argued to be in error is because the ERA as the 28th amendment became effective on January 28, 2022 which was after the oral argument. As a consequence, an effective ERA would have an important impact on the arguments asserted by the parties, amici, and at the already completed hearing that led to the leaked Alito draft fundamental error. On June 30, 2022, the motion for leave to file an Amicus was not accepted by the Supreme Court (it simply disappeared on the docket) a week after the *Dobbs* opinion was released on June 24, 2022.

A significant and related matter was *sub judice* at that time in the case of *Virginia v. Ferriero* before the US Court of Appeals for the DC Circuit in which the last three states to ratify the ERA sought a writ of mandamus in the D.C. District Court to compel the Archivist—the federal official charged by Congress

50. A further layer of complication in the American hodge-podge that may arise is with respect to the different types of surrogacy and in vitro fertilization as those occur. The French approach appears to simplify that decision making with again its focus on the medical, while the American hodge-podge adds levels of complexity as to state public policy on the surrogacy or IVF contract and processes that are in need of further reflection in this post-Dobbs era.

51. Amandine Clarvaud, *The Health Crisis in France: Women’s Rights Put to the Test*, SANTE FONDATION JEAN JURÉS (Aug. 31, 2022), <https://www.jean-jaures.org/publication/la-crise-sanitaire-en-france-les-droits-des-femmes-mis-a-lepreuve/> [<https://perma.cc/UXA6-PEHB>].

52. Amended Motion for Leave to File Brief for ERA-NC Alliance as Amici Curiae in Support of Respondents, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

with announcing and certifying new amendments who had not published or certified the amendment—to certify and publish the amendment. The Archivist filed a motion to dismiss the lawsuit, and the district court granted the motion, concluding that because “the certification [the states] demand from the Archivist has no legal effect,” the states suffered no “concrete injury.”⁵³ The states subsequently appealed that ruling to the D.C. Circuit where it sat (as of the date of the *Dobbs* decision) awaiting oral arguments.⁵⁴

Prior to the release of the *Dobbs* opinion, the Court clearly did not address this extraordinary motion which does make one wonder whether the Court weighed the implications of the ERA possibly being effective at the time it issued the *Dobbs* decision. For the ERA, unlike Equal Protection, provides a substantive protection of Constitutional law for all women. At a minimum, the Court should have had the parties to the case brief the implications of the 28th Amendment on *Dobbs* that go to a central characteristic of being a woman—the risk of getting pregnant and women’s bodily autonomy. But it simply did not accept the admittedly well-after-normal-schedule motion. We can only await the results in the *Virginia v. Ferriero* case.

2. State Level Solutions

The French system is more centralized than the United States, so it is difficult to compare and contrast in a traditional sense. However, given that *Dobbs* has overturned the constitutional right to abortion in *Roe* and now leaves it to the states to address the reproductive issues related to forced pregnancy discussed above, the question as to how to vindicate the human rights violation of forced pregnancy within our landscape of federalism and separation of powers squarely presents itself. At the state level, maintaining protections in the state constitution (Kansas) or adding such protections to the Constitution (Vermont) by referendum has been a tactic. However, getting the referendum to the voters has met difficulty even if ultimately successful in other states (Michigan⁵⁵). A second tactic is to

53. *Virginia v. Ferriero*, 525 F. Supp. 3d 36 (D.C. Cir. Mar. 5, 2021). On February 28, 2023, the DC Circuit Court of Appeals decided that “the States have not clearly and indisputably shown that the Archivist had a duty to certify and publish the ERA or that Congress lacked the authority to place a time limit in the proposing clause of the ERA. Under the rigid standard required for mandamus actions, this Court must affirm the District Court’s dismissal of the States’ complaint on the ground that the lower court lacked subject matter jurisdiction.” *Illinois v. Ferriero*, 60 F.4th 704 (Feb. 28, 2023). As of the time of this Article the parties have not determined what they will do in light of this decision.

54. Elizabeth Wydra, Brianne Gorod, Brian Frazelle & Charlotte Schwartz, *Virginia v. Ferriero*, CONST. ACCOUNTABILITY CTR., <https://www.theconstitution.org/litigation/virginia-v-ferriero/> [https://perma.cc/986B-DWSM].

55. Christopher Wilson, *Michigan Voters to Decide Abortion Policy This Fall After State Supreme Court Ruling*, YAHOO NEWS US (Sept. 9, 2022), <https://www.msn.com/en-us/news/politics/michigan-voters-to-decide-abortion-policy-this-fall-after-state-supreme-court-ruling/ar-AA11EsPO> [https://perma.cc/V46W-9BH5].

prevent state legislatures from enacting restrictions that either overturn prior legislation or, in the wake of *Dobbs*, further enhance the risk of forced pregnancies through criminalization of the pregnant person and/or criminalization of anyone who assists such pregnant person in seeking abortion within the state or across state lines. A third tactic is to challenge state trigger laws that became effective upon the overturning of *Roe* under federal law and the Supremacy Clause (Idaho). But, the reversion to prior, even ante-bellum anti-abortion laws with criminal penalties (Arizona), is occurring. At the same time, states are moving forward with bans or restrictions on abortion whether through trigger laws or new legislation (Indiana, Oklahoma, and South Carolina).⁵⁶ These state level efforts inevitably have led and will lead to a patchwork of rules being interpreted and applied in various ways by the Executive and the Judiciary in each state. As a consequence, the absence of a federal constitutional right leads to a situation of confusion for the person at risk of being pregnant or the pregnant person during the course of their pregnancy.⁵⁷

3. Federal Level Solution

As noted above, in France, the approach has been legislative relaxation of restrictions on abortion and a movement toward a constitutional amendment. In the United States, while these state-level constitutional, legislative, and/or judicial approaches are being undertaken, there are two efforts at the federal level underway to pass legislation that would either (1) “codify” *Roe* or (2) codify a federal ban on abortion.

4. Codify *Roe* in Federal Law

a. Background

The most recent “codify *Roe*” bill was introduced in the Senate by a bipartisan group of Senators on August 1, 2022, as the Reproductive Freedom for All Act.⁵⁸ The stated purpose of the Act is as follows:

56. Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INSTITUTE (Jan. 10, 2023), <https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-to-do-so-roundup> [<https://perma.cc/8QN8-EG63>]. An interesting aspect in those states with highly restrictive trigger laws is that the Veteran’s Administration is now proposing to offer abortions to veteran patients in some circumstances. U.S. DEP’T OF VETERANS AFFS., *VA Will Offer Abortion Counseling and – in Certain Cases – Abortions to Pregnant Veterans and VA Beneficiaries* (Sept. 2, 2022), <https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5820> [<https://perma.cc/KRY5-2CEM>].

57. One possible ameliorative situation, based on the Federal EMTALA law described in the Idaho litigation, is a limited carve out through federal preemption for medical care in emergency services for abortions and efforts such as guidance for the Veteran’s Administration medical care.

58. Reproductive Freedom for All Act, S. 4688, 117th Cong. (2022).

It is the purpose of this Act to guarantee that Americans have the freedom to make certain reproductive decisions without undue government interference, consistent with the essential holdings of *Griswold v. Connecticut* (381 U.S. 479 (1965)), *Eisenstadt v. Baird* (405 U.S. 438 (1972)), *Roe v. Wade* (410 U.S. 113 (1973)), *Carey v. Population Services International* (431 U.S. 678 (1977)), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (505 U.S. 833 (1992)), and *Whole Woman’s Health v. Hellerstedt* (579 U.S. 582 (2016)).⁵⁹

The Congressional powers asserted for this proposed federal act are within Section 5 of the Fourteenth Amendment and the power to regulate interstate commerce “because contraception and abortion services are economic transactions that frequently involve the shipment of goods, the provision of services, and the travel of persons across State lines.”⁶⁰

b. Analysis of the codify Roe bill

The merit of this act would appear to create a uniform floor under reproductive rights from conception through termination of the pregnancy or birth—squarely addressing the risk of forced pregnancies. The question of what fetal viability⁶¹ is transfers to some extent the woman’s decisional autonomy as to their pregnancy to the attending health care practitioner or practitioners. The undue burden language opens the way for state regulation pre-viability that would tend—as we saw over the years since *Roe*—to severely restrict access to reproductive services other than contraception. Post-viability, the determination is made by the attending health care practitioner or practitioners but at no point in the language is the *decisional autonomy* of the woman to either follow or not follow that medical advice recognized. Moreover, by placing such decisional authority in the hands of the attending health care practitioner(s), the interests of those practitioner(s) in not running afoul of any state legislation becomes a central part of the deliberative process influencing the woman—another loss of autonomy. In addition, there is the question of situations where there is no attending health practitioner or practitioner to which the woman is referred. It is not clear how exactly such a woman would be able to avail themselves post-viability of the protection of this law in such a case. This becomes particularly important in a setting where access to healthcare is not universal, with a hodge-podge of federal, state, private and self-insurance and daunting costs, particularly in the setting of difficult pregnancies. Moreover, there might emerge definitional issues as to whether women are the only persons who can be pregnant persons

59. *Id.* at Section 1.

60. *Id.*

61. *Id.* (“The term “fetal viability” means the time at which, in the appropriate medical judgment of the attending health care practitioner or practitioners, there is a realistic possibility of maintaining and nourishing a life outside the womb.”).

given the presence in the polity of transgender persons. It is unclear whether this act would offer any protection to such individuals.

Beyond the substance of the proposed act there is the question of it being challenged in the Supreme Court by a state which sought to declare the law unconstitutional. In that regard, the concurrence of Justice Thomas in the *Dobbs* opinion lists a series of right-to-privacy based decisions of the Court that are vulnerable to being overruled in subsequent court cases. To the extent that the right to privacy is severely restricted, underpinning this act by the Fourteenth Amendment would appear to be at risk. Similarly, with respect to the Commerce Clause, the question is whether a conservative Supreme Court would see such an act as being too broad an assertion of federal power in the interplay of our federalism. More recent decisions, such as *Shelby* on the Voting Rights Act, would suggest that the court has great respect for state power.

One could, however, imagine Congress basing its enactment of this law on another basis: The Treaty Power. Clearly, that power is reserved to the federal government, and it is clear that for non-self-executing treaties, Congress retains the sole power to promulgate implementing legislation pursuant to the Necessary and Proper Clause. In this scenario, Congress could anchor its decision under Articles 1 and 16 of the Convention Against Torture and Other Forms of Cruel, Inhumane and Degrading Treatment, and Article 7 of the International Covenant on Civil and Political Rights that ban torture and cruel, inhuman and degrading treatment or punishment. This anchoring in international law implemented in domestic law could vindicate the international law concerns described in section III below.

If that type of language were added to this bill, there is need for a word of caution. One concern is that the Supreme Court would possibly review the text of the law, as enacted, to determine the extent to which Congress provided a clear statement of its intent to occupy the field and pre-empt contrary state law. The second would be a question of whether the federal government would have overstepped its powers in our federalism as compared to states. The question is whether such an act, by implementing the treaty obligations, would be considered constitutionally infirm in a manner similar to that decried in *Reid v. Covert*⁶² through some interpretation of the Constitution that would argue an explicit constitutional limit on the federal treaty power to operate in this domain.⁶³ In the end, maybe a combination of state constitution, state legislation, and federal legislation would need to be cobbled together in the wake of *Dobbs* to protect

62. *Reid v. Covert*, 354 U.S. 1 (1957). The right to a jury trial in the Constitution made the court-martial of a spouse of a military person unconstitutional. I am imagining the Court deciding that reproductive rights were a “quintessential” state matter that was not susceptible of being addressed by the federal government under the Constitution.

63. As noted above, the tragic irony for those confronting forced pregnancy, of course, would be that this line of reasoning in an attack on a federal law would tend to turn on its head Madison’s famous dictum that the separation of powers and federalism provide a “double security to the rights of the people.” THE FEDERALIST NO. 51 (James Madison). Here, no federal or state succor for the person facing a forced pregnancy would be available.

pregnant persons against forced pregnancy.

5. *Codify National Abortion Ban Bill*

a. *Background*

In contrast to the codify *Roe* effort, on September 13, 2022, a bill to have a national ban on certain types of abortions was introduced in both Houses of Congress on party lines entitled the “Protecting Pain-Capable Unborn Children from Late-Term Abortions Act” (national abortion ban bill).⁶⁴ Under this bill, it would be unlawful, with criminal and civil penalties, for any person to perform an abortion or attempt to do so, unless in conformity with the requirements set forth in that law.⁶⁵ The exceptions to this prohibition are when: 1) “in reasonable medical judgment, the abortion is necessary to save the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, *but not including psychological or emotional conditions*,”⁶⁶ 2) rape of an adult women 48 hours prior to the abortion with procedural requirements of obtaining counseling for the rape or medical treatment, and 3) rape or incest against a minor that has been reported at any time prior to the abortion to child abuse authority or law enforcement.⁶⁷

64. Protecting Pain-Capable Unborn Children from Late-Term Abortions Act, H.R. 8814, 117th Cong. (2022). This Act starts with a series of legislative findings on various aspects of human prenatal development, asserts constitutional authority under (A) the Commerce Clause of section 8 of article I of the Constitution of the United States, as interpreted by the Supreme Court; and (B) the Equal Protection and Due Process Clauses of section 1, and the Enforcement Clause of section 5, of the 14th Amendment to the Constitution. *See id.* This Act starts with a series of legislative findings on various aspects of human pre-natal development, asserts constitutional authority under (A) the Commerce Clause of section 8 of article I of the Constitution of the United States, as interpreted by the Supreme Court; and (B) the Equal Protection and Due Process Clauses of section 1, and the Enforcement Clause of section 5, of the 14th Amendment to the Constitution. *See id.*

65. The federal minimum protections are various and include (1) assessment of the age of the unborn child and, (2) prohibition on performance or attempt to perform of certain abortions generally for unborn children 15 weeks or older with exceptions. *See id.*

66. *See id.* (Emphasis added)

67. Several requirements are set forth as to the manner of the procedure being performed: limiting the manner in which the physician does the abortion, requiring a physician trained in neonatal resuscitation be present, procedures for children born alive after an attempted abortion, mandatory reporting of violations, documentation of the adult woman or child compliance with counseling, treatment or reporting requirements and informed consent requirements. *See id.* at § 1532(b)(2). Counseling or medical treatment cannot be provided by a facility that performs abortions (with the exception of hospitals), and there is a curious carve out for reports requirements not applying if the rape has been reported at any time prior to the abortion to a law enforcement agency or Department of Defense victim assistance personnel. *See id.* at § 1532(b)(2)(I)(iii).

b. Comparative analysis of the national abortion ban bill

The national abortion ban bill makes a one-way ratchet to ban abortions after 15 weeks to the extent the federal law is more restrictive than a state's law and thus preempts that state law. The exceptions presented in the federal law are encumbered by a series of significant formal medical procedure requirements as to the manner of treating a patient, non-medical notification, and other requirements that increase the complexity of complying with the exception, thus increasing the risk of violating the law for any entity providing abortion services under these restrictions. In addition, for states that have rules that are more restrictive than the national abortion ban in the period after 15 weeks, those higher restrictions would reverse preempt the federal ban. In the period prior to 15 weeks, state rules, whether restrictive or not, would apply. The overall tenor of the national abortion ban is to dry up the supply of abortion providing entities, with the effect that women's access to abortion services are severely restricted by the combination of the federal and state restrictions. And, unlike in France, women's mental health is explicitly excluded in evaluating the pregnancy's danger to her.

E. Summary

The French approach severely limits the risks of forced pregnancy with its medical focus throughout the pregnancy and its permission for abortion during the first 14 weeks. In contrast, the hodge-podge of state laws post-*Dobbs* increases the risk of forced pregnancy in restrictive states. These risks are attenuated if the Equal Rights Amendment is recognized or the "codify *Roe*" bill is passed and is seen to preempt contrary state law. On the other hand, these risks of forced pregnancy are exacerbated if the national ban bill is passed. Confronting this myriad and confusing situation is the woman (and a possibly even more complex situation for other pregnant persons) caught in a web of uncertainties.

IV. SANCTIMONIOUS BARBARITY: ENTER INTERNATIONAL LAW ANALYSIS
THROUGH TREATIES AND CONVENTIONS RELATING TO INTERNATIONAL
CRIME, DISCRIMINATION, WOMEN, CHILDREN, AND TORTURE

International Law was discussed in the *Dobbs* case,⁶⁸ but not the opinion. This section examines several international law instruments that may shed light

68. See Brief for European Legal Scholars as Amici Curiae Supporting Neither Party, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief for 141 International Legal Scholars Supporting Petitioners, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief for International and Comparative Legal Scholars Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief for European Law Scholars Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392); Brief for United Nations Mandate Holders Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

on the question of post-*Dobbs* forced pregnancy. Even if the United States is not a party to a treaty,⁶⁹ to the extent a treaty codifies customary international law, it would be binding on the United States.

A. The Convention on the Elimination of All Forms of Discrimination Against Women (1979)

1. Background

Adopted in 1979 by the UN General Assembly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, or “the Convention”) “defines what constitutes discrimination against women and sets . . . [forth] an agenda for national action to end such discrimination.”⁷⁰

The Convention defines discrimination against women as:

. . . any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁷¹

Parties to the Convention—including 187 countries but excluding, notably, the United States—commit to undertake a series of actions to end discrimination against women in all forms.⁷² Those actions include the incorporation of the principle of equality of men and women in their legal system; the abolishment of all discriminatory laws and adoption of appropriate ones prohibiting discrimination against women; the establishment of tribunals and other public institutions to ensure the effective protection of women against discrimination; and otherwise ensuring the elimination of all acts of discrimination against women by persons, organizations, or enterprises.⁷³ The Convention strives to ensure women have equal access to political and public life, including the right to vote and to stand for election, as well as to education, employment, and, most importantly for the purpose of this Article, to healthcare.⁷⁴ Parties to the

69. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Convention on the Rights of the Child, Mar. 7, 1990, U.N.T.S. 1577, and the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544 all of which the United States is not a party to.

70. U.N. WOMEN, *Convention on the Elimination of All Forms of Discrimination Against Women: Overview of the Convention*, <https://www.un.org/womenwatch/daw/cedaw/> [<https://perma.cc/6Q5D-8TJ3>].

71. *Id.*

72. The United States is the only established democracy in the world that has signed but not ratified CEDAW. Other non-parties to the Convention include Iran, Somalia, Sudan, Tonga, and Palau.

73. U.N. WOMEN, *supra* note 70.

74. *Id.*

Convention agree to take all appropriate measures, including legislation and temporary special measures, such that women may enjoy these fundamental freedoms.⁷⁵

2. CEDAW and Reproductive Rights

a. On reproductive rights, generally

CEDAW is the only human rights treaty which affirms the reproductive rights of women, providing that “[t]he Convention also affirms women’s right to reproductive choice.”⁷⁶ It is also the only human rights treaty to mention family planning.⁷⁷ Parties to the Convention are obligated to include advice on family planning in the education process⁷⁸ and to develop family codes that guarantee women’s rights “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”⁷⁹

b. CEDAW on abortion

Although the Convention does not expressly reference abortion, the CEDAW Committee, the official monitoring body for the treaty’s implementation, considers restrictive abortion laws incompatible with the human rights of women.⁸⁰

75. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 3 [hereinafter CEDAW].

76. *Id.* at introduction.

77. Dr. Carmel Shalev, *Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women*, (International Conference on Reproductive Health, March 18, 1998) <https://www.un.org/womenwatch/daw/csw/shalev.htm> [<https://perma.cc/YN6U-5UKX>] (This paper was presented at the International Conference on Reproductive Health, Mumbai (India), jointly organized by the Indian Society for the Study of Reproduction and Fertility and the UNDP/UNFPA/WHO/World Bank Special Programme of Research, Development and Research Training in Human Reproduction).

78. CEDAW, *supra* note 75, art. 10(h).

79. *Id.* at art. 16(e).

80. CTR. FOR REPROD. RIGHTS, *Briefing Paper: Abortion and Human Rights*, (Oct. 2008) https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_abortion_hr_revised_3.09_WEB.PDF [<https://perma.cc/P4ED-E5FU>] (“Women’s right to comprehensive reproductive health services, including abortion, is rooted in international human rights standards guaranteeing the rights to life, health, privacy, and non-discrimination. These rights are violated when governments make abortion services inaccessible to the women who need them. Under international law, governments can be held accountable for highly restrictive abortion laws and for failure to ensure access to abortion when it is legal. Governments also bear responsibility for high rates of death and injury among women forced to resort to unsafe abortion.”); U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 24: art. 12: (Women

Human rights bodies globally have characterized restrictive abortion laws as a form of discrimination against women, the CEDAW Committee stating that “it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women.”⁸¹ As noted, violations of women’s sexual and reproductive health and rights, such as . . . criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, and forced continuation of pregnancy, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”⁸²

The Special Rapporteur on torture and other forms of cruel, inhuman and degrading treatment or punishment has especially highlighted that “[t]he denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment.”⁸³ Likewise, the Special Rapporteur on the right to health has stated that laws criminalizing abortion “infringe

and Health), U.N. Doc. A/54/38/Rev.1, chap. I (1999) (“14. The obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals. States parties should report on how public and private health-care providers meet their duties to respect women’s rights to have access to health care. For example, States parties should not restrict women’s access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried* or because they are women. Other barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women punish women who undergo those procedures.”) <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> [<https://perma.cc/KS2G-FJEA>]; *See also* Hum. Rts. Comm., General Comment No. 36 on Article 6, ICCPR, U.N. Doc. CCPR/C/GC/36 (2019) (“Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly.”).

81. U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 24: art. 12, ¶ 11, *supra* note 80.

82. U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-based Violence Against Women, Updating General Recommendation 19, ¶ 18, U.N. Doc. CEDAW/C/GC/35 (Jul. 26, 2017).

83. Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ¶ 44, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

women's dignity and autonomy by severely restricting decision making by women in respect of their sexual and reproductive health."⁸⁴

The UN Working Group on discrimination against women and girls has emphasized that the "right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights."⁸⁵ The Committee on Economic, Social and Cultural Rights urges States to address "criminalization of abortion or restrictive abortion laws" to satisfy the Convention's obligation of eliminating forms of discrimination against women.⁸⁶ The Special Rapporteur on extrajudicial, summary, or arbitrary executions has stated that deaths caused by unsafe abortions should be understood as a "gender-based arbitrary killing, only suffered by women, as a result of discrimination enshrined in law."⁸⁷

B. The United Nations Convention on the Rights of the Child (1989)

The UN's Convention on the Rights of the Child (CRC) is the most widely ratified human rights treaty in the world, its parties including all but the United States and Somalia.⁸⁸ The CRC protects children's rights to sexual and reproductive health services, along with their rights to substantive equality and nondiscrimination. Though the CRC is neutral on abortion,⁸⁹ it recognizes that for girls in particular, the stigma surrounding sexuality, coupled with the discrimination and inequalities that females face, often work together to further prevent girls from accessing sexual and reproductive health services. Lack of access to such services, as the CRC also acknowledges, perpetuates a cycle of inequality and discrimination. In recognizing the inextricability of reproductive health and girls' rights to substantive equality and nondiscrimination, the CRC further suggests strengthening of state efforts to protect the reproductive health

84. Interim Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 21, U.N. Doc. A/66/254 (Aug. 3, 2011).

85. Rep. of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, ¶ 35, U.N. Doc. A/HRC/38/46 (May 14, 2018).

86. U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health, ¶ 34, U.N. Doc. E/C.12/GC/22 (May 2, 2016).

87. Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings, ¶ 94, U.N. Doc. A/HRC/35/23 (June 6, 2017).

88. LUISA BLANCHFIELD, CONG. RSCH. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (2015).

89. Jonathan Todres & Loise N. Howe, *What the Convention on the Rights of the Child Says (And Doesn't Say) About Abortion and Family Planning*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 163-64 (Jonathan Todres, Mark E. Wojcik & Cris Revaz eds., 2006).

of girls,”⁹⁰ urging states to “ensure universal access to a comprehensive package of sexual and reproductive health interventions”⁹¹

C. Statute of the International Criminal Court (1998)

The Statute of the International Criminal Court speaks directly to forced pregnancy as therein defined as a crime against humanity under Article 7 provided it is part of a widespread or systematic attack directed against a civilian population with knowledge of the attack.⁹² Given the range of bans and number of states providing bans in some form that compel forced pregnancy, these preliminary elements of widespread or systematic attack, directed against a civilian population (the universe of pregnant or potentially pregnant persons subject to such bans), and the knowledge of the attack by the state and federal executive, legislative, and judicial branches are hurdles that are clearly overcome.

Under Article 7(1)(g), the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity are described. Forced pregnancy is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”⁹³

As a preliminary matter, it is argued that there is no support in specific treaty language or customary international law for abortion to be a human right and that oft-cited international instruments cannot be fairly understood as recognizing a global human right to abortion.⁹⁴ Reference is specifically made to the last sentence of the definition of forced pregnancy in the Statute of the International

90. U.N., Comm. on the Rts. of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, ¶ 31, U.N. Doc. CRC/GC/2003/4 (Jul. 2003) (“The Committee urges States parties (a) to develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception and safe abortion services where abortion is not against the law, adequate and comprehensive obstetric care and counselling; (b) to foster positive and supportive attitudes towards adolescent parenthood for their mothers and fathers; and (c) to develop policies that will allow adolescent mothers to continue their education.”); *see also* CTR. FOR REPROD. RTS., *Reproductive Rights Under The Convention On The Rights Of The Child*, https://reproductiverights.org/sites/crr.civicactions.net/files/documents/Wright_Glo%20Adv_7.15.14.pdf#:~:text=The%20Convention%20on%20the%20Rights%20of%20the%20Child,need%20for%20the%20realization%20of%20their%20human%20rights [https://perma.cc/END3-9ZEP].

91. Comm. on the Rts. of the Child, General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, ¶ 51, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013).

92. Rome Statute of the International Criminal Court art. 7, ¶ 1(g), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

93. Rome Statute, art. 7, ¶ 2(f).

94. Brief of 141 International Legal Scholars as Amici Curiae in Support of Petitioners at 2, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

Criminal Court, to wit: “[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy;”⁹⁵ The argument thus being made is that this language of the Statute of the International Criminal Court “neither requires any state to legalize abortion nor serves as a basis for creating an international right to abortion.”⁹⁶

The above analysis confuses the states’ power to legislate about pregnancy as a matter of domestic or internal law with the international obligation being described. Whether a state is monist (international law applies directly in the domestic order) or dualist (international law must be implemented into domestic law) or mixed, the language seems to simply recognize that states retain their authority over the wide range of issues that affect pregnancy within that state. However, while retaining that authority, it would seem abundantly clear that a state cannot exercise that authority in good faith in a manner that would be inconsistent with or in breach of its human rights obligations to those concerned.⁹⁷

Under the elements of the crimes for forced pregnancy,⁹⁸ the perpetrator is

95. *Id.* at 11.

96. *Id.*

97. This reading of the forced pregnancy crime appears completely consistent with the approach of the Trial Chamber of the International Criminal Court in its judgment in the case of the Prosecutor v. Dominic Ongwen in 2021 where no reference is made to the legality of his actions under local law (in this case Uganda) in the conviction of him for forced pregnancy as a war crime and a crime against humanity. *See* Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment (Feb. 4, 2021). One cannot see how it would be otherwise when forced impregnation in the *Ongwen* case, and forced parenthood and forced marriage in other cases were human rights violations. *See* Myriam Denov, Pok Panhavichetr, Sopheap Suong & Meaghan Shevell, “*We Vowed by Force, Not by Our Heart*”: *Perspectives of Men and Women on Forced Marriage During the Cambodian Genocide*, 26 INT’L J. HUM. RTS., 1547 (2022); Rene Provost & Myriam Denov, *From Violence to Life: Children Born of War and Constructions of Victimhood*, 53 N.Y.U. J. INT’L L & POL. 1, 3, 18-23 (2020); Myriam Denov & Mark Drumbl, *The Many Harms of Forced Marriage: Insights for Law from Ethnography in Northern Uganda*, 18 J. INT’L CRIM. JUST. 349, 363-64 (2020); Myriam Denov, Anais Cadieux Van Vliet, Atim Angela Lakor & Arach Janet, *Complex Perpetrators: Forced Marriage, Family, and Fatherhood in the Lord’s Resistance Army*, 94 REVISTA DE HISTORIA JERÓNIMO ZURITA 139, 142 (2019); Leah Woolner, Myriam Denov & Sarilee Kahn, “*I Asked Myself if I Would Ever Love My Baby*”: *Mothering Children Born of Genocidal Rape in Rwanda*, 25 VIOLENCE AGAINST WOMEN 703 (2018).

98. The elements of the crime of forced pregnancy are stated as:

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Int’l Crim. Court [ICC], *Elements of Crimes* art. 7(1)(g)-4 (2013).

defined as a person, as only individuals are subject to international criminal liability. That states create the coercive environment under which forced pregnancies occur leads to two types of situations: (1) criminal liability of the individual state actor or actors who put in place the coercive rules which permit forced pregnancies; and (2) the civil liability for the state for committing an internationally wrongful act engaging state responsibility. Thus, it is important to understand that these state actors that provide the legislative environment propitious to forced pregnancy are perpetrators along with any individual perpetrator who rapes or commits incest or causes an unwanted pregnancy in this post-*Dobbs* environment, which could be seen as liable just as well.⁹⁹

The element of confining women should not be seen solely as physical confinement in a given space but rather more broadly in terms of reducing the possibility of access to abortion or even preventing the ability to travel to get an abortion.¹⁰⁰ The element of affecting the ethnic composition of any population could be viewed as present in the animus in the discussion of white supremacist replacement theory or in the clear danger of pregnancy for Black women. Also, the alternative element of the carrying out of other grave violations of international law such as torture and cruel, inhuman, and degrading treatment through the federal and state governments post-*Dobbs* blocking access to abortion could also be argued to fit this definition of forced pregnancy.

Alternatively, under Article 7(1) (k), further crimes against humanity are described as “[o]ther inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.”¹⁰¹ The definition of perpetrator discussion above would again apply here. The focus would be on great suffering or serious injury to the body or to mental or physical health by means of denying access to an abortion procedure or providing such procedure in such a limited way that it amounts to such a denial. The widespread

99. Maya Manian, *Dobbs and The Undue Burdens of Pre-Viability Abortion Bans*, SCOTUSBLOG (Nov. 30, 2021, 2:56 PM), <https://www.scotusblog.com/2021/11/dobbs-and-the-undue-burdens-of-pre-visibility-abortion-bans/> [https://perma.cc/625F-FL2D].

100. For example, pregnant undocumented women may fear traveling across state lines to get an abortion at the risk of hitting immigration controls that are 100 miles in from the border, effectively confining them in a zone without abortion access.

101. Rome Statute, art. 7, ¶ 1(k) The elements of “other inhumane acts” are:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Elements of Crimes, *supra* note 98, art. 7(1)(k).

or systematic aspect of denying access to abortion and the related health access issues would follow the analysis above under forced pregnancy, and the knowledge aspect by the intentional acts to create the suffering of forced pregnancy. Structuring an environment where such great suffering is widespread across the United States and the actions of state and federal actors that systematized the oppression of force pregnancy operates as a widespread and systematic attack against a civilian population.

D. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights

Unlike the above treaties, the United States is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 1 defining torture and Article 16 defining cruel, inhumane, or degrading treatment invoke both the state (civil) and the state actor (criminal) liability for breaches of its provisions. Moreover, if we turn to the International Covenant on Civil and Political Rights, to which the United States is also a signatory, under Article 7 torture, cruel, inhuman, or degrading treatment are also prohibited. As discussed above under CEDAW, the United States, through its federal and state actors, could be deemed in breach of these provisions through its permitting and sanctioning the kind of forced pregnancy described. The idea is not so much that there is a right to abortion but that there is a right to not be tortured or treated cruelly, inhumanely, or degradingly, along with other rights.¹⁰² Forced pregnancy would then be seen as fitting within those definitions.

E. The Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Given the profound effect on African-American women as a subset of the broader group of women and other pregnant persons affected by *Dobbs*,¹⁰³ a number of highly restrictive state laws, and a potential national ban on abortion, breach of the CERD due to racial discrimination would be another basis for

102. See U.N. Hum. Rts. Comm., Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (Nov. 11, 2013) (also addressing the right to privacy, right to obtain information, and gender discrimination); U.N. Hum. Rts. Comm., General Comment 36 on the Right to Life, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

103. This effect of *Dobbs* was noted in the shadow report of Amnesty International, the Global Justice Center, the Southern Rural Black Women's Initiative for Economic and Social Justice, and Human Rights Watch submission to the UN Committee on the Elimination of Racial Discrimination for its review of the United States compliance with its international obligations. Amnesty Int'l, Glob. Just. Ctr., S. Rural Black Women's Initiative for Econ. and Soc. Just. & Hum. Rts. Watch, United States of America – Submission to the United Nations Committee on the Elimination of Racial Discrimination, AI Index AMR 51/5877/2022 (Aug. 8-30, 2022).

challenging these forced pregnancies.¹⁰⁴ The *Dobbs* decision and the further state or federal law bans or severe limitations operate as a form of racial discrimination together with the other human rights violations such as torture, cruel, inhuman or degrading treatment or punishment, or intentionally causing great suffering, or serious injury to body or to mental or physical health. It is reasonable to believe that the heavy weight of these forced pregnancy burdens is falling and will fall disproportionately on pregnant women of color and pregnant persons in a form of racial discrimination either by purpose or effect.¹⁰⁵

V. SANCTIMONIOUS BARBARITY

Reaction to becoming pregnant can range from the most profound elation to the most profound dread and regret. When the reaction of the pregnant person is toward the profound dread and regret end of that spectrum, the state setting up a set of rules that make medical alternatives unavailable, illegal, and or criminal is the state placing the pregnant person in a position in which they are forced to go through with the pregnancy. Without women and other pregnant persons, there is no life. Their human dignity is to be respected as a human right. For all the reasons discussed above, the *Dobbs* opinion approach is a recipe for sanctimonious barbarity, for it evidences an appalling disrespect for human rights of women and pregnant persons. What a disgrace.

104. The definition of racial discrimination in the CERD is as follows:

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

105. For those treaties to which the United States is a signatory, the United States Reservations, Declarations, and Understandings might be asserted as a basis to limit the reach of these international law rules into the United States. This approach would take us into a discussion of whether those Reservations, Declarations, and Understandings are so sufficiently limiting as to render forced pregnancies legal as a matter of both domestic law and international law as accepted by the United States as a treaty obligation. It would seem that having RUD’s have such an effect to limit international rules in treaties but not customary international law hardly would be enough to render the cruelty of forced pregnancies legal as a matter of international human rights law.