REPRODUCTIVE JUSTICE AND TRANSFORMATIVE CONSTITUTIONALISM

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INTRODUCTION

Since the founding of the United States, women[1] have fought for control over their bodies and the ability to make reproductive and parenting choices, free from control and coercion by the government, communities, institutions, private actors, and family. Reproductive oppression violates basic human rights to make decisions about one's body, life, and future and, if one chooses, to have, parent, and nurture children. These rights go to the heart of what it means to be a human and live a life with dignity and respect. Yet, from the founding of the United States, our constitutional structure has failed to recognize—much less protect and prevent—reproductive oppression. Indeed, for much of U.S. history, the legal system sanctioned and furthered oppression, rather than remedied it.

Though revolutionary in some respects, for the most part, the U.S. Constitution left existing political, social, and economic relationships untouched, and further entrenched rather than abolished slavery. Enslaved people were denied freedom and autonomy over their own labor, bodies, and family life. For enslaved Black women, this included control over their reproductive capacity and their ability to parent their children. For non-enslaved women, state and common law legal disabilities continued, which disqualified women from political rights and stripped married women of legal personhood, rendering their property, labor, and bodies subject to the dominion of their husbands.

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[1] This Article uses the term "women" because it relies on legal and historical sources documenting or describing the impact of reproductive laws and policies on cisgender women. However, people with a diverse range of gender identities may become pregnant, seek abortions, or need other services during their reproductive life course, and many people who experience reproductive oppression do not identify as women, including transgender, gender nonconforming, and queer individuals. *See* Chase Strangio, *Can Reproductive Trans Bodies Exist?,* 19 CUNY L.. REV. 226 (2016); Marie-Amélie George, *Queering Reproductive Justice,* 54 U. RICH. L. REV. 671 (2020).

Following the Reconstruction Amendments, the Nineteenth Amendment, and the dismantling of state coverture laws, the state began replacing private control over women's bodies. In the 1860s, states started passing laws criminalizing abortion and contraception, and by the beginning of the twentieth century, states asserted even more direct control over women's fertility through forced sterilization laws. After World War II, forced sterilization fell out of favor as eugenic ideas became associated with Nazi Germany, and in the 1960s and 1970s, legal challenges resulted in the decriminalization of contraception and abortion. However, with the rise of population control ideology and later "welfare reform," a new form of state control emerged, which cast state interference into the reproductive lives of certain women as an acceptable exercise of government power. Overt legal restrictions and compulsions were replaced by coercive programs—often tied to public benefits—to discourage childbearing and later to discourage abortion. Today, rather than reversing this trend, we see it extended to the private sector, with employers and health facilities trying to impose religious or moral beliefs about contraception and abortion on the people they employ or serve through restrictions on the provision of services or health care coverage. Further, the state continues to coerce and often compel reproductive choices in carceral settings.

Some lessons emerge from this history. In the United States, reproductive oppression has taken the form of either discouraging/prohibiting or encouraging/requiring childbearing, depending on societal attitudes about the fitness and value of certain mothers and their children at a given point in time. While its form changes, at bottom, reproductive oppression is the instrumentalization of a person's reproductive capacity to serve the goals of others. In the United States, these goals have been inextricably tied to slavery, capitalism, white supremacy, nativism, classism, ableism, and cisheteropatriarchy.

In 1994, a Black women's caucus in Chicago coined the term "reproductive justice" as a framework and vision to articulate what it means to be free from reproductive oppression.[2] That vision reflected and built upon a history of organizing and activism by women of color to address the reproductive oppression faced by their communities.[3]

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2 LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 63 (2017).

3 It is difficult to do justice to the history of the reproductive justice movement and its precursors. Some important works include: ROSS & SOLINGER, *supra* note 2; JAEL SILLIMAN, MARLENE GERBER FRIED, LORETTA ROSS, & ELENA R. GUTIÉRREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE (2004); RADICAL REPRODUCTIVE JUSTICE: FOUNDATION, THEORY, PRACTICE, CRITIQUE (Loretta J. Ross, Lynn Roberts, Erika Derkas,

Reproductive justice recognizes that all people have the human rights (1) not to have a child, (2) to have a child, and (3) to parent children in safe and healthy environments.[4] It also recognizes that all people have a right to sexual autonomy and gender freedom.[5]

This Article begins with the premise that all people have the right to be free from reproductive oppression and that legal systems should be designed to achieve rather than thwart reproductive justice. Part I describes reproductive justice in greater depth. Part II looks at the history of reproductive oppression in the United States, with attention to the role that the law has played in sanctioning, codifying, and enforcing forms of oppression. Part III considers how transformative constitutionalism might better support the goals of reproductive justice than our current constitutional structure. Finally, Part IV considers possible legal strategies to expand constitutional protection for reproductive justice under our existing constitutional scheme.

In undertaking this endeavor, I recognize that reproductive justice activists are skeptical about the place of legal strategies in the quest for reproductive justice.[6] I share this skepticism.[7] Indeed, historically, the mainstream reproductive rights movement has invested disproportionate attention and resources to legal approaches, crowding out other actors and strategies.[8] As discussed below, the Constitution protects a limited set of rights that have been narrowly interpreted. For the most part, U.S. constitutional rights have been limited to their "negative" dimensions, and legal victories often are meaningless without the political will and pressure to implement them. Given all

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Whitney Peoples, & Pamela Bridgewater Toure, eds. 2017); ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 5 (2005) https://forwardtogether.org/tools/a-new-vision [https://perma.cc/BXB5-Q83S] (click the link to download the full report) [hereinafter ACRJ, *A New Vision*]. Works looking at the relationship between lawyers and reproductive justice include: Sarah London, *Reproductive Justice: Developing a Lawyering Model,* 13 BERKELEY J. AFR.-AM. L. & POL'Y 71 (2011); Gemma Donofrio, Note, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement,* 42 N.Y.U. REV. L. & SOC. CHANGE 221 (2018).

4 ROSS & SOLINGER, *supra* note 2, at 9.

5 *Id.*

6 *See, e.g.*, *id.* at 127–28 ("[T]he most effective pathways to reproductive autonomy and dignity are community-based organizing, coalitions of social justice organizations, activist alliances across race and class, and other democratic initiatives . . . . Reproductive justice challenges the paradigm that starts with the judicial system, because activists believe that the law is only as good as social justice movements make it be. Laws don't create movements; movements create laws.").

7 *Id.* at 125–26.

8 Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform,* 15 CUNY L. REV. 391, 399 (2012).

these infirmities, I do not suggest that more resources and energy be expended on legal strategies at the expense of organizing or the investment in resources that families need to thrive, including health care, housing, and safe and healthy communities.

However, it is useful to consider alternative constitutional approaches to envision how the law could do more.

I. REPRODUCTIVE JUSTICE

Reproductive justice recognizes that each person has an inherent human right to control their own body. It requires an end to the control and exploitation of others through their bodies, sexuality, and reproduction and the ability of all people to enjoy "[s]afe and dignified fertility management, childbirth, and parenting."[9] In order to achieve this vision, communities must have access to material resources to exercise self-determination.[10] Thus, reproductive justice conceives of rights within a human rights framework, which includes positive as well as negative rights.[11]

A. *Universal Demands, Different Forms of Oppression*

While the reproductive justice movement grew out of the history of organizing and activism of women of color, the framework also responded to the cramped vision of the mainstream women's rights movement in the 1990s, which too often based its priorities and analysis on the experiences of white middle-class women.[12] It is important to acknowledge the mainstream movement's achievements and recognize its work to end real forms of reproductive oppression. However, the

9 ROSS & SOLINGER, *supra* note 2, at 9; ACRJ, *A New Vision*, *supra* note 3, at 2.

10 ROSS & SOLINGER, *supra* note 2, at 9.

11 *Id.* at 10.

12 DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY xix–xx (1997) ("[T]he rhetoric of 'choice' had privileged predominantly white middle-class women who have had the ability to choose from reproductive options that are unavailable to low-income women and women of color."). It should be noted that many voices within the women's rights movement actively worked to broaden the movement's agenda. *See, e.g.*, Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 16 (1990–91) (discussing "society's responsibility both to protect choice and to provide the material and social conditions that render choice a meaningful right rather than a mere privilege"); Martha F. Davis, *The New Paternalism: War on Poverty or War on Women?*, 1 GEO. J. ON FIGHTING POVERTY 88, 88 (1993) (criticizing sexist and racist underpinnings of welfare programs using financial incentives and penalties to target "irresponsible childbearing").

critique lies in the movement's focus on the needs of a particular community of women—predominantly white women who enjoy class and other privileges. This resulted in the adoption of a limited set of demands that did not alter the material conditions preventing other communities from realizing their rights.[13] As discussed below, these limited demands focused on removing legal barriers to services, rather than seeking to build power and leadership in groups that have historically lacked political and economic power.

This limited vision not only ignored the needs of other communities; at times, it resulted in strategies that inadvertently (or opportunistically) inflicted harm. For instance, the embrace of population control rhetoric to support contraceptive access and funding[14] reinforced stereotypes portraying poor and minority women as unfit parents and supported the idea that controlling the fertility of others was an acceptable policy goal.

Rather than prioritizing the experience of one community, reproductive justice recognizes the universality of rights while avoiding essentialism. As explained by Professors Loretta Ross and Rickie Solinger, "The reproductive justice framework begins with the proposition that while every human being has the same human rights, not everyone is oppressed in the same way, or at the same time, or by the same forces."[15] The concept of "intersectionality" developed by Professor Kimberlé W. Crenshaw is central to this analysis.[16] Intersectionality recognizes that the forms of oppression that target a person depend on the communities to which they belong and their other identities (e.g., "race, class, gender, sexuality, ability, age and immigration status"), and that their ability to exercise self-determination is influenced by power inequities embedded in our society's institutions, culture, and political systems.[17] Taking an intersectional approach, reproductive justice emphasizes addressing the needs of the most vulnerable communities rather than those with the most privilege.[18]

B. *Tensions between "Reproductive Rights" and "Reproductive*

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13 *See* ROSS & SOLINGER, *supra* note 2, at 117–20. Because middle class women often fought stereotypes limiting them to motherhood roles, they challenged restrictions preventing them from avoiding pregnancy. Since they typically had access to health providers and the means to afford services, they narrowly focused on removing legal barriers to abortion and contraceptives.

14 *Id.* at 118.

15 *Id.* at 72.

16 *See id.* at 73–75 (discussing historic contributions to the development of intersectionality).

17 ACRJ, *A New Vision*, *supra* note 3, at 2.

18 ROSS & SOLINGER, *supra* note 2, at 56.

Justice"

In a groundbreaking 2005 policy paper on reproductive justice, Asian Communities for Reproductive Justice (now Forward Together) defined "Reproductive Justice," "Reproductive Health," and "Reproductive Rights" as distinct frameworks for fighting reproductive oppression that together provide complementary and comprehensive solutions.[19] In distinguishing between "Reproductive Rights" and "Reproductive Justice," the paper addressed key weaknesses in U.S. legal protections to prevent reproductive oppression.[20]

The paper criticized the dominant U.S. legal framework, which emphasizes individual rights and choice within a negative rights tradition.[21] This is because—while individual liberty and choice are necessary for reproductive justice—alone they are not sufficient.[22] The traditional neoliberal conception of rights obscures that individual decisions are made within a social context of wealth and power inequities. In the United States, "individual choices have only been as capacious and empowering as the resources any woman can turn to in her community."[23] In addition, governmental, institutional, and private coercion designed to support or discourage procreation depending on "who is deemed worthy to bear children and capable of making decisions for themselves" actively constrains individual decisions.[24] Not only can a "choice" framework obscure context, focusing on individual choices often "blames individuals" for making "bad choices" without recognizing the limitations or barriers they face.[25]

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19 *See* ACRJ, *A New Vision*, *supra* note 3, at 1–2; *see also* ROSS & SOLINGER, *supra* note 2, at 69.

20 Within the legal community, there has been a movement to recognize reproductive justice as a unified field of law. In 2015, the first casebook on the topic was published. *See* MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (2015).

21 ACRJ, *A New Vision*, *supra* note 3, at 3.

22 *See* ROSS & SOLINGER, *supra* note 2, at 124–25; *see also* Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice as Resistance to the State's Property Interest in Black Women's Reproductive Capacity*, 31 YALE J.L. & FEMINISM 35, 36 (2019) ("RJ recognizes that the right to privacy and governmental non-intrusion—at the core of much reproductive rights discourse—is inadequate to address the needs of the most vulnerable and marginalized women.").

23 ROSS & SOLINGER, *supra* note 2, at 16.

24 ACRJ, *A New Vision*, *supra* note 3, at 4 (quoting Professor Dorothy Roberts); *see also* ROSS & SOLINGER, *supra* note 2, at 47 ("[C]hoice masks the different economic, political, and environmental contexts in which women live their reproductive lives . . . . [and] disguises the way that laws, policies, and public officials differently punish or reward the childbearing of different groups of women as well as the different degrees of access women have to health care and other resources necessary to manage sex, fertility, and maternity.").

25 Soohoo, *supra* note 8, at 397.

II. HISTORY OF REPRODUCTIVE OPPRESSION IN THE UNITED STATES

This Section considers the history of the United States to better understand the role the law has played in the operation of reproductive oppression. After briefly discussing the Constitution and legal system at the nation's founding, it examines three periods: the founding until the Civil War, post-Civil War to the 1940s, and the 1950s through the 1990s. Within these periods, different communities experienced unique forms of oppression at the hands of a variety of actors, including slave owners, family members, medical authorities, and the state. Even as the forms of oppression changed, far too often, rather than remedying oppression, the law enabled and perpetuated it.

In considering the past, it is important to recognize that people's lived experiences often varied from the formal choices available to them. Throughout history, whether regulation was imposed by the government, family, or other authorities, women have always engaged in acts of resistance.[26] In public spaces, women participated in public protest, activism, and organizing. In private spaces, women practiced contraception, ended pregnancies, and fought to have, keep, and nurture their children.

A. *Setting the Stage: The Founding*

When the United States was founded, vast numbers of people were enslaved; others lived under unequal laws and were economically powerless. Women, enslaved people, indentured servants, and propertyless men could not vote and were not represented at the Convention that drafted the Constitution.[27] The Framers who wrote the Constitution represented a small subset of identities (cis-male, white, property-owning) and had a vested interest in maintaining existing laws and power arrangements.

For the most part, they incorporated existing power hierarchies into the new legal order. As Professor Dorothy E. Roberts notes, "[t]he

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26 *See* ROSS & SOLINGER, *supra* note 2, at 11.

27 *See* Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 434 (2014) (citing CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 24 (1913)); *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 976 (2002). Unmarried women in New Jersey were the exception to the rule. *See* Judith Apter Klinghoffer & Lois Elkis, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776–1807*, 12 J. EARLY REPUBLIC 159, 159–60 (1992) (describing how during this brief period women's suffrage in New Jersey deviated from the "norm of exclusive male suffrage").

Constitution was built on a foundation of laws, passed in the colonies in the 1600s, that constructed a political hierarchy that divided people into racial categories with differing claims to power and privilege."[28] In addition to laws promoting and protecting chattel slavery, laws gave "propertyless white men special entitlements over [B]lack and Native people."[29] Coverture and traditional conceptions of family gave men dominion over the property, bodies, and labor of their wives and daughters.[30]

The legal system inherited and perpetuated under the Constitution had significant impact on the reproductive lives of women. Many laws were inherited through the common law, but others were enacted by the colonies, including laws supporting slavery. For instance, Professor Roberts describes a 1662 Virginia statute that altered a common law rule by "assign[ing] . . . children born to [B]lack women and 'got by an Englishmen,' the status of their mothers—thereby making them enslaveable."[31] This law helped perpetuate slavery by condemning all children of enslaved women to the status of slaves, irrespective of their parentage.[32]

Not only did the Constitution fail to abolish slavery and end legal subordination based on race or gender, the Constitution affirmatively incorporated chattel slavery into its fabric through the Three-Fifths Clause and the protection of the property rights of those who enslaved Black people.[33] The Constitution and the initial Bill of Rights also failed to include an express commitment to non-discrimination and equal protection of the laws, a provision that would not be added until the Reconstruction Amendments.

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28 Dorothy E. Roberts, Forward, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 51 (2019).

29 *Id.* at 51.

30 Siegel, *supra* note 27, at 983 n.101 ("At common law, a husband acquired rights to his wife's paid and unpaid labor and to most property she brought into the marriage. A wife was obliged to serve and obey her husband, and a husband had a reciprocal duty to support her financially and represent her in the legal system"). *See infra* notes 87–91 and accompanying text.

31 Roberts, *supra* note 28, at 51; *see also* MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT, 97–98 (rev. ed. 1996).

32 Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 119 (2005). This also removed the risk that a white man who raped an enslaved woman would father a child who could make claims to his property.

33 *See* U.S. CONST. art. I, § 2, cl. 3; Roberts, *supra* note 28, at 52–53; Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 320–22 (2004) (discussing the Constitution's protection of slavery).

B. *Founding to the Civil War: Private Control*

The household in colonial America has been described as "a crucible of class and gender hierarchies" which continued into the early years of the Nation.[34] "Slaves, bound servants, apprentices, hired servants, wives, children, and wards all lived under the dominion and protection of the master of the house."[35] The property rights that justified slavery were based on the same principles justifying a free man's domination over the household and his right to the property and services of his wife. Representative Chilton White's statement during congressional debates in 1865 summarized the prevailing state of affairs prior to the Civil War:

> A husband has a right of property in the service of his wife; he has the right to the management of his household affairs. The master has a right of property in the service of his apprentice. All these rights rest upon the same basis as a man's right of property in the service of slaves. The relation is clearly and distinctly defined by the law, and as clearly and distinctly recognized by the Constitution of the United States.[36]

While the status of white women and enslaved Black women had a common root in property law because of race, their lives were vastly different.

1. Enslaved Women

At the founding of the nation, enslaved Black women were subjected to a unique and brutal form of reproductive oppression imposed on them because of the combination of their race and sex. In her groundbreaking book, *Killing the Black Body*, Professor Roberts proclaims that "whites' control of slave women's wombs perpetuated many of slavery's greatest atrocities."[37]

The work of Professor Roberts and Professor Pamela Bridgewater centering the experience of enslaved African-American women helps us

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34 James Gray Pope, *The Thirteenth Amendment at the Intersection of Class and Gender:* Robertson v. Baldwin*'s Exclusion of Infants, Lunatics, Women, and Seamen*, 39 SEATTLE U. L. REV. 901, 903 (2016).

35 *Id.* at 903–04.

36 CONG. GLOBE, 38th Cong., 2d Sess. 215 (1865) (statement of Rep. White); *see also* Pope, *supra* note 34, at 904–05.

37 ROBERTS, *supra* note 12, at 45.

understand the unique gendered aspects of slavery.[38] Enslaved women were expected to work as long and as hard as male counterparts, but because of their sex, they were also subject to sexual and reproductive oppression.[39] Not only did enslaved women lack bodily autonomy and the ability to make decisions about whether and when to have children, under the practice of slave breeding,[40] their procreative capacity was owned and commoditized by slave owners.

Rather than being tangential to the institution, reproductive oppression was a pillar of U.S. slavery.[41] Professors Loretta J. Ross and Rickie Solinger describe Black women's fertility as "the essential, exploitable, colonial resource."[42] Reproductive control was used to both further slave owners' "economic and social interests" and as a means to "instill their dominion over female slaves."[43] The economic importance of slave breeding grew after the United States banned the international slave trade in 1808.[44] According to Professor Bridgewater, "female slaves became the life-line of slavery when the international slave trade closed and the western expansion created a growing market for slaves."[45] Slave breeding was particularly important in border states and mid-Atlantic states where agriculture was less profitable.[46] After 1808, "slave breeding became one of the main vehicles for capital accumulation in [those states]."[47] As previously mentioned, Virginia enacted the first "status-of-the-mother law" in 1662, and by 1809, one year after international slave trading was banned, "nearly all slave states had enacted status-of-the-mother laws . . . ."[48]

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38 Pamela Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11 (2001).

39 *Id.* at 14. On large plantations, seventy to ninety percent of slaves of both genders worked in the fields. ABRAMOVITZ, *supra* note 31, at 60.

40 Professor Bridgewater defines slave breeding as a "systematic mode of enslavement which was based on the sexual and reproductive exploitation of female slaves made possible by force, coercion and oppression—all done for the socio-economic uplift of slave owners." Bridgewater, *supra* note 38, at 15.

41 ROBERTS, *supra* note 12, at 23 (stating that "control of reproduction [was] a central aspect of white's subjugation of African people in America"); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1938 (2012).

42 ROSS & SOLINGER, *supra* note 2, at 18.

43 Bridgewater, *supra* note 38, at 13.

44 ROBERTS, *supra* note 12, at 24; Dacia Green, *Ain't I . . . ?: The Dehumanizing Effect of the Regulation of Slave Womanhood and Family Life*, 25 DUKE J. GENDER L. & POL'Y 191, 214 (2018); Koppelman, *supra* note 41, at 1938–39.

45 Bridgewater, *supra* note 38, at 20.

46 *Id.*

47 *Id.* at 20–21; ABRAMOVITZ, *supra* note 31, at 61.

48 Bridgewater, *supra* note 38, at 24.

a. Sexual Autonomy

At a basic level, enslaved women did not have autonomy over their own bodies, which were legally owned by others. Professor Jill Morrison conceptualizes this right to sexual autonomy as the "right to exclude others from access to their bodies."[49] The law failed to provide protection from violation of this right. There were no criminal penalties for slave owners who raped slaves. In *State of Missouri v. Celia*, a court found that the state rape statute did not apply to an enslaved woman raped by her owner because the definition of a woman protected by the statute did not apply to a slave.[50] Similarly, Louisiana's rape law explicitly excluded Black women from protection.[51] Instead of protecting the woman's right to her own body, the law took the right from her and gave it to slave owners. Thus, rape of a female slave was viewed as a violation of the property rights of the slave owner, and only the slave owner could bring criminal or civil claims against third parties.[52]

b. Procreative Choice

For enslaved women, the right to "exclude others" was linked to the right to procreative choice. Professor Bridgewater notes that "[i]n order to create a viable slave system supported by the reproductive capacities of female slaves, it was necessary to deny legal protection against sexual assault to female slaves."[53] Indeed, while slave owners could file a rape claim against a third party, if the rape resulted in the birth of a child, rather than harming the slave owner's interests, the birth of the child increased the slave owner's wealth.[54] Conversely, slave owners could grant any man sexual access to female slaves,[55] and they often did so in order to encourage pregnancy and childbearing.[56] Professor Roberts describes the practice of "rent[ing] men of exceptional physical stature to serve as studs."[57] Professor Bridgewater notes that the law "made sexual assault a wise investment strategy for a

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49 Morrison, *supra* note 22, at 50.

50 *Id.* at 50–51.

51 ROBERTS, *supra* note 12, at 31. Professor Roberts notes that while the Virginia law purported to apply to all women victims, there was not a single reported case in the eighteenth century involving a white man raping a female slave. Further, in most slave holding states, Black people were disqualified from testifying against a white person. *Id.*

52 Bridgewater, *supra* note 38, at 25–26.

53 *See id.*

54 *See id.*

55 *See id.*

56 Green, *supra* note 44, at 214–15.

57 ROBERTS, *supra* note 12, at 28.

cash-strapped slave owner who was interested in increasing the number of his slaves."[58] Enslaved men were also denied their ability to control their procreation, with slave owners having the power to limit their sexual relations and even to castrate them.[59]

c. Right to Marry

In addition to rape, slave owners used other forms of coercion and manipulation to encourage procreation.[60] While marriage law provided some protection for free women who could (theoretically) choose their spouse and limit their sexual relations to one person, enslaved women had neither the choice of whom to marry nor the shield of marriage to prevent unwanted sexual access. In essence, as Professor Dacia Green writes, enslaved women "were denied their status as wives."[61] Courts held that marital relations between slaves were "essentially different from that of a man and wife joined in wedlock" and "may be dissolved at the pleasure of either party, or by a sale of one or both, dependent on the caprice or necessity of the owners."[62]

Although not recognized by law, many enslaved people entered into marital relationships, with or without their owners' consent.[63] However, slave owners ultimately had the power to force slaves into "marital couples" and to disregard or end marriages.[64] Professor Green describes accounts of young girls who were "married" by their owners to older men shortly after their first period.[65] Some slave owners may have encouraged marriage for religious reasons or to promote stability and prevent slaves from running away, but others encouraged coupling outside of marriage and manipulated the concept of marriage to grant sexual access to women and encourage births.[66]

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58 Bridgewater, *supra* note 38, at 26, 29.

59 Tsesis, *supra* note 33, at 380–81.

60 ROBERTS, *supra* note 12, at 25 (explaining that slave owners rewarded pregnancy, punished women who did not bear children, manipulated marriage choices, and forced slaves to breed); Bridgewater, *supra* note 38, at 16–17 (describing the use of threats, punishments, and rewards to encourage reproduction).

61 Green, *supra* note 44, at 200. For instance, the Slave Code enacted in North Carolina refused to recognize any marriage involving an enslaved person. *Id.*

62 *Id.* at 201.

63 *Id.* at 202–04.

64 Tsesis, *supra* note 33, at 374 (discussing that slave marriages were viewed as "temporary and subject to forced termination" and separation).

65 Green, *supra* note 44, at 214.

66 *Id.* at 202; ROBERTS, *supra* note 12, at 22.

d. Pregnancy Care

Once pregnant, enslaved women were forced to continue to work far into their pregnancies. Professors Ross and Solinger describe pregnant women in Louisiana who "worked sixty to seventy hours a week 'while standing or stooping over cane shoots in ninety-degree temperatures.'"[67] Pregnant enslaved women were denied adequate and appropriate health care during pregnancy and immediately after birth.[68] New mothers typically were not given time to recover or care for newborns.[69] These conditions endangered pregnant women's health and the health of their newborn infants, likely increasing miscarriages, stillbirths, and infant mortality.[70]

e. Right to Parent

Enslaved women were also denied their ability to parent. This right included "an ongoing relationship with the children they bore, the ability to nurture their own children, and the right to direct and influence the upbringing of the children."[71]

Under slavery, women had no legal claim to their children. Indeed, wills and legal cases determined ownership over enslaved women's future children before they were even conceived.[72] Property interests were asserted over women's fertility with cases alleging "fraud and misrepresentation regarding the reproductive capacities of female slaves."[73]

Given children's status as property, there were no limits to a slave owner's ability to separate mother and child. Indeed, a South Carolina court held that enslaved children could be sold away from their mother at any age because "the young of the slaves . . . stand on the same footing as other animals."[74] According to Professors Ross and Solinger, almost a third of children living in the Upper South in 1820 were sold away to "new owners" in the Lower South or farther west by 1860.[75]

But even when children and their parents were not legally separated, enslaved women were denied the ability to nurture their

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67 ROSS & SOLINGER, *supra* note 2, at 19.

68 Green, *supra* note 44, at 209–10.

69 Bridgewater, *supra* note 32, at 115; Green, *supra* note 44, at 209–10 (stating that slaves were not accorded maternity leave and were given little time to recover after childbirth).

70 ROSS & SOLINGER, *supra* note 2, at 20.

71 Morrison, *supra* note 22, at 50.

72 ROBERTS, *supra* note 12, at 33–34.

73 Bridgewater, *supra* note 38, at 25.

74 ROBERTS, *supra* note 12, at 34 (quoting ANGELA DAVIS, WOMEN, RACE, AND CLASS 7 (1981)).

75 ROSS & SOLINGER, *supra* note 2, at 19.

children and determine their upbringing.[76] Under slavery, a woman's productive labor performed for the slaveholder took precedence over her time caring for her children.[77] In order to maximize time in the field, mothers were forced to leave babies and children behind to be cared for by others.[78] As children grew older, the slaveowner or overseer dictated their daily routine, set rules and expectations, and meted out discipline and punishment instead of the parents.[79]

To justify the brutalities of slavery, the white community developed and promoted stereotypes about Black women rationalizing rape, slave breeding, and forced separation of parents and children.[80] Characterizing Black women as lacking morals and being oversexed helped to obscure the harm of rape as "responsibility was lifted from the sexually enticed perpetrator, and the victim was blamed for the sexual abuse carried out against her."[81] "Black women could not be raped because they were naturally lascivious."[82] Similarly, "[s]ome slave owners justified the involuntary separation of families by arguing that slaves did not care about their family members."[83] Enslaved women were blamed for the deaths of infants, which often were caused by infant illness resulting from the conditions of slavery, including mothers' lack of prenatal care, poor nutrition, and hard work during pregnancy.[84] These stereotypes would continue to impact attitudes and policies affecting Black mothers long after slavery.

2. Non-Enslaved Women

The experience of non-enslaved women differed markedly from that of enslaved Black women before the Civil War. Professors Ross and Solinger summarize that

> Enslaved women did not have any of the sexual, relational, or maternal rights that white females could generally claim, such as the right to choose their sexual partners, the right to enter into a legal

76 ROBERTS, *supra* note 12, at 36; Morrison, *supra* note 22, at 50.

77 ABRAMOVITZ, *supra* note 31, at 58, 62.

78 ROBERTS, *supra* note 12, at 36; Bridgewater, *supra* note 32, at 115.

79 ROBERTS, *supra* note 12, at 37.

80 *Id.* at 10–12.

81 Bridgewater, *supra* note 32, at 116; Bridgewater, *supra* note 38, at 18.

82 ROBERTS, *supra* note 12, at 31.

83 Green, *supra* note 44, at 212.

84 ROBERTS, *supra* note 12, at 14.

> marriage, the right to mother and protect their own children, or even the right to *know* their own children.[85]

Yet non-enslaved women suffered different forms of reproductive oppression. This Section discusses legal structures that governed their lives. While these laws impacted all free women, different communities of free women faced additional and different forms of oppression because of class, race, immigration status, disability, and other identities.[86]

a. Right to Marry, Sexual Autonomy, and Procreative Choice

Prior to the Civil War, free women had the legal right to choose whom they married, but ironically "some of the most important barriers to female self-possession were located within the structure of marriage."[87] Common law principles of coverture stripped free women of most aspects of their legal identity and gave husbands control over their lives.[88] In addition to rights to their wives' property, men also owned the labor of their wives and unmarried daughters and any wages they earned.[89] Most significantly, the common law of marital status "endowed a husband with rights to his wife's 'services' in exchange for his obligation of support."[90] Thus, while a free woman was protected by laws against rape outside of marriage, she did not have the legal right to

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85 ROSS & SOLINGER, *supra* note 2, at 19 (emphasis in original).

86 *See* ROSS & SOLINGER, *supra* note 2, at 21–22 (describing anti-natalist policies designed to reduce Native populations and destroy traditional reproductive practices); 28–29 (describing immigration policies designed to exclude Chinese women and girls).

87 Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1416 (2000).

88 *Id.* at 1389 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES, *430) ("Coverture united husband and wife by subsuming a married woman's civil identity and according husbands wide-ranging control over their wives."). Under common law, a married woman could not own property and any earnings or inherited wealth during the marriage went to her husband's benefit. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 Nw. U. L. Rev. 1229, 1250 (2000). A married woman had no right to make contracts and could not independently bring a tort suit. *Id.* at 1251–52. Her husband was also insulated from civil liability for torts he committed against her. *Id.* at 1252. So-called married women's property acts were passed in the mid-1800s, allowing married women to own property in many states. *Id.* at 1250. By the time of Reconstruction in 1877, every state had passed a married women's property act. *Id.* However, married women still could not make enforceable contracts and disabilities in tort law continued. *Id.* at 1251–53. *See* Hasday, *supra* note 87, at 1382–83 (stating that "[a]t common law, married women had little, or no, right to contract, own property, or sue[,]" but that married women's property acts began to be passed in the 1840s).

89 Case, *supra* note 27, at 439–40. Starting in the 1850s, statutes allowing women to keep their own earnings were passed. Hasday, *supra* note 87, at 1383.

90 Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. Rev. 261, 305 (1992).

control her husband's sexual access, and rape laws specifically carved out exceptions for acts committed by a person against their wife.[91]

Before the widespread use of contraceptives and abortion, control over intercourse was inextricably linked to procreative choice. [92] In a society in which women undertook almost all childcare responsibilities, the ability to decide whether to have children—or the number of children to have—dictated the course of women's lives by defining "the amount of their lives they devoted to motherhood."[93] Decisions about pregnancy and childbirth also implicated women's right to health and well-being as "[w]omen still commonly died, or were permanently disabled, by pregnancy and childbirth in the nineteenth century."[94]

b. Right to Parent

Free women were charged with the majority of work in the home and child-rearing under prevailing custom and the common law, but fathers enjoyed the legal right to custody and control over minor children born to married couples, and mothers did not have a right to custody upon divorce.[95] Indeed, a father could choose who would serve as his children's guardian and need not select the child's mother.[96] A notable exception to a free man's common law right to custody was created by status-of-mother laws, which denied a father custody over a child if the child's mother was enslaved.[97] However, in such cases custody over the child would go to the slave owner rather than the child's mother.

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91 Hasday, *supra* note 87, at 1392–93.

92 Leading nineteenth-century feminists located the right to be free from forced motherhood in the right to refuse sex, rather than the ability to prevent or end a pregnancy. LINDA GORDON, WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA 98, 111, 119 (rev. ed. 1990); Hasday, *supra* note 87, at 1437. This may reflect an awareness of the political costs of supporting abortion and contraception at a time when the medical establishment was actively campaigning against abortion. *Id.* at 1438; Siegel, *supra* note 90, at 305. Linda Gordon suggests that middle-class white women may have been concerned that contraceptive use and abortion would facilitate male infidelity and increase women's vulnerability to sexual exploitation and rape. LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 57 (2002) [hereinafter GORDON, MORAL PROPERTY]; Hasday, *supra* note 87, at 1437–38.

93 Hasday, *supra* note 87, at 1417.

94 *Id.* at 1438.

95 Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 310 (2002); ABRAMOVITZ , *supra* note 31, at 114.

96 Hasday, *supra* note 95, at 310.

97 *See supra* notes 31–32, 48 and accompanying text.

c. Right to Her Own Person

While accounts of the early U.S. women's rights movement often focus on the battle for "gender-neutral" civil and political rights, Professor Jill Hasday argues that starting in the 1840s, feminists also fought for a woman's "right to . . . her own person."[98] This concept included both the right to refuse sex (and with it childbearing and rearing) and the material conditions to freely exercise the right. In 1855, Elizabeth Cady Stanton[99] wrote that "a woman's right to control her person [is] the foundational right upon which political and economic equality needed to rest."[100] Because sexual autonomy was linked to childbearing, for free women in the United States, control over intercourse not only determined whether or when they had children, but also impacted their short and long-term health, and the time and labor they devoted to childrearing.[101]

Professor Hasday observes that "[i]n demanding a woman's right to her own person, the nineteenth-century feminist movement was asserting an equal right, and challenging gender-based subordination, in a completely gender-specific way."[102] Given the comparative position of women and men, "organized feminism explained the right to self-ownership in an idiom radically different from that employed by the nation's founders."[103] They recognized that for women, control over procreation was central to determining the course of their lives and the amount of time and labor invested in childbearing and parenting. Thus, freedom from reproductive oppression was central to liberty and personal autonomy. [104]

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98 Hasday, *supra* note 87, at 1415–16.

99 Stanton was a brilliant theorist in articulating the reproductive oppression experienced by white, middle-class women, but her broader advocacy work was marred by racist, classist and anti-immigrant beliefs. *Id.* at 1439 n.229. For instance, when fighting for women's suffrage, Stanton often employed racist, classist, and nativist appeals, arguing that white educated women should get the vote before former slaves and immigrants. *Id.*; *see* Martha S. Jones, *How New York's New Monument Whitewashes the Women's Rights Movement*, WASH. POST (March 22, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/03/22/how-new-yorks-new-monument-whitewashes-womens-rights-movement [https://perma.cc/K49D-TEV9].

100 Hasday, *supra* note 87, at 1420.

101 *Id.* at 1379 ("[W]omen needed to control the terms of marital intercourse in order to regulate the portion of their lives they would have to devote to raising children.").

102 *Id.* at 1417.

103 *Id.*

104 *Id.* at 1385 ("[F]eminists repeatedly identified a woman's right to control the terms of marital intercourse as the predicate condition for women's equality, without which full property rights and even suffrage would be meaningless."); GORDON, MORAL PROPERTY, *supra* note 92, at 61 (stating that the right to refuse was fundamental to birth control and a woman's independence and personal integrity).

Notably, early feminists also recognized that even if laws and customs changed to allow a "right to refuse" sex and childbearing, the formal right was meaningless unless women had the financial independence that enabled them to refuse.[105] Professor Hasday writes that nineteenth-century feminists "challenged the voluntariness of a wife's consent to sexual intercourse with her husband" (and the possibility of procreation) "whenever the wife had no realistic socioeconomic alternatives to marriage and submission."[106] Thus, the "right to one's own person" required broader legal reforms, including changing marital laws to grant married women property rights and legal personhood,[107] but it also required fundamental societal changes, such as ending workplace discrimination and creating economic opportunities for women to earn a decent wage outside of marriage.[108]

3. Abortion and Contraception: Use and Legal Regime

From the founding of the United States, laws were structured in a manner that gave slave owners and men control over women's sexuality, reproduction, and children. However, one way both enslaved and free women exercised control over reproduction was through contraceptive use and abortion.

a. Contraception Use and Abortion

As discussed above, enslaved women did not have the legal right to control their sexual relationships or to parent or protect their children. Enslaved women stood not only to lose their children at birth, but also were faced with the knowledge that their children would be born into slavery. Under such circumstances, a woman's exercise of control over her fertility was a form of insubordination and resistance.[109]

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105 Hasday, *supra* note 87, at 1431.

106 *Id.* at 1434.

107 *Id.* at 1416 (noting that "[f]eminists criticized both a husband's legal right of sexual access and the coverture rules that stripped married women of control over their family's resources").

108 *Id.* at 1433 (stating that feminists argued that women could not freely choose marriage unless they had full economic opportunities so that they were not forced to marry to secure economic stability).

109 ROBERTS, *supra* note 12, at 46–49. Infanticide may have been the most extreme form of resistance. It is difficult to know how often infanticide occurred. Professor Roberts notes that many enslaved women were falsely accused for naturally occurring deaths ultimately attributable to poor prenatal care, but she also describes the personal anguish of mothers who were forced to watch older children sold off and the impossible moral position of enslaved mothers forced to

It is difficult to know how often enslaved women took action to avoid or end pregnancies. Given the conditions under which they lived, they likely experienced high spontaneous miscarriage rates,[110] but evidence suggests that they both used contraception and took steps to terminate pregnancies. Contemporary medical journals documented abortions and miscarriages, and techniques used.[111] Scholars believe that enslaved women shared information about the use of herbal contraceptives and abortifacients,[112] and midwives and other women in their communities performed and helped cover up abortions.[113]

By the mid-nineteenth century, significant societal changes led to increased efforts to control family size, and the birth rate among the free population in the United States steadily declined.[114] Industrialization and the shift from an agrarian to a wage economy changed the nature of work, creating strict divisions between work and home. Industrialization decreased the value of child labor as work moved out of the home and changing ideas about child-rearing increased the cost and the amount of time and energy required for childcare.[115] As a result, parents began seeking to decrease the size of their families.

Professor Linda Gordon describes a thriving nineteenth-century contraceptive market that included "small entrepreneurs [who] . . . manufactured gadgets" and pharmaceutical and rubber companies.[116] Before laws prohibited advertisement of contraceptives, these devices were openly hawked in magazines and newspapers.[117] Abortifacient drugs and doctors and midwives who performed abortion procedures were also advertised.[118] From 1821 to 1841, states began tightening safety and poison regulations to apply to abortifacients,[119] but for the most part, abortion early in pregnancy was legal through the mid-nineteenth century.

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perpetuate slavery by "producing human chattel for their masters." *Id.* at 48–49; *see* ABRAMOVITZ, *supra* note 31, at 63.

110 ROBERTS, *supra* note 12, at 47–48.

111 *Id.* at 47.

112 *Id.* at 46–47; ROSS & SOLINGER, *supra* note 2, at 20; Bridgewater, *supra* note 38, at 28.

113 ROSS & SOLINGER, *supra* note 2, at 20; Bridgewater, *supra* note 38, at 27.

114 Siegel, *supra* note 90, at 285; GORDON, MORAL PROPERTY, *supra* note 92, at 22 (the average fertility rate per 1,000 women was 7.04 in 1800 and 3.56 in 1900); ROBERTS, *supra* note 12, at 47.

115 Hasday, *supra* note 95, at 321–22; ABRAMOVITZ, *supra* note 31, at 117.

116 GORDON, MORAL PROPERTY, *supra* note 92, at 32; Andrea Tone, *Black Market Birth Control: Contraceptive Entrepreneurship and Criminality in the Gilded Age*, 87 J. AM. HIST. 435, 439–40 (2000).

117 GORDON, MORAL PROPERTY, *supra* note 92, at 33.

118 MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT 12 (2020).

119 *Id.*

Scholars believe that abortion played a significant role in the decline in birthrates, especially among the urban, white, non-immigrant middle class.[120] "[A]bortion in the 1840s," according to Professor Mary Ziegler, "was arguably more commonplace than ever before, especially in larger cities."[121] Significantly, Professor Reva Siegel observes that during this period "abortion was commonly perceived as a practice of married women seeking to avoid dangerous pregnancies and to control family size—a matter of special concern to middle-class families in the new industrial order."[122]

b. Legal Regime

Before the late 1800s, contraception and abortion early in pregnancy were not illegal in the United States.[123] While husbands controlled many aspects of women's lives, there was no legal requirement that husbands consent to abortions, and the management of the birthing process was largely left to midwives rather than doctors.[124] Contraception and abortion among free women likely took place in private, non-professional spaces, creating less opportunity for regulation, surveillance, and governmental coercion.

Under common law, abortions before quickening, the moment at which fetal movement is detected (typically around the sixteenth to eighteenth week of pregnancy), were not criminalized.[125] Prior to quickening, women could exercise their "traditional prerogative to ask midwives or physicians to 'restore their menses.'"[126] Notably, a woman

120 Siegel, *supra* note 90, at 285; ROBERTS, *supra* note 12, at 47 (noting that white women were more successful at avoiding pregnancy than enslaved Black women in the nineteenth century); ZIEGLER, *supra* note 118, at 12; GORDON, MORAL PROPERTY, *supra* note 92, at 31.

121 ZIEGLER, *supra* note 118, at 12.

122 Siegel, *supra* note 90, at 285.

123 Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of* Roe v. Wade, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 53, 54 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019); *see* Commonwealth v. Bangs, 9 Mass. (8 Tyng) 387, 388 (1812) (holding that indictment for procuring an abortion requires an allegation that the woman was quick with child); Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 263 (1845) (stating that abortion was not a punishable offense unless a woman is quick with child); Abrams v. Foshee, 3 Iowa 274, 280 (1856) (stating that "to cause, or procure an abortion, *before* the child is quick, is not a criminal offence at common law"); Smith v. Gaffard, 31 Ala. 45, 51 (1857) (same); Mitchell v. Commonwealth, 78 Ky. 204, 210 (1879) (stating that "it never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child").

124 Siegel, *supra* note 90, at 296, 296 n.133, 299 (noting that at common law women did not need a husband's consent to obtain an abortion).

125 Roe v. Wade, 410 U.S. 113, 132 (1973) ("It is undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense.").

126 ROSS & SOLINGER, *supra* note 2, at 24.

had substantial ability to determine when quickening occurred because, as a practical matter, public recognition of quickening would depend on when a woman reported feeling fetal movement.[127] States began passing laws criminalizing abortion in the 1860s and contraception in the 1870s, driven by a number of social and political factors discussed below.[128]

C. *Post-Civil War–1940s: Criminalization and Eugenics*

After the Civil War, the site of control of women's reproduction moved from private actors to the state and the medical profession. Laws criminalizing abortion and contraceptives either prevented legal access entirely or required medical approval before allowing their use. By the turn of the century, the pseudoscience of eugenics gained popular support, leading to compulsory state sterilization programs that targeted people deemed genetically unfit.

1. 1860s–1890s: Criminalization of Contraception and Abortion

The professionalization of medicine and a growing commercial contraceptive market provided both an impetus and a means for increased criminalization and regulation of contraceptives and abortion. In 1873, the federal Comstock law prohibited sending contraceptives and information about contraception across state lines or by mail.[129] The prohibition was passed as an anti-obscenity measure in response to concerns that widespread contraceptive use would free sex from the constraints of marriage and childbearing.[130] By the end of the nineteenth century, nineteen states had laws prohibiting the advertisement and sale of contraception; several other states had laws that banned the advertisement of contraception. Five more states banned the sale of contraceptives in the 1930s and 1940s. [131]

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127 Siegel, *supra* note 90, at 287 (noting that the common law understanding of gestational life and focus on quickening "deferred to the testimony of a pregnant woman").

128 ZIEGLER, *supra* note 118, at 12–13 ("Until the 1860s and 1870s, most states allowed abortion before quickening, the point at which fetal movement could be detected.").

129 Siegel, *supra* note 90, at 314–15. The Comstock Law was the first statute that explicitly outlawed the sale of contraceptives. Tone, *supra* note 116, at 441.

130 Tone, *supra* note 116, at 440.

131 Martha J. Bailey, "*Momma's Got the Pill*": *How Anthony Comstock and* Griswold v. Connecticut *Shaped US Childbearing*, 100 AM. ECON. REV. 98, 105–06 (2010).

The campaign to criminalize abortion began in the mid-nineteenth century, led by the medical profession.[132] At the time, the medical field—and obstetricians and gynecologists in particular—sought to professionalize their practice and establish authority in a field typically dominated by women and midwives.[133] By regulating and criminalizing abortion, male doctors can be understood as trying to exert control over women who were both their "competitors and clientele."[134] Their campaign was remarkably successful. By the late nineteenth century, intentionally terminating a pregnancy was criminalized in every state.[135] Many abortion and contraception laws included therapeutic exceptions allowing doctors to perform abortions if they determined that the mother's life was in danger or authorizing the use of contraception for health reasons.[136]

Criminalization campaigns proliferated at a time when states were modifying common law rules barring married women from engaging in public life, and granting them rights to own property and wages earned outside the home.[137] During this reform period, public campaigns attacking contraception and abortion can be understood both as an effort to reassert traditional conceptions about sex, women's roles, and marital responsibilities, and an attempt to shift the location of control over women's fertility from private actors (husbands, fathers, and slave owners) to the state and the medical profession.[138] Professor Siegel writes: "Men interested in establishing their professional authority over women's role in reproduction encouraged other men to assert their political authority over women's role in reproduction by

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132 Siegel, *supra* note 90, at 279; ZIEGLER, *supra* note 118, at 12–13.

133 Siegel, *supra* note 90, at 283–84; ZIEGLER, *supra* note 118, at 12–13 (citing historian James Mohr).

134 Siegel, *supra* note 90, at 301.

135 Greenhouse & Siegel, *supra* note 123, at 54; *see* Roe v. Wade, 410 U.S. 113, 129 (1973). In 1840, only eight states had abortion statutes, and it was not until after the Civil War that abortion legislation began replacing the common law. *Roe*, 410 U.S. at 138–39; Steven Graines & Justin Wyatt, *The Abortion Right, Originalism, and the Fourteenth Amendment*, 47 CLEV. ST. L. REV. 161, 165 (1999) ("Between 1860 and 1880, states and territories passed forty anti-abortion statutes in different forms and for various reasons, and these statutes generally abolished the common law doctrine of quickening.").

136 Siegel, *supra* note 90, at 296 ("The so-called 'therapeutic exception' to birth control laws . . . . . .made the woman a ward of her physician, whose judgments governed her legal access to abortion and contraception.").

137 Hasday, *supra* note 87, at 1382–83 (discussing the passage of married women's property acts and laws granting women the right to keep their wages). According to Professor Farnsworth, in 1848, New York passed a married women's property act and by 1877, every state had passed such a statute. Farnsworth, *supra* note 88, at 1250.

138 Siegel, *supra* note 90, at 321.

criminalizing the means of controlling birth, each acting to preserve life in the social order as they knew it."[139]

The proliferation of laws criminalizing abortion also can be understood as a means to preserve social order and class and race hierarchies. The goal of keeping the birth rate high among "non-immigrant" middle class white women played a significant role in campaigns to criminalize abortion.[140] With the rise of immigration and the belief that immigrants were reproducing at a faster rate than the "native" white population, nativist rhetoric both extolled white women of Northern European descent to produce more babies as their patriotic duty[141] and condemned the dangers of "race-suicide."[142] Criminal abortion laws were actively promoted as a way to increase the birth rate of middle class white women.[143] Anti-abortion tracts "emphasized that abortion was most frequently practiced by married women, particularly those of the so-called 'native' middle class" and lamented their low birth rates compared to immigrants.[144] Campaigners criticized abortions as the "reason for so few native-born children of American parents . . . in comparison with those of other nationalities among us."[145] Thus, prohibiting abortion was understood as a public necessity to preserve the ethnic character of the nation.

2. Early 1900s: Eugenic Policies

By the beginning of the twentieth century, government intervention to achieve population objectives gained new support as eugenics ideas spread. Eugenicists argued that most human traits were genetically transmitted and, as result, society could be improved by increasing the reproduction of those with desirable traits, and conversely, that "the ills of society (disease, crime, poverty, and other social abnormalities) [could] be eradicated by discouraging, or preventing if necessary, the reproduction of socially deviant

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139 *Id.* at 318.

140 *Id.* at 297–99; Hasday, *supra* note 87, at 1439.

141 Siegel, *supra* note 90, at 298–99.

142 ROBERTS, *supra* note 12, at 60.

143 Professor Roberts discusses this type of policy as "positive Eugenics" or the practice of encouraging the reproduction "of the best stock." *Id.*

144 Siegel, *supra* note 90, at 279–98; ZIEGLER, *supra* note 118, at 12 (noting that in this period "many of those seeking abortions were white, married, and middle class or wealthy").

145 Siegel, *supra* note 90, at 298 (quoting James S. Whitmire, *Criminal Abortion*, 31 CHI. MED. J. 385, 392 (1874)).

individuals."[146] The pseudoscience of eugenics appeared to give scientific and moral credence to nativist fears and racist constructions of "us" verses "them," as "defective germ-plasm" became associated with non-Nordic Europeans.[147] Professor Khiara M. Bridges observes "[e]ugenicists essentially proposed that the existing social hierarchy simply reflected a genetic hierarchy."[148] Laws passed for eugenic purposes were portrayed as public health initiatives designed to protect society from an "epidemic of crime, poverty, and feeblemindness. . . ."[149]

a. Prohibitions on Marriage

In the early 1900s, government efforts to shape the nation's population shifted from encouraging childbirth among desirable stock to preventing "undesirable" births. Initially, lawmakers sought to do this indirectly by passing laws prohibiting marriage between institutionalized individuals or segregating them by sex.[150] By 1913, twenty-four states and the District of Columbia had laws forbidding marriage for people deemed undesirable, "including epileptics, imbeciles, paupers, drunkards, criminals, and the feebleminded."[151] At the turn of the nineteenth century, there also was a resurgence of anti-miscegenation laws preventing interracial marriages.[152] After Reconstruction, seven southern states that had repealed or struck down anti-miscegenation statutes readopted or judicially revived the laws, and by 1910, "a clear majority of states" had adopted anti-miscegenation laws.[153] Lawmakers also sought to preserve the nation's

146 Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 3–4 (1996); Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 CARDOZO J.L. & GENDER 319, 320–21 (2008).

147 Lombardo, *supra* note 146, at 5; Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 463 (2019).

148 Bridges, *supra* note 147, at 462.

149 Lombardo, *supra* note 146, at 4.

150 Natalie M. Chin, *Group Homes as Sex Police and the Role of the* Olmstead *Integration Mandate*, 42 N.Y.U. REV. L. & SOC. CHANGE 379, 391 (2018).

151 ROBERTS, *supra* note 12, at 65.

152 Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America*, 83 J. AM. HIST. 44, 49 (1996); Bridges, *supra* note 147, at 463; David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges and Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 281–82 (2015) (describing how the *Slaughter-House* cases and the "racist and contra-constitutional zeitgeist" of the late nineteenth century contributed to the renewed passage and enforcement of anti-miscegenation laws).

153 Upham, *supra* note 152, at 285. Professor Upham notes that immediately after the ratification of the Fourteenth Amendment, anti-miscegenation laws did not exist, were not

dominant ethnic character by passing laws prohibiting immigration from Asia and discouraging immigration from Eastern and Southern Europe.[154]

b. Forced Sterilization

In the early 1900s, states began asserting even greater and more direct control over individuals' bodies and reproductive capabilities through the adoption of forced sterilization laws designed to prevent people with undesirable "genetic" traits from having children. By 1913, twelve states had laws that empowered state institutions to sterilize "the mentally retarded, the mentally ill, epileptics, and criminals."[155] While some laws imposed sterilization as a form of punishment, laws framed as public health measures had better luck withstanding legal challenges.[156] After the Supreme Court upheld Virginia's compulsory sterilization law in the 1927 case *Buck v. Bell*, the number of states with compulsory sterilization laws grew to around thirty.[157]

Buck v. Bell was manufactured as a test case to establish the constitutionality of a Virginia law authorizing the superintendent of state institutions to sterilize patients "with hereditary forms of insanity, imbecility, etc.," if sterilization is in "the best interest of the patients and

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enforced, or were virtually a dead letter in twenty-one of the nation's thirty-seven states. *Id.* at 262–64.

154 In 1917, Congress extended the 1882 Chinese Exclusion Act to ban immigration from the entire Asiatic Zone from Afghanistan to the Pacific, except Japan. Rose Cuison Villazor, *The Other* Loving*: Uncovering the Federal Government's Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1392 (2011). In 1924, Congress created immigration quotas that limited immigration from southeastern Europe. *Id.* at 1394. President Calvin Coolidge, who signed the 1924 Act, stated that "America must be kept American" and "[b]iological laws show. . . that Nordics deteriorate when mixed with other races." *Eugenics Movement Reaches its Height*, PBS, https://www.pbs.org/wgbh/aso/databank/entries/dh23eu.html [https://perma.cc/8LUS-RGEG]. Earlier immigration laws were constructed and enforced in a manner that discouraged immigration by Chinese women. *See* Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 242, 266 (2015) (describing how the Page Act of 1875 was "discriminatorily applied and aimed to exclude Chinese women based on a constructed stereotype that Chinese women had a cultural inclination towards prostitution" resulting in skewed gender ratios between Chinese men and women, the inability to form families, and a decrease in the size of the Chinese population in the United States); Page Act, ch. 141, 18 Stat. 477 (1875) (repealed 1974).

155 ROBERTS, *supra* note 12, at 67.

156 Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128, 1130 (2005) (noting that in the 1910s, state courts struck down sterilization statutes that were deemed "cruel and unusual punishment").

157 Buck v. Bell, 274 U.S. 200 (1927); *see* ROBERTS, *supra* note 12, at 69; Ziegler, *supra* note 146, at 321.

of society."[158] Based on questionable findings that Carrie Buck was a "feeble-minded white woman," who would probably parent "socially inadequate offspring, likewise afflicted . . . and that her welfare and that of society [would] be promoted by her sterilization," the Supreme Court upheld the statute and Buck's sterilization.[159]

In order to reach its decision, the Court justified forced sterilization as a public health initiative, writing that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[160] In doing so, the Court discounted the state violence inflicted on Buck, characterizing her sterilization as a lesser sacrifice and explicitly sanctioned the statute's eugenic purpose, which was described as preventing "those who are manifestly unfit from continuing their kind[,]" rather than "waiting to execute degenerate offspring for crime, or to let them starve for their imbecility."[161]

After *Buck v. Bell*, Professor Roberts notes a shift to more overt use of compulsory sterilization as a means to prevent the procreation of women who were deemed unfit to be mothers.[162] The Great Depression also contributed to an increased focus on decreasing births by unwed mothers, and others who would require public assistance, as their children were viewed as a cost to society.[163] The questionable medical diagnosis of "feeblemindedness" made it easy to target women for other socially undesirable characteristics like promiscuity and poverty.[164] In Buck's case, evidence of her feeblemindedness included that she was unmarried and pregnant at seventeen (likely as a result of rape)[165] and testimony that described her as belonging to the "shiftless, ignorant, and worthless class of antisocial whites of the South."[166]

Medical developments that made sterilization procedures faster and less medically risky also contributed to the increased sterilization

158 *Buck*, 274 U.S. at 206; *see* Lombardo, *supra* note 146, at 8–9; Bridges, *supra* note 147, at 452–55; ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016).

159 *Buck*, 274 U.S. at 205, 207; *see* Bridges, *supra* note 147, at 454.

160 *Buck*, 274 U.S. at 207 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905); *see* Lombardo, *supra* note 146, at 10–11.

161 *Buck*, 274 U.S. at 207.

162 ROBERTS, *supra* note 12, at 69.

163 *See* ROBERTS, *supra* note 12, at 70; Ziegler, *supra* note 146, at 326 (noting that prior to the 1950s, eugenics laws targeted unwed mothers on public assistance based on the "unnecessary" costs and on the theory that these defective mothers would have defective children).

164 *See* Bridges, *supra* note 147, at 464–65; ROBERTS, *supra* note 12, at 69; Stern, *supra* note 156, at 1131 (noting that a high percentage of cases in California characterized female patients as "promiscuous—even nymphomaniacal—or having borne a child out of wedlock").

165 *See* Bridges, *supra* note 147, at 453–55.

166 ROBERTS, *supra* note 12, at 69.

of women who were deemed "immoral, loose, or unfit for motherhood."[167] Young women were often targeted for "sexual immorality" and admitted to facilities for the "feebleminded," for the specific purpose of being sterilized and then released.[168]

3. Development of Programs to Assist Deserving Mothers

The push to decrease births within certain populations coincided with the development of the welfare state. In the early 1900s, states began to create mothers' pensions designed to assist "deserving mothers," who were mostly widowed and white, to raise their children.[169] According to Professor Mimi Abramovitz, these programs reflected a Progressive-Era preoccupation with "children as a national resource" and focused on the state's interest in future productive citizens and workers rather than assisting the women who parented them.[170] By 1921, forty of the forty-eight states had mothers' pensions.[171] Southern states with the largest Black populations were the last to join.[172] For white immigrants, many of these programs were used as a form of social control to encourage their conformity with "American" family standards, with aid conditioned on compliance with "morality" provisions.[173] These programs typically did not support women of color, as they were deemed unfit.[174] In 1931, only three percent of recipients of mothers' pensions administered by state and local governments were Black.[175]

In the 1930s, the New Deal incorporated mothers' pensions into federal welfare legislation, but it did so in a way that reflected society's mixed response to husbandless women and their children. It solidified the idea that the state had a stake in children's upbringing and the right to "reform" mothers' behavior in return for state benefits.[176] The 1935

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167 Stern, *supra* note 156, at 1132.

168 *See* ROBERTS, *supra* note 12, at 69; Stern, *supra* note 156, at 1131–32 (noting the increase in sterilizations after the 1920s in California that occurred at institutions for the feebleminded, as compared to institutions for the mentally ill).

169 ABRAMOVITZ, *supra* note 31, at 193–94.

170 *Id.* at 191.

171 *Id.* at 194.

172 *Id.*

173 ROBERTS, *supra* note 12, at 204.

174 *See* ROSS & SOLINGER, *supra* note 2, at 26; ROBERTS, *supra* note 12, at 203–04 (stating that administrators "failed to establish welfare programs in locations with large Black populations or distributed benefits according to standards that disqualified Black mothers").

175 ROBERTS, *supra* note 12, at 205.

176 ABRAMOVITZ, *supra* note 31, at 318.

Aid to Dependent Children (ADC) program permitted states to determine eligibility criteria and grant amounts based on indicia of deservingness. "Suitable home" requirements gave administrators significant discretion over who received aid,[177] enabling them to limit Black, unmarried, or other undesirable recipients.[178] The requirements also created a precedent for the state to use benefits as a means to interfere with parenting.[179]

Although ADC was touted as releasing mothers from "the wage-earning role" to enable them to provide their children the care and guidance needed to make good citizens, the program did not free all mothers from wage earning.[180] White society continued to view "[B]lack women as laborers rather than homemakers, [denying] them patriarchal 'protections' accorded to white women."[181] Reflecting this view, some states added "employable mother" requirements, which allowed states to disqualify able-bodied women on the grounds that they should work.[182] Thus in the 1930s, one southern public assistance supervisor justified the lack of inclusion of Black mothers in ADC because there was "no reason why the employable Negro mother should not continue her usually sketchy seasonal labor or indefinite domestic service rather than receive a public assistance grant."[183]

D. *1950s–1990s: Decriminalization, Coercive Sterilization, and Population Control*

After World War II, compulsory government sterilization fell out of favor, as eugenic laws came to be associated with Nazi Germany.[184] However, the policy goal of preventing unwed and poor mothers from having children continued to be popular. By the 1950s and 1960s, population control goals replaced eugenics as the rationale for state

177 *Id.* at 318.

178 Davis, *supra* note 12, at 89 (noting that "unmarried mothers and poor black women—the undeserving poor—were discouraged from participating").

179 ROBERTS, *supra* note 12, at 205–06.

180 ABRAMOVITZ, *supra* note 31, at 315; Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 26 HARV. J.L. & GENDER 151, 163–64 (2006).

181 ABRAMOVITZ, *supra* note 31, at 110.

182 *Id.* at 318.

183 *Id.* at 319. *See also* ADAM COHEN, SUPREME INEQUALITY 16 (2020) (describing a successful legal challenge to a state AFDC program that "allowed states counties to cut benefits during the okra-harvesting season to force poor mothers out into the fields").

184 Ziegler, s*upra* note 146, at 322, 324.

interference with reproduction.[185] Population control policies sought to curb population growth by decreasing births, especially among the "poor" who were deemed more likely to have too many children and least able to care for them.[186] During this same period, women's rights activists fought campaigns and brought legal challenges to decriminalize contraception—and later abortion—to enable women to control their fertility.[187] As the state got out of the business of legally forcing or limiting reproductive choices, the manipulation or withholding of public benefits became a new means for the state to assert control over reproductive choices.[188]

1. Coercive Sterilization

Scholars have noted that in the 1950s, as non-white populations began to obtain greater access to social benefits, population control policies adopted a more overtly racist tone and "punitive edge."[189] Population control policies identified Black people, Puerto Ricans, Mexican-Americans, Native Americans, and white immigrants as "high fertility" groups that made the wrong choices, continuing to reproduce at high rates because they were "incompetent, unmotivated, or influenced by their own or their family's culture."[190] As society became preoccupied by "fears of overpopulation, welfare dependency, and illegitimacy," many viewed sterilization as a solution.[191]

However, by the 1950s, public attitudes towards forced state sterilization had changed. In 1942, the Supreme Court struck down an Oklahoma statute authorizing the sterilization of persons convicted of two or more "felonies involving moral turpitude."[192] The Court's holding in *Skinner v. Oklahoma* rested on Equal Protection grounds, but in reaching its decision the Court recognized a fundamental human right to procreate.[193] Although the Supreme Court has never overturned

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185 Mary Ziegler, Roe*'s Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1, 15 (2013).

186 *Id.* at 14–15.

187 *See infra* Sections II.D.2 & 3.

188 *See infra* Section II.D.4; *see also infra* notes 243–45 and accompanying text.

189 *See* Ziegler, s*upra* note 146, at 335; Bridges, *supra* note 147, at 473 (stating that once non-white people gained access to the social safety net, society gained a greater interest in their fertility and "society began to inflict the violence of coercive sterilization [on them]"); ROBERTS, *supra* note 12, at 89–90; Stern, *supra* note 156, at 1132.

190 Ziegler, *supra* note 146, at 336; Stern, *supra* note 156, at 1135–36.

191 Stern, *supra* note 156, at 1132.

192 Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).

193 *Id.* at 541; ROBERTS, *supra* note 12, at 307–08.

Buck v. Bell, by the 1960s and 1970s, most states repealed eugenic compulsory sterilization laws.[194] While legislators in many states were convinced that sterilization was a good way to stop ADC recipients from having children, by the 1960s public distaste prevented the passage of new compulsory sterilization laws.[195]

As a result, in the 1960s overt state compulsion was replaced by coercive sterilization carried out under the illusion of patient choice. Coercive sterilization committed by doctors, often at public hospitals, was facilitated by an increase in federal funding for family planning—which included sterilization in the 1960s and 1970s—and by the lack of standardized informed consent protocols to prevent health care providers from performing procedures without full informed consent.[196]

During this period, women who relied on government benefits and health care services were sterilized without their consent by health care workers and government employees. Whether or not a woman would be subjected to these practices depended on subjective judgments (reinforced by prevailing racist and classist stereotypes) about their fitness for motherhood and the desirability of their children. Tactics varied but consistently reflected medical staff conviction that they were justified in sterilizing women to prevent their childbearing, whether or not patients wanted the procedure or even knew it was occurring. For instance, doctors performed sterilizations without consent while patients were receiving other treatment or told patients that they were receiving other treatments.[197] They failed to fully inform or misled patients about the need for or nature of the procedure (e.g., by failing to discuss alternative forms of birth control or that the procedure is

194 Michael G. Silver, Note, *Eugenics and Compulsory Sterilization Laws: Providing Redress for the Victims of a Shameful Era in United States History*, 72 GEO. WASH. L. REV. 862, 870 (2004). North Carolina did not repeal its compulsory sterilization law, which allowed involuntary sterilization for both genetic reasons ("the respondent would be likely to procreate a child . . . who would probably have serious mental deficiencies") and for parental unfitness ("the respondent because of mental deficiency would probably be unfit to care for a child . . . ."), until 2003. *See In re* Johnson, 263 S.E.2d 805, 809 (N.C. Ct. App. 1980); Act of Apr. 17, 2003, ch. 13, 2003 N.C. Sess. Laws 13.

195 Ziegler, *supra* note 146, at 326–27; ROBERTS, *supra* note 12 at 94.

196 Stern, *supra* note 156, at 1133. In 1971, the federal Office of Economic Opportunity lifted a ban on the use of federal funds for voluntary sterilizations. *Id.*

197 *See* Stern, *supra* note 156, at 1133–34. In Alabama, twelve and fourteen-year-old sisters were sterilized after their mother, who could not read, signed an "X" on a form, believing her daughters were receiving birth control. *Id.*; ROBERTS, *supra* note 12, at 90–91, 93; Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of* Madrigal v. Quilligan, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 97, 102–03 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019).

permanent).[198] Health care workers also obtained consent from women under situations of duress—for example, while patients were in active labor—or coerced consent by threatening to withhold medical treatment.[199] Government workers also coerced consent by threatening to withhold benefits or threatening loss of custody of children if women did not consent to sterilization.[200]

Ironically, during the 1960s and 1970s, while working-class and minority women "often found themselves combating" the view that "they were destructive overbreeders whose procreative tendencies needed to be managed," middle-class white women fought against restrictions on sterilization and contraception based on stereotypes and societal expectations about their *duty to have children*.[201] These included restrictions on access to sterilization.

Both coercive sterilization and restrictions on voluntary sterilization reflected a medical culture in which doctors and hospitals disregarded patient autonomy and adopted paternalistic attitudes about their role in women's medical decision-making. In the 1960s, the American College of Obstetricians and Gynecologists (ACOG) effectively restricted access to sterilization unless a woman had done her reproductive duty. The "120 rule" stipulated that a woman's age times the number of her children must equal 120 in order for her to qualify for voluntary sterilization.[202] ACOG also required consultation with two doctors and a psychiatrist before allowing voluntary sterilization.[203] In the 1970s, the ACLU brought lawsuits challenging hospitals' refusal to provide elective sterilizations.[204]

Despite ACOG's rules, hospitals and doctors exhibited different attitudes about the sterilization of Black, Mexican-American, Puerto Rican, and Native American women and women receiving Medicaid

198 ROBERTS, *supra* note 12, at 91; Stern, *supra* note 156, at 1134; Manian, *supra* note 197, at 103.

199 ROBERTS, *supra* note 12, at 91–93; Stern, *supra* note 156, at 1134; Manian, *supra* note 197, at 102.

200 ROBERTS, *supra* note 12, at 92–93; Stern, *supra* note 156, at 1134. As recently as 2001, the Eighth Circuit heard a case in which a woman with intellectual disabilities was told that if she consented to sterilization, she would get her children—who had been removed by child protective services—back. Vaughn v. Ruoff, 253 F.3d 1124, 1127–28 (8th Cir. 2001).

201 Stern, *supra* note 156, at 1133; ROSS & SOLINGER, *supra* note 2, at 51–52.

202 ROBERTS, *supra* note 12, at 95; Stern, *supra* note 156, at 1132. The rule was dropped in 1969. *Id.*

203 ROBERTS, *supra* note 12, at 95; Stern, *supra* note 156, at 1132–33. ACOG retracted the requirement in 1970. *Id.*

204 ROBERTS, *supra* note 12, at 96; ROSS & SOLINGER, *supra* note 2, at 51 (noting studies in the 1970s showed that "women of color, Medicaid recipients, and women receiving welfare benefits were sterilized at much higher rates than women who did not fall in these categories").

and public benefits.[205] Sterilization abuse typically occurred at municipal hospitals and teaching hospitals where procedures were done to train residents, and Medicaid was charged for procedures.[206] The Indian Health Services also aggressively promoted the sterilization of Native American women.[207] Interviews with doctors who participated in these practices reflected a conviction that sterilization to combat population growth and "reduce the welfare rolls" was a social good and that doctors had the right to make sterilization decisions on behalf of their patients.[208]

In the 1970s, women of color organized to end coercive practices, forming the Committee to End Sterilization Abuse (CESA). In response to the campaign and highly publicized lawsuits documenting patterns of abuse against Black women in Alabama and Mexican-American women in California,[209] in 1978, the Department of Health and Human Services adopted new sterilization consent guidelines. The regulations prohibited the use of federal funds to sterilize individuals who were adjudicated incompetent or institutionalized and adopted informed consent requirements to prevent coercion and ensure that individuals were adequately informed about the procedure and told that withholding consent would not result in the loss of benefits.[210] Notably, Planned Parenthood and the National Abortion Rights Action League initially opposed guidelines proposed by CESA out of concern that they might restrict white middle-class women's access to sterilization.[211]

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205 ROBERTS, *supra* note 12, at 94–95; Stern, *supra* note 156, at 1134–36.

206 ROBERTS, *supra* note 12 at 91; Stern, *supra* note 156, at 1133; ROSS & SOLINGER, *supra* note 2, at 51 ("The head of Obstetrics and Gynecology at a public hospital in New York reported, 'In most major teaching hospitals in New York City, it is the unwritten policy to do elective hysterectomies on poor [B]lack and Puerto Rican women, with minimal indications, to train residents.'").

207 ROSS & SOLINGER, *supra* note 2, at 50 ("A Native organization, Women of All Red Nations, has estimated that on some reservations, the rate of female sterilization was as high as 80 percent. Scholars have found that between 1968 and 1982 about 42 percent of Native women of childbearing age were sterilized compared to 15 percent of white women."). *See* D. Marie Ralstin-Lewis, *The Continuing Struggle against Genocide: Indigenous Women's Reproductive Rights*, WICAZO SA REV. 71 (2005) (describing the targeting of Native American women for involuntary birth control and sterilization during the 1960s and 1970s by Indian Health Services). Many Native women were almost entirely dependent on the IHS for health care, placing them at high risk if abuse of abuse. *Id.* at 75.

208 ROBERTS, *supra* note 12, at 92; Ralstin-Lewis, *supra* note 207, at 76 (citing a 1972 survey finding that many "white doctors believed that they were helping society by limiting births of low-income minority women, and alleviating their own tax burdens."). For an in-depth discussion of sterilization at a public hospital, see generally Manian, *supra* note 197.

209 *See, e.g.*, Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974); Madrigal v. Quilligan, 639 F.2d 789 (9th Cir. 1981).

210 42 C.F.R. §§ 441.253–54, 441.257–58.

211 ROBERTS, *supra* note 12, at 300.

2. Contraception and "Birth Control"

Competing struggles over women's access to the means to control fertility and societal efforts to encourage or discourage childbearing also impacted laws and policies around contraceptives, raising similar concerns about the line between choice and coercion. Before discussing the changes in laws and policies around contraception in the 1960s and 1970s, it is helpful to provide further background about early decriminalization efforts and contraceptive use.

a. Early Efforts to Expand Access to Contraceptives

At the beginning of the twentieth century, Margaret Sanger led the movement to decriminalize and expand access to contraceptives. Sanger's work promoting contraception reflected feminist concerns about reproductive autonomy, but unlike other feminists of her time, Sanger located women's reproductive autonomy in the ability to access contraceptives, rather than in the right to abstain from sex.[212] Sanger began her career as a nurse working with poor and immigrant women on the Lower East Side of New York City.[213] Unlike wealthy women, Sanger's patients could not access contraceptives, and Sanger's goal became the creation of clinics that would provide access to contraceptives for women without means.[214] However, in promoting her vision, by the 1920s, Sanger began to adopt the instrumentalist language of population control and eugenic arguments about reducing births among the "unfit" to support campaigns to decriminalize and expand access to contraceptives.[215] During this period, eugenic ideas were widely accepted and the "alliance" with eugenicists "gave the birth control movement a national mission and the authority of a reputable science."[216]

Below the surface of the public campaigns around contraception, it is clear that women from all communities desired and were using contraception. By 1940, national fertility rates in both the white and

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212 *Id.* at 57.

213 Cary Franklin, *The New Class Blindness,* 128 YALE L.J. 2, 20–21 (2018).

214 *Id.*

215 ROBERTS, *supra* note 12; *Id.* at 56, 72–73.

216 *Id.* at 72; ACRJ, *A New Vision*, *supra* note 3, at 3 ("[P]opulation control discourse was politically successful in increasing the visibility and acceptance of birth control in the first half of the 20th century.").

Black communities reached an all-time low.[217] Despite criminal laws in many states, "legal leniency, entrepreneur savvy, and cross-class consumer support enabled the black market in birth control to thrive."[218] Advertisements in newspapers indicate that a mail order and drugstore trade in contraceptives existed in Black communities as well as white and immigrant communities.[219] In the 1930s and 1940s, Black women's clubs worked to educate people about birth control, and Black people formed independent birth control organizations and sponsored clinics in Black neighborhoods.[220]

In the 1930s and 1940s, an initial wave of legal reform carved out exceptions to contraceptive bans, including the federal Comstock laws, which enabled doctors to disseminate contraceptives.[221] But some states continued to ban dissemination, sale, and in some instances use, of contraceptives,[222] continuing to make access difficult for women without access to sympathetic private doctors or the ability to travel to states without restrictions who relied on public clinics.[223]

b. Decriminalization and Funding

By the 1960s, public attitudes towards contraceptives had changed and legislatures and courts began lifting legal restrictions. By 1965, seven of the twenty-four states that banned the sale of contraceptives had repealed their laws, and another seven recognized exceptions that allowed physicians to distribute contraceptives.[224] That same year, the Supreme Court held that a Connecticut law banning the use of

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217 Tone, *supra* note 116, at 456; ROBERTS, *supra* note 12, at 83. During this period, the average number of children born to white women declined from 4.4 to 2.1 children, and for African American women the number declined from 7.5 to 3.0. ROSS & SOLINGER, *supra* note 2, at 29.

218 Tone, *supra* note 116, at 437.

219 *Id.* at 457.

220 ROBERTS, *supra* note 12, at 86–87.

221 *See, e.g.*, United States v. One Package, 86 F.2d 737 (2d Cir. 1936) (holding that the Comstock law did not apply to dissemination by doctors); Bailey, *supra* note 131, at 105–06.

222 In 1940, when the Connecticut Supreme Court upheld a state ban on contraceptives, all the state's clinics were forced to close. Franklin, *supra* note 213, at 22; Melissa Murray, *Sexual Liberty and Criminal Law Reform: The Story of* Griswold v. Connecticut, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 11, 19–20 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (describing unsuccessful challenges to Connecticut ban in the 1940s).

223 Franklin, *supra* note 213, at 24 (describing a particularly acute problem with accessing contraceptives in Connecticut for young and unmarried women, poor women, and women of color).

224 Bailey, *supra* note 131, at 104–06.

contraceptives violated the right to privacy in marital relations,[225] and in the 1972 case *Eisenstadt v. Baird*, the Court extended the right to access contraceptives to unmarried people.[226]

By the 1960s and 1970s, legal and societal changes combined with advancements in contraceptive technology to dramatically expand women's ability to control their fertility.[227] Increased governmental funding in the late 1960s for family planning made sterilization and contraception more affordable, improving access for many women.[228] However, the influx of public funding also opened the door for increased public involvement in reproductive decision making, clearing a path for instrumentalist family planning policies designed to achieve population goals.[229] The dangers were illustrated in the 1990s when Norplant, a long-acting contraceptive that is physically inserted in a person's arm, was developed.[230] Norplant was aggressively marketed and pushed on poor communities despite concerns about its side effects.[231] Because Norplant had to be removed by a doctor, once it was inserted women could not discontinue use on their own.[232] Some states covered the cost of implanting the drug, but not the cost of removal.[233] Women also reported doctors who refused to remove the device, and judges who required use of Norplant as a condition of probation.[234] Ultimately, concerns about Norplant's safety led government agencies and courts to abandon its use.[235]

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225 Griswold v. Connecticut, 381 U.S. 479 (1965).

226 Eisenstadt v. Baird, 405 U.S. 438 (1972).

227 In the 1960s, the IUD and the birth control pill both became available on the market, increasing the effectiveness of contraception, but also requiring medical intervention for use—and in the case of IUDs, to stop use. *See* Stern, *supra* note 156, at 1132.

228 *Id.* at 1133.

229 ACRJ, *A New Vision*, *supra* note 3, at 3 (noting that family planning programs were adopted as a population control strategy rather than for women's empowerment).

230 ROBERTS, *supra* note 12, at 105.

231 *Id.* at 108–10, 122–28; Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER, RACE & JUST. 401, 405–06 (2000).

232 ROBERTS, *supra* note 12, at 129; Ralstin-Lewis, *supra* note 207, at 87 (describing issues with doctors refusing to remove Norplant).

233 ROBERTS, *supra* note 12, at 131.

234 *Id.* at 131–32; Bridgewater, *supra* note 231, at 402, 423.

235 Bridgewater, *supra* note 231, at 421–22.

3. Abortion

There is a robust scholarship on the history of the fight to legalize abortion in the United States, which I will not repeat here,[236] but some observations are appropriate. In the 1973 case *Roe v. Wade*, the Supreme Court struck down a Texas criminal abortion ban and recognized a constitutional right to abortion.[237] Almost twenty years later, in the 1992 case *Planned Parenthood v. Casey*, the Supreme Court affirmed *Roe*'s central holding but changed the standard for determining whether a law restricting access to abortion is constitutional.[238] The *Roe* standard provided greater protection against government interference in a person's decision to have an abortion than *Casey*'s "undue burden" standard.[239] But *Roe* has been criticized for basing its reasoning on doctors' ability to make medical decisions without state interference and for characterizing abortion as a privacy right.[240] In *Casey,* the Court recognized the right to abortion as a liberty interest that is central to a woman's autonomy, dignity, and equal citizenship.[241]

However, although the Court has recognized the centrality of the abortion decision to a woman's autonomy, it has allowed the state to pressure her choice by making access to abortion more difficult through its funding of benefit programs and prohibitions on providing abortions at government facilities.[242] In the 1980 case *Harris v. McRae*, the Supreme Court acknowledged that financial constraints restrict a poor woman's ability to exercise her constitutional right to choose to have an abortion, but held that the state did not have an obligation to fund abortion.[243] In doing so, the Court recognized that a federal restriction prohibiting abortion coverage by Medicaid (which covered all other health services, including prenatal and obstetrics care) was

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236 *See, e.g.*, Greenhouse & Siegel, *supra* note 123; ZIEGLER, *supra* note 118.

237 Roe v. Wade, 410 U.S. 113 (1973).

238 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

239 The undue burden standard provides that the state cannot impose restrictions that have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

240 Greenhouse & Siegel, *supra* note 123, at 70–71.

241 *Id.* at 74.

242 In the 1980 case *Harris v. McRae,* the Supreme Court held that the federal government could exclude funding for abortion from the Medicaid program. Harris v. McRae, 448 U.S. 297, 326 (1980). Following *Harris*, federal and state governments expanded the use of government funding programs as a means to discourage abortion by expanding funding restrictions to other groups that rely on the government for health care coverage and to prohibit the provision of abortion in government funded facilities or programs. Soohoo, *supra* note 8, at 407–08.

243 *Harris*, 448 U.S. at 314 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

intended to discourage Medicaid recipients from having abortions, but held that Congress could make a "value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of funds."[244] Notably, while Congress prohibited federal abortion funding, the federal Title X program continued to fund sterilization for poor women, subject to the informed consent requirements communities succeeded in getting adopted in 1978.[245]

Since *Casey*, the constitutional right to abortion continues to be subject to legal and political attacks.[246] In addition, the "undue burden" standard adopted in *Casey* opened the door to countless types of state regulations that make it more difficult for women to access services.[247] After *Casey*, many states began adopting health regulations that only applied to abortion clinics ("TRAP" laws), which are designed to make it difficult or impossible for the clinics to remain open.[248] Laws that decrease the number of abortion providers disproportionately impact women living in rural areas and poor women, who can least afford the costs of travel and taking time off from work.[249]

4. The Right to Parent

Laws designed to burden abortion access by making services more expensive or difficult to obtain constitute a form of reproductive oppression. However, the right to abortion must be understood within the broader reproductive justice framework, which guarantees a right to choose whether or not to parent, as well as access to the resources needed to exercise the decision without coercion. While women must be able to exercise the choice to avoid or terminate a pregnancy, they must also have access to resources for healthy pregnancies, as well as a safe and healthy environment to raise children should they desire to have a child. This requires both meaningful access to legal contraceptive and abortion services and social conditions that allow people who

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244 *Id.*

245 Khiara M. Bridges, *Elision and Erasure: Race, Class, and Gender in* Harris v. McRae, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 117, 120 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019).

246 *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

247 *See* Nora Ellman, *State Actions Undermining Abortion Rights in 2020*, CTR. FOR AM. PROGRESS (Aug. 27, 2020, 9:04 AM), https://www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020 [https://perma.cc/5ABY-6Z74].

248 Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J.F. 149, 150–52 (2016).

249 *Whole Woman's Heath*, 136 S. Ct. at 2302.

choose to parent to have children and to raise them.[250] Adequate social support of families is a key aspect of enabling people to choose to parent.

As discussed in Section II.C.3, from its inception, the federal ADC, and later the Aid to Families with Dependent Children (AFDC) program, were structured and administered in a manner that often disqualified unwed mothers and Black mothers from support.[251] In the 1960s, the "War on Poverty" and the civil rights and welfare rights movements increased the number of program recipients and enabled Black mothers to gain greater access to benefits.[252] As a result, by 1967, the welfare caseload, which had been eighty-six percent white, became forty-six percent non-white.[253] Demographic changes also increased divorced and unwed recipients.[254]

Professor Roberts and other scholars observe that as AFDC became associated with single and Black mothers (even though the majority of recipients remained white), the program became "increasingly burdened with behavior modification rules, work requirements, and reduced effective benefit levels."[255] In 1967, the program's orientation shifted away from providing support to mothers to enable them to stay at home with their children towards moving them into the labor market.[256] Amendments adopted that year renounced AFDC's commitment to "mother-in-the-home" and strengthened welfare departments' involvement in removing children from their homes.[257] Program changes were justified by attacking recipients who were "stereotyped as lazy, irresponsible, and overly fertile."[258]

As discussed *supra* in Sections II.D.1 & 2, the increase in AFDC recipients and the inclusion of single and Black mothers coincided with coercive sterilization and contraceptive policies predicated on the

250 ROBERTS, *supra* note 12, at 302.

251 In the 1950s, states began cutting ADC funding and expanding moral fitness standards, many of these rules had a disproportionate impact on Black mothers. ABRAMOVITZ, *supra* note 31, at 323–25. These rules included "man in the house" and "substitute father" rules and "suitable home" requirements. *Id.*

252 Davis, *supra* note 12, at 89; Smith, *supra* note 180, at 16.

253 ROBERTS, *supra* note 12, at 207; ABRAMOVITZ, *supra* note 31, at 334–35. In addition to political activism and legal changes, Professor Abramovitz notes that demographic changes also increased the welfare caseload. *Id.*

254 ABRAMOVITZ, *supra* note 31, at 334.

255 ROBERTS, *supra* note 12, at 207; ABRAMOVITZ, *supra* note 31, at 336–37.

256 ABRAMOVITZ, *supra* note 31, at 337 (describing a shift where the state "began treating the entire caseload as 'undeserving,' redoubling its effort to channel AFDC mothers into the labor market").

257 *Id.* at 337–39.

258 ROBERTS, *supra* note 12, at 207.

assumption that controlling the fertility of poor people and people of color served the "public interest" of decreasing welfare rolls.[259] Even as coercive sterilization and contraceptive policies fell out of favor,[260] public support for decreasing benefits for poor mothers increased, as well as attempts to use benefits to influence reproductive decision-making.[261] In 1996, the federal government repealed AFDC, ending the entitlement to welfare benefits and imposing new requirements on benefits.[262] The law imposed stricter work requirements and a five-year lifetime limit on benefits.[263] Certain groups of immigrants were excluded from the program.[264] During this period, states were encouraged to adopt "family caps" on welfare benefits.[265] The caps were designed to discourage childbearing by people who receive aid by limiting or decreasing benefits upon the birth of an additional child.[266] Almost half the states adopted family caps in the mid-1990s.[267] Legal challenges to these policies failed based on the reasoning that a state does not impermissibly burden reproductive decision making when it uses its funding power to encourage or discourage its preferred choice, essentially the same argument that prevailed in the abortion funding cases.[268]

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259 Bridges, *supra* note 147, at 472.

260 *See supra* Sections II.D.1 & II.D.2.b.

261 Davis, *supra* note 12, at 88 (describing a "New Paternalism" in the 1990s linking public benefits to appropriate conduct).

262 Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1, 4 (2008).

263 HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOMES 2 (2020).

264 *Id.*

265 Jill E. Adams & Melissa Mikesell, *And Damned if They Don't: Prototype Theories to End Punitive Policies Against Pregnant People Living in Poverty*, 18 GEO. J. GENDER & L. 283, 288 (2017); Smith, *supra* note 180, at 153.

266 Smith, *supra* note 180, at 152, 154.

267 Adams & Mikesell, *supra* note 265, at 288. In recent years, California, Massachusetts, and New Jersey have repealed family caps, but an estimated 13 states still retain them. Bruce Covert, *New Jersey, Birthplace of Welfare Family Caps, Has Finally Repealed Them*, TALK POVERTY (Oct. 16, 2020), https://talkpoverty.org/2020/10/16/new-jersey-birthplace-welfare-family-caps-finally-repealed [https://perma.cc/472B-9TG8]; Teresa Wiltz, *Family Caps Lose Favor in More States*, PEW (May 3, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/05/03/family-welfare-caps-lose-favor-in-more-states [https://perma.cc/TW8R-ECZV].

268 *See, e.g.*, C.K. v. N.J. Dep't of Health & Hum. Servs., 92 F.3d 171, 195 (3d Cir. 1996) (stating that "it would be remarkable to hold that a state's failure to subsidize a reproductive choice burdens that choice"); Sojourner A. v. N.J. Dep't of Hum. Servs., 794 A.2d 822, 833 (N.J. Super. Ct. App. Div. 2002) (finding that the family cap did not "place a direct legal obstacle in the path of a woman's decision to have additional children"), *aff'd*, 828 A.2d 306, 317 (N.J. 2003) (stating that "[t]his case is not about a woman's right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice").

5. Re-emergence of Criminalization and Carceral Settings

The 1980s marked a rebirth in the use of criminal law to coerce and punish reproductive choices, but in a different form. Rather than criminalizing abortion procedures or use of contraception outright, the new criminalization sought to punish and control the behavior of pregnant women by prosecuting them for conduct during pregnancy.[269] Initially, the prosecutions targeted pregnant women who used drugs under child abuse statutes and criminal assault laws by treating their fetuses as children harmed by parental drug use.[270] Later states passed laws specifically protecting fetuses and targeting pregnant women.[271]

Professor Priscilla Ocen explains that the prosecutions in the 1980s reflected the intersection of "the war on drugs and the fetal rights movement."[272] Media focus on the "crack cocaine epidemic" fueled concern that pregnant women using crack would give birth to damaged children, who would be prone to criminality and a drain on society's resources.[273] Prosecutions for drug use while pregnant disproportionately targeted crack use and Black mothers, despite relatively equivalent drug use across racial groups,[274] relying on enduring stereotypes of Black women as bad mothers responsible for society's ills.[275] Professors Roberts, Ocen, and Bridges argue that these prosecutions can be understood as an attempt to punish and regulate Black mothers to discourage "irresponsible" childbearing deemed to be a burden on the state.[276] Notably, these prosecutions occurred despite

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269 Priscilla A. Ocen, *Pregnant While Black: The Story of* Ferguson v. City of Charleston, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES 161, 168 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019).

270 *Id.*; ROBERTS, *supra* note 12, at 150, 153; *see* AMNESTY INT'L, CRIMINALIZING PREGNANCY 8, 15–19 (2017), https://www.amnesty.org/download/Documents/AMR5162032017ENGLISH.pdf [https://perma.cc/M4KK-L3LQ] (explaining the range of criminal laws used against pregnant women which can include general criminal laws where the crime "victim" has been expanded to include fetuses). South Carolina and Alabama courts have interpreted child abuse and child endangerment statutes to apply to fetuses. Whitner v. State, 492 S.E.2d 777 (S.C. 1997); *ex parte* Hicks, 153 So. 3d 53 (Ala. 2014).

271 *See* AMNESTY INT'L, *supra* note 270.

272 Ocen, *supra* note 269, at 165. For the definitive study of criminalization of pregnant women during pregnancy, see Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299 (2013).

273 Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 815–16 (2020); Ocen, *supra* note 269, at 166.

274 Bridges, *supra* note 273, at 817–18; Paltrow & Flavin, *supra* note 272, at 315.

275 Ocen, *supra* note 269, at 167; Bridges, *supra* note 273, at 823.

276 ROBERTS, *supra* note 12, at 180; Bridges, *supra* note 273, at 834; Ocen, *supra* note 269,

limited evidence that the use of cocaine during pregnancy led to fetal harm.[277] Further, medical and public health organizations condemn the prosecution of pregnant women for substance use as contrary to public health goals.[278]

State power to coerce reproductive choices is perhaps at its greatest in carceral settings. Despite the repeal of compulsory sterilization laws, forced and coerced sterilization continues to occur, including recent reports of forced sterilizations in ICE facilities in Georgia.[279] Between 2006 and 2010, more than 100 incarcerated women in California prisons were sterilized without full informed consent.[280] Reflecting broader public narratives about who should have babies and the public's interest in preventing births, physicians and medical staff reportedly targeted incarcerated pregnant women who had two or more children.[281] An obstetrician who participated in the sterilizations justified his actions in fiscal terms, saying that the cost of the sterilizations was small "compared to what you save in welfare paying for these unwanted children—as they procreated more."[282]

What is most striking about sterilization abuse is that it continues to occur despite clear legal requirements designed to prevent it. In California, state rules prohibit tubal litigation without state approvals and federal funding restrictions prohibit the use of federal funds to sterilize people in prison, setting a policy norm against the practice.[283] This has led scholars and activists to argue that the inherent coercive nature of carceral settings, the poor quality of health services, and lack of respect for patients makes "truly voluntary and informed consent" impossible.[284] As a result, they have called for decreasing the scale of incarceration and a ban on the sterilization of people in carceral settings.[285]

III. TRANSFORMATIVE CONSTITUTIONALISM AS AN ALTERNATIVE

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at 167.

277 Ocen, *supra* note 269, at 166–67; Bridges, *supra* note 273, at 818–19.

278 AMNESTY INT'L, *supra* note 270, at 31–32.

279 Melissa Gira Grant, *ICE Is the New Face of America's Legacy of Forced Sterilization*, NEW REPUBLIC (Sept. 17, 2020), https://newrepublic.com/article/159390/immigration-detention-hysterectomy-forced-sterilization [https://perma.cc/9THR-R9ZW].

280 Rachel Roth & Sara L. Ainsworth, *"If They Hand You a Paper, You Sign It": A Call to End the Sterilization of Women*, 26 HASTINGS WOMEN'S L.J. 7, 7–8 (2015).

281 *Id.* at 8, 15.

282 *Id.* at 16.

283 *Id.* at 9.

284 *Id.* at 11–12.

285 *Id.* at 12, 47–48.

MODEL

Cast with an eye on protecting the rights most valued by white, cisgender, propertied males, the U.S. Constitution and Bill of Rights failed to explicitly protect and ensure the rights needed by people who are pregnant, have the capacity to become pregnant, or choose to become parents. These include the right to reproductive autonomy (bodily autonomy and procreative choice), the right to adequate health care, and the right to safely raise and parent children. Despite the lack of explicit constitutional protections—with the exception of the right to health care—these rights have been recognized as fundamental liberty interests protected by the Fifth and Fourteenth Amendments.[286] Protection of these rights under the Constitution required reconceiving rightsholders to include women and people with the capacity to become pregnant. The Supreme Court's decision in *Planned Parenthood v. Casey* accomplished that to some degree by recognizing that decisions about whether or not to have a child, "choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[287]

However, realizing reproductive justice requires more than acknowledging that reproductive autonomy is essential to a person's liberty. "Choice, privacy, freedom from interference, and personal autonomy are all necessary for all women to achieve reproductive justice, but they are also completely insufficient."[288] In the words of Professor Roberts, justice cannot be achieved by "superimpos[ing] liberty on an already unjust social structure."[289] Instead, reproductive justice requires a societal commitment to dismantling systems of oppression and creating enabling conditions to ensure—not only that people can choose and access contraception and abortion—but that they can make autonomous decisions about procreation and parenting.

Just as reproductive justice activists and scholars have recognized the shortcomings of the traditional liberal conception of rights,[290]

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286 *See supra* Section II.D.3; Santosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing parents' fundamental liberty interest in the care, custody, and management of their children); M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) ("[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. . . ." (quoting *Santosky*, 455 U.S. at 774)); Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].").

287 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

288 ROSS & SOLINGER, *supra* note 2, at 124.

289 ROBERTS, *supra* note 12, at 294.

290 ACRJ, *A New Vision*, *supra* note 3, at 2; ROSS & SOLINGER, *supra* note 2, at 123–24.

countries around the world also have found "Constitutionalism 1.0" inadequate to address the material conditions that prevent people from realizing their rights.[291] As an alternative, the term "transformative constitutionalism" was developed by Professor Karl E. Klare in 1998 to describe the constitutional approach adopted by South Africa after apartheid.[292] He defined transformative constitutionalism as the project of "transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction" and accomplishing "large-scale social change through nonviolent political processes grounded in law."[293]

According to Professors Eric Kibet and Charles Fombad, the South African model built upon, but went beyond the traditional liberal concept of constitutionalism, to create a constitution that addressed the "prevailing social and political realities."[294] Rather than applying legal concepts in a vacuum, transformative constitutionalism recognizes the importance of history and context to fully understand the constitutional harm of challenged practices and to determine the actions required to remedy past injustices.[295] Transformative constitutionalism recognizes that for countries seeking to break from a traumatic past, like South Africa, constitutions "generally have to do more, including addressing past injustices and crises as well as inspiring hope for a better future."[296]

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291 The U.S. Constitution has been dubbed "Constitutionalism 1.0" for its emphasis on liberty and the lack of a positive role for the state in achieving the "common good." Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMPAR. L. 527, 537 (2017) (citing ALEXANDER SOMEK, THE COSMOPOLITAN CONSTITUTION ch. 2 (2014)).

292 Karl E Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998). In 1998, former Chief Justice Arthur Chaskalson wrote "a commitment . . . to transform our society . . . lies at the heart of our new constitutional order." Soobramoney v. Minister of Health 1998 (1) SA 765 (CC) at 117 para. 8 (S. Afr.). In 2005, Justice Kate O'Regan stated "this Court has emphasized on many occasions [that] our Constitution is a document committed to social transformation." Mkontwana v. Nelson Mandala Metro. Municipality 2005 (1) SA 530 (CC) at 565 para. 81 (S. Afr.). *See* Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351 (2006).

293 Klare, *supra* note 292, at 150.

294 Eric Kibet & Charles Fombad, Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa, 17 Afr. Hum. Rts. L.J. 340, 350 (2017).

295 Professor Lucy Williams notes that South Africa's jurisprudence regarding the right to housing is the most developed of its social and economic rights provisions, which may be explained by the "profound trauma of forced removals and evictions during the apartheid era" and history of race-based land occupation that continues to result in a maldistribution of property. Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816, 819–20 (2014). In invalidating the death penalty, the South African Constitutional Court noted the role that the death penalty had played in advancing apartheid. *See* Kibet & Fombad, *supra* note 294, at 360 (discussing S v. Makwanyane & Another, 1995 (3) SA 391 (CC) (S. Afr.)).

296 Kibet & Fombad, *supra* note 294, at 350.

Transformative constitutionalism reflects "a constitutional commitment to broad-scale social transformation" that envisions the "state as a catalyst of fundamental social change."[297] Unlike the classic liberal constitutional model, transformative constitutionalism does not stop at formal legal equality. Instead, it emphasizes substantive justice and requires that the state "ensure that rights are indeed enjoyed."[298] This imposes an obligation on the state to take action to realize rights, both by abolishing structures that make it impossible for people to enjoy their rights and by creating enabling structures and supports.[299]

While the term "transformative constitutionalism" developed in the 1990s, transformative approaches can be found in earlier constitutions.[300] For instance, after World War II, as Germany sought to create a democratic state that would not repeat the human rights abuses of the Nazi regime, the German constitution adopted affirmative state duties and horizontal application of constitutional principles to private law, which are viewed as elements of transformative constitutionalism.[301]

Below I consider how adopting elements of transformative constitutionalism, considering rights violations while taking into account history and context, imposing an affirmative state obligation to realize rights—including socioeconomic rights—and the horizontal application of constitutional duties could help better realize reproductive justice.

A. *History and Context*

Like transformative constitutionalism, reproductive justice requires that we recognize that "past abuses of women's reproductive

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297 Hailbronner, *supra* note 291, at 540.

298 Kibet & Fombad, *supra* note 294, at 353. *See* Eric C. Christiansen, *Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice*, 13 J. GENDER, RACE & JUST. 575, 575 (2010).

299 Kibet & Fombad, *supra* note 294, at 353; Hailbronner, *supra* note 291, at 533–34 (describing transformative constitutionalism as "a commitment to *social and political* change" including access to vital socio-economic goods and addressing "old hierarchies and inequalities" in the private relationships); Professors Kibet and Fombad note that the South African constitution was drafted at a moment when "[l]iberal ideology, premised mainly on formal autonomy and abstract equality, had been on the decline" and recognition that constitutions fashioned in the European model "failed to meet the peculiar needs of African situations characterized by widespread poverty, underdevelopment, wide ethnic and cultural diversity as well as African communitarian orientation." Kibet & Fombad, *supra* note 294, at 349.

300 *See, e.g.*, Hailbronner, *supra* note 291, at 541–45 (discussing German transformative constitutionalism emerging after World War II).

301 *Id.*

bodies live on in contemporary harms and coercions[.]"[302] In the United States, that requires understanding our history of colonialism, slavery, white supremacy, nativism, cis-heteropatriarchy, and ableism when evaluating constitutional harm. It also requires recognizing that context and intersectional identities shape individuals' experiences of reproductive oppression.

B. *Positive Rights, Socioeconomic Rights*

If we recognized reproductive justice as a positive liberty right to self-determination and equal personhood, what would it look like?[303] First, at the very minimum, it would prohibit the state from adopting laws and policies specifically designed to coerce, rather than enable procreative choices. This would prevent the use of state benefit programs to burden the exercise of disfavored procreative choices, such as abortion funding restrictions and welfare family caps.[304] If we recognized a positive right to reproductive justice, states also would be prohibited from imposing new obstacles impeding access to reproductive health services. More importantly, they would have to take affirmative steps to change or abolish unjust practices and oppressive structures, and to adopt policies that enable people to enjoy their rights.[305]

An affirmative duty to ensure socioeconomic rights is inextricably linked to reproductive justice and transformative constitutionalism. Guaranteeing that basic needs are met is a precondition to promoting equality and empowering excluded segments of society.[306] Indeed, if we recognized an affirmative state duty to ensure basic socioeconomic rights, including health care and an adequate standard of living, the coercive nature of withholding benefits to coerce reproductive decision-making becomes all the more clear.

Both the right to health care and a positive right to reproductive autonomy would impose government obligations to ensure a full range of reproductive health services—contraception, abortion, prenatal, obstetric and post-partum care, and STD and cancer screening. This would require the government to take action to ensure that these

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302 ROSS & SOLINGER, *supra* note 2, at 12.

303 *See* Copelon, *supra* note 12, at 41 (discussing the difference between "positive liberty of self-determination and equal personhood" and the "negative and qualified right to be left alone by the state").

304 Soohoo, *supra* note 8, at 435.

305 Roberts, *supra* note 12, at 310–11.

306 Kibet & Fombad, *supra* note 294, at 353.

services are available and accessible to all people throughout the country, and that inability to pay does not deter access.[307]

In order to achieve reproductive justice, government affirmative obligations must go further than ensuring the right to "not parent." Reproductive justice activists emphasize that exercising a choice that is the best among bad options is not true reproductive autonomy.[308] Thus, positive obligations must go beyond access to reproductive health services and address material conditions that influence a person's decision about whether to have a child, including access to a living wage, housing, child care, and a safe and healthy environment.[309]

In addition to creating enabling conditions, an affirmative obligation to ensure reproductive justice requires ending practices and structures that lead to oppression. This would include working to eradicate discriminatory and patriarchal attitudes that drive policies to encourage, discourage, or impede child bearing by particular groups or individuals. It also would include working to decrease the number of people in carceral settings,[310] and to reform or abolish institutions like ICE and prisons, where coercive and dehumanizing conditions have led to forced and coerced sterilizations and other human rights abuses.

C. *Horizontal Application of Rights*

Transformative constitutionalism recognizes that "constitutional rights and values may be threatened by extremely powerful private actors and institutions as well as governmental ones, and the [limitation of constitutional protections to actions committed by the state] automatically privileges the autonomy and privacy of such citizen-threateners over that of their victims."[311] Countries that recognize horizontal constitutional duties vary in their approaches, with some adopting "strong" horizontal application and others simply requiring

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307 In *Lakshmi Dikta v. Nepal,* the Nepal Constitutional Court held that the government had an obligation to ensure that no woman was denied a legal abortion because she could not pay for it. In C-355/06, the Constitutional Court of Columbia stated that abortion services should be available throughout the country and no woman should be denied care because she lacks insurance or cannot pay for services. *See* Soohoo, *supra* note 8, at 432, 433; Copelon, *supra* note 12, at 41.

308 ROSS & SOLINGER, *supra* note 2, at 123.

309 *Id.*

310 Roth & Ainsworth, *supra* note 280, at 12.

311 Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 395 (2003); *see* Hailbronner, *supra* note 291, at 533.

courts to consider constitutional values when adjudicating private disputes.[312]

Throughout U.S. history, reproductive oppression has occurred at the hands of non-state actors, including slave owners, spouses, partners, family members, and medical professionals. Given the privatization of health care and health insurance in the United States, private actors enjoy significant control over the delivery of reproductive health services. Transformative constitutionalism would prohibit powerful private actors from abusing their power to deny others the ability to exercise reproductive self-determination.

In the reproductive health context, health care providers often assert the right to limit the range of health care options provided to patients based on providers' religious or moral views. A constitutional commitment to reproductive justice would ensure that conscience claims do not undermine access to reproductive health services. For instance, in trying to balance religious objections to abortion with a woman's right to end a pregnancy, some countries limit religious refusal to individuals who have been asked to directly perform or assist in abortions and require doctors who refuse to provide services to refer patients to other providers.[313] Human rights bodies also have held that states have an obligation to ensure the availability of non-objecting providers.[314] Such limitations on conscience claims and attention to ensuring that patients have alternative means to access services prevent private actors from denying others reproductive self-determination.

IV. ATTEMPTS TO CHANGE

The prior Section discussed possible alternative constitutional structures that could create a legal framework to end reproductive oppression. Given that it may be difficult to amend the Constitution, in this Section I consider some approaches inspired by transformative constitutionalism that would not require major shifts in constitutional interpretation. I focus on federal arguments, but I note that state constitutional litigation may also provide opportunities, especially in

312 Gardbaum, *supra* note 311, at 395–402 (describing Ireland, South Africa and the European Union as binding private actors to comply with certain constitutional rights and Canada and Germany adopting an indirect approach).

313 Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 187, 210–11 (Susanna Mancini & Michel Rosenfeld eds., 2018); U.N. Hum. Rts. Comm., General Comment 36, U.N. Doc. CCPR/C/GC/36, para. 8.

314 NeJaime & Siegel, *supra* note 311, at 213–14.

states with constitutions that explicitly include socioeconomic rights or reflect affirmative duties.[315]

A. *Gender Mainstreaming, Intersectional Identities, and Context*

Over time, the Supreme Court's substantive due process doctrine has enabled the Constitution to protect the fundamental rights of individuals who may not have been envisioned as rightsholders at the founding. By rejecting the idea that the liberty protected by the Due Process Clause only encompasses rights explicitly listed in the Constitution or recognized when the Fourteenth Amendment was ratified,[316] the Supreme Court has made it possible to protect the liberty and autonomy interests of women and people with the capacity to become pregnant. Indeed, in *Casey*, the Court can be viewed as engaging in "gender mainstreaming" by recognizing that "the urgent claims of the woman to retain the ultimate control over her destiny and her body [are] implicit in the meaning of liberty."[317]

However, in order to end reproductive oppression, the Court must do more than recognize that a rights holder may be a woman or person with procreative capacity. In determining whether a particular restriction imposes constitutional harm, the Court also should inquire how the restriction impacts a rights holder given their intersectional identities and context.[318] *Casey* arguably sanctions this approach. In *Casey*, the Court struck down a spousal notification requirement because it would create a substantial obstacle to abortion for women married to abusive spouses.[319] Following *Casey*, several lower courts

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315 *See* Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997 (2010) (discussing theories for enforcing socio-economic rights under state constitutions).

316 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

317 *Id.* at 869.

318 Professor Cary Franklin describes the history of the Court's incorporation of class-based concerns in its abortion jurisprudence in her article. Franklin, *supra* note 213, at 13 (arguing that "mechanisms that sometimes require courts to examine the effects of governmental regulation on women without financial resources" are built into substantive due process doctrine).

319 The Court emphasized that its inquiry must focus on the impact of the requirement on married women who did not wish to notify their husbands, and also recognized that women who are victims of domestic violence have good reason not to wish to notify their husbands. *Casey*, 505 U.S. at 893–95. Notably, the Court declined to find a mandatory twenty-four-hour waiting period requiring two visits to a provider unconstitutional, even though the district court found it would be "particularly burdensome" to "women who have the fewest financial resources, those

considered the obstacles imposed by abortion restrictions in light of the actual circumstances facing certain women.[320] These courts considered "the interaction of the regulation with other challenges in women's lives."[321] Courts specifically considered the impact abortion restrictions would have on women with limited incomes.[322] State courts that struck down abortion funding restrictions under their state constitutions applied a similar analysis, which looked at how funding restrictions actually affected poor women given their lack of resources.[323] In those cases, some state courts suggested that the state had an obligation to provide more—not less—support for the rights of poor women to access abortion.[324]

In the 2016 Supreme Court case *Whole Woman's Health v. Hellerstedt*, the district court decision that initially held that two health regulations, which would result in the closure of three-quarters of the abortion clinics in Texas, were unconstitutional specifically considered how the closures would impact women in light of their actual circumstances. It found that "increased travel distances" combined with "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, [and] poverty level" established "a *de facto* barrier to obtaining an abortion."[325] The district court emphasized that while a "woman with means, the freedom and ability to travel, and the desire to obtain an abortion, will always be able to obtain one, in Texas or

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who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others." *Id.* at 886. However, the Court appeared to base its holding on the lack of a specific district court finding that the increased costs and potential delays amounted to a substantial obstacle for a group of women. *Id.* at 886–87.

320 *See* Jackson Women's Health Org. v. Currier, 760 F.3d 448, 458 (5th Cir. 2014) (reviewing "the entire record and factual context in which the law operates"); Planned Parenthood Se., Inc. v. Strange, 9 F. Supp. 3d 1272, 1285 (M.D. Ala. 2014) (holding that "[c]ontext matters" and requires "a careful, fact-specific analysis of how the restrictions would impede women's ability to have an abortion, in light of the circumstances of their lives").

321 *Strange*, 9 F. Supp. 3d at 1285; *see also* Planned Parenthood Ariz., Inc. v. Humble, 753 F.3d 905, 915 (9th Cir. 2014) (considering "the ways in which an abortion regulation interacts with women's lived experience").

322 *See, e.g.*, Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 919 (7th Cir. 2015) (noting that a ninety-mile trip could be a "big deal" for fifty percent of Wisconsin women seeking abortions with incomes below the federal poverty line); *Humble*, 753 F.3d at 915 (considering how an abortion regulation "interacts with women's lived experience [and] socioeconomic factors").

323 *See* Soohoo, *supra* note 8, at 414–15.

324 *Id.*

325 Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014), *aff'd in part*, *vacated in part*, *rev'd in part*, Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015).

elsewhere," the Constitution "guarantees to all women, not just those of means, the right to a previability abortion."[326]

Significantly, the district court's inquiry was not limited to the impact of class identity and lack of economic advantage. The court emphasized that the travel distances "*combine* with practical concerns unique to every woman,"[327] and it specifically recognized that immigration status and the context of rural geography should also be taken into account.[328] It specifically expressed concern about the substantial barriers imposed on immigrant women who lived in the rural Rio Grande Valley and El Paso, who faced "higher-than-average poverty levels, and other issues uniquely associated with minority and immigrant populations."[329] These issues included roving immigration checkpoints, which isolated women in communities that lacked health care and the lack of transportation infrastructure.[330] However, on appeal, the Fifth Circuit explicitly rejected the district court's approach, asserting that the court should only consider burdens created by the "law itself."[331]

Ultimately, when the Supreme Court decided *Whole Woman's Health*, it did not address whether the undue burden standard requires that courts consider intersectional identities and context in evaluating the burden that a law places on abortion access. This is because the Court adopted a balancing test that considered "the burdens a law imposes on abortion access together with the benefits those laws confer."[332] Because the Court concluded that the challenged regulations provided no health benefit, the Court did not consider the burden imposed by the regulations in any depth.[333]

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326 *Id.* at 683.

327 *Id.*

328 *See* Madeline M. Gomez, Note, *Intersections at the Border: Immigration Enforcement, Reproductive Oppression, and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84, 108–09 (2015) (describing particular barriers impacting abortion and healthcare access for Latinas in the Rio Grande Valley, including isolated communities lacking health care and other infrastructure and an immigration system that traps women in their communities).

329 *Lakey*, 46 F. Supp. 3d at 683.

330 *Id.*

331 Whole Woman's Health v. Cole, 790 F.3d, 563, 589 (5th Cir. 2015), *opinion modified by* 790 F.3d 598 (5th Cir, 2015), *rev'd and remanded*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

332 *Hellerstedt*, 136 S. Ct. at 2309–10.

333 *Id.* at 2311–16. In the 2020 case *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), the Supreme Court revisited the constitutionality of a law that was almost identical to one of the laws struck down in *Whole Woman's Health*. While the Court struck down the law, Justice Roberts's concurrence appeared to depart from the balancing test, suggesting that greater attention will be paid to the burdens imposed by abortion restrictions in the future. *Russo*, 140 S. Ct. at 2135–38.

B. *The Thirteenth Amendment and Transformative Constitutionalism Revisited*

Professor Michaela Hailbronner describes U.S. constitutionalism as "the counter-paradigm" to the transformative constitutionalism that has developed in the Global South.[334] Yet, there is one constitutional provision that imposes an affirmative obligation on the government and constitutional duties on private actors: the Thirteenth Amendment.[335]

Forged in a moment of national transition, the Thirteenth Amendment articulated a constitutional commitment to societal change and re-forged the Constitution as an antislavery document.[336] In addition to abolishing slavery, the Amendment created an affirmative governmental duty to end subordination, including subordination imposed by private actors. [337] Indeed, rather than occupying a "neutral position" between nonstate actors, the Thirteenth Amendment takes the side of those who are subordinated, prohibiting "certain uses of freedom, particularly those used for domination" and

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334 Hailbronner, *supra* note 291, at 536, 540.

335 *See* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . .).

336 *See* Tsesis, *supra* note 33, at 322–23. Professor Richard Albert has argued that the Civil War Amendments are "better understood as dismemberments" because they amounted to more than amendments as traditionally understood. Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1, 4–5 (2018). He defines dismemberments as "self-conscious efforts to repudiate the essential characteristics of the constitution . . . [that] dismantle the basic structure of the constitution [and build] a new foundation rooted in principles contrary to the old." *Id.* at 2–3. Passed after the Civil War, the Reconstruction Amendments created a national commitment to equality and demolished the infrastructure of slavery in the original Constitution. *Id.* at 4.

337 Professor Rebecca Zietlow has argued that the Thirteenth Amendment creates a positive guarantee against racial discrimination and exploitation of workers. Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 266 (2010); *see also* William M. Carter, Jr., *Race, Rights and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1332–33 (2007) (arguing that under abolitionist philosophy reflected in the Thirteenth Amendment "not only was the federal government required to refrain from action that denied the humanity of those subject to its jurisdiction, it was also required to take positive action to prevent the states and private persons from doing the same").

making "exploitative use of power an unconstitutional abuse of freedom."[338]

Section 1 of the Thirteenth Amendment abolishes slavery and involuntary servitude,[339] and Section 2 gives Congress enforcement power through appropriate legislation.[340] There is continued debate about the breadth of Section 1's self-executing prohibition on slavery and involuntary servitude,[341] and without Supreme Court guidance, lower courts have interpreted Section 1 narrowly, limiting its prohibition to chattel slavery and physically or legally coerced labor.[342] Scholars have argued that Section 1's scope is much broader and includes at least some "incidents" of slavery.[343]

Professor Bridgewater criticizes Thirteenth Amendment doctrine for failing to reflect women's experience during slavery.[344] As discussed *supra* in Section II.B.1, reproductive exploitation was a pillar of the institution of slavery. Explicitly recognizing reproductive oppression as a core component of slavery prohibited by the Amendment would better reflect the realities of slavery, as well as contemporary understandings of the institution that Congress intended to abolish.[345]

During debates about the Thirteenth Amendment, members of Congress frequently referred to disabilities in marrying, sexual relations, and raising children imposed on enslaved people when arguing for abolition.[346] Professor Bridgewater writes:

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338 Tsesis, *supra* note 33, at 311 ("[T]he Thirteenth Amendment prohibits private and public acts resulting in arbitrary deprivations of freedom.")

339 U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ."); *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

340 U.S. CONST. amend. XIII, § 2.

341 Carter, *supra* note 337, at 1314; James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 428 (2018).

342 Carter, *supra* note 337, at 1315, 1340–41; Pope, *supra* note 341, at 462.

343 Carter, *supra* note 337, at 1342–44 (stating that legislative history makes clear that the Thirteenth Amendment itself was intended to relieve enslaved people from "the oppressive incidents of slavery"); Pope, *supra* note 341, at 464.

344 Bridgewater, *supra* note 38, at 40.

345 *Id.* at 33–35 (noting that abolitionists organized opposition to slavery around sexual and reproductive abuses). *See* Patricia Viseur Sellers & Jocelyn Getgen Kestenbaum, *The International Crimes of Slavery and the Slave Trade: A Feminist Critique, in* GENDER AND INTERNATIONAL CRIMINAL LAW (Valerie Oosterveld, Indira Rosenthal & Susana SáCouto, eds., 2021), Cardozo Legal Studies Research Paper No. 622, 2, 14 (arguing that historically sexual practices and the violation of sexual integrity and reproductive autonomy have been integral to slavery at 2, 14).

346 Pope, *supra* note 341, at 434–35 (quoting statements from the Amendment's floor leader and Senators); *see also* Tsesis, *supra* note 33, at 327 (stating that "Representative Ebon C. Ingersoll . . . . asserted that [slaves] have a right . . . to enjoy conjugal happiness without fear of forced separations at the behest of uncompassionate masters"). Professor Tsesis notes that the first use of the term "incident of servitude," by Senator James Harlan in 1864, referred to the

> While Congressional debates over the Thirteenth Amendment fell short of clearly delineating the precise conditions of slavery intended to be eradicated by the constitutional declaration, references to reproduction, sex, and familial ties were made frequently when compared to specific references to other conditions. In other words, the degree of specificity and frequency that Congress mentioned reproductive and sexual abuse is on an equal footing with any other condition of slavery.[347]

Given the evidence that Congress considered reproductive oppression a condition of slavery, Professor Bridgewater argues that more recent forms of reproductive oppression should be recognized as "offensive to the notions of freedom and liberty embodied in the Thirteenth Amendment."[348] A modern understanding of prohibited conduct would include "the government's manipulation of reproduction to advance the interests of the powerful via the procreative control of the less powerful."[349] It follows that direct government interference or control over reproductive decision-making (e.g., compulsory sterilization and legal prohibitions on abortion or contraception) violates the Thirteenth Amendment. Arguably, laws denying access to abortion and imposing forced pregnancy also violate the Amendment's prohibition on involuntary servitude,[350] but the heart of a slavery-based reproductive oppression claim focuses on the denial of reproductive autonomy and applies both to forced child bearing and parenting and forced sterilization. Professor Bridgewater asserts that the Thirteenth Amendment goes further than prohibiting direct legal compulsion and also prohibits oppressive government coercion of reproductive decisions. Specifically, she analogizes tying the receipt of benefits or grant of probation in a criminal case to the use of Norplant to the system of punishments and rewards doled out by slave owners to encourage reproduction.[351] In both situations, the government or the slaveowner abuses positions of power and conditions the satisfaction of fundamental needs upon the relinquishment of reproductive self-determinism.[352] Professor Bridgewater's analysis would also apply to coercive sterilization and laws designed to deter people from obtaining

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"prohibition of the conjugal relation" and that abolitionist Theodore Weld emphasized enslaved parents' lack of control over their children's upbringing. *Id.* at 372, 377.

347 Bridgewater, *supra* note 38, at 35–36.

348 Bridgewater, *supra* note 231, at 416.

349 *Id.* at 422–23.

350 *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 487 (1990) (arguing that laws outlawing abortion essentially coerce a woman's services and invade her body for the benefit of a fetus).

351 Bridgewater, *supra* note 231, at 423.

352 *Id.*

abortions by creating obstacles, such as funding restrictions or unreasonable health regulations designed to shut down abortion providers.

To the extent that courts are reluctant to find that the Thirteenth Amendment creates a self-executing right to be free from reproductive oppression as a core component or incident of slavery prohibited under Section 1, the Supreme Court has held that Congress can adopt legislation under Section 2 that goes beyond prohibiting chattel slavery and involuntary servitude narrowly defined to abolish the "badges [or] incidents of slavery."[353] Professor William M. Carter, Jr. argues that in order to constitute a badge or incident of slavery, a particular harm must have a concrete connection to the system of slavery.[354] His analysis requires a case-by-case inquiry that considers the history of slavery and its effects on the descendants of enslaved people and American society.[355] The test looks at both the subordinated group and the harm alleged and "as the group's link to slavery grows more attenuated, the nature of the injury must be more strongly connected to the system of slavery to be rationally considered a badge or incident thereof."[356] Under his analysis, Black women who are, or are perceived to be, descendants of enslaved people, confronted with reproductive oppression, a documented practice and an essential aspect of slavery, constitute a "paradigmatic" badges and incidents claim.[357] The claim is strengthened by the fact that stigma and stereotypes about Black women's hypersexuality, fertility, and parenting were integral to justifying the system of slavery, and continue to be reflected in contemporary coercive reproductive policies. Similar policies targeting other women of color based on group stigma and stereotypes replicate a key aspect of the system of slavery and should also be considered a

353 Zietlow, *supra* note 337, at 262–63, 276–77; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968).

354 Carter, *supra* note 337, at 1369.

355 *Id.* at 1366. According to Professor Carter "a badges or incidents of slavery claim must demonstrate some concrete connection either to the effects that slavery had upon its immediate victims (African Americans) or upon American laws, customs, or traditions." *Id.*

356 Carter, *supra* note 337, at 1318; Pope, *supra* note 341, at 468 (noting that judges, legislators and scholars "generally focus on two elements: (1) group targeting, with African ancestry and previous condition of servitude being the core cases, and (2) some causal, genealogical, analogical, or functional connection between the particular injury . . . and the law, practice, or experience either of chattel slavery itself or of the post-slavery resubjugation of African Americans").

357 Carter, *supra* note 337, at 1366–68 (describing the "paradigmatic badges and incidents slavery claim").

badge or incident of slavery.[358] If reproductive oppression is recognized as a core component of slavery, the claim can be broadened to include all women.[359]

If reproductive oppression is recognized as a core component of slavery or a badge or incident of slavery, Congress and the Executive Branch would have the power, and possibly the obligation, to adopt measures addressing the material conditions that prevent reproductive justice.[360] This could be done by allocating funding for a full range of reproductive health services and taking steps to ensure that there are sufficient facilities providing reproductive care. It would also require laws and policies to prevent private actors from improperly coercing reproductive decisions.[361] While the rights and liberties of private actors should be taken into account when crafting such measures, the Thirteenth Amendment places a clear limitation on private actions that result in reproductive subordination and imposes an obligation on the government to prohibit private actions that result in arbitrary domination.[362]

CONCLUSION

Throughout the history of the United States, communities have faced different forms of reproductive oppression, but a common element has been the instrumentalization of women's bodies and procreative capacity to achieve the goals of others. While procreative capacity has placed women uniquely at risk for reproductive oppression, the form and intensity of the oppression have depended on their other identities. Building on the work and analysis of reproductive justice activists and scholars, this Article describes how slaveholders, families, the medical profession, other powerful private actors, and the state have tried to force/encourage or prevent/discourage reproduction

358 *Cf. id.* at 1373 (arguing that racial profiling of Arabs and Muslims should be considered a badge or incident of slavery because subjugation "equating membership in [a] group with a negative trait" replicated a key aspect of the slave system).

359 Alternatively, some scholars argue that "any act motivated by arbitrary class prejudice should be regarded as imposing a badge of slavery on its victim." *Id.* at 1364. Under this test scholars have argued that certain forms of subordination imposed on women as a class satisfy the test. Pope, *supra* note 341, at 479–80.

360 *See* Zietlow, *supra* note 337, at 258–59 (arguing that the Thirteenth Amendment creates positive obligations on the state to address socioeconomic conditions).

361 Tsesis, *supra* note 33, at 339 ("Congress has the power to legislate against state or private infringements that arbitrarily interfere with individuals' right to live freely.").

362 *Id.* at 389 ("[L]aws passed under Section 2 against any badges of involuntary servitude must make it easier for people to express their individuality and prevent arbitrarily domineering private and state actions.").

based on various motives, including profit, eugenics, white supremacy, and population control ideologies. More recently, overt governmental compulsion has been replaced by other forms of coercion that do not legally compel reproductive choices,[363] but instead operate by restricting the range of viable choices[364] or making a woman "an offer she can't refuse." Because these forms of reproductive oppression rely on existing power inequalities to gain their coercive force, the harm they inflict is often rendered invisible under our current legal system.

Given the entrenched nature of many of the power inequities that facilitate reproductive (and other forms of) oppression, I have argued that truly achieving reproductive justice requires a transformative approach. This approach would require taking context into account in determining whether rights violations have occurred, including history, power relationships, and the intersectional identities of rights holders. It would impose affirmative obligations on the government to promote reproductive justice and horizontal obligations preventing private acts of reproductive oppression.

The Thirteenth Amendment provides a natural home for some transformative approaches, and there is evidence that Congress understood reproductive oppression as a condition of slavery abolished by the Amendment. However, a transformative approach to reproductive justice requires more than textual support in the Constitution. It requires a social commitment to ending all forms of oppression "so that women and girls are able to thrive, to gain self-determination, to exercise control over [their] bodies, and to have a full range of reproductive choices."[365] This broader social transformation can only be accomplished through the hard work of activists and organizers. But as lawyers we have a crucial role to play in transforming legal culture.

In a 2006 address, the late Chief Justice Pius Langa of the South African Constitutional Court identified the transformation of legal education and culture as two major challenges for transformative constitutionalism.[366] In the South African context, Professor Lesley Greenbaum explains that it was crucial for lawyers to understand how

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363 Examples include criminal restrictions on abortion or contraception and compulsory sterilization laws.

364 Examples include manipulation of government benefits to burden or coerce choices; state laws designed to shut down abortion providers, private health care providers or institutions that refuse to provide services in situations where there are no alternative providers; and coercive pressure imposed upon women by health care providers.

365 ACRJ, *A New Vision*, *supra* note 3, at 2.

366 Lesley Greenbaum, *Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with our Educational Legacy*, 60 N.Y.L. SCH. L. REV. 463, 469–70 (2016).

the law had been "used as an instrument of oppression in the past" and the "disconnect" between the country's old "conservative legal culture and the transformative imperatives of a post-liberal constitution[.]"[367] Similarly, lawyers in the United States committed to ending reproductive oppression must work to change our legal culture by recognizing the ways in which the law has been used to impose or perpetuate reproductive and other forms of oppression, rejecting formalist habits and "inflexible legal positivism" and instead embracing a substantive commitment to societal transformation and reproductive justice.[368]

367 *Id.* at 469–70.

368 *Id.* (quoting Dikgang Moseneke, *Transformative Adjudication*, 18 S. AFR. J. ON HUM. RTS. 309, 316 (2002)) (describing an address by former Chief Justice Pius Langa).