Jane Crow Constitutionalism

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Jane Crow Constitutionalism

Evan D. Bernick*

On June 24, 2022 The United States Supreme Court issued its decision on Dobbs v. Jackson Women’s Health Organization; overturning Roe v. Wade, and destroying fifty years of precedent to protect the constitutional right to abortion in the United States. This overturning sets a dangerous, new precedent that reinforces the State’s control of reproduction, and criminalizes a woman’s right to choose, with very few exceptions. In states like Mississippi, Black women are already experiencing the highest rates of maternal mortality, incarceration, and poverty.

This article posits that Dobbs operates to maintain a racialized and gendered underclass, and names this phenomenon “The New Jane Crow.” Though provocative, the phrase fits the phenomenon, given substantive and functional continuities between state control of reproduction past and present. Dobbs celebrates the demise of Plessy v. Ferguson, upholding the constitutionality of “separate but equal,” as an example of the importance of overruling egregiously wrong precedents. But Justice Samuel Alito’s opinion for the Court in Dobbs has more in common with Plessy than its author recognizes. This article details the how and the why.

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INTRODUCTION

Rennie Gibbs was 16 when she gave birth to her stillborn daughter Samiya. She was seventeen years old when she indicted for “depraved heart murder” by a Lowden County, Mississippi grand jury. The indictment accused Rennie of “unlawfully, willfully, and feloniously” causing the death of her baby by smoking crack cocaine during her pregnancy. She faced the prospect of life imprisonment for the death of her daughter, who entered the world with her umbilical cord wrapped around her neck and never took a breath. It would be seven years before the charges were dismissed.

Mississippi has one of the worst records for maternal and infant health in the United States. Gibbs is Black, and many factors linked to prenatal and infant mortality are particularly prevalent among Black women, who suffer twice as many stillbirths as White women. Mississippi also locks up more of its population than any state in the Union and indeed any democracy in the world. Between 1980 and 2015, the number of women in Mississippi jails increased 944 percent, and the number of women in prison increased 1,081 percent.

But if Mississippi is unusual in respect of the sheer numbers of people whom it incarcerates, it is not unusual in expanding state control over reproduction. Tens of thousands are imprisoned in U.S. jails and prisons every year. Nearly a million are on probation, parole, or pretrial release. This carceral control is unevenly distributed, being primarily exercised over poor women of color. And it is growing.

These realities are part of what has been conceptualized as “the New Jane Crow,” and Dobbs v. Jackson Women’s Health Org. gives them the U.S. Supreme Court’s constitutional blessing. Dobbs celebrates the demise of Plessy v. Ferguson, upholding the constitutionality of “separate but equal,” as an example of the importance of overruling egregiously wrong precedents. But Justice Samuel Alito’s opinion for the Court in Dobbs has more in common with Plessy than its author recognizes. This Essay details how and why.

Part I provides an overview of the New Jane Crow, tracing the genealogy of the term and describing the phenomenon that it names. The New Jane Crow existed before Dobbs, and it encompasses all state control of reproduction that operates to maintain a racialized and gendered underclass. Though provocative, the phrase fits the phenomenon, given substantive and functional continuities between state control of reproduction past and present.

Part II describes how Dobbs constitutionally legitimates key components of the New Jane Crow and encourages its expansion.

Part III goes one step further, analogizing Dobbs to Plessy in three respects. First, in its disregard of relevant history. Second, in its lack of attention to present socioeconomic realities. Third, in its capacity to produce effects that outstrip its context and provide constitutional legitimation to an entire political-economic order that perpetuates racialized and gendered subjugation.

12. Id.
13. Id.
15. Id. at 2279.
I. JANE AND JIM CROW, OLD AND NEW

A. THE CAREER OF JANE CROW

The phrase “the new Jane Crow” is original to Black legal theorist and activist Dr. Pauli Murray. Murray’s foundational work analogizing race and sex shaped Equal Protection doctrine and the text of Title VII of the Civil Rights Act of 1964. She articulated the basic premises of the analogy in an influential 1961 memorandum which she circulated while serving on the Committee on Civil and Political Rights of the President’s Commission on the Status of Women. First, women and racial minorities are easily identifiable. Second, they are underrepresented in formal political decision-making. Third, they face considerable resistance from dominant social groups. Fourth, their subordination is defended on the basis of their supposed inferiority. And fifth and finally, racial and sexual inequality emerged from similar causes and served similar social functions. To establish this last premise, Murray drew upon a number of sociological, anthropological, and philosophical sources, including Gunnar Myrdal, Helen Mayer Hacker, Ashley Montagu, and Simone de Beauvoir.

As Serena Mayeri has detailed, Murray deployed the analogy for two purposes. She sought to “persuad[e] skeptics that the eradication” of sex discrimination “deserved moral commitment and legal mobilization equivalent to the fight against ‘Jim Crow.’” And she aimed to “universalize demands for rights that threatened to … force a false choice between the interests of blacks and women—a choice that erased those at the intersection of the categories.” When Representative Howard Smith of Virginia—an adamantly opposed the Civil Rights Act—proposed that “sex” be included as a prohibited basis for discrimination, there was a real possibility that the bill would be derailed by disagreement between supporters over whether including sex would undermine the bill’s primary purpose of eradicating racial

19. See id. at 1056-57.
20. Id.
21. Id.
22. Id.
23. Mayeri, supra note 18.
24. Id.
25. Id.
26. Id. at 1045.
27. Id. at 1067.
discrimination. Murray urged that including sex was critical to achieving this purpose because “it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against race and sex.”

Prohibiting sex discrimination was the only way in which half of the Black work force could share in the benefits of Title VII. “Jane Crow” thus served moral and coalitional purposes. It communicated the moral harms of sex discrimination and brought together forms of discrimination that might otherwise be regarded as competing political priorities.

Today, “the New Jane Crow” brings to mind the work of another Black scholar and activist, Michelle Alexander. In her best-selling 2010 book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Alexander uses the Crow analogy to illuminate and critique “mass incarceration,” understood as “not only . . . the criminal justice system but . . . the web of laws, rules, policies, and customs that control the people labeled criminals both in and out of prison.”

She describes mass incarceration as a “caste system . . .” that has “caged millions of poor people of color and relegated millions more to a permanent second-class status.”

Like Murray, Alexander uses the analogy to motivate moral opposition and justifies the analogy on causal and functional grounds. Mass incarceration, she argues, is caused by White supremacy. It operates, as the old Jim Crow did, through the targeting, confinement, and disenfranchisement of people of color—and here Alexander underscores young Black men. This operation is not accidental; the relevant institutions are given shape and implemented by people who associate young Black men with crime and danger.

In a 2012 introduction to the second edition of her book, Alexander acknowledges criticism that her focus was too narrow—that it excluded women in general (who are the fastest-growing prison demographic) and Black women in particular (whose incarceration rate is double that of White women). It fell to Lynne Paltrow and Michele Goodwin, bringing together


29. Mayeri, supra note 18, at 1065-66 (citing Pauli Murray, Memorandum in Support of Retaining the Amendment to H.R. 7152, Title VII (Equal Employment Opportunity) To Prohibit Discrimination in Employment Because of Sex 4-5 (Apr. 14, 1964) (Pauli Murray Papers, MC 412, Box 85, Folder 1485, on file with the Schlesinger Library, Radcliffe Institute, Harvard University)).

30. See id. at 1066.


32. *Id.* at 13.

33. See *id.* at 26, 106-07.

34. See *id.* at 178-80.

35. See *id.* at 15.
Murray and Alexander, to label the mass incarceration of women of color “the New Jane Crow.”

Paltrow, the founder and executive director of the National Advocates for Pregnant Women, initially used “Jane Crow” to describe state increases in female imprisonment in the 2010s. These increases disproportionately included Black women. They were, she argued, the result of “[e]fforts to establish separate legal ‘personhood’ for fertilized eggs, embryos, and fetuses” and were “being used as the basis for the arrests and detentions of and forced interventions on pregnant women, including those who seek to go to term.”

In a previous paper with Jeanne Flavin, Paltrow documented 413 cases of arrests and forced interventions on pregnant women in the US between 1973 and 2005. They found that in the majority of cases, drug use was the basis of arrest and prosecution; that “low-income women, especially in some southern states, are particularly vulnerable to these state actions”; and that pregnant Black women were “significantly more likely to be arrested, reported by hospital staff, and subjected to felony charges.”

Drawing upon this research and noting Alexander’s emphasis on the “War on Drugs” as a contributor to mass incarceration, Paltrow predicted that personhood efforts would, “if unchecked, ensur[e] a permanent underclass for pregnant women or, for lack of a better term, a new Jane Crow. That underclass would be disproportionately Black, owing to negative stereotypes about Black women and Black maternity. Among the works cited in the footnotes in Paltrow’s “Jane Crow” essay is Dorothy Roberts’s germinal Killing the Black Body, which offers an exhaustive history of the devaluation of Black maternity.

Finally, Michele Goodwin uses “Jane Crow” to name all of the ways in which “women become the target of state policing and criminalization due to states’ intensified scrutiny of pregnancies.”

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37.  Paltrow, supra note 36.
38.  Id. at 19.
39.  Id.
41.  Id. at 333.
42.  Paltrow, supra note 36, at 17.
44.  Id. at 8.
45.  See Goodwin, supra note 36; Michele Goodwin, Lessons in Race and Racism in the Legal Academy: Notes on Pauli Murray, 73 RUTGERS U. L. REV. 913 (2020); Michele Goodwin, Reproductive Chattel: The New Jane Crow, HARV. L. & POL’Y REV. (Sep. 4, 2020),
Roberts, she contends that “protecting fetal health” has “serve[d] as a proxy for policing and punishing women, particularly Black and Brown women” and has focuses attention on statutes that “extend[] beyond penalizing . . . illicit drug use” to “sanctioning women for refusing cesarean sections, forcibly confining them to bed rest, and instigating prosecutions for otherwise legal conduct [such as ignoring doctors’ recommendations or falling down steps].”

Surveying these criminal interventions in reproductive life, she finds “historic patterns of sex subordination, race and class bias, moral panic, selective prosecutions, and the extra-legal desire to punish and shame vulnerable women.”

Goodwin laments that discussions of criminal justice, policing, and prison abolition have primarily focused on men of color. She argues that movements for racial justice cannot “gain or offer legitimate alternatives if they ignore women[]” who are “targeted because of their race, poverty, and sex” for state policing, prosecution, and imprisonment.

Over the course of its career, “the New Jane Crow” has retained a conceptual identity. For Murray, Paltrow, and Goodwin the phrase links an existing phenomenon with one widely regarded as having been rightfully overcome. For all three authors, “Jane Crow” is intended to raise alarm about an underappreciated moral evil and inspire action to combat it. The evil goes underappreciated because of the ways in which women of color experience “wrongs, and sufferings, and mortifications peculiarly their own,” as Harriet Ann Jacobs described her experience in bondage. The force of the analogy is contingent upon its perceived accuracy in describing both what was and what is, and in its power to persuade people that they should feel about the former roughly what they feel about the latter. If the analogy succeeds, it can convert an individual to a particular, morally urgent cause and help to build an intersectional politics—a politics that regards racial and gender justice as inseparable.

But Paltrow and Goodwin are not merely following Murray. “Jane Crow” now names institutions that did not exist in 1965. It is informed by experiences with state control of reproduction that are artifacts of late-20th-

47. Goodwin, supra note 36, at 568.
48. Id.
49. HARRIET ANN JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 119 (1861).

B. A HISTORY OF VIOLENCE

The New Jane Crow is not the same thing as mass incarceration, nor is it merely the form that mass incarceration takes among women of color. It encompasses material conditions, ideas, and institutions that constitute an integral part of U.S. history. But these conditions, ideas, and institutions have a specificity that resists efforts to lump them together with other forms of racialized and gendered subjugation.

1. \textit{The Shackling}

Begin with the present. Women constitute the fastest growing population of American prisoners.\footnote{See Wendy Sawyer, \textit{The Gender Divide: Tracking Women's State Prison Growth}, \textsc{Prison Policy Initiative} (January 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/3X4L-GYBY].} There are over 172,000 women in either prison or jail.\footnote{See Kajustra & Sawyer, supra note 11.} Between 1980 and 2020, the number of women in prison or jail increased by more than 475%, rising from a total of 26,326 in 1980 to 152,854 in 2020.\footnote{See Kajustra & Sawyer, supra note 11. Alice Ristroph and David Sklansky have shown that what constitutes “violence” for the purposes of criminal law is politically contingent and may not consistently correspond with ordinary intuitions about what is violent. See Alice Ristroph, \textit{Criminal Law in the Shadow of Violence}, 62 \textsc{Ala. L. Rev.} 571 (2010); David A. Sklansky, \textit{A Pattern of Violence: How the Law Classifies Crime and What It Means for Justice} (2021). That is, “violent crime” is a legal term of art. Ristroph offers the examples of theft of an unoccupied car, walking away from a prison honor camp, failing to report to a halfway house, and tampering with an automobile, all of which have been held to} The majority of women in prison have not been convicted of what are labeled “violent crimes”; in 2020, 40 percent of women in state prisons had been convicted of violent crimes, as compared to 60 percent of men.\footnote{See Kajustra & Sawyer, supra note 11.}
Imprisoned women are more likely than men to be incarcerated for drug offenses, with 26 percent having been convicted of a drug offense as compared to 13 percent of men. The latter percentage has risen over the decades, with the proportion of women convicted of a drug offense increasing from 12 percent in 1986 to 26 percent in 2019.

Not all people who can become pregnant are women, and not all women can become pregnant. But it is overwhelmingly women and girls who face harassment, arrest, and prosecution for negligent or attempted abortion, abortion, drug use, and accidents. A pregnant woman who voluntarily seeks prenatal care risks having their drug-test results reported to police without their knowledge, pursuant to policies requiring such reporting.

Consider Regina McKnight, a 22-year-old Black woman who became the first woman in the U.S. to be convicted for experiencing a stillbirth. The urine sample taken from her while in the hospital was used to prosecute her for homicide by child abuse. McKnight was sentenced to 20 years in prison; the South Carolina Supreme Court would not reverse the conviction until 2008, meaning she spent 5 years behind bars.

The law under which McKnight was prosecuted was not new. What was novel was its application to prenatal life. At common law a live birth was required for manslaughter or murder prosecutions arising from fetal harm. Today, express legislative departures from the common law are on the rise, with states revising their criminal codes to include “an unborn child” as a “person” for the purposes of assault, manslaughter, negligent homicide, and murder laws. At least 38 states have “feticide” laws in place; 29 provide that a person can be charged with homicide at any stage of pregnancy.

Meghan Boone and Benjamin Michael have shown that these criminalization efforts are undermining rather than promoting maternal and fetal health. By discouraging women from seeking prenatal care or disclosing concerns to their providers lest they face prosecution, they worsen birth

be “violent felonies” that trigger the Armed Career Criminal Act’s 15-year mandatory sentences. Id. at 607.

55. See THE SENTENCING PROJECT, supra note 10.
56. Id.
57. Goodwin, supra note 45, at 16.
58. Id.
59. Id.
60. Id.
61. Id. at 29.
62. Goodwin, supra note 45, at 35.
outcomes and increase both fetal and infant death rates.\textsuperscript{65} Meanwhile, men who use drugs, alcohol, or tobacco and father children are not criminalized.\textsuperscript{66}

In contrast to men, most women behind bars have not been convicted of any crime and thus are detained in jails, not prisons.\textsuperscript{67} 60 percent or incarcerated women are awaiting trial.\textsuperscript{68} This is in part a function of the fact that incarcerated women tend to have lower incomes and thus have a harder time than incarcerated men affording money bail.\textsuperscript{69} Incarcerated women are overwhelmingly poor, with most living well below the poverty line.\textsuperscript{70} Because the vast majority of women in jail are mothers and most are primary caretakers, the effects of this distribution on families are especially devastating.\textsuperscript{71} Jail phone calls are more expensive, and communication is more restricted.\textsuperscript{72}

Jails are especially harmful to women. Women in jails are more likely to suffer from mental health problems and psychological distress than women in prisons or men in either setting, and jails are particularly poorly positioned to provide mental or other health care. Women die of drug and alcohol intoxication at twice the rate of men.\textsuperscript{73} The number of deaths by suicide among women in jails increased by almost 65 percent between the periods of 2000-2004 and 2015-2019.\textsuperscript{74}

The first systematic study of pregnancy outcomes in the US found that during 2016-17, 1,396 pregnant people entered prison and 1,622 entered jails.\textsuperscript{75} In some state systems, miscarriage, premature birth, and cesarean section rates were higher than national rates among the general population.\textsuperscript{76} As Priscilla Coen has detailed, “many pregnant prisoners are subjected to some form of shackling during labor or childbirth[ ]” and shackling “is often standard operating procedure for the transport of women in labor and is also used as a mechanism to control and demean them during childbirth.”\textsuperscript{77} More than a dozen states have no laws limiting shackling; in a 2018 study 82.9 percent

\begin{thebibliography}{99}
\bibitem{65} \textit{Id.} at 478.
\bibitem{66} \textit{Id.} at 519.
\bibitem{67} See \textit{Kajstura & Sawyer, supra note 11.}
\bibitem{68} \textit{Id.}
\bibitem{69} \textit{Id.}
\bibitem{70} \textit{Id.}
\bibitem{71} \textit{Id.}
\bibitem{73} \textit{Id.}
\bibitem{74} \textit{Id.}
\bibitem{76} \textit{Id.} at 800.
\bibitem{77} \textit{Id.} at 803.
\end{thebibliography}
of hospital nurses reported that their incarcerated patients were shackled “sometimes to all of the time.”

Even when abortion was recognized as a fundamental federal-constitutional right, incarcerated people had difficulty exercising it. Circuits split on the question whether preventing incarcerated women from terminating their pregnancies deprives them of “liberty” in violation of the Fourteenth Amendment or constitutes cruel and unusual punishment under the Eighth Amendment. Only half of 22 state prisons sampled in a 2021 study allowed abortion in both the first and second trimesters, and 14 percent did not allow abortion at all. Even in the prisons that did allow abortion, there existed practical barriers to access. Most state prisons were located in rural areas, more than 10 miles from an abortion caregiver, and transportation availability from prison is limited. Medicaid is suspended for incarcerated people, so even where state Medicaid funded abortion for other members of the community, pregnant people would not be covered by it. Within federal prisons, the Hyde Amendment prohibits the use of Medicaid funds for elective abortions.

Incarcerated women also face barriers to any choice that they might make to have children. Many jails and prisons provide inadequate prenatal care. Incarcerated women are commonly separated from their children within 24 hours of birth—a practice that Crystal Hayes, Carolyn Sufrin, and Jamila Perritt describe as “den[y]ing both the mother and the infant the benefits that

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79. Compare Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008) (holding unconstitutional on substantive due-process grounds a policy of prohibiting transportation for elective, non-therapeutic abortions) with Victoria W. v. Larpenter, 369 F.3d 475 (5th Cir. 2005) (upholding a policy requiring an inmate to receive a court order to procure an elective abortion).
80. For an overview, see Carolyn Sufrin, Alexa Kolbi-Molinas & Rachel Roth, Reproductive Justice, Health Disparities And Incarcerated Women in the United States, 47 PERSPECTIVES ON SEXUAL AND REPROD. HEALTH 213, 214-215 (2020); see Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 351 (3d Cir. 1987) (only one circuit held that delaying or preventing an abortion violates the Eighth Amendment.).
82. Id. at 333.
83. Id. at 330.
84. Id. This prohibition applies to all federal funding for abortion care, including appropriations to the Indian Health Service (“IHS”). It thus “puts severe constraints on the financial resources that tribes could devote toward providing abortion care.” See Lauren van Schilfgaarde, Aila Hoss, Sarah Deer, Ann Tweedy, & Stacy Leeds, The Indian Country Abortion Safe Harbor Fallacy, LPE PROJECT (June 6, 2022), https://lpeproject.org/blog/the-indian-country-abortion-safe-harbor-fallacy/ [https://perma.cc/T9RU-FRKE].
come from breastfeeding."\textsuperscript{85} Despite an appalling history of forced sterilization of Black,\textsuperscript{86} Latinx,\textsuperscript{87} and Native\textsuperscript{88} women that inspired lawsuits and campaigns against sterilization by women of color and their allies in the 1970s,\textsuperscript{89} a number of states allow prisons to sterilize incarcerated people. More than 100 women incarcerated in California were sterilized by tubal ligation surgery between 2006 and 2010, reportedly under pressure from doctors who targeted pregnant women who had already had two or more children.\textsuperscript{90} In California and elsewhere, members of groups who have been historically targeted for sterilization are overrepresented in the population of incarcerated women, including Black, Latinx, and Native women.\textsuperscript{91}

Women behind bars are also disproportionately likely to experience other forms of violence. While women comprise only 7 percent of imprisoned people, they make up 33 percent of the survivors of staff-perpetrated sexual abuse.\textsuperscript{92} But most sexual abuse behind bars is perpetrated by other imprisoned people.\textsuperscript{93} Abuse by imprisoned women is underreported, possibly as a consequence of its being “dismissed . . . as merely a ‘cat fight,’ or explained away as an attempt by women to replicate family dynamics outside of prison.”\textsuperscript{94}

As with the male incarcerated population, women and girls of color are more likely to be confined than White women. Black women are nearly twice as likely to be imprisoned as White women; Latinx women are imprisoned at 1.3 times the rate of White women.\textsuperscript{95} Native women are disproportionately

\begin{itemize}
\item \textsuperscript{85} Crystal M. Hayes, Carolyn Sufrin, & Jamila B. Perritt, \textit{Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression}, 110 \textit{AM. J. PUB. HEALTH} 521, 523 (2020).
\item \textsuperscript{87} See Maya Manian, \textit{The Story of Madrigal v. Quilligan: Coerced Sterilization of Mexican-American Women}, in \textit{REPRODUCTIVE RIGHTS AND JUSTICE STORIES} (Melissa Murray, Kate Shaw & Reva Siegel, eds., 2019).
\item \textsuperscript{89} See Gemma Donolrio, \textit{Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement}, 42 \textit{N.Y.U. REV. L. & SOC. CHANGE} 221, 229-30 (2018).
\item \textsuperscript{90} See Rachel Roth & Sara L. Ainsworth, \textit{"If They Hand You a Paper, You Sign It”: A Call to End the Sterilization of Women in Prison}, 26 \textit{HASTINGS WOMEN’S L. J.} 7 (2015).
\item \textsuperscript{91} \textit{Id.} at 16-17.
\item \textsuperscript{92} Gina Fedock, Cristy Cummings & Kathleen Darcy, \textit{Incarcerated Women’s Experiences of Staff-Perpetrated Rape: Racial Disparities and Justice Gaps in Institutional Responses}, 36 \textit{J. INTERPERSONAL VIOLENCE} 8668 (2021).
\item \textsuperscript{94} \textit{Id.}
\item \textsuperscript{95} \textit{THE SENTENCING PROJECT, supra} note 10.
\end{itemize}
represented among incarcerated women. Native girls are four times as likely as White girls to be incarcerated in youth prisons, and Black girls are more than three times as likely to be imprisoned.

The number of women and girls in prison and jail represents only a small fraction of the female population under the control of the criminal legal system. Women who are on probation or parole constitute over 80 percent of the entire population of incarcerated women and girls. Here again, the relative poverty of women has a multiplier effect. As poverty increases the likelihood that a woman will be detained prior to one’s conviction (and thus increases the likelihood of violent attacks in jail as well as the likelihood that one will ultimately be convicted), it increases the likelihood that she will be unable to pay probation fees; hire a babysitter to take care of her children during a meeting with a probation officer; or afford transportation to the meeting—and thus causing her to violate one’s probation.

Finally, the “collateral consequences” of conviction for women can be especially severe. Fewer female prisons than male prisons offer post-secondary education to imprisoned people that would help them secure jobs, and fewer post-release programs are available to the nearly two million women and girls who are released from prison and jails every year. And state and federal laws not only deny people who have been convicted of drug offenses food stamps, housing, education, and job opportunities but bar them from occupations held predominantly by women.

Unsurprisingly, formerly incarcerated women are more likely to be unhoused than incarcerated men. This is especially so for formerly incarcerated Black women, whose unemployment rates are correspondingly higher than any other demographic group. Black children of incarcerated mothers are also more likely to be in foster care than their counterparts, making it harder for formerly incarcerated Black women to regain their children. About one-third of women in prison are Black; about one-third of children in

96. Kajustra & Sawyer, supra note 11.
98. Id.
100. Kajustra & Sawyer, supra note 11.
101. Id.
102. Id.
103. Id.
104. Kajustra & Sawyer, supra note 11.
105. Id.
foster care are Black, most of whom have been separated from Black mothers who are their primary caretakers.  

2. **Peculiar Sufferings**

The conceptualization of the above systems and conditions as the New Jane Crow is grounded in substantive and functional continuities between state control of female reproduction past and present. Substantively, the New Jane Crow is constituted by institutions and ideas with a genealogy that can be traced through older systems of racial subjugation. Functionally, the New Jane Crow maintains a racialized and gendered political economy in which the reproduction of women of color is shackled.

The story of the shackling begins with slavery. Enslaved Black women were at once denied femininity and exploited for their reproductive capacities. Forced to work in the fields and in the homes of slaveholders, away from their families, they were excluded from the “private” domain reserved to White women.  

At the same time, as Prisciilla Ocen writes, their bodies were “not only utilized to generate profits as a result of labor, but were also used as a means of increasing the slave population” and “treated as sexually viable commodities.” This “degradation and control” was facilitated and reinforced by stereotypes that constructed them “as sexually aggressive, promiscuous, and deviant”—in effect, not “true women.” Black women were subjected to physical and sexual abuse, arrested and punished, separated from their children, and forced to labor—in every sense of the word—in ways that White women could not be because these stereotypes “placed [Black women] outside of dominant conceptions of Victorian womanhood.”

Like that of Black men, the subjugation of Black women continued following the Civil War, even after the Thirteenth Amendment proclaimed that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” Taking advantage of the latter Amendment’s allowance of involuntary servitude “for punishment of a crime,” the former Confederate states enacted “Black Codes” that criminalized absence from work, firearms possession, insulting gestures, failure to perform under employment contracts, and “vagrancy”—a catch-all offense empowering police to make arrests for being without proof of employment

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107. Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1261 (2012). This should not be taken to imply that that private domain was free of reproductive coercion.

108. Id. at 1263.

109. Id. at 1264.

110. Id. at 1261.

111. U.S. CONST. amend. XIII.
while Black. 112 A system of convict leasing forced Black people to work in areas previously maintained by slave labor—in some cases to rebuild infrastructure destroyed during the Civil War. 113

Black women were not excepted from the use of “crime and the penitentiary . . . as a new device for racial control.” 114 Mary Ellen Curtin, 115 Sarah Haley, 116 and Paula Johnson 117 have shown that southern police and prosecutors singled out Black women for alleged prostitution and solicitation offenses; southern judges singled Black women out for sentencing to the chain gang; and southern jail guards singled Black women out for sexual violence and abuse. Pregnant women were, if anything, treated more harshly by convict-leasing operators than by enslavers because convict-leasing operators lacked any economic interest in their children and pregnant workers were less productive. 118

As it was during the antebellum period, this racialized and gendered subjugation was rationalized and reproduced by the selective denial of Black women’s femininity. When enslaved women who were raped by their enslavers turned to abortion to spare a child the horrors of slavery, southern physicians chalked it up to degeneracy, writing of the “unnatural tendency in the African female population to destroy her offspring.” 119 David Oshinsky cites a telling Reconstruction-era remark to a Mississippi newspaper by a Mississippi Delta resident who stated that Black women “exhibit a ferocity as bloody and as savage as that exhibited by the men.” 120

Racialized and gendered tropes surfaced again in the late-nineteenth and early-twentieth centuries. When male physicians launched a campaign against abortion, predominantly Black midwives served as convenient

113. See generally Douglas A. Blackmon, Slavery by Another Name: The Reenslavement of Black Americans from the Civil War to World War II (2009).
114. Ocen, supra note 107, at 1261.
118. See Talitha L. LeFleuria, Chained in Silence: Black Women and Convict Labor in the New South 8 (2015) (“Whereas in the Old South slaveocracy reproduction was the linchpin for slaveholders’ success, the New South fiscal model saw pregnancy and childbirth as threats to economic progress and productivity.”) Id.
villains.\textsuperscript{121} “Regular” physicians positioned themselves as managers of a racialized and gendered political economy\textsuperscript{122} in which White women dutifully performed motherhood without being led astray by purportedly ignorant and callous Black women.\textsuperscript{123} As Dr. Horatio Storer, the primary architect of the regulars’ campaign, put it, “upon [White women’s] loins depends the future destiny of the nation.”\textsuperscript{124} By contrast, opponents \textit{and} proponents of birth control embraced the burgeoning eugenics movement and framed the reproduction of non-White women as an existential threat to the nation.\textsuperscript{125}

As Khiara Bridges and Melissa Murray have emphasized, the response that eugenicists initially converged on was the sterilization of White women.\textsuperscript{126} In 1927 the Supreme Court endorsed the constitutionality of the sterilization of “feeble-minded white woman” Carrie Buck\textsuperscript{127} on the ground that, as Justice Oliver Wendell Holmes Jr. put it, “it is better for all the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”\textsuperscript{128} Carrie was sterilized in a facility that, like most state facilities for people with cognitive disabilities, was segregated.\textsuperscript{129} As Murray puts it, “according to eugenics logic, non-white races were already debased.”\textsuperscript{130}

The demographics of sterilization changed with the Second Reconstruction. As the federal government in the 1960s set to work dismantling de jure segregation, welfare-rights groups lobbied successfully to expand public assistance programs to include non-White women.\textsuperscript{131} Southern states that had operated segregated sterilization regimes used extant sterilization statutes to

\textsuperscript{121} See Michele Goodwin, \textit{Policing the Womb: Invisible Women and the Criminalization of Motherhood} 50-55 (2020).
\textsuperscript{124} Horatio Robinson Storer, \textit{Why Not? A Book for Every Woman} (1866), reprinted in \textit{A Proper Bostonian on Sex and Birth Control} 85, 184 (Arno Press 1974).
\textsuperscript{126} See Buck v. Bell, 274 U.S. 200, 207 (1927).
\textsuperscript{127} Id.
\textsuperscript{129} See Murray, supra note 125, at 1618.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 1619.
target women of color on public assistance and considered bills that would require welfare recipients to submit to sterilization as a condition of benefits. Ready-to-hand negative stereotypes about Black women and mothers underwrote the use of sterilization “as a means of controlling the unintended consequences of excessive reproduction.”

Forced sterilization of women of color was rampant well into the 1970s, when activism by Black, Latinx, and Native sterilization victims gave rise to litigation, investigation, and reform.

The numbers are staggering. Sixty percent of Black women in one Mississippi county were subjected to postpartum sterilizations at one hospital without their permission. More than one-third of the women of childbearing age in Puerto Rico were sterilized in 1968. More than 25 percent of all Native women were made infertile through sterilization during the 1970s.

Contemporaneous with the decline of Jim Crow and the rise of targeted sterilization of women of color was the emergence of the carceral state as a bipartisan political project. The initial impetus was provided by White terrorism. Scores of what were euphemistically termed “racial battles,” in which White rioters, assisted by White police officers, brutalized and killed people of color, generated “international embarrassment, personal fear, and genuine disgust” among liberal northern Democrats who perceived a law-and-order problem best addressed through a neutral, rational, and expansive criminal justice system. The “lawless violence” of the Lynch mob, aided and abetted by the local sheriff and excused by the kangaroo court, was to be replaced with “clearly defined laws, administrative protocol and due process.”

The result would be no less violent but it would not be arbitrary or prejudiced—it would be calibrated to the protection of what President Harry Truman’s Committee on Civil Rights (“CCR”) in a 1947 report called the “right to safety and security of the person.”

Critically, the CCR report framed the protection of Black people against White lynch mobs as a means of addressing Black criminality. According to the report, racism was criminogenic. Black people’s “frustrations [with] their restricted existence,” the report stated, “are translated into aggression against

132. Id.
133. Id. at 1626.
134. Murray, supra note 125, at 1620.
136. See Jane Lawrence, The Indian Health Service and the Sterilization of Native American Women, 24 Am. Indian Q. 400, 404, 408 (2000).
138. Id. at 43.
139. The President’s Comm. on C.R., To Secure These Rights: The Report of the President’s Committee on Civil Rights 20 (1947).
The report then block-quoted Swedish sociologist Gunnar Myrdal, who claimed that “[n]ot only occasional acts of violence, but most laziness, carelessness, unreliability, petty stealing and lying are undoubtedly to be explained as concealed aggression.”

Naomi Murakawa details how Myrdal’s theory of “concealed aggression” was associated with both masculine and feminine archetypes. The masculine archetype, discussed by Myrdal, was exemplified by Bigger Thomas, the rage-filled antihero of Richard Wright’s 1940 *Native Son*. The feminine archetype was the “bumper,” a term coined by Black sociologist Charles Johnson. Bumpers, wrote Johnson in 1944, were “Negro women with grievances, said to be organized for the purpose of harassing whites by bumping into them in crowded cars and on the streets.”

According to a report in a Black newspaper, Truman himself prohibited his daughter Margaret from riding D.C. streetcars for fear of the bumpers. Murakawa finds that northern Democrats as well as southern Democrats “framed ‘the crime problem’ as a subset of ‘the Negro problem.’” For both coalitions, Blackness was associated with criminality via racialized stereotypes, and criminal justice was primarily about preventing Black crime.

Further, race liberals viewed the Black family as a source of Black criminality. In the same 1965 Howard University Speech in which he deployed the metaphor of the shackled runner that so vividly captured the lasting consequences of racial subjugation, President Lyndon Johnson claimed that among the “most important” of these consequences was “the breakdown of the Negro family structure.” Here Johnson referenced an extraordinarily influential Department of Labor report authored by Daniel Patrick Moynihan. The “Moynihan Report” claimed that when a community “allows large numbers of young men to grow up in broken families, dominated by women, never acquiring any stable relationships to male authority … [c]rime, ...

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140. *Id.* at 145-46.
141. MURAKAWA, supra note 137, at 51-52.
142. *Id.*
143. *Id.*
144. *Id.* at 52 (quoting Charles S. Johnson, Backgrounds of the Negro Migrant Population, in CITY OF CHICAGO, CITY PLANNING IN RACE RELATIONS: PROCEEDINGS OF THE MAYOR’S CONFERENCE ON RACE RELATIONS 11, 14 (1944)).
145. *Id.*
146. MURAKAWA, supra note 137, at 52.
147. *Id.*
violence, unrest, and disorder, are not only to be expected, but they are very nearly inevitable.”

The carceral consensus that made possible the Omnibus Crime Control and Safe Streets Act of 1968 (“Safe Streets Act”) rested upon assumptions of Black familial pathology that included deviant Black maternity. Elizabeth Hinton documents how the Moynihan Report served as “the primary reference point” following the 1965 Watts uprising—an uprising precipitated by the beating and arrest of Rena Price and her sons by a group of California Highway patrolmen and Los Angeles police officers. “Sensationalized depictions of disorder in Watts extended Moynihan’s assumptions about community behavior beyond the [Johnson] administration, suggesting to the public that single black mothers raising illegitimate children not only explained poverty in urban neighborhoods but also caused the riots.” Subsequent uprisings in Detroit and Newark nourished liberal fears that “outside influences, whether communists or black militants, had mobilized the [Black] community” and encouraged the Johnson administration to prioritize “militarizing urban police forces as an extension of anti-riot efforts.” Meanwhile, southern Democrats sought resources to suppress Black collective action of all kinds. The resulting Safe Streets Act empowered a new Law Enforcement Assistance Administration to make block grants to states and to engage in discretionary spending for crime-control purposes. Under the Nixon Administration, some $2.4 billion would be distributed to local police departments to the end of “support[ing] the targeted enforcement of patrol and surveillance of low-income black communities.”

So, too, did assumptions of deviant Black maternity shape the Anti-Drug Abuse Acts of 1986 and 1988, both of which singled out the possession of crack cocaine for particularly severe mandatory minimum prison sentences. Washington Post columnist Charles Krauthammer expressed a bipartisan fear when he announced: “The inner-city crack epidemic is now giving birth to the newest horror: a bio-underclass, a generation of physically

151. ELIZABETH KAI HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 75 (2016).
152. See id. at 67.
153. Id. at 75.
154. Id. at 111.
155. See HINTON supra note 151 at 58.
156. See id. at 173.
159. MURAKAWA, supra note 137, at 121.
damaged cocaine babies whose biological inferiority is stamped at birth.”

The monstrous “crack baby,” the product of what Democratic Representative Bruce Vento described as an “astronomical rise in the incidence of substance abuse among pregnancy women,” was pivotal to the 1986 Act’s now-notorious 100:1 ratio—the amount of crack versus powder cocaine necessary to trigger mandatory minimum prison sentences. The 1988 Act imposed a five-year minimum for first time possession of more than five grams of crack; first-time possession for any other illegal substance was a misdemeanor punishable by a maximum of one year behind bars.

The crack baby was a myth that grew out of enduring stereotypes concerning deviant Black maternity. Major newspapers published articles claiming that crack use by pregnant women constituted “an entirely new, and now leading, category of children abuse”; that it “undermin[ed] the maternal instinct”; and that it “produced an entire generation of innocent addicts.” And they implied that the abusive, pregnant addict, bereft of maternal instincts and swamping the nation with a population of “poisoned babies” was typically Black. As Dorothy Roberts summarizes: “A public health crisis that cut[] across racial and economic lines was transformed into an example of Black mothers’ depravity that warranted harsh punishment.”

The latter took the form of “jailing them during pregnancy, … seizing custody of their babies at birth, and … prosecuting them for

161. Id. at 123.
162. MURAKAWA, supra note 137, at 121.
In thousands of cases, low-income Black mothers lost custody because of a single drug test.169

In the early 1990s, President Bill Clinton’s Democratic Party positioned itself as offering a solution to a national problem of “crime-ravaged communities” where “crime is not only a symptom but also a major cause of the worsening poverty and demoralization that afflicts inner-city communities.”170 This goal, Clinton’s advisers urged, could be pursued simultaneously with that of “reinventing government” by shrinking the welfare state.171 The larger strategy was to win over working-class White people who associated crime and undeserved government largesse with racial minorities.172

Three pieces of legislation exemplify this strategy. The 1994 Violent Crime Control and Law Enforcement Act of 1994 created dozens of new federal capital crimes and authorized more than $16 billion for state prison grants and the expansion of state and local police forces.173 Two years later, the Personal Responsibility and Work Opportunity Reconciliation Act replaced Aid to Families with Dependent Children (“AFDC”) with a block grant to the states called Temporary Assistance to Needy Families (“TANF”).174 The connection between the two can be perceived in TANF’s permanent ban on eligibility for welfare and food stamps for anyone convicted of a felony drug offense.175

Finally, the 1997 Adoption and Safe Families Act176 mandated termination of parental rights when a child was in out-of-home care for more than 15 months and requires state family policing authorities to make the health and safety of children, not family preservation, their “paramount concern.”177 Dorothy Roberts has documented how “ASFA proponents called upon states to ‘free’ black children for adoption by speeding up termination of their mothers’ rights.”178 Because the enactment of AFSA “corresponded with the

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168. ROBERTS, supra note 43, at 159.
169. Id.
171. See MURAKAWA, supra note 137, at 127.
172. See id. at 125; ALEXANDER, supra note 31, at 72.
175. See id. at Sec. 115; MURAKAWA, supra note 136, at 130.
growing disparagement of mothers receiving public assistance and welfare reform’s retraction of the federal safety net for poor children[,]” all of these “undeserving mothers” were “in the public’s mind” the same Black mothers.\textsuperscript{179} AFSA operates in conjunction with state termination statutes to make it considerably easier to terminate parental rights based on incarceration, even without independent abuse or neglect.\textsuperscript{180} The effect of AFSA has been staggering increases in the number of cases terminating parental rights due to parental incarceration—especially those of Black parents.\textsuperscript{181}

Given the enduring character of negative stereotypes about Black mothers, it is not surprising that those stereotypes have shaped reproductive criminalization. \textit{Ferguson v. City of Charleston, SC}\textsuperscript{182} arose from the work of a task force that was established at the Medical University of South Carolina (MUSC) that routinely turned over prenatal screenings that showed evidence of drug use, pursuant to a “real and very firm stick” policy for pregnant drug users adopted by former state prosecutor, Charles Cordon.\textsuperscript{183} The class-action suit brought by some of the women whose records were turned over absent consent revealed that only one of the dozens of women arrested because of drug use was Black.\textsuperscript{184} At trial, a nurse who indicated on a patient’s chart that the patient “live[d] with her boyfriend who is a Negro” admitted that she believed that interracial relationships violated “God’s way” and “raised the option of sterilization for Black women testing positive for cocaine but not for White women.”\textsuperscript{185}

We have here a legacy of racialized, gendered social control directed towards women of color, rationalized and reproduced by negative stereotypes about Black maternity. Some institutions canvassed above—convict leasing, the crack-powder disparity—have been abolished or modified in substantial ways. Others, like the shackling of pregnant people, mandatory minimums for drug offenses, and family termination on the basis of incarceration, remain. And they continue to produce racialized, gendered outcomes.

\section*{C. CRITICISM}

Analogies bring together things that are similar but not identical and focus attention on the similarities. Any analogical argument invites the

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\item \textsuperscript{179} Shattered Bonds, supra note 178, at 173.
\item \textsuperscript{180} See Desirée A. Kennedy, Children, Parents, & the State: The Construction of a New Family Ideology, 26 BERKELEY J. GENDER L. & JUST. 78, 105 (2011).
\item \textsuperscript{182} Ferguson v. City of Charleston, S.C., 308 F.3d 380 (4th Cir. 2002).
\item \textsuperscript{183} Roberts, supra note 168, at 941.
\item \textsuperscript{184} Michele Goodwin, The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration, 104 CORNELL L. REV. 899, 975 (2019).
\item \textsuperscript{185} Id. at 109.
\end{itemize}
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objection that the differences outweigh their similarities, blunting their normative force. Murray faced these objections. Harvard Law School Dean Erwin Griswold urged “there are differences in sex, and these differences may, in appropriate cases, be the basis of classification.” National Woman’s Party officer Miriam Holden worried that the ERA would fail to win segregationist support as a consequence of “comparisons of our position with the position of the American Negro.”

So, too, has Alexander. James Forman, Jr. accuses Alexander of neglecting the contribution of “violent crime” to mass incarceration. Alexander begins The New Jim Crow by telling readers about Jarvious Cotton, who “cannot vote because he, like many black men in the United States, has been labeled a felon and is currently on parole.” Forman criticizes Alexander for omitting to tell readers that Cotton convicted of murder after a jury trial. In this regard, he is different from his ancestors, who were disenfranchised “because they were Black.” He is also similar to the majority of those presently imprisoned for extended periods of time, far more of whom have been convicted of crimes of violence than for the drug crimes on which Alexander focuses her attention. Forman does not claim that Cotton is unrepresentative or that his disenfranchisement is unproblematic. Rather, Forman argues that Cotton is representative in ways that fit uneasily with Alexander’s overall narrative, which emphasizes the War on Drugs as a driver of mass incarceration.

186. Mayeri, supra note 18, at 1062 & n. 78 (quoting Letter from Erwin N. Griswold, Dean, Harvard Law School, to Pauli Murray 1 (Jan. 31, 1963) (Pauli Murray Papers, MC 412, Box 49, Folder 878, on file with the Schlesinger Library, Radcliffe Institute, Harvard University)).
187. Id. at 1055 & n. 47 (quoting Letter from Miriam Holden to Anita [Pollitzer], Honorary Chairman, National Woman’s Party (Feb. 16, 1963) (National Woman’s Party Papers, Film Misc 959, Reel 108, on file with the Sterling Memorial Library, Yale University)).
188. James Forman, Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow, 87 N.Y.U. L. REV. 21 (2012). See also Kajustra & Sawyer, supra note 11 (finding that “4 out of 5 people in prison or jail are locked up for something other than a drug offense” and that “almost half (47%) of people in prison and jail are there for offenses classified as “violent”); John F. Pfaff, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 14 (2017) [hereinafter Pfaff, Locked In]; see also John F. Pfaff, Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here, 26 FED. SENT’G REP. 265, 265 (2014) (finding that “the increase in drug incarcerations explains only 21 percent of the growth in state prison populations.”).
189. ALEXANDER, supra note 31, at 1.
191. Id. at 50.
192. Forman, supra note 189, at 53.
Others criticized Alexander of failing to name the political-economic order from which the New Jim Crow arose. Alexander does note that “political and corporate interests have a stake in the expansion ... of mass incarceration.” And she cites critical geographer and abolitionist Ruth Wilson Gilmore’s *Golden Gulag,* crediting Gilmore for “an excellent discussion of how surplus capital, labor, and land helped to birth the prison industry in rural America.” But *The New Jim Crow* does not explore in any depth the relationship between capitalism and the rise of the carceral state. It does not engage arguments from prison-industrial-complex abolitionists to the effect that, as Dorothy Roberts has summarized, “prisons are part of a larger system of carceral punishment that legitimizes state violence against the nation’s most disempowered people to maintain a racial capitalist order for the benefit of a wealthy white elite.”

It is beyond the scope of this Article to fully engage these criticisms of Alexander. But it is important to recognize salient distinctions between her case against mass incarceration and the emergent conceptualization of the New Jane Crow. These distinctions insulate the latter against certain critiques of Alexander—while inviting others.

First, the New Jane Crow is less vulnerable to the objection that it neglects violence. Most women behind bars have not been convicted of violent crimes. This remains the case if one considers convictions arising from prenatal harms to be convictions for violent crimes. The “violence” of Regina McKnight’s conduct is contestable in ways that Jarvious Cotton’s conviction for the murder of seventeen-year-old Robert Irby is not, owing to the


194. ALEXANDER, supra note 31, at 288.


196. ALEXANDER, supra note 31, at 361.


199. Kajustra & Sawyer, supra note 11.
contested moral status of prenatal life. It would be similarly contestable to urge that people of color are disproportionately victimized by violent crime arising from prenatal harms, just as they are disproportionately criminalized for them. And even granting the premise that the moral status of prenatal life is comparable to that of a pregnant person, the available evidence suggests that criminalization of pregnancy outcomes threatens rather than protects prenatal life.200

Second, whereas Alexander’s book is noncommittal on political economy, the New Jane Crow is not. Goodwin forthrightly argues that modern prison labor constitutes a continuation of slavery by another name and that “[s]lavery persists . . . because involuntary prison labor is profitable.”201 She notes that “the very first female firefighter, Molly Williams, was a slave, forced to put out fires in New York in the early 1800s.”202 Today, imprisoned Black women are forced to fight fires in California.203 Goodwin claims that racialized forced labor, old and new, was and is of “fundamental importance to U.S. capitalism and the American economy.”204 Then, the convict leasing system and Black Codes “provided vital labor for the southern economy”;205 now, “the laws of supply and demand create perverse incentives and practices that continuously fuel the system that legitimizes slave and slave-like labor.”206

Goodwin does not endorse prison abolition. But she draws extensively upon the work of abolitionists. She affirms that these scholars are “right” to “equate[] the prison system to slavery” and to contend that “refining these systems to make them more ‘humanized’ will fail to address the more significant, underlying issues, such as racism, classism, and the persistence of racial hierarchy forged in both law and practice in the United States.”207

Like Alexander’s thesis, however, the New Jane Crow invites the objection that racial subjugation cannot explain the existence of a multiracial incarcerated population. Most incarcerated women are White, and the imprisonment rate for Black and Hispanic women declined from 2000 through 2016 after increasing during the 1990s.208 Between 2000 and 2016, the Black female drug imprisonment rate fell by nearly 80 percent, while the White

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200. See Boone & McMichael, supra note 64.
202. Id. at 904.
203. See id. at 901-04.
204. Id. at 907.
205. Id. at 935.
206. Id. at 960.
207. Goodwin, supra note 200, at 989.
female drug imprisonment rate increased by almost 60 percent. For Hispanic women, the imprisonment rate fell by 24 percent as a consequence of a 61 percent drop in their drug imprisonment rate. To borrow from Forman’s criticism of Alexander, if we think of the carceral state as targeting women of color, “That’s a lot of collateral damage.”

A response is available. Allegra McLeod points out that those who believe that race plays a causal and functional role in mass incarceration know well that “there are countless [non-White] people affected by hyperpunitive policies.” They maintain, however, that “criminal processes in the United States assumed their especially degrading and dehumanizing character through historical practices of racial subordination that have led blackness and criminality to be connected in the American imagination.” Those processes continue to exist and the connection remains “even when criminal suspects and defendants are not African-American.” They inflict harm on the ancestors of their original targets; they also inflict harm on others who are caught up in a system that was not consciously designed for them.

Take the shackling of incarcerated pregnant people. In states that continue this practice, it is followed as a matter of course with incarcerated people of all races. But its racialized origins remain relevant. When a pregnant White woman is shackled, she is dehumanized and degraded and her reproductive capacities are controlled in ways that are only possible because shackling under slavery “created racial and gendered subjects through the exploitation of Black women’s physical labor and reproductive capacities.” Her shackling is a badge of race-differentiated slavery because it owes its existence to its utility in constructing and reproducing the “racialized space of the women’s prison.” Formerly incarcerated criminal-system reformer Sue Ellen Allen’s description of the Arizona prison official who shackled her during a mastectomy well illustrates the effect:

[H]e didn’t see me as an old white lady with breast cancer. He saw me as an inmate with a number. And inmates with numbers are historically Black. And that’s what I deserved. And so that’s what he saw . . .

210. Id. at 383
211. Forman, supra note 191, at 136.
213. Id.
214. Id. at 663-64.
216. Id. at 1310.
And everything was symbolic of the person that was there. [B]eing handcuffed [and] shackled.\textsuperscript{217}

A final objection arises from the motives of opponents and proponents of reproductive freedom. To analogize a phenomenon that includes restrictions on abortion to Jim Crow requires a reckoning with White supremacy within movements \textit{for} abortion rights. It also requires confronting opposition to abortion among supporters of civil rights for Black people that is grounded in the conviction that abortion is an instrument of White supremacy. It is demonstrable that opponents of White supremacy have denounced abortion because of its perceived role in promoting White supremacy.\textsuperscript{218} That reality alone might seem to cast doubt on any claim that abortion restrictionism can be fairly analogized to Jim Crow.

Here, too, responses are available. First, if express, self-conscious support for White supremacy by all of its defenders were essential to the case for Jim Crow’s moral evil, that case would fail. The modal supporter of segregation was not Bull Connor.\textsuperscript{219} Second, although the case for the analogy does not rest upon self-conscious White supremacy, the latter’s existence cannot be consigned to the distant past—as the work of the South Carolina task force illustrates. It must therefore be part of the moral evaluation of any system in which White-supremacist attitudes might be influential.

Third, the framing of this last objection begs a question in favor of a particular understanding of Jim Crow’s moral evil. It assumes that Jim Crow’s evil is contingent upon presence of some \textit{conscious} goal by some critical mass of people. Proponents of the analogy can—and do—reject this assumption.\textsuperscript{220} The perpetuation of racial subordination may inflict what Bridges calls a “racial injury”\textsuperscript{221} and constitute a moral evil irrespective of conscious goals, beliefs, or motivations. Such goals, beliefs, and motivations might explain how the injury came to be inflicted, aggravate it, or focus moral

\begin{footnotes}
\item[220] \textit{See Alexander, supra} note 31, at 134 (discussing “[d]ecades of cognitive bias research [which] demonstrates that both unconscious and conscious biases lead to discriminatory actions[.]”)
\item[221] \textit{See Khiara M. Bridges, Foreword: Race in the Roberts Court}, 136 Harv. L. Rev. 26, 33 (2022).
\end{footnotes}
criticism on particular people. But a judge without any conscious goal, belief, or motivation related to race may, in their compliance with a mandatory minimum for a drug possession offense, do moral wrong simply by following a law that operates to marginalize people of color.

These responses are only preliminary, befitting limited space. Perhaps you are not convinced by the analogy and do not believe the label has been earned. I hope to have at least described the phenomenon that has been labeled the New Jane Crow with sufficient precision for you to be able to assess the further claim that Dobbs constitutionalizes major components of it and encourages its expansion. The next Part makes good on that claim.

II. DOBBS AS CONSTITUTIONALIZATION

A. NO FUNDAMENTAL RIGHT

The most direct ways in which Dobbs entrenches the New Jane Crow are by overruling Roe v. Wade223 and Planned Parenthood v. Casey224 and specifying that abortion restrictions are to receive a form of constitutional scrutiny that it is doubtful that any restriction will fail to meet.

Before Dobbs, the Court’s recognition of a substantive-due-process right to terminate a pregnancy impeded state efforts to criminalize abortion. States could not directly prohibit abortion pre-viability. In practice, whether one had the means to access abortion depended on race, class, and geography.225 But by recognizing the right to terminate a pregnancy as a “liberty” protected by the Fourteenth Amendment, Roe/Casey guaranteed some access for some people in some places and some insulation against state control of reproductive choices.

Dobbs removes that guarantee. Justice Samuel Alito’s opinion for the Court is unequivocal: “[T]he Constitution does not [protect the] right to [an]
abortion.”226 Lacking deep roots in the nation’s history and traditions, the right to terminate a pregnancy is not “fundamental” and any restrictions on it are to receive rational-basis review—the lowest level of constitutional scrutiny.227

By itself, relegating abortion restrictions to rational-basis review would diminish reproductive freedom. But by how much? Scholars have long noted that rational-basis review is really two different rules that the Court applies at its discretion.228 One form of rational-basis review—“rationality review”—is deferential to the government but not so much that a challenger cannot prevail.229 There are scores of cases in which the Court has held government actions unconstitutional because they are not rationally related to any constitutionally legitimate goal.230 The other form of rational-basis review—“conceivable basis review”—is less a standard of review than a rule of decision dictating victory for the government.231 Following FCC v. Beach Communications,232 the case in which this non-review was most precisely elaborated, judges are not to seek out what goals the government is actually pursuing and don’t require the government to support its claims with evidence.

Dobbs specifies that abortion restrictions are to receive conceivable basis review. “A law regulating abortion… must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.”233 “Could have” makes plain that abortion laws can be defended and upheld for reasons that never crossed anyone’s mind when they were enacted.

Because abortion is no longer considered a fundamental constitutional right, any argument that people behind bars have a Fourteenth Amendment right to terminate a pregnancy is unlikely to succeed in federal court. Even before Dobbs, circuits split over the extent to which states could restrict it, owing to the deference that Turner v. Safley234 requires courts to extend to

227. Id. at 2284.
“legitimate penological interests” when incarcerated people claim fundamental rights. Absent a fundamental right, all that is left is penological interests. The same goes for the Eighth Amendment, which prohibits officials from being deliberately indifferent to the medical needs of imprisoned people. The lone circuit that held that failure to provide abortion care constituted deliberate indifference relied upon Roe/Casey.

B. PRENATAL LIFE

Even if the Court had allowed for some meaningful measure of scrutiny to determine whether an abortion restriction is directed at a legitimate end, any hope of a successful substantive-due process challenge would likely be illusory.

The Court provides a laundry list of constitutionally legitimate government interests to restrict abortion, one of which could be invoked in any imaginable case. The latter interest is “[r]espect for and preservation of prenatal life at all stages of development.” Consider the breadth of that formulation. Although Alito refers to “fetal life” and “fetal pain” in his opinion, his language of “prenatal life” at this crucial juncture is not so cabined.

Nor is it cabined by reference to the intentions of the pregnant person or their doctor. This is a constitutional interest that is broad enough to underwrite state intervention before a pregnant person even becomes aware they are pregnant—the stuff of Texas’s S.B. 8, which prohibits abortion upon detection of what the state refers to a “fetal heartbeat” around 5-6 weeks’ gestation. It is also broad enough to legitimize the treatment of prenatal “persons” as victims of manslaughter, negligent homicide, and child endangerment and abuse.

So broad indeed is this language that it has been seized upon by proponents of prenatal constitutional personhood—the view that the Fourteenth Amendment requires states to criminalize abortion. Responding to the

235. Bernick, supra note 230; Turner, 428 U.S. at 89.


237. Dobbs, 142 S. Ct. at 2235.


239. See, e.g., Michael S. Paulsen, Three Very Enthusiastic Cheers for the Dobbs Draft, NAT’L REV. ONLINE (May 6, 2022), https://tinyurl.com/2s44rh59 (“The opinion goes as far as necessary to decide the case and no further; it does not deny, but (quite the reverse) seems to affirm, the humanity of the living human embryo or fetus, in the course of its discussion of the precise legal issues it treats; it would provide an excellent grounding for the next stage of the debate, in legislatures and in courts.”).
dissent’s concerns that fundamental rights to contraception, intimacy, and marriage between same-sex couples would not survive the history-and-tradition analysis performed by the Court, Alito chastises the dissent for its “striking” failure to appreciate the importance of prenatal life as a point of distinction. From whence does this importance arise? Proponents of prenatal personhood have argued since before Roe that it arises from the Fourteenth Amendment’s guarantees that “[n]o state shall … deprive any person of life, liberty, or property without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.” These arguments are deeply rooted in the history of the anti-abortion movement, and they will be heard again and again.

C. NO DISCRIMINATION

Even absent any fundamental right to terminate a pregnancy and even with the recognition of a legitimate interest in the protection of prenatal life, challenges to abortion restrictions predicated upon discrimination might still succeed. Men enjoy no fundamental right to drink “nonintoxicating” alcohol at the age of 18, and preventing accidents is an incontestably legitimate government interest. Nonetheless, the Court in Craig v. Boren held that states cannot prohibit the sale of near beer to men under the age of 21 if females are permitted to purchase it at the age of 18. Sex-based classifications trigger heightened scrutiny, and classifications that are grounded only in stereotypes result in the invalidation of a government action.

The leading argument that Roe was correctly decided notwithstanding the deficiencies of Justice Blackmun’s opinion for the Court holds that abortion restrictions violate the Equal Protection Clause by discriminating on the basis of sex. They do so by forcing some people and not others to perform a particular social role: motherhood. They require some people and not

240. Dobbs, 142 S. Ct. at 2261.
others to endure pregnancy, birth, and lactation, with attendant physical and psychological burdens that range from the nausea-inducing to the extremely painful to the life-threatening. And they do so because of stereotypes concerning the social roles that women ought to perform.

Sex discrimination arguments have also been advanced against prenatal-harm laws. Writing before Dobbs, Goodwin contended that “when the state uniquely and exclusively burdens women in the advancement of fetal health, but not men … [it] reflects adverse stereotypes about women and pregnancy.” In doing so she confronted the apparent hurdle of Geduldig v. Aiello, in which the Court held that a disability insurance program that exempted work loss due to normal pregnancies from insurance coverage did not discriminate on the basis of sex and did not violate the Equal Protection Clause. She pointed out that Geduldig had been “roundly criticized” for blinking the reality that being capable of becoming pregnant is closely associated with sex and that, even taken on its own terms, Geduldig did not “reject the principle that pregnancy regulation can be sex regulation and, as such, can be discriminatory.” Further, the Court in subsequent cases recognized that “male health may have as much bearing on fetal outcomes as women’s health” and upheld the Family and Medical Leave Act as a means of enforcing the Equal Protection Clause because the state leave policies the act targeted were based on “the pervasive sex-role stereotype that caring for family members is women’s work.”

Dobbs unceremoniously rejects the sex-discrimination argument against abortion restriction in a single paragraph. Alito proclaims it “squarely foreclosed by our precedents.” He cites Geduldig and Bray v. Alexandria Women’s Health Clinic, reading them to hold that “laws regulating or prohibiting abortion are not subject to heightened scrutiny.” What about the application to pregnant people of criminal laws that cannot be said to “regulate[ ] or prohibit[ ]” abortion? Homicide-by-child-abuse laws, for instance? Alito’s description of Geduldig’s holding may insulate them from heightened scrutiny as well. Citing Geduldig, Alito states that

249. See id. at 182-184 (discussing Int’l Union v. Johnson Controls, 499 U.S. 187 (1992)).
250. See id. at 184 (discussing Nevada Dep’ t of Hum. Services v. Hibbs, 538 U.S. 721 (2003)).
253. Dobbs, 142 S. Ct. at 2245.
“[t]he regulation of a medical procedure only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other.”  

With the protection of prenatal life identified as a legitimate interest, any argument that fetal-harm laws or prosecutions under them are invidiously discriminatory would struggle to get off the ground.

In determining that there exists under the Fourteenth Amendment no right to terminate a pregnancy, Alito emphasizes the existence of widespread restrictions on abortion before quickening—the point at which the fetus is detectable in the womb—in 1868, when the Amendment was ratified. Alito acknowledges that these restrictions broke with the common law, which generally did not criminalize abortion pre-quickening but has little interest in why this break with tradition took place. He asserts that “[t]his Court has long disfavored arguments based on alleged legislative motives” because different legislators have different motives. He brushes aside evidence adduced by amici that these restrictions were designed to achieve racist, sexist, and bigoted goals on the ground that the evidence consisted only in statements from supporters of the law—not legislators—even though legislators worked closely with supporters of the campaign.

The Court has long since made it nearly impossible to successfully challenge discriminatory prosecution or law enforcement under facially neutral criminal laws. In United States v. Armstrong, the Court held that a defendant is not entitled to discovery on a claim that they have been singled out for prosecution on the basis of race unless they can show that the government intentionally declined to prosecute similarly situated suspects of other races. Showing that the government overwhelmingly prosecutes people of a particular race even though statistics indicate no significant racial differences in rates of offending is insufficient. Absent smoking-gun statements of intent to target

254. Id.
255. Dobbs, 142 S. Ct. at 2247.
256. See Mohr, supra note 122.
257. Dobbs, 142 S. Ct. at 2555.
258. Id.
259. See Mohr, supra note 122, at 207.
261. See id. at 465.
particular groups, selective-prosecution litigation against fetal-harm laws is unlikely to succeed.

D. RACE AND GENDER AS RATCHETS

At the same time that it declines inquiry into the possibility that anti-abortion laws are downstream of racialized or gendered stereotypes, *Dobbs* offers comfort to those who believe that abortion causes racialized and gendered harms. Race and gender operate as ratchets; they can only move in the direction of abortion restriction.

First, race. In a pointed footnote, Alito highlights amicus briefs that cast aspersions on the motives of proponents of abortion legalization. He then states that “[a] highly disproportionate percentage of aborted fetuses are Black[,]” and references a concurrence by Justice Clarence Thomas in a decision upholding the regulation of the disposal of fetal remains by abortion providers. Concurring in *Box v. Planned Parenthood*, Thomas argued at length that support of abortion is closely associated with eugenics, racism, and racial genocide. This footnote anticipates *Dobbs*’s identification of “the prevention of discrimination on the basis of race, sex, or disability” as a constitutionally legitimate reason for abortion restriction.

*Dobbs*’s approach to gender is similar. Alito claims that “returning the issue of abortion” to the states will allow “women on both sides of the abortion issue to seek to affect the legislative process,” which sounds neutral enough. But he goes on to tip the constitutional balance in favor of opponents of abortion by identifying among the legitimate interests for abortion restriction “the protection of maternal health and safety.” There is no comparable acknowledgment of state power to liberalize abortion in order to protect maternal health or safety or even any suggestion that consideration of the health or safety of pregnant people is constitutionally required. Maternal health and safety is offered only as a reason for abortion restrictions. The asymmetry is striking, particularly given that Chief Justice William

264. Id.
267. Id. at 2277.
Rehnquist, dissenting in Roe, stated that he had “little doubt” that a statute that did not permit an abortion even where a pregnant person’s mother’s life is in jeopardy “would lack a rational relation to a valid state objective.”

Beyond the doctrinal details, Dobbs sends a clear message concerning whose side the Court is on in the coming conflicts over reproductive rights. Those who sincerely believe that abortion is an instrument of genocide and harms women have a friend in the Court; those who believe that racial and gender justice requires abortion access do not. Neutral though the Court may position itself as being at various points, it is not consistently so.

E. WEAPONIZABLE AMBIGUITY

One of the principal reasons that Dobbs is unlikely to succeed in its apparent aspiration to withdraw the federal judiciary from abortion-related conflict is that the opinion does not precisely define what abortion is. With the rise of pills that are used both to terminate pregnancies and treat other medical conditions, ascertaining both termination and intent will be fraught with ambiguities. Unlike under the nineteenth-century laws that are so pivotal to Dobbs’s constitutional analysis, ambiguities concerning pregnancy loss are likely to be resolved in favor of criminalization—particularly of women of color.

Jill Wieber Lens and I have mapped the historical landscape that is missing from Dobbs, showing that the lived experience of women and their doctors under the then-relatively new pre-quickening abortion restrictions was very different than attention to the letter of those laws alone might suggest. As a practical matter, the pre-quickening restrictions upon which Dobbs places so much weight in its constitutional analysis were effectively unenforceable because there existed no reliable way to detect pregnancy prior to quickening. And they did not change many minds about abortion. Pregnancy loss was then common and not regarded as morally blameworthy,


272. See id. at 27-32.
prenatal attachment was varied and contextual; understanding of prenatal development was in flux; and the growing field of embryology depended upon access to and study of fetal remains. Alito’s assumption that the Fourteenth Amendment would have been understood in light of relatively new, effectively unenforceable, and widely unpopular laws is far too quick.

The landscape is very different today. Remember Alito’s assertion that “[a] highly disproportionate percentage of aborted fetuses are Black” and his citation to Justice Thomas’s argument that abortion is a form of racial genocide. Alito’s assertion and Thomas’s argument rest on a binary understanding of pregnancy endings. Race being socially constructed rather than natural kind—a function of physical and social qualities rather than genetics—racializing an aborted fetus (to say nothing of an embryo or a zygote) only begins to make sense on the assumption that the alternative to abortion is the birth of a Black child. Unintentional pregnancy loss is erased, as are racial disparities in pregnancy loss.

This binary understanding of pregnancy is not unusual. It is a function of technological and cultural developments and their intersection with enduring racialized and gendered assumptions about motherhood. Medical advances like in vitro fertilization and neonatology have created the expectation that all pregnancies end with the birth of living babies. A pregnancy that does not end with a living baby is seen as aberrational and invites suspicion, blame, and criminalization. As the case of Regina McKnight illustrates, suspicion, blame, and carceral responses have been directed towards women of color who fit racialized bad-mother stereotypes. In states that not only criminalize abortion but charge pregnant people under child endangerment and abuse laws, every pregnancy loss stands to become a potential crime scene. Because women of color lose pregnancies more often than White women, they face heightened criminalization risks.

Even as it makes abortion care more accessible, the availability of medication abortion creates new risks of criminalization. The two most common

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273. See generally id.
274. See, e.g., KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: KHIRA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011); Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209 (1995). See also Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, 43 Stan. L. Rev. 1241, 1296-97 (1991) (emphasizing that “to say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people . . . is thinking about the way power has clustered around certain categories and is exercised against others.”).

means of medication abortion involve the use of one or both of two drugs: mifepristone and misoprostol. Use of these drugs has already led to charges and convictions. Kenlissia Jones took misoprostol and then gave birth to her 20ish weeks old baby on the way to the hospital; when the baby died at the hospital, she was charged with murder. Purvi Patel gave birth to her 28ish gestational weeks stillborn baby at home and then went to the hospital due to heavy vaginal bleeding. When police discovered that Patel had ordered mifepristone and misoprostol after searching Patel’s text messages, they began an investigation that ended with the discovery of the stillborn baby in a dumpster and charges of feticide and child neglect. Patel was convicted and sentenced to 20 years in prison; she spent nearly 2 years behind bars before her conviction was overturned.

Pills used to induce abortions are used for a number of other purposes, including ulcers, Cushing’s Syndrome, labor induction, and miscarriage care. Strictly speaking, miscarriage management takes place only where there is no longer a living pregnancy, so use of pills for miscarriage management should not fall under abortion bans. And half of states specifically exclude the removal of a dead fetus from their definition of abortion. Still, the line between abortion and miscarriage can be blurry in practice because—as Greer Donley and Lens have explained—“incomplete abortions look exactly like incomplete miscarriages.” The response to any given pregnancy loss will be affected by the same biases that already shape responses by hospital staff and prosecutors to drug use in pregnancy. “Those least likely to be suspected of abortion are those who were actively trying to become pregnant, already sought prenatal care, and showed up to the hospital at the advice of

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282. Id. at 55.
Finally, it is one thing to describe abortion as the intentional termination of a pregnancy; it is another to sort out what qualifies as intentional pregnancy termination in the real world. Many anti-abortion advocates have insisted that the use of methotrexate to end an ectopic pregnancy—which occurs when a pregnancy implants outside the uterus—is not an abortion in any morally or legally salient sense, and a number of state laws specifically provide as much. Still, such methotrexate treatment is intended to end a pregnancy before it would end on its own, and doctors in states with abortion bans have refused to use it until life exceptions kick in for fear of criminal liability. *Dobbs* attempts to distinguish abortion and contraception. But the Court has been receptive to claims by anti-abortion advocates who consider contraceptives—like Plan B and IUDs—that result in the destruction of fertilized eggs to be abortifacients. Here as elsewhere, ambiguity can be expected to have a disparate impact on women of color, who have more abortions and higher rates of pregnancy loss.

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In criticizing the majority’s focus on 1868, the *Dobbs* dissenters correctly emphasized that men framed and ratified the Fourteenth Amendment. Women were then excluded and from political life and denied political power over their reproductive lives. Any decision that tried to recreate the legal world of the late nineteenth-century would fail to secure reproductive rights. *Dobbs*, however, does not recreate the late nineteenth-century. It makes out the nineteenth-century to be more restrictive of reproductive rights than it in fact was. It neglects subsequent developments which make it likely that its selective history will hit the ground in a racialized and gendered way beyond the context of abortion. And puts its institutional weight behind a particular side of a broader constitutional conflict over reproductive rights, even

284. *Id.* at 1709.
289. See *id.*
as it claims to be neutral. In these respects, it does not place the Supreme Court behind the New Jane Crow but invites a further analogical criticism.

III. DOBBS AS THE NEW PLESSY

Among the fixed stars in the constitutional (law) constellation is egregious wrongness of Plessy v. Ferguson, upholding the constitutionality under the Thirteenth and Fourteenth Amendments of an 1890 Louisiana law requiring “separate” but “equal” rail accommodations.290 But as Jamal Greene has written in identifying it as one of four anti-canonical cases that “we all agree are wrong,” criticisms of Plessy vary.291

Some have denounced Plessy as inconsistent with the original meaning of the Fourteenth Amendment.292 Others have criticized its “blind[ness] to the social meaning of segregation, that blacks are and should remain a permanent underclass.”293 Still others have focused attention on its effects; as Lucas Powe put it, Plessy was “the South’s Magna Carta,” a ringing endorsement of separate-but-equal everything that encouraged the former Confederate states to double down on White-supremacist political economy that maintained a racialized underclass.294 Not only was it wrong when decided; in countless ways, it made the world worse.

Dobbs deploys Plessy’s overruling by Brown as an illustration of the importance of discarding “egregiously wrong” precedents. But core components of its reasoning recall Plessy’s egregious errors. And it, too, holds the potential to entrench and expand political economies that perpetuate racialized and gendered subjugation.

A. ERASING RECONSTRUCTION

Plessy’s discussion of the Thirteenth and Fourteenth Amendments is bereft of engagement with the history of their framing or ratification; any substantial discussion of the constitutional theory that informed the Amendments’ content and structure; or any careful inquiry of the kinds of laws that they were designed to eradicate or legitimate. It takes for granted the correctness of decisions that made similar omissions. Unsurprisingly, the Court arrived at a conception of the Amendments’ reach that was so limited that it

293. Greene, supra note 292, at 414; see, e.g., Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L. J. 421, 424 (1960); Cheryl I. Harris, Equal Treatment and the Reproduction of Inequality, 69 Fordham L. Rev. 1753, 1766-67 (2000).
could cite without evident embarrassment antebellum decisions endorsing the constitutionality of segregated schools—as if the Amendments had no bearing upon them.

Pivotal to the Court’s reasoning was a distinction between “social” and “political” equality. Here, the Court uncritically borrowed conceptions of constitutionally salient categories from the opponents of the Reconstruction Amendments. To a person, Reconstruction Republicans insisted that the Fourteenth Amendment did not protect “social” rights. But the right to nondiscriminatory access to common carriers was not among them. Rather, the prevailing Republican view was that the latter was a civil right and ranked among the privileges and immunities of citizens of the United States. The “social rights” that no one argued were constitutional rights were rights of access to private clubs and the esteem of others. Opponents of Reconstruction labeled as a social right every right that they worried would prove destabilizing to a social order built on the denial of civil rights to Black people; Plessy took these unreliable witnesses at their word.

Dobbs engages even less with the history of Reconstruction than does Plessy and relies upon precedents that suffer from similar deficiencies. Originalists who have studied abolitionist and Republican constitutional argumentation and politics during the antebellum and Reconstruction periods generally agree that the Fourteenth Amendment imposes some kind of anti-discrimination requirement on the states. There is, however, not a word in Justice Alito’s opinion about what abolitionists, Republicans, or anyone else who contributed to the content of the Reconstruction Amendments said about discrimination. The Court’s assumption that the Fourteenth Amendment requires discriminatory intent is based on a string of precedents that lack any such discussion.

Khiara Bridges points out that “[i]f so inclined, the Roberts Court could jettison Washington v. Davis … which held that plaintiffs must provide evidence that discriminatory intent lay beneath a law with

296. See id. at 184-93.
297. See id. at 231.
harmful racial impacts before courts can review it with strict scrutiny."\textsuperscript{300} The Roberts Court is obviously not so inclined. But it is anyone’s guess what history has to do with that disinclination.

As articulated by Justice Alito, moreover, discriminatory intent is virtually impossible to prove absent explicit use of a suspect classification. We are told that the nineteenth-century abortion statutes cannot be “motivated by hostility to Catholics and women” because the votes of “hundreds of lawmakers … were needed to enact these laws.”\textsuperscript{301} The implication is that all of the officials whose decisions are critical to a government action must be motivated by hostility in order for there to exist discriminatory intent. Taken seriously, this would make it difficult to indict scores of Jim Crow laws, including poll taxes and literacy tests that were designed to exclude Black people from the jury and ballot boxes. And as Katie Eyer observes, “[m]any segregationists … believed themselves to be acting for good reasons—not out of raw racial animus.”\textsuperscript{302}

Most scholars to have considered the question have concluded that the history of the Thirteenth Amendment supports an understanding of discrimination that forbids stratified citizenship and empowers Congress to ensure that it is not created by states. They point out that most Reconstruction Republicans took the view that the abolition of slavery was sufficient to provide Congress with the authority to target public or private practices associated with it and to construct an unstratified citizenship by securing fundamental civil rights associated with citizenship.\textsuperscript{303} Hence the override by a

\textsuperscript{300} Bridges, supra note 219, at 53. For arguments that discriminatory intent is not required by original meaning, see Melissa L. Saunders, Equal Protection, Class, Legislation, and Colorblindness, 96 Mich. L. Rev. 245 (1997); Evan D. Bernick, Antisubjugation and the Equal Protection of the Laws, 110 Geo. L.J. 1 (2021).


\textsuperscript{302} See Eyer, supra note 218, at 1024.

congressional supermajority of President Andrew Johnson’s veto of the Civil Rights Act of 1866, which provided:

Be it enacted . . . , That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.\textsuperscript{304}

The supermajority that overrode Johnson’s veto believed that Congress had the constitutional authority to define U.S. citizenship and protect civil rights associated with citizenship that only “white citizens” had consistently enjoyed—even before the \textit{Fourteenth Amendment} was framed and ratified. Why, then, the Fourteenth Amendment at all?

As noted above, the Thirteenth Amendment’s prohibition on slavery and involuntary servitude contains an exception: “except as a punishment for crime whereof the party shall have been duly convicted.”\textsuperscript{305} Over the vociferous objections of Republicans who denied that it permitted any such thing, the former Confederate states sought to recreate as nearly as possible ante-bellum racial hierarchy by means of the Black Codes and convict leasing.\textsuperscript{306} The Fourteenth Amendment was designed to put beyond any doubt

\textsuperscript{304} \textit{Civil Rights Act of 1866}, ch. 31, 14 Stat. 27 (1866).

\textsuperscript{305} \textit{U.S. CONST. amend. XIII}.

\textsuperscript{306} \textit{See generally BLACKMON, supra} note 113. On Republican objections, see Pope, \textit{Convict Leasing, supra} note 304, at 1478.
Congress’s constitutional authority, not only to abolish slavery but to establish its opposite: Republican citizenship.307

One will not find in 1868 an established legal right to terminate a pregnancy. But forced reproduction was integral to the institution of slavery,308 and Republican citizenship was understood to have a fundamental right not to be treated differently than others without a reason grounded in a constitutionally proper end of government.309 Given this history, conscripting the bodies of some citizens and not others into the performance of a particular social role associated with sex demands more than a bare assertion that states are furthering an “interest in protecting prenatal life.”310

B. ERASING SOCIAL REALITY

Few passages of Plessy or indeed any Supreme Court opinion are more notorious than the following:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.311

As Justice John Marshall Harlan acidly replied in dissent, this was no “assumption”: “[E]very one [sic] knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.”312 The purpose of the act was to promote White supremacy, and Black people were correct to construe it that way. To posit otherwise was to betray a fundamental failure to understand the social context in which the Railway Act operated—one in which political life was

309. BARNETT & BERNICK, supra note 296, at 118-126.
312. Id. at 557 (Harlan, J., dissenting).
dominated by White people who enacted racial distinctions in order to perpetuate the dominance.

Less notorious but comparably risible was Plessy’s effort to demonstrate the fallaciousness of the notion that racial segregation communicates racial inferiority. Imagine, wrote Justice Harry Brown, “if… the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms.” It would be absurd to think that such a law “would thereby relegate the white race to an inferior position.” The absurdity of this argument—from-absurdity lies in Brown’s apparent ignorance of ways in which southern states made it impossible for Black people to dominate state legislatures—through poll taxes, White primaries, and grandfather clauses that allowed voters to register only when their fathers and grandfathers had been eligible to vote.

I began with Rennie Gibbs, whose existence and experience points to a social context that Dobbs neglects entirely. It includes higher rates of poverty; higher rates of unintended pregnancy; higher rates of reproductive coercion, sexual assault, and intimate partner violence; higher abortion rates; higher rates of pregnancy complications, and higher rates of criminalization for pregnancy outcomes among Black people capable of pregnancy. These rates are related. Unintended pregnancy is downstream of reproductive coercion, sexual assault, and intimate partner violence; abortion is downstream of unintended pregnancy and poverty; pregnancy complications are downstream of unintended pregnancy and poverty; criminalization is downstream of complications and racialized and gendered stereotypes concerning Black maternity. Everyone should know that the overruling of Roe and Casey will exacerbate these problems.

313. Id. at 551.
314. Id.
317. Id. at 21.
319. See Brief of Amici Curiae Reproductive Justice Scholars Supporting Respondents, supra note 314, at 15-16.
320. See Jasmine D. Johnson, Celeste A. Green, Catherine J. Vladutiu & Tracy A. Manuck, Racial disparities in prematurity persist among women of high socioeconomic status, 2 Am. J. Obstetrics & Gynecology MFM (2020).
321. See Paltrow & Flavin, supra note 39.
322. See Bridges, supra note 220, at 43.
One might respond on Alito’s behalf that this social context— unlike the context ignored by Justice Brown in *Plessy*— is constitutionally irrelevant. But this response begs the question left open by Alito’s citation to precedents that insist upon proof of discriminatory intent without grounding that insistence in constitutional text or history. A similar response was available to Brown, who pointed to precedents that grounded the distinction he drew between social and political rights. These responses are no stronger than the reasoning of the precedents that they rely upon.

There is an analogue as well in *Dobbs* to Justice Brown’s appeal to a level political playing field on which opponents of segregation could compete and indeed prevail, becoming dominant in the state legislature. “Women are not without electoral or political power,” Justice Alito declares, adding that “the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so” and that Mississippi women made up 55.5 percent of the voters who cast ballots in the November 2020 election despite making up 51.5 percent of the population.323

These numbers don’t tell the whole story of democracy in Mississippi. Mississippi has been ranked among the worst states in terms of state-imposed obstacles to voting, as measured by difficulty of registering to vote and casting a ballot.324 This is in part a function of Supreme Court decision-making. In *Shelby County v. Holder* the Court held unconstitutional Section Four of the Voting Rights Act of 1965 (VRA), inviting states that— owing to their records of discrimination against Black voters— had once been required to submit new election laws to the federal government for approval, to disenfranchise Black voters.325 Mississippi was among them—the federal government noted objections to Mississippi voting changes 173 times in the Act’s nearly fifty-year history, with over three-fifths of those occurring after the 1982 reauthorization of the VRA.326 In 2012, the Mississippi state legislature passed a bill to enact a requirement that all voters show identification prior to casting a ballot, which was awaiting preclearance from the Department of Justice when *Shelby County* came down.327 Mere hours after the decision,

Mississippi Secretary of State Delbert Hosemann released a statement declaring that he would immediately put the law into effect.328

David Landau and Rosalind Dixon have detailed why the equation of the ability of women to vote in large numbers with female political power is so undertheorized as to be insulting. Numbers are insufficient for power, as evinced by the fact that “[w]omen have long been subject to constraining social role expectations, legal and economic discrimination, and political disenfranchise[ment] despite their numbers.”329 Nor are they necessary; statistical minorities “historically disadvantaged” and “subordinated” have been able to form coalitions and achieve significant electoral influence.330 Further, “[t]here is… a close relationship between allowing access to abortion and promoting social, economic and political inclusion and equality” because “[w]ithout access to abortion, women will have limited choice but to play the role of mother and caregiver.”331 In other words, a decision by a legislative majority to limit reproductive rights can limit women’s political influence in future elections even if the majority was initially elected by women in large numbers.332

Finally, as Landau and Dixon detail, female votes are a poor measure of female political power if the elections are “fundamentally unfair as tests of popular will.”333 And Mississippi—like “the vast majority of states that have total or near total bans on access to abortions”—has “laws governing redistricting processes that create an ‘extreme’ or ‘high’ risk of partisan gerrymandering, based on who draws maps, how they are drawn, and how they may be challenged in state court[.].”334 Again, this is a world that the Court has helped make—here, by determining in *Rucho v. Common Cause* that there are no judicially enforceable constitutional limits on the scope for partisan gerrymandering in congressional and state legislative redistricting processes.335 As in *Plessy*, the Court appears unaware that its veneration of democracy does not track political reality.

C. LEGITIMATING SUBJUGATION

The United States Reports are littered with decisions that omit important history and disregard salient social realities. The most derided among them


329. See David Landau & Rosalind Dixon, Dobbs, Democracy, and Dysfunction, 2023 WIS. L. REV. 1569, 1587 (2023)

330. *Id.*

331. *Id.* at 1588.

332. *Id.*

333. *Id.*

334. Landau & Dixon, supra note 330, at 1589.

have had ripple effects across law and society. *Plessy* is rightly derided, not only for upholding a racist law but for legitimating a racist political economy and encouraging its expansion. As Angela Harris summarizes, “[a]s well as fostering ‘colorblind’ statutes that in their social operation promoted white supremacy, *Plessy* fostered the proliferation of state racial regulation in the name of ‘difference.’”

*Dobbs* shares this vice. It reads not merely as a constitutional endorsement of Mississippi’s abortion ban but of a politics in which the values of prenatal and maternal life underwrite carceral control of pregnancy—and nothing else.

In her pathbreaking work on the growth of the California prison system, Ruth Wilson Gilmore coined the term “antistate state” to name a particular approach to governance. The antistate state is defined by the abandonment of public goods like safe housing, clean water, reliable jobs, healthy food, and social service provisions, and their replacement with police, prisons, and criminalization. The effect is to confine, control, and “accelerate the mortality” of dispossessed, racialized populations who are un- or under-employed.

Susan Cate’s study of the content and consequences of Mississippi prison reform efforts that commenced in 2013 reveals Mississippi to be a paradigmatic antistate state. At the same time it has “decimated its social services and aggressively reduced taxes over the past several decades”; imposed “some of the most stringent restrictions on welfare recipients in the nation”; declined to expand Medicaid; and made cuts to its mental health system that “have earned . . . the distinction of ranking last in the nation in access to mental health[]” Mississippi continues to imprison people at a 57 percent higher rate than the national average and jail people at twice the national average. It has, however, embarked on a program of penal austerity that has entailed shifting people in jail from county-run regional jails to state jails; closing community work centers without replacing them with decent-paying public service jobs; lowering staff salaries, resulting in more shortages and lockdowns requiring imprisoned people to remain in their cells for nearly

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339. See *id.* at 244-48.

340. *Id.* at 247.

24 hours a day—one lockdown lasting more than seven months; and more violence in prisons, among other pathologies.\textsuperscript{342}

One of Mississippi’s areas of organized abandonment is health care. A 2022 March of Dimes Report found that half of the counties in Mississippi lack hospitals that provide obstetric care, OB-GYNs, or certified nurse midwives.\textsuperscript{343} Its health care system ranks last, or close to last, in almost every leading health outcome\textsuperscript{344}—including maternal and infant mortality—and it is among the worst states in respect of racial disparities.\textsuperscript{345} The state’s own Department of Health found that the maternal mortality rate increased by 8.8 percent between 2013-2016 and 2017-2019, with the latter period being the most recent one analyzed by researchers.\textsuperscript{346} This is the state to which \textit{Dobbs} defers when it invokes prenatal and maternal life to justify abortion criminalization.

Mississippi does not consistently pursue a commitment to prenatal or any other kind of life. Indeed, it has organized itself to expose people—in Gilmore’s words—to “group-differentiated vulnerability to premature death.”\textsuperscript{347} The Court expresses not a word of constitutional concern about this. Instead, it leaves readers with the impression that Mississippi is a well-functioning, constitutionally faithful democracy. Other states are thus encouraged to do likewise, hollowing out the provision of public goods while criminalizing pregnancy outcomes in a way that will predictably contribute to the marginalization of women of color—just as \textit{Plessy} encouraged states to expand Jim Crow.

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To analogize \textit{Dobbs} to \textit{Plessy} is to invite criticism, not only for being too hard on the Court but for being too easy on the Constitution. To identify

\begin{thebibliography}{99}
\bibitem{342} Id. at 727-28.
\bibitem{347} GILMORE, supra note 195, at 28.
\end{thebibliography}
Plessy as distinctively bad is to imply something positive-by-comparison about the Court’s decision-making in other cases. To say that it missed the constitutional mark is to pay the Constitution a backhanded compliment for not permitting segregated railcars. The vilification of Plessy thus may “obstruct serious engagement with the reality that constitutional interpretation is often contested, unstable, and susceptible to otherwise appropriate use for tragic ends.”\textsuperscript{348} So too with Dobbs; indeed, more so with Dobbs for those who take the view (as I do) that the original public meaning of the Reconstruction Amendments should constrain constitutional decisionmakers today.\textsuperscript{349}

There is compelling evidence that nondiscriminatory access to common carriers was widely understood during the nineteenth century to be a fundamental civil right, among the privileges and immunities of citizens of the United States.\textsuperscript{350} We have no such evidence concerning the right to terminate a pregnancy. If that seems morally intolerable, the original meaning of the Reconstruction Amendments might just be morally intolerable, and I should blame the Constitution rather than the Court—and perhaps give up originalism.

I do not therefore claim that Dobbs is inconsistent with the Fourteenth Amendment’s original meaning; that it is one of the Court’s worst decisions; or that identifying a category of anticanonical cases is a worthwhile enterprise. Rather, I claim that Dobbs shares several of Plessy’s vices, and that those similarities should inform our engagement with it. These shared vices should motivate us—if further motivation we need—to question Dobbs’s analysis; anticipate its harms; and build democratic power to dismantle it.

IV. CONCLUSION

“Crow” analogies are at once descriptive and normative. They describe continuities across institutions; they urge that people ought evaluate the new institutions negatively if they evaluate the old institutions negatively. A person who does not regard the old institutions negatively will be unmoved; the hope is that there are few such people. For the rest, the connection can spark a fire or provide fuel to one that is already burning.

To be sure, dismantling oppressive institutions requires more than a potent analogy (or two). It requires building political power. Here, it requires learning from, and supporting those who long ago recognized that the legal right to access abortion and contraception was insufficient to prevent

\textsuperscript{348} Greene, supra note 292, at 475.
\textsuperscript{349} See Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 91 Notre Dame L. Rev. 1, 6-7 (2015).
\textsuperscript{350} See Barnett & Bernick, supra note 296, at 3-6.

351. See Donofrio, supra note 89, at 227-29.

352. See supra id.

353. See sources cited supra notes 87-91.


356. See Ross & Solinger, supra note 348, at 9 (defining “reproductive justice” to include “(1) the right not to have a child; (2) the right to have a child; and (3) the right to parent children in safe and healthy environments.”).

357. See Rebouché, supra note 352, at 17.}

The RJ movement emerged in response to ongoing, post-\textit{Roe} state control over the bodies of women of color, low-income women, and LGBTQIA individuals.\footnote{See Donofrio, supra note 89, at 227-29.} Long before the term “reproductive justice” was coined in 1994, women of color criticized the mainstream pro-choice movement—and the abortion-rights doctrine that it had forged through constitutional litigation—for neglecting the reproductive needs of marginalized groups.\footnote{See id.} \textit{Roe} did not prevent the targeting of women of color and low-income women and girls through sterilization;\footnote{See supra notes 87-91.} subsequent decisions upheld restrictions on the use of public funding for abortion\footnote{See Maher v. Roe, 432 US 464 (1977); Harris v. McRae, 448 US 297 (1980).} and denied that there exists under the Constitution any “positive” right to government aid.\footnote{See DeShaney v. Winnebago Cnty. Dept. of Social Servs., 489 U.S. 189 (1989).} Pro-choice constitutionalism had demonstrably failed to provide race-class marginalized people the resources that they needed, not only to decide whether to have children but to raise their children in safe, healthy environments.\footnote{See Ross & Solinger, supra note 348, at 9 (defining “reproductive justice” to include “(1) the right not to have a child; (2) the right to have a child; and (3) the right to parent children in safe and healthy environments.”).} Accordingly, the RJ movement seeks more than the right to terminate a pregnancy, recognizing that absent sex education, post-natal and prenatal care, childcare support, and other health resources and infrastructures, reproductive oppression will continue.\footnote{See Rebouché, supra note 352, at 17.
and individuals the power to “make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families, and our communities.”

These demands are not new. They grow out of freedom movements that are older than the Constitution itself. These movements have smashed oppressive institutions at what appeared to be the height of their powers and built liberatory ones in their place. Crucial to their success has been an understanding of constitutional political economy—the ways in which constitutionalism, inside and outside the courts, shapes the accumulation and distribution of economic power, as well as how economic power shapes political power. Thus, Reconstruction Republicans knew that abolishing slavery required more than prohibiting a particular legal relationship. It meant providing formerly enslaved people with the material resources to achieve physical, economic, and political autonomy. It meant land and education. For the more radical among them, it meant breaking the enslaving oligarchy, expropriating and redistributing planters’ estates. Without political-economic transformation, re-subjugation was inevitable—as the ultimate collapse of what W.E.B. Du Bois called abolition democracy and the rise of Jim Crow attest.

This history is the future beyond Jane Crow. It is a future in which the Court’s Constitution does not limit our political imagination. It is a future in which the indictment of Rennie Gibbs is not possible. It is prefigured by infrastructures of care that for decades provided money, lodging, travel, and child care to women, girls, and other individuals seeking abortions, and are operating to mitigate the harms of Dobbs. It can be our future, if we make it so.


361. See id. at 120-23.

362. See id. at 124-25.

363. See W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 149-70 (2007) (“Abolition-democracy demands for Negroes physical freedom, civil rights, economic opportunity and education as a right to vote, as a matter of sheer human justice and right.”); ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND PRISONS, EMPIRE, AND TORTURE 95 (2005) (“Du Bois argued that the abolition of slavery was accomplished only in the negative sense. In order to achieve the comprehensive abolition of slavery . . . new institutions should have been created to incorporate black people into the social order.”).