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# Feminist Legal Theory and Praxis after *Dobbs*: Science, Politics, and Expertise

Aziza Ahmed<sup>†</sup>

Fifty years ago, in *Roe v. Wade*, Justice Blackmun set into motion the idea that abortion should be a decision between a woman and her doctor.<sup>1</sup> That idea traveled from the Supreme Court decision to popular discourse; with it, came the notion that when it comes to reproduction, medical experts are a key part of women's liberation. In *Dobbs v. Jackson Women's Health Organization*, the court ignored the role of experts and threw the question of who should decide when and how a person has an abortion to the people. In my essay for this symposium issue dedicated to feminist legal praxis, I will argue that contestation around medical and epidemiological evidence will continue to shape the abortion debates despite the Supreme Court's recent decision. Reproductive rights advocates need to continue to pay close attention to new battles occurring in the register of evidence, medicine, and expertise. Doing so will require reproductive rights advocates to examine purportedly neutral scientific and expert-based justifications in the legal regulation of the practice of medicine and medication more closely.<sup>2</sup> This will create new and necessary avenues for legal advocacy, including challenging when and where legal institutions legitimate misinformation about abortion or limit access to abortion based on science and evidence. In taking on questions of expertise and evidence, abortion rights advocates can learn from the overlapping movement to end racial bias in medicine and medical technology.<sup>3</sup>

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> My work examines several dimensions of law, medicine, and expertise. See Aziza Ahmed, *Abortion Experts*, U. CHI. LEGAL F. (forthcoming 2023); Aziza Ahmed, *Abortion in a Post-Truth Moment*, 95 TEX. L. REV. 198 (2017); Aziza Ahmed, *Will the Supreme Court Legitimate Pretext?*, SCOTUS BLOG (Jan. 31, 2020), <https://www.scotusblog.com/author/aziza-ahmed> [<https://perma.cc/35UK-E6EC>]; Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J. L. & MED. 85 (2015).

<sup>3</sup> Jonathan M. Metzl & Dorothy E. Roberts, *Structural Competency Meets Structural Racism: Race, Politics, and the Structure of Medical Knowledge*, 16 AM. MED. ASS'N J. ETHICS 674 (2014); Harald Schmidt, Dorothy E. Roberts & Nwamaka D. Eneanya, *Rationing, Racism and Justice: Advancing the Debate Around 'Colourblind' COVID-19 Ventilator Allocation*, 48 J. MED. ETHICS 126 (2022); DOROTHY E. ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011); Lundy Braun, *Race, Ethnicity and Lung*

### **Roe to Dobbs: Moving from Medical Expertise to Politics**

In *Roe*, Justice Blackmun placed physicians and the medical establishment on the side of the pro-choice movement.<sup>4</sup> Reproductive rights advocates paid close attention to this move and built a strategy that relied on medical and public health experts to argue for a set of legal arrangements that would protect access to abortion. This legal advocacy benefited from support of major institutional players, from the American College of Obstetricians and Gynecologists to the American Psychological Association. Epidemiological research, too, found that access to safe abortion care would decrease maternal mortality and morbidity and ensure better financial outcomes for women and people who need abortions.<sup>5</sup>

This would not be an easy path, however. *Roe* not only set into motion a wide array of legal challenges—it also set the stage for a new type of organizing: physicians and scientists who would try to change the very facts known to be true about abortion.<sup>6</sup> In other words, since courts had decided to defer to scientific evidence and expertise, anti-abortion advocates sought to change the science and redefine who the experts were. In the following decades, this new movement focused on changing the knowledge environment around fetal viability, fetal pain, and the purported long-term consequences of abortion on the woman or pregnant person, such as poor mental health outcomes and breast cancer.<sup>7</sup> While the fetus took precedence

*Function: A Brief History*, 51 CANADIAN J. RESPIRATORY THERAPY 99 (2015); JONATHAN KAHN, RACE IN A BOTTLE: THE STORY OF BIDIL AND RACIALIZED MEDICINE IN A POST-GENOMIC AGE (2012); Patricia J. Williams, *Race, the New Black: On Fashioning Genetic Brand*, 43 AM. J. L. & MED. 183 (2017). I say overlapping movements because some of the key voices in thinking about knowledge production and race in medicine, including Dorothy Roberts, are also leading figures in the reproductive justice movement. For a recent discussion of how the Supreme Court has engaged ideas about eugenics and racial science, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 124 HARV. L. REV. 2025 (2021).

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113 (1973). See Linda Greenhouse, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005) (discussing that Blackmun had previously researched abortion as a lawyer for the Mayo Clinic). But see Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147 (2006) (challenging the idea that Blackmun relied on medical expertise in reflection of his time at the Mayo Clinic).

<sup>5</sup> See DIANA GREENE FOSTER, THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION (2020).

<sup>6</sup> Physicians opposed to abortion include the American Association of Pro-Life Obstetricians and Gynecologists. See *History of AAPLOG*, AAPLOG, <https://aaplog.org/about-us/history-of-aaplog/> [https://perma.cc/CMB5-XBTA]. See TEX. HEALTH AND HUMAN SERVICES, A WOMAN'S RIGHT TO KNOW: INFORMATIONAL MATERIAL (2016), <https://www.hhs.texas.gov/sites/default/files/documents/services/health/women-children/womans-right-to-know.pdf> [https://perma.cc/7H4H-J9VB]; Priscilla K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995–2009*, 199 BRIT. J. PSYCHIATRY 180 (2011). But see Press Release, Guttmacher Inst., Study Purporting to Show Link Between Abortion and Mental Health Outcomes Decisively Debunked (Mar. 5, 2012), <https://www.guttmacher.org/news-release/2012/study-purporting-show-link-between-abortion-and-mental-health-outcomes-decisively> [https://perma.cc/J2ZV-TBMH].

<sup>7</sup> See John A. Robertson, *Science Disputes in Abortion Law*, 93 TEX. L. REV. 1849, 1858-61 (2014); I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J. L. MED. & ETHICS 235 (2011). See also Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES

in questions of fetal pain and viability, it was the woman who took central stage when it came to the consequences of abortion itself. Together with legal advocates, these “woman-protective” abortion arguments became a new frame in the conservative battle to end abortion access.<sup>8</sup> Mobilizing the idea that excessive regulation of abortion was good for women’s health, the anti-choice movement successfully moved forward despite many legal challenges, as courts deferred to legislatures’ regulation of healthcare. In the context of specific legal regulations, like those on informed consent and building regulations, the Court deferred to pretextual claims about maternal health outcomes, even over the protests of the vast majority of researchers and scientists, who argued that the regulations were unnecessary, based on misinformation, or unlikely to serve their claimed purpose.<sup>9</sup> Among other types of misinformation, these cases propped up the idea that abortion causes negative mental health consequences and helped justify the need for abortion restrictions.<sup>10</sup>

Following *Roe*, reproductive rights advocates might have been led to believe that judges would exercise deference to physician experts—almost all of whom have supported liberalizing abortion access since *Roe*—and that this deference would result in protecting access to abortion. Instead, courts, including the Supreme Court, have played an important role in propping up questionable scientific and medical claims about the consequences of abortion in order to restrict access. In other words, in the fifty years since *Roe*, courts have done more than simply defer to bad evidence. They have played an active role in resetting the playing field: allowing misinformation to be treated on par with what is known to be the standard of care in medicine.<sup>11</sup> Legislators, too, have given a powerful platform to debunked and problematic science.<sup>12</sup>

The *Dobbs* decision, which overturned the constitutional right to abortion, ignored the longstanding debates over controversial medical claims. Unlike *Roe*, which started us down the path of an expert-driven discussion of abortion access (i.e., listen to the doctors), the *Dobbs* decision

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MAG. (Jan. 21, 2007), <https://www.nytimes.com/2007/01/21/magazine/21abortion.t.html> [<https://perma.cc/STH3-FS85>].

<sup>8</sup> Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L. J. 1641 (2007). See also Mary Ziegler, *Substantial Uncertainty: Whole Woman’s Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77 (2017).

<sup>9</sup> *Planned Parenthood v. Casey* created the undue burden standard, which prohibited laws that place a substantial obstacle in the path of a woman seeking an abortion for unviable pregnancies. In *Whole Woman’s Health v. Hellerstedt* and *June Medical Services LLC v. Russo*, the Supreme Court began to consider the “effect” prong of the *Casey* standard, allowing them to hold that provisions of laws in Texas and Louisiana were unconstitutional.

<sup>10</sup> *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012). *Gonzales v. Carhart*, 550 U.S. 124 (2007).

<sup>11</sup> *Id.* I discuss the court’s role in the production of facts and knowledge about abortion in Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J. L. & MED. 85 (2015).

<sup>12</sup> Siegel, *supra* note 8, at 1651-56 (describing testimony in a state legislature by anti-abortion researchers on so-called post-abortion syndrome).

did not suggest that abortion is an issue that should be decided by experts. Instead, it treated abortion as a political issue and threw the core question of whether people should be able to access the procedure back into the political arena. Since *Dobbs*, abortion can be regulated through the legislature without the need to reference its medical dimensions. This is true despite the growing evidence that there are negative health consequences to abortion bans, including that doctors are waiting longer and longer to intervene in crisis pregnancy situations, in many cases, causing harm to women.<sup>13</sup>

### **Post-Dobbs: New (and Old) Questions on the Politics of Knowledge Production**

Despite the reticence of the *Dobbs* majority to see abortion as an issue that might require some deference to experts, the questions surrounding the role of experts in the legal regulation of abortion continue to play a central role in the legal struggles on the regulation of abortion. In the last few years, these fights have often focused on mifepristone, also known as RU-486, one of the two drugs in the medication regime for abortion.<sup>14</sup> In 2021, in *FDA v. ACOG*, for example, the Supreme Court held, over the protest of physicians and advocates, that only the Food and Drug Administration (FDA) could regulate mifepristone. The latter group sought to force the FDA to loosen restrictions on the provision of abortion medication. These restrictions required in-person dispensation, which physicians and advocates thought was unnecessary and would increase exposure to the virus that causes COVID.<sup>15</sup> The decision was rendered moot when the FDA lifted restrictions on mifepristone. Following *Dobbs*, however, with abortion medication becoming a new site of contestation, questions of medical evidence, expertise, and authority will continue to shape access.<sup>16</sup>

Debunked claims also continue to surface, empowered by deference paid to them by the courts and legislatures over the last fifty years. One of the most prominent of these has been that abortion causes negative mental health outcomes. Some supposed experts have even gone so far as to label

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<sup>13</sup> Maya Manian, *The Impact of Dobbs on Health Care Beyond Wanted Abortion Care*, J. L. MED. & ETHICS (forthcoming 2023); Amy N. Addante et al., *The Association Between State-Level Abortion Restrictions and Maternal Mortality in the United States, 1995-2017*, 104 CONTRACEPTION 496 (2021) (making the connection between abortion restrictive states and health outcomes post-pregnancy); Anjali Nambiar et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, 227 AM. J. OBSTETRICS & GYNECOLOGY 648 (2022).

<sup>14</sup> Misoprostol can be used alone to induce an abortion. *Medication Abortion Up to 70 Days of Gestation*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Oct. 2020), <https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2020/10/medication-abortion-up-to-70-days-of-gestation> [<https://perma.cc/EZ3P-BUE8>].

<sup>15</sup> *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578, 579 (2021).

<sup>16</sup> See David Cohen et al., *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (outlining political questions that will emerge at the Food and Drug Administration in the regulation of mifepristone).

this post-abortion syndrome.<sup>17</sup> The creation of this condition was the result of a very successful move by anti-abortion advocates, who utilized disproven studies to help pass informed consent laws.<sup>18</sup> These advocates have stayed the course. Since *Dobbs*, for example, prosecutors in Michigan considered whether they should prosecute providers under a 1931 abortion ban that was still on the books. The Governor of Michigan sought and was awarded a temporary restraining order against the application of the law. Support for the law came from a variety of places, including testimony provided by Priscilla Coleman, who frequently writes and publishes on the issue of mental health and abortion.<sup>19</sup> Drawing on her research, whose claims have been questioned time and again by leading researchers, she testified that abortion causes various forms of mental health distress, and therefore, the law should be in effect. Though the court discredited the testimony, and placed a temporary restraining order on the law, in many other cases, similar assertions have led to the passage of informed consent laws that require physicians to give incorrect information to patients about abortion.<sup>20</sup>

Debates in the register of medical evidence, drug regulation, and public health expertise necessitate a question: how should reproductive rights advocate prepare and respond?

### **Lessons from Racial Justice Advocacy for Reproductive Rights Advocates**

Existing advocacy from other contexts teaches valuable lessons on how to engage with the politics of science and expertise as they affect legal regulation of medicine: that reproductive rights advocates must be vigilant about factual claims about abortion even when they are validated by our most venerated institutions. Racial justice scholars and advocates have modeled how and why it is necessary to track how expert claims are being made, who validates them, and how this shapes the knowledge environment.

Among other strategies to challenge racial inequality, race scholars and racial justice activists have challenged the scientific and medical research and questioned the tools that have long been used to rationalize and naturalize racial difference.<sup>21</sup> Taking on medical practice and technologies have required racial justice scholars and advocates to unearth the assumptions and politics that are embedded in medical care. These past few years a few

<sup>17</sup> Siegel, *supra* note 8, at 1669.

<sup>18</sup> *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012).

<sup>19</sup> Guttmacher Inst., *supra* note 6.

<sup>20</sup> *Whitmer v. Lindermer*, No. 22-193498-CZ (Mich. 6 Cir. Aug. 1, 2022) (granting a temporary restraining order). In *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012), the court upholds informed consent laws based on *Carhart v. Gonzales*, 550 U.S. 124 (2007), with reference to the idea that abortion can cause severe depression and loss of self-esteem. For a description of Priscilla Coleman's testimony, see Katie Tandy, *Abortion Stays Legal in Michigan, For Now*, MEDIUM: THE PUB. MAG. (August 22, 2022), <https://medium.com/the-public-magazine/abortion-stays-legal-in-michigan-for-now-7d83839f3beb> [<https://perma.cc/H78A-96NS>].

<sup>21</sup> See *supra* note 3.

medical tools have come under intense scrutiny from racial justice scholars and advocates including the vaginal birth after caesarean calculator (VBAC Calculator), lung spirometer,<sup>22</sup> the pulse oximeter,<sup>23</sup> and the eGFR score (the formula for calculating who should receive a kidney transplant).<sup>24</sup> Each of these tools contained within them a “race correction” allowing for an adjustment in test outcomes based on race, with implications for further testing and treatment. In the tools mentioned, the race corrections may have resulted in fewer recommended vaginal births for Black women, fewer necessary medical interventions for Black patients with COVID, or an inability for Black patients to receive transplants. Some of these race corrections, like that involved in the lung spirometer, were the outcome of assertions that date back to slavery about the differences between Black and white bodies.<sup>25</sup>

In order to undo the harms caused by these medical technologies and the medical practice that accompanies them, racial justice advocates and scholars have engaged various legal institutions and practitioners including the FDA and physicians. They have argued that racial biases built into neutral-seeming medical technologies ought to be removed. Advocates have mobilized political leaders to speak out against racial bias built into medical technology.<sup>26</sup> Unlike reproductive rights advocates, who have had a steadfast faith in expertise post-*Roe*, racial justice activists have kept critically interrogating science for bias and, in turn, have changed expert norms and practice in the context of medical care and technology. Their advocacy led to revolutionary change: the VBAC calculator and eGFR no longer contain a race correction.<sup>27</sup> And, following the COVID-19 pandemic and the increased attention to measuring lung capacity, there has been a broad conversation

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<sup>22</sup> Braun, *supra* note 3, at 99.

<sup>23</sup> Michael Sjoding et al., *Racial Bias in Pulse Oximetry Measurement*, 383 NEW ENGLAND J. MED. 2477 (2020).

<sup>24</sup> Dorothy Roberts, *Abolish Race Correction*, 397 LANCET 17 (2021).

<sup>25</sup> See LUNDY BRAUN, *RACE AGAINST THE MACHINE* (2021).

<sup>26</sup> The FDA issued a safety communication warning users of the potential inaccuracies of pulse oximeters. Researchers and advocates called for fixing the racial bias embedded in the technology itself. Actual change will only come, however, with sustained pressure and attention to the failures of the pulse oximeter. *Pulse Oximeter Accuracy and Limitations: FDA Safety Communication*, U.S. FOOD & DRUG ADMIN. (Nov. 7, 2022), <https://www.fda.gov/medical-devices/safety-communications/pulse-oximeter-accuracy-and-limitations-fda-safety-communication> [<https://perma.cc/Z9K3-GSH7>]. See also Letter from Sen. Elizabeth Warren et al., to Gopal Khanna, Dir. of the Agency for Healthcare Rsch. and Quality (Sept. 22, 2020), <https://www.warren.senate.gov/imo/media/doc/9.22.2020%20Letter%20to%20AHRQ%20re%20Use%20of%20Race%20in%20Clinical%20Algorithms.pdf> [<https://perma.cc/RK3J-3U4S>].

<sup>27</sup> *Changes to eGFR Calculation and What that Means for People Living with Kidney Disease*, NAT'L KIDNEY FOUND. (Sept. 23, 2021), <https://www.kidney.org/newsletter/changes-to-egfr-calculation-and-what-means-people-living-kidney-disease> [<https://perma.cc/DP3Z-QJQ2>]; Katie Palmer, *Changing the equation: Researchers Remove Race from a Calculator for Childbirth*, STAT (June 3, 2021), <https://www.statnews.com/2021/06/03/vbac-calculator-birth-cesarean/> [<https://perma.cc/KRC6-K6W>].



about pulse oximeters and lung spirometers, their limitations, and the need to more closely examine racial assumptions built into medical technology.<sup>28</sup>

Racial justice scholars have created a blueprint for thinking critically about medicine and science in resetting the knowledge environment and law to arrive at better health outcomes. Several lessons emerge from their work for the reproductive rights movement. First, law and science legitimate each other and eventually make the idea of racial difference turn into common sense.<sup>29</sup> Second, undoing this common sense to end racial bias in medicine requires interrogating expert claims. As questions of evidence and expertise remain at the fore of organizing for and against abortion access, these lessons from racial justice advocacy should motivate reproductive rights scholars to pay attention to how expertise is deployed and taken up in the arguments around the regulation of abortion. This will mean not only paying attention to legal transformations but also to how legal change shifts the knowledge environment around abortion.<sup>30</sup> For reproductive rights advocates, like racial justice advocates, this might include continued advocacy at administrative agencies, challenging technocratic and scientific assertions, and watching for new scientific claims around abortion as they emerge and are validated by the courts. Reproductive rights advocates can learn from ongoing activism of racial justice advocates in tracking shifts in the scientific knowledge environments around race. This is especially so as reproductive rights advocacy must now take on a new and ever-shifting scientific, legal, and political landscape in the post-*Dobbs* moment.

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<sup>28</sup> Meredith Anderson & Atul Malhotra, *Could Routine Race-adjustment of Spirometers Exacerbate Racial Disparities in COVID-19 Recovery?*, 9 LANCET 124 (2020).

<sup>29</sup> See 1 SHEILA JASANOFF, *The Idiom of Co-production*, in STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND SOCIAL ORDER 3 (2004) (discussing the embeddedness of scientific knowledge in identities, institutions, representations, and discourses).

<sup>30</sup> Aziza Ahmed, *Abortion Experts*, U. CHI. LEGAL F. (forthcoming 2023).