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INTRODUCTION: Securing Reproductive Justice After Dobbs

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INTRODUCTION
Securing Reproductive Justice After *Dobbs*

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When we conceptualized this symposium, *Roe v. Wade*[1] was still the law of the land, albeit precariously. We aimed to commemorate its fiftieth anniversary by exploring historical, legal, medical, and related dimensions of access to abortion as well as the challenges ahead to secure reproductive justice. With the leak of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* on May 2, 2022, we shifted to mark the dawn of a new era. In the nearly identical official opinion announced on June 24, 2022,[2] Justice Samuel Alito, writing for the majority (6-3), overturned *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[3]

Roe held that the right of privacy, grounded in the Fourteenth Amendment Due Process Clause's concept of "personal liberty," included a "woman's decision whether or not to terminate a pregnancy," while allowing states to regulate access to abortion to protect "maternal health," "maintain medical standards," and (after viability) further the state's interest in "potential life."[4] *Casey* affirmed constitutional protection for this liberty and declined the invitation to overrule *Roe*.[5] Neither *Roe* nor *Casey* fully secured on-the-ground access to abortion. *Casey* opened the door to a broader range of state restrictions on abortion access so long as they did not impose an "undue burden" on the person seeking an abortion.[6] However, as reproductive justice scholars argued in *Dobbs*, *Casey*'s protection of a pregnant person's right "to make the ultimate decision" of whether to have a child — and its recognition of how personal dignity and autonomy were at stake in such decisions — furthered two prongs of reproductive justice: the right *not* to have a child and the right *to* have a child in healthy circumstances for both parent and child.[7]

Using a narrow historical approach to defining "liberty," the *Dobbs* majority concluded that pregnant persons had no constitutional right to abortion in 1868 (when the 14th Amendment was ratified) and did not have one in 2022.[8] The majority further dismissed — in one paragraph — the argument that the Equal Protection Clause provided additional grounding for abortion rights because restrictive abortion laws (like the Mississippi 15 week ban at the heart of *Dobbs*) are sex-based classifications and rest on impermissible sex stereotypes.[9] The majority asserted several times that "the Constitution and the rule of law" demanded returning the issue of abortion "to the people's elected representatives." Henceforth, laws regulating abortion carry a "'strong presumption of validity'" and should be sustained if a legislature has a "rational basis" to enact laws that "would serve" any number of "legitimate interests."[10] While the majority showed no interest in the dire consequences of this holding for persons who might become pregnant, the powerful joint dissent by Justices Breyer, Sotomayor, and Kagan recognized the "on the ground" impact of laws like Mississippi's and the "draconian restrictions" states would

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likely adopt in *Dobbs*' wake.[11] They warned "the disruption of overturning *Roe* and *Casey* will . . . be profound," and expressed sorrow not only for the Court's departure from precedent but also for "the millions of American women who have today lost a fundamental constitutional protection."[12]

It is impossible to overstate the importance of exploring both the legacy and the future of *Roe* and *Casey* in the wake of *Dobbs*. The constitutional, political, and policy landscape changes by the day, with major implications for law, medicine, and public health.

This symposium marks *Roe*'s anniversary but also its demise. We evaluate the challenges to reproductive rights and justice as they have existed for the last fifty years as well as new barriers to securing reproductive justice after *Dobbs*.

after *Dobbs*. We asked authors to look beyond the formal legal environment and consider how a reproductive justice frame might bring into focus structural inequalities, new social movement alliances, and new areas for research and thinking. Together the papers in this issue offer a glimpse into the vast and often uncharted legal and medical debates set into motion after *Dobbs* alongside the impact the decision will have on entrenching racial, gender, and class inequalities.

The Current Landscape

As the joint dissent predicted, *Dobbs'* decision to push regulation to the states triggered nothing less than legal chaos. Some states had trigger laws waiting to outlaw abortion the moment *Roe* was overturned, and others acted quickly to restrict or ban abortion, often

Throwing the question of how to regulate abortion to the "people and their elected representatives," the *Dobbs* decision radically reset the legal, ethical, medical, public health, and political landscape. The symposium has a multidisciplinary approach that reflects these facets, and includes articles on law, medicine, public health, history, social movements, health equity, and reproductive health and justice. Each article contributes a critical aspect of the bigger picture, demonstrating the need for working across disciplines. The symposium is organized into several parts, with notable synergies within and among them: Beginnings; Social and Legal Dimensions of the Post-Dobbs Health Care Environment; Legal Regulation of Pregnancy and Reproduction; and New Strategies and Approaches.

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This introduction sets the stage for the 25 symposium articles that map and document the landscape

grouped now as abortion "restrictive" states. Other states acted to protect access to medical care through a variety of laws, including public payment for abortion care, constitutional amendments, and new laws that "shield" health care providers from cross-border actions by restrictive states. These states are often grouped as "protective" states. Calls to "codify *Roe*" through state and federal law became urgent, as have calls for further federal regulation and clarification of laws protecting patient privacy, access to emergency care, and drug regulation, among other issues.

As Radhika Rao discusses, the *Dobbs* decision signaled both a change in how the Supreme Court operates and a major shift in the law pertaining to medical practice for abortion and beyond, unleashing a new legal regime where, at the time of our publication, fourteen states ban abortion. While all states include exceptions for the life of the pregnant person, and

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some states include rape or incest exceptions, many do not count mental health as a threat to the patient's life. Six states have pre-viability gestational bans, and Georgia's begins at six weeks. George Annas offers insights as to the gravity of patient experiences, how they have played a role historically, and why personal narratives surrounding abortions and abortion law will continue to shape the politics and law of reproductive justice. Paul Lombardo adds historical perspective on the rising misuse of eugenics as a bogeyman in the politics of abortion. Aziza Ahmed and coauthors demonstrate how *Dobbs* continues a trend away from state responsiveness and responsibility for public health and toward policies favoring individual responsibility and reproductive coercion.

Several contributors canvass social and legal dimensions of the post-*Dobbs* health care environment. The practice of medicine itself is changing. Hospitals in restrictive states may require patients to be nearer to death before allowing physicians to intervene under a "life exception." This impacts not only the health and life of patients but also, as Amirala Pasha and coauthors discuss, medical training will be incomplete because hospitals and physicians offering medical education fear the consequences of performing these procedures to properly train medical students and residents. Scientific study of women's health may also change, as Richard Weinmeyer and coauthors note, as concerns about the new status of the fetus could alter women's participation in clinical trials. As Nadia Sawicki and Elizabeth Kukura elaborate, pregnant patients' autonomy is jeopardized by state abortion bans.

The impacts reach far beyond abortion. Broader health care problems exist for people with disabilities, as Leslie Francis writes, but critiques of restrictive abortion laws fail to recognize such issues. Further, as explored by Judy Daar as well as Sonia Suter and Laura Hercher, assisted reproductive technology and various forms of infertility treatments are likely to be impacted by the shifting landscape. Restrictive abortion laws protecting fetal "personhood" may potentially reach these politically popular treatments, raising questions about whether supporters of ART will join forces with supporters of endangered abortion rights or aim for special protection of ART alone.

Many contributors chart how *Dobbs* already has dire and far-reaching effects on the legal regulation of pregnancy and reproduction. The full impact remains to be seen, as various authors examine. With patients relying heavily on medication abortion, and using medication abortion in their homes with the help of online providers, federal regulatory agencies such as the FDA have taken a more central role. Yet, the FDA has been critiqued for regulatory paternalism, as Jordan Paradise writes, and abortion opponents seek to undermine the approval process for mifepristone or roll back recent liberalization of the FDA's protocols. As Elizabeth Tobin-Tyler writes, maternal morbidity and mortality has increased and laws restricting access to abortion will only add to health disparities, though Terri-Ann Thompson notes that Medicaid payments may help low-income women somewhat. Michael Ulrich and Leah Fowler consider the rise of "femtech" and how information in the digital age is vulnerable to state actors intent on prosecuting abortion restrictions. Joan Krause analyzes how end of life decision-making is likely to become harder for pregnant people, though it was already limited by some states pre-*Dobbs*.

The threat of prosecution, especially for physicians but also for pregnant people, casts the spectre of imprisonment for pregnancy and for performing a necessary medical procedure. The fear of prosecution and inability to provide a full spectrum of care means that physicians are reticent to practice in some jurisdictions and is worsening obstetric deserts. For many pregnant people, as Wendy Bach shows, criminalization of pregnancy and pregnancy outcomes is not new but rather has shaped care for low-income women, especially those who use drugs. Her article resonates with work of reproductive justice scholars, including Dorothy Roberts, Michele Goodwin, and Pricilla Ocen, who have unpacked the relationship between the carceral state and maternal health care for poor, Black women. Jennifer Carroll and coauthors, and Patty Skuster's essay further explore concerns about criminalization of pregnancy for both the patient and people who help them. Jane Stoever frames rape exceptions as problematic but necessary for protecting victims of intimate partner violence.

In this post-*Roe* era begun by *Dobbs*, new questions arise about how to secure reproductive justice and about what strategies and approaches hold promise. In the year since *Dobbs*, travel for abortion access has increased among those who can afford the time and expense, but as David Cohen, Greer Donley, and Rachel Rebouché describe, shield laws can protect physicians, yet only within their state of licensure. As Elizabeth Sepper writes, abortion exceptionalism led to other forms of legal exceptionalism, spurring a wave of First Amendment lawsuits related to abortion. Restrictive states are poised to regulate abortion-related speech directly, but protective states are also considering how to regulate informed consent as well as privacy in a variety of health care settings. Tracy Thomas explores whether state constitutions offer a

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path forward to protect access to reproductive care. Gabriela Arguedas-Ramirez and Danielle Wenner contextualize the U.S. landscape, suggesting lessons that may be gleaned from larger global reproductive justice movements. Maya Manian surveys evidence regarding how abortion bans are hindering access to medical care, providing a roadmap for future empirical research on *Dobbs*' ripple effects by identifying areas where further public health research will help to ensure the full breadth of health care consequences are clearly understood. Finally, with a distinct perspective as a theologian and legal scholar, as well as being sympathetic to the pro-life movement, Cathy Kaveny examines challenges to the cohesiveness of the pro-life movement including whether it will coalesce more around enacting restrictive abortion laws, or laws and policies that would provide generous supports for pregnant persons, children, and families.

Dobbs created strong headwinds for access to reproductive health services for those who have long faced deep inequality in reproductive health care and a broader swath of pregnant people who are now subject to punitive and restrictive laws on abortion. In keeping with the conversations begun by reproductive justice scholars, this issue looks to the legal, historical, social, political, and economic structures that shape access to health care. By beginning to map the many challenges facing pregnant people after *Dobbs*, we hope this symposium helps lay groundwork for change.

Challenges to Securing Reproductive Justice

As we publish this symposium, the Center for Reproductive Rights is suing Texas to allow pregnant patients to receive necessary, life-saving medical care that is being denied due to physicians' fear of criminal liability. Texas bans abortions after six weeks except for medical emergencies, left undefined by the law. The lack of clarity in this language produced a health care crisis due to physician uncertainty about when to intervene. The plaintiffs describe harrowing experiences, including being told to wait until they were "sick enough" to receive medical care or having to leave the state for an abortion to end a pregnancy in which the fetus had anencephaly, a fatal condition where the skull does not develop.

As this symposium shows, mistreatment of those seeking reproductive health care is not new. Long before *Dobbs*, reproductive justice scholars documented the crisis of care in the United States: loss of child custody, criminalization of pregnancy, inaccessibility of abortion, reproductive surveillance, and high maternal mortality rates characterized the experiences of racial and ethnic minorities within health care settings. These experiences deeply shape the lives of Black women in the context of pregnancy. Immigrant women, many of whom are Latina, have experienced forced sterilizations and period tracking in immigration detention. Low-income women have been prosecuted for drug use during pregnancy and lacked access to basic care of all kinds. The writings of reproductive justice scholars turned out to be prophetic: to borrow a framing from critical race theorists Lani Guinier and Gerald Torres, poor women, many Black and Latina, were canaries in the coalmine.[13] Their experiences revealed deep cracks in American democracy and failure of the state to provide basic services for pregnant people, now being exacerbated by *Dobbs*.

Conclusion

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Note

Aziza Ahmed serves on the Board of Our Body Our Selves, as an Advisor for Lawyering Project, and as Advisor for UT Austin reproductive rights program. Linda C. McClain, reports that money from the Robert Kent Chair Fund, which supports her Chair at BU, has helped to pay for this symposium in *JLME*. It did not specifically support this manuscript, but the symposium as a whole.

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