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Dobbs, the Intrusive State, and the Future of Solidarity

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Abstract

The intrusive state has long viewed women as fetal containers. The *Dobbs* decision goes further, essentially causing women to vanish when fetuses are abstracted from their relationships to pregnant persons. The ways in which women are first controlled and then made invisible are clearly connected with the move from obedience to omission that has historically affected black Americans. When personal decisionmaking and participation in democracy are regarded as threats, those threatened restrict decisional freedom and political power, deepening structural injustices relating to sex, race, and poverty. Fear of *Dobbs* has health effects on conditions unrelated to pregnancy and connects with erasures of human value that are not health-related. We reaffirm solidarity as a countering influence. Taking account of the richly relational context in which issues like abortion and political representation arise should lead to better, more meaningful policies, making so many people impossible to unsee.

Keywords: abortion; structural injustice; *Dobbs v. Jackson Women's Health Organization*; pregnancy; healthcare decisionmaking

Introduction

Supreme Court decisions are often portentous, and *Dobbs v. Jackson Women's Health Organization*¹ is an especially noteworthy portent. Its highly selective historical analysis and hints of future challenges to substantive due process have spawned a vast and growing body of scholarly literature and legal and policy responses. We, like many others, see abortion as inseparable from and inevitably linked with all sexual and reproductive health. When people capable of pregnancy are deprived of control of their bodily autonomy, even the intrusive state's view of women as "fetal containers"² is an overgenerous conceptualization. The reasoning in *Dobbs* could cause women to vanish entirely when fetuses are abstracted from their relationships to their human vessels and take priority over them.³

Dobbs has made it possible for states to scrutinize, control, and essentially criminalize almost all aspects of being a person capable of pregnancy,⁴ and many states are eagerly and rapidly doing so. The literature is filled with accounts of dangerously wrong mistreatments of life-threatening pregnancies and evidence of *Dobbs*' chilling effects on, and outright interference with, treatment and research addressing both pregnancy and conditions unrelated to pregnancy. The goal of *Dobbs* might appear limited to ensuring that all women, potentially pregnant people, and anyone with the misfortune of a diagnosis the treatment of which might overlap with a proscribed intervention are systematically erased from moral and legal consideration because of the absolute primacy of the conceptus. However, the flawed reasoning that underpins *Dobbs* could go on to dismantle substantive due process and further silence minoritized communities by allying gerrymandering and voter suppression with attacks on same-sex and interracial marriage, gender-confirming treatment, and

medical, personal, and data privacy. For these reasons, we see in *Dobbs* a culmination of long-standing practices of controlling and silencing women and people of color through a combination of slavery, enforced sterilization, pregnancy and childbearing, and voter suppression,⁵ strengthening our conviction that *Dobbs* is the most recent step along a troubling path away from democracy.

“Going Back Generations”

As Isabel Wilkerson explains in *Caste: The Origins of Our Discontents*:

When we go to the doctor, he or she will not begin to treat us without taking our history—and not just our history but that of our parents and grandparents before us. The doctor will not see us until we have filled out many pages on a clipboard that is handed to us upon arrival. The doctor will not hazard a diagnosis until he or she knows the history going back generations.⁶

The *Dobbs* decision purportedly relies on history, focusing on abortion laws in 1868, when the Fourteenth Amendment was ratified. This truncated historical analysis is far too narrow for accuracy. “Going back generations” is necessary, to acknowledge the critical role played by slavery, sexism, and the fight for power and control within the medical profession and within our democracy.

Slavery came to the United States in 1619 and was legal for 246 years. Controlling the colonial hierarchy required controlling sexual relationships between members of different races.⁷ Although some men who violated interracial sexual prohibitions were publicly punished,⁸ more frequently, interracial sexual abuse was overlooked because it involved white slaveowners having sex with enslaved women, usually without consent.⁹

The children born from these sexual assaults presented acknowledgment and inheritance issues. Therefore, the colonists, who otherwise tended to follow British common law, rejected the predominant law defining lineage and heritability as flowing through the father.¹⁰ In 1662, the Virginia General Assembly formally adopted the doctrine of *partus sequitur ventrum*, or “that which is born follows the womb,” to define the legal status of children:

Whereas some doubts have arisen whether children got by any Englishman upon a negro woman shall be slave or free, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother And that if any Christian shall commit fornication with a negro man or woman, he or she so offending shall pay double the fines imposed by the former act.¹¹

Children born to enslaved women would thus be slaves, regardless of the child’s paternity.¹² Slaveowners need not provide for—or even acknowledge—their mixed-race offspring, eliminating any “messy” questions of inheritance or property rights.¹³ Because productivity in the field increased with the number of children born, this doctrine effectively “converted the black womb into a profit center.”¹⁴

Although the next 175 years were rife with stories of sexual abuse against women generally and enslaved black women particularly, reproductive practices for all women (enslaved or free) were considered a private matter and not open for public discussion, debate, or regulation.¹⁵ Because physicians at this time received little formal education,¹⁶ when pregnancy occurred, midwives assisted with childbirth, as they had specialized knowledge.¹⁷ Many midwives, particularly in the South, were slaves trained in midwifery who served both black and white women.¹⁸

During the first few decades of the 1800s, owing to the lack of effective contraception and high maternal and infant mortality rates, ingesting a variety of common herbs or other poisons to terminate early pregnancy (before “quickening,” which occurred around the fourth month of pregnancy) was common.¹⁹ Up to 20%–35% of early pregnancies may have been terminated by this practice, which was referred to as “blocking the menses obstruction”²⁰ or “restoring the menses”²¹ rather than “abortion.”

After some public sex scandals,²² Connecticut in 1821 codified the common law prohibition against administering herbs and other poisons to induce miscarriage after quickening.²³ Although in a sense this

makes Connecticut home to the United States' first "abortion" regulation, the statute actually focused on the unregulated "medications" and permitted the practice of "restoring the menses" in early pregnancy, rejecting the more restrictive English precedent.²⁴ In an ironic twist, on May 5, 2022 after the leak of the *Dobbs* draft opinion, Connecticut became the first state to enact legislation to *protect* medical providers who perform abortions and patients seeking abortion who travel to Connecticut from states that outlaw it.²⁵

Following Connecticut's lead, by 1840, 10 of the 26 states enacted similar poison-control laws regulating abortifacients.²⁶ Because common law did not consider the fetus a separate entity from the mother until after quickening,²⁷ most of these laws did not make abortion a crime, prohibited the practice only post-quickening, or provided lesser penalties for pre-quickening pregnancy termination.²⁸ In the 1840s to 1860s, white male physicians, who were attempting to professionalize medical practice, wanted to separate themselves from female practitioners and midwives and be in charge of reproduction.²⁹ These developments help demonstrate that restrictions on pregnancy termination are historically linked to the competition between the nascent medical specialty of obstetrics and midwifery. Obstetricians, like all allopathic physicians from the beginnings of professional medicine until recently, were exclusively white and male; in contrast, midwives have always been women, at that time often women of color and often providing their services to women of color.³⁰

One obstetrician, Dr. Horatio Storer, was a staunch opponent of abortion and of admitting women to medical education and practice. When the American Medical Association was formed in 1847, Storer began to advocate for the criminalization of abortion, which was still commonly self-administered or performed by midwives.³¹ In 1857, Storer helped establish the Physicians' Crusade Against Abortion and was appointed to chair the AMA's Committee on Criminal Abortion.³²

The Physician-Dominant Era of Medicine

The 1860s ushered in physician-dominant medicine in the United States, characterized by legislative "deference to professional judgment."³³ Spurred into action by Dr. Storer, the AMA successfully pressured some state legislatures to broadly restrict abortion practices. These new abortion laws were primarily driven by a complex political power struggle linked to demographic changes.³⁴ The influx of Catholic immigrants, who, because of the religion's antiabortion stance, tended to have large families, the end of the Civil War and the ratification of the Thirteenth Amendment in 1865, and unexpected growth in cities³⁵ all raised concerns that early-pregnancy abortion practices common among married white Protestant women³⁶ would result in the failure to produce enough babies to perpetuate "Puritanic blood."³⁷ Dr. Storer argued that women were "destined by nature" for maternal duties³⁸; he urged that "white women should have babies for the 'future destiny of the nation.'"³⁹ It was these laws—riddled with nativism, sexism, and control by the white, male-dominated medical profession—that were in effect at the time the Fourteenth Amendment was ratified and that were relied on by Justice Alito in *Dobbs*.

However, not all abortion laws at the time were so restrictive. About one-third of the states that regulated abortion in 1868 followed common law practices⁴⁰ and regulated only post-quickening abortions or imposed lighter penalties on pre-quickening abortions.⁴¹ Furthermore, at the time the Fourteenth Amendment was ratified, only white males could participate in the political process and vote on these laws. The Fifteenth Amendment, allowing black men to vote, was not ratified until 1870, and women, regardless of race, would not receive the right to vote until 1920.

Contraception too became a political target, particularly as it inhibited white women from reproducing.⁴² Anthony Comstock, an antiabortionist, head of the Society for Suppression of Vice, and a high-ranking official of the U.S. Postal Service, lobbied for a federal anti-vice law controlled through the mail.⁴³ In 1873, Congress passed the Comstock Act, making it illegal to use the mail for "obscene" materials, including materials about abortion and contraception.⁴⁴ The Act was applied broadly, proscribing even the oral dissemination of information about birth control and family planning, as illustrated by the arrests of Margaret Sanger in 1914 and 1916 for publicly advocating birth control and Emma Goldman in 1916 for advocating family planning.⁴⁵

Physician control over pregnancy and delivery was also evolving. By 1900, physicians provided care in 50% of births.⁴⁶ As anesthesia grew in popularity to reduce the pain associated with childbirth, upper class white women began to use physicians for pregnancy care more frequently because only physicians could administer anesthesia during labor and delivery. By the 1920s, physician control of pregnancy and delivery was almost complete; midwifery services were used primarily by poor and black women.⁴⁷

The Eugenics Movement

In the 1920s, an emerging method of reproductive control based on a social movement promoting “good genetics”⁴⁸ saw states begin to pass eugenics laws permitting permanent sterilization of women who were “feeble minded or habitual criminals”⁴⁹ to “allow... the more suitable races or strains of blood a better chance of prevailing speedily over the less suitable.”⁵⁰ In its early years, this eugenics movement had the support of many women’s suffrage leaders and social progressives, who reasoned that eugenic control of reproduction, along with social and educational reforms, would improve the lives of women, families, and society.⁵¹ But even the best intentions quickly give way to fear of the “other.” Consider the words of progressive William Poteat, president of the Southern Baptist Education Association and Wake Forest College, who noted that “the alarming thing is that the upper grades of intelligence are not reproducing themselves, while the lower grades show an amazing fertility [I]t is not unreasonable that [this imbalance] will accomplish the overthrow of civilized society.”⁵²

On March 20, 1924, Virginia passed two pieces of legislation: The Racial Integrity Act, defining “white persons” as those who had “no trace whatsoever of blood other than Caucasian blood or had one-sixteenth or less American Indian blood and no other non-Caucasian blood,”⁵³ and the Eugenic Sterilization Act,⁵⁴ authorizing involuntary sterilization of women. At the same time, Carrie Buck, a white orphan who was allegedly raped by her foster parents’ nephew, committed to the Virginia State Colony for Epileptics and Feeble-minded, and sterilized,⁵⁵ was selected by Dr. Albert Priddy, the institution’s superintendent, as a test case to challenge and ultimately strengthen the Virginia sterilization law in the courts. Priddy is on record stating that Buck was part of the “shiftless, ignorant, and worthless class of antisocial whites of the South” who posed a threat to the purity of the white race.⁵⁶ In 1927, the U.S. Supreme Court in *Buck v. Bell* affirmed the lower courts’ decisions upholding Virginia’s sterilization law with a cruel assertion that “three generations of imbeciles are enough.”⁵⁷ Eugenic laws would increase in popularity and severity, although a few courts began to push back against the contraception ban as applied to physicians, because in their “professional role of maintaining health,” physicians act in the patient’s best interests rather than for “immoral or obscene reasons.”⁵⁸

During the approximately 40 years that state-sponsored sterilization was the practice in 30 states, over 60,000 women were sterilized.⁵⁹ But even after the horrors of the Holocaust were exposed during World War II and eugenic theory became disfavored, some states, including North Carolina, continued their sterilization programs, often with a focus on “preventing excessive dependence on the state.”⁶⁰ North Carolina sterilized approximately 7,600 individuals, most without meaningful consent, accelerating the number of sterilizations after World War II to target welfare recipients.⁶¹ In North Carolina, having a baby born out of wedlock was “immoral” and evidence of a cognitive disability; therefore, unmarried mothers were considered cognitively disabled and required to “consent” to sterilization to receive public benefits.⁶² When directly tied to welfare, eugenics became a tool to control women of color.⁶³ Although scholar Joanne Schoen noted that particularly during the later years, many physicians in North Carolina believed sterilization was in the patient’s best interests primarily because other forms of birth control were not widely available, disparate rates of sterilization were certainly evident.⁶⁴ By the 1960s, blacks represented 39% of sterilizations, although they made up 23% of the population.⁶⁵

In 2003, North Carolina’s sterilization law was repealed. Ten years later, North Carolina would become the first state to provide reparations for victims of state-sponsored eugenic sterilizations.⁶⁶

The Patient's Rights Approach of the Civil Rights Movement

With the Civil Rights movement in the 1960s came a corresponding shift in health law and ethics, as “professional autonomy gave way to a patient’s rights approach” and to the advent of meaningful informed consent.⁶⁷ Public assistance programs made healthcare more accessible,⁶⁸ and in 1965, President Lyndon Johnson signed the Voting Rights Act, which outlawed the discriminatory voting practices, such as poll taxes and literacy tests, adopted by the South to limit black Americans’ ability to vote and therefore their political power.⁶⁹

In step with the Civil Rights movement and the Voting Rights Act, reproductive rights for women were expanding. Narrow legislative exceptions enabled physicians to perform therapeutic abortions when the woman’s life was in danger, as during the rubella outbreak of the mid-1960s.⁷⁰ This, in turn, motivated physicians to pressure legislators to codify more broadly the conditions under which therapeutic abortions could legally occur.⁷¹

In *Griswold v. Connecticut* in 1965, the Supreme Court overturned a Connecticut statute criminalizing the use or encouragement of birth control, reasoning that it violated the right to marital privacy.⁷² Soon thereafter, in *Eisenstadt v. Baird*, the Court expanded the “right to privacy” to encompass contraceptive use by unmarried people, stating: “It is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁷³

In 1967, Colorado decriminalized abortion when pregnancy resulted from rape or incest or would lead to permanent disability in the pregnant woman, following the American Law Institute’s Model Penal Code on Abortion, which called for liberalized laws.⁷⁴ A number of other states passed similar legislation; thus, when *Roe v. Wade* was decided in 1973, 17 states allowed abortions either outright or in circumstances such as rape, incest, or when pregnancy threatened the health of the pregnant woman.⁷⁵

Roe v. Wade and Its Aftermath

In *Roe v. Wade*, the U.S. Supreme Court found that the liberty interests in the Fourteenth Amendment protected individual privacy, including the right of a pregnant woman, in consultation with her physician, to terminate a pregnancy before viability.⁷⁶ Many believed that *Roe* provided sufficient reproductive freedom and choice for optimal health, but its ruling left much undone, particularly for women of color and economically disadvantaged women, who would make use of its protections at a higher rate than did women from other demographic groups, but who suffered, and continue to suffer, much higher mortality rates from childbirth.⁷⁷

When *Roe* was decided, 23 states had forced sterilization statutes.⁷⁸ The Department of Health, Education and Welfare still reimbursed states more generously for sterilizations than abortions, and obstetricians commonly required consent to sterilization as a condition of abortion,⁷⁹ which “sends a message to indigent women that the government prefers to sever their reproductive capacities rather than allow them to control their fertility.”⁸⁰ *Roe* also led to a handful of fetal protection laws that appeared to protect pregnant people and fetuses but, in fact, have been used to criminalize pregnancy and “codify the belief that life begins at conception.”⁸¹

Roe spurred development of conscience laws and policies permitting healthcare practitioners to refuse to perform certain medical services, such as abortion or sterilization, or provide certain medications, like birth control. The Church Amendment in 1973 provided that federal funding could not compel a healthcare provider “to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.”⁸² Although conscience clauses are generally designed to protect refusals to act, the Church Amendment also protected those who, “following the dictates of conscience, performed such procedures.”⁸³

The post-*Roe* pro-life movement further lobbied to eliminate federal funding for abortion. Since 1977, the Hyde Amendment has prohibited use of federal funds for abortion, preventing women enrolled in

Medicare, Medicaid, and the Children's Health Insurance Program from using those programs to pay for abortions.⁸⁴

Today, because of structural racism, people of color have lower incomes and utilize these public insurance programs at much higher rates than do members of other demographic groups. Most states with significant abortion restrictions also have limited social safety nets, unavailable or unaffordable prenatal, pregnancy, and postpartum care, and poor pregnancy outcomes.⁸⁵ Abortion restriction thus has broad economic implications for women and families.

The late twentieth century also spawned a technological remedy for low rates of reproduction in prosperous white families. Assisted reproduction technologies (ARTs) generate significant revenues, primarily serve wealthy clients, and are virtually unregulated. ART use has skyrocketed since 1978, when Louise Brown, the first baby conceived using in vitro fertilization, was born.⁸⁶

Up to 10%–15% of heterosexual couples have fertility issues.⁸⁷ ARTs include but are not limited to “fertility medication, intrauterine insemination, in vitro fertilization, or the use of donor sperm, eggs or embryos.”⁸⁸ ART is rarely covered by insurance, and commonly costs thousands of dollars, with multiple attempts usually needed to achieve a pregnancy.⁸⁹ As Michele Goodwin notes, ART provides a “[d]izzying array of options that is mostly unchecked by federal and state regulations, leaving physicians and their wealthier patients to coordinate pregnancy according to personal choices.”⁹⁰ It is no surprise, then, that the demographic most frequently using ART is white and socioeconomically advantaged.⁹¹ It also comes as no surprise that even in a post-*Dobbs* world, ARTs are less subject to governmental scrutiny and control than pregnancy is in many states.

How *Dobbs* Links Health, Wealth, and Voice

The United States is a representative democracy; citizens vote in free and fair elections for candidates who address their views and concerns about social and economic policy. But to have free and fair elections, all citizens should have the right and ability to vote. The Voting Rights Act of 1965⁹² was reauthorized multiple times, but, in 2013, a conservative U.S. Supreme Court ruled in *Shelby v. Holder County* that Section 4(b) was unconstitutional because it imposed an impermissible burden on federalism and the equal sovereignty of the states.⁹³ That case set in motion a series of actions by states to implement voting restrictions. Political parties have long worked to obtain favorable voting districts through gerrymandering, but recently, Republicans have tried to consolidate state power through extreme partisan gerrymandering, which, in 2019, the Supreme Court ruled presented a political question beyond the reach of the federal courts.⁹⁴ Since then, and particularly after the 2020 election with its debunked claims of voter fraud, more and more restrictions on voting have been imposed by states—unsurprisingly, by the same states that have the most restrictive abortion laws. In an eerie flashback to the time before the Voting Rights Act, when black Americans were subject to Jim Crow laws and harassment both when registering and when voting, news about the 2022 midterm elections again reported that many states limited or eliminated early voting opportunities, mail-in voting, and polling places, and permitted intimidation during registration and voting.

The global coronavirus disease (COVID-19) pandemic had a disparate impact on blacks and members of other minoritized communities in the United States. This should have caused another shift in our public health landscape, toward a “health-justice approach that emphasizes distributive justice, equity, and social solidarity as organizing principles.”⁹⁵ *Dobbs*, however, changed the landscape dramatically. In lieu of a health justice approach, *Dobbs*' abandonment of federal protections for reproductive privacy has returned power to the states, posing harm to people in states that have restrictive laws and have refused to accept Medicaid expansion,⁹⁶ such as Alabama, Florida, Georgia, Mississippi, South Carolina, South Dakota, Tennessee, and Texas.⁹⁷ The wealthy will probably continue to enjoy a “dizzying array of options” for reproductive health and choice, but the poor will suffer. As Michele Goodwin notes, in Mississippi, “a Black person is 118 times more likely to die by carrying a pregnancy to term than by having an abortion.”⁹⁸ Indeed, a nationwide abortion ban could increase maternal mortality by 21% overall and by 33% among black Americans.⁹⁹

Dobbs has also led to a rash of horror stories reflecting profound injustice: a 10-year old who was raped and denied the opportunity to terminate her pregnancy in Ohio,¹⁰⁰ reports of women with ectopic pregnancies who cannot receive treatment until they are near death,¹⁰¹ and patients suffering from Cushing's Syndrome, uterine leiomyomas, rheumatoid arthritis, or lupus who now have trouble gaining access to mifepristone and methotrexate, medications necessary to treat their conditions, because these medications are also abortifacients.¹⁰² *Dobbs* has caused and will continue to cause women's deaths.

As North Carolinians, we are not alone in seeing in *Dobbs* a culmination of long-standing practices of controlling and silencing women and people of color through a combination of enforced sterilization, enforced pregnancy and childbearing, and voter suppression. North Carolina has an unusual track record in reproductive rights. It maintained a very active and highly discriminatory eugenic sterilization program well into the twentieth century, but has provided some compensation to survivors.¹⁰³ It still requires unmarried fathers to "legitimize" offspring for purposes of inheritance.¹⁰⁴ Its statute restricting pregnancy termination after 20 weeks' gestation includes one of the longest statutory waiting periods between counseling and termination¹⁰⁵ and was declared unconstitutional before the *Dobbs* decision.¹⁰⁶ Post-*Dobbs*, the statute was determined enforceable despite the opposition of the Governor and the Attorney General¹⁰⁷; this makes North Carolina a state to which pregnant persons from many states with similarly conservative legislatures now seek to travel for abortions, although the long statutory waiting period represents an insurmountable barrier for many. Examining what is currently happening in North Carolina, as well as reviewing its record of prohibiting pregnancy termination and imposing permanent sterilization, helps strengthen our conviction that *Dobbs* is only the most recent step along a troubling path away from democracy.

Clearly, *Dobbs* is about more than abortion; it significantly affects all reproductive healthcare, all healthcare that touches in any way on reproductive health, the financial well-being of women and their families, and more.¹⁰⁸ History shows that increasing controls over women correlates with decreasing power at the polls.¹⁰⁹ According to the Pew Research Center, 61% of Americans believe that abortion should be legal in all or most cases, whereas 37% believe that it should be illegal in all or most cases.¹¹⁰ Although the abortion issue is both personal and deeply partisan, when voters can make their views known at the ballot box, they generally support expansive reproductive rights. This was illustrated recently when voters in Kansas, consistently a "red" state, upheld a constitutional provision supporting abortion rights by a margin of 59% to 41%.¹¹¹ The 2022 midterms confirmed the majority view when voters in Michigan, California, and Vermont voted to amend their state constitutions to allow for abortion rights, and voters in Kentucky and Montana rejected constitutional provisions that would have limited or banned abortion.¹¹²

The ways in which women have been controlled and then made invisible by statutory and case law that prioritize "fetal protections" also seem clearly to parallel the move from enforcing obedience to forcing omission that has long characterized the political reality of black people in the United States. When the enslaved could no longer be expected to obey, and their participation in democracy was increasingly regarded as a threat, those threatened sought to eliminate their political power. The same process of omission continues today, through radical gerrymandering and other election "reforms."¹¹³ This is why the long arm of *Dobbs* is so concerning.

Conclusion: Humility, Solidarity, and Action

Over 30 years ago, Larry Churchill argued that we are not morally smart enough to make abortion laws except at the very margins. There are simply too many morally relevant factors to consider. No single moral calculus can account for all these factors or judge their relative merit. Therefore, with respect to termination of pregnancy, the best laws are few in number and limited in scope, leaving individuals to decide in their own way and simply making sure that everyone who so chooses has access to safe and effective services.¹¹⁴

Churchill's position is not very far from that originally espoused in *Roe*; it is based on liberty, but also, importantly, on humility and agnosticism about moral truth. Those who spin out theories like the

“moment of conception” theory of personhood, and reason to a conclusion that they intend should bind everyone, are fundamentally refusing to acknowledge and deal with the messiness of the world, as well as the limitations of medicine and science, which persist before and after we theorize. And those who justify assertions of power that silence voices of disagreement are refusing democracy itself.

Dobbs is unprecedented and highly concerning, wiping out a well-settled and broadly supported healthcare choice for women based on false history and flawed logic characterizing abortion as inherently immoral baby-killing for convenience. It opens the door to significantly diminishing the social and political role of women, and perhaps even to overturning other important precedents¹¹⁵ and many of the fundamental structures of federal and state government¹¹⁶ through invocation of an imaginary theory of originalism.¹¹⁷

How, then, can we work to restore trust in the morally messy work of democracy, when it seems simpler and neater to draw impenetrable lines between what is acceptable and what is not, between “us” and “them?” Solidarity—a virtuous practice that has not played a big part in the American experiment—may provide hope. Right action requires moral courage. Although action starts with individuals, solidarity reflects courageous action by and for groups. If more than one of us stands against unjust policies and practices, more and more of us can act together, the way democracies are supposed to work.¹¹⁸ Solidarity—perhaps a political opposite to the American obsession with individual autonomy—is a fundamental means of promoting shared responsibility for the well-being of others and fostering mutual trust and support.¹¹⁹

The enormous response to the *Dobbs* decision by scholars, activists, and midterm voters is both unprecedented and gratifying, and may reflect the beginnings of a broadening commitment to solidarity. The midterm elections rejected antiabortion initiatives and passed ballot measures to protect reproductive rights and health. Judges have recently begun to reject strict state abortion laws triggered by *Dobbs*.¹²⁰ But more needs to be done.

Physicians and other healthcare providers are justifiably concerned about the potential criminal liability they may incur by simply practicing medicine in states that have both licensed them to practice according to medical judgment and restricted their authority to make medical decisions about abortion. Collective action by physicians has the capacity to overcome *Dobbs*-based state restrictions on practice.¹²¹ The AMA House of Delegates has amended ethical guidance to acknowledge that even when law restricts or prohibits abortions, physicians should have “latitude to act in accord with their best professional judgment.”¹²² A positive right of conscience may justify taking action, rather than refusing to act, to avoid restrictions on abortion-related care.¹²³ EMTALA has been invoked to ensure that the health of every pregnant person can be stabilized regardless of post-*Dobbs* state law,¹²⁴ and emergency departments can reassure patients and providers that the goals of treatment require supporting patients, not reporting them.¹²⁵

We have begun to recognize but have only begun to address the dangers posed by *Dobbs*. The next steps can help solidarity begin to find its place in American society and thereby foster collective action to protect reproductive health, preclude divisiveness, and preserve democracy.

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Notes

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