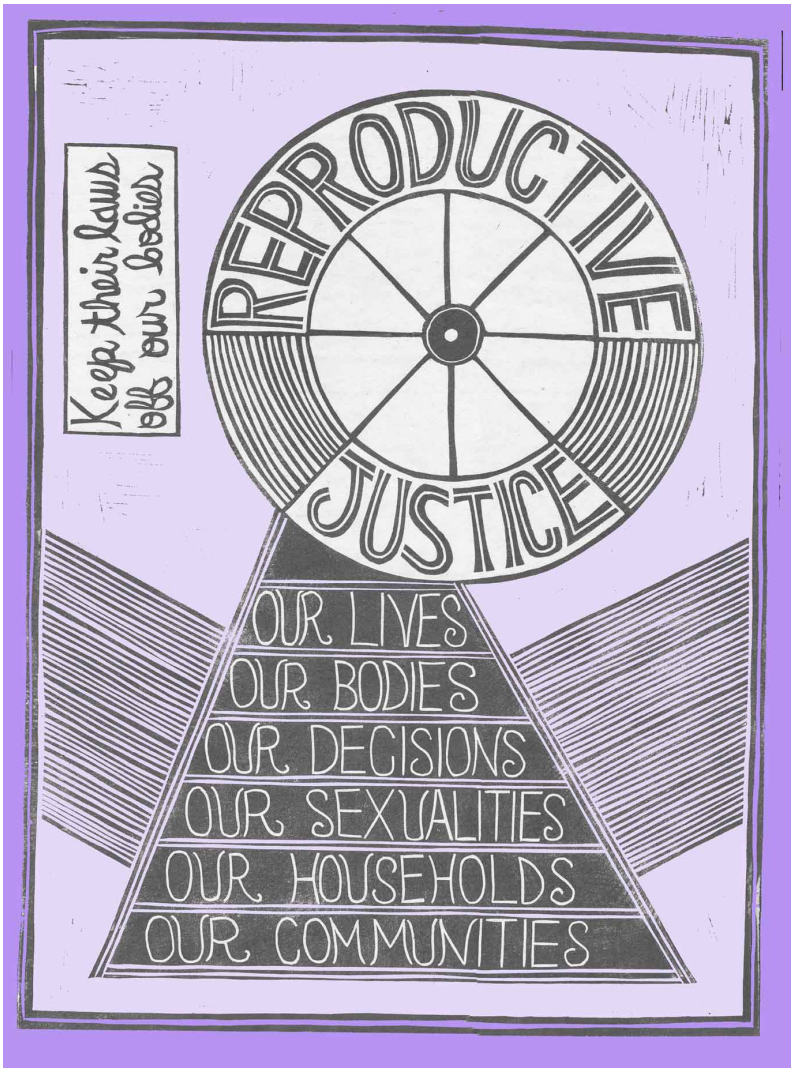
ISSN: 1941-0832

RADICAL TEACHER

A SOCIALIST, FEMINIST, AND ANTI-RACIST JOURNAL ON THE THEORY AND PRACTICE OF TEACHING

Teaching Reproductive Justice After Dobbs: A Forum

Edited by Sarah Chinn and Kimberly Mutcherson



"REPRODUCTIVE JUSTICE" BY MEREDITH STERN VIA JUSTSEEDS.ORG

In January 2024, leading scholars in reproductive justice law participated in a panel at the American Association of Laws Schools (AALS) Annual Meeting, "Teaching Reproductive Justice After *Dobbs*."

Organized by Jeffrey Dodge, Assistant Professor of Law, Joseph H. Goldstein Faculty Scholar, and Associate Dean for Academic Affairs at Penn State Dickinson Law and Naomi Cahn, Justice Anthony M. Kennedy Distinguished Professor of Law at the University of Virginia School of Law, the panel covered a range of topics crucial to legal pedagogy under these new and painful circumstances.

Co-editor Kimberly Mutcherson transcribed this conversation and edited it for length and clarity.

Rachel Rebouché, **Dean of Temple University Beasley School of Law, Peter J. Liacouras Professor of Law**: I will admit that I feel a little bit like a fraud because I'm actually not teaching while I'm the Dean, but I have taught a reproductive rights justice course as a seminar, and I thought I would kick us off today by offering some thoughts about how I explain the legal landscape post-*Dobbs* and some of the themes on which I focus. And I guess I'd start us with *Dobbs*. I think most people in this room know that when the Supreme Court overturned *Roe v. Wade*, Justice Alito, writing for the majority, listed five reasons why the court should discard precedent. And two, I think, are really striking in terms of their pedagogy punch. The first is reliance. So, you'll remember that Justice Alito opined that *Roe* and *Casey*[1] could be overturned because people in this country had not relied on abortion -- pre-viability abortion -- as a constitutional right.

He wrote that courts are not in the business of understanding or interpreting research about the pros or cons of abortion restrictions or permissions: those are empirical questions that courts can't possibly answer. But then went on to say, in dicta[2], but at length, why we might believe that abortion restrictions aren't so bad.

And it revolves around the idea that, in 2022 and beyond, pregnancy is a gift. It's not a burden. And that's because we have this really strong social safety net [audience laughter] that supports our pregnant people and protects their rights and interests [audience laughter], laws like the Family Medical Leave Act, giving someone time off work without pay or the Affordable Care Act, giving people the right to pay for health care services. So, the majority opinion implies that restrictions on abortion are not necessarily problematic or dangerous to people, ignoring the evidence that had been put before the court that tried to establish some of the realities of pregnancy and of abortion. As we heard in the oral argument of *Dobbs*, people have to resort to adoption or safe havens.

So, I like talking about that with classes that I spoke to about *Dobbs* because the court offers us one vision of the reality of law that, frankly, doesn't match lived reality. As public health scholars and as family law scholars, it's an opportunity to contrast that vision with competing visions of what pregnancy is about in this country — to talk about the ways in which laws fail to support pregnant people and what we know about the country's maternal morbidity and mortality rates.

The second thing I focus on, and another reason that Justice Alito offered for overturning *Roe* and *Casey*, is that the tests announced in those cases were unworkable. The undue burden test of *Casey* was unworkable because it was confusing, produced disparate results from courts and in court decisions, resulted in conflict, and deepened the debate about abortion in this country.

So, where are we now? The test that *Dobbs* announced was rational basis review[3] that returned abortion law to the states and allowed states to ban all abortion from the earliest moments of pregnancy (and if you haven't read that section of Dobbs listing legitimate state interests, they are breathtakingly broad). Is that test a more workable test in the present legal landscape? I would suggest workability is another great opportunity to think about where we are after *Dobbs* and to introduce some of the legal developments that have happened after *Dobbs*.

Our legal landscape is one of fracture. I probably don't have to say to this room that a third of the country now bans abortion, almost all abortion, and many states from the earliest moments of pregnancy. We have seen litigation particularly in Texas, around the exceptions written into those abortion bans, what they mean, how they apply, and whether or not a federal law like EMTALA[4] pre-empts the Texas abortion ban.

Almost the same number of states have passed so-called shield laws, which are laws that seek to insulate abortion providers, and people who help them, who provide legally protected reproductive health care as defined by their home state. Most of those shield statutes also include gender affirming care in that definition.

What a shield law seeks to do, though it hasn't been tested yet in any court, is to keep states from extraditing providers or others who are not fleeing from justice, shield them from civil penalties, from criminal sanction and prosecution, stop depositions, stop investigations, and protect their medical malpractice insurance and protect them from discipline in their own state. There are significant limitations to shield laws: for one, the Massachusetts provider that has a shield law in place can't step foot in Texas and expect the Massachusetts law to protect them.

But when we look at the "ban states" up against these "shield states," a picture of contestation between states emerges. And what is really interesting to think through with students is what that contestation means for our current legal system.

What does it mean to have these looming battles around travel, around enforcing shield laws, around out-of-state prosecutions? Or the conflict between federal law and state law, as the EMTALA example illustrates? And what is happening to abortion access on the ground? Six of those shield states define legally protected reproductive health care as "regardless of where the patient is." That

language has emboldened a group of providers to define abortion care as where they are, New York, Massachusetts, for example, rather than where the patient is -- Texas, Florida, you name it. There has been a surge of mailed medication abortion across the country from the shield states where that language about patient versus provider location exists. That surge is at the heart of what's happening in courts and before legislatures, responding to the shifts in how abortion is delivered. So, for example, at the heart of the *Alliance for Hippocratic Medicine* litigation is mailed medication abortion.[5] The FDA approved mifepristone, the first drug in medication abortion, 23 years ago in 2000, and removed restrictions in 2016 and 2021 – the latter lifting the requirement that a patient pick up mifepristone in a healthcare facility (a clinic, usually a clinic, or a hospital or medical office), which is what enabled mailed medication abortion to proliferate. There are real costs to focusing on mailed medication abortion and telehealth for abortion, but there's no doubt that it's changed the practical landscape and it's shaping the legal landscape as well.

The litigation, as a teaching tool, brings together so many areas of law that previously were not central to the reproductive rights field. In this way, we can resist abortion exceptionalism, and also RJ [Reproductive Justice] exceptionalism, by thinking about how issues across fields matter in these conversations -- in administrative law, in family law, and across the courses that we teach.

I'll give you the example of the Comstock Act. That is also part of the conversation around mailed medication abortion. It is an 1873 act that prohibits mailing anything, and that's the language of the act, anything, which includes drugs, personal protective equipment, you name it, that helps in producing an abortion.

And there's an argument embedded in the *Alliance* litigation that the Comstock Act is good law and it's essentially a nationwide abortion ban – of mailed medication abortion and all abortion because everything that helps support abortion care is mailed.

Again, that poses questions that are fascinating to consider. Not just at the level of doctrine, not just at the level of due process or the ways in which laws should or should not be enforced, but also the types of decisions that courts and legislatures and policy makers are making about what this legal landscape should look like. So, with that, I'll stop, and I'll turn it over to Aziza. Thank you.

Aziza Ahmed, Professor of Law, N. Neil Pike Scholar, and co-director of the BU Law Program in Reproductive Justice at Boston University School of Law: I teach Reproductive Rights and Justice, Constitutional Law, and Human Rights. I cover reproductive rights issues in each of these courses.

In Reproductive Rights and Justice, in addition to abortion, I cover a range of topics including gender-based violence and HIV AIDS as well as sex work and trafficking. We cover both doctrine and relevant theory.

For today, as I was trying to think what would be helpful to this conversation, I wanted to reflect on how I teach one aspect of the abortion conversation that's happening right now, which is about the criminalization of abortion provision.

Since *Dobbs* there have been many conversations on the intersection of criminal law and abortion care. There are a range of new questions: if and how will providers be prosecuted? What are the various legal avenues that will create vulnerability to prosecution? How creative will prosecutors get in terms of prosecutions for mishandling a corpse or chemical endangerment? There's the specter of fetal personhood that hangs over these questions and changes how to think about prosecutions.

There are also questions that are coming up around HIPAA, for example, when does a sort of, a potential violation of criminal law or a criminal act that has been committed require some sort of disclosure of patient health information by a physician?

When I teach the topic of criminalization of reproduction and abortion, I like to first ask the students how and why did criminal law become a legitimate space for this conversation to be occurring at all? Why should it be okay for us to have turned to criminal law? When did that happen? When did the road get laid for us to walk down this path? And I try to use a broader historical lens to teach and show to the students the continuities and discontinuities between the pre-*Dobbs* moment and the post-*Dobbs* moment. You know, what came before *Dobbs*, and how does it connect to what came after? And I think that the past really sets the stage for how criminal law was going to easily insert itself into the post-*Dobbs* conversation about the regulation and management of abortion. And, of course, it begins in many ways with the story of the governing of poor people and women of color and Black women in particular through the criminal legal system.

When I teach this material, I focus on a few themes. And these are themes that come up throughout the course of the semester in my class. First, at a very broad level, is to ask students what makes the management of some bodies and some types of reproduction through criminal law acceptable?

This begins a conversation about eugenics, race, class, and disability. Focusing in on the management of family, pregnancy, and abortion allows for a discussion about the continuities and discontinuities of the political narratives in the pre-*Dobbs* and post-*Dobbs* moment. It is also useful to show students how both conservative and progressive forces have utilized the criminal law to manage not only reproduction but families. Here I think it's useful to spend some time in the 1970s, 1980s, and 1990s to show how late-20th-century political and cultural shifts laid the foundation for the use of criminal law to manage families, pregnancy and abortion after *Roe*.

As we all know well, Reagan's presidency leaned into a discourse of personal responsibility -- often manifesting

as racist narratives about African American dependency on welfare. This idea is used to help scale back the welfare system and we begin to see how criminal law is going to take the place of social welfare programs. The work of Bernard Harcourt, Jonathan Simon, Dorothy Roberts, Michele Goodwin, and Aya Gruber is helpful in thinking about the question of a reliance on criminal law by conservatives *and* progressives. These scholars show how the "war on crime" replaced basic social welfare functions.

Further, the 1980s are an important period for understanding the rise of the "moral majority" and a new anti-choice religious politics in the Republican Party. It's an important moment to see the turn of the Republican Party towards the particular modes of religious activism that are anti-choice.

Though I focus on reproductive rights, I do try to make sure students understand that the regulation of reproduction is tied to the regulation of families through criminal law. To make this point I start with the Moynihan Report[6]. Through reading the Moynihan Report students can see how the state sees the study and regulation of families as a key government function related to the management of populations. The Moynihan report specifically allows us to discuss how race relates to the regulation of families, what does it mean for the state to produce good citizens?

Naomi Cahn and June Carbone's work is also instructive in thinking about how the state structures and supports some families while punishing other families. Again, Dorothy Robert's work on family regulation and Khiara Bridges scholarship on the regulation of pregnancy helps draw out specific examples of how the state manages the creation of families.

In covering this material, I also spend some time thinking about the role of scientific evidence and expertise in various debates about abortion and reproductive rights. Questions of scientific evidence and expertise are especially key in the conversation about the criminalization of pregnancy and abortion.

How do we make sense of this? I use that as an opportunity to think about the war on crime and the war on drugs. We'll talk about the 1980s, and I do a class on the purported "crack baby epidemic" asking how did this happen? Here's an epidemic which serves as a powerful example of the realities and possibilities of holding women criminally accountable for behavior during pregnancy, which of course is now part of the general conversation especially when it comes to a self-induced abortion.

And in many of those cases, you see a very specific reference to the fetus as being a child, the idea that you're delivering drugs to your fetus, that this is another being, and so it opens up doors to think about questions of fetal personhood. Because this intersects clearly with a lot of work that I'm doing, I also think about questions on the role of scientific evidence, for example. We talk about it both in the context of the crack baby epidemic and then I try to make those dots as we're thinking about criminal prosecutions in the context of pregnancy and abortion later, but you know, thinking about, for example, how the small sample size studies that were produced by one physician in the 1980s basically get absorbed into the logic of the carceral state and are used to prosecute and punish women and, of course, particularly poor Black women at that time.

It helps, I think, explain the ongoing prosecution of women. There's a sort of continuous line that's from that period until today. There's no discontinuity there at all. It's just, it's going on. Wendy Buck's work is great on that, you know, thinking about how the opioid epidemic is playing out for many pregnant women in Tennessee. And so, you get this continuity and then you get *Dobbs* layered on top of that.

In this class, in this set of classes where we think a little bit about evidence and expertise, I also raise an issue that I've been working on a lot, which is this test called the floating lungs test, which is a test that's used to prosecute women for when a woman is claiming she's had a stillbirth. In a very famous case, the Purvi Patel case that happened in Indiana, for example, she had, in fact, taken medication abortion. And, in those contexts, they take the lungs of the fetus, and they float them. And, if the lungs float, then the child is said to have taken a breath and therefore deemed to have been born alive. And then the woman can be held accountable for homicide, etc. I've been working on this for a long time, and it was a little bit more satisfying to teach this year for the reason that there's a ProPublica reporter that's very interested in this topic. [Patel] has been pushing us and Daniel Medwed at Northeastern and I have started a Floating Lungs Working Group. We're working now on this issue to see how we can actually make change, with a bunch of other people who have done expert testimony and forensic scientists and medical pathologists. I'm going to try to see how I can get students involved in that in the future.

But then, of course, by the time we get to this point we are in the 2000s, and the Purvi Patel case was, I think, only less than 10 years ago. We're right before *Dobbs* and the arc of criminal law is taking us right up to the *Dobbs* moment. I think then, when we read *Dobbs*, the students really get a sense (and of course there's many other themes we're thinking about alongside criminalization), but when *Dobbs* hits the class, they're sort of primed to see that there wasn't a switch that was flipped. It was actually completely in line with what had been going on, and with a few other people I've written--- sorry, I'm doing all these plugs because there's so much happening---this special issue we have coming out of the *Journal of Law, Medicine, and Ethics* from our program that I co- edited with Nicole Huberfeld and with Linda McLain and a bunch of people here. I had an article with a few other people in which we talk about how you can look at the *Dobbs* decision, and part of the way of reading the *Dobbs* decision is actually through this sort of generalized attack on public health and welfare that we've seen since the 1980s onward. What you see post-*Dobbs,* and the sort of stepping in of criminal law in that particular moment is exactly in line with what we've been seeing for the last 30 years. In fact, if you read it from that lens, it's not a surprising decision at all because you can read *Dobbs* as almost a furthering of, or a sort of moving forward of the

agenda to undermine the public health state. We saw this, of course, over and over again in COVID as well. The attempts to pass some sort of piece of federal legislation or some CDC policy and then it being undermined because it was essentially seen as a threat in the context of conservative politics.

Once we get to *Dobbs*, we then return back to all the issues I began with, which are the myriad issues that have now emerged in the context of the post-*Dobbs* moment. And here, too, we talk a lot about what it means, in a world where you have criminal prosecutions, especially for providers, to train physicians, to basically set the stage for a new generation of people who will be doing abortion care and provision.

Yeah, and maybe I'll stop there. Thank you.

Kimberly Mutcherson, Professor of law and past co-Dean at Rutgers Law School in Camden: It's so, so, so great to be here. And I'm going to sort of do a disclaimer in the same way that Rachel did, which is I stepped down from the deanship not too long ago and was not doing as much teaching as I would have liked during those years when I was Dean. So, it's really exciting for me to be able to get back into the classroom a lot more than I was. I want to talk about a few different things and really ultimately end up focusing on one of my courses in particular. But first I want to lay out what my premises are as I'm thinking about teaching and particularly teaching in the reproductive justice space.

First is that I really think it's important for a lot of us to be thinking about how we meet this post-*Dobbs* moment for our students. I imagine that a lot of you, like me, had students who were just in disarray when *Dobbs* came down: "Why am I in law school?" "None of it means anything?" "It's all the worst thing that's ever happened." And so I do think that part of what I am trying to do and, I assume that a lot of us in this room are trying to do, is really help some of those disaffected and disillusioned students sort of think about what comes next. How do you remain engaged? How do you remain thoughtful? And how do you think of yourself, no matter where you end up as a lawyer, how do you think of yourself as an activist? What are the ways in which you can be a part of movements even if you're working at a law firm or whatever it is that you end up doing for work?

The second thing is that I care a lot about creating space in the curriculum for conversations that they may not be having in their other classes. Conversations about race, about gender, about class, about inequality, about the law as a consistent tool of oppression and injustice. And I just think that they don't often, do not as often as they should, get opportunities to have those conversations and to have them in a really robust and critical way.

The third thing is to really challenge assumptions about what a broad and coalition-based movement should or must look like in order to be successful and being very clear that law is only a part of that movement and often it is not the most important part of that movement. We tend to really center ourselves as lawyers and lawyers who are activists and the truth of the matter is that, yes, law plays a huge role in lots of people's lives but, and particularly when it comes to abortion law, it isn't central to how people live every single day for a lot of folks in this country.

And then finally, and this is a thing I was talking to folks about before we started this panel, my sense over the last several years has been that so much discussion of reproductive justice is actually just reproductive rights that's wrapped in this patina of reproductive justice. It's really not reproductive *justice*-based work. And you see that in the academy, you see it in the real world where people sort of feel like, well, I'm supposed to be talking about reproductive justice, so that's what I'm going to say when I start, and then I'm going to do exactly what I would have done anyway that has nothing to do necessarily with RJ. I find that incredibly frustrating and so I've worked really to be very clear that reproductive justice was a movement and is a movement that it is not a theoretical framework, at its start, and that we should always be thinking about it in those terms, that it is a movement, that is trying to actually affect the world that we live in.

And this sort of question about how people are using RJ is something I would really love to talk about more in the Q& A because I'm getting very fed up and angry. Well, I'm fed up and angry most of the time, but this is particularly starting to drive me quite bonkers right about now. And because of that, *Dobbs*, frankly, hasn't substantially changed the way I teach because I was never teaching based on an understanding that *Roe* had been anything more than a deeply, deeply qualified victory that created a deeply qualified and stratified right to abortion in this country. And I was never teaching abortion as central or necessarily a pivotal aspect of RJ in the first place. So, I can continue to do a lot of what I have already been doing but do it in a way that now recognizes that *Dobbs* has made things worse, but the world was already garbage before *Dobbs*. [audience laughter].

The course that I want to talk about is a course that I've been teaching for 20 some years now that when I started it, I called it Bioethics, Babies, and Baby Making, and I will stand by it. I will not change the name, I refuse. It's got the nice alliteration, BBB, you know, it's very cool. But the other thing that it allows me to do because it is a course that is not just a law course, it's a bioethics course, it allows me, and it allows the students, to have much broader conversations about the issues that we're talking about that they often find to be very difficult---very personal in some ways and allows us to have conversations about morality and about ethics and all of this good stuff that supposedly is irrelevant to law but that is infused in so much of these areas of law.

So, how do I teach in my BBB class? One thing that I didn't do when I started teaching and that I do pretty consistently now in this course, not necessarily in some of my other courses, but I find it really important in this course, is set a sort of collective standard for the classroom. Why are we here? Who are we as a collective? How do we want to talk to each other? What is the language that we are comfortable using or not using?

Being sure that we are willing to give people grace. Being sure that we are willing to keep people's confidences if they want to share something in the classroom that they don't want shared outside of the classroom.

I really want to create a space, and I never call it a safe space because a lot of these conversations don't feel safe at all, but I do want it to be a space where people feel like they can talk about really hard things. And they can say things where they feel like "I don't have my thoughts completely formed here, but I want to be able to share this and I want to be able to be in conversation with everybody here." That is a really important way, at least for me, to start the conversation and it also allows me share some of my vulnerabilities about having these conversations as well. I talk about how we teach in an environment now where there's always this, this fear of like, "am I going to end up on Twitter because I said something in the classroom?" and all of that good stuff. So, I think it's nice to put that out there.

The other thing that I do very early on is set us in a historical context. As Aziza was saying when she was talking about the Moynihan Report, I think I've gotten past being shocked by it and now I'm just sort of irritated that other people aren't teaching these things before our students get to law school. I work really hard to make sure that students have a deep historical understanding of how we got to where we are. So sometimes that's about starting with talking about J. Marion Sims, the father of American gynecology who performed absolutely abhorrent and unethical experiments on enslaved women. I mean, absolutely horrifying. We talk about the history of forced sterilizations in this country and the Relf sisters[7], which gives us a chance to think about the intersection of race and class and gender and disability. We talk, obviously, about the Hyde Amendment[8]. We talk about the family policing system. And we do it through this context of thinking about things like Native American boarding schools, which are a reproductive justice issue. The Chinese Exclusion Act, which is a reproductive justice issue. And making it very clear to students that this country has been a mess since the beginning and, again, none of this is new. All these things that we are talking about and all these things that we are looking at are fundamentally a part of our system—they are not aberrations. And what we need to be thinking about is how do we change the entire system; not how do we fiddle around the edges of it.

Because I teach these issues in a bioethics context, it also means that I get to use a lot of materials that go beyond the law, which is really fun. Some of that is historical, it's sociological, it's philosophical, it's from anthropology. It's a way that I'm trying to give students a really wide range of tools for understanding these issues that we are dealing with in the context of the law, and frankly, to be very clear to them that often law is the least useful way to attack some of these problems and try to fix some of these problems.

And I'll just stress here, obviously we read Dorothy Roberts, but she's not the only person we read. There are a lot of folks who are writing and have been writing incredible work in this space that includes using work from people who are activists and not just folks who are academics.

Two other things that are really important to me about how I teach my bioethics class. One of the things that I say to my students, and this is going back to bringing some of my own vulnerability into the classroom, one of the things that I have learned and that has fundamentally changed the way I think about the world comes from incorporating a lot of disability studies work into my Bioethics, Babies, and Babymaking class and really pushing students to fundamentally think differently about what disability is and how it gets constructed. The difference between the medical model and the social model of disability, which for a lot of them they've never heard before. It's just never been put on the table for them before. And so even if there's just a little bit of an opening for them to think differently about what does it mean to have a body that works differently? What does it mean to have a mind that works differently? Understanding how we construct those differences within the law and then oppress people on that basis, I think, is always really useful.

And then, finally, of course, having lots of space to talk about the family policing system and the ways in which that system has been used in incredibly biased ways to fundamentally destroy lots of families.

So just a couple of specifics that I want to throw out there about what I do in BBB. The way that the syllabus works (and I'm certainly willing to share my syllabus, and I'm sure that other people here are willing to share as well), we start out and we do this sort of philosophy thing about personhood which is always really fun. And then we go from there to abortion; we go from there to assisted reproduction; we go from there to decision making for pregnant women and forced obstetrical interventions. Then we go to criminalization of pregnancy, and then we end with decision making for children— children with disabilities or children with various kinds of diseases or illnesses. So, we really run the gamut.

One of the things that's really interesting as we go across the semester is, you know, this is a self-selecting group of students, and so when we start with abortion, right, it's all autonomy, autonomy, autonomy, never, never, never. And then we start to move into some of these other areas, and you can sort of watch the students start to get uncomfortable, so somebody's at full term doesn't want to get a C-section, and they're thinking "This is a baby and all you have to do is a C section. It's really not a big deal, right?" And the students are sort of squirming in their seats. It is a sort of moment to really kind of recognize that these are really deep and difficult issues, but if you take a position, then you have to decide where are the places where you're willing to step away from that and why?

What *Dobbs* feeds into this in a way is how the state's interest in potential or fetal life has really been elevated, or at least the Supreme Court has allowed states to elevate that interest, and so that means something obviously in

abortion cases, but it also potentially means something in sterilization cases. It certainly can mean something in embryo disposition cases, so what happens when a state decides that an embryo is a person, and you can no longer destroy it, you can no longer use it for research, you can no longer leave it frozen in perpetuity? Maybe we have to let all those embryos be adopted by people who want to make babies because who would leave a baby frozen? What kind of person are you? We have really, really great discussions within the context, particularly of assisted reproduction, about the idea of parental licensure. Should we be able to figure out who deserves to be a parent and who doesn't deserve to parent? Should an assisted reproduction process be like an adoption process? And if so, who should play a role in that? I always sort of force them to make a list. What are the questions that you would ask if you had to license someone to be a parent? That's always a fun question.

And then we talk about other really difficult cases. The Ashley X case which probably, some people here either know about or have taught about, which is the case where you had a young girl who had a significant fetal anomaly, basically was never going to have a mental capacity beyond maybe a six-month-old, but her body was growing at the exact rate that anybody's body could grow. Her parents ended up having procedures done to give her a hysterectomy, to remove her breast buds, and then growth attenuation to basically keep her small because they said that if she got too big, they wouldn't be able to care for her at home anymore. That's always a fascinating discussion with students. And then we also have a really great discussion about the Jahai McMath case, which involved a young woman, a young Black girl, who went to a hospital to have her tonsils removed and something went very wrong, and the hospital staff was terrible in terms of dealing with her and her mother, and she ultimately ended up being declared brain dead in California, which is where the operation took place. Then her mother moved her to New Jersey because in New Jersey you cannot take somebody off of a ventilator if you have religious objections to it. So, she moved her all the way to New Jersey. And that of course raises lots of questions about who gets to make these decisions? Who gets to parent? But also, some really serious questions about why did this happen to this child? You cannot take a child to get her tonsils out and then expect that she's going to end up brain dead at the end of it.

I love, love, love teaching this class. I love the kinds of conversations that I get to have with students. And I love the feeling that when they leave that classroom, they have been challenged in really fundamental ways, both about their sense of what the law is and what the law should be, but also their sense about what families are, who constitutes a family, and whether and how the law should continue to insert itself into those questions. Thanks!

Meghan Boone, Associate professor at Wake Forest University School of Law: I love being on a panel with this group of people who are just my favorite scholars, and I'm actually really glad that now I'm speaking after Kim because I think our animating goals were very similar, and then we took them in different places, which I think is interesting.

I teach *Dobbs* in lots of different circumstances. I teach individual rights and liberties constitutional law, so we teach it there. I teach family law, so we teach it there. I actually teach a sort of standalone survey course on reproductive justice. Definitely teach it there. I have yet to find a way to get it into civil procedure, but I have not given up yet [audience laughter].

But despite the fact that I have many opportunities to talk about *Dobbs* and abortion rights, I found myself very frustrated by the limitations of the opinion. Both the majority and the dissent. And, similar to Kim, I'm really frustrated that it didn't, I felt like it didn't give space naturally to accommodate the ways that my students are reacting to this new reality, or their sort of overwhelming despair to the universe that they now find themselves in. And there's sort of a sense of confusion about how they've even arrived at this moment. And just talking about *Dobbs* and why it was or was not correct, or how we got there, just, it didn't seem to get to the underlying emotional response that I wanted to address.

So, I created a short course that widened the lens to talk about how the law treats abortion and how it could treat abortion without tying it to the way the law historically has treated abortion. So not necessarily assuming from the outset that it is a substantive due process privacy issue[9], but saying, like, if we started from a blank slate and we thought about this from lots of different legal angles, what might we come up with?

I tried it once as a once-a-week seminar at Wake Forest, and I also taught it as a standalone weeklong intensive at WashU during their winter term. I found there was a lot of student interest so I want to talk about what we cover in the course and the approach that I take and then just maybe make a pitch for why either this type of course or this type of approach might be something that you would consider in your own classes.

So, what do we cover? We start with *Dobbs*. We start with a discussion of the history behind *Dobbs*, the arguments in *Dobbs*, and how that situates it in the substantive due process history that they know and love from first year Constitutional Law (or know and *don't* love from first year Con Law).

And then we go through, thematically, week by week, and we do a week on all the equality/ equal protection arguments. And we read scholarship there. And then we do a week about common law arguments for abortion rights and what that looks like. And we think about property, or tort, or criminal law.

We talk about other constitutional arguments. So, arguments under the First Amendment, freedom of speech, freedom of religion. We talk about procedural due

process. We talk about Takings[10]. We talk about the Thirteenth Amendment arguments, and the Eighth Amendment arguments, and I won't tell a lot of war stories, but I always feel compelled to say, when we talk about the Eighth Amendment, I poll the students and say, if you had to decide right now, if you had to be pregnant without the ability to terminate or spend nine months in a minimum security prison, which would you choose and why? And the vast majority of my students very thoughtfully choose prison. Which I think is interesting because in general, I'm teaching at Wake Forest University, I have a room of well-resourced individuals who could probably accommodate in a practical respect for an unplanned pregnancy and yet, thoughtfully, they choose prison, which I think is interesting.

We also spend a week talking about why the law maybe doesn't do it . . . about why we might want to remove this whole discussion from a legal framework and talk about it in a sort of political/democratic process framework, in a public policy framework, in a public health framework. I have not done this yet, but the next time I teach the course, I'll add a human rights framework to spend some time thinking about comparative law approaches to abortion rights also. So as far as – I know this is a pedagogy panel – as far as the work that I'm requiring from my students as we're working through these alternative bases for abortion rights, these different frameworks, are mostly sort of short response papers asking them to analyze these different options more deeply. What's different about this type of argument versus this other type of argument? How does the presence or absence of the idea of fetal personhood make this argument different? Does fetal personhood matter to the First Amendment? Does it matter to the Thirteenth Amendment? How does that change the arguments?

We also do a thing where I ask them to go out "in the wild" and identify versions of these arguments in op-eds and TikToks and sort of the ways that when we talk about "my body, my choice," that can be undergirded by this idea of a property argument. A property belief in the body. They go out and find the ways that people are talking about abortion and then connect them to these theoretical frameworks we're talking about in class.

I focus on a deep dive on a much shorter list of readings. Although there has been such an explosion of interesting things written in this space that I feel like the next time I teach the course, it's going to be even harder to decide what that short list of things will be. But I try to leave lots of open space in the class so that we read one or two things closely and then we start the class by just talking about what surprised them, what interested them, what spoke to them, and then letting the discussion go there.

So, the benefits that I have found from this sort of short course, very intensive approach to just abortion rights—and I should say, in my Reproductive Justice class, obviously we talk about abortion rights, but of our 13-week semester, we'll do two or three weeks that focus there, and then generally I focus on a much broader range of topics. But I love being able to take this intensive and just say, "This is the only thing we're doing. We're really digging in." I get to engage with, and the students get to engage with, the decades of very interesting and creative scholarship. And also, now, get to talk about the sort of hot-off-the-presses litigation that's happening. That lots of these ideas have been floating around for decades, and now, for the first time, people are putting them up in court and saying, "Okay, if not substantive due process, if not privacy, then equality, then freedom of religion." That these things are really getting litigated in real time.

I just think it helps students understand *Dobbs* in a broader context, not limiting their thinking to the sort of terms of the debate as set by the decision itself or the history of abortion rights. But forcing them to just think really broadly including about arguments that make them uncomfortable.

One of my favorite students is a young woman of color and she is very upfront with me, and she said, "Professor Boone, when I saw it was the 13th amendment week, I was ready to come in and tell you why it was absolutely incorrect to talk about abortion and the 13th amendment."

But after we did the class, she ended up writing her final paper all about that argument, and how it just changed her thinking, and she got really excited about it. So, I feel like helping the students to work through those uncomfortable different ways of thinking about it is exciting.

Most importantly, I think that it helps them shake off some of the sense of futility and sadness that they come in the room with. Since the class is a seminar, the students are self-selecting. Most of my students who sign up for a class on abortion rights have a specific worldview and they come in and they do so with a sense of despair that [the federal right to an abortion] has been lost, and it might never be regained, and if it is regained, the only option is to go back to the world that we had before. And I think, by taking the time to just think creatively and broadly about these different, interesting arguments, it allows them to have a sense of hope and optimism, allows them to have a sense of agency, that they can talk to their friends and loved ones and groups about this in a new way.

Rachel talked a lot about the opportunities that *Dobbs* had given us. And I recognize obviously, like, the world is shit and always has been, but also, if you're looking for a silver lining, I think what *Dobbs* has given us is this moment where lots of people are interested in the bigger question of what's next? What else? How can we get around and over and through this in a way that I think is really exciting. None of this is new, and also, this doesn't have to be the last or only word about this subject. That maybe, *maybe* the law does have something to offer, but maybe it's not the law we thought it was going to be. Maybe it's a different set of legal principles or ideas. So, happy to share a syllabus if anyone wants to teach a short course on different, alternative bases for the abortion right at their own institutions.

But even if you don't, I would like to sort of encourage everyone that when we teach *Dobbs*, not to teach it just as the death knell of substantive due process, but also as

an invitation to think more broadly about these rights and how they sound in lots of different bodies of law. Thank you.

Notes

1. *Planned Parenthood of Pennsylvania v. Casey* was a 1992 Supreme Court case that upheld *Roe*, ruled against "undue burdens" on those seeking abortion (such as parental or spousal consent or lengthy waiting periods), and scrapped the *Roe* model of pregnancy trimesters in favor of the standard of viability.

2. Dicta are statements made in a Supreme Court decision that do not have the weight of a holding (which creates precedent and is binding for the judiciary) but are still available as sources to make another court's decision more persuasive and authoritative.

3. Rational basis review, or the rational basis test, is used by courts to determine whether a statute or ordinance is constitutional. For a rule to pass this test, it must establish or preserve "legitimate state interest" – that is, the right of the state to uphold certain rules whose interests are so pressing that they override the rights of the individual. In addition, there must be a "rational" connection between the goals of the state and the means the state uses to achieve those goals (bearing in mind that all these terms are *very* subjective). Finally, rational basis is the least stringent of judicial reviews of statutes and ordinances: it isn't concerned with protected classifications such as race, gender, religion, national origin etc.

4. EMTALA is the Emergency Medical Treatment and Labor Act, passed by Congress in 1984, which ensures medical treatment of anyone who walks into a hospital emergency room, regardless of their ability to pay. If patients need further care, hospitals must admit them.

5. The Alliance for Hippocratic Medicine is an organization of anti-choice physicians that has vocally supported all anti-abortion legislation in the United States (for example, it applauded Texas's Fetal Heartbeat Act for its "passion for protecting preborn children." "Alliance for Hippocratic Medicine Statement Following Texas Fetal Heartbeat Act Taking Effect." September 2021.https://app.box.com/s/pr02wt8w969h0rvc6yikated0oqleqnq. In *FDA v. Alliance for Hippocratic Medicine*, the AHM argued that the Federal Drug Administration did not properly approve mifepristone, the drug that causes the uterus lining to degrade and then contract to expel a fetus, for pregnancy termination (this case was largely in response to the FDA's approving mifepristone to be sent through the mail, due to the COVID pandemic). Although the AHM initially achieved a pause in the production and prescribing of mifepristone, higher courts countermanded the stay. Finally, the FDA countersued, arguing that the AHM did not have standing, since they didn't have a compelling interest in the administering of the drug. In June 2024, after this panel took place, the Supreme Court held that the AHM did not have standing and that mifepristone could be produced and prescribed according to FDA guidelines.

6. The Moynihan Report is shorthand for a 1965 report, *The Negro Family: The Case for National Action*, that was initiated by then Assistant Secretary of Labor, Daniel Patrick Moynihan, researched by his staff, and written by Moynihan himself. The main finding of the report was that Black social and economic inequality was due in large part to what he saw as the dissolution of the working-class Black family: "the family structure of lower class Negroes is highly unstable, and in many urban centers is approaching complete breakdown." For Moynihan, this instability was caused by the comparatively high number of Black working-class families headed by women. While Moynihan did point to the economic crisis caused by racial and gender disparities in wages, he focused more on the "tangle of pathology" caused by the primacy of "matriarchal" Black families, in which "Negro children without fathers flounder — and fail."

7. Minnie Lee and Mary Alice Relf, sisters who are still living, were involuntarily sterilized in 1973 by tubal ligation at the ages of twelve and fourteen, respectively. Because the two Relf sisters were African American and cognitively disabled, Montgomery Community Action – a social services agency largely funded by government sources – picked up the sisters and their mother Minnie. Minnie was told that the girls would be receiving "shots," and was asked to sign a consent form that she did not have the education to read. Ultimately, the Relf family, with the help of the Southern Poverty Law Center, filed a class action suit against the federal government for directing federal funds towards involuntary birth control (primarily Depo-Provera and IUDs) and sterilization.

8. The Hyde Amendment, sponsored in 1979 by Republican Illinois Congressman Henry J. Hyde, was an amendment to a funding bill for the Department of Health, Education, and Welfare. It bars the use of any federal funding for almost all abortion services. As well as preventing poor women from using Medicaid to pay for abortion care, the Hyde Amendment shifted the financial burden onto the states – currently 16 states use their own funds to cover non-emergency abortions.

9. Substantive due process is a doctrine that derives from the Fifth and Fourteenth Amendments: that both federal (the 5th Amendment) and state (the Fourteenth) governments may not deprive a person of "life, liberty, or property without due process of law." This principle was initially applied to contract and labor law where, in several cases in the 1930s, the Supreme Court ruled that state measures to regulate a minimum wage violated the right of employers and employees to freely contract conditions of work. At the same time, the Court also used substantive due process to protect the rights of voting, association, and free speech, especially of what it called "discrete and insular minorities." Over time, different iterations of the Supreme Court have expanded what scholars have called the "penumbra" of various parts of the Bill of Rights within the principle of substantive due process to affirm rights to privacy (establishing the right to contraception and, until recently, abortion), oppose "invidious racial discrimination" (overturning laws outlawing interracial marriage), overturn same-sex sodomy laws, and unhitch the right to marry from gender.

10. "Takings" derives from the clause in the Fifth Amendment that bars the government from taking private property for public use without appropriate compensation. Many of the cases that deal with the Takings clause focus on state and federal government's powers of eminent domain – the ability to lay claim to private land for public purposes, like laying a railroad or power lines.

Sarah E. Chinn teaches English at Hunter College, CUNY. A member of the *Radical Teacher* editorial collective, she's the author of three books, *Technology and the Logic of American Racism: A Cultural History of the Body as Evidence* (2000), *Inventing Modern Adolescence: The Children of Immigrants in Turn-of-the-Century America* (2009), and *Spectacular Men: Race, Gender, and Nation on the Early American Stage* (2017), as well as articles in *Signs*, *GLQ*, *Prospects, American Quarterly*, *American Literature*, and *WSQ.*

Kimberly Mutcherson is an award-winning professor whose scholarship focuses on reproductive justice, bioethics, and family and health law. She has presented her scholarship nationally and internationally and publishes extensively on assisted reproduction, families, and the law. She has been a Scholar in Residence at the Birnbaum Women's Leadership at NYU Law School, a Senior Fellow/Sabbatical Visitor at the Center for Gender and Sexuality Law at Columbia Law School, and a Visiting Scholar at the Center for Bioethics at the University of Pennsylvania.