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# REPRODUCTIVE JUSTICE AND THE THIRTEENTH AMENDMENT

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## INTRODUCTION

The Court's ruling in *Dobbs v. Jackson Women's Health Org.* overruling *Roe v. Wade* and finding no constitutional right to choose an abortion, has both exacerbated and laid bare the unequal access to reproductive liberty in this country.<sup>1</sup> During the *Dobbs* oral argument, Justice Amy Coney Barrett opined that forcing a pregnant person to carry a child to term would not be a problem because they could give the baby up for adoption. Noting the plaintiff's argument that forced motherhood hindered women's access to the workplace and to equal opportunities, Barrett suggested "Why don't the safe haven laws take care of that problem?"<sup>2</sup> Barrett's rhetorical question reflects a callous disregard of the experience of women of color throughout our nation's history.<sup>3</sup> Beginning with the tragic cruelty of chattel slavery, women of color have often not only been forced to give birth, but also to give up their children after they were born.<sup>4</sup> Women of color have also disproportionately been denied the ability to have children, subjected to forced sterilization and coercive birth control regimes.<sup>5</sup> Women of color are also disproportionately likely to have their children taken away from them by state officials.<sup>6</sup> Our nation's history of denying women reproductive autonomy not only reflects our history of gender based subordination but is also inextricably linked to the history of slavery and racial subordination.

Overcoming this history of subordination requires an affirmative campaign for reproductive justice, "the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities."<sup>7</sup> The Thirteenth Amendment provides both an effective tool and a framework to support the political movement for reproductive justice. Centering the Thirteenth Amendment in a campaign for reproductive justice highlights the disproportionately negative impact that the denial of reproductive rights has on women of color and emphasizes the role of state coercion in the denial of reproductive freedom.

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<sup>1</sup> *Dobbs v. Jackson Women's Health Org.* 597 U.S. 215 (2022); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>2</sup> Transcript of Oral Argument at 56, *Dobbs*, 597 U.S. 215 (No. 19-1392).

<sup>3</sup> *Id.*

<sup>4</sup> See *infra* note 84 and accompanying text.

<sup>5</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 6 (Pantheon Books 1997); Pamela Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401 (2000) [hereinafter Bridgewater, *Thirteenth*]; see also FELICIA KORNBLUH, *A WOMAN'S LIFE IS A HUMAN LIFE: MY MOTHER, MY NEIGHBOR, AND THE JOURNEY FROM REPRODUCTIVE RIGHTS TO REPRODUCTIVE JUSTICE* (Grove Press 2023).

<sup>6</sup> See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (Civitas Books 2002).

<sup>7</sup> *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice/> (last visited Jan. 3, 2024).

The Thirteenth Amendment to the United States Constitution provides that “[n]either slavery nor involuntary servitude . . . shall exist.”<sup>8</sup> Along with prohibiting slavery and involuntary servitude, the Amendment established formerly enslaved people as human beings with fundamental human rights, and empowered the federal government to remedy the badges or incidents of slavery.<sup>9</sup> A number of scholars have argued that the right to choose an abortion is among the rights protected by the Thirteenth.<sup>10</sup> This article agrees that there is indeed a very strong case to be made that restricting reproductive freedom, including the right to choose an abortion, violates the Thirteenth Amendment. The enormity of the harm of chattel slavery in the United States defies analogies.<sup>11</sup> Any conversation about slavery and reproductive rights must begin by acknowledging that the harm wrought by chattel slavery as a whole was a vastly different magnitude than that caused by the denial of reproductive freedom today. Nonetheless, it is essential that advocates for reproductive freedom have this important conversation, focusing on the lived experience of people who are denied reproductive justice. Restricting the reproductive freedom of enslaved women was central to the institution of chattel slavery in this country.<sup>12</sup> Throughout our nation’s history, “the control of Black women’s reproduction has shaped the meaning of reproductive liberty in America.”<sup>13</sup>

This article begins with the experience of enslaved women in the antebellum United States, who were sexually abused and forced to bring pregnancies to term, many only to have their children cruelly taken and sold away from them.<sup>14</sup> Antislavery activists often criticized “slave-breeding” as among the worst human rights abuses perpetuated by the institution of slavery.<sup>15</sup> As a result of their advocacy, slavery was widely understood as not only a form of coercive labor, but a forced deprivation of all human rights, including the most intimate decisions of whether to form a family and have and raise children.<sup>16</sup> During debates

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<sup>8</sup> U.S. CONST. amend. XIII (emphasis added).

<sup>9</sup> See Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE UNIV. L. REV. 859 (2016).

<sup>10</sup> See Bridgewater, *Thirteenth*, *supra* note 5; Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html?referringSource=articleShare> (“Black women’s sexual subordination and forced pregnancies were foundational to slavery.”); Andrew Koppelman *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

<sup>11</sup> See Pamela D. Bridgewater, *Ain’t I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L. J. 89, 113 (2005) [hereinafter Bridgewater, *Reparations*].

<sup>12</sup> See ROBERTS, *supra* note 5, at 6; see also Bridgewater, *Reparations*, *supra* note 11, at 113.

<sup>13</sup> ROBERTS, *supra* note 5, at 6.

<sup>14</sup> See *id.* at 22-55; Bridgewater, *Thirteenth*, *supra* note 5, at 415.

<sup>15</sup> Bridgewater, *Thirteenth*, *supra* note 5, at 415; *infra* p. 7.

<sup>16</sup> Bridgewater, *Thirteenth*, *supra* note 5, at 415 [EN: supremacy not directly mentioned in this article]

over the Thirteenth Amendment, members of the Reconstruction Congress often spoke of the cruelty of reproductive slavery, and the deprivation of reproductive liberty experienced by enslaved people.<sup>17</sup> Abolishing slavery restored those rights to formerly enslaved people. With the Thirteenth Amendment and implementing legislation, they sought to restore the fundamental human rights that have been denied to enslaved people.

Two lines of Thirteenth Amendment doctrine serve as a source to advocate for reproductive justice. First, depriving people of reproductive liberty imposes a badge or incident of slavery, remediable under the Thirteenth Amendment.<sup>18</sup> Not only was the denial of reproductive autonomy a central feature of chattel slavery in the United States, but women of color today, including descendants of enslaved people, are disproportionately negatively impacted by laws denying their reproductive autonomy.<sup>19</sup> Second, requiring pregnant people to carry pregnancies to term arguably imposes an involuntary servitude, violating the Thirteenth Amendment.<sup>20</sup> Forcing a pregnant person to bring a pregnancy to term deprives them entirely of bodily autonomy during the term of their pregnancy.<sup>21</sup> What would it be like if slavery and involuntary servitude really were abolished in this country?<sup>22</sup> What if our laws really engaged in remedying the badges or incidents of slavery?<sup>23</sup> This article asks these important questions and analyzes how they can aid in theorizing and achieving a campaign for reproductive justice.

## I. REPRODUCTIVE JUSTICE

The reproductive justice movement is a political movement that demands reproductive rights under conditions of social justice.<sup>24</sup> According to the Sister Song Women of Color Reproductive Justice Collective, reproductive justice is

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<sup>17</sup> See Bridgewater, *Reparations* *supra* note 11, at 125.

<sup>18</sup> See Bridgewater, *Thirteenth*, *supra* note 5, at 416; Goodwin, *supra* note 10; Lisa Crooms-Robinson, *The Amendment Ending Slavery Could be The Key to Securing Abortion Rights*, NBC NEWS (July 5, 2022, 4:28 AM), <https://www.nbcnews.com/think/opinion/abortions-rights-new-supreme-court-strategy-based-13th-amendment-rcna36309>.

<sup>19</sup> See ROBERTS, *supra* note 5, at 302-303; Bridgewater, *Reparations*, *supra* note 11, at 92.

<sup>20</sup> See Koppelman, *supra* note 10, at 484 (arguing that women who are forced to carry their pregnancy to term are subject to “involuntary servitude,” prohibited by the Thirteenth Amendment).

<sup>21</sup> See *id.*

<sup>22</sup> See, e.g., Rebecca E. Zietlow, *The New Peonage: Liberty and Precarity for Workers in the Gig Economy*, 55 WAKE FOREST L. REV. 1087 (2020) [hereinafter Zietlow, *Peonage*]; James Gray Pope, *Contract, Race, And Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L. J. 1474 (2010).

<sup>23</sup> See William C. Carter, *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007); Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, U PA. J. CON L. 561 (2012).

<sup>24</sup> See LORETTA ROSS & RICKIE SOLLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* (Univ. of Ca. Press 2017).

“the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.”<sup>25</sup> Rather than relying on individual liberty, the campaign for reproductive justice employs the language of human rights, arguing that reproductive justice rights are fundamental human rights.<sup>26</sup> Reproductive justice activists “focus on the lived, embodied reproductive and whole -life experiences within their communities of people who can become pregnant and give birth.”<sup>27</sup> These experiences reveal that people without institutionalized power are highly vulnerable to coercion and abuse in all aspects of their reproductive lives.<sup>28</sup> As Loretta Ross and Ricki Sollinger point out, “individual choices have only been as capacious and empowering as the resources any woman can turn to in her community.”<sup>29</sup> Their focus on access rather than choice recognizes the many barriers confronting people seeking abortions even when they had a legal “choice” to do so.<sup>30</sup> The Court’s ruling in *Dobbs* has laid bare the injustice underlying the veneer of rights and access under the *Roe* regime and opened up avenues for reproductive justice advocacy.

The Supreme Court’s ruling in *Roe v. Wade* protected right to privacy was limited by liberal ideals of individual autonomy and freedom from government

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<sup>25</sup> *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice/> (last visited Apr. 4, 2024); see also NAT’L COUNCIL OF JEWISH WOMEN, NCJW AND REPRODUCTIVE JUSTICE (Nov. 2014), [https://www.ncjw.org/wp-content/uploads/2018/07/NCJW-and-Reproductive-Justice\\_FINAL.pdf](https://www.ncjw.org/wp-content/uploads/2018/07/NCJW-and-Reproductive-Justice_FINAL.pdf) (defining reproductive justice as including “(1) the right to have full autonomy over our bodies; (2) the right to have or not have children; (3) the right to birth and/or parent our children with dignity; and (4) the right to live and/or raise a family in a safe, healthy environment”) [hereinafter NCJW, REPRODUCTIVE JUSTICE]. According to SisterSong, the term “reproductive justice” was invented in 1994, inspired by the International Conference on Population and Development in Cairo. *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice/> (last visited Apr. 4, 2024). However, for many years prior to 1994, women of color have fought forced sterilization and advocated for state support for child rearing as necessary components of reproductive rights. See ROSS & SOLLINGER, *supra* note 24, at 14; KORNBLUH, *supra* note 5.

<sup>26</sup> See ROSS & SOLLINGER, *supra* note 24, at 10.

<sup>27</sup> *Id.* at 12.

<sup>28</sup> See *id.* at 13; see also NCJW, REPRODUCTIVE JUSTICE.

<sup>29</sup> ROSS & SOLLINGER, *supra* note 24, at 16. Although Ross and Sollinger used gendered examples and pronouns in their 2017 book, more recently advocates for reproductive justice have highlighted the experience of trans people and thus avoid using gendered pronouns. See *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice/> (last visited Apr. 4, 2024); Irin Carmon, *You Can Still Say “Woman” But You Shouldn’t Stop There*, N.Y. MAG. (Oct. 28, 2021), <https://nymag.com/intelligencer/2021/10/abortion-law-trans-inclusive-advocacy.html>. I have chosen to follow the example of those advocates in my writing about reproductive rights.

<sup>30</sup> See *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice/> (last visited Apr. 4, 2024);

interference.<sup>31</sup> Court rulings following *Roe* perpetuated the racial and economic inequality of our society by “legitimizing the profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent.”<sup>32</sup> Achieving reproductive justice requires a responsive state that creates the conditions that nurture and support them.<sup>33</sup> However, after *Roe* both the Court and political actors did the opposite. Most notably, the Court held that the constitution did not require public funding of abortions even when the Court considered the right to an abortion to be a fundamental right.<sup>34</sup> The Court had already held that there is no constitutional right to state support for raising families.<sup>35</sup> Even as the Court upheld *Roe* in *Planned Parenthood v. Casey*, Congress gutted ended the federal entitlement to the welfare benefits that poor people depended on to help them raise their children.<sup>36</sup> At the same time, during the “war on drugs” in the 1980s and 1990s, states criminalized the use of drugs by pregnant women – laws that had a disproportionately negative impact on poor women of color.<sup>37</sup> The *Roe* regime of reliance on courts to enforce negative liberties thus failed altogether to bring about reproductive justice.<sup>38</sup> Individual liberty rights under the Fourteenth Amendment have limited use for people who lack economic and racial privilege in our society.<sup>39</sup> As Dorothy Roberts has argued, “We need a way of rethinking the meaning of liberty so that it protects all citizens equally.”<sup>40</sup>

A Thirteenth Amendment based campaign for reproductive justice would go beyond the limited vision of reproductive rights embodied in court opinions like *Roe v. Wade* and open up a discussion on how to achieve the responsive state needed for reproductive justice.<sup>41</sup> Unlike the Fourteenth Amendment Due Process Clause, which contains only negative protections against state deprivation

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<sup>31</sup> ROBERTS, *supra* note 5, at 6.

<sup>32</sup> Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409 (2009).

<sup>33</sup> See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE I. L. & FEMINISM 1, 5 (2008).

<sup>34</sup> See *Harris v. McRae*, 448 U.S. 297 (1980).

<sup>35</sup> See *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>36</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193 (1995).

<sup>37</sup> See Bridgewater, *Reparations*, *supra* note 11, at 409 n.36.

<sup>38</sup> ROBERTS, *supra* note 5, at 297 (arguing the negative view of reproductive liberty disregards obstacles to decision-making, and state interference).

<sup>39</sup> See *id.* at 294; *Reproductive Justice*, SISTERSONG, <https://www.sistersong.net/reproductive-justice/> (last visited Apr. 4, 2024) (arguing that reproductive justice is “About access, not choice. Mainstream movements have focused on keeping abortion legal as an individual choice. That is necessary, but not enough. Even when abortion is legal, many women of color cannot afford it, or cannot travel hundreds of miles to the nearest clinic. There is no choice where there is no access.”).

<sup>40</sup> ROBERTS, *supra* note 5, at 294.

<sup>41</sup> ROBERTS, *supra* note 5, at 297; West, *supra* note 32, at 1398.

of rights,<sup>42</sup> the Thirteenth Amendment is a source of positive rights that are enforceable against both state and private actors and has a radical potential as a tool for liberty and equality rights.<sup>43</sup> The Thirteenth Amendment prohibits unduly coercive practices that have a disparate impact on the people who have historically been harmed by those practices. As such, the Thirteenth Amendment is a powerful tool “to create conditions that let *all* people choose whether and when to bear and raise children.”<sup>44</sup>

## II. SLAVERY AND THE LACK OF REPRODUCTIVE AUTONOMY

A Thirteenth Amendment based approach to reproductive justice starts with the experience of enslaved people on the United States. Chattel slavery in the United States was a uniquely de-humanizing and cruel institution. As Pamela Bridgewater has observed, slavery in the United States “differed from historical slave societies in that it was based on race, was perpetual, and involved the complete domination of the lives of slaves by their owners.”<sup>45</sup> Enslaved people were not treated as human beings, but as property, lacking fundamental human rights.<sup>46</sup> They had no legal autonomy, by law under the “absolute dominion” of the slaveholder.<sup>47</sup> Enslaved people were prohibited from engaging in any economic activity. Enslaved people could not travel without the written permission of the slaveholder.<sup>48</sup> They were forbidden to read, write or testify in court against any white person.<sup>49</sup> Arguably, however, the cruelest feature of slavery in this country was the denial or reproductive autonomy to enslaved people.<sup>50</sup>

Because they lacked any rights whatsoever, enslaved women were at the mercy of their masters, who exploited them sexually.<sup>51</sup> Rape was both an act of violence and a means to maintain a subservient work force.<sup>52</sup> Some slaveholders

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<sup>42</sup> ROBERTS, *supra* note 5, at 297; West, *supra* note 32, at 1403.

<sup>43</sup> See Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255 (2010) [hereinafter, Zietlow, *Free at Last*]; Lee Vandervelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855 (2007).

<sup>44</sup> KORNBLUH, *supra* note 25, at xvi (emphasis added).

<sup>45</sup> Bridgewater, *Reparations*, *supra* note 11, at 113.

<sup>46</sup> *Id.* at 113.

<sup>47</sup> See Crooms-Robinson, *supra* note 18 (“Denying the rights of reproductive health and choice, bodily integrity and personal autonomy was essential to U.S. slavery, which recognized enslavers’ complete dominion over the people they enslaved.”).

<sup>48</sup> HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* 70 (Columbia Univ. Press 1943); W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA 1860–1880* at 40 (Free Press 1998).

<sup>49</sup> APTHEKER, *supra* note 48, at 70 (1943); W.E.B. DUBOIS, *supra* note 48, at 40.

<sup>50</sup> See ROBERTS, *supra* note 5, at 24 (“The essence of Black women’s experience during slavery was the brutal denial of autonomy over reproduction.”).

<sup>51</sup> See *id.* at 30.

<sup>52</sup> *Id.*

also identified slaves for breeding and paired them.<sup>53</sup> When they became pregnant, enslaved women were forced to bring those pregnancies to term, as they were creating new “property” for their enslavers.<sup>54</sup> Thus according to Michele Goodwin, “If cotton was euphemistically king, Black women’s wealth-maximizing forced reproduction as queen.”<sup>55</sup> The lack of reproductive autonomy continued after enslaved women were forced to give birth. Laws of slave states imposed the same legal status as the mother on any child of enslaved women, regardless of the status of the father.<sup>56</sup> One of the cruelest aspects of slavery was the fact that after they gave birth many enslaved women were deprived of a relationship with their children. Slaveholders often sold the children of enslaved people and separated family members.<sup>57</sup>

In the antebellum era, antislavery activists decried the abusive practice of slave breeding as the cruelest feature of slavery. As Sojourner Truth lamented in her canonical “Ain’t I a Woman” speech, Sojourner Truth declared, “*I have borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother’s grief, none but Jesus heard me!*”<sup>58</sup> The widely read and influential narratives of fugitives from slavery were the most powerful forms of advocacy.<sup>59</sup> For example, in her influential 1861 slave narrative, Harriet Jacobs

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<sup>53</sup> See Bridgewater, *Reparations*, *supra* note 11, at 120-21.

<sup>54</sup> See Bridgewater, *Reparations*, *supra* note 11, at 122 (noting that after the 1808 ban on the importation of enslaved people, slave breeding was exceptionally profitable, thought by some historians to be “on par with other slave industry commodities such as tobacco and cotton”); Koppelman, *supra* note 20, at 508 (“mandatory motherhood and loss of control over one’s reproductive capacities were partially constitutive of slavery for most black women of childbearing age, whose principal utility to the slaveholding class lay in their ability to reproduce the labor force”); see also Crooms-Robinson, *supra* note 18 (stating that slavery “forced enslaved women to reproduce” which fueled domestic trade after the 1808 ban on importation of enslaved people); Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett*, HARV. L. REV. BLOG (June 14, 2022), <https://harvardlawreview.org/blog/2022/06/a-response-to-justice-amy-coney-barrett/> (“Enslaved women and men were used against their will for breeding (as well as for the sexual satisfaction of the white owning caste)”).

<sup>55</sup> Goodwin, *supra* note 10.

<sup>56</sup> Enactment of Hereditary Slavery Law Virginia 1662 (“all children borne in this country shalbe held bond or free only according to the condition of the mother”); see ROBERTS, *supra* note 5, at 33 (noting that enslaved women “had no legal right to their children”).

<sup>57</sup> See Damian Alan Pargas, *Urban Refugees: Fugitive Slaves and Spaces of Informal Freedom in the American South*, 7 J. OF EARLY AM. HIST. 262, 271 (2017) (noting that family separations were “one of the things that caused much bitterness among the slaves”); APTHEKER, *supra* note 48, at 63 (“Another important for weakening unity and solidarity among the slaves which was particularly important during the early years of the institution was the separation of slaves of similar family”).

<sup>58</sup> Sojourner Truth, Address at Women’s Rights Convention, *Ain’t I A Woman?* (1851) (available at <https://www.nps.gov/articles/sojourner-truth.htm>).

<sup>59</sup> See MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 421 (2016).



described efforts to escape the inevitable sexual assault and rape by her captor.<sup>60</sup> The most common motive that fugitives from slavery cited for fleeing their enslavers was the threat of sale of oneself or one's family members.<sup>61</sup> Noted abolitionist J.W. Loguen, who escaped from slavery and became a leader of the Underground railroad in upstate New York, explained that he did not marry because, as he put it in his autobiography, slavery must "never own a wife or child of mine."<sup>62</sup> Henry Bibb, also a fugitive from slavery who was active in the northern antislavery movement, wrote that "if there was any one act of my life while a slave, that I have to lament over it is that of being a father and a husband of slaves," and vowed that the daughter whom he left in slavery was "the last slave that ever I will father for chains and slavery on this earth."<sup>63</sup> Other abolitionists responded to these narratives. As an 1860 *New York Times* commentary observed, slavery was an enterprise that "treats" a Black person "as a chattel, breeds from him with as little regard for marriage ties as if he were an animal, is a moral outlaw."<sup>64</sup>

Many enslaved people resisted the exploitation of their reproductive lives.<sup>65</sup> They used herbs and potions as abortifacients and contraceptives, as well as self-induced abortions.<sup>66</sup> Some enslaved people tragically took matters into their own hands to prevent the sale or capture of their children.<sup>67</sup> Memorialized in Toni Morrison's book, *Beloved*, Margaret Garner, who was fleeing from slavery with her four children, tried to kill them to prevent their re-enslavement.<sup>68</sup> Abolitionist Lydia Maria Child described a mother facing the

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<sup>60</sup> HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF (L. Maria Child, ed. 1861); see also SINHA, *supra* note 59, at 456 (describing Jacob's narrative as the most important narrative of slave resistance).

<sup>61</sup> See Pargas, *supra* note 57, at 119 ("The threat or reality of forced separation was one of the most important motivations for permanent slave flight within the South."). Fugitives also had to make the "wrenching choices . . . about whether family members should leave or stay." ERIC FONER, GATEWAY TO FREEDOM 200 (Oxford Univ. Press 2015). They almost always left some family behind, but also often reunited with relatives who had previously run away. *Id.* When they could, escaped slaves came back to help family members to escape. R.J.M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY 195 (Cambridge Univ. Press 2018).

<sup>62</sup> See Davis, *supra* note 54; SINHA, *supra* note 59 (describing Loguen's activism in the Underground Railroad); FONER, *supra* note 61, at 149 (describing Loguen as "the underground railroad king of Syracuse").

<sup>63</sup> Davis, *supra* note 54; see SINHA, *supra* note 59 at 430-431 (describing Bibb's antislavery activism).

<sup>64</sup> *The Issue in the United States — The North and Slavery*, N.Y. TIMES, Jan. 18, 1860, at 2, available at <https://www.nytimes.com/1860/01/18/archives/the-issue-in-the-united-states-the-north-and-slavery.html>.

<sup>65</sup> See Bridgewater, *Reparations*, *supra* note 11, at 122.

<sup>66</sup> See *id.*

<sup>67</sup> *Id.*

<sup>68</sup> See BLACKETT, *supra* note 61, at 249.

imminent sale of her children who “took an axe and chopped off their heads, and then ended her own life with the same instrument.”<sup>69</sup> She told of another enslaved woman who “threw her three infants into a well and then jumped in after them.”<sup>70</sup> These stories illustrate the extreme measures that enslaved people used to combat the total control of coercive practices of slavery, fierce assertions of autonomy at all costs.

### III. THIRTEENTH AMENDMENT BASED ARGUMENTS FOR REPRODUCTIVE JUSTICE

This section explores two lines of argument for reproductive justice under the Thirteenth Amendment. The first argument focuses on the undeniable fact that the denial of reproductive autonomy was a badge or incident of slavery, remediable under the Thirteenth Amendment. Section Two of the Thirteenth Amendment. The second argues that forcing pregnant people to carry their pregnancies to term imposes and involuntary servitude, directly violating the Thirteenth Amendment.

#### A. *Badges or Incidents of Slavery*

As illustrated above, the lack of reproductive autonomy was an essential characteristic of chattel slavery.<sup>71</sup> In *Jones v. Mayer*, the United States Supreme Court recognized that Section Two of the Thirteenth Amendment empowers Congress to “pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>72</sup> The Court has never defined “badges or incidents,” but the broad autonomy for political actors to define them leaves open a wide avenue for political advocacy.<sup>73</sup> According to William C. Carter, a legal injury can be considered to be a badge or incident of slavery when it is “proximately traceable to the system of slavery.”<sup>74</sup> Making this determination takes into account “the interaction of race, power and group status,” determining the relationship between the group affected and the extent to which the injury is constituent of the system of chattel slavery.<sup>75</sup> At a minimum, “inseparable incidents” of slavery amount to badges or incidents.<sup>76</sup> Applying this framework, it seems clear that the denial of reproductive autonomy is a badge or incident of slavery.

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<sup>69</sup> See Davis, *supra* note 54.

<sup>70</sup> *Id.*

<sup>71</sup> See Goodwin, *supra* note 10 (“Black women’s sexual subordination and forced pregnancies were foundational to slavery”).

<sup>72</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

<sup>73</sup> See Zietlow, *Free at Last*, *supra* note 43.

<sup>74</sup> Carter, *supra* note 23, at 1317-18.

<sup>75</sup> *Id.* at 1318.

<sup>76</sup> See Carter, *supra* note 23, at 1329; McAward, *supra* note 23, at 568 (looking at historical understandings at the time of the framing to determine what the original public meaning of an incident of slavery).

As illustrated above, the sexual exploitation of enslaved people and complete dominion over their reproductive rights was central to the institution of chattel slavery in this country.<sup>77</sup> “Slave breeding” was not only essential to the maintenance of chattel slavery, it was arguably the most profitable aspect of slavery, at least in the Mid-Atlantic states.<sup>78</sup> Moreover, that truth was widely recognized at the time that the Thirteenth Amendment was adopted. During debates over the Thirteenth Amendment and the 1866 Civil Rights Act implementing that amendment, members of the Reconstruction Congress often spoke of the denial of reproductive freedom as one of the worst aspects of slavery. Opening debates over the 1866 Civil Rights Act, Senator Jacob Howard declared: “What is a slave in contemplation of American law, in contemplation of the laws of all the slave States? We know full well . . . he had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child . . .”<sup>79</sup> Speaking in support of the Thirteenth Amendment, Senator James Harlan of Iowa said that the Thirteenth Amendment would abolish the legal status of slavery, including “the conjugal relationship [which] is a necessary incident of slavery” and “rob[s] the offspring of the care and attention of his parents.”<sup>80</sup> Similarly, Massachusetts Senator Henry Wilson opined that the Thirteenth Amendment was meant to “obliterate the last lingering vestiges of the slave system . . . . Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected.”<sup>81</sup> Senator John Cresswell of Maryland opined that any legislation protecting the rights of formerly enslaved people would not remedy the fact that “[t]he slave could sustain none of the relations which give life all its charms. He could not say my home, my father, my mother, my wife, my child, or my body.”<sup>82</sup> These are just a few examples of the many mentions of the lack of reproductive freedom that characterized slavery during the Reconstruction Era debates, evidence that control over their reproductive lives were among the rights protected by the Thirteenth Amendment and the 1866 Civil Rights Act.

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<sup>77</sup> Davis, *supra* note 54 (agreeing that “[w]hen the Reconstruction Amendments are understood together, and when they are understood in the light of their connection to the eschewal of human enslavement, they are easily understood to protect certain basic rights that had been denied to enslaved people: the right to live and labor on chosen terms, to have a political voice, to move about the country freely, to marry, to procreate, and to parent in chosen ways”).

<sup>78</sup> See Bridgewater, *Reparations*, *supra* note 11, at 122.

<sup>79</sup> CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Howard).

<sup>80</sup> 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 72 (Bernard Schwartz, ed., 1970).

<sup>81</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Henry Wilson).

<sup>82</sup> CONG. GLOBE, 38th Cong., 2d Sess. 120 (1865) (statement of Sen. Cresswell).

The disproportionate impact of the denial of reproductive autonomy continues to this day.<sup>83</sup> People of color, including descendants of enslaved people, are more likely to be accused of child abuse and neglect, and more likely to have their children taken away from them by the state.<sup>84</sup> After *Dobbs*, abortion bans will have a disproportionate impact on women of color, especially African American women, many of whom are descendants of enslaved people.<sup>85</sup> In the United States, Black women are over three times more likely to die by carrying pregnancy to term as white women.<sup>86</sup> This disproportionate effect is one of the legacies of slavery and race discrimination on Black women's bodies.

The argument that the deprivation of reproductive autonomy imposes a badge or incident of slavery on a group of people is strongest when those affected are descendants of enslaved or other people of color. Thus, Lisa Crooms-Robinson was correct when she argued that the Women's Health Protection Act of 2021, then pending in Congress, could be supported by Congress power to enforce the Thirteenth Amendment.<sup>87</sup> As Crooms-Robinson explained, "a law protecting Black people's reproductive health is essential to Black freedom because enslavement denied Black people rights, including those recognized in *Roe*."<sup>88</sup> Moreover, employing Carter's nexus, forced reproduction was such an "inseparable incident" of slavery that it is arguably remediable as a badge or incident of slavery for groups of people, such a white people, who lack a history of enslavement or discrimination on the basis of race.

While it is clear that Congress can act to remedy the badges or incidents of slavery, it remains an open question whether courts can directly provide relief for people who have been deprived of reproductive autonomy.<sup>89</sup> The prevailing view is that only Congress, and not the courts, possess this broad remedial power.<sup>90</sup> However, the Court has never directly addressed this issue, and courts

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<sup>83</sup> Koppelman, *supra* note 20 at 508-09 ("The effect of abortion prohibitions (whose impact, by the way, is felt mainly by poor women who are disproportionately black) is thus to consign women to a status of servitude much like that from which the amendment was supposed to free them.").

<sup>84</sup> Janell Ross, *One in Ten Black Children in America Are Separated from Their Parents by the Child-Welfare System*, TIME (Apr. 20, 2022, 9:30 AM), <https://time.com/6168354/child-welfare-system-dorothy-roberts/>.

<sup>85</sup> See Goodwin, *supra* note 10 ("State-mandated pregnancy will exacerbate what are already alarming health and dignity harms, especially in states with horrific records of maternal mortality and morbidity.").

<sup>86</sup> Emily E. Petersen, Nicole L. Davis, David Goodman, Shanna Cox, Carla Syverson, Kristi Seed, Carrie Shapiro-Mendoza, William M. Callaghan, Wanda Barfield, *Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007–2016* (Sept. 6, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6835a3.htm> (finding that Black women dies at a rate of 41 per 100,000 live births, while the rate for white women is 13).

<sup>87</sup> Crooms-Robinson, *supra* note 18.

<sup>88</sup> *Id.*

<sup>89</sup> See Carter, *supra* note 23, at 1339; McAward, *supra* note 23, at 567.

<sup>90</sup> See McAward, *supra* note 23, at 567.

arguably possess the same broad remedial power as Congress to address the badges or incidents of slavery.<sup>91</sup> On the other hand, the fact that courts have not defined the badges or incidents is a good thing, because the courts deference to the political process leaves more space for progressive advocacy.<sup>92</sup> Most importantly, the question of whether the denial of reproductive autonomy amounts to a badge or incident of slavery invites exactly the kind of intersectional analysis that is essential to achieving reproductive justice – exploring the relationship between racial subordination and forced reproduction from the days of chattel slavery to today.<sup>93</sup> Courts rarely engage in such intersectional analysis, and are institutionally poorly equipped to do so.<sup>94</sup> However, the badges or incidents theory lends itself well to the coalition building which promotes political success.

### B. *Involuntary Servitude*

A second line of argument for reproductive justice under the Thirteenth Amendment is the argument that laws restricting reproductive rights impose an involuntary servitude on those seeking to exercise their reproductive freedom. Forcing pregnant people to carry pregnancies to term arguably imposes an involuntary servitude on them.<sup>95</sup> The law of involuntary servitude is under-developed and, until now, focuses almost exclusively on conditions of employment.<sup>96</sup> Nonetheless, the involuntary servitude clause “clearly calls on courts and Congress to identify and enforce unenumerated rights.”<sup>97</sup> Moreover, “at the heart of abolishing slavery and involuntary servitude in the 13th Amendment was the forced sexual and reproductive servitude of Black girls and women.”<sup>98</sup> Most importantly, focus on the involuntary servitude invites an important conversation about the coercive impact of laws restricting reproductive freedom on the bodies of people seeking to exercise that freedom, and the history of state coercion of the reproductive lives of people of color dating back to the antebellum era.

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<sup>91</sup> See Carter, *supra* note 23, at 1351 (“[I]t requires elaborate theoretical and doctrinal gymnastics to believe that Congress enjoys carte blanche power to prohibit the badges and incidents of slavery while simultaneously believing that the Amendment itself only reaches literal enslavement”).

<sup>92</sup> See Rebecca E. Zietlow, *The Political Thirteenth Amendment*, 71 MD. L. REV. 283 (2011) [hereinafter, Zietlow, *Thirteenth*].

<sup>93</sup> See *Reproductive Justice, SISTERSONG*, <https://www.sistersong.net/reproductive-justice/> (last visited Jan. 3, 2024) (arguing that addressing intersecting oppressions is essential to achieving reproductive justice).

<sup>94</sup> See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

<sup>95</sup> See Koppelman, *supra* note 10.

<sup>96</sup> See Pope, *supra* note 54; Zietlow, *Peonage*, *supra* note 22 (discussing the meaning of involuntary servitude).

<sup>97</sup> Pope, *supra* note 54, at 1478.

<sup>98</sup> Goodwin, *supra* note 10.

Like the Thirteenth Amendment's prohibition of slavery, the involuntary servitude clause is directly enforceable, and has a separate a broader meaning than the ban on slavery. Slavery arose not only from racial subjugation, but "more generally from relations of exploitation and subjugation," leading to the creation of an aristocracy and the degradation of labor.<sup>99</sup> Immediately after the ratification of the Thirteenth Amendment Congress enforced the clause by enacting the Anti-Peonage Act, which prohibits "[t]he holding of any person to service or labor," including in liquidation of a debt, using either physical or psychological coercion.<sup>100</sup> Interpreting the anti-peonage act, in *Bailey v. Alabama*, the Court defined involuntary servitude as freedom from compulsion of one individual to serve another.<sup>101</sup> In *Pollack v. Williams*, the Court elaborated that a person is held in involuntary servitude "[w]hen the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."<sup>102</sup>

So far, courts have only interpreted the involuntary servitude clause to apply to labor and employment practices. Until now, that clause has not been employed in other contexts. However, there is no textual limit of the involuntary servitude clause's protections against undue coercion to the employment relationship. In *The Slaughterhouse Cases*, the Court interpreted the clause broadly, recognizing that "the word servitude is of larger meaning than slavery," encompassing "the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own *person*, property and *services*."<sup>103</sup> When the state requires a person to perform any kind of work or labor for another person, the state arguably imposes an involuntary servitude on that person.

Thus, Andrew Koppelman argues that laws that prohibit abortions and compel pregnant people to serve a fetus within them create "that control by which the personal service of one man [sic] is disposed of or coerced for another's benefit which is the essence of involuntary servitude."<sup>104</sup> Koppelman acknowledges that "[t]he injury inflicted on women by forced motherhood is lesser in degree than that inflicted on blacks by antebellum slavery, since it is temporary and involves less than total control over the body."<sup>105</sup> However, he insists that "it is the same *kind* of injury" because when the state denies the right to an abortion it forces the pregnant person to perform a service for the fetus.<sup>106</sup> Therefore, forcing a

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<sup>99</sup> See Pope, *supra* note 54, at 1497.

<sup>100</sup> 42 U.S.C. §1994.

<sup>101</sup> See *Bailey v. Alabama*, 219 U.S. 219 (1911).

<sup>102</sup> *Pollock v. Williams*, 322 U.S. 4, 18 (1944).

<sup>103</sup> See Koppelman, *supra* note 10, at 486 (citing *Slaughterhouse Cases*).

<sup>104</sup> *Id.* at 487.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

pregnant person to carry their pregnancy to term unconstitutionally imposes an “involuntary servitude.”<sup>107</sup>

The act of bearing a fetus, giving birth, and caring for the child itself is an overwhelming amount of labor.<sup>108</sup> However, even if the involuntary servitude clause requires a nexus with the employment relationship, such a nexus exists when the state forces a pregnant person to bear a pregnancy and give birth. Being forcibly impregnated and bearing children was a significant part of the labor performed by enslaved women.<sup>109</sup> As Pamela Bridgewater points out, “While female slavery still included physical labor, it now “centered on bearing, nourishing, and rearing children needed for the continual replenishment of the slave labor force.”<sup>110</sup> Finally, forcing pregnant people to give birth has a significant impact on their working lives, as the caretaker of the child must make sacrifices to ensure that their child is properly cared for.<sup>111</sup> Thus, the doctrine of involuntary servitude seems sufficiently expansive to encompass the denial of reproductive freedom.

Perhaps most importantly, a strategy based on the involuntary servitude clause acknowledges the fact that laws have historically and repeatedly been used to coerce people into bearing and raising children – and to deprive them of the right to do so. As this article has discussed, the forcible practice of “slave breeding” was perhaps the cruelest aspect of slavery. Enslaved women were forcibly raped, impregnated, bring the fetus to term and give birth in order to improve the economic condition of their slaveholders.<sup>112</sup> Women of color have historically been subject to forced sterilization, depriving them entirely of their reproductive lives.<sup>113</sup> Due to the eugenics movement, many women with disabilities were forcibly sterilized as well, as were men of “bad moral character,”

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<sup>107</sup> See *id.* at 490-491 (citing the case of *Bailey v. Alabama*, in which the Supreme Court held that Thirteenth Amendment “does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other”). According to Koppelman, another reason why abortion bans violate the Thirteenth Amendment is that they impose a class injury on pregnant people, who are almost exclusively women. Koppelman points out that “[t]he Thirteenth Amendment is both libertarian and egalitarian,” because it forbids practices that imposes servitude on subjugated groups. *Id.* at 503.

<sup>108</sup> Transcript of Oral Argument at 57-58, *Dobbs*, 597 U.S. 215 (No. 19-1392) (“[Pregnancy] imposes unique physical demands and risks on women and, in fact, has impact on all of their lives”).

<sup>109</sup> See Koppelman, *supra* note 10, at 508.

<sup>110</sup> Bridgewater, *Reparations*, *supra* note 11, at 119.

<sup>111</sup> See *Casey*, 505 U.S. at 928 (Blackman J., concurring) (“Because motherhood has a dramatic impact on a woman’s educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life”).

<sup>112</sup> Bridgewater, *Reparations*, *supra* note 11, at 120 (“Rape suddenly became a profitable enterprise not only for cash-strapped slave-owners.”)

<sup>113</sup> See ROBERTS, *supra* note 5, at 300.

disproportionately poor and Black.<sup>114</sup> Many laws banning abortion today force pregnant people to bring their pregnancies to term even if they know that the fetus will not survive once it is born.<sup>115</sup> All anti-abortion laws forcibly deprive of the ability to make decisions about one of the most intimate and important aspect of their lives – when and how to have and raise their children. The Reproductive Justice movement has long recognized the centrality of coercion in their fight for reproductive freedom. The involuntary servitude clause is an important constitutional vehicle for making these claims.

#### CONCLUSION

Candidly, this article describes a strategy that neither courts nor Congress are likely to enforce any time soon. Litigation in federal courts is largely foreclosed. The United States Supreme Court has been packed with conservative young Justices that are hostile to reproductive liberty, and, regardless, federal courts are reluctant to enforce the Thirteenth Amendment.<sup>116</sup> The Thirteenth Amendment has been enforced primarily by political actors, and not the courts.<sup>117</sup> The campaign for reproductive justice is most likely to succeed, not in courts, but through political activism. While legislation protecting reproductive liberty has been proposed in Congress, it is unlikely that such legislation will pass given the polarized nature of our politics today and the impossibility of achieving a filibuster proof majority in the Senate. However, the struggle for reproductive liberty is ongoing in the states, and supporters of reproductive rights have achieved significant victories in state legislatures and referenda amending state constitutions. Constitutional advocacy is more than filing court cases. Constitutional advocacy occurs at all levels, from individual people crossing state borders in search of abortions to networks of advocates supporting those measures. So far, that battle has achieved some significant victories on the ground, not in courts, but through state politics.

Since the *Dobbs* ruling, several states have amendment their constitutions to protect abortion rights. In the state of Vermont, supporters of the Reproductive Liberty Amendment adopted language that invoked reproductive justice.<sup>118</sup> The Vermont Amendment provides “That an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s

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<sup>114</sup> See *Buck v. Bell*, 274 US 200 (1927); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>115</sup> See *In re State*, No. 23-0994, 2023 WL 8540008 (Tex. Dec. 11, 2023).

<sup>116</sup> See Jack Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1469, 1462 (2012) (“The demand that ‘neither slavery nor involuntary servitude . . . shall exist within the United States,’ taken seriously, potentially calls into question too many different aspects of public and private power, ranging from political governance to market practices to the family itself.”)

<sup>117</sup> See Zietlow, *Thirteenth*, *supra* note 92.

<sup>118</sup> See Zoom Interview of Lucy Leriche, Vice President of Vt. Pub. Affs., Planned Parenthood Northern New England (Mar. 27, 2024) (recording on file with the author).



own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.”<sup>119</sup> Other states have also adopted constitutional amendments. For example, in August 2022, voters in the conservative state of Kansas rejected a ballot initiative that would have banned abortion by a lop-sided 59% to 41% vote and a general election level turnout.<sup>120</sup> In August 2023, voters in Ohio soundly rejected a ballot measure that would have made it harder to amend the state Constitution right before the voters weighed in such a proposed Amendment in November,<sup>121</sup> and in November, 57% of Ohio voters approved the abortion rights amendment.<sup>122</sup> Voters in California, Kentucky, Michigan and Montana have approved measures protecting reproductive liberty or rejected measures which would have restricted it.<sup>123</sup> Pro-abortion rights measures will be on the ballot in the fall of 2024 in Florida, Arizona, Maryland, and likely in Montana.<sup>124</sup>

At the same time, other activists have emphasized racial equality by engaging in a campaign to prohibit slavery and involuntary servitude in their state constitutions.<sup>125</sup> Four states (Alabama, Oregon, Tennessee and Vermont) have amended their constitutions to eliminate the “punishment clauses” from the provisions abolishing slavery, implementing total abolition.<sup>126</sup> The goal of the amendments is to enable challenges to convict labor practices, which the

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<sup>119</sup> Vermont Proposal 5, Right to Personal Reproductive Autonomy Amendment (2022), BALLOTPEdia, [https://ballotpedia.org/Vermont\\_Proposal\\_5\\_Right\\_to\\_Personal\\_Reproductive\\_Autonomy\\_Amendment\\_\(2022\)](https://ballotpedia.org/Vermont_Proposal_5_Right_to_Personal_Reproductive_Autonomy_Amendment_(2022)) (last visited Apr. 7, 2024).

<sup>120</sup> Dylan Lysen, Laura Ziegler, & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment>.

<sup>121</sup> Vanessa Williamson & Itai Grofman, *Ohio Voters Reject Issue 1*, BROOKINGS (Aug. 9, 2023), <https://www.brookings.edu/articles/ohio-voters-reject-issue-1-heres-what-that-means-for-democracy/>.

<sup>122</sup> Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, AP (Nov. 7, 2023, 11:31 PM), <https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270>;

Amanda Becker, *Ohio’s Abortion Protections Take Effect, But the Fight Over Access Continues*, THE 19TH (Dec. 7, 2023, 2:02 PM), <https://19thnews.org/2023/12/ohios-abortion-protections-take-effect-issue-1-fight-access/>.

<sup>123</sup> Carr Smyth, *supra* note 122.

<sup>124</sup> Patricia Mazzei, *With Abortion Ballot Question, A “Path to Relevance” for Democrats in Florida?*, N.Y. TIMES (Apr. 2, 2024), <https://www.nytimes.com/2024/04/02/us/abortion-democrats-florida.html>; Jennifer Rubin, *Republicans’ Abortion Woes Worsen*, WASH. POST (Apr. 2, 2024, 7:45 AM), <https://www.washingtonpost.com/opinions/2024/04/02/republican-abortion-election-challenge/>.

<sup>125</sup> See Michael L. Smith, *State Constitutional Provisions of Slavery and Involuntary Servitude*, 99 WASH. L. REV. (forthcoming 2024).

<sup>126</sup> *Id.* at 16.

punishment clauses arguably allowed.<sup>127</sup> Political activism and reckoning of systemic racism in our society in light of the Black Lives Matter movement provides a new pathway for advocacy for reproductive justice that grapples with the power imbalances in reproductive inequality. State anti-slavery amendments provide an avenue for advocacy along the lines described in this article, without the danger of federal courts narrowly interpreting the measures to foreclose reproductive justice. Advocates for all of the measures will be making the case for reproductive liberty, changing the paradigm to a focus on reproductive justice.

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<sup>127</sup> *Id.* at 19.