THE DAWN AFTER *DOBBS*: LIFE, LIBERTY, AND PURSUIT OF HAPPINESS FOR WOMEN ARE NO LONGER NATURAL RIGHTS

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INTRODUCTION

On May 2, 2022, an unknown individual working in the Supreme Court of the United States leaked Justice Alito's draft opinion for *Dobbs v. Jackson Women's Health Organization* to *Politico*.[1] While the contents of the decision may have been as expected, the bold defiance to *stare decisis* was still shocking, gripping the nation for what would come as a result. Seven weeks after the leak of the draft opinion, the official opinion circulated, confirming that women no longer have the federally-protected right to terminate a pregnancy.[2] This opinion will change the landscape not only for Fourteenth Amendment Due Process jurisprudence but will also jeopardize the future of several civil rights previously recognized by the Supreme Court that may not be explicitly stated within the Constitution.[3]

To understand the constitutional aspects of abortion rights, one must understand where reproductive laws originated. From the mid-thirteenth century to the late-eighteenth century, common law punished abortion after a certain point of early gestation as homicide.[4] However, beginning in the nineteenth century, there was a progression in the

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[1] Ariane de Vogue, Tierney Sneed, Devan Cole, *Supreme Court Issues Report on Dobbs Leak But Says It Hasn't Identified the Leaker*, CNN (Jan. 19, 2023), https://www.cnn.com/2023/01/19/politics/supreme-court-dobbs-report-leak/index.html.

[2] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

[3] Terri Day& Danielle Weatherby, *The Dobbs Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis That Lies Ahead*, 64 WM & MARY L. REV. Online 1, 3 (2021).

[4] JOHN KEOWN, BACK TO THE FUTURE OF ABORTION LAW: ROE'S REJECTION OF AMERICA'S HISTORY AND TRADITIONS 5 (2006).

common law that prohibited the abortion of a fetus once the mother could perceive fetal movement in the womb, a benchmark in fetal development known as the quickening, which occurs around the twenty-fifth week of pregnancy.[5] There was a shift in legislative attitude towards abortion, both here in the United States and in England, as there was a wide consensus towards enacting prohibitory regulations on abortions.[6] Scientific consensus at the time believed that human life began at fertilization, causing legislatures to remove the quickening distinction.[7] The main common law goal was to protect the interests of the unborn.

Religious fanatics and conservative politicians use the interests of the unborn as an insincere, albeit catchy, masquerade to market to the public the purpose behind such restrictions; however, these individuals solely deploy this public messaging to distract from their true motivation—the inherent distrust of women's bodily autonomy.[8] While there has been an evolution of the law's perception of women from property to people, majority Anglo-Saxon legislatures are still lacking in giving full equal rights to women, especially regarding reproductive autonomy.[9] Up until *Roe*, there was a strong political and legislative intention to restrict the reproductive rights of women under the guise of protecting unborn life.[10] Now after *Dobbs*, legislatures are re-

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[5] *Id.*
[6] *Id.*
[7] *Id.* at 6.
[8] *See generally* Randal Balmmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133/ (discussing the use of abortion restrictions for segregation); *see* Ron Elving, *Roe Draft is a Reminder that Religion's Role in Politics is Older than the Republic*, NPR (May 14, 2022), https://www.npr.org/2022/05/14/1098800437/religion-role-politics (discussing the religion's role in politics); *see* Adam Sonfield, *In Bad Faith: How Conservatives Are Weaponizing "Religious Liberty" To Allow Institutions to Discriminate*, GUTTMACHER INSTITUTE (May 16, 2018), https://www.guttmacher.org/gpr/2018/05/bad-faith-how-conservatives-are-weaponizing-religious-liberty-allow-institutions (discussing how religion has been used as a power tactic to control people).
[9] *See generally* Chris Price, *Women's Rights Throughout History* , POLITICO (Jan. 20, 2019), https://www.politico.com/story/2019/01/20/women-rights-abortion-us-history-1116040.
[10] KEOWN, *supra* note 4, at 5.

empowered to pursue restrictive reproduction laws, and consequently oppress the women living within their borders.

This Essay aims to dissect *Dobbs* and discuss the frightening future for women, with potential ramifications that are outside the realm of our immediate discernment. Part I will dissect the *Dobbs* decision, focusing on the historical justification for the decision and contrasting the decision to the precedents it contradicts. Additionally, Part I will discuss *Dobbs'* violation of judicial principles as well as analyze how several state statutes passed following *Dobbs* violate American women's natural and constitutional rights. Part II will discuss the principle of a panopticon and how the *Dobbs* decision has placed women in a dystopic nightmare that is counter to the American dream, as well as foreshadow additional surveillance dangers.

I. DISSECTING *DOBBS*

Under *Roe*, the right to an abortion was conferred in the Constitution as a part of the right to privacy, citing the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[11] While there is no explicit right to privacy listed in any of those amendments, the right derives from those rights explicitly conferred to the people. A majority of the *Roe* opinion hinged on the Fourteenth Amendment, which claims "no state shall deprive any person of life, liberty, or property without the due process of law…"[12] The right to obtain an abortion was viewed under the banner of "liberty."[13] As a result, the *Dobbs* court attempted to take apart the applicable standard provided under "liberty" as provided by the Fourteenth Amendment.[14]

Two decades later, *Roe* was reaffirmed in *Planned Parenthood v. Casey*.[15] Justice O'Connor ultimately held that a state abortion regulation places an undue burden on a woman's right to an abortion and is invalid if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.[16] Justice O'Connor explicitly referred to the doctrine of *stare*

[11] Roe v. Wade, 410 U.S. 113 (1973).
[12] *Id.*; U.S. Const. amend. XIV.
[13] *Roe*, 410 U.S. at 129.
[14] *Dobbs,* 142 S. Ct. at 2235.
[15] Planned Parenthood v. Casey, 505 U.S. 833, 843 (1992).
[16] *Id.* at 878.

decisis and argued that in order to overrule a precedent holding, the changing circumstances must have rendered the established rule unworkable.[17]

Almost two and half decades later, *Dobbs* fell at the steps of the Supreme Court. In 2018, Mississippi enacted the Gestational Age Act, which prohibits any physician from "intentionally or knowingly" performing an abortion after fifteen weeks of gestational age.[18] The Mississippi legislature claimed that "legitimate interests from the outset of pregnancy in protecting the health of women" was the intention behind the statute.[19] Jackson Women's Health Organization, a Mississippi abortion clinic, and one of its doctors brought an action against state health officer Thomas Dobbs, claiming the statute unconstitutionally limited the right to abortion.[20] There were two central questions that the court chose to answer. First, whether the United States Constitution confers the right to abortion, and second, whether the Supreme Court should overrule its own precedent.[21]

Justice Alito argued that to decide if the Constitution implies a right, the Court must scrutinize three factors: first, the articulated standard for the Constitutional grounds on which the activity or contested issue is claimed to be in violation of; second, whether the nation has a history and tradition of such activity and whether it is an essential component of the liberty in question; finally, whether the right in question is part of a broader entrenched right supported by other precedents.[22]

These three factors surround the framework of the Court's decision in *Dobbs*. While the Court examined a second question, the first central question displays an overreach of judicial restraint by the Court. Justice Alito provides a historical argument—one rooted in what can be coined as no less than "white-washed"—to go against the fabric of civil rights. Making a historical argument on civil rights based on the history of white America and their ancestors insults the foundation of civil rights and emphasizes the ideology of conservative, white-supremacist

[17] *Id.* at 854.
[18] MISS. CODE ANN. §41-41-191 6(b).
[19] *Id.* at 2(b)(v).
[20] *Dobbs*, 142 S. Ct. at 2234.
[21] *Id.*
[22] *Id.* at 2244.

patriarchs while ignoring the majority of Americans that are anything but.[23]

Justice Alito's use of history to analyze whether abortion is an essential component of liberty is fallacious. Using history as a determining factor on whether certain civil rights should be granted contradicts the intent of progressive civil rights for women because, historically, women have lacked economic, societal, and bodily autonomy for a majority of history. In particular, the Fourteenth Amendment protects the violation of these rights and liberties by state governments.[24] When abortion is banned, people in marginalized communities are forced to endure hardships that have a consequential impact on their health, economic well-being, and place in society.[25] In other words, abortion access is an economic and racial justice issue that is a crucial part of civil rights that tends to impact women of marginalized communities tremendously.[26] The use and reference to history and tradition is erroneous and contrary to the purpose of civil rights. The general purpose behind civil rights is to expand rights to protect individuals' freedom from infringement by the government, social organizations, and private individuals.[27] Civil rights are meant to progress in filling the gaps of equal protection for those who lack equality in the eyes of society, the economy, and the law.[28]

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[23] *See Party Affiliation*, GALLUP (2023), https://news.gallup.com/poll/15370/party-affiliation.aspx (indicating that the Republican party has not been the majority registered party in political demographics of the United States from 2004 to 2023). Additionally, when I say the Republican party is no longer the "majority" party holder, I am using the term "majority" in the literal sense, meaning less than fifty percent of Americans identify as Republicans. Further, the Republican party (and even the Democratic party) has ideologically shifted with regard to their level of conservativism and liberalism. As a result, the term and identity of "Republican" in 2004 is not necessarily synonymous with the term and identity of "Republican" in 2020 and beyond. The same applies to the term and identity of "Democrat."

[24] *Id.*; *see also* JUDITH A. BAYER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 77(1983).

[25] Press Release, *Abortion and Reproductive Health Care are Civil Rights*, Lawyers' Committee for Civil Rights Under Law (May 4, 2022), https://www.lawyerscommittee.org/abortion-and-reproductive-health-care-are-civil-rights/#:~:text=When%20abortion%20is%20banned%2C%20people,crucial%20part%20of%20civil%20rights; *see generally* Boone, *supra* note 11.

[26] *Id.*

[27] *Id.*

[28] *Id.*

Justice Alito used his thwarted view of history to ignore the purpose of civil rights. He stated that abortion had been historically criminalized and prohibited, particularly at common law and subsequently by statute.[29] He provided an abridged history of European, Anglo-Saxon views towards abortion, then proceeded to merge those views into the colonial American view, then moved to more recent American statutory history.[30] However, American history has not been shaped solely by European views. He ignored Native American and several immigrant communities' views on the discussion. This argument cited solely western ideals, which dangerously emphasized western exceptionalism and demeans the values, thoughts, and cultural practices of "non-western" cultural groups. [31]

Not only did he fail to include the diverse history with respect to different cultural groups, Alito distorted the purely Anglo-Saxon common law-based history he chose to examine and misstated the historical legacy of abortion rights. The common law did not regulate pregnancy in the early stages and did not even recognize abortion occurring at that stage.[32] In William Blackstone's 1765 *Commentaries on the Laws of England*, he notes that life begins at the contemplation of the law only when the fetus is able to actively move in the mother's

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[29] *Id.*

[30] *Dobbs*, 142 S. Ct. at 2249–2254.

[31] *See generally* SRUTHI CHANDRASEKARAN, KATHERINE KEY, ABBY OW, ALYSSA LINDSEY, JENNIFER CHIN, BRIA GOODE, GUYEN DINH, INHE CHOI, AND SUNG YEON CHOIMORROW, THE ROLE OF COMMUNITY AND CULTURE IN ABORTION PERCEPTIONS, DECISIONS, AND EXPERIENCES AMONG ASIAN AMERICANS(2023) (alluding to the fact that in countries like China and India, abortion is not criminalized, and feticide is not an uncommon practice for cultural reasons. As a result, immigrant communities from those countries do not view the act of an abortion as shameful or criminal; instead they defect that view onto the unwanted pregnancy itself. This Essay discusses how sexual health is stigmatized in Asian American youth, and the act of an abortion is a consequence of stigmatized sexual activity. It is the unwanted pregnancy that leads to feelings of shame which ends in an abortion. As a result, the shame associated with abortion is only a feeling that has bled through because of a shameful perception of sexual activity); *see also* KAFULI AGBEMENU, MARGARET HANNAN, JULIUS KITUTU, MARTHA ANN TERRY, WILLA DOSWELL, SEX WILL MAKE YOUR FINGERS GROW THIN AND THEN YOU DIE: THE INTERPLAY OF CULTURE, MYTHS, AND TABOOS ON AFRICAN IMMIGRANT MOTHERS' PERCEPTIONS OF REPRODUCTIVE HEALTH EDUCATION WITH THEIR DAUGHTERS AGED 10-14 YEARS (2018) (making a similar argument).

[32] DAMON ROOT, *UNENUMERATED RIGHTS OF ROE V. WADE* (Aug./Sept. 2022).

womb in such a way that she can feel its movement.[33] Even James Wilson, a driving force at the Constitutional Convention, repeated Blackstone's ideology that life begins when the fetus is able to "stir" in the womb.[34] Additionally, at the time of the founding of the nation, states did not have the lawful power to prohibit abortion before the quickening since the states followed the common law.[35] Thus, Alito's conclusion that abortion rights lack tradition and roots in history is inaccurate.

Even if Alito's poor historical work were somehow accurate, his decision ignores the positive growth of civil rights in recent history. For example, the Court's decision in *Plessy v. Ferguson*, which held that public accommodations that are segregated according to racial classifications do not violate the Equal Protection Clause of the Fourteenth Amendment provided that the accommodations were "separate but equal," was overruled by *Brown v. Board of Education*.[36] From *Plessy* to *Brown,* the United States saw an expansion of rights provided to African Americans to ensure they were granted equal protection under the Fourteenth Amendment.[37] The *Brown* court stated, "[w]e must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools derives these plaintiffs of the equal protection of the laws."[38]

Even though the *Brown* Court revolved around equal protection in public education, in the abortion context, a similar logical fallacy can be applied. Historically, the Fourteenth Amendment's equal protection clause was not necessarily written with abortion in mind. At the time of

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Plessy v. Ferguson, 162 U.S. 537 (1896); Brown v. Board of Education, 347 U.S. 483 (1954).
[37] *See* Brown v. Board of Education, 347 U.S. 483 (1954); Reynolds v. Sims, 377 U.S. 533 (1964) (established voting rights for African Americans); Loving v. Virginia, 388 U.S. 1 (1967) (legalized interracial marriage); The Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (1965) (barred discrimination based on race, color, religion, or national origin in public facilities); The Voting Rights Act of 1965, 52 U.S. Code §§ 10301-10702 (1965); *see generally Milestones of the Civil Rights Movement*, PBS, https://www.pbs.org/wgbh/americanexperience/features/eyesontheprize-milestones-civil-rights-movement/ (last visited Apr. 23, 2023).
[38] *Brown*, 347 U.S. at 493.

the Fourteenth Amendment's passage in 1868, women were not considered equal under the eyes of the law and were still deemed to be property.[39] The drafters of the Fourteenth Amendment intended to prohibit certain forms of race discrimination, and they regarded racially biased enforcement of the criminal law as the archetypal violation of the Equal Protection Clause.[40] Reconstructionists also intended to prohibit certain kinds of discrimination against people of lower socioeconomic classes and believed the enforcement of class-biased enforcement of criminal law was an "unconstitutional evil."[41] Thus, it would be against the government's prerogative to turn a blind eye to the existence of a gray market that affords affluent white women with the privilege of a de facto immunity from statutory bans on abortion.[42] The problem surrounding past abortion discussions have revolved around economic access. Meaning when privileged women in a community are able to terminate their pregnancies without significant obstacles, then this formal liberty should be extended to all women.[43]

The problems of the past can even be extended to the present day since the central issue in the discussion not only revolves around economic access, but geographical access. Now, some states have enacted their own pro-life blanket abortion bans, while others have not.[44] So in order for a woman to have access to abortions, if she does

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[39] *See generally* MARTHA TEVIS, *THE STATUS OF WOMEN: THE PATH TOWARDS LEGAL PERSONHOOD*, EDUCATIONAL HORIZONS (1981) (discussing the history of women under the eyes of the law and how that has evolved over time).

[40] MARK GRABER, RETHINKING ABORTION EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 76 (1996).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] States that have enacted blanket bans are Alabama (ALA. CODE §26-23H-4), Arkansas (ARK. CODE ANN. § 20-16-1901), Idaho (IDAHO CODE § 18-8805), Kentucky (KY ST § 311.172), Louisiana (LA. STAT. ANN. §14:87), Mississippi (MISS. CODE ANN., Title 41, Chapter 41, Section 41-41-93), Missouri (Missouri Revised Statutes, Section 188.028), Oklahoma (Oklahoma Statutes, Title 63, Section 1-745.5), South Dakota (South Dakota Codified Laws, Title 34, Chapter 23A, Section 34-23A), Tennessee (Tennessee Code Annotated, Title 39, Chapter 15, Part 2, Section 39-15-201), Texas (SB8),West Virginia (West Virginia Code, Chapter 16, Article 2F, 2M, 2O, 2R), North Dakota (North Dakota Century Code, Title 14, Chapter 02.1, Section 14-02.1-02), Wisconsin (Wisconsin Statutes, Section 253.095-253.107), Arizona (Arizona Revised Statutes, Title 36, Chapter 4, Sections 36-449.01-449.03), Florida (Florida Statutes, Title XLVI, Chapter 797), Georgia (Georgia Code, Title 31, Chapter

not live in a state that has codified the right to abortion, she must travel to a state that does to receive such care. Again, only women of privilege, usually affluent and white, have access to the means to travel to such states, stay at a hotel for the duration of the care, and have the ability to take leave from work.[45] This current situation for women is now a modern-day era version of the "separate-but-not-equal" ideology of the Jim Crow era.[46]

The Reconstruction Amendments acknowledged the federal government's ability to intervene in state matters when due process and equal protection are concerned. Policymakers could argue that the failure to provide women with a federally-protected right to abortion affects women exclusively, thus violating the Equal Protection Clause. However, the Supreme Court has routinely rejected arguments that laws regulating reproductive activities which solely affect women violate the Equal Protection Clause of the 14th Amendment.[47] Abortion, contrary

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9A, Article 1, Part 3, Section 31-9A), Utah (Utah Code, Title 76, Chapter 7, 7a). Indiana (Indiana Code Title16, Article 34), Wyoming (Wyoming Statutes Title 35, Chapter 6), and Ohio (Ohio Revised Code Title 29, Chapter 2919.10-2919.204).

[45] Margot Sanger-Katz, Claire Cain Miller, and Quoctrung Bui, *Who Gets Abortions in America*, N.Y. TIMES, (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html; Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters,* GUTTMACHER INSTITUTE (July 14, 2016), https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters; RICHARD V. REEVES AND JOANNA VENATOR, *SEX, CONTRACEPTION, OR ABORTION? EXPLAINING CLASS GAPS IN UNINTENDED CHILDBEARING (*Feb. 2015*),* https://www.brookings.edu/wp-content/uploads/2016/06/class_gaps_unintended_pregnancy_release.pdf.; Karen Brooks Harper, *Wealth Will Now Largely Determine Which Texans Can Access Abortions,* THE TEXAS TRIBUNE (June 24, 2022), https://www.texastribune.org/2022/06/24/texas-abortion-costs/.

[46] *See* Biftu Mengeha, *The Supreme Court's Abortion Ruling Upholds White Supremacy*, SCI. AM. (November 1, 2022), https://www.scientificamerican.com/article/the-supreme-courts-abortion-ruling-upholds-white-supremacy/.

[47] *See e.g.*, Gedulig v. Aiello, 417 US 484 (1974) (holding that a disability insurance program that denies benefits for disabilities resulting from pregnancy does not violate the equal protection clause, as it does not involve discrimination on the basis of sex, but discrimination between pregnant and nonpregnant persons); Michael M v. Superior Court (1981) (holding that a statutory rape law was founded on a clear sex distinction but was justified because it served an important governmental interest—

to instinctive belief, does not solely affect women. It affects men as well, particularly young men. Parental age, of both mother and father, at first birth is an important indicator of educational attainment and economic mobility.[48]

National data has found that teen fatherhood is associated with decreased years of schooling and a decreased likelihood of receiving a high school diploma.[49] Thus, men involved in a pregnancy before the age of twenty whose partner had an abortion were more likely to have graduated from college compared with those whose partner gave birth.[50] The lack of abortion access affects both men and women of lower socioeconomic status. One in four women in the United States will have an abortion; about sixty percent of them are in their twenties, and about seventy-five percent of them are in a low income bracket.[51] In addition, research has found that a smaller number of men are involved in a larger proportion of abortions, thus indicating that men are impacted in the restriction towards access to safe abortions.[52] Thus, the lack of abortion rights does not solely affect women, as these restrictions affect men and women particularly of low socioeconomic status and thus violate the Equal Protection Clause as it is discriminatory towards those of a lower social or economic status. As a violation of the Fourteenth Amendment, the federal government has a duty to step in and protect the people's civil right to abortion. As a result, abortion rights are not issues that should be deferred to states but, instead, are rights that should be federally protected as intended under the Fourteenth Amendment.

The arguments put forth by Justice Alito in the *Dobbs* decision are not only incorrect but are also contradictory to the very notion of civil rights. The use of history in the determination of constitutionally implied rights sets a dangerous standard that will give the Court permission to overturn progressively granted civil rights. As a result,

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the prevention of teenage pregnancies as women may become pregnant and men may not and thus men needed the additional legal deterrence of a criminal penalty).

[48] Bethany G. Everett et. al., *Male Abortion Beneficiaries: Exploring the Long-Term Educational and Economic Associations of Abortion Among Men Who Report Teen Pregnancy*, JOURNAL OF ADOLESCENT HEALTH 65, 520 (May 1, 2019).

[49] *Id.*at 521.

[50] *See* Andrea Becker, *Men Have a Lot to Lose When Roe Falls*, N.Y. TIMES (May 26, 2022), https://www.nytimes.com/2022/05/26/opinion/men-abortion.html.

[51] *Id.*

[52] *Id.*

the historical analysis in the Court's implied rights test should be abandoned when it is being used to grant or deny civil rights.

II. THE PANOPTICON

It is more dangerous than ever to be pregnant in the United States.[53] This can be attributed to the combination of pregnancy, policing, digital surveillance, and the overt criminalization of abortion.[54] The current use of digital surveillance along with the *Dobbs* Court's blessing to criminalize abortions, has swallowed women into living in a quasi-big-brother state. This targeted use of digital surveillance against women has placed them in something that is four walls short of a prison. The purpose of the surveillance is to make sure a woman carries a pregnancy to term, and the woman's inability to know whether she is being closely monitored during her reproductive years places her in the line of sight of an omnipotent prison guard. However, surveilling a group of people to ensure they are on their best behavior is not a new concept.

In 1785, Jeremy Bentham, the founder of utilitarianism, described the idea of a panopticon as a method for constant surveillance of prisoners.[55] Bentham's original panopticon was an octagonal prison design that encircled a tall inspection tower with individual cells built into the circumference of the octagon.[56] Through the specific architectural design, an illusion of constant surveillance is created.[57] The prisoners are not always being watched, but they do not know when they are being watched.[58] One of the key ideas of the panopticon was to create an extension of perception beyond visible locales while simultaneously reducing temporal relations to spatial relations, thus

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[53] *See* Natalie Fixmer Oraiz, *The Policing of Pregnancy and Homeland Security are Intimately Enmeshed*, Wash. Post (Aug 4, 2022), http://proxygt-law.wrlc.org/login?url=https://www.proquest.com/blogs-podcasts-websites/policing-pregnancy-homeland-security-are/docview/2698354907/se-2?accountid=36339.
[54] *Id.*
[55] *See* Elizabeth Stoycheff et. al., *Privacy and the Panopticon: Online Mass Surveillance's Deterrence and Chilling Effects*, 21 NEW MEDIA & SOC'Y 3, 603, 604 (2019).
[56] *Id.*
[57] *See* Masa Galic et. al., *Bentham, Deleuze and Beyond: An Overview of Surveillance Theories From the Panopticon to Participation*, 30 PHIL. & TECH. 9, 9, 12 (2017).
[58] *Id.*

creating a distortion in the prisoner's sense of space and time.[59] Surveillance is carried out from a single point, and it is the inspector in his darkened central tower that appears to possess the power of an omnipresent being.[60] The inspector's inherent omnipresence stems from the eyes of those who do not see him. Since they cannot see him anywhere in the panopticon, they cannot confirm they are being watched.[61] It is precisely the inspector's apparent omnipresence that sustains perfect discipline in the panopticon hypothesized by Bentham, that deters the prisoners themselves from transgressing.[62] Bentham's vision was not to create a controlled society where people would be under mass surveillance all of the time; rather, it was the idea of self-internalized discipline that would be implemented in individuals.[63]

This idea of a panopticon is similar to the mass surveillance of individuals, particularly a certain group of individuals, with the idea of forcing the targeted group into internalizing the deemed "correct" behavior to avoid facing punishment. Important to the post-*Dobbs* discussion nationwide, this concept seems relevant now more than ever before. There is an overlap between the historical analysis of civil rights, digital surveillance, and the criminalization of abortion that has come to fruition now that *Dobbs* has ushered the United States into a post-*Roe* era. Justice Alito's interpretation of the five factors violate the very principle this country was founded on: freedom of choice.[64] The use of commercial surveillance and open-source intelligence platforms in surveilling and prosecuting women has contradicted the concept of mutual trust, creating a panopticon for women. Now that *Roe* has been overruled, women are forced into an even further enforced panopticon

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[59] *Id.*

[60] *See* MIRAN BOZOVIC, AN UTTERLY DARK SPOT GAZE AND BODY IN EARLY MODERN PHILOSOPHY 103 (2000).

[61] *Id.*

[62] *Id.* at 102.

[63] *See* Galic, et al., *supra* note 57 at 12-13.

[64] The Court found it can overrule a wrongly decided constitutional decision upon consideration of five factors. First, the Court must consider the nature of its original error. Second, the Court must examine the quality of the reasoning behind the precedent's arguments. Third, the Court must examine the workability and administrability of the ultimate decision. Fourth, the Court must examine the effects of the precedent on other areas of the law. Finally, the court must weigh the reliance interests of the precedent decision and the current issue at hand.

society where it feels as though every move they make, especially in regards to their reproductive choices, is being monitored and watched.

In recent years, pregnant people have been prosecuted and punished for miscarriages, stillbirths, and attempting suicide while pregnant.[65] The intense criminalization of pregnancy, compounded with the improvements in technology, has led to modes of digital surveillance that were inconceivable before *Roe*.[66] Nowadays, an expansive range of surveillance equipment is available to identify women who are seeking abortions and women who have had abortions.[67] It is easier than ever for law enforcement to access information and bypass the use of a warrant. After *Dobbs*, digital surveillance is being employed to enforce the further criminalization of abortions.[68] In 2018, the Supreme Court, in its landmark decision of *Carpenter v. United States,* detailed the privacy risks of location information extracted from cell phones and required police to get a warrant prior to tracking an individual's location for an extended period of time.[69] Law enforcement and intelligence agencies, however, have been given approval by government lawyers to bypass this prohibition by buying data from data brokers.[70] In addition, de-anonymizing cell phone location data is not difficult, especially if the data is geofenced, geotagged, or includes information on the movements of the phone that can be used to infer the identity of its owner such as through their home address or workplace.[71] Internet search engines are a rich tool for tracking potentially pregnant people.[72]

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[65] *See* Fixmer-Oraiz, *supra* note 53 at 427.
[66] *Id.*
[67] *See* Faiza Patel & Alia Shahzad, *With Roe v. Wade at Risk, Digital Surveillance Threatens Reproductive Freedom*, JUST SEC., (May 17, 2022), https://www.justsecurity.org/81547/with-roe-v-wade-at-risk-digital-surveillance-threatens-reproductive-freedom/.
[68] *Id.*
[69] *See* 138 S. Ct. 2206 (2018) ; Patel & Shahzad, *supra note 68.*
[70] *See* Tau Byron, *IRS Used Cellphone Location Data to Try to Find suspects; The Unsuccessful Effort Shows How Anonymized Information Sold by Marketers Is Increasingly Being Used By Law Enforcement To Identify Suspects*, WALL ST. J. (June 19, 2020), https://www.wsj.com/articles/irs-used-cellphone-location-data-to-try-to-find-suspects-11592587815.
[71] *See* Patel & Shahzad, *supra* note 68.
[72]*See* David Ingram, *Can the Government Look at Your Web Habits without a Warrant? Senators Hope to Clarify That.*, NBC NEWS (May 15, 2020), https://www.nbcnews.com/tech/security/can-government-look-your-web-habits-without- warrant-senators-hope-n1207936.

Police can obtain search history records from search engines, and sometimes a warrant is not even needed.

Further, women commonly use menstrual tracking apps which contain sensitive data, trackable by law enforcement.[73] The popular app, Flo, alone has amassed forty-three million active users.[74] These apps contain data on when a person's period starts, when a person's period ends, when a person has sex, when a person takes birth control, and when a person could possibly be pregnant.[75] Additionally, medical staff are effectively deputized as criminal investigators to drug test pregnant patients without a warrant or consent and then subsequently report the results to the police.[76] This was all occurring even before *Dobbs* came into effect.[77] Such healthcare surveillance will only expand further now that *Roe* has been overturned.[78]

A digital panopticon surrounding women in the post-*Dobbs* era will cause hesitation to obtain access to adequate healthcare for fear of being prosecuted for a crime they did not commit. In 2015, for instance, Purvi Patel was charged with fetal homicide for attempting to induce her own abortion.[79] This was the first time a woman was charged for fetal homicide, but in the context of general criminalization of abortion, this was not the first. In recent years, pregnant women have been criminalized for falling down a flight of stairs and inducing a miscarriage, disclosing substance abuse while pregnant, refusing to have a Caesarean, miscarrying in high school bathrooms, suffering from

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[73] *See* Rina Torchinsky, *How Period Tracking Apps and Data Privacy Fit into a Post Roe v. Wade Climate*, NPR (June 24, 2022), https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps; Hannah Norman & Victoria Knight, *Should You Worry About Data From Your Period Tracking App Being Used Against You?*, KHN (May 13, 2022), https://khn.org/news/article/period-tracking-apps-data-privacy/.

[74] *Id.*

[75] *Id.*

[76] *See* Grace Howard, *The Pregnancy Police: Surveillance, Regulation, and Control*, 14 HARV. L. & POL. REV. 347, 352 (2022).

[77] *See* Albert Fox Cahn & Eleni Manis, *Pregnancy Panopticon: Surveillance After Roe*, SURVEILLANCE TECH. OVERSIGHT PROJECT (May 24, 2022), 3.

[78] *Id.*

[79] *See* Molly Redden, *Purvi Patel Has 20-Year Sentence For Inducing Own Abortion Reduced,* THE GUARDIAN (July 22, 2016), https://www.theguardian.com/us-news/2016/jul/22/purvi-patel-abortion-sentence-reduce.

stillbirth, and attempting suicide.[80] This surveillance will only grow in the post-*Dobbs* era.[81]

The fall of *Roe* and *Casey* will also expand the threat of private abortion bounty-hunting laws which allow private litigants to sue anyone who facilitates an abortion.[82] For example, a Texas statute, SB8, enables private civil actors to target anyone who seeks and facilitates abortion care. This Texas statute is essentially authorizing a "see something, say something" form of policing by private citizens, transforming them into bounty hunters.[83] Multiple states have either passed or introduced statutes similar to SB8, and this is likely to only increase.[84] Since civil claims can be pursued with much less evidence than is needed to enforce criminal abortion bans, police and prosecutors may use their surveillance powers to assist private bounty hunters, who are already able to weaponize commercial surveillance products and open-source intelligence platforms.[85] With state officials now poised to pursue charges under America's more than 4,400 abortion laws, they will turn to the surveillance tools that have become central to American policing, using technology to intrude into the most intimate aspects of a woman's life.[86]

Mass surveillance—problematic by its own nature—especially becomes a problem in this context because it focuses on a particular

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[80] *See* Natalie Fixmer-Oraiz, *The Policing of Prenancy and Homeland Security are Intimately Enmeshed*, WASH. POST (Aug 4, 2022), http://proxygt-law.wrlc.org/login?url=https://www.proquest.com/blogs-podcasts-websites/policing-pregnancy-homeland-security-are/docview/2698354907/se-2?accountid=36339.

[81] *See* Cahn, *supra* note 78 at 3.

[82] *Id.* at 7.

[83] *See* Chris Marr et al., *Worker's Abortion Privacy at Ris as Texas Targets Employer Aid*, BLOOMBERG L., (July 15, 2022), https://news.bloomberglaw.com/daily-labor-report/workers-abortion-privacy-at-risk-as-texas-targets-employer-aid.

[84] *See* Cahn, *supra* note 78 at 7; *See also* Keith Ridler, *Idaho Governor Signs Abortion Ban Modeled on Texas Law*, ABC NEWS (March 23, 2022), https://abcnews.go.com/Health/wireStory/idaho-governor-signs-abortion-ban-modeled-texas-law-83628634; *See also* Mary Kekatos, *Oklahoma Governor Signs 6-Week Abortion Ban into Law,* ABC NEWS (May 3, 2022), https://abcnews.go.com/Health/oklahoma-governor-signs-week-abortion-ban-law/story?id=84395778.

[85] Cahn, *supra* note 78 at 7.

[86] *See* Martin Antonio Sabelli, et. al, *Abortion in America: How Legislative Overreach is Turning Reproductive Rights into Criminal Wrongs*, NAT'L ASS'N OF CRIM. DEF. LAWYERS (Aug. 18, 2021), 3.

community or persons with a particular identity: in this case, women. Further restrictions on abortion access are more likely to further the gap between women in marginalized communities and women of different socioeconomic statuses. Thus, the targeted surveillance will likely affect women, more specifically women within those marginalized communities. Looking to the history of the United States' surveillance habits, surveillance on marginalized communities is not something that is simply a possibility but a destiny that has been predicted by a pattern. These similar surveillance techniques have been used in the name of immigration enforcement, the war on drugs, the war on terror, and several other law enforcement priorities.[87]

CONCLUSION

Justice Alito's opinion was not only decided on an incorrect historical analysis, amongst many other inaccuracies, but was also contrary to the wishes of most Americans.[88] As Part I discussed, using historical analysis as a factor in deciding whether a right is implied within the Constitution is erroneous when applied to civil rights and civil liberties. It fails to carry out the purpose of civil rights and civil liberties, which is to close gaps in inequalities, but instead forces those who are facing the consequence of that gap further into a state of inequality. As a result of this decision, women are further forced into a panopticon placing them in a state of constant, non-consensual surveillance. This decision has threatened bodily autonomy for women, economic security for men and women, and enabled further use of unjustified searches and seizures. The results of such a catastrophic overreach in judicial authority have placed the American people's civil liberties in a questionable state. Laws and norms that safeguard privacy in the United States do not work for people who are marginalized or

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[87] *See* Lily Hay Newman, *The Surveillance State is Primed for Criminalized Abortion*, WIRED (May 24, 2022), https://www.wired.com/story/surveillance-police-roe-v-wade-abortion/ (quoting Albert Fox Cahn).

[88] *See* Alison Durkee, *How Americans Really Feel About Abortions: The Sometimes Surprising Poll Results As Supreme Court Overturns Roe v. Wade*, FORBES (Jun. 24, 2022), https://www.forbes.com/sites/alisondurkee/2022/06/24/how-americans-really-feel-about-abortion-the-sometimes-surprising-poll-results-as-supreme-court-reportedly-set-to-overturn-roe-v-wade/?sh=21a310a82f3a (showing a majority of Americans support the right to abortions).

economically disadvantaged.[89] After *Dobbs*, rampant overcriminalization will emerge, aided by the use of mass surveillance and regulatory enforcement. Women from marginalized communities will be further forced into the plague of mass incarceration because anti-abortion legislation disproportionately impacts poor women and women of color and contributes to the problem of systemic racism and classism within the criminal legal system.[90]

[89] *See* Barton Gellman & Sam Adler Bell, *The Disparate Impact of Surveillance*, THE CENTURY FOUNDATION (Dec. 21, 2017), https://tcf.org/content/report/disparate-impact-surveillance/.
[90] *See* Sabelli, *supra* note 85 at 6.