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Front Matter

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Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

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26.1 EDITORS' NOTE: BODILY AUTONOMY

In his majority opinion in *Dobbs v. Jackson County Women's Health Org.*, Justice Samuel Alito took one paragraph to dismiss proponents of a constitutional right to bodily autonomy as unserious, disingenuous, and naïve.[1] Showing his detachment from wide swaths of the country, and any coherent notion of liberty, he argued that bodily autonomy *must* be nothing but a pipedream because otherwise it would permit such results as "a fundamental right to [sex work and] illicit drug use."[2] He goes on to absurdly claim that neither of these have "any claim to being deeply rooted in history,"[3] apparently forgetting that the former has been recognized and tolerated throughout all of Western history,[4] and ignoring just how recently the racist War on Drugs has altered the historic treatment of the latter.[5] Thus, not only must the fundamental rights protected by the Constitution be "deeply rooted in history,"[6] but if such "historic" activities as sex work and drug use are off the table, then Alito seems to be intimating that, in his worldview, the only rights protected by the Constitution are those that align with his Christofacist reactionary ideology.[7] Alito's opinion dramatically reveals the conservative Justices' intent to use the machinery of the state to restrict many more areas of fundamental liberty than just reproductive rights. The Constitution was written by white supremacist cishet[8] Christian landowning men *for* white supremacist cishet Christian landowning men, and this Court wants to keep it that way. This Court is ready and prepared to revisit previous decisions to impose their agenda and worldview on the nation.

Disturbingly, Justice Thomas in his somehow even worse concurrence calls upon the Court to "reconsider" all substantive due process rights, singling out the rights to contraception, same-sex intimacy, and same-sex marriage.[9] Even the nominally more "moderate" conservatives are not likely to be a buffer against this eventuality. Let us not forget Chief Justice Roberts—the supposed "swing vote"[10] who nonetheless joined the conservatives on *Dobbs*—and his homophobic dissent in

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[1] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2258 (2022).

[2] *Id.*

[3] *Id.*

[4] *See* RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918, at xiv-xv (1982). Justice Alito's analysis also lacks the nuance of understanding that as society and culture has evolved throughout history, sex work and sexual labor have also changed. *See id.* at xv.

[5] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[6] *Dobbs*, 142 S.Ct. at 2242.

[7] *See* Natasha Leonard, INTERCEPT, *The End of Roe: Saving Abortion Rights Means Taking Them Into Our Own Hands* (May 3 2022, 11:33 AM), https://perma.cc/97KL-RXA7.

[8] "Cishet" stands for cisgender heterosexual.

[9] *Dobbs*, 142 S.Ct. at 2301 (Thomas, J., concurring) (citing Griswold v. Connecticut, 381 U.S. 479 (1965), Lawrence v. Texas, 539 U.S. 558 (2003), and Obergefell v. Hodges, 576 U.S. 644 (2015)).

[10] Tom McCarthy, *John Roberts Is Now Supreme Court's Swing Vote – To Conservatives' Disdain*, GUARDIAN (June 20, 2020), https://perma.cc/G7KX-4JMZ.

Obergefell v. Hodges in which he made the (unsupported, irrelevant, and incorrect) claim that compulsory heterosexual monogamy was historically necessary because it advances "the good of children and society" by ensuring that "sexual relations that can lead to procreation . . . occur only between a man and a woman committed to a lasting bond."[11]

If this last year has made anything certain, it is that the individual right to control what happens to one's own body will be the battleground for wide swaths of progressive legal activism going forward. Moreover, language about bodily autonomy has been co-opted by political movements who ultimately wish to dictate what all people may do with their body. We at the *City University of New York Law Review* have dedicated our Winter Issue to collectively imagine a world in which an *expansive* view of the right is respected and protected. While most discussion of bodily autonomy focuses on reproductive and sexual rights,[12] for us, a progressive view of bodily autonomy is fundamentally liberatory, inclusionary, abolitionist, anti-racist, anti-imperialist, anti-colonial, anti-capitalist, anti-ableist, and anti-fascist.

Our view of bodily autonomy is anchored in the reproductive justice movement.[13] Through a reproductive justice lens, bodily autonomy means more than the ability to control one's own reproductive lives, but instead true reproductive justice requires achieving economic justice, environmental justice, racial justice, and gender justice. It encompasses a broad range of legal battles, not only reproductive freedom and sexual freedom—and yes, the right to drug use and sex work—but also: freedom to gender expression; freedom from incarceration; freedom from violence (including from police abolition and war); freedom to sell one's labor (including freedom to collectively bargain and freedom from slavery and coerced labor); freedom to travel and live where one wishes (including open borders and free housing); freedom to good health (including free health care, free access to nutritious food, universal accessibility, and environmental justice); and the ethical treatment of animals.

We are pleased to present the articles contained in this Issue of the *CUNY Law Review* as jumping off points for this wide range of advocacy. We hope they inspire the reader in their legal practice, scholarship, or activism to imagine and create a new world in which a strong individual right to bodily autonomy is a reality.

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[11] Obergefell v. Hodges, 576 U.S. 644, 689 (2015) (Roberts, J., dissenting).

[12] *See generally*, *Bodily Integrity*, WIKIPEDIA, https://perma.cc/LSD2-9GAK (last visited Nov. 24, 2022).

[13] Originally conceived by Black women, the reproductive justice movement fights for a more inclusive and expansive understanding of reproductive rights and bodily autonomy. Reproductive justice is rooted in an intersectional conception of reproductive oppression. *See generally* LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017); REPRODUCTIVE JUSTICE, *SisterSong*, https://www.sistersong.net/reproductive-justice (explaining the "herstory" of the Reproductive Justice movement, including the origin of the movement, which came from the Women of African Descent for Reproductive Justice in 1994, and the creation of SisterSong in 1997 as a national, multiethnic reproductive justice collective).

In ***Extradition in Post-Roe America****,* Alejandra Caraballo, Cynthia Conti-Cook, Yveka Pierre, Michelle McGrath, and Hillary Aarons explore the impact of the 2022 *Dobbs* decision on the constitutional power of extradition among states. With *Dobbs*, anti-abortion legislations in several states have the power and capability to outlaw and criminalize abortion, creating a deep chasm between states that now protect the right to abortion and those that criminalize essential health care. This article uses a historical analysis of the Extradition Clause of the United States Constitution to understand how the Extradition Clause might operate in a post-*Dobbs* landscape. Focusing on "safe harbor" state laws that protect a right to abortion and the criminalization of abortion in other states, *Extradition in Post-Roe America* examines the power of extradition and the possibility of using a dual criminality approach to protect human rights from encroachment by a state seeking to criminalize abortion and reproductive choice. The article offers practical recommendations for state legislation that seeks to protect reproductive rights from encroachment by other states.

In ***High Risk Hustling: Payment Processors, Sexual Proxies, and Discrimination by Design***, authors Zahra Stardust, Danielle Blunt, Gabriella Garcia, Lorelei Lee, Kate D'Adamo, and Rachel Kuo analyze how banks, payment processors, and financial providers discriminate against sex workers. The article focuses on how digital financial infrastructure presents specific challenges when sex workers use financial or banking services. Drawing on reported experiences of sex workers in the United States and in Australia, the article shows how sex workers are identified by financial institutions and payment processors and are systematically excluded from these platforms. The article explains how policies and social norms identifying sex work as presenting too much risk for financial institutions, or automatically linking all sex work to criminal activity, prevent not only sex workers from making use of financial and banking services, but also impact other actors working in the areas of sex education, reproductive services, or mutual aid funding. This article positions financial discrimination against sex workers as a manifestation of classism, racism, transphobia, and whorephobia embedded in law and policy. The article demonstrates how U.S. policy criminalizing sex work is exported to other jurisdictions where sex work is decriminalized, and thus, sex workers are prevented from using platforms in these jurisdictions as well. The article concludes by offering some accountability measures for financial institutions and payment processors.

The Comment in this Issue addresses the theme of bodily autonomy in the form of the commodification and exportation of workers. In ***This Article Is Considered Terrorism in the Philippines: The Role of People's Lawyers in Class Struggle***, author Amanda Katapang explores the forms of legal advocacy that aim to liberate Filipinos from the violence of capitalist neoliberal exploitation both at home and abroad. Delving into the ongoing history of American colonialism in the Philippines, Katapang explains the policy and legal mechanisms created to formalize, legalize, and streamline the trafficking of Filipino labor into the

United States. Notably, the United States fills staffing gaps in its healthcare system by importing large numbers of Filipino nurses, who are then stuck in coercive working arrangements. Katapang takes lessons from the Filipino National Democratic ("ND") Movement, to develop a vision of people's lawyers as an important component of an "all and any means necessary" strategy. In solidarity with other people's liberation movements, people's lawyers must push for revolution rather than reform and avoid the trends into NGOism, economism, and legalism. Drawing from her experience as an organizer, Katapang presents a path forward by looking to current work being done by grassroots organizations in the United States. In particular, she highlights the Mission to End Modern Slavery and its recent legal advocacy and organizing campaigns as a case study for how to enact the ND Movement's principles.

This Issue's Note works as a companion to its Comment by deeply exploring the exploitation of Filipino healthcare workers in the United States. In ***Made for Export: How U.S. and Philippine Policies Commodify and Traffick Filipino Nurses***, author Emlyn Medalla traces the history of American colonization of the Philippines beginning in the late nineteenth century through the creation of the modern system of mass migration of Filipino workers. Through military action and the development of a neoliberal economic regime, the U.S. has worked to maintain a system of Philippine debt that ensures a supply of cheap healthcare workers to fill American staffing shortages. Medalla illustrates how this relationship between the two countries has created a system of legalized trafficking. Nurses who immigrate into the U.S. often find themselves trapped in a system of debt bondage by unregulated recruitment agencies and subject to dismal working conditions. Medalla concretizes this system by delving into two recent federal cases out of New York in which plaintiff nurses were able to achieve some limited legal recognition of the exploitative conditions. She ends the piece by calling for a broader, community- and survivor-informed approach to legal advocacy that seeks change beyond favorable judicial rulings.

Our Public Interest Practitioner Section ("PIPS") connects bodily autonomy to the carceral violence inflicted upon low-income and racially minoritized communities. In ***Reducing Multigenerational Poverty in New York Through Sentencing Reform***, author Jared Trujillo notes the circular relationship between incarceration and poverty within racially marginalized communities. Focusing on criminal sentencing laws, he shows how New York imposes harsh sentences on young people and their families through so-called tough-on-crime policies, such as mandatory minimum sentences, restrictions on release, and harsh sentences for minors. Trujillo goes on to demonstrate the ways in which these policies harm and impoverish families, from court fees to social costs of separating children from their parents. Trujillo advocates to mitigate the racialized system of state violence through a suite of legislative actions, including the abolition of the Juvenile Offender Act, passage of the

pending Youth Justice and Opportunities Act, elimination of mandatory minimum sentences, and sentencing restrictions.

In addition to our print journal, *CUNY Law Review* maintains the Footnote Forum, a web-based publication that produces scholarship by authors traditionally excluded from legal academia, and a Blog, which produces shorter pieces related to social justice and current events. The Footnote Forum has published two pieces in conjunction with volume 26.1, and the Blog has produced several articles on the theme of bodily autonomy. These pieces are not included within the pages of this volume, but we encourage you to read them at www.cunylawreview.org.

In our first Footnote Forum article, ***The Domestic Violence Survivors Justice Act and Criminalized Immigrant Survivors***, authors Assia Serrano and Nathan Yaffe explore how the New York's Domestic Violence Survivors Justice Act ("DVSJA") works in practice for criminalized immigrant survivors. The article criticizes the shortcomings of the DVSJA, namely that the DVSJA does not expunge, vacate, or alter a survivor's convictions. Additionally, because the DVSJA exists at the intersection of New York State law and U.S. immigration law, despite relief offered by the act, immigrant survivors remain under heightened state surveillance and face a higher risk of deportation. The article begins by providing a concrete example of the harms the DVSJA by tracing the experience of author Assia Serrano. The article then proceeds by providing a legal and policy history of the DVSJA and its intersections with U.S. immigration agencies, such as Immigration and Customs Enforcement. The article further explores the operation of the DVSJA when immigrant survivors seek relief, the role of attorneys and the justice system in its implementation, and what government actors can do to alleviate the harms caused to immigrant survivors. As its conclusion, the article proposes clemency as a short-term remedy to the harms caused by the DVSJA's gaps.

The Footnote Forum also published ***NYSPRA v. Bruen And New York: A Lost Opportunity For Racial Equity In The Polarizing Gun Conversation***, in which author Zamir Ben-Dan examines the history and consequences of the recent Supreme Court decision. The article provides potential implications of the decision, and some insight into how New York's new gun law may be challenged in the future. The article anchors its discussion of the *Bruen* decision within a racial justice discourse. The article provides an explanation of why, in the wake of the *Bruen* decision, opportunities to promote racial justice through firearm regulations have been lost.

Since we first conceptualized our Issue's theme, the fight for bodily autonomy has only intensified. The effects of *Dobbs* on millions of people are significant,[14] and legislative sessions in several states have used

[14] *See, e.g.,* After Roe Fell: Abortion Laws by State, CTR. FOR REPROD. RTS, https://perma.cc/8RV9-JSPK (last visited Jan. 25, 2023) (showing that abortion is now illegal in 12 states and severely restricted in 12 other states).

this decision as a springboard to attack bodily autonomy.[15] Our hope is that this Issue will contribute to growing scholarship on bodily autonomy as a fundamental right and its intricate connections to gender justice, racial justice, and economic justice.

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[15] For example, Oklahoma legislators have finally done what the right has been gesturing towards for the past several years, introducing a bill that would remove all government funding from medical providers that provide gender affirming medical care for any person of any age, effectively banning gender affirming care in the state. S.B. 129, 59th Leg., 1st Sess. (Okla. 2023). This bill represents the natural escalation of legal violence against trans people which in previous sessions legislatures had focused primarily on children. Samantha Riedel, *A New Oklahoma Bill Will Attempt to Criminalize Trans Care for Adults*, THEM (Jan. 6, 2023), https://perma.cc/H83V-3ZQU.

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