

Episode: *Ethics Talk* Series on US Abortion Care After *Dobbs: Unequal Protection and Encroachment on Reproductive Destiny*

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TIM HOFF: Welcome to a special edition of *Ethics Talk*, the *American Medical Association Journal of Ethics* podcast on ethics in health and health care. I'm your host, Tim Hoff.

This multipart series examines ethical and clinical fallout from the recent United States Supreme Court holding for *Dobbs, State Health Officer of the Mississippi Department of Health v Jackson Women's Health Organization*. This decision upends 50 years of legal and clinical precedent established on abortion, privacy, and other rights foundational in everyday health care practice. *Dobbs* challenges clinicians and organizations everywhere in the US in unprecedented ways, including whether, where, and when to defy law to give their patients standard health care, and how far to go to offer standard care to patients who are medical refugees from restrictive states.

Abortions, when delivered by health care professionals, are safe, common, and until recently, legal. Whether as a request to end an unwanted pregnancy or in response to complications indicating risk to a patient's health, abortion is part of standard health care practice. In places where abortion care is restricted or banned, abortions will likely remain common. We know this from global research showing that regardless of changes in legality, abortion frequency remains steady, but that medical risk to women and legal risk to women, clinicians, and organizations increase when abortion is restricted to unduly infringe upon decision making and care planning that have, up until *Dobbs*, taken place within patient-clinician relationships.

Regardless of legality, abortions are often clinically indicated standard of care for pregnant people, especially in response to incomplete miscarriages or secondary to fetal development anomalies or complications. And regardless of legality, all clinicians are still legally and ethically required to practice according to standard of care. Though in restricted states, this is now extremely difficult for most clinicians who are motivated clinically to continue to provide safe abortion care and motivated ethically to prioritize their patients' best interests above the intrusive demands of an unjust law.

When abortions occur naturally and spontaneously, they're called miscarriages, which are common. Once straightforwardly managed according to clinical indications, miscarriage management in restricted states now requires navigating a labyrinth of unscientific legal requirements. For example, restriction exceptions, allowing abortion to "save the life of the mother" de facto incentivize clinicians to watch their patients

decompensate, that is become increasingly ill, to the point at which a complication formerly safely managed with an abortion becomes a life-threatening emergency. Though it is worth noting that these kinds of exceptions are increasingly rare, as many have or look to simply ban abortion without any nod to a pregnant person's right to life or to a clinician's duties to do no iatrogenic harm and to provide standard of care.

In this series we'll cover what students and clinicians need to know about how the changing legal landscape of abortion influences their practices. This series also considers how restrictions will influence health professions and a generation of students and trainees now at risk for possibly never learning how to manage according to standard practice complications from one of the most common human experiences: pregnancy.

Joining us on the second episode of the series is Professor Michele Goodwin, a Chancellor's Professor at the University of California, Irvine, and the founding director of the Center for Biotechnology and Global Health Policy. She's here to help us consider clinical encounter and health service delivery implications of how the current US Supreme Court interprets the US Constitution. Professor Goodwin, thank you so much for being here. [music fades out]

PROFESSOR MICHELE GOODWIN: Thank you so much for inviting me on the show. It's a pleasure to be with you.

HOFF: Coverage of the *Dobbs* decision so far has focused mainly on its overturning of the precedents established by *Casey v. Planned Parenthood*, and obviously, *Roe v. Wade*. But there is a much longer legacy of abortion and other reproductive rights that asks us to consider whether and how the Constitution offers protection for the privacy of individuals. So, to begin with, can you tell our listeners a little bit about that legacy and how it should inform our thinking about this recent *Dobbs* decision?

GOODWIN: It was clear that the framers understood that there is a long arc towards justice and freedom, such that we have a 9th Amendment which provides for there to be amendments to the Constitution, interpretations of law that extend beyond the Constitution as it was written by the framers. And what we've seen in the wake of *Dobbs* has been the claim by the majority of the Supreme Court that one can't find rooted in the Constitution or tradition of law any right to an abortion. That is, the word "abortion" explicitly is not in the Constitution. Neither is "pregnancy." No one would ever doubt that there is a right to be pregnant. One wouldn't question it.

And it is a mistake to think about abortion as being a creature of the last 49 years, existing only since *Roe v. Wade*, when in fact, abortions have been performed for millennia, as long as women have roamed the earth. The same is true with the use of contraception and is true as well with birth and delivery. And so, this sense of looking to something that is exact within the Constitution, the exact word of "abortion," is actually something that is a bit ridiculous in many ways. And let me explain why the opinion reads as one that is selective, if not opportunistic. That is, while Justice Alito says that abortion is not mentioned in the Constitution, what's very clear is that there were,

amongst the framers, those who wrote about abortion. Benjamin Franklin [laughs] actually wrote a book about how to perform a safe abortion. And it wasn't something that was questioned. Pilgrims. Pilgrims performed abortions, right? It was a part of what was normal in terms of medicine and health care related to women and their destinies.

It did take a political turn, though, and that was in an era leading up to the Civil War as abolitionists were gaining steam in the fight for slavery to be abolished in the United States. It was very clear that the institution of slavery in the United States included not only forced labor in the field, and by its very foundation, kidnap and trafficking, but it also included sex trafficking, sex trafficking of Black girls and women. For many Americans today, it's something that they have to pause on because Americans have not had to think about the experiences of Black girls and women during the hundreds of years in which slavery was practiced and legally enforced or legally protected in the United States. But it was very clear that members of Congress knew about this. They wrote about it. Charles Sumner was famously nearly beaten to death in the halls of Congress when he gave a speech about slavery having this involuntary component, this involuntary reproductive servitude that was enforced on Black women and Black girls even. So, abolitionists wrote about it. Many of them did. It was central to the debates of the 13th Amendment, which is in the Constitution! And even more as a social matter.

There were Black women who were articulating about it. A famous speech that almost everybody understands even if they've not read the speech, many Americans have heard this thing called "Ain't I a Woman?" Now, even if they don't know it was Sojourner Truth, even if they haven't read it, right, it has survived centuries. And Sojourner Truth said in that speech before a group, before an audience of people who were not all abolitionists, but many were, and she talked about how she bore 13 children and saw nearly each one snatched from her arms. And nobody heard her cry but God. "Ain't I a woman?" is what she wrote. Harriet Jacobs wrote a book, *Incidents in the Life of a Slave Girl*, writing about the predations directed even at a girl 11, 12 years old, the sexual subordination and forced reproduction, such that when the 13th Amendment was ratified, and explicitly the text says it banned slavery and involuntary servitude, that involuntary servitude included what Black women and Black girls endured. And so, when we think about what's original or what's textual within the Constitution, it's important to think about it within a broader context that actually takes into account an understanding about what Black women and girls were experiencing, and then also the broader history in America where abortions had been performed in the 1600s, as soon as folks landed from Europe, and even before that by Indigenous peoples.

HOFF: So, let's talk a little bit more specifically about the history of how Supreme Court justices have oriented themselves toward questions about privacy through their published opinions. Which cases can help our listeners think about that arc of reproductive rights in US jurisprudence?

GOODWIN: What's worth noting as one thinks about the Bill of Rights—which starts with protecting our speech from government tyranny and interference, includes the 4th Amendment against unreasonable searches and seizure, which clearly affects our privacy—underlying so much of this was about protecting men within these spaces, and

so protecting men's homes and protecting men's privacy from interference of the government. And within constitutional law, what's not been explicit within the Constitution in terms of privacy and reproduction was made clear by the Supreme Court.

Now, here's why history is important, including constitutional legal history from the Supreme Court, which Justice Alito doesn't bother to delve into. Which is that before *Roe v. Wade*, 30 years before *Roe v. Wade*, the United States Supreme Court spoke about how reproductive privacy was a human rights issue, [chuckles] was a civil rights issue. And so, it would be possible to read the *Dobbs* opinion as being about *Roe v. Wade* and *Planned Parenthood v. Casey* and being centered only within the last 49 years and therefore ignore the very important case *Skinner v. Oklahoma* 30 years before, 1942, where the United States Supreme Court unanimously says that reproductive privacy, reproductive rights are a human rights issue.

HOFF: Hmm. And did the court use that specific language of human rights? It seems like that kind of language is something that the court has historically avoided, possibly because of tensions between US jurisprudence and international law. So, if they did, can you speak a little bit more to that choice?

GOODWIN: Well, it's a great question because it's something that the US Supreme Court across decades, across centuries of jurisprudence has been reluctant to invest itself in. And so, it's notable that the court did in a case involving reproductive destiny. The court has also been reluctant to engage in a discourse involving international law itself. And so much of American jurisprudence and federal legislation has centered around matters of rejecting human rights and the establishment of rights that come from legislation, our own legislation, and also what we gain from our Constitution. But I will say this—and this is also another area that is increasingly becoming vulnerable—as the court has moved its way towards recognizing, and now it does, marriage equality and striking down laws that discriminate against individuals who are LGBTQ, the Supreme Court reached to international law. So, within this space of where the court has recognized privacy and intimacy, it has reached to international law.

Now, there are members of the court who don't want that and who don't like that. Justice Alito very recently was in Rome saying, how dare people from abroad critique the United States. And I think that that's part of the US exceptionalism. People should look to the United States, but we don't need to look abroad. It turns out that the areas in which both Congress and the court have looked abroad have been with dismantling slavery, so as part of the debates [laughs] of the 13th and 14th Amendments and then also in the area of decriminalizing gay sex.

HOFF: Mmhmm. That's very interesting. Thank you for that clarification. Sorry. I took us on a little bit of a tangent there. Let's get back to *Skinner v. Oklahoma* specifically. Can you tell us a little bit more about that case and how it helped build privacy and reproductive rights for US citizens?

GOODWIN: Oklahoma had enacted a law that was part of the branch of eugenics, really, that provided for the compulsory sterilization, castration of individuals who were petty thieves. Notably in this law, it made an exception. That is to say that it did not apply to people who were white-collar criminals. So, you could be a person who embezzled pension funds, you could be a person who basically had robbed people of their savings accounts, high level, and the law would not apply to you, right? And the Supreme Court issued an opinion that is one of the most important opinions of the last century, which established that a state may not encroach upon a person's reproductive destiny and future.

Now, we should talk about *Buck v. Bell* as well, a case from 1927 that predated that. But this was a unanimous Supreme Court that said, that recognized that states had the potential to engage in tyrannical conduct against individuals, and people must be protected from that. And they must be protected from when states would seek to encroach upon their reproductive destinies and that people have the right to be able to determine that. Now, notably, *Skinner v. Oklahoma* was a case that involved a man. But I want to pick up on history beyond that, too, because Justice Alito would leave, I think, many people with the impression that it was just *Roe v. Wade*, the first case that talked about any of this privacy stuff, that talked about reproduction, and that where individuals wanted to defy what the state wanted them to do with their bodies. Not true. It's worth noting that *Skinner v. Oklahoma* as a unanimous decision was penned by Justice Douglas. Now, the court will often talk about how, well, if we want to think about before *Roe v. Wade* privacy, maybe it's this case that was *Griswold v. Connecticut*, 1965, that involves contraception. But who wrote that opinion too? That was Justice Douglas. And in United States Supreme Court jurisprudence, we look at the legacy of authors. There is a legacy [laughs] that predates *Roe*! It is *Skinner v. Oklahoma*, and then it goes, not surprisingly, to *Griswold v. Connecticut*. The same author, right?

The Supreme Court at this point is on a mission to dismantle state laws that interfere with people's reproductive destinies. And even before *Roe v. Wade*, there's another case. So, we've got *Skinner v. Oklahoma*, *Griswold v. Connecticut*, which strikes down a Connecticut law that bars married couples from being able to use contraception. And then we have *Eisenstadt v. Baird*, just a few years after that, the Supreme Court striking down a Massachusetts law that bans people who are single from being able to have access to contraception. All of this is before *Roe v. Wade*.

But there's another case that actually doesn't make its way to the Supreme Court. So, a nifty lawyer named Ruth Bader Ginsburg hopes that it would make its way before the Supreme Court, and it's a case that involves a woman named [Susan] Struck. She is in the military, and this captain in the military is pregnant. And in the US military, prior to *Roe v. Wade*, you could have an abortion. In fact, you were mandated to have an abortion if you were a woman, and you were in the US military. And so, Captain Struck wants to be able to carry her pregnancy to term. And she even says, look, I will give up the child that's born from this pregnancy for adoption, but I want to be pregnant. I don't want to have an abortion. She loses multiple times when she is trying to appeal to be pregnant and not have an abortion! And the military says if you want to stay in the US Armed Forces, you're going to have an abortion. She even loses in American federal

courts! [laughs] They're like, no! This is before Roe v. Wade. Now, none of this Justice Alito talks about in this opinion.

So, if you read Justice Alito's opinion, and not much changed from the draft to the final opinion, you would think that it's just Roe v. Wade when this privacy talk starts and that abortions never existed before and that abortions had always been criminalized and that there were none of the framers who had ever thought about abortion, either the original framers of the Constitution, like Benjamin Franklin, or the framers of the 13th and 14th Amendments. And even when we think about Roe v. Wade itself, that was an opinion that was 7 to 2, 7 to 2. It wasn't a close opinion. So, even this sort of sense that, well, you know, there's been this great divide, the court was deeply uneasy. Not at all. It was a 7 to 2 opinion. So, this idea that reproductive privacy and freedom was just something that feminists thought of on their own in the 1970s, nobody was paying attention to this, it was forced upon the court because of these radical feminists? [laughs] We have a whole legacy of history that dates back centuries. But then, certainly in the decades leading up to Roe v. Wade, this was a very clear part of what was not only where American jurisprudence was going, but American society.

In 1966, Dr King received an award from Planned Parenthood and wrote a brilliant speech in support of receiving a humanitarian award from Planned Parenthood! Like, this is the history that's important for people to understand. This is not some isolated one-off, Roe v. Wade. And in Dr King's speech, he specifically uses the word "cruel" to describe a society that forces women to be mothers, for people to be parents when they cannot afford to be so. And he talks about how it's cruel for a child to be born into a family where they're not wanted and where the family can't afford to take care of that child, Dr King's words, 1966.

And later in 1966, he's asked by a reporter, why is it that he was speaking about health care issues? He gave a very famous speech in Chicago in that year where he told the group of doctors assembled that of all of the injustices that exist, inequality and equity in health care, he said, was the worst because people can die from it. And when he was asked later, well, you've been talking about women's rights and reproductive rights and talking about health care, you know? We know you as the Black guy in Alabama advocating for voting rights. Why all of this other stuff? And Dr King specifically said, "I refuse to segregate my moral concerns. I refuse to segregate my moral concerns." I think that's a powerful lesson for us.

HOFF: So, how do you explain to a student why a lack of standard of care abortion care is an expression of health inequity?

GOODWIN: It's a great question, and it's important to understand that when the knowledge and ability to terminate a pregnancy isn't there for a doctor, or when the actual ability for a patient who needs one isn't there, then this can be a life and death matter. About 20 percent of pregnancies will end in miscarriage or in stillbirth. And sometimes, while a miscarriage may be complete, as in the fetus may evacuate from the uterus completely, sometimes that is actually not the case, and there is the need for medical intervention because there's the risk of infection and serious infection that can

lead to death if that medical procedure doesn't take place. So, even beyond the context of the political debate, it's just simply a matter of medicine and health care. No one should have to die because their bodies have become unavailable to carry a pregnancy. And unfortunately, with some of the legislation that's being proposed and the way it's being framed it is such that, well, if your body is not well, then even though the technology to make you well is there, we impose, through state law, suffering and potentially even death because of a political or a religious agenda. And that counters everything that we appreciate and understand about health care, about bioethics, and prior to the *Dobbs* decision, it's contrary to what we appreciated in law.

HOFF: Sure. So, how do you see this decision as potentially widening current existing health inequities that we see, especially as they relate to pregnancy and miscarriage?

GOODWIN: Well, already in the United States, there are tremendous disparities between who survives pregnancies and who do not. And even if we look beyond pregnancies, it's been so well documented by researchers and also by commissions established by the government that there are glaring racial disparities in American health care. We wish that they weren't, but the reality is that they exist. And nationally, for Black women, they're three and a half times more likely to die than their White counterparts due to maternal mortality. And that's a national figure. That number, that figure, that gap only amplifies in states where there are aggressive anti-abortion laws that've been put in place such that a Black woman may be five times, 10 times, 15 times more likely to die, depending upon the county, than her White counterpart due to maternal mortality.

Another aspect of this that's worth noting is the kind of chilling effect, the kind of psychological injury that then manifests in terms of physical injury in the wake of racial disparities and racism in medical health care. And this has been documented, too, but it's important for us to actually talk about. When individuals are stereotyped, stigmatized, discriminated against, this can cause psychological harms. But those psychological harms can also manifest within the body, making it very difficult to be healthy. And it's possible that some of what we see with maternal mortality could be linked to those stressors that involve racism as a sort of daily matter. But it also could be that which is also linked to how individuals are treated when they come in for medical care or how they are neglected when they are seeking medical care.

HOFF: Hmm. So, how have we been seeing over the past couple months the effects of *Dobbs* manifest in the courts, and what sort of future responses do you anticipate? You mentioned things like legislatures sort of pushing pregnant people to get sicker and sicker until these protections to "save the life of the mother" kick in. What sort of responses do you anticipate?

GOODWIN: It's, well, it's been a really chilling landscape in the wake of the *Dobbs* decision. Very recently, there was a 16-year-old girl—16, 17-year-old girl—that a judge who sought a judicial bypass in order to obtain an abortion, and a judge deemed her too immature to have an abortion. But of course, this means that she will have a child and now not only be responsible for herself, but by a judge acknowledging or suggesting

that this immature girl will now be responsible for caring for another human being. And the state will hold her to a level of responsibility as a mother where she could be, in fact, civilly fined, she could be criminally prosecuted for being immature, negligent as a mother, which also happens. Which is more likely to happen to people who happen to be vulnerable.

We have seen even without judicial intervention in the state of Wisconsin, a woman bleeding for more than 10 days in an incomplete miscarriage, wanting for the miscarriage to be complete, which would be an abortion, something that would have taken place the day before *Dobbs* in a matter of minutes or hours. But in the wake of *Dobbs*, a woman bleeding over 10 days, waiting until she was nearly dead enough to satisfy the requirements now that are being imposed by local officials. And across the country, already there are prosecutions that are taking place in Nebraska involving a girl and her mother with law enforcement searching on Facebook to use evidence against the girl and her mother. So, we see a wide landscape emerging and a landscape that's really quite troubling.

HOFF: Hmm. So, how should we think about the role of the 14th Amendment's equal protection clause in response to pregnancy discrimination?

GOODWIN: Justice Ruth Bader Ginsburg and Justice Blackman and other justices over time believed that not only are the matters of reproductive rights matters of privacy and autonomy, but they're really fundamental matters of equality in society that no one and no group of people should be discriminated against within the context of their reproductive health journeys. And we see how important that is today in the wake of the Supreme Court's decision in the *Dobbs* case. And this is because there's a group of people, women and girls, so, by sex, individuals who are being denied fundamental basic health care because of their uteruses, because they happen to be women. The United States Supreme Court said that it was a fundamental human right and civil right to determine one's own reproductive destiny. Well, the same should hold true in these times as well, and we should be able to see these as fundamental matters of equality, that women are able to make the decisions that help to promote and sustain their health and well-being in their reproductive landscape. And that is whether to be pregnant, whether to have access to contraception, or whether to terminate a pregnancy.

HOFF: So, in a post-*Dobbs* world, the people who have the means to, and obviously that's not everybody, are going to travel to get safe health services in places where they can. So, what do you see as some of the most important constitutional legal implications of normalizing interstate travel to get basic health care?

GOODWIN: The federal government right now has recognized the fact that states are threatening individuals who want to terminate a pregnancy with bans for going out of state to do so. This contradicts fundamental constitutional principles that date back even before the current Constitution that we have now. The right to travel has been something fundamental to American life. It was fundamental to the life of the people who came to what became the United States and were in colonies. And so, we've heard responses from the Biden administration that the federal government will use all of its



powers to protect individuals' constitutional rights that are not affected by the *Dobbs* decision. Much of this we'll begin to see in manner of litigation that will come forward. I imagine that there will be states that follow through in seeking to prosecute individuals who go out of state to terminate a pregnancy. We don't know fully what that landscape is going to look like once those issues are litigated in court. There are lots of matters that are implicated. If the courts do allow for states to prosecute individuals who go out of state for health care, would this then affect individuals in other ways who want to travel out of state for other matters? And so, unless abortion is treated as this isolated island, which unfortunately it has been, but if it is treated as an isolated island, then states may be successful in trying to keep people in state and prevent them from going out of state to have abortions.

On the other hand, states may find that courts are resistant to allowing this type of aggressive surveillance of individuals because it could implicate other areas of Americans' lives where Americans want to be able to travel freely, should be able to travel freely, and have, for the most part, been able to travel freely. I will say this, that the closest—both in terms of the oppressive aspect of this and what it means for vulnerable groups—the closest that we come to this were southern states trying to prevent African Americans from leaving in the 1930s, '40s, and '50s. And African Americans represented cheap labor, and with little federal intervention against Jim Crow laws, sheriffs would regularly show up at train stations trying to threaten African Americans who were seeking to get on trains to make their way north.

HOFF: Hmm. So, what are your recommendations about how civil disobedience-minded clinicians should work within this current post-*Dobbs* climate and protect pregnant people?

GOODWIN: It's really important that medical providers understand that they, too, have rights. They, too, have constitutional rights. They have legal rights that may not be grounded in constitutional law theory, but rights that may be protected otherwise, either by federal legislation or by state legislation. What we see in the backdrop of *Dobbs* is a level of bullying that's taking place by local law enforcement and also by legislatures. But just because that bullying exists doesn't mean that those who are doing it are actually right or can. And we see this in the wake of the doctor who performed the abortion for the 10-year-old girl who left Ohio traveling to Indiana. It was already known that that doctor had already filled out all of the appropriate paperwork required by the State of Indiana. In the State of Indiana at the time, there were no laws that banned the doctor providing the abortion to the patient who sought it. Nevertheless, the Attorney General in that state went on various news programs making threats and allegations against the doctor, threats to investigate the doctor, that the doctor could be in big trouble.

Well, a lot of this was a kind of huff and puff. The doctor had already done everything that was appropriate. And in that case, I think it's a great model where the doctor realized that her reputation was being placed at risk by this lawmaker acting unlawfully. And I will say that Attorney Generals are not necessarily lawmakers, but they are politicians who have law enforcement authority. And that was strategically smart

because individuals can defend themselves against individuals who seek to harm their reputations and seek to do so, especially knowing that the information that they're spreading is false. [theme music gently returns] So, law can also be a tool for medical professionals to fight back. They need not just simply take it when they are being threatened by lawmakers or by Attorneys General or by local prosecutors.

HOFF: Professor Goodwin, thank you so much for your expertise and your time on the podcast today.

GOODWIN: It's been my pleasure to be with you. Thank you so much for having me.

HOFF: That's all for this episode of *Ethics Talk*. Thanks to Professor Goodwin for joining us. Music was by the Blue Dot Sessions. We'll be back next week with an episode that focuses on the health professions education implications for a post-June 2022 legal, ethical, and clinical landscape. Talk to you then.