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COUNTERSPACE

Unwritten law: Patriarchy, Dobbs, and the feminine

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Abstract The Dobbs decision writes into U.S. jurisprudence patriarchy's "unwritten law," deciphered by Ida B. Wells with respect to racialized lynching. Its effect undermines a robust free speech regime by sequestering the female sexed body, both as a body part, and as vitally, democratically necessary, mediating signifier and symbol. When properly enabled, by means of a vaginal signifier (beyond a phallocratic paternal law), another "unwritten law" becomes illuminated, grounded not in a patriarchal symbolic but instead in an ethics of the real. Feminine law, foundational to both the First Amendment and psychoanalysis's fundamental rule, offers a pathway for reproductive freedom and for the birth of Otherness, beyond theocratic/autocratic reproduction of the white masculinist same.

The Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization* (2022), an unprecedented turning over of a nearly fifty-year precedent granting women reproductive autonomy, has been widely indicted for its gratuitous cruelty and frank opportunism. The decision, which will impact untold numbers of women and other people who can become pregnant, will disproportionately affect black women, both because of the deeply rooted detrimental health effects of racism (affecting income, access to both insurance and good quality health care) and because, they

> seek abortions at higher rates, partly because of lower contraceptive access and partly because their pregnancies are more likely to have more dangerous complications … [Also,] they disproportionately live in states that will ban abortion. (Slaughter & Jones, 2022)

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We should read Dobbs, then, in the context of black activist and journalist Ida B. Well's conceptualization of America's "unwritten law," which "not only safeguarded the gratuitous ways in which lynching unfolded; it also authorized practices of white lawlessness over the legal statutes that would ostensibly offer citizenship and protection to free blacks and the formerly enslaved" (Park, 2020, p. 11). Linette Park extends her analysis to the middle passage, invoking Christina Sharpe's (2016) evocation of "the belly of the [slave] ship that births blackness (as no/relation)," by which means the state disinherits the black woman from her womb, which becomes instead conscripted into "the reproductive labor of chattel slavery," and the black woman ontologically conscripted into a state of "non-being" (Spillers, 1987). By means of an insidious play upon this primal racialized and misogynistic ancestral trauma, Dobbs performs its self-righteous and grievance-based political move in which what was previously unwritten gains the imprimatur of the Constitution.

The "unwritten" dimension of the Dobbs ruling hovers through the body of the text (of the decision) in part, because, as legal analyst Laurence Tribe (2022) puts it, the Alito opinion simply declares that the "abortion right" is not found in the Ninth Amendment, even though it aims to provide a template for how such rights come to be construed, not to enumerate rights themselves. Furthermore, Tribe remarks upon the Dobbs opinion's failure to contend with the Fourteenth Amendment:

> absent from Dobbs is any coherent legal analysis—or anything that deserves to be called "analysis" at all—of why someone's right to avoid compelled pregnancy, involuntary childbirth, and forced parenthood is not an essential part of the "liberty" protected by the Fourteenth Amendment (and perhaps even of the freedom from "involuntary servitude" protected by the Thirteenth). (Tribe, 2022)

Five Christian justices, four of whom are white, and four of whom are male, wrote "unwritten law" into law, with no pretext at masking their impunity and gratuitousness. Only in the dissent, written by Justices Breyer, Sotomayor, and Kagan, was the unwritten edict made explicit: that women might be criminalized for their conduct if they dare to seek an abortion, that States can turn citizen against citizen, to carry out the modern-day spectacle whereby reproductive autonomy slides into lynching.

The spirit of the First Amendment, too, has been violated by the five justices' Christian bias, amounting to what Tribe brands as "barely concealed theocracy." The Amendment's religion clause is intended to protect the free exercise of religion from governmental interference. Other thorny implications of the Dobbs decision include the free speech rights of doctors, patients, advocates, and activists, as well as the legality of providing and disseminating information on how and where and by what means it will be possible to obtain legal abortions.

While all of these concerns are valid and urgent, my psychoanalytic reading of Dobbs suggests that, in its wake, what is most vulnerable to degradation is yet more fundamental, undermining the spirit and robust potentiality of the First Amendment's free speech clause itself. This assertion stems from psychoanalysis's recognition, often too implicit, of the entwined allyship between freedom of speech

and the sexed/reproductive body of women or of others who can become pregnant. Unpacking this, at least as I have come to understand the stakes, requires some explanation.

Psychoanalysis knows that what is most sacred to its practice is its dedicated listening to the body's censored, repressed, suppressed speech. The psychoanalytic technique of free association developed not only as a rebuke of repressive tyranny; it offered a means of empowering the patient to exercise her free speech rights, free from the intrusion and surveillance of regulating authority. Freud founded the fundamental rule of psychoanalysis by listening to, translating, the fractured speech of the silenced, repressed, sexed body, which, otherwise foreclosed from symbolic release, is reduced to mere biophysical femaleness, absent a desiring, political subject.

Elsewhere, I have referred to the law that grounds the technique of free association and the fundamental rule of psychoanalysis as "feminine law," insofar as it is grounded in the eternal validity of the female sexed body, and is etched in the (Lacanian) Real. Both feminine law and Freud's bear an uncanny similarity to the pithy blueprint set forth by the First Amendment which "enshrines" an ambiguous space for freedom (of speech, thought, association, religion, and so forth) (Gentile, 2015a, 2015b, 2016). Unlike the named paternal laws of psychoanalysis, feminine law creates *space between*—between listener and hearer, between the spoken and the silenced, between the logics of the mind and the illegible, sensuous, disruptive, semiotic dimensions of the female sexed body. Its only "law" is a law of "no"—no colonizer, no imposition, no rule—which invites the subject to surrender to the "ideational serendipity" of her thoughts and yet to be bound by an "ethic of honesty" (Rieff, 1959). A lawful yet anarchic "feminine yes"—an ethical, if also disruptive and excessive, voice of desire (see Gentile, 2016, p. 204)—is thereby enabled, beyond the patriarchal logics of coercion, force, and capture.

Unlike the First Amendment's tenets, the patient was assured of a listening, translating interlocutor in her quest to set forth her free exercise of thought and speech. The analyst, per free association, was to listen for the gaps in speech—the pauses, hesitations, silences, slips of the tongue, parapraxes—exposing what remains untethered, the patient's resistances to naming desire. This signifying gap is a figuration of the vaginal gap, rendering coextensive the erasures of the feminine and those exiled from the symbolic, both vital to the psychoanalytic—but also democratic—project. However, Freud failed to decipher these links, and instead reduced the vaginal to a degraded body part, rendered it invisible, and filled the gap with a profusion of phallocentric phantasy, missing the opportunity to recognize the Vaginal symbolic as key to his otherwise radical project.

Public, democratic life, too, disables the Vaginal symbol and its elusive spaces of and for freedom beyond patriarchal surveillance and capture. Subjects (of all sexes and genders) are reduced to the grasping at this or that concretized sexed body part, deprived of the affirming, politically transformative potential of shared ownership in a symbolic feminine. Absent the mediating function of the feminine—which introduces difference and uncanny contradiction to the signifying/symbolic economy—what dominates *and* atrophies any free speech regime is a pseudo-phallic brute force exercise of power (including the overdetermined effort to build

walls and clamp down on the female genital itself), unmoored from disavowed, vitally necessary, truths. Thus, contra feminine unwritten law, Ida B. Wells's unwritten law remains in force—the omnipotent creation of a patriarchal, phallophiliac order which has lost its foothold in the ethics of the real, because it ablates the symbolic, uncanny figuration of the feminine.

Not only does the US Constitution not name an "abortion right" but, as Jill Lepore (2022) observes (in a scathing analysis of Alito's decision), neither does it name the rights of women, whose voices and bodies were excluded from the early Constitution. Christianity's doctrine also came "to exclude women, to stigmatize the very notion of the feminine: 'the Trinity procreates without the female—without body, blood, ooze, without nature, and superior to it'" (Mantel, 2009). But psychoanalysis, too, is complicit, writing the women and her body out of its laws (of the father). Woman, per Freud and Lacan, remains unnamed, under erasure (per Lacan). Paternal law, absent the lawful third space of the feminine, is rendered impotent, itself castrated, and thus prone to brute enactments of omnipotent unwritten law, the sort displayed by the Dobbs decision.

In an apparently unconscious move, Freud's obscuration of the vaginal was mitigated by the signature status afforded the unnamed "missing signifier" of free association. Feminine law restores these links between the signifying gaps and the unsignified feminine, revealing the latter's eruptive and motivic force, while enabling the symbolic exercise of freedom in a relationship of accountability to disavowed truths. In turn, an unwritten feminine law offers psychoanalysis—and the Constitution—a path forward beyond the travesty of Dobbs, a means of redeeming paternal law. To achieve this vision, jurisprudence—be it in the clinic or in the courts—must be guided by what enables the symbolic exercise of freedom, including positive levers that open robust inclusive spaces for disavowed and disinherited voices, and sensuous, ancestral textures and truths of the bodily Real, its unspoken traumas, its animating, uncapturable energy and *fertility*. Democracy—currently captive to and degraded by white heteropatriarchy's exiling and repudiation of the feminine (Gentile, 2018, 2022, 2023), along with all expressions of otherness, those at the cross-section of the feminized and racialized most profoundly—desperately needs this encounter with otherness if it is to resuscitate itself.

Despite their pronouncements that they are dedicated to the life of the unborn, and that their decision aims to return the abortion decision to the rule of the people, Justice Alito and his coterie reveal the hypocrisy at the heart of their conception of democracy, freedom, and of what it means to be "pro-life." Invested in controlling women's bodies, and the bodies of other people who can become pregnant, unborn life becomes a form of stillbirth, or perhaps of a future life "conscripted and condemned" if not to slavery (Hartman, 2016, p. 168), to serving yet again the agenda of a master. Far from democracy and the reproduction of "life," symbolic life (the only realm for life, beyond brute, material or omnipotent conditions) is annulled. What is instead sought in this state of ontological erasure and terror (Warren, 2018) is the eternal permanence (i.e., autocracy) of a masculinist order which precludes and excludes the reproductive freedom of the other, and hence, new life: the birth of otherness.

Meanwhile, we are living "in the wake," to borrow again from Christina Sharpe, sustaining a modern-day *middle passage*, wherein the *nowhere* of the slave ship and the ontology of the black feminine or maternal meets the "nowhere"[1] or "nothing" of the female sexed body, its unnamed vaginal signifier, and the suspended lives of too many women and others who might become pregnant. As the historian Gerda Lerner (1986) determined, patriarchy was founded upon the enslavement of women, and the exploitation—which is to say, "owning the means of production"—of her sexual and reproductive capacities. And no more so than upon racial slavery, in which, as Saidiya Hartman (2016, p. 168) notes, "subjection was anchored in black women's reproductive capacities." Lerner concluded that patriarchy, though naturalized, is a human invention. It has a beginning, and, one day, will have an end. Perhaps that end is near. Just beyond *this* middle passage.

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[1] Elsewhere (Gentile, 2017), I analyze Donald Trump's preoccupation with the unnamed signifier of the vaginal, and his insistence on Obama's birth coming out of "nowhere." Though commonly interpreted as a racial slur intended to cast doubt on Obama's birthplace, it also more insidiously called into question the "nowhere" of his mother's (white) vagina, racialized by a black man, not irrelevant to the plotline of Trump's election—nor, I might add, to the current makeup of the Supreme Court. On the "nothing" of the female sexed body, see Gentile, 2016, pp. 153–155 and Gentile, 2015b.

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