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Slavery Rhetoric and the Abortion Debate

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INTRODUCTION

There are many things that could be, and have been, said about the question of abortion. This article focuses on the rhetoric of the abortion debate. Specifically, I discuss how both sides of the abortion debate have appropriated the image of the slave and used that image as a rhetorical tool, a metaphor, in making legal arguments. Further, I examine the effectiveness of this metaphor as a rhetorical tool. Finally, I question the purposes behind this appropriation, and whether it reflects a lack of sensitivity to the racial content of the appropriated image.

“Rhetoric” is a term that is experiencing something of a rebirth in legal discourse. While it retains for some an explicitly pejorative meaning, that of empty, inflated oratory, a number of legal commentators have recently returned to a study of rhetoric as part of the larger inquiry into the language of law. As James Boyd White points out, the classical definition of rhetoric is “the art of persuading the people about matters of justice and injustice in the public places of the state . . .” In this classical sense, rhetoric persuades by appeals to reason, the emotions, or ethics. In these terms, law is practically synonymous with rhetoric. Those who practice law seek to persuade about matters of
justice and injustice; the means of persuasion involve, certainly, reason and ethics, and less explicitly, the emotions.

Law also shares with rhetoric the attribute of simultaneously focusing and limiting understanding. Legal rhetoric, like rhetoric generally, determines not just how we say what we say, but what it is that we say—how we see the world, how we think about it and explain it, how we conceive of ourselves and others and our relationships with others.5

The down side of this observation is that if legal rhetoric allows us to see, think, and say certain things, it also tends to impede us from seeing, thinking, and saying other things.6

Similarly, for many, metaphors are seen as "mere" figures of speech, of interest primarily to poets and English teachers. Metaphors entail more than this, however; metaphors create meaning. They are central to a culture’s concepts, values, and structures. The role of metaphor in the creation of meaning is explored in a provocative book, Metaphors We Live By, by George Lakoff and Mark Johnson.7 As an example of the way in which metaphors are central to a culture’s concepts and values, the authors point to the common metaphor “time is money.”8 This basic metaphor shapes our language in many ways: we spend, invest, waste, and budget our time. More surprisingly, this metaphor structures many aspects of our daily lives. Not only do we talk about time as if it were a valuable commodity, we act as if it were;9 lawyers, for example, bill on the basis of time.

But time, of course, is not money; thinking of it as money “isn’t a necessary way for human beings to conceptualize time.”10 The metaphorical conception of time as money is a reflection of our industrial-
ized culture and the values that it espouses,\textsuperscript{11} such as productivity and materialism. Other cultures conceive of time in other ways, reflecting other cultural values.\textsuperscript{12}

Similarly, metaphors create meaning in law. Legal reasoning is analogical, which is to say that it is metaphorical. The metaphor that symbolic acts are speech has allowed the Supreme Court to extend First Amendment protection to the wearing of black armbands.\textsuperscript{13} Likewise, lawyers have argued that oil and gas are comparable to rabbits and foxes.\textsuperscript{14} Lawyers could not argue cases and judges could not decide them without using metaphors.\textsuperscript{15}

Ironically, both anti-abortion and pro-choice advocates\textsuperscript{16} have used slave metaphors in legal arguments in cases and law review articles dealing with abortion. The competing slave metaphors in legal discourse reflect the struggle that is being played out in contemporary culture over the meaning of abortion. The competing metaphors are weapons on a battlefield (another metaphor)\textsuperscript{17} with the stakes being the hearts

\begin{itemize}
\item \textsuperscript{11} \textsc{Lakoff & Johnson, supra note 7, at 9.}
\item \textsuperscript{12} \textsc{Lakoff & Johnson, supra note 7, at 9. For example, cultures more connected to the land than our own urban, industrialized culture may conceive of time as cyclic, productive periods alternating with fallow periods. \textit{See, e.g., Eccles. 3: 1–8 (“To everything there is a season . . .”).}}
\item \textsuperscript{13} \textsc{Tinker v. Des Moines Indep. Commun. Sch. Dist., 393 U.S. 503, 505 (1969) (wearing of black armband by student is protected by First Amendment).}
\item \textsuperscript{14} \textsc{Richard A. Posner, Law and Literature: A Misunderstood Relation 2 (1988). \textit{See also} Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204, 206 (K y. 1934) (comparing natural gas to fox or fish); Lone Star Gas Co. v. Murchison, 355 S.W.2d 870, 875–77 (Tex. Civ. App. 1962) (citing numerous references comparing natural gas to wild animals, as well as references criticizing the analogy).}
\item \textsuperscript{15} \textit{But cf:} Posner, supra note 14, at 2–3. Posner argues that there is a difference between the poet’s use of metaphor and simile and the lawyer’s use of reasoning by analogy. The poet compares things that are dramatically, even shockingly, unlike in order to create an effect of vividness and novelty, while the lawyer argues for the likeness of things that at first appear different in order to fit within precedent.
\item \textsuperscript{16} It is impossible to discuss abortion without identifying the sides to the debate. But how to identify each side is itself a loaded rhetorical question. After agonizing over the array of choices, all of which seem problematic, I will use the term “anti-abortion” for those who want access to abortion limited to a few narrowly defined circumstances such as rape, incest, or saving the mother’s life, and the term “pro-choice” for those who want access to at least early abortions left to the woman’s unfettered discretion.
\item \textsuperscript{17} “The very deliberate choice of war rhetoric [in the abortion debate] perfectly embodies the message that this is a war with battles to be fought, skirmishes to be won or lost, an enemy to be defeated, and lives at stake.” \textsc{Annette E. Clark, Abortion and the Pied Piper of Compromise, 68 N.Y.U. L. Rev. 265, 298 (1993) (footnote omitted).}
\end{itemize}
I. SLAVERY RHETORIC IN THE ABORTION DEBATE

Pro-choice advocates have analogized the situation of the pregnant woman denied access to abortion to that of the slave. Both pregnant woman and slave, so the argument on this side runs, endure a condition of “forced labor.” The argument that the “forced labor” of an unwanted pregnancy is unconstitutional under the Thirteenth Amendment, which prohibited the “forced labor” of the slave, has been raised in litigation, albeit unsuccessfully.

Andrew Koppelman has written the most thorough explanation of this metaphor. He summarizes the argument thus: “Laws against abortion define women as a servant caste and enforce that definition with criminal sanctions. This is the same kind of injury that antebellum slavery inflicted on blacks, and it therefore violates women’s thirteenth amendment rights.”

This metaphor, like all metaphors, highlights similarities while obscuring differences. Thus, under this argument, an unwanted pregnancy is like slavery in that both entail an element of compulsion, one person being made to support another. Both can be perceived as a shameful or humiliating condition, leading to a desire for escape, even

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18. In this use of the metaphor, patriarchy stands in for the slave system; implicitly, anti-abortion legislators stand in for the slaveholder.
19. The Thirteenth Amendment states:

   Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

   Section 2. Congress shall have power to enforce this article by appropriate legislation.

   U.S. Const. amend. XIII.


22. Koppelman, supra note 20, at 485.
if escape is unlawful. In both cases, "escape" historically has been supported by an extralegal "underground." Finally, both can involve feelings of salvation and relief upon escape from the condition. The metaphor, however, masks the distinction that the slave had no choice in the condition of slavery, while in most cases the woman had some choice in the pregnancy. In most cases slavery was a life-long condition, while pregnancy is of limited duration.

The metaphor on the anti-abortion side of the debate is more complex. It contains both an explicit and an implicit analogy. The explicit analogy is between Roe v. Wade and Dred Scott v. Sandford. The implicit analogy is between an unborn child and a slave.

For anti-abortionists, Roe is the Dred Scott of our time. Roe held that the Constitution protects a woman's decision to terminate her pregnancy prior to viability. Dred Scott held that the descendants of African slaves were not citizens, and further, that a slave did not become free even after he or she had resided in a state or territory prohibiting slavery. Ronald Reagan compared the two cases, stating: "[Roe] is not the first time our country has been divided by a Supreme Court decision that denied the value of certain human lives. The Dred

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25. Obviously, the woman's part in the pregnancy covers a wide spectrum of actions, some of which can be described as chosen, some of which are not likely to be so described. A pregnancy resulting from rape is in no sense a consequence of the woman's choice, while a pregnancy resulting from unprotected intercourse could be described as a preventable, even if unintended, consequence of the woman's choice. Unpacking "choice" even further, we can ask how free the choice to engage in unprotected intercourse was; the question remains relevant because for some women, in some circumstances, there is a significant disparity in power between the sexes, rendering the concept of choice vis-à-vis sexual intercourse problematic. See, e.g., Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 61 (1987) ("Those who think that one chooses heterosexuality under conditions that make it compulsory should either explain why it is not compulsory or explain why the word choice can be meaningful here.").

26. "Motherhood" in the sense of having a child, however, is life-long, even for mothers who give up their children for adoption.


28. 60 U.S. 393 (1857).

29. Roe, 410 U.S. at 153-54 (constitution protects woman's decision to terminate pregnancy); 163-64 (state may proscribe abortion after viability).


31. Dred Scott, 60 U.S. at 452-53.
Scott decision of 1857 was not overturned in a day, or a year, or even a decade.”

Imbedded within the explicit analogy between Roe and Dred Scott, however, is the implicit comparison between unborn child and slave. Just as the law denied the humanity of the slave in the years before the Civil War, so the argument goes, the law denies the personhood of the unborn child by allowing abortion. George Swan articulated this analogy between unborn child and slave in a 1980 law review article in which he argues that abortion violates the Thirteenth Amendment because the unborn child’s life is subject to the will of another, the mother.

Again, the metaphor both highlights and obscures. The unborn child is like the slave in that both exist at the will of another, both have no or few legal rights, and both had no choice regarding their condition. What the metaphor obscures is that “fetushood” is both temporary and common to all humans, while slavery was mostly permanent and limited to a certain class. Moreover, slaves were compelled to work for another, while the unborn child is not similarly exploited.

The anti-abortion metaphor appears in Justice Scalia’s dissenting opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey. In Casey, the Court reaffirmed the “essential holding” of Roe v. Wade, “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.”

Justice Scalia compares the Casey decision to the nineteenth-century case of Dred Scott, which he refers to several times throughout his dissent. He quotes a “warning” from the dissent in Dred Scott about the dangers of abandoning a strict interpretation of the Constitution, which

34. For an excellent discussion of Justice Scalia’s dissent, see Jamin B. Raskin, Roe v. Wade and the Dred Scott Decision: Justice Scalia’s Peculiar Analogy in Planned Parenthood v. Casey, 1 Am. U. J. Gender & L. 61 (1993) (arguing that Roe and Dred Scott are methodological and jurisprudential opposites and not analogous).
36. Casey, 112 S. Ct. at 2804.
he then applies to Caseys plurality opinion. Later, he criticizes the Court's stance that reaffirming Roe was necessary because any other course would subvert the Court's authority. Scalia argues that, on the contrary, "the Court was covered with dishonor and deprived of legitimacy by Dred Scott . . . an erroneous (and widely opposed) opinion that it did not abandon. . ."38

Finally, Scalia subtly invokes an analogy between abortion and slavery in a remarkable passage. He begins by opining that, given Caseys "length, and what might be called its epic tone,"39 the Court believed that its decision would end the abortion controversy. He then launches into what at first seems to be a non sequitur: the description of a portrait hanging in Harvard Law School. The passage is worth quoting in full:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in Dred Scott. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There

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37. As Scalia states:

Justice Curtis's warning is as timely today as it was 135 years ago:

[When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Casey, 112 S. Ct. at 2876 (Scalia, J., dissenting) (quoting Dred Scott v. Sandford, 60 U.S. 393, 621 (1857) (Curtis, J., dissenting)).

38. Casey, 112 S. Ct. at 2883. Parenthetically, and ironically, Scalia suggests that Dred Scott relied upon the same concept of substantive due process that the Casey plurality relies upon to justify its abortion decision. Casey, 112 S. Ct. at 2883. But cf: Raskin, supra note 34, at 68 ("The essential holding in Dred Scott had nothing to do with substantive due process. It was a jurisdictional decision, turning on whether an African-American could be a federally recognized 'citizen' of a state for the purpose of establishing diversity jurisdiction in federal court." (footnotes omitted)).

seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by Dred Scott cannot help believing that he had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind.40

The passage is remarkable for several reasons. First, Scalia gives a reading of “profound sadness and disillusionment” to the portrait.41 A survey of Taney portraits (which Scalia almost invites) reveals that Taney almost invariably wore a lugubrious expression.42 Assuming that Taney is indeed depressed in the Leutze portrait, Scalia assigns his sadness to the consequences of the Dred Scott decision, which he sees “burning on [Taney’s] mind.”43 An equally plausible explanation could be found in Taney’s personal life, which in 1855 had been torn apart when his wife and youngest daughter died just a few hours apart.44 Next, Scalia implies that Taney shared the view that “his great Chief Justiceship [had been] eclipsed” by Dred Scott. It is not at all clear, however, that Taney came to regret Dred Scott, even after the outbreak of the Civil War.45 Finally, there is Scalia’s simplistic suggestion that the Dred Scott opinion “caused” the Civil War. While dissatisfaction with the decision might legitimately be considered one of many factors that led to armed insurrection, it was not the precipitating cause.46

Scalia’s dissent is a perfect example of what Wetlaufer identifies as

40. Casey, 112 S. Ct. at 2885.
41. Casey, 112 S. Ct. at 2885.
42. E.g., Frank B. Latham, The Dred Scott Decision March 6, 1857, at cover, 26 (1968); Martin Siegel, The Taney Court 1836–1864, at 241 (1987); Bernard C. Steiner, Life of Roger Brooke Taney: Chief Justice of the United States Supreme Court 418 (1922); Carl B. Swisher, Roger B. Taney, facing 554 (1935); Carl B. Swisher, The Taney Period 1836–64, following 236 (1974).
43. Casey, 112 S. Ct. at 2885.
45. Fehrenbacher, supra note 44, at 559–61 (documenting evidence that Taney’s fierce hostility to the anti-slavery cause arose from his loyalty to Southern lifestyle and values).
46. Fehrenbacher, supra note 44, at 562–67 (arguing that the Republican victory in the 1860 presidential campaign was the precipitating cause of the secession crisis, and that Dred Scott had no clear impact on Lincoln’s victory).
“the rhetoric of politics and not the rhetoric of law.” By comparing *Casey* to *Dred Scott*, Scalia implies that future generations will castigate the *Casey* opinion for its refusal to recognize fetal rights, just as future generations criticized *Dred Scott* for its failure to recognize the slave’s rights. Perhaps Justice Scalia meant to compare the *Dred Scott* Court’s refusal to allow the states to resolve the slavery issue with the *Roe* Court’s refusal to allow the states to resolve the abortion issue. However, the heightened rhetoric of his dissent suggests that he intended to tap into the more emotional issues of personhood that underlie both cases.

II. EFFECTIVE RHETORIC

In one sense, the reference to slavery in the abortion context is appropriate. Not since the national debates over slavery has this country found itself so divided over an issue involving fundamental concepts of personhood. Moreover, both issues have created intense disagreement whether the issue should be resolved politically, by the elected representatives, or judicially, by the courts.

At the same time, this appropriation of the image of the slave is curiously ironic because it occurs in the privileged discourse of law. By privileged, I mean that legal discourse is largely limited in its accessibility. To be fluent in “legalese,” it is ordinarily necessary to have attended law school, which is a post-graduate institution of limited

47. Wetlaufer, *supra* note 1, at 1563 (“Thus we find the dissenting justice speaking directly to the people, Congress, and lawyers of the future, speaking against closure, and seeking to cause people to identify with his position and to change what is now the law.”).

48. See Raskin, *supra* note 34, at 64 (“Justice Scalia dresses up and takes to Court the pro-life movement’s pet analogy between the nineteenth-century right to own slaves and the twentieth-century right to have an abortion.” (footnote omitted)).

49. Many beginning law students have shared the experience of being unable to comprehend the first case assigned:

OK. It was nine o’clock when I started reading. The case is four pages long and at 10:35 I finally finished. It was something like stirring concrete with my eyelashes. I had no idea what half the words meant. I must have opened *Black’s Law Dictionary* twenty-five times and I still can’t understand many of the definitions. There are notations and numbers throughout the case whose purpose baffles me. And even now I’m not crystal-clear on what the court finally decided to do.

enrollment and considerable expense. Thus, the legal discourse of cases, statutes, and law review articles employs a language addressed to and used by an “elite.”

By privileged, I also mean that legal discourse is the language of power, the power to deny or recognize rights. The abortion debate is a struggle between two competing images of power and rights. The pro-choice side focuses on the rights of the individual woman, giving her the power to end her pregnancy. The anti-abortion side focuses on the rights of the fetus, denying the woman’s power to end the pregnancy.

The slave, legally defined as chattel or property, had “no rights which the white man was bound to respect,” and thus the slave is the “image” of legal powerlessness. It seems strange that both sides in this power struggle should want to appropriate the quintessential image of powerlessness.

The strangeness of the appropriation fades, however, if the use of slavery is evaluated from the perspective of rhetoric. From this perspective, the “slave” can be seen as an extraordinarily persuasive metaphor because it can include all three types of appeals: logical, emotional, and ethical.

A. Appeal to Logic

Pro-choice rhetoric analogizes the woman faced with an unwanted pregnancy to the slave. The logical appeal hidden within this analogy runs something like this: a slave is compelled to render services for another; prohibiting abortion compels the pregnant woman to render service to another, the unwanted child; therefore, a woman who is compelled to bear an unwanted child is a slave.

Conversely, anti-abortion rhetoric analogizes the unborn child and the slave. The implicit logical appeal is: a slave is a living individual

51. In 1993, tuitions at A.B.A.-accredited law schools ranged from approximately $1,300 to approximately $20,000 annually. REVIEW OF LEGAL EDUCATION, supra note 50, at 4–63.
52. This is an example of how “rights talk” breeds counter-rights. See, e.g., CAROL SMART, FEMINISM AND THE POWER OF LAW 146–52 (1989).
54. See supra notes 1–3 and accompanying text.
55. See Koppelman, supra note 20, at 484–85.
who is legally compelled to hold his life at the will of another; the unborn are living individuals whose lives are held at the will of others; therefore, unborn children are slaves.56

B. Appeal to the Emotions

Images of the slave and the abuses of slavery carry a powerful emotional charge for white and black people in this country. Harriet Beecher Stowe’s fictional slave narrative, Uncle Tom’s Cabin,57 “became the second most popular book in the world after the Bible.”58 One need look no further than the success of the novel and mini-series Roots59 to see evidence of the continuing hold which slavery has on our collective imaginations. The power that this imagery still holds was also revealed in Justice Clarence Thomas’ confirmation hearings, where Justice Thomas successfully defended himself by invoking a lynching metaphor rooted in the abuses of slavery.60 The image of the slave in the abortion debate taps into this same emotional history.

C. Appeal to Ethics

In their recent book, Elizabeth Mensch and Alan Freeman explore the “peculiar political power” of two other metaphors that appear in abortion rhetoric: Nazism and the civil rights movement.61 They point out

56. Swan, supra note 33, at 4.
57. Harriet Beecher Stowe, Uncle Tom’s Cabin (1851–52).
60. In a prepared statement, Thomas stated:

I think that this today is a travesty. . . . And from my standpoint, as a black American . . . it is a message that unless you kowtow to an old order, this is what will happen to you. You will be lynched . . . by a committee of the U.S. Senate rather than hung from a tree.

61. Mensch & Freeman, supra note 32, at 9. Other metaphors operate in the abortion debate as well. See, e.g., Ruth Macklin, When Human Rights Conflict: Two Persons, One Body in, Defining Human Life: Medical, Legal, and Ethical Implications 225, 229-37 (Margary W. Shaw & A. Edward Doudera eds., 1983) (discussing several pregnancy analogies: Siamese twins, multiple personalities, and the well-known analogy devised by Judith Jarvis Thomson involving a famous violinist whose survival depends on being attached to another’s kidneys for nine months);
that both sides of the abortion debate have employed these images “to recapture the moral certainty”62 those images create:

To name one’s opponent a Nazi, with any credibility, is to suspend the usual rules of discursive engagement. The Nazi is denied respect, subjected to name-calling, vulnerable to extra-legal tactics, and must be opposed by all persons of conscience and good will. . . . Similarly, if inversely, to appropriate to one’s cause the aura of the civil rights movement is to demand the unquestioning allegiance of people of goodwill and conscience, to call for a vigorous and singular activism. That activism may include civil disobedience or other extra-legal activity, for even formally legitimate legal obstacles are rendered fundamentally illegal.63

The slave image contains within itself both the reflexive disgust triggered by the Nazi image and the equally reflexive support triggered by the civil rights image. To name someone a Simon Legree64 is to demonize him in the same way as naming him a Nazi, while the abolitionists claim the same high ground as the civil rights movement.

The slave metaphor also appeals to the same sense of moral certainty. I suspect that most white people today believe that they would have opposed slavery had they been living in antebellum times. Perhaps they would have, but perhaps they are underestimating the power of racism. In fact, history provides many examples of lawyers who believed

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63. Mensch & Freeman, supra note 32, at 9. The authors also note that the comparison between abortion and Nazism may be offensive to some Jews, as it trivializes the Holocaust and “debase[s] Jewish history by exploiting it for sectarian Christian goals.” Mensch & Freeman, supra note 32, at 26. See also Mensch & Freeman, supra note 32, at 171 n.11. Analogous arguments can be made about the comparisons between abortion and slavery. See infra notes 70–71, 80–82, 84–86 and accompanying text.

Curiously, Mensch and Freeman do not explore the slave image, except for one passing mention: “For the pro-life side, fetuses are not just victims, but also persons awaiting legal recognition of their true personhood, like slaves before the Civil War . . . .” Mensch & Freeman, supra note 32, at 10.

64. Simon Legree is the villain of Uncle Tom’s Cabin, the man responsible for the death of Uncle Tom. Beecher Stowe, supra note 57.
slavery was wrong and yet found themselves “bound by law” to uphold it. Nevertheless, because today we do have consensus on the issue of slavery, it looks “easy” and we “know” which was the side of the angels. Once the analogy, either between the slave and the pregnant woman or between the slave and the unborn child, is accepted, the resolution of the abortion question becomes “easy” because we now know which side is right.

III. A PROBLEMATIC METAPHOR

Racism infected both sides of the slavery question. Slaveowners justified their subjugation of their slaves by claiming that the African was naturally inferior. Many abolitionists, although opposed to the concept of owning another human being, “drew the line at social equality between the races,” and often refused to live or work with freed African Americans.

The poison of racism lingers to this day. Therefore, the question

65. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 230 (1975). In antebellum times, one could find judges who took the position that, although they personally disapproved of the institution and would never themselves own slaves, they lacked the right to outlaw slavery. See State v. Mann, 13 N.C. 263, 268 (1829) (abolitionist judge determines he is compelled “to recognise the full dominion of the owner over the slave”). One can draw comparisons, and the anti-abortionists do, with those who identify as pro-choice, but nevertheless express disapproval of abortion and would never themselves consider having one.

66. See Dred Scott v. Sandford, 60 U.S. 393 (1857). In Dred Scott, Chief Justice Taney, himself a former slave owner who had manumitted his slaves, referred to slaves “as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . .” Dred Scott, 60 U.S. at 407.


68. One historian of the Dred Scott decision has stated: “For proof of the Negro’s degraded status, [Taney] relied heavily upon examples taken from the free states. Without the northern record of increasing discrimination he would have found it much more difficult to exclude Negroes from citizenship.” FEBRENCHBACH, supra note 44, at 5. See also FEBRENCHBACH, supra note 44, at 429 (“The record of racial discrimination throughout most of the North laid [Northern anti-slavery Republicans] open to charges of hypocrisy in their expressions of sympathy for the slave . . . .”). Fehrenbacher also quotes from what he identifies as Abraham Lincoln’s first public comment on Dred Scott, where Lincoln argued that miscegenation was an evil by-product of slavery and referred to the “natural disgust in the minds of nearly all white people, to the idea of an indiscriminate amalgamation of the white and black races.” FEBRENCHBACH, supra note 44, at 436. Lincoln ended by “disclaiming any wish to have a Negro woman either for a slave or for a wife.” FEBRENCHBACH, supra note 44, at 436.
must be raised whether racism underlies the current use of the slave metaphor in the abortion debate.

Slavery rhetoric in the abortion debate turns upon the use of metaphor: either the pregnant woman is like the slave, or the unborn child is like the slave. Whether one focuses on pregnant women or unborn children, by comparing them to slaves the message is that they have been wronged, that their rights must be recognized, and that they must be protected. Shifting the focus off the pregnant woman and the unborn child and onto the slave, however, sends a different message: slavery is like an unwanted pregnancy; the slave is like a fetus. Focusing on what these metaphors say about the African-American slave highlights the hidden racial content of the messages.

A. An Objectionable Comparison

When anti-abortionists argue, as one law professor recently did, that the "small, voiceless, defenseless, and completely vulnerable" unborn child makes "the same silent claim on our social and moral responsibilities that Southern slaves made to Northern abolitionists," the imbedded message about African Americans is objectionable. To analogize the slave to the helpless, irrational (because pre-rational), voiceless and utterly dependent fetus reflects, at best, an unconscious paternalism and, at worst, a comparison that is as offensive as the antebellum legal analogy of the slave to a horse or cow.

The fetus is voiceless and dependent, not because the law renders it so, but because the fetus has not developed biologically to that point where speech or autonomy is possible. Some nineteenth-century slaveholders argued that African slaves were dependent because as a

69. Cf. Angela Y. Davis, Women, Race & Class 34 (1981) (In comparing marriage to slavery, nineteenth-century white women "seem to have ignored . . . that their identification of the two institutions also implied that slavery was really no worse than marriage.").

70. Lynn D. Wardle, Hiding Behind a False Morality, NETWORK, Dec. 1992, at 4 (Letter to the Editor). (Lynn Wardle is a professor at the J. Reuben Clark School of Law, Brigham Young University.) He has also compared the Freedom of Access to Clinic Entrances Act with attempts in the 1830s to suppress anti-slavery publications and petitions. See Lynn D. Wardle, Pro-Life Speech Curb Is Modern 'Gag Rule,' SALT LAKE CITY TRIB., June 10, 1994, at A23. For other examples of anti-abortion rhetoric that uses the analogy between fetus and slave, see Raskin, supra note 34, at 64 n.11.

71. See Dred Scott v. Sandford, 60 U.S. 393 (1857).

72. Such a description is of course problematic, as it could just as accurately be said that the white plantation owner was dependent on the unpaid labor of his slaves.
race they had not developed as far as whites, but today we see that, to the extent we can describe slaves as “dependent,” that dependency was the consequence of law and society, and not of biological constraints.

The criticism directed toward the hidden racial content of the fetus/slave analogy became public during Justice Ruth Bader Ginsburg’s confirmation hearings. During the questioning of then Judge Ginsburg on the subject of abortion, Senator Orrin Hatch drew some of the same connections between Roe and Dred Scott that Justice Scalia had used in his Casey dissent. Senator Carol Moseley-Braun interrupted, saying that she found his line of questioning “personally offensive,” that as “the only descendant of a slave... in this body” she found it “very difficult... to sit here and... quietly listen to a debate that would analogize Dred Scott and Roe v. Wade.” It would be a mistake, of course, to generalize from Senator Moseley-Braun’s comments; she was not speaking on behalf of all blacks. The point is, however, that the analogy between slave and fetus has the power to offend.

B. Feminism’s Failure of Inclusivity

As a white, pro-choice, feminist, I am more concerned with, and more troubled by, a similar critique of the analogy between the pregnant woman and the slave. The pro-choice side of the abortion debate, and feminists more generally, have been criticized for fostering racism and classism because they tend to focus on issues important to white,

74. While questioning Judge Ginsburg, Senator Hatch stated: “But in my view, it’s impossible as a matter of principal to distinguish Dred Scott v. Sanford [sic]... from the court’s substantive due process privacy cases like Roe v. Wade. The methodology is the same. The difference is only in the results, which hinge on the personal, subjective values of the judge deciding the case.” Confirmation Hearings, supra note 73.
75. Confirmation Hearings, supra note 73.
76. Wetlaufer notes that:

[T]he legal scholar adopts a voice that is objective, neutral, impersonal, authoritative, judgmental, and certain. It is a disembodied voice that implicitly denies any contingency upon the cultural or personal circumstances of the author... If we anywhere acknowledge our personal relationship to the problems about which we are writing, we do so not in the text, not even in a note to the text, but in the author’s note... By this avoidance of the personal voice, we preserve the rhetorical integrity of our implicit claim that what we say in the text is objective, neutral, noncontingent, and wholly rational.

Wetlaufer, supra note 1, at 1568-69 (citations omitted).
middle-class women. As Charlotte Rutherford has noted, for many poor women, who are disproportionately women of color, the “right” to abortion has looked more like a “privilege” reserved for those who could afford it. Some support for this criticism can be found in the rhetoric of the plurality opinion in Casey, which states: “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” It is not hard to imagine those “women” who are participating “equally” in the “economic and social life of the Nation” as being primarily white, educated, and middle-class.

Some have argued that racism underlies the pro-choice side’s use of the slave metaphor. According to Joyce McConnell, in her article Beyond Metaphor, “[n]o matter how rhetorically useful this metaphor ["women are slaves"] may . . . seem now, it . . . remains grossly inaccurate and inherently racist.” There are actually two prongs to her critique. One prong argues that the analogy between an unwanted pregnancy and slavery is inappropriate because, no matter how repugnant the idea of forced pregnancy may be, it is not comparable to a lifetime of slavery. The descendants of slaves could be offended by the

78. Rutherford, supra note 77, at 281. See also Roberts, Future of Choice, supra note 77, at 64 (noting that for poor women, Roe “is worse than an abstract right; it is a cruel deception”).
81. McConnell, supra note 80, at 207–08.
82. McConnell, supra note 80, at 208.
comparisons to slavery that surface in the abortion debate because, from their perspective, there is no equivalency. To suggest that the life-long and all-encompassing condition of the slave is comparable to the temporary condition of pregnancy, or to imply that the degradation and abuse that slaves endured is comparable to the impositions of an unwanted pregnancy, can be seen as trivializing the enormity of the injury that generations of slavery inflicted upon African Americans.

The defenders of the pregnant woman/slave metaphor would no doubt argue, as Koppelman has done, that while "[t]he injury inflicted on women by forced motherhood is lesser in degree than that inflicted on blacks by antebellum slavery, since it is temporary and involves less than total control over the body," nevertheless, "it is the same kind of injury."83 This argument, however, does not address the other, more troubling, aspect of McConnell’s critique.

The second prong of her criticism is that the slave metaphor ignores the historical truth that white women benefited from the slave system at the expense of African-American women.84 McConnell charges that white women, who benefited as a class from the institution, exploit black history when they argue that compelled motherhood is slavery.85 Susan Sniader Lanser, a literary scholar, makes the same point when she refers to “the problematic history of white women’s appropriation of slavery by analogy,” by which she means “the use of analogies with slavery not as a way of combating slavery but as a way of legitimating women’s rights.”86

This “history of appropriation” extends back over 150 years, to the middle of the nineteenth century. Sniader Lanser voiced her critique in a discussion of an 1832 text in which the author referred to a housewife as a “menial slave.”87 As early as 1838, Sarah and Angelina Grimké had drawn the comparison between the status of women and slaves.88 At
the Seneca Falls Convention of 1848, the first public meeting on women’s rights (which no black women attended), patriarchal marriage was described as giving the husband the rights of a slaveowner over the wife. After the Civil War, slavery/freedom became the “ruling paradigm” of the women’s rights movement.

The appropriation of the slave image by early feminists “grew naturally from the early ties with the abolitionist movement.” In the 1840s and 1850s, the movements for women’s rights and the rights of African Americans overlapped to a considerable degree. To a great extent, the suffragists were veterans of the abolitionist movement. For many suffragists, their speaking and campaigning against slavery became their initiation to “public” life.

But the appropriation of slavery rhetoric was also problematic; as Sniader Lanser has observed, feminists’ use of the slave analogy “tended to work more to the benefit of white women than to that of slaves.” During the same period of overlap between suffragism and abolition, the tensions between suffragism and black civil rights were also becoming visible. Sexism appeared in the way women were frequently relegated to “supporting” functions in abolitionist societies. “By the mid-1830s, abolitionists engaged in heated debates about whether women

89. DAVIS, supra note 69, at 57; YEE, supra note 67, at 140.
91. Clark, supra note 90, at 11. As an example, Clark notes that an article in the women’s paper, The Revolution, was entitled The Slavery of Women. Clark, supra note 90, at 13.
92. Clark, supra note 90, at 11. See also DAVIS, supra note 69, at 39–40 (describing how the abolitionist movement raised white, middle-class women’s consciousness about their own oppression and gave them the political skills to challenge it).
93. YEE, supra note 67, at 137.
94. DAVIS, supra note 69, at 39–40.
95. SNIADER LANSER, supra note 86, at 14 n.21. See also YEE, supra note 67, at 136 (noting that white women abolitionists did not always acknowledge their own racism).
96. See infra notes 97–101 and accompanying text.
should participate in ‘male’ activities for the sake of the cause.”97 In 1840, after a woman was elected to the Business Committee of the American Anti-Slavery Society, those opposed to linking the “woman question” to the issue of slavery walked out of the convention and organized a rival abolitionist group.98

Racism appeared in the way white suffragists prioritized their issues. By 1854, the black abolitionist Frederick Douglass, who considered himself a “women’s rights man,”99 was publicly quarrelling with white suffragists who spoke to audiences from which African Americans were banned.100 As was noted above, some abolitionist societies excluded blacks; others included blacks but members sat in halls segregated by race.101

After the Civil War, with the push for the adoption of the Fifteenth Amendment which would give African-American men the right to vote, the tensions between gender and race came to the forefront.102 By 1869, “political expedience” caused most black men, including Frederick Douglass, to abandon women’s suffrage.103 Suppressed racism rose to the surface as some white, middle- and upper-class suffragists voiced outrage that uneducated African-American men might receive the vote before they did.104 Some even went so far as to make common cause with former slaveowners by arguing that, if women were given the vote, the combined white vote would defeat the combined black

97. Yee, supra note 67, at 7.
98. Yee, supra note 67, at 7; Frederick Douglass, Frederick Douglass on Women’s Rights 7 (Philip S. Foner ed., 1976).
100. “When she learned that colored people were to be excluded from her lecture . . . Miss Stone should have felt herself excluded.” Douglass, supra note 98, at 68.
101. Yee, supra note 67, at 95.
102. Davis, supra note 69, at 70.
103. Yee, supra note 67, at 138, 147.
104. In late 1865, Elizabeth Cady Stanton, objecting to suffrage for black men without suffrage for women, wrote:

[N]ow, as the celestial gate to civil rights is slowly moving on its hinges, it becomes a serious question whether we had better stand aside and see ‘Sambo’ walk into the kingdom first . . . In fact, it is better to be the slave of an educated white man, than of a degraded, ignorant black one . . . .

Davis, supra note 69, at 70–71. See also Douglass, supra note 98, at 26. See generally Yee, supra note 67, at 90–95, 105, 140–41, 149 (discussing racism in the movement for women’s suffrage).
The racism of white feminists and the sexism of black male leaders put black women in a difficult position. A few, like Sojourner Truth, addressed both issues by speaking out to white suffragists about their racism and to black male civil rights leaders about their sexism. Others, if forced to choose, supported civil rights over “the lesser question of sex.” But, it is likely that many others were silenced by the dual betrayal, from white women and black men, and torn by their sense of conflicting loyalties.

Given such historical tensions, it behooves pro-choice white women using the slavery metaphor to ask whether they are being racist. The unthinking appropriation of the slave metaphor by white women for their own political purposes is symptomatic of a larger problem: too often when we speak of “women’s rights,” the women we are thinking of are all white. As Snider Lanser has noted, “contemporary analogies between ‘women’ and ‘blacks’ . . . risk erasing black women because ‘women’ comes to imply white women, and ‘blacks,’ black men.”

White women must also question whether the interests of African-American women are being incorporated into the reproduction debate. Some African-American women look at the statistics for teenage pregnancies and want the emphasis shifted from abortion to education and access to contraception. Some see other reproductive issues, such as the disproportionate number of women of color who have been sterilized, or who have lost custody of their children, and the high

105. DOUGLASS, supra note 98, at 30.
106. YEE, supra note 67, at 149.
107. DAVIS, supra note 69, at 60–64 (discussing Sojourner Truth’s famous “Ain’t I a Woman?” speech, in which she spoke to both racist oppression and sexist domination); YEE, supra note 67, at 141 (discussing Sojourner Truth’s “Ain’t I a Woman?” speech); YEE, supra note 67, at 150 (describing a speech of Sojourner Truth’s in which she spoke to sexism: “[You men] think, like a slaveholder, that you own us.”).
108. DOUGLASS, supra note 98, at 36 (quoting a description of an 1869 speech by black activist Frances Ellen Watkins Harper).
109. SNIADER LANSER, supra note 86, at 14 n.21.
111. See DAVIS, supra note 69, at 215–21 (citing 1970s data suggesting that 20% of all married black women, 35% of all Puerto Rican women, and 24% of all Native American women have been sterilized).
112. See Roberts, Punishing Drug Addicts, supra note 77, at 1427–42. Roberts gives a thoroughly researched discussion of how race and class impact loss of maternal custody. For example, although rates of drug abuse may be constant between populations, abuse by women of color is more likely to be reported and prosecuted,
mortality rate for children of color,\textsuperscript{113} and wonder whether the issue should not be support for motherhood among women of color.\textsuperscript{114} Many wonder why the legality of abortion should command the lion's share of the energy and resources of the "women's" movement, when that "choice" is beyond the economic reach of many women of color\textsuperscript{115}

CONCLUSION

Given both the rhetorical usefulness of the slavery metaphor and the problematic nature of its racial message, the question inevitably arises: should the slave metaphor be abandoned in the abortion debate?

Speaking as a feminist, when the long history of feminism's blindness to its own racism and classism is considered, a positive answer seems inescapable. This conclusion does not, however, preclude the possibility of arguing for a Thirteenth Amendment basis for abortion rights. The Amendment, after all, prohibits "involuntary servitude" as well as slavery.\textsuperscript{116} The objection is to the slave metaphor, not the use of the Amendment. For example, Loretta Ross\textsuperscript{117} has argued for the use of the Thirteenth Amendment in defending abortion rights, and in so doing has compared an unwanted pregnancy with involuntary servitude, because women of color are disproportionately poor and the poor are generally under greater governmental supervision. Additionally, racial attitudes may skew qualitative judgments regarding mothering skills. Thus, maternal reliance upon extended family or neighbors may be interpreted as neglect.

\begin{itemize}
\item 113. See Roberts, Punishing Drug Addicts, supra note 77, at 1446 (reporting that mortality rate for black infants is more than twice that for whites; the leading cause is inadequate prenatal care).
\item 115. See generally Roberts, Future of Choice, supra note 77.
\item 116. U.S. Const. amend. XIII; see also Koppelman, supra note 20, at 486-93 (arguing that involuntary servitude includes coerced pregnancy as the woman is compelled to act for the fetus's benefit).
\item Arguing that an unwanted pregnancy is "involuntary servitude" could have unintended consequences for surrogacy agreements; the doctrine could render such agreements unenforceable. Recall that the freedom to contract does not extend to contracting oneself into such servitude. See Koppelman, supra note 20, at 491-93 (labor contracts are compatible with Amendment only if they may be broken and there is no compulsion to continue). But cf. Koppelman, supra note 20, at 488 (assumes surrogacy is not involuntary servitude).
\item 117. Loretta Ross is the national program director for the Center for Democratic Renewal and formerly held positions with the National Black Women's Health Program and the National Organization for Women.
\end{itemize}
not slavery.\textsuperscript{118}

Apart from its hidden racism, there is another problem with the slave metaphor in abortion rhetoric. It polarizes and shuts down dialogue between the pro-choice and anti-abortion sides of the debate. This polarization, in turn, leads each side to focus narrowly on the assertion of rights and in the process to lose sight of the bigger picture. For example, because of the pro-choice focus on the mere legal right to abortion, we have seen the "de facto nonavailability of abortion for many, with no additional social mechanisms in place to help women cope with pregnancy."\textsuperscript{119} If more than a mere right to abortion is to exist, the debate has to be reframed so that the issue is not incommensurable.\textsuperscript{120}

The slavery metaphor, ironically, highlights this very problem. Ending slavery did not end the racial inequities. Freedom, in light of Reconstruction era policies, turned out to be hollow. Former slave-owners, deprived of any participation in the process of emancipation, retaliated by subverting the process through unfair contracts, Jim Crow laws, and violence.\textsuperscript{121}

If we are to make the goal reproductive freedom, rather than abortion, we have to move beyond polarizing rhetoric, such as the slave metaphor. We need to search for common ground, perhaps by advocation.

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\textsuperscript{118} Loretta Ross, \textit{Why Not Use the 13th and 14th Amendments to Achieve Reproductive Freedom?}, in \textit{Reflections after Casey: Women Look at the Status of Reproductive Rights in America} 17 (Center for Constitutional Rights ed., 1993). Ironically, in the same piece, Ross states: "Unless someone argues that fetuses are slaves in the sense meant by the Thirteenth and Fourteenth Amendments, [the Thirteenth Amendment's prohibition of involuntary servitude] is a much more secure basis on which to argue that women must have the same protections across the country ..." Ross, supra, at 17. Cf. Swan, \textit{supra} note 33, at 12 (arguing that fetuses are like slaves and thus protected by the Thirteenth Amendment).

\textsuperscript{119} \textit{Mensch \& Freeman, supra} note 32, at 150.

\textsuperscript{120} Compare Joan Williams, \textit{Abortion, Incommensurability, and Jurisprudence}, 63 Tul. L. Rev. 1651–72 (1989) (arguing that abortion is a classic and fundamental incommensurability) \textit{with Mensch \& Freeman, supra} note 32, at 13, 135 (arguing that the "incommensurable" label obscures that both sides have moral points not answered by opposing extremists and denies the possibility of compromise) \textit{and Clark, supra} note 17, at 299 (arguing that neither pro-choice nor anti-abortion advocates speak for or to the "moral middle").

\textsuperscript{121} \textit{E.g., W.E.B. DuBois, Black Reconstruction in America: An Essay Toward a History of the Part which Black Folk Played in the Attempt to Reconstruct Democracy in America} 1860–1880, at 673–75 (1962) (discussing the inequities of sharecropping, the passage of laws limiting voting rights, and the use of violence to intimidate the black population).
\end{flushleft}
ing increased access to contraception so that the need for abortion decreases, or by advocating more societal support for motherhood—for example, through better access to day-care—so that more women can avoid recourse to abortion. The slave metaphor denies the possibility of common ground, however, because there was no common ground between slaveholder and abolitionist.

Rhetoric teaches that how we talk reveals who we are. If we aspire to be a society that is sensitive to our history of racism and desires to correct that history with a commitment to inclusivity, and if we aspire to be a society that takes seriously both life, including the lives of the unborn, and autonomy, including the autonomy of women, then we need to find another way to talk about abortion. Slavery rhetoric focuses on abortion to the exclusion of other reproductive issues and contributes to the idea that abortion is the be-all and end-all of women's reproductive freedom. We need to talk about abortion in a way that keeps it in context, as one piece of a larger concern for reproductive autonomy and the existence of meaningful choices for all women, including choices to bear, as well as not to bear, children. §