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# Introduction

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## INTRODUCTION: NEW APPROACHES AND CHALLENGES TO REPRODUCTIVE JUSTICE

Cyra Akila Choudhury\*

Regulation of and access to reproductive care has been an enduring concern of women's rights activists, feminist lawyers and scholars, health care specialists, and the general public for the better part of the past five decades. Few social issues have had the distinction of being a source of lawmaking and interpretation with such regularity. Since the watershed decision of *Roe v. Wade* decriminalizing abortion, the activism surrounding abortion rights has been waged with such a ferocity on both sides that it has often overshadowed the other aspects of reproductive health and rights.

Indeed, the very term "reproductive justice" signals a turn away from the traditional focus on rights and specifically to the reduction of reproductive rights to abortion to a more holistic approach. In the words of Professor Dorothy Roberts writing on intersectional issues of race, family, criminal law, and reproductive justice:

A caucus of black feminists at a 1994 pro-choice conference coined the term "reproductive justice," a framework that includes not only a woman's right not to have children, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environments. This framework repositioned reproductive rights in a political context of intersecting race, gender, and class oppressions. The caucus recognized that their activism had to be linked to social justice organizing in order to gain the power, resources, and structural change needed for addressing the well-being of all women.<sup>1</sup>

Roberts goes on to argue that we need to "ditch the dominant reproductive rights logic and replace it with a broader vision of reproductive justice."<sup>2</sup>

Roberts reminds us of the mainstream pro-choice movements' overreliance on narratives of trauma and their complicity in promoting abortion to limit unfit populations. Indeed, our histories have often been

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<sup>1</sup> Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights>.

<sup>2</sup> *Id.*

dark with regard to the right to reproduce.<sup>3</sup> It has not always been the case that what has been restricted has been the ability to terminate a pregnancy. My own concern as a comparative scholar has been in South Asia where the focus on family planning has led to the forced sterilization of poor women in the thousands. It has been about not just the use of sex selection in abortion that has resulted in nearly 60 million missing women from the population and a skewed gender ration—but also about the structures of families that make the right to abortion problematic as an individual right. And it has been about access to health care to reduce both maternal and infant mortality.<sup>4</sup>

These experiences and histories are not alien among Native American, Latina Black, and poor communities in the United States. As such, reproductive justice resists and pushes back on the dominant framework of reproductive rights to include these experiences and histories. It challenges us to expand the frame. This symposium takes up that challenge by doing precisely what Professor Roberts suggests by conceiving of reproductive justice as broad set of challenges that require similarly broad strategies and critical thinking to resolve. This symposium examines the right to access abortion care,<sup>5</sup> make decisions about family planning,<sup>6</sup> the ability to obtain pregnancy care,<sup>7</sup> the (mis)uses of science and expertise in reproduction<sup>8</sup> and in litigation about reproductive rights, and the ways in which reproductive justice has been internationalized through transnational activism and human rights.<sup>9</sup> The papers share a critical approach to these topics challenging us to think of how law is used to limit access to abortion and also used to limit the right to procreate. We are asked to think about whether fighting for reproductive justice through the law and in courts is the best use of resources given the limits to what can be achieved in terms of the distribution of healthcare through these strategies. Further, if the authors evince ambivalence about the law and its indeterminacy, they are equally so about science and the use of questionable scientific evidence in litigation in

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<sup>3</sup> See e.g., Alfred L. Brophy & Elizabeth Troutman, *The Eugenics Movement in North Carolina*, 94 N.C.L. REV. 1871 (2016).

<sup>4</sup> Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L. L. 259 (2011).

<sup>5</sup> Lisa M. Kelly, *Abortion Travel and the Question of Choice*, 12 FIU L. REV. 27 (2017).

<sup>6</sup> Stu Marvel, *Laws of Conception: A Queer Genealogy of Canada's Assisted Human Reproduction Act*, 12 FIU L. REV. 81 (2017).

<sup>7</sup> Khiara Bridges, Keynote Address at the FIU LAW REVIEW Symposium: New Approaches and Challenges to Reproductive Justice (Nov. 4, 2016), <http://collections.law.fiu.edu/lawreviewsymposia/ReproductiveJustice/>.

<sup>8</sup> Seema Mohapatra, *Politically Correct Eugenics*; Aziza Ahmed, *Scientific Expertise in Abortion Jurisprudence*, 12 FIU L. REV. 51 (2017).

<sup>9</sup> Rachel Rebouché, *How Radical is Reproductive Justice? Remarks for the FIU LAW REVIEW Symposium*, 12 FIU L. REV. 9 (2017).

achieving reproductive justice. All the papers share a central concern about how vulnerabilities, identities, and historic subordinations intersect to deprive some populations of reproductive justice.

Rachel Rebouché's article, *How Radical is Reproductive Justice? Remarks for the FIU Law Review Symposium* in the volume raises the question of what happens to reproductive justice's priorities and its commitments to redistribution and justice when it becomes transnational and adopts international human rights strategies. Rebouché argues that reproductive justice, originating in women of color's critique of rights based approaches in the United States loses much of its "radical potential by referring to human rights and social justice as always interchangeable."<sup>10</sup> In other words, by relying on human rights in the transnational context, reproductive justice advocates may miss how the legocentrism (the focus on law reform, courts, and lawyers), postcolonial bias and the primacy of the global North, and redistribution on income and health resources of human rights strategies present challenges to realizing human rights' promises of social and political transformation.<sup>11</sup>

The intense focus on abortion both globally and within the United States has made it difficult to turn the attention of lawmakers and politicians to other areas of concern in reproductive justice. Since 1973, the polarization in the United States caused by abortion has led to a number of strategies aimed at eroding the right. For instance, there have been multiple attempts re-criminalizing abortion entirely and, for the most part, these have failed.<sup>12</sup> More recently, we have seen an upsurge of fetal heartbeat bills that seek to protect a fetus as soon as its heartbeat can be discerned—as early as six weeks and before pregnancy may be known to the mother.<sup>13</sup> Such measures to ostensibly overturn *Roe v. Wade* reflect only a small minority of Americans' political preferences because there is broad support for legal abortion even if somewhat restricted.<sup>14</sup> The important point to underscore here is that even if most Americans prefer that women avoid choosing abortion, they support the right to do so legally, particularly when other measures have not been available or the pregnancy involves trauma or

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<sup>10</sup> *Id.* at 10.

<sup>11</sup> *See id.*

<sup>12</sup> *See, e.g., Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2016*, GUTTMACHER INST., <https://www.guttmacher.org/article/2016/07/laws-affecting-reproductive-health-and-rights-state-trends-midyear-2016>.

<sup>13</sup> Camila Domonoske, *Ohio Legislature Moves To Ban Abortion As Early As 6 Weeks After Conception*, NPR (Dec. 7, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/07/504663799/ohio-legislature-moves-to-ban-abortion-as-early-as-6-weeks-after-conception> (last visited Dec. 12, 2016).

<sup>14</sup> *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Dec. 12, 2016) (Most Americans believe in the right to abortion but with some restrictions.).

danger such as a fetal anomaly, rape, or incest.<sup>15</sup>

In spite of the widespread support for abortion rights, restricting the ability to obtain an abortion to earlier in a pregnancy has been undertaken not only through the laws seeking to criminalize mid and late-term abortions but also through restrictions on abortion providers. In *The Burdens of Abortion Travel after Whole Woman's Health*, Lisa Kelly demonstrates how collateral attacks through laws that are now commonly called TRAP (“Targeted Regulations of Abortion Providers”) have sought to impose strenuous restrictions on the abortion facilities in an attempt to put them out of “business”.<sup>16</sup> The regulations are not directed at the constitutional right itself but impose onerous and unnecessary requirements on providers. These include requiring providers to have admitting privileges at nearby hospitals or facilities to conform to ambulatory care centers. Until the *Whole Women's Health v. Hellerstedt*, the most recent decision to interpret *Planned Parenthood v. Casey's* undue burden standard, these laws have been successful in reducing the number of operating reproductive health care options.<sup>17</sup> *Whole Women's Health* has set back TRAP laws recognizing the instrumental use of law to erode access to abortion in some states.<sup>18</sup>

Kelly analyzes the role of travel in abortion rights that has been the unfortunate corollary to the closure of health clinics particularly in rural areas. She argues abortion travel has been treated ambivalently by courts:

Women's ability to travel when abortion services are limited—“to chase their rights across state lines,” as Linda Greenhouse has recently described it—functions as a safety valve for states and for some women. At the same time, through this act of exile, women and families are turned into “reproductive refugees,” . . . for whom travel effects a punitive logic of exclusion. In contrast, for those women and girls unable to undertake abortion journeys, travel functions not as a punitive safety valve, but as a hard barrier leaving them with a constitutional right that cannot be realized in fact.<sup>19</sup>

As others in this symposium have pointed out, the analysis of

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<sup>15</sup> *Id.*

<sup>16</sup> Kelly, *supra* note 5.

<sup>17</sup> *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>18</sup> Linda Greenhouse & Reva B. Seigel, *What a Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L. J. FORUM (2016), <http://www.yalelawjournal.org/forum/the-difference-a-whole-woman-makes>.

<sup>19</sup> Kelly, *supra* note 5, at 31.

economic inequality and its implications for women's access to reproductive health care is at the heart of the reproductive justice agenda.<sup>20</sup> Without such an analysis, it is too easy to assume that a day or two of travel several hundreds of miles from home and staying overnight, several nights, or having to travel these distances repeatedly is not an "undue burden" for poor, working class, or unemployed women. Furthermore, woven into the narrative about abortion access is a strain of punitive justification that assumes that irresponsible and careless poor women, often of color, should bear the "responsibility" of their actions in getting pregnant.<sup>21</sup> A reproductive justice approach requires the acknowledgement that not only wealthy or "career women" choose parenthood; poor women—both working and unemployed—can also *choose* to procreate and unintended pregnancy is not restricted to these women.<sup>22</sup> It underscores the reality that since many abortion providers also provide critical health care quite apart from abortion, the reduction of the number of clinics like Planned Parenthood deprives poor women of access to reproductive health screenings and medical attention that they cannot afford to get anywhere else.<sup>23</sup> Reproductive justice resists being reduced to simply abortion rights and access but also the right to procreate and have access to care that supports procreation.<sup>24</sup>

Stu Marvel's article *Laws of Conception: A Queer Genealogy of Canada's Assisted Human Reproduction Act* takes up concerns about support for procreation at the intersection of LGBT rights, reproduction, and criminal law. Her paper which explores the legislative and regulatory landscape of assisted reproduction in Canada also demonstrates the troubling history of radical feminism's collaboration with the state to criminalize assisted reproduction. The fear of its commodification and the exploitation of women's reproductive capacities and radical feminists' reliance on constructions of reproduction as "natural" and requiring state protection results in LGBT families having to travel abroad to form families or face severe criminal penalties for circumventing assisted reproduction regulations. Marvel shows "how the privileging of an idealized form of 'normal' reproduction—predicated upon the two-parent, heterosexual, biological family . . . create[s] tangible effects in law, policy and the

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<sup>20</sup> See Kelly, *supra* note 5; Bridges, *supra* note 7; Rebouché, *supra* note 9.

<sup>21</sup> See generally Linda C. McClain, "Irresponsible" *Reproduction*, 47 HASTINGS L.J. 339 (1996).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., Alexa Ura, *Half of TX Women Face Barriers to Reproductive Health*, TEX. TRIBUNE (May 12, 2015), <https://www.texastribune.org/2015/05/12/more-half-women-face-barriers-reproductive-service/>; National Partnership for Women and Families Fact Sheet <http://www.nationalpartnership.org/research-library/repro/birth-control/defend-womens-access-to-essential-health-care-fact-sheet-2012.pdf>.

<sup>24</sup> See Roberts, *supra* note 1.

concrete outcomes experienced by those who fail to conform to such a model, most notably lesbian, gay, bisexual and transgender (“LGBT”) parents.”<sup>25</sup>

The scientific advances in reproduction have been welcomed by many but have also raised ethical questions. For instance, while LGBT and infertile heterosexual couples have embraced ART (“Assisted Reproductive Technology”) and surrogacy as Marvel notes in her article, there are groups that have been concerned about the social effects of these advances. One of these concerns that has been frequently raised is that of designer babies and also the effect of ART and particularly genetic therapies on our ideas about disability. In her paper *Politically Correct Eugenics*, Seema Mohapatra draws the connection between our history of eugenics and current uses of gene editing to create ideal children for those who can pay. “Using a reproductive and disability justice frame,” Mohapatra analyzes “how the acceptance of a politically correct eugenics—through the acceptance of these types of technologies—may affect and further disadvantage women of color and families of color.” Historically, eugenics has impacted the mentally disabled, poor, and/or communities of color disparately. The state has a dark history here that is often left out of our discussions on reproductive justice. Recent revelations tell us the extent to which the state forcibly sterilized women of color: Native American, black, and Latino women. Furthermore, mentally disabled women were routinely sterilized because as the Court opined in *Buck v. Bell*, “three generations of imbeciles were enough.”<sup>26</sup> Mohapatra’s article reminds us that with the advances in science, neoliberal eugenics through very advanced technologies can take a sophisticated turn that has the appearance of respectable choice about one’s own family planning.

Finally, Aziza Ahmed’s remarks transcribed for the symposium raise the question of how scientific expertise is used or (mis)used in abortion litigation. Ahmed argues that the longstanding use of the *Daubert* standard<sup>27</sup> to assess the strength and validity of scientific expertise has been inconsistent in abortion litigation. In many cases, pseudo-science about the trauma of abortion or its dangers have been admitted alongside respected science as though it were of equal validity and merit. Ahmed examines the partial birth abortion cases like *Gonzalez v. Carhart* as examples of this loosening of “expertise.” In contrast, those cases where courts adhered to the *Daubert* standard, scientific evidence tended to support the striking down of abortion restrictions. Given the likelihood of increased abortion

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<sup>25</sup> Marvel, *supra* note 6, at 86.

<sup>26</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>27</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

challenges, Ahmed's cautionary tale about the use of scientific expertise is an important one.

In its broadest contours, reproductive justice includes access to reproductive healthcare like health screenings for cancer, contraception, disease prevention, fertility treatments and access to assisted reproduction, as well as the more traditional decisional and physical privacy regarding family planning. In addition, availability and access issues are interwoven with poverty, sexual orientation, and race. All too often, income determines what kind of health care one can receive and the ability to vindicate formal rights. To put it another way, poverty (often racialized poverty) stands in the way of substantive rights and justice. While legal scholars in the confines of the academy can live in the theoretical space of neutrality, feminists, critical legal theorists, critical race theorists, reproductive rights scholars and activists have argued and demonstrated that enactments like TRAP laws and attempts at criminalizing both ART and abortion have a disparate impact on communities of color and the poor. These symposium articles taken together raise questions and concerns about the regulation of reproduction, the access to care, the role of science and the role of expertise in the ongoing struggle for reproductive justice—a struggle will continue for the foreseeable future.