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Kimberly Mutcherson

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## A PHOENIX FROM THE ASHES: REPRODUCTIVE JUSTICE IN A WORLD WITHOUT *ROE*

KIMBERLY MUTCHERSON\*

Today, I am going to explain the movement of reproductive justice and how it is distinct from reproductive rights. Then I'm going to talk about the long road to the end of *Roe v. Wade*. And then I'll conclude by contemplating the possibility of a Phoenix rising from the ashes of *Roe*. Before I begin, I want to stress that in my work, and a lot of reproductive justice work, it is crucial to remember that the category of women matters historically and in the present moment as we talk about reproductive oppression. So, while it is certainly the case that not only cis women become pregnant, I will not always be using gender neutral language when talking about pregnancy.

Often, people use the term reproductive justice synonymously with reproductive rights. That is not accurate. The term reproductive justice was coined as part of a movement started by Black women in the mid-1990s. These women were doing amazing work in their communities around a whole host of issues, including reproductive justice related issues. They were working with mainstream reproductive rights organizations that were often led by white women, and often white women with class privilege. Consequently, the mainstream reproductive rights organizations tended to focus on choice and abortion and largely ignore issues that were deeply relevant to Black women. And so, the founding mothers of reproduction justice wanted to build a movement focused on issues relevant to women living on the margins.

There are three basic tenets of reproductive justice. First, a woman has a right to decide if, and when, she will have a baby and the conditions under which she will give birth. Second, a woman has the right to choose her options for preventing or ending a pregnancy. Finally, we have a right to parent with the necessary social supports, in safe environments, healthy communities, and without fear of violence from individuals or the government.

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\* Kimberly Mutcherson is the Dean and Professor of Law at Rutgers Law School. This piece is a transcription of a talk Dean Mutcherson gave as part of the Rothenberg Speaker Series in 2023.

Reproductive justice is human rights based, which is distinct from the way we talk about reproductive rights in the U.S., which is based on constitutional rights. Reproductive justice is also intersectional in the true sense of that word. Intersectionality gets tossed around a lot now in a host of different academic fields and in the mainstream media, but I am concerned here with intersectionality as coined by Kim Crenshaw. Building on the work of the Black feminist thinkers and activists who came before her, Crenshaw rooted intersectionality in the experiences of Black women for whom sitting at the intersection of Blackness and femaleness meant that their experiences of discrimination and oppression were not simply about being Black or female but came from the specific experience of being a Black female in spaces where that unique identity was meaningful.

Reproductive justice is rooted in the experiences of women of color. It does not center the experiences of white women but places in the center the experiences of those who often sit at the furthest margins of our society. Finally, reproductive justice recognizes that communities of color and other marginalized communities experience reproductive oppression differently.

Reproductive justice is expansive in ways that reproductive rights discourse typically is not. It encompasses things like criminal justice reform because reproductive justice cannot exist if Black and Brown communities continue to be over-policed, over-criminalized, and disproportionately subject to the death penalty and other extreme forms of punishment. It encompasses environmental justice, so when a majority Black city, like Jackson Mississippi, does not have clean water, it is a reproductive justice issue. Reproductive justice also encompasses access to universal affordable childcare, high quality public education, adequate access to health care and an end to health disparities, fighting income inequality, ending voter suppression, challenging the overrepresentation of children of color in our child welfare system, finding solutions to homelessness and housing insecurity. I could go on, but you probably get the idea. The reproductive justice framework helps us understand the deep connection between various forms of oppression and discrimination and how they can perniciously feed into each other.

I took the time to lay this out so thoroughly because if we want to build a world in which there is reproductive justice, we must look beyond abortion right to the larger systemic issues that impact choices about procreation and parenting. This means that as I'm talking about abortion, I place that issue within the larger context of reproduction and parenting in the U.S. and, specifically, on how the law has failed so many of us by placing barriers in front of us based largely on socio-economic factors such as race, income, education level, disability, histories of incarceration, immigration status, and the like. But I am also thinking the spectrum of ways in which the treatment of Black and Brown people across a range of issues impacts our ability to become parents and parent our children safely.

At a time when there seems to be a war on history, there are parts of our nation's history that are important to remember, or for some, to learn for the first time when it comes to reproductive justice. For instance, the history of Native American boarding schools in the U.S. and the idea of "civilizing" Native communities by taking children away from their families; eugenic sterilization laws that sought to deny procreation to people with disabilities, people of color, and many others; and the Chinese Exclusion Act, which was a way to prevent Chinese men working in the U.S. from bringing Chinese women to the U.S. to marry and have babies who would be U.S. citizens. This oppression happened against the backdrop of deeply personal choices that people make about whether to become pregnant, whether to stay pregnant, and decisions we make about how to take care of our children.

Finally, in the context of choice, reproductive justice explicitly rests upon the reality that choice is always exercised within constraints. If you are having an abortion because your state does not have an adequate social safety net, that is a choice, but not a particularly fair choice for someone to make. If you carry your pregnancy to term because the Hyde Amendment forbids Medicaid from funding the abortion you want, that is a choice, but again, not a great choice to have to make. Risking a prison sentence by sending your child to a public school outside of your official school district, is a choice, and one many parents would make if it meant providing an expanded range of educational options for their children. Living in substandard housing because it is the only place you could find where the landlord would accept a Section 8 voucher is a choice, but again not a very good choice to have to make. Thus, using the rhetoric of choice without challenging this language as it reflects the realities of people's lives is anathema to reproductive justice.

I know that everyone in this audience is not law trained, so I want to give some context to the law and reproduction. There are a series of fundamental rights that the Supreme Court determined exist in the context of procreation and parenting. The right to the care, custody, and control of minor children, the right to procreate,<sup>2</sup> the right to access birth control,<sup>3</sup> and of course, what is formerly the federal right to terminate a pregnancy. When *Roe* was decided in 1973, it was a relatively uncontroversial decision. *Roe* articulated a fundamental right to an abortion and created a state interest in potential life using a trimester framework. In the first trimester, the state could not regulate abortion. In the second trimester, states could regulate abortion, but only to protect the health of pregnant women. In the third trimester, states could go as far as to ban abortion, but those bans had to include an exception for the life or health of pregnant women. In *Roe*, the Court explicitly did not recognize a fetus as a constitutional person.

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2. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

3. *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965).

In 1992, the Supreme Court decided *Casey*, which is where abortion rights started to slip precipitously.<sup>4</sup> The Court upheld the constitutional right to end a pregnancy but rejected *Roe*'s trimester framework in favor of viability because the Justices were concerned that *Roe* did not give enough weight to the state's interest in potential life. The Court created the undue burden standard, which prohibited states from placing a substantial obstacle in the path of a pregnant person seeking a pre-viability abortion. While a woman still had the right to end a pregnancy, the Court opined that she did not have a right to be insulated during the decision-making process. As such, states could create waiting periods, biased informed consent requirements, and require parental notification for minors so long as there was an option for judicial bypass. States could not require women to notify or get consent from their husbands.

*Roe* and *Casey* were deeply problematic, but they did establish some critical things like the idea that there is a constitutional right to terminate a pregnancy. The idea that a fetus is not a constitutional person. The idea that states could not ban abortion prior to fetal viability. The idea that any ban had to include an exception for the life or health of the pregnant person. The idea that states could not require spousal notification or consent. The idea that young women could access abortions through a judicial bypass if they did not feel safe notifying or getting consent from their parents. As late as 2020, in *June Medical Services v. Russo*, the Supreme Court reinforced the idea that there is a constitutional right to terminate a pregnancy. Between 2020 and 2022, the time between *June Medical Services* and *Dobbs*, only the composition of the Court changed—nothing in the law shifted.

Even before *Dobbs*, anti-choice legislators were passing restrictive abortion bills and many women and other people capable of pregnancy had very limited access to abortion care. Nonetheless, the fallout from *Dobbs* has been significant. Completely overruling *Roe* and *Casey* and deciding that there is no constitutional right to an abortion has created chaos. And the people paying the highest price for this chaos are, unsurprisingly, the most vulnerable people: women of color, black women particularly, low-income women, and young women.

It is challenging to keep up with the pendulum swing of laws post-*Dobbs*, but we have clearly seen a huge reduction in access to abortion care for women and other pregnant people. The Guttmacher Institute recently released data looking at clinic closures in fifteen states that have banned or severely restricted abortion post-*Dobbs*.<sup>5</sup> Prior to *Dobbs*, these states had a total of seventy-nine clinics, sixty-six have since closed. Fourteen of the fifteen states have no abortion providers at all. The twenty-two million women of reproductive age in those

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4. Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).

5. Marielle Kirstein, et. al., *100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care*, GUTTMACHER INSTITUTE (Oct 6, 2022), <https://www.guttmacher.org/2022/10/100-days-post-ro-e-least-66-clinics-across-15-us-states-have-stopped-offering-abortion-care>.

jurisdictions now have to look elsewhere for abortion care, try to safely manage their own abortions, or have babies that they did not want to have. Where abortion is banned, medical schools are trying to figure out what to teach their students and how to teach students about providing abortions. Medical students are trying to figure how they are going to learn to perform abortions which raises the question—which has been a question for a long time but is even more significant now—where are we going to get our next generation of abortion providers?

We have also heard terrible stories about miscarriage management where women are being denied access to care that normally would have been provided during a miscarriage. Notably, in some cases, women have been unable to access medications used in medication abortions, including those that are used for other purposes, like rheumatoid arthritis. Medication abortions will continue to be a target for legislators as states look for ways to keep abortion pills from crossing state lines or keep their citizens from crossing state lines to get abortion care elsewhere. To be fair, I should point out that some states are working very hard to be abortion protective states. Not only to protect people who provide abortions, but to protect folks who are seeking abortions as well.

There are many ways to capitalize on this moment. The first is thinking about and delving into the maternal mortality and infant mortality crisis. The United States has the highest rate of maternal mortality of any developed country. Because of abortion bans, more women in this country will die in pregnancy, childbirth, or soon after they deliver a child. This is especially true of Black women who are anywhere from two to five times more likely to die as a consequence of pregnancy in the U.S. than white women. If politicians are going to force women to be pregnant, which they should not do, they at least need to keep women and their infants alive.

Second, is criminalization. When we criminalize behaviors that may injure a fetus during pregnancy, like illicit drug use, low-income women and women of color bear the brunt of that criminalization. As states start to target women for self-managed abortions or even the suspicion of trying to self-manage an abortion, we know which women are going to end up incarcerated. Third, is sterilization. On one hand, when younger women, particularly younger white women, seek sterilization their physicians tell them, “Absolutely not, you’re going to change your mind, we’re not going to do this for you.” On the other hand, we also live in a country that has a very long history of forced or coerced sterilization of women of color. Black women in the south, Chicanas out west, Native American women, Puerto Rican women, the list is far too long. So, we want people who want sterilization to have access to sterilization, but we also need to make sure people are not coerced into sterilization.

Finally, this is a moment for us to reinforce the idea that words mean things. That science is meaningful. That medicine is meaningful. Already we are seeing an attempt to redefine what an abortion is and expand the definition of abortion to include anything that might keep a fertilized egg from implanting in the uterus.

For instance, Students for Life argues that Plan B is basically an abortion.<sup>6</sup> Such an extreme definition puts birth control on the chopping block as well.

For me, *Dobbs* matters not because it is a huge watershed in terms of abortion rights, but because it is part of a much larger history of oppression and discrimination in the realm of reproduction and the realm of parenting. But *Dobbs* is not an aberration. It is really a validation of what reproductive justice advocates have been saying for decades. This is a moment in which the righteous indignation that many of us feel should lead us to remember, and act on, the words of Audre Lorde: “I am not free while any woman is unfree. Even when her shackles are very different from my own.”

I am going to leave you with an urgent sense that we need to act. We are living through extraordinary times that tragically highlight how ordinary it is for people in this country to be wronged. But we have a chance to act decisively and to demand that this country do better and not just in the realm of abortion rights. We can demand that majority black cities, like Jackson, Mississippi and Flint, Michigan, have clean water. We can demand expansion of a social safety net so that people who choose to parent, or who are forced to parent because they cannot access abortion services, have what they need to raise and care for their children.

It is a time for us to continue to challenge over criminalization and incarceration in our country, particularly as that system seeks to capture more women who are seeking banned abortions or who are safely self-managing their own abortions. It is a time to demand comprehensive sex education and broad access to contraception, especially for young people. Because if we wait too long many more of the protections that some of us have long taken for granted are simply going to slip through our fingers.

I believe very deeply in the power of righteous anger. And I believe that those of us who embrace the concept of reproductive justice cannot be paralyzed by the enormity of the work that is in front of us. The enormity of the work that is required for us to actually achieve reproductive justice. Not just abortion rights, but reproductive justice. I urge you to be loud, to be angry, to make demands of yourselves and of the people who make laws and policy in this country that impact all of us, although in different ways. And to recognize that being an ally often means using our privilege to amplify the voices of people who are marginalized. This is a year like no other to vote as if your life depended on it. Because this year it really just might

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6. See *Facts About Plan B*, STUDENTS FOR LIFE OF AMERICA, <https://studentsforlife.org/learn/plan-b/>.