PART I

Introduction and Overview

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INTRODUCTION

American history is replete with examples of people with privilege controlling reproduction to assert power and domination over others. During chattel slavery in the United States, slaveowners denied black women and men the most basic forms of dignity – subjecting enslaved black women to sexual abuse and rape at the whim of people who believed that they could own human beings as property. When pregnancies resulted from rape by slave owners or consensual relationships among slaves, enslaved women frequently watched their children taken from them and sold for profit. Control of fertility and parenting decisions too often meant self-induced abortion or infanticide because other tools were out of reach.

Post-emancipation, and well into the present day, the experiences of black women and other women of color, as well as poor women and women living with disabilities, are a reminder that procreation remains a space of power and constraint. The eugenics movement in the United States led to thousands of unconsented sterilization procedures, largely on women. Today, parents seek to consent to sterilization on behalf of their adult children living with disabilities. The myth of the welfare queen, always depicted as a poor black woman with too many children, allowed states to create welfare caps that harm poor children by withholding needed financial resources from their families. States treat pregnant women and new mothers who are living with substance use disorder as criminals who need punishment, rather than sufferers who need a public health response. The federal government makes access to safe and legal abortion more difficult for poor women who are forbidden in almost all instances from using federal Medicaid dollars to pay for pregnancy terminations. It is fitting, then, that this entry into the Feminist Judgments canon focuses on procreation and parenting as sites of oppression and discrimination.

Reproductive Justice Rewritten creates greater context for and extends the reach of the original volume (Feminist Judgments: Rewritten Opinions of the United States Supreme Court) by introducing readers to reproductive justice (RJ). While many people have at least passing familiarity with the term reproductive rights, fewer are familiar with the concept of RJ, which began as a movement and has expanded into a framework for scholarly inquiry.

The Reproductive Justice Framework

Black women started the RJ movement in 1994 because they refused to accept being second class citizens in a women's rights movement led largely by middle class white women. The traditional reproductive rights movement and its rhetoric and issues failed to capture the complexities of the lived experiences of women who lacked class, race, or sexual orientation privilege.[1] RJ rejected the mainstream women's reproductive health movement's myopic focus on abortion, and the resulting exclusion or downplaying of other issues that were significant in the lives of poor black women, including sterilization abuse, educational disparities, and inadequate access to reproductive healthcare. Further, the justice frame allowed RJ to move beyond the rhetoric of rights and embrace a broader social justice paradigm.

RJ rests on three pillars of equal importance: the human rights to have a child, to not have a child, and to parent one's child or children in safe and sustainable communities.[2] Thus, RJ is about procreation but it is also about environmental justice, criminal justice reform, immigration reform, birth justice, education equality, the end of police brutality, and more.

This expansive set of ideas rests on several tenets that separate RJ from the narrower movement that it moved beyond. For instance, it thoroughly discards the idea that liberation comes from choices, because the ability to make choices and effectuate those choices is directly tied to privilege. In her call to move from reproductive rights to reproductive justice, Dorothy Roberts explains that:

> For too long, the rhetoric of "choice" has privileged predominantly white middle-class women who have the ability to choose from reproductive options that are unavailable to poor and low-income women, especially women of color. The mainstream movement for reproductive rights has narrowed its concerns to advocate almost exclusively for the legal right to abortion, further distancing its agenda from the interests of women who have been targets of sterilization abuse because of the devaluation of their right to bear children.[3]

[1] For more information about the RJ movement, see http://strongfamiliesmovement.org/what-is-reproductive-justice and www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81.

[2] What Is Reproductive Justice?, www.sistersong.net/reproductive-justice.

[3] Dorothy Roberts, *Reproductive Justice, Not Just Rights*, Dissent 79–82, 79 (Fall 2015).

Choices without economic or social resources cease to be choices at all. Thus, legal abortion creates access to abortion for those who can afford it but the Hyde Amendment's[4] ban on using federal Medicaid dollars to fund abortions for poor women means that the rhetoric of choice is not enough to lead to justice. Further, as Dorothy Roberts describes, organizing around choice has been ineffective in attempts to claim "public resources that most women need in order to maintain control over their bodies and lives."[5] Even more pernicious, arguing for choice has made it harder to garner support for movements to expand state support for women who need it. This is because policymakers declare that these women have made bad choices with which they should be forced to live and for which the state, and by extension taxpayers, should not have to bear the cost.[6] Thus, the rallying cry of choice fails to encompass the needs of a broad swath of women.

Importantly, and in keeping with Roberts' critique of reproductive rights, RJ is explicitly intersectional. Kimberlé Crenshaw coined the term intersectionality in her 1989 article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*.[7] Intersectionality is a guiding principle of RJ. Since Crenshaw offered up the name for a phenomenon long understood by black women and other women of color, the term intersectionality has been deployed all over the world within a range of disciplines and movements. Unfortunately, not all of those who use it do so in a way that is commensurate with the letter or spirit of its original meaning. Therefore, it is critical in this book to reclaim its origins to avoid distortions that have seeped into the framing over the decades.

In *Demarginalizing the Intersection of Race and Sex*, Crenshaw explored how discourses of feminist theory and antiracism erase black women because "both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender."[8] Using the example of employment discrimination cases, Crenshaw deftly exposed how black women's discrimination claims slip between the cracks in a legal system that measures discrimination based on the experiences of white women or black men. She explained:

> Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination – the combined effects of practices which

[4] Hyde Amendment, 1 U.S.C. chapter 4, Sec. 301–2.
[5] Roberts, *supra* note 3, at 80.
[6] *Id.*
[7] Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. Chi. Legal F. 139 (1989).
[8] *Id.* at 140.

> discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women – not the sum of race and sex discrimination, but as Black women.[9]

Crenshaw concluded that politics of black liberation and the tenets of feminist theory could not ignore the intersectional experience of black women if they sought to be successful in their liberation work. Black liberation must take account of gender and patriarchy, and feminist theorists must take account of how race impacts the experience of being female. Crenshaw called for a re-centering of discrimination discourse "at the intersection."[10]

In 1993, Crenshaw explored intersectionality again in her article, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*.[11] Here, she turned the intersectional lens on the issues of violence against women and rape and again revealed how failure to see and credit the impact of intersecting identities meant that black women who were survivors of battering or rape were placed in the unenviable position of choosing a single identity, black or woman, in order to be seen and provided the services that they needed to be safe or heal.[12]

The commitment to intersectionality means that RJ organizes around the ways that interlocking identities impact women's lived experiences. Thus, RJ is never just about a single identity standing separated from an individual's whole self. An RJ analysis takes account of race, class, sexual orientation, gender identity, immigration status, and beyond to highlight how treatment based on overlapping identities affects women's lives.

Equally as important as the commitment to intersectionality is RJ's commitment to being a bottom up, rather than top down movement. This means that the movement centers on the lived experiences of those who are most at risk to be the targets of reproductive oppression. In the RJ context, the category of woman, which in feminist theory often translated into white, middle-class women, starts with women on the margins, especially black women and poor women.

Finally, the RJ frame is steeped in human rights, rather than constitutional rights. This creates a structure that is not bound by U.S. Supreme Court cases and state statutes. Instead, RJ recognizes that governments do not grant the rights surrounding procreation and parenting in the first instance, and these rights do not depend on where and how one is born or in which country one has citizenship. The rights inherent in RJ are global and far-reaching, and the narrow confines of any particular societal or governmental structure do not cabin its reach.

RJ began as a movement, not a theory, so it is also defined by a focus on community level action. Within the world of academia, this often translates into

[9] *Id.* at 149.
[10] *Id.* at 167.
[11] Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stanford L. Rev. 1241 (1991).
[12] *Id.* at 1242.

work that is academic activism or scholarship that is deeply and unabashedly publicly engaged. The language of RJ has slowly but inexorably made its way into the realm of scholarship, producing books with titles such as REPRODUCTIVE JUSTICE: A GLOBAL CONCERN,[13] REPRODUCTIVE JUSTICE: AN INTRODUCTION,[14] and UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE.[15] Even so, there are few law books that take up the project of RJ as a scholarly concern and a framework for analyzing issues related to pregnancy, parenting, and childbirth. An exception is CASES ON REPRODUCTIVE RIGHTS AND JUSTICE[16] by Melissa Murray and Kristin Luker. This is not to say that no legal scholars infuse their work with RJ principles but there is much room for growth. This book helps to further that necessary growth through a re-imagining of important cases about procreation and parenting through an RJ lens.

In keeping with the tradition of the original Feminist Judgments volume, the opinion authors were bound by the precedent and surrounding facts upon which the original decisions are based. The writers, however, transformed the opinions, sometimes in drastic ways, by bringing an RJ perspective to the facts and the law. In so doing, the fifteen opinions in this volume, which cover topics as varied as the regulation of abortion, welfare caps, forced sterilization, pregnancy discrimination, and adoptions under the Indian Child Welfare Act, highlight not only how parenting and procreation continue to be sites for discrimination and oppression but how the experiences of marginalized women, and marginalized communities in general, too often go unexplored in feminist discourse. Framing the book around RJ, rather than the narrower concept of reproductive rights, allows for a more far-reaching and impactful discussion of how the law shapes the lives of the people it touches, especially those with minimal power to change the systems that make their lives more challenging.

With the assistance of a stellar advisory board, I chose the cases for this book based on their potential for robust RJ analysis that did not exist in the original cases. While I did not want to exclude cases related to abortion, it was critical that the volume cover a range of issues that touched on the three-pronged vision offered by RJ – the right to have a child (assisted reproduction, forced sterilizations, court-ordered c-sections, punishing pregnant women with substance use disorders, pregnancy discrimination), the right to not have a child (abortion access and contraception coverage), and the right to parent a child in safe and healthy environments (adoption procedures and welfare caps). I deliberately chose an abundance of cases

[13] JOAN C. CHRISLER, ed, REPRODUCTIVE JUSTICE: A GLOBAL CONCERN (Praeger 2012)
[14] LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (University of California Press 2017).
[15] JAEL SILLIMAN, MARLENE GERBER FRIED, LORETTA ROSS, & ELENA GUTIERREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE (Haymark Books 2004).
[16] KRISTIN LUKER & MELISSA MURRAY, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (Foundation Press 2015).

that reflect in some way on the right to have a child to highlight how the state has impeded access to childbearing, especially for black women considered to be overly fertile. At the same time, I included cases about assisted reproduction in part because the fertility industry raises such thorny questions about to what use women can put their own bodies but also because of the questions of maternity, parentage, and family in these cases that force discussion about how outsider families struggle for legal protection and recognition.

Cases on abortion and contraception were a natural fit for the issue of the right not to have a child but I did have to cut out some cases related to the right to parent in safe and heathy environments that I would have liked to include to showcase the breadth of issues that RJ covers. For instance, I considered including *District of Columbia v. Heller*,[17] in which the U.S. Supreme Court struck down parts of a D.C. law intended to reduce gun violence in the city by making it more difficult to own a handgun for personal use. The link to RJ may not be immediately obvious but gun control is a critical issue for those who wish to reduce gun violence, especially in low-income communities of color. RJ encompasses efforts to make all neighborhoods places where parents need not fear that a stray bullet will callously end a child's life far too early. In the same vein, I could have included cases about environmental justice, perhaps the class action litigation related to the water crisis in Flint Michigan, or cases that strike at the overincarceration of black women and men. Though I had to draw a line somewhere, the fact that cases of this nature could have been in the book is a testament to the movement-straddling nature of RJ.

USING RJ TO REWRITE JUSTICE

Many of the authors in this volume would not explicitly describe their work as being reflective of RJ, though I think most, if not all of them, would accept that their work traffics in various feminist principles. As an editor, I worked hard to ensure that the collective work in this book reflects the tenets of RJ as a practice and as a theory. This meant that black women had to be well reflected in the volume as a whole even if not in every case; that authors needed to embrace the complicated analysis required by considering intersectional identities; that the stories of the central characters in each of these cases needed to be at the core of the legal analysis, rather than an afterthought; and that the cases needed to be understood within the larger framework of RJ and reproductive oppression. The work that the opinion authors and commentators did to achieve those goals make this volume a timely entry into the canon of RJ theory in the legal academy.

Multiple themes find expression in the opinions in the book, such as the reality that choice is always exercised within constraints; that justice in the procreative realm requires resources as well as rights; that intersectional analysis is the best way

[17] District of Columbia v. Heller, 554 U.S. 570 (2008).

to capture the complex nature of reproductive oppression and this includes taking a bottom-up approach to problem solving; that people live in complicated circumstances that are relevant to their interactions with the law and that they deserve to have their full stories told; that movements overlap and intertwine and we should be mindful of how gains for some could be setbacks for others; and, finally, that law should not exist devoid from an understanding of its real-world impact on marginalized people.

THE ART OF STORYTELLING

From the beginning, the first two rewritten cases in the volume set the tone for what follows. *Buck v. Bell*[18] and *Skinner v. Oklahoma*[19] are seminal cases in the world of law and procreation. *Buck* represents the shameful history of eugenic sterilizations in the United States.[20] Carrie Buck was one of approximately 8,000 people sterilized in Virginia under the auspices of the eugenic sterilization law that the Supreme Court endorsed and found constitutional in its 1927 decision.[21] That 1924 law, as described by the Supreme Court:

> [R]ecites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, &c.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c.[22]

The language of the time and the justification offered for a barbaric practice do and should appall the modern reader.

In the actual court opinion, Justice Oliver Wendell Holmes describes Carrie Buck as a "feeble-minded woman" who is the product of a "feeble minded" mother and who has given birth to an "illegitimate feeble minded child."[23] In Kim Hai Pearson's rewritten opinion, however, facts from the trial record give a fuller and more accurate depiction of Carrie's history to explain how she came to be pregnant

[18] 274 U.S. 200 (1927).
[19] 316 U.S. 535 (1942).
[20] Paul Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell (John Hopkins University Press 2010).
[21] In 2002, then Virginia Governor, Mark Warner, issued a formal apology for the state's past eugenic practices, which lasted from 1927–1979. William Branigin, *VA. Apologizes to the Victims of Sterilizations*, Wash. Post (May 3, 2002).
[22] *Buck*, *supra* note 18, at 205–6.
[23] *Id.* at 205.

and have a child as an unmarried woman and how the state failed her and her family over the course of her lifetime. Thus, Pearson makes clear that the State's culpability in the pain it brought to Carrie Buck's life started well before her case made it to the U.S. Supreme Court.

In *Skinner v. Oklahoma*, decided 15 years after *Buck*, the Supreme Court faced a law that functioned as a three strikes and you get sterilized statute. The plaintiff, Jack Skinner, challenged the Oklahoma statute that would have allowed the state to sterilize him upon conviction for his third felony. Without overruling *Buck*, the *Skinner* Court decided that the statute could not stand because it violated equal protection. In his concurrence in this volume, Thomas Williams uses details of Skinner's life and the reality of the economic and social aftermath of the Great Depression to place Skinner's acts in a context, rather than view him as an isolated bad actor.

The theme of placing actors in context flows through many of the opinions in this volume, including Nancy Dowd's bold and illuminating re-telling of the facts that led to a challenge to the spirit, if not the fact, of the Indian Child Welfare Act in *Adoptive Couple v. Baby Girl*.[24] Dowd transforms a father who the Supreme Court describes as absent and unconcerned about his infant daughter into a man who was kept from his child after a mistake led him to consent to an adoption that he did not want.

And Margo Kaplan, in her opinion in *Ferguson v. City of Charleston*,[25] does not allow the ten plaintiffs in that case to be a faceless monolith. Instead, each name and story get a telling in her opinion, and she relays the horror of arresting women the day after they give birth or shackling pregnant women during labor and delivery – a practice that remains in place today in some jurisdictions.[26]

In the re-telling of these stories from the perspective of the people who were living them or with greater depth than happened in the opinions issued by courts, these authors allow the people at the center of controversial cases involving deeply questionable state actions to exist within the complex reality of their own lives, rather than in the flat pages of a legal opinion.

FEMINISTS, FEMINIST THEORY, AND RACE

There is nothing new or radical about asserting that feminism has a race problem. Sojourner Truth's declaration that she, too, was a woman despite the deep differences that separated her from the white women with whom she was agitating for

[24] *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).
[25] *Crystal M. Ferguson v. City of Charleston*, 532 U.S. 67 (2001).
[26] Ginette Ferszt, Michelle Palmer, and Christine McGrane, *Where Does Your State Stand on the Shackling of Pregnant Incarcerated Women?* 22 Nursing for Women's Health 17–23 (Feb. 2018) (noting that only twenty-two states and the District of Columbia had legislation that outlawed the shackling of pregnant women).

women's suffrage still resonates.[27] The opinions and commentaries in this book take seriously the RJ call to be intersectional in their analysis and espouse a feminism that takes account of race and racism. This is not a book in which all the women are white, and all the black people are men.

In her opening sentence, Priscilla Ocen makes clear that her rewritten majority opinion in *Wyman v. James*[28] will integrate the race, class, and gender implications of the political and legal discussion of welfare caps – laws that reduce access to public benefits when a family already receiving such benefits adds another child. In his majority opinion in the actual case, Justice Blackmun ignores race. Ocen begins her opinion by noting that Barbara James is not just a woman and a mother who receives Aid to Families with Dependent Children benefits – she is a black woman who receives those benefits. This framing immediately signals that Ocen's opinion will reflect ways in which race, class, and gender shape the welfare discussion in the United States. As a jurist, she takes seriously the intersectional implications of the totality of the experience of poor Black women who receive AFDC. It is the combination of being black, a woman, and poor that allows the state to justify a requirement that these women sacrifice privacy in their own homes and submit to state inspections as a requirement for continued state aid.

Similar to the Ocen opinion in *Wyman*, in *Sojourner A. v. N.J. Dep't of Human Servs.*[29] Cynthia Soohoo takes the state of New Jersey to task for its welfare cap that harkens back to coercive population control or eugenic efforts that targeted poor women of color. That she does so by reference to international human rights law brings her into territory that the U.S. Supreme Court studiously avoids.

In *Whole Woman's Health v. Hellerstedt*,[30] David Cohen adds a much needed perspective to the discussion of abortion by foregrounding the pernicious impact that laws that over-regulate abortion have on poor women of color. He focuses on black women who access abortion at higher rates than other women and who are more likely to be uninsured than other woman, thus increasing the likelihood that they will get their reproductive health services from the clinics that restrictive abortion laws target. He further highlights the Latina population in Texas—the state from which from which the Supreme Court case grew. This population faces the same burdens as black woman plus the burden of clinic closures for women living in rural areas. Under the law successfully challenged in Whole Woman's Health, These women would have found their ability to access reproductive health-care, including abortion care, stymied by long travel times, if they could even find transportation to make a 500 mile or more trip for healthcare.

In *Maher v. Roe*,[31] Michele Goodwin painfully highlights the bankrupt nature of choice in a world in which a state deprives poor women of the economic means to

[27] Sojourner Truth, Ain't I a Woman? (1851).
[28] *Wyman v. James*, 400 U.S. 309 (1971).
[29] *Sojourner A. v. N.J. Dep't of Human Servs.*, 134 S. Ct. 2751 (2014).
[30] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
[31] *Maher v. Roe*, 432 U.S. 464 (1977).

end a pregnancy. And in *In re Madyun*,[32] Maya Manian rewrites a case in which a judge issued an order giving physicians the right to perform a c-section on a nineteen-year-old married Muslim woman delivering her baby in a public hospital over the objection of the woman and her husband. A choice to get pregnant that leads to a court ordering submission to major surgery belies any notion of justice or autonomy.

Mainstay feminist principles of autonomy, bodily integrity, and choice are relevant in the cases described above but those principles only go so far as the examples in the above paragraphs illustrate. Justice demands taking notice of the fact that a young Muslim woman giving birth or receiving prenatal care in a public hospital may find her healthcare team more dismissive of her wants and demands as a patient than they might a white woman in a private hospital. Similarly, In a world in which poor black women get labeled as incapable of making good choices about reproduction, the right to privacy that protects abortion access may not seem broad enough to protect the right to use Medicaid funds to access a desired pregnancy termination. And, finally, courts may be deeply dismissive of a black woman's assertion of privacy in her home if she pays for that home through funds provided by the government.

THE RELATIONSHIP BETWEEN RIGHTS AND JUSTICE

Some of the cases in this volume read as much more conventional court opinions than others but a reader can discern their radical nature in the subtleties. In *Young v. UPS*,[33] Meredith Johnson Harbach takes pains to note that pregnancy discrimination in paid work has long been an issue for women of color, immigrants, and low-income women who have had high levels of work force participation, even when white women did not. Further, women who are low wage workers have less power to protect themselves against workplace harassment and discrimination than those who are more economically privileged. In this arena, removing barriers that keep and kept women from certain types of work, creating more choices, is a small step in a much larger process. Justice, as Harbach argues, sometimes demands that the law and employers treat people differently in order to give them the same access to paid work.

A case about assisted reproduction, *Johnson v. Calvert*,[34] raises profoundly difficult questions about rights and justice. In *Johnson*, Melanie Jacobs uses her opinion to explicitly extend the right to procreate to encompass a right to use assisted reproduction – a leap that the U.S. Supreme Court has yet to make. She then reckons with that expansive right to procreate as measured against the real risks of the exploitation of poor women who sell their reproductive services in fertility markets, including women who contract as gestational carriers known more colloquially as surrogate mothers. Especially where intended parents are white or even just non-black and the

[32] *In re Madyun*, 114 Daily Wash. L. Rptr. 2233 (D.C. Super Ct. July 2, 1986).
[33] *Young v. UPS*, 135 S. Ct. 1338 (2015).
[34] *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).