Special Section Reproductive Justice in the Era of Political Backlash

Reproductive Justice in the U.S. After *Roe*

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This article focuses on the role of the reproductive justice framework in protecting access to sexual and reproductive health care in the United States at a moment when reproductive rights are undeniably in jeopardy. In June 2022, a conservative majority of the U.S. Supreme Court held that the federal Constitution does not protect the right to decide whether or not to terminate a pregnancy. This article describes and assesses the reproductive health, reproductive rights, and reproductive justice frameworks, the interaction among these frameworks, and the ideological forces that shape anti-abortion politics and law. In the absence of a right anchored in the Constitution, reproductive justice advocacy and activity is becoming more important. This article considers what reproductive justice may contribute in the post-*Roe* era.

Keywords
reproductive justice, abortion, eugenics, family values, Roe, Dobbs

I. Introduction

The reproductive justice movement aims to shape a society in which all people have safety, resources, and freedom from oppression so that they can make reproductive and sexual decisions based on their values, identity, and hopes. In January 2023, participants of a reproductive justice summit met to envision "a new future for Reproductive Justice" (SisterSong 2023b). The introduction asserts a "focus on fighting against all oppression to create new policies and systems." (Forward Together, Visioning New Futures 2023) Reproductive justice focuses on actual, not assumed reproductive and sexual autonomy, and on access to care, rather than choice. Reproductive justice advocates use the concept of human rights rather than rights in U.S. law

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(Ross & Solinger 2017, 10). Advocates and organizers define reproductive justice as an approach that centers social change activities, including community mobilization, to remove structural barriers to reproductive access.

The reproductive justice framework emerged in the late twentieth-century United States as an intervention in both the anti-abortion movement and the mainstream reproductive rights movement (Ross & Solinger 2017, 56-57; Forward Together 2005, 5-6). Reproductive justice advocates identified reproductive justice as the third framework, an addition to the long recognized reproductive rights and reproductive health approaches used to enable access to reproductive health care (Forward Together 2005, 1). They positioned reproductive justice as a strategic response to increasingly obvious limits of the reproductive rights and health models. The framework's components, which include social justice strategies and intersectionality, were not necessarily new. Rather reproductive justice advocates and coalition participants intentionally launched the framework in 1994 to foster a movement more inclusive than the mainstream reproductive rights organizations had been and better able to mobilize community-based experience and ingenuity.

From the outset, advocates positioned reproductive justice as complementary to reproductive rights and reproductive health. Even as it critiqued the existing frameworks' limits, reproductive justice advocates did not seek to supplant reproductive rights and health organizations. "All three frameworks are imperative; by itself a single one cannot achieve the goal of ending reproductive oppression." (Forward Together 2005, 1) Reproductive justice advocates set out to strengthen the overall movement by expanding two fronts. First, reproductive justice advocates have sought to expand the fight to protect access to reproductive and sexual health care by making it more inclusive, and in doing so, challenge stereotypes used to justify barriers to access (Silliman, Gerber Fried, Ross & Gutierrez 2004, 15-19). Second, advocates have worked to situate reproductive justice as a core goal of the larger social justice agenda (Forward Together 2005, 7).

This article focuses on the role of the reproductive justice framework in protecting access to sexual and reproductive health care in the United States in the wake of *Dobbs*. In June 2022, a conservative majority of the U.S. Supreme Court held that the U.S. Constitution does not protect the right to decide whether or not to terminate a pregnancy. *Dobbs v. Jackson Women's Health* (hereinafter *Dobbs*) overturned nearly 50 years of precedent, including *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (Dobbs, 2279). This article considers what reproductive justice may contribute now that state legislatures have authority to ban abortion.

While this article focuses reproductive justice work in the United States, it may serve as a resource to advocates and scholars in Japan and other countries in their work. This analysis focuses on the United States to emphasize the point that context

matters. The particulars of how reproductive justice advocates define and prioritize issues, choose strategies, and build coalition varies widely, even within the U.S. The U.S.-specific experience illustrates some core strengths of the reproductive justice framework. In particular, it facilitates flexibility and creativity. Perhaps what matters most is that reproductive justice is understood as an intervention that lifts the voices of those who experience social-political marginalization and keeps the long-term goal of social justice in mind.

Part II describes the reproductive health, reproductive rights, and reproductive justice frameworks. Part III situates the U.S. Supreme Court's 2022 decision to overturn *Roe v. Wade* with respect to key constitutional precedent. More specifically, Part III includes analysis of how those cases and ideology shaped the legal and political battle over abortion in the U.S. The analysis ends with a brief review of *Dobbs* initial implications. Part IV assesses the challenges and strengths of the reproductive justice movement. It then discusses emerging pathways for reproductive justice, given current legal uncertainty and rapidly shifting political ground in the U.S. More specifically, Part IV is intended to suggest ways that using reproductive justice may contribute during times of uncertainty.

II. Three Frameworks: Reproductive Health, Reproductive Rights, Reproductive Justice

Part II sets out three models for creating and protecting access to reproductive and sexual health care in the United States. Each subpart incorporates selected historical and ideological background that have shaped the battle for sexual and reproductive health care access in the U.S. As noted, these models or frameworks are complementary. Not surprisingly, they often overlap.

A. Reproductive Health

The Reproductive Health framework is a service delivery model (Forward Together 2005, 2). It focuses on providing reproductive and sexual health care services. Services include contraception information and care, pregnancy testing and counseling, abortion information and services, testing and counseling for sexually transmissible infections, and other health care. Clinics designed to provide these services form the most visible evidence of the reproductive health model's success.

Reproductive health advocates also engage in other activities to bolster service delivery. Advocacy efforts encourage other health care sites to provide comprehensive reproductive and sexual health services. For example, public university students in California successfully campaigned to make medication abortion available at campus-based student health centers (California Senate Bill 24 2019). Other activities include advocacy for laws requiring comprehensive

sex education in schools, organizations that provide resources such as funds, transportation, and overnight accommodations for people seeking abortions, and efforts to increase training and research opportunities for health professionals in reproductive and sexual health care.

The reproductive health strategy emerged in the early twentieth century. Initially, a birth control movement arose to enable women, primarily married women, to use contraception to control the timing of and number of pregnancies (Ross & Solinger 2017, 32-33; CDC 1999, 1074). Since then, the meaning of "family planning" has changed in at least three ways. Family planning now includes a wider range of health services than contraception. In addition, marital status no longer defines the target audience for family planning. In its best form, service delivery assumes that anyone who needs reproductive and sexual health services should have access. Family planning has long been equated with cis-gender women's reproductive health care, although efforts to adapt service delivery to provide appropriate care to all gender identities have begun.

The reproductive health model has faced several ideological challenges. Three are worth noting here. First, conservative sexual morality characterizes access to contraception and abortion as a license to engage in illicit sex and thus, undermine patriarchal, marriage-based family. Versions of Victorian morality persist in 21st century campaigns to restrict access to reproductive and sexual health services or to limit reproductive and sexual autonomy of marginalized communities. For example, abstinence-only sex education curriculum, deliberate dissemination of inaccurate and stigmatizing information about contraception and other health services, and pro-natalist narratives that valorize heterosexual, monogamous married couples all express this "family values" ideology. The family values ideology also links opposition to reproductive and sexual health care access to campaigns against people who are LGBTQ+. (Dowland 2009, 4)

Second, pro-life ideology feeds opposition to reproductive health care delivery. Opposition, in part, conflates reproductive and sexual health care with abortion. This conflation is a logical extension of a series of gender-based distinctions used to categorize reproductive health care as separate from and marginal to standard health care. Women's health care has been defined as an exception or minor specialty to health care (See, e.g. Levison, Mendelsohn, Nieman 1995). Often, women's health care has been reduced to reproductive health care. And reproductive health care, in turn, is often equated solely with abortion. As a result, family planning and other reproductive health care clinics are seen as abortion clinics, and thus in the business of killing "unborn children." Abortion exceptionalism characterizes health care regulation (Borgmann 2014). Abortion is the most regulated medical procedure in the U.S. (Joffe 2018). Regulation extends to nearly every aspect of abortion care. For example, some states have tried to ban

use of state funds for clinics that do not provide abortion care, but that counsel, refer to, or are affiliated with an abortion provider (Guttmacher Institute State Laws and Policies 2023). And local governments have denied land use permits for new family planning clinics (Wells 2019).

Third, eugenic ideology has long shaped the misuse of reproductive health services. (Stern 2015) Eugenics gained widespread traction in the early 20th century U.S. It resulted in laws justified as necessary to improve the U.S. gene pool. Those laws included federal immigration restrictions, state marriage restrictions, and state laws authorizing involuntary sterilization of those deemed unfit for reproduction (Stern 2015). Nazi use of eugenics to justify the Holocaust prompted reconsideration of the so-called science and laws used to carry out eugenic goals. However, eugenic thinking has persisted. The most obvious instances arise from involuntary fertility control of people with disabilities, low-income people of color, and incarcerated people (Ikemoto 2011). Law has not authorized most impositions of fertility control, yet those who imposed forced sterilization or contraception claimed they were protecting the greater good. (Ikemoto 2011)

The reproductive health model works, in part, by countering longstanding ideologies that shape opposition to reproductive and sexual health services. The reproductive health model provides both access to the actual services and knowledge about those services. The women's health movement, formed in the late 1960s (Morgen 2002, 3; Silliman et al. 2004, 34-35) and the legal doctrine of informed consent formed the core of knowledge-based reproductive health serves. This model assumes that knowledge-based access enables autonomy and empowerment and challenges paternalism in health care.

B. Reproductive Rights

The Reproductive Rights framework uses law to protect access to reproductive health care services (Forward Together 2005, 2). U.S. culture is particularly legalistic. Law is seen as an important source of authority and as a solution for social and moral problems. In that context, a rights-based approach is necessary. Reproductive rights advocates focus on enforcing legal protections, developing law to increase access, and fending off laws intended to curtail reproductive rights. Strategies to protect reproductive rights include constitutional litigation, litigation under common law and statutory law, and engaging in the lawmaking and rulemaking processes (Forward Together 2005, 2).

For over fifty years, the U.S. Constitution has anchored the prevailing understanding of reproductive rights. More specifically, the U.S. Supreme Court has issued decisions recognizing constitutional protection against laws that authorize involuntary sterilization, ban distribution of contraceptives, and ban abortion. In 1942, the Court held invalid a state eugenics law that authorized involuntary sterilization of people convicted for theft. The Court determined that because the law treated two

forms of theft, and therefore two classes of thieves differently, the state's eugenic sterilization law violated the 14th Amendment's Equal Protection Clause (Skinner v. Oklahoma). However, in most reproductive liberty cases, the Court has located the right to make a reproductive decision within the constitutional right of privacy (Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade).

The text of the U.S. Constitution does not expressly mention either the right of privacy or reproductive rights. The Court has, through a series of cases, recognized that certain decisions are so personal and self-defining that they are necessary to the concept of individual liberty that the express rights describe. The implied right of privacy, therefore, encompasses protection for decisions the Court finds are deeply rooted in the nation's history and traditions and implicit in the concept of ordered liberty. The privacy cases have recognized parental autonomy (Pierce v. Society of Sisters, Meyer v. Nebraska), the right to marry (Zablocki v. Redhail, Loving v. Virgina), the right to use contraception (Griswold, Eisenstadt), the right to sexual intimacy in private spaces (Lawrence v. Texas), and until 2022, the right to decide whether to terminate a pregnancy (Roe v. Wade).

Constitutional rights protect against substantial government interference. Further, the U.S. Constitution confers only negative rights. Thus, government has no obligation to ensure that each individual has the resources necessary to exercise their rights. The Court has used a broad concept of negative rights in abortion rights cases. In 1977, Congress barred use of federal Medicaid funding for abortion, with narrow exceptions (Hyde Amendment). The Court used the concept of negative rights to determine that the Hyde Amendment does not interfere with the abortion right because the Constitution does not obligate the government to fund abortion services. (Harris v. McRae). The Court rejected the argument that the funding ban itself interfered with the abortion right. The Court's decision has effectively prevented many low-income people from obtaining abortions. Reproductive rights advocates have so far been unable to repeal the Hyde Amendment.

Shortly after the Supreme Court decided *Roe v. Wade* in 1973, anti-abortion advocates began to push abortion restrictions through state legislatures. The same ideologies used against reproductive health activities have shaped abortion restrictions. Legislators voting for bills that require parental consent for minors and spousal notification for married women seeking abortion have used family values narratives to justify the laws. In the 1980s, the idea of fetal personhood gained political influence (ProPublica 2014). Anti-abortion advocates supporting abortion restrictions described pregnancy as a potential maternal-fetal conflict and abortion as murder. In the 1990s, old-fashioned paternalism emerged as an important narrative in anti-abortion legislation. Laws were justified either as necessary to protect women from themselves or from abortion providers

(Siegel 2008). These "women-protective" laws required doctors to disclose often-false risks of abortion, to show the fetal ultrasound to patients, and to require waiting periods after disclosure. Some laws falsely portray abortion as very dangerous to justify imposing unnecessary, sometimes impossible requirements on doctors and clinics. These laws are called "targeted regulation of abortion providers" or TRAP laws. They include hospital admitting privilege requirements for clinic doctors and requirements that clinics meet out-patient surgical center standards. Anti-abortion advocates have even twisted eugenics ideology against abortion rights. Some anti-abortion advocates argue that abortion is a eugenics tool used against Black communities.

Reproductive rights advocates have responded by opposing restrictive abortion bills and by challenging the restrictions as constitutional violations. In some states, reproductive rights advocates have strengthened protection for reproductive rights through state constitutional law. For example, in November 2022, California voters passed a ballot initiative that amends the state constitution. The amendment adds express protection of reproductive rights (California Proposition 1). Reproductive rights organizations have also proposed and supported state legislation that protects access to and resources for reproductive health care (For example, New Jersey 2021; Connecticut 2022).

Reproductive rights advocates work on issues beyond abortion. For example, in the 1970s, advocates worked to secure federal funding for family planning clinics, and litigated to implement informed consent requirements to protect patients from eugenic uses of contraception and sterilization (Relf v. Weinberger). Women's health and reproductive rights advocates pushed for FDA approval of emergency contraception, as well as medication abortion. They continue to push for expanded access to those services.

The reproductive rights and reproductive health models have been intertwined since the mid-20th century. The most obvious evidence of this is that reproductive health providers such as Planned Parenthood and Whole Women's Health have served as plaintiffs in constitutional challenges to abortion laws. The complementary nature of the reproductive rights and reproductive health models also points to a key reason the reproductive rights approach has achieved some successes: active support from the medical and public health professions.

In the mid-19th century, the medical profession actively lobbied state legislatures to enact abortion bans. The resulting laws typically contained a narrow exception "for the purpose of saving the life of the mother." (Mohr 200-202; Luker 1984, 32-33; see e.g. Texas Penal Code). These were called "therapeutic abortions," and were legal only if performed by doctors. Historians have shown that the nascent medical profession campaigned for abortion bans to achieve exclusive authority over abortion against midwives (Mohr

1979). Yet, from the mid-20th century, the medical profession changed its position on abortion law (Greenhouse & Siegel 35). By then, the medical profession had achieved its initial goal -- law required that when abortions were legally permissible, only doctors could perform them. The medical profession and public health experts have also recognized the harmful effects of abortion bans on pregnant women. Abortion bans did not stop women from getting abortions, but it prevented many from accessing safe abortions. In the pre-*Roe* era, many women obtained abortions in unsafe conditions and from untrained abortionists, often resulting in injury and death. Yet law prevented doctors from protecting their patients by providing safe abortions. Abortion bans harmed medical professionals as well as people seeking abortion care. Laws criminalizing abortion put doctors in legal jeopardy. In addition, bans restrict the scope of medical practice and infringe on professional autonomy to determine standard of care.

C. Reproductive Justice

The reproductive justice framework approach uses human rights as a foundation for a robust understanding of reproductive and sexual freedom and, access to care regardless of income. Advocates target structural barriers that sustain systems of oppression. Advocates have defined reproductive justice as "the complete physical, mental, spiritual, political, economic, and social well-being of women and girls," that will be achieved "when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives" (Forward Together 2005, 1).

The reproductive justice framework emerged, in part, as a response to the limits of the reproductive rights model. Four limits are relevant to this analysis. First, focusing on legal rights constrains both issue framing and potential strategies to existing law. For example, the concept of negative rights assumes the government has no responsibility when poor people cannot afford to exercise their rights. The limits of law itself, then, prevents constitutional litigation from addressing the root causes of that particular problem, including structural racism. Second, reproductive rights advocates have long seen reproductive rights as necessary to achieve gender equality, yet the Court's majority has maintained the right of privacy and equal protection as separate, rather than connected doctrines. This has limited the force of reproductive rights by making the goal of gender equality secondary in constitutional analysis. Third, neoliberalism gained influence in the 1980s and 1990s. As a result, the understanding of individual rights began to align with a market-based understanding of liberty. This occurred in general political discourse and in law. Fourth, abortion became so politicized that extremist populism has affected the process and content of legislation.

The reproductive justice framework

also responded to limitations within the mainstream reproductive rights movement. Generally, in the late 20th century, leadership in the most well-resourced and influential organizations was less diverse than the U.S. population. Those organizations set priorities that largely reflected the views and experience of white, middle class and more privileged women (Browner 2015, 10). Black women disproportionately use abortion, as compared to other racial groups. Yet, reproductive rights advocacy did not always address the ways in which racism and poverty affected abortion decisions and access to care. In addition, the movement's substantial focus on abortion overlooked the many ways in which women of color, low-income women, LGBTQ+ communities experienced reproductive control (Ross & Solinger 2017, 43-54). For example, women of color, especially low-income women of color, have been more likely to experience coercion to use long-acting reversible contraception or sterilization, to be prosecuted for drug use during pregnancy, or to receive a court-ordered cesarean delivery (Ikemoto 1992, 122-125, 1228-1232, 1240-1246). LGBTQ+ people have been more likely than cis-gender people to be denied care, face discrimination by providers and staff, or receive care based on cis-gender care standards (Wingo 2018; Dawson 2021).

Reproductive justice advocates articulated the framework as an intentional strategic response at a time when social conservatism and neoliberalism were gaining influence *vis a vis* liberalism. The reproductive rights and health movements arose from liberalism during the civil rights era. The abortion wars have produced a simplistic oppositional discourse that characterizes reproductive rights and health supporters as pro-choice and advocates against abortion as pro-life. Reproductive justice advocates aligned the framework with other progressive social justice movements to offer not simply opposition to prevailing conservatisms, but also an alternative to the apparent diachronic character of the abortion debate in the U.S. It has sought to sidestep that discourse by offering alternative values and visions of society, and richer, more expansive, and engaged ways of seeking change.

The reproductive justice framework uses several methodologies or strategies. Three are particularly generative. In addition, the strategies often reveal significant connection to other social justice issues as well as to reproductive health and rights organizations. The connections foster coalition work.

First, reproductive justice uses a method called intersectionality. Critical race feminism, a legal theory, also uses intersectionality (Crenshaw 1989). The concept of intersectionality acknowledges that forms of subordination, such as racism or white supremacy, patriarchy, racist nationalism, heterosexism and homophobia, rigid binary gender identity norms, disability exclusion, poverty, are not separate and parallel categories. They form matrices that stratify power (Hill Collins 2000). Intersections among these oppressions do not produce separable components that are ad-

ditive in impact. Rather they can produce stereotypes, exclusions, and norms that are specific to identities constructed at the intersections. As a result, Asian women in the U.S. face forms of subordination shaped by racism, patriarchy, xenophobia and white nationalism that are particular to Asian women (Forward Together 2005, 4; Silliman et al., 2004, 14-15). Intersectional analysis examines the ways that forms of subordination interact to maintain structures of inequality. The resulting structures of inequality, in turn, maintain barriers to reproductive and sexual freedom.

Second, the reproductive justice approach looks at the root causes of social injustice. Thus, analysis requires identifying the role of structural inequality and exclusionary cultural norms (Ross & Solinger 2017, 56). Structural inequality is maintained by social norms so deeply embedded that they mask racism, patriarchy, poverty, nativism, exclusion of people with disabilities, and marginalization of LGBTQ+ people from social and economic life. Making structural inequality visible exposes how subordinating norms affect educational and employment opportunities, access to safe housing and neighborhoods, policing, environmental toxin exposure. Those inequalities, in turn, affect health and access to health care, including reproductive and sexual health care. Root causes analyses enables reproductive justice advocates to identify exactly how structural inequalities function as barriers to sexual and reproductive health access.

Third, the reproductive justice model relies on local knowledge to inform root causes analyses, and community organizing to frame issues, set priorities, and develop campaigns for change (Silliman et al. 2004, 15). The issues identified by lived experience are not crafted to fit existing law or to appeal to law and policy makers. Rather they reveal the complications of structural and legal barriers. Community-based organizations and their allies can amplify the voices of people to "speak truth to power."

III. From *Roe* to *Dobbs*

Part III provides legal background for the June 2022 *Dobbs* decision. More specifically, this part briefly describes *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey (*hereinafter *Casey)*, two key cases recognizing the abortion right. The analysis then sets out the U.S. Supreme Court's decision, *Dobbs v. Jackson Women's Health*. In *Dobbs*, the conservative majority overturned *Roe* and *Casey*. Part III then discusses some of the ideological and legal implications of that decision in the United States.

A. The Right to Decide

In 1973, the Supreme Court of the United States decided *Roe v. Wade*. At issue was a Texas ban on abortion. That law dated back to the mid-nineteenth century period in which the medical profession encouraged states to criminalize abortion. The court recognized that the constitutional right of privacy protects the abortion

decision -- the right to decide whether or not to terminate a pregnancy. *Roe* was one in a series of cases in which the Supreme Court defined the right of privacy. In *Roe*, the Court aligned the abortion decision with prior decisions recognizing the right to access contraception, the right to marry, and parental rights.

Most importantly, the Court cast the right to decide as a fundamental right, the most strongly protected level of individual rights. As a fundamental right, laws interfering with the right would undergo "strict scrutiny," which requires the state to establish a compelling or strong justification. Texas offered three justifications. The Court rejected the argument that abortion bans deter "illicit sexual conduct," as a "Victorian social concern." The court recognized the justifications or interests in protecting the woman's health by ensuring the safety of abortion and protecting prenatal life. The court determined that the state's interest in protecting women's health became compelling from the beginning of the second trimester, and the interest in protecting prenatal life became compelling from "viability," the point at which a fetus could survive outside the womb. The Court rejected the argument that a fetus is a person throughout pregnancy, and held that the Texas law was invalid.

Some saw *Roe v. Wad*e as a foundation for a broader claim of reproductive rights. Those advocates asserted that *Roe* protected women's bodily autonomy -- the right to control one's own body. Others, including pro-choice advocates, have criticized the Court's analysis, even as they fought to sustain its holding. One criticism worth noting is that the constitutional analysis medicalizes the personal decision by focusing on the woman's body and fetal development, rather than on how pregnancy and parenthood will affect the woman's ability to define her life's course, especially in a society stratified by patriarchy, racism, and other forms of subordination (Siegel 1992). By describing abortion only as a medical procedure, the court maintained medical providers as gatekeepers. While *Roe* has enabled more women to complete higher education, develop careers, become government officials and leaders, safely raise their existing children, it has also perpetuated gender essentialism.

Between 1973 and 1992, state legislatures enacted laws restricting access to abortion before viability, without directly banning access. Anti-abortion advocates' main strategy was to chip away at the right to decide. In 1992, the U.S. Supreme Court decided a case called *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In that case, the Court affirmed the core principle of *Roe v. Wade*. However, the Court rejected the trimester analysis and weakened constitutional protection of the right to decide. The new constitutional standard permitted regulation before viability unless the restriction imposed an "undue burden" on the right to decide. As in *Roe*, states could ban abortion from viability except when necessary to protect the woman's life. The weaker constitutional standard empowered legislatures to

regulate abortion during early pregnancy with more intrusive laws justified as necessary to protect women and prenatal life. Restrictions included long waiting periods, requirements that pregnant women be shown ultrasound images of the fetus or receive medically inaccurate information, and rules aimed at clinics and doctors that were so expensive or impossible to implement that clinics had to close.

The *Casey* decision spurred legislation that relied on old patriarchal images of women in need of protection. It encouraged anti-abortion advocates to produce inaccurate information that exaggerated the risks of abortion. For example, some laws claimed that abortion causes post-abortion regret and depression, increases the risk of breast cancer, and causes fetal pain. The false risks played into a new narrative that cast the "abortion industry" -- family planning clinics and abortion providers -- as a threat to vulnerable women and "unborn children." This narrative identifies abortion as something that threatens families and even, minority communities. This new narrative spins together traditional patriarchy, fetal personhood and family values, and it claims the mantle of anti-eugenics.

B. *Dobbs v. Jackson Women's Health Organization*

In 2020, Supreme Court Justice Ruth Bader Ginsburg died. Then-President Trump appointed Amy Coney Barrett to replace Justice Ginsburg. Since October 26, 2020, the Supreme Court has had six very conservative justices who were skeptical of the right to decide and the right of privacy. Three liberal justices whose judicial opinions recognized the right of privacy, including the right to abortion, formed a minority.

On June 24, 2022, the conservative majority of the Supreme Court overturned *Roe v. Wade* in a case called *Dobbs v. Jackson Women's Health Organization*. As a result, the U.S. Constitution no longer protects the right to decide whether or not to terminate a pregnancy. The decision substantially reduces the scope of the right of privacy and eliminates a core element of legal protection for reproductive rights.

The *Dobbs* decision to overturn *Roe* reflects three strands of conservatism in American politics. The most obvious is social conservatism. More specifically, conservative Christianity influenced the *Dobbs* decision. That perspective prioritizes the concept of fetal interests over the pregnant person's interests and well-being. It relies on an assumption that abortion undermines motherhood. Second, the *Dobbs* decision reflects neoliberalism. Neoliberalism is a free-market ideology that defines "personal responsibility" without attention to social reality. It claims that individuals, not the government, should have the responsibility to obtain health care for themselves, including reproductive health care (Browner 2015, 8-9). The third strand of conservatism in the *Dobbs* decision is a version of federalism that favors state rights over federal government authority.

The *Dobbs* decision allows states to ban,

regulate, or protect abortion access with little accountability to constitutional principles. In that respect, the *Dobbs* holding is a victory for a form of federalism that favors robust states' rights. Yet, overturning *Dobbs* leaves abortion access to the current excesses of electoral politics. The content of abortion laws depends more directly on prevailing ideology. In addition, by removing constitutional protection, the Court removed a tool for holding elected officials accountable to their constituents. Legislatures that pander to an influential minority view can enact abortion laws that most state residents abhor. Many claim the *Dobbs* decisions is also a victory for populism. And yet, now that abortion opponents have achieved the goal of overturning *Roe*, it may become apparent that ordinary people cannot afford the many costs of actually banning abortion.

The United States is now divided. As of February 2023, twelve states have banned abortion and two have effectively made abortion unavailable (Guttmacher Institute Interactive Map February 2023). Abortion bans that apply early in pregnancy effectively block nearly all abortion. People can only obtain abortion services by traveling to states where abortion is legal or by proving that they fit into narrow statutory exceptions. Abortion bans disproportionately impact low-income people who cannot afford to travel. Because structural inequality based on race, disability, gender identity, immigration status, and other forms of subordination affect access to wealth, members of those groups on more likely to lack the resources.

In contrast, seventeen states and the District of Columbia currently protect abortion rights. Protections include constitutional provisions and statutes (Guttmacher Institute Abortion Policy February 2023). Several states have recently expanded legal protection for abortion and other reproductive health services. Some states are also allocating more financial resources for both state residents and people traveling in-state to obtain abortions. The situation will remain fluid for years. In effect, the U.S. is in a civil war that is, at its core, a culture war.

C. Implications

The Supreme Court's decision to overturn *Roe* has already prompted change. Some impacts were immediate and predictable -- abortion bans and substantial restrictions. In addition, *Dobbs* has created a great deal of fear and uncertainty. This discussion provides a few examples to illustrate how fear produced by recent abortion restrictions has affected health care and research, and the role that ideology plays in fostering fear and uncertainty.

The impact of the *Dobbs* decision on health care was almost immediate. Many doctors have hesitated to provide standard care because they fear accusation and prosecution for violating an abortion law. Some statutes that criminalize abortion have narrow exceptions that permit abortions when necessary to save the woman's life in a medical emergency. For example, a Missouri abortion law makes it a crime

to anyone who performs an abortion in any circumstances "except medical emergency." The statute defines "medical emergency" as a circumstance where failure to provide an abortion would cause, "serious risk of substantial and irreversible physical impairment of a major bodily function" (Missouri Stat.). Because the statutory language is extreme and vague, it has made some doctors hesitate not only to provide abortions that jeopardize the woman's life, but also miscarriage care, and treatment for ectopic pregnancy. Abortion laws and political volatility squeeze providers between risk of criminal prosecution and their professional duty to provide good care.

Some state abortion laws include language that creates uncertainty about the legality of other health procedures. For example, statements that "life begins at conception" raise questions about in vitro fertilization procedures (See, Ariz. SB 1457). Fertility clinics in abortion-hostile states have considered relocation to states without fetal personhood laws. The same language has also prompted uncertainty about biomedical research that uses human in vitro embryos, such as human embryonic stem cell research or fertility research.

Early 21st century abortion rights opponents began to turn eugenics concerns and disability rights views against abortion rights. For example, anti-abortion publicity campaigns placed billboards in predominantly Black neighborhoods that asserted that abortion was a form of racial eugenics. A few states enacted laws that restrict abortion based on sex selection. Advocacy for laws banning sex selection often combined anti-Asian stereotypes and claims that the restrictions were necessary to prevent gender-based eugenics in Asian communities. In a 2019 Supreme Court case, Justice Thomas wrote a concurring opinion that described abortion as a tool of eugenics. Thomas' opinion mis-states the history of eugenics in the U.S. Eugenicists have used forced sterilization, not abortion as a tool of oppression (Roberts 2019). Thomas' opinion failed to acknowledge the role of structural racism and ableism as a factor in abortion rates and the lack of evidence for male preference in U.S. abortion. Yet, in *Dobbs*, the Court's opinion validated the misstatement by recognizing "the prevention of discrimination on the basis of race, sex, or disability" as a valid justification for restricting abortion access (Dobbs 2022, 78).

The *Dobbs* decision has emboldened social conservatives. For social conservatives, overturning *Roe* was a step toward the larger goal of establishing social control over sex, gender roles, gender identity, within a white Christian nationalist vision. In the wake of *Dobbs*, social conservatives have stepped up abortion bans and efforts that target people who are transgender. Like early abortion laws after 1973, many anti-trans laws aim at minors. For example, many bills would prohibit doctors from providing gender-affirming care for transgender youth. Patriarchy and racism in the U.S. have always relied on biological essentialism. The LGBTQ+ activists, anti-racist organizations, and the disability

rights movement all challenge biological essentialism. In the backlash against civil rights, conservative family values ideology has weaponized biological essentialism to attack trans and queer identity.

IV. Reproductive Justice in the Post-*Dobbs* Era

Part IV provides a brief assessment of the reproductive justice movement's demonstrated strengths and challenges in the post-*Dobbs* era. Part IV then discusses a few ways that the reproductive justice framework can contribute to reconfiguring the movement to expand access to comprehensive reproductive and sexual health care in the U.S.

A. Demonstrated Strengths of the Reproductive Justice Movement

Throughout the movement to expand access to reproductive and sexual health care, "Reproductive justice" is now recognized. It has become a widely used term in the broader movement for reproductive and sexual health, in civil rights, social justice, and national policy. Some use "reproductive justice" as a synonym for reproductive rights, or vice versa. Not all who use "reproductive justice" are familiar with its methodologies. However, widespread use of "reproductive justice" demonstrates the movement's impact. Young adults and youth are particularly likely to recognize and embrace reproductive justice goals and strategies.

The reproductive justice movement has significantly impacted reproductive rights and reproductive health work. For example, some reproductive rights and health organizations now incorporate intersectionality analyses. They work in coalition with reproductive justice organizations to organize communities and achieve law and policy change (See, e.g. Forward Together Strong Families New Mexico). And some reproductive rights and health organizations have become more conscious about the need to diversify staff and leadership in order to bring a wider range of experiences and voices to their understanding of access issues.

The reproductive justice movement has also affected other social justice work. Other social justice agendas now recognize reproductive justice as a core aspect of social justice. (See, e.g. Hernandez-Simmons 2022). Thus, the reproductive justice movement has expanded the definition of social justice. In turn, reproductive justice finds synergy with goals of other social justice work. For example, reproductive justice organizers have advocated against siting sources of environmental toxins in communities of color because of effects on reproductive health.

Recognizing mutuality of goals for social and policy change provides a basis for community and organizational alliance. For example, in response to the leaked and official *Dobbs* opinions, some mainstream environmental protection organizations spoke out against overturning *Roe* and expressed support for reproductive justice organizations. "NRDC [Natural Resources Defense Council] stands with organiza-

tions such as In Our Own Voice, National Asian Pacific American Women's Forum, National Birth Equity Collaborative, National Latina Institute for Reproductive Justice, Sister Song, and many others to defend the reproductive rights of all women and people who give birth to access safe reproductive health care." (Shahyd 2022).

B. Challenges for Reproductive Justice after *Roe*

The reproductive justice movement faces several challenges in the post-*Roe* era. Perhaps most immediately, the *Dobbs* decision shifted attention to abortion and abortion rights. Reproductive justice advocates have fought against conflating reproductive rights with abortion. They have sought to expand the issues on the reproductive and sexual health agenda. The implications of *Dobbs* shows that abortion bans affect other health care issues. Yet, the focus on *Dobbs* may result in less attention to and fewer resources for other reproductive and sexual health access issues.

In addition, the rapid implementation of state laws that ban or substantially restrict abortion services creates high demand for short term measures to reduce harms those laws cause. These measures include using litigation to challenge new abortion law, expanding reproductive health services in states where abortion remains legal, raising awareness of how abortion restrictions exacerbate racial, wealth, and other forms of subordination, and enacting greater legal protection of reproductive rights in abortion-rights states. These measures are necessary and align with reproductive justice goals. However, the all-out response to the immediate emergency that *Dobbs* has created may undermine the reproductive justice movement's efforts to effect long term social change.

The reproductive justice movement may also face a capacity shortage. Reproductive justice advocates work simultaneously on reproductive and sexual health care access, LGBTQ inclusion, and the ways that structural inequality affects those issues. In part, this arises from intersectionality analysis. It also responds to how family values ideology links condemnation of reproductive health care access and gender identity issues. In addition, as reproductive justice has succeeded in expanding alliances with other social justice organizations, including Black Lives Matter, it has also expanded its scope of work. *Dobbs* has made all of these issues more pressing, in part, by emboldening social, states' rights, and neoliberal conservatives to push harder. The greater demand on reproductive justice advocates may stretch their individual, organizational, and financial capacity.

A fourth challenge the reproductive justice movement may face arises from the new civil war. *Dobbs*, as mentioned, has enabled states to enact laws that ban or substantially restrict abortion access. Abortion-hostile states have already begun to do just that. *Dobbs* has also prompted abortion rights-states to strengthen protection for reproductive rights and increase resources for reproductive and sexual health services. This is increasing

the range of experiences that reproductive justice organizers seek to recognize and amplify. This exacerbates the possibility that the movement may face a capacity shortage. It may also make it difficult to set priorities. Abortion bans increase marginalization and urgency, and they add to the gaps in access that already exist.

C. Going forward

This discussion does not predict what will happen in the battle for reproductive justice. Nor does it propose next steps or specific strategies. Rather, this discussion highlights what the reproductive justice model can contribute no matter how the battle goes. It does assume, based on forecasts by reproductive rights and justice advocates, that the next phase of the battle will take decades.

The reproductive justice strategies this article discusses make the movement well-equipped to build alliances and coalition-based campaigns. Intersectionality analysis has already facilitated creation of organizations such as SisterSong, National Latina Institute for Reproductive Justice, and the National Asian Pacific American Women's Forum. Root causes analyses have prompted organizations like Asian Communities for Reproductive Justice to expand their agendas and mission. That organization is now called Forward Together. Forward Together's mission has expanded beyond reproductive justice. Many organizations, including In Our Own Voice, seek to amplify and support local and state reproductive justice community organizations. These organizations and others work in coalition, and increasingly ally with other social justice, rights, and health organizations.

Reproductive justice organizations have been particularly effective at contributing previously unheard voices to public discourse. Abortion-opponents had so successfully stigmatized abortion that public discourse consisted largely of political rhetoric. Recently, people have shared their abortion experiences publicly in order to de-stigmatize abortion. The initial wave of personal accounts consisted primarily of white women. Many of those accounts explained the abortion decision as a response to exceptional circumstances, including pregnancy from rape and pregnancy as a significant health risk. These stories began to break the silence and stigma of abortion. At the same time, some also reinforced the idea that only exceptional circumstances justify abortion.

Reproductive justice organizations have enabled people marginalized by racial subordination, poverty, disability, sexual orientation and gender identity, and immigration status to add their experiences. Including their stories in public discourse has had several effects. Their stories put both the need for and the barriers to reproductive and sexual health care access into context. That helps shift the discussion from the abstractions of political rhetoric and ideology to the real needs of individuals. The stories counter abortion opponents' claim that abortion is a racial eugenic tool. The personal accounts show

that structural inequality and its impacts often put Black women in situations that make abortion the most reasonable decision they can make in their circumstances. In other words, the stories show that abortion is not a stand-alone issue, but one that interacts with other oppressions. Third, adding personal accounts about abortion helps to de-stigmatize and to normalize abortion as a common experience. This, in turn, contributes to culture change.

Reproductive justice work aims at other aspects of culture change, as well. Some organizations, including Black Women for Wellness, enable community members to clarify and expand on the value of their own lived experiences (Black Women for Wellness). Culture change strategies highlight images, histories, and narratives that challenge narrow norms about family, motherhood, and gender roles. Culture change activities also channel culture change through traditional institutions. For example, Law Students for Reproductive Justice, now If/When/How, created a law schools project to incentivize adding reproductive justice curriculum in higher education (If/When/How) Other organizations work alongside civil rights organizations on cross-cutting issues, including voting rights.

The reproductive justice strategies have enabled community and organizational participants to be creative and nimble. There is no one type of reproductive justice organization. There are many. And they use intersectionality, root causes analysis, and community-based activities in a wide variety of ways. In other words, the reproductive justice framework is generative. That makes it well-suited to work pro-actively. The reproductive rights movement was hampered, in the past, by a largely reactive, defensive response to anti-abortion laws and activities. It is likely that reproductive justice strategies contributed to the reproductive rights movement's shift to proactive work.

Finally, the definition of reproductive justice suggests pathways forward. Reproductive justice has embraced human rights as a conceptual foundation for achieving its goals. Human rights remain distinct from the understanding of individual rights in the U.S.; human rights include affirmative rights. Nor has neoliberalism eroded the concept of human rights to procedural rights. The reproductive justice movement's express embrace of human rights may facilitate alliance across borders with, for example, the Green Wave in Latin America (Chang, Mehta and Kenin July 7, 2022), or the nascent reproductive justice activities in Japan.

V. Conclusion

The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health* has undermined the status and health of women, lesbian, gay, bisexual, transgender, and queer people. *Dobbs* opened the door to state control over pregnancy. It has also spurred many states to enact laws that regulate sexual intimacy and gender roles in other ways. For example, in the first year

after *Dobbs*, conservative legislatures have enacted bans on access to gender-affirming care for people who are transgender. No doubt, other types of bans will follow. Many of these laws are not enforceable. But they show that abortion is not a standalone issue. Abortion restrictions are part of a matrix of social and legal rules that maintain inequality and privilege. And they do so in disregard of the fact that people already marginalized by racism, poverty, immigration status, and other structures of subordination will experience the greatest harms.

In terms of advocacy for reproductive health access, the *Dobbs* decision positions the U.S. with countries that do not have constitutional protection for abortion rights. In that setting, the reproductive justice framework becomes more important. In the U.S., women of color organizations have used the reproductive justice approach to leverage social change and change in the reproductive health and rights movement. Reproductive justice leaders have not asserted that the reproductive justice framework is a totalizing theory. Rather, they have described it as a complementary approach. While this has not occurred without tension within the movement, the "complementary" approach has expanded the advocacy base and its strategies. Those expansions will be critical in the ideological civil war now taking place in the U.S.

This article discusses three strategies that reproductive justice advocates use. These strategies are adaptable and form only a starting point for reproductive justice-based advocacy. Intersectionality analysis requires identifying key forms of subordination and the communities impacted by them. Assessing how social, institutional, and governmental authorities interact with marginalized communities in ways that produce greater reproductive control and harm requires experiential knowledge from community members. It also directly engages with ideologies used to naturalize and justify control. Intersectionality analysis produces a more contextualized and nuanced understanding of the ways that social norms and formal rules divide us and respect for those who face greater barriers as a result. At the least, intersectionality analysis can prompt advocates to start every gathering and project with the questions: who else should be here; whose voice are we missing?

Reproductive justice work also requires analysis of the root causes of reproductive injustice. Typically, root causes analysis examines how social, economic, and government structures maintain patriarchy and other forms of subordination. It can also examine how other forces of social injustice shape reproductive injustice. This makes reproductive justice work daunting. But advocacy agendas can include short term goals as well as long term social change. In addition, root causes analysis helps identify ally organizations. For example, allies might include organizations addressing on LGBTQ issues, sex trafficking, sexual assault and harassment, immigration and xenophobia, environmental degradation, militarization, labor, and

health care.

Reproductive justice values community-based knowledge and organizational work. As a result, there may not be a national agenda or agreement on priorities. Because reproductive justice analysis requires contextualization, that result is logical. In one region, advocates may recognize that environmental toxins pose the greatest threat to reproductive justice. In another region, xenophobia and its impacts on immigrants and ethnic minorities may become the priority issue. It is also possible, however, to organize nationally and internationally to address one issue. In the United States, many if not most reproductive justice organizations, as well as reproductive rights and health organizations have prioritized working to protect abortion access. In Latin America, advocates in several countries have formed the Marea Verde or Green Wave movement that mobilizes action for abortion access. In these movements, reproductive rights and health work rely primarily on law and health expertise. Reproductive justice is most likely to use and create strategies that draw grassroots energy, raise community voices and knowledge, and generate ideological change. It asserts the goal of building an inclusive, just society, one in which all "have the complete economic, social, and political power and resources to make healthy decisions about our bodies, our families, and our communities in all areas of our lives." (In Our Own Voice 2023).

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要旨

ロー判決以後のアメリカ合衆国における リプロダクティブ・ジャスティス

リサ・C・イケモト*

本稿は、リプロダクティブ・ライツが間違いなく危機にあるアメリカ合衆国において、性と生殖のヘルスケアへのアクセスの保障における、リプロダクティブ・ジャスティス（性・生殖・再生産をめぐる社会正義）という概念枠組みの役割に焦点を当てる。2022年6月、妊娠を継続するかしないか決める権利を合衆国憲法は保障しないという判決が、アメリカ合衆国最高裁の保守多数派によって下された。本稿では、リプロダクティブ・ヘルス、リプロダクティブ・ライツ、そしてリプロダクティブ・ジャスティスのフレームワークと、これら三つのフレームワークの相互作用、そして反中絶の政治と法を導き出しているイデオロギー的な力に関して記述し、評価する。憲法に保障された権利が不在という状況の中、リプロダクティブ・ジャスティスの権利擁護と活動はより重要になってきている。本稿では、ポスト・ロー判決の時代において、リプロダクティブ・ジャスティスがどのような貢献ができるか考察する 。

キーワード
リプロダクティブ・ジャスティス、中絶、優生思想、保守的な家族規範（family values）、ロー判決、ドッブス判決

（翻訳：大室恵美）

この論文の日本語訳は以下のリンクから読むことができます。

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