

EXPLORING THE ROLE OF LAWYERS IN SUPPORTING THE REPRODUCTIVE JUSTICE MOVEMENT

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ABSTRACT

Reproductive freedoms have been under attack in the United States for centuries. The ability to decide whether to have children, and the capacity to adequately provide for those children, has been severely constrained in law and in practice, particularly for women of color, low-income women, and queer individuals. The reproductive rights movement began achieving significant legal victories during the latter half of the twentieth century, beginning with *Griswold v. Connecticut* and *Roe v. Wade*, establishing a right to privacy with respect to reproductive decisions. At the same time, the reproductive rights movement largely prioritized the needs of middle- and upper-class white women, often excluding historically marginalized groups.

By contrast, the reproductive justice movement was founded by women of color. The reproductive justice movement seeks reproductive liberation for all people, and connects the goal of eliminating oppression to its efforts to achieve reproductive freedom. Legal organizations, traditionally associated with the reproductive rights movement, have recently applauded reproductive justice, referring to reproductive justice as their ultimate objective. While lawyers can provide access to the court system and levers of power to achieve goals through litigation, there is a risk that this privileged group of actors could co-opt reproductive justice as both a term and a movement. This article traces the histories of the reproductive rights and reproductive justice movements. Based on interviews with reproductive justice activists as well as attorneys, this article seeks to provide insight into how lawyers can support reproductive justice without encroaching on the power of the movement's leaders or the needs of the communities at its core.

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I. INTRODUCTION

The reproductive justice movement coalesced during the 1990s to bring a wider social justice framework to the conversation surrounding reproductive rights. Reproductive justice is rooted in the lived experiences of women of color, queer women, low-income women, and other historically marginalized groups, in contrast to the traditional dominance of white, straight, cisgendered women's issues and opinions in the reproductive rights world.¹ Justice-focused

1. Many individuals who experience reproductive oppression do not identify as women, including some transgender, gender nonconforming, and queer individuals. The author does not intend to further marginalize the reproductive experiences of people who do not identify as "women," and uses the term "women" in this article due to the historical emphasis on women in the reproductive rights movement. For information regarding reproductive justice and LGBTQIA rights, see NAT'L LGBTQ TASK FORCE, QUEERING REPRODUCTIVE JUSTICE: A TOOLKIT (Zsea

organizations have expanded public consciousness and have generated advocacy for greater access to reproductive health and liberation.

Today, access to reproductive care is under siege throughout the United States, from restrictive state statutes that make it extremely difficult to find an abortion provider, to doctors who refuse to perform in-vitro fertilization for lesbians, to welfare laws that punish women for having children. Still, many mainstream reproductive rights organizations continue to be led by, and focused on, white, straight, affluent women. Some reproductive rights groups have adopted the term “reproductive justice,” yet mere use of the phrase has not necessarily translated into a commitment to the framework and its values.² At its core, the reproductive justice movement seeks to achieve reproductive freedom for all people, and as such, necessarily considers a broad range of issues, including sterilization, sex education, childcare, and environmental justice.

This article explores the emergence of the reproductive rights and reproductive justice movements, the growth of the reproductive justice movement, and the role of lawyers within the latter movement. Through interviews with reproductive justice and reproductive rights leaders, this article seeks to discern best practices for attorneys. By listening to activists who have a keen, nuanced understanding of reproductive justice, lawyers might make valuable contributions to support the movement without displacing its founders.

The concept of reproductive rights is structured around securing legal rights and court victories; it lends itself naturally to lawyering, and in fact, lawyers have frequently spearheaded reproductive rights organizations. Lawyers often work on protecting and expanding rights, and therefore gravitate to the rights-based framework. Reproductive *justice* instead grounds itself in the experiences of historically oppressed groups—communities from which privileged lawyers tend not to come—and has typically been led by activists. Consequently, there is scant legal scholarship on the justice framework, and very few lawyers practice in this field specifically.³ Lawyers could be assets to the reproductive justice movement, but mapping out a path for these practitioners that defines a role for them without supplanting the movement’s leaders is not an easy task. This article will explore how lawyers can leverage their access to power to be supportive of reproductive justice.

Beaumonts & Candace Bond-Therault eds., 2017), <http://www.thetaskforce.org/wp-content/uploads/2017/03/Queering-Reproductive-Justice-A-Toolkit-FINAL.pdf> [<https://perma.cc/HP93-LYVV>].

2. Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY AFR.-AM. L. & POL’Y 71, 72 (2011).

3. *Id.* at 73.

II. DEFINITIONS

A. Common Terms

Before delving into history and analysis, it is necessary to define some terms essential to examining the issues covered in this article. Internationally, *reproductive rights* are based on the recognition that all individuals and couples should have the right to make decisions about reproduction freely, the right to have the information and means to do so, and the right “to attain the highest standard of sexual and reproductive health.”⁴ In the United States, the reproductive rights movement typically focuses on the legal right to access abortion and contraception.⁵ A similar though distinct term, *reproductive freedom* denotes the equality and self-determination to exercise reproductive choice,⁶ as well as access to healthcare and the ability to make choices free from coercion or discrimination.⁷ *Reproductive health* addresses reproductive care at all stages of life,⁸ and the health framework analyzes oppression as a condition due to a lack of access to healthcare.⁹ Accordingly, reproductive health advocates focus on improving and expanding reproductive healthcare services in communities of color and low-income communities to remedy health disparities.¹⁰

Reproductive justice “situates reproductive health within the social justice framework,”¹¹ and will be achieved when “all people can exercise the rights and access the resources they need to thrive and to decide if, when, and how to create

4. U.N. Population Fund, Office of the U.N. High Comm’r on Human Rights & Danish Inst. for Human Rights, *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions* 19, U.N. Doc. HR/PUB/14/6 (2014), <http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf> [https://perma.cc/J2HT-ZN35]; U.N. Fourth World Conference on Women, *Beijing Declaration and Platform for Action* ¶ 95, U.N. Doc. A/CONF.177/20/Rev.1, annex II (Sept. 15, 1995), <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf> [https://perma.cc/8HCY-BST2].

5. See, e.g., NARAL PRO-CHOICE AM., WHO DECIDES? THE STATUS OF WOMEN’S REPRODUCTIVE RIGHTS IN THE UNITED STATES (2016), <https://www.prochoiceamerica.org/wp-content/uploads/2017/01/WhoDecides2017-DigitalEdition3.pdf> [https://perma.cc/5YFF-VY2G].

6. *About Us*, CTR. FOR REPROD. RIGHTS, <http://www.reproductiverights.org/about-us> [https://perma.cc/PCV9-SG7B] (last visited Oct. 22, 2017).

7. *Id.*

8. *Reproductive Healthcare*, U.S. DEP’T OF HEALTH & HUM. SERVS., <http://www.hhs.gov/opa/reproductive-health/> [https://perma.cc/2SKS-MD6K] (last visited Oct. 21, 2017).

9. ASIAN CMTYS. FOR REPROD. JUSTICE (ACRJ), A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE (2005) [hereinafter ACRJ, A NEW VISION], <https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf> [https://perma.cc/F9N4-ZSQZ].

10. *Id.*

11. IF/WHEN/HOW: LAWYERING FOR REPROD. JUSTICE, REPRODUCTIVE JUSTICE 101: THE FUNDAMENTALS 3 (2017) [hereinafter IF/WHEN/HOW, REPRODUCTIVE JUSTICE 101] (pre-publication version presented at Stanford Law School on April 6, 2016).

and sustain their families with dignity, free from discrimination, coercion, or violence.”¹² While reproductive rights emphasizes an individual, rights-based framework, reproductive justice highlights tackling societal power inequities. Reproductive justice organizations combat *reproductive oppression*, the exploitation and control of individuals through their bodies, sexuality, labor, and reproduction.¹³ The justice lens focuses on systemic change, and takes leadership cues from communities that most commonly experience oppression, recognizing that “strategies must lift up entire communities to support individuals.”¹⁴ The term reproductive justice is popular today, yet as will be explored later, its popularization has led to a “whitewashing” of the movement in some ways. Reproductive health, rights, and justice need not be in tension; though the approaches within each are distinct, all three frameworks can complement each other to provide a comprehensive solution to reproductive oppression.¹⁵ Reproductive justice is an intersectional term, and it recognizes larger societal oppression that restricts reproductive freedom for all people.¹⁶

B. A Note on the Legal Rights Framework in the United States

Before continuing, it is important to distinguish the reproductive justice critique of the reproductive rights framework from the Critical Legal Studies critique of the civil rights framework, so as not to conflate the two. Critical Legal Studies (CLS) critiques the civil rights approach to seeking equity on the basis that, by achieving legal rights through the use of an inherently unequal legal system, civil rights lawyers actually legitimate the inequalities they are seeking to address.¹⁷ However, as Professor Kimberlé Crenshaw highlights, CLS scholars fail to acknowledge the importance of civil rights in addressing the

12. *What is RJ?*, IF/WHEN/HOW: LAWYERING FOR REPROD. JUSTICE, <https://www.ifwhenhow.org/about/what-is-rj/> [<https://perma.cc/XG2K-NV39>] (last visited Oct. 19, 2017).

13. Loretta Ross, SisterSong Women of Color Reprod. Health Collective, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4 (SisterSong ed., 2007), <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051> [<https://perma.cc/D72Z-ATTD>].

14. ASIAN CMTYS. FOR REPROD. JUSTICE & ACCESS/WOMEN’S HEALTH RIGHTS COALITION, THREE APPLICATIONS OF THE REPRODUCTIVE JUSTICE LENS (2009), <https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-Three-Applications-of-the-RJ-Lens.pdf> [<https://perma.cc/A8BU-VPD2>].

15. ACRJ, A NEW VISION, *supra* note 9.

16. For further discussion of intersectionality, see *infra* Part VI.B.1. See generally AFRICAN AM. POLICY FORUM, A PRIMER ON INTERSECTIONALITY 3–4 (2016), <http://static.squarespace.com/static/53f20d90e4b0b80451158d8c/53f399a5e4b029c2ffbe26cc/53f399c8e4b029c2ffbe2b28/1408473544947/59819079-Intersectionality-Primer.pdf?format=original> [<https://perma.cc/7Q54-5W3P>] (defining intersectionality as “a concept that enables us to recognize the fact that perceived group membership can make people vulnerable to various forms of bias, yet because we are simultaneously members of many groups, our complex identities can shape the specific way we each experience that bias”).

17. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334 (1988).

racism embedded in, and upholding, current social conditions.¹⁸ Though a civil rights framework might legitimate the inequality and oppression it seeks to remedy, Crenshaw points out that its use is also an effective advocacy strategy resulting in tangible, needed benefits for communities of color.¹⁹

The perspective of reproductive justice groups is more akin to Crenshaw's views than to that of Critical Legal Studies theorists. The reproductive justice framework does not act in opposition to the rights framework; reproductive justice groups recognize the need for both models to work in concert to achieve goals.²⁰ Still, reproductive justice points out that reproductive rights groups have tended to focus on the needs of only a small part of the population, and by contrast, reproductive justice seeks to ground its framework in the experiences of historically marginalized communities to change structural power dynamics. While the relative utility of a rights-based legal strategy is the subject of an entirely different article, this discussion seeks to clarify and highlight that reproductive justice groups do not necessarily oppose the legal rights for which the reproductive rights movement advocates.²¹ Instead, reproductive justice also seeks larger systemic change connected with the struggle for social justice, through which all communities can obtain health and wellbeing.²²

Additionally, some reproductive justice advocates call for a shift in the United States legal landscape from seeking negative rights to seeking positive rights. As it stands, most reproductive rights in the United States are negative rights.²³ For instance, the fundamental right to have children was established in *Skinner v. Oklahoma*.²⁴ The government cannot interfere with that right, absent a compelling purpose, yet the right does not give the government an obligation to make the freedom to have children a reality for all women.²⁵ If the right to have or not have children were instead framed positively, the government would be obligated to protect and fulfill that right.²⁶ Viewing reproduction as a positive

18. *Id.* at 1335.

19. *Id.* at 1368.

20. ACRJ, A NEW VISION, *supra* note 9.

21. Though they support several reproductive rights victories, reproductive justice groups might critique *how* many of these victories have been achieved. For instance, as discussed later in this article, some white feminists used eugenicist theories to argue for greater availability of birth control. See *infra* pp. 8–9, 13–14.

22. ACRJ, A NEW VISION, *supra* note 9.

23. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”) (citing *Harris v. McRae*, 448 U.S. 297, 318 (1980) (holding that “it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices”)).

24. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”).

25. See IF/WHEN/HOW, REPRODUCTIVE JUSTICE 101, *supra* note 11.

26. *Id.*

right could lead the nation to policies that provide support for childcare, legal abortion, and family leave, among other social supports.²⁷

III.

HISTORY OF REPRODUCTIVE RIGHTS AND THE EMERGENCE OF THE REPRODUCTIVE JUSTICE MOVEMENT

A. Reproductive Rights. . . for Some

The history of reproductive subjugation, the appearance of the right for women to control their own bodies, and the continued oppression of more marginalized women, is quite lengthy. As a brief summary, abortion and contraception were banned and criminalized throughout the United States during the nineteenth century. The American Medical Association led this charge, persuading male politicians that access to abortion would undermine the traditional family structure in which men retained social power.²⁸ Until the passage of the Thirteenth Amendment, most Black women were enslaved, and thus did not have any control over their bodies in the eyes of the state.²⁹ In fact, the “father of modern gynecology,” J. Marion Sims, obtained many of his findings by conducting gynecological experiments on enslaved women.³⁰ Enslaved women were considered property, and accordingly, doctors like Sims performed surgeries on these women without their consent and without anesthesia.³¹

White women began to openly advocate for reproductive rights in the early twentieth century, and almost immediately did so by preying on stereotypes about women of color. Charlotte Perkins Gilman, prominent feminist and author, publicly embraced eugenics and supported state control of the ability of women of color to have children based on the belief that such women threatened the goal of reproductive “purity.”³² Other feminists advocated for contraception by arguing that Black women and low-income women had “[a] ‘moral’ obligation to restrict the size of their families.”³³ Margaret Sanger, a working-class activist,

27. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1431 (2009).

28. RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA 7 (2003).

29. See U.S. CONST. amend. XIII; Jennifer Hallam, *The Slave Experience: Men, Women, and Gender*, PBS (2004), <http://www.pbs.org/wnet/slavery/experience/gender/history.html> (discussing Black men and women experiencing slavery, prior to the passage of the Thirteenth Amendment in 1865).

30. *Hidden Brain: Remembering Anarcha, Lucy, and Betsey: The Mothers of Modern Gynecology*, NAT'L PUB. RADIO (Feb. 7, 2016), <http://www.npr.org/2017/02/07/513764158/remembering-anarcha-lucy-and-betsey-the-mothers-of-modern-gynecology>.

31. *Id.*

32. See Alys Eve Weinbaum, *Writing Feminist Genealogy: Charlotte Perkins Gilman, Racial Nationalism, and the Reproduction of Maternalist Feminism*, 27 FEMINIST STUDS. 271, 277 (2001).

33. ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* 210 (1983).

opened the first birth control clinic in the United States in Brooklyn, and was praised by W.E.B. DuBois and Martin Luther King, Jr. for providing contraceptive access to Black women.³⁴ Still, even Sanger later allied herself with eugenicists and those in favor of exclusionary immigration laws once they began supporting access to birth control.³⁵

Some women's rights organizations acknowledged the particular struggle faced by low-income women. Redstockings was a radical feminist group that concentrated on women's "personal experiences of oppression" surrounding reproduction.³⁶ They highlighted that, as long as only doctors could perform abortions, reproductive choice would be inaccessible to poor women.³⁷ Still, Redstockings assumed that their own reproduction experiences represented those of all women, even though the group was almost entirely white and middle-class.³⁸ Accordingly, their advocacy work did not encapsulate or even consider the experiences of women of color, or of LGBTQIA individuals. While Redstockings moved slightly closer to looking at reproduction through an intersectional lens, they still failed to adequately acknowledge the concerns of all women.

Lack of consideration for women of color, as well as overt racism and targeting of these women, only grew along with the reproductive rights movement. In many respects, the reproductive rights movement paralleled the second wave feminist movement of the late 1960s and 1970s. Although second wave feminists accomplished some broad policy victories such as the Equal Pay Act of 1963, they largely focused on the needs of a narrow subset of women. Second wave feminism was "informed almost entirely by the experiences of middle-class, White women."³⁹ These feminists focused on women's oppression due to their gender, treating classification by gender as the worst form of oppression and ignoring differences of experience based on race, sexual orientation, and class.⁴⁰ Feminists of color, low-income women, and queer women were largely excluded from this movement. Similarly, reproductive

34. DuBois served on the advisory board for Sanger's "Negro Project," which aimed to provide reproductive health services to rural Black Southerners. After Sanger's death, Martin Luther King, Jr. praised her early work. Anna Holley, SisterSong, *Margaret Sanger and the African American Community*, TRUST BLACK WOMEN (July 2010), <https://www.trustblackwomen.org/2011-05-10-03-28-12/publications-a-articles/african-americans-and-abortion-articles/26-margaret-sanger-and-the-african-american-community-> [https://perma.cc/BT8S-QSS7].

35. SOLINGER, *supra* note 28, at 90–92.

36. JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 6 (2003).

37. *Id.* at 15.

38. *Id.* at 23.

39. Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 227 (2005).

40. Douglas T. Huffman & Susan Archer Mann, *The Decentering of Second Wave Feminism and the Rise of the Third Wave*, 69 SCI. & SOC'Y, 56, 59 (2005).

rights advocates focused on abortion and contraception in the 1960s and 1970s because these were the issues most salient to privileged white women. The resulting pro-choice movement rarely reached out to women of color, low-income women, or LGBTQIA individuals, nor did it consider other reproduction-related issues that might affect members of these more marginalized groups.

Pro-choice advocates did achieve important victories during the 1970s, including the *Roe v. Wade* decision.⁴¹ Yet the 1970s also saw the failure of these activists to understand and speak out against continued coerced sterilization for non-white women and poor women. Private doctors pressured women of color to agree to “voluntary” sterilization before they would accept them as patients,⁴² and state medical associations defended these doctors.⁴³ Perhaps even more disturbing, the federal government funded a significant number of sterilizations. In 1972, between 100,000 and 200,000 sterilizations were paid for through the Department of Health, Education, and Welfare.⁴⁴

The government targeted women of color and low-income women to encourage sterilization, and these women underwent the procedure in vastly disproportionate numbers. For instance, 43% of all women sterilized through federally subsidized programs were Black.⁴⁵ By 1976, 24% of all Native American women of childbearing age were sterilized, and by the late 1970s over 35% of all Puerto Rican women had been surgically sterilized.⁴⁶ Many of these women were unaware that they had signed something consenting to the procedure, or that they were sterilized at all.⁴⁷

Cases brought in several states by the Southern Poverty Law Center and the American Civil Liberties Union (ACLU) likewise reveal the government campaign to coercively sterilize Black women and women on Medicaid. The ACLU brought twenty-one lawsuits for forced sterilization between the early 1970s and late 1980s.⁴⁸ In one such suit, *Cox v. Stanton*, the plaintiff’s mother consented, on behalf of her daughter, to what she was told would be a temporary tubal ligation in order to avoid losing welfare for her entire family, only later discovering that the sterilization was permanent.⁴⁹ In *Relf v. Weinberger*, a Southern Poverty Law Center case that drew national attention, two Black teenagers from an indigent family were sterilized without a parent’s knowledge

41. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that “a woman’s decision whether or not to terminate her pregnancy” is protected by the Fourteenth Amendment).

42. DAVIS, *supra* note 33, at 362–63.

43. See, e.g., NELSON, *supra* note 36, at 73.

44. DAVIS, *supra* note 33, at 218.

45. *Id.* at 218–19.

46. *Id.*

47. See DOROTHY ROBERTS, *KILLING THE BLACK BODY* 90 (1997).

48. Laura T. Kessler, “A Sordid Case”: *Stump v. Sparkman*, *Judicial Immunity, and the Other Side of Reproductive Rights*, 74 MD. L. REV. 833, 878 (2015).

49. *Cox v. Stanton*, 529 F.2d 47, 49 (4th Cir. 1975); Kessler, *supra* note 48, at 878–79.

or consent.⁵⁰ The Supreme Court effectively sanctioned sterilizations of low-income women in *Stump v. Sparkman*, when it decided that a judge's approval of a petition to sterilize a poor, uneducated minor fell under judicial immunity, and thus the young plaintiff could not seek damages for a tubal ligation performed without her consent.⁵¹

Native Americans were particularly vulnerable to sterilization because the federal government directly regulated Native and Indigenous women's health choices through the Indian Health Service (IHS), the only source of health services for many Native Americans.⁵² IHS coercively sterilized about 25,000 Native women by 1975, many of whom were given consent forms in English irrespective of their Native or primary languages.⁵³ If women refused, their welfare benefits were threatened.⁵⁴

Despite sterilization abuse and the governmental campaign to coerce women into having this surgical procedure, white feminists continued to focus on abortion. The pro-choice movement continued to be largely white as a result. That movement attributed its homogeneity to women of color being overburdened or unwilling to recognize sexism, but in reality, sterilization's use as a "racist form of mass 'birth control'" made it difficult for women of color to be enthusiastic about the pro-choice campaign.⁵⁵

Targeting of women of color and low-income women has continued through recent history. In California, almost 150 women in prisons were sterilized between 2006 and 2010, and some of those tubal ligations were performed without informed consent.⁵⁶ Further reproductive abuse came as new forms of contraception were invented. The public release of Norplant in 1990 was touted as an innovation in birth control. Though the ACLU strongly opposed levonorgestrel implants like Norplant and Depo-Provera due to safety concerns and the potential for disproportionate impact, welfare reform advocates argued that "connecting birth control to public assistance programs would overcome the 'cycle of poverty.'"⁵⁷ Within months of the drug's FDA approval, a California

50. *Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977); Kessler, *supra* note 48, at 879–81.

51. *Stump v. Sparkman*, 435 U.S. 349 (1978) (holding that the judge's approval of the petition was a "judicial act," and therefore he retained absolute immunity).

52. IF/WHEN/HOW: LAWYERING FOR REPROD. JUSTICE, WOMEN OF COLOR AND THE STRUGGLE FOR REPRODUCTIVE JUSTICE 5–6 (2016), <https://www.ifwhenhow.org/resources/women-of-color-and-the-struggle-for-reproductive-justice/> [<https://perma.cc/V5SL-P3P8>].

53. *Id.*

54. *Id.*

55. DAVIS, *supra* note 33, at 354.

56. Hunter Schwartz, *Following Reports of Forced Sterilization of Female Prison Inmates, California Passes Ban*, WASH. POST (Sept. 26, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/following-reports-of-forced-sterilization-of-female-prison-inmates-california-passes-ban/?utm_term=.9e17728a2aef [<https://perma.cc/N5LJ-QRSJ>].

57. Pamela Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 IOWA J. GENDER RACE & JUST. 401, 404 (2000).

judge offered Norplant implantation as one condition of a woman's probation.⁵⁸ More judges continued to offer women the choice between Norplant or jail time, and some legislatures even tried to tie receiving an implant to financial incentives within the welfare program.⁵⁹

Class-based reproductive restrictions also persist today. Until June 2016, California had the Maximum Family Grant Rule (MFG) in its welfare program. Passed in 1994, this rule attempted to compel poor mothers to have fewer children by barring them from additional financial assistance if they had a new child.⁶⁰ The rule was based on the classist premise that women have children to get additional financial aid. Though this idea was quickly disproven after the law's passage, MFG remained in effect for more than twenty years.⁶¹

The above history does not mention reproductive rights for LGBTQIA individuals, largely because the mainstream movement has treated reproduction as primarily straight women's issue. Same-sex marriage has only recently gained nationwide legal legitimacy with the *Obergefell v. Hodges* decision,⁶² and with or without marriage, LGBTQIA individuals or couples having children is still controversial. Even with advances in reproductive technologies, queer people have faced enormous discrimination when trying to conceive, with many doctors refusing to perform advanced reproductive technologies for them.⁶³ Intersex, transgender, and gender nonconforming people face particularly steep barriers to accessing reproductive health and justice.⁶⁴ Intersex children are often subject to non-medically necessary surgeries that can permanently alter their reproductive capacity,⁶⁵ and transgender and gender nonconforming people often experience discrimination when trying to access healthcare.⁶⁶ The mainstream reproductive

58. *Id.* at 402 (citing ROBERTS, *supra* note 47, at 110–12 (discussing an unpublished California state case in which a mother convicted of child abuse was offered Norplant as a condition of probation)).

59. *Norplant: A New Contraceptive with the Potential for Abuse*, ACLU, <https://www.aclu.org/norplant-new-contraceptive-potential-abuse?redirect=reproductive-freedom/norplant-new-contraceptive-potential-abuse> [<https://perma.cc/8HPA-AUX7>] (last visited Oct. 23, 2017).

60. Hugh Roland, *California's Maximum Family Grant Rule Isn't Just Discriminatory—It Worsens Public Health*, REWIRE (June 16, 2015, 11:14 AM), <https://rewire.news/article/2015/06/16/californias-maximum-family-grant-rule-isnt-just-discriminatory-worsens-public-health/> [<https://perma.cc/W35J-QVRE>].

61. Times Editorial Bd., *Good Riddance to a Repugnant California Cap on Family Aid*, L.A. TIMES (June 16, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-maximum-family-grant-20160615-snap-story.html> [<https://perma.cc/S2XH-4FMQ>].

62. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

63. JUDITH DAAR, *THE NEW EUGENICS: BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES* 109 (2017).

64. NAT'L LGBTQ TASK FORCE, *QUEERING REPRODUCTIVE JUSTICE*, *supra* note 1, at 35.

65. *Id.*

66. NAT'L WOMEN'S LAW CTR. & LAW STUDENTS FOR REPROD. JUSTICE, *IF YOU REALLY CARE ABOUT REPRODUCTIVE JUSTICE, YOU SHOULD CARE ABOUT TRANSGENDER RIGHTS! 1* (2015), https://nwlc.org/wp-content/uploads/2015/08/rj_and_transgender_fact_sheet.pdf [<https://perma.cc/7L45-5KYU>] (“Twenty-eight percent of transgender and gender non-conforming individuals report

rights movement has largely followed suit with societal norms throughout United States history, failing to advocate for the rights of LGBTQIA people, and only recently have the rights of queer individuals gained popular support.

B. The Need for Justice for All: Formation of Reproductive Justice Organizations

In the context of such racial, class, and sexuality-based reproductive oppression, the reproductive justice movement emerged in the United States during the 1990s.⁶⁷ Women of color were organized around reproductive justice long before the term was coined. They primarily focused on addressing sterilization abuse and teen pregnancy at first, and then formed autonomous reproductive health organizations in the 1980s and 1990s that were more responsive to the needs of their communities than were mainstream pro-choice organizations.⁶⁸ Reproductive justice then emerged in 1994 after a Black women's delegation at the International Conference on Population and Development in Cairo saw the success of women from other nations who were using a human rights framework in their reproductive health advocacy.⁶⁹ A few months later, a group of Black women organized at a national pro-choice conference, and they united reproductive rights, social justice, and human rights to launch "reproductive justice" as a term and a movement.⁷⁰

Women of color in other communities were also becoming increasingly visible in their organizing around reproductive issues. Asian Pacific Islanders for Choice was founded in 1989, and became Asian Pacific Islanders for Reproductive Health (APIRH) a few years later, recognizing the need for a broader focus.⁷¹ As APIRH saw its place more fully reflected in the reproductive justice movement, it grew in that framework and became Asian Communities for

facing harassment in medical settings, and 19% report being refused medical care altogether due to their transgender status, with even higher numbers among communities of color.”)

67. *Online Exhibits: Birthing Reproductive Justice: 150 Years of Images and Ideas*, U. MICH. LIBRARY (2017), <https://www.lib.umich.edu/online-exhibits/exhibits/show/reproductive-justice>; Loretta Ross, *Understanding Reproductive Justice*, TRUST BLACK WOMEN, <http://www.trustblackwomen.org/our-work/what-is-reproductive-justice/9-what-is-reproductive-justice> [<https://perma.cc/W8FH-2JFC>] (last updated Mar. 2011).

68. Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 OFF OUR BACKS 14, 16 (2006).

69. Manuscript by Loretta Ross, SisterSong, *The Color of Choice: White Supremacy and Reproductive Justice*, at 12, in *Reproductive Justice*, RACIAL EQUITY TOOLS, <http://www.racialequitytools.org/resourcefiles/The-Color-of-Choice----Public-Version-with-footnotes-1.pdf> [<https://perma.cc/E9TQ-3TLL>] (last visited Oct. 19, 2017) (collection of online resources).

70. About Us: What is Reproductive Justice, ASIAN CMTYS. FOR REPROD. JUSTICE, <http://strongfamiliesmovement.org/what-is-reproductive-justice> [<https://perma.cc/ZJ8Q-V639>] (last visited Oct. 19, 2017) [hereinafter About Us, Asian Cmtys. for Reprod. Justice].

71. JAEL SILLIMAN, MARLENE G. FRIED, LORETTA ROSS & ELENA R. GUTIÉRREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 175–78 (2004).

Reproductive Justice (ACRJ).⁷² The organization also became a multi-gender group, expanding to include programming across genders.⁷³ Today, the organization is known as Forward Together, with a mission to “build courage and foster connection among our multi-racial community of changemakers to secure the rights, recognition and resources all families need to thrive.”⁷⁴

The Native American Women’s Health Education Resource Center was created in 1988 specifically to address reproductive health and justice issues that Native and Indigenous women faced.⁷⁵ The Center quickly began bringing Native women together to discuss the impact of federal policies on their reproductive choices, as well as issuing reports that highlighted community-specific reproductive justice issues.⁷⁶

The National Latina Institute for Reproductive Health (NLIRH) was founded in 1994, the same year as the term reproductive justice was coined.⁷⁷ Originally an initiative of Catholics for Free Choice, NLIRH incorporated as its own organization, recognizing the need for a national reproductive justice group focused on Latinas and their communities.⁷⁸ NLIRH began utilizing policy advocacy to fight for improved reproductive freedom, while also remaining connected to local community leaders in several cities throughout the country.

In 1997, a few years after reproductive justice’s emergence, the Ford Foundation assembled a convening of sixteen women of color organizations. These sixteen organizations then created the SisterSong Women of Color Reproductive Health Collective.⁷⁹ The Collective included organizations led by women from the Native American, Black, Latina, and Asian American communities,⁸⁰ and it continued to spread reproductive justice based on a human rights approach to legal advocacy.⁸¹ SisterSong promoted reproductive justice

72. Telephone Interview with Moira Bowman, Deputy Dir., Forward Together (Mar. 31, 2016).

73. *Id.*

74. *About Us*, FORWARD TOGETHER, <https://forwardtogether.org/about-us/#mission> [<https://perma.cc/9Q3T-MTL7>] (last visited Jan. 31, 2018).

75. *Who We Are*, NATIVE AM. WOMEN’S HEALTH EDUC. RESOURCES CTR., <http://www.native-shop.org/> [<https://perma.cc/R7SS-9ATX>] (last visited Oct. 21, 2017).

76. *Reproductive Justice Program*, NATIVE AM. WOMEN’S HEALTH EDUC. RESOURCES CTR., <http://www.nativeshop.org/programs/reproductive-justice.html> [<https://perma.cc/JRN7-HXB9>] (last visited Oct. 21, 2017).

77. *Who We Are*, NAT’L LATINA INST. FOR REPROD. HEALTH, <http://latinainstitute.org/en/who-we-are> [<https://perma.cc/7F74-NUWG>] (last visited Oct. 21, 2017).

78. *About NLIRH*, NAT’L LATINA INST. FOR REPROD. HEALTH, <http://latinainstitute.org/en/content/about-nlirh> [<https://perma.cc/R3YS-HMAU>] (last visited Nov. 17, 2017).

79. SISTERSONG WOMEN OF COLOR REPROD. JUST. COLLECTIVE, <http://sistersong.net/> [<https://perma.cc/M6QC-PJ4L>] (last visited Oct. 21, 2017).

80. *Id.*

81. *About Us*, ASIAN CMTYS. FOR REPROD. JUSTICE, *supra* note 70.

during its first national conference launch in 2003,⁸² and since then the term has become a part of the popular lexicon.

Reproductive justice continued to grow and thrive, and today it is a prominent movement throughout the United States. Led by historically oppressed groups—women of color, women from low-income backgrounds, and LGBTQIA individuals, for instance—the movement centers the experiences of these communities when demanding change to achieve justice.

IV.

HISTORY OF PUBLIC INTEREST LAW AND INTERSECTIONALITY (OR LACK THEREOF) IN STRIVING FOR REPRODUCTIVE FREEDOM

A. Lawyers Enter the Fight

As organizers and activists engaged in reproductive rights or reproductive justice advocacy, lawyers began using legal strategies to expand reproductive health access. The public interest lawyering movement spread around the same time as the pro-choice movement, and in many ways, has followed a parallel track. Before public interest lawyering became popularized, the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People, Legal Defense Fund (LDF) were the largest and most prominent organizations providing legal representation to promote free speech and destroy racial segregation.⁸³ When public interest law spread during the late 1960s and early 1970s,⁸⁴ more public interest organizations sprouted up, and some began to focus on reproductive rights.

Largely part of the mainstream reproductive rights movement, lawyers chiefly focused on expanding access to abortion and contraception, and did have moderate success early on. In 1965 with *Griswold v. Connecticut*, Planned Parenthood was able to secure the Supreme Court's recognition of a right to privacy regarding contraception, though it was restricted to married couples only.⁸⁵ With *Roe v. Wade* in 1973, the Court recognized that the constitutional right to privacy “encompass[es] a woman's decision whether or not to terminate her pregnancy,”⁸⁶ striking down forty-six state laws and paving the way for far

82. Telephone Interview with Loretta Ross, Co-Founder & former Nat'l Coordinator, SisterSong Women of Color Reprod. Justice Collective (Feb. 2, 2016).

83. See Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 55 UCLA L. REV. 1223, 1234–35 (2005).

84. See *id.* at 1231.

85. *Griswold v. Connecticut*, 381 U.S. 479 (1965); see *Griswold v. Connecticut: It Happened Here*, PLANNED PARENTHOOD OF S. NEW ENG., <https://www.plannedparenthood.org/planned-parenthood-southern-new-england/who-we-are/our-history/griswold-v-connecticut-it-happened-here> [<https://perma.cc/C2CU-89M2>] (last visited Oct. 21, 2017).

86. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

greater access to abortion for women throughout the United States.⁸⁷ The late 1970s and even 1980s saw the continued success of public interest litigation in striking down restrictive state abortion laws,⁸⁸ though by the late 1980s the Court began to roll back previous advances in abortion access.⁸⁹

Like other public interest organizations, legal reproductive rights groups sprung up and grew throughout the 1970s with generous funding from donors. As a result, these groups were able to develop significant expertise and support several staff attorneys. Since these public interest firms had outside funding, they could focus on pursuing law reform rather than being beholden to client fees.⁹⁰

This structure also created the danger that public interest lawyers would focus on their own agendas at the expense of each client's needs or priorities, since they were not receiving financial incentives from clients directly. This danger is particularly apparent in cases such as *Griswold v. Connecticut*. During the *Griswold* case, Planned Parenthood of Connecticut's counsel recognized that the state's ban on birth control clinics had particularly dire consequences for poor women, since their only source of medical care was private or public clinics.⁹¹ Yet to challenge the ban, the organization centered on a criminal charge against the clinic's affluent Executive Director and Medical Director, and the subsequent Supreme Court case focused on the rights of married, heterosexual couples.⁹²

B. Some Movement Toward a Justice Lens

Other mainstream activists or lawyers working on reproductive health during the 1970s did seek community with groups different from their own. The strategy used in *Abramowicz v. Lefkowitz* is most similar to today's social justice

87. PLANNED PARENTHOOD FED'N OF AM., *ROE V. WADE: ITS HISTORY AND IMPACT* (2014), https://www.plannedparenthood.org/files/3013/9611/5870/Abortion_Roe_History.pdf [<https://perma.cc/4ERF-3J4L>]. *Roe v. Wade* also spurred an enormous, and relatively politically successful, conservative backlash. See, e.g., *Backlash From Roe v. Wade Continues to Shape Public Discourse, Says Klarman*, HARV. L. TODAY (Mar. 25, 2013), <http://today.law.harvard.edu/backlash-from-roe-v-wade-continues-to-shape-public-discourse-says-klarman/> [<https://perma.cc/YM3B-DU77>].

88. *Timeline of Important Reproductive Freedom Cases Decided By The Supreme Court*, ACLU, <https://www.aclu.org/timeline-important-reproductive-freedom-cases-decided-supreme-court> [<https://perma.cc/32P2-5LKJ>] (last visited Oct. 20, 2017).

89. *Id.* Justice Rehnquist opposed the decision in *Roe*, and with his ascendancy to Chief Justice in 1986, the Court began upholding a range of state laws resulting in decreased access to abortion. See, e.g., Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC (Apr. 2005), <https://www.theatlantic.com/magazine/archive/2005/04/rehnquist-the-great/303820/> [<https://perma.cc/C7QM-98AS>]; *Rehnquist: A Life in the Law*, NAT'L PUB. RADIO (Sept. 4, 2005, 12:00 AM), <https://www.npr.org/templates/story/story.php?storyId=4529632>.

90. Southworth, *supra* note 83, at 1235–36.

91. Catherine G. Roraback, *Griswold v. Connecticut: A Brief Case History*, 16 OHIO N.U. L. REV. 395, 396 (1989).

92. David G. Garrow, *Human Rights Hero: The Legal Legacy of Griswold v. Connecticut*, 38 A.B.A.: HUM. RTS., Spring 2011, at 25.

lawyering.⁹³ In late 1969, four lawsuits were filed challenging New York's ban on abortion.⁹⁴ Three of the suits presented arguments typical of the time, based on the constitutional right to privacy⁹⁵ and the right of doctors to prescribe a course of action.⁹⁶ In the fourth case, *Abramowicz v. Lefkowitz*, the plaintiffs' brief made right to privacy, due process, and equal protection arguments. Plaintiffs sought to extend the privacy protection of *Griswold* to all women, a position not yet commonly articulated regarding abortion. By banning abortions, the plaintiffs argued, the state forced women to ultimately choose between giving birth, procuring an illegal abortion, or taking oral contraceptives of questionable safety.⁹⁷ In doing so, the law endangered women's lives without due process in violation of the Fourteenth Amendment.⁹⁸ Furthermore, and most innovatively, the *Abramowicz* lawyers argued that New York's laws violated the equal protection clause of the Fourteenth Amendment by treating women and men differently. They argued that, since women faced criminalization if they attempted an abortion, and the disproportionate burdens of pregnancy and motherhood if they complied with the law, the abortion ban had a disparate impact on women.⁹⁹ This women's equality framework had not yet been used in an abortion case, and it became hugely influential in reproductive rights litigation moving forward.¹⁰⁰

The makeup of lawyers and plaintiffs in *Abramowicz* was just as, if not more, pioneering than the legal arguments. The Center for Constitutional Rights brought the lawsuit¹⁰¹ in coordination with women's rights activists including

93. *Abramowicz v. Lefkowitz* (Hall v. Lefkowitz), 305 F. Supp. 1030 (S.D.N.Y. 1969) (granting a motion to convene a three-judge court to determine whether the state's abortion laws violated the federal Constitution).

94. *Id.*

95. *Id.*

96. Nancy Stearns, Catherine G. Roraback, Kathryn Emmett, Marjorie Gelb, Barbara Milstein & Marilyn Seichter, *Plaintiffs' Brief, Abramowicz v. Lefkowitz (March 9, 1970)*, in *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* 140 (Linda Greenhouse & Reva B. Siegel eds., 2012).

97. *Id.*

98. *Id.*

99. *Id.* at 141.

100. *Abramowicz v. Lefkowitz*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/abramowicz-v-lefkowitz> [<https://perma.cc/Q44R-4ZNR>] (last visited Oct. 22, 2017). In the 1980s (and before becoming a Supreme Court Justice), Ruth Bader Ginsburg suggested that the Court's decision in *Roe* should have been based on the Equal Protection Clause. If the Court had decided against the abortion restriction on equal protection rather than due process grounds, Ginsburg argued, the decision would have engendered less criticism, and there may have been fewer anti-abortion measures in reaction as a result. See Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); see also Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO L.J. 1085, 1085–86 (2009). For further discussion of abortion as an equality issue, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 781–83 (2011).

101. Reva B. Siegel, *Roe's Roots: The Women's Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1885 (2010).

the Women's Health Collective and the Women's Abortion Project,¹⁰² and the legal team consisted entirely of women.¹⁰³ Florynce Kennedy, one of the country's best-known Black feminists during the late 1960s,¹⁰⁴ was a leading lawyer on the case.¹⁰⁵ To emphasize a shift from a medical model to a women's rights model, the named plaintiffs in this class action consisted of over one hundred women with varied experiences regarding pregnancy and abortion.¹⁰⁶

Moreover, the plaintiffs' strategy was built on the progressive premise that the most important testimony consisted of stories of women who had experienced the extremely harmful consequences of the abortion ban.¹⁰⁷ Storytelling was considered a "new feminist mode[] of argument,"¹⁰⁸ and a radical departure from previous approaches steeped in more traditional, textual or quantitative analysis. The plaintiffs' brief included testimony about the physical and emotional trauma of undergoing an illegal abortion, the great financial burden of forced pregnancy on low-income women and single mothers, and issues of disproportionate responsibility on women for child-rearing.¹⁰⁹ This strategy, coupled with effective activism surrounding the lawsuit, drove the New York legislature to legalize abortion in 1970, rendering the lawsuit moot.¹¹⁰ Despite the progressive aspects of the legal strategy, virtually all of the women who testified in the *Abramowicz* case were white and middle class.¹¹¹

C. Intersectionality, Client-Centered Lawyering, and Community Lawyering

Thankfully, theories developing in the latter half of the twentieth century pushed legal organizations and mainstream reproductive rights groups to think critically about the need for voices other than those of straight, affluent, white women to be heard in the conversation. The most groundbreaking concept to emerge was *intersectionality*, a term popularized by Columbia and UCLA Law

102. FLORYNCE KENNEDY & DIANE SCHULDER, ABORTION RAP: TESTIMONY BY WOMEN WHO HAVE SUFFERED THE CONSEQUENCES OF RESTRICTIVE ABORTION LAWS 92 (1971).

103. Cynthia Greenlee, *How Abortion Storytelling was Born*, REWIRE (Jan. 22, 2016, 4:48 PM), <https://rewire.news/article/2016/01/22/abortion-storytelling-born/> [<https://perma.cc/C8FC-E4XV>].

104. Sherie M. Randolph, *Not to Rely Completely on the Courts: Florynce "Flo" Kennedy and Black Feminist Leadership in the Reproductive Rights Battle, 1969–1971*, 27 J. OF WOMEN'S HIST., Spring 2015, at 136.

105. Cynthia Greenlee, *The Road to Roe: Paved with Bodies of Women of Color and the Activism of African Americans*, REWIRE (Jan. 23, 2013, 9:41 PM), <https://rewire.news/article/2013/01/23/covering-our-base-why-i-fight-affordable-reproductive-care/> [<https://perma.cc/72TB-AHTB>].

106. Siegel, *supra* note 101, at 1880–81, 1885 (describing the medical model of abortion as a paternalist campaign to liberalize abortion laws to allow doctors discretion to decide whether a pregnant woman could obtain an abortion).

107. Greenlee, *How Abortion Storytelling was Born*, *supra* note 103.

108. Siegel, *supra* note 101, at 1885.

109. Stearns, Roraback, Emmett, Gelb, Milstein & Seichter, *supra* note 96, at 141–45.

110. Siegel, *supra* note 101, at 1886.

111. Stearns, Roraback, Emmett, Gelb, Milstein & Seichter, *supra* note 96, at 141.

Professor Kimberlé Crenshaw in 1989.¹¹² Prior to use of this term, women of color-led groups had been discussing the interplay of multiple identities and overlapping oppressions for decades.¹¹³ Instead of thinking of discrimination along a “single categorical axis,”¹¹⁴ intersectionality looks at the complex ways in which people are subject to bias across multiple identities in order to shape more effective interventions.¹¹⁵ An intersectional lens necessitates viewing reproduction within the larger social context, which can lead to more inclusive remedies and collaboration between previously disparate movements.¹¹⁶ Specifically, the theory demonstrates how the legal system’s failure to recognize the interactions between identities had direct, detrimental consequences for women of color. For instance, because some courts refused to look at the compound discrimination that Black women faced, as women and as Black people, these women were denied legal reprieve.¹¹⁷

In highlighting intersectionality, Professor Crenshaw also drew attention to ways in which women of color were harmed by activism that failed to account for interacting identities. In the context of domestic violence, antiracist leaders historically brushed aside this issue’s effect on Black women in order to prevent public recognition and avoid further racial stereotyping of the Black community.¹¹⁸ Black women’s experiences were similarly overshadowed in a white feminist approach, through which statewide services for survivors were designed largely by white women and often failed to account for the access needs of other communities.¹¹⁹ Similarly, in the reproductive rights world, intersectionality can help explain why the anti-racist frame or the feminist frame alone were each inadequate to tackle the inequities faced by many women when making reproductive choices. Anti-racism restricted women of color from spreading awareness in an effort to prevent further stereotyping, whereas white feminism encouraged restrictive and abusive reproduction policies such as sterilization in order to garner support for alleged reproductive rights. By embracing an intersectional lens, reproductive justice activists committed to

112. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, *Demarginalizing the Intersection of Race and Sex*].

113. See, e.g., THE COMBAHEE RIVER COLLECTIVE, A BLACK FEMINIST STATEMENT (1977) (recognizing the history of “women of color-led groups [that have] been discussing the interplay of multiple identities and overlapping oppressions for decades”).

114. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 112, at 140.

115. AFRICAN AM. POLICY FORUM, *supra* note 16, at 3–4.

116. *Id.*

117. Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 112, at 148 (discussing cases such as *DeGraffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480 (8th Cir. 1977), in which Black women were denied relief for compound discrimination claims).

118. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1253–58 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

119. *Id.* at 1258–65.

advocating for improved policies in a way that centered the experience of women of color and low-income women.

Several modes of public interest lawyering also emerged in the latter half of the twentieth century. *Public interest lawyering* refers to working with individuals, organizations, and communities that might otherwise lack legal representation.¹²⁰ *Social justice lawyering*, an analogous term explored by Professor William Quigley, supports critical movements for positive, progressive change. Activists, advocates, and people throughout the United States provide the impetus for social change, and social justice lawyers aid in moving that energy forward with legal information and advice.¹²¹ In the context of reproductive rights, public interest lawyering typically consists of advocacy, pro bono litigation, or class action lawsuits. Lawyers can support advocacy efforts for policy change that would expand reproductive freedom. Alternatively, lawyers can represent individual clients who have experienced barriers to accessing reproductive healthcare, or can bring a class action when a given practice is infringing on many people's rights.

Client-centered lawyering helped lawyers move from pursuing their personal objectives to fighting for the needs of clients and communities disparately affected by oppressive policies. In the traditional model of lawyering, the attorney made important decisions for the client. That began to change in the United States with the American Bar Association's Model Code of Professional Responsibility in 1969,¹²² which stated that "the authority to make decisions is exclusively that of the client."¹²³ The rationales for client-centered lawyering were both ethical and practical; client decision-making afforded respect for the client, while also allowing the lawyer to be better informed and thus make better arguments on the client's behalf.¹²⁴

Rebellious lawyering and *community lawyering* emerged as similar concepts in the early 1990s, and took the client-centered lawyering model a few steps further by integrating intersectionality and other progressive legal theories into legal practice. Rebellious lawyering eliminated the power distinction between lawyers and clients, calling for the two groups to learn from each other and work

120. *Public Interest Practice*, GEORGETOWN L., https://web.archive.org/web/20140804153821/https://www2.law.georgetown.edu/academics/academic-programs/graduate-programs/careers/job_search_skills/careeroptionspracticesettings/public-interest.cfm (last visited Oct. 22, 2017).

121. William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7 (2007).

122. Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 716–17 (1989).

123. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (AM. BAR. ASS'N 1980), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr_authcheckdam.pdf [<https://perma.cc/YL9G-DTK9>].

124. Grosberg, *supra* note 122, at 719.

together to achieve client goals.¹²⁵ Community lawyering expanded upon rebellious lawyering to welcome and support community empowerment and apply a collaborative problem-solving strategy.¹²⁶ In a community lawyering system, attorneys “act as translators between client communities and the legal system.”¹²⁷ Today, lawyers working in reproductive rights tend to replicate the traditional power dynamics between lawyer and client, while reproductive justice and intersectionality theory appear to point to following a rebellious lawyering or community lawyering approach.

V.

THE NEED FOR REPRODUCTIVE JUSTICE LAWYERING TODAY

A. Rise of a Conservative Backlash and Further State Restrictions

Lawyering for reproductive justice is needed now more than ever. While *Roe v. Wade* was a moment of celebration for many pro-choice advocates, the decision also led to a conservative backlash that resulted in state and national restrictions on access to abortion and contraception, especially for low-income women. The most wide-reaching of these restrictions is the Hyde Amendment, first passed as a rider in 1976.¹²⁸ The Hyde Amendment prohibits Medicaid funding from covering abortions and abortion-related care in almost all circumstances.¹²⁹ The language of the Amendment has been attached to every Health and Human Services appropriations bill since 1976,¹³⁰ and it continues to prevent federal funding from being used for abortions except when the life of the mother is in danger, or in cases of rape or incest.¹³¹ The Amendment targets poor

125. Joann H. Lee, *A Case Study: Lawyering to Meet the Needs of Monolingual Asian and Pacific Islander Communities in Los Angeles*, 36 CLEARINGHOUSE REV. 172 (2002); see also GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 10 (1992) (“Any vision of activist lawyering worth pursuing reflects the participation of a diverse group of people—people like those secretaries, clients, *concilios*, administrators, social workers, *maestras*, judges, *notarios*, organizers, church groups, friends, relatives, priests, rabbis, bureaucrats, and lawyers I first looked to years ago for alternatives to orthodox law practice. . . . [L]aw practice [is] too important to activist work to leave to the influence of lawyers alone.”).

126. Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363, 1366 (1993), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1742&context=californialawreview>.

127. *Id.*

128. Julie Rovner, *Abortion Funding Ban Has Evolved Over the Years*, NAT'L PUB. RADIO (Dec. 14, 2009, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=121402281> [hereinafter Rovner, *Abortion Funding*].

129. NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., *INDIGENOUS WOMEN'S REPRODUCTIVE JUSTICE: A SURVEY OF THE AVAILABILITY OF PLAN B AND EMERGENCY CONTRACEPTIVES WITHIN INDIAN HEALTH SERVICES* (2008), http://www.nativeshop.org/images/stories/media/pdfs/Survey_of_EC_PlanBintheIHSER2008.pdf [https://perma.cc/97KX-WGB8]; see also Rovner, *Abortion Funding*, *supra* note 128.

130. Rovner, *Abortion Funding*, *supra* note 128.

131. Sarah Kliff, *The Hyde Amendment at 35: A New Abortion Divide*, WASH. POST, (Oct. 2, 2011), https://www.washingtonpost.com/blogs/ezra-klein/post/the-hyde-amendment-at-35-a-new-abortion-divide/2011/10/02/gIQApQ6cFL_blog.html [https://perma.cc/T326-9QBM].

women, often making it unfeasible for them to have an abortion. Since women receiving health insurance through Medicaid are disproportionately women of color, the Hyde Amendment is also racially discriminatory.¹³²

Reproductive restrictions including and in addition to Hyde have not only increased, but they have also often been upheld by the Supreme Court. In *Harris v. McRae*, the Court sanctioned class-based discrimination regarding abortion by rejecting a challenge to the Hyde Amendment, holding that a woman's right to an abortion does not entitle her to the financial resources to terminate her pregnancy.¹³³ The Supreme Court continued to support obstructive reproductive policies in 1989 with *Webster v. Reproductive Health Services*.¹³⁴ Though *Webster* did not overrule *Roe v. Wade*, it did allow for restrictive state laws regarding abortion, holding that neither forbidding the use of public facilities for abortions nor requiring doctors to perform viability-testing of fetuses were unconstitutional barriers to abortion access.¹³⁵

The right to abortion access in *Roe* was again in danger just three years later during Court deliberations about *Planned Parenthood v. Casey*. Four justices would have overturned *Roe*'s central holding, and in a scathing critique, Chief Justice Rehnquist argued that the Court "was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a 'fundamental right.'" ¹³⁶ The plurality, citing *stare decisis*, did not overturn *Roe v. Wade*.¹³⁷ Nevertheless, *Casey* signaled weakened protection of reproductive freedom by establishing an "undue burden" standard that remains in place today; under this standard, states' regulations regarding abortion are constitutional so long as they do not place an undue burden on a woman seeking the procedure.¹³⁸

In 2007, the *Gonzales* cases dealt the most recent judicial setback to the reproductive rights movement nationwide. In *Gonzales v. Carhart*, the Court

132. See JESSICA ARONS & MADINA AGÉNOR, CTR. FOR AM. PROGRESS, SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR 3 (2010), https://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf [<https://perma.cc/7944-7DL9>] (describing the Hyde Amendment as "intentionally discrimin[atory] against poor women, who are disproportionately women of color"); see also *id.* at 13.

133. See *Harris v. McRae*, 448 U.S. 297, 316–18 (1980); ACLU, TIMELINE OF MAJOR SUPREME COURT DECISIONS ON WOMEN'S RIGHTS 4 https://www.aclu.org/sites/default/files/field_document/101917a-wrptimeline_0.pdf [<https://perma.cc/6UQK-VK7S>] (last updated Oct. 19, 2017).

134. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 499, 509 (1989) (plurality opinion) (quoting *McRae*, 448 U.S. at 315) (arguing that a state's decision here to use public facilities and staff to encourage childbirth over abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy").

135. *Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court*, *supra* note 88; see also *Webster*, 492 U.S. at 507, 519–20.

136. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944, 953 (1992) (Rehnquist, J., concurring in judgment in part and dissenting in part).

137. *Id.* at 845–46 (majority opinion).

138. See *Timeline of Important Reproductive Freedom Cases Decided By The Supreme Court*, *supra* note 88.

upheld Congress' Partial-Birth Abortion Act and stated that the Act did not impose an undue burden on the right to abortion.¹³⁹ The Act had an exception in cases where an abortion would save a woman's life, but no exception for protecting a woman's health.¹⁴⁰ The majority opinion in *Gonzales* decided that the lack of a health exception was acceptable because of uncertainty about whether the procedure was necessary to protect health,¹⁴¹ maintaining that a state's interest in promoting respect for human life could outweigh a woman's interest in her health.¹⁴² In addition to imposing further restrictions on reproductive freedom, the majority's justification for its decision alleged that a woman might not make the correct choices for herself.¹⁴³ Despite the misogynist tone of that argument, the national restriction remains in place.

B. Reproductive Freedom Under Attack Today

The right of freedom over an individual's own reproductive decisions remains tenuous today. Since the passage of the Hyde Amendment, many states have passed similar bans on the use of state Medicaid funding to cover abortion care. As of January 2018, over half of the states and the District of Columbia follow the federal standard for use of Medicaid funding, and only cover abortion in cases of rape, incest, or life endangerment.¹⁴⁴ Many states also have restrictions designed to make it more difficult for anyone to get an abortion, such as requirements to have the procedure performed in a hospital after a certain point in the pregnancy (nineteen states), a mandatory waiting period between the first doctor's visit and the abortion (twenty-seven states), and mandatory counseling (thirty-five states).¹⁴⁵ Abortion is particularly cabined in the South,

139. *Gonzales v. Carhart*, 550 U.S. 132–33, 147 (2007) (deciding consolidated cases from the Second and Ninth Circuits). The phrase “partial-birth abortion” is not recognized as a medical term by the American Congress of Obstetricians and Gynecologists, and is instead a politicized term used to describe a variation of a “dilation and extraction” procedure. See Press Release, Am. Coll. of Obstetricians & Gynecologists (ACOG), ACOG Files Amicus Brief in *Gonzales v. Carhart* and *Gonzales v. PPF* (Sept. 22, 2006), https://web.archive.org/web/20080531043420/http://www.acog.org/from_home/publications/press_releases/nr09-22-06.cfm; Julie Rovner, ‘*Partial-Birth Abortion*’: *Separating Fact from Spin*, NAT’L PUB. RADIO (Feb. 21, 2006, 9:44 PM), <https://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin>.

140. Linda Greenhouse, *Justices Back Ban on Method of Abortion*, N.Y. TIMES (Apr. 19, 2007), http://www.nytimes.com/2007/04/19/washington/19scotus.html?_r=0 [https://nyti.ms/2kXo6hA].

141. *Id.*

142. *Timeline of Important Reproductive Freedom Cases Decided By The Supreme Court*, *supra* note 88.

143. *See id.*

144. *State Funding of Abortion Under Medicaid*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicare> [https://perma.cc/CC77-4FLW] (last updated Jan. 1, 2018).

145. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [https://perma.cc/UM3N-NRB6] (last updated Jan. 1, 2018); *see also An Overview of Abortion*

where at least five states require any doctor performing abortions to have admitting privileges at a local hospital.¹⁴⁶

In addition to these legal restrictions, anti-choice groups have launched social campaigns hoping to discourage abortions. These groups have particularly targeted Black women, paying for billboards from Atlanta to Milwaukee to Los Angeles with incredibly racist slogans that read, “Black children are an endangered species,” and “the most dangerous place for an African American is in the womb.”¹⁴⁷ As Professor Dorothy Roberts explained, these billboards fail to account for the racism that truly hurts Black children and mothers, instead blaming Black women for systemic issues.¹⁴⁸

The current legal landscape also has the potential to affect women’s reproductive options across the racial and class spectrum. In *Whole Woman’s Health v. Hellerstedt*,¹⁴⁹ the Supreme Court struck down a Texas law, HB 2, that imposed a number of restrictions on abortion clinics.¹⁵⁰ The effects of HB 2 were debated by petitioners and respondents, with petitioners arguing that HB 2 resulted in such widespread closures of abortion clinics that, if upheld, would have resulted in a quarter of Texas women living more than one hundred miles from a clinic.¹⁵¹ The Texas law included a mandate that every clinic meet the specifications of an ambulatory surgical center (ASC), despite the American Medical Association’s assertion that the onerous burden involved in creating an ASC is not necessary or medically justified.¹⁵² HB 2 also required that

Laws, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [https://perma.cc/RUQ8-VETK] (last updated Jan. 1, 2018).

146. See *Map: Abortion Access in the South*, PLANNED PARENTHOOD ACTION FUND, <http://plannedparenthoodaction.org/issues/abortion/map-abortion-access-south> [https://perma.cc/SHW2-4V3R] (last visited Oct. 21, 2017).

147. See Steve Osunsami, *Abortion Billboards: Strong Words Spark Debate in Atlanta’s Black Neighborhoods*, ABC NEWS (Feb. 22, 2010), <http://abcnews.go.com/WN/billboard-controversy-signs-atlanta-black-children-endangered-species/story?id=9888149> [https://perma.cc/7YSC-D64S]; Miriam Zoila Pérez, *Past and Present Collide as the Black Anti-Abortion Movement Grows*, COLORLINES (Mar. 3, 2011, 9:35 AM), <https://www.colorlines.com/articles/past-and-present-collide-black-anti-abortion-movement-grows> [https://perma.cc/5P93-K8QU].

148. Pérez, *supra* note 147.

149. 136 S. Ct. 2292 (2016).

150. *Whole Woman’s Health v. Hellerstedt*, CTR. FOR REPROD. RIGHTS, <http://www.reproductiverights.org/case/whole-womans-health-v-hellerstedt> [https://perma.cc/58WZ-F5MH] (last visited Oct. 22, 2017).

151. Transcript of Oral Argument at 1, 36–37, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-274_d18e.pdf [https://perma.cc/C2NR-X3A7].

152. *Id.* at 21 (discussing that medical abortion merely involves taking an oral medication); Brief for Amici Curiae American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Osteopathic Association, and American Academy of Pediatrics in Support of Petitioners at 5, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/ACOG%20WilmerHale.pdf> [https://perma.cc/H4SG-3E5N].

physicians performing abortions have hospital admitting privileges, even though such doctors typically have trouble getting privileges, ironically, because abortion is such a safe procedure. Many hospitals do not give admitting privileges to doctors whose practices do not generate a certain number of hospital admissions per year.¹⁵³ In Texas, it is one hundred times safer to have an abortion than to carry a pregnancy to term; accordingly, virtually no abortion doctors have enough patient admissions to gain hospital privileges.¹⁵⁴ As Professor Pam Karlan noted, if a doctor did have enough patient admissions to acquire hospital admitting privileges, “that would be a sign of a terrible doctor in a practice that involves performing abortions.”¹⁵⁵

Despite evidence of undue burden, the Fifth Circuit ruled in favor of the Texas statute. The Supreme Court soon granted certiorari, and heard oral arguments in the case on March 2, 2016.¹⁵⁶ Utilizing the *Planned Parenthood v. Casey* standard, the Court decided that HB 2’s restrictions placed an undue burden on women seeking abortions in Texas.¹⁵⁷ Still, the future legality of reproductive rights remains uncertain, as President Trump has committed to appointing Supreme Court justices who would overturn *Roe v. Wade*.¹⁵⁸

C. Reproductive Justice Organizations Build Power

Meanwhile, reproductive justice organizations have continued to grow and build capacity to engage in advocacy for the wide spectrum of issues affecting reproductive liberation in LGBTQIA communities, low-income communities, and communities of color. SisterSong’s current mission is to “strengthen and amplify the collective voices of indigenous women and women of color to achieve reproductive justice (RJ) by eradicating reproduction oppression and securing human rights.”¹⁵⁹ SisterSong united many women of color-led reproductive groups during the 1990s and enabled the reproductive justice movement to spread. Today, SisterSong’s robust network consists of organizations throughout the country advocating for reproductive justice in their

153. *Slate’s Amicus with Dahlia Lithwick: Is the Burden Undue?*, at 17:26, SLATE (Mar. 7, 2016), <https://player.fm/series/slates-amicus-with-dahlia-lithwick/is-the-burden-undue> (podcast interview with Pamela Karlan).

154. *Id.* at 17:53. As Karlan stated, in Texas, the death rate is 0.27 per 100,000 abortions, as compared to 27 per 100,000 pregnancies. *Id.* at 20:14. See also *Slate’s Amicus with Dahlia Lithwick: A Woman’s Right to Choose Returns to the Highest Court*, SLATE (Mar. 10, 2016), http://www.slate.com/articles/podcasts/amicus/2016/03/amicus_dahlia_lithwick_covers_whole_woman_s_health_v_hellerstedt_and_abortion.html.

155. *Is the Burden Undue?*, *supra* note 153, at 18:04.

156. Transcript of Oral Argument, *supra* note 151, at 1.

157. 136 S. Ct. at 2313, 2315.

158. Ariane de Vogue, *Trump: Same-sex Marriage Is ‘Settled,’ but Roe v. Wade Can Be Changed*, CNN (Nov. 15, 2016, 7:24 AM), <http://www.cnn.com/2016/11/14/politics/trump-gay-marriage-abortion-supreme-court/> [<https://perma.cc/4WEV-B4D2>].

159. SISTERSONG WOMEN OF COLOR REPROD. JUST. COLLECTIVE, *supra* note 79.

respective states as well as nationwide.¹⁶⁰ Consequently, SisterSong's role has shifted. SisterSong's central priorities today include providing a platform for reproductive justice organizations to work collaboratively, and supporting the expansion of reproductive justice into other social justice movements.¹⁶¹

Within and outside of SisterSong, women of color-led groups have magnified their voices in the struggle for reproductive justice. For instance, a partnership among five organizations called the National Black Women's Reproductive Justice Agenda has created a national and state-level policy agenda.¹⁶² In 2016, Trust Black Women and New Voices for Reproductive Justice came together in a public discussion with Alicia Garza, an Oakland-based leader of the Black Lives Matter movement, to emphasize the synergy between the two causes.¹⁶³

ACRJ is now called Forward Together, a name reflecting the organization's multi-gender, multi-racial network that continues to focus on the needs of women of color, queer people of color, and gender-nonconforming people.¹⁶⁴ Forward Together has strong queer leadership and sees reproductive justice as intertwined with the LGBTQIA movement at its core, which is reflected in the group's vision of reproductive justice: "that all *people* have the political, economic, and cultural power to make decisions about their bodies, genders, and sexualities."¹⁶⁵ Forward Together prioritizes inclusion of transgender folks in the reproductive justice movement, and also collaborates with social justice organizations in other fields that share the goal of self-determination at the intersection of race, gender, and sexuality.¹⁶⁶

The National Latina Institute for Reproductive Health has similarly grown and expanded. The organization currently has its headquarters in New York, a policy-focused office in Washington, D.C., and three additional advocacy networks in Texas, Florida, and Virginia.¹⁶⁷ The networks are directed by leaders known as *Poderosas* (or powerful), who are a part of and grounded in

160. *See id.*

161. *Id.*

162. Nat'l Black Women's Reprod. Justice Agenda, *Mission and Values*, IN OUR OWN VOICE: NAT'L BLACK WOMEN'S REPROD. JUSTICE AGENDA, <http://www.blackrj.org/about-us/mission-and-values/> [https://perma.cc/YZ5M-USP9] (last visited Oct. 21, 2017).

163. Kenrya Rankin, *Black Lives Matter Partners with Reproductive Justice Groups to Fight for Black Women*, COLORLINES (Feb. 9, 2016, 2:35 PM), <http://www.colorlines.com/articles/black-lives-matter-partners-reproductive-justice-groups-fight-black-women> [https://perma.cc/N4KA-2465].

164. Telephone Interview with Moira Bowman, Deputy Dir., Forward Together (Mar. 31, 2016).

165. *Id.* (emphasis added).

166. *Id.*

167. *See Who We Are*, NAT'L LATINA INST. FOR REPROD. HEALTH, *supra* note 77.

their communities.¹⁶⁸ Poderosas inform the national offices in New York and Washington regarding the most salient issues that their communities are experiencing; as a result, the Institute's work is truly culturally responsive and driven by the needs of the Latina community.¹⁶⁹ Native and Indigenous women have continued to organize through the Native American Women's Health Education Resource Center, and in 2000, the Native community within SisterSong held a roundtable through which they developed a reproductive justice agenda.¹⁷⁰ Still, the deficiencies in the reproductive healthcare offered by the Indian Health Service are an ongoing issue.¹⁷¹

The particular barriers that low-income women face are gaining increased attention thanks to the rise of All* Above All, an organization determined to "restore and sustain abortion coverage for low-income women."¹⁷² All* Above All was founded in an effort to repeal the Hyde Amendment, and has a wide range of support from reproductive health, justice, and rights groups alike.¹⁷³ Reproductive justice organizations have also embraced intersectional advocacy on behalf of the LGBTQIA community.¹⁷⁴ Meanwhile, LGBTQIA organizations have increasingly prioritized reproductive justice. Legal groups like the National Center for Lesbian Rights advocate for the familial and parenting rights of queer parents,¹⁷⁵ and grassroots groups such as the LGBTQ Task Force have become allies for reproductive justice and rights.¹⁷⁶

In the legal realm, If/When/How: Lawyering for Reproductive Justice (formerly Law Students for Reproductive Justice) is the primary group focused on this approach to reproductive access. If/When/How organizes and collaborates with law students throughout the country, and is now beginning to reach out to practicing lawyers who might be allies to the reproductive justice

168. *Soy Poderosa*, NAT'L LATINA INST. FOR REPROD. HEALTH, <http://latinainstitute.org/en/soy-poderosa> [<https://perma.cc/7C2W-7QQC>] (last visited Oct. 21, 2017).

169. *See id.*

170. *SisterSong Native Women's Reproductive Rights and Health Roundtable Convened*, NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., <http://www.nativeshop.org/news-110/93-information/698-2000-sistersong.html> [<https://perma.cc/Z3NX-FL6S>] (last visited Oct. 21, 2017).

171. Barbara Gurr, *The Failures and Possibilities of a Human Rights Approach to Secure Native American Women's Reproductive Justice*, 7 SOCIETIES WITHOUT BORDERS 1, 2, 10 (2012) ("[I]t is widely acknowledged by IHS that their facilities are too few, and that many of them are outdated.").

172. ALL* ABOVE ALL, <https://allaboveall.org/> [<https://perma.cc/ES6Q-4FCW>] (last visited Oct. 20, 2017).

173. *See About*, ALL* ABOVE ALL, <https://allaboveall.org/about/partner-organizations/> [<https://perma.cc/EM6Y-DBKZ>] (last visited Oct. 20, 2017).

174. *See supra* p. 25 for discussion of Forward Together.

175. *See Family and Relationships*, NAT'L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/our-work/family-relationships/> [<https://perma.cc/FAX2-MYUT>] (last visited Oct. 19, 2017).

176. *See Reproductive Rights*, NAT'L LGBTQ TASK FORCE, <http://www.thetaskforce.org/reproductive-rights/> [<https://perma.cc/4HF3-69QP>] (last visited Oct. 21, 2017).

movement.¹⁷⁷ Many of the reproductive justice groups mentioned above have formed alliances to bridge past identity-group separation; All* Above All highlighting the National Black Women's Reproductive Justice Agenda as its featured partner is just one of many examples.¹⁷⁸

D. Reproductive Justice and Reproductive Rights Organizations

1. Rights Organizations Enter

While reproductive justice organizations are increasingly collaborative with each other, the relationship between the reproductive rights and the reproductive justice movement remains precarious at times. Some reproductive rights groups have learned from justice advocates and have entered the reproductive justice space with respect. For instance, women of color leadership in California has pushed reproductive rights lawyers to acknowledge how the rights-based framework has failed to address many issues faced by women of color and low-income women.¹⁷⁹ In turn, groups like the California Coalition for Reproductive Freedom (CCRF) and the ACLU of Northern California have become more intersectional, striving to consistently support reproductive justice goals.¹⁸⁰ CCRF has been intentional about addressing power imbalances among its coalition of reproductive groups.¹⁸¹ The ACLU has supported reproductive justice advocacy in several instances, including being one among hundreds of organizations championing the statewide effort to repeal the Maximum Family Grant (MFG) Rule.¹⁸²

Similarly, some state chapters of NARAL Pro-Choice America have publicly recognized that women of color's power has not traditionally been respected in the pro-choice effort, and have held themselves accountable for partnering with reproductive justice groups.¹⁸³ Acknowledging America's history of sterilization abuse, NARAL has promoted birth control options while

177. Interview with Wendy Fu, Former Acad. & Attorney Programs Coordinator, If/When/How: Lawyering for Reprod. Justice, in Stanford, CA (Apr. 6, 2016).

178. *About*, ALL* ABOVE ALL, *supra* note 173.

179. Telephone Interview with Phyllida Burlingame, Reprod. Justice Policy Dir., ACLU of N. Cal. (Mar. 21, 2016).

180. Telephone Interview with Maggie Crosby, Former Senior Staff Attorney, ACLU of N. Cal. (Feb. 4, 2016).

181. Telephone Interview with Phyllida Burlingame, *supra* note 179.

182. *Id.*; Ashley Morris, *It's Time to Repeal the Maximum Family Grant Rule*, ACLU OF N. CAL. (Mar. 30, 2015), <https://www.aclunc.org/blog/its-time-repeal-maximum-family-grant-rule>.

183. *See, e.g., Our Commitment*, NARAL PRO-CHOICE OR., <https://prochoiceoregon.org/our-commitment/> [<https://perma.cc/3JEH-XGCT>] (last visited Dec. 28, 2017); *Northern Virginia Leadership and Advocacy Summit*, NARAL PRO-CHOICE VIRGINIA, <http://www.naralva.org/events/fairfaxsummit.shtml> [<https://perma.cc/UJD8-JKD9>] (last visited Dec. 28, 2017).

also recognizing the history of coercion and racism embedded in past advocacy regarding contraception.¹⁸⁴

Though the reproductive rights organizations mentioned above have acknowledged past injustice and are moving toward a culture of respect, others have failed to credit or work with the reproductive justice movement's founders or organizers. A recent public example, though likely unintentional, occurred in a prominent 2014 New York Times Article entitled "Advocates Shun 'Pro-Choice' to Expand Message."¹⁸⁵ The article discussed how many reproductive groups have stopped using the term "pro-choice" since it does not encapsulate the broader range of reproductive health issues, yet it failed to credit the reproductive justice movement for any part of this shift. Not only did the reporter interview only reproductive rights leaders, but those individuals interviewed for the widely-read piece never mentioned the reproductive justice framework at all.¹⁸⁶ Given the already-disproportionate attention to reproductive rights groups relative to reproductive justice groups, this omission was especially notable.

2. Reproductive Justice Organizations Assert Their Power

Reproductive justice organizations responded swiftly and collaboratively to the article. Over sixty reproductive justice groups and individual leaders signed onto "Reproductive Justice and 'Choice': An Open Letter to Planned Parenthood," authored by SisterSong. The letter framed the New York Times article as yet another example of erasure of women of color's work, and traced the origins and twenty-year history of the reproductive justice movement.¹⁸⁷ The letter enumerated the many important victories achieved through the reproductive justice frame, including activism leading to passage of state legislation to increase early access to abortion; organizing work resulting in racist state laws being declared unconstitutional; and advocacy for national access to healthcare for low-income people and the LGBTQ community.¹⁸⁸

While acknowledging Planned Parenthood's importance in providing healthcare to people who could not otherwise afford it, the letter also highlighted that Planned Parenthood Federation of American (PPFA) and other mainstream reproductive rights groups had chosen not "to understand and work on the intersectionality of issues" that affect marginalized communities when given the

184. See Addy Baird, *City Advocates, Gently, for Use of IUD*, POLITICO (Mar. 21, 2016, 5:26 AM), <http://www.capitalnewyork.com/article/city-hall/2016/03/8593585/city-advocates-gently-use-iud> [<https://perma.cc/C3GD-FJAC>].

185. Jackie Calmes, *Advocates Shun 'Pro-Choice' to Expand Message*, N.Y. TIMES (July 28, 2014), http://www.nytimes.com/2014/07/29/us/politics/advocates-shun-pro-choice-to-expand-message.html?_r=1 [<https://nyti.ms/2k8YaLw>].

186. *Id.*

187. Monica Simpson, *Reproductive Justice and 'Choice': An Open Letter to Planned Parenthood*, REWIRE (Aug. 5, 2014, 12:34 PM), <https://rewire.news/article/2014/08/05/reproductive-justice-choice-open-letter-planned-parenthood/> [<https://perma.cc/8LLS-Q27B>].

188. *Id.*

opportunity to do so.¹⁸⁹ To conclude, the signatory organizations requested a meeting with PPFA leadership, PPFA's commitment to explicitly recognize the work of reproductive justice organizations when commenting on justice issues in the media, and a commitment by Planned Parenthood to examine how they work with reproductive justice groups.¹⁹⁰

This letter's power can be seen clearly in the response it generated, leading to external and internal progress. Cecile Richards, President of the Planned Parenthood Federation of America, published a response in which she acknowledged that Planned Parenthood and others have "sometimes fallen short" in honoring the work of reproductive justice advocates.¹⁹¹ While the response did not quite amount to an apology, Richards did publicly appreciate the reproductive justice movement for pushing reproductive rights groups, and committed to meeting with reproductive justice organizations to create shared strategies.¹⁹²

3. Collaboration Between the Reproductive Justice and Reproductive Rights Movements

Since 2014, reproductive rights and reproductive justice groups have formed a closer relationship. While not perfect, the relationship has led to greater acknowledgement for reproductive justice. The open letter and response led to a series of discussions between SisterSong and Planned Parenthood, and those conversations likely produced greater understanding of reproductive justice in the reproductive rights world. Alternatively, rights groups' increased public respect for reproductive justice organizations could also be attributed to pragmatism, as they recognized the importance of working with a movement that is continually increasing its power.¹⁹³ Whichever the reason, increased recognition and respect for reproductive justice are largely considered net-positives.

Increased collaboration between the two movements has followed, and was apparent during litigation in *Whole Woman's Health v. Hellerstedt*. The Center for Reproductive Rights reached out to reproductive justice organizations, and those organizations agreed to write amicus briefs, which resulted in a larger number of the briefs submitted highlighting the importance of abortion access for marginalized groups.¹⁹⁴ Such increased collaboration is an important step, but

189. *See id.*

190. *Id.*

191. Cecile Richards, *A Response to an Open Letter on Reproductive Justice and 'Choice,'* REWIRE (Aug. 5, 2014, 2:52 PM), <https://rewire.news/article/2014/08/05/response-open-letter-reproductive-justice-choice/> [https://perma.cc/4CYL-TLP7].

192. *Id.*

193. Telephone Interview with Loretta Ross, *supra* note 82.

194. Interview with Wendy Fu, *supra* note 177.

traditional reproductive rights organizations still have more work to do in meaningfully integrating reproductive justice into their process and strategy.

VI.

EFFECTIVE LAWYERING FOR REPRODUCTIVE JUSTICE

A. What Reproductive Justice Groups Want From Lawyers

Attorneys tend to come from privileged backgrounds.¹⁹⁵ All lawyers have educational privilege, and many have the privileges directly associated with the reproductive rights movement and second-wave feminism; they tend to be white, straight, cisgender, upper- and middle-class. Whether these lawyers have been previously engaged in reproductive rights work or not, they are likely to have a lived experience and perspective that differs from that of the communities of color, low-income communities, and LGBTQIA communities that make up the reproductive justice movement. Even leaving identity privilege aside, the reproductive justice movement was founded as a grassroots movement, and continues to be led largely by people experiencing ongoing marginalization and barriers to accessing reproductive choice and care. What exactly, then, can lawyers do to work on reproductive justice issues?

From the leaders interviewed for this article, the general consensus is that reproductive justice organizations want lawyers to occupy support roles in the movement. Because the reproductive justice framework is rooted in experiences of reproductive oppression, it necessarily centers individuals and communities who have experienced marginalization.¹⁹⁶ Undoubtedly, there need to be “more women and people of color and people with lived experiences at the intersection of race, gender, and sexuality” in the lawyering role,¹⁹⁷ but as noted above, most lawyers do not yet come from marginalized communities. In the meantime, lawyers can best help by uplifting and supporting the voices of those who are from oppressed communities.

In order to fulfill that purpose, most members of the legal profession will need to shift their perspectives about a lawyer’s role in achieving a given goal. Lawyers are traditionally viewed as leaders, and especially in the reproductive rights arena, tend to speak on behalf of the movement or issue on which they are working. To be effective for reproductive justice, though, lawyers will need to step back and leave space for marginalized voices to speak, instead utilizing their

195. In 2017, approximately 65% of active attorneys were male, and 85% were white. AM. BAR ASS’N., ABA NATIONAL LAWYER POPULATION SURVEY (2017), https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-10-year-demographics-revised.authcheckdam.pdf [https://perma.cc/5HLF-WZ3N].

196. *What We Do*, NAT’L LATINA INST. FOR REPROD. HEALTH, <http://latinainstitute.org/en/what-we-do/reproductive-justice-more> [https://perma.cc/QJ3F-E3MG] (last visited Oct. 19, 2017).

197. Telephone Interview with Moira Bowman, *supra* note 72.

privilege and education to provide legal arguments for the reproductive justice framework.¹⁹⁸

B. Best Practices: How Lawyers Can Work with the Reproductive Justice Movement

1. Supporting the Movement by Understanding and Respecting Intersectionality

Knowledge of and deference to the reproductive justice movement's origins in grassroots leadership of those experiencing oppression is key to lawyers building trust and working effectively in the movement. Reproductive justice and rights leaders interviewed had a variety of suggestions for achieving that understanding and respect, but all of those suggestions involved lawyers taking the time to listen to reproductive justice advocates and to do research to gain a grasp of reproductive justice as an independent, self-directed movement. Some suggested that lawyers first make sure that they are grounded in the theoretical underpinnings of the justice framework, including critical race theory¹⁹⁹ and Black feminist theory, before trying to engage in reproductive justice work directly.²⁰⁰ Others pointed to coalition work with reproductive justice organizations itself as a launching point for better mutual understanding.²⁰¹ Wherever they acquire knowledge of the justice framework, lawyers' true understanding of the movement is more likely to result in legal strategies that are lined up with community momentum.²⁰²

2. Coalition Building

Lawyers from the reproductive rights world can also help build the power of justice organizations by including them in influential, multi-movement coalitions, as well as by forming new coalitions between rights and justice groups. Still, creating coalitions alone is not enough; within those alliances, all groups must be intentional about working against traditional power dynamics and ensuring that reproductive justice is continually centered in any discussion of goals or tactics.²⁰³ Since the reproductive justice framework involves building goals from the community on up, lawyers must respect community knowledge rather than focusing solely on sources of knowledge traditionally valued in the legal field.

198. Interview with Wendy Fu, *supra* note 177.

199. *See generally* KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xi (1995) (defining critical race theory as a movement that confronts “the historical centrality and complicity of law in upholding white supremacy”).

200. Telephone Interview with Loretta Ross, *supra* note 82.

201. Telephone Interview with Phyllida Burlingame, *supra* note 179.

202. Telephone Interview with Moira Bowman, *supra* note 72.

203. Telephone Interview with Phyllida Burlingame, *supra* note 179.

Since reproductive rights and reproductive justice are complementary frameworks,²⁰⁴ these two movements might also need to work separately at times while staying in communication about mutual goals. When a reproductive rights organization is pursuing a particular legal case, it could make sense for them to focus on the legal rights framework while still asking for input from reproductive justice experts. This could involve asking for the reproductive justice leaders' expertise, but doing so in a way that respects their time and not only fully includes them in the decision-making process, but actually trusts their expertise when creating and building a strategy.²⁰⁵ For instance, before deciding on a legal strategy and asking for amicus briefs, reproductive rights groups might sit down with reproductive justice groups to discuss their potential plan and action steps, and to solicit input from the justice perspective.

3. *Financial Support*

Likely due to the reproductive rights movement's closer connections to traditional institutions of power and privilege, rights-based organizations have also had more success in securing sustainable funding sources.²⁰⁶ As funders are generally less knowledgeable about reproductive justice, they tend to fund justice work less often.²⁰⁷ Rather than competing for funding, lawyers could use their institutional power to ensure that smaller reproductive justice organizations can continue engaging in important community work. A vision of non-competitiveness regarding financial support may seem naïve, and yet organizations have been able to leverage their differing contributions to secure collective funding. For example, the ACLU of Northern California applied for a sex education grant in concert with California Latinas for Reproductive Justice and Forward Together, and in doing so, all three groups secured money for important education initiatives.²⁰⁸

VII. CONCLUSION

“People get hung up on the word reproductive and assume it's just a few things, but really the focus is on justice and access to the resources you need to be able to make decisions—decisions affecting your ability to family plan, but also decisions that affect your quality of life.” — Lina Houston, *If/When/How*.²⁰⁹

204. ACRJ, *A NEW VISION*, *supra* note 9.

205. Interview with Wendy Fu, *supra* note 177.

206. Telephone Interview with Loretta Ross, *supra* note 82.

207. Telephone Interview, with Phyllida Burlingame, *supra* note 179.

208. Telephone Interview with Maggie Crosby, *supra* note 180.

209. Interview with Lina Houston, Campus & Cmty. Programs Coordinator, *If/When/How: Lawyering for Reproductive Justice* (Apr. 6, 2016).

Reproductive justice encompasses liberation for all people to make decisions about their families, as well as the economic security to truly make those choices freely. The reproductive justice framework has its origins in communities that have experienced intersecting layers of oppression, and is grounded in the idea of changing structural power inequities to achieve social justice. Accordingly, the best role for lawyers in the movement is to listen to and support reproductive justice activism, especially women of color, LGBTQIA, and low-income-led initiatives.

There is almost nothing written about lawyering for reproductive justice. In fact, If/When/How organized a convening of lawyers in June 2016 to try to better understand how lawyers might plug into the reproductive justice movement.²¹⁰ Given the current dearth of lawyering in reproductive justice, this article provides some possible entry points for lawyers seeking to support the movement. Legal tools can be very effective in achieving social justice goals, but also come with the risk of traditional power dynamics overwhelming the roots of a given objective. When lawyers do what they assume is best, they may alienate reproductive justice activists, and actually further the oppression experienced by marginalized communities. Instead, if lawyers are able to practice active listening and take a support role rather than a leadership role, they can add to the capacity of the reproductive justice movement enormously. A largely untapped possible alliance, a respectful coalition between lawyers and reproductive justice leaders has the potential to be incredibly powerful in achieving reproductive liberation.

210. Interview with Wendy Fu, *supra* note 177.