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Redefining Reproductive Rights and Justice

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REDEFINING REPRODUCTIVE RIGHTS AND JUSTICE

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INTRODUCTION

The 2016 presidential election was a critical moment for reproductive rights and justice. The Republican Party platform promised Supreme Court "appointments [that] will enable courts to begin to reverse the long line of activist decisions – including *Roe[v. Wade]*,"[1] the case holding that women have a fundamental right to decide whether to end their pregnancies.[2] During a debate, then-Republican-candidate Donald Trump announced that he would "put[] pro-life justices on the court" so that overturning *Roe* would "happen, automatically."[3] And when pressed about his stance on abortion, Trump said that there should be "some form of punishment" for women who have abortions.[4] Just three years into his presidency, Donald Trump has had two Supreme Court appointments.[5]

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1. REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016, at 10 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf [https://perma.cc/AY4U-62KT].

2. Roe v. Wade, 410 U.S. 113, 153 (1973). *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), affirmed the "central holding" of *Roe* but modified the legal framework governing abortion restrictions.

3. NBC News, *The Third Presidential Debate: Hillary Clinton and Donald Trump (Full Debate)*, YOUTUBE (Oct. 19, 2016), https://www.youtube.com/watch?v=smkyorC5qwc; *see also* Ron Elving, *Which Trump Should Be Believed on Overturning* Roe v. Wade*?*, NPR (July 3, 2018, 5:00 AM), https://www.npr.org/2018/07/03/625410441/which-trump-should-be-believed-on-overturning-roe-v-wade [https://perma.cc/N88Y-RC97]; Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn* Roe v. Wade *Abortion Case*, CNBC (Oct. 19, 2016, 9:31 PM), https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html [https://perma.cc/DN7C-3SR7].

4. *Trump: 'Some Form of Punishment' Needed for Abortion*, CNBC (Mar. 30, 2016, 3:34 PM), https://www.cnbc.com/video/2016/03/30/trump-some-form-of-punishment-needed-for-abortion.html; *see also* Tom Kertscher, *In Context: Transcript of Donald Trump on Punishing Women for Abortion,* POLITIFACT WIS. (Mar. 30, 2016),

Since taking office, the Trump administration has, to no surprise, attempted to dismantle various protections for reproductive rights and justice. The administration reinstated a broader version of the global gag rule, under which all foreign nongovernmental organizations that provide abortions or counsel women about abortions are ineligible to receive federal funds.[6] Vice President Pence cast a tie-breaking vote to rescind a regulation that prohibited states from excluding abortion providers from Title X, a program that provides money to family planning services.[7] The administration subsequently promulgated a regulation that excludes from the Title X program all entities that perform abortions or offer referrals to abortion providers.[8] The administration promulgated another regulation that would allow employers to opt out of the statutory requirement to provide their employees insurance coverage for contraception.[9] The Office of Refugee Resettlement has refused to allow undocumented minor women in government custody to obtain abortions.[10] And states, perhaps sensing that the tides are changing, have enacted a spate of draconian restrictions.[11] One of the recently enacted laws would imprison women who obtain abortions.[12]

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https://www.politifact.com/wisconsin/article/2016/mar/30/context-transcript-donald-trump-punishing-women-ab/ (on file with the *Michigan Law Review*).

5. *Current Members*, SUP. CT. U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/6A8X-VYKE].

6. Jessie Hellmann, *Trump Reinstates Ban on US Funding for Abortion Overseas*, HILL (Jan. 23, 2017, 11:58 AM), https://thehill.com/policy/healthcare/abortion/315652-trump-signs-executive-order-reinstating-global-gag-rule-on [https://perma.cc/K2NN-93ZN]; *see also* Ariana Eunjung Cha & Carol Morello, *Trump Expansion of Abortion 'Gag Rule' Will Restrict $8.8 Billion in U.S. Aid*, WASH. POST (Mar. 15, 2017, 4:16 PM), https://www.washingtonpost.com/news/to-your-health/wp/2017/05/15/trump-expansion-of-abortion-gag-rule-will-restrict-8-8-billion-in-u-s-aid/ (on file with the *Michigan Law Review*) (discussing how this restriction also affected programs started under Republican President George W. Bush).

7. Lisa Mascaro, *Pence Casts Tie-Breaking Vote to Let States Withhold Federal Funds from Planned Parenthood*, L.A. TIMES (Mar. 30, 2017, 3:45 PM), https://www.latimes.com/politics/la-na-pol-congress-planned-parenthood-20170330-story.html [http://perma.cc/T4AT-ZM5Z].

8. Compliance with Statutory Program Integrity Requirements, 83 Fed. Reg. 25,502 (proposed June 1, 2018) (to be codified at 42 C.F.R. pt. 59), *amended by* 84 Fed. Reg. 7714 (Mar. 4, 2019). This regulation is currently being challenged. California v. Azar, No. 19-15974 (9th Cir.).

9. Ricardo Alonso-Zaldivar, *Trump Administration Finalizes Birth Control Opt-Out Policy*, AP (Nov. 7, 2018), https://www.apnews.com/8c90eb432f73420786de1c05da872761 [https://perma.cc/2XM7-SJCK]. This regulation is also being challenged. California v. Azar, No. 18-15144 (9th Cir.).

10. Jeremy W. Peters, *Under Trump, an Office Meant to Help Refugees Enters the Abortion Wars*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/us/politics/refugee-office-abortion-trump.html [http://perma.cc/8GAD-BCU7].

11. The governors in Ohio, Kentucky, Georgia, North Dakota, Louisiana, and Mississippi have signed into law bills prohibiting abortion after a fetal heartbeat is detected, which can be as early as six weeks into a pregnancy. *See, e.g.*, Sarah Mervosh, *Georgia Is Latest State to Pass Fetal Heartbeat Bill as Part of Growing Trend*, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/georgia-fetal-heartbeat-abortion-law.html

[https://perma.cc/AS3M-UJCN]; Amelia Thomson-DeVeaux, *Here's Why the Anti-Abortion Movement Is Escalating*, FIVETHIRTYEIGHT (May 21, 2019), https://fivethirtyeight.com/features/we-categorized-hundreds-of-abortion-restrictions-heres-why-the-anti-abortion-movement-is-escalating/ [https://perma.cc/G9NU-BXUM]; *see also* Tara Law, *Here Are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana and Elsewhere*, TIME (May 18, 2019), https://time.com/5591166/state-abortion-laws-explained/ [https://perma.cc/57CU-QE7L]. Alabama Governor Kay Ivey signed a bill criminalizing performing abortions at any stage of a pregnancy. Debbie Elliott & Laurel Wamsley, *Alabama Governor Signs Abortion Ban into Law*, NPR (May 14, 2019, 10:04 PM), https://www.npr.org/2019/05/14/723312937/alabama-lawmakers-passes-abortion-ban [https://perma.cc/DZE5-M468]. Other states have been passing laws that prohibit or severely limit access to abortion further along in the pregnancy. For example, Missouri governor Mike Parson signed a bill banning abortion at or after eight weeks of pregnancy, containing no exceptions for rape or incest and making it a felony to perform abortions in violation of that measure. *See* Anna North, *Missouri's 8-Week Abortion Ban Blocked by Court*, VOX (Aug. 27, 2019, 2:02 PM), https://www.vox.com/identities/2019/5/24/18632667/missouri-abortion-ban-law-2019-bill-126 [https://perma.cc/2MR9-GYB9]. Missouri also requires that pregnant women requesting an abortion undergo an invasive pelvic exam. *See* Reis Thebault, *Explaining the Missouri Pre-Abortion Exam Rachel Maddow Called 'State-Sanctioned Sexual Assault,'* WASH. POST (June 8, 2019, 8:00 AM), https://www.washingtonpost.com/health/2019/06/08/explaining-missouri-pre-abortion-exam-rachel-maddow-called-state-sanctioned-sexual-assault/ (on file with the *Michigan Law Review*).

Arkansas, Utah, Texas, North Dakota, and Indiana all passed measures in 2019 prohibiting abortion at eighteen to twenty weeks, removing exceptions to existing twenty-week bans, or proscribing procedures used in second-trimester abortions. Jessica Campisi et al., *All the States Taking Up New Abortion Laws in 2019*, HILL (May 27, 2019, 3:17 PM), https://thehill.com/policy/healthcare/445460-states-passing-and-considering-new-abortion-laws-in-2019 [https://perma.cc/Q22H-W8TP]; *see also* Arya Sundaram, *Texas Senate Removes Exception that Allows Abortion After 20 Weeks if the Pregnancy is Unviable*, TEX. TRIB. (May 7, 2019, 7:00 PM), https://www.texastribune.org/2019/05/07/texas-abortion-law-allowing-procedures-after-20-weeks-removed-senate/ [https://perma.cc/D859-FUZV]. Abortion is banned at eighteen to twenty weeks postfertilization in eighteen states. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (updated Feb. 1, 2020), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [https://perma.cc/PB4B-KP7F].

Some commentators have noted how Kavanaugh's confirmation "certainly influenced many states' decisions to pass significant restrictions on abortion contradicting existing constitutional guarantees." *E.g.*, Helen Alvare, *Symposium:* Roe *. . . or Wait?*, SCOTUSBLOG (July 24, 2019, 2:13 PM), https://www.scotusblog.com/2019/07/symposium-roe-or-wait/ [https://perma.cc/854S-YDHC].

12. A bill signed by Georgia Governor Brian Kemp prohibits abortion after the first detectable heartbeat, gives fetuses "full legal recognition," and redefines abortion as including self-termination. H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019) (to be codified at Ga. Code Ann. §§ 1-2, 16-12-5, 19-7, 31-9A, 31-9B (2020)). It therefore opens up the possibility that a woman who self-terminates, or seeks out an abortion, could be prosecuted for murder or another felony. Mark Joseph Stern, *Georgia Just Criminalized Abortion. Women Who Terminate Their Pregnancies Would Receive Life in Prison.*, SLATE (May 7, 2019, 2:03 PM), https://slate.com/news-and-politics/2019/05/hb-481-georgia-law-criminalizes-abortion-subjects-women-to-life-in-prison.html [https://perma.cc/3Q88-3SWZ]. Texas considered a similar bill, which would have—had it not halted in committee—opened up the ability for prosecutors to charge a woman who had an abortion with criminal homicide. H.B. 896, 86th Leg. (Tex. 2019). Under Texas law, criminal homicide can be punishable by the death sentence. TEX. PENAL CODE ANN. §§ 12.31, 19.02 (West 2019).

Against this backdrop comes Melissa Murray, Katherine Shaw, and Reva Siegel's[13] edited collection of essays, *Reproductive Rights and Justice Stories*. The collection could not be timelier. Their volume contains a series of essays that "bring[] together important cases involving the state regulation of sex, childbearing, and parenting" (p. 1). The two goals of the collection are to expand the contours of the field of reproductive rights and justice and to decenter the role of courts in that field (p. 1).

The editors' pathbreaking volume cements a definition of reproductive rights and justice that is both more coherent and more nuanced than many earlier definitions, which often limited discussions of reproductive rights and justice to contraception and abortion.[14] The volume makes significant headway in illustrating the many different ways that law affects reproductive rights and justice.

Broadening readers' understandings about what constitutes reproductive rights and justice has several benefits. It illuminates the many different ways that law and society construct and constrain what parenthood—and particularly motherhood—entails. Unpacking how law and society have made motherhood carry certain roles and expectations clarifies the stakes of traditional reproductive rights and justice issues. For example, if becoming a parent, and in particular becoming a mother, entails assuming a particular identity, then the autonomy and liberty interests at stake in parentage decisions are much greater than just bodily autonomy.

The collection of essays also offers a lens through which to understand myriad legal issues. The volume makes clear that many different topics—ranging from workplace protections, to labor law, to disability law, to criminal procedure, to insurance law—implicate reproductive rights and justice in addition to decisions about whether to criminalize abortion or contraception. That has the salutary benefit of unearthing the complex web of laws and social conventions that influence parentage decisions. Understanding all of the influences on parentage decisions would also make it easier to construct a system that is supportive of families.

By broadening the definition of reproductive rights and justice to include the many different ways that law and society shape individuals' decisions about whether to have children, the volume also pushes its readers to think about additional ways in which law and society influence decisions about sex and parentage. For example, certain conceptions about the role of women in society may influence decisions about whether to have children. So may background societal conditions that make it easier for men to succeed professionally. These forces may also affect how decisions about repro-

13. Melissa Murray is the Frederick I. and Grace Stokes Professor of Law, New York University School of Law; Katherine Shaw is a Professor of Law, Benjamin N. Cardozo School of Law; and Reva Siegel is the Nicholas deB. Katzenbach Professor of Law, Yale Law School.

14. In particular, as the introduction notes, it builds on "[t]he publication of the first casebook on the topic, MELISSA MURRAY & KRISTEN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (2015)." P. 1 n.2.

ductive rights and justice are made. The volume's nuanced and enriching essays invite readers to think about these and other ways in which the field of reproductive rights and justice might be expanded further still.

The volume also succeeds in its second goal of decentering courts. The volume states that it seeks to tell reproductive rights and justice "stories using a wide-lens perspective that illuminates the complex ways law is forged and debated in social movements, in representative government, and in courts" (p. 1). The introduction explains that narrating the cases by going outside of the courts has the virtue of "de-center[ing] courts" within the field of reproductive rights and justice.[15] The volume succeeds in that endeavor by drawing attention to the social movements and organizing that drive democratic governance and influence judicial decisionmaking, and by highlighting the real women whose lives are affected by laws and judicial decisions on reproductive rights and justice.

But the framework of "decentering courts" calls to mind something that has become a problem for progressives when it comes to the courts. It is no secret that there is a historical mismatch between progressives and conservatives when it comes to the judiciary. The mismatch is reflected in myriad ways, including the comparative focus that Democratic and Republican administrations give to judicial nominations.[16] Conservatives' relative interest

15. *See* p. 1.

16. As of November 1 of each president's third year, Trump had appointed forty-three judges to the US Courts of Appeals, while Obama had appointed twenty-two. *See Judicial Appointment Tracker*, HERITAGE FOUND., https://www.heritage.org/judicialtracker [https://perma.cc/6XPM-SRXL] (comparing the number of judicial vacancies and appointments as of each of the last six presidents' third year and showing that conservative presidents, on average, appointed more judges to the bench than liberal ones); *see also* Deanna Paul, *'Keep Those Judges Coming': Conservatives Praise Trump's Success in Filling the Courts*, WASH. POST (Nov. 16, 2018, 3:21 PM), https://www.washingtonpost.com/politics/2018/11/16/keep-those-judges-coming-conservatives-praise-trumps-success-filling-courts/ (on file with the *Michigan Law Review*); Li Zhou, *Trump Has Gotten 66 Judges Confirmed This Year. In His Second Year, Obama Had Gotten 49.*, VOX (Dec. 27, 2018, 7:10 AM), https://www.vox.com/2018/12/27/18136294/trump-mitch-mconnell-republican-judges [https://perma.cc/Y9RJ-56J9]. President Obama's first chief of staff, Rahm Emanuel, deprioritized spending political capital on judges while passing key stimulus legislation in Obama's first term. He "compared himself to an air traffic controller trying to land multiple jetliners, and said he didn't want a flock of geese flying into the middle of them." Michael Grunwald, *Did Obama Win the Judicial Wars?*, POLITICO (Aug. 8, 2016, 5:25 AM), https://www.politico.com/story/2016/08/obama-courts-judicial-legacy-226741 [https://perma.cc/CG2J-E4LY].

Of course, some of this focus is a product of the administrations and courts that preceded them—part of the Republican focus on courts reflects lessons learned from the Warren Court, and part of the Democratic disinterest and lack of faith in courts reflects lessons learned from the Burger, Rehnquist, and Roberts Courts. *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 233–35 (2019); *see, e.g.*, Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016, 9:51 PM), https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice [https://perma.cc/Z7BA-8KTW] (suggesting that the Republican Party focuses more on using federal courts to reduce crime, while the Democratic party platform focuses more on community-based practices and other organiz-

in the courts is part of what produced the Trump presidency and its war on reproductive justice in the first place; Republican voters identified the courts, and the Supreme Court in particular, as an important voting issue for them.[17]

There is a risk that decentering courts and urging a focus on other actors' roles in reproductive rights and justice will obscure something that is so basic it may not seem academically interesting—courts are important, including to reproductive justice and to women's lives. The essays in the volume have passages that imply that courts are important,[18] and the editors of the volume have elsewhere defended the importance of courts and judicial doctrine.[19] But the mismatch between the right and the left on the courts now threatens the very field that is the subject of the edited collection. With *Roe* and so many other protections for reproductive justice now on the line, part of what this Review will do is bring out a point that the volume makes quietly or through inference or implication: the courts are worth caring about, especially when it comes to reproductive rights and reproductive justice.

I. DEFINING REPRODUCTIVE RIGHTS AND JUSTICE

The volume makes an important contribution by providing a coherent and nuanced definition of what reproductive rights and justice entails.[20] The volume reflects the editors' position that the "contours" of the field, properly understood, "are quite broad" and encompass "a wider range of issues" than just "decisionmaking about contraception and abortion" (p. 1), which is how the field of reproductive rights and justice has often been defined.[21] The vol-

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ing tools to address issues in criminal justice). For a piece critical of progressives' attitude toward courts, see Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987 (2017).

17. *See, e.g.*, Jennifer Bendery, *Don't Forget About Trump's Judicial Nominees. Another 44 Just Moved Forward.*, HUFFPOST (Feb. 7, 2019, 8:14 PM), https://www.huffpost.com/entry/trump-judicial-nominees-lgbtq-abortion-voting-rights_n_5c5c97d6e4b0e01e32aa8edf [https://perma.cc/FF9X-WFUL] (discussing how recent judicial appointees have ruled on abortion rights, among other issues).

18. *See* Franklin, p. 227; Murray, p. 28 ("[T]he decision's articulation of a right to privacy set in motion a 'privacy revolution.'"); Siegel, p. 35 & n.13.

19. *See, e.g.*, Linda Greenhouse & Reva B. Siegel, *Backlash to the Future? From* Roe *to* Perry, 60 UCLA L. REV. DISCOURSE 240, 245–46 (2013); Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J.F. 149, 149–50 (2016); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1744 (2017). Reva Siegel and Linda Greenhouse's essay in the volume continues these themes. *See* Greenhouse & Siegel, p. 53.

20. *See* p. 1.

21. Again an important exception is MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (2015).

ume makes important headway on this front by weaving together "cases [that] have not often been conceived of as part of a unified field of law." [22]

Broadening our understanding about what reproductive rights and justice entails is helpful for several reasons. It illuminates the stakes of traditional reproductive rights and justice issues—by pointing out what law and society expect parents, and in particular mothers, to be.[23] It unearths the laws and social structures that influence sex and parentage decisions, which is helpful to reforming and constructing a regime that is truly supportive of families and of parentage decisions.[24] And it offers a novel lens through which to understand many different issues that are not often thought of in terms of reproductive rights and justice.

Part of what is exciting about the collection's move is that it invites readers to think about other aspects of law and society that might fit under the volume's broadened definition of reproductive rights and justice. For example, it might be helpful to consider how the institutions of civil society, democratic politics, and courts understand sex, women, and gender equity in a broader sense than the essays cover. The ways in which women are treated at work, apart from whether they have children, may also shape women's decisions about whether to have children. So may societal expectations about women and their bodies. One of the key insights of one of the volume's essays is that society can police sex roles and family relationships even if the government does not do so via criminal law,[25] a provocative suggestion that implies reproductive rights and justice encompasses the many different ways that society values or devalues women's autonomy. Section I.A discusses the broadened definition of reproductive rights and justice that the volume offers, and Section I.B considers some other pockets of law that might fit within that broader definition, as well as one possible concern with the broadened definition.

A. *An Expanded Definition*

The introduction to the volume informs its readers that one of the volume's goals is to "examine[] the many ways law shapes the choice to have, as well as to avoid having, children" (p. 1). The volume does this in part by hav-

22. *See* p. 1 (emphasis omitted).

23. *See infra* text accompanying notes 92–95 (discussing Rubenfeld and Murray essays).

24. *Cf.* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—And Why It Matters in Law and Politics*, 93 IND. L.J. 207, 207–09 (2018) (outlining what legal scrutiny of states' interest in protecting life and a legal regime interested in protecting life might look like).

25. Murray, p. 29 ("[M]ore than fifty years after *Griswold* began the process of decriminalizing contraception, access to contraception remains a subject of intense debate and contestation in the United States."); Murray, p. 31 ("[T]he stigma and disapproval that once attended contraceptive use can still be felt—albeit in more muted forms . . . . These insights make clear the limitations of decriminalization as a means of law reform, and underscore the many vehicles, beyond the criminal law, that the state may deploy in its efforts to enforce a particular vision of sex and sexuality.").

ing its audience read a varied set of cases that are not typically grouped together. This lumping of cases "makes visible forms and effects of reproductive regulation that are less evident when the cases are read in isolation" (p. 1).

The essays in the volume do yeoman's work in widening the reader's lens to myriad ways in which law affects matters of sex and childbearing. I will highlight just two. First is the volume's focus on laws and policies that concern the workplace. One of the essays in this category is Neil Siegel's piece on *Struck v. Secretary of Defense*,[26] a case involving an Air Force Captain who was fired when she became pregnant (Siegel, p. 33). In the essay, Siegel highlights a brief by then-ACLU-attorney Ruth Bader Ginsburg (Siegel, pp. 37, 39–42). The brief argued that the Air Force's decision to fire Captain Struck violated equal protection because it "enforced the sex roles and stereotypes of the separate-spheres tradition" and evaluated pregnant women as a group that was inherently unfit for the workforce (Siegel, p. 39). It does not take much to see how policies like the Air Force's shape decisions about whether to "bear or beget" a child,[27] yet cases like *Struck* are not taught together with cases on contraception or abortion, at least in traditional constitutional law classes, even though it would enrich our understanding of them.

The collection includes other essays about how laws treat women who choose to have children, and these essays also focus on economic issues. Deborah Dinner's essay analyzes *Geduldig v. Aiello*,[28] the case in which the Court held that California's disability benefits scheme, which excluded coverage for disabilities related to pregnancy, did not constitute discrimination on the basis of sex (Dinner, pp. 77, 79). Kate Shaw's essay focuses on *Young v. UPS*,[29] the recent Supreme Court case that interpreted the scope of the Pregnancy Discrimination Act, which prohibits employers from taking adverse employment actions against employees on the basis of pregnancy (Shaw, pp. 205–06).

Although Dinner and Shaw's essays both focus on different forms of legal support for women who choose to have children, they arrive at very different assessments about society's willingness to absorb some of the costs related to pregnancy and childbirth. Dinner's essay maintains that *Geduldig* reflected a societal unwillingness to redistribute the costs associated with pregnancy, which forced individual women to bear them all (Dinner, pp. 79, 90–95). Shaw views the more recently decided *Young*, which ruled in favor of the pregnant employee, as a reason for optimism about the possibility that an ideologically varied coalition will shoulder some of the costs associated

26. 409 U.S. 1071 (1972).

27. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

28. 417 U.S. 484 (1974).

29. 135 S. Ct. 1338 (2015).

with pregnancy by being attentive to the needs of pregnant women in the workplace.[30]

The collection also includes essays that touch on other aspects of family care and the workplace. Sam Bagenstos's essay examines *Nevada Department of Human Resources v. Hibbs*,[31] the decision upholding the family-care provisions of the Family and Medical Leave Act (Bagenstos, p. 183). The family-care provisions require employers to offer employees a certain amount of leave time in order to care for their families.[32] *Hibbs* recognized that sex stereotyping and traditional sex roles often affect which employees take time off from work to care for family and, perhaps more importantly, that they affect employers' expectations about which employees will take time off from work to care for family.[33] Mandating family care leave for everyone, *Hibbs* suggested, would address the resulting sex-based disparities.[34]

The second way in which the edited collection improves our understanding of the field of reproductive rights and justice is by bringing to light the stark racial and socioeconomic disparities that permeate matters related to decisions about whether to have a child. Maya Manian's essay on *Madrigal v. Quilligan*[35] reconstructs the story of the "Madrigal Ten," a group of Mexican-American women who claimed the Los Angeles County Police Department coerced them into submitting to sterilization (Manian, p. 97). The deeply racialized history and practice of sterilization is crucial to better understanding traditional reproductive rights and justice cases such as *Buck v. Bell*.[36] It is also important to assessing modern sterilization practices. Take the recent U.S. Court of Appeals for the Sixth Circuit decision in *Sullivan v. Benningfield*, which addressed Tennessee's policy of affording inmates a thirty-day sentencing credit if the inmates submitted to sterilization.[37] The dissent referred to the policy as a means of offering "free contraceptive

30. Shaw, p. 207. I do not share Shaw's optimism, particularly in light of recent discussions about health insurance coverage for contraception or mammograms; occasionally, some participants in the discussions will assert that it is unfair for men to pay for these treatments as part of insurance schemes. *See* Amber Phillips, *'I Wouldn't Want to Lose My Mammograms,' Male GOP Senator Says – then Immediately Regrets*, WASH. POST: FIX (Mar. 23, 2017, 4:28 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/03/23/i-wouldnt-want-to-lose-my-mammograms-snipes-gop-male-lawmaker/ (on file with the *Michigan Law Review*) (quoting Kentucky Governor Matt Bevin as saying "I don't need maternity benefits because I don't expect I'll be expecting"); *see also* Siegel, *supra* note 24, at 222 ("Attitudes about private property, rather than gender and sexuality, may explain a state's choice of means to protect life. Differently put, conservatives may oppose the expansion of Medicaid because they are hostile to redistribution and are committed to a limited state.").

31. 538 U.S. 721 (2003).

32. *Hibbs*, 538 U.S. at 724.

33. *Id.* at 735–37.

34. *Id.* at 737. Mandating family leave for everyone would not address the cultural norms suggesting that mothers should do the heavy lifting on parenting.

35. 639 F.2d 789 (9th Cir. 1981) (unpublished table decision).

36. 274 U.S. 200 (1927).

37. 920 F.3d 401 (6th Cir. 2019).

services."[38] Manian's essay and others in the collection suggest that the dissent's understanding of the policy elides important realities about who the policy may be used against and why. As Manian explains, policies that are ostensibly facially neutral may be applied in ways that reflect societal biases and prejudices and that ultimately operate to the detriment of marginalized communities.[39]

Like Manian's essay, Khiara Bridges's essay on *Harris v. McRae*[40] highlights how the law at issue in *Harris*, the Hyde Amendment, had outsized effects on marginalized communities and racial minorities, even though the case made little mention of those disparities.[41] The Hyde Amendment prohibits federal funds from being used for abortion, including in the Medicaid program (Bridges, p. 117). Priscilla Ocen's essay on *Ferguson v. City of Charleston*[42] similarly identifies how the decision in that case (which invalidated a hospital policy on drug testing) did not grapple with how the hospital often used its policy to drug test pregnant women—and specifically poor, black women—during the height of the panic about crack cocaine (Ocen, pp. 161–63). That failure, Ocen notes, has left some uncertainty about whether and when states may criminalize women's actions during their pregnancies (Ocen, p. 163).

The residual uncertainty is troubling because of the racial and socioeconomic disparities often produced by criminalization, including the criminalization of pregnancy. Consider the recent case of an Alabama woman who was initially prosecuted for manslaughter after she got into a fight with a coworker, during which the coworker shot her in the belly, killing the fetus she carried.[43] The state prosecutor indicted the woman for "initiating a fight knowing she was five months pregnant."[44] Only after the case "stirred national outrage" did prosecutors drop the charges.[45] Michele Goodwin has described other examples of this phenomenon, including a sixteen-year-old

38. *Id.* at 413 (Suhrheinrich, J., dissenting).

39. *See* Manian, p. 99.

40. 448 U.S. 297 (1980).

41. Bridges, pp. 117–18, 127. Bridges's essay builds on her book, *The Poverty of Privacy Rights*, which highlights how poor communities and communities of color have substantially less privacy rights given the many ways in which the law assigns the women fault for their poverty. *See* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017). For a review of Bridges's book, see Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270 (2018).

42. 532 U.S. 67 (2001).

43. *See* Farah Stockman, *Alabamians Defend Arrest of Woman Whose Fetus Died in Shooting*, N.Y. TIMES (June 30, 2019), https://www.nytimes.com/2019/06/30/us/alabama-woman-marshae-jones.html [https://perma.cc/C5TB-HRYB].

44. Farah Stockman, *Manslaughter Charge Dropped Against Alabama Woman Who Was Shot While Pregnant*, N.Y. TIMES (July 3, 2019), https://www.nytimes.com/2019/07/03/us/charges-dropped-alabama-woman-pregnant.html [https://perma.cc/XMA8-NKGX] (quoting Indictment, Alabama v. Jones, No. CC19-719 (Ala. Cir. Ct. May 1, 2019)).

45. *Id.*

woman who was charged with depraved-heart murder after her child was stillborn, and a woman who was charged with first-degree murder after she tried and failed to end her own life by eating poison while pregnant.[46] In these cases, prosecutors are pursuing charges and advancing theories that apply only to pregnant women—their actions carry particular criminal consequences only because they are pregnant.

Again it is not difficult to see—but still important to underscore—how these essays enrich the field of reproductive rights and justice. They both broaden the definition of the field and give more depth to the traditional contours of the field, contraception and abortion. The essays make clear, for example, why it would be a grave oversight to have a discussion about the legal regulation of abortion without acknowledging that maternal mortality rates for black women are significantly higher than those for white women.[47] Without appreciating that disparity, how can we assess, as the doctrine requires, whether restrictions on abortion benefit the health and safety of women or unduly burden women by jeopardizing their well-being?[48]

The various essays also add value to one another in ways that underscore the power of the volume's definition of the field of reproductive rights and justice. The essays that draw out racial disparities in reproductive rights and justice (including the essays on *Ferguson*, *Harris*, and *Madrigal*) enrich the essays on the workplace (including the essays on *Geduldig*, *Stark*, *Young*, and *Hibbs*). Consider the juxtaposition of the essays on *Geduldig* and *Harris*. In *Harris*, the government was (and still is) unwilling to help women who would choose not to have a child, and who would forgo the health risks that go along with doing so.[49] In *Geduldig*, the government was unwilling to help women who chose to have a child, and who experienced health issues as a result.[50] What does it say about our health care system that it is unwilling to assist women no matter what decision they make about whether to have a child?

B. *A More Expansive Definition*

In addition to making wonderful headway in enriching understandings about what reproductive rights and justice entails, the volume also invites its readers to think about what else might fit within the volume's expanded def-

46. Michele Goodwin, Opinion, *Alabama Isn't the Only State that Punishes Pregnant Women*, N.Y. TIMES (July 1, 2019), https://www.nytimes.com/2019/07/01/opinion/alabama-pregnant-woman-shot.html [https://perma.cc/QQ4L-WJRB] (citing cases involving Rennie Gibbs and Bei Bei Shuai and connecting these cases to *Ferguson v. City of Charleston*).

47. Roni Caryn Rabin, *Huge Racial Disparities Found in Deaths Linked to Pregnancy*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/health/pregnancy-deaths-.html [https://perma.cc/5WDN-PN73].

48. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

49. *See* Harris v. McRae, 448 U.S. 297 (1980).

50. *See* Geduldig v. Aiello, 417 U.S. 484 (1974).

inition of reproductive rights and justice. This Part offers some thoughts on other topics that might also fall under this broader conception of reproductive rights and justice. Consider the volume's insight that the field of reproductive rights and justice should consider certain aspects of the workplace, such as the availability of work for pregnant women and women with children. If the availability of work for pregnant women and women with children shapes decisions about whether to have a child, then so too might the availability of quality health care, health insurance, and safe environments for pregnant women and women with children. The volume also asks its readers to think about how the law takes away from poor women (particularly poor women of color) the decision to have children, which calls to mind the significant racial and socioeconomic disparities in access to health care and safe environments that might limit some women's ability to have children. Finally, some of the essays in the volume suggest that the general treatment of women in the workplace, including through the law on sexual harassment, might also be relevant to reproductive rights and justice and to how reproductive rights are made.

1. Sociolegal Factors Affecting Parenting Decisions

The volume's essays on the workplace's treatment of pregnancy or family care suggest that decisions about whether to offer support to pregnant women or women with children relate to reproductive justice. The essays offer a clear narrative about how these laws "shape[] the choice to have, as well as to avoid having, children" (p. 1). If employers can fire or refuse to accommodate workers who are pregnant, or states can choose not to assist women who become ill while pregnant, that will affect decisions about whether to bear or beget a child.[51]

But other facets of law and society that are not covered by the volume will also affect parentage decisions, and through similar mechanisms as legal protections for pregnant women or women with families. The availability of health insurance and health care, for example, may affect choices about whether to have a child, just like access to employment during and after pregnancy may.[52] Employment and health insurance are important benefits that allow individuals to care for themselves and their families, and the availability of those benefits is occasionally affected by a woman's decision to have a child. Before the Affordable Care Act, insurance companies could refuse to sell policies to individuals with preexisting conditions, and they could

51. A whopping 38 percent of women reported that they decided to end a pregnancy because they feared it would interfere with their job or career. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 113 (2005).

52. These issues are connected in the United States, though not always. The extent of insurance coverage is a separate issue, which Melissa Murray writes about in the conclusion of her essay. Murray, pp. 29–31.

charge individuals with preexisting conditions more for health insurance.[53] And insurance companies sometimes deemed conditions associated with pregnancy preexisting conditions that precluded insurance coverage[54] or sold insurance policies that excluded coverage for maternity care.[55] If insurance companies can charge women who become pregnant more for insurance, or if they can exclude maternity care from insurance coverage, that too may affect decisions about whether to bear and beget a child. One of the essays in the collection, Melissa Murray's essay on *Griswold v. Connecticut*, gestures in this direction.[56] Murray notes that limiting states' ability to criminalize certain conduct such as using contraception may not be sufficient to achieve reproductive justice so long as laws permit employers or other private actors to penalize individuals for that same conduct.[57]

There are also racial disparities in the American health care system in both the level of care and the overall health outcomes that individuals experience.[58] Do these disparities affect decisions about whether to have a family? Given their effect on infant mortality rates, the disparities in health care and health care outcomes may affect women's ability to have a family at all.[59]

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53. *See* Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2012); *see also Pre-Existing Conditions*, HHS.GOV (Jan. 31, 2017), https://www.hhs.gov/healthcare/about-the-aca/pre-existing-conditions/index.html [https://perma.cc/D6YB-ZJ42] (explaining how the Affordable Care Act prevents insurance providers from denying coverage on the basis of a pre-existing condition).

54. *Insurance When You're Pregnant: FAQ*, WEBMD, https://www.webmd.com/health-insurance/aca-pregnancy-faq [https://perma.cc/PXY9-KWP2]; *What Are Pre-Existing Conditions?*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/health-care-equity/what-are-pre-existing-conditions [https://perma.cc/EQ2F-P7YL].

55. *E.g.*, Theresa Chalhoub, *How the Latest ACA Repeal Plan Would Harm Women*, CTR. FOR AM. PROGRESS (June 29, 2018, 12:00 PM), https://www.americanprogress.org/issues/healthcare/news/2018/06/29/453011/latest-aca-repeal-plan-harm-women/ [https://perma.cc/NJ6M-V35V]; Louise Norris, *How Obamacare Changed Maternity Coverage*, HEALTHINSURANCE.ORG (Oct. 16, 2018), https://www.healthinsurance.org/obamacare/how-obamacare-changed-maternity-coverage/ [https://perma.cc/HC5R-8V6K].

56. *See* Murray, pp. 29–31 ("[M]ore than fifty years after *Griswold* began the process of decriminalizing contraception, access to contraception remains a subject of intense debate and contestation in the United States.").

57. Murray, p. 31 ("[T]he stigma and disapproval that once attended contraceptive use can still be felt—albeit in more muted forms . . . . These insights make clear the limitations of decriminalization as a means of law reform, and underscore the many vehicles, beyond the criminal law, that the state may deploy in its efforts to enforce a particular vision of sex and sexuality."). For more on this theme from Murray, see Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825 (2019).

58. *See* Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 HUM. RTS., no. 3, 2018, at 19.

59. *See* Douglas Almond et al., *Civil Rights, the War on Poverty, and Black-White Convergence in Infant Mortality in the Rural South and Mississippi* (Mass. Inst. of Tech. Dep't of Econ., Working Paper No. 07–04, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=961021 [https://perma.cc/NLH5-KKRU] (suggesting that mandated desegregation as a result of Title VI of the Civil Rights Act of 1964 of institutions receiving federal funds accounted for

The different economic opportunities available to men and women may also implicate reproductive justice. It is well established that women make, on average, less money than men for similar work.[60] It is also no secret that men possess an outsized portion of wealth in the United States and seem to have an easier time ascending to economically powerful positions. Men attract more venture capital for startups;[61] the CEOs of Fortune 500 companies are primarily men;[62] and the managing partners and law firm leadership are also primarily men.[63] Women in more socioeconomically vulnerable groups are also treated worse than their male counterparts.[64] The federal minimum wage statute does not extend to certain categories of domestic workers,[65] a profession that was understood, when Congress enacted the statute, to be primarily filled with women, particularly women of color.[66]

These realities about the workplace may implicate reproductive rights and justice just as other professional and economic disadvantages that dis-

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up to up to 35 percent of national decline in the infant mortality rate of black children nationwide between 1965 and 1975).

60. Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. ECON. LITERATURE 789, 852–55 (2017) (analyzing microdata to explore reasons for differences in the gender wage gap and suggesting that because some gap remains even after accounting for differences in occupational distributions and an increase in college attainment of women, labor-market discrimination may continue to contribute to the gender wage gap); *see also* Alan S. Blinder, *Wage Discrimination: Reduced Form and Structural Estimates*, 8 J. HUM. RESOURCES 436 (1973) (exemplifying early findings and research into gender-based wage discrimination); Ronald Oaxaca, *Male-Female Wage Differentials in Urban Labor Markets*, 14 INT'L ECON. REV. 693 (1973).

61. Valentina Zarya, *Female Founders Got 2% of Venture Capital Dollars in 2017*, FORTUNE (Jan. 31, 2018, 7:30 AM), http://fortune.com/2018/01/31/female-founders-venture-capital-2017/ [https://perma.cc/3RNT-ZUDY].

62. Claire Zillman, *The Fortune 500 Has More Female CEOs than Ever Before*, FORTUNE (May 16, 2019, 6:30 AM), http://fortune.com/2019/05/16/fortune-500-female-ceos/ [https://perma.cc/4NV2-78QE] (stating that while the number of Fortune 500 companies led by female CEOs is at an all-time high, only 6.6 percent of all Fortune 500 companies are led by a female CEO).

63. Cristina Violante & Jacqueline Bell, *Law360's Glass Ceiling Report, by the Numbers*, LAW360 (May 28, 2018, 9:02 PM), https://www.law360.com/corporate/articles/1047285 [https://perma.cc/WGT8-XNJ4] (discussing results from Law360 survey that found that men make up 79% of the equity partner tier at the almost 350 law firms surveyed, while white women make up 17.9% and minority women make up less than 3%).

64. For example, single mothers were twenty percentage points more likely to be in poverty than single fathers with children between 1969 and 2006. Maria Cancian & Deborah Reed, *Family Structure, Childbearing, and Parental Employment: Implications for the Level and Trend in Poverty*, FOCUS, Fall 2009, at 21, 24 tbl.1.

65. Fair Labor Standards Act of 1938 § 13, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 213 (2012 & Supp. V 2018)).

66. *See* Madeleine Joung, *Domestic Workers Aren't Protected by Anti-Discrimination Law. This New Bill Would Change That*, TIME (July 15, 2019, 12:04 PM), https://time.com/5626156/domestic-workers-anti-discrimination-law-ndwa/ [https://perma.cc/5L76-GEVM] (noting that in 2012 nearly 90 percent of live-in workers were women, more than half of whom were women of color).

proportionately fall on women implicate reproductive rights and justice. Statistics indicate that a significant number of women choose not to have a child because they are concerned about their ability to provide financially for a child.[67] In light of this data, why isn't wage theft or the ability to obtain a living wage a matter of reproductive rights and justice?

If the field of reproductive rights and justice is properly understood to cover all of the ways in which law and society shape the decision about whether to have a child, the field would not be limited to the availability of health care or health insurance or living wages. Access to nutrition and clean water might affect decisions about whether to have children too. There are some places in the United States that have gone for years without clean water, spanning an entire generation of children.[68] A complex web of laws and policies limits would-be parents' and others' ability to leave these environmentally unsafe areas.[69] Isn't it a matter of reproductive justice that some would-be parents and their potential children struggle to obtain adequate nutrition and clean water?

Access to clean water and healthcare affect reproductive rights in ways that the essays suggest are relevant to thinking about the field of reproductive justice. Poor nutrition, unclean water, environmental pollution, and limited healthcare may affect women's ability to have children at all.[70] Manian's essay on coerced sterilization and Ocen's essay on the criminalization of pregnancy highlight different ways in which law and society take away the ability to have children from poor women, particularly poor women of color.

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67. Finer et al., *supra* note 51, at 113–18 (describing a study that employed different questions and data from 2004 and found that 73 percent of women reported having an abortion because they could not afford having a baby); *see also* Claire Cain Miller, *Americans Are Having Fewer Babies. They Told Us Why.*, N.Y. TIMES: UPSHOT (July 5, 2018), https://www.nytimes.com/2018/07/05/upshot/americans-are-having-fewer-babies-they-told-us-why.html [http://perma.cc/75YX-X7MQ] (discussing results from a self-commissioned survey that found that among the most common reasons stated by the almost 2,000 men and women surveyed for not having children were concerns over the state of the economy, individual student debt, and affordability of child care or a home).

68. FOOD & WATER WATCH, THE WATER CRISIS IN MARTIN COUNTY, KENTUCKY (2008), https://www.foodandwaterwatch.org/sites/default/files/ib_1802_martincntykywater-web5.pdf [https://perma.cc/E4GH-XXVH]; Maura Allaire et al., *National Trends in Drinking Water Quality Violations*, 115 PROC. NAT'L ACAD. SCI. 2078, 2081–82 (2018) (discussing and demonstrating, in Figures 3 and 4, an increase in health-based violations of drinking water quality in rural areas of the United States over a thirty-four-year period).

69. Sara S. Greene, *A Theory of Poverty: Legal Immobility*, 96 WASH. U. L. REV. 753, 786–88 (2019) (explaining, using a hypothetical situation, how state and local laws hinder upward mobility); *see also* David Schleicher, *Stuck! The Law and Economics and Residential Stagnation*, 127 YALE. L.J. 78, 123 (2017) (suggesting that the localized nature of legal regimes, public services, and public benefit programs inhibit the ability of people to exit a region, even in times of a negative economic shock).

70. *See, e.g.*, Neelima Panth et al., *The Influence of Diet on Fertility and the Implications for Public Health Nutrition in the United States*, FRONTIERS PUB. HEALTH (July 31, 2018), https://doi.org/10.3389/fpubh.2018.00211 [https://perma.cc/XC3H-257M] (documenting the relationship between poor nutrition and lower fertility).

If that is relevant to the study of reproductive rights and justice (and I agree with the essayists and editors that it is), then so too is the kind of health care and health insurance that we provide to women, and so too is the clean water and nutrition that we should ensure they have access to.

To be sure, defining the field this expansively raises boundary questions of its own, such as identifying what *wouldn't* be covered within the field of reproductive rights and justice. If every law or social norm that has an effect on decisions about whether to have children fits within the field, that could encompass almost everything under the sun.[71] But opening readers' eyes to the myriad ways law and society shape these decisions is an important move, and the limits on the field can be constructed later.

2. Women at Work

One of the great insights of the edited collection is the essays' recognition that the treatment of women at work is relevant to understanding reproductive rights and justice. The edited collection provides various reasons why the treatment of women in the workplace relates to reproductive rights and justice. The treatment of women at work affects families' ability to provide for their children, which may affect families' decisions about whether to have children (Siegel, p. 49). How women are treated at work also has some connection to the kind of sex stereotyping that the essays argue relates to reproductive rights and justice. Neil Siegel's essay on Ginsburg's brief in *Struck*, for example, argues that the brief's key insight to reproductive rights and justice is "that laws enforcing traditional sex stereotypes inflict harm because they reinforce 'the subordinate position of women in our society and the second-class status our institutions historically have imposed upon them.'"[72] As Siegel explains, sex stereotyping and the subordination of women—including through their exclusion from the workplace—are relevant to reproductive rights and justice.

If the essayists and editors are right that these reasons explain why the treatment of women at work is relevant to reproductive rights and justice (and again, I think that they are), then perhaps the law of sexual harassment is also relevant to thinking about reproductive rights and justice. The law of sexual harassment may also shape decisions about whether to have a child for the same reasons that other ways in which women are treated at work shape decisions about whether to have a child. Sexual harassment might affect a parent's ability to provide for their family: the harassment may be so bad it forces someone out of a job or a profession, and harassment may also tax and strain victims in other ways that affect their personal or family lives.

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71. This way of defining the field—laws that have an effect on parentage and family decisions—is reminiscent of Jill Hasday's work documenting how much of family law is federal because federal laws, like state law, will shape decisions about whether to have children. *See, e.g.*, Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998).

72. Siegel, p. 45 (quoting Brief for Petitioner at 27, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178)).

And, equally important, sexual harassment also reflects and reinforces the same mechanism of sex discrimination that Ginsburg's brief in *Struck* identified—the subordination of women in society and their second-class status in institutions of labor.

There is much to say about the law of sexual harassment along these lines. Consider, for example, how courts have adopted extremely narrow interpretations about what amounts to actionable sexual harassment. To constitute harassment, the behavior must be "severe or pervasive," and courts have held that persistent groping, sexual propositions, and sexualized comments do not constitute severe and pervasive conduct.[73] Jessica Clarke has outlined the myriad ways courts have developed tools to minimize or discount evidence of sex discrimination or sexual harassment.[74] Clarke discusses the "stray remarks" doctrine, under which courts can write off sexualized or harassing comments, as well as comments that reveal straight up bias.[75] As Clarke notes, "one court dismissed a case brought by a female investment banker whose supervisor routinely called her 'such epithets as "bitch," "cunt," "whore," "slut" and "tart,"' reasoning that these remarks were irrelevant to . . . whether she was paid less money in bonuses than her male subordinates because of sex discrimination."[76]

Another similar case is *Brooks v. City of San Mateo*.[77] Both the court of appeals and the district court held that a 911 phone dispatcher did not allege severe and pervasive harassment when she claimed that her coworker touched her stomach and commented on how soft and sexy it was and then forced his hand underneath her sweater and bra to fondle her breast when she tried to push him away.[78] Other women reported that the same coworker had treated them in similar ways.[79] Or consider the case of Melody Swenson, who worked as a mail sorter for the Postal Service.[80] For several months, Swenson's coworker battered her with unwanted attention.[81] He told her she had a "beautiful sexy body," that he was "watching [her] ass moving," and that he dreamed about her.[82] He mouthed the word "sexy" at her, gave her a gift, asked to kiss her, and grabbed her.[83] After Swenson complained, the

73. SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 34–40 (2017) (outlining and critiquing this phenomenon).

74. Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018).

75. *Id.* at 540.

76. *Id.* at 510 (quoting Ferrand v. Credit Lyonnais, No. 02 CIV.5191(VM), 2003 WL 22251313, at *10 (S.D.N.Y. Sept. 30, 2003)).

77. 229 F.3d 917 (9th Cir. 2000).

78. *Id.* at 921–22, 930.

79. *Id.* at 922.

80. Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001).

81. *Id.* at 1189.

82. *Id.* at 1200.

83. *Id.*

Postal Service moved Swenson, against her wishes, to another work area.[84] Swenson later sued, arguing that the Postal Service mishandled her harassment complaint.[85] The court of appeals said it did not.[86]

When we think about reproductive justice, perhaps it is worth thinking about some of the ways in which the law allows women to be sexualized and subordinated at work and whether and how that might shape decisions about whether to have a child. The stories behind these cases would tell us something about the kinds of conditions that women endure in order to obtain the kind of reproductive justice that goes along with a well-paying (or sufficiently paying) job or an employer-provided health insurance plan. The cases may also reinforce or supplement Dinner's narrative about *Geduldig*, which framed the case in terms of society's decision about who bears the costs that are associated with sex and families.[87] The sexual harassment cases are about society's unwillingness to force harassers or their employers to bear the costs of harassment, which makes the harasser's victims, often women, bear them all. These narratives may be related, and they may be related in ways that can better our understanding of what reproductive rights and justice could mean.

Sexual harassment may also inform our thinking about more traditional aspects of reproductive rights and justice. Sex discrimination, including sexual harassment, can result in harms that sound in the register of reproductive rights and justice. Discrimination on the basis of sex, including sexual harassment, can send the message that some people are less worthy of "equal concern and respect,"[88] and that message may be internalized and reflected in other contexts, including the legal regulation of decisions about whether to have a child.[89] The underlying message of discrimination, subordination, or stereotypes can be normalized and perpetuated.[90] Medical research has also identified a person's experience with discrimination as being associated with adverse mental and physical health outcomes.[91]

Sexual harassment isn't about sex, of course; it's about power (or power over sex, or power over one of the sexes). But the same could be said—and indeed, has been forcefully said—about other matters of reproductive rights

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84. *Id.* at 1204.

85. *Id.* at 1191.

86. *Id.* at 1197.

87. Dinner, p. 79; *see* Geduldig v. Aiello, 417 U.S. 484 (1974).

88. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

89. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 569–70, 577–84 (2003).

90. Clarke, *supra* note 74, at 518–23 (summarizing research).

91. *See, e.g.*, Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCHOL. BULL. 531, 531 (2009); Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, PLOS ONE (Sept. 23, 2015), https://doi.org/10.1371/journal.pone.0138511 [https://perma.cc/TT2S-K5GT] (discussing the "growing body of epidemiological evidence . . . documenting the health impacts of racism" and reviewing 293 studies).

and justice. Jed Rubenfeld articulated the point as follows: "Women should be able to abort their pregnancies so that they may avoid being forced into an identity, not because they are defining their identities through the decision itself."[92]

Using this lens, what *Casey* and other reproductive rights and justice decisions recognize is that assuming the identity of motherhood unwillingly, and under compulsion by the state, is antithetical to liberty. The identity of motherhood in particular is wrought with social and political expectations and consequences. As *Reproductive Rights and Justice Stories* highlights, motherhood carries a particular set of roles and responsibilities that have been constructed and reinforced over time, in part through the legal regulation of parentage and families, but also through social structures and civic society. Melissa Murray, one of the editors of the collection, has previously written about the legal structures that "rebuke[] [women] when they fail to align their behavior with th[e] model of self-abnegating motherhood."[93] The "caregiving norms" that are cultivated and imposed by such laws, in turn, "transcend law and become embedded in daily life, creating a culture of motherhood in which mothers are rigorously scrutinized and, in turn, rigorously scrutinize themselves."[94] The result is that the "trope of selfless, sacrificing mothers is not only present in law; it echoes throughout our culture."[95]

The power struggle in *Casey* is therefore about more than just the decision about whether to have a child. It is also about whether to assume the social and political identity that comes along with motherhood; some people may want to be mothers, but do not want the identity it carries. In some ways, the power struggle in all of the cases in *Reproductive Rights and Justice Stories* is about what the social and political identity of motherhood or parentage will entail—does it involve primarily caretaking, rather than being in the workforce; does it involve responsibility for all of the physical costs of childbirth; does it involve state monitoring of women's bodies; etc. These concepts are inextricably related: if the identity of motherhood is so all encompassing and riddled with expectations and rules, then assuming that identity unwillingly will raise substantial concerns.

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92. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 782 (1989) (emphasis omitted). It has been reported that Rubenfeld is under Title IX investigation for harassing behaviors toward students. *See* Dahlia Lithwick & Susan Matthews, *Investigation at Yale Law School*, SLATE (Oct. 5, 2018, 3:58 PM), https://slate.com/news-and-politics/2018/10/jed-rubenfeld-amy-chua-yale-law-school.html [https://perma.cc/MV92-VGYG].

93. Melissa Murray, *Panopti-Moms*, 4 CALIF. L. REV. CIR. 165, 173 & n.51 (2013). The essay focused in particular on how "[c]hild molestation laws cultivate and impose caregiving norms upon women caregivers . . . instilling in them a sense of near-constant surveillance, limiting their autonomy, and facilitating the internalization of gendered norms regarding caregiving and extra-domestic activities like paid work." *Id.* at 168.

94. *Id.*

95. *Id.* at 173.

3. Women and Power

Incorporating others forms of sex discrimination, such as sexual harassment, into the study of reproductive rights and justice would also force readers to consider the relationship between who makes the law on reproductive rights and justice and the content of the law itself.[96] One anecdote that sheds some light on this topic is the case of former Judge Alex Kozinski, the influential former Chief Judge of the U.S. Court of Appeals for the Ninth Circuit who retired (with a full pension) after several women accused him of inappropriate conduct.[97] The allegations against Judge Kozinski included the claim that Kozinski repeatedly showed one of his law clerks pornography and asked if it turned her on (after referring to her as his slave),[98] a former judge's allegation that Judge Kozinski propositioned her and groped her breasts when she turned him down,[99] and other accusations of inappropriate sexual remarks and touching,[100] including court-wide emails about female

96. Several decades ago, Catharine MacKinnon urged scholars to think about the ways in which law is uncritically and systematically male oriented. She identified one source of law's male orientation as the feedback loop between who benefits from the law and who writes it. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

97. I was one of those women. *See* Leah Litman, Emily Murphy & Katherine H. Ku, Opinion, *A Comeback but No Reckoning*, N.Y. TIMES (Aug. 2, 2018), https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html [https://perma.cc/5H9Y-5LHB]; Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017) [hereinafter Zopotosky, *Nine More Women*], https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html (on file with the *Michigan Law Review*); Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017) [hereinafter Zapotosky, *Prominent Appeals Court Judge*], https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html (on file with the *Michigan Law Review*). As this piece was going to publication, a former law clerk accused another federal judge, Judge Stephen Reinhardt, of serious sexual harassment. *See Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet*, 116th Cong. (2020) (testimony of Olivia Warren), https://docs.house.gov/meetings/JU/JU03/20200213/110505/HHRG-116-JU03-Wstate-WarrenO-20200213-U2.pdf [https://perma.cc/GZA8-QRJ5].

98. *See* Heidi Bond, COURTNEY MILAN, http://www.courtneymilan.com/metoo/kozinski.html [https://perma.cc/2LG9-EUYL]; Zapotosky, *Prominent Appeals Court Judge*, *supra* note 97.

99. Zapotosky, *Nine More Women*, *supra* note 97.

100. Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11 PM), https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html [https://perma.cc/9UY3-8FQB].

attorneys wearing push-up bras,[101] and asking a law clerk what single girls in San Francisco do for sex.[102] Before the judicial misconduct investigation into his actions began, Kozinski retired, which ended the judiciary's jurisdiction to investigate the allegations against him.[103]

Judge Kozinski sat on the court of appeals for thirty-two years and over the course of those years authored or joined numerous decisions.[104] Did his alleged behavior and worldview influence the legal decisions he made in matters related to reproductive rights and justice? Judge Kozinski sat on the panel that concluded, over a dissent, that the Postal Service had not mishandled Melody Swenson's sexual harassment claim.[105] He also authored the decision in *Brooks v. City of San Mateo*, which held that it did not constitute sexual harassment for a coworker to force his hand up the plaintiff's sweater and grab her breast.[106] The then-judge wrote: "No reasonable woman in Brooks's position would believe that Selvaggio's misconduct had permanently altered the terms or conditions of her employment . . . . Brooks was harassed on a single occasion for a matter of minutes in a way that did not impair her ability to do her job . . . ."[107] (Would she be *unreasonable* to think that it did?)

The case of Judge Kozinski is also revealing because of what it suggests about who is empowered to shape the law on matters related to reproductive rights and justice. The former law clerk who alleged that Judge Kozinski showed her pornography in his office wrote about how her experience in that clerkship affected her subsequent career decisions. The former clerk took herself out of consideration from two schools when she was on the aca-

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101. *See* Joanna Grossman (@JoannaGrossman), TWITTER (Dec. 9, 2017, 12:09 PM), https://twitter.com/JoannaGrossman/status/939542418638147584 [https://perma.cc/8XX8-XQ6F] ("When I clerked on the Ninth Circuit, Kozinski sent a memo to all the judges suggesting that a rule prohibiting female attorneys from wearing push-up bras would be more effective than the newly convened Gender Bias Task Force. His disrespect for women is legend-legendary.").

102. Nancy Rapoport, *There Are Likely Several More Stories to Come*, NANCY RAPOPORT'S BLOG (Dec. 9, 2017), https://nancyrapoports.blog/2017/12/09/there-are-likely-several-more-stories-to-come/ [https://perma.cc/9VWF-S6KZ].

103. *See* Matt Zapotosky, *Judiciary Closes Investigation of Sexual Misconduct Allegations Against Retired Judge Alex Kozinski*, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/world/national-security/judiciary-closes-investigation-of-sexual-misconduct-allegations-against-retired-judge-alex-kozinski/2018/02/05/e3a94bb8-0ac0-11e8-95a5-c396801049ef_story.html (on file with the *Michigan Law Review*).

104. *See* Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html [https://perma.cc/SDW9-3RQS].

105. Sam Sankar, *Judge Kozinski's Opinion in This 2001 Sexual Harassment Case Is Even More Alarming Now*, SLATE (Dec. 15, 2017, 8:04 PM), https://slate.com/news-and-politics/2017/12/judge-alex-kozinskis-opinion-in-a-2001-sexual-harassment-case-is-alarming.html [https://perma.cc/7F43-3ZEV].

106. Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).

107. *Id.* at 924–26.

demic job market, and she later chose to leave the academy and law entirely.[108]

Another former law clerk of Judge Kozinski, by contrast, maintained a close relationship with the judge. This former clerk stayed connected to the Judge.[109] Judge Kozinski helped this former clerk get a clerkship with a judge who Judge Kozinski had previously clerked for—Justice Anthony M. Kennedy on the U.S. Supreme Court.[110] When this former clerk was nominated to a judgeship on the U.S. Court of Appeals for the D.C. Circuit, Judge Kozinski introduced him at his confirmation hearing.[111] And when Justice Kennedy retired from the Supreme Court, this man replaced him.[112]

That man, of course, is now Justice Brett Kavanaugh. During his short time on the Supreme Court (and during his tenure on the court of appeals), Justice Kavanaugh has provided a clear picture of the kind of Justice he will be on reproductive rights and justice.[113] In his confirmation hearings, then-Judge Kavanaugh was questioned about the Supreme Court's decision in *Eisenstadt v. Baird*.[114] *Eisenstadt* invalidated a Connecticut law that made it a crime to prescribe certain forms of contraception to unmarried couples.[115] When asked whether he agreed with the decision in that case, then-Judge

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108. *See* Bond, *supra* note 98.

109. Ryan J. Foley & Curt Anderson, *Kavanaugh's Ties to Disgraced Mentor Loom over Confirmation*, AP (Aug. 29, 2018), https://apnews.com/e37ba9bc11014b72a5db6f926f80eb42 [https://perma.cc/2JWH-NJY4].

110. *Id.*; *Hon. Alex Kozinski*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/alex-kozinski [https://perma.cc/YP6S-D4M8].

111. *Confirmation Hearing on the Nomination of Brett Kavanaugh to Be Circuit Judge for the District of Columbia Circuit Before the S. Comm. on the Judiciary*, 109th Cong. (2006), https://www.congress.gov/109/chrg/shrg27916/CHRG-109shrg27916.pdf [https://perma.cc/CP94-UR4K].

112. *Current Members*, *supra* note 5. He was confirmed after being accused of attempted sexual assault and sexual assault in high school and college. *See* Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 10:28 PM), https://washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html (on file with the *Michigan Law Review*); Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, from Brett Kavanaugh's College Years*, NEW YORKER (Sept. 23, 2018), https://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez [https://perma.cc/GG3E-93TB].

113. *See infra* notes 146–155 and accompanying text for discussion of *Garza v. Hargan*. Judge Kavanaugh was one of the two judges on the panel that would have allowed ORR to continue to delay—and quite possibly prevent—the undocumented woman in its custody from having an abortion.

114. Ian Hanchett, *Kavanaugh: White's Griswold Concurrence 'Persuasive'—I Agree with Roberts and Alito on* Griswold *and* Eisenstadt, BREITBART (Sept. 5, 2018), https://www.breitbart.com/clips/2018/09/05/kavanaugh-whites-griswold-concurrence-persuasive-i-agree-with-roberts-and-alito-on-griswold-and-eisenstadt/ [https://perma.cc/A8AM-YM2E]; *see* Eisenstadt v. Baird, 405 U.S. 438 (1972).

115. *Eisenstadt*, 405 U.S. at 454–55.

Kavanaugh said he had no quarrel with Justice White's concurrence.[116] Justice White would not have held that unmarried persons have a constitutional right to access contraception.[117] Rather, he would have invalidated the defendant's conviction on the ground that the state had not proven the defendant was unmarried.[118]

Several months after his confirmation, Justice Kavanaugh voted to allow Louisiana to enforce a law regulating abortion providers that was identical to a law the Supreme Court had invalidated just two years earlier in *Whole Woman's Health v. Hellerstedt*.[119] The case, *June Medical Services v. Gee*, involves a Louisiana law that requires abortion providers to obtain admitting privileges at hospitals within thirty miles of where they perform abortions.[120] In *Hellerstedt*, the Court invalidated that same law when Texas enacted it, finding that there was no evidence that an admitting privileges requirement would have helped any woman anywhere in the country, which includes Louisiana.[121]

The point about Judge Kozinski's legacy is not whether Justice Kavanaugh knew or should have known about Judge Kozinski's inappropriate behavior (though that is a fair question). It is, instead, about how (alleged) sexual harassment and other forms of sex discrimination will affect who gets to be in a position to shape the law and regulation of reproductive rights and reproductive justice.[122] It is about whether the law on reproductive rights and justice is so thoroughly enmeshed and influenced by sexual misconduct and other forms of misogyny that it is, in part, a product of them.

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116. *See* Hanchett, *supra* note 114; *see Kavanaugh Responses to Questions for the Record: Hearing on the Nomination of the Honorable Brett Kavanaugh to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary* 10, 115th Cong. (2018) (questions of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary).

117. *Eisenstadt*, 405 U.S. at 460–65 (White, J., concurring).

118. *Id.* at 464–65.

119. *See* June Med. Servs., L.L.C. v. Gee, 139 S. Ct. 663, 663 (2019) (Kavanaugh, J., dissenting); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

120. *June Med. Servs.*, 139 S. Ct. at 663 (Kavanaugh, J., dissenting); June Med. Servs. LLC v. Kliebert, 158 F. Supp. 3d 473, 484 (M.D. La. 2016).

121. *Whole Woman's Health*, 136 S. Ct. at 2310–14.

122. There are other related aspects to the story as well, such as the rest of the federal judiciary's response to accusations of sexual misconduct against one of its own. *See* Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/06/71-Stan.-L.-Rev.-Online-Gertner-1.pdf [https://perma.cc/G67M-GB7P]; Elie Mystal, *Ineffectual Judicial Response to #MeToo Will Continue*, ABOVE L. (Apr. 10, 2019, 4:25 PM), https://abovethelaw.com/2019/04/ineffectual-judicial-response-to-metoo-will-continue/ [https://perma.cc/6PR4-V7ST]; Elie Mystal, *John Roberts Praises Efforts to Rid Judiciary of Sexual Misconduct, Ignores Sexual Misconduct of His Colleagues*, ABOVE L. (Jan. 2, 2019, 1:33 PM), https://abovethelaw.com/2019/01/john-roberts-praises-efforts-to-rid-judiciary-of-sexual-misconduct-ignores-sexual-misconduct-of-his-colleagues/ [https://perma.cc/V8WH-NTT3]. *See generally* MACKINNON, *supra* note 96; MacKinnon, *supra* note 96.

II. RECENTERING COURTS

The volume's second stated goal is to "narrate the cases in ways that decenter courts" (p. 1). The essays do this by "tell[ing] their stories using a wide-lens perspective that illuminates the complex ways law is forged and debated in social movements, in representative government, and in courts" (p. 1).

There is much to be said about the volume's approach to reproductive rights and justice. Courts are led by judges, and judges are people, so it is important to acknowledge that judges are influenced by the forces that influence people, such as organizing and social movements.[123] It is also important to emphasize the actual people who are affected by judicial decisions. And it is likewise important to point out that legal protections such as 42 U.S.C. § 2000e(k) (2012) or 29 U.S.C. § 2601 (2012) are often created outside of courts. This emphasis may seem especially warranted now, given that the changing composition of the federal courts will make the federal courts a less-than-friendly place for reproductive rights and justice.[124]

In this Part, however, I want to bring out another point that is merely implicit in the volume—a point that the volume occasionally mentions, rather than uses as a frame for the entire collection. That point is about the importance of courts. Despite the collection's goal of decentering courts, the volume provides a significant amount of evidence that suggests the courts are essential to reproductive rights and justice. Indeed, the volume's efforts to humanize the judicial decisions and identify the real lives that are affected by the decisions only underscore the importance of courts.

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123. *See, e.g.*, Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013) (reviewing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011)).

124. Some of the president's nominees to the lower federal courts have been subject to criticism from Republican senators for not being pro-life enough or for not being obviously hostile enough to abortion. *See* Annie Karni & Maggie Haberman, *Senator Josh Hawley Raises Questions About Neomi Rao's Abortion Stance*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/us/politics/josh-hawley-neomi-rao-abortion.html [https://perma.cc/2N8M-YLEQ]; Seung Min Kim, *Two GOP Senators Said to Express Concerns over Trump's Nominee for Appeals Court*, WASH. POST (Feb. 26, 2019, 10:29 PM), https://www.washingtonpost.com/politics/two-gop-senators-said-to-express-concerns-over-trumps-nominee-for-appeals-court/2019/02/26/5dcabe0a-3a30-11e9-b786-d6abcbcd212a_story.html (on file with the *Michigan Law Review*); Marianne LeVine, *GOP Sen. Hawley Presses Trump's Judicial Pick to Clarify Abortion Stance*, POLITICO (Feb. 26, 2019, 1:16 PM), https://www.politico.com/story/2019/02/26/hawley-rao-abortion-1187923 [https://perma.cc/F52S-4QVR]; Anna North, *What a Republican Fight over Brett Kavanaugh's Replacement Says About the Abortion Debate Today*, VOX (Feb. 28, 2019, 1:37 PM), https://www.vox.com/2019/2/27/18243090/neomi-rao-dc-circuit-josh-hawley-abortion [https://perma.cc/369C-ZV92].

A. *Courts as Sword*

Some of the pieces in the volume highlight the statutory protections for reproductive rights and justice such as the Pregnancy Discrimination Act and the Family and Medical Leave Act. These essays advance the volume's suggestion that courts are not sufficient to secure reproductive rights and justice. But the essays also quietly imply that courts are probably necessary to achieve reproductive rights and justice because they highlight how courts can defang democratically enacted protections.

Take Shaw's essay on *Young* (Chapter 10) or Bagenstos's essay on *Hibbs* (Chapter 9). *Young* involved a question about the proper interpretation of the Pregnancy Discrimination Act, whereas *Hibbs* involved a constitutional question about the validity of the family care provisions of the Family and Medical Leave Act.[125] The question in *Young* was whether an employee could establish a triable issue of discrimination on the basis of pregnancy when her employer offered accommodations to employees who had similar work limitations that were not attributable to pregnancy.[126] By a vote of 6–3, the Court said yes.[127] *Hibbs* addressed whether Congress could constitutionally hold the states liable for violating the FMLA provision that required employers to offer their employees time off to care for family members.[128] Again by a vote of 6–3, the Court said yes.[129]

These cases illustrate that courts can defang democratically enacted protections for reproductive rights and justice either by narrowly interpreting statutory protections or by invalidating them. The Court didn't ultimately pull the trigger and gut the PDA in *Young* or the FMLA in *Hibbs*, but in each case, three justices would have.

There are, however, several recent cases in which a majority of the Court has limited the reach of democratically enacted protections for reproductive rights and justice. Take two statutory interpretation cases decided in 2013. In *Vance v. Ball State University*, the Court ruled, 5–4, that a "supervisor" for purposes of Title VII liability means a person who is empowered to take tangible employment actions (such as hiring or firing) against the victim, and not a person who, for example, directs the victim's daily work activities.[130] Under Title VII, if the harasser-employee is the victim's coworker, the employer is liable for the harassment if the employer was negligent in control-

125. *See* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1343 (2015); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725–26 (2003).

126. *Young*, 135 S. Ct. at 1343–44.

127. *Id.* at 1343–44.

128. *Hibbs*, 538 U.S. 721.

129. *Id.* at 723–25.

130. *See* 570 U.S. 421 (2013). *Vance* addressed harassment on the basis of race, but the rule is applicable to sexual harassment cases because the Court derived its interpretation of "supervisor" from its previous holdings in sexual harassment cases. *Id.* at 436–37.

ling working conditions; if the harasser-employee is a supervisor, however, the employer is strictly liable.[131]

The decision in *Vance* limited the scope of employers' liability for sexual harassment and sexual discrimination and reduced employers' incentives to proactively deal with sexual harassment and discrimination. Justice Ginsburg's dissent argued that the decision "ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[132] As she explained, the Court's ruling would limit an employer's liability in a case where an employee "punish[ed] [other employee]s who would not date him with full-time toilet-cleaning duty" at work.[133] She continued: "A supervisor with authority to control subordinates' daily work is no less aided in his harassment than is a supervisor with authority to fire, demote, or transfer."[134]

The other case, *University of Texas Southwestern Medical Center v. Nassar*, held that in order to make out a retaliation claim under Title VII, a plaintiff must demonstrate that her allegation of harassment was the "but-for" cause of the retaliation, rather than just a "motivating factor" behind the retaliation.[135] That 5–4 decision also limited the scope of employers' liability under Title VII, including where an employer retaliated against workers who bring sex discrimination or sexual harassment to the attention of their employers.[136] Again in dissent, Justice Ginsburg wrote that "'fear of retaliation is the leading reason why people stay silent' about . . . discrimination."[137] She ended her dissent with this warning about the Court's ruling:

> Senator Case, a prime sponsor of Title VII, commented that a "sole cause" standard would render the Act "totally nugatory." Life does not shape up that way, the Senator suggested, commenting "[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."[138]

The importance of courts to securing reproductive rights and justice is also reflected in the federal courts' willingness to invalidate democratically enacted protections for reproductive justice. In recent years, courts have wielded the First Amendment against such statutory protections. Take the Supreme Court's recent decision in *NIFLA v. Becerra*, which invalidated a

131. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 789–90 (1998). There is an affirmative defense that is available under certain conditions. *Id.* at 805.

132. *Vance*, 570 U.S. at 451 (Ginsburg, J., dissenting).

133. *Id.* at 457. Justice Ginsburg drew these facts from an actual case. *See Faragher*, 524 U.S. at 780.

134. *Vance*, 570 U.S. at 457–58 (Ginsburg, J., dissenting).

135. *See* 570 U.S. 338 (2013).

136. *Univ. of Texas Sw. Med. Ctr.*, 570 U.S. at 362. The decision in that case was specifically about retaliation for making a racial and religious discrimination claim. *Id.* at 345.

137. *Id.* at 363 (Ginsburg, J., dissenting) (quoting Crawford v. Metro. Gov't of Nashville & Davidson Cty., 555 U.S. 271, 279 (2009)).

138. *Id.* at 385 (citations omitted) (quoting 110 Cong. Rec. 13,837 (1964)).

California law that required crisis pregnancy centers to disclose public funding options for abortion and required unlicensed crisis pregnancy centers to disclose that they were unlicensed.[139] The California law sought to address the burdens that crisis pregnancy centers impose on women, particularly women in marginalized communities, when the centers do not inform women of all of their available health care options.[140] The Court held that the First Amendment prohibited the California legislature from enacting these protections.[141]

Before *NIFLA*, there was *Burwell v. Hobby Lobby* and other related cases.[142] There, employers sought a First Amendment exemption from the statutory requirement to fill out some forms that would have allowed their employees to obtain health insurance coverage for contraception from an insurance provider.[143] The employers had already succeeded in preventing the government from requiring the employers themselves to provide the contraception coverage through their designated insurance providers.[144] Here too, the courts are undoing democratically enacted protections for reproductive rights and justice.

These cases make clear that even if reproductive justice supporters and advocates obtain protections in representative government, they need to be able to protect those victories in the courts. Deemphasizing courts risks ignoring that reality and minimizing its threat.

B. *Courts as Shield*

Reproductive justice supporters will not always secure protections from representative governments even though a majority of the country supports women's access to contraception and abortion.[145] Over the last few years, courts have proven to be important shields from draconian restrictions on reproductive rights and justice.

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139. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2369–70 (2018).

140. For a critique of the decision, see Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 63–64 (2019).

141. *NIFLA*, 138 S. Ct. at 2378.

142. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); *see* Wheaton Coll. v. Burwell, 573 U.S. 958 (2014).

143. *Hobby Lobby*, 573 U.S. 682; *Wheaton College*, 573 U.S. 958.

144. *Hobby Lobby*, 573 U.S. at 736.

145. *See* Gretchen Frazee, *New Abortion Laws Are Too Extreme for Most Americans, Poll Shows*, PBS NEWSHOUR (June 7, 2019, 5:00 AM), https://www.pbs.org/newshour/politics/new-abortion-laws-are-too-extreme-for-most-americans-poll-shows [https://perma.cc/A9YN-MKTQ]; *Public Opinion on Abortion*, PEW RES. CTR. (Aug. 29, 2019), https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/ [https://perma.cc/SL8X-6SL3]; *see also Where the Public Stands on Religious Liberty Vs. Nondiscrimination: 4. Very Few Americans See Contraception as Morally Wrong*, PEW RES. CTR. (Sept. 28, 2016), https://www.pewforum.org/2016/09/28/4-very-few-americans-see-contraception-as-morally-wrong/ [https://perma.cc/WG68-YR5H].

Take *Garza v. Hargan*, the case about the Office of Refugee Resettlement's treatment of undocumented minor women in its custody.[146] ORR asserted that it could prevent (or perhaps just delay) the undocumented minor women in its legal custody from having abortions.[147] ORR maintained that its director had the power to determine that having an abortion was not in the women's best interests.[148] A state court had already concluded that the women were competent to decide on their own whether to end their pregnancies.[149] ORR alternatively insisted that it could further delay the women's ability to have an abortion while it continued to search for a private sponsor to take custody of the young women.[150] ORR's search for a private sponsor had already pushed the women from the first to the second trimester.[151] ORR also argued that it could prevent or delay the women from having abortions because it did not want to be "complicit" in their abortions by continuing to offer the young women medical care after they received abortions.[152]

Initially, the U.S. Court of Appeals for the D.C. Circuit allowed ORR to delay (and possibly prevent) the young women from having abortions on the ground that putting the women in the custody of private sponsors (and indefinitely delaying their abortions in the process) would put the women in a "better place."[153] There was no evidence for this hypothesis, and Judge Millett issued a fierce dissent from that opinion.[154] ORR was not, however, able to carry out its plans because a majority of judges on the U.S. Court of Appeals for the D.C. Circuit intervened and vacated the panel opinion, largely for the reasons that Judge Millett gave in her dissent.[155]

That decision underscores the importance of courts to reproductive rights and justice. But the decision also underscores that it is important to

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146. *See* 874 F.3d 735, 738 (D.C. Cir. 2017) (Millett, J., concurring), *vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018).

147. *See* Marty Lederman, *Return to* Garza*: How ORR Is Acting Without Statutory Authority (and Why DOJ's Arguments Haven't Gotten Any Better Since Last Year)*, BALKINIZATION (Sept. 24, 2018), https://balkin.blogspot.com/2018/09/return-to-garza-how-orr-is-acting.html [https://perma.cc/WLM5-WRD4]; Marty Lederman, *The SG's Remarkable Cert. Petition in* Hargan v. Garza*, the "Jane Doe" Abortion Case*, BALKINIZATION (Nov. 8, 2017), https://balkin.blogspot.com/2017/11/the-sgs-remarkable-cert-petition-in.html [https://perma.cc/VCL9-CRX3].

148. *See Garza*, 874 F.3d at 741.

149. *Id.* at 736.

150. *Id.* at 738.

151. *See Garza*, 138 S. Ct. at 1790; *Garza*, 874 F.3d at 736, 741.

152. *See Garza*, 874 F.3d at 740–41; Petition for Writ of Certiorari at 5, *Garza*, 138 S. Ct. 1790 (No. 17-654); Marty Lederman, *Lawless and Cruel: The HHS Abortion Scandal That's Flying Under the Radar*, BALKINIZATION (Dec. 21, 2017), https://balkin.blogspot.com/2017/12/lawless-and-cruel-hhs-abortion-scandal.html [https://perma.cc/Q53D-N7UM].

153. *Garza*, 874 F.3d at 755; Garza v. Hargan, No. 17-5236, 2017 WL 9854555, at *1 (D.C. Cir. Oct. 20, 2017), *vacated in part on reh'g en banc*, 874 F.3d 735 (D.C. Cir. 2017), *vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018).

154. *Garza*, 2017 WL 9854555, at *1 (Millett, J., dissenting).

155. *Garza*, 874 F.3d at 736.

reproductive rights and justice to recognize—and make painfully clear—that courts are important. Many of the judges on the D.C. Circuit, including Judge Millett herself, were on the D.C. Circuit only because Senate Democrats fought to fill several vacancies on the court after Republican senators slow walked and stonewalled President Obama's judicial nominations.[156] Democratic Senators responded to then-Minority Leader McConnell's tactics by abolishing the filibuster for lower-court nominations, which is how Judge Millett got confirmed to the D.C. Circuit (along with several of the other judges in the en banc majority).[157]

Garza is a powerful example of why the courts were—and are—worth focusing on.[158] The decision ended up preventing the federal government from barricading a woman indoors so she could not have an abortion.[159] Courts may not be able to—and should not be able to—enact sweeping changes to society or government. But they can still make an enormous difference to people's lives, including in the field of reproductive rights and justice.

* * *

The edited collection contains essays that include details or observations that imply that courts have an important role to play in reproductive rights and reproductive justice. Cary Franklin's essay on *Whole Woman's Health v. Hellerstedt*, for example, notes how upholding the Texas law in *Hellerstedt* would have allowed states to overregulate abortion providers out of existence (Franklin, p. 227). And Neil Siegel's essay on *Struck* contains a remarkable

156. *See* Ailsa Chang, *Republicans Push Back on Obama's D.C. Court Nominees*, NPR (Sept. 19, 2013, 5:10 PM), https://www.npr.org/2013/09/19/224133307/republicans-push-back-on-obamas-d-c-court-nominees [https://perma.cc/URB5-A9FH]; Burgess Everett & Seung Min Kim, *Judge Not: GOP Blocks Dozens of Obama Court Picks*, POLITICO (July 6, 2015, 5:13 AM), https://www.politico.com/story/2015/07/payback-gop-blocks-obama-judge-picks-judiciary-119743 [https://perma.cc/5877-KYZF]; Jeremy W. Peters, *Obama Pick for Court is 3rd in a Row Blocked by Republicans*, N.Y. TIMES (Nov. 18, 2013), https://www.nytimes.com/2013/11/19/us/politics/republicans-block-another-obama-nominee-for-key-judgeship.html [https://perma.cc/8ENL-G6F8].

157. *See* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013, 1:13 PM), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html (on file with the *Michigan Law Review*); Tom McCarthy, *Senate Approves Change to Filibuster Rule After Repeated Republican Blocks*, GUARDIAN (Nov. 21, 2013), https://www.theguardian.com/world/2013/nov/21/harry-reid-senate-rules-republican-filibusters-nominations [https://perma.cc/62CC-LTDH]; Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), https://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html [https://perma.cc/TB6H-A3R3].

158. One of the women ORR sought to prevent from having an abortion was a rape victim who indicated she would harm herself if she could not have an abortion. *See* Lederman, *supra* note 152.

159. *See Garza*, 874 F.3d at 738–40.

excerpt from the district judge's ruling that sheds some light on the importance of judicial attitudes toward reproductive rights and justice. In a ruling from the bench in favor of the Air Force, the judge said "[s]omebody said that [women are a little more difficult when they are pregnant than when they are not], that there is some change in their personality, and their capabilities. It could well be that the Air Force felt that when they formulated their policy and rules."[160] And the introduction to the volume suggests that courts are important to reproductive rights and justice when it notes that there will be consequences for reproductive rights from Justice Kavanaugh's confirmation to the Supreme Court (p. 2).

But when courts are so much a part of the current war on reproductive justice, it may be time to make explicit that courts are important to reproductive rights and justice and to convey to those who are interested in reproductive justice that the courts are worth focusing on and fighting for.

Parts of the volume seem to imply that courts do more following than leading with respect to reproductive rights and justice. That is, perhaps courts are not unimportant to reproductive rights and justice per se; they just merely follow the lead of other actors—be it political movements, social organizing, or the political branches.[161] But some of the preceding examples complicate this conception of courts. Consider, for example, the decisions that narrowly interpreted the scope of laws remedying sexual harassment.[162] In those cases, it is hard to identify a particular social movement or political organization motivating those decisions.

Or consider the decisions on abortion or contraception. One function of early dissents on those issues (as well as more recent ones) is to inject certain ideas into the conversation on abortion and contraception and in particular into the social movements and organizing about them. That is part of what Justice Thomas accomplished in his separate writing in *Box v. Planned Parenthood*, which argued that modern-day abortion and contraception have their origins in the eugenics movement.[163] After his concurrence, people started talking about possible connections between abortion, contraception, and eugenics.[164] That was one function of earlier dissents on abortion as well—those writings reinforced the political movements and social networks

160. Siegel, p. 35 (quoting Brief for Petitioner at 35 n.29, Struck v. Sec'y of Def., 409 U.S. 1071 (1972) (No. 72-178)).

161. *See, e.g.*, Dinner, p. 79; Mayeri, p. 137–38.

162. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013); SPERINO & THOMAS, *supra* note 73, at 125–26; Clarke, *supra* note 74, at 540–42.

163. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782–93 (2019) (Thomas, J., concurring).

164. *E.g.*, Dahlia Lithwick, *Why Clarence Thomas Is Trying to Bring Eugenics into the Abortion Debate*, SLATE (June 17, 2019, 10:42 AM), https://slate.com/news-and-politics/2019/06/clarence-thomas-eugenics-abortion-debate-roe-v-wade.html [https://perma.cc/Y6XD-CR4S]; Jason L. Riley, Opinion, *Justice Thomas on Abortion and Eugenics*, WSJ (June 4, 2019, 6:36 PM), https://www.wsj.com/articles/justice-thomas-on-abortion-and-eugenics-11559687789 (on file with the *Michigan Law Review*).

that, in turn, garnered support for judicial nominations that were aimed at overturning *Roe*.[165] One of the volume's editors, Reva Siegel, has written about how theories of judicial decisionmaking such as originalism, when they are articulated by the courts, provide organizing points for political actors and political movements.[166] Courts, in other words, can be change agents and leaders as well as followers.

CONCLUSION

There is so much to like in the edited collection that perhaps future volumes will be longer. This Review has offered some possible ways in which the collection could be expanded, but there are others too.

For example, it might be worth thinking about how women are treated when they seek out reproductive health care. Journalists uncovered how the University of Southern California kept an OBGYN on staff—and allowed him to continue seeing patients—after there were multiple allegations that he harassed female patients in the course of exams, including by taking naked pictures of them.[167] And recent law reform work has brought attention to the phenomenon of medical students performing "practice" gynecological exams on women who were sedated for other surgical procedures and did not consent to the exams.[168]

Did these practices shape some women's decisions about whether to have children? The volume is right to call attention to the many ways that law and society shape decisions about parentage and sex. But there are other pockets of law and society that also influence sex and parentage decisions beyond what the volume covered. By underscoring how workplace policies and criminal justice issues influence parentage decisions just as access to abortion and contraception do, the volume opens up the conversation on reproductive rights and justice to examine other influences on parentage deci-

165. *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); T.R. Goldman, *The Flower of the Reagan Revolution*, LEGAL TIMES, Aug. 1, 2005, at 10; Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61 (2009); *Judge Scalia's Cheerleaders*, N.Y. TIMES, July 23, 1986, at B6.

166. *E.g.*, Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

167. *See* Harriet Ryan et al., *Must Reads: A USC Doctor Was Accused of Bad Behavior with Young Women for Years. The University Let Him Continue Treating Students*, L.A. TIMES (May 16, 2018, 6:25 AM), https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html [https://perma.cc/3MN2-LPUX]; Mihir Zaveri, *50 More Women Sue U.S.C. as Accusations of Gynecologist's Abuse Pile Up*, N.Y. TIMES (July 25, 2018), https://www.nytimes.com/2018/07/25/us/usc-gynecologist-george-tyndall-lawsuit.html [https://perma.cc/3F6G-FE5Z].

168. *See* Phoebe Friesen, *Educational Pelvic Exams on Anesthetized Women: Why Consent Matters*, 32 BIOETHICS 298 (2018); Paul Hsieh, *Pelvic Exams on Anesthetized Women Without Consent: A Troubling and Outdated Practice*, FORBES (May 14, 2018, 9:20 AM), https://www.forbes.com/sites/paulhsieh/2018/05/14/pelvic-exams-on-anesthetized-women-without-consent-a-troubling-and-outdated-practice/ [https://perma.cc/BY6W-AJQH].

sions. And despite its approach of decentering courts, the implication of the volume is that courts play an important role in constructing and reinforcing the law on reproductive rights and justice, which influences culture and social norms too.