

REPRODUCTIVE INJUSTICE AND COVID-19

Seema Mohapatra, JD, MPH*

I. INTRODUCTION

In the midst of a global pandemic and horrifying examples of police injustice in the summer of 2020, the Supreme Court added to the pain by delivering several blows to reproductive justice.¹ Although *June Medical v. Russo*² was a technical victory, the dissenting and concurring opinions, written by five men, made clear that the majority of the Court seeks to restrict access to abortion care, regardless of how it affects pregnant people's lives.³ *June Medical* likely will make abortion easier to restrict.⁴ Chief Justice Roberts upheld *Whole Woman's Health v. Hellerstedt*⁵ in name only.⁶ Since the decision, Republican lawmakers across the country have proposed and passed more abortion restrictions in their states, banking on the decision and changing Supreme Court.⁷ Since

* © 2021. All rights reserved. Tenured Associate Professor of law and Dean's Fellow at the Indiana University Robert H. McKinney School of Law. Thanks to the editors of *Stetson Law Review* and *Harvard Law and Policy Review* for helpful comments on this Article. A version of this Article was first published as a blog essay at Seema Mohapatra, Reproductive Injustice and COVID-19, HARV. L. & POL'Y REV. BLOG (July 21, 2020), <https://harvardlpr.com/2020/07/21/reproductive-injustice-and-covid-19/>.

1. See Carter Sherman, *This Is the Case That Could Bring Down Roe v. Wade*, VICE NEWS (Dec. 8, 2020, 9:59 AM EST), <https://www.vice.com/en/article/pkdk8n/this-is-the-case-that-could-bring-down-roe-v-wade>; see also Andrew DeMillo, *Court Lifts Block On 4 Arkansas Abortion Restrictions*, AP NEWS (Aug. 7, 2020), <https://apnews.com/article/reproductive-rights-health-u-s-supreme-court-arkansas-little-rock-35d85111a05fc86ff2b0fa791136af>.

2. *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (2020).

3. Katha Pollitt, *A Small Victory for Reproductive Rights*, THE NATION (July 1, 2020), <https://www.thenation.com/article/society/supreme-court-abortion/>.

4. Caroline Mala Corbin, *June Medical Is the New Casey*, AM. CONSTITUTION SOC'Y (June 29, 2020), <https://www.acslaw.org/expertforum/june-medical-is-the-new-casey/>; Leah Litman, *June Medical As The New Casey*, TAKE CARE BLOG (June 29, 2020), <https://takecareblog.com/blog/june-medical-as-the-new-casey>; Melissa Murray, *The Supreme Court's Abortion Decision Seems Pulled from the 'Casey' Playbook*, WASH. POST, June 29, 2020, <https://www.washingtonpost.com/opinions/2020/06/29/problem-with-relying-precedent-protect-abortion-rights/>.

5. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

6. Murray, *supra* note 4 ("[Roberts] does not endorse *Whole Woman's Health's* reasoning. . . . [instead,] [i]n the name of stare decisis, Roberts reiterates *Whole Woman's Health's* outcome, while completely disavowing its reasoning and its protections for abortion rights.")

7. Chloe Atkins, *"A crisis moment": States, Advocates Brace for New Fight over Abortion Rights*, NBC NEWS (Jan. 11, 2021, 4:32 AM EST), <https://www.nbcnews.com/politics/politics-news/crisis-moment-states-advocates-brace-new-fight-over-abortion-rights-n1253665>.

Justice Amy Coney Barrett, a known critic of abortion rights, joined the Supreme Court after this case was decided, the future of abortion rights in the country is even more in jeopardy.⁸ According to Justice Roberts' concurrence in *June Medical*, courts can only overturn abortion regulations that impose a substantial obstacle for people seeking abortions, even if those laws do not benefit pregnant people's health and safety.⁹ This is a departure from a faithful reading of *Whole Woman's Health*, which would require the courts to balance the burdens on pregnant people with health and safety benefits. Although some commentators interpreted Roberts' concurrence as a victory for abortion rights,¹⁰ there were worrying signs, such as the Supreme Court ordering the Seventh Circuit to reconsider, in light of *June Medical*, two Indiana abortion regulations it had previously invalidated.¹¹ That certainly did not feel like a win.

*Little Sisters of the Poor v. Pennsylvania*¹² was a definite loss for reproductive rights with seven Justices upholding the Trump Administration's legal authority to issue broad exemptions to the Affordable Care Act's (ACA) contraceptive requirement based on moral or religious objections.¹³ This was the third time the policy was before the Supreme Court, and the seven Justices did not appear to care that as many as 125,000 women (by the government's own admission) could lose their contraceptive coverage if Trump's rules went into effect.¹⁴

8. Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES, (Nov. 2, 2020), <https://www.nytimes.com/article/amy-barrett-views-issues.html>.

9. Murray, *supra* note 4.

10. Laurence H. Tribe, *Roberts's Approach Could End Up Being More Protective of Abortion Rights — Not Less*, WASH. POST, July 1, 2020, <https://www.washingtonpost.com/opinions/2020/07/01/robertss-approach-could-end-up-being-more-protective-abortion-rights-not-less/>.

11. Alice Miranda Ollstein, *Supreme Court Sidesteps Abortion Cases, Shortly After Striking Louisiana Restrictions*, POLITICO, <https://www.politico.com/news/2020/07/02/supreme-court-sidesteps-abortion-cases-shortly-after-striking-louisiana-restrictions-348044> (last updated July 2, 2020, 1:45 PM EDT); see also Rachel Rebouché, *Burdens and Benefits*, BOSTON REV. (July 10, 2020), <http://bostonreview.net/law-justice-gender-sexuality/rachel-rebouch%C3%A9-burdens-and-benefits>.

12. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2386 (2020).

13. Maya Manian, *Reproductive Justice Under Assault at the Supreme Court*, MS. MAGAZINE (July 9, 2020), <https://msmagazine.com/2020/07/09/reproductive-justice-under-assault-at-the-supreme-court/>.

14. Dahlia Lithwick, *The Supreme Court Can Only See Certain People's Suffering*, SLATE (May 6, 2020, 6:08 PM), <https://slate.com/news-and-politics/2020/05/little-sisters-of-the-poor-supreme-court-contraception-obamacare.html>; Laurie Sobel & Alina Salganicoff, *Round 3: Legal Challenges to Contraceptive Coverage at SCOTUS*, KAISER FAMILY FOUND. (May 4, 2020), <https://www.kff.org/womens-health-policy/issue-brief/round-3-legal-challenges-to-contraceptive-coverage-at-scotus>.

These cases show how the Supreme Court is largely indifferent to people's reproductive realities, particularly those of poor, Black¹⁵ women. Amicus briefs filed in *June Medical* and *Little Sisters* tried to focus the Court's attention on how the decisions regarding abortion care and contraception affect poor people of color, especially Black women, the most.¹⁶ Yet, there was no mention of race at all in either case.

This willful omission of race has always undercut the goals of racial justice, but it is inexcusable in the present moment. The COVID-19 pandemic has laid bare deep racial inequities in healthcare, and COVID-19-related restrictions on reproduction and lack of support for childbearing and childrearing disproportionately burden Black women and other women of color.¹⁷ The Supreme Court seems unwilling to take into account whom their decisions impact most. Additionally, even with a different Court composition, courts alone cannot achieve justice. Legislative action and policy decisions that ensure access to health care and financial support, as well as with meaningful participation by communities of color, would better support reproductive justice. This Article views the COVID-19 pandemic through a reproductive justice (RJ) lens to demonstrate how a comprehensive health justice approach is needed to address these issues.¹⁸

15. I capitalize Black when referring to the racial group. See Kimberle' Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun"); see also David Lanham, *A Public Letter to the Associated Press: Listen to the Nation and Capitalize Black*, BROOKINGS (June 16, 2020), <https://www.brookings.edu/blog/the-avenue/2020/06/16/a-public-letter-to-the-associated-press-listen-to-the-nation-and-capitalize-black/>.

16. Brief *Amici Curiae* of the American Civil Liberties Union, the ACLU of Pennsylvania, the ACLU of New Jersey, and the Leadership Conference on Civil and Human Rights in Support of Respondents at 14 n.3, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431 & 19-454); Brief for *Amici Curiae* The National Women's Law Center, The National Asian Pacific American Women's Forum, The National Latina Institute for Reproductive Justice, Sisterlove, Inc., and 50 Additional Organizations in Support of Respondents at 11-21, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431 & 19-454); Brief of *Amici Curiae* National Health Law Program and National Network of Abortion Funds Supporting Petitioners-Cross-Respondents at 11-15, *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18-1323 & 18-1460).

17. Abigail Abrams, *Amid Social Upheaval and COVID-19, Black Women Create Their Own Health Care Support Networks*, TIME (July 17, 2020, 3:10 PM EDT), <https://time.com/5866854/black-women-health-care/>.

18. See Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiyah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS (2020), <https://yaleconnect.yale.edu/YJHPLE/health-justice-strategies/>.

II. REPRODUCTIVE JUSTICE

The RJ movement was started by Black women who felt unseen by the reproductive rights movement, which had focused mainly on abortion rights and the concept of choice.¹⁹ Black communities faced (and continue to face) involuntary sterilizations and criminalization of their pregnancies.²⁰ The RJ framework focused on three tenets: (1) the right not to have a child, (2) the right to have a child, and (3) the right to parent one's child safely.²¹ As the National Network of Abortion Funds puts it: "Reproductive justice is as much about raising our children without fear of being killed by a police officer as it is about accessing an abortion."²²

III. REPRODUCTIVE JUSTICE AND COVID-19

The COVID-19 pandemic has been devastating to people of color, especially Black people, who are more likely to have lost a job, work as low wage essential workers, and die from COVID-19.²³ Looking at the COVID-19 pandemic through an RJ lens shows how facially neutral laws and policies disproportionately harm Black women, and why relying on only courts for help is inadequate. Not only are courts often unwilling to address populations most harmed by their decisions, but courts are primarily limited to interpreting laws. Directed legislative action and policies that are consciously designed to help achieve equity for communities of color are needed to achieve health justice in these areas.

19. Natelegé Whaley, *The Radical Reproductive Justice Movement Launched in 1994. Its Co-founders Say Little Has Improved.*, MIC (Mar. 23, 2018), <https://www.mic.com/articles/188577/the-radical-reproductive-justice-movement-launched-in-1994-its-co-founders-say-little-has-improved>.

20. DOROTHY ROBERTS, *KILLING THE BLACK BODY* 3–9 (1997); MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 14 (2020).

21. Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. OF L. & SOC. SCI. 327, 328–29 (2013).

22. Yamani Hernandez, *A Statement from Executive Director Yamani Hernandez: Defund Police, Not Abortion*, NAT'L NETWORK OF ABORTION FUNDS (June 16, 2020), <https://abortionfunds.org/defund-police-not-abortion/>.

23. Emma Grey Ellis, *Covid-19 Is Killing Black People Unequally—Don't Be Surprised*, WIRED (May 2, 2020, 7:00 AM), <https://www.wired.com/story/covid-19-coronavirus-racial-disparities/>; Leah Rodriguez, *Women of Color Are Experiencing the Biggest Economic Losses Amid COVID-19 Pandemic*, GLOBAL CITIZEN (Apr. 8, 2020), <https://www.globalcitizen.org/en/content/women-of-color-disproportionately-unemployed-covid/>.

A. The Right Not to Have a Child

RJ requires affordable, safe access to abortion care and contraception. Being denied abortion care is not only an affront to one's dignity, but it is also unhealthy. Among people with unwanted pregnancies, "those who experience[] childbirth report[] worse overall health five years later than those who underwent an abortion."²⁴ When one compounds that with the fact that Black and Native American individuals are already more sick and live shorter lives than white people, the negative health consequences of not having access to abortion are stark.²⁵

During the pandemic, while stay-at-home orders were in effect, many states restricted medical services deemed nonessential.²⁶ Thirteen states, many led by officials already hostile to abortion care, passed or attempted to pass abortion restrictions under COVID-19 emergency orders by deeming abortion nonessential.²⁷ The penalties for violating such orders included steep fines and jail time.²⁸

Even as states started allowing nonessential services, roadblocks for abortion remained. For example, Arkansas instituted a requirement that a pregnant person must test negative for COVID-19 two days in advance of an abortion.²⁹ One woman had to drive to Little Rock seven times before she was able to obtain an abortion, which almost cost her a job.³⁰ She was one of many who experienced increased costs and unnecessary delay. Multiple trips and lost wages are not minor inconveniences, and not everyone has the ability to travel due to lack of money, transportation, childcare, or time off from work.³¹

24. Rita Rubin, *Among Women Seeking Abortion, Continuing Pregnancy Linked to Worse Physical Health*, 322 J. AM. MED. ASS'N 714, 714 (2019).

25. David R. Williams & Lisa A. Cooper, *COVID-19 and Health Equity—A New Kind of "Herd Immunity"*, 323 J. AM. MED. ASS'N 2478, 2478 (2020).

26. *Factsheet: State Action Related to Delay and Resumption of "Elective" Procedures During COVID-19 Pandemic*, AM. MED. ASS'N (2020), <https://www.ama-assn.org/system/files/2020-06/state-elective-procedure-chart.pdf>.

27. Dan Keating, Lauren Tierney & Tim Meko, *In These States, Pandemic Crisis Response Includes Attempts to Stop Abortion*, WASH. POST, Apr. 23, 2020, <https://www.washingtonpost.com/nation/2020/04/21/these-states-pandemic-crisis-response-includes-attempts-stop-abortion/?arc404=true>.

28. Lauren Gambino, *Clinics in Ohio and Texas Ordered to Stop 'Nonessential' Surgical Abortions*, THE GUARDIAN (Mar. 23, 2020, 8:00 PM EDT), <https://www.theguardian.com/world/2020/mar/23/ohio-texas-abortion-us-coronavirus-outbreak>.

29. Melissa Jeltsen, *The Inside Story of How Arkansas Exploited COVID to Stop Abortions*, HUFFPOST (June 22, 2020, 11:32 AM ET), https://www.huffpost.com/entry/arkansas-coronavirus-abortion_n_5eeba27ac5b6413b964e4caa.

30. *Id.*

31. Monica Anderson, *Who Relies on Public Transit in the U.S.*, PEW RES. CENTER (Apr. 7, 2016), <https://www.pewresearch.org/fact-tank/2016/04/07/who-relies-on-public-transit-in-the-u-s/>;

Low-income people have the highest abortion rates, in part because a person living in poverty is more than five times as likely to have an unintended pregnancy than a person with income at least two times above the poverty.³² Thus, abortion restrictions overwhelmingly impact poor women, given that a staggering 76% of abortions “occur among women at or below 200% of the federal poverty level.”³³ And poverty is racialized in America.³⁴ According to the Kaiser Family Foundation, Black, Native American, and Latinx women are disproportionately poor: 21.2% of African Americans and 17.2% of Latinx individuals live below the poverty level, compared with only 9.0% of white Americans and 9.7% of Asian Americans.³⁵

Two of the most common reasons to seek abortion care are economic insecurity and an inability to financially care for a child, and both stressors have been exacerbated by the economic effects of COVID-19.³⁶ Due to worsening employment conditions since the pandemic began, people are more concerned about their own economic well-being than normal. In these conditions, adding the expenses of a child may be more difficult than before.³⁷ Unlike any other type of healthcare, abortion is specifically carved out of Medicaid via the Hyde Amendment and the appropriations bills that incorporate the Hyde Amendment each

Ann P. Bartel, Soohyun Kim, Jaehyun Nam, Maya Rossin-Slater, Christopher Ruhm & Jane Waldfogel, *Racial and Ethnic Disparities in Access to and Use of Paid Family and Medical Leave: Evidence from Four Nationally Representative Datasets* (Jan. 2019), <https://www.bls.gov/opub/mlr/2019/article/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.htm>; Leila Schochet, *The Child Care Crisis Is Keeping Women Out of the Workforce*, CENTER FOR AM. PROGRESS (Mar. 28, 2019, 8:00 AM), <https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce/>.

32. Michelle Oberman, *Motherhood, Abortion, and the Medicalization of Poverty*, 46 J. L. MED. & ETHICS 665, 666 (2020).

33. *Id.*

34. *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND. (2019), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&selectedDistributions=white--black--hispanic--asiannative-hawaiian-and-pacific-islander--american-indianalaska-native--multiple-races&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (providing a table comparing White, Black, Hispanic, Asian/Native Hawaiian and Pacific Islander, American Indian/Alaska Native, and Multiple Races).

35. *Id.*

36. Alaina Percival, *Covid-19 Economic Impact and the Need to Do Better*, FORBES (Dec. 15, 2020 3:44 PM EST), <https://www.forbes.com/sites/alainapercival/2020/12/15/covid-19-impact-and-the-need-to-do-better>; *The Turnaway Study: A Look into the Consequences of Unwanted Pregnancy and Abortion on Women's Lives*, ADVANCING NEW STANDARDS IN REPRODUCTIVE HEALTH: THE TURNAWAY STUDY, <https://turnawaystudy.com/> (last visited Mar. 25, 2021).

37. Percival, *supra* note 36.

year.³⁸ This means poor pregnant people who are covered by Medicaid have to pay out of pocket for abortion care in most states.³⁹

Poor women are also much less likely to be able to access “nearby, publicly-funded family planning services,” the lack of which correlates with higher rates of abortion.⁴⁰ This affects Black and Latinx women disproportionately, as they are more likely to fall below the federal poverty level and less likely to be able to afford contraception.⁴¹ Many people have been laid off during the pandemic and have lost access to employer-sponsored health care coverage.⁴² The economic realities of the pandemic have made it more difficult for poor people, especially people of color, to exercise their right not to have a child. Courts cannot compel funding for contraception and abortion—that funding must come from legislative action.

B. The Right to Have a Child

The second tenet of an RJ approach moves beyond abortion rights to support for people during pregnancy and at birth. Carrying a pregnancy to term has long been fraught for people of color and low-income individuals.⁴³ The pandemic has only deepened the disparities in prenatal care and post-birth assistance for Black and poor women.⁴⁴

38. Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, KAISER FAMILY FOUND. (Jun. 24, 2019), <https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/>.

39. *Id.*

40. Oberman, *supra* note 32, at 666–67.

41. BWHI Staff, *Title X Domestic Gag Rule Harmful for Black Women’s Health*, BLACK WOMEN’S HEALTH IMPERATIVE (May 24, 2018), <https://bwhi.org/2018/05/24/title-x-domestic-gag-rule-harmful-for-black-womens-health/>; *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND. (2019), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&selectedDistributions=white--black--hispanic&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (providing a table comparing White, Black, and Hispanic); *The Status of Participation in the Title X Federal Family Planning Program*, KAISER FAMILY FOUND. (Dec. 20, 2019), <https://www.kff.org/interactive/the-status-of-participation-in-the-title-x-federal-family-planning-program/>.

42. Mathieu Despard, Michal Grinstein-Weiss, Yung Chun & Stephen Roll, *COVID-19 Job and Income Loss Leading to More Hunger and Financial Hardship*, BROOKINGS (July 13, 2020), <https://www.brookings.edu/blog/up-front/2020/07/13/covid-19-job-and-income-loss-leading-to-more-hunger-and-financial-hardship/#cancel>.

43. *Why are Black Women at Such High Risk of Dying from Pregnancy Complications?*, AMERICAN HEART ASS’N (Feb. 20, 2019), <https://www.heart.org/en/news/2019/02/20/why-are-black-women-at-such-high-risk-of-dying-from-pregnancy-complications> [hereinafter *Why are Black Women at Such High Risk of Dying From Pregnancy Complications?*].

44. Nina Bahadur, *Is COVID-19 Making Black Birth More Complicated?*, CBS NEWS (Aug. 10, 2020, 11:55 AM), <https://www.cbsnews.com/news/coronavirus-black-childbirth-pregnancy-complicated-covid-19/>.

Consider that the United States has the worst maternal mortality rate among similarly situated countries, and Black women are up to four times more likely to die from a pregnancy-related death than white women.⁴⁵ Due to the pandemic, many pregnant people have received care via telemedicine, rather than in-person visits.⁴⁶ Although telemedicine could potentially improve access to prenatal care, the studies showing improved birth outcomes included “mainly white, usually wealthy, and privately-insured populations.”⁴⁷ Given that Black, Latinx, and Native American pregnant people receive less prenatal care than other racial groups, and that many Black women’s prenatal and postnatal complaints are dismissed even in pre-pandemic times, it is important to ensure that telehealth is not exacerbating the divides that already exist.⁴⁸ In one recent case in New York City, where Black women die in childbirth at rates twelve times that of white women,⁴⁹ a pregnant Black woman died due to complications that could have been detected with in-person visits.⁵⁰ The issue of what is adequate prenatal and postnatal care during the pandemic for people of color needs more attention, especially when physicians report that pregnant patients are delaying care due to fear of contracting the virus.⁵¹

45. Julia Belluz, *We Finally Have a New US Maternal Mortality Estimate. It's Still Terrible.*, Vox (Jan. 30, 2020, 10:40 AM EST), <https://www.vox.com/2020/1/30/21113782/pregnancy-deaths-us-maternal-mortality-rate>; Rachel Mayer, Alison Dingwall, Juli Simon-Thomas, Abdul Sheikhnuureldin & Kathy Lewis, *The United States Maternal Mortality Rate Will Continue To Increase Without Access To Data*, HEALTH AFF. (Feb. 4, 2019), <https://www.healthaffairs.org/doi/10.1377/hblog20190130.92512/full/>.

46. Joni Sweet, *What It's Like to Give Birth With COVID-19*, HEALTHLINE (Nov. 21, 2020), <https://www.healthline.com/health-news/what-its-like-to-give-birth-with-covid-19>.

47. Cassie Shortsleeve, *What Does Virtual Care Mean for the Future of Maternal Health?*, INSTYLE, <https://www.instyle.com/beauty/health-fitness/virtual-prenatal-postpartum-care-maternal-health-crisis> (last updated June 18, 2020); see Gabriela Weigel, Brittnei Frederiksen & Usha Ranji, *Telemedicine and Pregnancy Care*, KAISER FAMILY FOUND. (Feb. 26, 2020), <https://www.kff.org/womens-health-policy/issue-brief/telemedicine-and-pregnancy-care/>.

48. Agency for Healthcare Research and Quality, *Disparities in Health Care Quality Among Minority Women: Maternal and Child Health*, U.S. DEP'T OF HEALTH AND HUM. SERVICES (Oct. 2012), <https://archive.ahrq.gov/research/findings/nhqrdr/nhqrdr11/minority-women.html#maternal>; *Why are Black Women at Such High Risk of Dying from Pregnancy Complications?*, *supra* note 43.

49. N.Y.C. Dep't of Health and Mental Hygiene, Bureau of Maternal, Infant and Reproductive Health, *Pregnancy-Associated Mortality: New York City, 2006–2010*, CITY OF NEW YORK, <https://www1.nyc.gov/assets/doh/downloads/pdf/ms/pregnancy-associated-mortality-report.pdf> (last visited Mar. 25, 2021).

50. Ese Olumhense, *A Pregnant Woman Tweeted Concerns About a Bronx Hospital. She Died Days Later.*, THE CITY (Apr. 27, 2020, 10:15 PM EDT), <https://www.thecity.nyc/health/2020/4/27/21247056/a-pregnant-woman-tweeted-concerns-about-a-bronx-hospital-she-died-days-later>.

51. Sheri Fink, *Hope, and New Life, in a Brooklyn Maternity Ward Fighting Covid-19*, N.Y. TIMES, Apr. 12, 2020, <https://www.nytimes.com/2020/04/12/nyregion/coronavirus-births-mothers.html>.

Pregnant people experience acute effects of COVID infection and can pass the virus to their infant via nursing or other contact.⁵² To protect health care workers and preserve equipment, two New York hospital systems prohibited visitors to delivery and labor departments.⁵³ After an outcry, the governor issued an order preventing hospitals from barring all visitors.⁵⁴ Some medical facilities now permit just one person to visit. People who rely on the care of a doula or birthing support person then have to choose between their birth assistant and a partner or family member to be present during labor. Having in-person support is especially important for pregnant people of color.⁵⁵ The “Giving Voices to Mothers” study found that poor Native American, Black, and Latinx women report much higher rates of mistreatment by providers during birthing than white women.⁵⁶ Although safety in a pandemic is certainly important, we need to ensure that even protective measures passed with good intentions do not have disparate racial impacts.

C. The Right to Parent a Child

The third tenet of RJ is recognition of a right to parent one’s children with dignity. With disturbing recent reminders like George Floyd and Ahmaud Arbery caught on video, the crisis of over-policing and punishing the Black community could not be clearer.⁵⁷ Black men are disproportionately incarcerated;⁵⁸ in addition to the injustice they face,

52. Angela N. Baldwin, *Pregnant Women with COVID-19 Not More Likely to Die, but Possibly More Likely to Get Sick, Studies Find*, ABC NEWS (June 25, 2020, 8:58 PM), <https://abcnews.go.com/Health/pregnant-women-covid-19-die-possibly-sick-studies/story?id=71450430>; *Breastfeeding and COVID-19*, WORLD HEALTH ORG. (June 23, 2020), <https://www.who.int/news-room/commentaries/detail/breastfeeding-and-covid-19>.

53. Katie Van Syckle & Christina Caron, *Women Will Not Be Forced to Be Alone When They Are Giving Birth*, N.Y. TIMES, Mar. 28, 2020, <https://www.nytimes.com/2020/03/28/parenting/nyc-coronavirus-hospitals-visitors-labor.html>.

54. *Id.*

55. *Id.*

56. Saraswathi Vedam, Kathrin Stoll, Tanya Khemet Taiwo, Nicholas Rubashkin, Melissa Cheyney, Nan Strauss, Monica McLemore, Micaela Cadena, Elizabeth Nethery, Eleanor Rushton, Laura Schummers, Eugene Declercq, & the GVTM-US Steering Council, *The Giving Voice to Mothers Study: Inequity and Mistreatment During Pregnancy and Childbirth in the United States*, REPRODUCTIVE HEALTH (June 11, 2019), <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-019-0729-2>.

57. Connor Maxwell & Danyelle Solomon, *Mass Incarceration, Stress, and Black Infant Mortality*, CENTER FOR AM. PROGRESS (June 5, 2018, 9:01 AM), <https://www.americanprogress.org/issues/race/reports/2018/06/05/451647/mass-incarceration-stress-black-infant-mortality/>.

58. Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

their children bear the consequences of having parents held unfairly in the criminal justice system.⁵⁹ Over-policing is associated with a higher infant mortality rate.⁶⁰ Black women also suffer financial, emotional, and childrearing burdens related to mass incarceration.⁶¹ In addition, Black mothers are more likely to work in low-wage jobs and need affordable childcare options.⁶²

Many childcare facilities are closed due to the pandemic but, as discussed above, many women of color are essential workers who cannot work from home.⁶³ The lack of affordable childcare is a challenge during normal times. But with schools closed and a shortage of childcare, single mothers—who are disproportionately Black, Latina, and Native American—are particularly vulnerable.⁶⁴ Financial instability could result in greater involvement by child welfare officials, who have long targeted Black, single mothers. As Dorothy Roberts has documented, Black mothers disproportionately have their parenting decisions questioned and subjected to “extraordinary scrutiny and vilification” by the state,⁶⁵ which in turn leads to the overrepresentation of Black children in the foster care system.⁶⁶ Khiara Bridges critiques how poor mothers are more likely to be subject to child welfare investigations and posits that the fact of poverty itself “gives the state a legitimate reason to suspect child maltreatment.”⁶⁷

59. Leila Morsy & Richard Rothstein, *How Does Our Discriminatory Criminal Justice System Affect Children?*, ECON. POL’Y INST. (Dec. 21, 2016), <https://www.epi.org/publication/how-does-our-discriminatory-criminal-justice-system-affect-children-black-children-are-six-times-as-likely-as-white-children-to-have-a-parent-whos-been-incarcerated/>.

60. Maxwell & Solomon, *supra* note 57.

61. Margaret Goff, *Three Ways Mass Incarceration Affects Women of Color*, URB. INST. (Mar. 30, 2018), <https://www.urban.org/urban-wire/three-ways-mass-incarceration-affects-women-color>.

62. Sarah Jane Glynn & Katie Hamm, *The Economics of Caregiving for Working Mothers*, CTR. FOR AM. PROGRESS (Dec. 10, 2019, 9:02 AM), <https://www.americanprogress.org/issues/earlychildhood/reports/2019/12/10/478387/economics-caregiving-working-mothers/>.

63. Marguerite Ward, *The Pandemic is Set to Shutter 40% of US Childcare Centers — and It Could Prove Catastrophic for the Careers of American Women*, BUS. INSIDER (July 30, 2020, 10:54 AM), <https://www.businessinsider.com/pandemic-child-care-closures-could-be-terrible-for-womens-careers-2020-5>.

64. Nicole Chavez & Artemis Moshtagian, *48 States Have Ordered or Recommended That Schools Don’t Reopen This Academic Year*, CNN, <https://www.cnn.com/2020/04/18/us/schools-closed-coronavirus/index.html> (last updated May 7, 2020); Kids Count Data Center, *Children in Single-Parent Families by Race in the United States*, THE ANNIE E. CASEY FOUND., <https://datacenter.kidscount.org/data/tables/107-children-in-single-parent-families-by-race#detailed/1/any/false/37,871,870,573,869,36,868,867,133,38/10,11,9,12,1,185,13/432,431> (last visited Mar. 25, 2021).

65. Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, THE APPEAL (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/>.

66. DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* vi (2002).

67. KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 114 (2017).

As an overarching, and concluding, concern, Americans are facing unprecedented economic uncertainty with high unemployment rates, loss of income, loss of health insurance, and lack of ability to pay rent or mortgages. These economic realities are worse in states that did not expand Medicaid.⁶⁸ The dim economic outlook makes it difficult to raise children for all people, but especially people of color, who are facing more dire financial consequences of this pandemic.⁶⁹ These problems are outside the court's ambit, and we need to refocus the conversation on policymakers, not courts.

IV. MUCH WORK LEFT TO DO

Though there are numerous reproductive injustices exacerbated by the pandemic, the purpose of this essay is to survey some of the most salient, particularly as they impact communities of color.

In taking up these injustices, advocates cannot look to courts alone to address the RJ challenges posed by COVID-19. In *Policing the Womb*, Michele Goodwin suggests that a "Reproductive Justice Bill of Rights" may be helpful, at least conceptually, to focus on the broad RJ challenges facing women.⁷⁰ David S. Cohen and Carol Joffe, in their book, *Obstacle Course*, note that "addressing the massive income inequality that characterizes American society" could improve the lives of people who seek abortions.⁷¹ Community-led policies, long-term financial and legislative support, universal health insurance, and dismantling structural discrimination are vital to restoring reproductive justice.

68. Michael Stein & Nicole Huberfeld, *A Straightforward Solution to the Newly Uninsured*, THE HILL (June 8, 2020, 7:00 PM EDT), <https://thehill.com/opinion/healthcare/501743-a-straightforward-solution-to-the-newly-uninsured>.

69. Danielle Kurtzleben, *Job Losses Higher Among People of Color During Coronavirus Pandemic*, NPR (Apr. 22, 2020, 10:18 AM EDT), <https://www.npr.org/2020/04/22/840276956/minorities-often-work-these-jobs-they-were-among-first-to-go-in-coronavirus-layo>.

70. Goodwin, *supra* note 20, at 165.

71. DAVID S. COHEN & CAROL JOFFE, *OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA* 236 (2020).