

Real Choice: Abortion Rights Reconstruction

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INTRODUCTION

Beginning in 1965¹ with the revolutionary era of the emergence of widespread access to birth control and abortion,² coupled with social acceptance of non-marital sex and parenthood,³ American women and men experienced a radical change in the scope of their personal freedom. Whether that freedom was actual rather than theoretical varied by class and race.⁴ And it was freedom that was heterosexual only until 2003, with the beginning of LGBTQ+ freedom to have sex, marry, and form families by decriminalizing sodomy.⁵

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¹ See *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965).

² See *Roe v. Wade*, 410 U.S. 113, 154 (1973).

³ See *Eisenstadt v. Baird*, 405 U.S. 438, 438 (1972); Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR.: PARENTHOOD (Apr. 25, 2018), <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents> (changing social acceptance of single parenthood and non-marital parenthood). For the series of core cases on the rights of unmarried fathers, see generally *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). On fathers and the Constitution, see generally Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1271 (2005).

⁴ It has not escaped the attention of advocates and scholars that the freedom experienced for roughly half a century was unevenly experienced by class and race. See Brandi Leigh Jones, Comment, *Whose Choice? Exploring the Need for Greater Class-consciousness Within the Reproductive Rights Movement*, 32 HAMLINE J. PUB. L. & POL'Y 1, 3-4 (2010). See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1999); ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* (1981).

⁵ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Obergefell v. Hodges*, 576 U.S. 644 (2015); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1999); ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* (1981).

For many, this heady reproductive freedom and ability to define one's life by having and making reproductive choices was heavily circumscribed and hardly real.⁶ The lack of support for pregnancy—and even more significantly the lack of support for children once born—meant that women, and sometimes men, were making decisions within the realities of the inability to complete their education, the elimination or limitation of employment opportunities, and the sheer impossibility of financially supporting a child when deciding whether to continue or end a pregnancy.⁷ The absence of work/family policies meant not only the lack of time off for childbirth or recovery from childbirth, but also the long-term unavailability of time off for childcare emergencies like commonplace childhood illnesses as well as other caregiving demands. In addition, the lack of universally available quality childcare and the absence of even the most minimal work/family policies such as universal sick leave made combining caregiving with work predictably difficult.⁸ This lack of support for children and families disproportionately affected women, but it also significantly stymied the equal engagement of men in caregiving.⁹

The challenge to reproductive freedom (however imperfect) triggered by *Dobbs*'¹⁰ reversal of *Roe*,¹¹ and the fight to preserve choice should include critical examination of the state of choice. Let me be clear: *Dobbs* was wrongly decided, and women's right to choice is essential. But more than restoration is needed; reconstruction is essential. I argue that choice is not meaningful when the lack of support for children and families influences personal decision-making and the quality of children's lives. The privatization of responsibility for children perpetuates inequalities and fosters subordination.¹² This

⁶ See Madeline Curtis, Note, *Inconceivable: How Barriers to Infertility Treatment for Low-income Women Amount to Reproductive Oppression*, 25 GEO. J. POVERTY L. & POL'Y 323, 341 (2018); Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2050–51 (2021); see also Jones, *supra* note 4, at 3, 5.

⁷ See *infra* notes 36–55 and accompanying text.

⁸ See *infra* notes 36–55 and accompanying text.

⁹ See *infra* notes 56–59 and accompanying text.

¹⁰ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹¹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹² CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014); MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 257 (2010) [hereinafter *The Vulnerable Subject and the Responsive State*]; MARTHA ALBERTSON FINEMAN, *THE*

is an anti-life, anti-child context, sharply at odds with the rhetoric of the anti-abortion movement. One might question the vision of this movement in terms of the lives of children who are “saved” by limiting or prohibiting abortion.¹³ And it is reasonable to question whether this is a racist strategy to enhance white births.¹⁴ Support of children and maximizing the opportunities and well-being of each child and their caregiver(s) allows for unfettered choice that benefits the freedom of women and men across race and class lines, ensuring the equality of all children and their well-being as an essential social good.

In this Article, I elaborate on the choice/freedom dynamic within the structural support of children and families. I urge the reconstruction of choice and freedom not only to eliminate the inequalities in the exercise of access to birth control and abortion and the provision of high quality pregnancy and childbirth care, but also to include strong, comprehensive support for the care of *all* children and their families that ensures each child’s right to maximize their well-being and developmental capacity.¹⁵ This Article has three parts. First, I explore the data on why women choose to have abortions.¹⁶ I link that exploration to structural problems that women reflect in their decision-making: the absence of supports for children and families, the inadequacies of work/family policies, and the differential impact of children and caregiving on women and men.¹⁷ I also consider that structural framework in the context of family patterns with a special

AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) [hereinafter THE AUTONOMY MYTH].

¹³ Linda A. Jacobsen, *Are the States Banning Abortion Truly Pro-child or Just Pro-birth?*, POPULATION REFERENCE BUREAU (Aug. 9, 2022), <https://www.prb.org/articles/are-the-states-banning-abortion-truly-pro-child-or-just-pro-birth>; Jackie Calmes, *Column: Republican ‘Pro-Life’ Advocacy Ends with a Child’s Birth*, L.A. TIMES: OP. (May 13, 2022, 3:15 AM), <https://www.latimes.com/opinion/story/2022-05-13/republicans-pro-life-mothers-children-abortion-birth-pregnancy-roe>.

¹⁴ See Carla Bell, *Race Against Time: How White Fear of Genetic Annihilation Fuels Abortion Bans*, YES! MAG. (July 4, 2019), <https://www.yesmagazine.org/social-justice/2019/07/04/abortion-ban-fear-white-extinction-babies>; Alex Samuels & Monica Potts, *How The Fight To Ban Abortion Is Rooted in the ‘Great Replacement’ Theory*, FIVE THIRTY EIGHT: FEATURES (July 25, 2022, 6:00 AM), <https://fivethirtyeight.com/features/how-the-fight-to-ban-abortion-is-rooted-in-the-great-replacement-theory>; Alex DiBranco, *The Long History of the Anti-Abortion Movement’s Links to White Supremacists*, NATION: POL. (Feb. 3, 2020), <https://www.thenation.com/article/politics/anti-abortion-white-supremacy>.

¹⁵ See generally NANCY E. DOWD, REIMAGINING EQUALITY: A NEW DEAL FOR CHILDREN OF COLOR (2018) [hereinafter REIMAGINING EQUALITY].

¹⁶ See *infra* notes 20–35 and accompanying text.

¹⁷ See *infra* notes 36–59 and accompanying text.

focus on single parents and the patterns of children's inequalities with particular attention to early childhood.¹⁸ This data is the basis for the analysis of the unfreedom/lack of freedom that has persisted since before *Roe* to this day, set out in Part II. Women's decision-making is a window into the broad context that undermines women's freedom and children's equality.

At the heart of reconstruction of reproductive freedom is imagining robust choice—broad freedom available to all, not just those privileged to actually exercise choice. In the final Part of the Article, I explore what that might look like and what component pieces might be included.¹⁹ Hardly unattainable, multiple models provide alternatives, with critical insights from those examples. This requires not only policies and commitments, resources and programs, but perhaps most significantly, a reorientation of principles.

Dobbs has galvanized a movement for freedom and equal citizenship. I argue here that we should think broadly and comprehensively, unbound by past practice but informed by its limitations, seeking not simply to restore choice but to expand choice so as to make freedom equal and to achieve children's equality. This resists a simplistic, legalistic, formal idea of choice and instead links it to the implications and life course of men, the lived realities of parents and families, and the intersectional inequalities that bedevil children and adults on the grounds of race and class.

I. DATA: WHY WOMEN CHOOSE ABORTION

Abortion is the most common surgery for women in their lifetime: one in four American women will have an abortion.²⁰ Overwhelmingly, most abortions, whether surgical or medical abortions, occur during the first trimester.²¹ The demographics of who has abortions disproportionately include unmarried women and women of color.

In the [District of Columbia and] 46 states that reported data to the CDC in 2020, the majority of women who had abortions (57%) were in their 20s, while about three-in-ten (31%) were in their 30s. Teens ages 13 to 19 accounted for

¹⁸ See *infra* notes 61–67 and accompanying text.

¹⁹ See *infra* Part III.

²⁰ Luu D. Ireland, *Who Are the 1 in 4 American Women Who Choose Abortion?*, THE CONVERSATION: HEALTH (May 30, 2019), <https://theconversation.com/who-are-the-1-in-4-american-women-who-choose-abortion-118016>.

²¹ *Id.*

8% of those who had abortions, while women in their 40s accounted for 4%.

The vast majority of women who had abortions in 2020 were unmarried (86%), while married women accounted for 14%, according to the CDC, which had data on this from 39 states and New York City (but not the rest of New York).

In the District of Columbia and 29 states that reported racial and ethnic data on abortion to the CDC, 39% of all women who had abortions in 2020 were non-Hispanic Black, while 33% were non-Hispanic White, 21% were Hispanic, and 7% were of other races or ethnicities.

Among those ages 15 to 44, there were 24.4 abortions per 1,000 non-Hispanic Black women; 11.4 abortions per 1,000 Hispanic women; 6.2 abortions per 1,000 non-Hispanic White women; and 12.7 abortions per 1,000 women of other races or ethnicities in that age range, the CDC reported from those same 29 states and the District of Columbia.²²

The available data on *why* women choose abortion is surprisingly scarce. It suggests that their decision-making is complex, with the choice often made for multiple reasons and highly dependent on their age and individual circumstances.²³ Among the most common reasons cited, however, are contextual ones, such as the impact of having a child on the mother's education, job, ability to raise a child financially, or the stress of adding a child to existing responsibilities for care of others.²⁴ Moreover, the disproportionate rate of abortions for women of color is likely connected to their greater likelihood of making decisions in the context of negative prospective circumstances linked

²² Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), <https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2>; see also Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html>; *Abortion*, WORLD HEALTH ORG. (Nov. 25, 2021), <https://www.who.int/news-room/fact-sheets/detail/abortion>.

²³ See Rachel K. Jones et al., "I Would Want to Give My Child, Like, Everything in the World": *How Issues of Motherhood Influence Women Who Have Abortions*, 29 J. FAM. ISSUES 79, 88–98 (2008); Sophia Chae et al., *Reasons Why Women Have Induced Abortions: A Synthesis of Findings from 14 Countries*, 96 CONTRACEPTION 233, 235–36 (2017).

²⁴ Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 110 (2005), <https://www.guttmacher.org/journals/psrh/2005/reasons-us-women-have-abortions-quantitative-and-qualitative-perspectives>.

to structural racism, not to irresponsibility or the absence of family planning.

A classic but dated study of why women choose abortion is the 2004 Guttmacher study, which found that many women cited choosing not to have a child due to interference with education and/or work, that they did not want to become a single mother, or that it would interfere with their relationship:

The reasons most frequently cited were that having a child would interfere with a woman's education, work or ability to care for dependents (74%); that she could not afford a baby now (73%); and that she did not want to be a single mother or was having relationship problems (48%). Nearly four in 10 women said they had completed their childbearing, and almost one-third were not ready to have a child. Fewer than 1% said their parents' or partners' desire for them to have an abortion was the most important reason. Younger women often reported that they were unprepared for the transition to motherhood, while older women regularly cited their responsibility to dependents.²⁵

Women often cited multiple reasons for wanting an abortion, not a single factor. "The decision to have an abortion is typically motivated by multiple, diverse and interrelated reasons. The themes of responsibility to others and resource limitations, such as financial constraints and lack of partner support, recurred throughout the study."²⁶ It is notable that a sizable proportion, nearly half, of all women who choose to have abortions are already mothers with full knowledge of the realities of parenthood.

A study conducted a decade later confirmed the underlying reasons for choice and that most women decide to have abortions for multiple reasons:

Women's reasons for seeking an abortion fell into 11 broad themes. The predominant themes identified as reasons for seeking abortion included financial reasons (40%), timing (36%), partner related reasons (31%), and the need to focus on other children (29%). Most women reported multiple reasons for seeking an abortion crossing over several themes (64%). Using mixed effects multivariate logistic regression analyses, we identified the social and demographic

²⁵ Finer et al., *supra* note 24, at 110.

²⁶ *Id.*

predictors of the predominant themes women gave for seeking an abortion.²⁷

A 2017 compilation of data from multiple countries, including the United States, noted the scarcity and limitations of data.²⁸ Nevertheless, the report concluded that “[i]n most countries, the most frequently cited reasons for having an abortion were socioeconomic concerns or limiting childbearing.”²⁹

The Turnaway Study, which was a study of women who sought abortions but were denied them, provides additional insights around abortion decision-making.³⁰ The study monitored women for five years after they sought an abortion.³¹

In more than 40 reports published in peer-reviewed scientific journals, researchers analyzed what happened to the women, adjusting for potential confounding factors such as age. The overall finding was that, on average, receiving an abortion [did not] harm women’s mental or physical health, but being

²⁷ M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN’S HEALTH 1, 1 (2013) (“Study findings demonstrate that the reasons women seek abortion are complex and interrelated, similar to those found in previous studies. While some women stated only one factor that contributed to their desire to terminate their pregnancies, others pointed to a myriad of factors that, cumulatively, resulted in their seeking abortion. As indicated by the differences we observed among women’s reasons by individual characteristics, women seek abortion for reasons related to their circumstances, including their socioeconomic status, age, health, parity and marital status.”).

²⁸ Chae et al., *supra* note 23, at 233 (collecting data from fourteen developed countries and noting the lack of data from less developed countries). On the scarcity of data, see also Christina San Fillipo, *Why Women Should Make the Abortion Decision: Damned if You Do, Damned if You Don’t* 22–23 (Sept. 17, 2020) (Thesis, Ramapo College), <https://www.ramapo.edu/law-journal/thesis/why-women-should-make-the-abortion-decision-damned-if-you-do-damned-if-you-dont> for a pretty comprehensive look, and the same two studies, noted above, were cited. So this continues the picture that not much research has been done on the why, and/or that the whys that we have confirmed what we think we know, e.g., financial, partner, not the right time, interfere with my life (education, job), reasons tied to self-control of one’s life, and the realities of lack of support for children and families, individual responsibility not a social responsibility.

²⁹ Chae et al., *supra* note 23, at 233.

³⁰ See Diana Greene Foster et. al., *The Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, <https://www.ansirh.org/research/ongoing/turnaway-study> (last visited Mar. 14, 2023).

³¹ Amy Maxmen, *Why Hundreds of Scientists are Weighing In on a High-Stakes Abortion Case*, 599 NATURE 187, 188 (2021), <https://www.nature.com/articles/d41586-021-02834-7>.

denied an abortion resulted in some negative financial and health outcomes.³²

The educational and economic consequences of abortion denial were also summarized in the economists' brief³³ summarizing the data on the connection, filed in *Dobbs*:

Some of the studies described in the economists' amicus brief find that abortion legalization in the 1970s helped to increase women's educational attainment, participation in the labour force and earnings[—especially for single Black women]. That remains true, the brief says. For example, one study posted last year assessed about 560 women of comparable age and financial standing periodically after they either got an abortion or were unable to get an abortion they sought. After five years, the group that was turned away from an abortion had experienced a 78% increase in overdue debt and an 81% increase in publicly recorded financial events, such as bankruptcies and evictions. Meanwhile, the overdue debt of women who had received an abortion remained stable, and their financial events had declined modestly.³⁴

The concept of abortion choice should be reconstructed to center the perspective of marginalized women, and particularly women of color, and requires a broad notion of choice with both history and current lived realities guiding the scope of action.³⁵

II. ANALYSIS

The available data on why women seek abortions underscores the complexity and multiple factor process of their decision-making. While some of the factors are unique and personal, it is striking that so many of the factors point to the perceived consequences of continuing the pregnancy and raising a child: the impact on education plans and opportunities, the impact of existing or future work plans and opportunities, and concerns about the financial framework within which they are functioning. This points to a series of factors that infuse the decision-making process.

³² *Id.*

³³ See Brief of Amici Curiae Economists in Support of Respondents at 11–15, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

³⁴ Maxmen, *supra* note 31, at 189.

³⁵ See Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1206–07 (2017); MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 191 (2019) [hereinafter POLICING THE WOMB].

A. *Supporting Families*

First, this points to the framework or, more precisely, the lack of a framework for the support of families and children.³⁶ The American framework for supporting children and families is a private model oriented around privacy doctrines that protect the family against state intrusion and maximize parental choice.³⁷ This is a model of private responsibility rather than state support to ensure the well-being of children.³⁸ Ironically, post-*Dobbs*, the states with the most restrictive abortion laws or total bans offer the least support (with support very narrowly defined) for children.³⁹

The absence of support begins with the health care system before children are born. Although some state support for health care is provided through Medicaid, the inadequacies and shortcomings of health care for children mean that women are not guaranteed high-quality health care during pregnancy.⁴⁰ Childbirth in the United States remains risky, particularly so for women of color without respect to class, but even more disproportionately risky when non-white women and low-income factors are combined.⁴¹

In addition to the lack of high-quality health care, women are not supported in the workplace to ensure appropriate accommodation or

³⁶ See, e.g., REIMAGINING EQUALITY, *supra* note 15, at 46; BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 10–11 (2008).

³⁷ See WOODHOUSE, *supra* note 36, at 8–9.

³⁸ See Barbara Bennett Woodhouse, *The Family-Supportive Nature of the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 37, 37 (Jonathan Todres et al. eds., 2006); Barbara Bennett Woodhouse, *Comparative Perspectives*, in A EUROPEAN PERSPECTIVE ON THE RIGHTS OF CHILDREN AND ADOLESCENTS (*Minors and the New Rights*, Elena Urso ed., Vol. 14, 2014).

³⁹ Emily Badger et al., *States with Abortion Bans are Among Least Supportive for Mothers and Children*, N.Y. TIMES (July 28, 2022), <http://www.nytimes.com/2022/07/28/upshot/abortion-bans-states-social-services.html>.

⁴⁰ See Munira Z. Gunja et al., *What Is the Status of Women's Health and Health Care in the U.S. Compared to Ten Other Countries?*, THE COMMONWEALTH FUND (Dec. 19, 2018), <https://www.commonwealthfund.org/publications/issue-briefs/2018/dec/womens-health-us-compared-ten-other-countries> (“U.S. women report the least positive experiences among the 11 [wealthy] countries studied. They have the greatest burden of chronic illness, highest rates of skipping needed health care because of cost, [and] difficulty affording their healthcare.”).

⁴¹ POLICING THE WOMB, *supra* note 35, at 137–40.

other support.⁴² Women who do not make sufficient income are not provided supplemental income essential to secure good housing, avoid food scarcity, and ensure good nutrition during pregnancy.⁴³

At birth, a high proportion of women are not guaranteed any form of leave to give birth and recover from birth, nor are they assured they will have time to bond with their child for a period of parental leave.⁴⁴ Much of the leave that is provided is unpaid.⁴⁵ The lack of parental leave and the lack of paid leave discourages fathers from providing care or taking much time at the birth of their children, feeding the disproportionate care patterns of men as compared to women.⁴⁶

The importance of the first thousand days of a child's life (and the average of 280 days in utero) cannot be understated.⁴⁷ The absence of robust early childhood policies, discussed in more detail below, means that although children are relatively equal at birth, by eighteen months inequalities emerge based not on capacity but rather on the differences in developmental context.⁴⁸ The differential quality

⁴² CARLY McCANN & DONALD TOMASKOVIC-DEVVEY, UNIV. OF MASS. AMHERST, CTR. FOR EMP. EQUITY, PREGNANCY DISCRIMINATION AT WORK: AN ANALYSIS OF PREGNANCY DISCRIMINATION CHARGES FILED WITH THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 8–9 (2021); Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>.

⁴³ See INST. FOR WOMEN'S POL'Y RSCH., GENDER WAGE GAPS REMAIN WIDE IN YEAR TWO OF THE PANDEMIC 1 (2022), https://iwpr.org/wp-content/uploads/2022/02/Gender-Wage-Gaps-in-Year-Two-of-Pandemic_FINAL.pdf (“In 2021, women earned just 83.1 percent of what men earned.”).

⁴⁴ See Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave>.

⁴⁵ See *What Data Does the BLS Publish on Family Leave?*, BUREAU OF LAB. STAT. (Sept. 23, 2021), <https://www.bls.gov/ebs/factsheets/family-leave-benefits-fact-sheet.htm> (“In March 2021, 23 percent of civilian workers had access to paid family leave and 89 percent had access to unpaid family leave. Twenty-three percent of private industry workers had access to paid family leave and 89 had access to unpaid family leave. Amongst state and local government workers, 26 percent had access to paid family leave and 94 had access to unpaid family leave.”).

⁴⁶ See Gretchen Livingston, *Stay-at-Home Moms and Dads Account for About One-in-Five U.S. Parents*, PEW RSCH. CTR. (Sept. 24, 2018), <https://www.pewresearch.org/fact-tank/2018/09/24/stay-at-home-moms-and-dads-account-for-about-one-in-five-u-s-parents>.

⁴⁷ See generally Scott A. Rivkees, *Protecting the First 1000 Days of Life and the 280 Days Before*, 71 FLA. L. REV. F. 113 (2019).

⁴⁸ REIMAGINING EQUALITY, *supra* note 15, at 58, 105.

of support during pregnancy is magnified and continues during critical early child development years so that children arriving in preschool or kindergarten are already unequal due to the lack of an environment that supports their maximum development.⁴⁹

Unavailable health care, housing, and income support during pregnancy and early childhood continues during children's lives as they grow and develop into adults.⁵⁰ The most profound burden in their lives is poverty. Poverty affects each of these structural areas and results in powerful developmental risks and impacts.⁵¹ The child poverty rate in the United States has persisted at a rate of roughly one-in-five children and at times has risen above one in four.⁵² The rate among families of color is even higher, a harsh marker of persisting inequality.⁵³

The lack of structural supports for all children creates what one author calls an "Ovarian Lottery": children's inequalities are not random, but they are subject to limits linked to structures.⁵⁴ Children's well-being and development are left to an unequal set of chances that are the consequence of the context into which they are born.⁵⁵ Health care, housing, and income factors all impact the lives of children dramatically; these are known patterns for every person making reproductive decisions. Their choices are not "free" but instead are highly circumscribed. As noted earlier, the most common ages for abortion decision-making are women in their twenties and thirties.⁵⁶ Thus, these decisions are being made in the realities of structural inadequacies that underscore personal capability to raise children.

⁴⁹ *Id.* at 15–16.

⁵⁰ *Id.* at 46.

⁵¹ See Craig Benson, *Poverty Rate of Children Higher Than National Rate, Lower for Older Populations*, U.S. CENSUS BUREAU (Oct. 4, 2022), <https://www.census.gov/library/stories/2022/10/poverty-rate-varies-by-age-groups.html> ("The child poverty rate (for people under age 18) was 16.9% in 2021, 4.2 percentage points higher than the national rate, while poverty for those ages 65 and over was 10.3%, 2.5 percentage points lower than the national rate.").

⁵² *Id.*

⁵³ Areeba Haider, *The Basic Facts About Children in Poverty*, CTR. FOR AM. PROGRESS (Jan. 12, 2021), <https://www.americanprogress.org/article/basic-facts-children-poverty> ("Children of color across most racial categories are more likely to experience poverty than their white counterparts . . . Black, Hispanic, and American Indian and Alaskan Native (AIAN) children have the highest rates of poverty.").

⁵⁴ Susan Nittrouer, *Ending the Lottery*, 71 FLA. L. REV. F. 132, 133–34 (2019).

⁵⁵ See *id.*

⁵⁶ Ireland, *supra* note 20.

B. *Caregiving Inequality*

A second critical piece of women's decision-making is the continuing disproportion in caregiving between women and men.⁵⁷ As the data indicate, women still disproportionately care for the children that they bring into the world. They do so in a world that continues to structure work in conflict with caregiving.⁵⁸ Not only are the structures to support children absent, but also the work essential to provide support under the private model is not organized to support or even accommodate caregiving. Certainly not all women's lives fit this model, but awareness of this context implicates the freedom of decision-making.

This gender asymmetry also continues to influence men's engagement in reproductive decision-making and meaningful, full care of their children. Women are expected to care for their children, and that expectation limits their opportunities; men are expected to be work primary, so actions contrary to that stereotype or construction of masculinity are disfavored and discouraged.⁵⁹ Pressure to conform to an "ideal worker" norm⁶⁰ not only impacts men and their opportunities, but also reinforces care expectations for women and disables couples from shared, equal coparenting. The weight of women's perceived responsibilities and obligations, and those expectations, is reflected in abortion decision-making linked to caregiving responsibilities.

⁵⁷ See Kim Parker, *Women More Than Men Adjust Their Careers for Family Life*, PEW RSCH. CTR. (Oct. 1, 2015), <https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life>.

⁵⁸ JOSEPH B. FULLER & MANJARI RAMAN, *THE CARING COMPANY: HOW EMPLOYERS CAN HELP EMPLOYEES MANAGE THEIR CAREGIVING RESPONSIBILITIES—WHILE REDUCING COSTS AND INCREASING PRODUCTIVITY* 12 (2019), https://www.hbs.edu/managing-the-future-of-work/Documents/The_Caring_Company.pdf.

⁵⁹ See Parker, *supra* note 57.

⁶⁰ JOAN WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 80–81 (2011) [hereinafter *RESHAPING THE WORK-FAMILY DEBATE*]; JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 25–30 (2000) [hereinafter *UNBENDING GENDER*].

C. *Diverse Family Forms*

A third factor that impacts abortion decision-making is the influence of diverse family patterns and expectations about the families within which a child might be born.⁶¹ It is notable that overwhelmingly the women who obtain abortions are unmarried.⁶² Sex and pregnancy outside of marriage is no longer universally condemned, but the realities of family patterns and the specific realities of single parenthood clearly remain relevant to decision-making.⁶³ The discouragement of an unmarried pregnancy and the stigma of single motherhood, recognized and acknowledged in *Roe* as a legitimate factor in women's decision-making,⁶⁴ has largely disappeared despite its continued prevalence in some families and communities.⁶⁵ What remains, however, is just as powerful: the lack of

⁶¹ See Stephanie Kramer, *U.S. Has World's Highest Rate of Children Living in Single-Parent Households*, PEW RSCH. CTR. (Dec. 12, 2019), <https://www.pewresearch.org/fact-tank/2019/12/12/u-s-children-more-likely-than-children-in-other-countries-to-live-with-just-one-parent>; Juliana Menasce Horowitz et al., *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s>.

⁶² Ireland, *supra* note 20.

⁶³ Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 20 (1995) [hereinafter *Stigmatizing Single Parents*]; NANCY E. DOWD, IN DEFENSE OF SINGLE PARENT FAMILIES (1997) [hereinafter IN DEFENSE OF SINGLE PARENT FAMILIES]; *Child Well-Being in Single-Parent Families*, THE ANNIE E. CASEY FOUND. (Aug. 1, 2022), https://www.aecf.org/blog/child-well-being-in-single-parent-families?gclid=Cj0KCQjA4aacBhCUARIsAI55maEhDoqk5YztRYqUltGOgnGpnwKyJwN4RRrrHYn-415bP3LssXGXYkwaAg5GEALw_wcB.

⁶⁴ *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.”).

⁶⁵ See Rebecca Wind, *Premarital Sex Is Nearly Universal Among Americans, and Has Been for Decades*, GUTTMACHER INST. (Dec. 19, 2006), <https://www.guttmacher.org/news-release/2006/premarital-sex-nearly-universal-among-americans-and-has-been-decades>; Amanda Barroso, *Key Takeaways on Americans' Views of and Experiences with Dating and Relationships*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-takeaways-on-americans-views-of-and-experiences-with-dating-and-relationships>; Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018),

support for single parents and the lack of support for children raised by single parents, making the form of family a huge factor in women's decision-making and in the well-being of children.⁶⁶

Moreover, family status at the time of pregnancy does not ensure stability. Family patterns for many women are fluid and unstable, evidenced by the family patterns relating to marriage, divorce, unmarried cohabitation, and single parenthood without a partner.⁶⁷ Coupled with the reality that parental partnerships fail is the asymmetrical pattern of post-divorce care. While joint custody in terms of parental decision-making is the norm, joint care is not.⁶⁸

D. *Intersectionality*

All of the structural factors—the lack of support for children and families; the gendered asymmetry in caregiving linked to ongoing work/family conflict; the lack of support for diverse family forms, especially single parent families—intersects and interacts with race and class inequalities that perpetuate children's inequalities by virtue of the inequalities of their parents.⁶⁹ The context of reproductive decision

<https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents>.

⁶⁶ *Stigmatizing Single Parents*, *supra* note 63, at 21, 34; IN DEFENSE OF SINGLE PARENT FAMILIES, *supra* note 63; *Child Well-Being in Single-Parent Families*, *supra* note 63.

⁶⁷ See sources cited *supra* note 60.

⁶⁸ TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2017-3 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf> (stating that in 2018, about four of five custodial parents were mothers and about one-of-five custodial parents were fathers.).

⁶⁹ The disproportionate impact of overturning *Roe* on the lives of Black women was noted in another amicus brief filed in *Dobbs*:

About one-quarter of people in poverty in the United States are Black. Joia Crear-Perry, president of the National Birth Equity Collaborative in Washington DC, warns that banning abortion would disproportionately harm the physical, mental and economic well-being of Black people with the capacity for pregnancy. In particular, Crear-Perry is concerned that abortion bans will raise the already dire rates of maternal mortality for Black women in the United States—which currently stand at 44 deaths per 100,000 births, four times the global average for high-income countries. The amicus brief that she co-signed with other health-equity researchers and advocates states: “Black women, in particular, who continue to experience the effects of racially-motivated policies and practices that impact their maternal health, must have the right to decide whether to continue a pregnancy to term.”

Brief of Amici Curiae Birth Equity Organizations and Scholars in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

making for Black women in particular is harsh, discouraging, and undermining. The lack of adequate health care and the risks of childbirth are extraordinarily prevalent and cross class lines.⁷⁰ Income disparity and job segregation are especially acute for Black women.⁷¹ Their financial challenges impact housing choices and neighborhood stability.⁷²

For children, this plays out in lifetime inequalities.⁷³ Those inequalities begin and are predictable in early childhood. “[G]aps in achievement, incidents of discipline, rates of suspension and exclusion, even funneling from school to juvenile justice in the school to prison pipeline, exacerbate the differences among children that present themselves at the schoolhouse door.”⁷⁴

The system that exacerbates the structural inequalities noted earlier (health, income, and housing) is education. Early childhood education is uneven and partial, widely varying in quality.⁷⁵ During the essential and critical years from birth to age five, the lack of structural supports creates and widens children’s early inequalities along racial lines. Once public education begins, inequalities go largely unaddressed, and even worsen.⁷⁶ Equity, or providing every child with what they need to maximize their developmental capacity, is virtually

⁷⁰ Latoya Hill et al., *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KAISER FAM. FOUND. (Nov. 1, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/#:~:text=Black%20and%20American%20Indian%20and,13.7%20per%20100%2C000>.

⁷¹ See generally NAT’L P’SHP FOR WOMEN & FAMILIES, BLACK WOMEN AND THE WAGE GAP (2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/african-american-women-wage-gap.pdf>; WILL MCGREW, WASH. CTR. FOR EQUITABLE GROWTH, HOW WORKPLACE SEGREGATION FOSTERS WAGE DISCRIMINATION FOR AFRICAN AMERICAN WOMEN I (2018), <https://equitablegrowth.org/how-workplace-segregation-fosters-wage-discrimination-for-african-american-women>.

⁷² Robin Bleiweis et al., *Women of Color and the Wage Gap*, CTR. FOR AM. PROGRESS (Nov. 17, 2021), <https://www.americanprogress.org/article/women-of-color-and-the-wage-gap>.

⁷³ See REIMAGINING EQUALITY, *supra* note 15, at 2; Nancy E. Dowd, *Children’s Equality Rights: Every Child’s Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1367 (2020).

⁷⁴ Nancy E. Dowd & Teresa Drake, *Early Childhood Matters*, 71 FLA. L. REV. F. 1, 1 (2019).

⁷⁵ See June Carbone, *The Fight to Expand Education—Two Centuries Apart*, 71 FLA. L. REV. F. 164, 164 (2019).

⁷⁶ Dowd, *supra* note 74.

unknown in public education, or is otherwise strongly limited. Re-segregated schools translate into racialized opportunity.⁷⁷

As previously noted, the example that most clearly brings this into focus is the life course of Black boys.⁷⁸ Their life situation is not a claim of priority but rather an exemplar of how race is a marker of inequality within intersecting systems and biases.⁷⁹ This begins at birth and continues in early childhood due to poverty, the undermining of Black neighborhoods and communities, poor childcare and early childhood education, and early racial awareness.⁸⁰ The pattern of racial disadvantage becomes one of race and gender disadvantage once Black boys enter school: they face stereotypes that affect their learning and result in disproportionate discipline and exclusion.⁸¹ By adolescence, they face not only the common challenges of that life stage, but also must construct a racial identity amidst a too-often reactionary pattern from adults, particularly teachers and police.⁸² Their very lives are endangered in far too many circumstances.⁸³ Their potential to emerge as adults with strong, positive, resilient personalities is confounded by the structural inadequacies of their context and the profound irony that their very success triggers conditions of risk throughout childhood.⁸⁴

Because the patterns of racial inequality are so deep, impacting the reproductive freedom particularly of Black women as well as women of color broadly, this calls for an overarching analysis of the reasons why women choose to have an abortion, overarching reproductive justice, and the needs for real freedom and equality, from their perspective.⁸⁵ The pro-choice movement, as with women's rights

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See REIMAGINING EQUALITY, *supra* note 15, at 9.

⁸⁰ *Id.* at 10.

⁸¹ *Id.*

⁸² *Id.*

⁸³ For all adolescents, accidents are the leading cause of death. *Mortality Among Teenagers Aged 12-19 Years: United States, 1999-2006*, NAT'L CTR. FOR HEALTH STAT. (May 2010), <https://www.cdc.gov/nchs/products/databriefs/db37.htm>. For Black males between the ages twelve through nineteen, homicide is the leading cause of death, according to 2018 data from the CDC. *Leading Causes of Death—Males—Non-Hispanic Black—United States, 2018*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 2, 2022), <https://www.cdc.gov/minorityhealth/lcod/men/2018/nonhispanic-black/index.htm>.

⁸⁴ See REIMAGINING EQUALITY, *supra* note 15, at 42–50.

⁸⁵ See generally POLICING THE WOMB, *supra* note 35.

generally, notoriously has been framed from the perspective of white women.⁸⁶ At the same time, it has ignored the history of subordination of the bodies, choices, and lives of women of color, as well as the inequalities and suppression of development and opportunity for their children. Essential to a vision of freedom and equality is making the perspective of women of color central.

III. VISION

What if these intersecting issues were removed from the context of reproductive choice? What if the choice could be made in the context of valuing children, parenting, women and men, and supporting families throughout the period of raising children from birth to adulthood? What if choice and decision-making were truly free, not dictated by structural limits? What if that meant choosing within a framework of equality, respecting and valuing the humanity of all across gender, race, and class lines, and the intersections and mutual support of an equal, pluralistic society? What if our vision of equality deliberately and intentionally worked from the perspective of those who have always struggled the most, suffered the most, and were most likely to exercise choice in only the most limited or even meaningless way?

I mean here not to be understood as being against abortion as a choice or encouraging continuation of a pregnancy by the elimination of factors that skew that decision. Rather, my perspective is to support the choice being unencumbered, not dictated by necessity or the sacrifice of dreams, or in reaction to sobering inequalities. Moreover, as much as women's choices should be truly free, men's choices should not rest on gendered norms or unacknowledged privilege. In addition, adult freedom and equality is only part of the picture: children's lives should be equal and assured of the support to reach their full developmental potential. The humanity of all children should be valued, supported, and acknowledged.

Imagine a world in which children and their parents are well supported, free and equal. Imagine the impact of that framework on reproductive decision-making, the distribution of care between women and men, and equality among children, parents, and their

⁸⁶ See Emma Goldberg, *I Can't Focus on Abortion Access if My People Are Dying*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2020/06/30/us/politics/abortion-supreme-court-gen-z.html>; Jill C. Morrison, *Resuscitating the Black Body: Reproductive Justice As Resistance to the State's Property Interest in Black Women's Reproductive Capacity*, 31 YALE J.L. & FEMINISM 35 (2019); Jones, *supra* note 5.

families untainted by race and class. This is a vision that would not only change the framework of decision-making for pregnant women and male reproductive thinking; it would also construct a framework for children's lives grounded in the care and equality of all children. The perspectives and viewpoints of women, men, and children each are essential to constructing a vision of freedom and equality, and inequalities among women, men, and children are integral to transforming reproductive choice to a right for all adults.

Helpful frameworks to incorporate include “*evaluating the macrosystem* of ideas, concepts, and principles . . . focusing on *vulnerable populations of children* as a reminder of differences among children and the current hierarchies among children; and *critical analysis of systems* both in isolation and in interaction with each other.”⁸⁷ Consistent with Urie Bronfenbrenner’s conceptual model of how to see the context in which decision-making occurs, the macrosystem of valued principles infuses everything else that creates the context of decision-making.⁸⁸ The core insights of Margaret Beale Spencer, critically elaborating on Bronfenbrenner’s interlocking ecologies, remind us that no model can focus on a universal or neutral decision maker, nor on a neutral, raceless, genderless child.⁸⁹

Current realities of inequality make decision-making different for women of color, and the life course and developmental trajectory different for children of color.⁹⁰ Framing a different vision of reproductive choice must come from a sophisticated understanding of context and create a vision that serves all. What would an alternative landscape look like?

⁸⁷ Dowd & Drake, *supra* note 74, at 5.

⁸⁸ See URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 3–19 (1979).

⁸⁹ See Margaret Beale Spencer et al., *A Theoretical and Empirical Examination of Identity as Coping: Linking Coping Resources to the Self Processes of African American Youth*, 7 *APPLIED DEV. SCI.* 181, 182 (2003); Margaret Beale Spencer et al., *Understanding Hypermasculinity in Context: A Theory-Driven Analysis of Urban Adolescent Males’ Coping Responses*, 1 *RSCH. HUM. DEV.* 229, 231 (2004); see also Margaret Beale Spencer et al., *African American Adolescents: Adaptational Processes and Socioeconomic Diversity in Behavioral Outcomes*, 11 *J. ADOLESCENCE* 117, 134 (1988); Margaret Beale Spencer & Carol Markstrom-Adams, *Identity Processes Among Racial and Ethnic Minority Children in America*, 61 *CHILD DEV.* 290, 299 (1990).

⁹⁰ See REIMAGINING EQUALITY, *supra* note 15.

A. *Before Pregnancy*

Before pregnancy is the place to begin. Prior to pregnancy, a high-quality health care system would provide comprehensive care, including reproductive care consistent with the concept of reproductive justice: care that is supportive of all women. Women's life course and opportunities would reflect egalitarian opportunity, and pregnancy would not disrupt those opportunities. Current circumstances (such as age or lack of earning power due to educational level) would be understood as transitory rather than indicative of failure or an unsupported burden. This would build upon high-quality health care during pregnancy plus any necessary support for a healthy pregnancy (including housing, income support, pre- and postnatal care).

But even pregnancy is not early enough. Pregnancy should occur in the context of sexual freedom and the absence of sexual violence.⁹¹ This would include the absence of intimate partner violence of any form, not just sexual violence.⁹² Reframed masculinities divorced from justifications for sexual and other violence, or any form of subordination are also essential.⁹³ Just as essential is the male embrace of sexual responsibility, including a commitment to shared contraceptive responsibility and shared caretaking should the decision to bring a life into being be made.⁹⁴ Men's full engagement and

⁹¹ See generally Jean M. Twenge et al., *Changes in American Adults' Sexual Behavior and Attitudes, 1973–2014*, ARCHIVES OF SEXUAL BEHAV. 1713 (2015); David B. Cruz, "The Sexual Freedom Cases"? *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299 (2000).

⁹² *Fast Facts: Preventing Intimate Partner Violence*, CTNS. FOR DISEASE CONTROL & PREVENTION (Oct. 11, 2022), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html#:~:text=IPV%20is%20common.&text=Data%20from%20CDC's%20National%20Intimate,related%20impact%20during%20their%20lifetime> ("About 41% of women and 26% of men . . . reported an intimate partner violence-related impact during their lifetime.").

⁹³ See generally NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* (2010); Nancy E. Dowd, *What Men? The Essentialist Error of The End of Men*, 93 B.U. L. REV. 1205 (2013); Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047 (2012); Nancy E. Dowd et al., *Masculinities and Law: Feminist Legal Theory Meets Masculinities Theory*, in *MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH* (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

⁹⁴ See generally GABRIELLE BLAIR, *EJACULATE RESPONSIBLY: A WHOLE NEW WAY TO THINK ABOUT ABORTION* (2022); see Kase Wickman, *Gabrielle Blair Would Like a Word With Men*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/well/family/gabrielle-blair-design-mom.html?smid=nytcore-ios-share&referringSource=articleShare>.

mutual, coequal caretaking of children would be normative, not exceptional, and the model of primary and secondary caregiving would no longer control.⁹⁵ Coequal, non-subordinating parenting would create norms of conduct and care for the benefit of children and at the same time reframe single parenthood as fully supported, not stigmatized.⁹⁶

B. *Children's Lives*

Rather than focusing solely on birth, a vision of support, freedom, and equality is a focus on the life course of children until they become adults. This ensures that a child's full developmental period, birth to age twenty-five, is fully, robustly supported.⁹⁷ This should be a goal that transcends the limited focus of abortion politics: the support of every child to their maximum capacity should be a goal on which all can agree, even if the means to achieve it might generate differences. At present, ironically, there is consensus (or complicit inaction) that articulates the value of children's lives but fails to translate into the support, resources, and structures that truly value all children.

First, we might begin with robust, multidimensional, interlocking structural support in early childhood. As I have argued in previous work, the developmental importance of birth to age three, extended to encompass the years prior to the beginning of public education, is so vital that an infusion of resources at this critical period would yield substantial results toward ensuring children's developmental equality.⁹⁸ Such a framework would not be limited to childcare and early childhood education, but would rather be framed across the structures that impact early development: housing, income support, health care, community engagement, and support.⁹⁹ All of the multiple ways of learning (e.g., sports, play, creative facilities) must be

⁹⁵ See *Parenting—An Equal Opportunity*, SWEDISH INST. (Jan. 4, 2022), <https://sharingsweden.se/toolkits/parenting-an-equal-opportunity>.

⁹⁶ Disa Bergnehr & Helena Wahlström Henriksson, *Single Parenthood, the Non-Residential Parent and Co-Parenting in Swedish Daily News*, 2022 FEMINIST MEDIA STUD. 11–12 (2022).

⁹⁷ See REIMAGINING EQUALITY, *supra* note 15, at 59; see generally Clare Huntington, *Lessons from the Prekindergarten Movement*, 47 FORDHAM URB. L.J. 343 (2020).

⁹⁸ See Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1379–80 (2020) [hereinafter *Children's Equality Rights*]; Dowd & Drake, *supra* note 74, at 1 (introduction to symposium volume on early childhood).

⁹⁹ *Children's Equality Rights*, *supra* note 98, at 1414–15; see generally Dowd & Drake, *supra* note 74.

part of the equation. An example of such holistic support is the Harlem Children's Zone.¹⁰⁰

Such multidimensional investments in child wellbeing cannot be separated from family wellbeing. And this approach must continue throughout childhood, not be limited to an infusion in early childhood. This approach would include, at a minimum, income support, high-quality housing, access to and ability to fund food for a healthy diet, neighborhood safety and security, and neighborhood facilities for creativity, sports, and play. This would imagine childhood free from subordinating, policing, or violence of any form, not by the harsh enforcement of the child welfare system, but the abolition of the existing system in favor of building supports and assistance to truly help families when even supporting interlocking systems are not enough.¹⁰¹

This is also a vision that would redefine and reimagine public education, arguably the most critical framework for children's development once we assume that children's caregivers and their families and communities are well supported. Education remains central and critical to children's equal development.¹⁰² Children must have the guarantee of a high-quality, equal system that is responsive to unique needs (e.g., equity concerns) while honoring the humanity of all children. This would be a radical reorientation of the concept of educational equality as well as educational quality, oriented around the common and equal humanity of every child.¹⁰³ All children function within an unequal school system, with huge variations of resources, per pupil expenditures, quality of teachers, buildings, and programs. Those inequalities disproportionately disadvantage children of color and continue to treat girls and boys differently. Beyond these measurable inequalities in inputs that translate into differential support of each child's education by comparing school to school, there are significant intra-school inequities that translate into outcome and opportunity differentials. Imagine then an education system operating without those tangible inequities, serving the needs of each child. Now imagine an education system that also meets the intangible needs of each child, respecting each child's humanity and their identities, in a

¹⁰⁰ See HARLEM CHILDREN'S ZONE, <https://hcz.org> (last visited Dec. 20, 2022).

¹⁰¹ See generally DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

¹⁰² See generally REIMAGINING EQUALITY, *supra* note 15; Nancy E. Dowd & Margaret Beale Spencer, *Radical Brown* (forthcoming 2023).

¹⁰³ Dowd & Spencer, *supra* note 102.

system devoted to equality based on the radical meaning of *Brown v. Board of Education*.¹⁰⁴

For children to be fully supported, it is critical to keep the focus on children's equalities—not only the correction of the negative, but the shape of the positive. We must address and not perpetuate children's inequalities along race and class lines. We must address children's differences from a perspective of equity, not a slavish devotion to sameness. Commitment and hope for children's futures, and the context of their lives, which by definition must support the lives of their parents and families, is therefore essential to true freedom of reproductive decision-making.

C. *Parents' Lives/Caregivers' Lives*

The commitment to children's support and equality, to maximize their developmental potential and well-being, inherently involves the support for their parent or parents, or other caregivers who take the place of a parent or parent. It bears repeating, from the perspective of children, what this vision must look like for children's lives to be well-supported.

First, this vision would replace work/family (or work/education) conflict with resolution, collaboration, and peace. It would replace it by putting family first: with family/work and family/education balance and harmony. It would require the structural change of the workplace to orient around this balance rather than to assume a caregiver who supports the primary worker who provides family income.¹⁰⁵ The family/education relationship would be one of harmony and mutuality, permitting particularly very young parents to complete their education, or older parents to return to increase their education or reorient their education to achieve a shift in work priorities or personal priorities. This would reflect gender equality in jobs and job structures, a shift from gender dissonance in work/family issues to eliminating sex identification of jobs and sex segregation in the workplace.

Second, this envisions caregiving by both women and men. This would require moving from a transitional recognition of the context

¹⁰⁴ See 347 U.S. 483 (1954). The basis for understanding *Brown* as mandating this radical equality perspective is further explored in Dowd & Spencer, *supra* note 102.

¹⁰⁵ See *The Vulnerable Subject and the Responsive State*, *supra* note 12, at 257 & n.21 (2010); THE AUTONOMY MYTH, *supra* note 12; see generally RESHAPING THE WORK-FAMILY DEBATE, *supra* note 60; UNBENDING GENDER, *supra* note 60.

of gender difference toward a world that supports engaged caregiving and expects it from all parents.

Third, the support of parents would recognize and affirm the life course patterns of adults in all their diversity. It would encourage stability over time as beneficial to children but focus on function rather than form. It might include special supports in order to achieve equity, such as unique supports for single parents.

Finally, as with children, there must be attentiveness to fault lines along race and class with the vision being one not that is race-less, but race-diverse and race-celebratory. As to class, the structural supports integral to children's development and their freedom and equality would create a world free of child poverty.¹⁰⁶ The context of support for all parents would be a generous foundation sufficient to insure the maximum development of every child.

This vision is not an impossible dream. Our commitment to women's real freedom and choice, as well as to all children's equality and humanity, is central. These principles must incorporate race and gender equalities. While no one country embodies this vision, models nevertheless exist that rebut the critique that this is beyond our capability.¹⁰⁷ How that translates in reality was vividly brought home to me when a colleague in Sweden told me her story of being a very young mother to her daughter. She became pregnant at sixteen and, despite her parents urging her to have an abortion, decided to carry the pregnancy to term. She was thrown out of the house, but housing, income support, continuation of her education, health care, and childcare were all readily available. She completed high school, went to college, and ultimately earned her Ph.D. She eventually had two more children, in addition to becoming a respected law professor and serving as dean. I remember listening to this life history in utter amazement, as such a life path was virtually unimaginable in the United States not only in my lifetime but at present. Just as amazing was her utter matter-of-fact assumption that this was simply the way it was, that her story was not unusual.

¹⁰⁶ See OECD, CHILD POVERTY (2021), https://www.oecd.org/els/CO_2_2_Child_Poverty.pdf ("In Denmark and Finland, the child relative income poverty rate is only around 4%."); Valerie Wilson & Jessica Schieder, *Countries Investing More in Social Programs Have Less Child Poverty*, ECON. POL'Y INST. (June 1, 2018), <https://www.epi.org/publication/countries-investing-more-in-social-programs-have-less-child-poverty>.

¹⁰⁷ See OECD, *supra* note 106; see also Wilson & Schieder, *supra* note 106.

CONCLUSION

If we do not simply *imagine* but instead *build* a society that ensures robust support for children and families, this would radically change and reconstruct abortion choice. First, it makes explicit that the support of “life” requires support for the life of the child and those who care for children. The lives of children should be equal to maximize their potential. This calls out the claimed rationale of anti-abortionists as difficult to believe given the disconnect between saving fetuses but disregarding children’s needs once born. It raises the question of to what extent anti-abortion rhetoric and support is grounded in sexist and racist rationalizations. Second, reconstructing abortion choice in this broader way reminds us that abortion is not just a women’s issue, but rather exposes the intersection of women’s lives with men’s masculinities, the presumed heterosexual norm, and its expressed comprehensive model in a still-traditional or only-modified tradition work/family framework. Third, reproductive decision-making in our current framework replicates children’s inequalities. Until freedom is interlinked with equality, choice if simply restored is a hollow victory. We must do more.