

**UNIVERSITY OF MINNESOTA
LAW SCHOOL**

**REPRODUCTIVE RIGHTS AND JUSTICE 6036
PROFESSOR JUNE CARBONE**

**Fall 2023
SYLLABUS**

Classes: MTW, 1:25 to 2:20, Mondale Hall, Rm 35

I have not posted dates to leave room for guest speakers and special assignments.

Contact Information: June Carbone, Email: jcarbone@umn.edu, Phone: (612)626-3012
Mondale Hall, Rm. 224. Email is the preferred form of contact.

Office Hours: Immediately after class Mondays and Tuesdays, 3 to 4 pm Tuesdays. Other times by appointment, just send me an email.

Exam/Grades: 3 units, A-F. **72%** of the grade in this course will be based on the open notes final (see below) examination scheduled remotely at **9 a.m., Dec. 13th**, Mondale Hall, subplaza, and **25%** will be based on class participation. The class participation grade will have **four** components: **1)** a written assignment involving drafting a regulatory comment **10%** (**see Class 6 below due Sept. 18th, 5 p.m.**), and **2)** drafting a reflection on the sperm donor agreement **10%** (**see Class 32**), **3)** taking responsibility for leading a class at some point during the semester **4%**, and **4)** participation in regularly scheduled classes **4%**.

Responsibility for leading a class: I have not scheduled every class this semester to leave room for student led classes. The top may be a topic already scheduled that merits additional consideration or a new topic. The class may consist of additional readings and discussion, playing a YouTube video, podcast, or short movie to set up a discussion, inviting a guest speaker, your own PowerPoint presentation, or other form of your choice. The class should include some additional readings or assignments, and some opportunity for discussion. Up to two students may join together to present a single presentation. There will be an opportunity to sign up for a class early in the semester.

Final Exam: The growing use of and access to generative AI raises concerns about the modalities of law school exams. We have recently determined that in order to maintain the integrity and fairness of law school exams and grading, the default rule for exams in Fall 2023 will be locked in-person examinations. That means that this exam, which will follow the **locked in-person option, will be open-book with access only to hardcopy materials and no access to digital copies, computer hard drives, or the Internet.** The hardcopy materials may include any notes you prepare yourself, but not the textbook, other books, or material prepared by others. If the exam requires discussion of specific statutes, those statutes will be provided on the exam.

Attendance: Persistent lack of attendance may result, after notice to the student, in involuntary withdrawal from the course or a failing grade in the course. While I do not intend to grade

regular attendance, I reserve the right to lower the grade or lack of attendance or participation and will notify students if the issue arises. If you need to miss more than three during the semester, please let me know. If your absence is likely to interfere with an assignment deadline, you must contact me as far in advance of the deadline as possible to request appropriate extensions. If your absence interferes with completion of a blind-graded exam, in order to preserve blind grading please do NOT notify me, but instead contact Law School Student Affairs at lawdos@umn.edu to discuss potential exam variances or accommodations.

Artificial intelligence (AI) language models, such as ChatGPT, may be used for any assignment (other than the final exam) with appropriate citation. Examples of citing AI language models are available at: libguides.umn.edu/chatgpt, subject to specific instructions for the particular assignment. You are responsible for fact checking statements composed by AI language models.

Class Objectives: This course will introduce you to select topics in the field of reproductive rights and justice. Most people know about reproductive rights because of abortion's prominence in American politics. Fewer people know about reproductive justice, a different framework for similar issues that explores how reproductive decision-making arose in a system of male control of women's reproductive capacity and continues in ways that reinforce gender, race, and class-based inequities. A reproductive justice framework questions the regulation of sexuality, limitations on the ability to have children (e.g., mandatory sterilization and limited access to assisted reproduction), restrictions on the means to prevent pregnancy and childbirth (e.g., restricted access to birth control and abortion), and autonomy in creating and maintaining families of choice. This conception of justice combines considerations of liberty and autonomy with examination of the structural injustices that arise from biological circumstances and economic inequality. The Supreme Court decision in *Dobbs*, overturning the right of access to abortion, brings all of the issues into this course in sharper focus and a substantial part of the course will thus involve asking how will reproductive rights and justice reshape the legal and political landscape in the future.

By the end of this course, students should be able to:

- • Understand and articulate the different and overlapping approaches to reproductive issues between reproductive rights and justice.
- • Know several of the different doctrinal and subject areas in which reproductive rights and justice issues arise, particularly those addressing sexuality, sterilization, contraception, abortion, assisted reproduction, and other topics.
- • Recognize the ways that issues related to identity, such as race, gender, ethnicity, sexual orientation, disability, class, etc., affect issues related to reproduction.
- • Appreciate the way that issues of reproductive rights and justice arise in practical lawyering situations and current events.

Class Recordings: I record class sessions by request in the event of an absence if I receive a request at least one day in advance and a reminder just before the class. The recordings will be posted on Canvas. Students should not rely on the availability of recordings in case technological problems occur or the quality makes the lecture hard to hear

Students may make their own recordings, subject to Law School requirement that such recordings may be used only for the academic benefit of enrolled students and may not be redistributed. The policy is available on the [Academic Policies website](#), under Classroom Environment and Use of Electronic Devices.

To make this class more accessible to enrolled students, all or some class lectures and discussions may be recorded by the instructor, with or without further specific notice. Since your audio/video may be part of those recordings we are informing you. Along with the instructor, these recordings will be shared only with the students enrolled in the class during this semester, in accordance with FERPA regulations and the Law School's Policy on Recording Classes.

You may not: (1) access a recording in an unauthorized manner; (2) copy a recording; (3) distribute a recording to any other person, either directly or through an intermediary such as a server or website; or (4) allow unauthorized persons to hear recorded audio. Also, if watching a recorded video, you must, to the extent feasible, prevent third parties from viewing the recording.

Applicability of Academic and Conduct Policies: This course is subject to all generally applicable law school and university rules, including the Law School Honor Code and Academic Rules, the University's Code of Student Conduct, the University's [policy on Teaching and Learning: Student Responsibilities](#) as well as with other relevant university rules and policies.. The full text of these and other applicable policies can be found on the [Rules and Policies for Students website](#).

You should conduct yourself in this class and throughout your Law School career in accordance with the principles of professionalism applicable to practicing attorneys. The [Minnesota Supreme Court and MSBA Professionalism Aspirations](#) state that “a lawyer’s conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms” and “lawyers and judges owe each other respect, diligence, punctuality, and protection against unjust and improper criticism and attack.” I expect the same behavior in your interactions with me and other faculty, with your fellow students, and with Law School staff.

Accommodation Support: For degree-seeking law students in need of academic accommodations related to a disabling condition, please connect directly with the Law School’s designated Access Consultant from the [University’s Disability Resource Center](#). Classroom and/or testing accommodations may be available. For questions about accommodation implementation at the Law School, connect directly with our Student Affairs team at lawdos@umn.edu. Any accommodations for testing on blind-graded exercises should be directed to Student Affairs and not to your instructor so that we can maintain blind grading and protect your privacy.

Immigration Concerns (including DACA status): The University’s [Immigration Response Team](#) can provide support, answer questions, and connect students with both campus and community resources. If you are an undocumented student and need support, email immigration@umn.edu to contact the director. More information can be found on the [Immigration Response Team Services website](#).

Personal or Health-Related Challenges: The University of Minnesota Law School is committed to promoting emotional and psychological wellness for all students.

Many resources are available to students facing personal or health challenges that may impact their academic success. Consult with the Office of Student Affairs (lawdos@umn.edu) for specific information and referrals for your situation, or connect directly with the supports highlighted on the [Law Student Support & Well-Being Resource Guide](#), the [Student Life website](#), the [University Mental Health website](#), or with [Lawyers Concerned for Lawyers](#). Student Affairs has advisors available to discuss resources every day of the week, both in-person and virtually, at lawdos.appointments.umn.edu.

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CLASS ASSIGNMENTS

ALL ASSIGNMENTS ARE FROM Murray and Luker, *Cases on Reproductive Rights And Justice* (2nd Ed.) UNLESS OTHERWISE NOTED. ALL ASSIGNMENTS ARE SUBJECT TO CHANGE. Supplemental materials will be posted on Canvas. Each assignment (designed by number) is for one class unless otherwise noted.

1. Course Introduction: *Organization Reproductive Rights and Justice*
ACRJ, A New Vision, *Dobbs v. Jackson Women's Health* (Canvas, pp. 1-6); Goodwin, *Reproductive Justice Is in the Constitution* (Canvas); Hasday, Alito Cites a Judge Who Treated Women as Property (Canvas), *Understanding the Difference Between Positive and Negative Rights* (Canvas), <https://alabamapolicy.org/research/understanding-the-difference-between-positive-and-negative-rights/>.

For this class, first, consider the distinction between reproductive rights and reproductive justice set out in the first reading "A New Vision." Compare these definitions with the discussion of positive versus negative rights in Alabama Policy Institute Statement. Then, think about how the two views may influence constitutional interpretation and litigation strategies.

Second, we will not discuss *Dobbs* in detail in this class. But skim the reading on *Dobbs* and come to class having identified a passage (of not more than a paragraph), you would most like to see discussed in this class.

2. Regulating Marriage: The Role of Sex and Reproduction
Murray and Luker, pp. 1-7, 13-16, 21-43, skim 65-69
The primary focus of this class will be the role of marriage in the constitutional order, considering the constitutional basis for *Obergefell* and how it might fare post-*Dobbs*. Did the place of marriage in the constitutional order historically depend on the relationship between sexuality and marriage? Does Roberts' dissent in *Obergefell*, pp. 31-35, which equates marriage with sexuality and sexuality with procreation, capture the traditional rationale? How do the equal protection rationales in *Obergefell* and *Loving* compare with the due process rationales?

3. Regulating Sex: The Role of Reproduction
Murray and Luker, pp. 7-12, 47-64, 69-80, 86-91, 116
What is the purpose of regulating sexuality? What is the purpose of regulating sodomy and other sexual acts in the context of heterosexual relationships? (*See Bowers*, pp. 53-59).
What is the modern basis for regulating sexuality? Cf. Hart-Devlin debate, pp. 59-64 with Scalia's dissent in *Lawrence* (particularly his comment about "taking sides in the culture wars," p. 78). Are there some practices (e.g., prostitution, *Doe*, p. 86) that should be regulated?
4. Regulating Pregnancy: The Constitutional Framework
Murray and Luker, pp. 117-21, 128-141, 145-54
Skim Blake and Grossman, pp. 98-114 (Canvas)
Consider 1) the role of *Mueller v. Oregon* as a companion case to *Lochner* (which I assume you have studied in other classes); 2) the Supreme Court's treatment of pregnancy discrimination and the role of Congress in reacting to the Court; 3) the Blake and Grossman critique of the legal evolution of statutory construction and their reproductive justice critique
5. Regulating Pregnancy: Congress to the Rescue
NWLC, Heavy Lift (Canvas)
Pregnant Workers Fairness Act (Canvas); Supermajority (Canvas)
Pregnant Workers Fairness Act Regulations (Canvas)
EEOC Issues Expansive Regulations (Canvas)
Pump Act (Canvas); Fact Sheet Pump Act (Canvas)
Consider the implications of the Pregnant Workers Fairness Act and the Pump Act, both of which became effective in 2023, and the proposed implementing regulations. How far do they go in addressing the issues raised in Blake and Grossman article and *Heavy Lift*? What comments do you think should be submitted in the rule and comment process? [The readings include the statutes, proposed regulations, and commentary summarizing the statutes and regulations.]
6. Pregnant Workers Fairness Act: Comments
Read Comments on Menstruation (Canvas)
Come to class prepared to discuss your draft comment on the EEOC regulations assigned in Class 5.

The draft comment must be handed in by **5 pm on Monday, September 18th**. It does not need to exceed 5 pages. It should be in a form appropriate for submission to the EEOC, but it does not need to be submitted. Students may combine their submission with advance permission.

7. Regulating Pregnancy: Maternal-Fetal Conflict
Murray and Luker, pp. 159-184.
A Women's Rights, <https://www.nytimes.com/interactive/2018/12/28/opinion/pregnancy-women-pro-life-abortion.html>. [The New York Times site is interactive. You only need to read the first part. If you cannot access the New York Times site, I have posted the text on Canvas.]

Class discussion will focus on two issues. First, should the state be able to regulate women's bodies to protect fetuses? How does a reproductive justice lens affect the answer? Second, how might these issues be reframed if the states adopt fetal personhood laws?

8. Regulating Pregnancy: The Lawyers' Role

Murray and Luker, pp. 184-200

Consider, first, the problems of proof: if the crime require proof of harm to the fetus, what is necessary to show causation? Second, consider how these statutes might apply to abortion. If federal preemption were to make possession and use of abortion pills legal in a state, could the state still prosecute a person who terminated a pregnancy through the use of such pills for murder, manslaughter or child abuse? How do states distinguish between abortion and miscarriage?

9. Regulating Birth: Doctors v. Patients

Murray and Luker, pp. 155-59, 206-223, 231-37

How should decision-making occur in these circumstances? Are these issues of autonomy? What role do midwives play?

10. Regulating Birth: Incarceration

Guest speaker: JaneAnne Murray, readings TBA

11. Incarceration continued:

Murray and Luker, pp. 241-67

Should the capacity for pregnancy and parenthood affect carceral policies? How should gender equality influence the answers? How is reproductive justice different from equal treatment?

12. Regulating Reproduction: History and Contraception

Murray and Luker, skim pp. 572-587, read more closely, pp. 593-606, 612-619

Is the availability of contraception inevitably tied to the acceptability of sex? Did the Supreme Court, in the cases from *Griswold* through *Carey*, uphold a right to engage in sex? If not, what was the basis for these decisions? What does the Court understand privacy to mean in these cases? What would happen to contraceptive access if the Supreme Court overturned the entire line of cases that began with *Griswold*?

13. Regulating Contraception: Modern Developments

Murray and Luker, pp. 606-12, 622-54

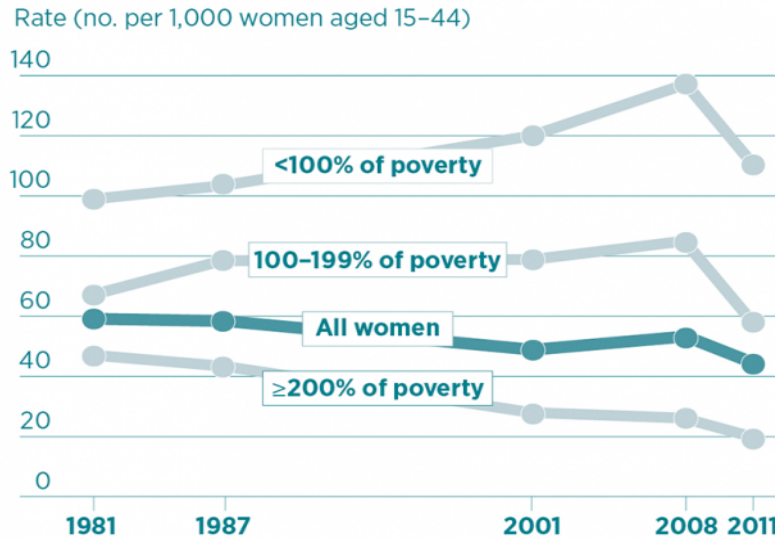
Contraceptive Use Before and After the ACA (Canvas)

See Guttmacher charter below

Should contraceptive usage be available as a matter of right? What are the consequences of lack of access? Should the FDA be involved in routine contraception without serious health effects?

UNINTENDED PREGNANCY RATES

Unintended pregnancy is increasingly concentrated among low-income women.



www.guttmacher.org

14. Religion and Contraception

Murray and Luker, pp. 654-88

Little Sisters (Canvas)

Caroline Mala Corbin, *Religious Liberty for All? A Religious Right to Abortion*, 2023 Wis. L. Rev. 475 (2023)

Russell Shorto, *Contra-Contraception* (Canvas)

Whelan, *Aggravating Inequalities*, pp. 172-180 (Canvas)

What is the nature of religious opposition to contraception? How has the Supreme Court approached the question of religious objections? What are the consequences of expanded conscience based objections to contraceptive access?

For likely further restrictions on Plan B (the morning after pill) and the IUD, see Whelan.

15. Regulating Abortion: The Road to *Roe*

Murray and Luker, pp. 569-72, 688-724

Skim: Garrow, *How Roe v. Wade Was Written* (Canvas)

For this class find an anti-abortion statute enacted after *Dobbs* and compare it to the pre-*Dobbs* statutes. For an example, I have posted the current Texas statute on Canvas.

Roe has been endlessly criticized both by its champions and its critics. Reading it today, what parts strike you as dated, prescient, well-reasoned?

[How *Roe v. Wade* Was Written provides a fascinating, behind the scenes account of the circulation of drafts on the Court. We will not focus directly on the article in this class but will discuss it in the next class.]

16. Regulating Abortion: Undermining *Roe*

Murray and Luker, pp. 724-747, 797-846

In this class, we will cover two issues: first, consider the early efforts to undermine *Roe*, which involved efforts to restrict public abortion funding, but that left the right to abortion intact. Are these cynical efforts to satisfy anti-abortion constituents or something else? Do they illustrate the limits of a negative as opposed to positive rights approach? Second, read *Casey* carefully and skim *Gonzales*. The Supreme Court was widely expected to overturn *Roe* at the time it decided *Casey*. Instead, Justice Kennedy, a Catholic personally opposed to abortion, was persuaded to join the majority in preserving *Roe*. How is *Casey* different from *Roe*? *Roe* is the only major Supreme Court decision written by a woman. Are there passages that you see as reflecting a different sensibility from other decisions? Consider this passage in particular, which was deleted from the excerpt in the casebook:

As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

How is different from the worldviews present in *Roe* and in *Gonzales*?

17. *Dobbs v. Jackson Women's Health Organization*, Murray and Luker, pp. 976-1030

Dobbs Statement of American historians (Canvas)

Doeringer, *Women, Witches, and Abortion* (Canvas)

First, what is the majority's view of the 14th Amendment and how does it compare with Justice Thomas's concurrence? Both liberals and conservatives criticize *Lochner* (and *Mueller*) as judicial lawmaking that bears no relationship to the words of the Constitution or the intent of the framers and the Supreme Court repudiated *Lochner*'s approach to economic regulation in the forties. Conservatives maintain that the *Lochner* era's substantive due process doctrine also produced personal rights, such as the parental rights in *Meyer* and *Pierce* (precedents cited in *Griswold*), and that these precedents, including the entire line of privacy cases that started with *Griswold*, should be viewed as just as illegitimate as *Lochner*, and that the Court should repudiate all substantive due process decisions. How does the majority approach the issue and what does it mean for other decisions that Thomas highlights, such as the right to contraception, sexual intimacy (*Lawrence*), marriage equality (*Obergefell*), and perhaps even *Loving* (interracial marriage), which Thomas does not mention?

Second, what role does history play in the majority opinion? Review *Roe*, and the Goodwin, and Hasday op eds from the first class, the Statement of American historians and the Doeringer article. Is Alito using an originalist methodology in the *Dobbs* opinion? If so, how does his history compare with the history in *Roe* and the history Goodwin emphasizes? What role does Matthew Hale play in the decision and why does Professor Hasday find it objectionable? Can an originalist approach be consistent with reproductive justice? Third, what does the majority opinion say about the role of precedent? How does Justice Alito justify overturning a long standing precedent (*Roe*)? Fourth, what does the majority say about the status of women and the impact of abortion on women's lives? How does this compare with *Casey* and the dissent?

18. Regulating Abortion post-*Dobbs*: Do Pregnant People Have a Right to Life?

Zurawki v. State, Complaint (Canvas)

Check updates, <https://19thnews.org/2023/08/texas-abortion-dangerous-pregnancy-complications/> (August 4th, 2023)

Oberman, *How Abortion Laws Do and Don't Work* (Canvas), pp. 164-180, skim rest

Review *How Roe v. Wade Was Written* (Canvas) focusing on Blackmun's initial preference for basing the opinion on the void for vagueness argument, nn. 77-80, p. 4

Note how different state laws address therapeutic abortions:

Only to "protect the life or health of the patient"

Only if doctors can show abortion is necessary "to prevent the death of the pregnant woman" (Idaho)

Only if it can be proven that the patient's life is in danger (Tennessee)

"Aiding and abetting" includes referrals or information about "illegal" abortion

This class will focus on cases where access to abortion is necessary to preserve the health of a pregnant person. In some countries, including Israel, statutory law makes abortion available only to protect the life of the mother, but in practice abortion is often freely available if a doctor agrees. Is this an alternative strategy for securing abortion access? Would this work in the U.S. today? Who would benefit most?

Does the federal government have the ability to compel protection of health during pregnancy?

Check status of federal efforts to guarantee emergency care:

<https://www.hhs.gov/about/news/2023/05/01/hhs-secretary-xavier-becerra-statement-on-ementala-enforcement.html#:~:text=While%20many%20state%20laws%20have, stabilize%20the%20patient's%20emergency%20medical>

[While%20many%20state%20laws%20have, stabilize%20the%20patient's%20emergency%20medical](https://www.hhs.gov/about/news/2023/05/01/hhs-secretary-xavier-becerra-statement-on-ementala-enforcement.html#:~:text=While%20many%20state%20laws%20have, stabilize%20the%20patient's%20emergency%20medical)

19. Regulating Abortion post-*Dobbs*: The Right to Travel and Conflicts of Law

Extraterritorial State Criminal Law, Post-Dobbs, Brown (Canvas)

Skim Cohen, Donley, & Rebouché, *The New Abortion Battleground*, pp. 1-15

& *Extradition in Post-Roe America* (Canvas)

Brown provides a nice overview of the issues; Conley, et al., is the most thorough and influential article (but denser), and the Extradition article has more practical detail. Read the articles for the purpose of preparing to answer these questions:

1. Missouri, an abortion restrictive state, posts pregnancy sniffing dogs at a checkpoint on the Mississippi River and questions all women of childbearing age on why they are crossing the River into Illinois (an abortion supportive state). On

what grounds can this be challenged?

2. Jean Doe lives in Wisconsin and used to work at an abortion clinic there. After *Dobbs*, the clinic relocated to Minnesota, just over the state line, and Doe continues to work for them, commuting each day from Wisconsin. Many of the clinic's patients are Wisconsin residents. Can Doe be prosecuted in Wisconsin for providing abortion services or serving Wisconsin residents?
 3. Dr. Smith, a doctor licensed in Minnesota, practices telemedicine in accordance with state regulations. He sees patients from the Dakotas who come to Minnesota to obtain abortions and he routinely recommends the use of abortion medications where appropriate. One of his patients legally obtains abortion pills in Minnesota, returns home to South Dakota, takes the pills there, and then experiences complications. She calls Dr. Smith for medical advice and he gives her advice over Zoom. Can Dr. Smith be prosecuted in South Dakota for violating that state's abortion restrictions? Would your answer change a) if Minnesota immunized all abortion providers for any actions related to abortion taking place in Minnesota or b) if providing medical advice across state lines violated Minnesota provisions limiting the geographic scope of Dr. Smith's license to practice medicine to Minnesota?
 4. If Mom and Dad drive to Wisconsin and pick up their seventeen-old-daughter from the University of Wisconsin and drive her home to Minnesota to have an abortion, can Mom and Dad be prosecuted in Wisconsin for aiding and abetting the violation of the Wisconsin's abortion restrictions? Would your answer change if Mom and Dad (and daughter) were Wisconsin residents?
 5. If Wisconsin indicts Minnesota residents Mom and Dad and South Dakota indicts Minnesota resident Dr. Smith, can the criminal defendants be extradited to the prosecuting state? Can Mom and Dad be extradited to Wisconsin if they are Wisconsin residents who move to Minnesota to avoid prosecution? Would your answer change if Minnesota prohibited cooperation with abortion prosecutions?
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20. Regulating Abortion post-*Dobbs*: The Political Landscape
Guest speaker: Howie Lavine, Political Science
Readings TBA
Will discuss political science literature discussing characteristics of the Trump base
Reading will involve the overlap between the MAGA base, white Christian evangelicals opposed to abortion, and the psychological characteristics associated with "collective narcissism"
 21. Regulating Abortion post-*Dobbs*: Access to Abortion Medication
The assignments for this class will change given pending litigation on abortion medication and depending on what the Supreme Court does, this may be two classes
The Post-Roe Abortion Underground, New Yorker (Canvas)
ABORTION PILLS, Cohen, Donley, & Rebouché (Canvas)
<https://www.nytimes.com/interactive/2023/03/02/us/abortion-pill-lawsuit-mifepristone.html> (summary of abortion pill availability in March 2023)
Summary of law governing efforts to block information about abortion

<https://www.brookings.edu/articles/can-a-state-block-access-to-online-information-about-abortion-services/>

Even before *Dobbs*, the majority of abortions took place early in pregnancy using medication. This class will discuss:

- 1) Pending litigation of the validity of FDA actions making the pills available
- 2) The ability of the FDA to pre-empt state restrictions on federally approved drugs (if states prevail, some state bans will be enforceable)
- 3) Ability to restrict information about abortion pills (Brookings website)
- 4) The creation of an abortion underground (New Yorker article) and other means of circumventing state restrictions. Consider that: The website for the organization “Plan C” provides information about how to order medication abortion pills from foreign suppliers who will ship them to states where use of the pills is illegal. Social media also suggest creative ways around the laws, such as “how to change their VPNs, have pills illicitly mailed to a FedEx drop-off point in a neighboring state, or how to have pills sent to someone else who can deliver them.”

22. Reproductive Justice: Is Federalism the Problem?

NFIB v. Sebelius (Canvas)

Aggravating Inequalities, Whelan, pp. 173-186, 203-04 (Canvas)

Supporting Families in a Post-Dobbs World, Cahn and Carbone (Canvas)

In reading *NFIB*, pay particular attention to Justice Scalia’s dissent. The conservatives on the Court, including Chief Justice Roberts, have been characterized as wanting to “repeal the New Deal”? How does the rejection of Medicaid expansion reflect such an agenda? Justice Scalia asks: if the incentives to adopt Medicaid expansion are so great, why did 26 states join in the litigation against it? How would you answer that question? Is it related to the issues underlying abortion and contraception – and the lack of support for the resulting children? What should the respective state and federal roles be with respect to health care? Is single payer or a public option (e.g., Medicare for all), a better answer? How do the readings frame that question as a matter of reproductive justice?

23. Regulating Sterilization: The Historical Narrative

Murray and Luker, pp. 1055-83 (including *Skinner v. Oklahoma*, p. 16)

24. Regulating Sterilization: Continuing Controversies

Murray and Luker, pp. 1083-1100

The Puzzle of Falling US Birth Rates since the Great Recession (Canvas)

How do falling birthrates change the picture of fertility control?

25. Regulating Families: The Constitutional Framework

Murray and Luker, pp. 269-88

Do parents have rights? Do they survive *Dobbs*? These cases were important sources of precedent for *Griswold*.

26. Parenthood Revisited: Unmarried Fathers

Murray and Luker, pp. 288-306

For this class, consider the following problems: First, shortly after Dana broke up with James, whom she had dated for a year and a half, she discovered that she was pregnant. She lives in an abortion restrictive state and decides to place the child for adoption. She tells the abortion agency that the father's name was Jimmy but that she did not know the father's last name. James learns of the child's existence when the child is a eighteen months old and immediately files suit to vacate the adoption, which became final when the child was five months old. Should James be able to do so?

Second, Morgan, who lives in the same state as Dana, discovers that she is pregnant. She tells Chris, the father of the child. Chris becomes deeply depressed and tells Dana that she is on her own. Dana tells Chris that she plans to place the child for adoption. Chris seeks professional help, overcomes his depression, and tells Dana when she is seven months pregnant that he would like to raise the child and will not consent to an adoption. Dana, who has located an adoptive couple in another state and who had no confidence in Chris's parenting abilities, is appalled. When Chris calls to find out the due date, she lies to him and gives him a date eight weeks later than the date the doctor has given her. Without telling Chris, she gives birth in the adoptive parents' home state, places the child with the adoptive parents, and says nothing to Chris. Chris finds out what has happened when the child is four weeks old, but Dana still refuses to give him any information about the child's location. Should he be able to obtain custody? What if the suit he fills is not heard until the child is six months old?

Third, Cindy and Anna, who are in a committed, unmarried relationship, decide that Cindy will have a child that she and Anna will raise together. Cindy arranges for a co-worker, Tanner, to contribute sperm. He does so without signing any forms relinquishing parental rights, but Cindy does not become pregnant. Cindy and Tanner decide to try again the old-fashioned way. This works and Cindy bears a child, Geoffrey. Cindy and Anna's names are placed on the birth certificate. When Geoffrey is 18-months-old, Cindy and Anna break up and Anna move to another city an hour away. Shortly before Geoffrey turns two, Cindy and Tanner marry. Who should be recognized as Geoffrey's parents?

27. Regulating Assisted Reproductive Technologies: The Case of Surrogacy

Murray and Luker, pp. 393-24, *How gay surrogacy became a battleground*, <https://www.theguardian.com/lifeandstyle/2022/oct/01/how-gay-parenthood-through-surrogacy-became-a-battleground>, skim 424-28, 441-453.

Baby M and Calvert v. Johnson are the classic cases. Read more closely *P.M. v. T.B.*

For this class, consider:

1. Why is gestational surrogacy treated differently from traditional surrogacy? What is the role of the agreement in accordance with the Uniform Parentage Act?
2. Is surrogacy involving gay men different in terms of the determination of parentage; in terms of potential political clashes?
3. For all surrogacy, what role do contracts play? What will happen to abortion clauses post-*Dobbs*? How do parties deal with legal uncertainty in states like Minnesota that have no surrogacy statutes?

28. Determining Parenthood: NY and CA

Murray and Luker, pp. 453-63, 474-81

What Makes a Parent? *New Yorker* (Canvas)

This class will focus on two points: 1) What is the difference between the New York and California approaches? What roles do intent and function play in each decision?

2) Focus on the *New Yorker* article. What would the result be in California? What should it be in New York?

29. Reproduction and Decision-making Power

Murray and Luker, pp. 428-41

When and how should decisions about parenthood occur? Consider how you would draft 1) an agreement about disposition of the embryos in *Rooks* at the time of their creation, at the time when one of spouses wishes to donate them during marriage, or at the time of divorce; 2) when should parenthood in *Jason P.* be determined? If the parties had reached an agreement, would that agreement have been different at the time of conception, the time of birth, or the time the disagreement between the two of them arose?

30. Determining Parenthood

Murray and Luker, 464-74, *In re N.S.V., Gatsby v. Gatsby* (Canvas)

Should the courts defer to intent? Function? Biology? State statutes? Which of these cases promotes certainty in the determination of parenthood? Is *Gatsby* likely to be influential in providing a pathway for states that wish to deny recognition of same-sex parentage?

31. Reproduction and the Family Welfare System

Murray and Luker, pp. 319-329, 334-49, 392-97

Dorothy Roberts, *A World Without Family Policy*, <https://lpeproject.org/blog/building-a-world-without-family-policing/>

Skim *Fertility, Immigration and Public Support for Parenting* (Canvas)

Murray and Luker, pp. 320-329, 392-97

The movement to end the family policing (or child welfare) system parallels the movement to defund the police. At its core is the tension between Type 1 errors (leaving a young child with a parent who because of poverty, substance abuse, mental illness or other circumstances is not prepared to care for the child adequately) and Type 2 errors (needlessly and cruelly removing a child from a capable parent who would be able to adequately care for a child with additional support or a more accurate judgment of the circumstances). What is the right response to these circumstances in an imperfect world?

32. Sperm Donor Drafting Assignment

Draft a sperm donor agreement pursuant to the instructions on Canvas. The draft will be due at 5 p.m. on Tuesday November 21st. Class on November 22nd will be on Zoom and will discuss the exercise.