

Summer 2017

## The Polarization of Reproductive and Parental Decision-Making

Jamie R. Abrams

*University of Louisville Louis D. Brandeis School of Law*

Follow this and additional works at: <https://ir.law.fsu.edu/lr>

 Part of the [Family Law Commons](#), [Law and Gender Commons](#), [Law and Society Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Jamie R. Abrams, *The Polarization of Reproductive and Parental Decision-Making*, 44 Fla. St. U. L. Rev. 1281 ().  
<https://ir.law.fsu.edu/lr/vol44/iss4/1>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

# THE POLARIZATION OF REPRODUCTIVE AND PARENTAL DECISION-MAKING

JAMIE R. ABRAMS\*

## ABSTRACT

*Women's abortion and parental decision-making in child rearing are constructed as polarized methods of decision-making in law, politics, and society. Women's abortion decision-making is understood as myopic and individualistic. Parental decision-making is understood as sacrificial and selfless. This polarization leaves reproductive decision-making isolated, marginalized, and vulnerable while parental decision-making is essentialized, protected, and revered. Both framings are inaccurate and problematic. A unified family decision-making framework that aligns abortion decision-making and parental decision-making reveals that both forms of decision-making are more multi-dimensional, relational, and family-centered than currently understood. This Article exposes the ground to be gained by crossing longstanding boundaries in family law and reproductive rights to more accurately and inclusively frame decision-making. This is a critical step to pull abortion decision-making from its marginalized periphery and reposition it as complex, imperfect, family-focused, and central to family law.*

I. INTRODUCTION.....	1282
II. THE POLARIZATION OF AUTONO(ME) AND AUTONO(THEE) .....	1283
A. <i>The Marginalized Autono(me) Framing of Women's Abortion Decision-Making</i> .....	1283
B. <i>The Dominant Autono(thee) Framing of Parental Decision-Making</i> .....	1289
1. <i>The BIOC Standard</i> .....	1289
2. <i>The Premise of Autono(thee) Parental Decision-Making</i> .....	1293
III. THE UNIFIED COMPLEXITIES OF FAMILY DECISION-MAKING.....	1298
A. <i>A Unified Model</i> .....	1299
B. <i>Autono(thee) Decision-Making in Abortion</i> .....	1302
C. <i>Autono(me) Decision-Making in Parenting</i> .....	1303
D. <i>Autono(we) Decision-Making in Abortion and Parenting</i> .....	1309
1. <i>Autono(we) in Abortion</i> .....	1309
2. <i>Autono(we) in Parenting (Family)</i> .....	1310
3. <i>Autono(we) in Parenting (Community)</i> .....	1311
IV. WHY USE PARENTAL DECISION-MAKING TO UNDERSTAND AND SUPPORT WOMEN'S DECISION-MAKING? .....	1314
A. <i>The Reproductive Rights Movement's Trajectory</i> .....	1314
B. <i>Pragmatic Realities</i> .....	1319
C. <i>Doctrinal Connections</i> .....	1322
D. <i>The Intersection of Family Law and Reproductive Rights</i> .....	1326
V. CONCLUSION .....	1327

---

\* Jamie R. Abrams (LL.M., Columbia University School of Law; J.D., American University Washington College of Law; B.A., Indiana University Bloomington) is an Associate Professor of Law at the University of Louisville Louis D. Brandeis School of Law. The Author extends her sincerest thanks to the participants in the Family Law Scholars and Teachers Workshop (New Orleans, LA 2016), the International Society of Family Law Lawyers Conference (Jackson, WY 2016), and the University of Akron Feminist Judgments Conference (Akron, OH 2016); Jennifer Hendricks, Suzanne Kim, Anibal Rosario Lebron, Yvonne Lindgren, Ariana Levinson, Sam Marcossou, Goldburn Maynard, Jason Pletcher, Dara Purvis, Rachel Rebouche, and Justin Walker for feedback and discussion on earlier drafts. The Author also thanks the Brandeis School of Law for grant support, the University of Leeds (U.K.) for an impactful Visiting Scholar exchange, and Abigail Lewis, Jessica Nichols, and Jennifer Reynolds for invaluable research and editing assistance.

## I. INTRODUCTION

This Article reveals worrisome inaccuracies in how we understand and frame abortion decision-making. It particularly reveals a problematic polarization in how abortion decision-making is framed compared to parental decision-making, a polarization distinguished between “autono(me)” and “autono(thee)” decision-making. It concludes that autono(me) is the troublesome framework by which a woman is inaccurately perceived to universally make abortion decisions exclusively in a myopic lens, focused only on her own needs or wants. However, strong data exists supporting that a women’s *actual* decision-making lens often focuses squarely on existing children. This framing ignores how women make reproductive decisions in an autono(thee) and, more often, in an autono(we) lens. Autono(thee), in contrast, is the troublesome framework by which the law wrongly pretends that parents exclusively make decisions in a myopic lens focused only on the Best Interests of the Child (BIOC). This framing ignores the ways in which parents can also make decisions in an autono(me) and, more often, in an autono(we) lens. This polarized framing marginalizes women’s abortion decision-making as anomalously self-centered, callous, and gendered when compared to the ordinary decision-making framework of parents.<sup>1</sup>

A unified decision-making framework grounded in family law would yield a more accurate, inclusive, destigmatized framing.<sup>2</sup> Proposing a unified framework to understand and describe parental and abortion decision-making disrupts longstanding boundaries in reproductive politics and core organizing principles of family law.<sup>3</sup> It is virtually unprecedented within reproductive rights scholarship or advocacy to speak of reproductive rights in the same conversation as “parents” or “children.”<sup>4</sup> This is for fear that such categorizations would

---

1. See generally Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. CR.-C.L. L. REV. 409, 439 (2013) (arguing that “abortion disgust” derives from “women engaging in gender-atypical behavior”).

2. Importantly, as discussed more thoroughly below, the question of abortion decision-making can be tethered to family law regardless of one’s political perspective on abortion. While this Article is candidly written from the perspective of advancing the reproductive rights movement, this Article targets the *methodology* of how decision-making is framed in law and society more than the substance of the decision itself.

3. See, e.g., KATHLEEN McDONNELL, NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION 21 (1984) (observing, over thirty years ago, that the “feminist discourse on abortion has changed little” (emphasis added)). While feminist theory has done great work to expand, develop, and mature in the areas of violence, for example, it has remained more static on the issue of abortion. *Id.* at 22-23.

4. 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, 79-80 (2008) (“In the prevailing discourse on abortion in the United States, abortion and motherhood are often regarded as opposing interests, and it is typically assumed that women

subject women as reproductive decision-makers to the same *obligations* and state oversight that parents have. This Article does not seek to apply parental standards or obligations to a woman's decision to terminate a pregnancy, but it seeks to comparatively analyze *how* both types of decisions are made to debunk myths and to destigmatize abortion decision-making.<sup>5</sup>

Part II sets out the polarized framings that currently dominate and divide abortion decision-making and parental decision-making. Part III explains the ways in which these framings are inaccurate and problematic and makes the case for a unified framing of family decision-making. This framing inclusively acknowledges that both parental decision-making and abortion decision-making have aspects of *autono(me)*, *autono(thee)*, and *autono(we)* lenses. Part IV explains why this approach is needed and how a revised strategic framing would build bridges instead of walls, and strengthen credibility and inclusivity in the reproductive rights movement.<sup>6</sup>

## II. THE POLARIZATION OF AUTONO(ME) AND AUTONO(THEE)

Women's abortion decision-making and parental decision-making in child-rearing are constructed as polarized processes. Women's abortion decision-making is understood as myopic and individualistic, and parental decision-making is understood as sacrificial and selfless. This polarization leaves reproductive decision-making isolated, marginalized, and vulnerable while parental decision-making is essentialized and revered. Both framings are inaccurate and problematic.

### A. *The Marginalized Autono(me) Framing of Women's Abortion Decision-Making*

The *autono(me)* framing largely dominates legal, political, and social discourses of women's abortion decision-making. The language of "*autono(me)*" depicts how "autonomy" legal framings are overlaid with problematic connotations and perceptions suggesting that this decision-making is myopic and individualistic.

---

who obtain abortions do not want to be mothers, at least not at the time of the abortion, because they are unable or unwilling to assume the responsibilities of raising a child.”)

5. See generally Priscilla J. Smith, *Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. ONLINE 1, 14 (2008) (“One of the problems we will face in explaining women's decision-making, though, is the lack of information people have about the process and the assumptions that grow in that void, assumptions fueled by the anti-abortion movement's widespread and well-funded disinformation campaigns.”).

6. See, e.g., Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 327-35 (2013) (examining the development and interconnections among reproductive health, reproductive rights, and reproductive justice movements).

The “pro-choice” movement has worked to frame and protect a woman’s right to choose to terminate her pregnancy. Advocates historically were driven to respond to the “pro-life” framing with an accessible, understandable framing, and the “right to choose” prevailed.<sup>7</sup> This language of choice was a critical historic pivot from the early efforts to frame abortion as an issue of public health—a framing that activists have staunchly sought to return to in modern times.<sup>8</sup> This language of “choice” versus “life” has critically “co-opted the hard fact that” a woman may terminate a pregnancy to save her own life.<sup>9</sup> This language of choice was then enshrined in *Roe v. Wade*.<sup>10</sup> This language explains the legal roots of the right, but it oversimplifies and essentializes how the decisions are made. It is too narrow of a frame.<sup>11</sup> This framing has had critical “staying power” over several decades, a point that legal historian Mary Ziegler argues merits a “fuller account.”<sup>12</sup> This Article seeks to expand that account as to the decision-making it depicts.

---

7. LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 33-34 (2012) (providing the historic documentation of Jimmye Kimmey offering the options of “Freedom of Conscience” and “Right to Choose”).

8. See *id.* at ix (explaining how the claims for liberalizing abortion law “in the name of public health gave way over time to claims of the women’s movement seeking for women liberty, equality, and dignity: women’s right to control their own bodies and lives; to have their voices and decisions treated with respect; and to participate as equals in private and public life”); see, e.g., *About Us*, CTR. FOR REPROD. RTS., <http://www.reproductiverights.org/about-us> [<https://perma.cc/C7JQ-JGRY>] (helping women realize their “right to reproductive health and autonomy” and fighting globally to advance women’s reproductive health, self-determination, and dignity as basic human rights); PLANNED PARENTHOOD ACTION FUND, <https://secure.ppaction.org/> (last visited August 22, 2016) (emphasizing its work on reproductive health).

9. Nicole Huberfeld, *With Liberty and Access for Some: The ACA’s Disconnect for Women’s Health*, 40 FORDHAM URB. L.J. 1357, 1361 (2013) (noting that prohibiting access to abortions thus can threaten the life of pregnant women too).

10. 410 U.S. 113 (1973). See generally CELESTE MICHELLE CONDIT, DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE 117 (1990) (“[T]he vocabularies of both Life and Choice became partially entrenched in the law, although in different ways and covering different territories.”).

11. See *Reproductive Justice Media Reference Guide*, FORWARD TOGETHER, <https://forwardtogether.org/tools/media-guide-abortion-latinx-community/> (last visited Feb. 22, 2017) (explaining how mainstream media coverage focuses narrowly on a “single ‘choice’ framework” that has “limited the media coverage of many other reproductive rights and health issues”). See generally Luna & Luker, *supra* note 6, at 328 (highlighting how the reproductive justice movement “called for recognition of the limitations of emphasizing choice, which had largely come to mean the choice to have an abortion”).

12. MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 232 (2015). For example, Ziegler explores: “Has the choice framework varied in influence, or have supporters of legal abortion challenged, reshaped, and revived it? What can abortion-rights activists do, if anything, to move away from this approach? Like single-issue politics, the idea of a right to choose has a long and complicated history.” *Id.* at 232-33.

This framing has perpetuated misperceptions of how women make abortion decisions. Consider as a starting point all of the problematic ways in which abortion decision-making is framed solely around auto(n)me in the following quote:

A woman's choice to terminate a pregnancy is both empowering and liberating. It empowers *her* because *her* choice acknowledges that *she* understands *her* options, *her* current situation, and *her* future expectations, and *she* is able to make a fully informed decision about what would most benefit *her* and act on it. It liberates *her* because *she* can regain control of *her* reproductive system and chart *her* destiny without an unwanted child in tow. It liberates *her* to fully care for *her* existing family, *her* career, *her* emotional and mental well-being, and *her* goals.<sup>13</sup>

This quote uses “her” or “she” seventeen times to refer to the decision! It positions the pregnant woman as a mirror, and her decision-making methodology only focuses on herself and her needs. In contrast, as explored more below, parental decision-making is positioned as an external scope in which parents look out at their children. While this account may explain *some* abortion decision-making, it is not a universal or fully descriptive account, yet it dominates mainstream political, legal, and social framings.

This auto(n)me framing is perpetuated, for example, in laws governing minor's access to abortion bypassing parental consent. While the exact standards applied to minors seeking a judicial bypass of parental consent vary from state to state, fifteen states use a BIOC standard to focus exclusively on whether a judicial bypass is in the interest of the minor.<sup>14</sup> This considers explicitly whether the *abortion* is in the minor's best interests. This perpetuates the idea that girls are making this decision in an exclusively individualistic manner, without the context of family, community, and existing children.

This auto(n)me framing can be used to troublesome legal and political ends. It distorts the methodology of abortion decision-making by stripping it of any perspectives of the needs of others or the interconnected relationships involved. A South Carolina court of appeals decision reveals the harsh consequences of an exclusive (and even derogatory) auto(n)me frame. In *Purser v. Owens*, the family court

---

13. Henry Morgentaler, *Abortion Is a Moral Choice*, in THE ETHICS OF ABORTION 13, 21 (Jennifer A. Hurley ed., 2001) (emphasis added).

14. *Parental Involvement in Minors' Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> [https://perma.cc/HKT8-FMCB]. All states provide a mechanism for a minor bypass. Some states particularly instruct judges to use the BIOC standard to grant this relief. Satsie Veith, *The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the "Maturity" Standard*, HOFSTRA L. REV. 23, 453 (1994).

considered a custody dispute between the mother and father of an autistic child.<sup>15</sup> The couple had never married.<sup>16</sup> The father had irregular contact with the child and paid child support voluntarily for the first several years of his son's life, but after a remarriage, he began more consistent contact in 2005.<sup>17</sup> The mother was the child's primary caretaker for his entire life, including extensive speech and occupational therapy.<sup>18</sup> In 2006, the mother became pregnant with her current boyfriend and elected to terminate the pregnancy.<sup>19</sup> She testified that the abortion was because the second child had a 50% chance of also having autism and "she felt a second child would take away her focus from [the existing] [c]hild, and [her] [b]oyfriend was not someone she wanted involved in her and [the existing] [c]hild's lives anymore."<sup>20</sup> The family court awarded custody to the father, despite findings that the mother was fit and the primary caretaker.<sup>21</sup> The court explicitly expressed concern with the pregnancy and abortion: "That was an irresponsible decision; two irresponsible decisions. First being involved with a 19 year old when you are 36 or 35. That's irresponsible. And then having an abortion. That's irresponsible. I am concerned about the environment."<sup>22</sup>

Here, the mother paid a steep cost for an autono(me) lens, as the court perceived it. Because she had made what the judge perceived to be "irresponsible" decisions, she lost custody of her child. When the trial court saw her decision in a demonized autono(me) frame, it saw it also as fundamentally inconsistent with parenting decision-making, without regard to how she had actually cared for and raised her child who was the subject of the litigation.

The South Carolina Court of Appeals held that the family court erred in considering the mother's abortion.<sup>23</sup> Rather, her decision "had no direct or indirect effect on [the existing] [c]hild and therefore was not relevant to the custody determination."<sup>24</sup> The court of appeals remanded for consideration excluding this evidence.<sup>25</sup> It reframed the mother's decision as one focused on the well-being of her existing child and acting in *his* best interests. The court of appeals,

---

15. Purser v. Owens, 722 S.E.2d 225, 226 (S.C. Ct. App. 2011).

16. *Id.* at 225.

17. *Id.* at 225-26.

18. *Id.* at 226.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 227.

23. *Id.* at 228.

24. *Id.*

25. *Id.*

thus, reframed her decision around what the next Section will describe as an auto(n)thee lens. This auto(n)thee and/or auto(n)we lens considered her existing child's needs, the impact that a second autistic child would have on her first child, and the role of the second child's father in their lives.

As *Purser's* family court opinion reveals, this exclusive auto(n)me framing can be misperceived and distorted. It can create an inaccurate framing of women's abortion decision-making as narrowly focused on themselves in the abstract. The "right-to-life" movement has seized on this framing and pushed forward descriptions of abortion decision-making as driven by "convenience" and "self-development."<sup>26</sup> The marginalization and demonization of an exclusive auto(n)me framework are perhaps well reflected in Pope Francis's recent remarks stating that the decision not to have children is a "selfish choice."<sup>27</sup> The "*Silent No More*" movement has likewise leveraged this frame of abortion as an inherently selfish act and urged women to come forward and explain it as such.<sup>28</sup> And accordingly, this political framing has yielded notable political traction in which many Americans *do* disapprove of abortion for the self-development (e.g., career or schooling) of the pregnant woman.<sup>29</sup>

Critically, this individual autonomy framing contrasts with other approaches, such as the legal rules governing abortion in England. The 1967 Abortion Act, as amended by the Human Fertilisation and Embryology Act of 1990, makes abortion legal up to twenty-four weeks under certain circumstances.<sup>30</sup> Those circumstances include when two doctors agree in good faith that "continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman *or any existing children of her family*."<sup>31</sup> The statute further

---

26. Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1578 (1991).

27. David Gibson, *Pope Francis: 'Not to Have Children Is a Selfish Choice'*, HUFFINGTON POST (Feb. 13, 2015), [http://www.huffingtonpost.com/2015/02/12/pope-francis-children\\_n\\_6671464.html](http://www.huffingtonpost.com/2015/02/12/pope-francis-children_n_6671464.html) [https://perma.cc/Z95F-528X] ("Life rejuvenates and acquires energy when it multiplies: It is enriched, not impoverished!" (quoting Pope Francis)).

28. *Why We Chose Abortion: Susan and Hrach Share Their Story*, SILENT NO MORE, <http://www.silentnomoreawareness.org/testimonies/testimony5235.htm> [https://perma.cc/6UVV-SGG3] (quoting one narrative that the reason a woman had three abortions was "I selfishly wanted my career, educational plans and my relationships to remain unchanged," and another husband explaining that "[t]he reason I encouraged her was selfishness. I wanted our new marriage to get off the ground without being hindered in any way. I also did not want our professional and travel plans to be steered off course.").

29. Williams, *supra* note 26, at 1583.

30. Abortion Act 1967, in FRANCES BURTON, CORE STATUTES ON FAMILY LAW, 25 (2016-2017).

31. *Id.* (emphasis added).

allows that when determining the risks, “account may be taken of the pregnant woman’s actual or reasonably foreseeable environment.”<sup>32</sup> Under this model, there is arguably no individual autonomy at all because the doctors make the ultimate decision. This framing is subject to its own critiques, including that it arguably positions women as either “too selfish or too irrational to be left to make her own decision,” and that it still positions maternity as the norm for women and abortion as the exception.<sup>33</sup> It does, however, position abortion decision-making as a decision to be understood in a contextual family frame.

The exclusive auto(n)me frame positions women—and only women—to have to defend their decisions from dominant hierarchies, requiring women’s decision-making to be uniquely selfless and sacrificial.<sup>34</sup> *Gonzales v. Carhart* particularly revealed how demonized an auto(n)me frame can become and how it can be contrasted starkly with women’s roles as “natural” caregivers.<sup>35</sup> *Gonzales* challenged the constitutionality of the Partial Birth Abortion Act.<sup>36</sup> It revealed that the Court still understood the woman’s right to choose to terminate her pregnancy as a decision that occurred in consultation with her doctor.<sup>37</sup> The Court’s rhetorical language revealed its view that “doctors” protect fetal interests, “abortion doctors” protect women’s autonomy, that women are naturally destined as mothers, and women who seek to terminate a pregnancy need to be protected.<sup>38</sup> It suggests that abortion is not healthcare and that women need to be “protected from providers” who might fail to inform or guide them properly in their decision.<sup>39</sup> This is a distinctly “woman-protective argument.”<sup>40</sup> The Court suggested that it was not just that women need to be protected from poor decision-making; it is that women who seek to exer-

---

32. *Id.*

33. Sally Sheldon, *The Abortion Act 1967: A Critical Perspective*, in *ABORTION LAW AND POLITICS TODAY* 43, 49 (Ellie Lee ed., 1998).

34. *See* CONDIT, *supra* note 10, at 180 (“As American society and public discourse have been constituted, women must *justify* their own moral principles *as they apply them* because these principles and the female interests they represent have not become publicly accepted maxims. . . . [leaving women to] then negotiate between ‘their’ principles and the dominant principles.”).

35. 550 U.S. 124, 125 (2007).

36. *Id.* at 124.

37. *See generally id.*

38. *See id.* at 159-60 (“The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.”)

39. Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 *HASTINGS L.J.* 385, 405 (2013) (explaining how *Gonzales* and *Casey* have positioned “abortion exclusively as a right of choice, uncoupled from healthcare” (citing *Gonzales*, 550 U.S. 124, and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992)).

40. *Id.* at 410.

cise their decision-making autonomy in any way other than with a fetal focus are in need of protective barriers. It is a false choice for women: either act to protect fetal life, or the state needs to protect you from your decision-making.<sup>41</sup>

This Article critiques the essentialized view that all women make decisions using one particular lens. While some women *do* make reproductive decisions in an auto(n)me lens, it is important that the law acknowledge that not *all* women or *all* decisions sit in this frame or in any one frame alone.<sup>42</sup> This conclusion is explored more fully in the Section below.

### B. *The Dominant Auto(n)me Framing of Parental Decision-Making*

In stark contrast, the BIOC legal standard perpetuates an essentialized inaccuracy that parents act myopically in the best interests of their children. It is not just that this narrative *exists*, but that it is revered and accepted as universal. This, in turn, perpetuates the myth that parents always subordinate their interests to their children. A narrative suggesting that parental rights have been subordinated to children's interests dominates family law, but it is not fully accurate or descriptive.<sup>43</sup> This Section explores the legal standard and the false premise that it explains parental decision-making universally.

#### 1. *The BIOC Standard*

The BIOC standard perpetuates a view that is squarely focused on the children's interests—in stark contrast to the individual rights of the parents. This view may be generally accurate in describing state interventions, but even then, it is not consistently accurate, and it is not accurate for all parental decision-making. The BIOC standard is

---

41. *Id.* (“[T]he woman-protective argument conflates healthcare and choice: A woman must be protected from the abortion *decision* because the choice is harmful to her physical and mental *health*.”).

42. *See, e.g.,* Kate Cockrill & Tracy A. Weitz, *Abortion Patients' Perceptions of Abortion Regulation*, 20 WOMEN'S HEALTH ISSUES 12, 14 (2010) (“The reasons for choosing abortion among the women in our sample were diverse, but for most they matched the general categories identified in recent research ‘that having a child would interfere with a woman's education, work or ability to care for dependents; that she could not afford a baby now; and that she did not want to be a single mother or was having relationship problems.’”). Consider, for example, a woman who terminates her pregnancy to save her own life. These women do not feel that they have exercised their autonomy or made a choice at all. *See* MCDONNELL, *supra* note 3, at 35.

43. *See* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 133 (2014).

consistently extended to many different family law settings, including custody and visitation.<sup>44</sup>

The BIOC standard is the “touchstone” underlying custody law in the United States and globally.<sup>45</sup> The history of custody law is, at bottom, a debate about whose rights—children, parents, moms, or dads—should be given “paramount consideration.”<sup>46</sup> It is generally understood to have “at least as many weaknesses as it does strengths.”<sup>47</sup>

Custody law has changed dramatically throughout history from a property interest to a fundamental constitutional right, and from a gendered to a gender-neutral standard.<sup>48</sup> The BIOC standard distinctly emerged as the touchstone of family law, hallmarked by the release of the 1970 Uniform Marriage and Divorce Act’s BIOC factors.<sup>49</sup> The gender-neutral BIOC standard replaced the earlier eras of gendered presumptions.<sup>50</sup>

---

44. See, e.g., FLA. STAT. § 752.011 (2016) (applying the BIOC standard to grandparent visitation); *R.S. v. J.S.*, 457 S.W.3d 389, 391 (Mo. Ct. App. 2015) (citing the Missouri statute requiring the court to consider the BIOC when modifying a prior custody decree); Brian Bix, *Best Interests of the Child 2* (Univ. Minn. Law Sch. Legal Studies Research Paper Series, Research Paper No. 08-08, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1092544](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092544). See generally Lahny R. Silva, *The Best Interest Is the Child: A Historical Philosophy for Modern Issues*, 28 BYU J. PUB. L. 415 (2014) (arguing that the BIOC standard should be reframed and applied even beyond family law to the juvenile justice system).

45. Caroline Simon, *The ‘Best Interests of the Child’ in a Multicultural Context: A Case Study*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 175, 180 (2015) (“The notion of the BIC is today one of the most often mobilised concepts in national and international children’s rights and family law.”).

46. Erin Bajackson, Note, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. LAW. 311, 311-12 (2013) (noting that this question has “sparked a firestorm of legislation”).

47. See *id.* at 311 (summarizing that “[a]t best it can be described as a fact-driven process that most accurately protects a child’s physical, psychological, and emotional needs [and a]t worst it has been deemed an egocentric, utilitarian product of the state’s design to make children productive members of society rather than burdens upon it later in life,” ultimately concluding that the truth lies somewhere between these extremes (footnotes omitted)).

48. Custody was presumptively given to fathers, historically aligning with understandings of children as property and the lack of legal identity of women. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 390-91 (2008). In time, this presumption shifted to a gendered presumption that women were more appropriate caretakers of children of young ages. *Id.* at 391. This maternal presumption was entirely gone by the 1970s. *Id.* This presumption was particularly applied for children of “tender years,” often considered to be children under seven years old. Kelly Schwartz, Note, *The Kids Are Not All Right: Using the Best Interest Standard to Prevent Parental Alienation and a Therapeutic Intervention Approach to Provide Relief*, 56 B.C. L. REV. 803, 815-16 (2015). Fathers, however, were still presumed to be the presumptive best custodians of children beyond their formative years. Bajackson, *supra* note 46, at 314 (noting that these presumptions could be overcome with factual findings of unfitness).

49. Bajackson, *supra* note 46, at 314-15 (explaining that factors contributing to the shift to female favoritism include “the industrial revolution, the women’s rights movement, and changes in the field of psychology” (quoting Shannon Dean Sexton, Note, *A Custody System*

The BIOC standard directs judges to focus squarely on the perspective of the children.<sup>51</sup> While the exact factors vary from state to state, the core factors allow states to consider the wishes of the child's parents; the wishes of the child; the interaction and interrelationship of the child with parents, siblings, and any other persons who may significantly affect the child's best interests; and the mental and physical health of all parties.<sup>52</sup> No one factor is considered dispositive in identifying the child's best interests.<sup>53</sup> Typically, the only evidence that is *not* admissible in determining the BIOC is evidence that does not have a nexus to the child, such as the sexual activity of a parent that does not impact the child.<sup>54</sup> Courts deploy experts and consider a broad range of factors that are all narrowly focused on answering the "central concern" of the child's best interests.<sup>55</sup> In a

---

*Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761, 768 (2000)).

50. Elrod & Dale, *supra* note 48, at 392 ("The impact of child custody law's paradigm shift to the gender-neutral best interests of the child standard in the 1970s almost defies description. Rather than basing custody decisions on gender- or status-based presumptions, judges were suddenly charged with making individualized determinations without presumptions or a clear default position."). *But see* Bajackson, *supra* note 46, at 312-15 (noting that some men and men's rights groups argue that gender neutrality has not been achieved and that the maternal presumption still influences courts); Elizabeth Gresk, *Opposing Viewpoints: Best Interests of the Child vs. the Fathers' Rights Movement*, 33 CHILD. LEGAL RTS. J. 390, 391 (2013) ("[T]he tender years doctrine still influences decisions made in family courts. . . . [M]others are overwhelmingly favored as primary custodians for children.").

51. Bix, *supra* note 44, at 1 (noting that this emphasis is distinctly *not* focused on the "claims and interests of other parties," such as the parents).

52. *See, e.g.*, 23 PA. CONS. STAT. § 5328 (2016). The inclusion of the children's wishes in the custody decision-making framework marked a historic development in custody law away from children as property to children as autonomous beings. Bajackson, *supra* note 46, at 317 ("This factor [reflects] an important leap forward from the presumption periods defining a child's worth as a piece of owned property to a more even playing field that puts children's rights more in line with those enjoyed by their parents.").

53. *See, e.g.*, MINN. STAT. § 518.17(b)(1) (2016) ("The court may not use one factor to the exclusion of all others, and the court shall consider that the factors may be interrelated."). "The court may not focus on a single factor to the exclusion of all others. 'In the search for an appropriate custodial placement, the primary focus of the court is the best interests of the child, the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment.'" *Gilbert v. Gilbert*, No. 093459, 1996 WL 494080, at \*3 (Conn. Super. Ct. Aug. 16, 1996) (quoting *Cappetta v. Cappetta*, 490 A.2d 996, 999 (Conn. 1985)).

54. Bajackson, *supra* note 46, at 315-22 (explaining that the court should not consider the conduct of a custodian that does not affect his relationship with the child). *See generally* MINN. STAT. § 518.17(b)(3) ("In assessing whether parents are capable of sustaining nurturing relationships with their children, the court shall recognize that there are many ways that parents can respond to a child's needs with sensitivity and provide the child love and guidance, and these may differ between parents and among cultures.").

55. *See, e.g.*, *Landwehr v. Landwehr*, 442 S.W.3d 139, 142 (Mo. Ct. App. 2014) ("The best interest of the child is not merely an important consideration in modification proceedings . . . it is the trial court's central concern." (quoting *Soehlke v. Soehlke*, 398 S.W.3d 10, 15 (Mo. 2013))).

sense, the standard thus functions more like a *process* or decision-making methodology than a definition.<sup>56</sup>

Given its breadth and fact-specific nature,<sup>57</sup> implementation has proven more difficult and indeterminate. The standard relies heavily on trial court findings of fact to which appellate courts give great deference.<sup>58</sup> The standard positions judges to make BIOC determinations. Accordingly, critics argue that the standard can often hide judicial bias and promote “arbitrary and inconsistent decision-making.”<sup>59</sup> This oft-cited quote summarizes the challenges:

Finding the best interests of the child is an attractive public policy and a lofty objective, but it is a difficult operational standard. When compared to the legal presumptions it replaced, the best interests standard has been assailed as indeterminate and unpredictable. Judges, without the requisite training in child development and adequate resources to fully investigate these intensely fact-sensitive cases, tend to rely on their own values.<sup>60</sup>

Some criticize whether judges are actually prioritizing the children’s best interests. Others suggest that the standard is applied in a way that privileges women and harms men; conversely, some suggest the standard is applied in a way that harshly judges and punishes mothers, while applying disproportionately lenient standards for fathers.<sup>61</sup>

---

56. Simon, *supra* note 45, at 180 (summarizing Belgian family justice and noting that “no one can legitimately claim to know a priori what is in the child’s best interests”).

57. See, e.g., *Noland-Vance v. Vance*, 321 S.W.3d 398, 418 (Mo. Ct. App. 2010) (“There is no absolute set of rules to follow when awarding child custody; each case must be examined in light of its own set of unique facts.” (quoting *In re Marriage of Barton*, 158 S.W.3d 879, 884 (Mo. Ct. App. 2005))).

58. See, e.g., *R.S. v. J.S.*, 457 S.W.3d 389, 392 (Mo. Ct. App. 2015) (explaining that the appellate court must give “great deference” to the trial court’s determination); *Noland-Vance*, 321 S.W.3d at 403 (“Because a trial court is vested with considerable discretion in determining custody questions, an appellate court should not overturn the trial court’s findings unless they are manifestly erroneous and the child’s welfare compels a different result. . . . We will not substitute our judgment for that of the trial court so long as credible evidence supports the trial court’s beliefs.” (citations omitted)). “Greater deference is given to a trial court’s decision in matters involving child custody than in any other type of case.” *Id.* (explaining that this is because of the trial court’s unique ability to “assess the credibility of the witnesses, along with their character, sincerity, and other intangibles not completely revealed by the record”).

59. Bix, *supra* note 44, at 2; see also June Carbone, *Legal Applications of the “Best Interest of the Child” Standard: Judicial Rationalization or a Measure of Institutional Competence?*, 134 PEDIATRICS S111, S117 (2014) (“Moreover, however easy it is to posit cases in which the courts and other third parties should intervene to protect children’s interests, it is equally possible to point to other cases in which such interventions reflect judicial bias.”).

60. Elrod & Dale, *supra* note 48, at 392-93 (footnotes omitted).

61. See HASDAY, *supra* note 43, at 141.

Criticisms and obstacles notwithstanding, the BIOC standard applies throughout the world<sup>62</sup> and has been embedded in international human rights documents.<sup>63</sup> It holds great longevity, breadth, and acceptance.

## 2. *The Premise of Autono(the) Parental Decision-Making*

The BIOC standard is not just relevant to state interventions. The Supreme Court has further concluded that this standard, as implemented in the United States, is premised on the conclusion that parents—like the state—make decisions focused on their children’s best interests.

*Troxel v. Granville*<sup>64</sup> reveals this premise of parental decision-making in the BIOC.<sup>65</sup> In *Troxel*, Tommie Granville sought to limit and restrict the visitation terms and conditions of Jennifer and Gary Troxel, the parents of the children’s deceased biological father, Brad Troxel.<sup>66</sup> The children’s grandparents wanted greater visitation, closer to the visitation terms that the children’s father had before his suicide.<sup>67</sup> The trial court made factual findings relating to the mother’s wish to establish a unified, blended family with the children she had with Brad Troxel, her children from a prior marriage, her child in her current marriage, and the children of her current husband. This required extensive coordination and effort.<sup>68</sup> Tommie’s reasons for limiting the Troxel’s visitation were very much grounded in the chil-

---

62. See, e.g., Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1557 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC] (applying the best interests of the child standard as the primary standard). See generally KAREN WELLS, CHILDHOOD IN A GLOBAL PERSPECTIVE 15-21 (2d ed. 2015) (highlighting the emergence of international law frameworks for regulating the protection of children).

63. CRC, *supra* note 62, art. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.”); Bajackson, *supra* note 46, at 351; Jason M. Pobjoy, *The Best Interests of the Child Principle as an Independent Source of International Protection*, 64 INT’L & COMP. L.Q. 327, 328 (2015) (explaining that the BIOC standard embodied in the CRC is “playing an increasingly significant role in decisions involving the admission or removal of a child from a host State”).

64. 530 U.S. 57 (2000).

65. Ariela R. Dubler, *Constructing the Modern American Family: The Stories of Troxel v. Granville*, in FAMILY LAW STORIES 95, 108 (Carol Sanger ed., 2008) (“[Justice O’Connor] frames this story as a rather ordinary tale of family disagreement . . .”).

66. *Troxel*, 530 U.S. at 60-61.

67. See *id.*

68. Dubler, *supra* note 65, at 103 (“Indeed, through Tommie’s testimony, the complicated logistics of the Wynn family emerged in full: Ryan and Kevin Wynn were with Tommie and Kelly every other weekend; Jessie and Hallie Granville were with them every Saturday through Wednesday; Roth Granville was with them every Tuesday . . . ; and, of course, Riley always lived with them.”). This family composition left “twelve adults who considered themselves grandparents to the children.” *Id.*

dren's needs, but also family unity and straightforward parenting logistics. The trial court judge wrongly viewed the dispute as one between the biological mom and the grandparents, with each positioned equally in their respective interests.<sup>69</sup> The trial judge ruled that it was in the BIOC to spend "quality time" with their grandparents.<sup>70</sup>

Justice O'Connor wrote the plurality opinion for the Supreme Court. She concluded that the trial court had erred in giving "no special weight at all to [the mother's] determination of her daughters' best interests."<sup>71</sup> Absent a finding of fitness, the court should have given deference to the mother's analysis of what was in her children's best interests. Thus, the fundamental right that the Court recognizes as "perhaps the oldest of the fundamental liberty interests recognized by [the] Court"<sup>72</sup> was premised on the conclusion "that a fit parent will act in the best interest of his or her child."<sup>73</sup> The Court held:

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.<sup>74</sup>

One Supreme Court case explained:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>75</sup>

This critical threshold premise has been the guiding principle as states consider the constitutionality of their third-party visitation laws after *Troxel*. For example, when California considered the constitutionality of its nonparental visitation statute, it emphasized that *Troxel* held that parents' fundamental rights are threatened when the "court exercises this discretion to substitute its own judgment of a child's best interests for that of a competent custodial parent."<sup>76</sup> The threshold presumption these courts make is that fit parents *do* act in the best interests of their children.<sup>77</sup>

---

69. See *Troxel*, 530 U.S. at 61, 66-67.

70. *Id.* at 62.

71. *Id.* at 69; Dubler, *supra* note 65, at 109.

72. *Troxel*, 530 U.S. at 65.

73. *Id.* at 69.

74. *Id.* at 68.

75. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

76. *Punsly v. Ho*, 105 Cal. Rptr. 2d 139, 144 (Cal. Ct. App. 2001).

77. *Id.* at 1109.

The premise of the BIOC standard—that parents universally and exclusively act in the best interests of their children—inaccurately frames parental decision-making around a lens of auto(n)the(e) parental decision-making. Critically, the BIOC standard is not necessarily the standard that all parents use when they make day-to-day parenting decisions free from state oversight or intervention. Perpetuating this myth is surely detrimental to parents, particularly mothers, but deeply detrimental to normative framings of women’s abortion decision-making.

The premise that parents make decisions always and narrowly in the BIOC is not necessarily descriptive of how parental decision-making actually occurs. Although it may certainly express the state’s normative goals for parenting behaviors, the BIOC standard is not scientifically studied, taught to parents, or empirically supported.<sup>78</sup> Rather, while parents make decisions every day on behalf of their children, “surprisingly little work has addressed the process by which parents make decisions for their children.”<sup>79</sup> In particular, “no work has systemically examined how parents’ decisions for their children differ from how they decide for themselves in identical situations”—a critical area of inquiry relevant to this Article.<sup>80</sup> Even if work had been done, parenting norms change by historical period and across geographies and cultures.<sup>81</sup> Consider, for example, differences in feeding and sleeping practices, discipline, employment, and marriage age, to name a few. Most existing work chronicles how parents make certain types of decisions, such as medical and childcare, but not systemically how they make decisions for their children as compared to for themselves.<sup>82</sup>

Parenting, particularly in Western cultures, is done in relative isolation.<sup>83</sup> It is done with relatively little training, guidance, educa-

---

78. See VAL GILLIES, MARGINALISED MOTHERS: EXPLORING WORKING-CLASS EXPERIENCES OF PARENTING 156 (2007) (presenting research that “seriously undermines the notion that mothering skills are universal, easily abstracted and able to be neutrally conveyed in the form of parenting classes”).

79. Rebecca A. Dore et al., *A Social Values Analysis of Parental Decision Making*, 148 J. PSYCHOL. 477, 477 (2014) (concluding this lack of work is “unfortunate”).

80. *Id.* at 478 (anticipating that parents would be more risk-averse on behalf of their children).

81. SHARON HAYS, THE CULTURAL CONTRADICTIONS OF MOTHERHOOD 21 (1996) (“At any given time and place one particular model tends to take precedence over all others. American mothers and fathers, just like parents of other times and places, are likely to recognize this dominant model of appropriate child rearing and feel pressed to adopt or reject it in whole or in part.”).

82. Dore et al., *supra* note 79, at 480.

83. TINA MILLER, MAKING SENSE OF MOTHERHOOD: A NARRATIVE APPROACH 113 (2005) (concluding that mothers do not “admit how burdensome the constraints and diffi-

tion, or support.<sup>84</sup> Despite a proliferation of “how to” books on parenting, interest and research in parental development is relatively underdeveloped.<sup>85</sup> Setting aside “computer-like images of thinking” is thus important in understanding parenting.<sup>86</sup> Any framing of standardized parenting wrongly suggests that parenting is essentialized across race, class, age, gender, and immigration status.<sup>87</sup>

Even when parents have the best interests of their children at heart, that does not necessarily translate into the ability to act on the parent’s determination of the best interests of their children.<sup>88</sup> Rather, parental decision-making is often more survivalist within a “limited framework of choices and opportunities.”<sup>89</sup> For example, the decision of what form of childcare is in the BIOC is constrained by “family finances, inflexible work schedules, and limited availability of suitable options” and differs according to “parents’ preferences, values, and worries,” all of which factor into their decision-making.<sup>90</sup> Economics scholarship studying how families allocate resources and make decisions further reveals these complexities.<sup>91</sup>

Finally, family law scholars have also long recognized that even the state is not well-equipped to make BIOC determinations, no mat-

culties of their condition can be,” as the children are in a relatively private and isolated sense that “perpetuate[s] self-reliance”).

84. MARVIN J. FINE, PARENTS VS. CHILDREN: MAKING THE RELATIONSHIP WORK 168 (1979) (“Parents seem to have been a forgotten group in relation to their education. Our society has treated parenthood as something that people learn about automatically; yet many of us found ourselves less than adequately prepared for the day-to-day challenges of parenthood.”).

85. See Jack Demick, *Stages of Parental Development*, in 3 HANDBOOK OF PARENTING 389, 408-09 (Marc H. Bornstein ed., 2d ed. 2002) (noting the lack of research suggests that “how-to” books should be reviewed cautiously).

86. Jacqueline J. Goodnow, *Parents’ Knowledge and Expectations: Using What We Know*, in HANDBOOK OF PARENTING, *supra* note 85, at 439, 456.

87. See generally LAURA ELDER & STEVEN GREENE, THE POLITICS OF PARENTHOOD: CAUSES AND CONSEQUENCES OF THE POLITICIZATION AND POLARIZATION OF THE AMERICAN FAMILY (2012) (summarizing research concluding that parenthood is political and that it differs by gender, class, etc.); HAYS, *supra* note 81, at 76 (“Every mother’s ideas about mothering are shaped by a complex map of her class position, race, ethnic heritage, religious background, political beliefs, sexual preferences, physical abilities or disabilities, citizenship status, participation in various subcultures, places of residence, workplace environment, formal education, the techniques her own parents used to raise her—and more.”); MILLER, *supra* note 83, at 6 (“[M]otherhood is differently patterned and shaped in different contexts.”).

88. See, e.g., KAREN WELLS, CHILDHOOD IN A GLOBAL PERSPECTIVE 11 (2015) (“[A] protected, nurturing childhood has been available only to a minority of elite . . . children.”).

89. GILLIES, *supra* note 78, at 159.

90. Laura Sosinsky, *How Parents Make Child Care Decisions*, CHILD TRENDS: BLOG (Apr. 1, 2014), <https://www.childtrends.org/how-parents-make-child-care-decisions/> [<https://perma.cc/2GMX-2XNQ>].

91. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY (1981) (analyzing family life with a rational choice approach); Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1 (1962).

ter how noble its objectives might be. Not trained in the “dynamics of interpersonal relationships and the developmental needs of children, judges increasingly look[] to mental health professionals and the social sciences for help in determining the child’s best interest.”<sup>92</sup> The law lacks the “capacity to supervise the delicately complex interpersonal bonds between parent and child.”<sup>93</sup>

This auto(n)thee framing is inaccurate and problematic, particularly for mothers. It feeds into a long, troublesome historical narrative of differing gendered norms and expectations of parents.<sup>94</sup> While the BIOC standard is unequivocally gender-neutral, social norms and expectations still presume that mothers uniquely put the needs of others first.<sup>95</sup> It uniquely requires a woman “to subordinate her own interests and to put the children first.”<sup>96</sup> Mothers are uniquely “defined through an articulation of their children’s needs,” a hierarchy which leaves a mother’s needs “occluded by the needs of her children.”<sup>97</sup> Mothers’ needs are thought to be actualized by the child, and women’s needs are reframed as desires.<sup>98</sup> Tethering abortion decision-making to parental decision-making might powerfully expose these differences in gender norms and align abortion decision-making with parental decision-making in more gender-neutral ways.

Pretending that parenting is done in an auto(n)thee lens also complicates parenting framing broadly. It falsely suggests that parenthood is a one-way street in which parents are believed to shape and direct their children’s upbringing, but little recognition is given to other influences, forces, or the general reciprocal nature of family relationships. Anne-Marie Ambert’s research in *The Effect of Children on Parents*, concludes that “[t]his perspective has too frequently resulted in a narrow interpretation of family dynamics emphasizing the effect that parents have on their offspring without regard for other, more potent influences on children.”<sup>99</sup> This approach

---

92. Elrod & Dale, *supra* note 48, at 384.

93. Carbone, *supra* note 59, at S118 (quoting *Newmark v Williams*, 588 A.2d 1108, 1115, 1116 (Del. 1991); Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 649 n.13, 14 (1977)).

94. See, e.g., ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 14 (1976) (critiquing the ways in which mothering is “defined and restricted under patriarchy”).

95. Jones et al., *supra* note 4, at 81.

96. DIANE RICHARDSON, *WOMEN, MOTHERHOOD AND CHILDREARING* 7 (1993).

97. JULIE A. WALLBANK, *CHALLENGING MOTHERHOOD(S)* 5 (2001).

98. *Id.*

99. ANNE-MARIE AMBERT, *THE EFFECT OF CHILDREN ON PARENTS* 13 (2d ed. 2001) (explaining how concepts of socialization, childrearing, and child development have created an exaggerated “parental causality in parent-child interaction and child outcomes.”). “This approach totally ignores the larger environment in which children evolve,” and it reflects a

ignores a “multiplicity of influences” that affect children and ignores the impact that children have on parents.<sup>100</sup> Children do influence parents in their health, place / space of their activities, employment, finances, marital and family relationships, personalities, attitudes, values, beliefs, life plans, and feelings of control over life.<sup>101</sup>

This legal framing of parenting as a one-way street is costly for parents. It “has misled entire cohorts of parents into believing that they could control their children’s future and shape its contours.”<sup>102</sup> Treating parenthood as a one-way street renders it not “socially proper for parents to admit that they have problems with their children or that their children are affecting them negatively.”<sup>103</sup> Parenting is not a one-way street of parents actualizing their children’s best interests. It is highly contextual as explored further in Section III.C. Indeed, both parental decision-making and women’s abortion decision-making are actually more multi-dimensional, inclusive, and aligned than the law reflects as the next Section explores.

### III. THE UNIFIED COMPLEXITIES OF FAMILY DECISION-MAKING

While legal framings of reproductive decision-making are described as a right to privacy, the realities of that decision-making have never been legally framed around the woman alone. Women actually make decisions focused on their children and families and in consultation with doctors.<sup>104</sup> Likewise, parental decision-making also squarely considers that stable and healthy parents and family units are central to decision-making.<sup>105</sup> It is not accurate to frame either category of decision-making as a one-dimensional lens. Abortion decision-making is not a mirror in which the decision-maker does exclusively what is best for her. Likewise, parental decision-making is not a myopic outward-looking scope in which only the children are within sight and only their needs in the abstract are considered. Rather, family decision-making is complex and varied. Decisions are made, not exclusively in the BIOC, but considering complex layers of interconnectedness.<sup>106</sup> Both catego-

---

“scientific bias” that “negates environmental, genetic, and reciprocal effects between parents and children.” *Id.* at 14.

100. *Id.* at 21.

101. *Id.* at 49-67.

102. *Id.* at 20.

103. *Id.* at 68.

104. *See infra* section III.D.1 (analyzing how women make decisions in consultation with others).

105. *See infra* section III.C (analyzing how parents can make decision in their own interests).

106. Robert D. Hess, *Approaches to the Measurement and Interpretation of Parent-Child Interaction*, in PARENT-CHILD INTERACTION: THEORY, RESEARCH, AND PROSPECTS 207, 207-08 (Ronald W. Henderson ed., 1981) (concluding that unique genetic linkages,

ries of decision-making are multi-dimensional and include difficult balancing considerations of the self and others. This next Section explores and explains this unified framing of family decision-making.

### A. *A Unified Model*

The realities of abortion decision-making and parental decision-making reveal that a more unified framework governs in practice.<sup>107</sup> The below image reveals a more accurate depiction of the decision-making frameworks that actually govern parenting and reproductive decision-making—visually depicting critiques that have been raised for some time by relational feminist accounts challenging both privacy and rights-based framings.<sup>108</sup> This image reveals that a unified lens of family-based decision-making includes lenses of *autono(me)* that squarely focus on the decision-maker, lenses of *autono(thee)* that squarely focus on individuals other than the decision-maker, and *autono(we)* that focus on the interrelatedness of the family unit as a whole. The impact of revealing a more unified model of *how* decisions are made does critical work bringing parental decision-making and women's abortion decision-making closer together.

This unified decision-making framework stands regardless of an individual decision-maker's unique views on parenting or reproduction, and it de-genders decision-making. For example, a woman decision-maker who decides to continue a pregnancy can do so in an *autono(me)* lens that actualizes her subjective religious and moral understandings of the decision for her. She might also be understood to make the decision in an *autono(thee)* lens that she perceives to actualize the best interests of the child. She might also be understood to make the decision in an *autono(we)* lens that is focused on the needs

---

affective bonding, continuity of family ties, distribution of authority and power, social roles and norms, and external influences upon family interaction disrupts and complicates the academic study of family behavior).

107. See generally Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 939 (2011) (“[Abortion] should be disposed of under the rubrics of family law, rather than the law governing the Equal Protection Clause . . .”).

108. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (exposing the inaccuracies of framing policy around the marital family household as separate and self-sufficient, and arguing for societal organization around caregiving relationships); JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011) (describing the inadequacies of framing of autonomy as independence in an individual rights context); Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) (advocating for a more responsive state to the inherent and ongoing status of human vulnerability); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989) (arguing for a new conception of autonomy in feminism).

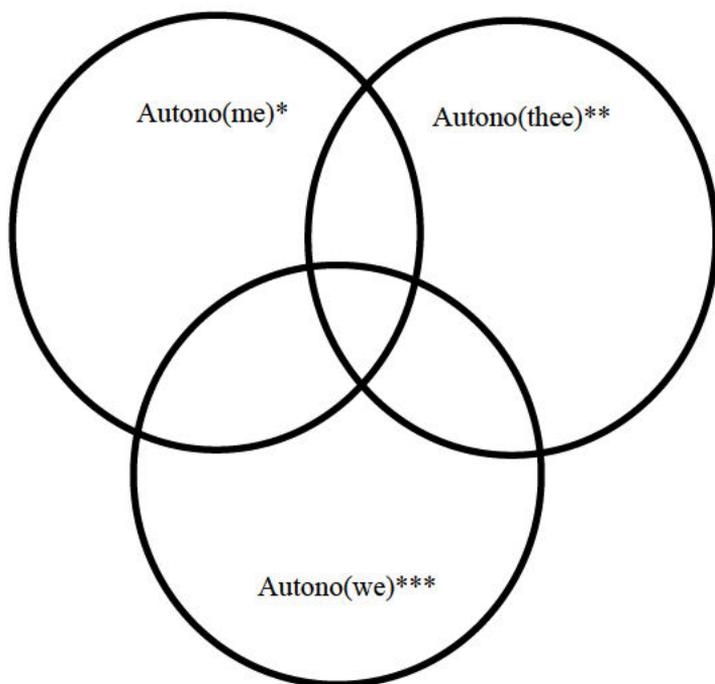
of her partner, parents, or other members of the family and community in a more broad and interconnected way.

In contrast, a woman decision-maker who decides to terminate a pregnancy can be understood to make that decision in an autono(me) lens to actualize her freedom to control her body and her reproduction. She might also be understood to make that decision in an autono(thee) lens that she perceives to actualize the best interests of that child or another child. She might also be understood to make the decision in an autono(we) lens that is focused on the needs of her partner, parents, existing children, future children, or future partners in a more interconnected way.<sup>109</sup> The below image depicts this unified model and its intersections.

---

109. See Cockrill & Weitz, *supra* note 42, at 18 (“[W]omen in our study considered each law and attempted to balance the rights of women to make decisions and be informed with the responsibility of women to make conscientious decisions for themselves and their families.”).

**Family-Based  
Decision-Making Frameworks**



\* The autono(me) lens might include the decision-maker's religion, career, health, finances, etc.

\*\* The autono(thee) lens might include the decision-maker's perceptive assessment of what is best for others, without considering self or the interconnected family unit.

\*\*\* The autono(we) lens might include the decision-maker's perceptive assessment of what is best for the family unit, which includes relationships and interdependencies among self and other members of the family, as understood by the decision-maker.

This model is explored and further supported in the following two Sections.

### B. *Autono(thee) Decision-Making in Abortion*

Women's abortion decision-making, like parenting, also reflects important dimensions of the autono(thee) decision-making framework. Research on how women actually make reproductive decisions strongly supports this point. Nearly 60% of the women who terminate a pregnancy have already given birth to at least one child before terminating a later pregnancy.<sup>110</sup> One-third of the women terminating their pregnancies have had two or more children already.<sup>111</sup> Thus, women who are already mothers are the most likely category of women to have abortions, by a growing margin.<sup>112</sup> This is often due to the crushing financial pressures of parenthood.<sup>113</sup> As one woman stated, "We feel we have to choose between our unborn child and our born children."<sup>114</sup>

Women as reproductive decision-makers "want the conditions to be right when they do [have children], and women who already are mothers want to care responsibly for their existing children."<sup>115</sup> Importantly, it is not just that they already have children in the abstract, but that they do not think that they can "have another child without compromising the care given to the existing children."<sup>116</sup> Women can "often choose abortion because of their wish to be good parents."<sup>117</sup> This was distinctly revealed in the *Purser v. Owens* case in which the lower court improperly took custody of the mother's children from her based on her decision to have a subsequent abortion.<sup>118</sup> Women in narrative interviews regularly "deemphasized how the physical problems [of pregnancy] interrupted their own lives or activities and instead emphasized the impact that they had on their abilities to care for their children that they already had."<sup>119</sup> Narrative survey respondents who already had children likewise revealed that they had abortions to "dedicate the financial, emotional, and physical

---

110. *Who's Getting Abortions? Not Who You'd Think*, NBC NEWS (Jan. 18, 2008, 6:09 PM), [http://www.nbcnews.com/id/22689931/ns/health-womens\\_health/t/whos-getting-abortions-not-who-you-d-think/#.V1W4P1dxgUU](http://www.nbcnews.com/id/22689931/ns/health-womens_health/t/whos-getting-abortions-not-who-you-d-think/#.V1W4P1dxgUU) [<https://perma.cc/XFZ4-GLYL>] (noting critical racial disparities in abortion due to "hard times").

111. *Id.*

112. Lauren Sandler, *The Mother Majority*, SLATE (Oct. 17, 2011, 4:34 PM), [http://www.slate.com/articles/double\\_x/doublex/2011/10/most\\_surprising\\_abortion\\_statistic\\_the\\_majority\\_of\\_women\\_who\\_ter.html](http://www.slate.com/articles/double_x/doublex/2011/10/most_surprising_abortion_statistic_the_majority_of_women_who_ter.html) [<https://perma.cc/N45J-QX3A>].

113. *Who's Getting Abortions? Not Who You'd Think*, *supra* note 110.

114. *Id.*

115. *Id.* (quoting Rachel Jones, Guttmacher Institute Researcher).

116. Jones et al., *supra* note 4, at 88.

117. *Who's Getting Abortions? Not Who You'd Think*, *supra* note 110.

118. *Purser v. Owens*, 722 S.E.2d 225, 226 (S.C. Ct. App. 2011); *see also supra* notes 15-26 and accompanying text.

119. Jones et al., *supra* note 4, at 90.

resources that they had—which were often limited—to the children whom they were already supporting.”<sup>120</sup>

This reveals that it is a myth to pretend that all women make decisions in an individualistic lens. The National Abortion Federation takes the myth that “[w]omen have abortions for selfish or frivolous reasons” on directly.<sup>121</sup> It explains clearly that women, in reality, “base their decision[s] on several factors, the most common being lack of money and / or unreadiness to start or expand their families due to existing responsibilities.”<sup>122</sup> In fact, 66% of women who terminate a pregnancy plan to have children later when they are better able to provide for their children or are in better relationships.<sup>123</sup> This suggests that the challenges of living up to the societal and legal demands of acting in the best interests of children is a heavy burden that women take seriously, so seriously that it may sometimes cause them to opt out of parenting and terminate a pregnancy.

This data suggests that abortion can be an external decision focused on the well-being of others, rather than self. Some decision-making frameworks governing abortion are unequivocally an auto(n)thee decision-making framework, which maps and follows the legal norms we purport to impose on parents. For some women, terminating a pregnancy is a means to ensure that they are the kind of mothers they wanted to be (or perhaps, that the law expected them to be) to their existing children.<sup>124</sup>

### C. *Autono(me) Decision-Making in Parenting*

It is likewise inaccurate to frame all parental decision-making as exclusively child-focused. Some parental decision-making is also focused on the decision-maker parent. Sometimes the trade-offs involved in family decision-making explicitly include putting parents’ needs first. Free from state intervention, parents can—and indeed do—sometimes subordinate their children’s interests to “the interests of other children, or indeed even to the interests of the parents or guardians themselves.”<sup>125</sup> Parenting is not universally a self-

---

120. *Id.* at 91.

121. NAT’L ABORTION FED’N, WOMEN WHO HAVE ABORTIONS 2 (2003), [https://prochoice.org/wp-content/uploads/women\\_who\\_have\\_abortions.pdf](https://prochoice.org/wp-content/uploads/women_who_have_abortions.pdf) [<https://perma.cc/7R28-36XH>].

122. *Id.*

123. *Id.*

124. Jones et al., *supra* note 4, at 91, 98 (summarizing how some women who terminate pregnancies “believed that terminating the current pregnancy was the best decision to make to be or remain a good mother”).

125. Carbone, *supra* note 59, at S113.

sacrificial, myopic enterprise that systemically puts children's needs before all else.<sup>126</sup> There must be a "me" in parental decision-making.

Parenting includes critical self-care.<sup>127</sup> Taking care of yourself is "related to your child's functioning in the home and provides an important contextual influence."<sup>128</sup> Tending to individual needs, not just the needs of children, includes time for oneself, time with spouses and friends, and stress minimization.<sup>129</sup> "[B]uilding in your own downtime, your own social interaction, your own special routines with your spouse or friends. . . . If you're flat-out all the time, you're going to break down, or at least show the negative effects of that stress in how you interact with your child."<sup>130</sup> The auto(n)me components may be about self-care, but also about the advancement of self as explored more below in the relocation cases for the purposes of caring for others. This is reflected in the diagram above. Self-care might reflect intersections between auto(n)me, auto(n)thee, and auto(n)we, although initially understood as being about self.

While the BIOC standard is a universally accepted standard for the state to apply, the premise that parents actually make decisions in this lens is not universally accepted. Other jurisdictions give paramount consideration when the state is considering the children's welfare, but do not begin from the standpoint that parents actually apply a BIOC analysis themselves. The paramountcy principle requires courts to consider the state's best interests without regard to other interests.<sup>131</sup> The paramountcy of putting children's interests before all else, however, does not universally "apply to parents or other individuals with respect to their day to day or even long-term decisions affecting the child."<sup>132</sup> This legal framework acknowledges that parents *can* consider their own interests in careers, moving, and

---

126. See generally Naomi Cahn, *State Representation of Children's Interests*, 40 FAM. L.Q. 109, 131 (2006) ("[R]ather than the paradigmatic triangle of parents, children, and the state, we must think of a rectangular pyramid that places children at the top, but has a base that includes family, state, international actors, and, as the final point, civil society and other nongovernmental actors.").

127. FINE, *supra* note 84, at 154 ("It is important for family members to be aware of their own needs within a family structure so that others can become aware and the needs met, if appropriate. Families vary in what they do for their members in relation to individual needs.").

128. ALAN E. KAZDIN, *EVERYDAY PARENTING TOOLKIT* 138 (2013).

129. *Id.* at 139 ("This isn't 'me generation' propaganda or 'I come first' selfishness; it's what the research on parent-child interaction tells us about the best route to effective parenting.").

130. *Id.*

131. See, e.g., Helen Reece, *Subverting the Stigmatization Argument*, 23 J.L. & SOC'Y 484, 484 (1996) (explaining that section 1(1) of the Children Act of 1989 requires courts to make the child's welfare the court's paramount consideration regarding the upbringing of children and "no other interests or values may affect the decision").

132. RICHARD WHITE ET AL., *THE CHILDREN ACT IN PRACTICE* 27 (4th ed. 2008).

divorcing, for example.<sup>133</sup> One commentator summarizes how the state may very well have *norms* that parents act in their children's best interests, but they are not legally enshrined:

It can hardly be argued that parents, in taking family decisions affecting a child, are bound to ignore completely their own interests, the interests of other members of the family and, possibly, outsiders. This would be a wholly undesirable, as well as an unrealistic objective. . . .

Those who imply that the welfare principle has this much wider application [to parents] are really expressing the hope that society in general, and individual adults, will, in their decisions, feel it appropriate to act in the best interests of children, as they see them. . . . The [Children] Act reposes a great deal of trust in parents that they will know what is best for their children and act accordingly. Whether this level of trust is justified by the historical record is something which at least one commentator was quick to question.<sup>134</sup>

These comments reveal how the legal premise that parents act exclusively in their children's best interests may be a legal norm, but it is not a factually descriptive account of all parental decision-making.

American family law cases also acknowledge that the focus is more properly on parents' interests in certain contexts. Parental relocation cases are an ideal lens to deconstruct some of the challenges family courts face in trying to identify the outcome that is in the BIOC because they reveal the challenges of disconnecting the children's best interests (autono(thee)) from the parent's interests (autono(me)).<sup>135</sup> They reveal the courts' struggles with the BIOC autono(thee) framework,<sup>136</sup> reflecting the "San Andreas Fault of children's law" because of the deep tensions exposed.<sup>137</sup>

Relocation cases force courts to consider the parent's fundamental right to travel, the BIOC, and the fundamental right of the nonrelo-

---

133. *Id.*

134. ANDREW BAINHAM, CHILDREN: THE MODERN LAW 45 (3d ed. 2005).

135. Linda D. Elrod, *A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases*, in RELOCATION ISSUES IN CHILD CUSTODY CASES 29, 30 (Philip M. Stahl & Leslie M. Drozd eds., 2006) (noting that relocation cases are some of the "knottiest and most disturbing problems").

136. *Id.*

137. Jonathan Crowe & Lisa Toohey, *From Good Intentions to Ethical Outcomes: The Paramountcy of Children's Interests in the Family Law Act*, 33 MELB. U. L. REV. 391, 412 (2009) (quoting Richard Chisholm, "The Paramount Consideration": *Children's Interests in Family Law*, 16 AUSTL. J. FAM. L. 87, 108 (2002)). As evidence of the challenges presented, the American Academy of Matrimonial Lawyers sought to draft a model relocation statute and was unable to reach consensus on the burden of proof in these thorny cases, ultimately proposing three different alternatives. See *American Academy of Matrimonial Lawyers Proposed Model Relocation Act*, 15 J. AM. ACAD. MATRIM. LAW. 1 (1998).

cating parent to the care, custody, and control of his or her children.<sup>138</sup> States have resolved these competing rights differently.<sup>139</sup> Some states elevate the children's welfare to trump the parent's right to travel<sup>140</sup> while other states reject this hierarchy and conclude that parents and children are on equal footing to demonstrate (using statutory factors) what is in the children's best interests.<sup>141</sup> The trend across the states is toward abandoning any presumptions favoring or disfavoring relocation and toward a BIOC standard.<sup>142</sup>

When this BIOC standard is applied and the state has enumerated specific factors governing relocation cases, however, notably these factors often "stress 'parent' considerations such as the distance, cost and difficulty of visitation."<sup>143</sup> The American Law Institute, for example, recognizes valid reasons for a move to include being closer to family or support, addressing health care problems, protecting the children from harm, pursuing employment or education, uniting with a spouse or partner pursuing employment or education, and improving quality of life for the family.<sup>144</sup> While framed around a BIOC standard, these factors notably consider the needs of the parent explicitly in ways that the ordinary BIOC standard does not.

There are other contexts as well where the BIOC standard might seem to be the most appropriate standard, but it is not what the state actually uses. Parental discipline is a good example of this distinction. Tort law and family law protect a parent's right to use some physical force when disciplining a child. This right stands and remains unchanged "although pediatric and psychological studies overwhelmingly conclude that corporal punishment does not benefit children and can harm them."<sup>145</sup> Likewise, child labor laws exempt

---

138. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (describing the fundamental right to parent); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (analyzing the fundamental constitutional rights of parents).

139. See Theresa Glennon, *Divided Parents, Shared Children: Conflicting Approaches to Relocation Disputes in the USA*, 4 *UTRECHT L. REV.* 55, 56 (2008) (noting that legislative activity has increased considerably).

140. Elrod, *supra* note 135, at 32-33 (citing Minnesota as an example).

141. *Id.* at 33 (citing Colorado, Maryland, and New Mexico as examples).

142. *Id.* at 39.

143. *Id.* at 41. For example, the American Academy of Matrimonial Lawyers' factors include "[w]hether the relocation will enhance the general quality of life for both the custodial party seeking relocation and the child, including but not limited to financial or emotional benefit or educational opportunity." *Id.* (providing a comprehensive list of factors).

144. *Id.* at 43-44 (noting that some states have approved the American Law Institute's list, such as Rhode Island, Vermont, and West Virginia).

145. See HASDAY, *supra* note 43, at 148 ("Researchers have repeatedly found that corporal punishment can inflict physical damage; undermine trust, confidence, self-esteem, and mental health; impair the quality of the parent-child relationship; contribute to delinquent, counterproductive, and antisocial behavior; and increase the chances that the child will be violent and will accept violence as an adult.").

certain activities, such as farming, despite these being some of the most dangerous jobs for children, causing catastrophic injuries.<sup>146</sup>

There are also many contexts in which the state does not apply a BIOC analysis, although one might seem logical or appropriate, such as in parentage, immigration law, military service, and juvenile detention.<sup>147</sup> The state is also only interested in whether parents are *actually* acting in the BIOC standard when conflict arises, not in the abstract or general sense.<sup>148</sup>

There are also examples in which the state itself has prioritized an *autono(me)* lens over *autono(thee)*. For example, some jurisdictions have created statutory presumptions favoring joint custody.<sup>149</sup> There is a tension, however, in this presumption, which favors the parenting rights of both parents, but may not necessarily actualize the BIOC.<sup>150</sup> In lobbying efforts by the men's rights movements for joint custody, such efforts could certainly be framed in the BIOC using some social science research, but that research is conflicting at best. Fights for presumptions of joint custody might also be framed in an *autono(me)* lens as an exercise in parental rights under the premise that what is good for the parent is good for the child.

---

146. See *id.* at 149-50 (explaining that critics will not adopt child labor laws in these settings because they interfere with parents' control of their children).

147. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130-31 (1989) (concluding that the biological daughter's interest in having a relationship with her biological father did not merit any finding of parentage over the claims of the marital father). See generally Christine Piper, *Child Focused Legislation: For the Sake of the Children?*, in FIFTY YEARS IN FAMILY LAW 71, 71 (Rebecca Probert & Chris Barton eds., 2012) (explaining that what is in the BIOC is a "contested area, subject to changing values, knowledge, fears and aspirations"); John A. Lynch, Jr., *Military Law: Time to Mandate Best Interests of the Child to Restrict Deployments of Parents That Affect Preschool Children*, 55 SANTA CLARA L. REV. 131, 148 (2015) (arguing that the BIOC standard should be considered in military deployments).

148. See Carbone, *supra* note 59, at 115 (clarifying that the BIOC standard does not apply if parents meet certain minimum requirements of caring for their children).

149. Bajackson, *supra* note 46, at 326 (citing Minnesota as an example of a state with a rebuttable presumption in favor of joint custody upon request of either party); see also Children (Access to Parents) Bill 2010-1, HC Bill [174] cl. 1 (Eng., Wales, N. Ir.) ("[T]he court must act on the presumption that the child's welfare is best served through having reasonable access to and contact with both parents unless exceptional circumstances are demonstrated that such access and contact is not in the best interests of the child.").

150. Bajackson, *supra* note 46, at 323-24 (quoting critics who argue that a joint custody presumption "flies in the face of the national trend to put children first in all custody decisions"). Some states have thus expressed a preference for joint custody, but not gone so far as to create a rebuttable presumption. *Id.* at 326 (citing Kansas and Wisconsin as examples); see, e.g., *R.S. v. J.S.*, 457 S.W.3d 389, 392 (Mo. Ct. App. 2015) (explaining how Missouri policy encourages both parents to share in parenting decisions, but clarifying that "[t]here is no preference for joint custody unless, in the given circumstances, it is in the best interests of the child"). Both parents have to be willing to "share the rights and responsibilities related to raising their children" in order for a preference of joint custody to apply. *Id.* at 392 (quoting *Dunkle v. Dunkle*, 158 S.W.3d 823, 839 (Mo. Ct. App. 2005)).

This tension between the constitutional rights of parents and the BIOC standard has been revealed in Australian jurisprudence.<sup>151</sup> The Family Law Act of Australia requires courts to focus on the BIOC standard and explicitly make this the “paramount consideration.”<sup>152</sup> This paramouncy principle is intended to discourage excessive adversarialness and alleviate children’s harm from parental conflict.<sup>153</sup> Yet, these good intentions are difficult to implement ethically. The premise of the ethics of paramouncy seems to be embedded in the idea that parents place the best interests of their children ahead of their own.<sup>154</sup> This, of course, risks becoming gendered with a stronger “social discourse which holds that women must consistently be willing to sacrifice their own interests in [favor] of their offspring’s and that to do otherwise is to be deficient as a mother,” as noted above.<sup>155</sup> The authors, therefore, argue that only a relatively weak interpretation of this principle can withstand ethical analysis.<sup>156</sup> This means that the BIOC should be the primary factor considered, but not necessarily the *only* factor, thus disregarding other interests that may be of significance.<sup>157</sup>

The question becomes how far this principle of paramouncy must go; does it mean that parents “are not permitted to do anything that will impinge upon the child’s best interests, regardless of its impact on their own wellbeing”?<sup>158</sup> As an illustration, the authors provide an example of parents pursuing careers or relaxation, resulting in personal gain for the parent(s), but with a slight reduction in the child’s best interests. These types of questions run into conflict with “common-sense” understandings of parental responsibilities, by which we allow parents to make trade-offs between their own interests and their children’s interests.<sup>159</sup> Parents do have an obligation to consider

---

151. See Bajackson, *supra* note 46, at 348-51 (noting that many countries consider Australia to be the most child-focused model, “almost to the point of being unethically against the weight of the parents’ rights”).

152. Crowe & Toohey, *supra* note 137, at 391 (citing *Family Law Act 1975* (Cth) s 60CA (Austl.), to add the “paramouncy principle” in 2006).

153. *Id.* at 392.

154. *Id.* at 393.

155. *Id.* at 404.

156. *Id.* at 392. Additionally, the authors argue “that the strong approach to the paramouncy principle violates the basic ethical principle of equal consideration, by placing unjustified emphasis on the interests of children while arbitrarily discounting those of other parties.” *Id.* at 405. Further, the authors do not argue that parents should not treat their children more favorably than themselves, but that the courts should not enforce this absolutely. *Id.* at 407.

157. *Id.* at 395-96. The authors conclude that the Australian courts have generally adopted a strong interpretation. *Id.* at 396.

158. *Id.* at 408.

159. *Id.* at 409 (noting that this is so long as parents do consistently consider the “child’s emotional, physical and material wellbeing”).

their children's welfare, but "to [conceptualize] the child's welfare as an overriding good to be [maximized] at the expense of all other interests is both oppressive and senseless."<sup>160</sup> This is even more concerning when understood against the social backdrop in which women disproportionately bear the weight of domestic labor.<sup>161</sup>

It is inaccurate to frame all parental decision-making as always myopically child-centered. Some decision-making is focused on the well-being of the parents. Other decision-making is focused on the family unit as a whole, as explored in the next Section.

#### D. *Autono(we) Decision-Making in Abortion and Parenting*

##### 1. *Autono(we) in Abortion*

An autono(we) frame is a critical frame to understanding both women's abortion decision-making and parental decision-making. It is perhaps the most accurate account of all family decision-making. This is a family-centered or community-centered methodology in which the focus is not exclusively centered on the decision-maker or the subject of the decision. The focus is on the interconnections.

The autono(we) frame also dominates some women's abortion decision-making.<sup>162</sup> Women's abortion decision-making is, in fact, "not individualistic or private at all,"<sup>163</sup> even if that was the feminist goal. Of course, this framing has been heavily criticized as problematic and paternalistic.<sup>164</sup> Importantly, the constitutional cases espousing a woman's right to privacy did not position a woman's right to choose in isolation. Rather, the right was first framed in *Griswold v. Connecticut* as a right of marital privacy that *the couple* held.<sup>165</sup> *Griswold* first articulated that this right belongs to a "married couple[]" in consultation with a doctor.<sup>166</sup> *Roe* expanded contraceptive decisional au-

---

160. *Id.* at 409-10.

161. *Id.* at 410.

162. Carol Gilligan, for example, has described how women make decisions, including abortion decisions, based on an ethic of care and responsibility, considering their relationships and obligations to others. Jones et al., *supra* note 4, at 81.

163. Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J.L. & MED. 567, 569 (2011).

164. *See, e.g., id.* at 595 (concluding that feminists "decry" allowing the state into the informed consent conversation between a woman and her doctor as "paternalistic infringement"); Lindgren, *supra* note 39, at 396 ("Abortion scholarship has uniformly criticized the medical model of abortion reform for deferring women's decisionmaking to the judgment of physicians.").

165. *See* 381 U.S. 479, 485-86 (1965).

166. *Id.* at 498 (Goldberg, J., concurring) ("But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples.").

tonomy to include the right to terminate a pregnancy, but importantly and critically, tethered that right to a decision in consultation with her doctor.<sup>167</sup> The decision was framed as a contextual one. The Court acknowledged that the woman would consider the possibilities of psychological harm, mental and physical health, and social stigmas, to name a few.<sup>168</sup> The companion case of *Doe v. Bolton* provided further insight on the decision-making framework governing a woman's right to terminate a pregnancy.<sup>169</sup> *Doe* clarified what it means to allow an abortion for the "health" of the mother. It read the term expansively to include a "medical judgment [that] may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."<sup>170</sup>

The British statute discussed above likewise explicitly contemplates this contextual, family-centered framing. Those circumstances include when two doctors agree in good faith that "continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family."<sup>171</sup> The statute further allows that when determining the risks, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment."<sup>172</sup>

It is detrimental to the framing of women's abortion decision-making to strip away relational aspects of the decision. Summarizing a study of women with unintended pregnancies, *Decoding Abortion Rhetoric* concluded that women making the decision to terminate a pregnancy "did not generally characterize it in the abstract terms of the public discourse, such as genetic structure, personhood, or soul," instead framing a relationship as a material experience and weighing the decision from there.<sup>173</sup> A woman's decision to terminate a pregnancy instead is often about the desire to have a "stable and loving famil[y]" in which to raise the child, as explored above.<sup>174</sup>

## 2. *Autono(we) in Parenting (Family)*

Parents also make decisions in an autono(we) lens. The "we" lens can be a family-centered lens or a community-centered lens. First, the family-centered lens: Parenting occurs in the context of a family

---

167. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("All these are factors the woman and her responsible physician necessarily will consider in consultation.").

168. *Id.*

169. 410 U.S. 179, 189-92 (1973).

170. *Id.* at 192.

171. BURTON, *supra* note 30 (emphasis added).

172. *Id.*

173. CONDIT, *supra* note 10, at 184.

174. Jones et al., *supra* note 4, at 91.

in which people interact and interconnect.<sup>175</sup> Parental decision-making occurs in the context of parents acting as parents to their children, parents acting as children of their own parents, and parents as individuals with interests and needs.<sup>176</sup> The family is an interrelated system.<sup>177</sup> Changes in any one aspect of the system implicate the entire system, whether those changes are external or internal, desired or undesired.<sup>178</sup> In this system, parents do not make decisions myopically focused on the children; they make decisions as “one piece of a complex puzzle of work and family life.”<sup>179</sup>

Using the human body as an analogy, the BIOC pretends that—in that system—the focus is exclusively on the heart, while each part actually feeds and nourishes the health of the other.<sup>180</sup> Or, as Helen Reece articulated: “[I]t does not follow that in order to protect a child adequately his or her welfare must be the sole consideration.”<sup>181</sup> Rather, consider a mother attempting to cross the street safely with her three kids of different ages. Her attention will not be on one child alone, but instead, on trying to get the whole family across safely.<sup>182</sup>

### 3. *Autono(we) in Parenting (Community)*

Family decision-making regularly involves difficult trade-offs among family members that require consideration of the entire family unit.<sup>183</sup> Parents are “able to balance the interests of their multiple children, and the mere fact that their obligations to multiple children conflict should not in itself disqualify their judgment.”<sup>184</sup> Rather, the relationships they have *with* their caregivers shape their decision-making

175. FINE, *supra* note 84, at 151 (“A family is really a system in the ways that the parts of the family interact. Each family member takes on a role, has certain relationships with other family members, and performs certain activities in relation to the family.”).

176. BOSTON WOMEN’S HEALTH BOOK COLLECTIVE, *OURSELVES AND OUR CHILDREN: A BOOK BY AND FOR PARENTS* 154-55 (1978).

177. *See id.* at 156.

178. FINE, *supra* note 84, at 152.

Families are complex systems because many things may be happening and changing simultaneously. Not only are the children growing and changing in different ways, but so are the parents as individuals and as a couple; in addition there are many external pressures on a family coming from the economy and the community.

*Id.* at 154.

179. Sosinsky, *supra* note 90.

180. BOSTON WOMEN’S HEALTH BOOK COLLECTIVE, *supra* note 176, at 156.

181. JONATHAN HERRING ET AL., *GREAT DEBATES IN FAMILY LAW* 80 (2012).

182. *Id.*

183. Carbone, *supra* note 59, at S118-19.

184. *Id.* at S119.

heavily.<sup>185</sup> “The best interest of the child standard can only advance children’s interests when it is sensitive to the importance of the family in creating the context in which children experience the world.”<sup>186</sup>

The realities of parental decision-making are much more contextual and family-centered than an auto(n)thee lens alone would suggest. Revisiting *Troxel*, it is too myopic to pretend that Tommie was considering her children with Brad without other factors coming into play. For example, she was thinking about her children at issue in the case, herself and her spouse, and the larger family unit. It was more contextual and interconnected than a narrow focus on these children at the exclusive deprivation of all others. The *Troxel* decision recognized that “the stories of real families are messy—full of conflict, separation, and melding—and that those families still deserve to be protected by the Constitution.”<sup>187</sup> Families differ from household to household and there is “no single ‘normal family.’”<sup>188</sup> In striking down the statute, the Court held that “Tommie was entitled to make decisions about what was in her girls’ best interest within their web of familial relations.”<sup>189</sup> It protected Tommie’s right to make decisions “for the family that she forged in the crucible of multiple relationships and multiple divorces.”<sup>190</sup>

Relocation cases are also a powerful example of the family-centered lens. Acknowledging the auto(n)we lens, in at least one Arkansas case, the court explicitly held that the standard for child custody was the BIOC standard but that the standard for relocation cases was the “best interests of the family unit as a whole.”<sup>191</sup> The court explained that the chancellor was to consider the request to relocate by determining whether “such a move is in the best interests of the family unit as a whole.”<sup>192</sup> Other courts do not explicitly use the term “best interests of the family,” but they are clear that “the best interest of the child can never be determined in a vacuum without considering the other members of the family. The circumstances and well-being of the parents are inextricably entwined with the best interest of the child.”<sup>193</sup> To underscore its point, the court explained that,

---

185. *Id.*

186. *Id.*

187. Dubler, *supra* note 65, at 111.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Vo v. Vo*, 79 S.W.3d 388, 392 (Ark. Ct. App. 2002). This was eventually replaced with a presumption in favor of relocation for the custodial parent. *See Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 663 (Ark. 2003) (putting the burden on the noncustodial parent to rebut the presumption).

192. *Vo*, 79 S.W.3d at 392.

193. *McGuinness v. McGuinness*, 970 P.2d 1074, 1076 (Nev. 1998).

technically, if the needs and circumstances of divorcing parents were entirely irrelevant, some divorces should not even be granted.<sup>194</sup> Likewise, if the needs of parents are not considered, motions to relocate would rarely be granted because it is almost always in the BIOC to be in close physical proximity to both parents.<sup>195</sup>

Distinctions in Louisiana law between how courts handle children in a divorce compared to how courts handle the marital home also reveal the inaccuracy effectively. The Louisiana code states that determinations regarding the family home must be made using the “best interest of the family” standard, considering the economic status of the spouses and the needs of the children.<sup>196</sup> “Ordinarily, occupancy by the spouse who has custody of the children is in the best interest of the family.”<sup>197</sup>

Parental decision-making also occurs in a community-centered lens where parents seek to actualize what the community concludes is best, which is not necessarily the same as what is in the best interests of particular children. Social values theory, for example, concludes “that decisions for others are based more on perceptions of social norms than are self decisions.”<sup>198</sup> Some parenting studies support this method of decision-making by parents. Research suggests that parents actually make decisions “based on what they perceive that their peer group values and thinks should be done,” which is a very different lens than a myopic child-centered, individualistic analysis.<sup>199</sup> This research suggests that parenting occurs in an ongoing exchange of information from parents to advisers in the context of relationships in which each person is also influenced by their perceptions of “the other’s capacity and motives, of what each should contribute, of what each can ask for or speak about.”<sup>200</sup>

It is a myth that parents exclusively and myopically always make decisions in an auto(n)thee lens.<sup>201</sup> The realities of parental decision-

---

194. *Id.* (noting that this is not “the law nor public policy”). See generally Michael E. Lamb, *Placing Children’s Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL’Y & L. 98, 98 (2002) (explaining that many family interventions are “justified by reference to children’s best interests,” but they are not grounded in “reference[s] to developmental theory or the results of scientific research”).

195. *McGuinness*, 970 P.2d at 1079.

196. *Bridges v. Bridges*, 33 So. 3d 914, 919 (La. Ct. App. 2010) (citing LA. STAT. ANN. § 9:374(B) (2016)).

197. *Goodwin v. Goodwin*, 618 So. 2d 579, 587 (La. Ct. App. 1993) (citing *Burrell v. Burrell*, 437 So. 2d 354 (La. Ct. App. 1983)).

198. Dore et al., *supra* note 79, at 497.

199. See *id.* (noting that the results of these findings can be both positive and negative).

200. Goodnow, *supra* note 86, at 456.

201. See MICHAEL WYNESS, *CHILDHOOD AND SOCIETY* 136 (2d ed. 2012) (describing this as the “paramount consideration of parents”).

making are much more diverse and complex. Both parenting and abortion decision-making also include clear auto(n)me and auto(n)we framings.

#### IV. WHY USE PARENTAL DECISION-MAKING TO UNDERSTAND AND SUPPORT WOMEN'S DECISION-MAKING?

Merely revealing the problematic polarizations discussed in Sections II and III is not enough. It is time to explore and reconsider longstanding tensions and boundaries for the specific purpose of destigmatizing and de-essentializing abortion decision-making given the otherwise perilous political trajectory of the reproductive rights movement, existing tensions in the movement that clash with pragmatic realities, and doctrinal connections.<sup>202</sup> Each of these reasons for reframing abortion decision-making and aligning it with parental decision-making are discussed below.

##### A. *The Reproductive Rights Movement's Trajectory*

A unified approach is necessary because women's abortion decision-making is marginalized and receding in the courts, legislatures, and agencies, at both the federal and state level. *Whole Woman's Health v. Hellerstedt* did critical work to halt the aggressive pace and content of restrictive measures, but it did nothing to expand access, destigmatize, or strengthen allies.<sup>203</sup>

---

202. See, e.g., Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 4 (2015) (arguing that “[parental] rights are not compatible with normative commitments to equal protection or moral equality between persons” and proposing a “deliberate effort to roll back the substantive due process rights jurisprudence that constitutionally enshrines parental rights of an independent vitality separate from those that follow from children’s rights and interests”).

203. In March 2016, the United States Supreme Court considered its first major abortion case in a decade. *Whole Woman's Health* examined just how far a state could go in passing legislation purportedly to benefit women's health within the parameters set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). This case came at a particularly volatile time for the Supreme Court in the wake of Justice Scalia's passing, and renewed and recharged a national conversation surrounding the legality of abortion. In a 5-3 decision, the Court reaffirmed the undue burden standard set out in *Casey* and struck down the admitting privileges requirement and the ambulatory-surgical center requirements of Texas House Bill 2. *Id.* at 2300. The Court concluded that these provisions created an undue burden and emphasized that the state must consider the burdens of restrictive laws, but also the benefits provided. *Id.* at 2309. House Bill 2 had not been enacted with sufficient evidence supporting benefits to women's health. This decision did considerable work to position abortion as a safe procedure akin to other medical procedures, but it did not advance understanding of *how* and *why* women terminate their pregnancies or the constitutional principles that protect their decision-making autonomy. See, e.g., Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149, 149-50 (2016) (analyzing the impact of *Whole Woman's Health*).

Abortion decision-making is presently dangerously untethered from health care.<sup>204</sup> Abortion services are increasingly “isolated from mainstream medicine” in *who* provides medical care, *where* the medical care is provided, and *how* the care is provided.<sup>205</sup> While 80% of abortions were in hospitals in 1973, by 1981, stand-alone clinics outnumbered hospitals, and 15 years later, 90% of all abortions were performed in clinics.<sup>206</sup> This isolation has exacerbated security and safety concerns to dangerous levels.<sup>207</sup> The Guttmacher Institute reports that there are only 367 abortion providers in doctors’ offices nationwide, down from 700 in 1982.<sup>208</sup> This isolation was never the “feminist plan.”<sup>209</sup>

The Patient Protection and Affordable Care Act furthered this separation when it explicitly excluded abortion from coverage requirements, even pre-viability abortions and even when the woman’s health is in jeopardy—a move that distanced abortion problematically from the delivery of healthcare services.<sup>210</sup> The impact of this legislation on access was critical. Before enactment of the Affordable Care Act, approximately 87% of private insurance plans covered abortion.<sup>211</sup> Private and public coverage alike are dramatically reduced today.<sup>212</sup> Abortion care is not included as an Essential Health Benefit that must be included in a qualifying plan.<sup>213</sup> By 2017, federal regula-

204. See generally Lindgren, *supra* note 39 (analyzing the decoupling of abortion and healthcare).

205. Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES (July 14, 2010), [http://www.nytimes.com/2010/07/18/magazine/18abortion-t.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/07/18/magazine/18abortion-t.html?pagewanted=all&_r=0) [<https://perma.cc/SX3P-UTNE>].

206. *Id.* (concluding that clinics “truly came to stand alone”).

207. See generally DAVID S. COHEN & KRISTEN CONNOR, *LIVING IN THE CROSSHAIRS: THE UNTOLD STORIES OF ANTI-ABORTION TERRORISM* (2015) (analyzing the types and extent of harassment and terrorism as well as the strategies that providers deploy to respond).

208. Bazelon, *supra* note 205.

209. *Id.* “The clinics’ founders didn’t intend them to become virtually the only settings for abortion services in many communities.” *Id.* (quoting Carole Joffe). Rather, since *Roe*:

[T]he shadow of the greedy, butchering “abortionist” continued to hover, and many doctors didn’t want to stand in it. As mainstream medicine backed away, feminist activists stepped in. They set up stand-alone clinics to care for women in their moments of crisis. In many ways, the clinics were a rebel-sister success story.

*Id.* (noting that this positioned clinics as targets of extremism).

210. Huberfeld, *supra* note 9, at 1358 (describing Congress’s legislative move as a “pariah designation”).

211. *Id.* at 1363.

212. *Id.* at 1380.

213. See Alina Salganicoff et al., *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, KAISER FAM. FOUND. (Jan. 20 2016), <https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicare-marketplace-plans-and-private-plans/> [<https://perma.cc/R77T-75F5>]. Since the

tions require at least one multi-state plan be available on the marketplace that excludes abortion coverage, but today twenty-six states have banned all plans participating in the state exchanges from covering abortions and six states do not formally ban coverage although no plans currently offer coverage.<sup>214</sup>

*Whole Woman's Health* suggests that there is an outer boundary in restrictive measures, but it certainly will not halt such efforts entirely. In fact, it may provide a roadmap of *how* to enact restrictive measures under the *guise* of women's health.<sup>215</sup> On the state level, the drumbeat of restrictive measures had increased in pace and volume to a deafening level leading up to *Whole Woman's Health*.<sup>216</sup> These restrictive measures are distinctly stigmatizing and demonizing.<sup>217</sup> They create a framework of "abortion exceptionalism."<sup>218</sup>

Kaiser report, Texas has since become the twenty-sixth state to ban plans participating in the state exchange from offering abortion coverage *See* Tex. Ins. Code Ann. § 1696.002.

214. *See* sources cited *supra* note 213. (leaving seventeen states and the District of Columbia to not ban coverage and include at least one plan with coverage and two states in which there is no ban and all plans offer coverage).

215. *See, e.g.*, Ryland Barton, *Ky. Lawmaker Still Wants Abortion Restrictions After SCOTUS Ruling*, 89.3 WFPL (June 27, 2016), <http://wfpl.org/supreme-court-abortion-ruling-lawmaker/> [<https://perma.cc/AM36-VWCL>].

216. This increase followed the *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) decision. "The framework these Justices crafted allowed states more latitude to restrict abortion in the interest of protecting potential life, but only as long as women could make the ultimate decision whether to continue a pregnancy." Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1431 (2016); *see, e.g.*, S. 152, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016) (amending the state's informed consent law to require a physician consultation by video or in person twenty-hour hours before pregnancy termination); S. 1552, 55th Leg., 1st Sess. (Okla. 2016) (subjecting medical practitioners to loss of licensure for abortion, deeming the procedure "unprofessional conduct"); H.R. 2568, 82nd Leg., Reg. Sess. (W. Va. 2015) (banning abortion after twenty weeks in the Pain Capable Unborn Child Protection Act; H.R. 1411, 118th Leg., Reg. Sess. (Fla. 2016) (precluding abortion providers from receiving Medicaid funding); Amber Phillips, *14 States Have Passed Laws This Year Making It Harder to Get an Abortion*, WASH. POST (June 1, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/06/01/14-states-have-passed-laws-making-it-harder-to-get-an-abortion-already-this-year/?utm\\_term=.d0f235d52020](https://www.washingtonpost.com/news/the-fix/wp/2016/06/01/14-states-have-passed-laws-making-it-harder-to-get-an-abortion-already-this-year/?utm_term=.d0f235d52020) [<https://perma.cc/GM3R-ZHBT>] (summarizing that nine states sought to ban all or most abortions (although none were enacted), three states banned a common method of second-trimester abortions, two states lengthened the waiting period, two states enacted twenty week bans, and Indiana made it illegal to abort a fetus with Down Syndrome or because of race or gender).

217. For example, in the final hours of the 2016 legislative session, Alabama passed a law which likened abortion clinics to sex offenders by imposing the same restriction that they cannot be within 2,000 feet of a public K-8 school. This may require two of the state's five clinics to close or move. *See, e.g.*, Hannah Levintova, *Alabama Passes a Bill to Regulate Abortion Clinics Like Sex Offenders*, MOTHER JONES (May 6, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/05/alabama-just-passed-bill-regulate-abortion-clinics-sex-offenders> [<https://perma.cc/59ZM-5D34>]. Indiana House Resolution 1137 was perhaps one of the most notable of the 2016 legislative session on this front. *See* H.R. 1337 § 11(b), 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016); H.R. 1337 § 22(9)(a), 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016). This law states that a "health care facility hav-

These laws target abortion for “burdensome, health-justified restrictions not imposed on other medical procedures of similar risk.”<sup>219</sup> These laws regulate the licensing of clinics, the qualifications of doctors, reporting requirements, informed consent rules, and pharmaceutical limitations.<sup>220</sup> In 2011 alone, for example, 92 restrictive abortion measures passed in state legislatures, reflecting a three-fold increase since 2005.<sup>221</sup> Then, in just the first half of 2012, another 39 restrictive laws were passed at the state level.<sup>222</sup> By 2015, “57% of women live[d] in states considered to be ‘hostile’ or ‘extremely hostile’ to reproductive rights.”<sup>223</sup>

The impact of all of these restrictive measures is very real for women’s access to reproductive care. The impact is logistical, geographical, financial, and psychological.<sup>224</sup> This geographic hardship was particularly poignant following Texas House Bill 2.<sup>225</sup>

These restrictive measures are particularly challenging for low-income women who face a “three-front war in reproductive health.”<sup>226</sup> Low-income women have fewer resources for contraception to avoid unintended pregnancies, they are less likely to have abortion coverage because Medicaid “almost never” provides cov-

---

ing possession of a miscarried fetus shall provide for the final disposition of the miscarried fetus” and creates criminal, civil, and licensing accountability for “knowingly or intentionally perform[ing] an abortion in violation” of these requirements. IND. CODE §§ 16-25-4.5(3), 16-34-4(9)(a)-(b) (2016).

218. Greenhouse & Siegel, *supra* note 216, at 1447.

219. *Id.* at 1430.

220. *Id.*

221. Amber Phillips, *Three States’ Abortion Laws Just Fell Thanks to the Supreme Court. These States Could Be Next.*, WASH. POST (June 28, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/06/27/how-many-states-could-see-their-abortion-restrictions-struck-down-after-the-supreme-courts-big-ruling/?utm\\_term=.c5902760c06f](https://www.washingtonpost.com/news/the-fix/wp/2016/06/27/how-many-states-could-see-their-abortion-restrictions-struck-down-after-the-supreme-courts-big-ruling/?utm_term=.c5902760c06f).

222. Michele Estrin Gilman, *Feminism, Democracy, and the “War on Women,”* 32 LAW & INEQ. 1, 8 (2014).

223. Christina Cherel, *Holding the Line: Challenges to Reproductive Rights in 2016*, NAT’L WOMEN’S HEALTH NETWORK (Jan. 13, 2016), <https://www.nwhn.org/holding-the-line-challenges-to-reproductive-rights-in-2016/> [https://perma.cc/WW9D-3VPW] (noting that thirteen states were considered hostile in 2000).

224. Caitlin Gerdts et al., *Impact of Clinic Closures on Women Obtaining Abortion Services After Implementation of a Restrictive Law in Texas*, 106 AM. J. PUB. HEALTH 857, 857 (2016) (finding that overall 36% of women whose nearest clinic had closed said the burdens associated with obtaining the service was difficult, while only 18% of women said the same when their nearest clinic had not closed, reflecting a 50% increase).

225. After the Texas legislature passed House Bill 2, the average one-way distance to find an abortion provider increased from 22 miles to 85 miles. *Id.* at 861. Twenty-five percent of Texas women would have to travel a distance of 139 miles one-way, and 10% of Texas women would have to travel a distance of 256 miles one-way. *Id.* Even *Whole Woman’s Health* alone only challenged the most restrictive components of the Texas abortion regulations.

226. Huberfeld, *supra* note 9, at 1380.

erage, and they are less likely to find a doctor because few doctors even participate in Medicaid.<sup>227</sup>

Many of the legislative attacks in 2015 and 2016 focused particularly on defunding and delegitimizing Planned Parenthood. In 2015, Congress actively sought to defund Planned Parenthood.<sup>228</sup> Defund Planned Parenthood legislation passed in states such as Ohio, Alabama, Arkansas, Kansas, Louisiana, New Hampshire, North Carolina, Texas, and Utah—thereby restricting the flow of state funds to Planned Parenthood.<sup>229</sup>

For the reproductive rights movement, preserving the status quo was the “Alamo” in *Whole Woman’s Health*. Whether it can be used meaningfully to *improve* the legal status of women’s health or access to reproductive care as compared to stopping the enablement and empowerment of *more* unfounded restrictions being enacted at the state level remains to be seen.<sup>230</sup> *Whole Woman’s Health* takes a critical step forward, but it does not speak to *why* this decision is so important for women, *how* women make the decision, and the centrality of the decision to women’s overall political and social equality. Rather, it speaks almost exclusively to the actions and methodologies of legislatures. The overall trajectory of the social, political, and legal

---

227. *Id.* In comparison, in England and Wales, for example, 98% of all abortions in 2015 were publicly funded. See U.K. DEP’T OF HEALTH, ABORTION STATISTICS, ENGLAND AND WALES: 2015 (2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/529344/Abortion\\_Statistics\\_2015\\_v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/529344/Abortion_Statistics_2015_v3.pdf) [<https://perma.cc/L9KF-PXRA>].

228. Defund Planned Parenthood Act of 2015, H.R. 3134, 114th Cong. § 2(3) (2015) (“All funds that are no longer available to Planned Parenthood Federation of America, Inc. and its affiliates and clinics pursuant to this Act will continue to be made available to other eligible entities to provide women’s health care services.”).

229. Leah Jessen, *Since the Release of Undercover Videos, 8 States Have Defunded Planned Parenthood. Ohio Makes It 9*, DAILY SIGNAL (Feb. 12, 2016), <http://dailysignal.com/2016/02/12/since-the-release-of-undercover-videos-8-states-have-defunded-planned-parenthood-ohio-makes-it-9/> [<https://perma.cc/GMH3-ZEFD>]; see, e.g., S.B. 44, 1st Spec. Sess. § 1(a) (Ala. 2015) (“No person, entity, or association shall offer money or anything of value for an aborted fetus or any portion of an aborted fetus; nor shall any person, entity, or association accept any money or anything of value for an aborted fetus or any portion of an aborted fetus.”); S.B. 569, 90th Gen. Assem., Reg. Sess. § 1(3) (Ark. 2015) (“[P]ublic dollars made available . . . through the State . . . may be awarded to an entity that performs elective abortions or subsidizes or otherwise facilitates the entity’s ability to perform elective abortions although the funds were not disbursed specifically for the purpose of performing elective abortions . . . .”); S.B. 214, 131st Gen. Assemb., Reg. Sess. (Ohio 2016) (“ensur[ing] that state funds and certain federal funds are not used either to perform or promote nontherapeutic abortions, or to contract or affiliate with any entity that performs or promotes nontherapeutic abortions”). Some of these statutes may be appealed.

230. Molly Redden, *Planned Parenthood: Eight States Now Striving to Repeal Abortion Restrictions*, GUARDIAN (June 30, 2016), <https://www.theguardian.com/us-news/2016/jun/30/planned-parenthood-state-repeal-abortion-restrictions> [<https://perma.cc/Y3JH-8M6V>] (“Lawmakers are formulating specific plans to target similar abortion restrictions in Arizona, Pennsylvania and Virginia, and they are broadly prepared to repeal laws in Florida, Michigan and Texas.”). Other anticipated challenges are in Tennessee and Missouri.

framing of reproductive decision-making remains perilous and marginalized.<sup>231</sup> Thus, crossing longstanding boundaries may be necessary to move the movement forward.

### B. Pragmatic Realities

Acknowledging the risks of crossing these longstanding boundaries, the costs of retaining the boundaries are also worthy of discussion.<sup>232</sup> Existing critiques have explained how the language of choice provided a powerful rationale for states to not fund abortion healthcare.<sup>233</sup>

The boundaries that are well drawn in the reproductive rights debate are not pragmatic either. “Pro-life” advocates frame their arguments around the language of personhood, children, parenthood, and life.<sup>234</sup> “Pro-choice” advocates frame their arguments around choice, autonomy, health, decision-making, and women’s rights.<sup>235</sup> They consciously avoid the parent / child framing for political and strategic reasons.<sup>236</sup> These boundaries are black and white; the “third rail” of

---

231. See, e.g., Susan Decker, *Donald Trump Intent on Overturning Supreme Court Abortion Ruling*, DALL. NEWS (Nov. 2016), <http://www.dallasnews.com/news/politics/2016/11/13/donald-trump-intent-overturning-supreme-court-abortion-ruling>.

232. See, e.g., Williams, *supra* note 26, at 1584 (“[C]urrent abortion rights rhetoric carries significant costs. The need to reassess that rhetoric seems particularly pressing today.”).

233. See, e.g., CONDIT, *supra* note 10, at 201; Lindgren, *supra* note 39, at 414 (“By severing both private and state health insurance funds for abortion, these laws isolate abortion as fundamentally different in kind from healthcare and a luxury that must be paid for from private funds.”).

234. See, e.g., *National Right to Life Mission Statement*, NAT’L RIGHT TO LIFE, <http://www.nrlc.org/about/mission/> [<https://perma.cc/M8EE-QRVR>] (“The mission of National Right to Life is to protect and defend the most fundamental right of humankind, the right to life of every innocent human being from the beginning of life to natural death.”).

235. See, e.g., *Our Mission*, NAT’L ABORTION FED’N, <http://prochoice.org/about-naaf/> [<https://perma.cc/QG6W-93RQ>] (“The mission of the National Abortion Federation is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women.” (emphasis omitted)).

236. See, e.g., I. Glenn Cohen, Reply, *Burying Best Interests of the Resulting Child: A Response to Professors Crawford, Alvaré, and Mutcherson*, 97 MINN. L. REV. HEADNOTES 1, 10 (2012) (noting that there is sensitivity to language of “resulting children” when discussing reproductive decision-making and that this language may be “misused by . . . political opponents,” but concluding that “[s]ometimes we must press forward in an intellectually honest way even if our arguments will be co-opted by those we disagree with”); *How Do I Know If I’m Having a Miscarriage?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/pregnancy/miscarriage/how-do-i-know-if-im-having-miscarriage> [<https://perma.cc/EXZ3-HFNN>] (explaining that miscarriage may cause a “mix of emotions, including disappointment, despair, shock, guilt, grief, and relief” and that this range of emotions is normal). “Take care of yourself physically and emotionally, and give yourself permission to grieve your loss if you need to. Grief and sadness are very normal responses to miscarriage.” *Id.*; see also *Miscarriage and Fetal Anomaly Support*, PLANNED PARENTHOOD, <http://patients.pposbc.org/miscarriage-support/> (last visited Sept. 5, 2016) (“Many families have found creating tangible memories to be helpful and comforting as they grieve the loss of their pregnancy. Rituals and keepsakes that speak to your personal experience can help bring about closure for those who wish to say goodbye. Below we have included a handful of ideas that other families have used to honor the pregnancy.”).

advocacy.<sup>237</sup> Crossing those boundaries, even an inch, is considered to concede too much on either side of the debate.<sup>238</sup>

The language of “choice” simply does not resonate with all women’s experiences, particularly for women terminating for reasons of medical necessity.<sup>239</sup> The language of “life,” in turn, compromises the understanding of women’s health risks in pregnancy and erases the life of the pregnant woman from the frame.<sup>240</sup> The language of choice purports to be gender-neutral, allowing all adults to be self-interested, but “the ideology of conventional femininity condemns mothers who pursue self-interest over their children’s needs as ‘selfish.’”<sup>241</sup> These boundaries essentialize women’s experiences as decision-makers.<sup>242</sup>

The troublesome way in which the Court’s rhetorical shift to “mother” and “unborn child” from “pregnant woman” and “fetus” in *Gonzales v. Carhart* was used exploitatively and emotively is an example of the deep dangers associated with any shifts.<sup>243</sup> In con-

237. The “third rail” refers to a highly charged rail that powers a train and could be dangerous, if not lethal, to touch. *See, e.g.*, I. Glenn Cohen, *Regulation Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 426 (2011) (critiquing the role that the BIOC analysis plays in regulating reproductive rights).

One way of understanding the prominence of [Best Interests of the Resulting Children] justifications for the regulation of reproduction, then, is as transposition of reasoning from *family law* into *the law of reproduction*. The analogy goes: protecting the best interests of existing children is to the constitutional protections against interference in child rearing and legal parenthood (family autonomy) *as* protecting the best interests of resulting children is to the constitutional protections against interference in reproductive decisions (reproductive autonomy).

*Id.* at 435. Cohen carves out the “abortion right” as requiring a different analysis. *Id.* at 441.

238. *See* Lindgren, *supra* note 39, at 388 (explaining how “the Court’s current analysis leaves access to abortion vulnerable to erosion by courts and legislatures” and the decision between “healthcare and choice [has] become a zero-sum trade-off”).

239. *See, e.g.*, Jeannie Ludlow, *Love and Goodness: Toward a New Abortion Politics*, 38 FEMINIST STUD. 474, 476 (2012) (explaining that rights and legislation seem removed from her experience in that moment); Williams, *supra* note 26, at 1584 (“Yet choice rhetoric is not the simple, unadulterated truth of women’s lives: many aborting women feel they have no choice but to abort. The rhetoric has been strategic from the beginning, not expressive of pristine, unchanging truths.” (footnotes omitted)).

240. Huberfeld, *supra* note 9, at 1361 (prohibiting access to abortion thus can threaten the life of pregnant women too).

241. Williams, *supra* note 26, at 1561.

242. *See, e.g.*, MCDONNELL, *supra* note 3, at 23 (“[W]omen’s experience of abortion is not being addressed and integrated into the way we talk politically about the issue. . . . [H]aving an abortion is not the straightforward exercise it sometimes appears to be in our leaflets and slogans.”).

243. To consider examples of the concerns that reproductive rights advocates had with the rhetorical shifts in *Gonzales v. Carhart*, 550 U.S. 124 (2007), see generally Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 282 (2009) (concluding that abortion law treats competent adult women as incompetent “to make decisions about their own healthcare”); Lindgren, *supra* note 39, at 413. To consider how advocates for restricting abortion understood the

trast, *Roe v. Wade*, for example, described the interests of pregnant women and potential prenatal life.<sup>244</sup>

Parental rights and reproductive rights are also pragmatically interconnected because the exercise of a woman's right to decide to terminate a pregnancy is most notably an exercise of her decision on whether to be a parent at that point in her life.<sup>245</sup> She is deciding whether to forego parenting, defer parenting to a later point, or become a parent now. It is only logical that in making this decision she would be analyzing what the state expects of her in terms of *how* she would parent and the relationship that she would (should) have with her child, a point which is explored further below. To the extent that the state will apply parenting standards that the pregnant woman does not believe she is able to meet, that is a critical way in which parental decision-making is deeply relevant to abortion decision-making. If the state expects her to act always in her children's best interests and will judge her unfit otherwise, that is a critical, pragmatic intersection.

The state also holds tremendous power over both types of decision-making, as compared to other types of decision-making (for example, healthcare, employment, or financial). While states certainly regulate healthcare, employment, and finances, the power of the state to terminate parental relationships or to implicitly compel one to parenthood is a distinctly unique power. The BIOC standard is often understood as a considerable "trump" to supersede parental authority. The state, for example, plays a *parens patriae* role to protect children in certain contexts.<sup>246</sup> It is defined as a "sovereign right and duty [of the state] to care for a child and protect him from neglect, abuse and fraud during his minority."<sup>247</sup> *Roe* likewise espoused a state's interest in acting on behalf of "protecting prenatal life."<sup>248</sup> As discussed above, the state intervenes in innumerable ways to regulate and restrict the abortion decision-making of women. Thus, both types of state action are to override individual decision-making.

---

case and its rhetorical shifts, see Helen M. Alvaré, *Gonzales v. Carhart: Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409, 411 (2008) (arguing that *Gonzales* "created abortion law that looks and feels like family law").

244. 410 U.S. 113, 150 (1973).

245. See generally Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 329 (2010) (positioning abortion as a range of reproductive rights, rather than an isolated right to put reproductive rights on "firmer footing").

246. Cahn, *supra* note 126, at 109, 112.

247. Carbone, *supra* note 59, at S115. This state role has "been more presumed than explored" and the "parameters of that role, are somewhat obscure." Cahn, *supra* note 126, at 109, 112 (noting, however, that it has been explored more in the foster care system).

248. *Roe*, 410 U.S. at 150 (noting that "some phrase it in terms of duty").

It is unrealistic to think that the state builds boundaries and walls around its power to intervene on behalf of children and its power to intervene on behalf of potential life.<sup>249</sup> It is also unrealistic to think that women universally build and retain these boundaries.<sup>250</sup> The contours of the state's power to trump parental decision-making is deeply connected comparatively to understanding the scope of the state's power in regulating women's abortion decision-making.<sup>251</sup>

### C. Doctrinal Connections

A unified approach also aligns with the doctrinal framings of the right to privacy governing women's abortion decision-making. Notably, the trajectory of the rights for parents remains much more stable and protected than reproductive rights. Parents play a primary role raising their children and that right is constitutionally protected,<sup>252</sup> but it is not absolute.<sup>253</sup> Parents in intact families are presumed to act in the children's best interests, and their child-rearing decisions receive "special weight."<sup>254</sup> This is a unique aspect of constitutional law and family law and one that merits strategic consideration in the modern and perilous reproductive rights advocacy conversation.

The roots of the right to privacy include critical strands of parental decision-making. The right to privacy that prohibits the state from improperly infringing on a woman's right to decide whether to bear or beget a child as articulated in *Griswold*, *Eisenstadt*, and *Roe*, relied heavily on the parental decision-making cases of *Meyer* and *Pierce*. In a pair of *Lochner*-era cases, the United States Supreme Court first held that parents hold a fundamental right to direct the upbringing of their children. First, in *Meyer v. Nebraska*, the Supreme Court held that the Fourteenth Amendment to the United

---

249. See, e.g., Cahn, *supra* note 126, at 132 ("The state's claim that it can represent children's interests plays a significant role in defining the structure of families, the relationships within families, and the development of children's interests.").

250. MCDONNELL, *supra* note 3, at 80 ("We can no longer talk about 'choice' in a vacuum. We must talk about the right to have as well as not have children.").

251. Carbone, *supra* note 59, at S113.

252. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). The Supreme Court held in *Meyer v. Nebraska* that the liberty clause of the Fourteenth Amendment "[w]ithout doubt" included "the right of the individual to contract, to engage in any of the common occupations of life . . . to marry, establish a home and bring up children." 262 U.S. 390, 399 (1923).

253. See, e.g., *Crafton v. Gibson*, 752 N.E.2d 78, 90 (Ind. Ct. App. 2001) ("[T]he State may limit parental rights in a number of ways, including prohibiting the abuse or neglect of children, regulating child labor, requiring children to be vaccinated, requiring school attendance, and requiring that children be restrained while riding in motor vehicles.").

254. *Troxel v. Granville*, 530 U.S. 57, 58-59 (2000) (striking down a statute allowing any person at any time to petition for visitation of the biological mother's children).

States Constitution provides “freedom from bodily restraint” as well as the freedom to marry, “establish a home and bring up children.”<sup>255</sup> The Court held that the state had improperly infringed on these liberties when it prohibited the teaching of foreign language to certain children in schools.<sup>256</sup> It concluded that “[w]ithout doubt, [the Due Process Clause of the Fourteenth Amendment] denotes . . . the right of the individual to . . . bring up children . . . [and] to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>257</sup>

In 1925, the Supreme Court reaffirmed these protections in *Pierce v. Society of Sisters*, holding that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>258</sup> *Meyer* and *Pierce*, however, had doctrinal limitations in their longevity because they were also very much about the contractual and property rights of the teachers to earn a living, and the Court was striking down laws with strong nativist implications. In time, however, the rights of parents to the custody, care, and control of their children set out in *Meyer* and *Pierce* were reaffirmed in later decisions that were free from the critiques of *Lochner*-era cases.<sup>259</sup>

*Griswold v. Connecticut* is the doctrinal bridge that first connected the parental decision-making cases to reproductive decision-making under a unified lens of family. In *Griswold*, the Court struck down a Connecticut statute that criminalized the use of contraceptives. It cited the above cases outlining the rights of parents to make decisions related to the care, custody, and rearing of their children.<sup>260</sup> Legally, however, the reproductive rights arguments were channeled into a right-to-privacy frame following Justice Harlan’s dissent in *Poe*

---

255. *Meyer*, 262 U.S. at 399.

256. *Id.* at 400 (concluding that the statute was arbitrary and “without reasonable relation to some purpose within the competency of the State to effect”).

257. *Id.* at 399 (defining the right as a fundamental liberty interest).

258. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (upholding a preliminary injunction enjoining enforcement of a compulsory education law). The Oregon statute at issue required parents and guardians with control or custody of children between the ages of eight and sixteen to send the children to public school or face misdemeanor penalties. *Id.* at 510.

259. In 1944, for example, the Court held that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In *Wisconsin v. Yoder*, the Court held that “the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.” 406 U.S. 205, 213-14 (1972). It held that the strong tradition of parental concern for the nurturing and “upbringing of their children is now established beyond debate.” *Id.* at 232.

260. See *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (“Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.”).

*v. Ullman*.<sup>261</sup> The right to privacy, critically, protected the marital couple from government intrusion into procreative decision-making.<sup>262</sup> *Eisenstadt* then expanded that right to individuals based on an equal protection challenge. It held that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>263</sup>

*Roe v. Wade* affirmed the shared doctrinal roots of abortion decision-making with parental decision-making. When the Court in *Roe* considered the right of a woman to terminate her pregnancy, the Court held:

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.<sup>264</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed the central holding of *Roe*. It did so in a way that also reaffirmed the interconnectedness of abortion decision-making and family decision-making as well. The plurality tethered the right to terminate a pregnancy to broader concepts of autonomy and dignity when it stated, “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>265</sup>

---

261. 367 U.S. 497, 508 (1961) (striking down a challenge to the same Connecticut law challenged in *Griswold*, but concluding that the plaintiffs did not have standing to challenge the law). Justice Harlan’s dissent argued that the Fourteenth Amendment’s Due Process clause was broad enough to include the liberty interests violated here. *Id.* at 523 (Harlan, J., dissenting). This approach is limited because it “cannot accommodate the fact that many people rely on government support for their daily activities, whether they be education (e.g., student loans), family formation (e.g., tax credits), or employment.” Luna & Luker, *supra* note 6, at 329.

262. *See Griswold*, 381 U.S. at 479. Justice Douglas, writing for the *Griswold* majority, positioned the right to privacy within the “penumbras” and “emanations” of other constitutional rights. *Id.* at 484. Concurring opinions placed the right to privacy in the Ninth Amendment to the Constitution (Justice Goldberg) and the Due Process Clause of the Fourteenth Amendment (Justice Harlan). *See id.* at 486-89 (Goldberg, J., concurring), 499-502 (Harlan, J., concurring).

263. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (striking down the statute on equal protection grounds).

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

265. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). The decision positions a pregnant woman with decision-making autonomy, but also considerably empowered the state to persuade and “inform” that decision. The opinion expressed a “pro-

The bridge between parental decision-making and reproductive decision-making was reaffirmed in *Troxel v. Granville*, but *Troxel* also showed the enduring protections given to parental rights. In 2000, the Supreme Court, citing the previous lineage of cases, held in *Troxel* that the liberty interests of parents and guardians protected by the Due Process Clause of the Fourteenth Amendment “includes the right ‘to direct the upbringing and education of children under their control.’”<sup>266</sup> It held that for fit parents “there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent’s children.”<sup>267</sup> The Court thus reaffirmed the positioning of parental decision-making as a constitutionally protected right that is doctrinally aligned in the source of the right (the right to privacy) with the decision to terminate a pregnancy.<sup>268</sup> As Jill Hasday concludes in *Family Law Reimagined*, “change in family law’s treatment of the parent-child relationship has not been nearly as dramatic or far-reaching as stories about the modern preeminence of children’s interests might suggest.”<sup>269</sup> Rather, parental rights are protected in many contexts, including the constitutional protections noted above.<sup>270</sup>

Notably, as uncomfortable as it might be for the reproductive rights movement to acknowledge, this positions the constitutional jurisprudence of abortion as doctrinally tethered closer to parental rights (and thus, to family law) than it is to women’s constitutional equality. That was never the feminist plan, but it is the current reality. Women’s reproductive decision-making remains untethered explicitly from equal protection arguments—a point many feminist

---

found interest in potential life” that supported the enactment of state laws throughout a woman’s pregnancy. *Id.* at 878. The “means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it” and the state cannot impose an “undue burden” on the woman’s decision. *Id.* at 877. An undue burden is a “state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* *Whole Woman’s Health* clarified that an undue burden requires the state to consider the burdens a law imposes on women, but also the benefits that it offers to women; laws that are not medically justified will not stand.

266. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-535 (1925)).

267. *Id.* at 68-69.

268. This doctrinal framing might be surprising to some. Notably missing is legal analysis of reproductive rights as women’s rights. The doctrinal underpinnings of reproductive rights align more closely with the rights of parents than they do with the rights of woman under the Equal Protection Clause.

269. See HASDAY, *supra* note 43, at 135.

270. See *id.*

scholars have critiqued for decades.<sup>271</sup> Women were protected from some aspects of government regulation, but the basis for this protection was not about women making autonomous decisions or achieving equal political status.<sup>272</sup> Rather, the right was about freedom from government intrusion into private matters.

The absence of the parallel equal protection frame became particularly noteworthy after *Obergefell v. Hodges* and *United States v. Windsor*.<sup>273</sup> These cases struck down state bans on same-sex marriage and federal bans on the recognition of valid same-sex marriages, respectively, using a “helix” of both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>274</sup> Reproductive rights, critically, only hold one strand of the helix in current constitutional doctrine.

#### D. *The Intersection of Family Law and Reproductive Rights*

The polarization described above leaves abortion decision-making in a tenuous and untethered place in the field of family law. A simple web search for “reproductive rights” yields no references to families whatsoever without extensive and prolonged digging. The key results focus on, for example, nonprofit groups working on reproductive rights, news about state legislative activity, historical chronologies of the movement. The notion of “family” is simply missing from social, legal, and political framings of abortion. Interestingly, it is largely missing from both the “choice” and the “life” sides of the debate. In contrast, simple web searches for “family law” yield innumerable links to law practitioners, resources and tools to work through family law issues, and pages for local bar sections. The social, political, and legal framing of family law is likewise missing conception, reproduction, and abortion.

Scholars and casebook authors typically consider reproductive rights as a subset of family law, but primarily in the area of constitutional law. Most family law casebooks use a constitutional lens to set the outer boundaries of how far the state can go in regulating the

---

271. See Bachiochi, *supra* note 107, at 889 n.3 for a list of sources arguing that the abortion right should be based in equal protection. For a chronology of equal protection cases and scholarly debate about the Equal Protection Clause argument’s role in abortion, see *id.* at 898-907.

272. Huberfeld, *supra* note 9, at 1372 (“[W]omen qua women are absent from the Court’s analyses.”).

273. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (striking down state bans on same-sex marriage); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down provisions of the Defense of Marriage Act).

274. See *Obergefell*, 135 S. Ct. at 2584; *Windsor*, 133 S. Ct. at 2675.

family.<sup>275</sup> The right to access contraception and the right to terminate a pregnancy are presented, but they are presented as an outer boundary to state power—set distinctly apart from the decision-making roles of parents and the BIOC standard.<sup>276</sup> This leaves the impression that reproductive rights abstractly are a chapter of family law, but that they do not bear a connection to the way we think about parenting and family decision-making more broadly.

Reproductive rights scholarship also has a tenuous relationship to family law scholarship. While family law conferences will accept papers about reproductive rights, they are generally segmented off as a subset of the field. Law conferences routinely bifurcate papers on reproductive rights from those on parenting, custody, or visitation. There are separate blogs, separate casebooks,<sup>277</sup> separate courses, and separate fields of scholarship. A unified framing of reproductive and parental decision-making would also more cohesively position reproductive rights as a field that is interconnected with family law.

## V. CONCLUSION

Conventional approaches have positioned reproductive rights as distinct from parental rights. Any alignment is something that the reproductive rights movement has historically resisted squarely.<sup>278</sup> It has resisted this alignment for fear that it compels the personhood of the fetus or the parental status of the woman decision-maker. This hardline approach may be too cautious or too all-encompassing. There may be critical gains to using a unified approach to understanding the decision-making methodologies of parents and women making reproductive decisions. To deny this alignment with parental decision-making entirely is also to compromise the identities of other

---

275. See, e.g., D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 1 (6th ed. 2016). Chapter 1 describes the constitutional protections for the family and its members. *Id.* The content on reproduction is there to frame the power of the state. It is not connected to parenting per se or to the decision to become a parent. It is about state power.

276. Compare DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* (3d ed. 2012), and IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* (5th ed. 2010) (beginning the respective texts with a chapter on marriage, family, and privacy and ending with content on ART and adoption), with HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* (7th ed. 2013) (embedding chapters on “Becoming a Parent: Contraception, Abortion, and Paternity,” “Adoption,” “Assisted Reproduction,” and “Child, Parent, and State: Rights and Obligations” in the heart of the doctrinal material).

277. A pioneering textbook on reproductive rights was published in 2015. See MELISSA MURRAY & KRISTIN LUKER, *CASES ON REPRODUCTIVE RIGHTS AND JUSTICE* (2015). This book signals the importance of the field of reproductive rights.

278. See *supra* Section II.A.

decision-makers who *do* think in these terms.<sup>279</sup> It allows oppositional groups to demonize, marginalize, and distance the decision-making of women over their reproduction from the ordinary decision-making of others. It compromises empathy. It fosters isolation and loneliness.<sup>280</sup>

Expanding our understandings of abortion decision-making to include auto(n)thee and auto(n)we results in a more inclusive feminist account of abortion decision-making.<sup>281</sup> It builds on liberal notions of autonomy, but also builds in space for other framings. Feminists have historically been “wary of reliance on liberal notions of individualistic choice to promote autonomy and equality.”<sup>282</sup> Feminists have critiqued liberal autonomy as marginalizing “interdependence and care,”<sup>283</sup> instead emphasizing how liberal politics must be “sensitive to relations of care, interdependence, and mutual support that define our lives and which have traditionally marked the realm of the feminine.”<sup>284</sup> Some feminist strands instead emphasize a relational autonomy model that “optimiz[es] autonomous decision making through dialogue and explicit recognition of social and contextual pressures involved in choice.”<sup>285</sup> This approach acknowledges that autonomy occurs “*within* and *because* of relationships.”<sup>286</sup> This is a more dynamic concept of autonomy in which one’s autonomy is actualized in the context of relationships and others.<sup>287</sup>

279. See, e.g., Ludlow, *supra* note 239, at 476 (explaining that the language of “autonomy and choice” does not resonate with “many women” who have had abortions because their lives are complex and they are focusing on their families and their lives).

280. This is a point which reproductive rights groups, such as the Abortion Care Network, have tried to counter with publicity campaigns and supportive materials emphasizing “[y]ou are a good woman” or that “[g]ood women have abortions.” *Id.* at 478-79 (noting as well that there might be a normative critique to feminists being concerned with “good women”).

281. See generally Smith, *supra* note 5, at 14 (explaining that Justice Kennedy does not understand or relate to abortion decision-making and that he “imagines [it] as a process that results in the loss of maternal bliss”). Smith argues that there is a significant lack of information about the process of abortion decision-making, which fuels misinformation and beliefs that the decisions are “irrational and selfish.” *Id.*

282. See, e.g., Laufer-Ukeles, *supra* note 163, at 608; Williams, *supra* note 26, at 1561 (“A more accurate understanding of liberalism would recognize the way it excludes mothers from the republic of self-interested choice, mandating selflessness for mothers and self-interest for others.”).

283. Laufer-Ukeles, *supra* note 163, at 608, 610 (“‘Relational autonomy’ provides an alternative understanding of autonomy that acknowledges the many social and contextual constraints and pressures that may be placed on choices while simultaneously recognizing that there is value in self-determination.”).

284. John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD. 143, 143 (2004).

285. Laufer-Ukeles, *supra* note 163, at 611 (noting that relational autonomy focuses on the “contextual forces that shape a decision beyond explicit coercion”).

286. Carolyn Ells et al., *Relational Autonomy as an Essential Component of Patient-Centered Care*, 4 INT’L J. FEMINIST APPROACHES TO BIOETHICS 79, 86 (2011).

287. *Id.*

It is dangerous and marginalizing to leave reproductive rights dangling perilously as an offshoot of constitutional law and a bookend of family law. Rather, it is time to embrace the doctrinal interconnections that reproductive decision-making has to parental decision-making. This is in no way to displace the critical work that rights and autonomy framings also add to our understandings of reproductive rights, but to add depth and context to the origins of the right and the realities of decision-making. This approach—while admittedly breaching longstanding boundaries—seeks to ultimately build bridges, understanding, and inclusiveness to the reproductive rights movement.<sup>288</sup>

Positioning abortion decision-making in a unified frame with parental decision-making would powerfully debunk troublesome and demonizing myths about *why* women terminate pregnancies. Reducing cultural stigma is a critical goal of the reproductive rights movement. Despite the data discussed above revealing that the typical woman who terminates her pregnancy is already a mother, few people recognize or internalize these accounts.<sup>289</sup> These misperceptions come squarely from the challenges people perceive in reconciling parenting and abortion.<sup>290</sup> It is hard to “demonize politically” mothers who are making such tough choices about “low income, unemployment, and a lack of health insurance, or [who] are struggling to raise kids on their own.”<sup>291</sup> It would also destigmatize certain aspects of abortion decision-making because it would soften the perceived dissonance of women choosing not to become parents.<sup>292</sup>

This unified framing also challenges the monopoly on morality that the pro-life movement currently holds. It suggests that an individual’s perception of morality or religion is also a way of actualizing one’s autono(me). This framing brings the strong religious lens and the strong women’s autonomy lenses closer together. A religious objection to abortion can be an autono(me) decision just as a woman’s decision to terminate can be an autono(thee) decision.

---

288. See generally Daniel Skinner, *The Politics of Medical Necessity in American Abortion Debates*, 8 POL. & GENDER 1, 1 (2012) (concluding that “medical necessity” is a “high-stakes rhetorical contest”). “Rights discourse has historically introduced problems such as competition among groups for the recognition and resources that rights entail, constitutive exclusions, and the reinforcement of patriarchy.” *Id.* at 19.

289. Sandler, *supra* note 112.

290. *Id.* (describing it as a “terrible mistake” to “focus ‘on the less frequent reasons [for terminating pregnancies], which are rape and incest’”).

291. *Id.* (quoting a qualitative study on why women have abortions).

292. Cahill, *supra* note 1, at 441 (“Her behavior causes ‘cognitive discomfort,’ if not extreme cognitive dissonance, because it ‘confounds the general scheme of the world.’” (footnotes omitted)).

While abortion decision-making is understood as a highly politicized and polarizing framework, a unified framework would reveal that parenting decision-making is likewise political.<sup>293</sup> The cultural script that we write for parents is deeply entrenched in cultural, social, and moral expectations.<sup>294</sup> This script, as many feminist authors have revealed, is not gender-neutral in the expectations it places on parents.<sup>295</sup> When parents, particularly mothers, do not align with this cultural script, it can silence and isolate parents.<sup>296</sup> That script is also heavily grounded in middle-class privilege, in which what “children are and need patently reflect a white, middle-class cultural hegemony.”<sup>297</sup>

This approach might also build new allies or empathizers. When abortion decision-making is reframed as a contextual and relational decision, might someone who experienced a divorce or a separation be able to better understand the complex, contextual decision-making that women undergo in relation to their pregnancies?<sup>298</sup> Might a parent who has decided not to vaccinate their children or to homeschool their children empathize with the demonization and judgment that is cast upon those women who elect to terminate their pregnancies? These tethers might cross critical political and legal boundaries at least to create understanding.

It is time to reconsider the longstanding boundaries. There may be critical ground to be gained in exploring the complex, multi-dimensional realities of decision-making.

---

293. See generally ELDER & GREENE, *supra* note 87 (chronicling political emphasis on parenthood and the family in the twenty-first century political system).

294. MILLER, *supra* note 83, at 13.

295. See, e.g., WALLBANK, *supra* note 97.

296. See MILLER, *supra* note 83, at 13-14; GILLIES, *supra* note 78, at 155 (explaining that working-class parents expressed “silence, withdrawal, anger, aggression and resistance” when they conflicted with their children’s teachers); RICHARDSON, *supra* note 96, at 3 (“Both the assumption that women have a duty to take care of their children and the expectation that women will find motherhood naturally rewarding make it difficult for women, as mothers, openly to express feelings of dissatisfaction and disappointment, anger and frustration.”).

297. GILLIES, *supra* note 78, at 145.

298. “Yet there is no escaping the fact that abortion is frequently a painful experience for the woman; it signifies a loss. What is interesting is that so many women choose it anyway, and are able to separate their *feelings* from their moral judgment about what is best to do. As with divorce or separation, feelings about an abortion may be in conflict without this spelling a sense of ‘guilt.’” ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM 368 (1984).