

# University of Miami Law Review

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Volume 65  
Number 3 *Volume 65 Number 3 (Spring 2011)*  
*SPECIAL TOPIC: Gender Justice and Human  
Rights in the Americas*

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Article 3

4-1-2011

## Modern Day Inquisitions

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# KEYNOTE ADDRESS

Gender Justice and Human Rights in the Americas Convening  
University of Miami School of Law  
February 23–25, 2011

## Modern Day Inquisitions

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### I. INTRODUCTION

Thanks and ever thanks to the organizers for giving us this remarkable opportunity to:

- celebrate our past achievements in applying human rights and constitutional provisions to protect the dignity of different sexualities, reduce violence, and promote reproductive and sexual health,
- explore some of the lessons learned in applying human rights and

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constitutional provisions to these issues: why we won, why we failed and how we missed opportunities, and finally,

- think together about our strategic plans to face the challenges ahead and strengthen our networks to create better synergies in our research, teaching, and advocacy to improve gender justice in the Americas.

Like the Inquisition in the 1600s, particularly its trials that took place in Lima, Peru; Cartagena, Colombia; and Mexico City,<sup>1</sup> and the trial of Galileo for defying the scripture that took place in Rome,<sup>2</sup> the modern day inquisitions are attempts to secure the supremacy of fundamentalist religions and their hierarchies in matters of gender, sexuality, and reproduction. The modern day inquisitions jeopardize academic freedoms of researchers, such as those whose scholarship focuses on reproductive health law and ethics,<sup>3</sup> and use hostile stereotypes and social condemnation, among other mechanisms, to control sexuality and reproduction and to privilege male dominance. In this sense the overarching barriers to achieving gender justice in this hemisphere are the modern day inquisitions.<sup>4</sup>

As we take stock, explore lessons learned, and face the challenges ahead, we need to recognize that each of us does so from particular perspectives. My perspective is that public universities are created as trusts to generate knowledge and make it universal in order to benefit societies. As a result of that perspective, I am constantly testing research questions about gender justice, exploring whether those questions are

1. BOLES LAO LEWIN, *LA INQUISICIÓN EN MÉXICO: IMPRESIONANTES RELATOS DEL SIGLO XVII* (J.M. Cajica Jr. ed., 1967); BOLES LAO LEWIN, *LA INQUISICIÓN EN MÉXICO: RACISMO INQUISITORIAL (EL SINGULAR CASO DE MARÍA DE ZÁRATE)* (1971).

2. DAVA SOBEL, *GALILEO'S DAUGHTER* 7 (1999) ("In 1616, a pope and a cardinal inquisitor reprimanded Galileo, warning him to curtail his forays into the supernal realms.")

3. See, e.g., Debora Diniz Rodrigues v. Brazilian Union of Culture and Education, *Processo*: 0019900-12.2007.5.10.0101 (Vara do Trabalho de Taguatinga do Tribunal Regional do Trabalho da 10 Regi file Feb. 13, 2007). See also DEBORA DINIZ, SAMANTHA BUGLIONE & ROGER RAUPP RIOS, *ENTRE A DÚVIDA E O DOGMA: LIBERDADE DE CÁTEDRA E UNIVERSIDADES CONFESSIONAIS* (2006); VICTORIA BAXTER, *AM. ASS'N FOR THE ADVANCEMENT OF SCI., DIRECTORY OF PERSECUTED SCIENTISTS, ENGINEERS, AND HEALTH PROFESSIONALS* (2003), available at [http://shr.aaas.org/aaashran/directory\\_2003.pdf](http://shr.aaas.org/aaashran/directory_2003.pdf); *AAAS Science and Human Rights Program*, AM. ASS'N FOR THE ADVANCEMENT OF SCI. (Oct. 21, 2002), [http://shr.aaas.org/aaashran/alert.php?a\\_id=236](http://shr.aaas.org/aaashran/alert.php?a_id=236) (discussing firing of Brazilian bioethicist "in retaliation for her participation in a public debate about abortion"); Mariana Carbajal, *Metodos para Interrumpir un Debate Pendiente*, PAGINA 12, Oct. 19, 2009, <http://www.pagina12.com.ar/diario/elpais/1-133700-2009-10-19.html> (explaining the expulsion of law professors from Catholic universities in Argentina for their work on behalf of pregnant women).

4. See Juan Marco Vaggione, *Evangelium Vitae Today: How Conservative Forces are Using the 1995 Papal Encyclical to Reshape Public Policy in Latin America*, *CONSCIENCE*, vol. 31, no. 3, 2010, at 23, available at <http://viewer.zmags.com/publication/f1f99f2e#f1f99f2d/24> (stating that "the manner in which these [Catholic] activists work has been transformed," though "the content of their beliefs" remains the same).

relevant, and determining how best to do the research in ways that resonate with those who might use it. I also have a perspective on the nature of the legal research. Domestic legal research is essential, but transnational research is increasingly important as our world globalizes. Transnational research is not about privileging one kind of knowledge. It is, for example, about learning from successes in the South and the mistakes of the North.

\* \* \*

With my perspectives clear, let me proceed by taking stock, exploring lessons learned, and facing the challenges ahead.

## II. TAKING STOCK

We often forget to take stock of our achievements: add them up, examine their importance, and assess how they can contribute to longer-term victories within countries and within the Western Hemisphere. Acknowledging our achievements is critical to understanding how to build on them. We might start by doing a mapping of significant legislative reforms, important domestic court decisions, and significant decisions of the Inter-American Commission on Human Rights<sup>5</sup> and the Inter-American Court of Human Rights<sup>6</sup> within our respective fields.

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5. See, e.g., *Ramírez Jacinto v. Mexico*, Petition 161-02, Inter-Am. Comm'n H.R., Report No. 21/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 ¶¶ 24–27 (2007), available at <http://www.cidh.oas.org/annualrep/2007eng/Mexico161.02eng.htm> (friendly settlement between girl and Government of Baja California where rape of girl caused unwanted pregnancy and authorities denied abortion); *Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. Comm'n H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶¶ 9–12, 14, 17 (2003), available at <http://www.cidh.oas.org/annualrep/2003eng/Peru.12191.htm> (friendly settlement between various women's rights nongovernmental organizations and Peruvian State where coerced sterilization of 33-year-old rural mother of seven caused death); “Baby Boy” v. United States, Case 2141, Inter-Am. Comm'n H.R., Res. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶¶ 30–31 (1981), available at <http://www.cidh.org/annualrep/80.81eng/usa2141.htm> (permitting abortion); Ann Farmer, *Luisa Cabal: Turning National Wrongs Into International Rights*, VOICES UNABRIDGED (Sept. 26, 2003), [http://www.voices-unabridged.net/article.php?id\\_article=35&numero=0](http://www.voices-unabridged.net/article.php?id_article=35&numero=0) (Peruvian government paid reparations for rape of a street vendor by her examining physician and the subsequent denial of remedies).

6. See, e.g., *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 217, 232, 234, 275, 301–303, 306 (Aug. 24, 2010) (State of Paraguay responsible for failing to prevent a maternal death of a woman in the Xákmok Kásek indigenous community); *Gonzalez v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter Am. Ct. H.R. (ser. C) No. 205, ¶¶ 1–2, 20–30 (Nov. 16, 2009) (Mexican State accepted partial international responsibility for disappearances and deaths of three women later found in a cotton field, where State had knowledge of gender-related violence yet failed to prevent deaths); *De La Cruz-Flores v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 115, ¶¶ 73(8), 74, 90, 94–102 (Nov. 18, 2004) (criminal prosecution of doctor for providing care to terrorists impermissible). See also Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17 TEX. J. WOMEN & L. 227, 232–46, 286–87 (2008) (discussing six Inter-American Court of Human

We might find important synergies, or troubling divergences in these reforms and court decisions. One right might be applied in one way in one context and another way in another sector, or the criminal law might be used advantageously in one sector and not in another.

### A. *Gender Identities*

Legislators and judges have begun to grasp the importance of respecting different gender norms and identities. Laws permitting same sex marriage have been passed in Argentina,<sup>7</sup> Canada, and Mexico City, and those laws in Canada<sup>8</sup> and Mexico City<sup>9</sup> have been affirmed as constitutionally compliant. These legal reforms have helped to reframe the way we think about sexuality<sup>10</sup> and sexual health.<sup>11</sup> Sexual intimacy is an important part of everyone's lives and should not be compromised, especially on grounds of one's sexual preference.<sup>12</sup>

A particular sexuality can no longer be privileged over another. The meaning of sexual citizenship is expanding,<sup>13</sup> most recently as gays and lesbians are being allowed increasingly to openly serve in the various militaries of the region, such as the U.S.<sup>14</sup> Degrading stereotypes of a person or groups of persons with one orientation is increasingly prohibited legally and socially. Individuals cannot be stereotyped in ways that deny them a benefit or impose a burden.<sup>15</sup> Debates and literature now

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Rights gender-related cases and prescribing strategies for "a more gender-friendly Court jurisprudence" in the future).

7. Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31.949 (Arg.).

8. Reference re Same Sex Marriage, [2004] 3 S.C.R. 698, ¶ 5 (Can.), available at <http://scc.lexum.org/en/2004/2004scc79/2004scc79.pdf> (holding that "the Proposed Act, which defines marriage as the union of two persons, is consistent with the Canadian Charter of Rights and Freedoms.").

9. Acción de Inconstitucionalidad 2/2010, Promovente: Procurador General de la República. Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], Novena Época, Agosto de 2010 (Mex.), available at <http://www.scjn.gob.mx/Documents/AI-2-2010.pdf>.

10. See generally Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 863 (2010) ("re-discovery [of gay and lesbian dignity] may have to happen by traveling to very unfamiliar places.").

11. See generally Esteban Restrepo-Saldarriaga, *Advancing Sexual Health through Human Rights in Latin America and the Caribbean* (Int'l Council on Human Rights Pol'y, Working Paper, 2011), available at [http://www.ichrp.org/files/papers/183/140\\_Restrepo\\_LAC\\_2011.pdf](http://www.ichrp.org/files/papers/183/140_Restrepo_LAC_2011.pdf).

12. Alice M. Miller, Int'l Council on Human Rights Pol'y, *Sexuality and Human Rights*, at 8 (2009), available at [http://www.ichrp.org/files/reports/47/137\\_web.pdf](http://www.ichrp.org/files/reports/47/137_web.pdf) ("Sexual rights make a strong claim to universality, since they relate to an element of the self which is common to all humans: their sexuality.").

13. See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* (2007).

14. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

15. See REBECCA COOK & SIMONE CUSACK, *GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES* 3, 85-89 (2010) (available in Spanish).

explore the importance of masculinities,<sup>16</sup> enabling a fuller sense of the meanings of gender identities.

### B. *Freedom from Violence*

There have been many important advances in norms that protect us from violence,<sup>17</sup> the most recent of which was the decision of the Inter-American Court of Human Rights in *Gonzalez v. Mexico* (the “Algodonero” decision).<sup>18</sup> That decision held Mexico responsible under the American Convention on Human Rights (the “Convention”) and the Convention on Prevention, Punishment and Eradication of Violence against Women (the “Convention Belém do Pará”) for failing to investigate the gendered disappearances and murders of three poor, migrant women, two of whom were minors.<sup>19</sup> The bodies of these three women, Claudia Ivette Gonzalez, Esmeralda Herrera Monreal and Laura Berenice Ramos Monarrez, were found in the cotton field near Juarez, a Mexican town bordering El Paso, Texas, in the Mexican state of Chihuahua.<sup>20</sup>

The decision is important for a number of reasons including that, for the first time, the Court ruled that states have positive obligations to respond to violence against women by private actors, looked at the murders of these three women in the context of mass violence against women and structural discrimination, and found that gender-based violence constitutes gender discrimination.<sup>21</sup> The Court decided that the State violated the obligation not to discriminate contained in Article 1(1) of the Convention, in connection with the obligation to guarantee the rights embodied in Articles 4(1) (life), 5(1) (physical, mental and moral integrity), 5(2) (torture or cruel, inhuman, or degrading punishment or treatment) and 7(1) (personal liberty and security) of the Convention to the detriment of the three victims; as well as in relation to the right of access to justice established in Articles 8(1) (right to a fair trial) and 25(1) (simple, prompt, effective recourse) of the Convention, to the det-

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16. See, e.g., Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J. L. & GENDER 415, 417–424 (2010); NANCY E. DOWD, *THE MAN QUESTION—MALE SUBORDINATION AND PRIVILEGE* (2010).

17. See Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, June 9, 1994, 33 I.L.M. 1534, available at <http://www1.umn.edu/humanrts/instree/brazil1994.html>. See also LILIANA TOJO, CTR. FOR JUSTICE AND INT’L LAW, *SUMMARIES OF JURISPRUDENCE: GENDER-BASED VIOLENCE* 355–56 (2010).

18. *Gonzalez v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009) (also known informally as the “Algodonero” or the “cotton field” decision).

19. *Id.* ¶¶ 1–2, 20–30.

20. *Id.* ¶ 2.

21. *Id.* ¶¶ 164, 402.

riments of the victims' next of kin.<sup>22</sup>

In presenting the facts of the case, the Court included a section, *Stereotyping allegedly manifested by officials to the victims' next of kin*.<sup>23</sup> It referenced the testimony of the victims' mothers to show how state officials had generated hostile stereotypes of the victims' roles, attributes, and characteristics, in part to justify their avoidance of their obligations to investigate.<sup>24</sup> For example, the Court cited testimony of Esmeralda Herrera's mother saying that "when she reported her daughter's disappearance, the authorities told her that she "had not disappeared, but was out with her boyfriends or wandering around with friends" and "that if anything happened to her, it was because she was looking for it, because a good girl, a good woman, stays at home."<sup>25</sup> Importantly, the Court concluded that "the comments made by officials that the victims had gone off with a boyfriend or that they led a disreputable life . . . constitute stereotyping."<sup>26</sup>

In the section of its judgment, *Obligation not to discriminate: violence against women as discrimination*, the Court took judicial notice of the phenomenon of gender stereotyping: "the Tribunal finds that gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women."<sup>27</sup> The Court then went on to refer to the statements made by the State agents, to identify how hostile stereotypes are perpetuated in the particular context of the police authorities: "Bearing in mind the statements made by the State, the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities, as in this case."<sup>28</sup>

Significantly, the Court concluded this section by saying that "[t]he creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women."<sup>29</sup> In short, the Court recognized the structural nature of violence against women, reframed it as a form of discrimination, and acknowledged the contribution of stereotypical thinking to violence.

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22. *Id.* ¶¶ 402, 602.

23. *Id.* ¶¶ 196–208.

24. *Id.*

25. *Id.* ¶¶ 197–98.

26. *Id.* ¶ 208.

27. *Id.* ¶ 401.

28. *Id.* (internal cross-reference omitted).

29. *Id.*

### C. Reproductive Dignity and Equality

Important achievements have been made transnationally in characterizing reproductive choice as a component of dignity and to holding a state accountable for failing to that dignity.

#### 1. REPRODUCTIVE DIGNITY

In 2005, the United Nations Human Rights Committee held Peru responsible when a governmental hospital denied an adolescent girl, pregnant with an anencephalic fetus, a fetus without an upper brain, access to abortion services to which she was legally entitled.<sup>30</sup> In order to protect prenatal life at any cost, the adolescent girl was forced to carry her pregnancy with an anencephalic fetus to term and to breast feed the child for a few days after birth, knowing that newborn infant would die a few days after birth.<sup>31</sup> The Committee found that the treatment forced upon this young girl constituted a violation of her rights to be free from inhuman and degrading treatment, to private life, to such measures of protection as are required by her status as a minor, and to her right to an effective legal remedy for violation of such rights.<sup>32</sup>

Dignity is a foundational concept in the 2006 Colombian Constitutional Court decision liberalizing the abortion law.<sup>33</sup> The Court explained its meaning as follows:

[T]he rules which flow from the concept of human dignity—both the constitutional principle and the fundamental right to dignity—coincide in protecting the same type of conduct. This Court has held that in those cases where dignity is used as a criterion in a judicial decision, it must be understood that dignity protects the following: (i) autonomy, or the possibility of designing one's life plan and living in accordance with it (to live life as one wishes); (ii) certain material

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30. U.N. Human Rights Comm., *Noelia Llantoy Huamán v. Peru*, ¶¶ 2.1–2.3, 6.4–6.6, 7, U.N. Doc. CCPR/C/85/D/1153/2003 (Oct. 24, 2005), <http://www1.umn.edu/humanrts/undocs/1153-2003.html>.

31. *Id.* ¶ 2.6.

32. *Id.* ¶¶ 6.4–6.6, 7. See also Rebecca J. Cook, Joanna N. Erdman, Martin Hevia & Bernard M. Dickens, *Prenatal Management of Anencephaly*, 102 INT'L J. GYNECOLOGY & OBSTETRICS 304, 304–308 (2008), available at <http://ssrn.com/abstract=1263905> (discussing legal and ethical implications of abortion of anencephalic fetuses in South America).

33. Colombian Constitutional Court Decision C-355/2006; Rebecca J. Cook, *Foreword to WOMEN'S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA 7* (2007), available at [http://www.womenslinkworldwide.org/pdf\\_pubs/pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf). See also ISABEL CRISTINA JARAMILLO SIERRA & TATIANA ALFONSO SIERRA, *MUJERES, CORTES Y MEDIOS: LA REFORMA JUDICIAL DEL ABORTO* (2008); Verónica Undurraga & Rebecca J. Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006*, in *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE LAW* 215 (Susan H. Williams ed., 2009).

conditions of existence (to live well); and (iii) intangible goods such as physical integrity and moral integrity (to live free of humiliation)

...<sup>34</sup>

As a result of this foundational concept of human dignity, the Court explained that

when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.<sup>35</sup>

## 2. REPRODUCTIVE EQUALITY

The Inter-American Court of Human Rights, in the case of *Xákmok Kásek Indigenous Community v. Paraguay*, held Paraguay responsible for the lack of guarantee of the right of the members of the Xákmok Kásek Indigenous Community to their ancestral property.<sup>36</sup> This case is historic for many reasons, including for purposes of reproductive health. The Court ruled that the failure of the government to guarantee for the Xákmok Kásek indigenous peoples the possession of their property kept this community in a vulnerable state regarding their health and welfare.<sup>37</sup>

Specifically with regard to one member, Remigia Ruíz, a 38 year-old woman who died in childbirth because she did not receive appropriate medical attention, the Court declared that the circumstances of her death manifested “many of the signs relevant to maternal deaths, namely: death while giving birth without adequate medical care, a situation of exclusion or extreme poverty, lack of access to adequate health services, and a lack of documentation on cause of death, among others.”<sup>38</sup>

The Court emphasized that

extreme poverty and the lack of adequate medical care for pregnant women or women who have recently given birth result in a high maternal mortality rate. Because of this, States must put in place adequate healthcare policies that allow it to offer care through personnel who are adequately trained to handle births, policies to prevent maternal mortality with adequate prenatal and postpartum care, and legal and administrative instruments regarding healthcare policy that allow for the adequate documentation of cases of maternal mortality.

34. WOMEN'S LINK WORLDWIDE, *id.* at 35 (initial alteration in original).

35. WOMEN'S LINK WORLDWIDE, *id.* at 37.

36. Xákmok Kásek Indigenous Cmty. v. Paraguay, *supra* note 6, ¶¶ 2, 337(2).

37. *Id.* ¶¶ 214, 273.

38. *Id.* ¶ 232.

All this is because pregnant women need special measures of protection.<sup>39</sup>

The Court found that the State violated her right to life (Article 4(1)) and the right to exercise that right without discrimination (Article 1(1)) of the American Convention, because Paraguay “did not take the positive measures necessary within the realm of its responsibilities, which would be reasonably expected to include preventing or avoiding risk to the right to life. As a consequence, the deaths of the following individuals are attributed to the State: . . . Remigia Ruiz, who died in 2005 at 38 years of age from complications while giving birth and did not receive medical care . . . .”<sup>40</sup>

In the finding on discrimination, the Court went beyond the discrimination that can be found in the letter of the law and looks at *de facto* discrimination against the members of the community based on: their marginalization in the enjoyments of the rights that the Court declared were violated, the lack of positive measures taken by the State to reverse this exclusion and, in general, their situation of extreme and special vulnerability with the consequent “lack of adequate and effective remedies that protect the rights of the indigenous in practice and not just formally . . . .”<sup>41</sup>

The Court decided the State discriminated by not complying with their obligation “to provide goods and services to the Community, particularly in regard to food, water, healthcare, and education; and to the preeminence of a view of property that grants greater protection to private property owners over indigenous territorial claims, thereby failing to recognize their cultural identity and threatening their physical subsistence.”<sup>42</sup>

In the order of reparations, the Court ordered the State to take measures which are immediate and permanent while the land is in the process of being handed over to the community: “provision of special medical care for the pregnant women, both pre- and post-natal and during the first few months of the baby’s life . . . .”<sup>43</sup>

To assure that the provision of basic goods and services are adequate, the State must provide a study, within six months of the notification of the judgment, “regarding the medical and psycho-social care, as well as the delivery of medication: 1) the necessary regularity of medical personnel’s visits to the Community; 2) the principle ailments and ill-

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39. *Id.* ¶ 233.

40. *Id.* ¶ 234.

41. *Id.* ¶¶ 272–73.

42. *Id.* ¶ 273.

43. *Id.* ¶ 301.

nesses suffered by the members of the Community; 3) the medications and treatments necessary for those ailments and illnesses; 4) the necessary pre- and post-natal care; and 5) the manner and regularity with which the vaccinations and deparasitizations should be carried out

...<sup>44</sup>

Finally, the State must provide a healthcare center in the settlement where the community is temporarily located “with the medications and supplies necessary to provide adequate healthcare. To do this, the State has six months as of the notification of this Judgment. Likewise, it must immediately establish a system of communication in the settlement that allows the victims to contact the relevant healthcare authorities for care in the event of an emergency. Should it be necessary, the State will provide transportation to the individuals who need it. Later, the State shall also ensure that the healthcare center and communication system are moved to the place where the Community settles permanently.”<sup>45</sup>

\* \* \*

These victories regarding gender identities, freedom from violence, and reproductive dignity and equality are fragile and backlash is inevitable, but significant beginnings have been made, and we must think strategically about how best to build on them.

### III. LESSONS LEARNED

What are the lessons learned from the last decade for achieving gender justice? Learning lessons is an evolving process: what should we build on from past experiences, and what should we change in our programs, policies, and advocacy moving forward to secure gender justice? Answers to these questions will depend on one’s perspective. Some of the lessons that I have learned include the need to

- redefine religious space,
- understand technology as transformation, and
- build on the constitutive role of the law.

#### A. *Redefining Religious Space*

If one steps back from the particular fights on sexuality and reproduction in the past decade, a lesson learned is that there has been an undeniable expansion of religious space to the detriment of gender justice. This can be seen in the unaccountable nature of religious hierarchies, as evidenced by the clerical sexual abuse scandal, and the abuse of the right of conscience.

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44. *Id.* ¶ 303.

45. *Id.* ¶ 306.

## 1. UNACCOUNTABLE NATURE OF CHURCH HIERARCHIES

I want to talk specifically about the unaccountable nature of the hierarchy of the Catholic Church, but I recognize that other religions have challenges in failing to hold themselves accountable for abusive acts. What might we learn from how the sexual abuse scandal has put the Catholic Church on the defensive? The recently published book *The Case of the Pope: Vatican Accountability for Human Rights Abuse*, carefully, one might say forensically, documents the widespread practice of clerical sexual abuse, the systematic way the Vatican has covered it up, and how it has consistently failed to report the abuse, no matter how heinous, to the police.<sup>46</sup> The book lays out the case for considering the widespread and systematic cover up of clerical sexual abuse, as a crime against humanity, such crimes not being confined to times of war.<sup>47</sup> The book raises the possibility of convicting the current Pope Benedict XVI for aiding and abetting the international crime of systematic child abuse through his previous position as head of the Office of the Doctrine of the Faith, formerly known as the Office of the Inquisition.<sup>48</sup>

The Church has begun,<sup>49</sup> but has a long way to go, to remedy the abuses and to prevent their repetition. The Church has been shamed into acknowledging the devastating impact of its cover-up of clerical sexual abuse on the well-being of children and the adults they become. Now it has to be shamed into recognizing the harmful impact, on women and their reproductive and sexual health, of its policies on contraception, abortion and its expansion of the abuse of conscience on sexual and reproductive health. What lessons might be drawn from how the clerical sexual abuse scandal was exposed for holding the Church accountable for its policies on the spread of HIV or for stigmatizing different sexualities for its opposition to same-sex marriage?

## 2. THE ABUSE OF THE RIGHT OF CONSCIENCE

The right of conscience is being invoked in the reproductive and

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46. GEOFFREY ROBERTSON, *THE CASE OF THE POPE: VATICAN ACCOUNTABILITY FOR HUMAN RIGHTS ABUSE* 6 (2010) (“[S]exual abuse of children by priests in the Catholic Church . . . has been covered up by many bishops with the support and at the direction of the Vatican. The cover-up has included an almost visceral refusal to call in the police . . .”).

47. *Id.* at 149–50 (stating “[i]t must be hoped that, in due course, international law will develop its very real potential to threaten heads of state with accountability if they oppress their own people or their own faithful, or turn their eyes, blinded with a mote, to crimes that their own agents are committing[.]” noting the Vatican is responsible under international law due to its “decision to opt for statehood,” and hoping for a new “stage in the struggle for global justice.”).

48. *Id.* at 121–33.

49. Alexei Barrionuevo & Pascale Bonnefoy, *Chilean Priest Found Guilty of Abusing Minors*, N.Y. TIMES, Feb 18, 2011, <http://www.nytimes.com/2011/02/19/world/americas/19chile.html>.

sexual health field by pharmacists not to fill prescriptions for contraception,<sup>50</sup> by doctors not to treat ectopic pregnancies until the tube ruptures<sup>51</sup> not to perform abortions in emergencies,<sup>52</sup> not to perform lawful abortions,<sup>53</sup> and by anesthesiologists not to provide anesthesia, leaving pregnant women to endure the pain of undergoing lawful abortions,<sup>54</sup> or early induction of labor of an anencephalic fetus, without the benefit of anesthesia.<sup>55</sup>

The right of conscience is an important right and should be accommodated to the extent possible. However, when providers object on grounds of conscience to providing such services and refuse to refer patients to a willing provider or fail to provide these services in the case of emergency, this refusal infringes the rights of women to receive lawful services.

Health care providers are professionals and have professional and ethical duties to consider first the well-being of the patient. Why is it that firefighters are not allowed to choose the burning houses they rescue, while health care providers may choose the patients they treat? Why is it that the right of conscience in the context of a burning building will not be accommodated, while the right of conscience of health care providers is accommodated when women's lives are at stake? Why is it that the rights of women to their own conscience, to live their lives according to their own moral codes, get lost in the equation?

Is there a contagion in the abuse of the rights of conscience? In Canada, at least, the spread of this contagion was limited by the Sas-

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50. Pichon and Sajous v. France, Eur. Ct. H.R. (Third Section), Appl. No. 49853/99 (2001) (claim of pharmacists to object on grounds of conscience to selling contraceptives held inadmissible, but limitations on conscience permissible when necessary for women's health).

51. See, e.g., Susan Berke Fogel & Lourdes A. Rivera, *Saving Roe Is Not Enough: When Religion Controls Healthcare*, 31 *FORDHAM URB. L.J.* 725, 733 (2004).

52. See, e.g., Katharina Wecker, *Doctors Refuse to Perform Abortion on 13-Year Old Rape Victim*, *COLOMBIA REPORTS*, July 1, 2009, <http://colombiareports.com/colombia-news/news/4787-doctors-refuse-to-perform-abortion-on-13-year-old-rape-victim.html>.

53. Decision T-209 of 2008 20-21 and 45 (Constitutional Court of Colombia) (objecting providers are obligated to refer women to non-objecting providers and that hospitals, clinics and other institutions have no rights of conscience); see also Rebecca J. Cook, Monica Arango Olaya & Bernard M. Dickens, *Health Care Responsibilities and Conscientious Objection*, 104 *INT'L J. GYNECOLOGY & OBSTETRICS* 249-52 (2009).

54. Laurie Michelle Denyer, Call Me "At-Risk": Maternal Health in Sao Paulo's Public Health Clinics and the Desire for Cesarean Technology, at 9 (Aug. 19, 2009) (unpublished M.S. thesis, Massachusetts Institute of Technology), available at <http://dspace.mit.edu/bitstream/handle/1721.1/55107/589272652.pdf?sequence=1> (noting that racially marginalized women are often denied anesthesia).

55. *Brazil: Severina's Story (Uma História Severina)*, THE HUB (Aug. 20, 2008), <http://hub.witness.org/en/node/8605>; *Uma História Severina*, ANIS, <http://www.anis.org.br/ImagensLivres/Detalhes.cfm?Idfilme=5> (last visited April 26, 2011); Debora Diniz, *Research Ethics in Social Sciences: The Severina's Story Documentary*, 1 *INT'L J. OF FEMINIST APPROACHES TO BIOETHICS* 23-35 (Fall 2008).

katchewan Court of Appeal that ruled that public officers cannot discriminate on grounds, for instance of sexual orientation, in rendering lawful public services, such as the celebration of non-religious marriages.<sup>56</sup>

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Last year, the Vatican lost credibility in publishing the so-called New Norms that issued no instructions to report clerical sexual abusers to the civil authorities and announced that attempts to ordain women are as serious as sexually abusing a child.<sup>57</sup> In claiming immunity from human rights, the church hierarchy has defied criminal laws on sexual abuse and child protection. In hiding behind the right of conscience, the hierarchy has ignored the rights of women to reproductive and sexual health care.

A lesson is that our field has not been sufficiently adept at taking on the religious opposition, in part because no one wants to be considered as anti-religious. Religious faith plays an important role in people's lives, and religious institutions run hospitals and schools that are essential to societies. However, religious space has grown well beyond its religious purpose, to abuse the rights of children and women, and to offend the dignity of those of the same-sex who want to marry.

What might we change moving forward to achieve gender justice, given this expansion of religious space? We need to be more effective in challenging the practices of religious hierarchies that offend human rights, being clear that it is not religious faith behind these practices that is the issue. People are entitled to believe what they want, but they are not free to impose those beliefs on others to the detriment of their rights, or pursue practices that offend the rights of others.

### B. *Technology as Transformation*

The last decade has seen the introduction of methods to treat HIV/AIDS, HPV vaccines to reduce liability to cervical cancer,<sup>58</sup> improved in-vitro fertilization techniques to accommodate infertility ("IVF"),<sup>59</sup> the

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56. *In re Marriage Commissioners Appointed Under The Marriage Act, 1995*, S.S. 1995, c. M-4.1 (2011), 2011 SKCA 3 (Can. Sask. C.A.), available at <http://www.lawsociety.sk.ca/judgments/2011skca3.pdf>.

57. *Modifications Made in the Normae de Gravioribus Delictis*, VIS NEWS (July 15, 2010), <http://visnews-en.blogspot.com/2010/07/modifications-made-in-normae-de.html>; see also Nicole Winfield, *Female Ordination and Sex Abuse of Minors*, THE GLOBE AND MAIL, July 16, 2010, at A9; Maureen Dowd, Op-Ed, *Rome Fiddles, We Burn*, NY TIMES, July 17, 2010, <http://www.nytimes.com/2010/07/18/opinion/18dowd.html>.

58. Joanna N. Erdman, *Human Rights in Health Equity: Cervical Cancer and HPV Vaccines*, 35 AM. J.L. & MED. 365, 377 (2009) (describing the HPV vaccine as "a particularly promising remedial measure for cervical cancer inequity").

59. See *Sanchez Villalobos v. Costa Rica*, Case 12.361, Inter-Am. Comm'n H.R., Report No.

introduction of Viagra, the expanded use of improved emergency contraception (“EC”),<sup>60</sup> the expanded use of Misoprostol for purposes of preventing hemorrhage in child birth and the post-partum period, causing abortion or treating post-abortion complications,<sup>61</sup> and the abortion pill combination of Mifepristone/Misoprostol.

With many of the initiatives to introduce new methods or initiatives for expanded use, clinical protocols have been elaborated to ensure safe and effective use.<sup>62</sup> These initiatives are essential to meeting the practical needs of women and men in accessing medicines and methods essential to their reproductive and sexual health and well-being.

But with many of these initiatives, there have been and will be innumerable fights in the region. Some have turned to the court decisions for resolution, some have been resolved by new regulatory guidelines, and some have resulted in outright bans.

There are current attempts in El Salvador to control the distribution of Misoprostol for post abortion care by requiring its registration as a narcotic; that is the class of drugs which requires special prescription, thus limiting its distribution and use.

Another example is emergency contraception (“EC”).<sup>63</sup> The highest

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25/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶¶ 1, 16–17 (2004), available at <http://www.cidh.org/annualrep/2004eng/CostaRica.12361eng.htm> (noting that President of Costa Rica authorized IVF and Supreme Court of Justice subsequently declared authorization unconstitutional due to high aggregate loss of embryos associated with the procedure at the time); Brief for Sanchez Villalobos as Amici Curiae Supporting Petitioners, *Sanchez Villalobos v. Costa Rica*, Case 12.361, Inter-Am. Comm’n H.R., Report No. 25/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶ II.C.3 (2009) (explaining that scientific and technological development of IVF procedures renders concern about embryo loss unjustified).

60. See *Welcome to ICEC: The International Consortium for Emergency Contraception*, INT’L CONSORTIUM FOR EMERGENCY CONTRACEPTION, <http://www.cecinfo.org/> (last visited Mar. 22, 2011) (“Now women in over 140 countries can buy emergency contraception . . .”).

61. See GYNUITY HEALTH PROJECTS, <http://gynuity.org/> (last visited Mar. 22, 2011) (offering information on how to use Misoprostol and Misoprostol’s intersection with law).

62. *Sexual and Reproductive Health*, WORLD HEALTH ORGANIZATION, <http://www.who.int/reproductivehealth/en> (last visited Mar. 22, 2011) (listing initiatives).

63. See Maria Alejandra Cardenas, *Banning Emergency Contraception in Latin America: Constitutional Courts Granting an Absolute Right to Life to the Zygote*, 3 HOUMBOLT AM. COMP. L. REV., no. 6 (2009), [http://haclr.org/index\\_archivos/Page359.htm](http://haclr.org/index_archivos/Page359.htm).

courts in Argentina,<sup>64</sup> Chile,<sup>65</sup> and, for example, Ecuador<sup>66</sup> have prohibited the use of EC because of its alleged action after the union of the sperm and the egg, thus offending to right to life as beginning from conception. Ignoring the science, the Supreme Court of Argentina based its reasoning on religious doctrines expressed in the national constitution that state that life has to be protected from conception.

The reproductive and sexual health field is constantly searching for a better technological fix, a better contraceptive, a more effective health intervention, without regard to the need to change norms and values to ensure women are empowered to make choices, and to ensure that technologies are distributed fairly. My fear is that in focusing on the technological fix without regard to the impact of prohibiting EC on the rights of women and their rights to equal access to medicines, we are missing important opportunities to promote gender justice and health equity.

Have the transformative roles of technology to promote gender justice and health equity been overlooked in these battles to introduce new methods? Has the discourse been changed? Do communities understand that neglecting medicines that only women need is a form of discrimination against them? Has the fact that Viagra gets covered by health insurance plans, and not contraceptives, been sufficiently characterized, debated, and advocated both in the court of public opinion and the courts of law as an offense to gender justice?

### C. *The Constitutive Role of the Law*

Another lesson learned is that we have to underscore the impor-

64. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 5/3/2002, "Portal del Belén—Asociación Civil sin Fines de Lucro c. Ministerio de Salud y Acción Social de la Nación / recurso de amparo", *La Ley* [L.L.] (2002-P-709) (Arg.), available at <http://aadat.org/biofallo.htm> (the use of emergency contraception prohibited as the fertilized egg has full legal protection prior to implantation due to the national constitution which states that life begins at conception). See also Fiorella Melzi, *The Supreme Court of Argentina: Ruling against Women's Equality*, 4 J.L. & EQUALITY 261, 263 (2005).

65. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 30 agosto 2001, "Sara Philippi Izquierdo y otros c. Ministerio de Salud y otros," Rol de la causa: 2186-2001, civiles, REVISTA DE DERECHO Y JURISPRUDENCIA [R.D.J.] No. 98 p.199 (Chile), available at [http://www.poderjudicial.cl/modulos/BusqCausas/BCA\\_esta402.php?rowdetalle=AAANoPAAMAABPmTAAW&consulta=100&causa=2186/2001&numcua=13837&secre=UNICA](http://www.poderjudicial.cl/modulos/BusqCausas/BCA_esta402.php?rowdetalle=AAANoPAAMAABPmTAAW&consulta=100&causa=2186/2001&numcua=13837&secre=UNICA) (emergency contraception violates constitutional protection of life "from conception" because of its possible action after the union of sperm and egg); Tribunal Constitucional [T.C] [Constitutional Court], 18 Abril 2008, "José Antonio Kast Rist c. Ministerio de Salud," Rol de la causa: 740-07-CDS, Sentencia (Chile), available at <http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/914>.

66. *In re Access to Emergency Contraception in Ecuador / Amici (Constitutional Tribunal of Ecuador)*, CTR. FOR REPROD. RIGHTS (Dec. 10, 2008), <http://reproductiverights.org/en/case/in-re-access-to-emergency-contraception-in-ecuador-amici-constitutional-tribunal-of-ecuador> (noting the distribution of emergency contraception was declared unconstitutional as a violation of the right to life established in the Ecuadorian Constitution).

tance of evidence-based policies and laws, and to hold governments accountable for basing their policies on pseudo-science, junk science, fraudulent science, or what might be called theo-physiology. In particular, we need more systematically to expose judicial reasoning that is not evidence-based, and show how such judicial thinking migrates from one religiously motivated judge to another.

Where ministries of health and therapeutic drug approval agencies have been motivated by factors other than scientific evidence of safety and efficacy of emergency contraception, some courts in Colombia<sup>67</sup> and the U.S.<sup>68</sup> have generally considered their actions to be arbitrary.

While recognizing the transcending importance of religious and theological questions to some people, judges often emphasize that their obligations are to apply the law.<sup>69</sup> For instance, in *Smeaton v. Secretary of State for Health*, addressing whether the distribution of emergency contraception constitutes an offense under the country's abortion laws, Justice Munby explained that the "days are past when the business of the judges was the enforcement of morals or religious belief."<sup>70</sup> This particular English *Smeaton* decision was so meticulous in its analysis of scientific evidence that a translation into Spanish and publication in *Revista Mexicana de Bioética* was arranged by a Mexican lawyer, Pedro Morales.<sup>71</sup>

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Exposing the deficiencies of judicial reasoning is important, but it is also essential to examine our own advocacy, why it succeeded and how it might be improved. We might start by examining our briefs or amicus briefs, determining which briefs worked, which briefs did not

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67. See Consejo de Estado [C.E.] [State Council], First Section, junio 5, 2008, Counselor Ostau de Lafont Pianeta (Colom.). See also *In re Access to Emergency Contraception in Colombia (amicus brief) (Colombian Council of State)*, CTR. FOR REPROD. RIGHTS (Dec. 10, 2008), <http://reproductiverights.org/en/case/in-re-access-to-emergency-contraception-in-colombia-amicus-brief-colombian-council-of-state> (noting decision held EC "is a contraceptive method and not an abortifacient, and therefore, access to emergency contraception is in accordance with the right to life as established in the Colombian Constitution").

68. See *Tummino v. Torti*, 603 F. Supp. 2d 519, 523 (E.D.N.Y. 2009) ("The FDA repeatedly and unreasonably delayed issuing a decision on Plan B for suspect reasons . . . . [T]he record is clear that the FDA's course of conduct regarding Plan B departed in significant ways from the agency's normal procedures regarding similar applications to switch a drug product from prescription to non-prescription use . . .").

69. See *Smeaton v. Sec'y of State for Health*, [2002] EWHC 610 (Admin) (Eng.); see also Rebecca J. Cook, Bernard M. Dickens & Joanna N. Erdman, *Emergency Contraception, Abortion and Evidence-Based Law*, 95 INT'L J. GYNECOLOGY & OBSTETRICS 191 (2006) (courts and legal tribunals increasingly decline to serve as religious or moral guardians, and require social evidence to support access to emergency contraception and abortion).

70. *Id.* ¶ 48.

71. See *Smeaton v. Sec'y of State for Health*, 1 REVISTA MEXICANA DE BIOETHICA 87, 87-123 (2003) (Spanish translation of the English case).

work and why, and what are the implications for our advocacy moving forward? Have our briefs sufficiently emphasized the constitutive role of the law, the role of the law in constituting new conceptions of gender justice? Why do courts rule on equality grounds in cases of violence against women, and resist such claims when it comes to reproductive rights?

The team at the University of Toronto has tried under our director of the Health Equity and Law Clinic, Joanna Erdman, to select cases where we could file amicus briefs promoting equality arguments. We have filed amicus briefs in eight cases, but have failed to convince the courts of the discriminatory dimensions of neglecting health care that only women need. Some courts, such as the Colombian Constitutional Court in the 2006 abortion decision, have nodded to the importance of equality, but none have held on that ground. Are we not sufficiently adept at arguing equality in the context of reproductive health, do we do it at too high a level of abstraction? What can we learn from the cases on violence against women, like *Algodonero*, that hold governments accountable for the structural nature of discrimination?

#### IV. CHALLENGES AHEAD

There are many ways to think about challenges: practical challenges, strategic challenges, and intellectual challenges. There are challenges of ensuring the implementation of cases that have been decided by different tribunals, the challenges of advocacy around cases that are pending before domestic courts, the Inter-American Commission on Human Rights,<sup>72</sup> the Inter-American Court of Human Rights, and, for example, the Committee on the Elimination of Discrimination against Women.<sup>73</sup> For purposes of this talk, I want to focus on the following challenges:

- Protection of Life Provisions,
- Health Disparities,

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72. See, e.g., *F.S. v. Chile*, Inter-Am. Comm'n H.R. (filed Feb., 2009) (forced sterilization of HIV-positive woman); *Forcibly Sterilized Woman Files International Case against Chile*, CTR. FOR REPROD. RIGHTS (Feb. 3, 2009), <http://reproductiverights.org/en/press-room/forcibly-sterilized-woman-files-international-case-against-chile>. See also *A.N. v. Costa Rica*, Inter-Am. Comm'n H.R. (filed Oct., 2008) (denial of lawful abortion for a high risk pregnancy of a fetus with severe brain abnormality); *Del Rosario Guzmán Albarracín v. Ecuador*, Petition 1055-06, Inter-Am. Comm'n H.R., Report No. 76/08 (2008), available at <http://www.cidh.oas.org/annualrep/2008eng/Ecuador1055-06eng.htm> (violence against adolescents in public educational institutions); *Sanchez Villalobos v. Costa Rica*, Case 12.361, Inter-Am. Comm'n H.R., Report No. 25/04, OEA/Ser.L/V/II.122, doc. 5 rev. ¶¶ 1, 16-17 (2004), available at <http://www.cidh.org/annualrep/2004eng/CostaRica.12361eng.htm> (prohibition of IVF treatment).

73. See, e.g., *Comm. on the Elimination of Discrimination against Women*, *Alyne da Silva Pimentel v. Brazil* (filed Nov. 30, 2007) (avoidable maternal death).

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### A. *Protection of Life Provisions*

Like the various inquisitions in the 1600s, such as the inquisition of Galileo for defying scripture, the modern day inquisitions are attempts to ensure the supremacy of the Catholic Church in matters of sexuality and reproduction. There are many dimensions of the modern day inquisitions, but perhaps the one that is the most pressing is the constitutional provisions attempting to protect life from the moment of conception.

Constitutional provisions protecting prenatal life exist in many countries of the world, such as Dominican Republic,<sup>74</sup> Chile,<sup>75</sup> Ireland,<sup>76</sup> Mexico,<sup>77</sup> and the Philippines.<sup>78</sup> A growing number of Mexican states now have constitutional amendments that protect life from the moment of conception. These provisions are part of a backlash strategy to attempt to limit the influence and spread of liberal abortion laws, such as the legislative reform in Mexico City, and the subsequent decision of the Supreme Court of Mexico to uphold the reform.<sup>79</sup> They are variously worded: one stating, “[t]he law protects the life of those about to be born,”<sup>80</sup> another requiring the vindication of the “right to life of the unborn . . . with due regard to the equal right to life of the mother.”<sup>81</sup> The American Convention states that “[e]very person has the right to have his life respected. This right shall be protected by law and, in gen-

74. DOM. REP. CONST., Jan. 6, 2010, art. 8, para. 1, art. 37, para. 8, available at <http://pdba.georgetown.edu/constitutions/domrep/domrep02.html>.

75. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] [Constitution] Article 19, paragraph 1 of the Chilean Constitution states, “[t]he law protects the life of those about to be born.” *Id.*

76. Eighth Amendment to the Constitution Act 1983 (Amendment No. 8/1983) (Ir.), available at <http://www.irishstatutebook.ie/1983/en/act/cam/0008/print.html>. Article 40, paragraph 3(3) of the Irish Constitution guarantees to defend and vindicate the “right to life of the unborn . . . with due regard to the equal right to life of the mother.” *Id.*

77. *A backlash that has gone viral*, GIRE: INFO. GRP. ON REPROD. CHOICE (July 29, 2009), <http://www.gire.org.mx/contenido.php?informacion=187> (“So far fourteen Mexican states have approved constitutional reforms that protect life from the moment of fertilization”); Alejandro Madrazo, *Abortion in Mexico: A Brief Description of its Current Regulation and Recent History 1* (May 2010) (unpublished presentation, Yale Law School Workshop on Comparative & Transnational Perspectives on Reproductive Rights) (on file with author) (“sixteen out of thirty-two States have amended their Constitutions to expressly establish the right to life.”).

78. CONST. (1987), art. II, sec. 12 (Phil.). The Filipino Constitution requires the State to “equally protect the life of the mother and the life of the unborn from conception.” *Id.*

79. Alejandro Madrazo, *The Evolution of Mexico City's Abortion Laws: From Public Morality to Women's Autonomy*, 106 INT'L J. GYNECOLOGY & OBSTETRICS 266 (2009), available at [http://www.ijgo.org/article/S0020-7292\(09\)00256-2/abstract](http://www.ijgo.org/article/S0020-7292(09)00256-2/abstract).

80. See *supra* note 75.

81. Eighth Amendment to the Constitution Act 1983 (Amendment No. 8/1983) (Ir.), available at <http://www.irishstatutebook.ie/1983/en/act/cam/0008/print.html> (memorialized at Article 40, paragraph 3(3) of the Irish Constitution).

eral, from the moment of conception.”<sup>82</sup>

These provisions present many questions that need research, for example: Do these provisions have only symbolic value, or do they have actual legal and material consequences for how pregnant women are treated and how pregnancies are managed? What negative and positive obligations are implicated by the protection of unborn life as a constitutional norm?<sup>83</sup> Do they express rights, norms, or values concerning prenatal life? How do these rights, norms, or values interact with the rights of pregnant women?

The Spanish Constitutional Court upheld a proposed 1985 bill extending grounds for abortion,<sup>84</sup> and explained that the fetus cannot be holder of rights, because the right to life provision,<sup>85</sup> in conjunction with the provision protecting human dignity,<sup>86</sup> of the Spanish Constitution does elaborate a general norm to protect prenatal life.<sup>87</sup> What is the meaning of the 1985 decision of the Spanish Constitutional Court which ruled that the “foetus [sic] is not the holder of the right to life; yet, on the other hand, there exists a right (although it is nobody’s right) to the protection of the unborn life as a constitutional norm[?]”<sup>88</sup>

Consistently with the Spanish 1985 decision, the Costa Rica Supreme Court in 2004 held that notwithstanding the fact that the unborn is protected by the right to life, therapeutic abortion is permitted.<sup>89</sup>

In 2006, the Colombian Constitutional Court, in declaring the criminal prohibition of all abortions unconstitutional, recognized the constitutional value of life, including fetal life. However, the Court

82. Organization of American States, American Convention on Human Rights art. 4(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, available at <http://www.oas.org/juridico/english/Treaties/b-32.html>; “Baby Boy” v. United States, Case 2141, Inter-Am. Comm’n H.R., Res. No. 23/81, OEA/Ser.L/V/II.54, doc. 9 rev. 1 ¶ 14 (1981).

83. Verónica Undurraga, *Propuesta Interpretativa del Mandato de Protección del que está por Nacer Bajo la Constitución Chilena en el Contexto de la Regulación Jurídica del Aborto* (forthcoming 2011) (Ph.D. thesis, University of Chile) (on file with author) (interpretative proposal of the duty to protect the unborn under the Chilean Constitution in the context of the legal regulation of abortion).

84. This bill became Criminal Code art. 417 (C.P. 1985) (Spain).

85. CONSTITUCIÓN ESPAÑOLA, sec. 15, B.O.E n. 311, Dec. 29, 1978 (Spain).

86. *Id.* at sec. 10.

87. S.T.C., Apr. 11, 1985 (B.O.E., No. 53) (Spain), available at <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC531985en.aspx>.

88. Blanca Rodríguez Ruiz & Ruth Rubio Marín, *Abortion in Spain 6* (May 2010) (unpublished presentation, Yale Law School Workshop on Comparative & Transnational Perspectives on Reproductive Rights) (internal reference omitted) (on file with author) (discussing the Spanish Constitutional Court decision S.T.C., Apr. 11, 1985 (B.O.E., No. 53) (Spain), available at <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC531985en.aspx>).

89. Tribunal Supremo de Costa Rica, 17 marzo 2004, Sentencia No. 2004-02792.

distinguished between the value of life and the claimed legal right to life. The legal right to life was ruled to be limited to a born human being, while the constitutional value of life can be protected before a fetus has been born. The Court explained that the state can protect prenatal life, but it may do so only in a way that is compatible with the rights of women: "A woman's right to dignity prohibits her treatment as a mere instrument for reproduction. Her consent is essential to the fundamental life changing decision of giving birth to another person."<sup>90</sup>

Most recently in 2010, the Portuguese Constitutional Court<sup>91</sup> upheld the constitutionality of a 2007 law that enables a woman to decide to terminate a pregnancy during the first ten weeks of pregnancy, provided she undergoes counseling and a three-day reflection period.<sup>92</sup> No doubt drawing from the reasoning of the 1985 decision of the Spanish Constitutional Court, the Portuguese Constitutional Court explained that the unborn is not a rights holder under the right to life provision of the Portuguese Constitution,<sup>93</sup> but that the unborn is to be protected as an objective value.<sup>94</sup>

Research is needed on the meaning of constitutional provisions and court decisions to determine what kinds of protection of prenatal life are in fact required. A case is now pending in the Supreme Court of Justice of Nicaragua that might provide some illumination in the context of that country.<sup>95</sup> In the context of France, the 1975 decision of the French Constitutional Court, upholding the liberal law allowing abortion on extended grounds, required "respect for all human beings from the inception of life."<sup>96</sup> Respect for "human beings from inception of life" is

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90. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.), available at [http://www.womenslinkworldwide.org/pdf\\_pubs/pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf) (English translation). See Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence under the Colombian Constitution*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 75, 93–97 (Beverly Baines & Ruth Rubio-Marin eds., 2005), for an analysis of the Colombian Constitution's treatment of fetuses as people prior to this 2006 decision.

91. S.T.C., Feb. 23, 2010 (Acórdão No. 75/2010) (Port.), available at <http://w3.tribunalconstitucional.pt/acordaos/Acordaos10/1-100/7510.htm>.

92. Law No. 16/2007 art. II, CXLII (2007) (Port.).

93. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.] Apr. 2, 1976, art. 24.

94. RUTH RUBIO MARIN, *CONSTITUTIONAL FRAMING: ABORTION AND SYMBOLISM IN CONSTITUTIONAL LAW* 35 (forthcoming 2011) (on file with author).

95. See Sentencia [S.] No. 38-2008, 15 July 2008 [Supreme Court of Justice] p. 143, 144–49 Cons. I (Nicar.). See also Ley No. 641, 9 May 2008, Título Preliminar Sobre Las Garantías Penales y de la Aplicación de la Ley Penal [Preliminary Title About the Penal Guarantees and the Application of the Penal Law], LA GACETA, DIARIO OFICIAL [L.G.] 9 May 2008 (Nicar.), available at [http://legislacion.asamblea.gob.ni/Normaweb.nsf/\(\\$All\)/1F5B59264A8F00F906257540005EF77E?OpenDocument](http://legislacion.asamblea.gob.ni/Normaweb.nsf/($All)/1F5B59264A8F00F906257540005EF77E?OpenDocument).

96. Conseil constitutionnel [CC] [Constitutional Court] decision No. 74-54DC, Jan. 15, 1975, J.O. 671 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/>

met in part by the reflection delay requirement in the laws of France,<sup>97</sup> Portugal,<sup>98</sup> Spain,<sup>99</sup> and the U.S.<sup>100</sup>

Other ways of protecting prenatal life have evolved in other countries, such as Germany, which requires counseling of pregnant women.<sup>101</sup> Debates exist as to whether such approaches undermine women's rights and their moral agency.<sup>102</sup>

Research is needed to help shift the debate beyond the dichotomous thinking of either protecting women's rights or protecting prenatal interests, to address how best to promote human dignity by protecting prenatal life in ways that are consistent with women's rights.<sup>103</sup>

Some law reforms, such as the new 2010 Spanish Statute on Sexual and Reproductive Health and Voluntary Interruption of Pregnancy, states clearly that its purpose is to protect women's sexual and reproductive health as an aspect of their equality.<sup>104</sup> The statute protects prenatal life, consistently with women's rights, by informing women with unwanted pregnancies about assistance for them as mothers.<sup>105</sup> However, Spanish legal scholars question "whether the obligation to protect the unborn life from the very moment of conception is sufficiently served by a system informing women of the social and legal possibilities at their disposal if they decide to bring pregnancy to term and to assist

les-decisions/acces-par-date/decisions-depuis-1959/1975/74-54-dc/decision-n-74-54-dc-du-15-janvier-1975.7423.html.

97. Loi 75-17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse [Law 75-17 of January 17, 1975 on the Voluntary Interruption of Pregnancy], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 18, 1975, p. 739, *as amended* by Loi 79-1204 du 31 décembre 1979 relative à l'interruption volontaire de la grossesse [Law 79-1204 of December 31, 1979 on the Voluntary Interruption of Pregnancy], J.O., Dec. 31, 1979, p. 3, *available at* [http://www.legifrance.gouv.fr/jopdf/common/jo\\_pdf.jsp?numJO=0&dateJO=19750118&numTexte=&pageDebut=00739&pa](http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19750118&numTexte=&pageDebut=00739&pa).

98. Law No. 16/2007 art. II, CXLII (2007) (Port.).

99. Organic Law 2/2010 art. XIV (B.O.E. 2010, 3514) (Spain), *available at* <http://www.boe.es/boe/dias/2010/03/04/pdfs/BOE-A-2010-3514.pdf> (three days).

100. *Biased Counseling & Mandatory Delays*, NARAL PRO-CHOICE AMERICA, [http://www.prochoiceamerica.org/what-is-choice/fast-facts/biased\\_counseling.html](http://www.prochoiceamerica.org/what-is-choice/fast-facts/biased_counseling.html) (last visited Mar. 24, 2011) (typically twenty-four hours).

101. Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93, 97 (Susan H. Williams ed., 2009). Accord D.A. Jeremy Telman, *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. REV. L. & SOC. CHANGE 91, 91 (1998).

102. Case, *supra* note 101, at 101-04; Telman, *supra* note 101, at 135.

103. See Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1087-90 (2007).

104. Organic Law 2/2010 Preamble (B.O.E. 2010, 3514) (Spain), *available at* <http://www.boe.es/boe/dias/2010/03/04/pdfs/BOE-A-2010-3514.pdf>.

105. Blanca Rodriguez Ruiz & Ruth Rubio Marin, *Abortion in Spain* 4 (May 2010) (unpublished presentation, Yale Law School Workshop on Comparative & Transnational Perspectives on Reproductive Rights) (on file with author).

them as mothers.”<sup>106</sup> It also needs to be asked whether a system of informing women of such possibilities better protects their rights to substantive equality.

Means of protecting prenatal life in ways that are consistent with women’s rights include addressing the preventable causes of maternal death<sup>107</sup> (death to a woman while pregnant or within forty-two days of pregnancy) now estimated around 358,000 annually,<sup>108</sup> which can result in the death of the fetus during birth, or the baby soon after birth. It also requires addressing socioeconomic and sociocultural conditions, such as reduction of economic and social vulnerabilities of pregnant women.<sup>109</sup> In addition, protecting prenatal life consistently with women’s rights necessitates addressing the social determinants of poor birth outcomes, such as poor nutrition during pregnancy, including the lack of folic acid supplements during pregnancy, and intimate partner violence against pregnant women.<sup>110</sup>

Clinical measures for protecting prenatal life consistently with women’s rights include:

- decreasing miscarriages, including recurrent miscarriages, of wanted pregnancies;<sup>111</sup>
- decreasing perinatal deaths (fetal or early neonatal deaths that occur during late pregnancy—at 22 completed weeks gestation and over—during childbirth and up to seven completed days of life), now estimated around 5.9 million annually;<sup>112</sup> and
- reducing intrapartum (during labor and childbirth) stillbirths and neonatal deaths (death in the first twenty-eight days of life), now estimated around two million annually.<sup>113</sup>

106. *Id.* at 8.

107. See generally Oona M. R. Campbell & Wendy J. Graham, *Strategies for Reducing Maternal Mortality: Getting on with What Works*, 368 LANCET 1284 (2006).

108. World Health Org. [WHO], *Trends in Maternal Mortality: 1990 to 2008*, at 17 (2010), [http://whqlibdoc.who.int/publications/2010/9789241500265\\_eng.pdf](http://whqlibdoc.who.int/publications/2010/9789241500265_eng.pdf).

109. Véronique Filippi et al., *Maternal Health in Poor Countries: The Broader Context and a Call for Action*, 368 LANCET 1535, 1535–36 (2006), available at <http://www.ncbi.nlm.nih.gov/pubmed/17071287> (discussing, *inter alia*, fear of costs, time spent looking for funds to pay costs, and costs themselves as contributing to vulnerability).

110. Joanna Cook & Susan Bewley, *Acknowledging a Persistent Truth: Domestic Violence in Pregnancy*, 101 J. ROYAL SOC’Y MED. 358, 362 (2008) (“Further work needs to be concentrated on establishing which interventions consistently reduce the incidence of violence in pregnancy . . .”).

111. I.A. Greer, *Antithrombotic Therapy for Recurrent Miscarriage?*, 362 NEW ENG. J. MED. 1630, 1630–31 (2010); Raj Rai & Lesley Regan, *Recurrent Miscarriage*, 368 LANCET 601, 601 (2006).

112. WHO, Dep’t of Making Pregnancy Safer, *Neonatal and Perinatal Mortality: Country, Regional, and Global Estimates 2004*, at 2–4 (2007), [http://whqlibdoc.who.int/publications/2007/9789241596145\\_eng.pdf](http://whqlibdoc.who.int/publications/2007/9789241596145_eng.pdf).

113. Joy E. Lawn et al., *Two Million Intrapartum-related Stillbirths and Deaths: Where, Why, and What Can be Done?*, 107 INT’L J. GYNECOLOGY & OBSTETRICS S5, S5–S19 (2009).

These policies go much further in protecting life than restrictive abortion policies because they increase the resources available for care of pregnant women and their newborns. Moreover, they serve women's and men's interests in healthy birth outcomes, rather than merely seeking to assure the birth of children, irrespective of their condition and their prospects for survival.

Research is needed to move the discourse beyond a myopic focus on protection of prenatal life to a broader focus on developing public policy that serve women's and men's interests in family life,<sup>114</sup> and on developing public policies "on gender, work and family that distributes the cost of child bearing and caring evenly among mothers, fathers and the State."<sup>115</sup> Does equitable family policy require more than a new legal framework for abortion? Does it require the State develop a new sensitivity towards the deeper social problems surrounding abortion?<sup>116</sup>

### B. *Health Disparities*

Gender, as with race, ethnicity, class, and sexual orientation, has an effect on health status, how services are provided and used, and health-seeking behaviors and risk factors, to name but a few. In addition, reducing gender health inequities is essential to achieving all the Millennium Development Goals, and is not limited to the sole issues of maternal mortality and HIV.

Gender is a social determinant of health<sup>117</sup> as are restrictive laws and policies. Research shows that the burden of restrictive sexual and reproductive health laws is borne disproportionately by different subgroups of women,<sup>118</sup> for example by adolescents,<sup>119</sup> by rural

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114. See generally Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97 (2009).

115. Blanca Rodriguez Ruiz & Ruth Rubio Marin, *Abortion in Spain* 11 (May 2010) (unpublished presentation, Yale Law School Workshop on Comparative & Transnational Perspectives on Reproductive Rights) (on file with author).

116. *Id.* (arguing states must "develop a new sensitivity towards the deeper social problems surrounding" abortion if abortion is to be made more widely available).

117. WHO, Comm. on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, at 2 (2008), available at [http://whqlibdoc.who.int/publications/2008/9789241563703\\_eng.pdf](http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf) ("In order to address health inequities, and inequitable conditions of daily living, it is necessary to address inequities—such as those between men and women—in the way society is organized.").

118. *Access to Abortion Reports: An Annotated Bibliography*, INT'L REPROD. & SEXUAL HEALTH LAW PROGRAMME (Jan. 2008), <http://www.law.utoronto.ca/documents/reprohealth/abortionbib.pdf>.

119. See, e.g., WHO, *Women and Health: Today's Evidence, Tomorrow's Agenda*, at 31 (2009), available at [http://whqlibdoc.who.int/publications/2009/9789241563857\\_eng.pdf](http://whqlibdoc.who.int/publications/2009/9789241563857_eng.pdf).

residents,<sup>120</sup> or racial groups.<sup>121</sup> The report of the Inter-American Commission on Human Rights, *Access to Maternal Health Services from a Human Rights Perspective*,<sup>122</sup> explained that improving access to appropriate care includes at least ensuring

- access to information necessary in appropriate languages to make health care decisions and obtain health care services, often referred to as information access;<sup>123</sup>
- transparent access to ensure that the terms and conditions of delivery of health care services are clear to the provider and the patient;<sup>124</sup>
- dignified access to ensure service provision is free of dignity-denying treatment; such as forced pregnancy,<sup>125</sup> coercive steriliza-

120. See, e.g., Antonio Bernabé-Ortiz et al., *Clandestine Induced Abortion: Prevalence, Incidence and Risk Factors among Women in a Latin American Country*, 180 CAN. MED. ASS'N J. 298, 302–03 (2009).

121. When the U.S. reported national developments to the UN Committee on the Elimination of Racial Discrimination (“CERD”), the Center for Reproductive Rights filed a shadow letter with CERD showing that in the U.S., African-American women are almost four times more likely to die from pregnancy-related causes than white women. Letter from Nancy Northup, Pres., Ctr. for Reprod. Rights, to Nathalie Prouvez, Sec’y, Comm. on the Elimination of Racial Discrimination (Dec. 19, 2007), available at [http://www.reproductiverights.org/pdf/CERD%20Shadow%20Letter%20Final\\_07\\_08.pdf](http://www.reproductiverights.org/pdf/CERD%20Shadow%20Letter%20Final_07_08.pdf); cf. Dorothy E. Roberts, *Punishing Drug Addicts who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1446 & n.141 (1991) (discussing black infant mortality rates in the U.S.).

122. Inter-American Commission on Human Rights [IACHR], *Access to Maternal Health Services from a Human Rights Perspective*, OEA/Ser.L/V/II. Doc 69 (June 7, 2010), available at <http://cidh.org/women/SaludMaterna10Eng/MaternalHealth2010.pdf>.

123. *Id.* ¶ 20; see also *Open Door Counselling, Ltd. v. Ireland*, App. Nos. 14234/88, 14253/88, 15 Eur. H.R. Rep. 244 (1993); Comm. on Econ., Soc., & Cultural Rights, Gen. Comment No. 14: The Right to the Highest Attainable Standard of Health, 22nd Sess., Apr. 25–May 12, 2000, ¶ 12(b), U.N. Doc. E/C. 12/2000/4, Apr. 25, 2000–May 12, 2000; Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights*, 34 HARV. J. L. & GENDER (forthcoming 2011); Letter from Rebecca Gomperts, Founder, Women on Waves, Joanna Erdman, Dir., Univ. of Toronto Health Equity & Law Clinic & Susan Newell, Univ. of Toronto Health Equity & Law Clinic, to Google Inc. Legal Department (June 30, 2009), available at <http://www.womenonwaves.org/download.php?id=2019>.

124. IACHR, *supra* note 122, ¶ 28. See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.); *Smeaton v. Sec’y of State for Health*, [2002] EWHC 610 (Admin) (Eng.); *Family Planning Ass’n of N. Ir. v. Minister for Health, Soc. Servs. & Pub. Safety*, [2005] NICA (Civ) 37, N.I. 188, CA (N. Ir.); *Tysi c v. Poland*, App. No. 5410/03, 45 Eur. Ct. H.R. 42 (2007); U.N. Human Rights Comm., *Noelia Llantoy Huam n v. Peru*, ¶¶ 2.1–2.3, U.N. Doc. CCPR/C/85/D/1153/2003 (Oct. 24, 2005), at <http://www1.umn.edu/humanrts/undocs/1153-2003.html>.

125. See, e.g., *Ram rez Jacinto v. Mexico*, Petition 161-02, Inter-Am. Comm’n H.R., Report No. 21/07, OEA/Ser.L/V/II.130, doc. 22 rev. 1 ¶¶ 9–16 (2007); U.N. Human Rights Comm., *Noelia Llantoy Huam n v. Peru*, ¶¶ 2.1–2.3, U.N. Doc. CCPR/C/85/D/1153/2003 (Oct. 24, 2005), at <http://www1.umn.edu/humanrts/undocs/1153-2003.html>.

tion,<sup>126</sup> and, for example, breaches of their confidentiality.<sup>127</sup> Terrible breaches of confidentiality continue to exist in some countries of the region,<sup>128</sup> despite the important decision of the Inter-American Court of Human Rights, which decided that physicians have “an obligation to protect the confidentiality of the information to which, as physicians, they have access,”<sup>129</sup> and norms elaborated by the Committee on the Elimination of Discrimination against Women,<sup>130</sup> the Committee on the Rights of the Child,<sup>131</sup> and the Committee against Torture.<sup>132</sup>

- nondiscriminatory access to ensure that services are provided to all, irrespective of gender, race, ethnicity, and class in public health services. This might require that health insurance schemes cover services in ways that are proportionate to the health needs of individuals and groups of individuals.<sup>133</sup> Nondiscriminatory access

126. See, e.g., IACHR, *supra* note 122, ¶ 45; see also Mamérita Mestanza Chávez v. Peru, Case 12.191, Inter-Am. Comm’n H.R., Report No. 71/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶¶ 9–12, 14, 17 (2003) (holding case alleging compulsory sterilization that caused death admissible); Ann Farmer, *Luisa Cabal: Turning National Wrongs Into International Rights*, VOICES UNABRIDGED (Sept. 26, 2003), [http://www.voices-unabridged.net/article.php?id\\_article=35&numero=0](http://www.voices-unabridged.net/article.php?id_article=35&numero=0) (case settled for the rape of a young Peruvian woman by a public health doctor and for the victim’s subsequent denial of justice).

127. IACHR, *supra* note 122, ¶¶ 37, 98, 105; see also María Mercedes Cavallo, *Law as a Social Determinant of Unsafe Abortion in Argentina* 36–44 (2009) (unpublished LL.M. thesis, University of Toronto) (on file with author).

128. Cavallo, *supra* note 127.

129. *De La Cruz-Flores v. Peru, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 115, ¶ 101 (Nov. 18, 2004).

130. See Comm. on the Elimination of Discrimination against Women, *CEDAW General Recommendation 24: Women and Health*, ¶ 12(d), U.N. Doc. A/54/38 (Pt. 1); GAOR, 54th Sess., Supp. No. 38 (May 4, 1999) (“lack of respect for the confidentiality of patients . . . may deter women from seeking advice and treatment and thereby adversely affect their health and well-being.”).

131. See Office of the High Comm’r for Human Rights, *CRC General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶¶ 7, 29, 35–37, U.N. Doc. CRC/GC/2003/4 (July 2003).

132. The Committee Against Torture took Chile to task for breaches of confidentiality of women seeking post-abortion care. Comm. Against Torture, *Consideration of Reps. Submitted by States Parties Under Article 19 of the Convention*, 32nd Sess., May 3–21, 2004, U.N. Doc. CAT/C/CR/32/5 (June 14, 2004). Responding to these recommendations, the Chilean Ministry of Health instructed the directors of health services not to condition the treatment of women with post-abortion complications to the confession of the crime of abortion, explaining that this would offend Article 15 of the Convention Against Torture, among other legal obligations. Daniela Estrada, *Activists Demand Humane Treatment for Women Who Abort*, IPS (Aug. 28, 2009), <http://ipsnews.net/news.asp?idnews=48250>.

133. WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*, at 92 (2003), available at <http://whqlibdoc.who.int/publications/2003/9241590343.pdf>. The Superior Court of Quebec has ordered the Quebec government to reimburse a total of \$13 million to nearly 45,000 women who paid out-of-pocket expenses for abortion services in private clinics. The Court decided the case on the basis of a duty imposed on the government by statute and regulation because abortion services are covered under the Quebec Health Insurance Act. *Ass’n pour l’accès à l’avortement c. Procureur Gen. du Que.* [*Ass’n for Access to Abortion v. Att’y Gen. of Que.*]

might also require that States ensure that medicines, such as Misoprostol, are registered in national essential drug list to maximize availability and facilitate cost containment.<sup>134</sup>

The elimination of *de facto* discrimination to achieve substantive equality “requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.”<sup>135</sup> In thinking about how human rights have helped to constitute notions of gender justice in the Americas, it is important to understand how the social practices of gender generate and perpetuate prejudice against women and different subgroups of women.

The elimination of structural discrimination requires understanding how health systems perpetuate negative stereotypes of women and how that perpetuation inhibits women’s access to health care services. A gender stereotype is a generalized view or preconception of qualities or characteristics possessed by, or the roles that are or should be performed by, men and women, respectively.<sup>136</sup>

A pervasive and persistent stereotype that inhibits women’s equal access to health care services is that women are incompetent decision-makers. This stereotype implies that women are irrational in their decisions, lack the capacity for moral agency and self-determination, and, therefore, should be denied access to health care services of their choice.<sup>137</sup> This stereotype is compounded by prejudices about poor ethnically marginalized women who are denied information to make informed decisions about their health care.<sup>138</sup>

The elimination of *de facto* discrimination in order to realize substantive equality requires, among other measures, reforming law, policies, and practices that are sex-neutral but in practice disproportionately negatively affect women or specific groups of women. In an effort to achieve substantive equality, courts rely on statistics produced by claimants to establish a difference in treatment between two groups (men and women) in similar situations. The European Court of Human Rights has

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[2006] C.S. 8654 (Can.), available at <http://www.jugements.qc.ca/php/decision.php?liste=51846250&doc=40B3D66F1DCD753D52C38E24737ADACAAE302A752938971B8BBD1CBA0AFA5853C&page=1>.

134. *Id.* at 62–64.

135. Comm. on Econ., Soc. & Cultural Rights, *Gen. Comment No. 20*, 42nd Sess., May 4–22, 2009, ¶ 8(b), U.N. Doc. E/C.12/GC/20 (July 2, 2009).

136. COOK & CUSACK *supra* note 15, at 9.

137. *Id.* at 85–86.

138. See Views of the Comm. on the Elimination of Discrimination against Women, *A.S. v. Hungary*, ¶¶ 1.1, 2.2, U.N. Doc. CEDAW/C/36/D/4/2004 (Aug. 29, 2006) (coerced sterilization of Roma woman after receiving signature on permission form she could not understand presented to her while she was in a state of shock).

explained that “where an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule—although formulated in neutral manner—in fact affects a clearly higher percentage of women than men,”<sup>139</sup> it shifts the burden to the government to explain why a sex-neutral policy disproportionately affects women.

Governments will have to show that there are legitimate objectives for the sex-neutral rule despite the fact that it disproportionately prejudices the health of women, or a subgroup of women. In the field of health care, governments often try to justify policies that have disproportionate impact on certain groups by pointing to cost considerations<sup>140</sup> or to the nature of the circumstances.<sup>141</sup>

### C. Networks

Our field is filled with examples of strong partnerships, networks, and other types of collaboration,<sup>142</sup> but how can we think anew to strengthen the collective impact of our collaborations to address the challenges of the modern day inquisitions? How can our networks collaborate with associations of universities and colleges to ensure that they hold academic institutions accountable for infringements of academic freedoms?<sup>143</sup>

What can be learned from the network literature to improve the collective impact of our political and legal advocacy? That literature explains that “large-scale social change comes from better cross-sector coordination rather than from the isolated intervention of individual organizations.”<sup>144</sup>

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139. *Hoogendijk v. Netherlands*, App. No. 58641/00, 40 Eur. Ct. H.R. at 22 (2005). *Accord D.H. v. Czech Republic*, App. No. 57325/00, 47 Eur. H.R. Rep. 3, ¶¶ 188–89 (2007) (stating that statistics are sufficient to constitute the prima facie evidence the applicant is required to produce).

140. See T.C., 6 agosto 2010, “Constitucionalidad del artículo 38 ter de la Ley No. 18.933,” Rol de la causa: 1710–10, ¶¶ 103, 155–56 (Chile), available at <http://www.articulacionfeminista.org/ad/index.cfm?fuseaction=MUESTRA&campo=pdf&codcontenido=1022&aplicación=app003&cnl=3&opc=8>.

141. CEDAW was concerned about a law that forces victims of sexual violence to report to police immediately, prior to seeking health care, as it may cause some victims to choose not to seek health or psychological support. Since most victims of sexual violence are women, this law may have a disproportionate effect upon women’s health. Comm. on the Elimination of Discrimination against Women, Concluding Observations, Myanmar, 42nd Sess., Oct. 20–Nov. 7, 2008, ¶¶ 22–23, U.N. Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

142. See, e.g., REPROD. HEALTH MATTERS & ASIAN-PACIFIC RES. & RESEARCH CTR. FOR WOMEN, REPOLITICIZING SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS: REPORT OF A GLOBAL MEETING 1 (2010).

143. See generally MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009).

144. John Kania & Mark Kramer, *Collective Impact*, STAN. SOC. INNOVATION REV., Winter 2011, at 36, 38, available at [http://www.ssireview.org/pdf/2011\\_WI\\_Feature\\_Kania.pdf](http://www.ssireview.org/pdf/2011_WI_Feature_Kania.pdf).

How might we strengthen our networks to build on the historic Paraguay decision to apply the necessary norms to ensure that each woman in indigenous communities can access the care that she needs to survive pregnancy and childbirth and to have a healthy infant? How can we hold other governments accountable for preventable causes of high rates of maternal mortality? It is worth repeating that the Inter-American Court ruled that states have positive obligations, not just negative ones, to address preventable maternal deaths in the Xákmok Kásek indigenous community by ensuring access to appropriate services.<sup>145</sup>

What can be learned from the knowledge translation methodologies, which have emerged primarily in the health sciences,<sup>146</sup> to ensure that greater attention is given to maximize utilization and impact of research undertaken in the legal academy? Might the same be asked of court decisions?

What can be learned from the 2008 Commission for the Legal Empowerment of the Poor<sup>147</sup> (“LEP”), a group of developing and developed countries’ experts, chaired by Madeleine Albright and Hernando de Soto, to empower more indigenous communities to advocate and ensure that the health disparities that they face are removed?

One of the main arguments of the LEP Commission Report is that over 4 billion people are “robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.”<sup>148</sup> LEP, conceptualised broadly in terms of access to justice, property rights, labour rights, and business rights is thus thought to provide the opportunity for those living in poverty to improve their conditions.

The LEP Commission Report explains that existing political, administrative, and judicial institutions are not geared to protect the rights of the poor. A broad international framework in terms of human rights protections does already exist, but what is “lacking are the myriad national and local rules of the game and policies that give substance to” these rights.<sup>149</sup> The Report notes that LEP must not be bound by processes that are stalled or dysfunctional. Problems cannot be solved

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145. Xákmok Kásek Indigenous Cmty. v. Paraguay, *supra* note 6 at ¶¶ 217, 232, 234, 275, 301–303, 306.

146. KNOWLEDGE TRANSLATION IN HEALTH CARE: MOVING FROM EVIDENCE TO PRACTICE (Sharon Straus et al. eds., 2009); WORLD HEALTH ORG., BRIDGING THE “KNOW-DO” GAP: MEETING ON KNOWLEDGE TRANSLATION IN GLOBAL HEALTH (2006), available at <http://www.who.int/kms/KTGH%20meeting%20report,%20Oct%2705.pdf>; WORLD HEALTH ORG., WORLD REPORT ON KNOWLEDGE FOR BETTER HEALTH 97–128 (2004), available at [http://www.who.int/rpc/meetings/world\\_report\\_on\\_knowledge\\_for\\_better\\_health.pdf](http://www.who.int/rpc/meetings/world_report_on_knowledge_for_better_health.pdf).

147. COMM’N ON LEGAL EMPOWERMENT OF THE POOR & UNITED NATIONS DEV. PROGRAMME, MAKING THE LAW WORK FOR EVERYONE (LEP) (2008).

148. *Id.* at 1.

149. *Id.* at 76.

using the same processes that created them. Solutions must be bottom-up, affordable, realistic, liberating, and risk-aware.<sup>150</sup>

What needs to happen in the next few years to ensure that the legal wrong of these failures to address gender health disparities becomes more broadly understood within the indigenous communities of the region? Do we need to think beyond law as a way of ordering the world, law as policy, to law as culture, as a way of belonging with one another in the world?<sup>151</sup>

We cannot take one kind of law, in our case human rights law, and assume that it is the whole law.<sup>152</sup> We need to be more cognizant of the range of different models of how human rights universals are internalized domestically.<sup>153</sup> One model is norm internationalization, a top-down approach whereby norm dissemination happens through trickle-down mechanisms where universal norms are internalized.<sup>154</sup> “[T]his model assumes that people will internalize human rights norms once states legislate their commitments to these principles.”<sup>155</sup>

Another model, articulated by legal anthropologists, is more bottom-up. It examines the process of rendering human rights meaningful according to local languages and values. This has been called the process of vernacularization of human rights norms with local conceptions of justice. It interrogates the gaps between global visions of justice and specific visions in local contexts, the vernacular, and examines how the vernacular might move beyond the notions of justice from which it emerged.<sup>156</sup> Important work has been done by legal anthropologists to examine this phenomenon in the context of violence against women. This suggests that we need to work with social scientists to determine the conditions under which human rights become valid for and used by different communities.<sup>157</sup>

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150. Following the report, the United Nations General Assembly acknowledged the importance of the LEP Commission in terms of its poverty eradication goals and initiatives. G.A. Res. 64/57, U.N. GAOR, 64th Sess., U.N. Doc. A/C.2/64/L.4/Rev.2, at 2 (Dec. 3, 2009).

151. Shai Lavi, *Turning the Tables on “Law and . . .”*: A Jurisprudential Inquiry into Contemporary Legal Theory, 96 CORNELL L. REV. (forthcoming 2011).

152. *Id.*

153. KAMARI MAXINE CLARKE, *FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* 30 (2009).

154. *Id.* at 30–31.

155. *Id.* at 31.

156. *Id.* See also SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 219–23 (2006) (discussing vernacularization).

157. See generally MERRY, *supra* note 156; Kamari Clarke, *Constituting Terms for International Change: Reflecting on Strategies for Women’s Rights*, 104 ASIL PROC. (forthcoming 2011).

Yes, we are skilled at networking among like-minded groups, but we need to push ourselves to network beyond our disciplinary, programmatic, and geographic borders to work with differently-minded groups that can expand our visions in order to more adequately address the challenges of the Modern Day Inquisitions to secure gender justice in the region.