

**HOW RADICAL IS REPRODUCTIVE JUSTICE?
REMARKS FOR THE FIU LAW REVIEW SYMPOSIUM**

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INTRODUCTION

In a recent documentary, one of the founders of the reproductive justice movement, Loretta Ross, described reproductive justice in this way: “We took reproductive rights and social justice and combined them. We came up with reproductive justice, and we always had human rights in mind.”¹ Ross’s statement aligns reproductive justice with social justice and human rights movements. It also makes another, perhaps more subtle but frequently repeated, claim—that human rights and social justice projects are one and the same. Reproductive justice writings presume that human rights provide a vision for progressive law reform.

And, indeed, human rights have been catalysts for legal and political transformation in many places and for many people.² But the reproductive justice movement has embraced human rights without incorporating any skepticism of modern human rights law, despite reproductive justice’s sophisticated critique of rights-based approaches in mainstream U.S. reproductive politics.³ I argue this is, in part, because reproductive justice advocates view human rights as the more robust alternative to U.S. constitutional rights, especially in the context of abortion litigation. However, the focus on law reform and courts, on the priorities of the global North, and on identity instead of redistribution undercuts the commitments that set reproductive *justice* apart from reproductive *rights*.

My talk today is an exploration of how human rights and reproductive justice intersect at this moment in U.S. advocacy. In what follows, I make four arguments. First, the human rights regime has embraced reproductive

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¹ BIRTHRIGHT: A WAR STORY (Civia Tamarkin 2016).

² See Rachel Rebouché, *Abortion Rights as Human Rights*, 25 SOC. LEGAL STUD. 765, 767–70 (2016) (demonstrating an emerging international consensus around abortion rights as human rights) [hereinafter *Abortion Rights as Human Rights*].

³ See Rachel Rebouché, *The Intersection of Human Rights and Reproductive Justice*, 7 UC IRVINE L. REV. Part III (forthcoming 2017) (describing literature that is critical of human rights law).

rights through international declarations and the decisions of treaty-monitoring bodies. Second, national courts and international committees have helped transplant human rights arguments into conversations about abortion law reform by relying on the principles of universality, consensus, and balancing. Third, the reproductive justice movement persuasively has contested U.S. advocates' conventional focus on constitutional litigation and abortion rights, and it has directed attention to the reproductive health needs of women of color and other marginalized populations. Reproductive justice strategies seek not only to be intersectional, but also address a spectrum of reproductive issues through grassroots and community engagement. And fourth, the representations of human rights in reproductive justice materials may contradict the movement's commitment to the fair distribution of health resources—a goal that emergent health justice research also takes as its priority. I conclude that the reproductive justice movement may lose some of its radical potential by referring to human rights and social justice as interchangeable.

I. The International Landscape

Reproductive rights have advanced significantly at the level of international human rights law, both in the process of drafting conventions or declarations and in the interpretation of human rights texts. Examples span the last thirty years, from the 1994 International Conference on Population and Development (ICPD) and the 1995 Fourth World Conference on Women (FWCW) to recent declarations on reproductive rights.⁴ Specifically, tying early terminations or terminations for certain reasons to women's rights to equality, autonomy, and dignity helped establish abortion as a human right.⁵ Now treaty-monitoring bodies make clearer and stronger statements in support of abortion rights,⁶ and have

⁴ U.N. International Conference on Population and Development, *Report of the International Conference on Population and Development*, Principle 4, U.N. Doc. A/CONF.171/13/Rev.1 (Sept. 13, 1994), http://www.unfpa.org/sites/default/files/event-pdf/icpd_eng_2.pdf; Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20/Rev.1, annex I (Sept. 15, 1995), <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>. For an example of a contemporary human rights standard on reproductive rights, see U.N. Conference on Economic Commission for Latin America and the Caribbean, *Montevideo Consensus on Population and Development*, Priority Action 42, 2013, <http://www.unfpa.org/sites/default/files/resource-pdf/Montevideo%20Consensus-15Aug2013.pdf>.

⁵ Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1, 2-3 (2003); Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 256-60 (2008); Martha F. Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. REV. 1657, 1674 (2010); Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957, 968 (2010).

⁶ Kelsey Zorzi, *The Impact of the United Nations on National Abortion Laws*, 65 CATH. U. L.

looked to international human rights law to support terminations when a woman's life or health is at risk, in instances of rape or incest, and when there is a threat of a serious fetal medical condition.⁷ For instance, the right to life and the right to health underpin an abortion to save a woman's life or to protect her physical and mental health; rights to bodily integrity or freedom from inhumane treatment support terminations on the grounds of rape, incest, and severe fetal anomaly.⁸ On the national level, since the ICPD and the FWCW, over thirty countries have legalized or expanded access to abortion whereas only eleven countries have restricted abortion permission.⁹

To be sure, there is not an international consensus around permitting abortion on request (for socio-economic reasons, for example) or later in pregnancy. But international support for first-trimester terminations or abortion on particular grounds is a sizable step forward from the ICPD in 1994 and the FWCW in 1995. Rather than urging states to ensure women's access to safe abortion *when legal*, human rights documents recommend that states decriminalize termination services.¹⁰ The mantra "reproductive rights are human rights" has evolved from an aspirational statement to a reflection of contemporary international law and policy.¹¹

REV. 409, 416, nn.48–49 (2015). The CEDAW Committee interpreted CEDAW's rights to equality and health as supporting women's right to safe abortions. The Committee's General Recommendation 24 pressed states to amend, "when possible, legislation criminalizing abortion . . . and [to] remove punitive provisions imposed on women who undergo abortion." U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, ¶ 31(c), U.N. Doc. A/54/38/Rev.1, chap. I, (1999), <http://www.refworld.org/docid/453882a73.html>.

⁷ Zampas & Gher, *supra* note 5, at 251.

⁸ *Id.* at 249; ROSALIND DIXON & MARTHA NUSSBAUM, *Abortion, Dignity and a Capabilities Approach*, in *FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 7* (Beverly Baines, Daphne Barak-Erez, & Tsvi Kahana eds., 2012).

⁹ Zorzi, *supra* note 6, at 414.

¹⁰ For example, a 2011 report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health states: "Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated." Dainius Pūras (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Interim Report on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Recommendations ¶ IV.1.21, U.N. Doc. A/66/15 (Aug. 3, 2011). The Rapporteur recommends that "legal and safe abortion services [be] available, accessible, and of good quality." *Id.* ¶ IV.1.29.

¹¹ See MINDY JANE ROSEMAN & LAURA REICHENBACH, *Global Reproductive Health and Rights: Reflecting on the ICPD*, in *REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 17* (Laura Reichenbach & Mindy Jane Roseman eds., 2009); Rhonda Copelon, *Remarks of Rhonda Copelon*, 44 AM. U. L. REV. 1253, 1253 (1995); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136, 152 (1997); Nancy Northup, *Reproductive Rights at Home and Abroad*, 15 CUNY L. REV. 265, 265 (2012); Alma Beltrán y Puga, *Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in*

II. Human Rights Arguments for Law Reform

Human rights arguments have been persuasive to treaty-monitoring bodies and national courts, even when there are stark differences among those forums.¹² In this presentation, I highlight three ways in which human rights arguments support transnational as well as national abortion law reform.

First, courts tie abortion rights to universal, interdependent values associated with the advancement of women's equality and autonomy.¹³ Feminist scholars and activists have made the case that abortion rights are fundamental to ensuring women's equal standing with men—that control over the number, spacing, and timing of pregnancy permits women to pursue equality in public and private life (seeking education or employment and negotiating caretaking roles) and to resist traditional stereotypes of women as mothers.¹⁴ Second, courts depend on human rights as a mode of communicating modern agreement among states, either to situate a country within a regional consensus or to explain why a country's law is retrograde in comparison to its neighbors.¹⁵ Moreover, international reports or declarations, like the ICPD, describe laws permitting abortion as indicators of states' commitment to women's rights.¹⁶ And third, courts deploy human rights protections as a shield to anti-abortion opposition by balancing women's rights and fetal rights. Said another way, courts weigh women's human rights against the competing interests of potential life.¹⁷

International Human Rights Law, 3 CREIGHTON INT'L & COMP. L. J. 146, 148 (2012).

¹² See *Abortion Rights as Human Rights*, *supra* note 2, at 771–74. For national approaches to abortion law reform, see generally ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 177 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

¹³ A 2009 decision of the Supreme Court of Nepal described an interdependent group of women's rights that support permitting abortion and located abortion rights as part of the state's human rights duties. In upholding revisions to Nepalese penal code, the court wrote, "Reproductive rights are considered to be an inseparable part of women's human rights and within that the right to abortion is seen to hold an important place . . . the rights guaranteed to women under international treaties, the constitution and other laws would become unachievable [without reproductive rights]." *Lakshmi Dhikta & Others v. Government of Nepal*, Writ No. 0757, Jestha, 2066 ¶¶ 32–34 (2009) (Supreme Court of Nepal). See also *Abortion Rights as Human Rights*, *supra* note 2, at 771–72.

¹⁴ Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355, 355 (2012).

¹⁵ A 2010 case decided by the Constitutional Court of Portugal provides an example of consensus-based justifications that are rooted in an appeal to modernity. In comparing Portugal's newly liberalized abortion law to the laws of neighboring countries, the Court characterized abortion liberalization as "widely prevalent" in Europe and aligned with the human rights standards that most European countries recognize. Tribunal Constitucional [Constitutional Court] Feb. 23, 2010, Acórdão no. 75/2012, § 7. See also *Abortion Rights as Human Rights*, *supra* note 2, at 772–73.

¹⁶ Siegel, *supra* note 14, at 355.

¹⁷ In a 2007 judgment, the Constitutional Court of Slovakia mined international human rights texts to conclude that although the Constitution of Slovakia conferred value on potential life, it did not

Consider the 2016 opinion of the Human Rights Committee (HRC), *Mellet v. Ireland*.¹⁸ Evoking the justification of universalism, the HRC's majority view focused on why abortion restrictions undermine women's equality, as well as threaten privacy rights and the freedom from inhumane treatment. Then, referring to consensus, the majority view found that Ireland's ban on abortion (except to save a pregnant woman's life) was an outlier in Europe.¹⁹ The HRC concluded that Ireland's treatment of Mellet violated her equal protection right under Article 26 of the International Covenant on Civil and Political Rights (ICCPR), among other rights.²⁰

Mellet is an Irish citizen who, in her third trimester of pregnancy, learned that the fetus she carried would die *in utero* or shortly after birth.²¹ To circumvent Irish abortion restrictions, she spent thousands of pounds to travel to the United Kingdom to terminate her pregnancy; if she had miscarried, she could have relied on state-subsidized medical and psychological care at her local hospital.²² Weighing the financial, physical, and psychological costs to Mellet, the HRC balanced competing interests and found that the burden imposed on women in Mellet's situation far outweighed protecting the life of a fetus with a fatal medical condition.

Member Sarah Cleveland's concurring view best captures human rights arguments rooted in the universal value of women's equality. Cleveland argued that abortion restrictions, such as those in Ireland, contradict international human rights law's support for substantive gender equality. She wrote,

The right to sex and gender equality and non-discrimination obligates States to ensure that State regulations, including with respect to access to health services, . . . do not *directly or indirectly* discriminate on the basis of sex [and] require States to protect on an equal basis, in law and in practice, the unique needs of each sex. In particular, as this

establish a right to life for a fetus and no such right was recognized at the level of international law.

Nález Ústavného súdu Slovenskej republiky, sp. zn. [Decision of the Constitutional Court of the Slovak Republic, No.] PL. ÚS 12/01-297 (Dec. 4, 2007) (unofficial translation on file with the Center for Reproductive Rights). See *Abortion Rights as Human Rights*, *supra* note 2, at 773–74.

¹⁸ *Mellet v. Ireland*, CCPR/C/116/D/2324/2013, U.N. Human Rights Committee (HRC), (June 9, 2016), http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/116/D/2324/2013&Lang=E.

¹⁹ *Id.* ¶¶ 7.4, 7.8, 9.

²⁰ *Id.* ¶ 7.11. In addition, the HRC found that, under Article 7, the toll of Mellet's travel and lack of aftercare "subjected her to conditions of intense physical and mental suffering." *Id.* ¶ 7.4. Also, the costs Mellet incurred by traveling to circumvent the Irish law amounted to an arbitrary interference with her right to privacy under Article 17. *Id.* ¶ 7.8. The HRC did not find violations of Mellet's rights under Articles 2 (sex discrimination), 3 (right to competent tribunal), or 19 (freedom of expression).

²¹ *Id.* ¶ 2.2. Mellet's midwife and physician advised her that she could travel to another country for an abortion or "could carry to term, knowing that the fetus would most likely die inside her." *Id.*

²² *Id.* ¶ 7.4, 7.8.

Committee has recognized, nondiscrimination on the basis of sex and gender obligates States to adopt measures to achieve the “*effective and equal empowerment of women.*”²³

For Cleveland, the ICCPR’s right to equal protection as well as the Article 2 prohibition of gender discrimination (which the HRC did not find a violation of) prohibit the perpetuation of “traditional stereotypes regarding the reproductive role of women, by placing the woman’s reproductive function above her physical and mental health and autonomy.”²⁴

In making these arguments, Cleveland cited the work of several international human rights bodies, which have recognized that “differential treatment of women based on gender stereotypes can give rise to gender discrimination” and “tradition, history and culture” cannot justify gender discrimination or gender stereotypes.²⁵ The opinions of treaty-monitoring bodies provide evidence of a consensus against criminal abortion bans and of the universality of women’s reproductive rights. The same human rights arguments undermine the appeals of states, like Ireland, to culture or tradition to defend abortion restrictions.

Mellet, and specifically Cleveland’s view, provides powerful language about women’s reproductive equality and autonomy, but enforcement of aspects of the decision has proven difficult.²⁶ The dilemma of implementation is well known and is only one limitation, among others, of human rights law.²⁷ I highlight here two critiques that are salient to reproductive rights advocacy, to which I will return in the last part.²⁸

First, international human rights law is not neutral or politics free.²⁹

²³ *Id.* ¶ 7 (emphasis in the original).

²⁴ *Mellet*, CCPR/C/116/D/2324/2013 ¶ 14.

²⁵ *Id.* ¶ 15.

²⁶ Deirdre Conroy, *As Long as Enda Kenny is in Power, Women Like Amanda Mellet Will Continue to Suffer*, IR. INDEP. (June 15, 2016), <http://www.independent.ie/opinion/comment/as-long-as-enda-kenny-is-in-power-women-like-amanda-mellet-will-continue-to-suffer-34802557.html>; Mark O’Regan, *State Could Cover Foetal Return Costs*, IR. INDEP. (July 24, 2016), <http://www.independent.ie/irish-news/health/state-could-cover-foetal-return-costs-34907203.html>.

²⁷ See, e.g., Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUM. J. GENDER & L. 510, 512–13 (2003); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 2012–13 (2002).

²⁸ See Wendy Brown, “*The Most We Can Hope For . . .*”: *Human Rights and the Politics of Fatalism*, 103 S. ATLANTIC Q. 451, 458 (2004) (“Rights, especially those as dependent on a universal moral vocabulary as human rights are, hardly guarantee local political deliberation about how we should live together; indeed, they may function precisely to limit or cancel such deliberation with transcendental moral claims [or] refer it to the courts . . .”); see generally Susan Marks, *Human Rights and Root Causes*, 74 MODERN L. REV. 57, 78 (2011); Susan Marks, *Four Human Rights Myths*, LSE LAW, SOC’Y AND ECON. WORKING PAPERS 10/2012, http://www.lse.ac.uk/collections/law/wps/WPS2012-10_Marks.pdf.

²⁹ Dianne Otto, *Introduction*, in GENDER ISSUES AND INTERNATIONAL HUMAN RIGHTS: AN

Human rights law builds from liberal individualist traditions, and concepts like modernity and consensus are informed by the priorities and politics of the global North.³⁰ The field's potential conservatism and roots in imperialism have led some feminists to contest that human rights can provide an empowering language or emancipatory logic for women.³¹

And, second, litigation over abortion laws may not produce the expected changes in the local delivery of reproductive healthcare.³² Rights-based litigation can provide incomplete solutions to the complicated problems associated with improving a country's health care infrastructure.³³ Even when courts or legislatures extend legal permission for abortion, unintended consequences can follow law reform and impede the realization of newly-won rights.³⁴ To summarize a longstanding observation, reproductive rights on paper do not necessarily translate to reproductive rights in practice.³⁵

If reproductive rights advocates do not make these arguments often, it is perhaps because their victories seem fragile.³⁶ Yet, the reproductive

OVERVIEW 6 (Dianne Otto ed., 2013) [hereinafter *Introduction*].

³⁰ Brown, *supra* note at 28, at 455; SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 5* (2012) [hereinafter *THE LAST UTOPIA*]; Gayatri Chakravorty Spivak, *Righting Wrongs*, 103 S. ATLANTIC Q. 523, 524 (2004).

³¹ See Anne Orford, *Feminism, Imperialism, and the Mission of International Law*, 71 NORDIC J. INT'L L. 275, 296 (2002); Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, 10 MELB. J. INT'L L. 1, 11–26 (2009); Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343, 344–45 (2003); Sally Engle Merry, *Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law*, 44 OSGOODE HALL L.J. 53, 54 (2006) [hereinafter *Human Rights and Transnational Culture*]; Sari A. Kouvo, *A "Quick And Dirty" Approach to Women's Emancipation and Human Rights?*, 16 FEM. LEGAL STUD. 37, 39–40 (2008); Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM / LEFT CRITIQUE* 1, 25–33 (Wendy Brown & Janet Halley eds., 2002).

³² See Alicia Ely Yamin, *Promoting Equity in Health: What Role for Courts?*, 16 HEALTH & HUM. RTS. J. 1, 4 (2014) (noting the limitations of litigation in ensuring systemic change in health care delivery and drawing an example from the litigation following the liberalization of abortion law in Colombia).

³³ Samuel Moyn writes, "One could imagine one man owning everything—an absolute overlord—and he would not violate the current scheme of human rights, so long as everyone had their basic rights fulfilled. Even perfectly realized human rights are compatible with radical inequality." Samuel Moyn, *Human Rights and the Age of Inequality*, OPENDEMOCRACY (Oct. 27, 2015), <https://www.opendemocracy.net/openglobalrights/samuel-moyn/human-rights-and-age-of-inequality>.

³⁴ See Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1, 26–35 (2011) (based on a case study of South Africa, demonstrating that enacting a liberal abortion law had unintended consequences of provider and parental refusals, resulting in logistical obstacles to abortion care).

³⁵ *Introduction*, *supra* note 29, at 7.

³⁶ In 2015, around the same time that the HRC considered *Mellet*, the HRC began drafting a new comment on the right to life guaranteed by the ICCPR. The Committee received numerous submissions on the duty to protect a fetus's right to life. *Human Rights Committee Discusses Draft General Comment on the Right to Life*, OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS (July 14, 2015),

justice movement has not been shy to criticize U.S. advocates for analogous reasons. The next part explains how reproductive justice distinguishes its mission from that of established reproductive rights organizations.

III. Defining Reproductive Justice

Reproductive justice materials locate the movement's origin at the ICPD.³⁷ A foundational text in defining reproductive justice, *Undivided Rights*, described the influence of the conference: “[Founders of the Women of Color Coalition for Reproductive Health Rights] connected their local and national struggles to the global movement of women of color for reproductive health that would, for the first time, incorporate human rights framework into their activism.”³⁸ Movement leaders, like the SisterSong Collective for Women of Color, “connected the lack of reproductive freedom for poor and marginalized women in the [United States], many of whom are women of color, with that of women in developing countries.”³⁹

Four movement commitments suggest a pioneering approach to both organizing for social justice and to realizing better reproductive health for women. First, reproductive justice is explicitly intersectional. Mainstream reproductive rights organizations overlooked or disregarded the experiences and issues of importance to women of color, low-income women, rural women, and LGBTQI women, among others.⁴⁰ The reproductive justice movement draws directly from critical race theory and emphasizes, “control [over] what happens to our bodies is constantly challenged by poverty, [and] racism. . . .”⁴¹

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16234&LangID=E>.

³⁷ Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL’Y 47, 61 (2014); Joan C. Chrisler, *Introduction: A Global Approach to Reproductive Justice—Psychosocial and Legal Aspects and Implications*, 20 WM. & MARY J. WOMEN & L. 1, 1 (2013); Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 328 (2013); MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 528 (2015); JAE SILLIMAN, MARLENE GERBER FRIED, LORETTA ROSS, & ELENA GUTIÉRREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE 49 (2004).

³⁸ SILLIMAN, GERBER FRIED, ROSS, & GUTIÉRREZ, *supra* note 37, at 49.

³⁹ *Id.*; see also Jennifer Nelson, *Women of Color and the Movement for Reproductive Justice: A Human Rights Agenda*, in MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN’S HEALTH MOVEMENT 194 (2015).

⁴⁰ Kimala Price, *What is Reproductive Justice? How Women of Color Activists are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42, 54 (2010); Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR. AM. L. & POL’Y 71, n.59 (2011); see generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 56–57, 100–04 (1997) (“[T]he movement to expand women’s reproductive options was marked by racism from its very inception”).

⁴¹ Loretta Ross et al., *Just Choices: Women of Color, Reproductive Health, and Human Rights*, in POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION 147 (Jael Silliman, Angela Davis

Second, reproductive justice has incorporated a critique of “choice” and specifically of U.S. privacy rights. Reproductive justice writings emphasize that the traditional rhetoric around abortion rights “fits best the situation of relatively privileged women in Western, industrialized nations” because that framework “requires that a woman know that she has reproductive rights, that her nation and her community acknowledge those rights, and that she is able to exercise them.”⁴² This draws from the work of feminist scholars, who have argued that a right grounded in individual decision making is stunted and unrealistic, especially when it receives little state support.⁴³ Exercising one’s privacy rights can be a privilege; women at the mercy of state bureaucracies—receiving public assistance or new to the country, for example—cannot afford to opt-out of state surveillance or state interference.⁴⁴

Third, reproductive justice looks beyond abortion and addresses a wide range of reproductive health care throughout an individual’s life. Zakiya Luna and Kristin Luker, in distinguishing reproductive rights from reproductive justice, define “reproductive justice [as] equally about the right to not have children, the right to have children, the right to parent with dignity, and the means to achieve these rights.”⁴⁵ A reproductive justice agenda includes issues such as sex education, post-natal and prenatal care, childcare support, and the treatment of incarcerated women, just to name a few.⁴⁶

Finally, reproductive justice calls for community-based strategies for improving reproductive health policy and not just reliance on courts or rights. Lindsay Wiley writes that the innovation of reproductive justice is the “commitment to participatory engagement by the poor and socially marginalized in decision-making processes”—a “shift away from substantive law reform . . . and toward a process-based conception of social justice lawyering as a democratic, participatory, collaborative project to ensure recognition of and self-determination for marginalized

& Anannya Bhattacharjee eds., 2002).

⁴² Chrisler, *supra* note 37, at 2.

⁴³ See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 31 (2004) (arguing for conceptions of dependency that are collective and confer responsibility on the state, state bodies, and the market to support dependency and care work); JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 27–28 (2011); ROSALIND P. PETCHESKY, *ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 388 (1984).

⁴⁴ See Khiara M. Bridges, *Privacy Rights and Public Families*, 34 *HARV. J. L. & GENDER* 113, 117–22 (2011).

⁴⁵ Luna & Luker, *supra* note 37, at 343.

⁴⁶ Price, *supra* note 40, at 59; Luna & Luker, *supra* note 37, at 341.

individuals.”⁴⁷ Reproductive justice advocates seek to work through local networks that affect people’s reproductive decisions and deliver reproductive health services.⁴⁸

In addition to community organizing, reproductive justice engages with law’s effect on the availability of reproductive health care. Related to abortion, funding restrictions and the proliferation of TRAP laws—the Targeted Regulation of Abortion Providers—have imposed significant burdens on abortion providers and on the delivery of abortion services in the United States. The U.S. Supreme Court recently weighed the costs imposed by a TRAP law in *Whole Woman’s Health v. Hellerstedt*.⁴⁹ The Supreme Court struck down a Texas statute that required abortion clinics to operate as ambulatory surgical centers and physicians to have admitting privileges at nearby hospitals.⁵⁰ The Supreme Court held that *Planned Parenthood v. Casey*’s undue burden standard requires courts to balance the benefits and burdens a law imposes on the constitutional right to abortion.⁵¹ After a detailed review of the number of women affected, the number of clinics that would close, the number of miles between clinics, the Court held that the Texas privileges and ambulatory surgical center requirements offered no health benefit and resulted in burdens of cost, travel, and time.⁵²

Reproductive justice has played an important role in highlighting the costs of TRAP laws, often providing the context and the information for how marginalized and low-income women suffer under restrictive statutes.⁵³ At the same time, reproductive justice advocates recognize the

⁴⁷ Wiley, *supra* note 37, at 101.

⁴⁸ In the abortion context, for instance, there has been recent attention to the prevalence of self-induced abortion. The Berkeley Center for Reproductive Rights and Justice has undertaken a five-year project to understand and to expand women’s ability to gain access to self-induced abortion. The Center plans to study the local and state laws that penalize self-induction and to “build a cadre of lawyers and scholars poised to fight for self-determined abortion care.” Jill E. Adams & Melissa Mikesell, *Primer on Self-Induced Abortion*, CENTER FOR REPRODUCTIVE RIGHTS AND JUSTICE, UNIVERSITY OF CALIFORNIA BERKELEY SCHOOL OF LAW, <https://www.law.berkeley.edu/wp-content/uploads/2016/01/SIA-Legal-Team-Primer.pdf>.

⁴⁹ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

⁵⁰ *Id.* at 2293.

⁵¹ *Id.* at 2310 (citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

⁵² *Id.* at 2311, 2314, 2318.

⁵³ Through interviews with women denied abortion care, the Turnaround Study—a self-described reproductive justice project—demonstrated that poor and marginalized women bear the brunt of abortion restrictions and that limited or poor quality reproductive health care, including termination services, perpetuates cycles of poverty. REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT, *TWO SIDES OF THE SAME COIN: INTEGRATING ECONOMIC AND REPRODUCTIVE JUSTICE* (2015), <http://rthtp.org/wp-content/uploads/2016/08/Two-Sides-of-the-Same-Coin-Integrating-Economic-and-Reproductive-Justice.pdf> [hereinafter Turnaround Study]; see also Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER, L. & JUST. 76, 77–78, 81–83 (2014) (demonstrating the heavy burdens that TRAP laws impose on women who are both rural and poor).

limits of Supreme Court cases and the explication of constitutional rights in providing on-the-ground change.⁵⁴ In comparing *Mellet* to *Whole Woman's Health*, both cases weighed the impediments to services imposed by abortion restrictions. In *Whole Woman's Health*, however, the Court did not mention women's equality or autonomy or dignity.⁵⁵ The U.S. reproductive justice movement notices this difference: U.S. decisions often do not ground abortion rights in women's rights to substantive equality or in human rights provisions.⁵⁶ As one response, reproductive justice seeks "to 'Bring Cairo Home' by adapting agreements from the [ICPD] Programme of Action to a U.S. specific context."⁵⁷ The final part considers what human rights might or might not achieve for reproductive justice strategies in the United States.

IV. The Intersection of Human Rights and Reproductive Justice

I conclude by questioning if the movement's references to human rights detract from its ambitions and priorities. Reproductive justice materials refer to human rights as foundational to the movement commitments just described.⁵⁸ To be clear, reproductive justice advocates likely understand all too well the limitations of human rights. However, reproductive justice writings are surprisingly thin in their account of what human rights achieve or the state of human rights law today. This is, perhaps, a function of the use to which human rights rhetoric is put. Scholars' and advocates' writings rely on human rights to bolster their arguments and not to bring cases.

But I believe it matters if reproductive justice advocates embrace human rights, for whatever purpose, without skepticism of human rights law. Without the same questioning of what discourses actually accomplish and what groups they include or exclude, reproductive justice may invite a co-optation of movement principles that its leaders fear—taking the label of reproductive justice, but not investing in its values.⁵⁹

⁵⁴ Cynthia Soohoo, *Human Rights Could Influence Whole Woman's Health*, HUMAN RIGHTS AT HOME BLOG (Feb. 29, 2016), http://lawprofessors.typepad.com/human_rights/2016/02/human-rights-could-influence-whole-womans-health-1.html.

⁵⁵ On the other hand, *Whole Woman's Health* has immediate effect; it is enforceable in ways that *Mellet* is not.

⁵⁶ Soohoo, *supra* note 54, at 1.

⁵⁷ Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 *FORDHAM L. REV.* 459, 497–98 (2008).

⁵⁸ Interviews with movement leaders led sociologist Kimala Price to conclude that "human rights doctrine has taken center stage in the reproductive justice framework." Price, *supra* note 40, at 49.

⁵⁹ Luna & Luker, *supra* note 37, at 329; Zakiya T. Luna, "The Phrase of the Day:" *Examining*

Contemporary writings on reproductive justice emphasize an expansive take on human rights—civil and political as well as social and economic, positive and negative rights, substantive and formal equality, immediately enforceable or progressively realized rights.⁶⁰ Some reproductive justice materials nonetheless invoke a conception of human rights that starts from the premise of individual-based, state-centered protections, even when thicker accounts would better serve activists' goals.⁶¹ The SisterSong website, for example, announces, “[Reproductive justice] is based on the internationally-accepted Declaration of Human Rights upheld by the United Nations, a comprehensive body of law that details the rights of individuals and the responsibilities of government to protect those rights.”⁶²

The SisterSong description simplifies the legacies and trajectory of the field, and it takes for granted the universality of human rights.⁶³ Yet the universal application of women's rights is contested ground. Recall Cleveland's argument in *Mellet*—“tradition, history and culture” cannot justify practices or laws that result in gender discrimination or stereotypes. However, a well-known source of disagreement among feminists is how to

Contexts and Co-optation of Reproductive Justice Activism in the Women's Movement, in RESEARCH IN SOCIAL MOVEMENTS, CONFLICT AND CHANGE 219, 230 (Patrick G. Coy ed., 2011); see also Brown, *supra* note 28, at 460 (“It is hard to parse cynical from sincere deployments of human rights discourse and to separate human rights campaigns from legitimating liberal imperialism.”).

⁶⁰ Founders of the reproductive justice movement write: “Many women of color reproductive rights activists increasingly find the human rights framework, successfully used by anti-racist and anti-fascist movements worldwide, to be one of the best ways of articulating and advancing their rights. Linking civil, political, economic, sexual and social rights, it bridges the gap between having legal rights and lacking the economic resources to access those rights. Those women of color who embrace the existing global human rights framework do so in order to locate reproductive freedom within a broad movement for human rights.” SILLIMAN, GERBER FRIED, ROSS, & GUTIÉRREZ, *supra* note 37, at 49.

⁶¹ Brown, *supra* note 28, at 455 (“to the extent that human rights are understood as the ability to protect oneself against injustice and define one's own ends in life, this is a form of “empowerment” that fully equates empowerment with liberal individualism”); JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ, & HILA SHAMIR, GOVERNANCE FEMINISM: AN INTRODUCTION 24 (forthcoming 2017) (“Freedom and equality in American liberal-centrist feminism are recurrently understood to inhere in rights. This brings a constitutive legal formalism and a willingness to rely on the state into the project. It also structures in, at the foundation, an emphasis on the individual rather than the collective as the primary subject of moral and political concern.”) (on file with the author).

⁶² *Reproductive Justice*, SISTERSONG: WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, <http://sistersong.net/reproductive-justice/>.

⁶³ For example, as part of its grassroots activism, SisterSong hands out copies of the Universal Declaration of Human Rights. *Reproductive Justice*, SISTERSONG: WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, <http://sistersong.net/reproductive-justice/>. Kimala Price also notes that SisterSong distributes free copies of the Universal Declaration of Human Rights to its grassroots constituencies. Price, *supra* note 40, at 49. For an alternative account of human rights ascendancy in international law, see THE LAST UTOPIA, *supra* note 30, at 4 (arguing that human rights campaigns took on their present force in the 1970s and not the 1940s with the drafting of the UDHR, which reflected greater attention to duties than rights).

square universalism with a “developing world perspective,” particularly when that perspective embraces cultures and traditions viewed as antithetical to human rights.⁶⁴

Feminists engaged in postcolonial critique have challenged North American and Western European advocates who may too readily characterize women in the global South as people in need of saving or as “dupes of patriarchy.”⁶⁵ They note that women’s human rights campaigns often depict only “Third World” practices or beliefs as harmful to women. Ratna Kapur writes,

Generalizations [of “women in the Third World”] are hegemonic in that they represent the problems of privileged women, who are often (though not exclusively) white, Western, middle-class, heterosexual women. These generalizations efface the problems, perspectives, and political concerns of women marginalized because of their class, race, religion, ethnicity, and/or sexual orientation. The victim subject ultimately relies on a universal subject: a subject that resembles the uncomplicated subject of liberal discourse. It is a subject that cannot accommodate a multi-layered experience.⁶⁶

Feminists in the global South have reacted against such labels or law reform efforts, and they point to how feminist arguments can be co-opted by colonializing powers to justify their control.⁶⁷ They suspect, too, that the human rights agendas supported by the global North divorce women’s rights from projects that target international economic relations or the inequalities produced by the global economy.⁶⁸

The insights of post-colonial feminism reveal a tension in reproductive

⁶⁴ See Brems, *supra* note 11, at 153–59. Karen Engle, *Feminist Governance and International Law: From Liberal Inclusion to Carceral Feminism*, in GOVERNANCE FEMINISM: NOTES FROM THE FIELD (Janet Halley et al. eds.) (forthcoming 2018) (on file with author) (“Early Third World feminist critiques . . . called attention to cultural differences they believed were ignored or misunderstood by women’s human rights advocates, as well as to the failure of those advocates to see similarities of oppression in their own Western cultures.”).

⁶⁵ Uma Narayan, *Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women*, in A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 418 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002); see also Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 296 (Cary Nelson & Lawrence Grossberg eds., 1988); Lewis, *supra* note 27, at 512–13.

⁶⁶ Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the ‘Native’ Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002).

⁶⁷ See SITAL KALANTRY, WOMEN’S HUMAN RIGHTS AND GLOBAL MIGRATION: SEX-SELECTIVE ABORTION LAW AND POLITICS IN THE UNITED STATES AND INDIA (introduction to book on file with the author).

⁶⁸ Lewis, *supra* note 27, at 518; Kapur, *supra* note 66, at 34.

justice advocacy. On the one hand, reproductive justice seeks to reflect the experiences of marginalized women, including women in the global South. On the other hand, reproductive justice ignores how human rights advocacy often reflects U.S. experience and priorities. U.S. abortion law, for instance, has been both a model and anti-model. Courts all over the world consistently cite *Roe v. Wade*, but without mention of the restrictions that followed.⁶⁹ At the same time, U.S. advocates look to human rights to expand what they perceive as courts' limited interpretations of domestic, constitutional rights.⁷⁰ So, *Whole Woman's Health* meets *Mellet*.

A consequence of U.S. influence may be that human rights approaches shift the focus of advocacy to abortion litigation. Although reproductive justice materials seek to move beyond litigation strategies, human rights protections typically depend on lawyers and courts to fill out their meaning.⁷¹ Thus, while reproductive justice questions the overreliance on courts or the ability of rights to translate into health services, human rights lawyers and the materials produced by legal organizations continue to focus on abortion rights.⁷²

In contrast, research in public health law calls for policy interventions that can improve pregnant women's standard of living. For instance, work on the social determinants of health explores the class and income inequalities that perpetuate cycles of poor health for individuals and populations.⁷³ Where we live, work, learn—our daily environments and stressors—powerfully shape our health, and those with low incomes, living at the sharp end of inequality, negotiate significant obstacles to leading healthy lives.⁷⁴ Social determinants research demonstrates that increases in individual and family income at the lowest end of the socio-economic scale

⁶⁹ Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85, 124–30 (2014).

⁷⁰ Soohoo & Stolz, *supra* note 57, at 479 (contrasting equal protection under the U.S. Constitution and substantive equality under CEDAW). Soohoo and Stolz write, "Like early transnational movements concerning the abolition of slavery and women's suffrage, reproductive justice activists acknowledge the value of learning from movements in other countries. In particular, they recognize the value of learning from the experience had by advocates from other countries in using international human rights standards, especially economic, social, and cultural human rights, as part of their organizing work." *Id.* at 498.

⁷¹ See *Human Rights and Transnational Culture*, *supra* note 31, at 57–58, 65.

⁷² See, e.g., Brief of National Latina Institute for Reproductive Health, et al. as Amici Curiae Supporting Petitioners at 16–19, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) (referring to litigation around the world that relies on human rights principles in striking down restrictive abortion laws).

⁷³ See Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1651 (2011).

⁷⁴ See Rachel Rebouché & Scott Burris, *The Social Determinants of Health*, in THE OXFORD HANDBOOK OF U.S. HEALTH LAW 1099 (William Sage et al. eds., 2016) (describing social determinants research as it relates to income inequality and redistribution of wealth).

produce the greatest improvements in population health.⁷⁵

Likewise, health justice strategies concentrate on “social change that transforms the current systems of neglect, bias, and privilege into systems—policies, practices, institutions—that truly support healthy communities for all.”⁷⁶ Health justice purports to be an ecological model that views “recognition and redistribution as distinct, and potentially compatible, goals.”⁷⁷ Thus, health justice is not only concerned with who has access to health care, but with policies that ensure the poorest do not shoulder a disproportionate burden in a health care system.⁷⁸ Because of this, health justice writings, though not uniformly, express skepticism of human rights’ ability to ensure a fair allocation of limited resources or to address the “harsh social distress of most of the world’s population.”⁷⁹ Acute power and income disparities get left behind, creating a gap between the pronouncements of human rights and the practiced realities of health care provision across the socio-economic spectrum. Audrey Chapman argued that,

[A] human rights approach rarely considers inequalities in economic status and social class to be problematic unless they interfere with the realization of human rights or are implicated in differential treatment by the state. . . . Human rights law is concerned with disparities in the enjoyment of rights rather than differentials in social position, access to resources, and political power.⁸⁰

⁷⁵ Take income transfer strategies as examples. In the United States, the income tax experiments of the 1970s demonstrated that providing low-income pregnant women with additional cash correlated with higher birth weights of babies. *Id.* (citing Hilary W. Hoynes, Douglas L. Miller, & David Simon, *Income, the Earned Income Tax Credit, and Infant Health*, NAT’L BUREAU ECON. RES., WORKING PAPER SERIES (2012), <https://gspp.berkeley.edu/assets/uploads/research/pdf/Hoynes-Miller-Simon-AEJPolicy-Feb-2015.pdf>).

⁷⁶ Wiley, *supra* note 37, at 97.

⁷⁷ *Id.* at 99.

⁷⁸ Colleen M. Flood & Aeyal Gross, *Conclusion: Contexts for the Promise and Peril of the Right to Health*, in *THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY* 480 (Colleen M. Flood & Aeyal Gross eds., 2014). Health justice scholars call for political solidarity and political strategy beyond the legal battles of courtrooms. *Id.* at 473 (citing the scholarship of Paul Farmer). But health advocates also are quick to note the dangers of framing health rights in terms of progressive realization that is dependent on policy makers. *Id.* at 474 (citing the scholarship of Lucie White).

⁷⁹ Colleen M. Flood & Aeyal Gross, *Introduction: Marrying Human Rights and Health Care Systems: Contexts for a Power to Improve Access and Equity*, in *THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY* 13–16 (Colleen M. Flood & Aeyal Gross eds., 2014); *see, e.g.*, MOYN, *THE LAST UTOPIA* *supra* note 30, at 3.

⁸⁰ Audrey Chapman, *The Social Determinants of Health, Health Equity, and Human Rights*, 12 *HEALTH & HUM. RTS.* 17, 23 (2010); *see also* Peter Jacobson & Soheil Soliman, *Co-opting the Health and Human Rights Movement*, 30 *J. L. MED. ETHICS* 705, 705 (2002) (arguing that human rights rhetoric has been co-opted by opponents to public health law reform by focusing on individual rights, rather than

Addressing questions of budget or service delivery are priorities that agendas for equality, dignity, and autonomy may embrace, but may not completely reach.⁸¹

There is a gulf between social determinants or health justice approaches and reproductive rights, which may highlight what human rights may lack: human rights strategies often do not address how income and class shape a pregnant women's life opportunities.⁸² This is not to suggest that advocates are blind to the relationship between poverty and the availability or accessibility of termination services.⁸³ Reproductive justice organizations have focused on the redistribution of resources and wealth.⁸⁴ But research or advocacy attuned to people's everyday needs is difficult and it is complicated. The critical aspects of reproductive justice ideology can illuminate pathways for reform that take seriously the state's duty to provide a social safety net—social assistance that is local, expensive, but effective.⁸⁵

CONCLUSION

As a complement to human rights rhetoric, movement strategies attuned to systemic health problems, which rely on practical tools for collective action, may help advocates explore new solidarities, new roles for institutions, and new visions for socio-economic protections. This is one of the goals of the reproductive justice movement—to build alliances among groups and people that work toward eradicating present day inequalities in

collective or socio-economic rights, and urging public health advocates to reclaim human rights for community-based interventions).

⁸¹ Alicia Ely Yamin, *Shades of Dignity: Exploring the Demands of Equality in Applying the Human Rights Frameworks to Health*, 11 HEALTH & HUM. RTS 1, 2 (2009).

⁸² Chapman, *supra* note 80, at 22.

⁸³ An example is the Turnaround Study, described *supra* note 53.

⁸⁴ Rosalinda Pineda Orfeneo, *Economic and Reproductive Justice in the Context of Women in the Informal Economy*, 2 ASIAN BIOETHICS REV. 19, 19 (2010) (describing reproductive justice and economic justice discourses as indivisible *movements*, like human rights).

⁸⁵ Michelle Bates Deakin, *A Work in Progress*, HARV. L. BULLETIN, FALL 2016, 11, https://today.law.harvard.edu/wp-content/uploads/2016/10/HLB_fall_16_NCN.pdf (quoting Moyn: “The possibility emerges that human rights symbolize our commitment to global solidarity, but in a form that is weak and cheap, while welfare states enacted solidarity that, although local, was strong and expensive.”). See Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 272 (2010) (“To the extent that these legally constituted institutions distribute significant social goods, they should be monitored by the state. State involvement in the creation and maintenance of these institutions requires that the state be vigilant in ensuring that the distribution of such assets is accomplished with attention to public values, including equality or justice, or objectives beyond private or profit motivation. . . . Specifically, some are privileged by the structure and operation of these institutions, while others are relatively disadvantaged and left to cope with their shared vulnerability on an individual level.”).

pursuit of a fairer and more just society.⁸⁶ The connections that human rights can build among social movements are powerful and important; reproductive justice's commitments, in turn, might better tether human rights discourses to the work of local, political engagement.

⁸⁶ Orfeneo, *supra* note 84, at 21.