CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

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Volume Fifteen Summer 2012 Number Two

LOOKING FORWARD: AN INTRODUCTION TO THE SYMPOSIUM ISSUE

Lauren K. Dasse†

Professor Rhonda Copelon was a trailblazing human rights lawyer and activist, one of the world's foremost legal scholars of the rights of women, and founder of the International Women's Human Rights ("IWHR") Clinic at City University of New York ("CUNY") School of Law. Her extensive work on women's human rights has had a formative influence in shaping the discourse on human rights under international and domestic law. Professor Copelon's accomplishments in the human rights field are too numerous to list; however, it can be said that she is most remembered for opening United States federal courts to international human rights violations and demanding that international tribunals address gender-based violence.[1] Rhonda Copelon passed away on May 6, 2010. Her groundbreaking work continues to inspire human rights activists and lawyers in all parts of the world.

The *City University of New York Law Review* dedicated its 2012 Symposium to Professor Copelon's legacy and how her work has been a foundation for the ongoing protection of human rights.[2] The Symposium, titled *Looking Forward: Rhonda Copelon's Legacy in Action and the Future of International Women's Human Rights Law*, was held on March 30, 2012, at the CUNY Graduate Center in Midtown Manhattan in collaboration with the IWHR Clinic of CUNY School

† Editor-in-Chief, *City University of New York Law Review* (2011–2012); J.D., City University of New York School of Law, 2012. I would like to thank Rebecca Pendleton and Krystal Rodriguez, 2011–2012 *CUNY Law Review* Special Events Editors, for their commitment to the Symposium. I would also like to thank Jane Gish, 2011–2012 *CUNY Law Review* Managing Editor, and Cynthia Liang, 2011–2012 *CUNY Law Review* Managing Articles Editor, for their dedication to the journal. In addition, I thank the *CUNY Law Review* advisors, Professor Lisa Davis and Professor Andrea McArdle, for their mentorship and support. Thank you to the 2012-2013 *CUNY Law Review* Board for their dedication to publishing this volume of the journal.

1 *See* Symposium, *The Making of Filártiga v. Peña, the Alien Tort Claims Act After Twenty-Five Years: Symposium Transcript*, 9 N.Y. CITY L. REV. 249 (2006); *see also* Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994).

2 The *City University of New York Law Review* (formerly *New York City Law Review*) is a unique public interest legal journal that aims to inform the legal community of recent developments in public interest law, including international law. This issue's subject—the future of international women's human rights—represents the Law Review's commitment to and tradition of publishing symposia on crucial and timely legal issues.

of Law. This was the first symposium specifically focused on Professor Copelon's accomplishments and her influence, and the event brought together leading international and United States experts to discuss current implementations of her work. Specifically, the event focused on sexual rights, reproductive rights, rape as a form of torture, and domestic implementation of international human rights law.

Yifat Susskind, Executive Director of the women's human rights organization MADRE, opened the day with remarks about Professor Copelon's impact on the struggle for women's rights. She noted that many women activists who worked with Rhonda Copelon compared her work to being "as crucial as bread." Ms. Susskind remarked that while advocates often work with complicated issues, Professor Copelon never lost sight of the fact that justice is simple.

The first panel, Sexual Rights Developments Under International Law, explored cutting-edge developments in international law for upholding sexual rights based on sexual orientation and gender identity, as well as ongoing challenges and obstacles to securing rights in these areas. Panelists shared how Professor Copelon advocated for LGBT rights to be taken into account during reviews of the United States' compliance with international treaty bodies, and how her work influenced current victories on the local and international stage. Jessica Stern, Director of Programs for the International Gay and Lesbian Human Rights Commission ("IGLHRC"), shared a recent international victory for LGBT rights, the case of *Karen Atala v. Chile*. Karen Atala is a Chilean judge who was discriminated against when Chilean courts denied her the custody of her two children because she is a lesbian.[3] The Inter-American Court ruled in favor of Atala, and the precedent-setting decision established sexual orientation and gender identity as protected categories under the American Convention of Human Rights.[4] Scott Long, Visiting Fellow at the Human Rights Program at Harvard Law School, discussed the importance of LGBT movements connecting with social movements, and how human rights issues must be connected to broader efforts for social change. Andrea Ritchie, Director of Streetwise and Safe and coauthor of *Queer (In)Justice*, spoke about community activists in Louisiana challenging Louisiana's Crimes Against Nature law, which

[3] *See* Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

[4] *Id.*

criminalized sexual acts traditionally associated with homosexuality. Those convicted under the law were forced to register as sex offenders for a period of fifteen years, and the law disproportionately affected poor women of color, transgender women, and gay men of color.[5] On the eve of the Symposium, a federal court judge granted summary judgment in favor of plaintiffs in *Doe v. Jindal*, represented by Ritchie, the Center for Constitutional Rights ("CCR"), and Loyola University Civil Justice Clinic, ruling that the law's sex offender registration requirement violated the Equal Protection Clause of the United States Constitution.[6]

Panel two participants discussed current legal challenges and successes for reproductive rights domestically and internationally. CUNY Law Professor Cindy Soohoo shared how Professor Copelon began her career focusing on major women's issues such as the right to have children, the right to abortion, issues of forced sterilization, and discrimination against unwed mothers.[7] Professor Copelon recognized the disparity between rights that women officially hold and the reality of how difficult it is for women, especially low-income women and women of color, to exercise these rights. Her work has influenced the ongoing struggle to ensure women's access to abortion and reproductive health services, and panelists discussed how Professor Copelon brought reproductive rights violations to the attention of international fora. Nancy Northup, President of the Center for Reproductive Rights ("CRR"), provided an overview of recent legal victories for reproductive rights, focusing on CRR's recent cases before international bodies. For example, in *K.L. v. Peru*, a young woman was pregnant with an anencephalic fetus, and doctors refused to perform an abortion, even though abortion is legal in Peru in limited circumstances to protect a woman's life or health.[8] The woman was forced to give birth to a deformed baby, who died four days after birth, leaving the mother in severe depression.[9] The Human Rights Committee held that Peru was responsible for ensuring access to abortion, which marked the

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5 *See* Doe v. Jindal, 851 F. Supp. 2d 995 (E.D. La. 2012).

6 *Id.*

7 While at CCR, Professor Copelon was lead counsel in the 1980 Supreme Court case, *Harris v. McRae*, 448 U.S. 297 (1980), in which she argued for low-income women's rights to abortion access. The Supreme Court ruled in favor of the government, and upheld the Hyde Amendment, which bans funding for abortions even if necessary to protect women's health.

8 *See* Human Rights Comm., Karen Noelia Llatoy v. Perú, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), *available at*: http://www.umn.edu/humanrts/undocs/1153-2003.html.

9 *Id.*

first time that an international human rights body held a government responsible for failure to ensure access to abortion where the practice is legal.[10] Mónica Roa, Director of Programs at Women's Link Worldwide, shared details about a 2006 landmark victory in the Colombian Constitutional Court. The decision established a woman's right to an abortion in certain circumstances, including when the mother's life is at risk. Ms. Roa discussed current challenges to implementing this right in Colombia.[11] Marianne Møllman, Senior Policy Advisor at Amnesty International, discussed the need to de-isolate reproductive rights. She stressed that the conversation around reproductive rights must not only focus on controlling fertility, but also must include issues that strongly influence whether women decide to have children or not: access to childcare, access to health care, lack of paid parental leave, and how parents wish to parent their children. Ms. Møllman also stated that it is not enough to have laws that protect reproductive rights; we also have to change the way we feel about sexuality and sex itself.

The third panel explored innovative achievements in expanding the notion of rape as a form of torture under international law, including the state's obligation to address sexual violence committed by private actors. Sir Nigel Rodley, Member of the United Nations Human Rights Committee and Former Special Rapporteur on Torture, provided an overview of the development of international human rights jurisprudence recognizing rape as a form of torture. Felice Gaer, Vice Chair of the United Nations Committee Against Torture ("CAT" or "the Committee"), addressed how Professor Copelon successfully argued that domestic violence and rape cannot be thought of as a private matter and therefore isolated from the international human rights framework. Blaine Bookey, Staff Attorney from the Center for Gender and Refugee Studies, spoke about her work in Haiti, in partnership with the IWHR Clinic, and the recent decision from the Inter-American Commission on Human Rights holding the State of Haiti responsible for punishing acts of sexual violence perpetrated by non-state actors.[12] Patricia Viseur Sellers, Former Legal Advisor for Gender-Related Crimes with the Office of the Prosecutor for the Interna-

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10 *Id.*

11 *See* Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.).

12 *See* Precautionary Measures, Inter-Am. Comm'n H.R., Report No. MC-340-10 ("Women and girls residing in 22 Camps for internally displaced persons in Port-au-Prince, Haiti").

tional Criminal Tribunals for Rwanda and the Former Yugoslavia, discussed the ongoing *Bemba* case before the International Criminal Court ("ICC").[13] Jean-Pierre Bemba, a national of the Democratic Republic of Congo, is the leader and Commander-in-Chief of the Mouvement de Libération du Congo, which is accused of using sexual violence to terrorize towns and villages in the Central African Republic.[14] Ms. Viseur Sellers discussed how the Pre-Trial Chamber of the ICC, when determining charges to be brought against Bemba, dropped charges of torture, deciding that it would be unfair to prosecute him under charges of both rape and torture. Ms. Viseur Sellers reminded us that we are indeed back at a critical point in international criminal law, and that we must "surface torture" when analyzing rape.

The final panel examined innovative litigation regarding the implementation of an international human rights framework in a domestic context. Topics included the use of international human rights law to create change from the local level to the federal courts and innovative tactics to advance economic and social rights. One of Professor Copelon's most notable achievements is her work on the CCR case *Filartiga v. Peña-Irala*,[15] credited with resurfacing the Alien Tort Statute ("ATS"), which allows victims of international human rights violations to seek justice in federal courts. Pam Spees, Senior Staff Attorney at CCR, remarked on current CCR cases that use the ATS as a method for achieving justice, including *Sexual Minorities Uganda v. Lively*.[16] Scott Lively is an attorney, evangelical, and anti-LGBT activist in Massachusetts who is involved in violent anti-gay movements in Uganda.[17] The *Lively* case alleges that Lively's involvement in anti-gay movements in Uganda is equal to persecution, and is the first ATS case that seeks to hold a perpetrator accountable for persecution on the basis of sexual orientation and gender identity. CUNY School of Law alum Joey Mogul, Partner with the People's Law Office and Director of the Civil Rights Clinic at DePaul University College of Law, spoke passionately about how international law helped achieve a victory against torture in Chicago. Disappointed by the lack of prosecution

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13 *See* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08 (discussing the situation in the Central African Republic).

14 *Id.*

15 630 F.2d 876 (2d Cir. 1980).

16 Sexual Minorities Uganda v. Lively, No. 3:12-cv-30051-MAP (D. Mass. July 13, 2012).

17 For more information, see *LGBT Uganda Fights Back: The Case Against Scott Lively*, CTR. FOR CONSTITUTIONAL RIGHTS, http://www.ccrjustice.org/lgbt-uganda-fights-back-case-against-scott-lively (last visited Oct. 27, 2012).

against Chicago Police Commander Jon Burge for his role in over 110 torture cases committed against the city's African-American population, attorneys and activists brought what is known as the Chicago Torture Cases before the United Nations CAT.[18] The Committee issued a scathing report on the United States' lack of compliance with the United Nations Convention Against Torture, and called on the United States to immediately investigate the situation and bring the perpetrators to justice. Activists used the CAT's findings to lobby for justice, and the United States Attorney's Office in Chicago indicted Burge for perjury and obstruction of justice.[19] Caroline Bettinger-Lopez, Associate Professor of Clinical Legal Education and Director of the Human Rights Clinic at University of Miami School of Law, talked about the case of *Jessica Lenahan v. United States of America*.[20] The United States Supreme Court ruled that Lenahan had no constitutional right for the police to enforce a restraining order against her estranged husband, who murdered her three children, denying due process rights involving private acts of violence.[21] Frustrated by the lack of justice, Lenahan brought her case to the Inter-American Commission on Human Rights ("the Commission"). The Commission found the United States responsible for human rights violations suffered by Lenahan and issued recommendations regarding domestic violence law and policy in the United States.[22] Finally, Catherine Albisa, Executive Director of the National Economic & Social Rights Initiative ("NESRI"), discussed NESRI's work in solidarity with social movements, including their current campaign in support of the Coalition of Immokalee Workers.[23] Ms. Albisa reminded us that Professor Copelon, who was a founding member of NESRI, always stressed the importance of economic and social rights because these are the rights that shape women's lives on a daily basis.

During his afternoon remarks, Vince Warren, Executive Director of CCR, stressed how deeply Rhonda Copelon cared about partnering with community groups, and how she embodied community lawyering. He told us about how Professor Copelon urged

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18 *See* Joey Mogul, *The Chicago Police Torture Cases: 1972 to 2011*, *available at*: http://torturememorial.wordpress.com/background-on-chicago-torture/.

19 *Id.*

20 Jessica Lenahan (*Gonzales*) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (July 21, 2011).

21 Castle Rock v. Gonzales, 545 U.S. 748 (2005).

22 *Gonzales*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (July 21, 2011).

23 For more information, see *Coalition of Immokalee Workers*, NESRI, http://www.nesri.org/blog-tags/coalition-of-immokalee-workers (last visited Oct. 27, 2012).

CCR to surface gender, and how she rejected the idea of having a docket at CCR dedicated solely to women's issues, for fear that a gender docket would allow other dockets to ignore the intersectionality of gender and other justice issues. Vince Warren ended his remarks with Rhonda's advice to be bold, but careful:

> Finally, Rhonda told us to act boldly and be careful. Initially, that puzzled me. How does one act boldly and be careful at the same time? Rhonda has helped me learn a sacred truth about social justice work, which I want to share with you. This truth is that living in the tension between what is possible and what is actual, is what we do. If that stresses you out, you need to find another way to deal with that, because that is the place that we will always be. We will fight and we will love and we will dance and we will sing. But we will fight together and we will struggle together through this tension. So please, be bold, do not let the carefulness with which your colleagues outside this room want to tread diminish your boldness. At the same time do not let the boldness that other people want to push through on an issue diminish your desire to be careful to make sure that the work you are doing is actually supporting communities actually advancing movements, because that is the role of a lawyer. No lawyer in the history of the world has ever made social change by herself. Our job is to remove obstacles; our job is to make the path easier and to clear the path. You have to do that by being bold, and you have to be very careful.

Celina Romany, Director of the Center for Human Rights at the Inter-American University of Puerto Rico School of Law, closed the event with an extensive reflection on the history of the IWHR Clinic. Ms. Romany co-founded the IWHR Clinic with Professor Copelon, and discussed the Clinic's influence on international women's human rights today.

This issue of the journal includes articles and remarks from many of the panelists who discussed critical issues at the Symposium, including reflection pieces about Professor Copelon and remarks about current implementations of her work. Also included in this special edition of the journal are pieces that are thematically linked to the Symposium, including an article about the criminalization of victims of sex trafficking, as part of *CUNY Law Review's* unique Public Interest Practitioner Section ("PIPS").

The *CUNY Law Review* is deeply grateful to our Law Review faculty advisors, Professor Lisa Davis of the IWHR Clinic and Professor and Legal Writing Director Andrea McArdle, for their tireless dedication to the symposium, and to the journal. Professor Davis brought the concept for this event to the Law Review. With-

out their guidance and counsel, this event would not have been possible. We would like to thank *CUNY Law Review* Special Events Editors Rebecca Pendleton and Krystal Rodriguez for their extensive work on the event. We also thank CUNY School of Law Dean Michelle Anderson for supporting the Symposium and this publication, Professor Franklin Siegel and IWHR Clinic Fellow Bradley Parker for volunteering their time and expertise, and the hardworking staff in the Technology Department at CUNY School of Law for recording this event.[24] The *CUNY Law Review* extends our gratitude to MADRE and CCR for their co-sponsorship of the event. Our sincerest gratitude goes to our speakers, many of whom traveled great distances to discuss these vital issues. It is our hope that scholarship regarding Professor Rhonda Copelon's work continues to inspire further developments of gender justice in international human rights law.

Symposium Program

9:00 am Welcome

Lauren Dasse, Editor-in-Chief, *City University of New York Law Review*

Lisa Davis, Clinical Professor of Law, International Women's Human Rights (IWHR) Clinic, CUNY School of Law

9:15 am Opening Remarks

Yifat Susskind, Executive Director, MADRE

9:30 am Panel 1: Sexual Rights Developments Under International Law

Scott Long, Visiting Fellow, Human Rights Program, Harvard Law School

Rosa Celorio, Legal Advisor, Special Rapporteurship on the Rights of Women, Inter-American Commission on Human Rights (invited)

Jessica Stern, Director of Programs, International Gay and Lesbian Human Rights Commission (IGLHRC)

Andrea Ritchie, Director, Streetwise and Safe, Co-Author of *Queer (In)Justice*

Ruthann Robson, Moderator, University Distinguished Professor of Law, CUNY School of Law

11:00 am Panel 2: Reproductive Rights at Home and Abroad

Nancy Northup, President, Center for Reproductive Rights

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[24] Video footage from the symposium may be accessed at http://www.youtube.com/playlist?list=PL35BCE717D4E37FC3, and podcasts may be downloaded at http://itunes.apple.com/us/itunes-u/looking-forward-rhonda-copelons/id525143368.

Mónica Roa, Director of Programs, Women's Link Worldwide

Cindy Soohoo, Professor of Law and Director, International Women's Human Rights (IWHR) Clinic, CUNY School of Law

Marianne Møllman, Senior Policy Advisor, Amnesty International

Caitlin Borgmann, Moderator, Professor of Law, CUNY School of Law

12:30 pm Lunch

1:15 pm Dean's Welcome
Michelle J. Anderson, Dean, CUNY School of Law

1:20 pm Afternoon Remarks
Vincent Warren, Executive Director, Center for Constitutional Rights

1:30 pm Panel 3: Rape as a Form of Torture
Sir Nigel Rodley, Member, UN Human Rights Committee and Former UN Special Rapporteur on Torture

Felice Gaer, Vice Chair, UN Committee Against Torture

Blaine Bookey, Staff Attorney, Center for Gender and Refugee Studies

Patricia Viseur Sellers, Former Legal Advisor for Gender-Related Crimes, Office of the Prosecutor for the International Criminal Tribunals for Rwanda and the Former Yugoslavia

Penelope Andrews, Moderator, Associate Dean and Professor of Law, CUNY School of Law

3:00 pm Coffee Break

3:14 pm Panel 4: Domestic Implementation of International Human Rights Law
Pam Spees, Senior Staff Attorney, Center for Constitutional Rights

Caroline Bettinger-Lopez, Professor of Law and Director, Human Rights Clinic, University of Miami School of Law

Catherine Albisa, Executive Director, National Economic & Social Rights Initiative

Joey Mogul, Partner, People's Law Office and Director, Civil Rights Clinic, DePaul University College of Law

Julie Goldscheid, Moderator, Professor of Law, CUNY School of Law

4:45 pm Closing Remarks
Celina Romany, Director, Center for Human Rights, Inter-American University of Puerto Rico School of Law

LOOKING FORWARD: RHONDA COPELON'S LEGACY IN ACTION

Cathy Albisa†

When I was asked to speak about Rhonda Copelon's impact on my work, I did not know how to start. How do you measure or describe the effect of a person that does not merely influence but literally infuses everything and everyone around her with her vision and spirit? I can easily describe how Rhonda persuaded me (on a twenty-five hour car ride) that I should turn my life's work toward human rights in the United States. I can share with you how she compellingly explained why it was a broader and deeper vision of social justice than the rights framework in which we as social justice lawyers in the United States operate. I can tell you about specific legal strategies, whether constitutional, regional, or international, that she pushed me to explore, but none of these strategies would fully capture her legacy in action.

The only image that comes to mind is the idea of building the plane as you fly it. Rhonda was never satisfied with the confines of the law, even the most progressive of frameworks fell short in her mind and failed to bring the kind of human freedom and equality to which she was so fiercely committed. She believed the law could be a tool for nothing short of liberation and she had no intention of letting the expectations of the legal profession get in the way. She began from the premise of what the law needed to be and proceeded to act like the most activist Supreme Court justice anywhere in the world wholly unencumbered by precedent. She bent it, pulled it, and reshaped it toward these ends.

Rhonda also understood her legal advocacy to be a collective effort. She worked deeply ensconced in a political feminist community that informed all her priorities and constantly nourished

† Cathy Albisa is the Executive Director of the National Economic & Social Rights Initiative ("NESRI"). She is a constitutional and human rights lawyer with a background on the right to health. Ms. Albisa also has significant experience working in partnership with community organizers in the use of human rights standards to strengthen advocacy in the United States. She co-founded NESRI along with Sharda Sekaran and Liz Sullivan in order to build legitimacy for human rights in general, and economic and social rights in particular, in the United States. She is committed to a community-centered and participatory human rights approach that is locally anchored, but universal and global in its vision. Ms. Albisa clerked for the Honorable Mitchell Cohen in the District of New Jersey. She received a B.A. from the University of Miami and is a graduate of Columbia Law School.

her considerable creativity. In the same way that she tied her personal and political identities into one integrated whole, she tied her areas of engagement with the law—scholarship, litigation, teaching, advocacy, U.N. lobbying—into one strategically connected and seamless line of work. When she sought to write about domestic violence as torture while on sabbatical in Costa Rica she did so with a clear eye toward changing the law in the Inter-American system as well as the world.[1] Her scholarship was never simply about an academic conversation, nor about building her personal intellectual profile. Her scholarship was instead another activist expression of the need for change in the world.

When Rhonda called for change, she did so with such unparalleled stubbornness, intelligence, and indefatigable energy that she made change all but inevitable. She was also not above touching the pride of those she was engaging in order to make change. When she was working toward having rape recognized as a form of genocide, she called her contacts both at the Inter-American Commission and the Rwanda Tribunal to urge them each to hurry up and issue the right judgment so they could be the first, playing them off beautifully against one another—all for a good cause, of course.[2]

Rhonda also understood deeply the political connections across all her areas of work. She knew the anti-fundamentalist work she did on behalf of Algerian feminists was no different from the pro-choice work of battling Christian fundamentalists in the United States.[3] She understood that economic justice and reproductive freedom were inextricably intertwined in the real lives of

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[1] Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 292 (1994) (situating the article within a "global women's campaign . . . to transform significantly the place of women and the status of gender based violence within the human rights discourse").

[2] *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731-734 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) [hereinafter *Akayesu*] (finding Akayesu guilty of genocide, including criminal liability for sexual violence taking place at the Taba commune); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L. J. 217, 228–233 (2000) (describing the *Akayesu* judgment in the context of mainstreaming gender in international jurisprudence); *Report on the Human Rights Situation in Haiti*, (1995) 11 Y.B. Inter-Am. Comm'n H.R. 358, 418–420 (finding that rape and the threat of rape used against supporters of Jean-Bertrand Aristide to be a form of torture under both regional and U.N. instruments).

[3] Rhonda Copelon was legal counsel on cases covering both areas. *See, e.g.,* Doe v. Islamic Salvation Front, 257 F.Supp.2d 115 (2003) (Alien Tort Statute claim on behalf of nine Algerian feminists charging defendants with crimes against humanity and war crimes, including rape, sexual slavery in the form of "temporary marriage," and the enforcement of sexual apartheid); Harris v. McRae, 448 U.S. 297 (1980) (challenging

poor women. She saw no point in doing international work without connecting it to the domestic context. And she knew that what happened at times of war and at times of peace to women did not represent wholly different scenarios but rather deeply influenced and informed—if not determined—one another.

Rhonda Copelon was a force of nature. Luckily for all of us she was a force for good. We will never stop missing her and the hole in our universe she has left will never be filled satisfactorily. The best we can do is fuel her legacy in action to continue to breathe life into the vision created—as she would say, in concert with others—by this visionary woman.

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the discriminatory restrictions of the federal Hyde Amendment on Medicaid funds for medically necessary abortions affecting poor women).

LEGACY IN ACTION: HONORING THE LIFE WORK OF RHONDA COPELON

Lisa Davis†

On March 29, 2012, the *City University of New York Law Review* hosted the Symposium titled, "Looking Forward: Rhonda Copelon's Legacy in Action and the Future of International Women's Human Rights Law" honoring the work and legacy of Professor Rhonda Copelon.

Rhonda was a founding faculty member of the City University of New York ("CUNY") School of Law, a co-founder of CUNY School of Law's International Women's Human Rights Clinic ("IWHR"), a human rights attorney, and a vice-president of the Center for Constitutional Rights ("CCR"). She built on early pioneering work in the reproductive rights movement and broke new ground opening United States federal courts to international human rights violations claims and international tribunals to gender-based violence cases. She helped lay the conceptual foundation for some of today's most influential case law in the field of women's international human rights. Rhonda passed away in 2010 at age sixty-five, leaving an astounding body of work.

Over the course of her life, her scholarship was one of her sharpest advocacy tools, catalyzing major change in legal paradigms such as the notion that domestic violence should be recognized as a form of torture—a principle that the United Nations Committee Against Torture codified as law under the Convention Against Torture[1] in its General Comment No. 2 in 2007.[2] Rhonda

† Lisa Davis is a Clinical Professor of Law in the International Women's Human Rights ("IWHR") Clinic at the City University of New York ("CUNY") School of Law. For over ten years she has worked as an advocate for women's and LGBT human rights and has written extensively on international human rights issues. This Symposium has particular significance to the Author given how profoundly Rhonda personally affected her in her work. Rhonda was both a mentor and a friend and the Author expresses her gratitude for having the honor of being a professor in the IWHR Clinic, which Rhonda established, and an advisor to the *City University of New York Law Review* that made this Symposium possible. Special thanks to *Law Review* editors Lauren Dasse, Rebecca Pendleton, and Krystal Rodriguez for their hard work and dedication to this memorializing event, as well as J. Kirby for her invaluable editorial assistance.

[1] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* http://www2.ohchr.org/english/law/cat.htm.

[2] Comm. Against Torture, General Comment 2, Implementation of Article 2 by States Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

spent several years contributing to drafts of General Comment No. 2 with several generations of interns at CUNY School of Law's IWHR Clinic.

She worked for more than a decade at CCR, where she litigated civil rights cases with a focus on women's rights and international human rights. While at CCR, Rhonda was co-counsel on the landmark case *Filártiga v. Peña-Irala*,[3] which established that victims of gross human rights abuses committed abroad had recourse in United States courts.

Rhonda co-founded the Women's Caucus for Gender Justice, which was started by a small group of women human rights activists at the 1997 Preparatory Committee for the Establishment of an International Criminal Court ("ICC"). They realized that without an organized caucus, women's concerns would not be adequately defended and promoted. Through her role as Secretariat of the Women's Caucus and as the Director of CUNY School of Law's IWHR Clinic, she mobilized lawyers and activists internationally to ensure that the Rome Statute would take gender into account with regard to the procedure, evidence, and definition of crimes before the ICC, as well as in regard to the gender composition of the court itself. Though in the language of the Rome Statute, "gender" was ultimately narrowly defined in terms of "sex," the ICC subsequently codified sexual and gender crimes as within its jurisdiction.[4]

Rhonda laid the groundwork for lawyers and activists in the movement for gender justice today. For example, the current efforts by local advocates and international attorneys to end sexual violence in Haiti are guided by Rhonda's legacy. In 1994, after Haiti experienced a surge in politically motivated sexual violence, Rhonda pulled together a team to file a brief with the Organization of American States arguing that the rape of Haitian women by state actors that was underway amounted to torture under international law.[5] Nearly fifteen years later, when Haiti suffered another surge in sexual violence, this time due to the devastating earthquake in 2010, the same organizations that Rhonda had rallied in the 1990s, along with new allies, came together. The IWHR Clinic filed a petition with the Inter-American Commission on Human Rights ("the

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3 630 F.2d 876 (2d Cir. 1980).

4 Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90, ¶¶ 1, 3, *available at* http://untreaty.un.org/cod/icc/STATUTE/99_corr/cstatute.htm.

5 Country Conditions Communication by Int'l Women's H.R. Clinic at CUNY School of Law et al. (Inter-Am. Comm'n H.R. Oct. 16, 1996).

Commission").[6] This time, the Commission expanded on Rhonda's work to call attention to the State's due diligence obligation to end sexual violence committed by private actors.[7]

Despite persistent intolerance, the idea that discrimination on the basis of sexual orientation is a violation of human rights related to, yet distinct from, discrimination on the basis of sex and gender, has found acceptance in recent decades, making enormous strides in the jurisprudence and legislative decisions of many countries and international bodies. The case of Karen Atala Riffo, one Rhonda was deeply concerned with, highlights these intersections. Atala is a judge and lesbian mother who was stripped of custody of her three daughters when the Supreme Court of Chile ruled that she was an unfit mother on the basis of her sexual orientation.[8] Judge Atala sought redress through the Inter-American system, and in 2006, her petition to the Commission was supported by a number of amicus curiae briefs. An amicus brief jointly submitted by the IWHR Clinic, the International Gay and Lesbian Human Rights Commission ("IGLHRC"), the law firm Morrison & Foerster, and others, argued that the Supreme Court of Chile improperly denied custody based on unsubstantiated and negative assumptions about lesbian and gay parents that were contrary to the weight of international authority and decades of psychological and social science research.[9]

In a historic decision in 2006, the Commission found for Judge Atala, and the case made its way to the Inter-American Court of Human Rights.[10] It was the first time the court had ever heard a case specifically regarding sexual orientation or gender identity. Again, the IWHR Clinic and IGLHRC, joined by others, submitted an amicus brief renewing Rhonda's argument and additionally calling on the court to find that sexual orientation and gender identity are protected classes.[11] In February 2011, the court issued a

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6 Request by Int'l Women's H.R. Clinic at CUNY School of Law et al. for Precautionary Measures Under Article 25 of the Commission's Rules of Procedure at 5 (Inter-Am. Comm'n H.R. Oct. 19, 2010) (citation omitted).

7 Letter from Santiago A. Canton, Exec. Sec'y, Inter-Am. Comm'n H.R., to Lisa Davis, Esq., Int'l Women's H.R. Clinic at CUNY School of Law, H.R. Advocacy Dir., MADRE, et al. (Dec. 22, 2010).

8 Karen Atala and Daughters v. Chile, Application, Case 12.502, Inter-Am. Comm'n H.R. (Sept. 17, 2010) [hereinafter *Atala*, Application].

9 Brief for Int'l Women's H.R. Clinic at CUNY School of Law et al. as Amici Curiae Supporting Petitioner at 16-25, Karen Atala and Daughters v. Chile, Case No. P-1271-04, Inter-Am. Comm'n H.R. (Jan. 19, 2006), *available at* www.nycbar.org/pdf/report/Atala.pdf.

10 *Atala*, Application, *supra* note 8.

11 Brief for Int'l Women's H.R. Clinic at CUNY School of Law et al. as Amici Cu-

landmark decision finding that Chile not only violated Atala's right to equality and non-discrimination, but also affirming for the first time in its history that sexual orientation and gender identity are protected categories under the American Convention of Human Rights and that discrimination on such bases violates international law.[12]

This victory also belongs to Rhonda whose' tireless advocacy on behalf of women everywhere will never be forgotten. In the words of Anita Nayar, "She lit our path with a brilliant intellect and consuming passion that informed and transformed so many challenging political struggles."[13] Rhonda Copelon's strategic legal brilliance, unwavering political courage, and deep commitment to a women's human rights vision will forever inspire and guide our work.

riae Supporting Petitioner, Karen Atala and Daughters v. Chile, Case 12.502, Inter-Am. Ct. H.R., CDH-S/2092 (2011), *available at* http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/563-1.pdf.

12 Karen Atala and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

13 Anita Nayar, *Remarks at Rhonda's Life Celebration,* REMEMBERING RHONDA COPELON (May 25, 2012), http://rhondacopelon.blogspot.com/2010/09/from-anita-nayar.html.

RHONDA COPELON: A CELEBRATION OF A LIFE FULLY LIVED

Charlotte Bunch†

This *City University of New York Law Review* Symposium in recognition of Rhonda Copelon represents an important addition to the tributes to her work and life, which include events in Nicaragua, France, Costa Rica, and Uganda as well as the United States. At Rhonda's passing, remembrances poured in from over thirty counties all over the world—her community of activists, scholars, and friends spanned the globe from Algeria to Argentina, Burma, Chile, El Salvador, Ethiopia, Germany, India, Japan, Kenya, Malaysia, Serbia, Sierra Leone, and the U.S.[1]

Rhonda's keen intellectual acumen, her strategic brilliance in legal and political matters, her unswerving and courageous advocacy, and her perseverance in the pursuit of justice for all, touched so many people intellectually, politically, and personally. She was a fierce pioneer for gender justice with a creative legal mind that never stopped—literally keeping her and many of us up at night. We remember her as the generous and demanding teacher who helped to launch many careers in social justice work, and as a tender and loyal friend who took great joy in sharing her love for the beauty in life, food, nature, and music.

Even though Rhonda's perseverance sometimes drove us crazy—for example, in the women's caucuses for United Nations World Conferences, when we all thought a document was finished, she often raised another point not seen before, after it had already gone to the printer. We wanted to tell her it's too late, but we knew

† Charlotte Bunch, Founding Director and Senior Scholar of the Center for Women's Global Leadership, Rutgers University, has been an activist, writer, and organizer in the feminist and human rights movements for over four decades. A Distinguished Professor in Women's and Gender Studies, Bunch was previously a Fellow at the Institute for Policy Studies in Washington, D.C. and a founder of *Quest: A Feminist Quarterly*. She has served on the Board of Directors of many organizations and is currently on the Board of the Global Fund for Women and the Global Civil Society Advisory Committee for U.N. Women. She has edited nine anthologies and authored *Passionate Politics: Feminist Theory in Action* and *Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Right,* as well as numerous essays.

[1] Taken from the extraordinary blog to Rhonda Copelon organized by her friends Maureen Mason and Anita Nayar. REMEMBERING RHONDA COPELON, http://rhondacopelon.blogspot.com/ (last visited Nov. 21, 2012). There are now 120 people from over thirty countries who have shared their remembrances and photos.

she was usually right, and something more needed to be said or done.

Rhonda played a crucial role in many feminist and human rights developments, often working behind the scenes. But her fingerprints, or perhaps I should say "brain waves," are all over many of the most important breakthroughs in progressive feminist advances both in the United States and globally. She was an insightful political adviser as well as a litigator and a teacher who helped many of us sort through complex, thorny issues and never shied away from difficulty.

Early in her career as a litigator at the Center for Constitutional Rights ("CCR"), Rhonda played a critical role in the legal evolution of reproductive rights, and particularly the intersection of gender with race and class in determining women's access to these rights in the U.S. From her successful argument in the U.S. Supreme Court on behalf of African-American teacher aides in Mississippi fired for being unwed mothers,[2] to her lead as counsel in *Harris v. McRae*,[3] which challenged the federal Hyde Amendment cut-off of Medicaid funds for most abortions, she made connections between policy, law, and the everyday realities of who can exercise their rights, especially for women of color and poor women. Even though the loss in *McRae* was heartbreaking, the vision of reproductive justice in Rhonda's extraordinary brief has influenced the field deeply and changed, if not the law, then the politics and advocacy strategies to more profoundly link social and economic rights to personal rights.

Rhonda was also co-counsel in other critical CCR cases challenging racist practices, governmental misconduct, and the Vietnam War. She ultimately served as co-counsel in the groundbreaking case *Filártiga v. Peña-Irala*, which conferred jurisdiction on the federal courts to hear actions based on alleged violations of customary international law, including state-sponsored torture.[4] *Filártiga* laid the foundation for work that Rhonda continued by developing gender perspectives in numerous cases involv-

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[2] Drew Mun. Sch. Bd. Dist. v. Andrews, 425 U.S. 559 (1976) (dismissing the petition for certiorari as having been improvidently granted, leaving the favorable decision by the Court of Appeals for the Fifth Circuit intact).

[3] 448 U.S. 297 (1980).

[4] *See* Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) ("Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.").

ing war crimes, corporate abuses, and immigrant domestic workers.

In l983, Rhonda became part of the founding faculty of the City University of New York ("CUNY") School of Law where she was a Professor of Law and Director of the International Women's Human Rights ("IWHR") Clinic, which she co-founded in l992. This is the point at which I began to work closely with her. We both felt that we had been on parallel tracks in our U.S. feminist work in the 1970s, although we had not worked together. When she came to my apartment in Brooklyn in 1990 to discuss with me and my partner, Roxanna Carrillo, how she could bring her legal expertise to the developing global women's human rights movement, a close partnership began. We also shared a passion for linking global women's struggles to feminist and human rights issues in the U.S.—to seeing ourselves and United States movements as part of global solidarity, not as separate.

Together we traveled to Latin America to engage in feminist *encuentros* (where Rhonda rapidly picked up speaking Spanish with a French accent), while learning from women there who had been working to bring feminism to Latin America's human rights struggles. We strategized with activists from around the world on how to bring a feminist interpretation of human rights to the U.N. World Conference on Human Rights in Vienna in 1993,[5] which first fully recognized women's rights as human rights (and led some male human rights activists to accuse women of "hijacking the event"). We called for women's reproductive rights to be recognized as human rights at the Cairo International Conference on Population and Development ("ICPD") in 1994,[6] and we agitated for a women's human rights perspective to inform the framework for the platform adopted at the Beijing World Conference on Women in 1995.[7]

As Rosalind Petchesky, a close friend of Rhonda, puts it:

> She has been my beacon and partner in crime ever since the days of fighting (in *McRae* and CARASA[8]) for abortion to be

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5 World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993).

6 U.N. International Conference on Population and Development (ICPD), Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (1995).

7 Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (1995).

8 The Committee for Abortion Rights and Against Sterilization Abuse ("CARASA"), formed in 1977 in opposition to the infamous Hyde Amendment.

> safe, legal and fully accessible to all women. We put our heads together to draft language on bodily integrity rights in Cairo, and she's guided my thinking about how to conceptualize sexual rights and the indivisibility of all human rights in international law to this day. But even more than her brilliant mind, Rhonda's example shines in her practice of a truly feminist humanity in the everyday—her devotion to younger generations, her fierce and loving presence for her many friends, and her passionate embrace of both politics and fun. Rhonda is my model of a life fully realized.[9]

Through the IWHR Clinic, Rhonda always brought her students along, providing them with opportunities to be involved in ground-breaking developments in human rights by preparing documents and participating in key United Nations meetings related to the development of feminist gains in international instruments and human rights treaty bodies.

Her intellectual leadership is also reflected in her ground breaking articles—including her l994 article, *Intimate Terror: Understanding Domestic Violence As Torture*,[10] which impacted the work of the Committee Against Torture and the Special Rapporteur on Torture over a decade later, and remains one of the favorite eye opening articles of my students at Rutgers University.

Her article *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*[11] contributed to the recognition of rape as a form of torture when committed by state actors in several international and regional judicial bodies, including the Inter-American Commission on Human Rights[12] and the International Criminal Tribunals for Rwanda and the former Yugoslavia.[13] One of her lasting areas of leadership was co-founding the Women's Caucus for Gender Justice, leading to the landmark codi-

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9 Rosalind P. Petchesky is a CUNY Distinguished Professor in Political Science and Women's Studies. Professor Petchesky founded International Reproductive Rights Research Action Group and has authored numerous articles and books on reproductive and sexual rights, including *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* and *Global Prescriptions: Gendering Health and Human Rights*.

10 Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence As Torture, in* RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 152 (Rebecca J. Cook ed., 1994).

11 Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217 (2000).

12 *See* Fernando and Raquel Mejia v. Peru, Case No. 10.970, Inter-Am. Comm'n H.R., 1995 OEA/Ser.L/V/II.91 (1996).

13 *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 597 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), http://www.unictr.org/Portals/0/Case%5CEnglish%5CAkayesu%5Cjudgement%5Cakay001.pdf; Prosecutor v. Muciæ et al.,

fication of gender as a protected class in the Rome Statute of the International Criminal Court ("ICC").[14] This was the first international human rights instrument to incorporate gender from the beginning, rather than women having to catch up to add it later.

It is impossible to imagine the progress of the international women's human rights movement over the past two decades in gaining a feminist interpretation of human rights without Rhonda's creative legal mind and her political persistence and persuasive arguments. She trained judges in every continent and for the ICC; U.N. Special Rapporteurs and Representatives sought her advice; and she always showed up when we asked her to speak to global activists at the Center for Women's Global Leadership at Rutgers University. Whenever we in the movement had a legal-political question someone would always say, "let's ask Rhonda," and she would respond.

It is not only her legal mind, but also her creativity and courage we celebrate. She was willing to tackle the difficult issues, whether in the *McRae* case, or in her representation in a U.S. Court of Algerian journalists, feminists, and their families, persecuted and murdered by armed Islamist groups in the groundbreaking case *Jane Doe v. Islamic Salvation Front (FIS) and Anwar Haddam.*[15] That case was so dangerous that the clients, including people who had witnessed the killing of their own children, had to remain anonymous. As Karima Bennoune noted:

> Rhonda takes up human rights causes that many other progressives have neglected and is a nearly legendary figure among Algerians working to oppose religious extremism in their country. They see her as a visionary who comprehends that the state is not the only source of threat to human rights and who understands that the most progressive stance toward the Muslim world even in the era of the 'War on Terror' is concrete solidarity with its progressives rather than apology for fundamentalism.[16]

Case No.: IT-96-21-T, Judgment, ¶¶ 494–96 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf.

14 *See* Rome Statute of the International Criminal Court, art. 7, ¶ 1(h), art., 21 ¶ 3, July 17, 1998, 2187 U.N.T.S. 90.

15 Doe v. Islamic Salvation Front (FIS), 993 F. Supp. 3 (D.D.C. 1998).

16 Karima Bennoune is a Professor of Law at the University of California-Davis School of Law, and has published widely on women's human rights, international law, and terrorism, including *The Paradoxical Feminist Quest for Remedy: A Case Study of* Jane Doe v. Islamic Salvation Front and Anwar Haddam, 11 INT'L CRIM. L. REV. 579–587 (2011) and *Terror/Torture*, 26 BERKELEY J. INT'L. L. 1, 1–61 (2008). Professor Bennoune also has served as a Legal Advisor to Amnesty International, a delegate for the Center for Women's Global Leadership at the Fourth World Conference on Women

Many people profoundly admired Rhonda's willingness to take on an uphill battle often virtually alone, a hallmark of her legal career. Rhonda was not someone you could warn that something could not be done—her response was always to try to do it and to bring you along in her effort to push the boundaries!

Her voracity for life knew no boundaries, personal or political. She wanted to know everyone, to be everywhere (even if she arrived when the event was over), and to do everything with a sense of urgency about social justice and a vast curiosity about the world that could exhaust those around her and often led to missed deadlines or very late dinners.

I remember many times that Rhonda said "We must do . . ." to which I would try to sensibly reply: "But Rhonda, who is the 'we'? Who can take it on? We are all overloaded"—but to little effect, as it rarely stopped her from finding a way to take it on herself or move others to action.

Her extraordinary willpower could manifest in stubbornness that drove us crazy, but it also helped to achieve many of the milestones discussed today. It extended her own life against all the odds: to give her time to see one more opera, make one more submission to the Inter-American Court of Human Rights, and to say goodbye to so many of those who loved her. And love her we did. The organizers for this event today did it out of respect and admiration for her extraordinary work, but above all, out of love, because she touched so many of us so deeply as a friend. Lepa Mladjenovic of Women in Black Belgrade captured this love when she wrote:

> Rhonda Copelon is admired, read, discussed and cared for all over the world. At one point her piece on rape in war as primarily a form of male violence against woman, and not just nationalism, was a keystone. It was crucial in the particular moment of the war for us feminists from the Balkans, to have our Rhonda near, knowing that all her professional and activist self, written [and] spoken is behind her political belief. And as well her tender face that gives love and meaning to her feminist theory and inspires us to cherish her.[17]

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in Beijing, and an election observer with the Dutch NGO Gender Concerns International during the Tunisian Constituent Assembly elections.

17 Charlotte Bunch, Commentary, On the Occasion of the Society of American Law Teachers ("SALT") M. Shanara Gilbert Human Rights Award, Given to Rhonda Copelon, Jan. 2009 (on file with author). Lepa Mladjenovic is a feminist lesbian activist and a feminist counselor for women who have experienced male violence, as well as lesbians, in Belgrade. She is also active in Women in Black Against War, a feminist anti-war and anti-fascist group organizing against the Serbian regime. Lepa

Fortunately, the work Rhonda goes on today. It is unfinished but her impact is lasting, and that includes her impact on training a new generation of committed feminist progressive lawyers, as seen in many of the speakers at this symposium. Rhonda remains loved and respected by many around the world who know that our world is better because she was part of it. Politically and personally, we honor her with great love and admiration.

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co-founded Arkadija (1990–1997), a lesbian and gay group, and the lesbian human rights organization Labris (1995). Lepa was counselor and coordinator of the Counseling Team at the Autonomous Women's Center (1993–2010). Lepa has edited two books, on alternatives to psychiatry and violence against women, as well as numerous essays on issues of male violence, the feminist response to war, and lesbian conditions. More recently, Lepa has worked as a facilitator of workshops on themes including: emotional literacy, discrimination against women, lesbian lives, sexual violence, and similar topics.

REMEMBERING RHONDA

Peter Weiss†

There are three types of human rights lawyers. There are those whose emphasis is on rights, the spinners of theories, analysts of decisions, writers of books and articles. Then there are those who remember that human rights is about human beings and for whom every human rights case becomes a source of intimacy with and comfort for the plaintiff/victims. And there are those, very few in number, who partake of the characteristics of both of the other two. Rhonda was in that third group.

I always envied Rhonda's capacity for instant sisterhood. It was evident in her relationship with Dolly Filártiga, whose brother was tortured to death in Paraguay,[1] and with Joyce Horman, whose husband was executed in Chile.[2] Those were the two big Center for Constitutional Rights ("CCR") cases on which we worked together. Both of them have recently come back to life after many years of quiescence. Rhonda, who was always conscious of the role played by the United States in human rights abuses in foreign parts of the world, would be thrilled to know that, in the *Horman* case pending in Chile, the judge has submitted to the Chilean Supreme Court a request for the extradition from the United States of a senior U.S. military officer implicated in the case.[3]

While gender and other human rights matters were Rhonda's principal occupation during the last two decades of her all-too-short life, she was no intellectual slouch when it came to other mat-

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† Peter Weiss is a Vice President of the Center for Constitutional Rights.

1 Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (recognizing state-sponsored torture as a violation of the law of nations, actionable in federal court pursuant to the Alien Tort Statute); *see also* Filártiga v. Peña-Irala, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/past-cases/filártiga-v.-peñ-irala (last visited Aug. 11, 2012).

2 Horman v. Kissinger, 77 Civ. 1748 (D.D.C. filed October 3, 1977) (suing Henry Kissinger and other officials of the U.S. government for their role in the death of U.S. journalist, Charles Horman, who was executed by Chilean soldiers in the days following the U.S.-backed *coup d'état* against the democratically elected government of Salvador Allende); *see also* Horman v. Kissinger, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/past-cases/horman-v.-kissinger (last visited Aug. 11, 2012).

3 *See Solicitan Extradición de Ex Militar Estadounidense por la Muerte de Dos Personas en 1973* [Request Extradition of Ex-US Military Officer for the Death of Two People in 1973], LA TERCERA, April 29, 2012, http://www.latercera.com/noticia/nacional/2012/04/680-455561-9-piden-extradicion-de-ex-militar-estadounidense-por-muerte-de-dos-personas-en.shtml#.

ters involving constitutional and international law. I will never forget the run-through she inflicted on me the day before I was to argue at an emergency session of the First Circuit a case involving the illegal bombing of Cambodia.[4] She had a hyperactive hopscotch mind, which tended to jump to the next question almost before the first was answered. Her questioning was sometimes maddening, but never irrelevant.

She was a stickler for facts and a living demonstration of her belief that anything men could do women could do as well, if not better. In my tribute to her at the CCR event shortly before her death, I committed the mistake of saying that she had helped to build her house in Noyack, which prompted the following barely audible interjection: "What do you mean, helped? I built it!"

Others have rightly described her gigantic contribution to human rights and gender law in these pages. To me she was a dear and fiercely loyal friend, and I will miss her to the end of my days.

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[4] Drinan v. Ford 516 F.2d 894 (1st Cir. 1975). The challenged bombing stopped shortly before the hearing, rendering the case moot; *see also* Drinan v. Ford, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/past-cases/drinan%2C-et-al.-v.-ford%2C-et-al. (last visited Aug. 11, 2012).

"CRUCIAL AS BREAD": REMEMBERING RHONDA COPELON'S PIONEERING WORK

Yifat Susskind†

It has been two years since the passing of Rhonda Copelon, a women's human rights advocate and lawyer. While we feel her absence, women worldwide also feel the presence of her vital work. She changed the face of international law, molding it into a tool that could better protect women. Her work was critical in winning recognition of rape as a war crime and a crime against humanity.

In my work at MADRE, an international women's human rights organization, I had the opportunity to work with Rhonda. I met her in my late twenties in 1997, when I came from Jerusalem to New York to work with the organization. I was invited to dinner at the home of our longtime Executive Director Vivian Stromberg. This was a home that Vivian shared for many years in Brooklyn with Rhonda, so Rhonda joined us for dinner, and Rhonda very kindly asked me about myself. She wanted to know what I had been doing in Jerusalem. I told her that I had been part of a joint Israeli-Palestinian human rights organization and that I had been running a project for Palestinian political prisoners.

Rhonda reached across the table, patted my hand and said, with warmth and not a bit of condescension, "Oh, sweetie, that is so great!" And I felt honored.

I knew who Rhonda was, not because I was a lawyer, but because I was an activist. This speaks volumes about the impact of Rhonda's work in the world. What Rhonda did for those of us who are human rights activists was to create a treasure trove of strategies for how we could change conditions on the ground using international law.

This is a model that MADRE has pursued in our human rights advocacy for decades, and it is a model that was pioneered in many ways by Rhonda herself. This model is all about making international law relevant, accountable, and *useful* to women in the communities where violations are actually happening.

Of all of Rhonda's cases, the ones that touch most closely on

† As Executive Director of MADRE, Yifat Susskind works with women's human rights activists from Latin America, the Middle East, Asia, and Africa to create programs in their communities to address women's health, violence against women, economic, environmental justice, and peace building.

the work we do at MADRE are the cases in which Rhonda argued that rape committed during armed conflict is not incidental violence.[1] Rather, when committed by state actors, rape is an act of torture, and under certain circumstances, an act of genocide.[2] She won rulings that created new norms in international law.

I have worked over the years with the women these laws aim to protect; women from the former Yugoslavia, Rwanda, Haiti, and from other countries as well, who suffered those politically motivated rapes that Rhonda fought to prosecute. I know from these women how critical those rulings have been to their ability to recover from what happened to them, to face what happened with self-respect, to command respect from others, to overcome tremendous and life-threatening stigma. These rulings allowed them to not just heal and rebuild their own lives, but to participate more effectively in rebuilding their communities and their countries.

I once spoke with a woman from Bosnia who said that Rhonda's work was "as crucial as bread" to her and her daughters in being able to overcome what they experienced in the war. "As crucial as *bread*;" that is Rhonda's work.

The last time that I ever spoke with Rhonda was in the spring of 2010. She called me incensed about something that she had seen on television, something that many of us saw: images of women in Port-au-Prince, Haiti after the earthquake standing in line to receive food aid, and those women being shoved out of the way by men, being yelled at to get to the back of the line, having their food parcels torn out of their hands.

Rhonda said to me, "We've got to do something. It is so unjust." I was struck by the weight of that truth, because that in fact was the whole problem—that it was so unjust—and Rhonda said it plainly. It made me think about how we tend in our work to traffic

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[1] While Director of the International Women's Human Rights Clinic at CUNY Law, Rhonda Copelon authored amicus briefs influencing several landmark international criminal cases. *See, e.g.*, Prosecutor v. Duško Tadic, Case No. IT-94-1-I, Indictment (Amended), ¶ 4.3 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1995); Kelly D. Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 101 (1999) (noting the independent rape charge in the Tadic case was withdrawn at trial because the witness was afraid to testify); Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731-734 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) (finding Akayesu guilty of genocide and sexual violence at the Taba commune).

[2] Comm. Against Torture, General Comment 2, Implementation of Article 2 by States Parties, ¶ 22, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (emphasizing gender as a "key factor" in the implementation of the Convention Against Torture).

in complexities. Politics is complicated, and legal strategy can be complicated. But much of the time, *justice* is simple. Rhonda never lost sight of that.

ROADMAP TO A BOLDER FUTURE: RHONDA COPELON'S LEGACY

Vincent Warren†

The Center for Constitutional Rights ("CCR") is very proud to be the co-sponsor of this wonderful symposium, honoring and building on the legacy of Rhonda Copelon. We are also proud to co-sponsor with MADRE, another fierce, brilliant organization that Rhonda was deeply invested in.

Rhonda Copelon was one of my heroes before I ever met her. I'm fortunate to have had Rhonda as a colleague when we were both on the CCR board together, and as a mentor and friend when I became the Executive Director. In thinking about the "looking-forward" part of this Symposium, the Symposium conveners expressed the hope that people who didn't know Rhonda might get a sense of what her work was like and what the roadmap and inspiration could be for our current work as we move forward. Since the panels are very heavy on strategy and look deeply at international and domestic applications and implications for Rhonda's work, I thought I would talk about a different aspect of Rhonda's roadmap for the way forward.

Rhonda's roadmap does not merely push us to come to better policy and advocacy solutions for the world's problems, but it also pushes us to become better people. And, particularly as people that work together toward social change, when we form ourselves into organizations, Rhonda's roadmap causes the organizations to become better organizations.

I wanted to talk today about Rhonda's work and how it has created a roadmap and inspiration for CCR as we move our social justice work forward. When I began leading CCR, Rhonda gave me a series of what she called suggestions. The urgency and frequency of her expressions really compelled me to think of them more as demands. And here are the demands that Rhonda laid out for me as the new executive director for CCR five years ago:

> Vince, you need to surface gender. Gender needs to surface throughout CCR's work. You need to challenge patriarchy. You need to consult, and, after you are done consulting, you need to consult more. And then you need to consult again. Act boldly, but be careful. Align with those that are most affected by the

† Vince Warren is Executive Director of the Center for Constitutional Rights.

> policies and practices that you are challenging. Align with the activists who are supporting those that are most affected by the policies and practices you are challenging. And most importantly, don't ever give up, because justice is possible.

So how does that play out in the context of a human rights organization? Rhonda was very clear on the piece about surfacing gender and challenging patriarchy. I have to say, as the Executive Director of CCR, who is a man and a feminist, this is a tremendous challenge. However, if there is a patriarchal aspect to CCR, then I am the one who is responsible for recognizing it and addressing it. I think that what Rhonda has done by supporting my vision for CCR and believing in where we could take the work, is that she has actually challenged me to *be challenged* around gender and patriarchal constructions. That's a good thing.

So we have taken steps to surface gender within CCR. Both in terms of how we work together and also in terms of the work we generate. As Dean Anderson aptly put it, we at CCR have "put the lenses on," so that we can actually see the gender and lesbian, gay, bisexual, and transgender ("LGBT") implications and applications within the work that we are doing, surface them, and work to figure out what we are going to do about them.

With respect to patriarchy in our workspace, we are organizing ourselves in a way that women, LGBT folks, and folks of color within the organization are being and feeling heard. We organize ourselves intentionally in order to bring our boldest and most creative ideas, perspectives, and legal theories to the table internally. We then turn them outward to the world through our litigation and other advocacy. In this way, our internal values necessarily affect our work and take us closer toward the change we want to make in the world.

With respect to how that work actually happens, the important thing that Rhonda told me, was that she really did not want to see a "gender docket" at CCR. When I asked her why not, she replied, "If you have a gender docket within the Center for Constitutional Rights—people whose only job it is to work on gender and LGBT issues—then you have every other docket feeling that it is not their job to work on gender and LGBT issues. She was very clear about not having the dockets within CCR reflect the siloed discussions that are happening out there in the world. At some level, it is CCR's job to challenge the structures that marginalize the meaningful gender and LGBT discussions in the world. Therefore, we

must take care that those structures are not built into the fabric of our own organization.

Moving from that, Rhonda very generously created the Copeland Fund for Gender Justice within CCR. The two main aspects of that fund are to support work relating to the intersections between race, gender, LGBT status, and class; and also to challenge the evangelical and religious fundamentalist power structures that silence, repress, criminalize, injure, and kill women and LGBT folks. And so utilizing that framework, we have begun to think through what work we can generate, including the work generated in partnership with the people in this auditorium, to move those pieces forward and take affirmative steps toward dismantling some of these structures that we are seeing.

I am happy to report that while it has not been that long since Rhonda left us, we have had some tremendous movement within the organization that has externalized itself in very surprising and powerful ways. You will find (for the law students among you) that being able to articulate a legal framework and file a case or create an advocacy campaign in partnership with community is a deeply powerful thing. It is also a very hard thing to do. But you will also find, as Andrea Richie was talking about, in the Solicitation of a Crime Against Nature ("SCAN") case in Louisiana, that there are moments when you win. That is an indescribable moment and frankly it does not happen very often. But nonetheless, it is a moment in which you are then left with the following, dawning revelation: "now that we have won the case, what the heck do we do now?" I hope that you all find yourselves in that situation saying, "We've won, what the heck do we do now?"

With respect to some of the work we've done, there is *Doe v. Jindal*,[1] (the "Solicitation of Crimes Against Nature" case), which Andrea mentioned at the end of her talk. In this case, CCR successfully challenged the unconstitutional manner in which sex workers and others who performed certain consensual sexual acts were designated and punished as sex offenders by the State of Louisiana. Among many interesting things about that case, and why it fits in

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[1] *See* Doe v. Jindal, 851 F. Supp. 2d 995 (E.D. La. 2012) (ruling the SCAN sex offender registration requirement violated the Equal Protection Clause). CCR has subsequently filed a federal class action lawsuit seeking to remove from the sex offender registry the hundreds of people who are still forced to register solely as a result of a SCAN conviction, despite the March 29, 2012 ruling in *Doe v. Jindal* that deemed that practice unconstitutional. *See* Complaint, Doe v. Caldwell, No. 2:12-CV-01670 (E.D. La. June 23, 2011), *available at* http://ccrjustice.org/files/Doe-v-Caldwell-Complaint-6.27.2012.pdf.

with Rhonda's legacy, is that the case was brought to CCR by Andrea and was brought to Andrea by a grassroots group called Women With a Vision.[2] This was a movement case at its core, brought by the people most deeply affected by the law—sex workers, most of whom were women of color, many of them, gay men or transgender women. For people that read about the case, and maybe people will teach it in course books, people might make the mistake to say that it was, at essence, a pure civil liberties or sex offender case. It was so much more than that.

This was a case in which lawyers partnered deeply with community groups and women who were oppressed under this terrible law that criminalized sexual behavior by requiring harsher punishments for sexual behavior perceived to be linked to lesbian and gay activity. We partnered with Women with a Vision, which demanded they not be put aside as lawyers decided what to do. They looked to lawyers to help them figure out how to remove some of the obstacles they were facing in their ongoing advocacy and activism. That is what that case was about. It was about transgender women. It was about African-American women. It was about gay men who were doing sex work in Louisiana. The case had the additional effect of serving a broader civil liberties goal of limiting the government's ability to, as we talked about in the earlier panels today, criminalizing and demonizing whole groups of people.

With respect to the fundamentalism and evangelical work, we have also had some successes. Some of you may have heard about a case that CCR filed in September of this year where we petitioned the International Criminal Court ("ICC") to investigate high-level officials in the Vatican for rape and sexual violence against children and vulnerable adults under the Rome Statute.[3] I hope that Pam Spees will talk a little bit about that case later if she can. It is a very bold case. But also it is a very careful case and people should not make the mistake of thinking that this is simply a case about the Vatican and child sexual abuse. This is also about patriarchy. This case is about building on the work that Rhonda and others in this auditorium did with respect to the Rome Statute and the founding statutes of the ICC. Following their efforts to surface gender in the ICC, this case is an opportunity to link to and actualize

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2 WOMEN WITH A VISION, http://wwav-no.org (last visited Aug. 11, 2012).

3 *See* File No. OTP-CR-159/11, Victims Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-Level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity, (Int'l Crim. Ct. Sept. 13, 2011), *available at* http://www.ccrjustice.org/ICCVaticanProsecution.

that foundational work. It is an opportunity to push the jurisdictional envelope and take the case beyond the wartime paradigm with respect to Rwanda and Yugoslavia (states that are perpetrating violence against women as a part of their war making) and to think about jurisdiction to investigate organizations who aid and abet rape globally—whose entire makeup is about secrecy, silence, and hierarchy. The Vatican is completely incapable of policing itself when it comes to global rape by church officials, and it is our view that the ICC is the perfect place for these investigations to happen.

You also may have heard about a case that we filed last week. *Sexual Minorities Uganda v. Lively* is an Alien Tort Statute ("ATS") case that was filed to hold a particularly outlandish U.S. evangelical responsible for persecution of LGBT people in Uganda.[4] Again, I hope Pam Spees talks more about the case, but the point I wish to make here is that when you go back to what Rhonda counseled about looking at the fundamental structures of oppression—how evangelicalism and how fundamentalism repress and silence women and LGBT people, it is a massive problem that each one of us has a very difficult time wrapping our heads around, much less figuring out what to do about it. I am quite proud of the work we have been doing through the Rhonda Copelon Fund. This case and the ATS really take the issue to the courts as a vehicle to investigate, mine, explore, and hold people legally accountable for persecution abroad. It has the potential for a powerful impact, not only in the jurisprudential sense, but also in the justice sense, because this is a community case. This is a case that was brought to CCR by Frank Mugisha and other folks at Sexual Minorities Uganda ("SMUG") who came to us and told us that they were involved in a battle for their lives with respect to the Ugandan government. The things that they told us they needed our partnership on legally, were the long and powerful reach of anti-gay U.S. evangelicals that are making all of this possible. Our role in the broader movement is to deal with this U.S. evangelical piece.

There are other cases and issues that we are working on where gender is surfaced, but it does not necessarily get written up in the New York *Times* or the Washington *Post* or, even Truth Out newsletters. There are two examples I would give you.

One is in Honduras and one is in New York. In the Honduras context, we filed a case challenging political repression, killing,

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[4] Sexual Minorities Uganda v. Lively, No. 3:12-CV-30051-MAP (D. Mass. July 13, 2012); *see also LGBT Uganda Fights Back: The Case Against Scott Lively*, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/LGBTUganda/ (last visited Aug. 11, 2012).

and violence following the *coup* in Honduras in 2009.[5] The gender piece in that project is that the organizing bodies—the groups on the ground that are organizing to get the issues around the *coup* addressed—are led by women and LGBT folks in Honduras. While that is not something that is widely known to most people in the U.S., it is significant in terms of their organizing strategy. As someone was saying on an earlier panel, you have to be careful when you activate because the reaction can be just as strong. The reaction in this context in Honduras has been violent reprisal.

Even though some of these issues do not dictate the manner in which we argue our legal positions, we are trying to hold the gender pieces of this work in a way that reminds us of what we are fighting against and, more importantly, what we are fighting for.

Lastly, with respect to stop-and-frisk, you might ask what the New York City Police Department ("N.Y.P.D.") stopping more than 600,000 people a year has to do with gender and LGBT issues. If you do not know the answer to that question, I recommend Andrea Ritchie and Joey Mogul's book, *Queer (In)Justice* to you.[6] It was a revolutionary text for me—virtually everyone at CCR has read it. It even reframed how we think about racial justice issues by looking at the intersection. It is important to note that of the 600,000 stops that happen, over 84% of those are of Black and Latino folks. That is clearly problematic, unconstitutional, and it needs to be stopped. But if you look a little bit deeper, you begin to see the impact on other groups within that cohort. How does it affect LGB youth? How does it affect transgender youth? How does it affect the laws with respect to carrying a condom in your pocket. In New York, a condom can be considered indicia of sex work, and if you are a young, queer person that has a condom in your pocket in one of the many stops the N.Y.P.D. subjects you to, then that gives them an extra charge to put on you.[7] So surfacing gender and LGBT issues even within the racial profiling context, is deeply important.

Rhonda said to us, "Surface gender." I now say to you, "Surface gender." For those of you that will be working in organizations—either an organization that only works on gender issues or an or-

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5 *See* Complaint, Murillo v. Micheletti Bain, No. 4:11-CV-02373 (S.D.T.X. June 23, 2011), *available at* http://ccrjustice.org/honduras-coup.

6 *See* JOEY MOGUL, ANDREA RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES (2011).

7 *See generally* CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT (2012), *available at* http://stopandfrisk.org/the-human-impact-report.pdf (exploring the impact of the New York City Police Department's stop-and-frisk practices on people's lives).

ganization that works on a broad range of issues, take up the challenge. Ask yourselves, ask your colleagues. Create structures where the conversations around gender surface. If you do not surface those conversations, they will not happen. If they do not happen, your organization and your work will become as marginalized with respect to these issues as the structures that we are trying to push back against.

Finally, Rhonda told us to act boldly and be careful. Initially, that puzzled me. How does one act boldly and be careful at the same time? Rhonda has helped me learn a sacred truth about social justice work, which I want to share with you. This truth is that living in the tension between what is possible and what is actual, is what we do. If that stresses you out, you need to find another way to deal with that, because that is the place that we will always be. We will fight and we will love and we will dance and we will sing. But we will fight together and we will struggle together through this tension. So please, be bold, do not let the carefulness with which your colleagues outside this room want to tread diminish your boldness. At the same time do not let the boldness that other people want to push through on an issue diminish your desire to be careful to make sure that the work you are doing is actually supporting communities actually advancing movements, because that is the role of a lawyer. No lawyer in the history of the world has ever made social change by herself. Our job is to remove obstacles; our job is to make the path easier and to clear the path. You have to do that by being bold, and you have to be very careful.

CREATING LEGACY TODAY: THE FIRST LGBT RULING BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Jessica Stern†

It is a great honor to speak at a symposium on Rhonda Copelon's legacy. I once had the pleasure of hearing Rhonda speak to a small group of dedicated activists at the Center for Women's Global Leadership, and her passion infused the room and sent everyone furiously taking notes. In talking about her work, I know that same inspiration will guide us today.

I have been asked to speak today about the case of Karen Atala, a lesbian judge and mother from Chile who made history on March 21st of 2012 by winning the first-ever lesbian, gay, bisexual, transgender ("LGBT")-specific case to go before the Inter-American Court of Human Rights.[1] Rhonda Copelon supported Karen's work both legally and emotionally, so it is a fitting topic today.

But before I go into Karen Atala's case, I want to note another LGBT Chilean who recently made headlines. Daniel Zamudio, a clothing salesman, was attacked in a park in Santiago on March 3rd, and he died on Tuesday of this week.[2] The suspects allegedly beat him and burnt him with cigarettes for more than an hour. According to a summary of police reports published online:

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[1] Atala Riffo & Daughters v. Chile, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012), *available at* http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf.

[2] *Chile Prosecutors Seek Murder Charges over Gay Attack*, BBC NEWS, Mar. 28, 2012, http://www.bbc.co.uk/news/world-latin-america-17544423.

> [The attackers] hit him again. This time stronger and with kicks, punches in the head, face, testicles, legs, and all over the body. [One of the accused] admits that he kicked Zamudio a couple of times, but by then Zamudio was already passed out and bleeding through the nose and face. The same person also reported that the attackers didn't even need to hold Zamudio still when they carved swastikas into his flesh, three in total, using the neck of a soda bottle that they broke minutes before on his head.[3]

He was already unconscious. Daniel Zamudio was only twenty-four when he died. The non-discrimination bill that might have protected him has languished in the Chilean Parliament for seven years.[4]

Despite setbacks and persistent intolerance embodied in tragedies like Daniel Zamudio's death, the idea that discrimination on the basis of sexual orientation and gender identity is a violation of human rights has found acceptance in the last decades, making enormous strides in the jurisprudence and legislative decisions of many countries and international bodies. The good news I am here to share today is that the growing trend in customary international law is to find a protected class based on sexual orientation, and increasingly gender identity, with the European Court of Human Rights, the United Nations human rights bodies, the Inter-American System, courts and national legislatures globally regularly concluding that discrimination on the basis of sexual orientation and/or gender identity violates human rights.[5] Now, I would like to explore this point within the context of a specific case concerning another Chilean.

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3 *Who Are the Nazis Who Attacked Daniel Zamudio?*, CLINIC ONLINE, Mar. 20, 2012, http://www.theclinic.cl/2012/03/20/quienes-son-los-nazis-que-atacaron-a-daniel-zamudio/ (translated by author).

4 Chile's Congress passed the law one month following Zamudio's murder, seven years after it was first proposed. *Chile Passes Anti-Discrimination Law Following Daniel Zamudio's Death*, HUFFINGTON POST, (Apr. 4, 2012, 9:55 PM), http://www.huffingtonpost.com/2012/04/05/chile-discrimination-law-daniel-zamudio-gay-death_n_1405406.html; *see also Chile: President Signs Anti-Discrimination Law*, N.Y. TIMES, July 12, 2012, http://www.nytimes.com/2012/07/13/world/americas/chile-president-signs-anti-discrimination-law.html. Chile's President signed it into law in July 2012. The law criminalizes "any distinction, exclusion or restriction that lacks reasonable justification, committed by agents of the state or individuals, and that causes the deprivation, disturbance or threatens the legitimate exercise of fundamental rights." Law No. 20609, July 12, 2012 (Chile) *available at* http://bcn.cl/scdh (translated by author).

5 *See* Brief for Int'l Gay and Lesbian Human Rights Comm'n et al. as Amici Curiae Supporting Petitioner at 10–11, Karen Atala & Daughters v. Chile, Case 12.502, Inter-Am. Ct, H.R., CDH-S/2092 (2011) [hereinafter 2011 IGLHRC Brief], *available at* http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/563-1.pdf.

A. The Case of Karen Atala

In a widely publicized case, Karen Atala lost custody of her three daughters, who were then ages five, six, and ten years old, in 2004.[6] When she and her husband of nine years decided to separate, they agreed that their daughters should remain with her. However, when she fell in love with another woman, that all changed. On January 30, 2003, within weeks of Karen's then-partner moving into her home, the girls' father filed a legal action claiming that the children would suffer harm if they lived in a home with their lesbian mother and her partner.[7]

The case made its way all the way through the Chilean courts, and in reference to Ms. Atala's sexuality, the Supreme Court of Chile issued a homophobic verdict, plain and simple. On May 31, 2004, three of the five justices on the Supreme Court overturned the decisions of both the trial court and the court of appeals. They characterized the daughters as being in a "situation of risk" that placed them in a "vulnerable position in their social environment, since clearly their unique family environment differs significantly from that of their school companions."[8] The Court changed lives when, with derogatory assumptions, it stated:

> [G]iven their ages, the potential confusion over sexual roles that could be caused in [the daughters] by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected.[9]

With those words, Karen lost her children.

B. Regional Redress

Karen Atala was not only a devoted mother, but also an adept lawyer and judge who built a legal team that determined in 2004 that while she had exhausted domestic remedies, there was an opportunity to seek justice from the regional human rights system. As party to the American Convention on Human Rights, the Government of Chile is bound to its provisions, like all other States parties of the Americas. This means that if an individual cannot obtain justice at the domestic level, under specific circumstances, the In-

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[6] Brief for Int'l Gay and Lesbian Human Rights Comm'n et al. as Amici Curiae Supporting Petitioner at 5, Karen Atala Riffo v. Chile, Case P-1271-04, Inter-Am. Comm'n H.R. (Jan. 19 2006) [hereinafter 2006 IGLHRC Brief], *available at* www.nycbar.org/pdf/report/Atala.pdf.

[7] *See id.*

[8] *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R (ser. C) No. 239, ¶ 57.

[9] *Id.* ¶ 57.

ter-American human rights system may have jurisdiction to intervene and require that the State take certain actions.

For those of us who know what it means to be systematically discriminated against by state action that is racist, sexist, Islamophobic, able-bodyist, transphobic, homophobic, and/or discriminatory in some other way, it may be a relief to know that there are norms and standards beyond national borders that we can turn to when domestic mechanisms fail.

C. The Procedural History

To summarize, much happened in Karen Atala's pursuit of justice through the Inter-American human rights system. From 2004 to 2007, at the behest of and with assistance from the Inter-American Commission on Human Rights ("Commission"), the parties attempted to reach what is termed a "friendly settlement." During that time, various NGOs—including IGLHRC, the International Women's Human Rights Clinic ("IWHR Clinic") of CUNY School of Law under Rhonda's supervision, and ten other groups—submitted an amicus brief to the Commission in support of Karen Atala.[10] In late 2007, Karen Atala and her legal team informed the Commission that negotiations failed and requested that the Commission admit Karen Atala's case to the Commission's own review. Over protest by Chile, the Commission admitted her case.

In December 2009, the Commission issued a landmark decision finding that Chile violated Karen Atala's right to freedom from discrimination guaranteed by the American Convention on Human Rights.[11] Furthermore, the Commission required the Government of Chile to provide Karen Atala with "comprehensive redress for the human rights violations that arose from the decision to withdraw her custody on the basis of her sexual orientation" and also called upon Chile to "adopt legislation, public policies, programs and initiatives to prohibit and eradicate discrimination on the basis of sexual orientation."[12] Progress, at least of the formal variety, leapt forward.

Over 2010, the State of Chile met in an inter-governmental working group to address the Commission's recommendations. However, the Commission ultimately concluded that the State "failed to comply with the recommendation to provide reparations" and that "the measures outlined by the State of Chile, al-

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10 2006 IGLHRC Brief, *supra* note 6.

11 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R (ser. C) No. 239, ¶ 2 n.5.

12 *Id.*

though relevant, are of a general character and are not directed in a specific way to avoid repetition of the violations that occurred."[13] As a result, the Commission submitted the case to the jurisdiction of the Inter-American Court of Human Rights.

In July 2011, the Inter-American Court of Human Rights announced that it would hear the case of *Karen Atala and Daughters v. Chile* in late August of 2011.[14] IGLHRC, the IWHR Clinic, and the law firm Morrison & Foerster, carrying on Rhonda's legacy, and thirteen other parties submitted a joint amicus brief.[15] IGLHRC and the IWHR Clinic built an argument that sexual orientation and gender identity should be found to be a protected class under the American Convention on Human Rights as held under international law. Attorneys from Morrison & Foerster focused on the custody issue at hand, arguing that sexual orientation and gender identity should not be factors in custody determinations. The brief's other parties included thirteen other organizations, including Human Rights Watch, Amnesty International, and the New York City Bar Association.

D. The Verdict

On March 21, 2011, the Inter-American Court ruled in favor of Karena Atala. The court found that the Government of Chile must pay Atala $50,000 in damages plus $12,000 in court costs.[16]

More significantly, however, the decision reads, "any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no regulation, decision, or practice of domestic legislation, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on their sexual orientation."[17]

E. The Implications

The court's verdict will have far-reaching implications that courts, human rights defenders, NGOs, lawyers, and, crucially, LGBT people should now apply. The following are some of the reasons why.

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[13] Karen Atala and Daughters v. Chile, Case 12.502, Inter-Am. Comm'n H.R., Report No. 42/08 ¶ 39 (2010).

[14] *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R (ser. C) No. 239, ¶ 7.

[15] 2011 IGLHRC Brief, *supra* note 5.

[16] *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R (ser. C) No. 239, ¶¶ 299, 306.

[17] *Id.* ¶ 91.

First, the court's decision is legally binding, and the Government of Chile has already agreed to abide by its terms. At this crucial moment in Chile's history, the decision may reinforce domestic progress including on the non-discrimination bill that has been revitalized by Daniel Zamudio's murder.

Second, the court has relatively little history of work on discrimination, so its decision to hear a case about discrimination on the basis of sexual orientation means that the Inter-American Court of Human Rights has taken the extraordinary step of establishing its understanding of discrimination at least in part based on its understanding of homophobia. This is remarkable. Compared with most jurisdictions where sexual orientation and gender identity are late-day add-ons, interpreted into existing norms, and even designated as a less egregious manifestation of discrimination than issues like religion or race, this decision stands to put sexual orientation and gender identity at the center of the court's understanding of a fundamental right.

Third, the court's favorable verdict amounts to the first decision by a regional human rights court, outside of the European Court of Human Rights, to rule explicitly in favor of LGBT rights.[18] The significance of this cannot be overstated.

Fourth, the favorable decision by the court contributes to the growing perception that sexual orientation and gender identity should not only not be ignored but in fact constitute a protected class that must be protected from discrimination. Again, the significance of this development cannot be overstated.

As I conclude, I want to recall at this conference about legacy that Tuesday not only brought the death of Daniel Zamudio but also of Adrienne Rich, the feminist and lesbian essayist and American poet who, though older, was in many ways Rhonda Copelon's contemporary. We mourn her passing for she, like Rhonda, contributed so much to the struggle for gender and sexual justice. In fact, in her defiant 1968 poem about the struggle for women's rights, she wrote:

I'd rather
taste blood, yours or mine, flowing
from a sudden slash, than cut all day

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[18] As early as 1999, the European Court held that the discharge of members of the Royal Air Force on the basis of their homosexuality violated the European Convention on Human Rights. Smith and Grady v. United Kingdom, App. Nos. 33985/96 and 33986/96 (Eur. Ct. H.R. 1999).

with blunt scissors on dotted lines
like the teacher told.[19]

Let it be that the legacies of Rhonda Copelon and of Adrienne Rich, the work we both honor today and carry forward in our own practice, put an end to senseless deaths like that of Daniel Zamudio, put an end to the injustice done to LGBT parents like Karen Atala, and paves the way for the long lives, safety, joy, and liberation of us all.

[19] ADRIENNE RICH, *On Edges*, *in* LEAFLETS: POEMS 1965–1968 45 (1st ed. 1969), *available at* http://www.poetryarchive.org/poetryarchive/singlePoem.do?poemId=430.

LIVING THE LEGACY OF RHONDA COPELON

Andrea J. Ritchie†

It is an incredible honor to be on this panel, with this group of trailblazers for the human rights of lesbian, gay, bisexual, transgender, and/or queer ("LGBTQ") people and to be asked to participate in paying tribute to and building on Rhonda's long legacy of domestic and international advocacy for gender- and sexuality-based rights. My contributions to today's discussions are not so much around cutting-edge developments in the international law of sexual rights, but rather the application of international law to domestic issues of state violence, and particularly violence at the hands of law enforcement agents, against LGBTQ people.

In 2005, Amnesty International published *Stonewalled: Police Abuse and Misconduct Against Lesbian, Bisexual and Transgender People in the U.S.*,[1] finding widespread violations of the rights of LGBTQ people, and particularly LGBTQ people and youth of color, by law enforcement officers across the United States. This groundbreaking report documented patterns of profiling, arbitrary arrest and detention, cruel, inhuman, and degrading treatment, as well as physical and sexual violence amounting to torture under international law, failure to protect from violence, and denial of the redress and remedies required by international law. I had the privilege of serving as expert consultant, lead researcher, and co-author of the report, which looked to international standards that were and continue to be far more evolved than domestic law with respect to the protection of the rights of LGBTQ people, particularly where state violence based on gender and sexuality is concerned. A critical achievement of that report was to highlight the reality that violations of the rights of LGBTQ people to be free

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[1] AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 45–47 (2005), *available at* http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf.

from torture and cruel, inhuman, and degrading treatment, arbitrary arrest and detention, state and interpersonal homophobic and transphobic violence, and interference with freedom of movement and expression continue to take place here in the U.S., and that existing remedies for rights violations are failing LGBTQ communities, and particularly LGBTQ youth and people of color, and low-income and homeless LGBTQ people.

Stonewalled, and the research that informed it, formed the basis, in part, of a shadow report developed for the 2006 review of the U.S. government's compliance with the U.N. Convention on Torture[2] called *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse in the United States*.[3] The report not only highlighted continuing rights violations by law enforcement agents across the U.S., but also centered gender- and sexuality-based experiences of police profiling and brutality within the larger context of race- and poverty-based policing practices.

Our advocacy to the Committee Against Torture ("CAT") specifically focused on physical and sexual violence against women and LGBTQ people by law enforcement agents, and therefore relied on one of Rhonda's many legacies—and the one dearest to my heart—the notion that rape and sexual violence by law enforcement and correctional officials constitute torture under international law.[4] Thanks to Rhonda's tireless advocacy and connections with critical Committee members—all of whom were, of course, also her personal friends—and her willingness to show us the ropes of international human rights advocacy, we were able to secure a finding from the CAT expressing concern about sexual assault against people in detention, including police custody and pre-trial and immigration detention.[5] The Committee went on to note that people of "differing sexual orientation" are particularly vulnerable

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2 *See* Rep. of the U.N. Comm. Against Torture, Considerations of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture; United States of America 36th sess., May 1–19, 2006, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006) [hereinafter CAT Commitee Report].

3 Andrea J. Ritchie et al., In the Shadows of the War on Terror: Persistent Police Brutality and Abuse in the United States (2006), *available at* http://www.theadvocatesforhumanrights.org/uploads/shadow_report_to_cat_on_police_brutality_final.pdf.

4 Raquel Martín de Mejía v. Perú, Case 10.970, Inter-Am. Comm'n. H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7, ¶ 157 (1996), *available at* http://www1.umn.edu/humanrts/cases/1996/peru5-96.htm; *see also* Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. Doc. E/CN.4/2005/72 (Jan. 17, 2005) (by Yakin Ertürk).

5 CAT Committee Report, *supra* note 2, ¶ 32.

to such abuse, and called on the U.S. to implement preventative measures and ensure prompt and thorough investigation and accountability for such acts.[6] The CAT also issued a finding expressing ongoing concern regarding police brutality and excessive force by law enforcement agents, noting numerous allegations of ill treatment of persons of differing sexual orientation, which had not been adequately investigated.[7]

When we returned to Geneva for the review of the U.S. government's compliance with the International Covenant on Civil and Political Rights ("ICCPR") a few months later,[8] we once again raised issues of physical and sexual violence against women and LGBTQ people by law enforcement officers, as well as issues of race- and gender-based profiling of Black and Indigenous women in the context of the war on drugs; Arab, Middle Eastern, South Asian and Muslim women in the context of the war on terror; and gay men, transgender women, and women of color in the context of the policing of sex work. We highlighted the ways in which gender nonconformity gives rise to heightened police surveillance, scrutiny, and presumptions of violence, criminality, and involvement in sexual offenses. In one of my favorite moments in international human rights advocacy, Human Rights Committee Member Michael O'Flaherty held up the Amnesty Report during questioning of the U.S. on its track record of enforcement of the ICCPR domestically, and demanded to know what the U.S. government was doing about the patterns of human rights violations against LGBTQ people documented in the report. When issuing findings expressing concerns regarding ongoing police brutality in the U.S., the Human Rights Committee specifically highlighted the experiences of women.[9]

Finally, in 2008, during a concerted effort coordinated by the U.S. Human Rights Network, over 200 representatives from a broad range of local, state, and national organizations collectively participated in the U.N. Committee on the Elimination of Racial Discrimination's ("CERD") review of the U.S. government's com-

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6 *Id.*

7 *Id.* ¶ 37.

8 Rep. of the U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee; United States of America 87th sess., July 10–28, 2006, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), *available at* http://www2.ohchr.org/english/bodies/hrc/hrcs87.htm.

9 *Id.* ¶ 30 (calling for an end to the use of TASERs on pregnant women).

pliance with CERD,[10] submitting over twenty shadow reports on issues ranging from housing to labor to prison and policing.[11]

As part of this process, Rhonda helped ensure that the experiences of LGBTQ people were addressed in each and every one of these reports, offering up the considerable research and advocacy skills of one of her students at the time—who is largely responsible for all of us being here today—one Lisa Davis. Additionally, two transgender women of color, one of whom was Miss Major, a leader of the Stonewall uprising, survivor of the New York state prison system and currently the Executive Director of the Transgender, Gender Variant, & Intersex Justice Project[12] ("TGI Justice"), joined us in Geneva. Together, we broke new ground with the Committee in illuminating the intersections of race-, gender-, and sexuality-based rights violations.

Fierce and skilled advocacy yielded yet another one of my favorite international human rights advocacy moments, when, during opening remarks of the formal hearing on U.S. compliance with the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), the Rapporteur demanded to know what the U.S. government was doing to address the ongoing scourge of racial profiling, and its devastating impacts on communities of color, women of color, and on transgender women of color. Tears were rolling down the face of women, including Miss Major and her colleague, whose voices and experiences are so rarely heard by people in power, and for whom international human rights advocacy offered an opportunity to see their government directly confronted for violations of their rights in front of the entire world. These are the types of moments Rhonda's years of international human rights advocacy made possible.

The findings of the CAT and ICCPR are not, six years later,

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10 *See* Rep. of the U.N. Comm. on the Elimination of Racial Discrimination, 72nd sess., Feb. 18–Mar. 7, 2008, *available at* http://www2.ohchr.org/english/bodies/cerd/cerds72.htm; *see also* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

11 *See* ICERD Shadow Report 2008, U.S. Human Rights Network, *available at* http://www.ushrnetwork.org/content/resourcegroup/icerd-shadow-report-2008 (last visited Apr. 15, 2012); *see also* Andrea J. Ritchie & Tonya McClary, In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the U.S. (2d Periodic Rep., Apr. 2006), *available at* http://www.ushrnetwork.org/sites/default/files/9_PoliceBrutality.pdf; Andrea J. Ritchie & Joey Mogul, In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the U.S. (2d and 3d Periodic Rep., Dec. 2007), *available at* http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN15.pdf.

12 *See* Transgender, Gender Variant, & Intersex Justice Project, www.tgijp.org (last visited Sept. 10, 2012).

cutting-edge developments, but nevertheless represent promises unfulfilled, and opportunities for ongoing advocacy as well as continued engagement with the U.S. government in the context of upcoming reviews of its compliance with the ICCPR and the U.N. Convention Against Torture.[13] I have cited the CAT and ICCPR findings before the Prison Rape Elimination Commission with respect to sexual violence by law enforcement agents in police lockups,[14] in the context of advocacy to secure comprehensive changes to the New York City Police Department's ("NYPD") policies and practices with respect to the treatment of transgender New Yorkers,[15] and as part of an emerging city-wide campaign to challenge the NYPD's discriminatory, unlawful, and abusive policing practices such as stop and frisk, profiling, and targeting of particular communities, including LGBTQ youth of color.[16] I hope these hard-won statements from the highest international human rights bodies will continue to inform our domestic advocacy to protect and promote the rights of LGBTQ people, and particularly criminalized LGBTQ people and communities.

I want to close by sharing a very recent victory that, although not based on international human rights law, certainly puts an end to a gross violation of human rights of women of color and LGBTQ people of color in the U.S. I am doing so not only because victory is both sweet and rare, and therefore to be celebrated, and frankly because I am having a hard time thinking of anything else right now, but also because there is a connection to Rhonda's legacy.

In Louisiana, racialized policing of sexualities deemed "deviant" was, until yesterday at five p.m., facilitated by the existence of a centuries-old "crime against nature" law, which singled out solicitation of oral or anal sex for compensation for harsher punishment, including mandatory registration as a sex offender for periods of fifteen years to life.[17] Police and prosecutors had unfet-

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13 *See* Press Release, U.S. Human Rights Network, U.N. Mechanisms Update from the USHRN, (Nov. 4, 2011), http://www.ushrnetwork.org/content/pressrelease/un-mechanisms-update-ushrn (last visited Sept. 10, 2012).

14 *Hearing Before the Nat'l Prison Rape Elimination Comm'n* 30 (Mar. 26–27, 2007) (concerning lockups, Native American detention facilities, and conditions in Texas penal and youth institutions), *available at* http://www.wcl.american.edu/endsilence/documents/MARCH2007FULLHEARING.pdf.

15 *See* STREETWISE & SAFE, http://www.streetwiseandsafe.org/ (last visited Sept. 10, 2012).

16 *See* COMMUNITIES UNITED FOR POLICE REFORM, www.changethenypd.org/more-info (last visited Sept. 10, 2012).

17 *See generally* Andrea J. Ritchie, *Prostitution Conviction Not Sex Offense,* THE BILERICO PROJECT (Feb. 18, 2011), http://www.bilerico.com/2011/02/prostitutes_are_not_sex_offenders.php; Alexis Agathocleous, *Eight Years After Lawrence, Sodomy Laws Are*

tered discretion in deciding whether to charge under the prostitution statute, which reaches the same conduct but does not carry the same penalty, or the "crime against nature by solicitation" ("CANS") provision. It should come as no surprise that a law rooted in condemnation of sexual acts traditionally associated with homosexuality and applied in a context in which Black women's sexualities have historically and continue to be framed as deviant, was discriminatorily applied to poor Black women involved in street-based economies, as well as transgender women and gay men of color, many of whom are among the hundreds of thousands of LGBTQ youth around the country that wind up on the streets after they are kicked out of their families and communities, with nowhere to go and no way to safely access what little resources exist for poor and homeless communities. As a result of these discriminatory law enforcement practices, a significant percentage of individuals on Louisiana's sex offender registry are women and LGBTQ people of color, overwhelmingly as a result of this charge.[18]

The consequences of the mandatory sex offender registration requirement imposed upon a conviction of CANS are not insignificant. They implicate a broad range of civil, political, social, economic, and cultural rights. Among other things, Louisiana requires individuals who must register as sex offenders to carry a driver's license emblazoned with the words "SEX OFFENDER" across it in bright orange letters. Think of all the places you have to show identification: when you apply for a job, when you go to the bank, when you seek shelter, when you are stopped by police, when you order a drink at a bar, when you go register your children for school. Individuals required to register as sex offenders cannot evacuate with their families in cases of natural disaster or emergency, such as Hurricane Katrina, but must go to shelters designated for sex offenders. And they are required to notify all of their neighbors, schools, and community centers within a mile radius of their address and crime of conviction, and pay up to $800 to do so.[19]

Alive and Kicking, THE BILERICO PROJECT (Feb. 16, 2011), http://www.bilerico.com/2011/02/eight_years_after_lawrence_sodomy_laws_are_alive_a.php; JOEY MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE 157 (2011).

18 *See* WOMEN WITH A VISION, JUST A TALKING CRIME: A POLICY BRIEF IN SUPPORT OF THE REPEAL OF LOUISIANA'S SOLICITATION OF A CRIME AGAINST NATURE STATUTE 3 (2011), http://wwav-no.org/wp-content/uploads/Final_PolicyBrief_TalkingCrime.pdf.

19 *See id.*

As a general rule, discriminatory decisions made by law enforcement officers in the highly discretionary world of prostitution policing have profound consequences, in terms of loss of housing, employment, outing, the availability of immigration remedies and, under S-Comm,[20] deportation. CANS exacerbated these consequences in the extreme by mandating sex offender registration, thus compounding and multiplying the many barriers to accessing services and safety for people with prostitution-related convictions. By increasing penalties and consequences, CANS also gave police even greater leverage to extort sex—an experience described by many people we spoke to in the context of developing this litigation. It also places women, transgender people, and gay men at greater risk of sexual and other forms of violence while incarcerated for extended periods of time due to longer sentences or failure or inability to comply with onerous registration requirements.

Several years ago, under the leadership of Deon Haywood and Women With a Vision,[21] a local harm reduction organization in New Orleans led by Black lesbians, we, along with the Center for Constitutional Rights[22] and Loyola University Civil Justice Clinic,[23] began a concerted campaign to strike down the sex offender registration requirement for people convicted of CANS. We filed a lawsuit in February 2011, claiming, among other things, that the law violated the Equal Protection Clause of the U.S. Constitution.[24] We achieved a legislative victory less than six months later, when the mandatory sex offender registration requirement for CANS convic-

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20 *See* Andrea J. Ritchie, *It's Time for LGBTQ Groups to "Come Out" Against the ICE "Secure Communities" Program,* TURNING THE TIDE (Oct. 11, 2011), http://altopolimigra.com/2011/10/11/it%e2%80%99s-time-for-lgbtq-groups-to-%e2%80%9ccome-out%e2%80%9d-against-the-ice-%e2%80%9csecure-communities%e2%80%9d-program/. "S-Comm" is the term used by advocates to refer to the much-criticized "Secure Communities" initiative currently being implemented by the Department of Homeland Security's Immigration and Customs Enforcement Division. The program requires police departments to automatically forward fingerprints taken of individuals under arrest to immigration authorities before there has been any finding that probable cause even existed to justify the arrest. Advocates are concerned that this will facilitate deportation of immigrants subject to racial profiling as well as profiling and false arrests based on sexual orientation and gender identity, and serve as yet another tool of law enforcement violation of the rights of communities of color.

21 *See NO Justice*, WOMEN WITH A VISION, http://wwav-no.org/programs/louisiana-womens-advocacy-alliance/no-justice (last visited Apr. 15, 2012).

22 *Crimes Against Nature by Solicitation (CANS)* Litigation, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/crime-against-nature (last visited Apr. 15, 2012).

23 *Stuart H. Smith Law Clinic + Center for Social Justice*, LOYOLA UNIVERSITY NEW ORLEANS, http://www.loyno.edu/lawclinic (last visited June 15, 2012).

24 Doe v. Jindal, 2012 U.S. Dist. LEXIS 43818, 2002 W.L. 1068776 (E.D. La. Mar. 29, 2012).

tions was eliminated for individuals convicted after August 15, 2011. Unfortunately, the legislation passed was not retroactive, leaving up to 400 people convicted prior to that date, including the plaintiffs in our case, *Doe v. Jindal*, still on the registry for fifteen years to life for this offense. Yesterday, a federal court judge granted summary judgment in favor of the plaintiffs in our case, finding that continuing to require them to register as sex offenders violated the Equal Protection Clause.[25]

One of the many strengths of the litigation, advocacy, and organizing campaign around this issue is that it made the links between all populations whose sexuality is framed as deviant, and whose efforts and struggles to survive are criminalized. We took a page from theory advanced by Black feminists like Cathy Cohen[26] and Patricia Hill Collins,[27] who talk about how the sexuality of women of color is framed as inherently deviant and to be controlled, and as such is queered in deeply racialized ways. We put it into practice in a campaign that, unlike previous efforts to challenge this law, which focused only on LGB people, brought together advocates and organizations working locally and nationally with women of color and LGBTQ people of color, for civil and human rights, LGBTQ rights, and sex worker rights, and struggles against police profiling and brutality, HIV/AIDS, and poverty in unprecedented ways. We did this under the leadership of, accountable to, and centering the experiences and voices of women of color, including transgender women of color, and highlighting the shared experiences of policing and punishment among poor Black women and poor and homeless LGBTQ people of color. It challenged the criminalization of all sexualities deemed to be "deviant" as well as the criminalization of survival, and the use of policing and punishment of sexual and gender nonconformity to reinforce structural oppressions based on race and gender that feed the ongoing gentrification and ethnic cleansing of New Orleans, and was firmly rooted in struggles against poverty, racism, and criminalization.

When I told Rhonda about the case in the last few months she was with us, her immediate response was that this was precisely the kind of cutting-edge case we should be bringing to achieve gender justice and protect the human rights of women and LGBTQ peo-

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25 *Id.*

26 CATHY J. COHEN, *Punks, Bulldaggers, And Welfare Queens: The Radical Potential of Queer Politics?*, 3 G.L.Q. J. LESBIAN AND GAY STUD. 437, 440 (1997).

27 PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 76–7 (1999).

ple who are profiled, criminalized, and marginalized on a daily basis. And so it is particularly significant that the decision came down literally on the eve of this symposium honoring Rhonda's work and the directions it points us. So this victory, and this work, is not only dedicated to the women of color and LGBTQ people who labored under this injustice for decades, and to the tireless advocacy of Deon Haywood and the courageous people at Women With a Vision who doggedly fought to bring local and national attention to the issue until justice was done, but also to Rhonda's memory. I look forward to continuing to work with all of you to continue to fight as Rhonda did, courageously, tirelessly, and tenaciously, often against all odds, for sexual and gender rights until they are secured for everyone in the U.S. and around the world.

REPRODUCTIVE RIGHTS AT HOME AND ABROAD

Nancy Northup†

I. Introduction

The Center for Reproductive Rights ("the Center") is a global human rights organization that uses constitutional and international law to advance reproductive freedom as a fundamental human right that all governments are obligated to respect, protect, and fulfill. Nearly twenty years ago, in 1994, the International Conference on Population and Development was held in Cairo. At this conference, 179 countries worldwide adopted a Programme of Action, which was the first international consensus document to recognize that reproductive rights are human rights.[1] The Center works to ensure that governments throughout the world are held legally accountable for the political commitments they made by adopting the Cairo Programme of Action, applying international human rights treaties to the circumstances of women's reproductive health and decision-making. In this effort, the Center has partnered with women's rights advocates around the world, working in over fifty countries, to use a range of legal and advocacy strategies—including strategic litigation, fact-finding reports, legal publications, and law reform—to advance this goal.

Strategic litigation, a core component of the Center's legal and advocacy strategies, can serve the dual goals of shaping and defining international standards and holding governments accountable when they fail to comply with these norms. On the one hand, civil society can use this norm-building tool to transform broad human rights principles into concrete protections for sexual and reproductive health. On the other hand, by presenting individual complaints before national, regional, and international adjudicatory bodies, advocates can enforce international standards by seeking redress for individual rights violations.

It is worth emphasizing that strategic litigation cannot be an isolated tactic, but rather takes place in the context of a broader

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[1] International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, *Report of the ICPD*, U.N. Doc A/CONF.171/13/Rev.1 ch. 7 (1995).

advocacy strategy aimed at fostering a political, social, and cultural environment conducive to the advancement and protection of women's reproductive rights, laying the groundwork for both successful decisions and implementation of positive rulings.

The Center has litigated or supported the litigation of a number of reproductive rights cases internationally—covering such issues as access to maternal healthcare, abortion, reproductive health information, and emergency contraception, as well as the right to be free from abuse and violence in healthcare facilities—which have led to groundbreaking decisions by national, regional, and international courts. I will discuss here three of the landmark decisions that the Center has won as a way to illustrate how strategic litigation can be used to advance and protect sexual and reproductive rights. I will also discuss some of the challenges for transforming these victories into tangible protections for women's sexual and reproductive health needs.

II. Recognition of Reproductive Rights as Human Rights: Case Studies

A. K.L. v. Perú (Human Rights Committee)

Over the last fifteen years or so, the Center for Reproductive Rights has led strategies to ensure that human rights mechanisms, including United Nations (U.N.) treaty bodies and regional and national courts increasingly recognize that restrictions on access to safe and legal abortion interfere with women's enjoyment of their human rights. The groundbreaking decision by the Human Rights Committee in *K.L. v. Perú* marked the first time an international human rights body held a government accountable for failure to ensure access to abortion where it is legal.[2]

This case focused on K.L., a seventeen-year-old girl from Perú, who learned that she was pregnant with an anencephalic fetus.[3] Doctors confirmed that K.L.'s fetus would likely be born without major portions of the brain, leading to stillbirth or death and posing risks to K.L.'s life if the pregnancy continued. Thus, they advised her to terminate the pregnancy.[4] A social worker also advised K.L. to have an abortion to protect her and her family's mental health, noting that the continuation of the pregnancy "would only

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[2] Human Rights Comm., Karen Noelia Llatoy v. Perú, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), *available at* http://www.umn.edu/humanrts/undocs/1153-2003.html [hereinafter K.L. v. Perú].

[3] *Id.* ¶ 2.1.

[4] *Id.* ¶ 2.2.

prolong the distress and emotional instability of [K.L.] and her family."[5]

Although abortion in Perú is illegal in most circumstances, the law recognizes a limited exception to the abortion ban in order to preserve a woman's life or health.[6] The director of one of Perú's state hospitals, however, denied K.L.'s request for an abortion, claiming it fell outside the health and life exceptions, because there is no explicit right to abortion in cases of severe fetal impairment.[7] Thus, K.L. was forced to carry her pregnancy to term and give birth. The baby died four days later and K.L. became severely depressed, requiring psychiatric treatment.[8] A psychiatrist who examined K.L. at this time concluded that "the so-called principle of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance, and this has substantially contributed to triggering the symptoms of depression, with its severe impact on the development of an adolescent and the patient's future mental health."[9]

Unable to receive justice at the national level, K.L., with the assistance of the Center and local partners, filed a petition before the United Nations Human Rights Committee claiming that by denying access to therapeutic abortion, Perú violated its international obligations.

The Center chose to file this case at the U.N. Human Rights Committee because of its expansive jurisprudence in considering individual complaints. At the time, many of the other international human rights bodies had issued few decisions. Moreover, by filing the case with the U.N. Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights, the Center was able to invoke the articles on the rights to life,[10] privacy,[11] special protection of minors,[12] and freedom from cruel, inhuman and degrading treatment,[13] in an effort to develop

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5 *Id.* ¶ 2.4.

6 CODIGO PENAL [Criminal Code], art. 119 (Perú), *available at* http://spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=default-codpenal.htm&vid=Ciclope:CLPdemo.

7 *K.L. v. Perú* ¶ 2.3.

8 *Id.* ¶ 2.6.

9 *Id.* ¶ 2.5.

10 International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

11 *Id.* art. 17.

12 *Id.* art. 24.

13 *Id.* art. 7.

human rights standards around denial of access to legal abortion services as violations of these rights.

In November 2005, the Human Rights Committee held that, by denying K.L. access to a legal therapeutic abortion, the State violated her rights to be free from cruel, inhuman and degrading treatment, privacy, and special protection as a minor.[14] In particular, with respect to the Article 7 right to be free from cruel, inhuman and degrading treatment, the Committee noted that Article 7 "relates not only to physical pain but also to mental suffering."[15] The Committee determined that the depression and mental anguish that K.L. suffered as a result of having to carry the pregnancy to term was a foreseeable consequence and direct result of the State's denial of the abortion.[16] Specifically, it indicated that:

> owing to the refusal of the medical authorities to carry out the therapeutic abortion, [K.L.] had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon . . . which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy . . . . The Committee notes that this situation could have been foreseen . . . . The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced.[17]

With respect to the right to privacy, the Committee noted that K.L. was informed by her gynecologist that she could either choose to continue with the pregnancy or terminate it, and that the State's refusal to act in accordance with her decision amounted to a violation of her Article 17 right to privacy.[18] Finally, the Committee noted that, because she was a minor, K.L. was entitled to special care under Article 24, which she did not receive during and after her pregnancy.[19]

The Committee required Perú to provide K.L. with an effective remedy, including compensation. Additionally, it recognized Perú's obligation to take steps to ensure that similar violations would not occur in the future.[20]

The Center is still negotiating with the Peruvian government

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14 *K.L. v. Perú* ¶ 7.
15 *Id.* ¶ 6.3.
16 *Id.*
17 *Id.*
18 *Id.* ¶ 6.4.
19 *K.L. v. Perú* ¶ 6.5.
20 *Id.* ¶ 8.

to determine the appropriate monetary damages that should be paid to K.L. Additionally, Perú has not complied with its obligation to adopt clear legal guidelines for the provision of legal abortions. Cases like K.L.'s continue to occur. However, the Center has been consistently working for the implementation of this decision through a comprehensive strategy, including submitting memos to the Human Rights Committee on Perú's reluctance to comply with the decision, meeting with the Secretariat of the Committee to discuss this issue, and lobbying Committee members to pressure Perú to implement this decision.

Currently, K.L. is living with a relative in Spain and is studying at a university. She left Perú after her traumatic experience and has not returned since.

B. R.R. v. Poland (European Court of Human Rights)

Another piece of the Center's ongoing strategy to ensure access to safe and legal abortions has been to challenge the lack of clear legal and regulatory frameworks to implement laws permitting abortion for certain indications. In the landmark decision *R.R. v. Poland*, the European Court of Human Rights for the first time found a violation of the right to be free from inhuman or degrading treatment in an abortion-related case.[21] This was also the first time the Court recognized that states have an obligation to regulate the exercise of conscientious objection in order to guarantee patients access to lawful reproductive healthcare services.

This case focuses on R.R. who, during her eighteenth week of pregnancy, was informed that her fetus had a potentially severe malformation, and that genetic testing was required to confirm the diagnosis—information that would be crucial in her decision as to whether to carry the pregnancy to term.[22]

Abortion is legal in Poland when prenatal tests reveal a high risk that the fetus would be severely and irreversibly damaged.[23] Although R.R. was legally entitled to the genetic testing and her doctors confirmed the need for the tests, a series of doctors refused to provide her with the testing or referrals she needed. During the eight-week period that R.R. tried to access these tests, she saw six-

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[21] R.R. v. Poland, App. No. 27617/04, Eur. Ct. H.R. (2011), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911.

[22] *Id.* ¶ 9.

[23] *Id.* ¶ 67; *see also* Law on Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion of January 7, 1993, as amended as of December 23, 1997, art. 4a(1)–(2), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Polish%20abortion%20act—English%20translation.pdf.

teen doctors, underwent five sonograms, and was hospitalized twice. Recognizing her need for genetic screening, all of the physicians she saw refused a referral.[24]

Unable to secure the necessary referral, she was only able to access the genetic testing she needed by going to a hospital and stating that she was in need of emergency care. This was during her twenty-third week of pregnancy.[25] Once she received confirmation that the fetus was suffering from genetic abnormalities, her requests for an abortion were denied because at that point, during her twenty-fifth week of pregnancy, the hospital determined that the fetus was already viable.[26]

A few months later, R.R. gave birth to her third child, a baby girl suffering from Turner Syndrome,[27] a genetic condition in which a female does not have the usual pair of two X chromosomes.[28] Girls with this condition are normally shorter than average, infertile and can experience health problems such as kidney and heart abnormalities.[29]

Unable to obtain sufficient redress through the Polish legal system, the Center for Reproductive Rights and local partners assisted R.R. in bringing her claim to the European Court of Human Rights, alleging that the government had violated its human rights obligations under the European Convention for the Protection of Human Rights.

In May 2011, the European Court of Human Rights found Poland to be in violation of R.R.'s right to be free from inhuman and degrading treatment and her right to privacy.[30] In its first abortion-related decision finding a violation of the Article 3 right to be free from inhuman or degrading treatment, the European Court held that the denial of health information and genetic testing services, which should have been part of normal health services, was a source of great suffering to R.R. and met the threshold of severity to find an Article 3 violation.[31] The court recognized that the fact R.R. was pregnant and deeply distressed at the potential malformation of her fetus was an aggravating factor of her suffering. R.R.'s

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24 *R.R. v. Poland* ¶¶ 12–23.

25 *Id.* ¶¶ 27-28.

26 *Id.* ¶ 33.

27 *Id.* ¶ 37.

28 *Turner Syndrome*, NAT'L INST. HEALTH, GENETICS HOME RESEARCH, http://ghr.nlm.nih.gov/condition/turner-syndrome (last visited Sept. 18, 2012).

29 *Id.*

30 *R.R. v. Poland* ¶¶ 161–62, 214.

31 *Id.* ¶¶ 159, 161.

painful uncertainty was prolonged by the physicians' repeated refusals to grant her the necessary tests.[32] Additionally, the court explicitly stated that R.R. "had been humiliated" and condemned the conduct of the health professionals involved, noting that R.R. was "shabbily treated by the doctors dealing with her case."[33] The court also explicitly noted that R.R.'s access to genetic testing "was marred by procrastination, confusion and lack of proper counseling and information,"[34] and that ultimately she received this service by "means of subterfuge."[35]

Furthermore, the court found that Poland's lack of a clear legal and procedural framework to implement access to legal abortion, denial of access to information about the fetus' health, and inadequate regulation of conscientious objection all violated R.R.'s right to respect for her private life under Article 8.[36] It held that in order to comply with its obligations under the Convention, Poland must:

> (1) provide pregnant women the practical means to establish their right of access to a lawful abortion by putting in place effective and accessible procedures to implement Poland's abortion law;[37]
>
> (2) ensure an adequate legal and procedural framework to guarantee pregnant women access to diagnostic services and relevant, full, and reliable information on their pregnancy;[38]
>
> (3) organize its health system in a way so that conscientious objection of health professionals does not impede access to legal health services;[39] and
>
> (4) formulate provisions regulating the availability of lawful abortion in a way as to alleviate the chilling effect on doctors that current legal restrictions may have.[40]

Additionally, the court awarded 45,000 Euros to R.R. in nonpecuniary damages, as well as 15,000 Euros for legal fees.[41]

The judgment in this case was recently finalized and the Polish Ministry of Health is in the process of preparing an action plan to present to the Committee of Ministers, which oversees compliance

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32 *Id.* ¶ 159.
33 *Id.* ¶ 160.
34 *Id.* ¶ 153.
35 *R.R. v. Poland* ¶ 153.
36 *Id.* ¶¶ 197, 200, 206, 213–14.
37 *Id.* ¶ 213.
38 *Id.* ¶¶ 197, 200.
39 *Id.* ¶ 206.
40 *R.R. v. Poland* ¶ 193.
41 *Id.* ¶ 5.

with judgments from the European Court of Human Rights. The Center and its partners are continuing to monitor developments in this decision and are devising a strategy for its implementation.

Since giving birth, R.R. has been struggling to provide her daughter with the life-long medical care that she requires on a daily basis. Such care is costly and relatively difficult to obtain in Poland. Moreover, after the birth of the baby, R.R.'s husband left her.[42]

C. Alyne da Silva Pimentel v. Brazil (Committee on the Elimination of Discrimination against Women)

The Center has also been working for almost two decades on the recognition that maternal mortality is a human rights imperative. We advocate that U.N. treaty bodies call upon governments to ensure women's access to maternal healthcare; abolish practices that are prejudicial to women's health; and enable women to plan their pregnancies by promoting access to family planning. Just last year, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") Committee issued a decision in the case of *Alyne da Silva Pimentel v. Brazil*, the first U.N. decision holding a government accountable for failing to meet its human rights obligations to combat preventable maternal mortality.[43]

Alyne, an Afro-Brazilian woman and a resident of one of Rio de Janeiro's poorest districts, was repeatedly delayed in receiving access to emergency obstetric care when she was six months pregnant with her second child. This ultimately led to her preventable death.[44]

Brazil's maternal mortality rates are considerably higher than less economically developed countries.[45] Indigenous, low-income, and Afro-descendant women are disproportionately affected by maternal mortality.[46]

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[42] *Id.* ¶ 178.

[43] Comm. on the Elimination of Discrimination Against Women, Views of the Committee on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women Concerning Communication No. 17/2008, CEDAW/C/49/D/17/2008 (July 25, 2011), *available at* http://www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf [hereinafter Alyne v. Brazil].

[44] *Id.* ¶¶2.1-2.12.

[45] Braz. U.N. Country Team, A U.N. Reading of Brazil's Challenges and Potential: Common Country Assessment, ¶ 40 (Aug. 2005), *available at* http://www.undg.org/archive_docs/7631-Brazil_CCA.doc.

[46] *See generally* COMITÉ LATINOAMERICANO Y DEL CARIBE PARA LA DEFENSA DE LOS DERECHOS DE LA MUJER (CLADEM), MONITOREANDO EL REPORTE ALTERNATIVO SOBRE LA

Alyne first sought medical attention at her local health center when she experienced vomiting and severe abdominal pain. Although these signs indicated a high-risk pregnancy, doctors performed no tests and Alyne was sent home.[47] When she returned to the health center two days later, doctors discovered that there was no fetal heartbeat.[48] A few hours later, she delivered the stillborn fetus.[49] Despite medical standards dictating that Alyne should have undergone an immediate curettage surgery to remove placental parts and to prevent hemorrhage and infection, she did not undergo surgery until approximately fourteen hours later.[50]

Following surgery, Alyne experienced severe hemorrhaging, low blood pressure, and disorientation.[51] As her condition worsened, doctors determined that she needed to be transferred from the health center to a hospital with adequate equipment to treat her condition.[52] The staff at the hospital to which she was transferred was only given a brief oral account of her medical condition and treated Alyne without knowledge that she had just delivered a stillborn fetus.[53] Although she was temporarily resuscitated, her blood pressure suddenly plummeted to zero and she was left on a makeshift bed in an emergency room hallway.[54] She died on November 16, 2002, twenty-one hours after her arrival at the hospital,[55] of an entirely preventable condition.

Alyne's mother sought redress for her daughter's death by filing a petition for civil indemnification for material and moral damages against the state-sponsored healthcare system. To date, the Brazilian judiciary has failed to provide any effective or timely remedy.[56]

The Center and its local partner filed a petition before the Committee on the Elimination of Discrimination against Women

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SITUACIÓN DE LA MORTANDAD MATERNA EN BRASIL PARA LA CONVENCIÓN INTERNACIONAL SOBRE LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES [Monitoring Alternative Report on the Situation of Maternal Mortality in Brazil to the International Covenant on Economic, Social, and Cultural Rights], *available at* http://www.cladem.org/monitoreo/informes-alternativos/Brasil/Comite_DESC/2003-Mortandad-materna-Esp.pdf.

47 *Alyne v. Brazil* ¶ 2.2.
48 *Id.* ¶ 2.4.
49 *Id.* ¶ 2.5.
50 *Id.* ¶ 2.6.
51 *Id.*
52 *Alyne v. Brazil* ¶ 2.8.
53 *Id.* ¶ 2.10.
54 *Id.* ¶ 2.9.
55 *Id.* ¶ 2.12.
56 *Id.* ¶ 3.14.

(CEDAW Committee), alleging that the Brazilian government had failed to identify and address the barriers to maternal healthcare, particularly for marginalized women. The Center chose to file this case before the CEDAW Committee, which oversees compliance with CEDAW, because of its focus on discrimination. This Committee was uniquely positioned to recognize the multiple forms of discrimination that Alyne experienced when she was denied access to maternal health services—services that only women need.

In August 2011, the CEDAW Committee held that, by failing to provide appropriate maternal health services, the Brazilian government had violated its obligations to ensure the right to health and take all appropriate measures to eliminate discrimination against women, including by private actors.[57] In particular, the CEDAW Committee found that the State had neglected its due diligence obligation to regulate and monitor the provision of healthcare services by private healthcare institutions under Article 2(e),[58] as well as its obligation to ensure appropriate services in connection with pregnancy under Article 12.[59] The Committee noted in particular that Alyne's lack of access to quality and appropriate maternal healthcare systems stemmed from multiple forms of discrimination, which the State had failed to address.[60] The Committee also held that the State had failed to ensure effective judicial protection and to provide adequate remedies to Alyne's family, in violation of the Convention.[61]

The Committee ordered that the government provide appropriate reparations to Alyne's mother and daughter, including adequate compensation.[62] The Center is in the process of negotiating with the government to determine the amount of such compensation. Additionally, the Committee ordered the government to ensure women's right to safe motherhood and affordable access to adequate emergency obstetric care, provide professional training for health workers, ensure that private healthcare facilities comply with national and international standards on reproductive healthcare, and ensure sanctions are imposed on health professionals violating women's reproductive rights.[63]

The Center, in consultation with Brazilian experts and non-

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[57] *Alyne v. Brazil* ¶¶ 7.5–7.6.
[58] *Id.* ¶ 7.5.
[59] *Id.* ¶ 7.6.
[60] *Id.* ¶ 7.7.
[61] *Id.* ¶ 7.8.
[62] *Alyne v. Brazil* ¶ 8(1).
[63] *Id.* ¶ 8(2).

governmental organizations, has developed a 150-page document for the Brazilian government, which specifies the measures it can take to comply with this decision and is working with the Brazilian government to urge it to implement such measures. The Center, along with Alyne's family, is currently negotiating the terms of individual and symbolic reparations. The Center continues to work with the Brazilian government on how to effectively implement the remaining recommendations for general measures set forth by the CEDAW Committee.

Currently, Alyne's daughter is a high school student and resides with her maternal grandmother. They continue to live in abject poverty in Brazil. The grandmother, who is unable to work consistently because of health problems, is the sole source of support for the family.

III. Conclusion—Taking Stock of Victories and Challenges for the Future

Despite the recognition that existing human rights protections apply in the context of reproductive health and rights, transforming this promise into concrete legal protections has met with resistance, even within the mainstream human rights movement. For example, when the Center first started working on the *Alyne* case, a number of human rights experts said, "This is a medical malpractice case—why are you seeking government accountability from a human rights body for maternal mortality?"

During the past twenty years, the Center has been using its legal and advocacy strategies to give teeth to this promise, by ensuring that human rights treaties are interpreted to protect women's fundamental reproductive rights. These groundbreaking victories are a testament to the role that strategic litigation can play in promoting and protecting reproductive rights as human rights.

At the same time, these decisions demonstrate that it is a long-term struggle to ensure that women's reproductive rights are fully realized, and securing these victories does not mean that the struggle is over.

On the one hand, it is important for activists to know about groundbreaking decisions so that they can use these developments to push for changes on the ground. For example, the Peruvian government has yet to implement the *K.L.* decision, but the Human Rights Committee's ruling has had far-reaching effects, being cited, for instance, by the Colombian Constitutional Court in

its decision to liberalize Colombia's abortion law[64] and by the Slovakian Constitutional Court in its decision to uphold a law legalizing abortion in the first trimester.[65]

On the other hand, a central challenge for reproductive rights litigation, as with human rights litigation in general, is making sure that these decisions are fully implemented at the national level. This is one key area where we as advocates must remain vigilant. The Center, together with its local partners, uses sustained advocacy strategies at the national, regional, and international levels to push for implementation.

In the case of *K.L.*, for instance, the recalcitrance of the government to implement the decision led the Center to bring a similar case to the CEDAW Committee, with the aim of increasing the international pressure on the Peruvian government to ensure access to legal abortions and consolidating human rights standards across treaty bodies. This strategy led to a recent landmark decision by the CEDAW Committee in the case of *L.C. v. Perú*, handed down in November 2011—the CEDAW Committee held that Perú had violated L.C.'s right to health and to be free from discrimination.[66] The Committee also recommended that Perú decriminalize abortion where pregnancy results from rape,[67] marking the first international decision where a human rights body has recommended that a government change its abortion laws.

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64 Corte Constitucional [Constitutional Court], May 10, 2006, Sentencia C-355/06, at subsec. 8.4 (Colom.).

65 Ústavného súdu Slovenskej republiky [Constitutional Court of the Slovak Republic], Dec. 4, 2007, PL. ÚS 12/01-297 at subsec. 3.2.

66 Comm. on the Elimination of Discrimination Against Women, Views of the Committee on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women Concerning Communication No. 22/2009, CEDAW/C/50/D/22/2009 (Nov. 4, 2011), *available at* http://www2.ohchr.org/english/law/docs/CEDAW-C-50-D-22-2009_en.pdf.

67 *Id.* ¶ 9(b)(iii).

CHANGE IS POSSIBLE: THE LAW AS A BARRIER AND A TOOL

Marianne Møllmann†

It is a central principle for me that change is possible, and that law helps make it happen. However, as advocates and legal advisors for women's rights, we are constantly forced to confront the limits of the law as a tool for change. Today I will explore where and why the law is not enough, and look at what we can do to move beyond the law and effectively generate the change we want to see.

The truth of the matter is that the law can be very inadequate when it comes to the protection of reproductive rights. One example of this includes laws that impose punitive measures on drug use during pregnancy.

Last year, Amnesty International worked on a case in Norway involving a woman who is a recovering opiate user.[1] The woman was in opiate substitution therapy, which is entirely legal in Norway. She was not under the Norwegian government program, and it is also entirely legal in Norway to be on a privately sponsored opiate substitution program. She was getting her prescription drugs in Belgium, and that is also entirely legal as long as you are under medical supervision, which this woman was.

At the same time, Norway's social services law empowers the state to take anybody into its custody if it feels the person is in imminent danger of doing damage to herself or to a third person, including an unborn child.[2] There is no appeals procedure and there is also no definition of risk levels required or of what kind of danger a person must be in for the state to take custody of her. In fact, there is not even a definition of the substance use that could

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1 *See Norwegian Woman Forced to Endure Painful and Dangerous Withdrawal While Pregnant*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Dec. 6, 2011), http://advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/norwegian_woman_forced_to_endure_painful_and_dangerous_withdrawal_while_pregnant.php; Roy Vilmar Svendsen & Per Christian Magnus, *Tvangsinnleggelse av gravide Marlene kan være brudd på menneskerettighetene* [Forced Detention of Pregnant Marlene May Violate Human Rights], NORWEGIAN BROAD. CORP. (Dec. 5, 2011, 8:00 PM), http://www.nrk.no/nyheter/distrikt/hordaland/1.7904082.

2 Lov om sosiale tjenester m.v. (sosialtjenesteloven) [Law on Social Services, etc. (The Social Service Law)], § 6-2(a) Tilbakeholdelse av gravide rusmiddelmisbrukere [Detention of pregnant drug users], http://www.lovdata.no/oll/tl-19911213-081-008.html.

be the basis for intervention. Essentially, the law is written in such a way that a chain smoker could be taken into state custody without warning, whether pregnant or not.[3]

Of course, chain smokers are not taken into custody. The individuals who are taken into custody are mostly poor, often on opiate substitution therapy, and frequently pregnant women.[4] These are the women society sees as unfit mothers, and as a result they are especially targeted with this law.

In this particular case, the woman we were working with was dealing with her opiate addiction the best she could. She did not want to be on the government program because, she argued, it would connect her with individuals from prior circles of abuse and threaten the integrity and success of her treatment. She engaged in alternative but comparable therapy, with the sole purpose of overcoming her addiction and having a healthy child—something she very much longed for. But the law empowers the state to lock her up regardless and arbitrarily. She was indefinitely detained in a hospital, and though a public lawyer was provided, there was no apparent possibility for her to be released in the short term. After a week in the hospital, the woman decided to have an abortion, because she could not stand the thought of being locked up for another six months.

To me, the most tragic part of this story is that this was not the first time the woman had tried to carry a pregnancy to term. She had previously been pregnant, on a privately sponsored opiate substitution therapy course, then detained by the Norwegian authorities, and essentially forced by the situation to terminate a very much wanted pregnancy. Looking at this from the outside, it seems likely that part of the problem this woman faces is a system that just does not hear her. To the system, she is a resource-poor addict, incapable of making responsible decisions about her health and life. In this scenario, her reasoning for being on a private opiate substitution program did not register. The law allowed this percep-

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[3] The word "drug" (rusmiddel) in Norwegian refers to any substance that produces a sense of euphoria, drunkenness, or stupor. This word is routinely applied to alcohol, nicotine, or other substances in legal circulation in Norway, as well as to opiates, cocaine, or other substances not in general legal circulation.

[4] *See generally* Hanan Koleib, GRAVIDE RUSMIDDELAVHENGIGE: EN VURDERING AV KUNNSKAPSSTATUS OG BEHANDLINGSTILBUD [PREGNANT DRUG ADDICTS: AN EVALUATION OF THE KNOWLEDGE BASE AND TREATMENT OPTIONS], *available at* http://www.helse-stavanger.no/omoss/avdelinger/regionalt-kompetansesenter-for-rusmiddelforskning/Documents/Publiserte%20rapporter/publrapport%20Gravide%20rusmiddelavhengige%20En%20vurdering%20av%20kunnskapsstatus%20og%20behandlingstilbud.pdf.

tion to stand. The law can arbitrarily detain a person because of his or her status as undesirable, resource-poor, or otherwise "wrong." In short: law can be inadequate.

Another problem with law is that it can change, even when it is not inadequate. It can change both for the better and for the worse. We can see it happening in real time. This week a Canadian appeals court in *Bedford v. Canada* handed down a decision.[5] This case was brought by current and prospective sex workers, challenging the legality of criminal law provisions that make it more difficult for sex workers to protect themselves and to operate in a safe environment by doing so-called in-calls (receiving clients in their homes) or by hiring receptionists, bouncers, or bodyguards. The provisions were stricken as incompatible with the Canadian Human Rights Charter, which certainly is reason for celebration.

At the same time, the court repeatedly clarified that the outcome of the appeal had turned on the Parliament's objectives in passing the law, which the court noted was not to eradicate sex work but rather to eradicate street nuisance and public disturbance.[6] If the Canadian Parliament were to declare its intention to eradicate sex work through the imposition of criminal sanctions, the court's ruling implies that the provisions would become entirely legal under the Canadian Human Rights Charter, even if it were an undisputed fact—also in the ruling—that the provisions contribute to making sex work unsafe.[7]

This example highlights the fact that law is the result of a political process and that this political process is ongoing. In short, law can change.

Finally, and perhaps most importantly, the law does not convince everyone. Sometimes it feels like the law does not convince *anyone*. For example, for someone who believes fervently that abortion is murder, it really does not help for them to know that international human rights law does not protect the right to life of the fetus, but that it has strong protections for women's equality, and health, and life. In the face of such convictions, international human rights law is both uninteresting and irrelevant.

To be more successful at promoting human rights in the area of reproduction, I believe we have to learn to talk about the law in a manner that speaks to the real reasons behind women's decisions regarding motherhood. This means we must de-isolate the issues

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5 [2012] O.N.C.A. 186 (Can. Ont. C.A.).

6 *See id.* ¶¶ 242–243, 272, 278.

7 *See id.* ¶ 539.

that have to do with controlling fertility. For example, the discussion on choice in the United States is narrowly focused on access to contraception and abortion, and there is very little discussion about lack of childcare, lack of paid sick leave, lack of paid parental leave—all issues that make it harder to parent. There is also very little discussion about the needs and desires of those who want to have more children and those who wish to parent differently: attentive parenting requires time, space and economic resources. Perhaps more to the point, when people make decisions about their reproductive lives, or about their sexuality, they do it with reference to how they live their lives in general, not just in the area of sexuality and reproduction. They think about education, health care, and jobs. They think about housing and the environment, more generally. These are issues that determine women's choices much more than the legality of abortion and the right to life.

That moves me to the second point: we already know what we need to say and what we need to do in order to convince those who are left unconvinced by the law.

Rhonda Copelon was adamant about this. She often said that most of the time when you look at a situation, you already know when it is wrong or unjust—it is not that complicated. We do not have to look to the very intricate opinions of the United Nations treaty monitoring bodies, and all the different resolutions of various U.N. bodies. It is not that complicated. It is often very visible what is wrong, and it is certainly very visible to the people who are suffering the human rights violation—they have clarity on the wrongs they suffer.

We also already know the barriers to change. Sometimes they have to do with the law, but often they do not. Instead they have to do with a failure to recognize context. This context includes the racialized use of the criminal justice system and the focus on reproduction only for those people who "deserve" to be parents—meaning not the poor, not people of color, and not those addicted to drugs.

This illustrates the fact that barriers to change often have to do with issues of power and money. We know this, of course, yet often we look at a situation and think we can convince people with information about the law. This is an ineffective approach because most decision makers or power holders already know that they are in the wrong. They already know that waterboarding is torture, or that defunding Planned Parenthood creates access barriers to health care for women of color and the resource-poor. The reason

they continue to torture or to discriminate is that they believe these actions will bring them power or money in some way. To move beyond the law, we have to realize how to influence those perceptions of power or money.

I want to leave on an optimistic note about our capacity for change. I have this T-shirt that says "Some Kids are Gay, and That is OK." I sometimes wear this T-shirt when I pick up my daughter from school. I have other T-shirts that are equally in your face, but this one T-shirt is the one that gets comments. Parents will come up to me and say "They called me from school the other day and said your boy is different because he just said he wanted to kiss another boy." Or kids will come over and ask "What is gay? What does that mean?" What is interesting to me about this situation is the urgent relief people seem to feel at bringing these issues up, almost as if they have been wondering who to talk to and my T-shirt advertises that I am willing to engage.

But this relief implicitly highlights the discomfort many still display with regard to their own children's sexuality. I think we are watching this change, very slowly, with marriage equality gaining ground and a push for better information in schools. However, the real frontier is accepting that when we agree that being gay or lesbian or bisexual or transgender is not something we choose to be—when we say "I was born this way"—we are implicitly saying that children can know who they are, with regard to their sexual orientation and gender identity. We have to battle for the right of our children to know that they are *not* heterosexual, or they are *not* gender conforming, regardless of where their parents are, or what their parents feel.

The law can get us part of the way by establishing once and for all that discrimination on the basis of gender identity and sexual orientation is unacceptable, in marriage, in parenting, in employment, in education, or wherever else lesbian, gay, bisexual, transgender, and intersex individuals are currently suffering legally sanctioned discrimination. But the discomfort many still feel around children's sexuality tells me that the law is not enough. To change, we have to change the way we think about sexuality and, dare I say it, sex. I believe we can do it.

RAPE IN A POST-DISASTER CONTEXT: EVOLVING JURISPRUDENCE OF THE INTER-AMERICAN COMMISSION

Blaine Bookey†

I entered this field taking for granted that the proposition contained within the title of this panel, "Rape as a Form of Torture," was simply stating a fact and not an aspiration. This important advancement in the recognition of women's human rights is due in large part to the pioneering and visionary work of Rhonda Copelon and my fellow panelists, Felice Gaer, Patricia Viseur-Sellers, and Sir Nigel Rodley. Thank you to the *City University of New York Law Review* and Lisa Davis for the opportunity and the honor.

I was asked to speak about efforts to address rape of women and girls in post-earthquake Haiti and a related decision of the Inter-American Commission on Human Rights ("IACHR") recognizing that Haiti, like all States, has a responsibility to prevent and punish sexual violence perpetrated by non-State actors. I will first provide a brief historical backdrop, focusing on efforts led by Rhonda Copelon to address state-sponsored rape on the international level following the 1991 *coup d'etat* in Haiti. Then, I will provide an overview of rape in Haiti since the January 12, 2010 earthquake and a request filed with the IACHR by women and girls living in displaced persons camps in Port-au-Prince, Haiti, arguing that that the government was violating their right to be free from sexual violence. Finally, I will discuss the significance of the Commission's decision granting this request with respect to the government's obligation to exercise due diligence to prevent, investigate, prosecute, and punish private actors of rape.

I. HISTORICAL CONTEXT OF RAPE IN HAITI: HAITIAN WOMEN ESTABLISH PRECEDENT

Current efforts to combat gender-based violence in Haiti in the international arena build on the foundation established by Rhonda Copelon's work around the widespread use of rape as a

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tool of political repression during the 1991 to 1994 *coup* period in Haiti.

In 1994, Rhonda assembled a team of attorneys and advocates in the United States and Haiti—including those from the City University of New York ("CUNY") School of Law's International Women's Human Rights Clinic ("IWHR"), the Center for Constitutional Rights ("CCR"), MADRE, and the law firm Morrison & Foerster—and filed a Communication with the IACHR decrying the widespread use of rape following the 1991 *coup*.[1] The Communication called on the Commission to take the opportunity presented by the situation in Haiti to "take seriously" the crimes against women that society often does not; it labeled these acts crimes that "disappear from history though they remain seared into women's bodies, consciousness and lives."[2] The parties argued to the Commission that the numerous acts of violence documented in the Communication constitute violations of various Inter-American and other human rights instruments "whether the abuses were committed by officials of the illegal regime or by paramilitary groups acting in conjunction with the military," and that, moreover, "[t]hey also constitute violations if they were committed by armed bands of private citizens acting as agents, at the instigation of, or with the consent, tolerance or acquiescence of the illegal regime."[3]

In response to the brief, the IACHR issued a report recognizing that the evidence set forth in the Communication "clearly shows sexual violations and other types of violence against Haitian women as a form of reprisal, intimidation, terror, and degradation of women."[4] The Commission recognized that such abuses against Haitian women violate myriad provisions of Inter-American conventions, including those related to humane treatment and the protection of honor and dignity.[5] In addition, the Commission Report stated: "the Commission considers that rape represents not only inhumane treatment that infringes upon physical and moral integrity . . . but also a form of torture."[6] This holding is particu-

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1 Communication Respecting Violations of the Human Rights of Haitian Women, Submitted to Inter-Am. Comm'n H.R. (Oct. 16, 1996) (on file with author).

2 *Id.* at 1.

3 *Id.* at 32.

4 Org. of Am. States, Inter-Am. Comm'n on Human Rights, Report on the Situation of Human Rights in Haiti 1995, Doc. OEA/Ser.L/v/II.88 10 rev. ¶ 128 (Feb. 9, 1995), *available at* http://www.cidh.org/countryrep/EnHa95/eh95p2.htm.

5 *Id.* ¶ 129.

6 *Id.* ¶ 133.

larly significant as it was the first time any treaty body at a regional or international level ever rendered a decision clearly treating rape as a form of torture.[7]

Notably, it was also the case of a Haitian woman who fled Haiti during the 1991 *coup* period that led to the first precedent decision in 1993 by the U.S. Board of Immigration Appeals establishing that rape constitutes persecution on account of a protected ground, specifically political opinion and religion, to qualify for asylum.[8]

CCR (an organization with which Rhonda was intimately affiliated)[9] filed an action in federal court under the Alien Tort Statute against the notorious paramilitary leader, Emmanuel "Toto" Constant.[10] The District Court in 2006 issued a default judgment finding him liable for, among other things, torture and the systematic use of rape, and awarded the plaintiffs $19 million in damages.[11] To date, this suit remains the only successful action holding someone accountable for the state-sponsored campaign of rape that occurred following the Haitian *coup*. For all others, impunity prevailed.

During Haiti's next period of political crisis—the second ouster of President Aristide from 2004–2006—rape was again used as a weapon to suppress dissent. A startling study published in *The Lancet* estimated that more than 35,000 women were raped in Port-au-Prince during the eight months following the second *coup*.[12] There were few, if any, prosecutions for the rapes. It is against this backdrop that the earthquake struck Haiti on January 12, 2010.

II. RAPE IN POST-EARTHQUAKE HAITI: HAITIAN WOMEN CONTINUE TO LEAD THE WAY IN THE FIGHT FOR JUSTICE

A. Displaced Women and Girls Face Heightened Risk of Rape

At the time of the earthquake, I was working as an attorney

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7 Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229, 237 (2008).

8 Matter of D-V-, 21 I&N Dec. 77 (B.I.A. 1993).

9 Rhonda worked as an attorney with CCR for more than a decade and served on the CCR Board for more than three decades.

10 CTR. FOR CONSTITUTIONAL RIGHTS, *Doe v. Constant*, http://ccrjustice.org/our cases/current-cases/doe-v.-constant.

11 Doe v. Constant, Default Judgment, 04 Civ. 10108 (SHS)(S.D.N.Y. Aug. 16, 2006), *aff'd* 354 Fed. Appx. 543 (2d. Cir. 2009).

12 Athena R. Kolbe & Royce A. Hutson, *Human Rights Abuse and Other Criminal Violations in Port-au-Prince, Haiti: A Random Survey of Households*, 368 THE LANCET 864, 869–70 (2006).

with the Institute for Justice and Democracy in Haiti ("IJDH"), a U.S.-based non-profit, and its Haitian affiliate, the Bureau of International Lawyers ("BAI"), a public interest law firm in Port-au-Prince. Our office in Haiti served as a meeting point for grassroots organizations, including women's groups. Within days after the earthquake, dozens of displaced women and girls who came to the BAI began reporting instances of rape, forced evictions, and other human rights violations.

The BAI derives its priorities and programming from the communities that it serves, so the needs of rape victims quickly rose to the fore. The BAI and IJDH launched the Rape Accountability and Prevention ("RAP") Project that now provides legal services for victims of sexual violence both before Haitian courts and international bodies and helps build the capacity of grassroots women's groups organizing in the camps.[13] The first step we took with the RAP Project was to organize a fact-finding investigation. In May 2010, several attorneys and advocates, including representatives from many of the same organizations that had worked with Rhonda in 1994—including MADRE, CUNY School of Law, CCR, and Morrison & Foerster—conducted a series of interviews with victims, grassroots leaders, and government representatives in Haiti.

The situation we encountered was grim. We interviewed more than fifty women in one week who had either been raped or had a daughter or granddaughter who had been raped since the earthquake.[14] The majority of the victims could not identify their assailants, which distinguished this period of sexual violence from past periods when rape was directly attributable to actors of the State.[15] The vast majority of women interviewed lived in displacement camps in Port-au-Prince and hailed from impoverished communities (indeed, many of the same disfavored areas that were the sites of mass rapes following the 1991 and 2004 *coups*).

Sexual violence caused deep physical and psychological effects to the women and girls. Haiti's complete ban on abortion, even in cases of rape or where the mother's health is in danger, further deepened the physical and emotional hardship for the women we interviewed who became pregnant as a result of sexual violence.

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13 *See* Blaine Bookey, *Enforcing the Right to be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 N.Y. CITY L. REV. 101 (2011).

14 MADRE ET AL., OUR BODIES ARE STILL TREMBLING: HAITIAN WOMEN FIGHT AGAINST RAPE 4 (2010) *available at* http://ijdh.org/wordpress/wp-content/uploads/2010/07/Haiti-GBV-Report-Final-Compressed.pdf [hereinafter MADRE].

15 *Id.* at 11.

We heard repeated thoughts of suicide; at least one woman had taken steps to that end, thankfully without success.[16]

All of the camps we visited lacked adequate lighting and the police were markedly absent in the interior of the camps. To fill this gap, grassroots organizations began to organize their own security with women and men in their communities.[17]

Seeking assistance from the authorities was an exercise in futility, or worse yet, subjected women and girls to re-victimization. The police turned women away, blaming the woman for the rape or blaming the lack of a vehicle for their inability to respond. Deep-rooted sex discrimination pervaded even the highest levels of government. One official told us she believed that that the women were inviting the rape by going to the bathroom outside (albeit in the camps where women have no other option). Those in the government who recognized the crisis were completely hamstrung by the lack of resources.[18]

B. Lawyers Organize with Displaced Haitian Women and Girls to Hold the Government Accountable for Failure to Protect

Faced with these dire circumstances, in October 2010, our legal team filed a request under Article 25 of the Commission's Rules of Procedure, which provide that the Commission can grant precautionary measures in "serious and urgent situations" to prevent "irreparable harm."[19] The request was filed in collaboration with grassroots organizations, including KOFAVIV[20] and FAVILEK,[21] on behalf of women and girls living in twenty-two displacement camps in the capital, Port-au-Prince, identified by the organizations as places where women and girls were most at risk.[22]

The request alleged that the government of Haiti was in violation of several provisions of the American Convention on Human Rights and other regional conventions, including the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, also known as the Convention of Be-

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16 *Id.* at 12.

17 *Id.* at 21 and app. A at 32.

18 *Id.* at 16.

19 Request by Int'l Women's H.R. Clinic at CUNY School of Law et al. for Precautionary Measures Under Article 25 of the Commission's Rules of Procedure (Inter-Am. Comm'n H.R. Oct. 19, 2010) (on file with author) [hereinafter Request for Precautionary Measures]. *See also* MADRE, *supra* note 14, at 1.

20 *Komisyon Fanm Viktim Pou Viktim* [Commission of Women Victims for Victims].

21 *Fanm Viktim, Leve Kanpe* [Women Victims Get Up Stand Up].

22 Request for Precautionary Measures, *supra* note 19, at 5.

lém do Pará.[23] In particular, the request argued that Haiti was violating the American Convention's prohibition against torture and other cruel, inhuman, or degrading punishment or treatment.[24] Our precautionary measures request made the case that, among other things, the government knew (or should have known) about the crisis of sexual violence, but was not acting with due diligence to prevent, investigate, and punish rape perpetrated by non-State actors, thereby condoning the practices.

C. The IACHR Recognizes State Responsibility for Rape Perpetrated by Private Actors

In December of that year, the Commission granted our request in a letter to the Haitian Government.[25] The letter included recommendations related to the provision of adequate medical and psychological care for victims (including emergency contraception), increased security measures in the camps, improved accountability mechanisms, and inclusion of grassroots women's groups in planning and leadership.[26]

Although, like all precautionary measures decisions, the Com-

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23 Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 [hereinafter Convention of Belém do Pará].

24 Request for Precautionary Measures, *supra* note 19, at 5.

25 *See* Letter from Santiago A. Canton, Exec. Sec'y, Inter-Am. Comm'n H.R., to Lisa Davis, Esq., Int'l Women's Human Rights Clinic, City University of New York School of Law, Human Rights Advocacy Dir., MADRE, et al. (Dec. 22, 2010) (on file with author).

26 Precautionary Measures, Inter-Am. Comm'n H.R., Report No. MC-340-10 ("Women and girls residing in 22 Camps for internally displaced persons in Port-au-Prince, Haiti") (on file with author) [hereinafter Precautionary Measures]. The Commission's recommendations include:

> 1. Ensure medical and psychological care is provided in locations available to victims of sexual abuse of the twenty-two camps for those internally displaced. In particular, ensure that there be:
>
> a. privacy during examinations;
>
> b. availability of female medical staff members, with a cultural sensitivity and experience with victims of sexual violence;
>
> c. issuance of medical certificates;
>
> d. HIV prophylaxis; and
>
> e. emergency contraception.
>
> 2. Implement effective security measures in the twenty-two camps; in particular, provide street lighting, an adequate patrolling in and around the camps, and a greater number of female security forces in police patrols in the camps and in police stations in proximity to the camps;
>
> 3. Ensure that public officials responsible for responding to incidents of sexual violence receive training enabling them to respond adequately to complaints of sexual violence and to adopt safety measures;
>
> 4. Establish special units within the police and the Public Ministry to

mission's decision in this case is short and provides little legal analysis, its precedential value is consequential in at least three respects.

First, it recognizes that sexual violence is one of the gravest forms of human rights violations requiring immediate action by the State. In fact, hundreds of requests are filed each year, but few are granted, and only a few of those granted involve petitioners at risk of rape.[27]

Second, the measures apply to an unnamed group of women and girls in contrast to past decisions involving rape that have provided protection only to individual women.[28]

Third, the decision is the first precautionary measures decision to recognize that a state has a responsibility to prevent sexual violence by non-State actors.[29] The decision thus codifies the recognition by General Comment No. 2 to the Convention Against Torture ("CAT") that the failure to exercise due diligence to prevent, investigate, prosecute, and punish sexual violence perpetrated by non-State actors is tantamount to a state's consent or acquiescence in such impermissible acts.[30]

III. IMPLEMENTATION OF IACHR JURISPRUDENCE

Under domestic and international law, Haiti is obligated to take seriously the measures called for by the Commission.[31] Failure

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investigate cases of rape and other forms of violence against women and girls; and

5. Ensure that grassroots women's groups have full participation and leadership in planning and implementing policies and practices to combat and prevent sexual violence and other forms of violence in the camps.

27 For example, in 2009, the Commission granted only thirty-four requests out of 324 received. Annual Report 2009, ch. III(B)(2) tbls. (a)-(b), OEA/Ser.L/V/II (Dec. 30, 2009).

28 Lisa Davis, *Still Trembling: State Obligation Under International Law to End Post-Earthquake Rape in Haiti*, 65 U. MIAMI L. REV. 867, 890 (2011).

29 *Id.* at 889. The Commission and the Inter-American Court of Human Rights have recognized a State's duty to act with due diligence to prevent violence against women, such as domestic violence, but this has been in the context of individual petitions and the decisions have not recognized torture violations. *See, e.g.,* Maria da Penha v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 704 (2000); González v. Mexico (*Cotton Field*), Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (July 21, 2011).

30 Felice Gaer, *Opening Remarks: General Comment No. 2*, 11 N.Y. CITY L. REV. 187, 193–94 (2008).

31 The Commission's decision is based on international human rights principles codified in treaties that have been duly signed and ratified by the Haitian govern-

to do so, as CAT General Comment No. 2 states, would provide a form of "encouragement" or "de facto permission" on the part of the State.[32] However, it goes without saying, enforcement of the decisions of international bodies is often difficult.

Thus, we are continuing to think of creative ways to implement the framework set forth by the Commission, focusing, as lawyers, on the measures related to accountability and inclusion of grassroots organizations (as required by international law). In March 2011, three months after the Commission issued its decision, we requested and were granted a hearing with the Commission on the status of the precautionary measures decision.[33] The Haitian government did not respond to the precautionary measures request at the time of filing before the Commission ruled, so the hearing provided an opportunity for the government to participate and explain and defend its actions. The hearing also, to some extent, gave the grassroots leaders from KOFAVIV who testified at the hearing their "day in court." The significance of grassroots leaders sitting across the table from Haitian government officials should not be overlooked.

Since the hearing, through the ongoing work of the BAI and

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ment. *See* CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, Mar. 10, 1987, art. 276–2 ("Once international treaties or agreements are approved and ratified in the manner stipulated by the Constitution, they become part of the legislation of the country and abrogate any laws in conflict with them.").

[32] *See* Comm. Against Torture, General Comment 2, Implementation of Article 2 by States Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). General Comment No. 2 reads in relevant part:

> The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

[33] Inter-Am. Comm'n H.R., Precautionary Measures 340–10—Women and Girls in camps for Forcibly Displaced Persons in Haiti, 141 Period of Sessions (Mar. 25, 2011) *available at* http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=En&Session=122.

KOFAVIV, we have identified barriers to pursuing complaints in Haitian courts and are working to overcome them. For example, the procurement of a medical certificate to corroborate a victim's rape claim is one of the most problematic obstacles preventing full implementation of the Commission's decision.[34] Although a medical certificate is not required under Haitian law, the prosecutor's office will often refuse to pursue a rape case if a woman fails to present a medical certificate "verifying" that the rape took place, or if the certificate does not provide sufficient detail.[35]

Requiring a medical certificate to corroborate a claim of rape perpetuates the inherent distrust of women's testimony. Moreover, medical certificates are difficult to obtain and often do not provide probative evidence (rape is defined based on lack of consent, not use of violence or force).[36] Although public hospitals are meant to provide the certificates for free,[37] women often cannot make it to the hospital within seventy-two hours after a rape when forensic evidence can still be captured (even assuming that such evidence can be analyzed and used in a Haitian court). The lack of uniformity of the medical certificates across public and private institutions presents another complication.[38]

To address this issue, we worked with grassroots groups and various Haitian ministries to organize an interactive conference and workshop on the harmonization and improved provision of medical certificates in February this year. Government officials, judges, attorneys, and members of civil society were present and a small committee is now being formed to follow up on the solutions identified. Slowly, we are making progress.

At the same time, we have made suggested changes to Haiti's Draft Law on the Prevention, Punishment, and Eradication of Violence Against Women in Haiti, which is now in its final stages.[39] In particular, we recommended that the law explicitly state that a wo-

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34 Meena Jagannath, *Barriers to Women's Access to Justice in Haiti*, 15.1 CUNY L. REV. 41, 42 (2012).

35 *Id.* at 41–42.

36 CODE PÉNAL [C. PÉN] [HAITIAN CRIMINAL CODE], art. 278 (Haiti), *reprinted in* MENAN PIERRE-LOUIS & PATRICK PIERRE LOUISE, CODE PÉNAL app. at 15 (2007).

37 Haitian Presidential Protocol, *Protocole d'Accord sur l'Octroi et la Gratuité du Certificat Médical Relativement aux Agressions Sexuelles et/ou Conjugales* [Memorandum of Agreement on Granting Free Medical Certificates in respect to Sexual and/or Marital Assault] (on file with CUNY Law Review).

38 Jagannath, *supra* note 34, at 42.

39 MADRE ET AL., ACHIEVING JUSTICE FOR VICTIMS OF RAPE AND ADVANCING WOMEN'S RIGHTS: A COMPARATIVE STUDY OF LEGAL REFORM 4 (2012), *available at* http://www.trust.org/documents/connect/Madrev16-1final.pdf.

man's credible testimony alone should be sufficient to yield a conviction in a case of rape in line with international best practices to avoid the medical certificate as an obstacle altogether in some cases.[40] We are also working with Haitian women's organizations to identify pressure points in Parliament to target once the law is introduced to ensure its passage. Political gridlock, however, has stalled advancements in many areas, including legal reform (but that is a topic for another paper).

Despite barriers and setbacks, the work of BAI attorneys in collaboration with KOFAVIV and others has led to the arrest and prosecution of several accused rapists, and official figures show that reported rapes were down in 2011 from 2010, so one can find hope that the situation is improving. However, we are still aware of dozens of new cases every month and there are yet countless women and girls awaiting justice. Indeed, two recent studies confirm the alarmingly high rates of sexual assault since the earthquake, particularly among women and girls living in displacement camps or otherwise impoverished neighborhoods in the capital.[41] So, there is, of course, much more to be done. The Commission's decision provides a roadmap for priorities moving forward and, as they say in Haiti, *piti piti zwazo fe nich*, or, little by little the bird makes its nest.

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[40] *Id.*

[41] The Center for Human Rights and Global Justice at New York University School of Law conducted a comprehensive empirical study of the prevalence of sexual violence in internally displaced persons ("IDP") camps, finding that fourteen percent of IDP households reported at least one member had been a victim of sexual violence since the earthquake, with sexual violence defined as rape, unwanted touching, or both. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, YON JE LOUVRI: REDUCING VULNERABILITY TO SEXUAL VIOLENCE IN HAITI'S IDP CAMPS 35, fig.4 (2012). Nine percent of respondents surveyed indicated that one or more of their household members had been raped, defined as "forced into having sex when they did not want to." *Id.* at 36, fig.5. Additionally, seventy percent of survey respondents indicated that their worry about sexual violence against themselves or a member of their household had increased since the earthquake. *Id.* at 37, 39, figs.7–8. The results from a subsequent survey of random Haitian households conducted from August 2011 to February 2012 similarly indicate a dramatic escalation in criminal violence, particularly in densely populated urban centers. Residents of low-income urban areas were twenty-seven times more likely to be sexually assaulted than residents of wealthier, less densely populated areas. ATHENA R. KOLBE & ROBERT MUGGAH, HAITI'S URBAN CRIME WAVE? RESULTS FROM MONTHLY HOUSEHOLD SURVEYS AUGUST 2011–FEBRUARY 2012 1 (2012) *available at* http://www.athenakolbe.com/downloads/Strategic_Brief_1_(Haiti)_March_2012.pdf.

RAPE AS A FORM OF TORTURE: THE EXPERIENCE OF THE COMMITTEE AGAINST TORTURE

Felice D. Gaer†

Recognizing a Silence

Since the late 1980s, Professor Rhonda Copelon provided intellectual leadership in the evolution of the norm of torture and the recognition of its negative gendered origins, as well as ways to address this more positively. Working through and with the International Women's Human Rights Clinic ("IWHR") at City University of New York ("CUNY") School of Law, as well as with activists and advocates worldwide, she saw and explained to others how the issues of domestic violence and rape had been wrongly isolated from the human rights normative framework. They were not seen as violence, she explained, but as personal and private matters, which were not embraced within the international legal discourse, as their discriminatory nature was also invisible. She engaged in effective advocacy that helped develop the legal avenues through which to address these matters in ways that have profoundly influenced the discourse as well as international legal mechanisms.[1]

These remarks recap the recognition of rape as a form of torture by several international human rights mechanisms and discuss in particular how the Committee Against Torture has continued to address the issue since the adoption of its General Comment No. 2 in November 2007.

Breaking the Silence

In 1986, recognition by United Nations Special Rapporteur on Torture, Peter Kooijmans, that rape in prison should be regarded as torture,[2] opened the door to discussion and codification of

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1 *See* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291 (1994); Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. City L. Rev. 229 (2008).

2 *See* Special Rapporteur on Torture, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Comm'n on Human Rights, U.N. Doc. E/CN.4/1986/15, ¶ 119 (1986) (by Peter Kooijmans) [hereinafter Kooijmans, *Report on Torture*].

norms on a subject that had previously been ignored, despite the years of U.N. proscription of torture and ill treatment. Indeed, even at the 1980 Copenhagen World Conference on Women, where the broad issue of violence against women was at long last raised, albeit timidly, in the context of the U.N.'s separate programs dealing with the status of women, the issue of rape and other violence against women was presented not as a human rights issue, nor as a matter of discrimination, but rather as an issue of women's health.[3] Kooijmans offered recognition that rape was one of a long list of techniques used against detainees constituting torture.[4]

While the reference to rape by the Special Rapporteur on Torture was considered a breakthrough at the international level in addressing rape, Kooijmans did not address violence against women more broadly. Rape was simply one of many techniques used in the jail cell, either for extracting confessions or humiliating prisoners.[5] Kooijmans nonetheless helped women's rights activists to push forward. Having previously achieved adoption of the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), they began to press effectively for recognition of women's rights as human rights. That acknowledgement came later in the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights[6] and the 1995 Beijing Declaration and Platform for Action of the Fourth World Conference on Women.[7]

A Sea Change

After this recognition of rape as a form of violence, and of violence against women as a form of discrimination, a key goal, according to Rhonda Copelon, was finding ways to move away from treating torture in a gender discriminatory context into a gender inclusive one. Among the key achievements that followed were the recognition of rape and sexual violence as torture in international criminal law regarding war crimes tribunals; the acknowledgment

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3 Felice D. Gaer, *Women, International Law and International Institutions*, 32 Women's Studies Int'l Forum 60, 63 (2009).

4 *See* Kooijmans, *Report on Torture*, *supra* note 2, ¶ 119.

5 *See* Kooijmans, *Report on Torture*, *supra* note 2, ¶ 119.

6 *See* World Conference on Human Rights, June 14–15, 1993, *Vienna Declaration and Programme for Action*, ¶¶ 36–44, U.N. Doc. A/CONF.157/23 (July 12, 1993).

7 *See generally* Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

of rape as abuse in the conclusions of U.N. treaty bodies and independent special rapporteurs; and the adoption of General Comment No. 2 of the Committee Against Torture,[8] which explicitly discusses rape and gender-based violence in the context of the Convention Against Torture ("CAT").

As discussions began on whether to create an international criminal tribunal to address the responsibility of individual perpetrators in the Yugoslav conflict, the issue of whether rape was a war crime was raised, debated, and successfully included in the draft and final statutes of the Yugoslav war crimes tribunal.

Rhonda Copelon and other NGO experts successfully pursued the issue of gender violence as torture at the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda, as well as in the negotiations on the Rome Statute of the International Criminal Court. Gender-based crimes were included in the statutes and some successful prosecutions followed. Notably, in *Prosecutor v. Kunarac*,[9] known as the Foca judgment, the ICTY Appeals Chamber held that the numerous rapes of Bosnian Muslim women in both Bosnian Serb private homes and detention centers constituted torture, and the accused were convicted for rape, enslavement, and inhumane acts. Thereafter, as the former legal advisor to the ICTY prosecutor, Patricia Viseur Sellers, has described it, the *Kunarac* trial chamber "held that humanitarian law eschewed an element of State or official capacity or acquiescence or consent of official capacity."[10]

In the Committee Against Torture and the Human Rights Committee, and in consultations with the special rapporteurs, Rhonda Copelon and the IWHR Clinic also pressed for recognition of the gravity of officially inflicted sexualized violence as well as privately inflicted gender violence where the state does not intervene to exercise due diligence to prevent it. Subjects raised in these NGO submissions ranged from the sexualized abuses of women detainees at Abu Ghraib prison to coerced interrogation of women seeking medical services for incomplete and life-threatening abortions in Chile.

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8 *See* Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter General Comment No. 2].

9 *See* Prosecutor v. Kunarac, No. IT-96-23/1-T (Int'l Crim. Trib. For the Former Yugoslavia Feb. 22, 2001), *available at* http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.

10 Patricia Viseur Sellers, *Sexual Torture As A Crime Under International Criminal and Humanitarian Law*, 11 N.Y. CITY L. REV. 339, 348 (2008).

The results of such information-based advocacy from NGOs were impressive: the Committee Against Torture identified such practices to be concerns under the Torture Convention in the process of discussing and adopting General Comment No. 2. The Human Rights Committee also recognized gender-based violence as torture or ill treatment.

The Committee Against Torture examined the issue further in its process of adopting General Comment No. 2 on the Prevention of Torture. Numerous experts, NGOs, and national human rights institutions offered advice and comments prior to finalization of General Comment No. 2. A year later, the then-*New York City Law Review* devoted a symposium to General Comment No. 2 so that its path breaking and inclusive character could begin to be understood, particularly with regard to gender-based violence.

In 2008, the Special Rapporteur on Torture published an extensive report on Gender and Torture that lent further weight to understanding torture as encompassing many forms of gender violence, for which both official and non-state actors are responsible.

Torture and Actions of Private Individuals

As Committee members have reminded States parties with inadequate definitions of torture, there is a difference between naming and prosecuting conduct as "aggravated assault" or "abuse of power," and identifying it as torture. A key outcome of General Comment No. 2 was thus to include and name rape as a form of torture.

The reasons for naming and defining the crime of torture apply generally, and equally strongly, to the phenomenon of rape: defining the crime will alert everyone to the special gravity of torture, and the need to strengthen deterrent measures; and will assist the Committee as well as empower the public to monitor and challenge state action.[11] General Comment No. 2 emphasizes the legal responsibility of those in the chain of command as well as the direct perpetrators, including by acts of instigation, consent, or acquiescence.

By focusing on the obligation to prevent torture, the CAT reminds each State party to "closely monitor its officials and those acting on its behalf," to report to the Committee on any incidents prohibited by the CAT, and to investigate, punish, and prevent further incidents. General Comment No. 2 also reminds everyone of

[11] General Comment No. 2, *supra* note 8, ¶ 11.

the CAT's applicability to all persons under the state's control or custody.

General Comment No. 2 further emphasizes how broadly the word "all" extends by referring explicitly to an array of institutions, locations, and actors. It actually lists a number of venues of custody or control, including prisons, hospitals, schools, institutions that care for children, the aged, the mentally ill or disabled, and military institutions. States are reminded that they have obligations with regard to the acts of state agents, private contractors, and others acting in official capacity or on behalf of the state or under its direction or control. General Comment No. 2 further points out "contexts where the failure of the state to intervene encourages and enhances the danger of privately inflicted harm."[12]

The obligation of the State party to prevent torture necessarily extends to identifying and assigning responsibility for impermissible acts by non-state or private actors. Such acts are covered if a state fails to exercise due diligence.

As suggested above, there have been ongoing discussions over whether acts committed by private individuals ever trigger state responsibility under the CAT. The jurisprudence of the Committee, and other international bodies, makes it clear that there is indeed an array of circumstances in which the acts of private individuals triggers state responsibility for torture or ill treatment under the CAT. Measures needed to ensure due diligence have been defined repeatedly by U.N. experts and authoritative bodies working on issues of violence against women, including rape.

Importantly, General Comment No. 2 expresses concern about situations "where the state authorities or others . . . know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute, and punish." Such inaction even can be understood to constitute a form of encouragement or de facto permission.[13]

Under the CAT's article 2, States parties have an obligation to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." On the basis of a plain reading, this must surely include measures to ensure that there is no acquiescence in such acts of torture carried out by non-state actors for purposes of "discrimination of any

[12] Id. ¶ 15.
[13] Id. ¶ 18.

kind," as set out in the CAT's article 1, including violence against women.

The significance of this point becomes even clearer when understood in the context of article 2(1) of the CAT, which clearly requires that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." The emphasis of this article is thus not on an optional obligation or even an "appropriate" form of action; it requires that the measures taken by States parties to prevent torture must in fact be effective. This means that results accomplished will be the standard for judgments on compliance, not a State party's aspirations. It further implies that it must include measures to ensure that there is no acquiescence in such acts when carried out by non-state actors. In a commentary to the CEDAW Convention's article 2, Andrew Byrnes has argued the CEDAW Convention's requirement calling on States parties "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" carries obligations of result as well. Looking at both of these together, taking "effective measures" under the CAT must be at least as demanding as an obligation under the CEDAW to take "all appropriate measures."[14]

One of the panelists at this Symposium argued that, however "torturous" the act of rape might be to the victim, the action has to be directly committed by or acquiesced to by a public official for it to be considered torture under the Convention. He stated it was rare that steps by a government official failing to take due diligence can be called a violation of human rights. He nonetheless urged states to take measures not to neglect the serious matters of domestic violence, and, indeed, acknowledged that they should exercise due diligence in order to protect people. But his argument raises the question of whether "failure to prevent" constitutes a breach of the Convention, and what constitutes an appropriate due diligence standard as applied regarding violence against women. It further draws our attention to how such a standard can be applied with regard to the acts by private persons committing the abuse of rape.

There is a considerable body of law, practice, and international legal opinion on the elements of due diligence expected in cases of violence against women, all the more so because such vio-

14 Andrew C. Byrnes & Marsha Freeman, *The Impact of the CEDAW Convention: Paths to Equality*, (UNSW Law Research Paper No. 2012-7, 2012), *available at* http://ssrn.com/abstract=2011655.

lence is understood to be a form of discrimination against women.[15] Since the CAT identifies "discrimination of any kind" as one of the four purposive elements required for an act to constitute torture, acts of violence against women must be understood in a context of discrimination, and when they are perpetrated, they take on a character that rises above any mere individual criminal action.

U.N. Special Rapporteur on Violence Against Women, Yakin Ertürk, summarized international thinking on the issue of due diligence standards thusly:

> The due diligence standard has been crucial in developing state responsibility for violence perpetrated by private actors in the public and private arenas. It imposes upon the state the responsibility for illegal acts that are not directly committed by the State or its agents but by private actors on account of State failure to take sufficient steps to prevent the illegal acts from occurring. Likewise, once an illegal act has occurred, the State's inaction and failure to investigate prosecute or punish the act perpetrated by a private actor amounts to neglect of the State obligation to be duly diligent. The due diligence standard has long been part of international law . . . placing upon the state the duty to prevent, investigate, punish, and provide compensation for all acts of VAW wherever they may occur.[16]

Ertürk points out that there are positive expectations of measures to be taken by each State party including ratifying relevant treaties, enacting special legislation, and ensuring positive action by the state:

> through policies, programmes, creation of special mechanisms such as ombudspersons commissions, public education campaigns, sensitization of agencies engage . . . or collection of data to assess the de facto status of the problem. Protection requires the State to establish or promote institutional arrangements that provide services vital to respond to VAW, such as counseling, shelter, heathcare, crisis support, restraining orders, and finan-

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15 *See generally* Robert Perry Barnidge, *The Due Diligence Principle Under International Law*, 8 INT'L CMTY. L REV. 1 (2006), for discussion of the standards required for due diligence regarding violence against women. *See also* DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE (C. Benninger-Budel ed., 2008); Opuz v. Turkey, App. No. 33401/02, (Eur. Ct. H.R. 2009); Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, ¶ 56 (2001); Velasquez Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

16 Special Rapporteur on Violence Against Women, its Causes and Consequences, *15 Years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (1994–2009): A Critical Review*, ¶ 66, U.N. Doc. A/HRC/11/6/Add.5 (May 27, 2009) (by Yakin Ertürk).

> cial aid . . . . Punishment is measured in terms of action taken . . . in relation to investigating and prosecuting cases of violence or abuse.[17]

Earlier, Professor Copelon had demonstrated the gender-biased elements of the CAT's definition of torture, including how it draws inappropriate, gendered distinctions between private and public space. General Recommendation 19 of the CEDAW Committee defined gender violence as a form of discrimination against women,[18] helping re-conceptualize violence against women from a gender perspective.[19] Copelon wrote that domestic violence had to be understood "as a system of psychological and physical control" that could amount to torture. And she commented on the relevance of the CAT Committee's General Comment: "That this understanding has gained official recognition in General Comment No. 2 is thus particularly thrilling as I believe unveiling gender violence as torture is critical to eliminating discrimination in the norm of torture . . . emphasizing the urgency of concerted and effective prevention . . . and empowering the survivors."[20]

The CEDAW Committee's General Recommendation 28 recalls that the definition of discrimination in the women's convention addresses both purpose and effect of the discriminatory treatment.[21] In fact, General Recommendation 28 points out that CEDAW's prohibition on discrimination "would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there

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17 *Id.* ¶ 67.

18 Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, Violence Against Women, U.N. Doc. A/47/38 (1992).

19 Rhonda Copelon, *Gender Violence As Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229, 238-39 (2008).

20 *Id.* at 233.

21 Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28, The Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter General Recommendation No. 28]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (1984) (explicitly referencing discrimination against women as "any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms," thus recognizing discrimination against women may result even where an act of discrimination was not intended). *See also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (referencing "discrimination of any kind" as a purposive element of torture, surely included all forms of discrimination, including gender-based discrimination).

was no recognition of the pre-existing gender-based disadvantage and inequality that women face."[22] General Recommendation 28 recalls that:

> States parties have an obligation not to cause discrimination against women through acts or omissions; they are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws.[23]

Further, paragraph 13 of the General Recommendation states that:

> Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor's acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing.[24]

In paragraph 19, the CEDAW Committee's General Recommendation 28 repeats that "States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence."[25]

In assessing the matter of state responsibility concerning acts of rape that fall under the broader category of torture and violence against women, it seems clear that private acts of rape can indeed constitute torture under the CAT, if due diligence is not applied, and such diligence requires, inter alia, examining the nature of a State party's actions to prevent, prosecute, investigate, punish, and provide reparation. General Comment No. 2 states this directly. Using such a due diligence standard, it is simply inadequate to argue that the State party's authority must exhibit direct acquiescence to

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[22] General Recommendation No. 28, *supra* note 21, ¶ 5.

[23] Id. ¶ 10.

[24] Id. ¶ 13.

[25] Id. ¶ 19.

each single act of abuse in order to establish state responsibility. It is inadequate to claim that individual acts of rape and violence against women do not amount to torture under the CAT, as if such acts occur in a vacuum outside the context of state policies that perpetuate discrimination and violence against women.[26]

It is worth noting that then-Special Rapporteur on Violence against Women, Yakin Ertürk, referencing the due diligence requirements set forth in the 1993 Declaration on the Elimination of Violence Against Women, pointed out that "the application of the due diligence standard, to date, has tended to be state-centric and limited to responding to violence when it occurs, largely neglecting the obligation to prevent and compensate and the responsibility of non-State actors."[27] She argued that due diligence must be explored at "different levels of intervention: individual women, the community, the State and the transnational level," and she has offered guidelines for each level of intervention.

Special Rapporteur on Torture, Manfred Nowak, also reached a similar conclusion in his 2010 report when, in the context of a discussion of privately inflicted harm, he addressed domestic violence and the fact that most states do not take "enough action . . . to protect women and children against ill-treatment by their husbands, partners or parents." He concluded that "[b]y not acting with due diligence to protect victims of domestic violence . . . and similar practices, States may commit torture or cruel, inhuman or degrading treatment or punishment by acquiescence."[28]

The CAT's General Comment No. 2 and the practice of the Committee clearly agree with Nowak's analysis.

Rape and Torture Since General Comment No. 2 at the Committee Against Torture

Almost five years have passed since the adoption of General Comment No. 2. In the section below, we examine how the Com-

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26 *See* Andrew Byrnes, *Article 2, in* The Elimination of all forms of Discrimination against Women: A Commentary 88 (Freeman, Chinkin, and Rudolf, eds., 2012).

27 Special Rapporteur on Violence Against Women, its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, the Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, Econ. & Soc. Council, Comm. on Human Rights, U.N. Doc. E/CN.4/2006/61 (by Yakin Ertürk).

28 Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, U.N. General Assembly, U.N. Doc. A/HRC/13/39, ¶ 62 (Feb 9, 2010) (by Manfred Nowak).

mittee has in fact addressed issues of rape and violence against women.

To begin with, the Committee has substantially expanded its sensitivity to and awareness of the issue of violence against women, and rape in particular. Today, it routinely addresses the subject in its concluding observations following examinations of individual country reports. Indeed, the Committee has also embedded the concept of rape as torture in its ongoing work, procedurally. States are commonly asked for data on such cases and particularly about the measures taken with respect to their investigation, prosecution, and any relevant punishment or redress. During the oral review, such questions are commonplace, often extending to legislative issues such as criminalization of marital rape, exculpatory punishments when perpetrators marry their victims, amnesty laws, etc.

A review of the Committee's concluding observations on country reports reveals that the Committee has referred to the issue of rape in at least forty-six cases it has reviewed between 2002 and 2011. The number of such cases in which rape is referenced expanded substantially following the beginning of the Committee's serious discussion of these issues during the consideration of the draft of General Comment No. 2 in 2006, and even more so after its adoption in 2007. Specifically, rape was mentioned in three Committee conclusions between 2002 and 2005.[29] Between 2006 and the end of 2007, when the General Comment No. 2 was adopted, rape was cited in conclusions concerning twelve states.[30] Since then and through the end of 2011, thirty-one countries examined have had issues related to rape mentioned in Committee conclusions following the adoption of General Comment No. 2.[31]

Furthermore, an examination of the concluding observations and recommendations of the Committee Against Torture reveals that the issues raised, including simply those concerned with rape, are themselves quite varied and have changed in scope.

Prior to 2006, the Committee referenced rape very rarely in its conclusions and observations. In 2002, the only mention of rape in Committee concluding comments was a reference after Spain's review to concern over "[c]omplaints concerning the treatment of

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[29] Spain, Colombia, and Finland.

[30] United States, Rep. of Korea, Peru, Togo, Guyana, South Africa, Mexico, Burundi, Poland, Japan, Benin, and Latvia.

[31] Algeria, Macedonia, Zambia, Indonesia, Iceland, China, Kazakhstan, Kenya, Nicaragua, Philippines, Chad, El Salvador, Yemen, Moldova, Cameroon, Mongolia, Syria, Jordan, Ethiopia, Cambodia, Turkey, Bosnia, Madagascar, Finland, Morocco, Sri Lanka, Mauritius, Ghana, Belarus, Turkmenistan, and Bulgaria.

immigrants, including sexual abuses and rape" and, in this context, further concern about the particular importance the Committee attached to the incomplete definition of torture in Spain's penal code, which lacked reference to such acts when "based on discrimination of any kind."[32] Similarly, in the 2003 review of Colombia, the Committee expressed concern over "allegations and information indicating . . . inadequate protection against rape and other forms of sexual violence allegedly frequently used as a form of torture or ill-treatment." While recommending that Colombia investigate, prosecute, and punish those responsible for rape and sexual violence, the Committee made a special point of mentioning that this occurs "in the framework of operations against illegal armed groups,"[33] strongly suggesting that the practice was attributable to government agents. In 2005, there was a positive reference to Finland's laws aiding victims of torture and rape, but nothing more.

It was not until 2006 that the Committee addressed reports of rape more frequently, referencing rape in the conclusions of at least forty-three country compliance reviews since then. The concerns ranged from rape in detention, armed conflict, or at the hands of public or law enforcement officials, to the need for preventive measures to address and correct laws that inadequately protect against rape. States parties have been advised to amend the definitions in their laws and to criminalize rape including marital rape, and to address issues of consent and more.

Reports of rape in war, peacetime, police operations, or ordinary life were cited by the Committee in conclusions on fifteen countries.[34] Some recommendations focused on rape in detention. At least eleven countries have been criticized for reports of rape by state agents, including law enforcement and police officers. These include Colombia, Togo, Mexico, Japan, Indonesia, Kazakhstan, Kenya, Philippines, Ethiopia, Chad, and Turkey.

While many Committee country conclusions also criticize vio-

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32 Report of the Comm. Against Torture, 29th Sess., Nov. 11–22, 2002, 30th Sess., Apr. 28–May 16, 2003, U.N. Doc A/58/44, ¶ 61; GAOR 58th Sess., Supp. No. 44 (2004).

33 Annual Report of the Comm. Against Torture, 31st Sess., Nov. 10–21, 2003, 32d Sess., May 3–21, 2004, U.N. Doc A/59/44, ¶ 68(d); GAOR 59th Sess., Supp. No. 44 (2004).

34 Countries include Burundi (systematic use of rape as a weapon of war), Chad (criticizing government agents, armed forces, and allies of the government for rape and citing incidents at internally displaced person camps, refugee camps, and impunity), Indonesia (by military personnel), and Mexico (in police operations), as well as Cambodia, Turkey, Mongolia, Sri Lanka, Bulgaria, El Salvador, Zambia, Benin, Ethiopia, Morocco, and South Africa.

lence against women in general, which involves non-state actors, only a few criticize rape per se by non-state actors. The latter cases appear to involve armed groups: Algeria, where hundreds were raped by members of armed groups, and no investigations or prosecutions followed; Chad, where rapes were reportedly perpetrated by militias, armed groups, and forces of others; and Syria, where reports, based on the reports of other international bodies, also identified sexual violence by public officials.

Other recommendations also address rape, sometimes in the context of domestic violence and sometimes more broadly. Since 2006, the Committee has asked eleven states to criminalize marital rape, which is perpetrated by non-state actors.[35] In others, such as Jordan and Syria, the Committee has demanded an end to exculpatory provisions in law that permit rape charges against the perpetrator to be dropped if he marries his victim. Four countries were criticized for their abortion laws, three of which forbid abortion in all circumstances, specifically including rape. Five countries were asked for data on rape incidents in their states; two were advised to train their officials to address such cases.

As can be seen, there are already a sizable number of states being scrutinized regarding their compliance with the CAT's provisions calling for humane treatment and with regard to the issue of rape.

Individual Communications

The Committee Against Torture has examined some communications in which the matter of rape featured prominently. One of these was *V.L. vs. Switzerland* in 2005,[36] involving a Belarusian woman and incidents she experienced with local police in Belarus.[37]

The Committee has examined individual cases, in some of which there were violations of article 3, which prohibits returning a person to a country if he or she faces a risk of torture involving rape. The key to the examination of these cases insofar as they address rape and gender violence seems to reflect the significant rea-

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[35] Countries encouraged to criminalize marital rape have included Rep. of Korea, Benin, Latvia, Zambia, Cameroon, Syria, Ethiopia, Cambodia, Mongolia, China, and Bulgaria.

[36] Comm. Against Torture, V. L. v. Switzerland, Communication 262/2005, U.N. Doc. CAT/C/37/D/262/2005 (Nov. 20, 2006).

[37] *See generally* Katharine Fortin, Comment, *Rape as Torture: An Evaluation of the Committee Against Torture's Attitude to Sexual Violence*, 4 Utrecht L. Rev. 145 (2008) (assessing this decision and how it demonstrates changes in the Committee's approach to the subject).

soning and decision in *V.L. v. Switzerland*, which directly addressed the public-private distinction and discussed the gendered nature of the Convention. Further examined in *V.L. v. Switzerland* was the role of non-state actors in threatening torture, the location of torture, and the prohibited purpose of the act(s) of torture.

In the following two cases, where violations of article 3 were found, the issue arose of return to a country where rape was prevalent and conducted by non-state actors as well as state actors. In these cases, the Committee found a risk of return to torture.

In *Bakatu-Bia v. Sweden*,[38] the complainant claimed that she would be imprisoned and tortured if returned to the Democratic Republic of the Congo ("DRC") in violation of article 3 of the Convention, since she had been arrested and, while in detention, had been subjected to torture, beatings, and multiple rapes, due to her religious and political activities. The Committee noted the claims and evidence submitted by the complainant, the arguments of the State party, as well as the recent reports by seven U.N. experts and by the U.N. High Commissioner for Human Rights on the human rights situation in the country. In the light of the information before it, the Committee Against Torture considered that it was impossible to identify particular areas of the country that could be considered safe for the complainant. After having taken into account all the factors relevant for its assessment under article 3 of the Convention, and considering that the complainant's account of events was consistent with the Committee's knowledge about the present human rights situation in the DRC, the Committee concluded that substantial grounds existed for believing that the complainant was at risk of being subjected to torture if returned to the DRC. As noted, the Committee found a violation of article 3 of the CAT.

In *Njamba and Balikosa v. Sweden*,[39] the two complainants, mother and daughter, fled to Sweden from the DRC after discovering that all the rest of the family was murdered. The applicants claim, inter alia, that if they were returned to the DRC they would be subject to rape and sexual exploitation by DRC security forces. Sweden did not agree that the applicants' fear of torture was convincing. However, the Committee decided against Sweden's position, citing human rights reports that sexual violence was very

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[38] Comm. Against Torture, Bakatu-Bia v. Sweden, Communication 379/2009, U.N. Doc. CAT/C/46/D/379/2009 (Jun. 3, 2011).

[39] Comm. Against Torture, Njamba and Balikosa v. Sweden, Communication 322/2007, U.N. Doc. CAT/C/44/D/322/2007 (May 14, 2010).

common in all the provinces in the DRC, and that there are substantial grounds to fear that these applicants will be subject to such violence, recognizing rape as a form of violence against women where the state had failed to exercise due diligence to prevent its perpetration by non-state actors.

Lessons Learned and the Future

1. Encouraging more awareness of CAT's General Comment No. 2

Almost four years after the publication of General Comment No. 2, the significance of the comment and its potential for international and national advocacy and scholarship remains underdeveloped. The U.N. does not undertake to disseminate such documents (other than post them on the website and refer to them in documents) in a way that brings them home to those who need them badly and would be most likely to use them.

NGOs and complainants should engage more with the Committee on this, using the various procedures available under the CAT.

2. Continuing monitoring and interventions regarding gender and torture

More work clearly needs to be pursued to assist monitoring and intervention regarding gender-based violence. Despite the groundbreaking developments in understanding sexual and gender-based violence as torture, there is still much work to be done to ensure that the torture framework is both used and respected. This is critically important as it ensures that rape and other gender violence will remain as one of the gravest human rights violations having peremptory or *jus cogens* status. There is an obvious need to continue the practice of lodging complaints in such cases or developing appropriate new approaches as the need arises.

Addressing this issue in the context of torture has yet another utility, as attested to by rape and domestic violence survivors, because this approach transfers the burden of responsibility and shame to the perpetrator and away from the victim. In this way, it further helps to transform cultural understanding and practical prevention of such violence. Monitoring and lodging legal complaints through international bodies such as the Committee further demands that the state meet its due diligence obligations to prevent, investigate, prosecute, and redress such forms of torture.

3. Seeking greater efforts to ensure the state meets due diligence obligations to prevent, investigate, punish, and redress acts of rape by private actors in violation of the CAT

This final point, of course, is discussed earlier in this Article. But it merits repetition one last time, if only because Rhonda Copelon would have wanted us to add it to reemphasize the importance of concentrating legal skills and submissions on this subject.

SURFACING RHONDA[1]

Pam Spees†

One of the things I always regretted that we did not take the time to do when I was at the City University of New York ("CUNY") School of Law—and then later working with Rhonda with the Women's Caucus for Gender Justice—is bring home a sense to the CUNY Law community of just how big and far-flung that community really is as a result of the work of the International Women's Human Rights Clinic ("IWHR" or "the Clinic"). This Symposium can begin to give you a sense of how far-reaching the influence of the Clinic has been in many different fora. It is and has been such a vital resource in many arenas.

So then where to start when talking about Rhonda's vision and how it continues to impact work and our ideas for ways forward? CUNY Law was the only law school to which I applied. I would not have gone anywhere else. And it was Rhonda's work with the Clinic that called to me, that brought me to it. I had the privilege of learning from and working with her for many years. Her vision is always there challenging me to reach further, to think beyond where we might see the immediate strategy, looking for meaningful ways to get at the heart of the problem, rather than chipping around at the edges—although that is important too. From my current vantage point at the Center for Constitutional Rights ("CCR"), I can describe three areas where Rhonda's vision and approach continue to have an impact.

Working in Solidarity

We are currently engaged in a number of efforts related to the June 2009 *coup d'état* in Honduras. We brought a case under the Alien Tort Statute ("ATS") on behalf of the parents of Isis Murillo, a young protestor killed by the *coup* regime.[2] At the same time as helping our clients try to achieve some form of accountability for the murder of their son where no other possibility exists, we are also working to make more visible the struggle of allies and the

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1 An allusion to one of Rhonda's pivotal articles. *See* Rhonda Copelon, *Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law*, 5 Hastings Women's L.J. 243 (1994).

† Pam Spees is a Senior Staff Attorney at the Center for Constitutional Rights.

2 *See* Complaint, Murillo v. Micheletti Bain, No. 4:11-CV-02373 (S.D.T.X. June 23, 2011), *available at* http://ccrjustice.org/honduras-coup.

resistance movement and to address the role of the United States government in legitimating the *coup* and providing financial support and assistance to a military and police force that continue to commit gross human rights abuses.

Rhonda's presence is very much felt in the sense that we are using a type of case she helped give life to, but also through this idea of working in solidarity. This is key to CCR's international human rights work. The resort to international law and mechanisms was guided in large part by CCR's work in solidarity with allies and groups in Central America and in Haiti, particularly in the 1980s and early 1990s, where U.S. policies were having such disastrous effects. We must bring the same spirit and ethos to our work in terms of responding to the needs and furthering the goals of a movement in the same ways that CCR, at its inception, approached its work in the civil rights movement domestically. It is about working as partners with allies and colleagues and helping to bring visibility to the work, perspectives, and experiences of communities.

Continuing to Underscore the Gravity of Rape and Sexual Violence as Torture

Another case building on Rhonda's collaborative work is a case we brought against Joseph Ratzinger, now known as Pope Benedict XVI, on behalf of survivors of sexual violence by priests and others associated with the church. In September 2011, we lodged a complaint with the International Criminal Court ("ICC") seeking to have Ratzinger and three other high-level Vatican officials investigated for the widespread and systemic rape and sexual violence committed within the Church.[3] The power of the Vatican, the profound effects and use of religion, the scale and pervasiveness of the offenses as well as the seeming hopelessness around any accountability have combined to create a kind of collective cognitive dissonance around these crimes that has tragically trivialized and minimized the very deep and long-lasting harm of the sexual violence in this context.

There are three dimensions we saw as critically important in this case. First has been the work in partnership with those most

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[3] *See* File No. OTP-CR-159/11, Victims' Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-Level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity, (Int'l Crim. Ct. Sept. 13, 2011), *available at* http://www.ccrjustice.org/ICCVatican Prosecution.

affected. We are representing the Survivors Network of Those Abused by Priests ("SNAP"), which began over twenty years ago as a support group and now has over 10,000 members in the U.S. alone. That this effort be survivor-led and survivor-centered and aimed at reaching other survivors is a crucial part of this process for healing, empowerment, and reclaiming a sense of autonomy. Second, naming is crucial and that entails calling the "abuse" what it really is—rape, sexual violence, and torture.

Finally, in many respects we were building on the work that Rhonda and many others had done through the Women's Caucus for Gender Justice to codify and fully reflect the seriousness of rape and sexual violence in the ICC and in other international criminal tribunals. We are drawing on those successes in trying to address what is a global problem as these crimes—the sexual violence as well as the systemic cover-ups and further enabling of the offenses—are happening virtually everywhere the Church has a presence, which is global.

Sexual Orientation and Gender Identity

Finally, on March 14, 2012, we filed a case on behalf of Sexual Minorities Uganda ("SMUG") against Scott Lively, an attorney, evangelical minister, and anti-gay extremist based in Springfield, Massachusetts, who has played a critical role in the persecution of the lesbian, gay, bisexual, and/or transgender ("LGBT") community in Uganda, as well as elsewhere around the world.[4] Our clients are in a very difficult situation that is made even worse by the continuing influence of the likes of Scott Lively who export anti-gay extremist agendas developed in the U.S.

Again, it is important in this case to call it what it is—persecution. We tend to be atomized and look at these developments as unrelated, but when you step back and look at the larger whole, you can see that what is at issue in this case is part of a larger plan of persecution, and that Lively's overall agenda is clearly aimed at stripping away basic fundamental rights from people who are LGBTI wherever he can get away with it—whether in Uganda, Moldova, or Springfield, Missouri.

In bringing this case under the ATS for persecution on the basis of sexual orientation and gender identity, we are drawing on efforts undertaken many years ago. One of the successes in the

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4 *See* Sexual Minorities Uganda v. Lively, No. 3:12-cv-30051-MAP (D. Mass. July 13, 2012); *see also LGBT Uganda Fights Back: The Case Against Scott Lively*, Ctr. for Constitutional Rights, http://ccrjustice.org/LGBTUganda/ (last visited Aug. 11, 2012).

work around the ICC was protecting the space for sexual orientation and gender identity to be regarded as a prohibited basis of persecution, to allow the court to take into account the evolving standards in international law. The recent *Atala* case in the Inter-American Court, recognizing that sexual orientation and gender identity is a prohibited basis of discrimination in international law, is an example of the evolution that Rhonda both foresaw and helped bring about.[5]

Looking Ahead

In terms of looking forward to challenges and opportunities on the horizon, there is the real danger that the Supreme Court will limit the ATS through a case it is reviewing involving serious allegations of crimes against humanity arising out of Shell's presence in Nigeria.[6] At issue is whether corporations can be held accountable under the ATS and whether or to what extent the statute would apply extraterritorially. That these two issues are even in question is alarming when you consider that the ATS has been a primary means of seeking to hold corporations accountable for serious human rights abuses. Whatever happens in this case, we know that we must continue to think and act creatively and very strategically in looking for ways to address these harms in the future.

In terms of opportunities, one of the things that drew me to law school, and to CUNY Law and the Clinic in particular, was the promise of the human rights framework as a way of addressing more holistically the issues we deal with in our communities, which often involve more complexities and intersections in terms of root causes than our legal system will accommodate. The indivisibility principle in human rights law challenges us to develop and internalize a consciousness around economic and social rights and to have a clear understanding of the interplay and interdependence of economic, social, and cultural rights on the one hand, with civil and political rights on the other.

Growing efforts to incorporate and use human rights domestically in the U.S. are so important and promising—both in terms of cutting into U.S. exceptionalism and holding the U.S. accountable to these norms, and also for mobilizing and shifting our own consciousness. What would an understanding of health and education

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[5] Karen Atala and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

[6] Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (Mar. 5, 2012) (ordering reargument on the issue of the extraterritorial application of the ATS).

as basic *rights* do to the way we approach these issues as they play out domestically? While the human rights framework may not be perfect and we are still collectively trying to achieve or fully actuate the promise of its indivisibility, Rhonda saw that it presents us with more opportunities and space to envision and create more socially just communities, or as Adrienne Rich succinctly put it in 1984 and as noted in her obituary in the New York *Times*, "the creation of a society without domination."[7]

[7] Margalit Fox, Obituary, *Adrienne Rich, Influential Feminist Poet, Dies at 82*, N.Y. TIMES, Mar. 28, 2012, http://www.nytimes.com/2012/03/29/books/adrienne-rich-feminist-poet-and-author-dies-at-82.html.

THE CHALLENGE OF DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS LAW IN THE *COTTON FIELD* CASE

Caroline Bettinger-Lopez†

It is only fitting that a symposium commemorating Professor Rhonda Copelon's contributions to today's human and women's rights movements would end with a panel on implementation. Due to the efforts and notable successes of advocates—including, quite prominently, Copelon—we have witnessed great normative development in the field of international women's human rights in recent decades. Several international bodies—among them, the Committee on the Elimination of Violence Against Women, European Court of Human Rights, Inter-American Court of Human Rights, and Inter-American Commission on Human Rights—have found that gender-based violence, including domestic violence, can constitute impermissible discrimination under international law.[1] International treaties and jurisprudence have begun to recognize that such discrimination can take on "multiple" or "intersectional" forms when it affects marginalized populations, such as indigenous, poor, or minority women and girls.[2] Sexual orienta-

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1 Comm. on the Elimination of Discrimination against Women [CEDAW], General Recommendation No. 19, Violence Against Women, U.N. Doc. HRI/GEN/1/Rev. 1 ¶ 6 (1994); Opuz v. Turkey, App. No. 33401/02, ¶¶ 74–75 (Eur. Ct. H.R. 2009); Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 110, 165, 199 (2011) [hereinafter *Gonzales*]; González v. Mexico (*Cotton Field*), Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205., ¶ 395 (Nov. 16, 2009) [hereinafter *Cotton Field*]; Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 303 (Nov. 25, 2006).

2 Inter-Am. Convention on the Prevention, Punishment, and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63 [hereinafter Convention of Belém do Pará]; *Gonzales*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 6; *Cotton Field*, Inter-Am. Ct. H.R. (ser C.) No. 205, ¶ 113 (2011); Fernández Ortega v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010); Rosendo Cantú v.

tion and gender identity have been found to be protected classes under international law,[3] and sexual violence has been found to be a form of torture when perpetrated by state agents.[4] International human rights bodies have also examined the question of how states might best respond to structural discrimination and stereotypes, and have incorporated their conclusions into comprehensive reparations orders.[5] These bodies have begun to comprehensively examine the concept of state duty to act with the "due diligence" necessary to prevent, protect, investigate, sanction, and offer reparations in cases of violence against women and discrimination perpetrated by state and non-state actors, particularly in a context where these problems are pervasive and impunity is the norm.[6]

The development of these standards marks great progress for the international women's human rights movement. While normative development remains an ever-present and evolving goal, the greatest challenge today's movement faces is that of implementation—that is, "the process of putting international commitments into practice."[7] The efficacy, authority, and credibility of an international court or human rights body, it has been noted, are measured principally by the implementation of its judgments and other

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Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010); Ana, Beatriz, and Cecilia González Pérez (Mexico), Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01, OEA/Ser.L./V/II.111, doc. 20 (2001).

3 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91 (Feb. 24, 2012); Salgeuiro da Silva Mouta v. Portugal, App. No. 33290/96, ¶ 36 (Eur. Ct. H.R. 1999); Christine Goodwin v. The United Kingdom, App. No. 28957/95 (Eur. Ct. H R. 2002).

4 Raquel Martín de Mejía v. Peru, Case 10.970, Inter-Am. Ct. H.R., Report No. 5/96, OEA/Ser.L./V/II.91, doc. 7 rev. (1996); *Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 118

5 *See, e.g.*, *Opuz*, App. No. 33401/02; Fatma Yildrim v. Austria, Communication No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005, ¶ 12.1.1 (2007); A.T. v. Hungary, Commc'n No. 2/2003, U.N. Doc. CEDAW/A/60/38/2005, ¶ 9.2 (2005); Convention of Belém do Pará, *supra* note 2, arts. 6 & 7(g). *See also* Convention on the Elimination of All Forms of Discrimination Against Women, art. 5(a), Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 [hereinafter CEDAW Convention]; Rosa M. Celorio, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, 65 U. Miami L. Rev. 819, 854 (2011); *Gonzales*, 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 ¶ 6.

6 *See Cotton Field*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 113. *See also* Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 (2001). The concept of "due diligence" was originally developed in the case of *Velásquez Rodríguez*. Only recently has the concept been applied to gender.

7 Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in Handbook of International Relations, 538, 539 (Walter Carlsnaes et al., eds., 2002).

opinions resembling jurisprudence.[8]

The challenge of domestic implementation of international human rights law carries many dimensions. International human rights bodies "are notable in our international order precisely because they have the authority to regulate national sovereigns, but at the same time, they generally lack recourse to an international sovereign power to enforce those orders."[9] In light of this, the following questions become paramount when considering domestic implementation: What level of deference is given to international human rights law by a state's domestic legal and political regime? What are the implications of a state's internal political organization (e.g., democratic, federalist, etc.) for implementation in both theory and practice? How do law, policy, and politics interact on the ground to influence implementation of norms promulgated by an international body or a decision from an international tribunal? What role do social movements play in the realization of international human rights law at the domestic level?

Beyond these structural questions are mechanical questions surrounding how states can most effectively realize the "due diligence" elements noted above—namely, the duties to prevent, investigate, and provide redress for rights violations, protect victims, and sanction perpetrators. Each of these elements must be considered at both the individual level—with respect to the individual(s) whose rights were violated—and at the policy level—with respect to state policies and practices. The full implementation of the normative developments described at the beginning of this essay may require a wholesale restructuring of the state apparatus on multiple fronts.

With few best practice models upon which we may rely, the implementation challenge in the human rights field can feel insurmountable. Indeed, as Harold Koh has noted, "human rights is the subject matter area in international affairs where the largest enforcement deficit exists, inasmuch as the costs of enforcement appear high and the benefits seem low by traditional state interest

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[8] *See* OPEN SOC'Y JUSTICE INITIATIVE, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS (2010), *available at* http://www.soros.org/sites/default/files/from-judgment-to-justice-20101122.pdf; Steering Comm. for Human Rights (CDDH) Reflection Group on the Reinforcement of the Human Rights Protection Mechanism (CDDH–GDR) Draft Addendum to the Final Report Containing CDDH Proposals, CDDH–GDR (2003) (Mar. 12, 2003).

[9] OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 8, at 12.

calculations."[10] The Open Society Justice Initiative has described this deficit as an "implementation crisis [that] currently afflicts the regional and international legal bodies charged with protecting human rights."[11]

Rhonda Copelon, the brilliant scholar, formulated and expanded upon many of these questions concerning implementation in her writing and teaching. And then, in the same breath, Rhonda Copelon, the brilliant advocate-lawyer, helped forge a roadmap, through her briefs, reports, and other advocacy documents, for how advocates might pursue real change on the ground that is guided by human rights principles.

In this essay, I explore normative developments in the landmark *Cotton Field* case before the Inter-American Court of Human Rights—developments envisioned and championed by Rhonda Copelon, among others—and describe Copelon's vision for how those norms might be put into place in Mexico. I then briefly summarize the state of implementation of the court's decision and offer closing thoughts on the road ahead. As I discuss, the challenges of domestic implementation remain abundant, though important steps have been taken in a positive direction.

THE *COTTON FIELD* JUDGMENT: NORMATIVE DEVELOPMENTS

On November 16, 2009, the Inter-American Court of Human Rights issued a landmark decision in *González and Others v. México*, known familiarly as the *Cotton Field* (*Campo Algodonero,* in Spanish) case.[12] The court ruled that Mexico violated both the American Convention of Human Rights ("American Convention") and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women ("Convention of Belém do Pará") when it failed to prevent and investigate the gendered disappearances and murders of three poor migrant women, two of whom were minors.[13] These incidents, the court emphasized, took place in the context of a fifteen-year series of hundreds of unsolved and poorly investigated disappearances, rapes, and murders of poor, young, predominantly-migrant women and girls in Ciudad

10 Harold H. Koh, *Internalization Through Socialization*, 54 DUKE L.J. 975, 979 (2005).

11 OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 8, at 11.

12 *Cotton Field*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

13 *Id.*

Juárez, a Mexican city across the border from El Paso, Texas, with a population of 1.5 million.

The *Cotton Field* decision is important for a number of reasons. In terms of the legal foundations upon which the court relied, it is significant that the court found violations of both the American Convention, the foundational treaty of the Inter-American system[14] which has had a particularly important role in the development of the court's "due diligence" jurisprudence in the area of, inter alia, forced disappearances,[15] and the Convention of Belém do Pará, a newer treaty (adopted in 1994) that is the most ratified instrument in the Inter-American system and the only multi-lateral treaty that focuses exclusively on the issue of violence against women.[16] Also, as described in more detail below, the court analyzed the relationship between the rights and obligations contained in these two treaties.[17]

Moreover, the court's legal conclusions in *Cotton Field* are unprecedented. For the first time, the court found that states have affirmative obligations to respond to violence against women by private actors, and that those obligations are justiciable under article 7 of the Convention of Belém do Pará. Additionally, the court examined the cases at issue in the context of mass violence against women and structural discrimination, found that gender-based violence constitutes gender discrimination, and articulated its most comprehensive definition to date of gender-sensitive reparations.[18] In its judgment, the court found Mexico responsible for numerous rights violations:

- The rights to life, personal integrity, and personal liberty of the victims recognized in articles 4(1), 5(1), 5(2), and 7(1) of the American Convention and the obligation to investigate—and thereby guarantee—such rights and adopt do-

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14 I use the term "Inter-American system" to refer to the Inter-American Human Rights System, the regional human rights system of the Organization of American States ("OAS") that is composed of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

15 *See, e.g.*, Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

16 Thirty-two member states of the OAS have ratified the Convention of Belém do Pará. *See* Organization of Am. States, Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, Preamble. & arts. 1–9, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63.

17 *Cotton Field*, Inter-Am. Ct. H.R. (Ser. C) No. 205, ¶¶ 287–389.

18 *Id*; *see also* Caroline Bettinger-Lopez, *Inter-American Court Rules Against Mexico on Gender Violence in Cuidad Juárez* (Jan. 18, 2010 4:04 AM), http://ssrn.com/abstract=1550873.

mestic legal measures established in articles 1(1) and 2, in addition to the obligations established in articles 7(b) (due diligence to prevent, investigate, and impose penalties for violence against women) and 7(c) (penal, civil, administrative provisions to prevent, punish, and eradicate violence against women) of the Convention of Belém do Pará.[19]

- The rights of access to justice and to judicial protection, embodied in articles 8(1) and 25(1), in connection to articles 1(1) and 2 of the American Convention, and 7(b) and 7(c) of the Convention of Belém do Pará, to the detriment of the victims' next of kin.[20]
- The obligation not to discriminate, contained in article 1(1) of the American Convention, in connection to the obligation to investigate and guarantee the rights contained in articles 4(1), 5(1), 5(2), and 7(1), to the detriment of the three victims; and also in relation to access to justice embodied in articles 8(1) and 25(1) of the Convention, to the detriment of the victims' next of kin.[21]
- The rights of the child, embodied in article 19, in relation to articles 1(1) and 2 of the American Convention, to the detriment of the two minor victims.[22]
- The right to personal integrity in articles 5(1) and 5(2), in connection to article 1(1) of the American Convention, due to the suffering caused to and harassment of the victims' next of kin.[23]

In considering the violations, the court reiterated the elements of due diligence—the state duties to prevent, investigate, punish, and compensate human rights violations, including those committed by private actors—originally articulated in the seminal case *Velásquez Rodríguez v. Honduras*.[24] Further, the court considered the element of discrimination that overlaid the substantive law violations and noted the hostile stereotypes of state authorities toward the victims and their families. "The creation and use of stereotypes," the court found, "becomes one of the causes and consequences of gender-based violence against women."[25] Ultimately,

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19 *Cotton Field*, Inter-Am. Ct. H.R. (Ser. C) No. 205, ¶ 602(4-5).
20 *Id.* ¶ 602(5).
21 *Id.* ¶ 602(5).
22 *Id.* ¶ 602(7).
23 *Id.* ¶ 602(8-9).
24 Velasquez Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 172, 166–67, 182 (July 29, 1988).
25 *Cotton Field*, Inter-Am. Ct. H.R. (Ser. C) No. 205, ¶ 401; *see also* Brief for the Int'l

the court found, "the violence against women [in this case] constituted a form of discrimination."[26]

The court also ruled on an important jurisdictional question in *Cotton Field*; namely, the question of the justiciability of articles 7, 8, and 9 of the Convention of Belém do Pará—a treaty which, it bears mention, Rhonda Copelon played a role in drafting. The court concluded that, as per article 12 of that treaty, it had jurisdiction over claims brought under article 7, which provides that states must condemn all forms of violence against women and agree to pursue, by all appropriate measures and without delay, policies to prevent, punish, and eradicate such violence through legal, legislative, administrative, and policy initiatives. The court further concluded that it did not have jurisdiction over claims brought directly under article 8—by which states "agree to undertake progressively specific measures" to eradicate violence against women—or under article 9—by which states "shall take special account" of vulnerable groups of women. Still, the court found that the various articles of the Convention—including articles 8 and 9—can nevertheless be useful to aid interpretation of article 7 of the Convention of Belém do Pará and of other pertinent Inter-American instruments, such as the American Convention.[27]

This last pronouncement was especially important to Rhonda Copelon. Copelon served as an expert witness before the court in the *Cotton Field* case in April 2009, arguing that "articles 7–9 of Belém do Pará provide a thorough and gender sensitive outline of both immediate and progressive initiatives for the effective implementation of reparations."[28] The programs outlined in article 8, Copelon argued, give definition and specificity to the legal, legislative, policy, and administrative measures for eradicating violence against women that are laid out in article 7(c), (e), and (h).[29] Moreover, Copelon's testimony underscored that the measures articulated in articles 7 and 8 should arguably be tailored to take "special account" of vulnerable groups of women, as per article 9.[30]

Reprod. and Sexual Health Law Programme, Univ. of Toronto Faculty of Law et al. as Amici Curiae Supporting Petitioners, *Cotton Field*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (2009).

[26] *Cotton Field*, Inter-Am. Ct. H.R. (Ser. C) No. 205, ¶ 402.

[27] *Id.* ¶ 79.

[28] Rhonda Copelon, Professor of Int'l Law and Director, Int'l Women's Human Rights Law Clinic, City Univ. of N.Y. School of Law, Expert Testimony Before the Inter-American Court of Human Rights in the Case of *Cotton Field*, ¶ 33, (Apr. 28, 2009) [hereinafter Copelon Expert Testimony].

[29] *Id.* ¶ 37.

[30] *Id.* ¶ 12.

Copelon's arguments were echoed in an amicus brief submitted to the court by more than fifty U.S.-based individuals and organizations, which argued that Mexico's longstanding failure to investigate, prosecute, or prevent the gender-based crimes in this case violated its obligations under international human rights law.[31]

I would be remiss not to mention Judge Cecilia Medina's concurring opinion in *Cotton Field*, in which she contends that the court should have found a violation of the prohibition on torture contained in article 5(2) of the American Convention. Judge Medina champions the adoption of the three-part test set forth by the International Criminal Tribunal of Yugoslavia "to determine elements in torture that are uncontentious and that constitute, consequently, *jus cogens*: (i) infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) the intentional nature of the act, and (iii) the motive or purpose of the act to reach a certain goal."[32] Medina asserts that the suffering at issue in the case was sufficiently severe to constitute torture, as other international bodies have repeatedly found in cases involving gender-based violence.

Here, too, Rhonda Copelon's fingerprints can be found on Judge Medina's concurrence. Copelon, in her pathbreaking article *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, first set forth the theory that domestic violence, when the state fails to intervene, can constitute a form of torture that implicates state responsibility under the Convention Against Torture ("CAT Convention").[33] For years, she championed the idea that gender-based violence and abuse—whether committed by state actors or private actors when officially countenanced—could amount to torture, or, where less severe or lacking in impermissible purpose, was cruel, inhuman, or degrading treatment or punishment.[34] The CAT Committee's 2007 General Comment No. 2, which addresses the erosion of human rights during the post-September 11th era,[35]

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31 Brief for Amnesty Int'l et al. as Amici Curiae Supporting Petitioners, *Cotton Field*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 205 (2009).

32 *Cotton Field*, Inter-Am. Ct. H.R., (ser. C) No. 205 (Medina Quiroga, J., concurring) (citing Prosecutor v. Kunarac, Case No. IT-96-22-T, Judgment, ¶ 483 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 22, 2001)).

33 Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 356–58 (1994).

34 *See, e.g.*, Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2,* 11 N.Y. CITY L. REV. 229 (2008).

35 Comm. Against Torture [CAT], General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/28/Add.5 (Jan. 24, 2008).

mainstreams gender and embraces Copelon's vision. Specifically, the General Comment underscores State parties' obligation to "prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking" and emphasizes that gender, amongst other identifying characteristics, is a "key factor" in determining an individual's risk of torture or ill treatment.[36]

Reparations: Progress and Limitations

After comprehensively articulating the prevention, investigation, and punishment aspects of Mexico's due diligence obligations from a gender perspective, Copelon's expert testimony honed in on the hardest question: that of reparations. International law recognizes the right of victims to reparations bearing the following components: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[37]

Using articles 7, 8, and 9 of the Convention of Belém do Pará as a guidepost, Copelon proposed a framework for the implementation of reparations. First, she reiterated a principle near and dear to her heart: "women victims and their advocates must be enabled to participate fully in the design and implementation of all measures of reparations."[38] Copelon was a fierce advocate for the prin-

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[36] *Id.* ¶¶ 18, 22–23. As Copelon later wrote, "General Comment No. 2 provides important guidance as to the application of the Convention to gender violence [. . .] clarifies the State's responsibility for gendered torture inflicted by non-officials and private actors and thus closes a potentially huge and discriminatory gap in the monitoring and implementation of the CAT Convention." Copelon, *supra* note 34, at 256–57 (2008).

[37] Copelon Expert Testimony, *supra* note 28, ¶ 32. *See also* Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 Colum. J. Transnat'l L., Vol. 2, 362 (2008). Antkowiak defines "compensation" as monetary reparations and defines the equitable components of reparations as follows:

> Restitution comprehends restoring the victim to his or her original situation, such as a restoration of liberty, while rehabilitation includes 'medical and psychological care as well as legal and social services.' Satisfaction is comprised of a variety of possible measures: from apologies, 'full and public disclosure of the truth,' and victim memorials, to judicial and administrative sanctions against the responsible parties. 'Guarantees of non-repetition' are equally diverse, including, inter alia, the establishment of effective civilian control over state security forces and human rights educational and training programs.

Id. (citing to Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc A/RES/60/147, at 1 (Mar. 21, 2006)).

[38] Copelon Expert Testimony, *supra* note 28, ¶ 34.

ciple that we, as lawyers, must listen to our clients; that our clients know what's best for themselves and for other affected individuals; and that clients can challenge us lawyers to think outside the box. Second, citing *Aloeboetoe v. Suriname*,[39] Copelon emphasized that "remedies must be fashioned to enable beneficiaries to overcome the discriminatory conditions of the past."[40] Structural discrimination in Mexican legal and criminal justice institutions, and society generally, could not be decoupled from the specific events at issue in the case. Third, she contended, "rehabilitative relief is not limited to providing psychological counseling . . . Socio-economic relief [is critical] . . . where the victims are young or socio-economically marginalized."[41] Finally, with respect to the obligation of satisfaction and non-repetition, Copelon emphasized the importance of the right to truth, the incorporation of gender principles into ongoing legal and institutional change, state investigation of responsible officials, and measures to address the state-created environment of impunity and the underlying gender-based violence and discrimination.[42] This last point, Copelon underscored, is where article 8 of the Convention of Belém do Pará becomes especially useful.[43]

Copelon's influence was evident in the court's reparations award in *Cotton Field*. As Ruth Rubio-Marin and Clara Sandoval have observed, the court's reparations analysis was guided by a holistic gender approach and a "transformative agenda."[44] "[B]earing in mind the context of structural discrimination in which the facts of this case occurred," the court said, "the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable."[45] The court underscored, as key elements to its transformative agenda, that reparations should take into account a gender perspective and should be "designed to identify and eliminate

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39 *See* Aloeboetoe v. Suriname, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (Sept. 10, 1993).

40 Copelon Expert Testimony, *supra* note 28, ¶ 35.

41 *Id.* ¶ 36.

42 *Id.* ¶ 37.

43 *Id.*

44 Ruth Rubio-Marin & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the* Cotton Field *Judgment*, 33 HUM. RTS Q. 1062, 1083 (2011).

45 *Cotton Field*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205., ¶ 450 (Nov. 16, 2009).

the factors that cause discrimination."[46]

The reparations ordered by the Inter-American Court in *Cotton Field* were remarkable. The court ordered Mexico to comply with a broad set of remedial measures, including pecuniary and non-pecuniary reparations of more than $200,000 to each family in the suit, publication of the judgment, the State's public acknowledgment of international responsibility, construction of a national memorial, and state-financed medical, psychological, and psychiatric care to the victims' families.[47] Remedies aimed at guaranteeing non-repetition included: renewed investigations, prosecutions, and punishment for perpetrators;[48] investigations of public servants who failed to exercise due diligence in responding to the disappearances and murders and, in some cases, threatened or persecuted the victim's next of kin, and a public announcement of the results of such investigations;[49] the standardization of investigative protocols concerning cases of sexual violence and parameters to be taken into account when implementing rapid investigation responses in the case of disappearances of women and girls;[50] creation and updating of a national website and database with information on all missing women and girls;[51] training of all personnel in Mexico involved, directly or indirectly, in the prevention, investigation, and prosecution of violence against women; and the development of an educational program for the people of the State of Chihuahua, to ameliorate the situation of gender-based violence there.[52]

The court, however, rejected the argument advanced by the Inter-American Commission and Petitioners that, as a matter of non-repetition, Mexico should be required to design, coordinate, and implement a long-term national policy to guarantee due diligence in responding to cases of violence against women.[53] The court found that it had not been provided with "sufficient arguments" on "why the series of measures already adopted by the State cannot be considered an 'integral, coordinated policy.'"[54]

Rubio-Marin and Sandoval praise the court's willingness to

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46 *Id.* ¶ 451.
47 *Id.* ¶¶ 468–71, 549–86.
48 *Id.* ¶¶ 452, 455.
49 *Id.* ¶¶ 456–62, 465-66.
50 *Id.* ¶¶ 497–502, 506.
51 *Cotton Field*, Inter-Am. Ct. H.R., (ser. C) No. 205, ¶ 512.
52 *Id.* ¶¶ 541–43; *see also* Rubio-Marin & Sandoval, *supra* note 44, at 1088–89.
53 *Cotton Field*, Inter-Am. Ct. H.R., (ser. C) No. 205, ¶¶ 475, 493.
54 *Id.* ¶ 493.

embrace a gender-sensitive approach when interpreting Mexico's due diligence obligations and adopting "transformative reparations." However, they argue, the court, in rejecting the request by the Commission and Petitioners that the court require a coordinated, long-term national policy, "lost a major opportunity to apply its own concept of transformative reparations to the awards it made."[55] The onus, they argue, should have been on Mexico—not on the Commission or the victims—to provide evidence both as to the existence of such a policy and, critically, why any policies currently in place can be expected to prevent future violations. "Even more," Rubio-Marin and Sandoval argue, "the Court could have taken a more constructive approach to the problem and called for the establishment of an expert team to assess the effectiveness of [the] measures [Mexico had already adopted], identify their shortcomings, and put forward recommendations."[56]

My strong suspicion is that Rhonda Copelon would have agreed wholeheartedly with Rubio-Marin and Sandoval. Structural change, Copelon thought, could only be achieved through wholesale reform at every level in society—legal and non-legal, institutional and popular. I can see Copelon nodding her head and gently but firmly suggesting that without a coordinated, long-term national plan endorsed by the State to combat the massive epidemic of gender-based violence, murders, and disappearances in Ciudad Juárez, the problem will not—and cannot—be adequately addressed or resolved.

Domestic Implementation of the *Cotton Field* Judgment: An Assessment of Progress To Date

Such a dismal forecast, unfortunately, appears to be the reality currently before us. On June 23, 2012, the New York *Times* published a story, *Wave of Violence Swallows More Women in Juárez,* which painted a grim picture of the current situation in Ciudad Juárez. Despite international pressure and Mexican authorities' promises to prioritize gender-based violence cases, the *Times* reports,

> [r]oughly 60 women and girls have been killed [in Ciudad Juárez] so far this year; at least 100 have been reported missing over the past two years. And though the death toll for women so far this year is on track to fall below the high of 304 in 2010, state officials say there have already been more women killed in 2012 than in any year of the earlier so-called femicide era. This time,

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55 Rubio-Marin & Sandoval, *supra* note 44, at 1090.

56 *Id.* at 1089.

> though, the response has been underwhelming."[57]

The article goes on to describe poor, inconsistent, and obstructionist responses by authorities to disappearances and murders of women and girls, and the recent discoveries of "new clusters of slain women," some in mass graves.[58]

So what is the current status of the court-ordered remedies? With respect to the court's mandate that Mexican authorities put renewed efforts into investigations, the Federal Attorney General has organized a special working group to improve Mexico's capacity to investigate the crimes.[59] Together with the U.S. Federal Bureau of Investigation ("FBI"), the Mexican government has purportedly established a public national database to aid in matching known DNA samples with biological samples taken from crime scenes, though the database's functionality is dubious.[60] The Mexican government states that it continues to investigate the murders of the three named victims, with a "broader perspective" but with the same "team of professionals."[61] Mexico claims that this investigation now has access to a program called Attention to Victims that incorporates a gender perspective into the investigation.[62]

Investigations also continue regarding the allegations of irregularities.[63] The Mexican government claims to have enacted thirty-six different administrative sanctions against officials.[64] With respect to allegations of harassment against the victims' families, the

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57 Damian Cave, *Wave of Violence Swallows More Women in Juarez*, N.Y. TIMES, June 23, 2012, http://www.nytimes.com/2012/06/24/world/americas/wave-of-violence-swallows-more-women-in-juarez-mexico.html?pagewanted=1&_r=3&hp.

58 *Id.*

59 GOV'T OF MEX., PRIMER INFORME DEL ESTADO MEXICANO SOBRE LAS MEDIDAS ADOPTADAS PARA EL CUMPLIMIENTO A LA SENTENCIA DICTADA POR LA CORTE INTERAMERICANA DE DERECHOS HUMANOS EN EL CASO "GONZÁLEZ BANDA Y OTRAS VS. MÉXICO (CAMPO ALGODONERO)" [First Report of the Mexican Government regarding the measures adopted to fulfill the orders of the Inter-American Court of Human Rights from the Case *González v. Mexico (Campo Algodonero)*] 5 (2010), *available at* http://www.campoalgodonero.org.mx/documentos/primer-informe-del-estado-mexicano-medidas-adoptadas-cumplimiento-sentencia-dictada-corte [hereinafter PRIMER INFORME]. This report is available through a website maintained by the Roundtable of Women of Ciudad Juarez (Red Mesa de Mujeres) and by the Latin American and Caribbean Committee for the Defense of Women's Rights (Comité de América Latina y el Caribe para la Defensa de los Derechos de las Mujeres). *See* CAMPO ALGODONERO, http://www.campoalgodonero.org.mx (last visited Nov. 21, 2012). The report itself gives no indication of having been published or released by the Mexican Government, other than the title.

60 PRIMER INFORME, *supra* note 59, at 5.

61 *Id.* at 20.

62 *Id.*

63 *Id.* at 30.

64 *Id.* at 31.

Mexican government claims that no reports of any such actions exist in any federal or local entity.[65] A representative of the victims' families claims that the government has not even opened cases against at least thirty-one functionaries that were known to have intervened in investigations.[66]

With respect to the court's order that Mexico raise public awareness of the three murders and the general situation of gender-based violence in Ciudad Juárez, the government reports that, having published the text (in full and in part, depending on the forum) of the court's decision in national and local newspapers, governmental websites, and official federal and local gazettes, it has achieved more than the court required with respect to the publication and communication of the court's ruling.[67] Notably, the Gender Equality Program of Mexico's Supreme Court of Justice of the Nation website provides extensive information regarding the disappearance and deaths of women in Ciudad Juárez. This information includes a full version of the court's decision, several amicus briefs, the original complaint, and further analysis.[68]

According to the Mexican government, the victims' families rejected its plan to promulgate a public act to recognize its international responsibility on December 10, 2010.[69] Both the government and the victims' families agreed to conduct the public ceremony and public apology on March 8, 2011.[70] Subsequent obstacles and difficulties caused this plan to change.

The design, construction, and inauguration of the monument in memory of the victims in Ciudad Juárez have presented a series of complications for government officials. Finding an appropriate location for the monument was one of the first issues.[71] On December 10, 2010, the Ministry of the Interior donated land for the monument to the municipal government of Chihuahua.[72] The site of the monument was inaugurated on November 7, 2011.[73]

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65 *Id.*

66 Gloria Leticia Díaz, *Niega SEGOB política de elusión contra sentencias de la CoIDH*, PROCESO (Sept. 22, 2011), http://www.proceso.com.mx/?p=282116.

67 PRIMER INFORME, *supra* note 59, at 5.

68 *Programa de Equidad de Género, Información relevante "Caso González y otras ('Campo Algodonero') vs. México" Sentencia de la Corte Interamericana de Derechos Humanos*, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, http://www.equidad.scjn.gob.mx/campo_algodonero.php (last visited Nov. 21, 2012).

69 PRIMER INFORME, *supra* note 59, at 14.

70 *Id.* at 14.

71 *Id.* at 5–6; *see also id.* at 16–18 for other technical difficulties regarding the location of the proposed monument.

72 *Id.* at 6.

73 *Estado pide perdón por feminicidios*, EL UNIVERSAL Nov. 8, 2011. http://www.el

At the inauguration, the Deputy Secretary of Judicial Matters and Human Rights of the Ministry of the Interior, Felipe Zamora Castro, delivered the official apology.[74] Mr. Zamora Castro "profoundly lament[ed] the losses suffered by the families and by society" due in part "to the lack of investigation into the events."[75] He spoke for fifteen minutes and made specific reference to the court's ruling:

> The Mexican state is conscious of the suffering it causes the victims' families by not identifying, to date, those responsible for the deaths of these young women. . .I want to apologize in the name of the Mexican state. . .During these ten years and even before, the entire [Mexican] State has committed various violations of human rights, and it is for this reason that today, in fulfillment of the sentence dictated by the Inter-American Court of Human Rights in the case of *Campo Algodonero v. Mexico*, the Mexican State recognizes its responsibility.[76]

Mr. Zamora Castro delivered this speech at the site of the new memorial, which was built on the same land where the women were found ten years earlier.[77]

No one from the families of the three named victims attended the inauguration.[78] Families of other victims and parents of the disappeared protested the inauguration of the memorial.[79] Their shouts of "Justice!" are muted on the official video of the inauguration, but are heard clearly on other non-official recordings.[80] Family members of missing or deceased girls demanded the government investigate the disappearances and murders, not build

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universal.com.mx/nacion/190591.html. The actual monument has not yet been built.

74 Segobmexico, *Palabras del Subsecretario Felipe Zamora, Inauguración del Memorial Campo Algodonero*, YouTube (Nov. 8, 2011), http://www.youtube.com/watch?v=GYZ7gFVz_LM.

75 *Id.*

76 *Id.*

77 *Estado pide perdón por feminicidios*, *supra* note 73.

78 *Id.*

79 *Id.*; *see also* Carlos Lara, *Pide Gobernación perdón por feminicidios en Ciudad Juárez*, La Prensa, Nov. 8, 2011, http://www.oem.com.mx/laprensa/notas/n2300281.htm. These protests, taken together with the absence of the named victims' families, hint at a profound disconnect between the court's ruling and what victims' families actually need or want from local or federal government.

80 Segobmexico, *Palabras del Subsecretario Felipe Zamora, Inauguración del Memorial Campo Algodonero*, YouTube (Nov. 8, 2011), http://www.youtube.com/watch?v=GYZ7gFVz_LM; *Víctimas abuchean a autoridades en inauguración de monumento contra feminicidios en Juárez* (Grillonautas television broadcast Nov. 8, 2011), http://www.metatube.com/en/videos/84275/Victimas-abuchean-a-autoridades-durante-inauguracion-contra-feminicidios-en-Cd-Juarez/.

memorials.[81] One activist, Victoria Caraveo, criticized the amount of money the Mexican government spent on building the memorial and celebrating the inauguration: "It's absurd what [these officials] are doing. They justify this by saying the Inter-American Court ordered them to do this. But the Court didn't say [the government] should spend 16 million [Mexican] pesos in the name of three young girls."[82] Caraveo also criticized the federal government for taking a leading role in delivering the official apology.[83] According to Caraveo, the murders and disappearances are of local character and do not require the presence of federal officials.[84]

With respect to the court's order that Mexico build individual and institutional capacity to conduct criminal investigations and gender trainings, limited but notable progress has been made. The Chihuahua Prosecutor's Office maintains an easily accessible list of disappeared women and girls on its website.[85] This list is divided by geographic area and also contains names of women and girls who have been located since the initial report of a missing person.[86]

In response to previous recommendations made by the Committee on the Elimination of Discrimination Against Women ("CEDAW Committee") with regard to the disappearance and deaths of women in Ciudad Juárez, the federal government of Mexico implemented an Action Program to Prevent and Eradicate Violence Against Women in Cuidad Juaréz, Chihuahua.[87] This program began in June 2004 and is known as the "40-point Program of Action."[88] The "prosecution and enforcement of justice and promotion of respect for women's human rights" formed one

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81 Lara, *supra* note 79; *Estado pide perdón por feminicidios*, EL UNIVERSAL, Nov. 8, 2011, http://www.eluniversal.com.mx/nacion/190591.html. *See also* Grillonautas, *supra* note 80. Perhaps this calls into question whether these court-ordered remedies conform to or reflect the actual demands of the victims' families and whether these remedies are even victim-centered or appropriate solutions.

82 Grillonautas, *supra* note 80.

83 Angélica Bustamante, *Memorial, es un circo, es una enorme farza*, EL MEXICANO, Nov. 8, 2011, http://www.oem.com.mx/elmexicano/notas/n2300786.htm.

84 *Id.*

85 *Reporte de Ausencia de Mujeres*, FISCALÍA GENERAL DEL ESTADO DE CHIHUAHUA, http://fiscalia.chihuahua.gob.mx/reporteextraviomujeres.htm; *see also* PRIMER INFORME, *supra* note 59, at 10. The Chihuahua Prosecutor's Office is a new government agency established as part of a plan to provide better coordination of services. PRIMER INFORME, *supra* note 59, at 36–37.

86 *Reporte de Ausencia de Mujeres*, *supra* note 85.

87 Comm. on the Elimination of Discrimination Against Women [CEDAW], Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of all Forms of Discrimination Against Women, ¶ 213, U.N. Doc. CEDAW/C/MEX/7-8 (2011).

88 *Id.*

of the essential strategies of the 40-point Program of Action.[89] The government created, therefore, a Specialized Office for Female Homicide Investigation in the State Prosecutor's Office and a Crime and Forensic Sciences Laboratory in Ciudad Juaréz.[90] The CEDAW Committee recognized that the Court's ruling in *Cotton Field* strengthened and reinforced the 40-point Program of Action.[91]

In March 2012, the government inaugurated the "Women of Ciudad Juárez Center for Justice,"[92] a community center intended to provide medical, psychological, and legal assistance.[93] The Governor of Chihuahua announced this as a governmental achievement in compliance with the court's decision when he visited the Inter-American Commission on Human Rights.[94] However, the Committee of Mothers of the Victims alleged that the Center was opened with no guidelines, legal structures, or operating and procedural protocols, and with the sole purpose of falsely demonstrating compliance with the court's ruling.[95]

The Mexican government claims that full monetary reparations have been paid to the victims' families.[96] The government insists it has attempted to provide medical and psychological attention to the victims' next of kin.[97] The families, however, insist that the government has done no more than redirect them to the same mental health services provided through the universally accessible public health system, and that these services fall short of the specialized and integral health services ordered by the court.[98]

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89 *Id.* ¶ 215.

90 *Id.* ¶¶ 216–17.

91 *Id.* ¶ 225.

92 Gladis Torres Ruiz, *Centro de Justicia para las Mujeres de Ciudad Juárez*, DIARIO ROTATIVO, Mar. 22, 2012, http://rotativo.com.mx/seguridad/repudian-nuevo-centro-de-justicia-para-las-mujeres/87988/html/.

93 Marina Martínez Orpineda, *Inauguran hoy Centro modelo para la mujer*, EL MEXICANO (Mar. 26, 2012), http://www.oem.com.mx/elmexicano/notas/n2481587.htm.

94 *Ofrece CIDH apertura para avanzar en solución de casos en Chihuahua UniRadio Informa.com*, (Mar. 22, 2012, 5:55 PM), http://uniradioinforma.com/noticias/articulo105995.html.

95 Torres Ruiz, *supra* note 92.

96 PRIMER INFORME, *supra* note 59, at 6.

97 *Id.* at 6–9.

98 Press Release, Asociación Nacional de Abogados Democráticos, et al., Incumple Estado Mexicano Sentencia de la CoIDH (June 14, 2010). *See also* Gloria Leticia Díaz, *Niega SEGOB política de elusión contra sentencias de la CoIDH*, PROCESO.COM.MX, (Sept. 22, 2011), http://www.proceso.com.mx/?p=282116.

The Future of Mexico's Implementation of the Inter-American Court's Remedies

Felipe Zamora Castro, the interior ministry's Deputy Secretary of Judicial Matters and Human Rights, recently spoke at a conference titled, "Challenges and Possibilities in Complying with the Judgments of the Inter-American Court of Human Rights Against Mexico."[99] Claiming that the Mexican government was committed to fulfilling its international obligations,[100] he pointed to the lack of adequate regulations to implement the court's decisions and called for constitutional reform.[101] Even so, Zamora Castro also declared that the Mexican government, confronted with economic difficulties, "is not obligated to comply with the impossible."[102] Specifically in relation to the court's ruling in *Cotton Field*, Zamora Castro indicated that the federal government assumed expenses in paying reparations to the victims' families, since the Chihuahua state government was unable to fulfill its financial responsibility.[103]

The Mexican government has also conveyed in a report to the CEDAW Committee that many legislative and regulatory challenges exist to implementing the court's ruling.[104] The federal government specifically indicates a need for better interagency coordination both horizontally (among the three federal branches: legislative, executive, and judicial) and vertically (among the "three orders of government").[105] Zamora Castro has publicly acknowledged that a sentiment of "mutual distrust" exists between the government and the representatives of the victims' families.[106]

The families of the three named victims maintain that the Mexican government is not fulfilling the remedies ordered by the court.[107] In a report prepared in June 2010, several representative organizations detailed the government's dismal level of completion

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99 Gloria Leticia Díaz, *Propone Segob reforma constitucional para acatar sentencias de la CoIDH*, Proceso.com.mx (Sept. 23, 2011), http://www.proceso.com.mx/?p=282293; *Proponen crear ley para atender compromisos internacionales de México*, SDP Noticias (Sept. 23, 2011) http://www.sdpnoticias.com/notas/2011/09/23/proponen-crear-ley-para-atender-compromisos-internacionales-de-mexico.

100 Díaz, *supra* note 99.

101 *Id.*

102 *Id.*

103 *Id.*

104 CEDAW, *supra* note 87, ¶ 227.

105 *Id.* The report does not specify what is meant by "three orders of government." Within context, it appears to mean federal, state, and municipal governments.

106 Díaz, *supra* note 98.

107 *Estado pide perdón por feminicidios*, *supra* note 73.

of the court-ordered remedies.[108]

Two years ago, the United Nations High Commissioner for Human Rights ("UNHCHR") held an expert workshop, "The Elimination of all Forms of Violence Against Women—Challenges, Good Practices, and Opportunities," in which a panelist from Mexico, Ms. Medina Rosas (lawyer and member of the civil service society Enlace de la Red Mesa de Mujeres de Ciudad Juárez, Mexico), noted both the contributions and shortcomings of the *Cotton Field* decision, specifically with regard to implementation. The UNHCHR report summarized Rosas's comments:

> [O]ne year after the issuing of the judgment, the Mexican State had only published the judgment through the media and had just recently adopted a budget line for the compensation ordered in the ruling. According to the panelist, the promises to create databases, a memorial, training, protocols, counseling, etc. had not been acted upon. She also claimed that little had been done in terms of coordination with the various authorities and to fight the persisting impunity. In 2010, in Ciudad Juárez and the State of Chihuahua, no decrease in the murder rate for women had been observed.[109]

Despite these immense challenges, Medina Rosas also noted good practices stemming from the landmark decision. According to the High Commissioner's report, Medina Rosas noted:

> [D]espite the impunity, new victims and their relatives were still trying to obtain justice by organizing themselves and filing lawsuits, rather than trying to dispense justice themselves. She also noted that a strong network of organizations and people existed at local, national and international levels, providing for strong support without which she believed the situation would have become worse. Finally, she mentioned that a commission had been set up to assess access to justice and justice administration at the local level.[110]

These good practices illuminate some lessons learned from the implementation of *Cotton Field* with respect to societal change. The first good practice indicates a shift toward using the rule of law

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[108] Asociación Nacional De Abogados Democráticos et al., Primer Informe De Las Víctimas Sobre El Cabal Cumplimiento Del Estado Mexicano De La Sentencia González Y Otras ("Campo Algodonero"): Resolutivos 12, 13, 14, 15, 20, 241 (2010), *available at* http://www.campoalgodonero.org.mx/sites/default/files/documentos/Junio%2015%202010%201_INFORME_SOBRE_EL_CUMPLIMIENTO_DE_LA_SENTENCIA_DE_CAMPO%20(version%20para%20difusion).pdf.

[109] Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General*, ¶ 44, U.N. Doc. A/HRC/17/22 (2010).

[110] *Id.* ¶ 45.

(thus demonstrating respect for the rule of law), a crucial step in an area of the world where violence can easily perpetuate flagrant disregard for legal remedies. Furthermore, these practices highlight many Mexicans' desire to have access to a local support system, including better community support and stronger enforcement of law enforcement protocols, rather than apologies and memorials generated at the federal level.

Beyond Implementation: The Road Ahead

Mexico is far from full compliance with all components of the court's ruling, though it appears to have taken some steps in the direction of a good faith effort. The State's efforts at complying with the court's ruling could indicate deference to the court's judicial and enforcement authority. Even so, a larger issue looms on the horizon. How concordant are the mandates of the court with the wishes and needs of the broader community of victims and their families? The absence of the named victims' family members at the inauguration of the monument in their honor, along with the vocal protests of the unnamed and unrecognized victims' family members, revealed a dramatic chasm between the idealized court order and the messy reality of a community struggling with an ostensibly unstoppable succession of violent crimes against women.

I remember sitting with Rhonda Copelon immediately after the Inter-American Court issued its decision in the *Cotton Field* case. Her joy at the court's normative pronouncements and reparations order was immeasurable. I think she would look at the current realities of implementation of the court's decision with a note of frustration that would soon be overtaken by her forward-thinking vision. This vision would play itself out through a series of conversations with advocates and affected individuals and through a grueling intellectual process that would ultimately result in a long-term, strategic plan. Copelon would have no illusions of a short-term fix to such an entrenched problem. But she would also have no compunction about tackling the challenges of implementation head-on. After all, she was in the struggle for the long haul.

THE CASE OF *KAREN ATALA AND DAUGHTERS*: TOWARD A BETTER UNDERSTANDING OF DISCRIMINATION, EQUALITY, AND THE RIGHTS OF WOMEN

Rosa M. Celorio†

I. INTRODUCTION

The prohibition of discrimination and the guarantee of equality are cornerstones of the international system of human rights.[1] They are fixtures of the most ratified international treaties in the world[2] and are prominently featured in regional instruments.[3]

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1 *See, e.g.,* U.N. Human Rights Comm. [HRC (Committee)], General Comment No. 18, Non-Discrimination, ¶¶ 1–3, HRI/GEN/1/Rev.6 (Nov. 10, 1989) [hereinafter HRC (Committee), General Comment No. 18]; U.N. Comm. on Economic, Social, and Cultural Rights [CESCR Committee], General Comment No. 20, Non-Discrimination in Economic, Social, and Cultural Rights, ¶ 2, E/C.12/GC/20 (July 2, 2009) [hereinafter CESCR Committee, General Comment No. 20]; Yatama v. Nicaragua, Preliminary Objections, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 184 (Jun. 23, 2005); Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 88 (Sept. 17, 2003); Inter-Am. Comm'n H.R., Report on Terrorism and Human Rights, OEA/Ser.L./V/II.116 doc. 5 rev. 1 corr., ¶ 335 (Oct. 22, 2002).

2 *See, e.g.*, International Covenant on Civil and Political Rights, arts. 2(1), 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR Convention]; International Covenant on Economic, Social, and Cultural Rights, arts. 2(2), 3, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter CESCR Convention]; U.N. Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of all Forms of Discrimination Against Women, arts. 1, 2, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW Convention]; International Convention on the Elimination of all Forms of Racial Discrimination, arts. 1, 2, Dec. 21, 1965, 660 U.N.T.S. 195.

3 *See, e.g.*, Organization of American States [OAS], American Convention on Human Rights, arts. 1.1, 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, arts. 6, 8(b), June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63 [hereinafter Convention of Belém do Pará]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222; Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 2000, E.T.S. No. 177; African Charter on Human and Peoples' Rights [Banjul Charter], art. 2, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

They are also found in a number of broadly approved declarations, resolutions and platforms,[4] views from treaty bodies,[5] and jurisprudence issued by the universal and regional human rights monitoring systems.[6]

These obligations have also been at the heart of the development of legal standards in the realm of women's rights.[7] Even though women constitute half of the world's population,[8] they have been subjected historically to inferior treatment on the basis of their sex[9] and still bear the brunt of inequality in their

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Africa [Maputo Protocol], art. 2, July 11, 2003 [hereinafter Maputo Protocol], *available at* http://www.unhcr.org/refworld/docid/3f4b139d4.html.

4 *See, e.g.,* World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶¶ 15, 18, 19, 20–22, 24, 28, 37, 39, 40–41, 63, 91, 95, U.N. Doc. A/CONF.157/23 (July 12, 1993); Declaration on the Elimination of Violence Against Women, Preamble & art. 3, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994); Declaration on the Rights of Indigenous Peoples, Preamble & arts. 2 & 21, G.A. RES. 61/295, U.N. DOC. A/Res/47/1 (Sept. 13, 2007); Human Rights Council [HRC (Council)] Res. 17/19, Human Rights, Sexual Orientation, and Gender Identity, 17th Sess., May 30–June 17, 2007, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).

5 *See* Comm. on the Elimination of all Forms of Discrimination Against Women [CEDAW Committee], General Recommendation No. 28, Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of all Forms of Discrimination Against Women, U.N. Doc. C/2010/47/GC.2 (Oct. 19, 2010) [hereinafter CEDAW Committee, General Recommendation No. 28]; CESCR Committee, General Comment No. 20, *supra* note 1; CEDAW Committee, General Recommendation No. 25, Article 4, Paragraph 1, of the Convention on the Elimination of all Forms of Discrimination Against Women (Temporary Special Measures), U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004) [hereinafter CEDAW Committee, General Recommendation No. 25].

6 *See, e.g.,* CEDAW Committee, Communication No. 17/2008, ¶¶ 7.6–7.9, U.N. Doc. CEDAW/C/49/D/17/2008 (Sept. 27, 2011); HRC (Committee), S.W.M. Brooks v. Netherlands, Communication No. 172/1984, ¶¶ 12.1–16, U.N. Doc. CCPR/C/29/D/172/1984 (Apr. 9, 1987); *Yatama*, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 178–229; Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 130, ¶¶ 110–192 (Sept. 8, 2005); Maya Indigenous Communities of the Toledo Dist. v. Belize, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 ¶¶ 157–171 (2004); D.H. and Others v. Czech Republic, App. No. 57325/00, Eur. Ct. H.R. (2008).

7 *See generally* CEDAW Committee, General Recommendation No. 25, *supra* note 5; CEDAW Committee, General Recommendation No. 28, *supra* note 5; Declaration on the Elimination of Violence Against Women, Preamble & arts. 3 (b), (d), (e), G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994); Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Docs. A/CONF.177/20 & A/CONF.177/20/Add.1 (Sept. 15, 1995).

8 U.N. Dep't of Econ. and Soc. Affairs, World Population Prospects, 2010 Revision (June 28, 2011), http://esa.un.org/wpp/Excel-Data/population.htm (calculations based on world total population and world female population).

9 *See e.g.*, Inter-Am. Comm'n H.R. [IACHR], The Work, Education, and Resources of Women: The Road to Equality in Guaranteeing Economic, Social, and Cultural

societies.[10]

Accordingly, the leading international treaty on this issue—the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")—is based on the premise "that women have suffered, and continue to suffer several forms of discrimination" due to their sex and gender.[11] This treaty identifies the guarantees of non-discrimination and equality as preconditions for women's full exercise of their civil, political, economic, social, and cultural rights.[12]

Even though the prohibition of discrimination and the guarantee of equality span as far as the adoption of the Universal Declaration of Human Rights,[13] the definition of their scope in terms of state obligations is still in development.[14] International legal bodies continue to shed light on the scope of the duty of states to address discrimination at the national level, how to achieve the general goal of "equality," and how these obligations vary according to the subject of protection.[15] This challenging task has mostly been un-

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Rights, OEA/Ser.L/V/II.143 Doc. 59, ¶ 4 (Nov. 3, 2011) [hereinafter IACHR, The Work, Education, and Resources of Women].

10 *See e.g.*, U.N. SECRETARY-GENERAL, ENDING VIOLENCE AGAINST WOMEN: FROM WORDS TO ACTION, at 29, 34 & 36, U.N. Sales No. E.06.IV.8 (2006); U.N. WOMEN, 2011–2012 PROGRESS OF THE WORLD'S WOMEN: IN PURSUIT OF JUSTICE, at 8 (2012); THE WORLD BANK, WORLD DEVELOMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT, at 13–22 (2012).

11 CEDAW Committee, General Recommendation No. 25, *supra* note 5, ¶ 5. The Convention not only refers to discrimination on the basis of "sex," but also on the basis of "gender." The term "sex" refers to biological differences between men and women. The term "gender" alludes to "socially constructed identities, attributes and roles for women and society's social and cultural meaning for these biological differences," which result in hierarchical relationships between women and men, and in the unequal distribution of power between men and women. *Id.*

12 CEDAW Convention, *supra* note 2, arts. 1–3, 7–14.

13 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

14 *See generally* CESCR Committee, General Comment No. 20, *supra* note 1; Comm. on the Elimination of Racial Discrimination [CERD], General Recommendation No. 31, Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, U.N. Doc. A/60/18 at 98–108 (2005) [hereinafter CERD Committee, General Recommendation No. 31]; CERD, General Recommendation No. 32, Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) [hereinafter CERD Committee, General Recommendation No. 32]; Clift v. United Kingdom, App. No. 7205/07, ¶¶ 56–74 (Eur. Ct. H.R. 2010); Kiyutin v. Russia, App. No. 2700/10, ¶¶ 56–74 (Eur. Ct. H.R. 2011); Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 265–275 (Aug. 24, 2010).

15 *See generally* CEDAW Committee, General Recommendation No. 25, *supra* note 5; CEDAW Committee, General Recommendation No. 28, *supra* note 5; CERD Committee, General Recommendation No. 31, *supra* note 14; CERD Committee, General

dertaken by United Nations treaty-based bodies and regional human rights tribunals.[16] Such entities are aiming to answer the question of what it entails for a state to "respect, protect and fulfill" or to "respect and ensure" women's right to non-discrimination and to fully enjoy equality, as well as those of other sectors of the population.[17]

The decisions and reports issued by the organs of the Inter-American human rights system[18] are part of this trend of analysis.[19]

Recommendation No. 32, *supra* note 14; D.H. and Others v. Czech Republic, App. No. 57325/00, ¶¶ 175–210 (Eur. Ct. H.R. 2008); Opuz v. Turkey, App. No. 33401/02, ¶¶ 183–202 (Eur. Ct. H.R. 2009); Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 102–114, 160–170 (2011); Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 44–52 (2001).

16 *See* Universal Declaration of Human Rights, *supra* note 13; CEDAW Committee, General Recommendation No. 25, *supra* note 5; CEDAW Committee, General Recommendation No. 28, *supra* note 5; CERD Committee, General Recommendation No. 31, *supra* note 14; CERD Committee, General Recommendation No. 32, *supra* note 14; *D.H. and Others*, App. No. 57325/00, at ¶¶ 175–210; *Opuz*, App. No. 33401/02, at ¶¶ 183–202; *Jessica Lenahan (Gonzales)*, Inter-Am. Comm'n H.R., at ¶¶ 102–114, 160–170; *Morales de Sierra*, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.111, doc. 20 rev. at ¶¶ 44–52.

17 *See* CEDAW Committee, General Recommendation No. 28, *supra* note 5; CESCR Committee, General Comment No. 20, *supra* note 1; IACHR, Legal Standards Related to Gender Equality and Women's Rights in the Inter-American Human Rights System: Development and Application, OEA/Ser.L/V/II. 143 Doc. 60 (Nov. 3, 2011) [hereinafter IACHR, Legal Standards Related to Gender Equality and Women's Rights]; IACHR, The Work, Education, and Resources of Women, *supra* note 9. *See also* sources cited *supra* note 16.

18 The Inter-American human rights system is mainly composed of two organs—the Inter-American Commission on Human Rights and the Court—entrusted by the Member States of the Organization of American States to promote the observance and defense of human rights throughout the hemisphere. *See* American Convention, *supra* note 3, at arts. 33–73.

The Commission, as part of its mandate, receives, reviews, and investigates individual petitions that allege human rights violations, including those with gender-specific causes, grounded on the obligations contained in key regional human rights instruments, such as the American Convention, the American Declaration of the Rights and Duties of Man, and the Convention of Belém do Pará. Any person, group of persons, or nongovernmental organization may present a petition to the Commission alleging violations of the rights protected in the American Convention and other regional instruments. Petitions can also be presented before the Commission under the American Declaration in cases involving states that are not states parties to the American Convention. The Court for its part adjudicates individual cases related to human rights violations referred to it by the Commission and issues advisory opinions on matters of legal interpretation. *See* American Convention, *supra* note 3, arts. 34–69.

19 See discussion on the development of standards related to the obligations to not discriminate and to guarantee equality contained in IACHR, Legal Standards Related to Gender Equality and Women's Rights, *supra* note 17; IACHR, The Work, Education, and Resources of Women, *supra* note 9, at 3–25; IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II. Doc. 62, at 29–35 (Dec. 5, 2011).

Both the Inter-American Commission on Human Rights ("the Commission") and the Inter-American Court of Human Rights ("the Court") have begun the process of defining the contours of the obligations not to discriminate and to guarantee equality in the realm of the rights of women.[20] A significant part of this analysis has been dedicated to shedding light on the scope of articles 1(1) and 24 of the American Convention; article II of the American Declaration; and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ("Convention of Belém do Pará"), in light of CEDAW, and other international instruments and treaties.[21] Some important legal developments within this system since 1994 are noteworthy, including subjecting distinctions based on sex to "strict scrutiny," or rigorous review;[22] the consolidation of the link between discrimination and violence against women and the state's duty to act with due diligence to address these public problems;[23] the negative and positive components of the state's obligation to address discrimination at the national level;[24] the recognition of the disproportionate and discriminatory impact on women of restrictions in the exercise of their reproductive rights;[25] and the identification of gender elements related to the content and scope of articles 1.1 and 24 of the

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20 For more analysis, see IACHR, Legal Standards Related to Gender Equality and Women's Rights, *supra* note 17; Rosa M. Celorio, *The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting*, 65 U. Miami L. Rev. 819 (2011).

21 *See* sources cited *supra* note 20.

22 Morales de Sierra v. Guatemala, Case 11.625, Inter-Am Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 36 (2001).

23 *See, e.g.*, Jessica Lenahan v. United States (*Gonzales*), Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011); María da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. (2001); González v. Mexico (*Cotton Field*), Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); Fernández Ortega v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010); Rosendo Cantú and Other v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010).

24 *See* Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C.) No. 130, ¶ 141 (Sept. 8, 2005) (holding that the right to equal protection of the law and to non-discrimination mandates that "States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.").

25 Artavia Murillo v. Costa Rica, Case 12.361, Inter-Am. Comm'n H.R., Report No. 85/10, ¶¶ 128–131 (2010).

American Convention.[26]

Amidst these legal developments, the Inter-American Commission ruled on its first case related to discrimination on the basis of sexual orientation on December 18, 2009, in the context of female victims.[27] The decision was issued in the case of *Karen Atala and Daughters vs. Chile* ("*Karen Atala and Daughters*" or "*Karen Atala*").[28] This case originated with a petition presented before the Inter-American Commission on Human Rights on November 24, 2004, alleging that the Chilean State was responsible for human rights violations committed in the context of a proceeding where Mrs. Karen Atala, a well-known judge, lost custody of her three daughters—M., V., and R.—based on her sexual orientation by means of a Supreme Court of Justice decision.[29] The Commission ruled in favor of the Petitioners finding a violation of several rights contained in the American Convention, including the right to equal protection and the obligation not to discriminate; the rights to protection of the family and privacy; the rights of the child; and the right to judicial protection and guarantees.[30]

Upon considering that the State of Chile had not properly complied with its recommendations, the Commission sent this case to the Inter-American Court for its contentious review on September 17, 2010.[31] The Court for its part issued a landmark ruling on February 24, 2012, in favor of Karen Atala and M., V., and R.[32] In its ruling, the Court found for the first time that discrimination on the basis of sexual orientation and gender identity is comprehended within the phrase "other social condition" under article 1.1 of the American Convention.[33] The Court also presents groundbreaking analysis in regard to the content of the obligations not to discriminate and to guarantee equality;[34] their link with the right

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[26] *See e.g.*, *Cotton Field*, Inter-Am Ct. H.R. (ser. C) No. 205, ¶¶ 390–402 (Nov. 16, 2009) (indicating how the application of gender-based stereotypes by public officials in their investigation of violence against women cases contravenes the general obligation not to discriminate encompassed in Article 1(1) of the American Convention).

[27] *See* Atala and Daughters v. Chile, Application, Inter-Am. Ct. H.R. (Sept. 17, 2010) [hereinafter *Atala*, Application].

[28] *Id.*

[29] Atala and Daughters v. Chile, Petition 1271-04, Inter-Am. Comm'n H.R., Report No. 42/08, OEA/Ser.L/V/II.130, doc. 22, rev. 1 ¶¶ 1–2 (2008) [hereinafter *Atala*, Petition].

[30] *See Atala*, Application, *supra* note 27.

[31] *Id.* ¶¶ 24–39.

[32] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

[33] *Id.* ¶ 91.

[34] *Id.* ¶ 139.

to privacy and protection of the family of persons;[35] the elements that should inform the pursuance of the best interests of the child as an imperative objective in custody proceedings;[36] and the presence of prejudices and stereotypes in the actions of justice officials as contrary to different dispositions contained in the American Convention, among other considerations.[37]

The author suggests in this Article that both the Commission's and Court's decisions in the case of *Karen Atala and Daughters* represent key contributions to the development of legal standards in five key areas related to the obligations not to discriminate, the guarantee of equality, and the rights of women, including: 1) the scope and reach of the obligations not to discriminate and to guarantee equality under articles 1.1 and 24 of the American Convention; 2) the features of the "rigorous scrutiny" standard and its applicability to prohibited factors of discrimination; 3) the prohibition of discrimination on the basis of sexual orientation and gender identity, and its applicability to individual cases related to women; 4) the correlation of this prohibition with the rights to privacy and to protection of the family under international human rights law; and 5) the content of the bests interests of the child under international human rights law.

This Article concludes that further definition by the Inter-American Commission and the Court of the content and scope of the obligations not to discriminate and to guarantee equality in individual cases—such as the one related to *Karen Atala and Daughters*—is paramount to the development of adequate and effective international legal standards related to women's rights.[38] These obligations are of utmost importance as they are not only contained in articles 1.1 and 24 of the American Convention, but they constitute the backbone of the Inter-American and universal systems of human rights. They are also priority women's rights issues pertaining to civil, political, economic, social, and cultural rights. It is also

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35 *Id.* ¶ 165.

36 *Id.* ¶¶ 108–09.

37 *Id.* ¶¶ 145–46.

38 The Author understands the concept of a "legal standard" as a guideline for the state involved on how to adequately implement at the national level the binding and individual rights contained in the governing instruments of the Inter-American system of human rights, and other international human rights treaties. Therefore, the decisions in the *Karen Atala* case constitute authoritative pronouncements from international legal bodies related to the scope of the individual articles of the American Convention linked to the guarantees of non-discrimination and equality. For more discussion, see generally Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 20, at 819.

paramount to understand the connection between the obligations not to discriminate and to guarantee equality with the full panoply of human rights involved in the obligation to respect and guarantee the rights of women, including those related to their sexual orientation, gender identity, privacy, family, and children. Legal developments in this sense would also open the door for the Inter-American Commission and the Court's resolution of cases involving forms of discrimination that affect women based on their sex, and other factors of discrimination still unrecognized as "prohibited" or "suspect" by the international community.

This Article is divided in three parts. First, the Article discusses the Inter-American Commission's merits decision in the case of *Karen Atala and Daughters*, the Commission's allegations before the Inter-American Court of Human Rights, and the Court's ruling in this case. In the second part, it reviews what the Author considers to be the key contributions of the Commission's decision and the Court's ruling to the development of legal standards in the realms of discrimination, equality, and women's rights, in five key areas. In the third part, the Article closes with some final conclusions and observations.

II. THE CASE OF *KAREN ATALA AND DAUGHTERS*: ITS PATH THROUGH THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

In this section, the Author reviews the processing of the case of *Karen Atala and Daughters* through the organs of the Inter-American system of human rights, namely, the Inter-American Commission and the Court. First, the Article examines the main findings, conclusions, and recommendations of the Commission's merits decision; findings which also constitute the basis for the allegations brought forth by the Commission before the Inter-American Court of Human Rights on September 17, 2010.[39] The Author analyzes the resolution of the Commission in the following order: a) allegations presented by the Petitioners and the State of Chile before the Commission; b) main legal findings and conclusions; c) recom-

[39] In cases where the relevant state "has accepted the jurisdiction of the Inter-American Court in accordance with article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary." *See* Rules of Procedure of the Inter-American Commission on Human Rights, art. 45(1) (2009), *available at* http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm.

mendations issued to the State; and d) processing after merits report.

Second, the Author analyzes some of the main findings and conclusions of the Inter-American Court in its judgment of February 24, 2012.

A. Processing of Case before the Inter-American Commission

1. Allegations of the Petitioners and the State

The Petitioners in this case[40] alleged before the Commission that the State of Chile had committed a number of human rights violations in the context of a custody proceeding in detriment of Karen Atala and her daughters M., V., and R.[41] Petitioners claimed that said proceeding—initiated by Karen Atala's former husband—ended in a ruling by the Supreme Court of Justice of Chile that revoked Mrs. Karen Atala's custody of her three daughters—ages 5, 6, and 10 at the time of the events—based exclusively on discriminatory prejudices related to her sexual orientation.[42]

The Petitioners sustained before the Commission that Karen Atala married Ricardo Jaime López Allende on March 29, 1993, and that M., V. and R. were conceived in the course of this relationship.[43] The couple decided to end their marriage on March 2002, establishing by mutual agreement that Karen Atala would maintain custody of their daughters.[44] In June of 2002, Karen Atala initiated a relationship with a person of the same sex and began cohabiting with her during November of that year.[45]

On January 15, 2003, Ricardo Jaime López Allende filed a suit claiming custody of his daughters with the Juvenile Court of Villarica asserting that Karen Atala "is not capable of watching over and caring for them [*sic*], that her new sexual lifestyle choice, in addition to her cohabiting in a lesbian relationship with another woman, are producing and will necessarily produce harmful consequences for the development of these minors"[46] and referred to the risk of the children contracting sexually transmitted diseases

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[40] On August 18, 2008, Mrs. Karen Atala provided the Commission updated information on the attorneys that were representing her: Macarena Sáez, Public Liberties. They are also the representatives for this case before the Inter-American Court of Human Rights. *See Atala*, Petition, *supra* note 29, ¶ 1.

[41] *Id.* ¶¶ 1–2.

[42] *Id.* ¶¶ 14–32.

[43] *See Atala*, Application, *supra* note 27, ¶ 40.

[44] *Id.*

[45] *Atala*, Petition, *supra* note 29, ¶ 15.

[46] *Atala*, Application, *supra* note 27, ¶ 41 n. 15.

such as herpes and AIDS.[47]

The Petitioners noted that the custody proceeding was highly publicized in Chile,[48] and consisted of a series of judicial actions, rising to the level of the Supreme Court of Justice on May 31, 2004, which granted permanent custody to the father.[49] They also claimed that as a result of the public nature of the custody proceeding, Karen Atala was the subject of an investigation ordered by the Chilean justice system, the findings of which were disclosed by the media, including facts pertaining to her private life.[50] The Petitioners also noted that the final report of the judge appointed to perform this investigation alluded to her sexual orientation, concluding that it damaged the image of both Karen Atala and the Judicial Branch.[51]

The Petitioners presented a number of legal claims before the Commission pertaining to these events.[52] They mainly argued that Karen Atala was discriminated against throughout the custody proceedings on the basis of prejudicial notions and stereotypes related to her sexual orientation, rather than afforded an objective evaluation of her capacity to be a fit mother.[53] Among its considerations, the Supreme Court considered that Karen Atala had placed her own interests before those of her daughters by deciding to cohabit with a person of the same sex, and this "unique family environment" posed a risk to their development.[54]

This decision from the Supreme Court allegedly took place

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47 *Id.*

48 *Atala*, Petition, *supra* note 29, ¶ 16.

49 The judicial actions in the process included a decision handed down on May 2, 2003 by the Regular Judge of the Juvenile Court of Villarica granting provisional custody of the girls to their father; a first instance ruling handed down by the Acting Judge of the Juvenile Court on October 29, 2003, granting custody to the mother; an injunction not to move the girls issued by the Court of Appeals in Temuco on November 24, 2003 that prevented the girls from being handed over to their mother; a decision by the Court of Appeals of Temuco on March 30, 2004 confirming the first instance decision granting custody to the mother; a second injunction issued by the Supreme Court of Justice of Chile on April 7, 2004 suspending delivery of the girls to their mother; and a decision by the Supreme Court of Justice of Chile on May 31, 2004 granting permanent custody to the father. *See Atala*, Application, *supra* note 27, ¶¶ 47–65.

50 *Id.* ¶¶ 44–46 (citing to a report prepared by Judge Lenin Lillo Hunzinker, Court of Appeals of Terrjuco, April 2, 2003 and Decision of the Court of Appeals of Terruco, May 9, 2003).

51 *Id.*

52 *See Atala*, Petition, *supra* note 29, ¶¶ 13–32.

53 *Id.*

54 *Id.* ¶ 21 (quoting judgment of the Supreme Court of Justice of Chile, May 31, 2004).

even though the factual record—prepared by lower courts that ruled favorably for Karen Atala—was devoid of any evidence indicating that the girls were indeed harmed by their mother's cohabitation with a person of the same sex.[55] The Petitioners considered that this judgment was particularly serious in a context where the Chilean Civil Code contains a presumption of custody in favor of the mother in cases where parents separate, and limits the grounds on the basis of which a mother can be deprived of the same.[56]

At the heart of the case before the Inter-American Commission, the Petitioners sustained that the Supreme Court discriminated against Karen Atala due to a distinction based on her sexual orientation, neither objective nor reasonable, causing irreparable harm to her and her daughters.[57] They alleged that sexual orientation should be understood as a prohibited factor of discrimination under the phrase "other social condition" contained in article 1.1 of the American Convention.[58]

On the basis of this discrimination and prejudice, the Petitioners further claimed that the State interfered arbitrarily and abusively in the private and family life of Karen Atala and her daughters, and that it violated her daughters' rights as children due to the biased evaluation of which parent would be more fit to care for them, which ended up harming them, instead of protecting them.[59] The Petitioners also maintained that a series of due process violations were committed during the custody case, in violation of articles 8.1 and 25 of the American Convention.[60]

Throughout the proceedings, the State of Chile argued that the decision of its Supreme Court of Justice had as its primary ob-

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[55] *Id.* ¶ 17.

[56] Article 225 of the Civil Code of Chile stipulates: "If the parents live separately, the mother shall see to the personal care of the children. . . . Be that as it may, when necessary to protect the interests of the child, whether because of mistreatment, neglect, or another just cause, the judge may transfer the care of the child to the other parent." CÓD. CIV. [CIVIL CODE] art. 225. Said article was reportedly the subject of an extensive parliamentary review to protect the best interests of the child, and to limit the grounds based on which a mother may be deprived of custody. *See Atala*, Petition, *supra* note 29, ¶ 25.

[57] *See Atala*, Petition, *supra* note 29, ¶¶ 13–32.

[58] *Id.*

[59] *Id.* ¶ 13.

[60] The Petitioners claimed in particular that the State of Chile violated the judicial protection and guarantees contained in articles 8(1) and 25 of the American Convention since the Supreme Court of Justice of Chile issued the custody ruling by means of a disciplinary action (*recurso de queja*), which is a remedy of a purely disciplinary nature designed to correct the faults or abuses committed in judicial decisions. The Petitioners propose that, in this way, the Supreme Court opened a third judicial instance that does not exist in the Chilean criminal procedure. *See id.* ¶ 65.

jective the protection of the best interests of the girls involved.[61] The State sustained that the judgment did not violate the rights of the girls, since it was based on "the imperative need to protect the best interests of the daughters, threatened, according to the evidence in the case, by the conduct of the mother, who opted to cohabit with a partner of the same sex, with whom she proposed to raise her daughters, which was deemed inadvisable for the girls' upbringing and a risk to their development given the current climate in Chilean society."[62]

2. Main Legal Findings and Conclusions

The Commission admitted this case on July 23, 2008, finding that the allegations could constitute violations of articles 24 (right to equal protection of the law); 11(2) (right to a private life free of arbitrary or abusive interference); 17(1) (right to protection of the family); 8(1)(right to a fair trial); 25 (judicial protection and guarantees) in detriment of Karen Atala; and articles 19 (rights of the child) and 17(4) (the balancing of rights between spouses at the dissolution of marriage) in regard to M., V., and R.[63] The Commission admitted these articles in connection with the obligation to respect and guarantee all rights free from discrimination contained in article 1.1 (obligation to respect rights and non-discrimination provision) of the American Convention.[64] On December 18, 2009, the Commission issued a merits report finding a violation of all of these articles. The Commission's conclusions are summarized below.

a. *Legal Analysis Related to the Rights to Equality and Non-Discrimination (Articles 24 and 1(1) of the American Convention)*

The Commission concluded that the State of Chile violated Karen Atala's right to equal protection free from all forms of discrimination enshrined in article 24 of the American Convention, as it relates to the duty to respect and guarantee rights as established in article 1.1.[65] In its decision, the Commission undertakes a thorough analysis of the "interrelation, scope, and content" of articles 1.1 and 24 of the American Convention, and then proceeds to ap-

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61 *Id.* ¶ 35.

62 *Id.* (citing Response of the State of Chile, Ministry of Foreign Affairs, Dept. of H.R., June 15, 2005).

63 *Atala*, Petition, *supra* note 29, ¶ 4.

64 *Id.*

65 *See Atala*, Application, *supra* note 27, ¶ 108.

ply these legal principles to the facts of the case.[66]

The Commission reiterates some principles ingrained in the jurisprudence of the system, namely, that the rights to equality and non-discrimination are central to the Inter-American human rights system; that they entail obligations *erga omnes*[67] of protection that bind all states and generate effects with respect to third parties; and the connection between the principles of equality and non-discrimination.[68]

In its reasoning, the Commission also offers its view of the different "conceptions" of the principles of equality and non-discrimination.[69] One conception is predicated in the prohibition against any form of "arbitrary difference in treatment"—defined as any distinction, exclusion, restriction, or preference.[70] A second conception is premised on the obligation to "ensure conditions of true equality for groups which have been historically excluded, and are at greater risk of discrimination."[71] The Commission considers that even though both variants may be at issue in certain cases, each of them "warrants a different response from the State, and a different treatment under the American Convention."[72]

There are other groundbreaking elements to the Commission's analysis. The Commission innovatively finds that sexual orientation is covered by the phrase "other social condition" contained in article 1.1.[73] The Commission interprets article 1.1 as an open clause in accordance with current times and evolving social conditions and follows the precedent of other international bodies—such as the European Court, the Human Rights Committee, and the Economic, Social, and Cultural Rights Committee—in the flexible interpretation of the non-discrimination clause contained in major human rights treaties.[74]

The Commission goes further and also concludes that sexual

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66 *Id.* ¶ 74–108.

67 The Commission refers in particular to an advisory opinion titled *Juridical Condition and Rights of Undocumented Migrants. Id.* ¶ 74; Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion, OC-18/03, Inter-Am. Ct. H.R., (ser. A) No. 18, ¶ 173(5) (Sept. 17, 2003) ("That the fundamental principle . . . of equality and non-discrimination, which is of a preemptory nature entails obligations *erga omnes* of protection that bind all States and generate effects with regard to parties, including individuals.").

68 *See Atala*, Application, *supra* note 27, ¶ 77.

69 *Id.* ¶ 80.

70 *Id.*

71 *Id.*

72 *See id.*

73 *Id.* ¶ 94.

74 *Atala*, Application, *supra* note 27, ¶ 95.

orientation is a "suspect category" of discrimination, subject to a particularly rigorous standard of review, or "strict scrutiny."[75] In this regard, the Commission begins its analysis by stating that this rigorous standard is applicable to categories that are expressly referenced in the non-discrimination clauses contained in international human rights treaties.[76] These expressly referenced grounds are considered "suspect," and, therefore, potentially based on the prejudices and stereotypes that underlie discrimination,[77] the application of this "strict standard of review" shifts the burden of proof to the state, and demands that very "weighty reasons" are presented to justify a given distinction.[78] Even though not expressly referenced in article 1.1, the Commission also applies the strict scrutiny standard to "sexual orientation" as a prohibited ground of discrimination—including homosexuality, its expression, and its necessary consequences on a person's life plans.[79] It does this following the precedent issued by the European Court of Human Rights, among other international bodies.[80]

Applying this analysis to the facts of the case, the Commission made some key findings. It first established that the decision of the Chilean Supreme Court was based on Karen Atala's sexual orientation, despite the State's arguments.[81] The State had maintained that the Supreme Court's decision was not based on Karen Atala's sexual orientation, but on her cohabitation with a partner of the same sex, and the effect that situation could have on M., V., and R.[82] The Commission instead found that the decision was based on Karen Atala's expression of her sexual orientation as displayed by the language used by the Supreme Court of Chile.[83] The Supreme Court had referred explicitly in the judgment to "the absence of a male parent in the home," and the impact it could have on the girls' "mental and emotional wellbeing"; the "exceptional family environment of M., V., and R.," different from that "of their

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75 *Id.* ¶ 94.

76 The Commission describes this more standard test as involving several elements, including: a) the existence of a legitimate goal, the suitability or logical means–to-end relationship between the goal sought and the distinction; b) the existence of other alternatives; and c) proportionality—understood as a balance among the interests involved, and the level of sacrifice demanded from one party in comparison to the level of benefit to the other. *See id.* ¶ 86.

77 *Id.* ¶ 88.

78 *Id.* ¶ 89.

79 *Id.* ¶ 96.

80 *Atala*, Application, *supra* note 27, ¶ 92.

81 *See id.* ¶ 96.

82 *See id.*

83 *See id.* ¶¶ 97–98.

schoolmates and neighborhood acquaintances, exposing them to the risk of isolation and discrimination"; and the consideration that Karen Atala had "placed her freedom to express her homosexuality above the girls' right to grow up in a normally structured and socially accepted family in accordance with the corresponding traditional model."[84]

Secondly, the Commission—applying the strict scrutiny standard—considered that the State had a legitimate end in its actions by aiming to protect the interest of Karen Atala's daughters by means of the custody decision.[85] It did not find, however, that the decision met the "suitability" requirement, since there was no evidence indicating that Karen Atala's sexual orientation—or the expression of it in her life plans—posed a treat to her daughters.[86] Therefore, the Commission found that the Supreme Court based its decision on assumptions of risk grounded on prejudices and stereotypes regarding the characteristics and behavior of a given social group.[87] In conclusion, the Commission deemed other aspects of the test irrelevant to the decision.[88]

b. *The Right to a Private Life of Karen Atala (Article 11.2 of the American Convention)*

The Commission also established in its merits report that the State—by means of a custody decision rooted in prejudices based on sexual orientation—violated the right of Karen Atala to live free from abusive and arbitrary interferences in her private life, a right protected under article 11(2) of the American Convention.[89] Among its findings, and based on European Court precedent, the Commission highlighted that sexual orientation is a fundamental component of the private life of an individual, which should be free from arbitrary and abusive interferences by the state in the absence of weighty and convincing reasons.[90]

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84 *See id.* ¶ 98.
85 *Id.* ¶ 99.
86 *Atala*, Application, *supra* note 27, ¶ 103.
87 *See id.*
88 *Id.* ¶ 105.
89 *Id.* ¶ 117.
90 *See id.* ¶ 113 ("There is a clear nexus between the sexual orientation and the development of the identity and life plan of an individual, including his or her personality, and relations with other human beings," referencing E. B. v. France, App. No. 43546/02 ¶ 91 (Eur. Ct. H.R. 2008); Smith and Grady v. United Kingdom, App. Nos. 33985/96 & 33986/96 ¶ 89 (Eur. Ct. H.R. 1999); Lustig-Prean and Beckett v. United Kingdom, App. Nos. 31417/96 & 32377/96 ¶ 82 (Eur. Ct. H.R. 1999); Karner v. Austria, App. No. 40016/98 ¶ 37 (Eur. Ct. H.R. 2003).

In regard to the specific facts of this case, the Commission considered that while it may be necessary for judicial authorities in the framework of a custody proceeding to review aspects of a person's private life, a person's sexual orientation, on its own, is not a relevant criterion to determining a person's capacity to exercise custody over his or her children.[91] Therefore, in this particular case, the Commission held that the State's interference in the private life of Karen Atala was arbitrary, since the custody decision was based on discriminatory prejudices predicated on her sexual orientation, and not in an objective assessment of each of the parents' capacity to exercise custody of their daughters.[92]

c. *The Right to Private and Family Life of Karen Atala and her Daughters (Articles 11.2 and 17.1 of the American Convention)*

The Commission in its merits report established a connection between an individual's right to a private life with his or her right to protection of the family protected under article 17.1 of the American Convention.[93] The right to protection of the family underscores the central role of the family in a person's existence and life plans.[94] The Commission also held that the right to a private and family life extends to the development of relations between family members and the role of emotional relations in the life project of each of its members.[95]

In this particular case, the Commission held that a family comprising Karen Atala and her daughters was established in March of 2002, and after this arrangement was agreed-upon, the girls' father filed suit to secure custody for himself.[96] Therefore, the Commission held that the judgment denied the girls the opportunity to grow up alongside their mother. It also denied their mother the possibility of contributing to their development and upbringing, thereby altering their family life plans in a dramatic and irreparable fashion.[97] Thus, the Commission appealed to the Court to find that the State of Chile interfered arbitrarily and abusively in the family life of Karen Atala and M., V., and R. in violation of articles 11.2 and 17.1 of the American Convention, in conjunction with the

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91 *See Atala*, Application, *supra* note 27, ¶ 114.
92 *Id.* ¶ 115.
93 *Id.* ¶ 118.
94 *Id.*
95 *Id.* ¶ 122.
96 *Id.* ¶ 120.
97 *See Atala*, Application, *supra* note 27, ¶ 121.

obligation contained in article 1.1 thereof, by means of amending the custody regime solely on the basis of discriminatory prejudices regarding Karen Atala's sexual orientation.[98]

d. *The Rights of the Child and the Equal Rights of Spouses Following the Dissolution of a Marriage (Articles 19 and 17.4 of the American Convention)*

The Commission's ruling advances important standards related to the rights of the child, along with the rights of spouses vis-à-vis their children after a marriage is dissolved.[99] The ruling reiterates the duty of states under article 19 of the American Convention to offer special protection to children—an obligation particularly important in cases where parents separate.[100] It also underscores the importance under article 17.4 of adopting special protection measures for children when their parents dissolve their marriage and of safeguarding the right of each parent to participate in the upbringing of their children free from any form of discrimination, as a key to furthering the best interests of the children involved.[101]

The Commission also highlights several rights of children that are protected under the Convention on the Rights of the Child during legal proceedings that could end in their separation from their parents.[102] It underscores foremost the obligation of State parties to hear the opinions of children in judicial processes that directly affect them.[103]

In light of these standards, the Commission held that the custody decision handed down by the Supreme Court of Justice of Chile did not advance the best interests of M., V., and R. by separating them "arbitrarily, permanently, and irreparably" from their mother in the absence of clear evidence of harm to their welfare.[104] The Commission considered that the decision also stigmatized the girls "for having a homosexual mother and for living in a family not accepted by general Chilean society, thus embracing and legitimizing the prejudices and stereotypes toward homosexual couples and children raised by such couples," which were advanced by the father's custody suit.[105] In this context, the

98 *Id.* ¶ 123.
99 *See id.* ¶¶ 126–127.
100 *Id.* ¶ 126.
101 *Id.* ¶ 127.
102 *Id.* ¶¶ 129–130.
103 *Atala*, Application, *supra* note 27.
104 *Id.* ¶ 131.
105 *Id.*

Commission considered particularly serious that the Supreme Court failed to take into account the girls' preferences and needs during the custody proceedings, in contrast to what occurred in lower courts.[106] The Commission underscores that:

> . . . the girls' best interests cannot be used by the State as a pretext to discriminate against a specific group of people, and that removing children from their home environment must be an exceptional measure, on account of the irreparable damage it can cause to the structure of the family and their life plans.[107]

In the end, the Commission stated that the girls were entitled to a justice system that would look out for their interests during all stages of the proceedings by considering their opinion and by investigating and assessing the capacity of both parents to care for them—an objective analysis that did not take place in the custody proceeding at issue.[108]

e. *Right to a Fair Trial and to Judicial Protection (Articles 8.1 and 25 of the American convention)*

The Commission in its ruling also established a link between the guarantee of impartiality that must permeate all judicial proceedings under article 8.1 of the American Convention and the use of discriminatory prejudices to ground a legal decision.[109] The Commission reiterated that the guarantee of impartiality demands that the judge acting within the framework of a legal process approach the facts "of the case subjectively free of all prejudice and also offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality."[110] The Commission noted that the proceedings encompassed a series of prejudices and discriminatory stereotypes advanced by Ms. Atala's former husband in his suit, later reflected in the provisional custody judgment issued by the Regular Judge of the Juvenile Court in Villarica on May 2, 2003, and then in the judgment issued by the Supreme Court of Justice of Chile.[111]

3. Recommendations to the State

Based on the considerations outlined above, the Commission found the State of Chile responsible for the violation of the rights

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106 *Id.* ¶ 132.
107 *Id.* ¶ 135.
108 *Id.* ¶ 133.
109 *Atala*, Application, *supra* note 27, ¶¶ 137–150.
110 *Id.* ¶ 141.
111 *Id.* ¶ 143.

to equality and non-discrimination; private and family life; to protection of the family; to the special protection of girls; to the equal balancing of rights between the spouses; and to judicial guarantees and protection, established in articles 8.1, 11.2, 17.1, 17.4, 19, 24, and 25.1 of the American Convention, in relation to the general obligation not to discriminate contained in article 1.1 of said instrument.[112]

In its report No. 139/09,[113] the IACHR recommended that the Chilean State:

> 1. Provide Karen Atala and M., V., and R. with comprehensive redress for the human rights violations that arose from the decision to withdraw her custody on the basis of her sexual orientation, taking into consideration their situation and needs; and
> 2. Adopt legislation, public policies, programs, and directives to prohibit and eradicate discrimination on the basis of sexual orientation from all spheres of public power, including the administration of justice. These measures must be accompanied by adequate human and financial resources to guarantee their implementation, as well as training programs for the public officials involved in upholding those rights.

4. Process After Merits Report

In this case, the Commission gave the State of Chile several months to undertake steps to comply with the recommendations issued by the Commission.[114] After noting the absence of substantive progress in the implementation of its recommendations, the Commission decided to present this case to the Inter-American Court of Human Rights for its contentious review on September 17, 2010.[115]

a. *Processing of the Case Before the Inter-American Court of Human Rights*

The processing of the case of *Karen Atala and Daughters* before the Court included analysis of extensive documentation and information submitted by the representatives, the State, and the Commission;[116] the presentation of a significant number of amicus

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112 *Atala*, Application, *supra* note 27, ¶ 23.
113 *Id.* ¶ 24.
114 *Id.* ¶¶ 25–29.
115 *Id.* ¶ 39.
116 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 7–11 (Feb. 24, 2012).

briefs;[117] and the convening of a public hearing on August 23rd and 24th of 2011.[118] The Court also undertook a judicial diligence, visiting Chile to interview Karen Atala's daughters to gather their observations in relation to the case.[119]

The Court issued its final judgment on February 24, 2012. In its judgment, the Court found a number of violations under the American Convention to the detriment of Karen Atala and M., V., and R. echoing a significant part of the Commission's analysis presented before the Court, but also adding new elements related to the content of the obligations not to discriminate, to guarantee equality, the rights of the child, and the rights to a private and family life, to be discussed in more detail in the following section.[120]

More concretely, in its judgment, the Court found that the State of Chile was responsible for the violations to the rights to equality and the obligation not to discriminate contained in Article 24 of the American Convention, in relation to the obligation to respect and guarantee provided for in article 1.1 of the same instrument, to the prejudice of Karen Atala.[121] It also found violations for the same articles, in relation to the rights of the child contained in article 19 of the American Convention, to the detriment of M., V., and R., as well as their right to be heard, provided for in article 8.1 of the same instrument.[122] The Court also found a violation of the rights of Karen Atala to a private life and to the guarantee of impartiality contained in the American Convention in regard to the disciplinary investigation undertaken against her.[123] Lastly, the Court found violations to the rights to private life and protection of the family—contained in articles 11.2 and 17.1 of the American Convention—to the prejudice of Karen Atala and M., V., and R.[124]

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117 *Id.* ¶ 10.
118 *Id.* ¶ 7.
119 *Id.* ¶¶ 12–13, 67–71.
120 *Id.* ¶¶ 72–k, 238.
121 *Id.* ¶ 314(1).
122 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 314(2), (5).
123 *Id.* ¶ 314(6).
124 *Id.* ¶ 314(4).

III. The Case of *Karen Atala and Daughters* and Its Contribution to Legal Standards Related to Discrimination, Equality, and Women's Rights

The Author suggests in this Article that the Commission and Court's decisions in the case of *Karen Atala and Daughters* make key contributions to the development of legal standards related to the content of the obligations not to discriminate, to guarantee equality, and to respect and ensure women's rights. The potential legacy of these judgments will be reviewed in five areas: 1) the scope and reach of the obligations not to discriminate and to guarantee equality under articles 1.1 and 24 of the American Convention; 2) the features of the "rigorous scrutiny" standard of review of different treatment based on prohibited factors of discrimination; 3) the obligation not to discriminate on the basis of sexual orientation and gender identity, and its applicability to individual cases related to women; 4) the correlation of this prohibition with the rights to privacy and to protection of the family under international human rights law; and 5) the content of the bests interests of the child under international human rights law.

In the analysis presented in this section, the Author considers the cognizable trend in the international community to recognize the multidisciplinary nature of gender equality issues.[125] This tendency includes the recognition of a continuum of legal obligations of a negative and positive nature, threading a body of civil and political rights, with fundamental economic, social, and cultural rights, positioning women as rights-holders.[126] This web of rights includes not only the right of women to live free from discrimination and violence, but also their right to privacy and protection of the family; their right to be free from discrimination on the basis of sexual orientation and gender identity; their rights as children when applicable; and their entitlement to a diversity of judicial protections and guarantees in civil and criminal matters.[127] Therefore, the Commission and Court decisions in the case of *Karen Atala and*

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125 *See generally* CEDAW Committee, General Recommendation No. 28, *supra* note 5, ¶¶ 14-20; IACHR, The Work, Education, and Resources of Women, *supra* note 9.

126 *See* CEDAW Convention, *supra* note 2, Introduction.

127 *See id.*, arts. 1, 2, 16; CEDAW Committee, General Recommendation No. 19, Violence Against Women, U.N. Doc A/47/38 (Jan. 29, 1992) [hereinafter CEDAW Committee, General Recommendation No. 19]; CEDAW Committee, General Recommendation No. 12, Violence Against Women, U.N. Doc A/44/38 (1989) [hereinafter CEDAW Committee, General Recommendation No. 12]; CEDAW Committee, General Recommendation No. 21, Equality in Marriage and Family Relations, U.N. Doc A/49/38 (Feb. 4, 1994) [hereinafter CEDAW Committee, General Recommendation No. 21].

Daughters—and their potential legacy—should be studied and examined together, considering the comprehensive nature of the aforementioned body of human rights involved in the full respect and guarantee of women's human rights.

A. The Contours of the Obligations Not to Discriminate and to Guarantee Equality under the American Convention: The Implicit Content of "Other Social Condition"

There are several noteworthy elements in the Inter-American Court's analysis of the reach of the obligations not to discriminate and to guarantee equality under articles 1.1 and 24 of the American Convention in the *Karen Atala and Daughters* judgment. The Court solidifies some of the principles advanced by the Commission in its merits ruling reiterates, some of its legal precedent related to discrimination and equality, and pushes the boundary of these standards by presenting some ground breaking features related to sexual orientation, gender identity, and the response of state authorites to social prejudice and stereotypes.

Of utmost significance, is that the Court—as the Commission had done in its merits report—finds that sexual orientation is a prohibited factor of discrimination under article 1.1 of the American Convention, even though this factor is not explicitly included in the enumerated grounds.[128]

It should be noted also that the Court advances a broad reading of discrimination on the basis of sexual orientation, not only limited to the exercise of homosexuality, but also its expression and the necessary consequences of the same in the life project of persons, reaffirming the analysis advanced in the Commission's ruling.[129] In this way, the Court follows previous cases issued by the European Court of Human Rights alluding not only to sexual orientation, but its exercise, as a relevant aspect of the private life of an individual.[130]

The Court's ruling has broad implications for human rights throughout the Americas, as it means that all of the rights pro-

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128 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91; *Atala*, Application, *supra* note 27, ¶ 95; American Convention, *supra* note 3, art. 1.1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.").

129 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 133.

130 *See id.*

tected under the American Convention should be ensured in a non-discriminatory manner in regard to a person's sexual orientation, and the expression and the design of a life plan based on sexual orientation. The Court makes very clear that the Convention prohibits any norms, acts, or discriminatory practices based on the sexual orientation of a person, and no norm, decision, or internal law practice—performed by either states or individuals—can restrict the rights of a person on the basis of his or her sexual orientation in any way.[131]

But the Court also extends this recognition to gender identity, which opens a very important avenue for transgender and transsexual persons, and other marginalized groups, to bring their cases before the Inter-American system.[132] This is a very bold move by the Court since the facts before it in *Karen Atala and Daughters* centered mainly on discrimination on the basis of sexual orientation, as opposed to gender identity discrimination.[133] The statement of the Court pertaining to gender identity seems less enunciative, and it remains to be seen how the Court will address the differences and particularities of discrimination on the basis of gender identity in future cases.[134]

To offer an open interpretation to the non-discrimination clause contained in article 1.1, the Court also presents a nuanced analysis of the practice from international and regional protection bodies to prohibit discrimination on the basis of sexual orientation.[135] It also treats the American Convention as a "living instrument,"[136] the application of which should respond to the evolution of times and current life conditions[137] and should follow the princi-

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131 *Id.* ¶ 91.

132 *Id. See also* Int'l Comm'n of Jurists, *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 6 n.2 (2007), *available at* http://www.yogyakartaprinciples.org/principles_en.pdf ("'Gender Identity' has been defined as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."). *See also* U.N. High Comm'r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, HRC Council, 19th Sess., U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) (discussing priority concerns of persons based on their gender identity).

133 *See Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 16–58.

134 *Id.* ¶ 91.

135 *Id.* ¶¶ 87–88.

136 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 83.

137 *Id.* ¶ 85.

ple of the norm most favorable to the human person.[138] This judgment seems to continue the practice reflected in the Court's *Cotton Field Judgment* of referring in detail to pronouncements issued by international, regional, and national bodies and institutions as an important reference in its development of innovative legal standards related to gender equality issues.[139]

Even though the Court does refer to international tendencies related to sexual orientation, it seems to establish a difference between what it considers a tendency and a consensus-based argument that could be used as a pretext to discriminate.[140] The Court explicitly notes its rejection of arguments advanced by the State of Chile pointing to the lack of consensus inside some countries in the Americas as to the rights of sexual minorities, finding this argument invalid.[141] It is interesting to draw a comparison between the approach of the Inter-American Court and the mixed use by the European Court of Human Rights of the issue of consensus, and the margin of appreciation European States should have in this area.[142] The European Court has interpreted this margin of appreciation in diferente ways—at times broadly and at other times narrowly, depending on the issue examined.[143]

It is worth mentioning as well that in its review of discrimination on the basis of sexual orientation, the Court also combines both classic and innovative elements in its analysis of the general content of the obligation not to discriminate.[144]

In this regard, referring to its former precedent, it clarifies

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138 *See id.* ¶ 84.

139 *See* González v. Mexico (*Cotton Field*), Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 113–136, 147–164, 249–286 (Nov. 16, 2009).

140 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 92. The Court however does refer to the four OAS General Assembly resolutions related to sexual orientation and gender identity issued by the same entity since 2008. *See id.* ¶ 86. These resolutions have notably evolved over time from using violence-based language in regard to state obligations, to a more discrimination and gender equality-oriented mandate. OAS, Resolutions on Human Rights, Sexual Orientation, and Gender Identity, AG/RES. 2435 (XXXVIII-O/O8), AG/RES. 2504 (XXXIX-O/O9), AG/RES. 2600 (XL-O/10), AG/RES. 2653 (XLI-O/11).

141 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 92.

142 *See, e.g.*, Schalk and Kopf v. Austria, App. No. 30141/04, ¶¶ 49–64 (Eur. Ct. H.R. 2010); Goodwin v. United Kindgom, App. No. 28957/95, ¶¶ 71-93 (Eu. Ct. H.R. 2002); Karner v. Austria, App. No. 40016/98, ¶¶ 29–43 (Eur. Ct. H.R. 2003); Smith and Grady v. United Kingdom, App. Nos. 33985/96 and 33986/96, ¶¶ 69–112 (Eur. Ct. H.R. 1999).

143 *See* cases cited *supra* note 142.

144 *See Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 78–82.

that article 1.1 of the American Convention is a norm of a general nature whose content extends to all the dispositions in the treaty, which means that any treatment which can be considered discriminatory in respect to any of the rights guaranteed therein is *per se* incompatible with the same.[145] States should abstain from performing actions that in any way either directly or indirectly create *de facto* or *de jure* situations of discrimination, and states are obligated to adopt positive measures to address situations of discrimination existing in their societies, to the prejudice of a determined group of persons.[146] This involves a special duty of protection that a state should exercise with respect to the actions and practices of third parties, that under its tolerance and acquiescence, create, maintain, or favor discriminatory situations.[147]

The Court, however, does maintain a somewhat strict distinction between the contents of articles 1.1 and 24 of the American Convention—a precedent set in its case *Apitz Barbera and Others*—while the Commission advances a somewhat organic view of the relationship between both articles.[148] In its earlier jurisprudence,

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[145] *Id.* ¶ 78.

[146] *Id.* ¶ 80.

[147] *Id.*

[148] As noted by the Author previously, the Court continues to underscore the distinction between the obligations contained in articles 1.1 and 24 of the American Convention, holding in the case of *Apitz Barbera v. Venezuela*:

> The difference between the two articles lies in that the general obligation contained in Article 1.1 refers to the State's duty to respect and guarantee "nondiscrimination" in the enjoyment of the rights enshrined in the American Convention, while Article 24 protects the right to "equal treatment before the law." In other words, if the State discriminates upon the enforcement of conventional rights containing no separate nondiscrimination clause a violation of Article 1.1 and the substantial right involved would arise. If, on the contrary, discrimination refers to unequal protection by domestic law, a violation of Article 24 would occur.

See Apitz-Barbera v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 209 (Aug. 5, 2008). This position was reiterated by the Court in the judgments of *Fernández-Ortega* and *Rosendo-Cantú*. By contrast, the Commission in *Atala* established that:

> The development of the right to equal treatment and nondiscrimination points to the existence of several conceptions of it. For example, one conception is related to the prohibition of arbitrarily different treatment—with different treatment understood as meaning distinction, exclusion, restriction, or preference—and another is related to the obligation of ensuring conditions of true equality for groups that have historically been excluded and are at greater risk of discrimination. Although both views may be present in certain cases, each warrants a different response from the State and a different treatment under the American Convention. To this must be added the fact that under the different conceptions of the right of equality, a State's actions and fail-

the Court had advanced a more interrelated link between these two articles.[149]

The Author notes overall that the open interpretation of the non-discrimination clause by both the Commission and the Court decisions is a paramount gain for legal standards related to discrimination in the realm of the Inter-American system, as well as for sectors and communities particularly exposed to this human rights violation, such as women.[150] A flexible interpretation of arti-

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> ures to act may be related to rights enshrined in the American Convention or they may be related to any undertaking of the State that does not affect the enjoyment of Convention-protected rights. Therefore, although certain criteria can be used as a basis, the applicable Convention provisions must be determined in each specific case by means of an analysis that takes into account the individual or group of people affected; the reasons behind the alleged discrimination; the rights or interests involved; the actions or omissions that gave rise to it; as well as other considerations.

Atala, Application, *supra* note 27, ¶¶ 80–81. *See also* Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 20, at 861 n.229.

149 *See, e.g.*, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 85 (Sept. 17, 2003).

150 For example, the CESCR Committee has stated the following in regard to the open interpretation of the non-discrimination clause contained in article 2(2) of the International Covenant on Economic, Social, and Cultural Rights:

> The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

CESCR Committee, General Comment No. 20, *supra* note 1, ¶ 27.

The CEDAW Committee has also pronounced over the issue of "intersectionality" and the need for states to identity the factors that can combine with sex to foster discrimination against women:

> Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief , health, status, age, class, caste, and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men. States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on

cle 1.1 of the American Convention creates a space favorable to the recognition of new forms of discrimination affecting women, as well as other groups which may not yet be recognized by the international community, or that may be in an incipient stage of recognition.

For example, the Committee on Economic, Social, and Cultural Rights has identified a number of "implied grounds" it considers contained in the clause "other status" within the Covenant on Economic, Social, and Cultural Rights,[151] aside from the "express grounds"[152] already enumerated in that clause. The Committee identifies "implied grounds" to include: disability, age, marital and family status, health status, place of residence, and the economic and social situation of an individual[153]—all grounds that have been used to discriminate against women historically.[154]

Offering an open interpretation to the prohibition of discrimination is also a key component to understanding the concept of *intersectionality* in this context, meaning the multiple forms of discrimination a woman may face based on a range of factors combined with her sex.[155] Discrimination against women rarely happens in isolation and is often compounded by other factors, such as sexual orientation, gender identity, age, race, and economic status, among others.[156] As stated by the Committee on Economic, Social, and Cultural Rights, this "cumulative discrimination has a unique and specific impact on individuals and merits particu-

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> the women concerned. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and General Recommendation No. 25.

CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 18.

151 The International Covenant on Economic, Social, and Cultural Rights provides:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

CESCR (Convention), *supra* note 2, art. 2(2).

152 The Committee has identified among the "express grounds": discrimination on the basis of race and color, sex, language, religion, political or other opinion, national or social origin, property and birth. *See* CESCR (Committee), General Comment No. 20, *supra* note 1, ¶¶ 19–26.

153 *See id.* ¶¶ 27–35.

154 *See e.g.*, CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 18; HRC (Committee), General Comment No. 18, *supra* note 1; THE WORLD BANK, WORLD DEVELOMENT REPORT 2012, *supra* note 10, at 13–22.

155 *See* CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 18.

156 *See id.* ¶ 18.

lar consideration and remedying."[157] For example, a vast amount of persons who suffer discrimination on the basis of sexual orientation are also women of different ages, races, ethnicities, and socio-economic groups.[158] Lesbian and transgender women, moreover, face an acute risk to human rights violations due to prevailing gender inequality and its effect on family relations and social dynamics.[159]

The current international human rights law system needs to be responsive to the experience of marginalization that certain groups of the population face, and an open interpretation of the non-discrimination clause contained in human rights treaties is fundamental to this goal.[160] The Author also believes in the need to interpret the instruments of the Inter-American and universal systems of human rights as "living" documents, in light of the current times and emerging forms of discrimination, and taking into account the evolving nature of the international human rights law system, its values, and standards.[161] The Commission and Court's decisions in the case of *Karen Atala and Daughters* show how international, regional, and national precedent can be combined and interpreted in ways that offer the most protection to groups and sectors who have historically suffered, and continue to bear, alarming forms of discrimination.

B. The Features of Rigorous Scrutiny Analysis: The Legal Examination of Different Treatment on the Basis of Prohibited Factors of Discrimination

The Inter-American Court also innovatively found that distinctions based on sexual orientation should be subjected to rigorous scrutiny.[162] This entails a shift in the burden of proof, requiring from the state the presentation of very weighty reasons to justify

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157 CESCR (Committee), General Comment No. 20, *supra* note 1, ¶ 17.

158 U.N. High Comm'r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, HRC (Council), 19th Sess., U.N. Doc. A/HRC/19/41 ¶¶ 21, 29, 63, 67 (Nov. 17, 2011).

159 *Id.* ¶ 21.

160 *See, e.g.*, CESCR (Committee), General Comment No. 20, *supra* note 1, ¶¶ 15–35.

161 For more analysis on this principle, see The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1, 1999); Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC 10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 37 (Jul. 14, 1989).

162 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 124 (Feb. 24, 2012).

that the decision at issue did not have a discriminatory objective or effect, following precedent from the European Court of Human Rights, including the well-known case of *Karner v. Austria*.[163]

In applying this rigorous standard of scrutiny, the Court advances important principles that the Author considers may have long-lasting effects in the examination of potential allegations of bias, mistreatment, and prejudice contained in a judicial process.[164] This analysis can be particularly useful for the Inter-American Commission, due to its historical application of the "fourth instance doctrine" and the fact that as a matter of practice the Commission does not review cases where the main allegations are centered on errors of fact and law incurred by domestic tribunals.[165] This is a tricky doctrine to apply in cases like *Karen Atala and Daughters*, since it is very challenging to examine whether discrimination has been present in a judicial process without reviewing the main judicial actions and the processing of the case by domestic courts.

Firstly, the Court established that to determine whether a difference of treatment has been applied by means of a particular legal decision, it is not necessary that the entire decision be based on the sexual orientation of a person.[166] Applying the precedent set in the European Court judgment of *E.B. v. France*, the Inter-American Court considered it sufficient that sexual orientation was considered either explicitly or implicitly in the adoption of a specific legal decision.[167] In this regard, the Court advances a "nexus" test, where it analyzes whether there was a link—either causal or decisive—between the sexual orientation of Karen Atala and the decisions issued by the Supreme Court of Chile and the Juvenile Court of Villarica.[168] To determine the existence of this nexus, the

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163 *Id.* ¶ 124, n.143 (referring to cases from the European Court of Human Rights, Karner v. Austria, App. No. 40016/98, ¶ 37 (Eur. Ct. H.R. 2003) and Kozak v. Poland, App. No. 13102/02, ¶ 92 (Eur. Ct. H.R. 2010)).

164 *Id.* ¶¶ 100–146. These principles could potentially be applied in cases before the Inter-American Commission that allege the influence of prejudice and stereotypes in the resolution of a judicial process concerning violence against women issues. *See, e.g.*, Nunes da Silva v. Brazil, Petition 337-03, Inter-Am. Comm'n H.R., Report No. 93/09, OEA/Ser.L/V/II, doc. 51 (2009); Loaiza López Soto v. Venezuela, Petition 1462-07, Inter-Am Comm'n H.R., Report No. 154/10, OEA/Ser.L/V/II, doc. 5, rev. 1 (2011).

165 For a detailed analysis of the fourth instance doctrine, see Santiago Marzioni v. Argentina, Case 11.673, Inter-Am. Comm'n H.R., Report No. 39/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 48–51 (1997). *See also Atala*, Petition, *supra* note 29, ¶¶ 59–60.

166 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 94.

167 *Id.*

168 *Id.* ¶ 95.

Court enumerates a few factors that must be reviewed, including the arguments advanced by the national judicial authorities, their conduct, the language used, and the context in which the judicial decisions were produced.[169] Reviewing thoroughly a series of judicial actions in this case, including the reasoning presented in the custody complaint filed by the father of M., V., and R.; the reasoning advanced by the Supreme Court of Justice of Chile; and the provisional custody decisions; the Court determined that the process was centered around the sexual orientation of Karen Atala and the presumed consequences that cohabitation with a same-sex partner could produce on the three girls.[170] Therefore, the Court considered that a difference in treatment had been made in the context of the custody proceeding based on a prohibited factor of discrimination contained in article 1.1 of the Convention.[171]

Then the Court proceeded to determine whether this difference in treatment was justified based on the justification presented by the State of Chile, namely the best interest of the children involved and the presumed harm that they would have suffered founded on the sexual orientation of their mother.[172] In this regard, the Court affirms the legitimate and imperative nature of the best interests of the child as an objective, as well as the special protection principle contained in article 19 of the American Convention and the dispositions of the Convention on the Rights of the Child—what the Court has consistently referred to as the "corpus juris" related to the rights of the child.[173] The Court, however, clarifies that the sole abstract reference to the best interests of the child as a legitimate objective, without proving in a concrete fashion the risks and harms which have been provoked by the sexual orientation of the mother to her children, is insufficient to justify a custody determination.[174] A custody decision cannot be based on stereotypical notions related to the capacity of either of the parents to exercise their care-taking role.[175]

Using this foundation as a basis, the Court proceeds to analyze four of the main arguments advanced by the Supreme Court related to the potential impact of same-sex cohabitation on the girls involved, and whether these arguments furthered their best inter-

169 *Id.*
170 *Id.* ¶¶ 96–98.
171 *Id.*
172 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 99.
173 *Id.* ¶ 108.
174 *Id.* ¶ 109.
175 *Id.* ¶ 111.

ests.[176] In regard to the "presumed social discrimination" allegedly suffered by the girls due to their mother's cohabitation with a same-sex partner, the Court considers this an illegitimate foundation for a custody decision, as intolerance cannot be used a pretext to further discrimination.[177] The Court establishes that the law should aim to advance society and not legitimize different forms of discrimination in violation of human rights.[178] As to the potential "confusion of roles," the Court concluded that the Supreme Court of Chile did not present weighty reasons showing that the sexual orientation of Karen Atala and her cohabitation with a partner of the same-sex did have a negative impact on the psychological and emotional well being, the sexual orientation, and the social relations of the girls.[179] The Court also rejected the Supreme Court argument that Karen Atala had privileged her interests above those of her daughters in cohabiting with a person of the same-sex, as it was unreasonable to expect that she would sacrifice a crucial part of her identity to retain custody of her daughters.[180] The Court also considered arguments advancing a traditional or normal family model to be inadequate, as it did not deem that the American Convention advances such a model.[181]

Therefore, the Court considered that even though the Supreme Court and Villarica Juvenile Court's decisions sought to further the protection of the best interests of the children, it was not proven that the reasoning contained in these judgments was adequate to further that goal.[182] It considered instead that these decisions were based on "abstract, stereotyped and discriminatory arguments," in violation of article 24 of the American Convention, in relation to article 1.1 of the same instrument.[183]

The Author however hopes that the Court will delve in greater detail into the elements that compose the application of the "rigorous scrutiny standard," and what would be the determining criteria to apply this standard to certain factors of discrimination either explicitly or implicitly contained in article 1.1 of the American Convention.[184]

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176 *Id.* ¶ 113.
177 *Id.* ¶ 119.
178 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 120.
179 *Id.* ¶ 130.
180 *Id.* ¶ 139.
181 *Id.* ¶ 142.
182 *Id.* ¶ 146.
183 *Id.*
184 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 87. The Court does refer to *Clift v. United Kingdom*, decided by the European Court of

For example, the Author is interested in seeing whether the aforementioned analysis of the Court is reconciled with the Commission's more nuanced review of the strict scrutiny standard in its merits report.[185] The Commission in its merits decision on the case of *Karen Atala and Daughters* refers to a "strict scrutiny" standard of review and delves in more detail into the elements that should guide this analysis.[186] At its core, the Commission is pondering whether these distinctions are "objective and reasonable" in light of a state's advanced aim, and the burden of proof falls on a state involved to present "weighty reasons" to justify them.[187]

In the past, the Commission has referred to the elements of this rigorous test, highlighting in particular that a distinction based on reasonable and objective criteria: 1) pursues a legitimate aim; and 2) employs means which are proportional to the end sought.[188] This test is similar to the one applied by the European Court of Human Rights to factors it deems should be subject to a more rigorous level of scrutiny.[189]

The Commission in its merits report goes further, however, requiring the state to advance a pressing social need to justify the distinction, and to also show that the distinction complied with the elements of suitability, necessity, and proportionality.[190] For the Commission, it is not sufficient for a state to argue the existence of a legitimate goal. Instead, the end sought must be particularly important or weighty.[191] The measure must also be strictly necessary to attain the goal, meaning that no other less harmful alternative exists, and the measure must also be proportional to the end sought, entailing an appropriate balance of interests in terms of the levels of sacrifice and benefit.[192] Therefore, the analysis of different treatment based on the sexual orientation of a person

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Human Rights, in which the European Court reaffirms how categories included under "other status"—protected under Article 14 of the European Convention—often constitute personal characteristics of persons, in the sense that they tend to be innate or inherent to the person involved. *Id.* ¶ 87 (citing Clift v. United Kingdom App. No. 7205/07, ¶¶ 55–63 (Eur. Ct. H.R. 2010)).

185 *See Atala*, Application, *supra* note 27, ¶¶ 85–108.

186 *See id.* ¶¶ 85–89.

187 *See id.*

188 *See* Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 36 (2001).

189 *See, e.g.*, Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, ¶ 29 (Eu. Ct. H.R. 1999).

190 *See Atala*, Application, *supra* note 27, ¶¶ 85–89, 101–108.

191 *Id.* ¶¶ 88–89.

192 *Id.*

should be more rigorous.[193]

The Commission does conclude along with the Court that the objective identified by the State of Chile to justify the custody decision—to advance the best interests of the child of M., V., and R.—constitutes a pressing social need, but fails to find a logical causal relationship between the accomplishment of this objective and the custody decision.[194] The Commission considered that the custody decision was based on discriminatory prejudices, and not in an objective assessment of the parents' capacity to exercise custody over their daughters.[195] Therefore, the Commission found that the decisions in this case did not meet the suitability requirement, and the Commission did not consider it necessary to refer to the other elements of the strict scrutiny test.[196]

In its merits report, the Commission also refers to sexual orientation as a "suspect category" of distinction, meriting a strict scrutiny analysis to ensure it is not grounded in prejudice.[197] As mentioned earlier, the Commission reaches this finding on the basis of previous cases ruled by international bodies and well-known national Courts subjecting distinctions based on sexual orientation to a particularly rigorous standard of review.[198] The Court does not use this terminology or employ this line of analysis in its judgment.[199]

The Commission's analysis is also useful in its presentation of the elements assessed by different international bodies and national tribunals to consider that a prohibited ground to discriminate amounts to being "suspect."[200] Some of the factors weighed by courts and bodies are: "immutability" (understood as a characteris-

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193 *Id.* ¶ 86.

194 *See id.* ¶¶ 101–108.

195 *See id.* ¶ 105.

196 *See Atala*, Application, *supra* note 27, ¶¶ 96–108.

197 *See id.* ¶¶ 90–95.

198 *See id.* ¶¶ 81–83 (citing S.L. v. Austria, App. No. 45330/99, ¶ 37 (Eur. Ct. H.R. 2003); E. B. v. France, App. No. 43546/02, ¶ 91 (Eur. Ct. H.R. 2008); Corte Constitucional [C.C.] [Constitutional Court], enero 28, 2009, Sentencia, C-029/09, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, Sentencia, C-075/07, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 8, 2005, C-101/05, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC) at 14–16 (S. Afr.); Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699, 728 (9th Cir. 1989); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009).

199 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 78–146 (Feb. 24, 2012).

200 *See Atala*, Application, *supra* note 27, ¶¶ 85–89.

tic that is difficult to control and that a person cannot change without modifying his or her identity); the history of marginalization and exclusion of a given group; and the manifest irrationality of dividing social responsibilities on the basis of this factor.[201] Although not mentioned in the merits report, the limited political participation of a given group has also been considered by national courts as an element to determine whether a given discrimination factor is "suspect."[202]

The Commission itself has established in the past that distinctions based on grounds expressly identified in article 1.1 of the American Convention, such as sex and race, are subject to a particularly strict scrutiny,[203] and reiterates this finding as a matter of consensus in its merits report.[204] Even though the European Court does not refer to "suspect categories" per se, it has also applied a particularly rigorous level of scrutiny to distinctions based on grounds identified as as prohibited under article 14 of the European Convention on Human Rights.[205]

However, as more prohibited factors of discrimination are identified by international courts—beyond those expressly identified in the non-discrimination clauses of human rights treaties—more analysis will be needed as to whether these factors will automatically become "suspect" as well, meriting a strict scrutiny analysis.[206] For example, it remains to be seen whether all of the express and implied grounds recognized by the Committee on Economic, Social, and Cultural Rights under "other status" will also be consid-

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201 *Id.* ¶ 94.

202 *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (discussing U.S. federal and state cases shedding light on this element).

203 *See, e.g.*, IACHR, Access to Justice for Women Victims of Violence in the Americas, OEA/Ser.L/V/II, doc. 68, ¶¶ 80, 83 (Jan. 27, 2007); IACHR, Report on Terrorism and Human Rights, *supra* note 1, ¶ 338; Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 36 (2001); IACHR, Annual Report 1999: Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination, OEA/Ser.L/V/II.106, doc. 6 (Apr. 13, 1999).

204 *See Atala*, Application, *supra* note 27, ¶ 88.

205 Abdulaziz, Cabales and Balkandali v. United Kingdom, App. Nos. 9214/80; 9473/81; 9474/81, ¶ 78 (Eur. Ct. H.R. 1985) (discussing sex); Hoffmann v. Austria, App. No. 12875/87, ¶ 33–36 (Eur. Ct. H.R. 1993) (discussing religion); Timishev v. Russia, App. Nos. 55762/00 & 55974/00, ¶ 56 (Eur. Ct. H.R. 2005) (discussing race).

206 *See, e.g.*, *Atala*, Application, *supra* note 27, ¶¶ 85–96; Kiyutin v. Russia, App. No. 2700/10, ¶ 56 (Eur. Ct. H.R. 2011). *See also* Roberto P. Saba, *Igualdad, Clases y Clasificaciones:¿Qué es lo Sospechoso de las Categorías Sospechosas?* [Equality, Classes, and Classification: What is Suspect of the Suspect Categories?], *in* TEORÍA Y CRÍTICA DEL DERECHO CONSTITUCIONAL (Roberto Gargarella, ed., 2008).

ered suspect categories of discrimination by international legal bodies.[207]

As indicated earlier, sexual orientation has many elements in common with categories such as race and sex in terms of immutability—as a feature vital to a person's identity—along with the history of marginalization that has affected this group, the irrational division of responsibilities in a society based on this factor, and the still-limited political participation of this community.[208] However, is it reasonable to compare "sexual orientation" with other implied factors of discrimination identified by the Committee on Economic, Social, and Cultural Rights, such as economic situation, place of residence, or marital status? Some of these factors might not be considered "immutable," while at the same time they have undoubtedly been used historically to marginalize married and unmarried women in many rural and low-income zones, regions, and countries.[209] A challenge for international legal bodies is to identify which among this group of elements will be most preeminent or relevant to determine whether a specific ground of discrimination reaches the "suspect" level.

The European Court of Human Rights has already afforded some important analysis on this issue recently, and it will be interesting to see how other regional tribunals—such as the Inter-American Court of Human Rights—approach this area in the future.[210] In the case of *Kiutyn v. Russia*, the European Court recently analyzed whether the ground of "health status" could be considered as included within the prohibited factors listed in article 14 of the European Convention of Human Rights, and shared some important analysis regarding the elements that render a discriminatory ground subject to a especially rigorous level of scrutiny.[211]

In *Kiuytin v. Russia*, the applicant alleged that he had been the victim of discrimination on account of his health status in his application for a Russia residence permit.[212] He was required to undergo a medical examination during which he tested positive for HIV, which resulted in the rejection of his application.[213] The

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207 CESCR (Committee), General Comment No. 20, *supra* note 2, ¶¶ 18–35.

208 *See* HRC Council Res. 17/19, Human Rights, Sexual Orientation, and Gender Identity, 17th Sess., May 30–June 17, 2007, U.N. Doc. A/HRC/17/L.9/Rev.1 ¶¶ 48–73 (June 15, 2011).

209 *See* THE WORLD BANK, WORLD DEVELOMENT REPORT 2012, *supra* note 10, at 20; IACHR, The Work, Education, and Resources of Women, *supra* note 9, ¶¶ 309–312.

210 *See Kiyutin*, App. No. 2700/10.

211 *Id.* ¶ 56.

212 *Id.* ¶ 3.

213 *Id.* ¶ 9.

Court considered the applicant's claims under article 14 of the European Convention, in conjunction with article 8.[214] In its analysis of whether the applicant's health status fell under the "other status" clause within the meaning of article 14, the Court reasoned that the list of discriminatory factors set out in Article 14 is not exhaustive and that this open interpretation has not been limited to characteristics "which are personal in the sense that they are innate or inherent."[215] Accordingly, the Court considered that a distinction based on account of a person's health status, including conditions such as HIV infection, should be covered by the term "other status" in the text of article 14 of the Convention.[216] In its application of a more rigorous standard of review, the Court placed heavy emphasis on the marginalization that persons infected with HIV have suffered historically.[217]

As stated by the European Court of Human Rights, the Author proposes that the history of discrimination, marginalization, and exclusion suffered by a given group of the population based on a specific status is a factor of paramount importance in determining whether certain distinctions should be considered "suspect" for judicial review purposes.[218] Many of the prejudices and stereotypes that underlie arbitrary distinctions are the product of this history, and are fueled by social intolerance.[219] This is particularly important in the current context where a great deal of discrimination—for example, against women—is indirect, or results from the discriminatory impact of seemingly neutral policies.[220]

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214 *Id.* ¶ 39.

215 *Id.* ¶ 56, citing Clift v. United Kingdom, App. No. 7205/07, ¶¶ 56–58 (Eu. Ct. H.R. 2010) (considering it clear that while the court has consistently referred to the need for a distinction based on a "personal" characteristic in order to engage Article 14, the protection conferred by that Article is not limited to different treatment based on characteristics that are personal in the sense that they are innate or inherent. Therefore, the European Court of Human Rights includes within "other status" the different treatment of various categories of prisoners depending on the sentences imposed.).

216 *Kiyutin*, App. No. 2700/10, ¶¶ 56–58.

217 *Id.* ¶ 64.

218 *Id.* ¶ 63.

219 For more analysis on this issue, see REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 104–130 (2010).

220 For discussion from treaty bodies in regard to the problem of indirect discrimination, see CESCR (Committee), General Comment No. 20, *supra* note 2; CEDAW (Committee), General Recommendation 28, *supra* note 3; HRC (Committee), Althammer v. Austria, Communication No. 998/2001, ¶¶ 23–25, UN Doc. CCPR/C/78/D/998/2001 (Aug. 8, 2003); Comm. on the Elimination of Racial Discrimination [CERD], L.R. v. Slovakia, Communication No. 31/2003, ¶ 10.4, U.N. Doc. / C / 66 / D / 31 / 2003 (Mar. 7, 2005).

The Author hopes that the above-mentioned analysis from both the Court and the Commission related to potentially prejudicial different treatment, leads the way to more rulings identifying and reviewing thoroughly the features of the "rigorous scrutiny" or "strict scrutiny" test; the "weighty reasons" that need to be advanced by a state implicated to justify different treatment on the basis of prohibited factors; and what makes a discriminatory factor of discrimination merit the application of a "strict" or "rigorous scrutiny" standard.

C. Discrimination on the Basis of Sexual Orientation through the Lens of Women

One of the most important legacies of the case of *Karen Atala and Daughters* is that it exemplifies how discrimination can manifest itself in the realm of sexual orientation, and how it can happen to a woman at many levels.[221] This individual and concrete case illustration is crucial at this stage in the definition of state obligations oriented to guarantee women's rights, in order to foster the adequate and effective state implementation of standards at the national level.[222] The case of *Karen Atala* evidences the many facets of discrimination, its varied intersections, the settings and sectors that perpetrate it, and its casualties. It also offers a female face to discrimination on the basis of sexual orientation, as its main victims are women and girls.[223]

Karen Atala was deprived of custody of her daughters on the basis of her cohabitation with a partner of the same sex, and all the notions and prejudices associated with this kind of living arrangement—a key feature of sexual orientation discrimination. She suffered discrimination as a result of forming a life plan based on a crucial component of her identity. At a second level, she was discriminated against as a mother, with the judicial application of socially accepted conceptions of how a good and capable mother should act. At a third level, Karen Atala was discriminated against for her family choices, by selecting a model that does not conform to convention, devoid of a father figure. This discrimination hap-

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221 *See generally* Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); *Atala*, Application, *supra* note 27.

222 For a review of the impact that legal standards can have on the administration of the justice system in regard to violence and discrimination against women, see IACHR, Legal Standards Related to Gender Equality and Women's Rights, *supra* note 17.

223 *See id.*

pened within a custody proceeding and was perpetrated by the justice branch, which sends a powerful message in support of the marginalization of lesbian and gay parents from a fundamental human experience. The discrimination that Karen Atala underwent is striking considering that she is a well-known judge in her country and most discrimination happens against women from low-income and rural sectors.[224]

This exemplification and individualization of cases pertaining to the specific situation of women is also fundamental in the current trend in international human rights law favoring the prohibition of discrimination on the basis of sexual orientation and gender identity.[225] This marked trend initiated with a line of cases focusing on the right to privacy and the criminalization of consensual homosexual conduct[226], and has transitioned into a more nuanced analysis of the obligations not to discriminate and to guarantee equality in contexts such as the family, the employment sector, in pension benefits, and in custody settings, in order to prevent contravention of the right to equality, the obligation not to discriminate, and the protection of the right to privacy of persons.[227] This line of cases also includes a tendency to grant civil, political, economic, social, and cultural rights to homosexual persons analogous to those guaranteed to heterosexual persons.[228] The European Court has also started ruling on issues related to gender

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224 *See generally* THE WORLD BANK, WORLD DEVELOMENT REPORT 2012, *supra* note 10; IACHR, The Work, Education, and Resources of Women, *supra* note 9.

225 For more discussion of legal developments pertaining to discrimination on the basis of sexual orientation, see Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity, and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 82 HUM. RTS. L. REV. 207 (2008).

226 *See e.g.*, HRC (Committee), Toonen v. Australia, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994); Dudgeon v. United Kingdom, App. No. 7525/76 (Eur. Ct. H.R. 1981); S.L. v. Austria, App. No. 45330/99 (Eur. Ct. H.R. 2003).

227 *See, e.g.*, HRC (Committee), Young v. Australia, Communication No. 941/2000, U.N. Doc. CCPR/C/78/C/941/2000 (Aug. 6, 2003); Smith and Grady v. United Kingdom, App. Nos. 33985/96 and 33986/96, ¶¶ 94–112, 136 (Eur. Ct. H.R. 1999); Lustig-Prean and Beckett v. United Kingdom, App. Nos. 31417/96 and 32377/96 (Eur. Ct. H.R. 1999).

228 *See, e.g.*, HRC (Committee), *Young*, Communication No. 941/2000; Karner v. Austria, App. No. 40016/98 (Eur. Ct. H.R. 2003); Corte Constitucional [C.C.] [Constitutional Court] enero 28, 2008, Sentencia C-029/09 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] abril 16, 2007, Sentencia C-336/08 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] febrero 7, 2007, Sentencia C-075/07 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] octubre 3, 2007, Sentencia C-811/07 (Colom.); Corte Constitucional [C.C.] [Constitutional Court] septiembre 18, 2008, Sentencia T-912/08 (Colom.); M. v. H., [1999] S.C.R. 3, 6 (Can.); Egan v. Canada, [1995] S.C.R. 513, 603 (Can.).

identity and the same has been consistently recognized as a prohibited factor of discrimination, although at a slower pace than sexual orientation.[229]

The case of *Karen Atala and Daughters* is also noteworthy from the perspective of women's rights because it shows how traditional conceptions of motherhood can be intertwined with prejudices related to sexual orientation in a given custody case, such that they trigger human rights violations in an area traditionally relegated to the decision-making of domestic tribunals.[230] The Inter-American Court skillfully recognizes this issue in its decision by rejecting as illegitimate the arguments presented by the Supreme Judicial Court of Chile alluding to a supposed privileging of interests, in Karen Atala's choice to live with a partner of the same sex.[231] The Court emphasizes how unreasonable it considers it to be that the justice system would expect Karen Atala to sacrifice a crucial part of her identity to retain custody of her daughters.[232] For the Court, to expect that a mother conditions her life options for her children, advances a traditional conception of the social role of women as mothers, where it is expected socially that women undertake the main responsibility for the raising of their children, thereby renouncing a crucial part of their identity.[233] The Commission itself in the report refers to how the Supreme Judicial Court of Chile's ruling sent a stereotypical message "equating homosexuality with maternal inadequacy."[234]

There have been cases ruled by the international community related to custody matters delving into sexual orientation issues, but these have mostly focused on the situation of homosexual male parents, and not necessarily on women.[235] Probably the most well-known is the case of *Salgueiro Da Silva Mouta v. Portugal*, decided by the European Court of Human Rights, where said tribunal found that a difference in treatment based on the sexual orientation of

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229 *See, e.g.*, Goodwin v. United Kingdom, App. No. 28957/95 (Eur. Ct. H R. 2002); *see also* Int'l Comm'n of Jurists, *The Yogyakarta Principles*, *supra* note 133; HRC (Council) Res. 17/19, Human Rights, Sexual Orientation, and Gender Identity, 17th Sess., May 30–June 17, 2007, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).

230 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 139–140 (Feb. 24, 2010).

231 *Id.*

232 *Id.* ¶ 139.

233 *Id.* ¶ 140.

234 *Id.* ¶¶ 98, 116.

235 The Author notes, however, that there have been important decisions from international bodies—such as the European Court of Human Rights—related to the adoption of children by women in same-sex relationships. *See, e.g.*, E.B. v. France, App. No. 43546/02, ¶ 91 (Eur. Ct. H.R. 2008).

either of the parents in the context of a tuition proceeding violated article 8 (right to a private and family life) in relation to article 14 (non-discrimination on the basis of sex and gender) of the European Convention on Human Rights.[236]

The facts of this case are very similar to those in the case of *Karen Atala and Daughters*, and both the Commission and the Court relied heavily on this judgment in their respective rulings.[237] In *Salgueiro Da Silva Mouta*, the father was deprived of the custody of his daughter by means of a Court of Appeals ruling that echoes many of the same values, stereotypes, and traditional notions in the judgment issued by the Supreme Court of Chile in the case of *Karen Atala and Daughters*.[238]

It is well accepted internationally that traditional notions of the role of motherhood, what constitutes a family, and the artificial assignment of social roles within this institution, have been applied historically to the detriment of women, exposing them to an infer-

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[236] *See* Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96 (Eur. Ct. H.R. 1999).

[237] *See Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 95; *Atala*, Application, *supra* note 27, ¶ 106.

[238] Some of the considerations advanced by the relevant court in the custody decision were:

> Even if that were not the case, however, we think that custody of the child should be awarded to the mother. The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.

Atala, Application, *supra* note 27, ¶ 30.

The European Court considered that this language from the Lisbon Court of Appeals, far from "being merely clumsy or unfortunate" as the Government advanced, suggested that the applicant's homosexuality was a decisive factor in the final decision. Therefore, the European Court found that the Court of Appeals made a distinction on account of the father's sexual orientation; a distinction not acceptable under the European Convention. *Atala*, Application, *supra* note 27, ¶ 35.

ior and discriminatory treatment in society.[239] The Commission itself has repeatedly noted the alarming consequences of the discrimination perpetrated against women and stereotypical notions of their social and family roles, including exposure to acts of violence against women, as well as their repetition.[240]

In this light, the Author hopes that both the Inter-American Commission and the Court's rulings in the case *Karen Atala and Daughters* promote a discussion of the intricacies and content of the obligations to protect, respect, and fulfill the right of women to live free from any form of discrimination perpetrated by the judiciary, particularly in family law cases.[241] In this regard, the CEDAW Committee has underscored that protection against discrimination should be provided by competent tribunals, and enforced by sanctions and remedies, where appropriate.[242] States parties to CEDAW should also "ensure that all Government bodies and organs are fully aware of the principles of equality and non-discrimination on the basis of sex and gender," through adequate training and awareness-raising programs.[243] As mentioned earlier, the Committee has

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239 *See* IACHR, Status of Women in the Americas, OEA/SER.L./V/II.98, doc. 17 rev. 13 (Oct. 13, 1998); U.N. Secretary-General, *1999 World Survey on the Role of Women in Development: Globalization, Gender, and Work: Report of the Secretary General*, U.N. Doc. A/54/227 (Aug. 18, 1999); CEDAW (Committee), General Recommendation No. 21, *supra* note 127, ¶¶ 11–12; Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 32 (2001).

240 Morales de Sierra, Case 11.625, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 35, 36; María da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 55 (2001) (noting disproportionate exposure of female victims to violence and state's failure to prosecute perpetrators); IACHR, Access to Justice for Women Victims of Violence in the Americas, *supra* note 205, ¶¶ 59–122 (reporting on violence and discrimination against women and the state's duty to amend discriminatory norms, practices, and policies); González v. Mexico (*Cotton Field*), Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 138–143 (Nov. 16, 2009) (discussing widespread murder and disappearances of Mexican women and girls as acts of femicide).

241 CEDAW (Committee), General Recommendation No. 28, *supra* note 5, ¶ 9. The Committee has commented generally on the content of the duties to "respect, protect, and fulfill." The obligation to "respect" requires states parties to refrain from adopting laws, policies, regulations, programs, administrative procedures, and institutional structures that directly or indirectly result in the denial of women's equal enjoyment of their civil, political, economic, social, and cultural rights. The obligation to "protect" requires states parties to eliminate customs and other practices that prejudice and perpetuate the notion of the inferiority or superiority of either of the sexes and of stereotyped roles for men and women. The obligation to "fulfill" requires that states parties take steps to ensure that women and men enjoy equal rights *de jure* and *de facto*, including, where appropriate, the adoption of temporary special measures, among other interventions.

242 *Id.*, ¶¶ 17–18.

243 *Id.*, ¶¶ 19–26.

also clarified that CEDAW's obligations extend not only to sex-based discrimination, but also to that which is gender-based, including sexual orientation.[244]

The Commission in its application requested from the Inter-American Court non-repetition measures in order to prevent discrimination on the basis of sexual orientation in the future from the judiciary in Chile, including the adoption of legislation, public policies, programs, and initiatives to "prohibit and eradicate discrimination on the basis of sexual orientation in all areas of the exercise of public power, including the administration of justice."[245] The Court in its ruling echoed the rectification measures it ordered in its landmark *Cotton Field* judgment,[246] considering that the reparations ordered should have as their objective the transformation of the social context of discrimination which facilitated discrimination against Karen Atala.[247]

The Author hopes that the Court in future judgments related to discrimination builds on this case and its previous judgments, by illustrating in a more concrete fashion which kinds of measures can be implemented by a state within its justice system to end discrimination, and to prevent its repetition, and measures to guarantee the institutionalization and sustainability of remedial measures.[248]

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244 *Id.*, ¶¶ 4, 5, 17.

245 *See Atala*, Application, *supra* note 27, ¶ 168.

246 For more discussion, see Celorio, *The Rights of Women in the Inter-American System of Human Rights*, *supra* note 20; *see also Cotton Field*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶¶ 446–543 (Nov. 16, 2009).

247 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 267–272 (Feb. 24, 2012). The Court alluded to how the acts of discrimination reviewed in the case of Karen Atala and M., V., and R. were related to the reproduction of stereotypes which are associated to the structural and historical discrimination suffered by sexual minorities, particularly in matters related to access to justice, and national laws. Therefore, the Court ordered measures related to training of public officials in regards to: i) human rights, sexual orientation, and non-discrimination; ii) the protection of the rights of the LGBTI community; and iii) discrimination, overcoming gender stereotypes against the LGBTI population. The courses should be directed to public officials at the regional and national levels, in particular to justice officials from all areas and levels of the justice branch.

248 *See, e.g.*, *González*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 495; Fernández Ortega v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010); Rosendo Cantú and Other v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 34 (Aug. 31, 2010); IACHR, Access to Justice for Women Victims of Violence in the Americas, *supra* note 205, ¶ 44.

D. Discrimination, the Right to Privacy, and the Family Context: Positive and Negative State Obligations Under International Human Rights Law

One of the key contributions of the Commission and Court's decisions in the case of *Karen Atala and Daughters* is their analysis related to the link between the prohibition of discrimination and the rights to privacy and to protection of the family under international human rights law.[249]

In regard to the right to privacy, firstly, the Inter-American Court coupled its pronouncements related to discrimination in the custody proceeding, by adding how they had repercussions for the right to privacy of Karen Atala under article 11.2 of the American Convention.[250] In particular it referred to how the proceeding advanced a stereotyped vision of the scope of the sexual orientation of Karen Atala, generating an arbitrary interference in her private life, since sexual orientation constitutes a part of the intimacy of a person, and is not relevant to review of aspects of paternity or motherhood.[251]

Second, the Court referred to the disciplinary investigation of Karen Atala by the judicial branch, and how it had interfered arbitrarily with her right to a private life in contravention of article 11.2 of the American Convention.[252] The Court perceived no nexus between a desire to protect the image of the "judicial branch" and Mrs. Atala's sexual orientation.[253] The Court established in particular that sexual orientation and its exercise cannot constitute, under any circumstance, an adequate foundation to undertake a disciplinary proceeding, since there is no correlation between a person's fulfillment of professional duties and her sexual orientation.[254]

The Commission for its part presents a multi-layered analysis related to the right to privacy in its merits decision, applicable not only to sexual orientation issues, but to the exercise of human rights in general, including those pertaining to women.[255] The Commission innovatively amplifies the areas pertaining to a woman's private sphere—or what international legal bodies denominate as an "intimate zone" of decision-making—shielded from

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249 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 109–123.
250 *Id.* ¶ 167.
251 *Id.*
252 *Id.* ¶ 221.
253 *Id.*
254 *Id.*
255 *Atala*, Application, *supra* note 27, ¶¶ 109–117.

arbitrary state intervention.[256] Some of the zones identified are the development of a person's identity, personality, aspirations, and decisions over his or her sexual life, and his or her personal and family relations.[257] The Commission refers to them not only as components of this "intimate zone," but also goes further and associates them with the autonomy of an individual, and his or her life plan.[258] This analysis leads the Commission to conclude that "sexual orientation constitutes a fundamental component of the private life of an individual," which should be free from arbitrary and abusive interferences by the state.[259] It also specifies that there is a clear nexus between the sexual orientation and the development and life plan of a person, "including his or her personality, and relations with other human beings."[260]

The Commission's decision also smartly establishes a link between discrimination, prejudices, and stereotypes, and how these can be used as a pretext or background for a state's arbitrary and unjustified intervention in a person's zone of intimacy.[261] The Commission applies a rigorous standard of review—demanding the presentation of "weighty and convincing reasons"—to justify a state's intervention in this protected zone on the basis of an individual's sexual orientation, echoing precedent from the European Court of Human Rights.[262] This analysis is significant since it lays the groundwork for future cases that may be dealt with by the Court pertaining to areas fundamental to women's rights and their right to privacy, such as the ability to undertake fundamental decisions related to their reproductive rights and health.[263]

The Author also considers the Commission's decision useful to women's rights in the realm of privacy in setting limits on the assessment of a person's sexual life in a custody proceeding—a vi-

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256 For more analysis, see, for example, the Commission's analysis in Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 47 (2001); X v. Argentina, Case 10.506, Inter-Am. Comm'n H.R., Report No. 38/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 91 (1997).

257 *See Atala*, Application, *supra* note 27, ¶¶ 110–11.

258 *Id.*

259 *Id.* ¶ 111.

260 *Id.*

261 *Id.* ¶ 115.

262 *Id.* ¶¶ 111, 113.

263 *See, e.g.*, Artavia Murillo v. Costa Rica, Case 12.361, Inter-Am. Comm'n H.R., Report No. 85/10, ¶¶ 72–76 (2010); I.V. v. Bolivia, Petition 270-07, Inter-Am. Comm'n H.R., Report No. 40/08, OEA/Ser.L/V/II.134 doc. 5 rev. 1 ¶¶ 4, 80 (2009). *See also* Artavia Murillo (in vitro fertilization) v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶¶ 43-100 (November 28, 2012).

tal part of a woman's autonomy and life plan.[264] The Commission recognizes that "it is not only reasonable, but necessary, for a judicial authority" to ponder several factors to determine a parent's capacity to exercise custody over his or her children—factors which may include "the private, sexual and emotional life" of the persons involved.[265] The examination of these factors, however, should be consistent with states' international obligations, and the elements examined must be relevant to a mother's capacity to exercise custody over her children.[266]

The decisions of the Commission and the Court in the case of *Karen Atala and Daughters* can also constitute a very important contribution to the treatment of the "family" in international human rights law.[267] Probably the most palpable legacy will be felt in three areas: i) the conceptualization of the family model in international human rights law; ii) the connection between the right to privacy and protection of the family under the American Convention; and iii) when an international legal body should enter and assess cases related to family law.[268]

The family has been the central character in much of the discrimination that women have suffered historically.[269] It is widely recognized today that women have faced substantial limitations in the exercise of their civil, political, economic, social, and cultural rights within the family, leading to discrimination and its extreme forms, such as domestic violence.[270] At the root of this discrimination has been women's social assignment of child-rearing roles, requiring them to tend to the home within the so-called "private sphere"—a space traditionally undervalued in society.[271] CEDAW recognizes this disadvantage in its article 16, prohibiting all forms of discrimination against women in matters related to marriage

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264 *See Atala*, Application, *supra* note 27, ¶¶ 69, 114.

265 *Id.*

266 *Id.*

267 *See* Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 167–178 (Feb. 24, 2012); *Atala*, Application, *supra* note 27, ¶¶ 118–123.

268 *Atala*, Application, *supra* note 27, ¶¶ 118–123.

269 *See, e.g.*, U.N. Secretary-General, *In Depth Study on All Forms of Violence Against Women*, ¶¶ 69–91, 111–125, U.N. Doc. A/61/122/Add.1 (July 6, 2006); World Health Org., *Multi-Country Study on Women's Health and Domestic Violence against Women*: *Initial Results on Prevalence, Health Outcomes and Women's Responses*, at 3 (2005); Elimination of Domestic Violence Against Women, G.A. Res. 58/147, U.N. Doc. A/Res/58/147 (Feb. 19, 2004).

270 *See* Elimination of Domestic Violence Against Women, G.A. Res. 58/147, U.N. Doc. A/Res/58/147 (Feb. 19, 2004).

271 CEDAW (Committee), General Recommendation No. 21, *supra* note 127, ¶ 11.

and its dissolution, including the custody of children, the administration of property, the selection of a family name, profession, and occupation, among other issues.[272] CEDAW solidifies the important notion that human rights violations can happen in the realm of the family, and that the state has obligations in the protection of family members, especially those more at risk of abuses, such as women.[273] CEDAW has also broadened the concept of the "family" in its general recommendations and reaffirmed that women should be treated by the state with equality and justice in all models.[274]

In furthering these principles, the Court in groundbreaking fashion determined that the American Convention does not envision a closed conception of the family, and does not advance a "traditional model."[275] The Court considers that the concept of family life is not only to be reduced to marriage, but extends to all other de facto family ties where the parties have a common life outside of marriage.[276] In this case, the Court deemed that the language used by the Supreme Judicial Court of Chile—the supposed need of the girls to grow in a "family structured normally and appreciated in the social medium," and not in an "exceptional family"—reflected a limited and stereotyped perception of the concept of the family which has no basis in the American Convention.[277]

In similarity to the European Court of Human Rights' judgment in the case of *Schalk and Kkopf v. Austria*,[278] the Commission in its decision also treats the unit of Karen Atala and her daughters as a "family," even though it does not conform to traditional social notions, and she is a homosexual cohabiting with a partner of the

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272 *See* CEDAW (Convention), *supra* note 2, art. 16.

273 *See generally* CEDAW (Committee), General Recommendation No. 21, *supra* note 127.

274 *Id.* The CEDAW (Committee) has established that:

> The form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.

Id. ¶ 13.

275 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 142 (Feb. 24, 2012).

276 *See id.*

277 *Id.* ¶ 145.

278 In its judgment in the case of *Schalk and Kopf*, the European Court of Human Rights found that "a same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life' under Article 8" of the European Convention of Human Rights. *See* Schalk v. Austria, App. No. 30141/04, ¶ 94 (Eur. Ct. H.R. 2010).

same sex.[279] The Commission holds that the change in custody regime not only interfered in an arbitrary fashion in an intimate zone in the life of Karen Atala, but it also abusively impinged in her "family life plan,"[280] and emphasizes the right of Karen Atala to establish family relations based on her sexual orientation, even though her choices might not be tolerated by a social majority.[281] This principle is fundamental for the protection of women's rights, in benefit of those women forming families which are not traditional, such as same-sex couples, single-heads of households, mixed-race households, and widows.[282]

The Inter-American Court in its judgment also delves into the connection between the rights to privacy and the family, and how the family nucleus conformed by both Karen Atala and her daughters, previous to the onset of the custody proceedings, was protected by both articles 11.2 and 17 of the American Convention, even though the girls also had a family relationship with their father.[283] The Court considered that a family nucleus existed since there was frequent, personal, and affectionate contact between Karen Atala, her partner, her oldest son, and her three daughters.[284] Therefore, it concluded that the unsuitability of the custody measure also constituted an arbitrary interference in the rights to private and family life under articles 11.2 and 17.1, in relation to article 1.1 of the American Convention, to the prejudice of Karen Atala and her daughters.[285] The Commission in its ruling also recognizes this intimate connection between the right to privacy and protection of the family under the American Convention and international human rights law.[286]

The rulings of the Court and the Commission also bring added value to when international legal bodies are supposed to intervene in a family law matter.[287] International legal bodies have read a right to protect the family into international human rights law—and this right is also contained in several treaties—but they are

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279 *See Atala*, Application, *supra* note 27, ¶ 116.

280 *Id.* ¶ 115.

281 *Id.* ¶ 116; *see also* CEDAW (Committee), General Recommendation 21, *supra* note 127, ¶ 13.

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283 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 169–178 (Feb. 24, 2012).

284 *Id.* ¶ 177.

285 *Id.* ¶ 178.

286 *See Atala*, Application, *supra* note 27, ¶¶ 118–119, 122–123.

287 *See id.* ¶¶ 68–69; *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 64–66.

slowly shedding light on what kind of state interventions are necessary in this regard.[288] Several tribunals have highlighted the double nature of the right to protection of the family, involving: a) a "positive obligation"—which entails protecting the family as a fundamental unit in society; and b) a "negative obligation"—involving the duty to abstain from arbitrary and abusive interferences in this sphere.[289] Many of the efforts from international legal bodies have been devoted to shedding light on the scope of state obligations toward cases of violence against women, domestic violence, and child abuse, and the definition of the contours of the reach of the obligations to "prevent,"[290] "protect,"[291] and to act with "due diligence" in this regard.[292] The Commission and Court rulings in the case of *Karen Atala and Daughters* are clear in that an international tribunal should intervene in a custody matter—traditionally relegated to the domestic sphere—when discriminatory notions and stereotypes have been the basis for the resolution of a custody case, in lieu of an objective assessment of the capacity of the parents involved to care for their children.[293]

The Commission's decision in the case of *Karen Atala and Daughters* is also key in that it displays how international human rights law and state obligations toward the family evolve over time,

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288 *See, e.g.*, Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 66 (Aug. 28, 2002).

289 *See, e.g., id.*; Escher v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 200, ¶ 113 (July 6, 2009).

290 *See, e.g.*, Jessica Lenahan v. United States (*Gonzales*), Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 119, 124, 129 (2011); María da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L./V/II.111, doc. 20 rev. ¶ 56 (2001); Opuz v. Turkey, App. No. 33401/02, ¶¶ 78, 79, 84, 189–190 (Eur. Ct. H.R. 2009); E and Others v. United Kingdom, App. No. 33218/96, ¶¶ 88, 97, 115 (Eur. Ct. H.R. 2002); Z and Others v. United Kingdom, App. No. 29392/95, ¶ 73 (Eur. Ct. H.R. 2001).

291 *See, e.g.*, *Gonzales*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 111, 128, 129; *María da Penha Maia Fernandes*, OEA/Ser.L./V/II.111, doc. 20 rev. ¶¶ 53, 54, 58; *Opuz*, App. No. 33401/02, ¶¶ 149, 189–190; *E and Others*, App. No. 33218/96, ¶¶ 88, 99, 110, 111, 116; *Z and Others*, App. No. 29392/95, ¶¶ 73, 74, 109, 111; CEDAW (Committee), Yildirim v. Austria, Communication No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005, ¶ 3.1 (Oct. 1, 2007); CEDAW (Committee), Goekce v. Austria, Communication No. 5/2005, U.N. Doc. CEDAW/C/39/D/5/2005, ¶ 3.1 (Aug. 6, 2007).

292 *See, e.g.*, *Gonzales*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 111, 124, 128, 129; *Opuz*, App. No. 33401/02, ¶¶ 78, 79, 84, 149, 189–190; CEDAW (Committee), *Yilidirim*, Communication No. 6/2005, ¶ 3.5; CEDAW (Committee), *Goekce*, Communication No. 5/2005 ¶ 12.1.5.

293 *See Atala*, Application, *supra* note 27, ¶¶ 68–69; Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 64–66 (Feb. 24, 2012).

and should be interpreted in light of current social realities.[294] It illustrates how the decisions issued by the regional and universal regional human rights systems should respond to the passage of time and actual needs, based on the given features of social discrimination at a point in time.[295] It is also key to consider the values of the international system at the relevant historical stage of interpretation.[296]

The Author considers that one fundamental message of these two decisions is that the contemporary values of the international human rights law system—pluralism, equality, tolerance, and justice—should also apply to the family as well as to the behavior of public authorities toward this institution and its members.

E. Toward a Better Understanding of Children's Rights in Family Matters: Deconstructing the "Best Interests of the Child" as an Objective in Custody Cases

The Author considers that one of the most important legacies of the Inter-American Court judgment in the case of *Karen Atala and Daughters* is the analysis it presents related to the best interests of the child principle, and its advancement in matters pertaining to their custody and care.[297] The Court had previously analyzed the content of article 19 of the American Convention and the principle of special protection contained in said provision.[298] In this framework, it had referred and applied the notion of an international *corpus juris* related to the rights of the child, including the Convention on the Rights of the Child and other regional instruments.[299] The Court had also established how the separation of a child from his or her household must be exceptional, and preferably

294 *See Atala*, Application, *supra* note 27, ¶¶ 118–123.

295 *Id.* ¶¶ 81, 90.

296 *Id.*

297 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 ¶¶ 100–155 (Feb. 24, 2012).

298 *See, e.g.*, Juridical Status and Human Rights of the Child, Advisory Opinion, OC 17/02, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 60 (Aug. 28, 2002); Juvenile Reeducation Inst. v. Paraguay, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 112, ¶ 147 (Sept. 2, 2004); Gómez Paquiyauri Brothers v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 110, ¶¶ 163–164, 171 (July 8, 2004); Bulacio v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R (ser. C) No. 110, ¶ 133 (Sept. 18, 2003); Villagrán Morales v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R (ser. C) No. 63, ¶ 191 (Nov. 19, 1999).

299 *See* cases cited *supra* note 298.

temporary.[300]

The Court, however, in the case of *Karen Atala and Daughters* does push the boundary of the principle of special protection in custody cases, adding groundbreaking content related to its link with the obligation not to discriminate in international human rights law.[301] The Court advanced a series of human rights principles that are paramount for tribunals to consider when issuing custody decisions with long-lasting effects on the children and the parents involved, in harmony with human rights and the principle of non-discrimination.[302]

In this regard, the Court found that the discriminatory treatment suffered by Karen Atala had repercussions on the girls, as it became the foundation for the custody decision that ended up separating them from their mother.[303] This decision discriminated not only against Karen Atala, but also against M., V., and R. in contravention to article 24 of the American Convention, in relation to articles 19 and 1.1 of the same instrument.[304] This is a finding of utmost importance as it skillfully clarifies that discrimination against any of the parents in a custody case does not further the best interest of the child and serves to discriminate against the children involved.[305] Moreover, the best interests of the child as an objective, cannot be used to discriminate, as this can harm both the children and the parents at issue.[306]

The Court also skillfully refers to the standard of harm that must be applied in cases that could result in the removal of children from the custody of either parent.[307] Harm that can be a determining factor in a custody decision needs to be real and proven, not speculative, imaginary, or based on stereotypes.[308] A nexus needs to be present between the conduct of the parent and the alleged harm on the development of the child involved—an assessment which is key to ensure that decisions are not based in stereo-

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[300] *Juridical Status and Human Rights of the Child*, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 77.

[301] *See e.g.*, *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 100–155.

[302] *Id.*

[303] *Id.* ¶¶ 131, 133.

[304] *Id.* ¶¶ 123, 131, 133, 153.

[305] *Id.* ¶ 123.

[306] *Id.* ¶ 127; *see also* Comm. on the Rights of the Child [CRC (Committee)], General Comment No. 7, Implementing Child Rights in Early Adulthood, U.N. Doc. CRC/C/GC/7 /Rev.1 ¶ 7 (Sept. 20, 2006).

[307] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 119–128 (Feb. 24, 2012).

[308] *Id.*, ¶¶ 109–110.

types.[309] The Court bases its analysis on a variety of sources, such as judgments issued by high courts in other countries in the Americas,[310] and studies submitted to the Court by experts showing that children are not harmed from living with homosexual parents.[311]

Lastly, the Court advances analysis related to the content of the children's right to be heard in legal processes that concern them.[312] The Court incorporates this element into the content of article 8.1[313] and as a judicial protection and guarantee by referencing article 12 of the Convention on the Rights of the Child, along with the General Comment issued by the Committee on the Rights of the Child interpreting the scope of this provision.[314]

The Court reiterates some of the principles advanced by the Committee on the Rights of the Child related to the content of the right to be heard, including: i) that the point of departure should not be that the child cannot express his or her own opinions; ii) that the child only needs to have sufficient understanding to be capable of forming adequately his or her own opinion over this issue; iii) that the child can express his or her opinions without pressure and can choose whether she or he wants to be heard; iv) that those responsible for hearing the child inform him or her of the issues, options, and possible decisions that could be adopted and their consequences; v) that the capacity of the child should be assessed to duly take into account his or her opinions; vi) to communicate to the child the influence those opinions have had in the process; and vii) that the level of understanding of a child is not necessarily tied to his or her biological age.[315]

The Court also establishes that the right to be heard includes a correlative right for the children's opinions to be taken into account, in function of her or his age and maturity level.[316] This means that the court at issue needs to explain in the judgment the process and modalities it adopted for hearing the child, and how it

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309 *Id.*, ¶ 125.

310 *Id.*, ¶ 126.

311 *Id.*, ¶ 128.

312 *Id.*, ¶ 196.

313 The Commission referred to M., V., and R's right to be heard under article 19 of the American Convention. *See Atala*, Application, *supra* note 27, ¶¶ 124–136.

314 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 196–98.

315 *Id.*, ¶ 198. CRC (Committee), General Comment No. 12, The Right of the Child to be Heard, U.N. Doc. CRC/C/GC/12 ¶¶ 20–21, 25, 28, 30 (July 20, 2009) [hereinafter CRC (Committee), General Comment No. 12].

316 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 200.

takes into account her or his declarations and preferences.[317] In this particular case, the Court found that the girls' right to be heard was violated since the Supreme Court never explained in its judgment how it incorporated their preferences, in contrast with the lower courts.[318]

Another very interesting note about the content of the right to be heard in the case of *Karen Atala and Daughters* is that the Court actually made the effort to interview M., V., and R. about this process.[319] The interests of the girls had been represented before the Commission and the Court at all times by their mother and the Petitioners and later representatives.[320] But the Court noted that there was no manifestation in the file before it evidencing that the girls were in agreement with the representation of either of the parents before the Court.[321]

Curiously though, the Court provides minor details in its judgment regarding this diligence—which is a first for the Court in children's rights cases—only indicating that it was undertaken by personnel from the Court Secretariat and the psychiatrist of the girls.[322] The judgment indicates that the hearing was private, without the presence of either of the parents, conducted more as a separate conversation with each child.[323] The girls were 12, 13, and 17 years-old at the time of this diligence, and two of them participated.[324] The Court limits its analysis to stating that the girls knew and understood themes related to the alleged violations in which they have been identified as victims, and two of the girls manifested their own opinions regarding this case, as well as some of their expectations and interests.[325] The Author notes that the judgment does not add any more analysis of how the children's opinions were considered in the judgment, and the Court notes the reserved nature of the diligence.[326]

The Committee on the Rights of the Child is very clear in its General Comment No. 12 that the right of all children to be heard and to be taken seriously constitutes one of the fundamental values of the Convention on the Rights of the Child, along with the rights

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317 *Id.* ¶ 208.
318 *Id.*
319 *Id.* ¶¶ 67–71.
320 *See Atala*, Application, *supra* note 27, ¶¶ 10–39.
321 *Atala Riffo and Daughters*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 67.
322 *Id.* ¶ 69.
323 *Id.* ¶¶ 69–70.
324 *Id.* ¶¶ 68–70.
325 *Id.*
326 *Id.* ¶¶ 67–71,196–200.

to non-discrimination, the right to life and development, and the primary consideration of the child's best interest.[327] The Committee also explains how article 12 of the Convention on the Rights of the Child not only establishes a right itself, but should also be considered in the interpretation and implementation of all other Convention rights.[328] If the child's participation is to be effective and meaningful, it needs to be understood as a process, and not as an isolated event.[329] The Committee also urges states parties to pay special attention to the right of the girl child to be heard, to receive support, if needed, to voice her view, and her view to be given due weight, as gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of the right set forth in article 12.[330]

The Author is hopeful that the Court will illustrate the meaning of these principles through its future resolution of children's rights cases.[331] It will also be important to study in the coming years the impact of this diligence on the Commission's processing of individual cases related to the rights of the child, and other human rights concerns which affect them.

IV. CONCLUSIONS

The obligations not to discriminate and to guarantee equality constitute a basic pillar of the international human rights law system. Therefore, a more nuanced understanding of their content is needed to fully understand the adequate application of international human rights law at the national level, and the development of more legal standards in this area in the future.

Applying a flexible interpretation to clauses such as article 1.1 of the American Convention is a step in the right direction to providing important guidelines and insights to states as to how to address the needs of groups which have been traditionally

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327 CRC (Committee), General Comment No. 12, *supra* note 315, ¶ 2.

328 *Id.*

329 *Id.* ¶ 133.

330 *Id.* ¶ 77.

331 *See, e.g.*, Fornerón and Daughter v. Argentina. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, ¶¶ 20–148 (Apr. 27, 2012). In this case, submitted by the Inter-American Commission before the Court on November 29, 2010, it was alleged that Mr. Fornerón's biological daughter was given in adoption to a married couple without the father's consent, who had no access to the child. It was also claimed that the State had not ordered any visiting rights regime despite the multiple requests presented by Mr. Fornerón in more than ten years. *See also* Fornerón and Anibal Fornerón v. Argentina, Case 12.584, Inter-Am. Comm'n H.R., Report No. 83/10, ¶¶ 22–24 (2010).

discriminated against in their societies. It also opens the door to the identification, recognition, and thorough analysis of factors of discrimination that have yet to be recognized by the international community. Each ground of discrimination has its own complexity that needs to be reviewed by international bodies in order for states to have insight into the reach of their obligations to address discrimination, and how these concepts have evolved.

Within this framework, it is important not to forget that women have been a central character among those affected by marginalization and exclusion at the global level. The elimination of discrimination against women is widely recognized as a pillar and precondition for the full guarantee of women's rights. The concept of discrimination on the basis of sex has evolved since the onset of the human rights system from a biology-based notion, to the persistence of stereotypes and social patterns that promote the disadvantaged treatment of women. Toward these, a state's obligations are comprehensive and have different layers.

As the Commission has stated in the past, the continuum of human rights obligations to address discrimination against women is not only negative in nature; it also requires positive action from states.[332] It requires the guarantee of the equality of women in the law; the elimination of norms that are either discriminatory, or have a discriminatory impact on women; the eradication of discriminatory practices and stereotypes; and the organization of the entire state structure to confront discrimination with due diligence. Moreover, it is important that international judgments continue to illustrate how discrimination against women can be indirect and inherent in laws, policies, and judicial decisions issued with the "so-called" objective to protect the best interests of the children involved. The state has the immediate obligation to organize its state structure in order to prevent and address these discriminatory patterns with due diligence, and the intervention of international legal bodies is paramount in illustrating how to safeguard this guarantee at the national level.

Moreover, a thorough understanding of the limiting effect of intersectional discrimination in the exercise of women's civil, political, economic, social, and cultural rights cannot be underestimated. It demands from the state the recognition of sectors which are at a disadvantage in the exercise of their rights—such as women, children, indigenous peoples, people of African descent, per-

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332 *See* Jessica Lenahan v. United States (*Gonzales*), Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶ 117 (2011).

sons living in conditions of poverty, migrants, women affected by disabilities, etc.—and to adopt policies to redress this past history of discrimination.[333]

Since the obligations entailed are broadly encompassing, the development of more legal standards is needed—refined by international bodies—defining the content and scope of the obligations not to discriminate and to guarantee equality in individual cases. Due to the complex nature of the issue of discrimination, states need concrete guidance on how to best comply with the individual obligations contained in instruments such as the American Convention, the Inter-American Convention, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, and CEDAW, among other international treaties. Moreover, the definition of appropriate strategies at the national level to adequately and effectively implement these legal standards requires the participation of the relevant disadvantaged groups.

In this regard, the further definition by the Inter-American Commission and the Court of the content and scope of the obligations not to discriminate and to guarantee equality in individual cases—such as in the case of *Karen Atala and Daughters*—is paramount to the development of adequate and effective international legal standards pertaining to discrimination and its pernicious effect on women. A more nuanced and concrete understanding of the obligations contained in articles 1.1 and 24 of the American Convention is also fundamental to the protection of human rights in general in the hemisphere of the Americas. In this regard, it is key that the decisions of the Commission and the Court pertaining to the case of *Karen Atala and Daughters* are studied together, as each provides its own contribution to the development of standards in the realms of discrimination and equality.

For the Author, it is important that the Inter-American system—along with the universal system of human rights—can respond to the evolution of discrimination over time, serving to create spaces and avenues where the needs of historically marginalized groups are addressed.

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[333] IACHR, The Work, Education, and Resources of Women, *supra* note 9, ¶¶ 59–67.

HYDE-CARE FOR ALL: THE EXPANSION OF ABORTION-FUNDING RESTRICTIONS UNDER HEALTH CARE REFORM

Cynthia Soohoo†

> I would certainly like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle class woman, or a poor woman. Unfortunately, the only vehicle available is the [Medicaid] bill.
>
> Representative Henry Hyde (1977)[1]

> My hope for the next phase of the movement for procreative and sexual rights is that we not limit ourselves simply to winning back what we have lost, but rather set our sights on winning what we need: recognition of an affirmative right of self-determination . . . . This will . . . require recognizing that it is society's responsibility both to protect choice and to provide the material and social conditions that render choice a meaningful right rather than a mere privilege.
>
> Rhonda Copelon (1991)[2]

The historic health care reform law passed in 2010 has the potential to dramatically increase the number of Americans able to access health care. Health care reform is projected to result in health care coverage for thirty million Americans who are currently uninsured.[3] While increasing health coverage is a good thing,

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1 Frederick S. Jaffe et al., Abortion Politics: Private Morality and Public Policy 127 (1981) (quoting Representative Henry Hyde).

2 Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. Rev. L. & Soc. Change 15, 16 (1990–1991).

3 Cong. Budget Office [CBO], Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision 13, tbl. 1 (2012), *available at* http://cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf. The CBO estimates a decrease in the number of uninsured to fourteen million by 2014 and thirty million by 2022. *Id.*

health care reform will also dramatically increase the impact that the government will have on the provision of health care. The law achieves broader health care coverage by increasing the number of people covered by Medicaid and creating state insurance exchanges that allow individuals to buy health insurance with premium and cost-sharing credits.[4] The federal government will set minimum requirements for policies sold on the exchanges, and state governments will have significant power to dictate policy requirements and exclusions. This expansion of government influence over health care can be dangerous if government policies are driven by politics instead of medicine and if no legal or political constraints are imposed to protect individual rights. Nowhere is this danger more pronounced than in government policies around reproductive health and abortion.

Since the 1980 case *Harris v. McRae*, the Supreme Court has held that it is constitutional for the federal government to use its funding of health care services to dissuade women who rely on government health services from having abortions. Under the federal Hyde Amendment, Congress has prohibited the use of federal Medicaid funds to pay for abortion care even where a woman requires an abortion for health reasons since 1976. Over the past thirty-five years, similar restrictions have been imposed on other groups that rely on the federal government for health care, including federal employees and military personnel and their dependents, Native Americans who rely on the Indian Health Services for medical care, Peace Corps volunteers, adolescents covered by the Children's Health Insurance Program ("CHIP"), and women in prison.[5] The Supreme Court also expanded *Harris*'s holding to federal funding in other contexts, upholding laws prohibiting the use of public health facilities or employees in the provision of abortion services and restrictions prohibiting recipients of federal family planning funds from providing counseling or referrals for abortion.[6]

During the 2009 debates around health care reform, anti-

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4 THE HENRY J. KAISER FAMILY FOUND., SUMMARY OF THE HEALTH CARE LAW 1 (2010).

5 JESSICA ARONS & MADINA AGÉNOR. CTR. FOR AM. PROGRESS, SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR 8–9 (2010), *available at* http://www.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf; Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. No. 1 (Winter 2007), *available at* http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.pdf.

6 Rust v. Sullivan, 500 U.S. 173 (1991); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

choice legislators sought to use health care reform to expand the reach of abortion funding restrictions even further by arguing that because some policies offered on the new state insurance exchanges would receive government subsidies, the federal "policy" prohibiting public abortion funding required that exchange policies ban abortion coverage. Rather than questioning the underlying logic of prohibiting federal health care funding for medically necessary abortions, President Obama and supporters of health care reform accepted the Hyde Amendment as the starting point for the debate. In the end, congressional democrats brokered a compromise to defeat proposals to ban exchange polices from covering abortion by creating a complicated accounting procedure to segregate federal subsidies from individual premiums and to only use funds derived from individual premiums "to pay for" abortion care.

However, the political debate took its toll. Now, as we wait for the implementation of health care reform, we are poised to see the Hyde Amendment's impact dramatically expand. Ironically, the historic extension of health care coverage could result in the largest expansion of abortion funding restrictions since the amendment went into effect in 1977.[7] In addition to a dramatic increase of the number of women covered by Medicaid, we are seeing state legislative attempts to force the same coverage restrictions upon women who buy their own health insurance on the private market or through the new health care exchanges. These measures were explicitly sanctioned and indirectly encouraged by federal health care reform. The health care reform legislation provides that states may prohibit abortion coverage in the policies offered on their insurance exchanges. Even though the exchanges do not go into effect until 2014, over a third of states have already passed laws to

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7 Rachel Benson Gold, *Insurance Coverage and Abortion Incidence: Information and Misinformation,* 13 GUTTMACHER POL'Y REV. No. 4, 8–9 (Fall 2010), *available at* http://www.guttmacher.org/pubs/gpr/13/4/gpr130407.pdf. The Gold report, issued prior to the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), noted that because the Affordable Care Act's proposed Medicaid expansion would dramatically expand the overall Medicaid program and the effect of the expansion would be "felt disproportionately in states that do not subsidize abortion with their own funds" health care reform posed the "largest expansion of abortion funding restrictions since Hyde was first implemented." *Id.* Following the Supreme Court's holding in *Sebelius* that states can opt out of the Medicaid expansion without penalty; it is unclear exactly how great the Medicaid expansion will be. *Id.* It is also unknown whether the states that participate in the Medicaid expansion are likely to be states that use state funds to pay for medically necessary abortions. However, the increase in the number of women subject to abortion funding restrictions is likely to be substantial.

ban abortion coverage on their exchanges.[8] Further, by incorporating requirements that segregate federal funds so that they are not mixed with insurance premiums that are used to pay for abortion services, the health reform law has encouraged the idea that those who pay insurance premiums should have the right to dictate how insurance companies use the money paid to them. Several states have taken this to the extreme by passing bans on all private insurance coverage for abortion care, irrespective of whether policies are sold on their exchange, arguing that individual insurance buyers may not want their premiums used to pay for abortions. States have also sought to use the withdrawal of funding to punish health care providers associated with abortion by adopting measures to cut Planned Parenthood funding.[9]

While opponents of health care might argue that this type of overreaching is precisely why government should not be involved in the provision of health care coverage, the proper response is not to double-down on a negative rights paradigm that only protects women's right to be free from undue government interference. Instead, I argue that the Supreme Court made a wrong turn in 1980 when it held that the government could use its funding of health care services for the poor to further an anti-choice agenda based on a formalistic distinction between government-imposed obstacles and government exercise of its discretion to make funding choices to further its policy objectives.

In the wake of *Harris v. McRae*, progressive scholars and reproductive justice activists articulated the need for an affirmative concept of reproductive autonomy, which requires that government policies and programs actively support, rather than undermine the exercise of fundamental rights. Although Supreme Court decisions post-*Harris* have only reinforced the concept of reproductive freedom as a negative right, the concept that privacy and autonomy rights include affirmative government obligations has found support in international human rights law and in the decisions of high courts in other countries.[10] Further, as illustrated by state court cases holding that abortion funding restrictions violate fundamental rights protected by state constitutions, there is substantial support for construing even a negative privacy right to prohibit discriminatory government benefit programs that seek to coerce women's constitutional choices.

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8 *See infra* note 143 and accompanying text.

9 *See infra* notes 147 and 153 and accompanying text.

10 *See infra* notes 36–40 and Parts IV.A, C.

The first part of this Article examines critiques of the development of reproductive autonomy as a negative privacy right and arguments made by progressive scholars and the reproductive justice movement to adopt an affirmative right to reproductive autonomy. The second part looks at the Supreme Court's abortion funding cases from 1977 to 1980 and a related set of cases concerning prohibitions on the use of public medical facilities or staff to perform abortions and the prohibition of federal funding to organizations that provide or refer women to doctors or organizations that provide abortion services. These decisions allowed the federal and state governments to use their funding programs to impose substantial obstacles in the path of women seeking access to abortion care. The third part examines how the Hyde Amendment restrictions have been expanded by recent laws banning insurance coverage for abortion care on state insurance exchanges and in the private market and funding restrictions targeting Planned Parenthood. The fourth part of this Article looks at alternative ways of analyzing public and private health insurance restrictions on abortion coverage by considering state court cases, international law, and the decisions of high courts in Canada, Colombia, and Nepal.

I. An Affirmative Vision of Reproductive Health and Autonomy

In April 1980, eight years after the Supreme Court decided *Roe v. Wade*,[11] Professor Rhonda Copelon appeared before the Court to argue the abortion funding case *Harris v. McRae*. Following *Roe*, the Supreme Court issued a number of decisions applying *Roe*'s strict scrutiny standard to invalidate abortion restrictions.[12] The exceptions to this string of victories were two 1977 cases, *Beal v. Doe*[13] and *Maher v. Roe*,[14] which held that states were not obligated to cover non-therapeutic abortions—abortions that are not necessary

11 Roe v. Wade, 410 U.S. 113 (1973) *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

12 Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 Yale J.L. & Feminism 317, 324 & n. 32 (2006) (noting that with the exception of funding cases, the Supreme Court applied *Roe*'s strict scrutiny standard to strike down most abortion restrictions until 1989); Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 430 (17th ed. 2007) ("As to adult women, restrictions on public subsidies were the only abortion regulations upheld in the period between *Roe* and *Casey*.").

13 Beal v. Doe, 432 U.S. 438 (1977).

14 Maher v. Roe, 432 U.S. 464 (1977).

for health reasons—under state Medicaid programs.[15]

Although the Supreme Court had upheld state restrictions prohibiting Medicaid funding for non-therapeutic abortion, there was significant reason to think that the Court could find *Harris* distinguishable. The federal funding restrictions in *Harris* went significantly further than the state restrictions in *Beal* and *Maher*. In those cases, the Supreme Court held that state regulations could limit state Medicaid coverage to medically necessary abortions and prohibit funding for abortions that were not needed for medical reasons. The federal Hyde Amendment at issue in *Harris* prohibited the use of federal Medicaid funds to cover medically necessary abortions, only allowing coverage where an abortion was required because a woman's life was endangered or if the pregnancy resulted from rape or incest.[16]

The *Harris* majority rejected due process, equal protection, Establishment Clause, and statutory challenges to the discriminatory funding scheme and upheld the Hyde Amendment. Although the abortion funding cases were a setback for reproductive rights activists, the decisions were widely understood as turning on the distinction between government restrictions and government failure to fund. Thus, the government's decision not to fund an activity was not viewed as an overall threat to women's constitutional right to abortion services.[17]

However, Copelon did not underestimate the significance of the abortion funding cases, writing in 1991 that the decisions turned the right articulated in *Roe v. Wade* into "the right to be free of barriers to abortion interposed by the state."[18] She lamented that "[t]he divergence between the right to abortion and the reality of access transformed abortion from a privacy right into a privilege."[19] Copelon also criticized the "pro-choice" movement for failing to recognize how *Harris* undermined core principles of *Roe*.

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15 *Maher*, 432 U.S. at 465–66, 469. In *Maher*, the Supreme Court rejected constitutional challenges to state exclusions of nontherapeutic abortions, and in *Beal*, it rejected statutory claims under Title XIX, which sets forth federal requirements for state programs. *Id.*

16 Harris v. McRae, 448 U.S. 297, 302–03 (1980). Since 1976, the Hyde Amendment has passed as an amendment to the annual appropriations bill or as a joint resolution. The original Hyde Amendment did not include an exception for rape or incest. *Id.*

17 *See* Wharton et al., *supra* note 12, at 324 (writing that most abortion restrictions were struck down under *Roe*'s strict scrutiny standard until the "constitutional tide" turned in 1989).

18 Copelon, *supra* note 2, at 17.

19 *Id. See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade,* 63 N.C. L. REV. 375, 384 (1985) (stating that after *Harris* the Court was

She suggested that the failure of middle class women to fight against restrictions that undermined poor women's access to services opened the door to increasing abortion restrictions introduced in the late 1980s and early 1990s:

> Indeed, there can be no clearer example of the principle that no right is secure if it is not secure for everybody. Had more privileged women poured out in opposition to the cutbacks on Medicaid . . . , there might be less question today about the security of the right to abortion, the funding of abortions, or the Bill of Rights itself. While many pro-choice and feminist organizations did vigorously oppose the Medicaid cutoffs, the fact that Medicaid was an issue of poor people's rights severely narrowed the base of support and the scope of outreach efforts directed toward a significantly libertarian constituency for reproductive choice.[20]

In a 1991 article, Copelon discussed the tension between the liberal notion of privacy "characterized as the negative and qualified right to be left alone" and "the more radical ideal of privacy, depicted as the positive liberty of self-determination and equal personhood."[21] She wrote that the negative theory of privacy is problematic because it assumes that if the government does not impose any interference with a woman's reproductive autonomy and health, she is free to exercise her choice and any failure to effectuate her choice results from her own failure.[22] This theory fails to recognize the role that social conditions play and the state's role in creating those conditions.[23] It also denies any public responsibility for ensuring that individuals are able to exercise autonomy.[24] In fact, as discussed below,[25] the Supreme Court has interpreted the negative concept of privacy to allow the state to condition health care benefits upon a woman opting to continue pregnancy rather than obtain an abortion even if the pregnancy endangers her health.

A. The Reproductive Justice Movement

In the 1990s, women of color activists articulated similar and broader concerns about the mainstream pro-choice movement.

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accused of sensitivity to only the Justices' "own social milieu—'of creating a middle class right to abortion'").

[20] Copelon, *supra* note 2, at 22.

[21] *Id.* at 41.

[22] *Id.* at 46.

[23] *Id.*

[24] *Id.* at 44, 47.

[25] *See infra* Part II.A-C.

They questioned the movement's over-reliance on legal rights and strategies, given the cramped constitutional vision articulated by the Supreme Court and the consistent failure of legal recognition of reproductive rights to translate to actual access for low-income women.[26] Activists involved in what would become the reproductive justice movement called out reproductive rights activists for failing to see the racial implications of reproductive health laws and policies and for only focusing on issues that affect white middle class women. In particular, the reproductive justice movement criticized the pro-choice movement for focusing too narrowly on the legal right to abortion and for failing to address laws and policies that undermine the choice of women of color to have children.[27] Instead reproductive justice "emphasizes that women have a right to have or not have children, as well as to parent the children they have."[28]

Significantly, reproductive justice scholars and activists contend that full realization of reproductive rights requires more than a negative privacy right. A reproductive justice analysis "recognizes that 'enabling conditions' are necessary to realize these rights."[29] Thus, reproductive justice requires the recognition of an affirmative government duty "to facilitate the processes of choice and self-determination."[30]

Reproductive justice activists also have been critical of the reproductive rights movement's overreliance on litigation strategies

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26 Sarah London, *Reproductive Justice: Developing A Lawyering Model*, 13 BERKELEY J. AFR.–AM. L. & POL'Y 71, 77 (2011).

27 *Id.* at 75.

28 Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 497 (2008) (citing Loretta Ross, *Understanding Reproductive Justice* 1–2 (2006) (unpublished paper, on file with author)).

29 *Id.*

30 DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 309 (1997). *See* Timothy Zick, *Re-Defining Reproductive Freedom: Killing the Black Body: Race, Reproduction, and the Meaning of Liberty,* 21 HARV. WOMEN'S L.J. 327, 331 (1998); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1403 (2009) (writing that "what the Court created in [*Roe*] is not a right to legal abortion; it is a negative right against the criminalization of abortion in some circumstances . . . . To be a meaningful support for women's equality or liberty, a right to legal abortion must mean much more than a right to be free of moralistic legislation that interferes with a contractual right to purchase one. It must guarantee access to one."); London, *supra* note 26, at 71 (noting that the "mainstream reproductive rights movement has historically dodged the question of public resources" in contrast with the reproductive justice movement which "refuses to ignore the question of public resources—recognizing that a legal right to reproductive services, without support, leaves many women without meaningful choice.").

because they are ill equipped to address barriers to access or create the political pressure needed to catalyze the adoption of laws and policies to support women's reproductive autonomy. They argue that by defining problems in legal terms, the reproductive rights movement has marginalized issues that cannot be expressed in the existing rights framework and has concentrated the movement's leadership in the legal elite rather than in communities.[31] Because the right to abortion as constitutionalized by the Supreme Court is essentially a negative right, feminist scholar Robin West concurs that it is too narrow to address the concerns and demands of the reproductive justice movement.[32] Because "the Court has consistently read the Constitution as not including positive rights" and it "is so unlikely as to be a certainty that [the Court] will commence a jurisprudence of positive constitutional rights, by beginning [with] mandating public funds for abortion," she contends that the right to abortion might be better secured through political or legislative victories than through a strategy that relies on rights adjudicated by the courts.[33]

While the reproductive justice movement accurately critiques reproductive rights strategies that have resulted in a disproportionate focus on lawyers and courts, crowding out other strategies, fora and actors,[34] it may be too quick to dismiss rights arguments. Although the Supreme Court has consistently refused to recognize affirmative government obligations to ensure rights, human rights bodies are increasingly recognizing a broader conception of rights that require the state to take steps to enable individuals to exercise their fundamental rights.

B. Human Rights Standards

As the struggle for reproductive rights in the United States led women of color and progressive scholars like Copelon and West to articulate an alternative affirmative vision of women's reproductive rights, the international human rights community began to develop the concept that governments have obligations to ensure as well as respect fundamental rights. In the last twenty years, international human rights law and the decisions of high courts from many countries have begun to articulate a methodology for enforc-

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31 London, *supra* note 26, at 85–86.

32 West, *supra* note 30, at 1403–404.

33 *Id.*

34 London, *supra* note 26, at 85.

ing affirmative obligations.[35] Although the majority of scholarship and decisions around affirmative government obligations has focused on socio-economic rights, there is growing recognition that civil and political rights often require the development of government programs and expenditures.[36]

The International Covenant on Civil and Political Rights ("ICCPR") requires parties to the treaty to "respect and to *ensure*" the rights set forth in the treaty.[37] The U.N. Human Rights Committee, which monitors implementation of the ICCPR, has interpreted the treaty to encompass both negative and positive obligations.[38] In particular, it has stated that ratifying countries should "adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations" under the treaty.[39] The South African Constitution similarly provides that the state "must respect, protect, promote and fulfill the rights in the Bill of Rights."[40]

These dialogues among human rights activists, progressive feminist scholars, and women of color activists nurtured and strengthened each other. After *Harris v. McRae,* Copelon became a leading international women's human rights scholar. In the 1990s, she and other feminist scholars and activists worked to transform the international human rights movement to ensure that human rights law reflected the concerns of women and to address human rights violations committed against them. One of their key accom-

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35 Comm. on Economic, Social, and Cultural Rights [CESCR], General Comment No. 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (Dec. 14, 1990), *available at* http://www.unhcr.org/refworld/docid/4538838e10.html. *See also* Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory, in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 3, 22–24 (Malcolm Langford ed., 2008).

36 Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1006–1007 (2010). *See, e.g.*, Airey v. Ireland, 2 Eur. Ct. H.R. (Ser. A) 305, 315 (1979) (holding that the right to a fair and public hearing requires access to counsel in civil cases).

37 International Covenant on Civil and Political Rights, art. 2, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www.unhcr.org/refworld/docid/3ae6b3aa0.html. *See* Soohoo & Goldberg, *supra* note 36, at 1011; Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59, 65–66 (1998).

38 *See* Human Rights Comm., General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), *available at* http://www.unhcr.org/refworld/docid/478b26ae2.html ("The legal obligation under article 2, paragraph 1, is both negative and positive in nature.").

39 *Id.* at ¶ 7.

40 S. AFR. CONST. § 7(2), 1996, *available at* http://www.unhcr.org/refworld/docid/3ae6b5de4.html.

plishments was the recognition of reproductive rights as human rights at the International Conference on Population and Development ("ICPD") in Cairo in 1994. Members of the U.S. black women's caucus attended the ICPD and were inspired by the ways in which the human rights concepts developed by international activists addressed the very concerns they were struggling with at home.[41] Following the conference, Sistersong, a leading reproductive justice organization, embraced a human rights framework for its work, explaining that "[h]uman rights provides more possibilities for our struggles than the privacy concepts the pro-choice movement claims only using the U.S. Constitution."[42]

II. The Road We Traveled: U.S. Abortion Funding Cases

In the 1970s, when attempts to directly challenge *Roe* in the courts or by a proposed constitutional amendment failed, anti-choice legislators targeted abortion funding as an alternative strategy.[43] Their attention turned to the Medicaid program, which provides public health care funding for the poor. Medicaid is administered by the states, but in order to receive partial federal reimbursement for costs, states must abide by certain federal requirements set out in Title XIX of the Social Security Act.[44] After *Roe v. Wade* struck down criminal restrictions on abortion in 1973, abortion care was routinely covered by most state Medicaid programs.[45] In 1977, before the Hyde Amendment went into effect,

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41 *Why is Reproductive Justice Important for Women of Color?*, Sistersong, *available at* http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81 (last visited Dec. 21, 2012).

42 *Id.*

43 Jaffe et al., *supra* note 1, at 128.

44 Ctr. for Reprod. Rights, Whose Choice: How the Hyde Amendment Harms Poor Women 18 [hereinafter Whose Choice], *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf; Harris v. McRae, 448 U.S. 297, 301 (1980); Women of the State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 21 (Minn. 1995). *See* 42 U.S.C. § 1396 (2010) (establishing the Medicaid and CHIP Payment and Access Commission).

45 Jaffe et al., *supra* note 1, at 128. *See, e.g.*, Comm. To Defend Reprod. Rights v. Myers, 625 P.2d 779, 782 (Cal. 1981) (noting that prior to legislation passed in 1978, Medi-Cal paid for abortions obtained by Medi-Cal recipients); Right to Choose v. Byrne, 450 A.2d 925, 928 (N.J. 1982) ("In the three years between the *Roe v. Wade* decision and the enactment of [state legislation] in 1975, New Jersey did not restrict state Medicaid funding for abortion."); *Gomez*, 542 N.W.2d at 23 (stating that within months of *Roe,* Minnesota's policy was to reimburse for all abortions performed by a licensed provider); Doe v. Maher, 515 A.2d 134, 135–136 (Conn. Sup. Ct. 1986) (explaining that shortly after *Roe,* Connecticut provided coverage for therapeutic abortions).

Medicaid funded almost a quarter of the abortions in the United States.[46]

Congressional attempts to prevent Medicaid coverage for abortion care began as early as 1973, but initially were unsuccessful. Although then-Congressman Henry Hyde saw Medicaid funding as a potentially powerful weapon to prevent abortions,[47] even members of his own ranks expressed concern that the restrictions discriminated against the poor. The pro-life Chair of the Labor-Health Education and Welfare Appropriations Committee denounced Hyde's proposal as "blatantly" discriminatory:

> It does not prohibit abortion. It prohibits abortion for poor people . . . . To accept the right of this country to impose on its poor citizens . . . a morality which it is not willing to impose on the rich as well—we would not dare do that. This is what this amendment does . . . . It is a vote against the poor people.[48]

Despite the concerns expressed about denying abortion coverage for low-income women, between 1973–75 several states imposed restrictions on abortion coverage in their state programs.[49] In 1976, Congress passed the Hyde Amendment as an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare. The amendment prohibited the use of federal funds to pay for an abortion unless a woman's life was endangered. Subsequent versions of the Hyde Amendment added an exception for victims of rape or incest.[50]

The state and federal funding restrictions were quickly challenged. The Supreme Court's "abortion funding cases" *Beal v. Doe,*[51] *Maher v. Roe,*[52] and *Harris v. McRae*[53] were decided from 1977–80. *Beal* and *Maher* both involved challenges to state Medi-

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46 JAFFE ET AL., *supra* note 1, at 128. Although the Hyde Amendment passed in 1976, it was enjoined until 1977. *Id.* at 129.

47 *Id.* at 127 (quoting Representative Henry Hyde). During the debate, Hyde made his intention to use Medicaid funding to prevent women from choosing abortions and his indifference to the plight of poor women clear, stating "I would certainly like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle class woman, or a poor woman. Unfortunately, the only vehicle available is the [Medicaid] bill." *Id.*

48 *Id.* at 128 (quoting Representative Daniel J. Flood of Pennsylvania).

49 *Id.* at 132. From 1973–75 prior to the Hyde Amendment, thirteen states instituted restrictions on Medicaid abortion funding; federal courts threw out most of these restrictions. *Id.* By the end of 1979, forty states had moved to restrict Medicaid funding. *Id.*

50 Harris v. McRae, 448 U.S. 297, 302 (1980). Since 1976, Congress has passed the Hyde Amendment every year as an appropriations rider or by joint resolution. *Id.*

51 Beal v. Doe, 432 U.S. 438 (1977).

52 Maher v. Roe, 432 U.S. 464 (1977).

53 *Harris,* 448 U.S. 297.

caid laws that prohibited coverage for an abortion unless it was necessary to preserve a woman's health. *Harris* challenged the Hyde Amendment. As described in the next section, in the three cases the Supreme Court rejected statutory challenges and constitutional arguments that the funding restrictions were unconstitutional.

After getting the green light from the Supreme Court in *Harris,* the federal government began to extend similar abortion restrictions to other groups that rely on the federal government for health coverage.[54] New restrictions that expanded the use of government funding as a tool to discourage abortion beyond women who rely on the government for health care coverage were also introduced. Although these restrictions, which included prohibitions on the use of government facilities to perform abortions and restrictions on the activities of programs that received federal funds, created obstacles that were distinguishable from government refusal to fund abortions, the Supreme Court extended the line of the abortion funding cases to find such restrictions constitutional as well.[55]

A. Medicaid Exclusion of Non-Medically Necessary Abortions

In 1977, the Supreme Court decided two cases involving state laws prohibiting Medicaid coverage for non-medically necessary abortions. *Beal v. Doe* challenged a Pennsylvania regulation requiring that three doctors certify that an abortion was medically necessary in order for a Medicaid recipient to receive coverage.[56] *Maher v. Roe* challenged a Connecticut regulation that limited Medicaid coverage to "medically necessary" abortions by requiring a certificate of medical necessity from the attending physician.[57] The Supreme Court considered and rejected statutory arguments in *Beal*[58] and held that the restrictions were not unconstitutional in *Maher.*

In *Beal,* the Supreme Court rejected the plaintiffs' argument that the Pennsylvania regulation was inconsistent with the purpose of Title XIX.[59] Because the regulation only prohibited non-therapeutic abortions, the Court wrote, "[I]t is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary

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54 *See infra* Part II.C.

55 *See infra* Part II.A-C.

56 *Beal*, 432 U.S. 438.

57 *Maher*, 432 U.S. at 466.

58 *Beal*, 432 U.S. at 443. The Third Circuit struck down the regulation on statutory grounds and did not reach the plaintiffs' constitutional arguments. *Id.*

59 *Id.* at 444.

though perhaps desirable medical services."[60] The Court specifically distinguished the non-therapeutic abortions barred by the regulations from medically necessary abortions.[61] The Court wrote that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage."[62]

In *Maher v. Roe,* the Supreme Court rejected constitutional challenges to the Connecticut regulation. The Court avoided applying strict scrutiny to the regulation by declining to construe the discriminatory funding scheme as state interference with a woman's constitutional rights. The Court's analysis began by distinguishing the funding scheme from abortion restrictions that were struck down in its earlier cases. The Court noted that *Roe* involved a criminal restriction on abortion and that other impermissible restrictions, such as a spousal consent law that imposed an "absolute obstacle to a woman's decision," were "different in form but similar in effect."[63]

The Court distinguished the funding scheme from prior impermissible obstacles. In fact, it found that the scheme did not create any new obstacle for a poor woman who seeks an abortion. Based on the assertion that "[t]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents,"[64] it held that

> The Connecticut regulation . . . is different in kind from the laws invalidated in our previous abortion decisions. The . . . regulation places no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as

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60 *Id.* at 444–45.

61 *Id.* at 449 (Brennan, J., dissenting). While it is important to distinguish between therapeutic abortions—abortions that are required because pregnancy risks a woman's health—and non-therapeutic abortions, Justice Brennan argued in dissent that all abortions are medically necessary. He wrote: "Pregnancy is unquestionably a condition requiring medical services . . . . Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth . . .. [A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy . . . .'" *Id.*.

62 *Id.* at 444.

63 Maher v. Roe, 432 U.S. 464, 473 (1977).

64 *Id.* at 469. The Court claimed to recognize the "plight of an indigent women who desires an abortion" but suggested that constitutional protections cannot be accorded for "every social and economic ill." *Id.* at 479.

> before to be dependent on private sources for the service she desires.[65]

In addition to holding that the funding scheme did not pose an obstacle to a poor woman seeking an abortion, the Court also suggested that it was within the state's legislative power to adopt policies and allocate public funds in order to influence women's decision-making. The Court wrote that

> [t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.[66]

The Court's conclusion that the state should be given more leeway when it is affirmatively allocating resources as part of a government policy appears driven by institutional concerns[67] rather than by an analysis of the impact on a woman's constitutional rights. The Court wrote that the state should be given "wider latitude in choosing among competing demands for limited public funds,"[68] and that the decision to expend state funds for non-medically necessary abortions "is fraught with judgments of policy and value." In such situations, "the appropriate forum for their resolution in a democracy is the legislature."[69]

B. Medicaid Exclusion of Medically Necessary Abortions: Harris v. McRae

Although *Beal* suggested that there were serious questions about whether denial of coverage for medically necessary abortions violated the purpose of Medicaid, the *Harris* majority sidestepped any substantive discussion of the propriety of denying coverage for a medically necessary service under a program designed to provide health services for the poor. Because the government has no obligation to fund health care for the poor, the Court took the position that the scope of states' obligation to fund medically necessary services was defined by Congress and that Congress did not intend Title XIX to require states to fund any service for which the federal

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65 *Id.* at 474.

66 *Id.* at 475–76.

67 *See* Soohoo & Goldberg, *supra* note 36, at 1008 (discussing legitimacy and competency concerns that have led courts to refrain from enforcing socio-economic rights that require judicial oversight of policy decisions).

68 *Maher,* 432 U.S. at 479.

69 *Id.*

government withheld funding.[70] After rejecting plaintiffs' statutory arguments, the Court relied on the distinction drawn between affirmative obligations and government-imposed obstacles in *Maher* to reject plaintiffs' constitutional claims.

The Court defined the liberty interest established by *Roe* as a negative right[71] to "protection against unwarranted government interference . . . in the context of certain personal decisions."[72] It explicitly rejected the idea that the state had any obligation to ensure that a woman be able to exercise her constitutional right to abortion. It wrote "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resource to avail herself of the full range of protected choices."[73]

Although the government's decision to fund all medical care (including pre-natal care) other than medically necessary abortions might impact a poor woman's decision-making, the Court held the government's actions did not merit heightened scrutiny because it identified poverty as the obstacle to her constitutional right to decide to have an abortion rather than the discriminatory funding scheme:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, . . . the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.[74]

Although the Court relied heavily on the distinction between state action and inaction, it acknowledged that the plaintiffs' claim was not merely a claim that the state failed to fund a benefit. Congress' refusal to fund medically necessary abortions was not driven by a lack of resources or difficult choices about how to allocate

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70 Harris v. McRae, 448 U.S. 297, 309-10 (1980).
71 *See* Ginsburg, *supra* note 19, at 384.
72 *Harris,* 448 U.S. at 317–18.
73 *Id.* at 316.
74 *Id.* at 316–17.

resources amidst conflicting health care priorities. Instead, the Court recognized that the state sought to influence a woman's decision-making process through its selective allocation of resources. Citing *Maher,* the Court again asserted that Congress is entitled to a degree of deference in making funding determinations.[75] The Court wrote that the constitutional freedom recognized in *Roe v. Wade* "did not prevent [the state] from making 'a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds.'"[76]

Based on its distinction between state imposed barriers and funding allocations, the Court rejected the plaintiffs' due process and equal protection claims. Specifically the Court held that "the Hyde Amendment does not impinge on the due process liberty recognized in *Wade*."[77] It also held that the plaintiffs' equal protection claim was not entitled to strict scrutiny because it did not impinge upon a right or liberty protected by the Constitution[78] or involve a constitutionally suspect classification.[79]

C. Extensions of Government Funding Restrictions Beyond Medicaid Recipients

Following *Maher* and *Harris*, federal and state governments expanded the use of government funding programs to restrict access to abortion services. The first step was the extension of Hyde restrictions beyond poor women to other groups that rely on the federal government for health care coverage. In 1979, abortion coverage restrictions were introduced for military personnel and their dependents and for Peace Corps volunteers.[80] In the 1980s, restrictions were put in place for women in prisons, federal employees and their dependents, and individuals who rely on Indian Health Services for health care coverage.[81]

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75 *Id.* at 318. The Court wrote that the decision of whether or not to provide funding for abortions is a political decision, which is "a question for Congress to answer, not a matter of constitutional entitlement."
Id.

76 *Id.* at 314 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

77 *Harris,* 448 U.S. at 318.

78 *Id.* at 322.

79 *Id.*

80 Boonstra, *supra* note 5. There are no exceptions for the ban on abortion coverage for Peace Corps volunteers. *Id.*

81 *Id.*; INDIAN HEALTH SERV., DEPT. OF HEALTH & HUMAN SERVS., SGM 96-01, CURRENT RESTRICTIONS ON USE OF INDIAN HEALTH SERVICE FUNDS FOR ABORTIONS (1996), *available at* http://www.ihs.gov/ihm/index.cfm?module=dsp_ihm_sgm_main&sgm=ihm_sgm_9601.

Legislation was also introduced that attached restrictions on abortion-related activities at government facilities and on entities receiving funding. These restrictions went beyond limiting the range of health services provided to Medicaid recipients and other groups receiving government health care coverage to limit the abortion-related activities of public employees and individuals employed by programs that received federal funds. They also introduced significant practical obstacles in the path of women seeking information or access to abortion services beyond the issue of funding. In *Webster v. Reproductive Health Servs.*, the Supreme Court upheld a Missouri law prohibiting abortion care at public hospitals and prohibiting public employees from performing abortions, even if the patient paid for the services.[82] In *Rust v. Sullivan*,[83] the Supreme Court approved restrictions prohibiting any recipient of Title X family planning funding from engaging in abortion counseling, referral, or advocacy.

Relying on *Maher,* in *Webster* and *Rust*[84] the Supreme Court rejected the claim that "unequal subsidization" violated the Constitution,[85] finding instead that the government can "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."[86] The Court reaffirmed that the government can "selectively fund a program" that it believes is in the public interest without funding an alternate program.[87] The Court wrote, "Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[88] The decisions also invoked *McRae*'s distinction between positive and negative obligations,[89] stating that refusal to fund a protected activity "cannot be equated with the imposition of a 'penalty' on the substantive right."[90]

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82 Webster v. Reprod. Health Servs., 492 U.S. 490, 501 (1989).

83 Rust v. Sullivan, 500 U.S. 173 (1991).

84 *Id.* In *Rust,* the Court also rejected arguments that Title X recipients' free speech rights were violated based on a similar distinction between "selective funding" and a government penalty. *Id.*

85 *Rust*, 500 U.S. at 192–93; *Webster,* 492 U.S. at 507–08.

86 *Rust*, 500 U.S. at 192–93 (citing Maher v. Roe, 432 U.S. 464, 474 (1977)).

87 *Id.* at 193.

88 *Id.* at 194.

89 *Id.* at 201. Because the government has "no constitutional duty to subsidize a[ ] . . . constitutionally protected [activity]" it may adopt a legislative policy to fund childbirth and not abortion and "implement that judgment by the allocation of public funds." *Rust*, 500 U.S. at 201 (citing *Webster*, 492 U.S. at 510).

90 *Rust*, 500 U.S. at 193 (citing Harris v. McRae, 448 U.S. 297, 317, n. 19 (1980)); *Webster,* 492 U.S. at 507 (citing DeShaney v. Winnebago County, 489 U.S. 189 (1989)

Just as the Court found that the Hyde Amendment left a poor woman no worse off than if Congress had decided not to subsidize health care for the poor, the Court asserted that the funding restrictions in *Webster* and *Rust* left poor women "no worse off."[91] In reaching this conclusion, the Court ignored the fact that the restrictions did more than refuse to fund abortion services and would impose significant obstacles in the path of a woman's decision-making about her reproductive health. In *Rust,* the speech restriction undermined a woman's ability to freely exercise her reproductive choice by suppressing her ability to receive pertinent information from her health care providers.[92] The Court rejected this argument asserting that a poor woman was still free to obtain information about abortion-related services outside of the Title X program. In doing so, it refused to take into consideration that a poor woman may not have access to a doctor outside of the Title X program, writing, "But once again, even these Title X clients are in no worse position than if Congress had never enacted Title X."[93] Similarly, in *Webster,* the Supreme Court reversed the Eighth Circuit's holding that there was a fundamental difference between a prohibition of government funding to pay for abortion services and prohibiting staff physicians from performing abortions at existing public hospitals.[94] The Eighth Circuit recognized that the distance, cost, and practical issues such as doctors' privileges to perform services at alternative non-public facilities would narrow or possibly foreclose the availability of abortion care for women.[95] The Court refused to recognize that the restriction on public facilities and employees

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for the proposition that the "Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

91 *Webster*, 492 U.S. at 509 ("Missouri's refusal to allow public employees to perform abortions in public hospitals leave a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals."); *Rust*, 500 U.S. at 202 ("The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.").

92 *Rust*, 500 U.S. at 216 (Blackmun, J., dissenting) ("By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights.").

93 *Rust*, 500 U.S. at 203.

94 *Webster*, 492 U.S. at 503.

95 *Id.* at 509.

would impose an obstacle meriting serious constitutional consideration.[96]

In addition to impacting women's ability to access abortion services, the Title X restrictions challenged in *Rust* also implicated the free speech rights of the staff and patients of Title X programs because of the prohibitions on abortion counseling, advocacy, and referral. However, the Court rejected First Amendment claims based on the same distinction between the government's decision not to fund a protected activity and government action infringing upon a right.[97] The Court distinguished *Rust* from cases involving the conditioning of a benefit on the relinquishment of a constitutional right because Title X allowed recipients to engage in abortion advocacy and activities as long as they were kept separate from Title X programming.[98]

D. Criticisms of the Supreme Court Funding Cases

Even before the Supreme Court extended the abortion funding line of cases in *Webster* and *Rust,* there was significant legal and public sentiment that *Maher* and *Harris* had been wrongly decided. After the *Harris* decision, challenges to abortion funding restrictions moved to the state level. Courts in thirteen states—Alaska, Arizona, California, Connecticut, Illinois, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Vermont, and West Virginia—held that their state constitutions required that their state Medicaid programs cover medically necessary abortions even if the federal government would not provide reimbursement for services.[99] Although the state court decisions accepted the Supreme Court's characterization of the abortion right as a negative

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96 *Id.* at 510.

97 *Rust*, 500 U.S. at 192–93.

98 *Id.* at 196–98.

99 State, Dep't. of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904 (Alaska 2001); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28 (Ariz. 2002); Comm. To Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981); Doe v. Maher, 515 A.2d 134 (Conn. Sup. Ct. 1986); Doe v. Wright, No. 91-CH-1958, slip op. (Ill. Cir. Ct. Dec. 2, 1994); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); Women of the State of Minn. by Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995); Jeannette R. v. Ellery, No. BVD-94-811 (Mont. Dist. May 19, 1995); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Planned Parenthood Ass'n, Inc. v. Dep't. of Human Res. of State of Or., 663 P.2d 1247 (Or. App. 1983), *aff'd on other grounds* 687 P.2d 785 (Ore. 1984); Doe v. Celani, No. S81-84CnC, slip op. (Vt. Super. Ct. May 23, 1986); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993). *See* WHOSE CHOICE, *supra* note 44, at 20-21. An additional four states and the District of Columbia voluntarily opted to cover medically necessary abortions. *Id.*

right to be free from a government-imposed obstacle and rejected any affirmative obligation to ensure that women can access their right to abortion, the state courts held that when the government undertakes to fund a public benefit, it must do so in a neutral way.[100] This neutrality requirement is discussed *infra* in section IV.B.

The approach taken by the state decisions illustrates some of the flaws in the Supreme Court's formalistic distinction between government-imposed obstacles and discriminatory funding programs. The Supreme Court abortion funding cases brushed aside the actual impact the government's policy would have on a poor woman's reproductive health decision-making and options. In contrast, the state decisions examined the restrictions from a poor woman's perspective. The decisions also exhibited a more realistic and contextualized understanding of women's decision-making processes and the impact that the funding restrictions would actually have on women enrolled in Medicaid.[101]

1. Considering Women's Health Interests

The state decisions placed greater emphasis on the rights and interests impacted by the funding restrictions. The decisions include passages describing why the abortion right was integral to a woman's right to privacy, locating its roots in the right to bodily integrity and the right to make decisions about family life.[102] Un-

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100 The courts took great pains to reject an affirmative obligation to ensure that women can access abortion or other health care related services. *Myers,* 625 P.2d at 871 ("[T]he state has no constitutional obligation to provide medical care to the poor"); *Gomez,* 542 N.W.2d at 28 (noting that plaintiffs' arguments relied on the fact that differential treatment interfered with women's decision-making process rather than a state obligation to fund the exercise of every constitutional right); *Panepinto,* 446 S.E.2d at 666 (stating that appellees' assertion that "the state is not obligated to pay for the exercise of constitutional rights" is true); *Byrne,* 450 A.2d at 935 n.5 ("[T]he right of the individual is freedom from undue government interference, not an assurance of government funding"); *Simat Corp.,* 56 P.3d at 32 ("[W]e do *not* hold that Arizona's right of privacy entitles citizens to subsidized abortions."); *Alaska Dep't of Health,* 28 P.3d at 906 (stating that the issue is "not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so"); *Dep't of Human Res. of State of Or.*, 663 P.2d at 1255 ("[T]he federally protected right of a woman to choose abortion rather than childbirth is a 'negative' right: it prohibits a state from obstructing her exercise of that freedom of choice within the limits of *Roe v. Wade,* . . . but does not require affirmative action by the state to remove obstructions that it did not create.").

101 Wharton et al., *supra* note 12, at 505.

102 *Moe*, 417 N.E.2d at 398–99 (stating the right to privacy includes family life and bodily integrity); *Myers*, 625 P.2d at 879 (discussing a woman's right to "retain personal control over her own body" and her "right to decide for herself whether to

like *Harris,* they also explicitly considered women's health interest in being able to choose and access medically necessary abortions. Some of the decisions identified women's right to health as an additional fundamental interest separate from the privacy right.[103] Other cases suggested that the right to make personal health care decisions was an element of the right to privacy. Several cases described instances where abortion may be necessary for health reasons and the practical and ethical concerns created by limiting doctors' ability to perform medically necessary abortions and forcing a delay in treatment until a condition becomes life threatening.

The California Supreme Court cited prior cases recognizing that because pregnancy poses health risks, abortion decisions involve "the woman's right[ ] to life" as well as the right of procreative choice.[104] The court noted that even when a pregnancy is not deemed life threatening, the abortion decision "directly involves the woman's fundamental interest in the preservation of her personal health."[105] The New Jersey Supreme Court considered women's health interest in the balancing test it applied in finding that a funding restriction violated equal protection. The court balanced both "the protection of a woman's health and her fundamental right to privacy against the asserted state interest in protecting potential life."[106] The court appeared to accord significant weight to a woman's health interest because it found that state exclusion of coverage for nontherapeutic abortions, which do not involve the same life or health risks to the mother, was permissible.[107]

Consistent with the recognition of women's right to health as an important interest, the state decisions described the myriad situations where continuation of pregnancy may pose health risks but not be deemed necessary to save a woman's life.[108] In such situations, doctors testified that abortion might be the preferred treat-

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parent a child."); *Gomez,* 542 N.W.2d at 27 (discussing the right to "integrity of one's own body" and "[t]he right of procreation without state interference").

103 *Maher,* 515 A.2d at 150 ("[T]he right to make decisions which are necessary for the preservation and protection of one's own health, if not covered in the realm of privacy, stands in a separate category as a fundamental right protected by the state constitution."); *Byrne,* 450 A.2d at 934, 935 (noting "the high priority accorded by the State to the rights to privacy and health"). *See* B. Jessie Hill, *Reproductive Rights As Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 507 (2009) (arguing that the notion of the abortion right as part of the negative health care right "unquestionably runs through American abortion jurisprudence.").

104 *Myers*, 625 P.2d at 879 (citing People v. Belous, 458 P.2d 194 [Cal. 1969]).

105 *Id.* at 879.

106 *Byrne,* 450 A.2d at 937.

107 *Id.*

108 Women of the State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 24–25 (Minn.

ment to protect the woman's health.[109] Further, during pregnancy, cancer treatment and drug therapies for other conditions and preexisting diseases normally cannot be provided.[110] In such situations, pregnant women who cannot access an abortion "must choose either to seriously endanger their own health by forgoing medication, or to ensure their own safety but endanger the developing fetus by continuing medication."[111]

The decisions also emphasized that the distinction between life and health is arbitrary in practice and "antithetical to the medicine in general."[112] The New Jersey Supreme Court noted "the distinction between life and health may be difficult for even the most discerning physician."[113] It emphasized that "[w]hen an abortion is medically necessary is a decision best made by the patient in consultation with her physician without the complication of deciding if that procedure is required to protect her life, but not her health."[114] The cases also cited doctors' testimony that health risks associated with abortions increase later in pregnancy and that "postponing an abortion unnecessarily is wholly inconsistent with sound medical practice."[115] The decisions described how denial of Medicaid funding placed doctors in the position of being forced to refuse treatment "only to undertake a more complicated and dangerous operation at a later stage when the situation has become life-threatening."[116]

Recognition that women often need abortions for health reasons led several of the state courts to find that it was improper for state Medicaid programs to single out abortion services for defunding. The Alaska Supreme Court struck down a funding restriction on equal protection grounds holding that "[o]nce the State

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1995); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 665 (W. Va. 1993); *Maher,* 515 A.2d at 142, 154.

109 Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 393–94 (Mass. 1981).

110 Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 29–30 (Ariz. 2002) (stating that these conditions include heart disease, diabetes, kidney disease, liver disease, chronic renal failure, asthma, inflammatory bowel disease, gall bladder disease, severe mental illness, hypertension, uterine fibroid tumors, epilepsy, toxemia, and lupus erythematosis). *See* State, Dep't. of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 907 (Alaska 2001).

111 *Alaska Dep't. of Health*, 28 P.3d at 907.

112 *Moe*, 417 N.E.2d at 393-394; *Maher,* 515 A.2d at 155.

113 Right to Choose v. Byrne, 450 A.2d 925, 935 n.6 (N.J. 1982).

114 *Id.*

115 *Moe*, 417 N.E.2d at 393. *See Byrne*, 450 A.2d at 935, n.6; *Maher*, 515 A.2d at 142, 154-55 (noting that conditions that threaten women's health early in pregnancies can become life threatening as pregnancies progress).

116 *Moe*, 417 N.E.2d at 393.

undertakes to fund medically necessary services for poor Alaskans, it may not selectively exclude from the program women who medically require abortions."[117] Similarly, other state courts found that denial of coverage for medically necessary abortions was inconsistent with the purposes of Medicaid and state commitments to provide for the health of the poor.[118]

2. Considering the Actual Impact of the Restriction on Poor Women

The state court decisions can also be distinguished from *Harris* based on their consideration of the actual impact of the funding restrictions on the poor women targeted. The courts emphasized the importance of measuring the infringement "in light of the 'reality of the situation' . . . and the 'practical considerations' of the person the regulation affects."[119] The cases explicitly considered the impact of monetary incentives on poor women and the impact of forcing a woman to obtain funding through other sources.

The courts noted that the funding restrictions created a financial barrier for the very women who could least afford it—poor women who relied on Medicaid for their health care.[120] "[B]y definition . . . the only women affected by the restrictions at issue are those who lack the money or resources to pay for medically supervised abortion on their own."[121] The Minnesota Supreme Court wrote that the funding differential between abortion and pregnancy might not interfere with a wealthier woman's decision-making process, but the impact on a poor woman would be different.

> [Faced with disparate funding of abortion and childbearing], financially independent women might not feel particularly compelled to choose either childbirth or abortion based on the monetary incentive alone. Indigent women, on the other hand, are precisely the ones who would be most affected by an offer of

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117 State, Dep't. of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 906 (Alaska 2001).

118 *Maher*, 515 A.2d at 143 (holding that the regulation was an authorized exercise of authority because Connecticut law and public policy supported paying "all necessary medical expenses for the poor."); Women of the State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 26 (Minn. 1995).

119 *Maher*, 515 A.2d at 153. *See also Alaska Dep't of Health*, 28 P. 3d at 910 ("[W]e look to the real-world effects of the government action to determine the appropriate level of equal protection scrutiny.").

120 Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 793, 796 (Cal. 1981) ("[T]he state has singled out poor women and has subordinated only their constitutional right of procreative choice to the concern for fetal life.").

121 *Myers*, 625 P.2d at 793.

> monetary assistance, and it is these women who are targeted by the statutory funding ban.[122]

The California Supreme Court expressed particular concern about the restriction precisely because it targeted the poor.[123]

> Indeed, the statutory scheme . . . is all the more invidious because its practical effect is to deny to poor women the right of choice guaranteed to the rich. An affluent woman who desires to terminate her pregnancy enjoys the full right to obtain a medical abortion . . . . By contrast, when the state finances the cost of childbirth, but will not finance the termination of pregnancy, it realistically forces an indigent pregnant woman to choose childbirth even though she had the constitutional right to refuse to do so.[124]

Several of the decisions suggested that the state had an obligation to provide more, not less protection for the rights of the poor women. The Minnesota Supreme Court invoked the state's tradition of "affording persons on the periphery of society a greater measure of government protection and support,"[125] and expressed special concern about the need to protect the rights of Minnesota's indigent women.[126]

The decisions also considered the alternatives available to poor women denied public funding for therapeutic abortions and the practical effects of forcing women to find other funding sources. The courts noted that women would be forced to delay procedures while they tried to raise medical costs, resulting in later abortions with far greater health risks.[127] Obtaining funding for a medical procedure outside of the Medicaid scheme also had a punitive impact on women's benefits. The West Virginia and Connecticut courts noted that if a woman received funding to pay for a medical procedure outside of the Medicaid system, the funding must be reported as income which could render the woman ineligible for public benefits or decrease her benefits.[128]

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122 *Gomez,* 542 N.W.2d at 31. *See* Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 667 (W. Va. 1993) ("[F]or the indigent woman, the state's offer of subsidies for one reproductive option and the imposition of a penalty for the other necessarily influences her federally-protected choice.").

123 *Myers*, 625 P.2d at 796.

124 *Id.* at 799.

125 *Gomez*, 542 N.W.2d at 30; Doe v. Maher, 515 A.2d 134, 152 (Conn. Sup. Ct. 1986) (noting Connecticut's long history and tradition of health care for the poor).

126 *Gomez,* 542 N.W.2d at 31.

127 State, Dep't. of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 907 (Alaska 2001); *Gomez*, 542 N.W.2d at 26.

128 Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 664–65 (W. Va. 1993); *Maher,* 515 A.2d at 154.

III. Where We Are Now: the Privatization of Hyde

After the federal government extended Hyde restrictions to all women who relied on the federal government for health care and the state abortion funding cases were litigated, an uneasy status quo emerged around health care funding for abortion services, with the federal government and the majority of states prohibiting public funding, except in cases of life endangerment, rape, and incest, and a minority of states funding medically necessary abortions. At the same time, while the majority of women with government health care were denied coverage for medically necessary abortions, most women with private health care insurance had abortion coverage.[129] This state of affairs was disrupted when federal health care reform started to blur the lines between public and private health care.

Although the Patient Protection and Affordable Care Act ("ACA")[130] did not prohibit abortion coverage, the debate around the ACA[131] and the compromise crafted by Congress and the Obama administration resulted in setbacks for both the public dialogue and legal landscape around health care coverage for abortion care. The administration's failure to challenge the current Hyde restrictions on federal funding further entrenched the provisions as a reasonable compromise position and the status quo.[132] Not only was there a failure to articulate why a government health care policy that excluded coverage for a medically necessary procedure might be problematic, but the debate also failed to question whether it is appropriate for the government to use a public benefit program to coerce poor women's choices about their health care and reproductive decision-making.

The failure to revisit the Hyde Amendment itself continues to

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129 *Abortion Care Coverage and Health Care Reform: Getting the Facts Straight*, Planned Parenthood, (July 27, 2009), http://www.plannedparenthood.org/about-us/newsroom/press-releases/abortion-care-coverage-health-care-reform-getting-facts-straight-29733.htm (stating that the "majority of private insurance plans today cover abortion care").

130 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

131 Jennifer Keighley, *Health Care Reform and Reproductive Rights: Sex Equality Arguments for Abortion Coverage in a National Plan*, 33 Harv. J. L. & Gender 357, 357 n.7, 359, 369–70 (2010).

132 *See* Exec. Order No. 13,535 § 1, 75 Fed. Reg. 15,599 (Mar. 29, 2010) ("Following the recent enactment of the [ACA], it is necessary to establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment.").

have significant consequences on women who rely on government health care. The number of individuals impacted by the Hyde Amendment will substantially increase under the ACA's Medicaid expansion. Although *Nat'l Federation of Independent Business v. Sebelius* gives states the option of participating in Medicaid expansion,[133] the Congressional Budget Office estimates that Medicaid and CHIP will cover an additional eleven million people by 2022.[134]

Under the ACA, a projected twenty-five million Americans will obtain health insurance through newly created state health insurance exchanges.[135] Low and modest income individuals who buy insurance through the exchanges will receive tax credits and cost-sharing payment reductions.[136] Rather than rejecting the Hyde Amendment, both the ACA and an implementing Executive Order issued by President Obama parrot the amendment's funding restrictions and apply them to insurance policies offered on the insurance exchanges.[137] In doing so, the ACA and Executive Order suggest that tax credits and cost-sharing reduction payments for insurance plans that cover abortion care are akin to federal funding of abortion.[138] To avoid the possible use of federal funds to subsidize premium payments for a plan covering abortion services outside of the Hyde exceptions, the ACA requires that insurers segregate federal funds in a separate account that cannot be used to pay abortion benefits outside of the exceptions.[139] These segregation requirements may make the defeat of attempts to ban abortion coverage in exchange insurance policies a Pyrrhic victory. The

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133 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

134 CBO, *supra* note 3, Table 1. Federal law prohibits the use of federal Medicaid and CHIP funds for abortions except in the case of life endangerment, rape or incest, but states have the authority to use their own funds to cover abortion in a broader range of circumstances. CTR. FOR AM. PROGRESS, *supra* note 5, at 8.

135 CBO, *supra* note 3, Table 1. The number of individuals obtaining coverage on the exchanges is estimated to be nine million in 2014 and twenty-five million by 2022. *Id.*

136 HENRY J. KAISER FAMILY FOUND., EXPLAINING HEALTH CARE REFORM: QUESTIONS ABOUT HEALTH INSURANCE SUBSIDIES 1 (2012), *available a*t http://www.kff.org/healthreform/upload/7962-02.pdf.

137 Exec. Order No. 13,535 § 1, 75 Fed. Reg. 15,599 (Mar. 29, 2010); 42 U.S.C. § 18023(b)(1)(B) (2010). The ACA distinguishes between "abortions for which public funding is allowed" and "abortions for which public funding is prohibited" and tracks federal law by basing the definitions of these terms on whether the Department of Health and Human Services may expend federal funds on them or not. *Id.*

138 Exec. Order No. 13,535, at § 2, 75 Fed. Reg. 15,599 (Mar. 29, 2010); 42 U.S.C. § 18023(b)(2) (2010).

139 HENRY J. KAISER FAMILY FOUND., ACCESS TO ABORTION COVERAGE AND HEALTH REFORM 3 (2010), *available at* http://www.kff.org/healthreform/upload/8021.pdf.

coverage restrictions are so stringent that leading insurance experts have suggested that most insurers will simply decline to sell policies covering abortion care on the exchanges—and eventually in the broader private market as well.[140]

Although the ACA technically allows abortion coverage in exchange policies, the fight has now moved to the state level. The ACA requires that states create insurance exchanges by 2014, and states are beginning to hammer out what the exchanges will look like. Energized by the federal debate around abortion coverage, state legislators have not only passed laws prohibiting insurance policies on state exchanges from covering abortion care, they have also passed legislation prohibiting all private health insurance policies from covering abortion.[141] State legislators have also expanded the concept of public funding to look not just at whether the state is paying health care costs for individual women seeking abortions, but also to whether it funds entities that may provide or refer to abortion services, even if state dollars are not used to pay for the services.

A. The New State Landscape

Prior to the passage of the ACA, only five states banned insurance coverage for abortion care.[142] Just over two years after the ACA was signed into law, more than a third of states have passed laws to ban abortion coverage on their health care exchanges. As of June 2012, eighteen states—Alabama, Arizona, Florida, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Wisconsin, and Virginia—passed legislation prohibiting insurers from

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140 Gold, *supra* note 7, at 9.

141 Jacqueline R. Thomas, *Abortion to be Considered an Essential Benefit,* CONN. MIRROR, June 8, 2012, http://www.ctmirror.org/story/16602/abortion-be-considered-essential-health-benefit. At least one state has imposed restrictions in the other direction. Connecticut has found that abortion is an essential benefit that must be covered by insurance policies offered on its exchange. *Id.*

142 The states were Idaho, Kentucky, Missouri, North Dakota, and Oklahoma. *See* IDAHO CODE ANN. § 41-2210A (2012); KY. REV. STAT. ANN. § 304.5-160 (West 2012); MO. ANN. STAT. § 376.805 (West 2010)(amended 2010 Mo. Legis. Serv. S.B. 793 (West)); N.D. CENT. CODE ANN. §14-02.3-03 (West 2011); OKLA. STAT. ANN. tit. 63, § 1-1-741.2 (West 2012) *repealed by* Laws 2011, c. 92, § 2, eff. Nov. 1, 2011. *See* Keighley, *supra* note 131, at 367 n.47; Roy G. Spece, Jr., Note, *The Purpose Prong of Casey's Undue Burden Test and Its Impact on the Constitutionality of Abortion Insurance Restrictions in the Affordable Care Act or Its Progeny,* 33 WHITTIER L. REV. 77, 91 (2011); Nat'l Educ. Ass'n of R.I. v. Garrahy, 598 F. Supp. 1374 (D. R.I. 1984), *aff'd* 779 F.2d 790 (1st Cir. 1986). In addition, Rhode Island passed a statute prohibiting abortion coverage, but it was found unconstitutional. *Id.*

covering abortions in exchange policies.[143] The exact provisions of the restrictions varied, but most allowed exceptions where a woman's life is in danger but not her health.[144] More than half also included exceptions for abortions in instances of rape or incest.[145] Louisiana and Tennessee do not recognize any exceptions.[146] Perhaps more troubling, Kansas, Nebraska, and Utah went beyond plans offered on the exchanges and banned private insurance coverage for abortion services.[147] Some states that have banned the inclusion of abortion services in health insurance policies allow insurers to offer separate riders covering abortion for an additional

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143 S.B. 10, 2012 Leg., Reg. Sess. (Ala. 2012); ARIZ. REV. STAT. ANN. § 20-121 (2010); H.B. 97, 2011 Leg., Reg. Sess. (FL 2011); S.B. 1115, 61st Leg., Reg. Sess. (Idaho 2011); H.B. 1210, 117th Gen. Assemb. Leg., Reg. Sess. (Ind. 2011); H.B. 2075, 2011-2012 Leg., Reg. Sess. (Kan. 2011); LA. REV. STAT. ANN. § 22:1014 (2011); MISS. CODE ANN. §§ 41-41-97 to 99 (2012); MO. ANN. STAT. § 376.805 (2012); L.B. 22, 102nd Leg., Reg. Sess. (Neb. 2011); H.B. 79, 129th Gen. Assemb., Reg. Sess. (Ohio 2011-2012); OKLA. STAT. ANN. tit. 63 § 1-741.3 (West 2012); S.B. 102, 119th Gen. Assemb., Reg. Sess. (S.C. 2011-2012); H.B. 1185, 2012 Leg., Reg. Sess. (S.D. 2012); TENN. CODE ANN. § 56-26-134 (2012); H.B. 354, 2011 Gen., Reg. Sess. (Utah 2011); S.B. 92, 2011-2012 Leg., Reg Sess. (Wis. 2011); H.B. 2434, 2011 Gen. Assemb., Reg. Sess. (Va. 2011). Of the fourteen states, three states, Idaho, Missouri, and Oklahoma already had laws prohibiting abortion coverage in general insurance policies. These three states adopted additional legislation specifically prohibiting abortion coverage in policies offered on the exchanges. IDAHO CODE ANN. § 41-2210A (2012); MO. ANN. STAT. § 376.805 (West 2010) (amended 2010 Mo. Legis. Serv. S.B. 793 (West)); OKLA. STAT. ANN. tit. 63, § 1-1-741.3 (West 2012) (amended by 2011 OK S.B. 547 (West)). *See* CTR. FOR REPROD. RIGHTS, 2011: A LOOK BACK 4, 10, 12, 16 (2011) [hereinafter 2011 LOOK BACK], *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/endofyear_2011_FINAL.pdf. For an in depth discussion of the Louisiana statute see J. Daniel Siefker, Jr., Comment, *Louisiana's Abortion Politics and the Constitution: The Attempt to Regulate Health Insurance Benefits in the Wake of the National Healthcare Reform*, 13 LOY. J. PUB. INT. L. 253 (2011).

144 GUTTMACHER INST., STATE POLICIES IN BRIEF: RESTRICTING INSURANCE COVERAGE OF ABORTION (2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf. Although more restrictive than a general health exception, Arizona, Indiana, and Utah have created exceptions where pregnancy poses a risk of irreversible impairment of a major bodily function. Wisconsin has an exception for serious physical health conditions and South Dakota for a medical emergency. *Id. See also* S.B. 10, 2012 Leg., Reg. Sess. (Ala. 2012); H.B. 1185, 2012 Leg., Reg. Sess. (S.D. 2012).

145 *See supra* note 143. The states are Alabama, Florida, Idaho, Indiana, Mississippi, Ohio, Virginia, South Carolina, Wisconsin, and Utah. *Id.*

146 *See supra* note 143.

147 H.B. 2075, 2011-2012 Leg., Reg. Sess. (Kan. 2011) (prohibiting insurers on the private market from offering abortion coverage except where necessary to save a woman's life, optional riders are available); L.B. 22, 102nd Leg., Reg. Sess. (Neb. 2011) (prohibiting insurers in private market and exchanges from offering coverage for abortion except where necessary to avert a woman's death, riders are available); H.B. 354, 2011 Gen., Reg. Sess. (Utah 2011) (barring coverage except in cases of rape, incest, lethal fetal anomaly, life endangerment or risk of severe injury; no riders allowed); 2011 LOOK BACK, *supra* note 143, at 4, 12, 13, 18; GUTTMACHER INST., *supra* note 144.

cost.[148] However, even if insurance companies are permitted to offer separate riders, there is no guarantee they will offer them or that employers will choose to elect to purchase riders for employer plans.[149] Further, even if the option is available, it is questionable how many women will purchase a separate rider for a single health care service.

Other states are using state funding to restrict abortion services in more creative ways. Arizona prohibited funding of medical training to perform abortions.[150] It also passed a law preventing taxpayers from taking a state charitable deduction for donations to any organization that provides or refers to abortion services or supports any entity that does so.[151] In 2011, Ohio passed a budget that prohibits abortions from being performed in public facilities.[152] States also passed laws de-funding Planned Parenthood and other health care providers that perform or advocate for abortion services.[153] The legislation appeared to be motivated by a desire to punish Planned Parenthood for its involvement in providing abortions.[154] Sponsors also argued that the funding ban was necessary to prevent Planned Parenthood from using state dollars to pay for abortion services even though Planned Parenthood maintained separate projects for abortion care and family planning and did not commingle funds.[155]

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148 *See, e.g.*, H.B. 2075, 2011-2012 Leg., Reg. Sess. (Kan. 2011); L.B. 22, 102nd Leg., Reg. Sess. (Neb. 2011).

149 *See, e.g.*, Memorandum in Support of Plaintiff's Motion for Summary Judgment at 6, Am. Civil Liberties Union of Kan. & W. Mo. v. Praeger, 863 F. Supp. 2d 1125 (D. Kan. 2012)(No. 11-2462-JAR-KGG), 2012 WL 2375233 (stating that after the Kansas law passed not all insurance companies offered riders and even where riders are offered in a group plan, it is up to the employer to decide whether to purchase it, not the individual employee).

150 H.B. 2384, 50th Leg., Reg. Sess. (Ariz. 2011) (prohibiting the use of state funds for medical training for abortion); 2011 LOOK BACK, *supra* note 143, at 8.

151 H.B. 2384, 50th Leg., Reg. Sess. (Ariz. 2011); 2011 LOOK BACK, *supra* note 143, at 8.

152 H.B. 153, 129th Gen. Assemb., Reg. Sess. (Ohio 2011-2012); CTR. FOR REPROD. RIGHTS, 2011 MID-YEAR LEGISLATIVE WRAP-UP 21 (2011), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/state_midyr_wrapup_2011_8.10.11.pdf.

153 *See* H.B. 1210, 117th Gen. Assemb. Leg., Reg. Sess. (Ind. 2011); S.B. 7, 82nd Leg., Reg. Sess. (Tex. 2011); 2011 LOOK BACK, *supra* note 143, at 10, 18. Kansas and North Carolina passed 2012 budgets prohibiting Planned Parenthood from receiving state funds. 2011 LOOK BACK, *supra* note 143, at 12, 14. Wisconsin passed a budget prohibiting state funding to Planned Parenthood and other facilities that perform or refer for abortions. *Id.* at 19.

154 *See, e.g.*, Planned Parenthood of Cent. N.C. v. Cansler, 804 F. Supp. 2d 482, 496 (M.D.N.C. 2011).

155 *See, e.g.*, Planned Parenthood of Kan. & Mid-Mo. v. Brownback, 799 F. Supp. 2d

Lawsuits challenging the new funding restrictions have not proceeded past the district court level and so far have met with mixed success. Following the grant of a preliminary injunction, the State of Arizona agreed to permanently enjoin the prohibition on state tax credits for donations to organizations that provide, or refer to organizations that provide, abortions.[156] The funding restrictions targeting Planned Parenthood in Indiana, Kansas, and North Carolina have been enjoined.[157]A fourth funding restriction in Texas was initially enjoined, but the Fifth Circuit lifted the injunction.[158] As discussed *infra,* the sole case challenging a private insurance ban, although still pending, has been less successful. The court denied plaintiffs' motion for a preliminary injunction and the case is still pending. Although bans on insurance coverage on state insurance exchanges will have a significant impact on women's ability to obtain insurance coverage for abortion services, to date, no lawsuits have been filed to challenge the bans, which do not go into effect until 2014.

B. Challenges to Private Insurance Bans

The private insurance bans create an obstacle for women seeking an abortion. They are distinguishable from the Supreme Court's abortion funding cases because they do not involve decisions about the allocation of government funds. Instead, they create an obstacle preventing women from accessing private insurance funding and should be reviewed by courts as a state imposed restriction on access to abortion. As discussed below, the First Circuit came to this conclusion when it reviewed a private insurance ban in the 1986 case *Garrahy v. Calderone.*

Garrahy and the abortion funding cases were decided when the Supreme Court applied the *Roe v. Wade* standard to determine the constitutionality of abortion restrictions. The *Roe* standard's trimester framework prohibited most abortion restrictions during the first trimester and only permitted regulation of abortion proce-

1218, 1224, 1234 (D. Kan. 2011) (The amendment's sponsor stated that it "took all state funding away from Planned Parenthood to ensure that state dollars are not used for abortion services.").

156 *State Drops Defense of Arizona Law that Would Have Withheld Critical Resources for Women's Health,* AM. CIVIL LIBERTIES UNION OF ARIZ. (Jan. 30, 2012), *available at* http://acluaz.org/issues/reproductive-rights/2012-01/1733.

157 *Cansler*, 804 F. Supp. 2d 482; Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't. of Health, 794 F. Supp. 2d 892, 905-909, 911(S.D. Ind. 2011); *Brownback*, 799 F. Supp. 2d 1218.

158 Planned Parenthood Ass'n of Hidalgo Cnty. Tex., Inc. v. Suehs, 828 F. Supp. 2d 872 (W.D. Tex. 2012) *vacated and remanded*, 692 F.3d 343 (5th Cir. 2012).

dures during the second trimester in ways that were reasonably related to the promotion of maternal health.[159] The abortion funding cases avoided review under *Roe*'s strict standard by distinguishing government funding decisions from government-imposed restrictions.[160] Because the *Garrahy* court held that a private insurance ban is a government restriction, it applied the *Roe* standard and held the ban unconstitutional. However, in 1992 the Supreme Court's standard for reviewing abortion restrictions changed when *Planned Parenthood v. Casey* introduced the undue burden standard. This section looks at pre-*Casey* private insurance ban cases, describes how *Casey*'s undue burden standard changed the Court's review of government-imposed abortion restrictions, and discusses the first post-*Casey* private insurance ban case.

1. Pre-*Casey* Challenges to Insurance Bans

Private insurance bans have been challenged before with mixed results. In 1986, the First Circuit affirmed a district court decision striking down a Rhode Island private insurance ban. In 1992, the Eighth Circuit reversed a grant of summary judgment in favor of plaintiffs challenging a Missouri ban.

In *National Association of Rhode Island v. Garrahy*,[161] the District Court of Rhode Island found that a state law that prohibited abortion coverage in comprehensive health insurance policies, except if the life of the mother was endangered or in instances of rape or incest, was unconstitutional. The court distinguished *Harris* and *Maher* finding that restricting private insurance constituted a government-created obstacle to abortion. While

> a state is not constitutionally compelled to pay to remove financial burdens it did not impose, [*Harris* and *Maher*] clearly gave no license to the converse, the idea that government is free to *create* financial obstacles to abortion.[162]

The district court noted that the *Maher* decision relied heavily on the fact that the women who were denied Medicaid funding could "continue as before to be dependent on private sources."[163]

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159 Roe v. Wade, 410 U.S. 113, 164 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992).

160 *See supra* Part II.A-C.

161 Nat'l Educ. Ass'n of R.I. v. Garrahy, 598 F. Supp. 1374 (D. R.I. 1984).

162 *Id.* at 1384.

163 *Id.* (citing Harris v. McRae, 448 U.S. 297, 316 (1980)). *Garrahy* cited a Third Circuit decision invalidating a Pennsylvania law that required private insurers to issue policies that exclude abortions and that cost less than policies that include abortions because the "requirement adds an additional barrier to a woman's access to an abortion." Am. Coll. of Obstetricians & Gynecologists, Pa. Section v. Thornburgh, 737 F.2d

Deciding the case pre-*Casey*, the court applied strict scrutiny to the provision and found it unconstitutional.[164]

Six years later, as the Supreme Court began its retreat from *Roe*, the Eighth Circuit relied on its interpretation of the newly developing "undue burden" standard rather than the abortion funding cases to reverse a district court grant of summary judgment invalidating a private insurance ban. Although *Coe v. Melahn*,[165] was decided before *Casey*, the Eighth Circuit anticipated that the Supreme Court was moving toward upholding restrictions on abortion outside the public funding context. Its decision shifted the inquiry from whether or not the law constituted a government-created obstacle to the weight of the obstacle created. Relying on a non-funding case in which the Supreme Court upheld second trimester abortion restrictions despite the fact that they would cause delay and make abortion services more expensive, the Eighth Circuit held that the insurance ban did not constitute an undue burden and declined to apply strict scrutiny.[166]

2. *Casey's* Undue Burden Standard

In the 1992 case *Planned Parenthood v. Casey*, the Supreme Court articulated a new standard for reviewing abortion restrictions outside of the public funding context that would result in its upholding abortion restrictions that previously had been found unconstitutional under *Roe*. *Casey* held that the government can interfere with women's decision-making process prior to viability as long as it does not impose an undue burden.[167] The Court wrote that:

> throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.[168]

283, 303 (3d Cir. 1984) *aff'd sub nom.* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986) *overruled by Casey*, 505 U.S. 833.

164 *Garrahy*, 598 F. Supp. at 1385 (citing City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 444 n.33 (1983) *overruled by Casey*, 505 U.S. 833). Under the *Roe* standard, the court held that "any statute, other than a 'governmental spending statute,' . . . that adds cost and delay to the abortion procedure will not survive if it has any significant impact on the abortion right, unless justified by a compelling state interest." *Id.* at 1383–84.

165 Coe v. Melahn, 958 F.2d 223 (8th Cir. 1992).

166 *Id.* at 225–226.

167 *Casey*, 505 U.S. at 873, 875–76.

168 *Id.* at 878.

The *Casey* decision stated that "an undue burden is a shorthand for the conclusion that a state regulation has the *purpose* or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[169] The Court explained that a statute that has the purpose of creating an undue burden is invalid because the means chosen by the state to further its "interest in potential life must be calculated to inform the woman's free choice, not hinder it."[170]

Although *Casey* suggested that a restriction would be unconstitutional if it had the purpose or effect of creating an undue burden, in practice courts have been reluctant to rely on the improper purpose prong alone as grounds to invalidate a restriction.[171] Instead courts either fail to engage in a searching inquiry into legislative purpose[172] or conflate purpose with effect.[173] The decisions considering whether restrictions were passed with an improper purpose have also been criticized for mechanically holding that restrictions that are similar to those upheld in *Casey* are constitutional without independently considering the legislature's intent in enacting them. Commentators have suggested that review of a different type of restriction may result in a more searching inquiry.[174] The majority of cases applying the undue burden standard have involved restrictions that arguably seek to achieve a permissible goal, such as "promoting a woman's informed choice," but also have the collateral effect of imposing obstacles in the form of delay or expense. The private funding restrictions appear to have no purpose other than to create a financial obstacle in the path of a woman seeking an abortion. Thus, challenges to the private insurance bans will provide courts an opportunity to consider whether laws designed solely to burden access to abortion are constitutional.

3. Private Insurance Bans: *ACLU v. Praeger*

In 2011, the ACLU brought the first post-*Casey* challenge to a

169 *Id.* at 877 (emphasis added).
170 *Id.*
171 Wharton et al., *supra* note 12, at 377–85.
172 *Id.* at 377. *But see* Planned Parenthood of Heartland v. Heineman, 724 F. Supp. 2d 1025, 1044–46 (D. Neb. 2010) (granting a preliminary injunction and holding that the only sensible construction of a statute which imposed informed consent requirements that were impossible or nearly impossible to comply with and placing doctors in immediate danger of crippling litigation was that it was intended to place a "substantial, if not insurmountable, obstacle in the path of any woman seeking an abortion in Nebraska").
173 Wharton et al. *supra* note 12, at 344–45, 377.
174 *Id.* at 384–85.

private insurance ban. The case challenged a newly enacted Kansas law that prohibited insurance companies from covering abortion services in their comprehensive plans, except in instances when the abortion was necessary to save a woman's life. The complaint alleged due process and equal protection violations, but the ACLU's preliminary injunction motion relied solely on the improper purpose prong of the undue burden standard.[175] The district court denied the motion, though it specifically left the question of whether the law had the effect of creating a substantial obstacle open.[176] The case is still pending.[177]

In its opposition to the motion for preliminary injunction, Kansas argued that the private insurance ban should be reviewed under a rational basis standard like the abortion funding cases and the law should be upheld because the state could rationally choose to regulate insurance in a manner that subsidizes normal childbirth but not non-therapeutic abortions.[178] However, the abortion funding cases were premised on the Supreme Court's distinction between a discriminatory benefits program and a government-imposed obstacle. As the *Garrahy* court pointed out, a private insurance ban imposes an obstacle in the path of a woman seeking an abortion. Indeed, the *Maher* decision emphasized that the government's discriminatory benefits program would still leave Medicaid recipients free to obtain funding through private sources.[179] The Kansas law imposes a state obstacle that prevents a woman from obtaining funding from private sources. Although the district court correctly recognized that the undue burden standard applied to the Kansas law, it denied the preliminary injunction motion finding that the ACLU failed to show that the "Kansas legislature's predominant motive . . . was to create a substantial obstacle to abortion."[180] In particular, the court suggested that the state might have a permissible interest in protecting the conscience rights of

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175 Am. Civil Liberties Union of Kan. & W. Mo. v. Praeger, 815 F. Supp. 2d 1204, 1210 (D. Kan. 2011). This may be because it was difficult to prove what the effect of the law would be before it went into effect.

176 *Praeger,* 815 F. Supp. 2d at 1215 ("Whether the practical *effect* of the law is to actually create a substantial obstacle is another question, but plaintiff has not attempted in this motion to put on evidence to establish such an effect, and the court expresses no opinion here on that question.") (emphasis added).

177 In March 2012, the District Court denied a motion to dismiss the plaintiff's equal protection claim. Am. Civil Liberties Union of Kansas & W. Mo. v. Praeger, 863 F. Supp. 2d 1125 (D. Kan. 2012).

178 Defendant's Response to Plaintiff's Motion for Preliminary Injunction, Am. Civil Liberties Union of Kansas & W. Mo. v. Praeger, 863 F. Supp. 2d 1125 (D. Kan. 2012).

179 Maher v. Roe, 432 U.S. 464, 474 (1977).

180 *Praeger,* 815 F. Supp. 2d at 1214.

individuals who buy health care insurance who may not want their premiums to contribute to risk pools that pay medical providers who perform abortions.

The court's decision reflects a fundamental misunderstanding of the nature of insurance and the relationship between individuals who buy health insurance. Insurance constitutes a contract between the insurer and the insured where the insured pays a premium to the insurer to indemnify him or her against a risk.[181] As argued by the ACLU in its subsequent motion for summary judgment,

> [t]here is no 'subsidy' by any third party in the contractual agreement between insurer and insured. . . . As in any business enterprise, an insurance company's customers pay for the services they receive, and the company operates on the revenues it receives; neither the insurer nor any insured 'subsidizes' anything in this commercial transaction.[182]

Perhaps more troubling is the state's assertion that the individuals who buy health insurance have a "conscience right" to prevent other individuals from obtaining insurance coverage for abortion care simply because they may use the same insurance company.[183] The idea that unnamed individuals, who are neither the women receiving abortion care nor the medical professionals providing care, have a conscience right to interfere with others' right to obtain insurance coverage for abortion care would constitute a dramatic and potentially limitless expansion of the concept of conscientious refusal.[184]

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181 BLACK'S LAW DICTIONARY (9th ed. 2009) (defining insurance as "[a] contract by which one party (the *insurer*) undertakes to indemnify another party (the *insured*) against risk of loss, damage, or liability arising from the occurrence of some specified contingency . . . An insured party usu. pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk.").

182 Memorandum in Support of Plaintiff's Motion for Summary Judgment, *supra* note 149, at 18–19.

183 For a discussion about problems with extending conscientious refusal claims to health care institutions, which are several steps closer to the actual provision of services than health care insurers or individual insurance buyers, see Elizabeth Sepper, *Taking Conscience Seriously,* 98 VA. L. REV. 101 (2012) (introducing a new framework to evaluate conscientious objection claims that negotiates between individual and institutional interests to protect conscience more consistently).

184 International human rights law recognizes that only medical personnel directly providing abortions have conscience rights and that exercise of their rights cannot compromise the health and reproductive rights of others. *See e.g.,* T-388/09, discussed *infra* note 201; R.R. v. Poland, App. No. 27617/04, 2011 Eur. Ct. H.R. ¶ 206 ("States are obliged to organise their health services in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are

The *Praeger* case is still pending. The ACLU has moved for summary judgment arguing that Kansas has essentially conceded an improper purpose by asserting in its pleadings that it enacted the law to "treat abortion differently than other medical procedures" and to make it more expensive than childbirth.[185] The outcome of the case may ultimately turn on what showing the court requires to establish that the law's predominant purpose was to impose a substantial obstacle to abortion[186] and whether it accepts the protection of the conscience rights of unnamed anti-choice insurance purchasers to be a valid and plausible alternative government motive.[187] Although the ACLU has strong grounds to assert that the law violates the undue burden standard, the standard itself is problematic because it explicitly allows the government to adopt policies that impose abortion restrictions as long as the plaintiff cannot establish that the law's purpose or effect is to impose a substantial obstacle. As discussed below, a more rights-protective approach would impose an obligation on the government to adopt polices to ensure that women have access to abortion care rather than delineate the circumstances under which it may adopt policies to undermine access.

IV. Where We Could Be: Alternative Ways to Look at Health Care Coverage for Abortion

This section considers three alternative ways to analyze abor-

entitled under applicable legislation."); Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 24, Article 12 of the Convention (Women and Health) A/54/38/Rev.1, chap. I ¶ 11 (1999), *available at* http://www.unhcr.org/refworld/docid/453882a73.html ("[I]f health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers."). *See* Bernard M. Dickens, *Legal Protection and Limits of Conscientious Objection: When Conscientious Objection is Unethical,* 28 Med. & L. 337 (2009).

185 Memorandum in Support of Plaintiff's Motion for Summary Judgment, *supra* note 149, at 13.

186 The ACLU may also be able to prove that the law has the effect of imposing a substantial obstacle under the other prong of the undue burden test.

187 Memorandum in Support of Plaintiff's Motion for Summary Judgment, *supra* note 149, at 11–12. The ACLU argues that the Supreme Court has only recognized three valid state interests for imposing abortion restrictions (1) the state's interest in potential life, (2) its interest in the "health or safety of a woman seeking an abortion," and (3) its interest "in protecting the integrity and ethics of the medical profession." It asserts that the State can only advance its interest in potential life by adopting measures to inform women's decision-making. *Id.* According to the ACLU, these three interests reflect a careful balancing by the Supreme Court of the interests at stake, and although the Supreme Court has not foreclosed the possibility of additional valid interests, it cannot be that any state interest that would be permissible under a rational basis review would establish a valid purpose in the abortion context. *Id.* at 16.

tion funding restrictions in the public and private context. It first considers the adoption of a concept of reproductive autonomy that includes an affirmative government obligation to take steps to ensure rights. This formulation provides the most robust protection for reproductive rights, but is the furthest from current Supreme Court doctrine. The second section considers the minority view in the United States reflected by the standard adopted by U.S. state court decisions that require Medicaid funding of medically necessary abortions. The "neutrality" standard does not recognize affirmative government obligations, but requires that when the government undertakes programs to fund and provide benefits that it do so in a neutral, non-coercive way. The last section looks at a recent case from the Supreme Court of Canada that suggests that even a negative conception of the rights to liberty and personal security would require that the government refrain from prohibiting private insurance coverage.

A. Affirmative Obligation: Decisions from the ECHR, Colombia and Nepal

Although in the U.S. fundamental rights protected by the Constitution are generally conceived as a "negative" freedom from government violation or intervention,[188] there is growing international recognition that respect for civil and political rights may require affirmative government action.[189] Recent cases from the European Court of Human Rights ("ECHR"), the Constitutional Court of Colombia, and the Supreme Court of Nepal recognize that women have a right to access legal abortion care and explore the affirmative government obligations that flow from the right. The ECHR's decision was based on the right to private life and privacy, while the cases from Colombia and Nepal invoked a broader range of rights including dignity, liberty and autonomy, health, non-discrimination, freedom from cruel, inhuman, and degrading treatment, freedom from sexual violence, and the benefit from scientific progress.[190] The cases go farther than the state

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188 Ginsburg, *supra* note 19, at 384. *See* Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1589 (1981) (discussing that U.S. rights theory is a negative rights theory, explaining that "Congress is not *required* to do *anything* to protect or promote individual rights, or to make them effective, or more effective") (emphasis added).

189 *See supra* Part I.B.

190 *Lakshmi Dhikta v. Nepal*, Supreme Court of Nepal 2009, 6 (unofficial translation on file with author); Emilia Ordolis, *Lessons From Colombia: Abortion Equality and Constitutional Choices*, 20 CANADIAN J. WOMEN & THE L. 263, 265 (2008).

funding decisions discussed *infra* because in addition to requiring that the government refrain from imposing barriers and decriminalize abortion, the cases articulate an affirmative government obligation to take steps to make services accessible.

1. ECHR: *R.R. v. Poland*

In a 2011 case, *R.R. v. Poland*, the European Court of Human Rights held that a woman's right to determine whether to continue a pregnancy falls within the sphere of private life and privacy and that there are "positive obligations inherent in effective 'respect' for private life."[191] The ECHR found that if Polish law allows for abortions in cases of fetal abnormality, it must take steps to ensure that the right is not merely theoretical by establishing effective and accessible procedures to ensure that a pregnant woman has access to diagnostic services necessary for her to determine whether fetal abnormalities exist.[192]

2. Colombian Constitutional Court: C-355/06 and T-388/09

While *R.R.* recognized that respect of the right to privacy may entail affirmative government obligations to adopt effective procedures, it did not tackle the more thorny question of whether the government has an obligation to create enabling conditions or ensure that sufficient resources are available so that all women, rich or poor, can access abortion care.[193] In two recent decisions, the Colombian Constitutional Court held both that women have a constitutional right to access abortion in certain circumstances and that the government has an obligation to take steps to ensure that abortion services are available throughout the country and as part of the public health network. It also emphasized that inability to pay for services should not prevent women from accessing abortion care.

In its landmark case C-355/06, the Colombian Constitutional court struck down parts of a criminal abortion ban, holding that women's fundamental rights limited the legislature's power to criminalize abortion in all circumstances.[194] The court's recogni-

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191 R.R. v. Poland, App. No. 27617/04, ¶¶ 184, 214 (Eur. Ct. H.R. 2011).

192 *Id.* ¶¶ 210, 213.

193 *Id.* ¶ 198. The ECHR distinguished *R.R.* from cases alleging denial of health services for "reasons of insufficient funding or availability." *Id.*

194 Corte Constitucional [C.C.][Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.), *available at* http://www.unifr.ch/ddp1/derechopenal/jurisprudencia/j_20080616_03.pdf (in Spanish). Excerpts from C-355/06 are available at

tion of women's sexual and reproductive rights was strongly influenced by international human rights law, which forms part of the "constitutional block or bundle" that guides the Constitutional Court's decisions.[195] The decision extensively discussed international human rights standards concluding that "women's sexual and reproductive rights have finally been recognized as human rights and, as such, they have become part of constitutional rights."[196] Applying a proportionality analysis, the court held that the criminal abortion ban impermissibly infringed on women's right to dignity, autonomy, life, health, and personal integrity because it lacked exceptions for instances where the woman's life or health was at risk, where pregnancy results from rape or incest, and where the fetus has malformations incompatible with life outside the womb.[197]

The court noted that its decision decriminalized abortion under the three circumstances discussed above without the need for further legislative or regulatory action, but it also noted that women's sexual and reproductive rights imposed an affirmative obligation on the government. The court cited international human rights law standards imposing state duties to "offer a wide range of high quality and accessible health services, which must include sexual and reproductive health services," and to eliminate obstacles that impede women's access to services and education and information.[198] The court invited the legislature and other authorities to "adopt[ ] decisions within their discretion . . . in order to fulfill their duties with respect to the constitutional rights of women" such as "taking measures that will effectively ensure women access

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http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf [hereinafter C-355/06 Translation]; Martha F. Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. REV. 1657, 1679–80 (2010); Ordolis, *supra* note 190, at 265.

195 The Colombian Constitution explicitly incorporates international human rights treaties ratified by Colombia into its domestic legal system. Article 93 of the Constitution provides that human rights treaties have "priority domestically" and that "[t]he rights and duties mentioned in [the] Charter will be interpreted in accordance with international human rights treaties ratified by Colombia." *See* Veronica Undurraga & Rebecca 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 CONSTITUTIONAL LAW 215, 225 (Susan H. Williams, ed. 2009) (explaining the concept of the "constitutional block").

196 C-355/06 Translation, *supra* note 194, at 31. The court held that "the rights of the pregnant woman [are] protected by the Constitution of 1991 as well as by the international human rights treaties that are part of the *Constitutional Bundle*." C-355/06 Translation at 59.

197 C-355/06 Translation, *supra* note 194, at 51–57. Undurraga & Cook, *supra* note 195, at 238–39.

198 C-355/06 Translation, *supra* note 194, at 28–29.

in conditions of equality and safety."[199] In response to the court's decision, in December 2006, the Minister of Social Protection issued a regulation, which set out specific measures to ensure access to abortion services including coverage of legal abortions by the public health system.[200]

In 2009, the Constitutional Court issued a second decision providing more guidance on the government's obligation to ensure access to abortion in instances where it is constitutionally protected.[201] Case T-388/09 involved a municipal judge who refused to grant a court order permitting an abortion that was permissible under C-355/06 due to severe fetal abnormalities because of his personal beliefs opposing abortion. In upholding an intermediate court decision overturning the ruling and ordering termination of the pregnancy, the Constitutional Court stressed the gravity and impropriety of the municipal judge's actions.[202] It emphasized that judicial officers have a duty to apply the law and cannot refuse to perform their duties based on personal convictions.[203] The court also stated that conscientious objection is not an absolute right and that it is limited to the extent that it violates the fundamental rights of others, including women's sexual and reproductive rights.[204]

The Constitutional Court took the opportunity to reiterate the government's obligation to ensure access to abortion where constitutionally protected under C-355/06. Perhaps in light of challenges women continued to face in accessing abortion care services, the court described the scope of the government's obligation in

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199 *Id.* at 59.

200 GUTTMACHER INST., MAKING ABORTION SERVICES ACCESSIBLE IN THE WAKE OF LEGAL REFORMS: A FRAMEWORK OF SIX CASE STUDIES 22 (2012), *available at* http://www.guttmacher.org/pubs/abortion-services-laws.pdf; Davis, *supra* note 194, at 1681; Ordolis, *supra* note 190, at 275. After the regulation was in force for nearly three years, an anti-abortion coalition challenged the regulation and enforcement was suspended in October 2009 based on a technical argument that the Constitutional Court's decision should be implemented by the legislature rather than the executive. GUTTMACHER INST., at 24; Davis, *supra* note 194, at 1681 n.130.

201 Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2009 Sentencia T-388/09 (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2009/T-388-09.htm (in Spanish).

202 *Id.* § 7.

203 *Id.* § 5.3.

204 *Id.* §§ 5.1, 5.2. The court engaged in a lengthy discussion of the scope of the right to conscientious objection and stated that the right (1) is an individual right that does not extend to health care institutions, (2) only applies to medical personnel who are directly involved in the procedure and does not include individuals performing preparatory tasks or providing post-treatment care, and (3) can only be asserted by medical personnel where there is a guarantee that the woman can still access quality and safe care without additional barriers. *Id.*

greater detail. It stated that (1) women should have access to information about their rights and the court's decisions, (2) abortion services should be available throughout the country at all levels of care and sufficiently available in the public health network, and (3) a woman cannot be denied access to constitutionally protected abortion care because she does not have insurance or the ability to pay for services.[205] It also emphasized that obstacles or barriers to constitutionally protected abortions are categorically prohibited.[206]

As part of its decision, the Constitutional Court ordered the Ministries of Social Welfare and Education and the Attorney General and Public Defender to design and implement campaigns to promote sexual and reproductive rights and increase awareness of the court's decisions. The court urged the government to monitor the campaigns to assess their impact and effectiveness.[207] It also ordered the National Superintendent of Health to adopt measures requiring that the entities that promote and provide health care (whether public or private, secular or religious) employ enough medical professionals to provide constitutionally protected abortions and abstain from imposing impermissible requirements on abortion access.[208]

3. Nepal Supreme Court: *Dhikta v. Nepal*

The Colombian Constitutional Court decisions provide greater specificity about the scope of government affirmative obligations to ensure access to abortion where constitutionally protected, requiring that the government affirmatively inform women about their rights, ensure that adequate service providers are available, and prohibit health care institutions from imposing barriers to abortion access. The decisions also articulate a principle that services should be available on a basis of equality and should not be denied for lack of ability to pay. In the 2009 decision *Lakshmi Dhikta v. Nepal*, the Supreme Court of Nepal imposed similar obligations to make information available and expand the availability of service providers. Further, in addition to articulating the principle that services should be equally accessible, it articulates a government obligation to ensure that services are affordable.

In 2002, Lakshmi Dhikta sued the Nepalese government after she was forced to continue an unwanted pregnancy and give birth

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205 *Id.* § 4.4(ii), (iii), (vi), (vii).
206 *Id.* § 4.4 (viii).
207 *Id.* at Third, 22.
208 *Id.* at Fourth, 22.

to a sixth child because she could not afford an abortion at a government health facility.[209] The *Dhikta* case required the Nepalese Supreme Court to consider the scope of a woman's right to abortion following the 2002 decriminalization of abortion and the adoption of a provision in the Interim Constitution recognizing that "every woman shall have the right to reproductive health and rights relating to reproduction."[210] In its decision, the court affirmed that abortion is an important part of women's reproductive rights and recognized that reproductive health and rights are integral to women's human rights to dignity, liberty and autonomy, health, privacy, non-discrimination, freedom from cruel, inhuman, and degrading treatment, freedom from sexual violence, and the benefit from scientific progress.[211]

The Nepalese Supreme Court articulated a robust conception of the fundamental rights protected by its constitution and an affirmative government obligation to ensure them. The court stated that it is insufficient for fundamental rights to be merely declaratory. Instead, people must be able to benefit from the rights in practice.[212] The court infused its conception of rights with a strong equality principle, asserting that rights cannot be confined to a particular class but rather must be equally enjoyed by all.[213] The court also articulated a commitment to ensuring access to abortion care for poor and rural women.[214]

On the issue of affordability, the court emphasized that the government had an obligation to ensure that no woman is denied a legal abortion because she cannot pay for it.[215] It stated that the government should monitor the fees charged for abortion care and set limits to ensure that fees charged take into account women's ability to pay.[216] It also instructed the government to consider providing free services for women who cannot afford to

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209 Melissa Upreti, *Nepal Advances As U.S. Backslides on Women's Rights,* RH REALITY CHECK (Mar. 1, 2011, 6:49 PM) http://www.rhrealitycheck.org/blog/2011/03/01/nepal-takes-huge-step-women-rights-while-backslides.

210 INTERIM CONST. OF NEPAL 2063 (2007) § 20(2), Jan. 15, 2007, *available at* http://www.unhcr.org/refworld/docid/46badd3b2.html; Upreti, *supra* note 209.

211 *Lakshmi Dhikta v. Nepal,* Supreme Court of Nepal 2009, 6 (unofficial translation on file with author).

212 *Id.* at 22.

213 *Id.* at 22, 23, 25, 26.

214 *Id.* at 23, 24.

215 CTR. FOR REPROD. RIGHTS, LAKSHMI DHIKTA V. NEPAL FACT SHEET, *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Lakshmi%20Dhikta%20Factsheet%20FINAL.PDF; Upreti, *supra* note 209.

216 *Dhikta* at 24–26.

pay.[217]

A constitutional vision that focuses on whether people can enjoy rights in practice requires more than "non-interference." It imposes a government obligation to develop and adopt policies to ensure rights. Consistent with high court decisions from other countries,[218] the court recognized its responsibility to ensure that constitutional rights were both observed and implemented,[219] but emphasized that it is the government's responsibility to establish specific laws and policies to realize the rights.[220] However, in addition to generally noting a government obligation to establish infrastructure and monitoring procedures, the court highlighted specific issues for the government to address, including providing information about the decriminalization of abortion and the procedures to obtain services,[221] increasing the number of health workers and expanding their presence throughout the country,[222] and taking measures to ensure that fees charged are reasonable given women's ability to pay, including setting fair rates.[223] As a general principle, the court stated that government policies should distribute services according to the needs of the people.[224] It emphasized the government's efforts would be evaluated by whether the individuals who need services are actually able to access them.[225]

4. Affirmative Obligations to Ensure Access to Abortion

The ECHR, Colombian, and Nepalese decisions are notable for the courts' focus on results—whether or not women can exercise their rights—rather than the adequacy or impropriety of government actions. Like the state abortion funding cases, the courts' analysis is more contextual and less formalistic, focusing on the actual experience of women seeking services.[226] The Colombian and Nepalese courts also articulate a commitment to equality in acces-

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217 *Id.* at 23–25.

218 *See* Soohoo & Goldberg, *supra* note 36, at 1030–32 (describing cases where in the absence of bad faith, courts may issue declarations or recommendations to engage in a dialogic approach, which increases institutional competence, democratic legitimacy, and the likelihood of robust enforcement)

219 Dhikta, at 26.

220 *Id.* at 11–12.

221 *Id.* at 26.

222 *Id.* at 11–12.

223 *Id.* at 22, 23.

224 *Id.* at 23, 25.

225 *Id.* at 22–24.

226 *See supra* Part II.D.2. *See* C-355/06 Translation, *supra* note 194, at 16–17 (noting that illegal abortion is a serious public health problem that "primarily affects adoles-

sing fundamental rights and to ensuring that all women, rich or poor, have access to services[227] that was notably absent in the Supreme Court's decision in *Harris v. McRae*. *Dhikta* in particular recognizes that the government must address the issue of affordability by setting fees and considering the provision of free services.

Applying *Dhikta* and the Colombian Constitutional Court's reasoning to the right to abortion in the United States would require that the government adopt policies to promote women's ability to access abortion care instead of allowing the government to adopt funding policies designed to discourage abortion. Recognizing an affirmative government obligation would require that government policies take steps to remove affordability as a barrier to access for poor women rather than exploit their inability to afford care through discriminatory health care funding and bans on the provision of abortions in public facilities. Although courts imposing affirmative government obligations to ensure rights have been hesitant to require the adoption of specific policy measures, their review typically will consider whether the government has adopted policies that are reasonably crafted to ensure the protected right[228] and find a violation where policies are designed to frustrate rather than achieve that goal. The European Court of Human Rights has stated that if a state recognizes a legal right to abortion it may not "structure its legal framework in a way that would limit real possibilities to attain it."[229] Applying this standard, discriminatory benefit programs that undermine affordability and laws that impose obstacles to private insurance cannot be viewed as reasonable policies designed to ensure access to abortion. Similarly, reasonable policies to fulfill the government's affirmative obligations would require that the government work to improve access to abortion care at public health facilities rather than prohibit it.

B. Government Neutrality: State Court Funding Decisions

R.R., the Colombian Constitutional Court cases, and *Dhikta* provide the most expansive conception of government obligations to ensure reproductive autonomy addressing many of the concerns

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cents, displaced victims of internal armed conflict, and those with the lowest levels of education and income").

227 T-388/09, § 4.4(ii), (iii), (vii); *Dhikta*, at 22–26.

228 Soohoo & Goldberg, *supra* note 36, at 1021; R.R. v. Poland, App. No. 27617/04, ¶¶ 213, 214 (Eur. Ct. H.R. 2011) (holding that Poland had failed to comply with its affirmative obligations but stating that "it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations").

229 *R.R. v. Poland* ¶ 199.

articulated by Professor Copelon and the reproductive justice movement.[230] However, courts have recognized that even absent affirmative government obligations, there are constitutional limitations to the government's discretion to determine what it will or will not fund. This approach was adopted by the state abortion funding cases in rejecting *Harris*'s holding that a discriminatory funding scheme cannot impose an unconstitutional obstacle.[231] Instead, the state cases held that government funding programs cannot impose conditions that discriminatorily burden the exercise of a fundamental right or make invidious distinctions between classes of citizens.[232]

While the state decisions continued to reject an affirmative obligation to ensure that women are able to access abortion services,[233] they held that when the government enacts a policy or program conferring benefits it must allocate them in a neutral

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230 *See supra* Part I.

231 Women of the State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 29–30 (Minn. 1995) ("[T]o the extent that *McRae* stands for the proposition that a legislative funding ban on abortion does not infringe on a woman's right to abortion, we depart from *McRae*."); Doe v. Maher, 515 A.2d 134, 156 (Conn. Sup. Ct. 1986) ("[E]xcepting from the medicaid program of one single medical procedure which is absolutely necessary to preserve the health of the woman . . . constitutes an infringement of the right of privacy . . . under [the Connecticut constitution]").

232 Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 401 (Mass. 1981) ("While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right."); State, Dep't. of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 910 (Alaska 2001) (stating that while the state "may legitimately attempt to limit its expenditures . . . a State may not accomplish such a purpose by invidious distinctions between classes of its citizens").

233 The state decisions uniformly emphasized their rejection of an affirmative government obligation to ensure that women can access abortion or other health care services. Comm. To Defend Reprod. Rights v. Myers, 625 P.2d 779, 780 (Cal. 1981) ("[T]he state has no constitutional obligation to provide medical care to the poor."); *Gomez,* 542 N.W.2d at 28 (noting that plaintiffs arguments relied on the fact that differential treatment interfered with women's decision-making process rather than a state obligation to fund the exercise of every constitutional right); Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658, 666 (W. Va. 1993) (stating that Appellees' assertion that "the state is not obligated to pay for the exercise of constitutional rights" was true); Right to Choose v. Byrne, 450 A.2d 925, 935 n.5 (N.J. 1982) ("[T]he right of the individual is freedom from undue government interference, not an assurance of government funding"); Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 31–32 (Ariz. 2002) ("[W]e do *not* hold that Arizona's right of privacy entitles citizens to subsidized abortions."); *Alaska Dep't of Health*, 28 P.3d at 906 (stating that the issue is "not whether the state is generally obligated to subsidize the exercise of constitutional rights for those who cannot otherwise afford to do so"); Planned Parenthood Ass'n, Inc. v. Dep't. of Human Res. of State of Or., 663 P.2d 1247, 1255 (Or. App. 1983).

way.[234]

Thus, although the state does not have an obligation to fund health care or a woman's decision to exercise her right to have an abortion, once the government takes on the obligation to fund health care for the poor, it must not do so in a way that coerces women's procreative and reproductive health choices.[235] The state decisions held that the adoption of a discriminatory funding scheme implicated fundamental rights, triggering heightened scrutiny under a privacy and due process analysis[236] or an equal protection analysis.[237] The Massachusetts Supreme Court wrote:

> As an initial matter, the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman by its allocation of public funds; in this area, government is not free to "achieve with carrots what [it] is forbidden to achieve with sticks."[238]

The Alaska Supreme Court similarly emphasized that "the underly-

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234 *See, e.g.*, *Myers*, 625 P.2d at 781 (contrasting the *McRae* Court's holding that the federal Constitution does not require justification for discriminatory treatment as long as the program "placed no new obstacles in the path of the woman seeking to exercise her constitutional right" with the California line of cases holding that discrimination in government benefits requires strict scrutiny whether or not a new obstacle is imposed); *Panepinto*, 446 S.E.2d at 666 (holding that the common benefit clause of the state constitution imposes a neutrality requirement when the state provides a vehicle for the exercise of a constitutional right).

235 *Gomez*, 542 N.W.2d at 27 (noting that the right to privacy includes the right to control one's own body and the right to procreation without state interference); *Maher*, 515 A.2d at 152 ("[E]ven though the poverty of the plaintiff women was not the state's making and there may have been no constitutional obligation to pay for the medical treatment for the poor, once the state has chosen to do so it must preserve neutrality.").

236 *Maher*, 515 A.2d at 156–57 (applying strict scrutiny); *Gomez*, 542 N.W.2d at 31 (applying strict scrutiny); *Moe*, 417 N.E.2d at 404 (applying a balancing test).

237 Although each of the courts found that heightened scrutiny was required given the nature of the right at issue, consistent with their state equal protection jurisprudence, they applied slightly different tests. *See, e.g.*, *Simat Corp.*, 56 P.3d at 32 (applying strict scrutiny analysis because of the fundamental right in question); *Byrne*, 450 A.2d at 934 (applying a balancing test); *Alaska Dep't of Health*, 28 P.3d at 909 (holding that Alaska's sliding scale review requires strict scrutiny when the exercise of a constitutional right is involved); *Maher*, 515 A.2d at 159 (ruling that because of the fundamental right at issue the state "must establish both a compelling state interest [. . .] and that no less restrictive alternative is available"); *Dep't of Human Res. of State of Or.*, 663 P.2d at 1247 (applying a test balancing the "detriment to affected members of the class [. . .] against the state's ostensible justification for the disparate treatment").

238 *Moe*, 417 N.E.2d at 402 (quoting LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 933 n.77 (1978)); *Panepinto*, 446 S.E.2d at 666; *Maher*, 515 A.2d at 153; *Simat Corp.*, 56 P.3d at 36.

ing logic" of all the state cases is that "when state government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens."[239]

The neutrality principle espoused in these decisions looks at the overall impact of the funding scheme rather than focusing on the decision not to fund. The Minnesota Supreme Court wrote that the right to privacy protects a "woman's decision to abort" and that "any legislation infringing on the decision-making process . . . violates this fundamental right."[240] The cases reject *Harris*'s arbitrary distinction between coercive government acts that burden the exercise of a right and coercive allocation of benefits to fund government preferences where women do not have the means to fund another choice.[241] Justice Brennan expressed this view in his dissent in *Harris*:

> The fundamental flaw in the Court's due process analysis . . . is its failure to acknowledge that the discriminatory distribution of benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.[242]

Applying the neutrality principle articulated by the state cases and the dissent in the *Harris* decision, current law allowing the federal and state governments to use Medicaid benefits to coerce women's reproductive health and procreative decisions would be impermissible.

C. *Freedom from Government Prohibitions on Private Health Insurance:* Chaoulli v. Quebec

As discussed above, current U.S. abortion funding restrictions would violate affirmative government obligations to ensure that wo-

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239 *Alaska Dep't of Health*, 28 P.3d at 908 (quoting *Panepinto,* 446 S.E.2d at 667); *see also Myers*, 625 P.2d at 781; *Gomez*, 542 N.W.2d at 28; *Byrne*, 450 A.2d at 937; N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 856 (N.M. 1998); *Simat Corp.*, 56 P.3d at 36 (noting a consistency in cases "in the view that funding bans that discriminate against abortions medically necessary only to preserve the health of indigent women were unsustainable once the state had undertaken to provide medically necessary care").

240 *Gomez*, 542 N.W.2d at 31.

241 *Alaska Dep't of Health*, 28 P.3d at 909 ("Judicial scrutiny of state action is equally strict where the government by selectively denying a benefit to those who exercise a constitutional right, effectively deters the exercise of that right.").

242 Harris v. McRae, 448 U.S. 297, 333–34 (1980) (Brennan, J., dissenting), cited by *Gomez,* 542 N.W.2d at 24, 29.

men have meaningful access to abortion under developing international standards articulated by international bodies and the high courts in Colombia and Nepal. Even absent the recognition of affirmative government obligations, the funding restrictions violate a constitutional standard that requires government neutrality as held by the U.S. state court decisions. The new state legislation banning private insurance for abortion arguably poses even greater constitutional problems by creating a government obstacle to individuals' ability to access private health care.

In 2005, the Supreme Court of Canada found that a prohibition on private health insurance violated the right to life, personal security, inviolability, and freedom under section 1 of the Quebec Charter of Human Rights and Freedoms. *Chaoulli v. Quebec* involved a challenge to a Quebec statute that prohibited the purchase of private health insurance for services covered by the public health care system.[243] The legislation was adopted to preserve the integrity of the public health care system[244] and did not reflect any policy against the provision of a specific type of service. Notably, Quebec only prohibited the purchase of private health care insurance.[245] Individuals in need of health services could still purchase the services directly without insurance coverage.[246] They could also access health services through the public health system, but would be subject to lengthy waits.

A majority of four justices found that the law violated the Quebec Charter's analogue to Section 7 of the Canadian Charter of Rights and Freedoms, which provides for the right to "life, liberty and security of the person." Three of the justices also found that the provision violated Section 7[247] of the Canadian Charter based on the denial of "the right to access alternative health care"[248] and

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243 Chaoulli v. Quebec (Attorney General), [2005] S.C.C. 35 (Can.). For further discussion of *Chaoulli,* see Soohoo & Goldberg, *supra* note 36, at 1058–59; Hill, *supra* note 103, at 527.

244 *Chaoulli*, 1 S.C.C. at 45.

245 *Id.* at 66–67.

246 *Id.*

247 Canadian courts generally interpret Section 7 to impose negative obligations rather than positive duties to provide health care. Mel Cousins, *Health Care and Human Rights After* Auton *and* Chaoulli, 54 McGill L.J. 717, 737 (2009) ("[T]he courts have, to date, taken a limited view of *Chaoulli* and have not been prepared to adopt the somewhat expansive approach of that judgment so as to impose positive duties on the state in the area of health care under section 7 of the *Charter.*"); Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 Emory L.J. 1093, 1110 (2007).

248 *Chaoulli*, 1 S.C.C. at 84 (McLachlin, C.J., and Major & Bastarache, J.J., concurring).

the "loss of control by an individual over [his or] her own health."[249]

The concurring opinion found that the ban limited "access to private health services by removing the ability to contract for private health care insurance."[250] Although private services were available, the justices found that as a practical matter most individuals rely upon health insurance to cover health expenses and that as a result of the ban only the very rich would have access to private health care and that most Quebecers would be subject to lengthy delays resulting in adverse physical and psychological consequences.[251] The majority opinion similarly found that the ability to obtain private health care without insurance was "almost illusory" because "[t]he prohibition on private insurance creates an obstacle that is practically insurmountable for people with average incomes."[252]

Applying the Canadian concept that the right to personal inviolability and security prohibits government restrictions that undermine individuals' ability to access health care, current state law bans on private insurance that prevent women from accessing abortion care by prohibiting health insurance coverage would be impermissible. Although the Supreme Court has not held that the right to privacy encompasses the right to be free from government obstacles in accessing health care,[253] some state courts have adopted a view similar to the Canadian Supreme Court that the right to privacy and personal security may include the right to preserve and protect one's health.[254]

Although the approaches adopted by the high courts in other countries and the state courts that have struck down Medicaid funding restrictions diverge from current Supreme Court jurispru-

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249 *Id.* at 85.

250 *Id.* at 66–67.

251 *Id.* at 66–68.

252 *Id.* at 45.

253 *But see* Hill, *supra* note 103, at 531–37 (arguing that the "right to make medical treatment decisions without government interference—run[s] through a long line of Supreme Court and lower court cases." Although the "negative constitutional right to health" is not explicitly referred to as the basis for a Supreme Court holding "it is a strain that intersects and overlaps with other rights in a wide range of substantive due process cases."). *Id.* at 531.

254 Doe v. Maher, 515 A.2d 134, 151 (Conn. Sup. Ct. 1986); Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982)(citing Tomlinson v. Armour & Co., 70 A. 314 (N.J. 1908), for the proposition that, "[a]mong the most [important] of personal rights, without which a man could not live in a state of society, is the right of personal security, including 'the preservation of a man's health from such practices as may prejudice or annoy it'").

dence, they provide a possible road-map for future arguments to change and advance the law at the state or federal level. They also provide a normative framework for a more robust concept of reproductive rights that can be used in legislative and political advocacy and grassroots organizing and mobilization. The concept of a government obligation to ensure that women can access their rights can be used to encourage public dialogue around the questions asked by the Supreme Court of Nepal: are services affordable and accessible and if not, what should the government be doing to make them so? This dialogue would support efforts to beat back existing abortion funding restrictions, but would also support the creation of government programs to address other structural barriers that prevent women from accessing reproductive health services. At a more modest level, the concept of government neutrality could support efforts to prohibit discriminatory health care coverage in both public health care and the private insurance market.[255]

CONCLUSION

The Supreme Court's abortion funding cases allowed the federal government to use Medicaid funding to create, as a practical matter, a different set of rights for the rich and the poor. Ironically, rather than expanding insurance coverage for medically necessary abortions, health care reform is likely to result in the largest expansion of the Hyde restrictions since the amendment went into affect in 1977. These restrictions will not only affect low income women who receive health care coverage from the federal government, but will also be extended to women who buy their own health insurance through the new insurance exchanges and on the private market.

In the 1980s, the reproductive rights movement failed to sufficiently mobilize in response to the abortion funding cases. The failure to challenge the Supreme Court's conception of reproductive choice as a negative right or its assertion that Congress had the

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[255] Laura Bassett, *Reproductive Parity Act: Washington Considers Groundbreaking Abortion Rights Law,* HUFFINGTON POST POLITICS (Jan. 13, 2012, 5:02 PM) *available at* http://www.huffingtonpost.com/2012/01/13/washington-abortion-reproductive-parity-act_n_1205415.html. An example of legislation inspired by the neutrality principle is the Reproductive Parity Act, introduced in Washington State in 2012. *Id.* Although it failed to pass, the Act would have required that every insurance policy that covered maternity care also cover abortion. *Id.* Sponsors described the bill as an attempt to ensure that the implementation of the ACA does not undermine women's abortion coverage. *Id.*

discretion to manipulate Medicaid health benefits to coerce poor women's reproductive health decision-making and procreative autonomy paved the way for increased abortion restrictions in the 1990s and the current legislative attempts to impose abortion insurance restrictions on all women.

Because current state laws banning private insurance coverage for abortion services do not constitute "public funding restrictions" allowed under *Harris v. McRae*, courts may hold that they are unconstitutional under the improper purpose prong of the undue burden standard. However, prohibiting private insurance bans is only a step toward "winning back what we have lost." The Supreme Court's abortion funding cases opened the door to the use of government programs to coerce women's reproductive health and procreative decision-making based on the formalistic distinction that government funding allocations do not create new obstacles for poor women who seek an abortion. *Casey* went further, holding that states can impose an obstacle as long as it does not have the purpose or effect of creating a substantial obstacle. These standards have resulted in a steady stream of legislation and restrictions designed to whittle away women's access to abortion services, to create a right under the law that is not accessible in fact.

Although the neutrality standard adopted by the state courts that struck down Medicaid funding restrictions would be a step in the right direction, a woman's right to reproductive autonomy cannot be truly protected absent legal and political recognition that the government has an affirmative obligation to ensure her rights. This standard would require that the government adopt programs to support a woman's right to have an abortion and prohibit policies designed to coerce her decisions or to thwart her ability to exercise her rights.

RECALIBRATING AFTER *KIOBEL*: EVALUATING THE UTILITY OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT ("RICO") IN LITIGATING INTERNATIONAL CORPORATE ABUSE

Julian Simcock†

ABSTRACT

This analysis seeks to explore the unexamined question of whether the Racketeer Influenced and Corrupt Organizations Act ("RICO" or "The Act") could one day become a useful surrogate for the Alien Tort Statute ("ATS") in litigating international corporate abuses. Decades after the ATS became a robust tool for bringing claims for international violations in U.S. courts, the U.S. Court of Appeals for the Second Circuit recently ruled in Kiobel v. Royal Dutch Petroleum Co. *that corporations cannot be held liable for torts in violation of the law of nations under the ATS.*[1] *Rulings by the D.C Circuit*[2] *and the Seventh Circuit*[3] *quickly breathed new life into the debate, and the circuit split is now destined for resolution by the Supreme Court. Although the final outcome is still unknown,* Kiobel*'s reverberations are already apparent. With corporations potentially immune from the reach of the ATS, the search has begun for vehicles by which to sustain momentum in litigating international corporate abuses.*

Litigators have highlighted RICO as one potential alternative.[4] *Although originally structured as a domestic device to combat organized crime, over the past decade RICO has been deployed increasingly often in litigation concerning international corporate abuse.*[5] *This Note seeks to*

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1 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S.Ct. 472 (2011).

2 *See* Doe v. Exxon Mobil Corp., 654 F.3d 11,15 (D.C. Cir. 2011) ("[C]ontrary to . . . the Second Circuit, we join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.").

3 *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) ("All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable [under the ATS].").

4 *See* Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1248–49 (N.D. Cal. 2004) (summary judgment order); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20–27 (S.D.N.Y. Feb. 28, 2002).

5 *Id.*

explore the question of whether RICO is truly a useful tool for this realm of litigation.

I have been unable to find any work that addresses this issue specifically. Commentators have addressed the best manner in which to shape RICO claims as an adjunct *to ATS litigation,*[6] *but never in isolation, and never in a manner that tackles post-*Kiobel *implications. As I explain in this Note,* Kiobel *has added increased urgency to the search for other strategies. Commentators have also addressed RICO's applicability to domestic corporations,*[7] *and RICO's use in casting a web of liability across peripheral actors*[8]*—both of which I draw upon in my analysis. None of these assessments, however, considers RICO's utility in litigating against such entities for actions committed* abroad*, an issue especially worthy of exploration given the recent developments in ATS litigation.*

This Note builds on work conducted by Beth Stephens concerning the Alien Tort Statute.[9] *It also draws upon the work of Chimène Keitner in helping to establish the context for why, given the complicated choice of law debate that surrounds ATS litigation, the push toward RICO has some understandable appeal.*[10] *I use work by G. Robert Blakey, Professor of Law at Notre Dame Law School and expert on RICO, to provide the foundations for my assessment regarding the evolution of RICO's domestic application.*[11] *Finally, from a practical perspective, this piece also builds upon the litigating tactics that were deployed in two well-known ATS cases:* Bowoto v. Chevron Texaco Corp.[12] *and* Wiwa v. Royal Dutch Petroleum Co.[13] *In both instances, the litigators supplemented their ATS claims with RICO claims, providing the backdrop upon which my analysis regarding RICO's extraterritorial obstacles is formed.*

I conclude that intuitions regarding RICO's utility in this realm have proven largely misguided. A thorough analysis of RICO's structure, evolution in domestic case law, and burgeoning use in cases concerning international activity reveals that despite RICO's appeal, it is a limited tool for litigating against corporate abuse abroad. Although RICO offers

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6 *See* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 42 (2d ed. 2008).

7 *See e.g.*, G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 243 n.20 (1982).

8 *See* Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the* Reves *"Operation or Management" Test to RICO Conspiracy,* 97 J. CRIM. L. & CRIMINOLOGY 1 (2006).

9 *See* STEPHENS ET AL., *supra* note 6, at 42.

10 *See* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases,* 60 HASTINGS L.J. 61, 62–65 (2008).

11 *See, e.g.*, Blakey, *supra* note 7, at 307–325; *see also* G. Robert Blakey, *On the Waterfront: RICO and Labor Racketeering,* 17 AM. CRIM. L. REV. 341 (1980); G. Robert Blakey & B. Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts–Criminal and Civil Remedies,* 53 TEMP. L.Q. 1009 (1980).

12 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

13 No. 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

several structural and remedial options that are helpful to litigators—particularly for plaintiffs who have alleged economic claims, such as injury to business or property—RICO's disadvantages outweigh these benefits. RICO provides a generally narrow set of remedial options, is hamstrung by a more onerous test of extraterritorial jurisdiction than that of its ATS counterpart, and—based on the trajectory of domestic case law—will likely be of limited help in avoiding the complicated choice of law issues which remain a part of ATS litigation. These findings will remain true regardless of the way in which Kiobel *may be resolved by the Supreme Court. As a result, RICO claims are best used, if at all, as an adjunct tactic to ATS litigation, rather than as the primary thrust of legal strategy.*

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Introduction

By almost any account, September 17, 2010 was a trying day for public interest lawyers. Decades after the Alien Tort Statute ("ATS") had become a robust tool for bringing claims for international violations in U.S. courts,[14] the Second Circuit ruled in *Kiobel v. Royal Dutch Petroleum* that corporations cannot be held liable for torts in violation of the law of nations under the ATS.[15] Rulings by the D.C. Circuit[16] and the Seventh Circuit[17] quickly breathed new life into the debate, prompting the Supreme Court to grant certiorari and resolve the split. But definitive answers were slow to arrive. On March 5, 2012, the Supreme Court took the unusual step of asking the parties to return with expanded arguments.[18] It called upon parties to address the following question in a revised round of briefing: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[19]

The reverberations are already apparent. While the ATS had previously allowed litigators to bring civil actions in U.S. courts for a small range of violations against the law of nations, if the Second Circuit's ruling prevails, corporate entities will be largely out of reach. In fact, given the nature of the Court's March 5th order, the ramifications may be even more expansive: the Alien Tort Statute may be seriously circumscribed even in its applicability to non-corporate actors. Accordingly, as the parties in *Kiobel* push forward, litigators in the broader community appear to be undergoing a recalibration—a search for alternative vehicles by which to sustain

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14 The ATS had existed for over 200 years, yet the statute had received little attention until 1976, when a team of enterprising lawyers employed the device on behalf of a Paraguayan client seeking justice for the torture and murder of her husband. Their efforts led to the landmark decision, Filártiga v. Peña-Irala, which expressly enabled the victims of international rights violations to bring civil actions in U.S. federal courts. 630 F.2d 876 (2d Cir. 1980).

15 621 F.3d 111 (2d Cir. 2011).

16 *See* Doe v. Exxon Mobil Corp., No. 09–7125 2011 WL 2652384 (D.C. Cir. 2011) ("[C]ontrary to . . . the Second Circuit, we join the Eleventh Circuit in holding that neither the text, history, nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.").

17 *See* Flomo v. Firestone, 643 F.3d 1013, 1017 (7th Cir. 2011) ("All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable [under the ATS]").

18 Order In Pending Case, 565 U.S. __ (Mar. 5, 2012) (*available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/10-1491-order-rearg-3-5-12.pdf).

19 *Id.*

the momentum in litigating corporate involvement in extraterritorial abuses. If the Supreme Court endorses the Second Circuit's ruling on the issue, or if it limits the ATS more broadly, the search for alternatives will develop a renewed sense of urgency.

While practitioners may struggle to find a vehicle with the same potency as the ATS, litigators have highlighted the Racketeer Influenced and Corrupt Organizations Act ("RICO") as a potential alternative.[20] Although originally structured as a domestic device to combat organized crime, over the past decade RICO has been deployed increasingly often in litigation concerning international corporate abuse.[21]

The analysis herein seeks to explore the unexamined question of whether RICO could one day prove a useful surrogate for ATS litigation. A thorough analysis of RICO's structure, evolution in domestic case law, and burgeoning use in cases concerning international activity, reveals that despite RICO's intuitive appeal, it is a limited tool for litigating against corporate abuse abroad. Although RICO offers several structural and remedial options that are helpful to litigators—particularly for plaintiffs who have alleged economic claims, such as injury to business or property—RICO's disadvantages outweigh these benefits. The Act provides a generally narrow set of remedial options, is hamstrung by a more onerous test of extraterritorial jurisdiction than that of its ATS counterpart, and—based on the trajectory of domestic case law—will likely be of limited help in avoiding the complicated choice of law issues which remain a part of ATS litigation. These findings will remain true regardless of the way *Kiobel* is resolved by the Supreme Court. As a result, RICO claims are best used, if at all, as an adjunct tactic to ATS litigation, rather than as the primary thrust of legal strategy.

A. The Evolution of ATS Litigation and the Search for New Methods

Although *Kiobel* has given the search for alternative litigation strategies new urgency, the trend was well underway before the Second Circuit's decision. Almost two decades after the resurrection of the ATS enabled the victims of international human rights violations to bring civil actions in federal courts,[22] two trends in ATS

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[20] *See, e.g.*, Bowoto v. Chevron Texaco Corp, 312 F. Supp. 2d 1229, 1248-49 (N.D. Cal. 2004); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20–27 (S.D.N.Y. Feb. 28, 2002).

[21] *See* cases cited *supra* note 20.

[22] *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

litigation led litigators to reach for supplemental tactics. First, ATS-related litigation shifted increasingly from individuals and government officials to corporate entities.[23] Unlike earlier ATS cases, this recent wave of claims pose substantial economic consequences that cannot easily be shirked in the event of adverse judgments.[24] Second, corporate-based ATS litigation hinges more often on proving a company's *complicity* in torts, rather than ascribing fault for the direct perpetration of crimes. This process requires parsing a complicated and largely unresolved choice of law question;[25] and, in turn, proving the existence of the requisite mental state associated with that standard.[26] In particular, courts have split on whether to employ a purposefulness standard in cases involving international accomplice liability, or whether knowledge should suffice as the requisite mental state.[27]

B. Exploring RICO as a Potential Alternative

Originally designed as a legislative response to the growing problem of organized crime, RICO has since been used to target the criminal activities of unions,[28] abortion protest groups,[29] and a wide range of corporate entities.[30] The well-documented flexibility of RICO as a tool for ascribing liability to individuals who are removed from the direct perpetration of crimes has led some commentators to suggest that the Act may be an appropriate vehicle by which to pursue corporate involvement in international abuses.[31] In light of these suggestions, and in the context of the broader shifts taking place in ATS litigation, a closer reevaluation of RICO is instructive.

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[23] *See* David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STANFORD INT'L L. J. 121, 129 (2010).

[24] This is unlike many of the default judgments awarded against former government officials in the earlier rounds of ATS cases. Many of the defendants refused to remain in the U.S. to defend against claims, and in the event that a final judgment was awarded against them, few had the financial means with which to adequately compensate the victims. *See* STEPHENS ET AL., *supra* note 6, at 42.

[25] Chimène Keitner has provided a considered view of both sides in this debate. *See* Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 62–65 (2008).

[26] *Id.*

[27] *Id.*

[28] *See* Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union, 639 F.2d 782, 790 (D.C. Cir. 1988).

[29] *See* Nat'l Org. For Women v. Scheidler, 510 U.S. 249 (1994).

[30] *See, e.g.*, Nat'l Asbestos Workers Med. Fund v. Phillip Morris, Inc., 74 F. Supp. 2d 221, 229 (E.D.N.Y. 1999); H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 244 (1989).

[31] *See* STEPHENS ET AL., *supra* note 6, at 113–17.

The contours of this analysis include four parts. Part I explores the congressional history and statutory language of RICO, as well as some of the reasons why RICO's structure lends itself to an intuitive, if ultimately misguided, application to multinational corporate abuses. My assessment in this Part focuses largely on RICO's positive characteristics in pursuing the type of claims often involved in ATS litigation. It also provides context for why the decision regarding whether to employ RICO in such circumstances is not straightforward, and worthy of exploration. Part II explores the evolution of RICO in domestic litigation, and illustrates that although RICO is well designed for litigation against corporate defendants, domestic case law has substantially limited the Act's remedial offerings. Part III examines RICO's use in litigation regarding international abuses, and the considerable difficulties involved in establishing extraterritorial jurisdiction under RICO. Finally, Part IV assesses the potential value of RICO as a method of avoiding the more complicated choice of law debate regarding complicity liability. It concludes that based on domestic jurisprudence, RICO is unlikely to allow for a more direct avenue of ascribing liability, leaving litigators once again embroiled in the choice of law debate which continues to frustrate ATS litigation.

PART I: STATUTORY HISTORY AND LANGUAGE—RICO'S INTUITIVE, IF ULTIMATELY MISLEADING, APPEAL IN LITIGATING AGAINST CORPORATE MULTINATIONALS

A. RICO's Congressional History

In 1970, Congress passed RICO as a response to the growing domestic problem of organized crime. The Act was designed to prohibit "conducting or conspiring to conduct the affairs of an enterprise engaged in (or whose activities affect) interstate commerce 'through a pattern of racketeering activity.'"[32] The political impetus behind RICO is expressly depicted in the congressional record at the time: "Congress finds that organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."[33]

Congress also highlighted the legal system's increasingly ap-

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[32] 18 U.S.C. § 1962(b) (2006).

[33] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose).

parent deficiencies: "organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact."[34] In short, the federal justice system was grappling with a new species of criminal entity—one in which key decision makers were largely removed from the ground-level crimes which their organizations perpetrated. As a result, a new legislative device, replete with the capacity to link multiple parties together in the form of an "enterprise," and able to identify "patterns of activity," became necessary to counteract the threat. As will be explained, these characteristics are an important part of understanding why RICO has generated appeal as one method of litigating against multinational corporations.

Debate continues regarding the original intent behind RICO's extraterritorial applicability, and also the intended scope of its remedial possibilities, both of which are addressed later in this analysis. For now, however, it bears mentioning that from a *structural* perspective, the congressional intent underlying RICO does appear to align with the Act's use in litigation against multinational corporate defendants. One of Congress's primary goals was to bridge the evidentiary distance between the decision makers and the crimes themselves. This problem continues to frustrate litigators in pursuing claims against corporate defendants abroad, which, given the contractual nature of most of their activities, are more likely to be peripherally, rather than directly, involved in the perpetration of the alleged crimes.

B. Statutory Language

Even before RICO's evolution into a tool for litigation beyond traditional notions of organized crime, the plain language of the statute provides several potent enforcement mechanisms for ascribing liability. RICO outlines four substantive violations: the first three define the substantive offenses of the Act, and the fourth makes it a crime to conspire to violate any of the three preceding.[35] Subsections (a) and (b) are primarily aimed at the tendency for organized crime to take over otherwise legitimate businesses.[36] As a

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[34] *Id.*

[35] 18 U.S.C. § 1962(a)–(d).

[36] Subsection (a) states in part, "[i]t shall be unlawful for any person who has

result, although these sections have been used in some litigation against corporate defendants, they are more appropriate as a means of targeting crime syndicates—i.e., wholly illegitimate enterprises—which are attempting to influence or acquire otherwise legitimate businesses.

The third subsection, however, works in reverse. Rather than focus on the illegal takeover of a business, it applies when a business—or an employee of the business—begins to conduct its affairs in a way that qualifies as racketeering. It states in part that "[i]t shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering . . . ."[37] In this regard, "section 1962(c) aims at corruption of the enterprise from within."[38] To that end, subsection (c) provides a more obvious tool by which to target corporations engaged in international abuses. When an employee of a multinational firm with otherwise legitimate business practices begins to conduct her work using, or conspiring to use, methods which qualify as racketeering, the possibility of a RICO violation surfaces.

C. Predicate Offenses—What Counts as "Racketeering"?

As far as what constitutes racketeering, subsection 1961 of the Act provides a lengthy and specific list. Racketeering activity "means . . . any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in obscene matter . . . [or controlled substances], which is chargeable under State law and punishable by imprisonment for more than one year

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received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise." *Id.* § 1962(a). Subsection (b) takes this regulation one step further, prohibiting the direct acquisition of a business through racketeering, rather than the indirect investment of illegally obtained funds. It states in part that "[i]t shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* § 1962(b). Combined, these subsections prevent organizations both from laundering illegally obtained profits through the acquisition of legitimate businesses, and also from obtaining legitimate businesses through more assertive means (via coercion, threats, or pressure regarding "unlawful debts," for example).

37 *Id.* § 1962(c).

38 KAPLAN, WEISBERG & BINDER, CRIMINAL LAW: CASES AND MATERIALS (7th ed. 2012).

. . . ."[39] In addition, any act which is indictable under Title 18 of the U.S. Code can constitute racketeering, including, among others, "bribery, counterfeiting, theft from interstate shipment . . . obstruction of justice, obstruction of criminal investigations . . . [and] interstate transportation of stolen property."[40]

With an eye toward the Act's potential applicability in cases against multinational corporations, the intuitive appeal is once again understandable. Many of the claims that have been brought under ATS cases (and other human rights litigation) are featured as predicate offenses under RICO as well. Specifically, the acts of murder, robbery, bribery, extortion, obstruction of criminal investigations, and transportation of stolen property are all either forms of international human rights abuses, or activities which take place frequently in the context of such abuses.

These advantages, however, are tempered somewhat by RICO's requirement that there be a "pattern" of racketeering activity. Section 1961 of the Act defines a "pattern of racketeering activity" as requiring "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[41]

The flexibility of the pattern requirement is in keeping with Congress's larger intention to create a dynamic and functional law enforcement tool. Recent court rulings, however, have provided some limitations regarding how far the concept can be stretched. Courts have looked in particular for both a numeracy variable (how many times has the action taken place?), and a qualitative relatedness variable (do the acts have some sort of common relationship?).[42] In *Sedima v. Imrex Co.*, the Supreme Court established "that while two acts are necessary, they may not be sufficient."[43] On the other hand, there also need not be a temporal separation between the acts. In *United States v. Indelicato*, the Second Circuit Court of Appeals held that in some circumstances a pattern of activity "may be found. . . in the simultaneous commission of like acts

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39 18 U.S.C. § 1961(a) (2006).

40 *Id.*

41 *Id.*

42 Robert Weisberg provides a comprehensive discussion of the vagaries associated with defining a pattern which meets the concepts of both continuity and relatedness. *See* KAPLAN, WEISBERG & BINDER, *supra* note 38, at 9.

43 Sedima v. Imrex Co., 473 U.S. 479, 496 n.14 (1985).

for similar purposes against a number of victims."[44] The Supreme Court's ruling in *H.J. Inc. v. Northwestern Bell Co.* added much needed clarity when it articulated a six-step process to identify when continuity and relatedness were both present.[45] The test continues to allow litigators substantial flexibility, and has reduced confusion regarding how best to identify a pattern. To determine the qualitative relationship component of the pattern, the test allows litigators to prove merely that the acts are "related to an external organizing principle."[46] Equally important, with regard to the quantitative component, the ruling appears to leave the *Indelicato* standard largely intact. That is, if a *threat* of continuity can be inferred from acts that occurred simultaneously, the requisite continuity component has been met and the existence of a pattern can still be established.

In the context of the difficulties that ATS litigators have faced, the predicate offenses enumerated under RICO are once again understandably appealing. The Act, by contrast to the ATS, provides a lengthy and specific list of violations that fall under its purview. Moreover, the evolution of domestic case law has continued to allow great flexibility in establishing a "pattern"—so much so that a pattern may be established via the *simultaneous* occurrence of acts which feature only some relation to an "external organizing principle."

D. The Flexibility of the Term "Enterprise" as Applied to Corporate Defendants

Finally, a lengthy precedential history places a range of corporations and corporate activity well within RICO's reach.[47] Much of this can be traced to the flexibility of the term "enterprise."[48] In *United States v. Cauble*, the Fifth Circuit Court of Appeals held that

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44 United States v. Indelicato, 865 F.2d 1370, 1383 (2d Cir. 1989).

45 *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 242–44 (1989).

46 *H.J. Inc.*, 492 U.S. at 238.

47 *See Sedima*, 473 U.S. at 496 n.14 (1985); *Indelicato*, 865 F.2d at 1381; *H.J. Inc.*, 492 U.S. at 244.

48 Some of this flexibility can be attributed to the range of uses depicted in the statute itself. *See* 18 U.S.C. § 1962 (2006). As recent scholarship has noted, enterprise is used in at least four different ways in Section 1962 alone: it is, in various contexts, a "prize," an "instrument," a "victim," and a "perpetrator." *See e.g.*, Blakey, *supra* note 7, at 307–25; Blakey, *supra* note 11, at 341; Blakey & Gettings, *supra* note 11, at 1009. Section 1961 provides a list of groups which fall under the definition, which "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961 (2006). As denoted by the term "includes," Congress appears to have intended that this be an illustrative rather than exhaustive list.

RICO applies to "enterprise criminality" broadly, which consists of "all types of organized criminal behavior . . . from simple political corruption to sophisticated white-collar crime schemes . . . ."[49] More importantly, the term enterprise extends beyond corporations that are wholly illegitimate or corrupt. The Supreme Court's holding in *Sedima v. Imrex Co.* placed otherwise respectable businesses squarely within RICO's reach if they were found to be engaging in criminal activity.[50] Although the Court acknowledged that "in its private civil action, RICO [was] evolving into something quite different from the original conception of its enactors,"[51] it nevertheless resisted calls to curb the Act's application. In overturning the lower court's ruling, the Court interpreted congressional intent expansively:

> [C]ongress wanted to reach both 'legitimate' and 'illegitimate' enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.[52]

The court based this evolution largely on the "breadth of the predicate offenses" which included such corporate-oriented activities as "wire, mail and securities fraud."[53]

The Court's expansive interpretation in *Sedima* was once again based on both the intentions of Congress in enacting RICO, and also the inference to be drawn from Congress's use of a wide list of predicate offenses to constitute racketeering. This precedential history has enabled litigators to employ RICO as a potent tool for domestic litigation against corporate defendants. As the following parts depict, however, RICO's intuitive structural appeal is eventually outweighed by other limitations. In particular, the Act's limited remedial advantages, burdensome requirements for extraterritorial jurisdiction, and inability to avoid the complex choice of conspiracy law debate, all serve to frustrate the Act's utility in litigating against corporate multinationals.

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49 706 F.2d 1322, 1330 (5th Cir. 1983) (quoting Blakey & Gettings, supra note 11, at 1013–14).

50 *See Sedima*, 473 U.S. at 499–500.

51 *Id.* at 500.

52 *Id.* at 499.

53 *See id.* at 500.

PART II. THE EVOLUTION OF RICO IN DOMESTIC CASE LAW—A TOOL WITH LIMITED REMEDIAL OPTIONS

As noted, the application of RICO has become more expansive, reaching beyond traditional notions of organized crime to a variety of conceptions of criminal enterprise. Despite these advantages, however, the scope of RICO's civil remedies has received a much narrower interpretation by U.S. courts. The result is that while RICO's wide applicability to corporations is helpful, the scope of its civil remedies substantially narrows the pool of plaintiffs that can receive compensation.

A. RICO's Limited Remedial Scope

RICO's interpretation in domestic case law has substantially limited its remedial advantages. As previously mentioned, RICO provides for a civil remedy at law. Section 1964(a) of the Act gives courts the power to award injunctive relief including "prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . . or ordering dissolution or reorganization of any enterprise."[54] In some circumstances, RICO also stipulates the possibility of substantial punitive damages, including "threefold the damages [sustained]" as well as "the cost of the suit, including a reasonable attorney's fee."[55] This provision, however, is reserved only for individuals who have been "injured in [their] business or property."[56] The manner in which this latter restriction has been interpreted by courts substantially limits the Act's potential for garnering remuneration in cases involving multinational corporate abuse.

With regard to seeking compensation for injuries (rather than injunctive relief) the enumerated categories of "injury to business" and "injury to property" provide obvious restrictions. Their inclusion makes clear that Congress was intending to compensate victims for a somewhat narrowly tailored type of harm, such as innocent business owners who had lost their profits (or worse) through acts of racketeering. This restriction sits in contrast, however, to an uncodified portion of the RICO statute in which Congress articulates its intention that RICO "be liberally construed to effectuate its remedial purposes."[57] This juxtaposition has provided

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54 18 U.S.C. § 1964(a) (2006).

55 *Id.* § 1964(c).

56 *Id.*

57 Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (codified with some differences in language at 18 U.S.C. § 1961).

ample room for disagreement among courts regarding how far to extend the scope of what constitutes a business or property related injury.[58]

Despite this congressional guidance, courts have almost uniformly held that personal injuries do not qualify as injuries to business or property.[59] As such, these elements appear to restrict the pool of potentially successful plaintiffs to those who had some form of objective economic interest at stake. In fact, the Seventh and Eleventh Circuits have gone so far as to interpret injury to business or property as a requisite to establish standing, rather than an element of the cause of action.[60] Although the most expansive of existing interpretations permits the inclusion of "employment losses" under the category of "business," and also includes "intangible items" under the category of "property," none appear to provide for the possibility of reparation for personal injury itself.[61]

The extent to which plaintiffs can recover from economic losses which flow from personal injuries is the subject of greater debate. Yet the weight of authority once again leans toward a narrow remedial scope. In *Grogan v. Platt*, the Eleventh Circuit considered claims from the estates of F.B.I. agents that had been murdered in a gun battle with suspected bank robbers.[62] The plaintiff estates sought, among other claims, compensation for the resulting economic losses of the murders, including lost wages and funeral expenses.[63] The court engaged in a lengthy interpretation of congressional intent, and ultimately concluded that while the plaintiffs' argument had "some merit," Congress had not intended RICO to provide this manner of remedy.[64] The court therefore affirmed the district court's summary judgment against the plaintiffs as to their RICO claims.[65]

Although this decision has been followed by other courts seeking to parse the scope of RICO's remedies,[66] it has also met with substantial criticism. In *National Asbestos Workers Medical Fund v.*

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58 *See* Bowoto v. Chevron Texaco Corp, 312 F. Supp. 2d 1229, 1248-49 (N.D. Cal. 2004); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20–27 (S.D.N.Y. Feb. 28, 2002).

59 *See* Blakey & Gettings, *supra* note 11, at 1013–14.

60 *See* Evans v. City of Chicago, 434 F.3d 916, 924 (7th Cir. 2006); Grogan v. Platt, 835 F.2d 844, 846 (11th Cir. 1988).

61 *See* STEPHENS ET AL., *supra* note 6, at 116.

62 *Grogan*, 835 F.2d at 845.

63 *Id.*

64 *Id.* at 846–48.

65 *Id.* at 848.

66 *See, e.g.*, Evans v. City of Chicago, 434 F.3d 916, 930 (11th Cir. 2006).

Phillip Morris, Inc., the Eastern District of New York considered claims from a group of plaintiffs who managed self-insured trust funds that provided health care benefits to union workers.[67] The plaintiffs sought compensation under RICO for the "economic injuries associated with treatment of smoking related injuries."[68] By contrast to *Grogan,* the court upheld the plaintiffs' claims, and delivered an emphatic endorsement of RICO's ability to compensate victims for economic losses which derive from personal injury:

> The recovery of pecuniary losses associated with physical injuries directly caused by racketeering conduct is consistent with the language of the RICO statute. Such claims, furthermore, would materially advance the statute's legislative purposes of deterring racketeering, in all its forms, and of remedying, as fully as practicable, the economic consequences of racketeering."[69]

Despite this isolated example, however, successful efforts to establish standing through the economic damages which flow from personal injury are rare. Contrary to the holding in *National Asbestos Workers Medical Fund,* the more restrictive *Grogan* ruling has found enduring traction in modern RICO cases.[70]

B. A Narrower Class of Parties Eligible for Relief

Placing these holdings in the context of claims against multinational corporations, it becomes clear that the pool of applicants capable of garnering compensation via RICO is limited. A business or landowner who, in the course of suffering abuses, lost either business or property holdings, would likely fall under the purview of RICO's civil remedies. But the more common profiles—individuals who have sought the help of litigators by virtue of the *human* suffering they have incurred—fall largely outside the realm of RICO's civil compensation provision. This does not, of course, restrict RICO's remedial scope to a point of complete futility. The

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67 74 F. Supp. 2d 221, 224 (E.D.N.Y. 1999).

68 *Id.* at 229.

69 *Id.* This perspective found similar traction in *Libertad v. Welch*, a First Circuit ruling concerning claims from women who had sought reproductive health services at blockaded clinics and had been intimidated by protestors outside. 53 F.3d 428 (1st Cir. 1995). Although the court ultimately found that the plaintiffs lacked standing because they claimed no injuries beyond general intimidation and harassment, the opinion suggested that economic injuries, and even physical injury itself, would have been sufficient to confer standing. *Id.* at 437. The court held that "Plaintiffs. . . could have standing to sue under RICO, if they were to submit sufficient evidence of injury to business or property such as lost wages or travel expenses, actual physical harm, or specific property damage sustained as a result of a RICO defendant's actions." *Id.* at 437 n.4.

70 *See, e.g., Evans*, 434 F.3d at 924–25.

option to recover damage to business or property is not provided for under the ATS, as courts have generally held that property claims do not meet the requisite standards of a "widely accepted, clearly defined violation of the law of nations."[71] Rather than pursuing RICO as a primary legal tactic, however, litigators should consider its utility as an adjunct strategy to ATS claims. In doing so, they both broaden the scope of claims that can be made, and also slightly expand their remedial opportunities. Moreover, as the following sections depict, the onerous requirements of establishing jurisdiction, coupled with RICO's limited advantages for ascribing liability, further establish that RICO claims are not worth pursuing in isolation.

Part III. Litigating International Abuses with RICO—The Obstacle of Extraterritorial Jurisdiction

Although RICO has enjoyed burgeoning use in the realm of international litigation, the case law in this area is sparser than in the domestic arena. This paucity is further compounded by the lack of final judgments available—in several instances, although RICO claims have survived early motions for summary judgment, parties have agreed upon a settlement before a final verdict is reached. From the limited amount of case law that is available, however, the requirements for establishing extraterritorial jurisdiction under RICO have emerged as a substantial obstacle, significantly more onerous than the steps necessary to establish extraterritorial jurisdiction under the ATS. In *Bowoto v. Chevron Texaco Corp.* and in *Wiwa v. Royal Dutch Petroleum*—which both featured alleged abuses by extraction companies in the Niger Delta—the plaintiffs' RICO claims survived the initial rounds of pleading.[72] This progress elicited hopeful commentary from human rights proponents.[73] A more complete evaluation, however, reveals that the claims did not survive long. In both cases, RICO claims were dismissed for failure to uncover sufficient evidence during discovery to substantiate extraterritorial jurisdiction.[74] The courts demon-

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71 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 710–14 (2004).

72 *See* Bowoto v. Chevron Texaco Corp, 312 F. Supp. 2d 1229, 1248–49 (N.D. Cal. 2004); Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386(KMW), 2002 WL 319887, at *20–27 (S.D.N.Y. Feb. 28, 2002).

73 *See* Stephens et al., *supra* note 6, at 114.

74 *See* Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010, 1012 (N.D. Cal. 2007); Wiwa v. Royal Dutch Petroleum Co., Nos. 96 Civ. 8386(KMW)(HBP), 01 Civ. 1909(KMW)(HBP), 02 Civ. 7618(KMW)(HBP), 2009 WL 928297, at *1 (S.D.N.Y. Mar. 18, 2009) (consolidating the three claims brought by Mr. Wiwa and granting defend-

strated a tendency to seek guidance in antitrust and securities law for a framework by which to evaluate RICO's extraterritorial reach.[75] These frameworks place heavy burdens on litigators at early stages of the case, rendering RICO claims less appealing than their ATS counterpart in this regard.

Before examining these cases, it should be noted that the statutory language of RICO itself is largely silent with regard to extraterritorial jurisdiction.[76] Although it features repeated references to activities which effect "foreign commerce," courts have been reticent to hear suits in which the transaction or activities only "casually touch upon the United States."[77] Instead, the prevailing inquiry, as articulated by the Second Circuit in *North South Fin. Corp. v. Al-Turki*, is whether "Congress would have wished the precious resources of the United States courts" to be dedicated to the activities at issue.[78] With regard to litigation against corporations, this standard has been operationalized in two tests, both of which derive from securities and antitrust law: the conduct test and the effects test.

A. The Conduct Test

The conduct test requires the defendant to have committed activities *inside* the United States which "materially furthered the unlawful scheme."[79] The Ninth Circuit has held that in order for the conduct to be sufficient to establish jurisdiction, it "cannot be merely preparatory."[80] This latter stipulation proved critical in *Bowoto,* a case that was filed by a group of Nigerian nationals seek-

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ants' motion to dismiss exterritorial RICO claims for lack of subject matter jurisdiction).

75 *See* cases cited *supra* note 74.

76 In addition, this analysis assumes that personal jurisdiction has been established, preferring instead to focus on the disproportionate standards between establishing subject matter jurisdiction between RICO and the ATS. Personal jurisdiction, however, has also been the subject of some difficulty in both ATS and RICO claims. In *Wiwa v. Royal Dutch Shell*, for example, a district court found *forum non conveniens* in 1998 and directed that future litigation take place in London. On appeal, however, this decision was reversed, allowing the case to continue on U.S. soil. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

77 Brink's Mat Ltd. v. Diamond, 906 F.2d 1519, 1524 (11th Cir. 1990).

78 100 F.3d 1046, 1051 (2d Cir. 1996) (citing Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975)) ("[T]he ultimate inquiry is . . . whether 'Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [foreign transactions] rather than leave the problem to foreign countries.'") (alterations in original).

79 STEPHENS ET AL., *supra* note 6, at 119, citing to Butte Mining, PLC v. Smith, 76 F.3d 287 (9th Cir. 1996).

80 *See* Grunenthal GmbH v. Hotz, 712 F.2d 421, 424 (9th Cir. 1983).

ing to recover for a series of attacks at Chevron Nigeria's extraction facilities in the Niger Delta.[81] The plaintiffs, together with a group of over 100 local community members, had occupied the platform of one of Chevron's barges.[82] They alleged that after several days on the platform, Chevron Nigeria solicited the help of Nigerian Government security forces to remove the defendants, leading to the killing of several protestors and the torture of another protestor while in custody.[83]

Despite the plaintiffs' lengthy account of the connections between the conduct of the defendant's offices in the United States and the alleged attacks in Nigeria, the court held that the corporation's actions in the United States were "'merely preparatory,' and not a 'direct cause' of the attacks."[84] The plaintiffs presented evidence that the defendants' office in the United States had a substantial range of control over the Nigerian based subsidiary. This included having "designed and adjusted the general security policies," maintaining "general control and supervision" over the subsidiary, and also engaging in a robust "media campaign to cover up [the subsidiary's] involvement in the attacks."[85] Regardless, the court dismissed these connections as insufficient to constitute "material" conduct, and reiterated its earlier assessment that "the evidence produced by plaintiffs reflects not that defendants made decisions during the attacks, but that there was an extraordinarily close relationship between the parents and the subsidiary prior to, during and after the attacks."[86] The *Bowoto* ruling, as a result, sets a difficult evidentiary standard in order to satisfy the conduct test. Short of a direct and well-documented order which instructs the international subsidiary to engage in, or pay for, activities which constitute a human rights abuse, establishing sufficient conduct to warrant extraterritorial jurisdiction is unlikely.

B. The Effects Test

Unfortunately for litigators, the effects test provides little additional flexibility. In *Wiwa*, despite allowing the RICO allegations to survive the pleading stage, the court eventually granted a summary judgment motion on the grounds that the plaintiffs had not established "sufficient effects in the United States to give the Court sub-

81 *See* Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010, 1012 (N.D. Cal. 2007).
82 *Id.*
83 *Id.*
84 *Id.* at 1015.
85 *Id.*
86 *Id.*

ject matter jurisdiction."[87] *Wiwa* was one of three lawsuits brought against the Royal Dutch Petroleum Company, as well as several of the company's employees and subsidiaries, alleging the corporation's complicity in human rights abuses in the Niger Delta.[88] Although a wide range of claims were filed, including environmental damage, bribery, and obstruction of justice, the most severe allegations concerned Shell's complicity in the arrest and execution of the "Ogoni 9"—a group of nine activists who had protested Shell's activities in the region as part of a broader community of protestors.[89]

In its assessment of extraterritorial jurisdiction, the court acknowledged the paucity of litigation on the subject and also the lack of clarity regarding which standard to apply.[90] Like the *Bowoto* ruling, however, the court once again sought guidance in "precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters."[91] The *Wiwa* ruling spliced the tests one step further, stating that the effects test can be further subdivided into the "securities-based effects test" on one hand, in which "Plaintiffs must show substantial, direct effects on the United States," and the "antitrust based effects test," on the other, in which plaintiffs must demonstrate "intentional, actual, and substantial effects on United States imports and exports."[92]

In *Wiwa,* the plaintiffs sought to establish effects in the United States through the impact which the actions of the Nigerian subsidiary had on the profits of the United States parent company. Specifically, the plaintiffs alleged that racketeering activity had allowed the corporation to avoid several activities which would have jeopardized profits, including: agreeing to the demands of the activists; addressing the environmental hazards the corporation had created; and generally allowing their "manner of operations" and "international position" to be challenged by the activist movement.[93] The corporation's ability to smother these activities, the plaintiffs alleged, allowed the corporation to import Nigerian oil into the United States at a lower cost, thereby increasing profits and al-

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87 *See* Wiwa v. Royal Dutch Petroleum Co., Nos. 96 Civ. 8386(KMW)(HBP), 01 Civ. 1909(KMW)(HBP), 02 Civ. 7618(KMW)(HBP), 2009 WL 928297, at *1 (S.D.N.Y. Mar. 18, 2009).

88 *Id.* at *1–3.

89 *Id.* at *2–3.

90 *Id.* at *11.

91 *Id.* (quoting North South Fin. Corp. v. Al Turki, 100 F.3d 1046, 1051 (2d Cir. 1996)).

92 *Id.* at *4.

93 *See Wiwa* 2009 WL 928297 at *5.

lowing the corporation to "sell stocks and American Depository Receipts in the United States that offered investors a higher margin of return than they would have had if Defendants had met [the activists' demands]."[94]

These arguments failed to resonate. As the court explained, despite the plaintiffs' assertions, there was no evidence that the defendants' actions had contributed to an increase in investment returns or profits. Specifically, the plaintiffs had failed to establish "either (1) that Defendants' alleged racketeering activity lowered their costs of producing oil in Nigeria . . . or (2) if Defendants did have lower production costs in Nigeria, that these lower costs resulted in greater investment returns or otherwise affected commerce in the United States."[95] The latter of these two conclusions appears to pose a unique and especially intractable obstacle for litigators seeking to establish extraterritorial jurisdiction via the effects test. Prior to the *Wiwa* holding, it might have appeared reasonable to assume that a multinational corporation which aggregates profits from a range of international subsidiaries will benefit by at least *some* margin if one of its subsidiaries has managed to lower production costs. Although the absolute sum of profits from the corporation's international subsidiaries may remain unchanged when they are pooled, the fact that one division's increase in profit might be off-set by another division's loss should not discount the reality that the corporation has still felt the "effects" of the increased profit margins from its Nigerian operations. The court's conclusion, however, appears to suggest the opposite. It states that even in the event that the defendants are able to prove that production costs in Nigeria have been lowered through racketeering activity, defendants must also have demonstrable evidence of the effect—presumably through incremental profit increases or a shift in the corporation's share price—of the increased returns to the parent company in the United States. If this holding proves durable through subsequent judgments in international RICO cases, the standard it sets will remain an onerous obstacle for human rights litigators to overcome.

With regard to the alternative test articulated in the *Wiwa* holding—the antitrust-based effects test—the plaintiffs' evidence fared no better.[96] The court reiterated a similar argument, stating

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94 *Id.* at *6.

95 *Id.*

96 In *Bowoto*, the court's analysis of the antitrust effects test was nearly identical:

> Plaintiffs fail, however, to provide any evidence that defendants' treatment of the environment, the local community, oil protestors generally,

that "even assuming that Defendants' alleged racketeering activity lowered their Nigerian production costs, Plaintiffs provide no specific evidence that these lower costs resulted in lower oil prices or higher investment returns in the United States."[97] Although the court did not find it necessary to reach the question of whether or not "intent" had been established, it did provide some guidance for future litigation in this regard. The court noted that because the plaintiffs had failed to demonstrate the proportion of Nigerian oil that had been exported to the United States, there was insufficient evidence to "establish that the Defendants undertook their alleged racketeering activity *in order to* affect the United States, in addition to, or as opposed to, other countries."[98] Should future holdings stipulate that the antitrust test is a more apposite evaluation, litigants will be faced with the obvious difficulty of proving not only the effects mentioned above, but also the underlying intent of the corporation to bring about such effects. In any event, the antitrust-based test appears to mirror the difficult obstacles provided by the securities-based test. Both require litigators to isolate an incrementally identifiable chain of connections from a complex and opaque operating environment.

C. A Comparison to Extraterritorial Jurisdiction Under the ATS

Regardless of which test litigants employ to establish extraterritorial jurisdiction, the expectations on the litigator are substantially more cumbersome than that of establishing extraterritorial jurisdiction under ATS litigation. This held true even before *Kiobel* introduced the possibility that corporate complicity falls entirely outside the realm of the statute. The language of the ATS states that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

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> or these specific plaintiffs, generated any impact on the United States economy. Plaintiffs state that "[s]uppressing protest allows defendants to escape paying for measures that would avoid and remediate the harms caused by extraction, thereby lowering the cost of extraction and increasing profits earned by defendants from the sale of Nigerian oil in the U.S." Plaintiffs' statement, however, lacks any evidentiary support. Plaintiffs present no evidence that killing or otherwise suppressing protestors saves defendants money, or otherwise increases their profit margin. Plaintiffs therefore fail to present evidence that defendants gained a competitive advantage in the United States, or impacted the U.S. economy, by engaging in the alleged racketeering activity.

Bowoto v. Chevron Corp., 481 F. Supp. 2d 1010, 1014–15 (N.D. Cal. 2007).

97 *See Wiwa*, 2009 WL 928297, at *8.

98 *Id.* at *8 n.20 (emphasis added).

nations or a treaty of the United States."[99] There is some debate as to whether the term "violation" mandates that courts engage in a more "searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation."[100] Yet this assertion has been countered on the basis that it "appears to conflate subject matter jurisdiction and whether plaintiffs have stated a claim for relief."[101] Under the latter interpretation, the plaintiff need only allege an "arguable violation of the law of nations" in order to establish subject matter jurisdiction.[102] The trend, in fact, appears to be in the direction of a less onerous standard for establishing subject matter jurisdiction under the ATS. In 2007, the Ninth Circuit stated that a "district court [has] subject matter jurisdiction under the [ATS] so long as plaintiffs alleged a nonfrivolous claim by an alien for a tort in violation of international law."[103] Under this more flexible formulation, the comparative ease of establishing subject matter jurisdiction under the ATS is evident. There is no need to establish U.S.-based conduct or a chain of events leading to substantial effects occurring on U.S. soil. Provided that the alleged activity falls within the category of a violation of the law of nations, the plaintiff will be able to proceed to discovery and to the merits of the case.

Wiwa provides an instructive example of the differential between ATS and RICO with regard to establishing extraterritorial jurisdiction. As mentioned, the RICO claims in *Wiwa* foundered based on the plaintiffs' inability to establish extraterritorial subject matter jurisdiction. The ATS claims, by contrast, were allowed to proceed. The court held that the plaintiffs had met the standard of adequately pleading a "widely accepted, clearly defined violation of the law of nations."[104] In this instance, given the nature of some of the crimes alleged (including killings and torture), the burden was not substantial. But the ability for the plaintiffs to plead claims which concerned only the defendant's conduct *abroad*—rather than the ripple of connections it produced or the larger corporate motive for the conduct—substantially lessened the difficulty of establishing subject matter jurisdiction. The survival of the ATS claims ultimately proved paramount. Royal Dutch Shell settled with the plaintiffs out of court, agreeing to provide the plaintiffs with

99 *See* 28 U.S.C. § 1350 (2006).
100 Filártiga v. Peña-Irala, 630 F.2d 876, (2d Cir. 1980).
101 *See* STEPHENS ET AL., *supra* note 6, at 29.
102 *Id.*
103 Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1201 (9th Cir. 2007).
104 *See* STEPHENS ET AL., *supra* note 6, at 156.

$15.5 million to "establish a trust for the benefit of the Ogoni people, and cover some of the legal costs and fees associated with the case."[105]

From the perspective of a litigator, the lessons emerging from these cases are clear. First, from what limited rulings are available, the test to establish extraterritorial jurisdiction has yet to be met in a case where human rights allegations are being brought. Pleading a broad effect on profitability is not sufficient. Second, the standards that courts have articulated are onerous, requiring substantial analysis and discovery on the part of the litigator at an early stage of the case—well before the merits of the substantive RICO claims can be addressed. Finally, by comparison to the standards of establishing subject matter jurisdiction via the ATS, RICO is especially cumbersome.

PART IV. RICO'S LIMITATIONS AS A METHOD OF ASCRIBING DIRECT LIABILITY

If the obstacles regarding extraterritorial jurisdiction can eventually be overcome, there is, as mentioned, a limited class of plaintiffs who would be able to benefit from RICO's remedial options. These plaintiffs, however, are unlikely to discover that RICO provides litigators with a more direct avenue of ascribing liability to corporations involved in human rights abuses. Although the expansive scope of RICO's "enterprise" once suggested that courts might draw a wide net over players involved at the periphery of an enterprise's activities, domestic case law has substantially curtailed this reach. It should be noted that this question has yet to be fully addressed by courts in an international human rights setting (as most claims have foundered at the extraterritorial jurisdiction stage). But there is little reason to believe courts will approach international cases in a different manner than their domestic counterparts. Litigators who file RICO claims are just as likely to face the largely unresolved debate regarding which standards of law to apply to complicity allegations as they would if pursuing ATS claims alone.

A. The Once-Expansive Possibilities of the Term "Enterprise"

As previously mentioned, the term "enterprise" has been flexibly construed in domestic case law. To some degree, this flexibility

105 *Commentary on Wiwa et al v. Royal Dutch Petroleum et al.* CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum (last visited Nov. 21, 2012).

pertains to not only the type of organization at issue, but also the size and scope of its participants. Litigators may choose, for example, to stretch the conception of an enterprise broadly so as to encompass a wide array of possible participants, or they may draw a narrower conception of the core enterprise and rely on the conspiracy elements of the Act to implicate actors on the periphery. In past litigation regarding corporate violations of RICO, this flexibility depended largely on the theory by which litigators (and courts) chose to define a corporation. The "nexus of contracts theory," for example, posits that a corporation is composed merely of a series of interconnected contracts—employees, managers, customers, and suppliers are joined by contracts which, in aggregate, form a functioning corporation.[106] If placed in the context of RICO litigation, this construction once held expansive possibilities. Litigators might have placed both the contracted service providers and the corporation that had engaged their services under the same "enterprise" umbrella. Doing so would have enabled litigators to charge both the service providers (local security forces, for example) as well as the corporation itself, with a *direct* violation of RICO, rendering allegations of conspiracy, aiding and abetting, or vicarious liability, unnecessary. Critically, the possibility of dispensing with complicity charges would not only enable litigators to pursue a less convoluted pathway of ascribing liability, but would also allow them to sidestep the unresolved choice of law debate regarding whether to apply domestic or international standards of complicity liability.

B. The Narrow Construction Featured in Reves

Recent case law concerning RICO's domestic application, however, suggests that courts are likely to pursue a narrow construction of how far the term "enterprise" can be stretched. This strict approach would derail legal strategies that had sought to ascribe liability directly, rather than via conspiracy allegations. In *Reves v. Ernst & Young*, the Supreme Court established the "operation or management test" which required that, in order for an individual to be held directly liable for a violation of RICO, the individual must have had some role in conducting or managing the enterprise.[107] The *Reves* case involved the relationship between the auditing firm Arthur Young (prior to its evolution into Ernst &

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[106] Judge Frank Easterbrook of the Seventh Circuit, in particular, has been a leading proponent of the nexus of contracts theory. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 72 (1991).

[107] 507 U.S. 170, 173, 183–84 (1993).

Young), and the manager of a farmer's cooperative that had encountered financial trouble. The auditors had made several "questionable decisions" regarding how best to value the assets of the cooperative, creating an inflated valuation that led to subsequent confusion and financial reliance by the cooperative's trustees.[108] Among other allegations, the plaintiffs in the case alleged that the cooperative and the auditor had committed a violation of RICO as members of a common enterprise.[109] The Eighth Circuit granted summary judgment in favor of the auditor, and on appeal the Supreme Court upheld the decision, opting for a more restrictive interpretation of the RICO "enterprise" than those earlier announced by the Eleventh Circuit and the District of Columbia Circuit.[110]

The Court's analysis focused in particular on the language in section 1962(c), which makes it illegal for a person to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs."[111] The Court's interpretation concluded that if individuals who were mere participants in the enterprise could be held liable, the word "conduct" becomes essentially superfluous.[112] As such, rather than read "conduct" out of the statute entirely, the Court concluded that the term "participate" was modified by the phrase "[in the] conduct of such enterprise's affairs."[113] The Court thereby concluded that Congress had intended to focus on individuals who had a controlling or influencing role in the conduct of the organization, rather than on mere participants.[114] Following the ruling, some commentators have remarked that "the decision heralded an end to the liability of so-called 'outsiders,' including lawyers, accountants, and various other professionals sometimes pulled into RICO suits."[115]

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108 *Id.* at 174.

109 *Id.*

110 *Reves*, 507 U.S. at 185–88 (citing Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union, 639, 913 F.2d 948 (D.C. Cir. 1990); Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F.2d 966 (11th Cir. 1986)).

111 18 U.S.C. § 1962(c) (2006).

112 *See Reves*, 507 U.S. at 182.

113 *Id.* at 178–79 (citing 18 U.S.C. § 1962(c)).

114 Curiously, the Court's interpretation appears to have read "participate" largely out of the statute instead. A strong argument could be made that emphasis on the term "conduct" should not be so emphatic as to completely drown out an express provision in the statute. For an argument that *Reves* was not only correctly decided but should also apply to the conspiracy prong of RICO, see Sarah Baumgartel, *The Crime of Associating with Criminals? An Argument for Extending the* Reves *"Operation or Management" Test to RICO Conspiracy*, 97 J. CRIM. L & CRIMINOLOGY 1 (2006).

115 *Id.* at 2. Others, however, while acknowledging the obvious limitations that the

In *Reves*, the Supreme Court's interpretation allowed a service contractor—an auditor in that instance—to escape the "enterprise" umbrella. As a consequence, litigators were left having to plead allegations of conspiracy and accomplice liability, strategies which, had they been applied in the international context, would have embroiled litigators in the familiar choice of law debate surrounding ATS litigation. Placed in the context of a case involving corporate engagement in international abuses, the *Reves* standard presents clear limitations. In the instance of a service contractor hired by a multinational extraction company, for example, the *Reves* ruling would likely thwart any arguments that alleged that the contractor and the corporation were part of a common enterprise. It could be argued that a corporation that has actively acquired services should be characterized as the controlling or managing individual in the broader enterprise. Yet courts are likely to demand evidence that depicts the hiring corporation as the controlling or influencing participant in the pattern of racketeering itself. An individual who conducts or manages the security force that committed the abuses is almost certain to fall into this category. But it appears unlikely that the contracting corporation for whom they perform those services will also be implicated.

A thorough evaluation of the ways in which proving *conspiracy* liability under RICO may differ from proving aiding and abetting liability under the ATS lies beyond the scope of this analysis. It bears mentioning, however, that it is not at all clear that RICO is a better option in this regard either. The Court's ruling in *Reves* was silent as to whether the management or operations test was also applicable to RICO's conspiracy provision. This silence leaves litigators with the existing precedent for establishing conspiracy under RICO as originally articulated in *United States v. Neapolitan*.[116] It requires that litigators prove the existence of both "an agreement to conduct or participate in the affairs of an enterprise" and also "an agreement to the commission of at least two predicate acts."[117] The *Neapolitan* ruling placed considerable emphasis on distancing this standard from one based solely on association, stating, "[i]f either aspect of the agreement is lacking then there is insuffi-

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ruling created, maintain that the holding was largely context dependant. As such, "to the extent that a particular professional's services, as compared to an auditor's, are intimately connected with management, *Reves* will provide less protection." Jeffrey Shapiro, *Attorney Liability under RICO § 1962(c) after* Reves v. Ernst & Young, 61 U. CHI. L. REV. 1153, 1153–54 (1994).

116 791 F.2d 489 (7th Cir. 1986).

117 *Id.* at 498–99.

cient evidence that the defendant embraced the objective of the alleged conspiracy . . . mere association with the enterprise would not constitute an actionable 1962(d) violation."[118]

In aggregate, the "operation or management test" has substantially constricted the ability of domestic litigators to envelop peripheral players—such as contracting parties—into the core "enterprise." More importantly, this restriction suggests that, contrary to initial appearances, RICO does not provide a more direct route of ascribing liability. The likely outcome, as scholars have suggested, is that "plaintiffs will more often plead aiding and abetting and conspiracy theories of liability."[119] As a result, litigators who use RICO against multinational corporations will likely find themselves embroiled in a similar choice of law debate as that which they would have faced in pursuance of ATS claims alone.

CONCLUSION

RICO has become a potent resource for corporate litigation in U.S. courts, and the intuitive appeal of RICO in context of corporate multinational litigation is clear. From the time of its inception as a tool for combating the mafia and other organized crime syndicates, it has enjoyed applicability to a wide array of activities and entities. Moreover, when considering that corporate-based ATS litigation strategies have been increasingly confronted with a complex and unresolved choice of law debate regarding conspiracy law, the search for alternative legal strategies is understandable. While *Kiobel* may not have germinated this trend, it has certainly added a sense of urgency.

With few exceptions, however, the early intuitions regarding RICO have proven misguided. An analysis of RICO's potential utility in litigation against abuses committed by corporations abroad reveals that the Act offers few advantages. RICO provides narrow remedial opportunities, is burdened by a substantially more onerous test for establishing extraterritorial jurisdiction than the ATS, and is unlikely to allow for a more direct pathway of ascribing liability to corporate defendants in international locations. This analysis should not be interpreted, however, so as to suggest that RICO has no applicability in the context of international corporate litiga-

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118 *Id.*

119 *See* Shapiro, *supra* note 115, at 1173 n.95 (citing C. Stephen Howard, Payne L. Templeton, & Devan D. Beck, *RICO Claims Against Accountants After* Reves v. Ernst & Young, *in* 467 LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 291 (1993)).

tion. In instances where a plaintiff has suffered economic harm in the form of injury to property or business, RICO offers valuable remedial alternatives. In these cases, RICO should be strongly considered as a potential adjunct tactic to other legal strategies.

RICO doesn't suffice as a replacement for the ATS. Barring a reversal of *Kiobel* in the months to come, employing RICO without careful forethought is likely to lead litigators down a time consuming and resource intensive pathway.

THE PUBLIC DEFENDER AS ANTI-TRAFFICKING ADVOCATE, AN UNLIKELY ROLE: HOW CURRENT NEW YORK CITY ARREST AND PROSECUTION POLICIES SYSTEMATICALLY CRIMINALIZE VICTIMS OF SEX TRAFFICKING

Kate Mogulescu†

Introduction

J.C., now seventeen years old, was sixteen when she was first recruited into commercial sex. With her father recently incarcerated and facing numerous conspiracy charges, and her mother stressed out, anxious, and increasingly abusing drugs, J.C. wanted nothing more than a way out of her house. She spent as much time as possible anywhere other than home. One day, while hanging out with a group of her friends, she was approached by S., a fairly well known pimp in her Western Maryland town, more than twice her age. The relationship began with S. buying J.C. new clothes and food, and taking her to the movies. S. would quickly provide anything J.C. wanted those first few days. However, within a short period of time, he began prostituting her throughout Maryland by advertising her through pictures on a common website and arranging her dates. He instructed her how much to charge for different sexual acts, advised her how to avoid arrest, provided her with false identification so that she would pass for older than she was, and took all of the money earned from her dates. Some nights she would see between ten and fifteen customers. J.C. soon learned that S. prostituted a few other young women as well, including her aunt, who was close in age to J.C. In the beginning, S. was not violent with J.C., but he made sure that she observed him disciplining

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his other women with violence if they failed to comply with his orders.

S., like many other pimps, enforced a strict set of rules. These rules were well known to the young women. They ensured that S. continued to profit from prostitution and that those under his control remained so. The women under S.'s control: could never refer to him by his true name, only "Daddy"; always had to make themselves physically lower than S., for example, by standing on the street if S. stood on the sidewalk; had to meet a specific quota of money earned through prostitution each night; could not keep any of the money they earned, as it was all given to S.; and could not make eye contact with another pimp. J.C. and the other women prostituted by S. were only referred to as "bitch" or "ho." If S.'s victims broke any of these rules, they would be subjected to violence, abuse, or sexual assault.[1]

In October of 2011, S. brought J.C. to New York City to prostitute her. In addition to posting pictures and ads for her services online, he would drive her to various locations known for prostitution in Brooklyn and Manhattan and have her walk these areas looking for dates. One night, while driving, S. became angry with J.C. because of a perceived disrespect. He stopped the car, and told her she had to get out of the vehicle. He yelled and screamed at J.C., berating her, and telling her she was a "worthless lazy bitch" whom he never should have bothered bringing to New York City. He continued to scream at her as she exited the car. This caught the attention of two officers of the New York City Police Department ("NYPD"), assigned to the Thirteenth Precinct. The officers were on a standard anti-crime patrol in Midtown Manhattan, in an area they identified as prostitution-prone, i.e., frequented by people engaged in prostitution.[2]

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[1] These rules, familiarly known as the "rules of the game," are common in pimp-controlled prostitution, widely promulgated, and enforced. *See, e.g.*, POLARIS PROJECT, *Domestic Sex Trafficking: The Criminal Operations of the American Pimp*, http://www.dcjs.virginia.gov/victims/humantrafficking/vs/documents/Domestic_Sex_Trafficking_Guide.pdf (last visited May 2, 2012); RACHEL LLOYD, GIRLS LIKE US: FIGHTING FOR A WORLD WHERE GIRLS ARE NOT FOR SALE, AN ACTIVIST FINDS HER CALLING AND HEALS HERSELF 98 (2011). *See also* United States v. Pipkins, 378 F.3d 1281, 1286 (11th Cir. 2004) (noting that when under pimp control, women must follow rules imposed or "[e]ndure beatings with belts, baseball bats, or 'pimp sticks' (two coat hangers wrapped together). The pimps also punished their prostitutes by kicking them, punching them, forcing them to lay naked on the floor and then have sex with another prostitute while others watched, or 'trunking' them by locking them in the trunk of a car to teach them a lesson."); United States v. Todd, 627 F.3d 329, 331–32 (9th Cir. 2010).

[2] Supporting Deposition of NYPD Officer Giro Maccheroni, People v. J.C.,

The officers approached J.C. directly. They did not ask her if everything was okay. They did not ask her who this older man was or why he was screaming at her. They did, however, instruct her that she was going to be placed under arrest for loitering for the purpose of engaging in prostitution. J.C. found this to be confusing, as she had merely stepped out of his car seconds before, not even on the sidewalk long enough to be loitering. When J.C. protested her arrest, and S. began to question the officers as well, the officers indicated that if J.C. simply cooperated with them and did not give them a hard time, they would not arrest S. Fearful of the repercussions of doing anything that may get S. in trouble, J.C. ceased protesting, ceased asking questions about the reason for her arrest, and allowed the police to arrest her. When asked for identification, she produced the fraudulent identification card that S. had made for her. The arresting officer saw immediately that the identification was fake, and indicated to J.C. that he was going to do her a favor, and not take it from her. She admitted to the officer that she was, in fact, seventeen, not as old as the identification purported. The officer then returned the identification to S., placed J.C. under arrest, and allowed S. to drive away. J.C. was held overnight awaiting arraignment on the criminal charges of loitering for the purpose of engaging in prostitution. Despite her age, and the circumstances of her arrest, J.C. was prosecuted as an adult in Manhattan Criminal Court. S. was never even investigated.

Human trafficking has gained tremendous traction as a national and international issue. Referring to human trafficking as "modern-day slavery,"[3] media and anti-trafficking advocates celebrate the few instances in which traffickers have been investigated or arrested for their crimes.[4] Calls for tougher sanctions and penalties on trafficking abound.[5] Human trafficking has become a policy

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2011NY076356 (N.Y. Co. Crim. Ct., Oct. 21, 2011) (on file with City University of New York Law Review).

[3] *See* Janie Lynne Musto, *What's In a Name? Conflations and Contradictions in Contemporary U.S. Discourses of Human Trafficking*, 32 WOMEN'S STUD. INT'L FORUM 281, 286 (2009). *See also* Nicholas Kristof, *The Face of Modern Slavery*, N.Y. TIMES, Nov. 17, 2011, at A31; NEW YORK CITY COUNCIL, COMMS. ON WOMEN'S ISSUES AND PUBLIC SAFETY, OVERSIGHT: COMBATTING [*sic*] Sex Trafficking in NYC: Examining Law Enforcement–Prevention and Prosecution 5 (2011), http://legistar.council.nyc.gov/View.ashx?M=&ID=1583865&GUID=46919547-BF55-4D2B-96A9-2167995C7B77 [hereinafter OVERSIGHT REPORT].

[4] *See, e.g.*, Rocco Parascandola, *Sex-Slave Horror Story for a Little Girl*, N.Y. DAILY NEWS, May 1, 2011, at 8; William J. Gorta, *Pimp Fiend Indicted: DA*, N.Y. POST, Jan. 27, 2011, at 10; Karen Zraick, *8 Charged in Brooklyn Sex Trafficking Case,* N.Y. TIMES, June 2, 2010, at A28.

[5] *See, e.g.*, Mike McGraw, *States at Opposite Ends of Scale in Penalizing Traffickers*, KAN.

priority nationally and in New York State, and recent federal and state legislative developments further highlight the emerging importance of the issue.

Despite a robust anti-trafficking discourse, these notions have not permeated the spheres of urban policing and local criminal courts. Instead, many victims of sex trafficking are arrested and prosecuted for conduct that they are compelled to engage in. Swept up in a criminal justice system that depends on the swift and thoughtless processing of criminal cases in record times, sex trafficking victims are not identified or thought of as victims. The arrest strategy employed by the NYPD prioritizes a high volume of arrests for low-level offenses. Prostitution offenses are precisely such charges. Criminal courts designated to process this high volume are ill-equipped to explore the circumstances of each case individually. As a result, many exploited and trafficked people are processed in criminal court without the tragedy of their situation being brought to light. The complicated dynamics of prosecutorial discretion and power can further undermine the process.

Current criminal justice practice fails to adequately identify many of these individuals as victims, and to offer any meaningful intervention. Thus, as victims cycle in and out of the criminal justice system, the devastating impact is a re-victimization, which only exacerbates the danger, isolation, and marginalization of the victims' experiences. The responsibility of formulating a response then falls on public defenders, those charged with defending the rights of the accused. As they aspire to do in each type of case to which they are assigned, public defenders must work to expose this unjust phenomenon, to advocate for those criminalized, and to vigorously protect the interests of their client. The difference, however, when dealing with those charged with prostitution offenses, is the clear overlap between the experience of this group of criminal defendants and the victim class that the anti-trafficking movement seeks to protect. The failure to make the connection between these two groups constitutes a serious failing and oversight on the part of those dedicated to combating human trafficking.

Despite this reality, the anti-trafficking movement is largely made up of law enforcement groups, prosecutors, and service providers, and rarely is the public defender heard of as part of the dis-

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CITY STAR, Dec. 1, 2011, *available at* 2011WLNR24827141; Alan Johnson, *Call to Toughen 'Slavery' Law*, COLUMBUS DISPATCH, Jan. 12, 2010 at B1; Editorial, *Targeting Human Trafficking*, N.Y. TIMES, May 21, 2007, at A18.

cussion.[6] This article was born out of the experience of representing and advocating for individuals arrested for prostitution offenses in New York City. Public defenders constitute the true front line in advocating for survivors of sex trafficking in the criminal justice system, an unlikely role, but one that current arrest and prosecution policies make necessary.

I. Legislative Framework: Federal and New York Law

Federal laws define sex trafficking as forced sexual labor. Pursuant to the Trafficking Victims Protection Act ("TVPA") of 2000,[7] and its reauthorizations, federal law prohibits all forms of trafficking, but explicitly defines trafficking as "severe" when a commercial sex act is induced by force, fraud, or coercion, or when the person induced to perform such act has not attained eighteen years of age.[8]

Similarly, New York has an extensive statutory scheme designed to prevent trafficking, punish perpetrators of trafficking, and protect those at risk of victimization. In 2007, New York enacted its own sex trafficking statute, which criminalized many common forms of sex trafficking.[9] New York's anti-trafficking statutory scheme reinforces many of the concerns demonstrated in federal law, and similarly seeks to specifically protect youth vulnerable to commercial sexual exploitation.

In addition to being identified as a victim of a severe form of trafficking, an individual under the age of eighteen arrested for prostitution is now defined by New York law as a "sexually exploited child" under the Safe Harbour for Exploited Children Act ("Safe Harbor").[10] This universally lauded statute was enacted to reconcile the incongruity between New York's arrest and prosecu-

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6 For example, the Department of Justice funds anti-trafficking task forces nationwide consisting of law enforcement, prosecutors, and non-governmental organizations ("NGOs"). *See* U.S. Dept. of State, Trafficking in Persons Report 340 (2010), *available at* http://www.state.gov/documents/organization/142979.pdf. Public defender organizations, even in the largest metropolitan areas, are not invited to sit on these task forces. Rather, the task forces are "based on a sound strategy of collaboration among state and local enforcement, trafficking victim services providers, federal law enforcement, and U.S. Attorneys Offices." U.S. Dept. of Justice, Bureau of Justice Assistance, Enhanced Collaborative Model to Combat Human Trafficking, Grant Announcement, (F. Y. 2011), *available at* http://www.ojp.usdoj.gov/BJA/grant/httf.html (last visited Apr. 18, 2012).

7 TVPA of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

8 22 U.S.C. § 7101 (2006).

9 N.Y. Penal Law § 230.34 (McKinney 2011).

10 N.Y. Soc. Serv. Law § 447-a (McKinney 2011).

tion policy and federal human trafficking law.[11] Furthermore, New York has enhanced penalties for those charged with promoting prostitution where they knowingly advance or profit from the prostitution of those under the age of eleven, sixteen, and nineteen respectively.[12]

New York has also implemented an innovative remedy for those victims criminalized as a result of having been trafficked. The 2010 amendment to Article 440 of the Criminal Procedure Law creates a specific mechanism for survivors of trafficking to vacate prior prostitution convictions if the acts were committed as a result of having been trafficked.[13] This law was the first of its kind, leading several other jurisdictions to implement similar provisions to benefit survivors of trafficking.[14] In enacting the amendment, the legislature specifically sought to "remove a blot on the character of such victims so as to help those presumably not criminally responsible for the offense to gain useful employment and rebuild their lives."[15]

This legislation represents a critical step. It acknowledges, and attempts to rectify, the fact that survivors of sex trafficking are criminalized under current practice.[16] However, as described more

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11 *See, e.g.*, Editorial, *A Victory for Exploited Children*, N.Y. TIMES, Sept. 26, 2008, at A20.

12 *See, e.g.*, N.Y. PENAL LAW §§ 230.20, 230.32, 230.35 (McKinney 2011).

13 The law now provides, in relevant part, that a motion to vacate a judgment of conviction may be granted where:

> [T]he arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or section 230.00 (prostitution) of the penal law, and the defendant's participation in the offense was a result of having been a victim of sex trafficking under section 230.34 of the penal law or trafficking in persons under the Trafficking Victims Protection Act.

N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2011).

14 Andrew Keshner, *Prostitution Conviction is Vacated Under New Law*, 245 N.Y.L.J. 88, 1 (2011). *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/116-2.1 (West 2011); MD. CODE ANN. CRIM. PROC. § 8-302 (West 2012); NEV. REV. STAT. § 176.515 (West 2011).

15 Peter Preiser, Supp. Prac. Comment., CRIM. PROC. LAW § 440.10 (McKinney 2010).

16 There have been five published decisions under the amended statute to date, each granting the motion to vacate the prior conviction and dismissing the underlying accusatory instruments. *See* People v. G.M., 32 Misc. 3d 274, 280 (N.Y. Co. Crim. Ct. 2011); People v. Gonzalez, 32 Misc. 3d 831, 836 (N.Y. Co. Crim. Ct. 2011); People v. Doe, 34 Misc. 3d 237, 241 (N.Y. Sup. Ct. 2011); *People v. S.S.*, 948 N.Y.S.2d 520 (N.Y. Co. Crim. Ct. 2012); *People v. A.B.*, 35 Misc. 3d 1243(A), Slip Copy, 2012 WL 2360942 (Table) (N.Y. Co. Crim. Ct. 2012). Several other survivors of trafficking have similarly had convictions vacated without published decisions. *See* Erica Pearson, *New Law Lets Sex-Trafficking Victims Clear Their Convictions*, N.Y. DAILY NEWS, September 9, 2012 at 18.

fully in the sections that follow, very little is being done to prevent the criminalization from occurring in the first place and eliminate the need for the post-conviction relief offered in the newly amended law. In response, the Legal Aid Society ("LAS"), the nation's largest and oldest provider of free legal services to the indigent, and the primary public defender in New York City, has developed a specialized pilot project that focuses on its representation of those individuals charged with prostitution.

The Trafficking Victims Legal Defense and Advocacy Project ("TVLDAP") was created in March 2011, and represents the first effort by a public defender office to address the problem of systemic criminalization of victims of trafficking and exploitation.[17] The project uses an interdisciplinary team of attorneys and social workers to screen each case and connect clients to important services. It further seeks to slow the pace of the criminal court process to allow time for clients to be adequately assessed and build closer relationships with the project team. Additionally, TVLDAP works closely with individuals charged with prostitution offenses to provide this marginalized client group options for assistance and support, and engages in court advocacy, social work services, and holistic representation.

Drawing on the first year of TVLDAP's work, it has become clear that LAS cannot solve this problem alone. Indeed, by the time those arrested become TVLDAP clients, much of the damage has already been done. Current arrest policies must be more critically examined, and changed, in order to truly support those being trafficked and exploited, both in New York City and in other jurisdictions.

II. Victims of Sex Trafficking Continue to be Criminalized and Further Victimized by Current Arrest and Prosecution Policies

A. Prostitution Arrests in New York City

In 2011, more than 2,800 people were arrested and prosecuted in New York City criminal courts for engaging in prostitution-related activity.[18] Those arrested are often victims of ongoing

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17 TVLDAP is jointly funded by the Legal Aid Society and the NoVo Foundation, dedicated to eradicating exploitation of and violence against women and girls. *See* NoVo Foundation, http://novofoundation.org (last visited Apr. 18, 2012).

18 N.Y. Div. of Criminal Justice Servs., Computerized Criminal History Oracle File (Feb. 2012) (on file with City University of New York Law Review) [hereinafter DCJS Criminal History].

trafficking and exploitation, and overwhelmingly meet all of the legal criteria for sex trafficking under either New York or federal law.[19] This victimized group comprised both non-citizens and United States citizens alike, and includes domestically trafficked young people who have experienced extreme abuse, subjugation, and exploitation.

Despite the recent reforms and robust legislative framework described above, little has changed for those being victimized. To the contrary, the criminal justice system in New York City continues to systematically criminalize victims of trafficking. Of the 189 individuals TVLDAP represented in its first eleven months, more than sixty disclosed trafficking histories, which included control by pimp-traffickers, and another thirty-seven were identified as being at extremely high risk for trafficking.[20]

In addition to J.C., other clients represented by the project thus far include:

- A fifteen year-old girl who left her family home in New Jersey and was listed on the National Center for Exploited and Missing Children Registry. She took a bus to Port Authority where she was approached by a pimp who bought her something to eat within a few minutes of their meeting. When arrested by the police, she reported that she was eighteen years old, as instructed by the pimp for whom she had been working since her arrival in New York City. The police took no steps to ascertain her true identity or age, or to investigate if she was, in fact, a missing child. Instead, she was processed through the criminal court system as an adult.
- A Chinese national who, after paying an exorbitant fee to be smuggled into the U.S., arrived at the airport, had her only identification documents removed by her trafficker, and was driven for days to a remote location that she soon learned was a brothel, where she was made to engage in sexual con-

19 *See, e.g.*, Nicholas Kristof, *What About American Girls Sold on the Streets?* N.Y. TIMES, April 24, 2011, at 10. *See also* Chief Judge Lippman, *Foreword* to LAWYER'S MANUAL ON HUMAN TRAFFICKING & Pursuing Justice for Victims, at xvii (Jill Laurie Goodman & Dorchen Leidholdt eds., 2011), *available at* http://www.nycourts.gov/ip/womeninthecourts/LMHT.pdf ("[M]any adult or child victims of human trafficking are arrested and brought to court as defendants on prostitution-related charges."); New York State Assembly Memo for Bill, State Assemb. B., Reg. Sess. (N.Y. 2010), http://assembly.state.ny.us/leg/?default_fld=&bn=A07670&term=2009&Memo=Y ("Victims of sex trafficking who are forced into prostitution are frequently arrested for prostitution-related offenses.").

20 Interim Progress Report from Legal Aid Society Trafficking Victims Legal Defense and Advocacy Project to the NoVo Foundation (Feb. 2, 2012) (on file with City University of New York Law Review).

duct with numerous customers. She escaped from this location, only to have her traffickers threaten to kill every member of her family both in the U.S. and in China if her family did not pay $70,000 as penalty for her escape. Alone in New York, with no work authorization and unable to speak English, she was lured to another brothel with the promise of easy money she could use to pay her escape fee. She was arrested there by the NYPD in August.

- A twenty-four year-old woman who entered prostitution at the age of fifteen, when she ran away from her foster home, only to be exploited by a series of pimps in the years since. This woman has been arrested four times in the last two months. The officers from the NYPD's Midtown North Precinct have told her, in no uncertain terms, that she will continue to be arrested, every time they see her, whether or not she is doing anything criminal. They continue in this manner in spite of the fact that at the time of her most recent arrest, she had a black eye and bruises all over her, as a result of the violent behavior of her pimp. When the police noticed this, their response was to joke, in front of her, that she had probably had a "bad date."

Unfortunately, these cases are not unique. The majority of those arrested for prostitution have significant traumatic histories, and endure brutal exploitation and abuse at the hands of traffickers, yet they continue to face arrest. The devastating impact of this cannot be understated. Many victims struggle with lengthy criminal records as a result of their involvement with the criminal justice system. These records plague them, even after they have escaped a trafficker, and act as a bar for many forms of housing, employment, and other opportunities. Furthermore, the experience of arrest and prosecution is itself sufficiently traumatic.

People arrested for prostitution endure particularly inappropriate conduct from the police officers who arrest them. This can range from inappropriate comments and reprehensible conditions of confinement, to being forced to remain naked in front of various officers for extended periods of time, to being propositioned by officers, or asked to perform sex acts in exchange for avoiding arrest.[21] Fear of retaliation deters many from reporting such misconduct. In this way, current police practice and arrest policies often serve to further victimize trafficking victims.

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[21] JUHU THUKRAL & MELISSA DITMORE, SEX WORKERS PROJECT, URBAN JUSTICE CTR., REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 34–38 (2003), http://www.sexworkersproject.org/downloads/RevolvingDoor.pdf.

B. Impact of Prosecutorial Discretion

The treatment of those arrested for prostitution is not much better once they enter the criminal court system. For those who are arrested numerous times for prostitution—a population at high-risk for trafficking and exploitation—prosecutors routinely seek incarceration.[22] Even where there is a specific suspicion that a criminal defendant may have been trafficked, many prosecutors employ a heavy-handed approach to compel cooperation with their investigations rather than work to connect the victim to services.[23]

Although victim cooperation with law enforcement is one important part of a strategy to prevent and prosecute sex trafficking, this cannot be the only goal. A singular focus on cooperation with law enforcement, and an unwillingness to provide services unless a victim cooperates to the officer's subjective satisfaction, is irreconcilable with the reality that many victims confront.[24] Many victims face a significant safety risk if they provide information to law enforcement, a risk that is not eliminated even when a trafficker is arrested or incarcerated. Similarly, many victims have had negative experiences with law enforcement, and this presents severe barriers to building the trust necessary to cooperate in an investigation. Many trafficked people are unaware that their experience meets the legal criteria for sex trafficking, as their only experience with law enforcement has been their own arrest for prostitution activity, or they do not self-identify as victims of trafficking.[25] For these reasons, a victim may be hesitant or incapable of ever cooperating in an investigation with law enforcement, but even more so without the support of valuable social services.

Nevertheless, it is cooperation with law enforcement—or what

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22 *See, e.g.*, Lincoln Anderson, *New Combined Effort on Quality of Life, Prostitution,* THE VILLAGER, Vol. 75 No. 25 (November 9–15, 2005), *available at* http://www.thevillager.com/Villager_132/newcombinedeffordon.html (reporting on how prosecutors in the Midtown Community Court are seeking the penalty of ninety days in prison so as to prevent recidivist prostitutes from walking off with time served).

23 *See, e.g.*, Lauren Hersh, *Sex Trafficking Investigations and Prosecutions,* in LAWYER'S MANUAL ON HUMAN TRAFFICKING PURSUING JUSTICE FOR VICTIMS 269 (Jill Laurie Goodman & Dorchen Leidholdt eds., 2011), *available at* http://www.nycourts.gov/ip/womeninthecourts/LMHT.pdf (noting that it may be easier for prosecutors to maintain contact with an "arrested victim" and "an arrested victim who fears prosecution may offer useful information in exchange for a dismissal").

24 Ankita Patel, *Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking,* 9 SEATTLE J. SOC. JUST. 813, 821–29 (2011).

25 *See* MELISSA DITMORE, SEX WORKERS PROJECT, URBAN JUSTICE CTR., KICKING DOWN THE DOOR: THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 24 (2009), http://www.sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf.

is considered sufficient or acceptable cooperation with law enforcement—that determines whether someone may be considered a victim of sex trafficking, as opposed to the person's actual experience. Thus, the plight of many prosecuted in the system is missed completely. In order for a prosecutor to consider that someone charged with prostitution may, in fact, be trafficked, the individual charged must demonstrate it to the *prosecutor*'s satisfaction. Furthermore, victims must cooperate in the specific way deemed appropriate by prosecutors in order to qualify for the "benefits" of identification as a victim, regardless of whether that is best suited to their particular circumstance or empowerment.

Prosecutors appoint themselves as the only true arbiters of whether someone has been trafficked, whereas the process of identifying an individual as a trafficking victim should be multi-faceted and interdisciplinary.[26] The unreasonably stringent exercise of prosecutorial discretion is unlikely to lead to effective cooperation with law enforcement and may instead increase victims' feelings of distrust and low self-esteem.

Current efforts center on a criminal justice approach, rather than either a victim-centered or human rights approach.[27] This approach is governed by a singular focus on apprehending perpetrators rather than supporting survivors. It creates situations where victims must make difficult decisions about whether to cooperate before they have been provided services or an opportunity to develop stability and independence. Indeed, in the few cases where police or prosecutors have identified someone arrested for prostitution as a potential victim of trafficking, the victim *must* cooperate in the time frame deemed appropriate by the prosecutor in order to escape criminalization. Should the victims be unwilling or unready, at the precise moment of arrest, or immediately thereafter, they are made to go through the criminal court process marked as defendants.

This practice on the state and local level is analogous to the experience under federal law over the last decade. For many undocumented victims of trafficking, concerns about deportation or

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[26] Patel, *supra* note 24, at 828 (noting "when law enforcement is the primary agency that determines who is a trafficking victim, law enforcement is improperly placed in the position of jurist, which probably explains the cause of frustrations among advocates, service providers, and community leaders").

[27] *See id.* at 814, 820. *See also* Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-Victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT'L L. REV. 201, 215 (2011) (providing a more thorough discussion of the limitations of a criminal justice approach in combating human trafficking).

immigration detention compound the issues they already face. The TVPA recognizes this phenomenon, and provides an immigration remedy, in the form of a T-Visa, to those who meet the legal criteria for trafficked persons.[28] However, an applicant for a T-Visa must demonstrate cooperation with law enforcement, resulting in a dramatic underutilization of this remedy. Although the TVPA authorizes the grant of up to 5,000 T-Visas each year, only 1,862 were granted between 2002 and 2010.[29] Requiring cooperation—as defined by the prosecutor—in order for victims to qualify for protections such as a T-Visa similarly reflects the criminal justice approach in anti-trafficking efforts, which monolithically encourages and prizes the arrest of traffickers.[30]

Victims must first be supported with opportunities that encourage stability and healing before the question of potential cooperation with law enforcement can be considered. Conditioning access to protection, services, benefits, and legal status on an arbitrary concept of cooperation is ineffective, and fails to serve the important goal of empowering survivors of trafficking. Indeed, while victim participation in the investigation of traffickers should be encouraged at the appropriate time, current practice falls short of one of the most important goals of the TVPA, namely, that victims of human trafficking not be "inappropriately incarcerated, fined, or penalized."[31] Law enforcement has demonstrated its inability to adequately monitor its own behavior in this regard, and this has contributed to the ongoing criminalization of trafficking victims.

C. Current Practice Promotes Traffickers' Control Over Victims

Current arrest and prosecution practices also provide traffickers with a powerful tool to continue exploiting people under their control. Numerous clients report being warned by their trafficker that, because they have a prostitution record, they will never be able to obtain legal employment, and that if they consider filing a report, no one would believe them because they are merely prostitutes.[32] Victims' experience in the criminal justice system only rein-

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28 *See* 22 U.S.C. § 105 (2008).

29 Allison Siskin & Liana Sun Wyler, Cong. Research Serv., Trafficking in Persons: U.S. Policy and Issues for Congress (2010), http://www.fas.org/sgp/crs/misc/RL34317.pdf.

30 Patel, *supra* note 24, at 814.

31 22 U.S.C. § 7101(b)(19) (2006).

32 Patel, *supra* note 24, at 824.

forces this as they hear police officers talk about them in the same manner, and then find the sentiment echoed in the courtroom.

Traffickers use victims' criminal histories as grounds for bringing proceedings against them in Family Court, and as a consistent threat for clients who are undocumented immigrants. When a TVLDAP client recently left her trafficker, the trafficker immediately went to Family Court to seek custody of the daughter they had in common. The basis for his claim that she was an unfit mother was the series of prostitution convictions on her record—while he was forcing her to engage in prostitution.

Traffickers know that prostitution convictions present severe immigration consequences for those seeking status in the U.S. and use the threat of notifying immigration authorities as a way to compel compliance. Traffickers take advantage of their victims' isolation, and deceive them into thinking that they lack any legal protections and that reporting will result in arrest, deportation, and even abuse by authorities.[33] Once a victim has a prostitution conviction on his or her record, it simply provides more ammunition for the trafficker.

D. Misconceptions Dominate at the Criminal Court Level

Misconceptions regarding the reach of trafficking exacerbate the prosecution of victims of sex trafficking in local criminal courts. There is a general misunderstanding of trafficking as something that occurs in developing nations, or necessarily involves the smuggling of people between nations, or foreign-born individuals. Additionally, there is a mistaken sense that those arrested for prostitution in New York City—primarily U.S. citizens—could not be affected by force, fraud, or coercion. This is so even though, according to a Special Report from the Bureau of Justice Statistics, four-fifths or 83% of victims in confirmed trafficking incidents between 2008 and 2010 were identified as U.S. citizens.[34]

In addition, although the severity of the trafficking of youth into sexual labor is clearly acknowledged by both federal and state law, arrest and prosecution policy in New York City presents an inconsistent result. Indeed, in its plainest form, the TVPA holds

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33 *See* NEIL A.WEINER & NICOLE HALA, VERA INST. OF JUSTICE, MEASURING HUMAN TRAFFICKING: LESSONS FROM NEW YORK CITY 5–6 (Aug. 2008), https://www.ncjrs.gov/pdffiles1/nij/grants/224391.pdf. *See also* Patel, *supra* note 24, at 814.

34 DUREN BANKS & TRACEY KYCKELHAH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Special Report: Characteristics of Suspected Human Trafficking Incidents 2008–2010 1 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf.

that "[a]n adult is a victim of sex trafficking if he or she is subjected to commercial sex acts by force, fraud, or coercion. A child under the age of [eighteen] is a victim simply if he or she is subjected to commercial sex acts."[35] However, those under the age of eighteen engaging in prostitution in New York City are continuously arrested and prosecuted in local criminal courts as adults despite the fact that under federal law, they are clearly to be considered victims of a severe form of sex trafficking.[36] This is the case even though under New York law, they are defined as "sexually exploited" children[37] and there are escalated penalties associated with trafficking or promoting prostitution of those under nineteen.[38]

In 2011, sixty-four minors who reported their age to be under eighteen were arrested for prostitution activity and prosecuted as adults in criminal court in New York State.[39] This number has held fairly constant since the passage of Safe Harbor.[40] Even more troubling is the fact that the percentage of these arrests resulting in a misdemeanor conviction for the defendant is rising.[41] Recent challenges to these prosecutions citing federal and state anti-trafficking statutes and definitions have drawn mixed results.[42] Indeed, the "fact that the prostitution of U.S. minors likely constitutes trafficking is not well understood by most, including law enforcement."[43]

E. Court System Response in New York

Recognizing that "trafficking cases present difficult challenges for the criminal justice system,"[44] the criminal court system has attempted to craft a response to the high volume of prostitution cases heard in its lower courts each year. In New York City, there are two prostitution diversion parts to which a percentage of prosti-

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35 *Id.*

36 *See* 22 U.S.C. § 7101 (2006).

37 *See* N.Y. SOC. SERV. LAW § 447-a (McKinney 2011).

38 *See, e.g.*, N.Y. PENAL LAW §§ 230.32, 230.20, & 230.35 (McKinney 2011).

39 DCJS CRIMINAL HISTORY, *supra* note 18.

40 In 2009, there were sixty-five prosecutions of the same age group statewide. The year 2010 saw sixty-six such prosecutions. *Id.*

41 *Id.*

42 *Compare* People v. Samantha R., 33 Misc. 3d 1235(A) (Kings Co. Crim. Ct. Dec. 16, 2011) (dismissing charge of loitering for the purpose of engaging in prostitution in the interests of justice in light of the fact that the defendant was sixteen years old at time of arrest) *with* People v. Lewis, 2010NY03560, N.Y.L.J. 1202502663175, at *1 (N.Y. Co. Crim. Ct. July 12, 2011) (denying similar motion where defendant was seventeen years old at time of arrest).

43 OVERSIGHT REPORT, *supra* note 3, at 5.

44 Lippman, *supra* note 19, at xvii.

tution cases in Manhattan and Queens are routed.[45] These diversion parts, which seek to connect those charged with prostitution offenses to social services, represent a step in the right direction as they acknowledge the critical need for services among this population. However, in both courts, connection to services is tied to a guilty plea, either to an infraction level offense, or to a misdemeanor charge, with the exception of arrestees who have had no prior contacts with the criminal justice system.[46] Neither diversion part is far-reaching enough, as many charged with prostitution offenses are adjudicated without being offered the possibility of services. Furthermore, these projects only exist in Manhattan and Queens. There is no designated prostitution courtroom, or model, in Brooklyn, the Bronx, or Staten Island.

While these court programs seek to address some of the issues confronted by those arrested for prostitution, the largest problem is that they cannot undo the damage caused by the unjust arrests themselves.[47] Indeed, no matter how sympathetic or sensitive the court response may be, the mere existence of the criminal case and the experience of being arrested and then prosecuted in criminal court is devastating for someone being trafficked and exploited.[48] This is the perverse result that must be avoided. In order to truly ameliorate conditions of human trafficking, the NYPD must be held accountable for the prostitution arrests it makes, both in terms of the overwhelming quantity and the appallingly low quality.

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45 Courtney Bryan, *Representing and Defending Victims of Commercial Sexual Exploitation in Criminal Court*, LAWYER'S MANUAL ON HUMAN TRAFFICKING & PURSUING JUSTICE FOR VICTIMS, at 190 (Jill Laurie Goodman & Dorchen Leidholdt eds., 2011), http://www.nycourts.gov/ip/womeninthecourts/LMHT.pdf.

46 *Id.*; *see also* Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 342 (2005) (discussing how problem-solving courts create a "system of social service programs grafted onto people, many of whom did not need to be in the Criminal Court in the first place").

47 *Id.* at 340–41.

48 People v. Samantha R., 33 Mis. 3d 1235(A) at *5 (lauding the willingness of the District Attorney's office to refer the defendant to services as a condition of the disposition of her criminal case, but recognizing that:

> I cannot ignore the fact that the court retains the power to sentence the defendant to up to fifteen days in jail if she should ultimately fail to finish the STAR program and is then convicted of the charged offense, and that as a consequence of any such conviction she would have a potentially life-long criminal record, albeit for a violation. Nor can I ignore that her continued prosecution in criminal court may traumatize her to a greater extent than the prosecution of an adult defendant would affect an adult. These concerns counsel against continuing a prosecution, no matter how sensitively handled by the District Attorney.).

III. Law Enforcement Must Adapt Its Strategy to Truly Address the Issue of Sex Trafficking

The NYPD's current arrest policy is at odds with the goal of appropriately investigating and prosecuting sex trafficking. That is not to say that the NYPD does not profess that the prevention and investigation of human trafficking are among its priorities. In fact, both the NYPD and the City of New York publicly emphasize the importance of directing resources to combating sex trafficking.[49] The NYPD receives funding from the federal government specifically for that purpose.[50] However, what actually happens daily on the ground level undercuts any purported efforts to truly grapple with the issue of trafficking. The importance placed on the pursuit of low-level offenses in current policing strategy works against any efforts to meaningfully investigate and arrest sex traffickers. Instead, it encourages a high volume of arrests for prostitution offenses without regard to the impact of those arrests.

A. Quality-of-Life Policing & Prostitution Arrests

For the last twenty years, policing in New York City has been governed by a strategy entitled "Reclaiming the Public Spaces of New York," which amounts to "a full-scale initiative at the precinct level to eliminate quality-of-life offenses."[51] Immediately upon implementation of this strategy, misdemeanor arrests jumped more than 50% in New York City, and have continued on a steady rise.[52] Prostitution is an integral part of the NYPD's public order policing, and every so often a new "Operation" or frenzied approach is un-

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[49] *See, e.g.*, Press Release, The City of New York, Office of the Mayor, "Deputy Mayor for Legal Affairs Carol Robles-Roman Announces Second Phase of New York City's Multi-Media Campaign to Combat Human Trafficking in Observance of National Crime Victims' Rights Week," Apr. 12, 2011, *available at* http://www.nyc.gov/html/endht/downloads/pdf/dm_robles.pdf; Testimony of NYPD Inspector James Capaldo, before the New York City Council (Oct. 19, 2011) (on file with the City University of New York Law Review) [hereinafter Capaldo Testimony]; Nayaba Arinde, *Missing*, N.Y. Amsterdam News, Aug. 6, 2009, at 1.

[50] Capaldo Testimony, *supra* note 49, at 3.

[51] William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality of Life Crimes*, 3 J.L. & Pol'y 447, 451 (1995).

[52] From 1993 to 1998, the total number of adult misdemeanor arrests increased by 66.3%, from 129,404 to 215,158. Ian Weinstein, *The Adjudication of Minor Offenses in New York City,* 31 Fordham Urb. L.J. 1157, 1160 n.7 (2004). The most recent statistics available show 249,211 misdemeanor arrests citywide in 2011. N.Y. St. Div. of Crim. Just. Serv., Computerized Criminal History System, Adult Arrests 2002-2011 (Feb. 21, 2012), *available at* http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/NewYorkCity.pdf.

veiled as law enforcement's latest weapon in prostitution arrests.[53]

This is compounded by the constant pressure among NYPD officers to make unofficial arrest quotas, both to satisfy precinct commanders and to justify overtime.[54] Although the NYPD has always expressly denied the existence of an arrest quota system, recent investigations have confirmed that such systems do exist, and that they clearly impact the manner in which NYPD officers view arrests and their related investigatory duties.[55]

All of these factors together create a policing environment in which a steady flow of low-level arrests are incentivized because officers are encouraged to keep arrests uncomplicated, process them, and go out and make more. In Manhattan, the officers making prostitution arrests are not even required to speak to a prosecutor after making the arrest before the case is sent to criminal court. Unlike other types of crimes, where an officer either speaks to or meets with a prosecutor as part of the arrest process, these arrests proceed entirely by affidavit, meaning an officer merely has to check off boxes on a pre-printed form to complete the processing of a prostitution arrest. This ensures that there is no oversight, no screening, and no debriefing of prostitution arrests that could potentially lead to identification and investigation of sex trafficking. Furthermore, this high volume of arrests comes at a tremendous cost to the City, the court system, and taxpayers in general.[56]

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53 *See, e.g.*, Michelle McPhee, *Hooker Alert in Times Square: Cops in New Push to Rout Prostitutes and Drug Dealers*, N.Y. DAILY NEWS, May 4, 2002, at 6 (describing the NYPD's "Operation Neon Light," a "new quality-of-life initiative" unveiled to target prostitution and other low-level offenses); John Marzulli, *New War on Public Pests, Commish Focuses on Quality of Life*, N.Y. DAILY NEWS, Jan. 9, 2002, at 3 (describing another targeted operation called "Operation Clean Sweep").

54 *See, e.g.*, Joseph Goldstein & Christine Haughney, *Bad Manners Then, Cause for Arrest Now*, N.Y. TIMES, Jan. 7, 2012, at A17.

55 *See, e.g.*, M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing As a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 395 n.108 (2011) (noting how a series of newspaper articles from the *Village Voice* based on audio recordings of two NYPD officers from Brooklyn and the Bronx exposed a quota system where officers were threatened with discipline for failing to make sufficient arrests); Graham Rayman, *The NYPD Tapes Confirmed,* VILLAGE VOICE (Mar. 7, 2012), *available at* http://www.villagevoice.com/2012-03-07/news/the-nypd-tapes-confirmed/ (reporting that the NYPD confirmed the allegations from the audio recordings that precinct commanders encouraged arrests quotas); Rocco Parascandola & Rich Schapiro, *Cop Claims Quotas Rule in 42nd Precinct,* N.Y. DAILY NEWS (Feb. 23, 2012), *available at* http://articles.nydailynews.com/2012-02-23/news/31093008_1_cop-claims-quotas-42nd-precinct (discussing how officers in the 42nd Precinct who failed to meet arrest quotas were given undesirable assignments and not allowed to work overtime).

56 *See, e.g.*, Goldstein & Haughney, *supra* note 54.

B. Lack of Training Among Law Enforcement

Finally, one of the biggest obstacles to meaningful prevention and prosecution of sex trafficking in New York City is a lack of mandatory training for all NYPD officers. While the NYPD has a dedicated unit within its Major Case Squad that investigates cases of sex trafficking citywide, the majority of prostitution arrests are not made by this unit. Instead, VICE squads, anti-crime units, cabaret units, conditions units, and others unfamiliar with the reality of sex trafficking make the majority of arrests for prostitution activity citywide.[57]

While these officers could potentially be the eyes and ears in the ongoing effort to deal with sex trafficking, the majority has not received any specialized training on sex trafficking. Indeed, an officer from the Midtown South Precinct, responsible for more than 250 prostitution arrests in his career, testified in court recently that he had received no training on sex trafficking from the NYPD. Despite having arrested a seventeen year-old girl for prostitution, the officer, a ten-year veteran of the force, could not define sex trafficking. He was unaware that New York had an anti-trafficking law, and had never even been trained on the risk of commercial sexual exploitation of minors.[58]

Without a trained police force, sensitive to the risk of exploitation and trafficking that many involved in prostitution face, New York City's arrest policy will continue to mistake victim for offender. The NYPD must be held accountable in this regard. There must be oversight as to what specific training is conducted on sex trafficking for all members of the department, and a closer monitoring of prostitution arrest policy.

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[57] *See, e.g.*, Transcript of Record at 5, People v. S.M., 2011CN003797 (N.Y. Co. Crim. Ct., Jun. 14, 2011) (testimony of NYPD Officer Jeffrey Rohe from the Midtown North Precinct responsible for over 200 prostitution arrests in his career) (on file with City University of New York Law Review); Transcript of Record at 35–36, People v. J.W., 2010NY069272 (N.Y. Co. Crim. Ct., Nov. 23, 2010) (testimony of NYPD Officer Thomas Nuzio from the 6th Precinct prostitution conditions unit responsible for over 100 prostitution arrests in his career) (on file with City University of New York Law Review); Transcript of Record at 34–35, People v. T.S., 2010NY007515 (N.Y. Co. Crim. Ct., July 13, 2010) (testimony of NYPD Officer Lindsay Agard from the 6th Precinct prostitution conditions unit responsible for over 100 prostitution arrests in her career) (on file with City University of New York Law Review).

[58] Transcript of Record at 23, People v. I.G., 2011CN004514 (N.Y. Co. Crim. Ct., Jun. 21, 2011) (testimony of NYPD Officer Keith Stylianos confirming that he had received no training on sex trafficking from the NYPD) (on file with City University of New York Law Review).

Conclusion

Current arrest and prosecution policies in New York City cast too wide of a net, ensnare victims, and undermine the intent of New York and federal anti-trafficking law. The failure to adequately investigate whether those arrested are in fact victims of exploitation and trafficking has a devastating impact. Fear of law enforcement instilled in victims by traffickers is reaffirmed by unjust arrests. Prosecutions victimize them further. New York City needs to adjust its priority on low-level offenses to encourage investigation and include a sensitive and thorough treatment of prostitution arrests. Such a policy would be more fiscally responsible, as needed dollars could be reallocated to serve those in need. Ultimately, human costs would be reduced.

In order to truly prevent the criminalization of trafficking victims in our criminal justice system, there must be a significant shift in police and prosecutorial strategy, including specific training for law enforcement, a reevaluation of current arrest and prosecution policies and the dedication of specific and sufficient resources. Public defenders cannot be expected to fight this battle, and undo this considerable damage, on their own.