

12-2017

Reproducing Rights: The Intersection of Reproductive Justice and Human Rights

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Recommended Citation

Rachel Rebouche, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights*, 7 U.C. IRVINE L. REV. 579 (2017).
Available at: <https://scholarship.law.uci.edu/ucilr/vol7/iss3/4>

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Reproducing Rights: The Intersection of Reproductive Justice and Human Rights

Rachel Rebouché*

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Reproductive rights are human rights. That mantra has taken hold in United Nations documents, national and international advocacy campaigns, and in the position of governments across the world.¹ The reproductive rights movement has gained significant credibility and legitimacy in recent decades by casting its struggle in human rights terms. In particular, advocates have worked to make abortion a central part of campaigns for women’s human rights. International declarations as well as national court judgments support abortion by reference to women’s rights to equality, self-determination, liberty, autonomy, health, and dignity.² At the level of international advocacy, a right to an abortion—at least on the grounds of life or

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1. See *infra* Part I (demonstrating the emerging international consensus around abortion rights as human rights).

2. See Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1, 2–3 (2003) [hereinafter Cook & Dickens, *Human Rights Dynamics of Abortion Law Reform*]; Martha F. Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. REV. 1657, 1674 (2010); Lance Gable, *Reproductive Health as a Human Right*, 60 CASE WESTERN RES. L. REV. 957, 968 (2010).

health of the woman, rape or incest, or severe fetal anomaly—is now considered a core part of the constellation of women’s human rights.³ Human rights discourse has been indispensable to advocates urging states to decriminalize abortion in whole or in part.⁴

At the same time, a rich literature has emerged critiquing and complicating human rights strategies to advance women’s interests.⁵ Human rights texts can announce universal values but formalist conceptions of human rights can miss the technical and practical work of implementing social and legal reform.⁶ This is an acute problem for abortion care. Pregnant women’s access to and the availability of termination services are consistent concerns for reproductive rights advocates; a right to abortion means very little if women cannot obtain or afford healthcare.

This latter critique has been an impetus for change in advocacy strategies in the United States: activism and scholarship on reproductive justice sets its priorities apart from reproductive rights and makes one of its primary concerns the welfare of marginalized women.⁷ Reproductive justice is a movement founded by women of color who are committed to “a rededication to radical politics.”⁸ Reproductive justice reaches beyond conventional campaigns around constitutional rights to abortion and focuses on the many issues that affect women’s procreative lives. Rather than relying only on litigation and lawyers, reproductive justice is committed to grassroots and community organizing.⁹

3. See Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 256–60 (2008).

4. See *id.*

5. See Wendy Brown & Janet Halley, *Introduction*, in LEFT LEGALISM / LEFT CRITIQUE 25–33 (Wendy Brown & Janet Halley eds., 2002); see also Martha Albertson Fineman, *Equality Across Legal Cultures: The Role for International Human Rights*, 27 T. JEFFERSON L. REV. 1, 10–13 (2004); Sally Engle Merry, *Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law*, 44 OSGOOD HALL L.J. 54, 55–57 (2006) [hereinafter Engle Merry, *Human Rights and Transnational Culture*]; Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343, 344 (2003) [hereinafter Engle Merry, *Rights Talk and the Experience of Law*]; Sari Kouvo, *A “Quick And Dirty” Approach to Women’s Emancipation and Human Rights?*, 16 FEM. LEGAL STUD. 37, 39–40 (2008); Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57, 78 (2011) [hereinafter Marks, *Human Rights and Root Causes*]; Anne Orford, *Feminism, Imperialism, and the Mission of International Law*, 71 NORDIC J. INT’L L. 275, 296 (2002); Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade*, 10 MELB. J. INT’L L. 11, 12 (2009).

6. See Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L.J. 89, 103–04 (1996) (suggesting that women’s rights advocates focus on the adequacy of rights rather than implementation of rights).

7. See JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 1–4 (2004).

8. Carol Mason, *How Not to Pimp out Reproductive Justice: Adventures in Education, Activism, and Accountability*, 34 FRONTIERS: J. WOMEN STUD. 226, 226 (2013).

9. See Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL’Y 71, 71–72 (2011).

Perhaps in contrast to its skepticism of rights-focused litigation, the U.S. reproductive justice movement is anchored in international human rights.¹⁰ Reproductive justice founders describe meeting at the 1994 International Conference on Population and Development (ICPD), an event at which the statement “[r]eproductive rights are human rights” gained international prominence.¹¹ In contemporary writing, reproductive justice advocates routinely invoke human rights as synonymous with social justice.¹²

This Article argues that by relying on human rights as a source of transformation, reproductive justice writings may perpetuate a limited vision for global justice—one that contradicts the movement’s core commitments and detracts from the radical change that the movement’s advocates seek. International human rights law and practice, as traditionally conceived, relies heavily on courts and law reform projects.¹³ And it reflects many of the commitments of the U.S. reproductive rights movement.¹⁴ In adopting a human rights framework, reproductive justice may miss possible alliances with other movements, such as those working to understand the social determinants of health and to advance health justice.¹⁵

In highlighting the potential tension between reproductive justice and human rights, this Article has in mind U.S. advocates, who are central to campaigns for international reproductive rights and seek to incorporate human rights approaches at home. Part I of this Article summarizes the influence of human rights reasoning

10. Kimala Price, *What is Reproductive Justice?: How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 MERIDIANS 42, 46–47 (2010).

11. At the 1995 Fourth World Conference on Women (FWCW), the Executive Director of the United Nations Population Fund stated: “The concept of reproductive rights did not spring from one group or one country. It is neither neo-colonialist nor unethical. It is a universal concept, which reflects the experience of thousands of women and men in countries all over the world. Reproductive rights are human rights.” FOURTH WORLD CONFERENCE ON WOMEN, STATEMENT BY NAFIS SADIQ, EXECUTIVE DIRECTOR OF THE UNITED NATIONS POPULATION FUND (1995), <http://www.un.org/esa/gopher-data/conf/fwcw/conf/una/950905174345.txt> [<https://perma.cc/MH7D-39P5>].

12. See *infra* Part III (describing the invocation of human rights in reproductive justice materials). See generally SILLIMAN ET AL., *supra* note 7, at 24–25 (describing U.S. reproductive justice [and reproductive rights] advocates’ engagement with human rights).

13. See Paul O’Connell, *On the Human Rights Question*, 40 HUM. RTS. Q. 1, 1–3 (forthcoming 2018) (draft on file with author) (arguing that human rights are central to a number of social justice movements, and that “human rights can and should be deployed in emancipatory political projects today, but that reaching such a conclusion requires us to go beyond narrow, formalistic and overly juridical concepts of what human rights are, and stress the centrality of social and political struggle in the formulation and defence of human rights”).

14. For commentary on human rights approaches to the right to health, see Colleen M. Flood & Aeyal Gross, *Introduction: Marrying Human Rights and Health Care System, Contexts for a Power to Improve Access and Equity*, in THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY 13–16 (photo. reprint 2016) (Colleen M. Flood & Aeyal Gross eds., 2014) [hereinafter Flood & Gross, *Introduction*]. See, e.g., SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 210 (2012) (“[T]he rise of human rights in international law occurred . . . due to the ideological changes that set the stage for a moral triumph of human rights—one that in turn gave a whole new relevance to the field’s mission.”) [hereinafter MOYN, THE LAST UTOPIA].

15. See Flood & Gross, *Introduction*, *supra* note 14, at 13–16.

in reproductive rights generally and abortion rights specifically, the embrace of human rights by U.S. reproductive rights advocates, and the influence of U.S. abortion politics in the international arena. Part II describes the origins of the reproductive justice movement in the United States as well as reproductive justice's core priorities. It demonstrates how reproductive justice activism moves beyond a focus on abortion and at the same time calls for meaningful access to abortion care for women with and without resources. Part III reviews the references to human rights in reproductive justice literature and questions if human rights, as described by reproductive justice advocates, respond to the deep inequalities of income and socioeconomic status in the delivery of healthcare.

I. ABORTION RIGHTS ARE HUMAN RIGHTS

Women's equality and empowerment are now fundamental to conversations about reproduction, fertility, and population.¹⁶ But women's rights to reproductive healthcare and decision-making were not originally part of international agendas for development or the right to health.¹⁷ Reproductive rights became central to discussions of women's human rights because of the advocacy of women's rights activists, who helped place reproductive rights, including abortion rights, on the agendas of human rights bodies and organizations.¹⁸

Most academics and advocates highlight the 1994 ICPD as a pivotal event in introducing the mantra "reproductive rights are human rights."¹⁹ Women's rights advocates were at the center of ICPD negotiations and drafted guiding principles that focused on gender equality and "the empowerment of women."²⁰ A year after

16. Alma Beltrán y Puga, *Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law*, 3 CREIGHTON INT'L & COMP. L.J. 158, 159–62 (2012); see also Asian Communities for Reprod. Just., *A New Vision for Advancing Our Movement for Reproductive Health, Reproductive Rights, and Reproductive Justice*, STRONG FAMILIES MOVEMENT 1, 3 (2005), <http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf> [<https://perma.cc/J2W3-NQ3T>] ("In the 1960s, the federal government began funding family planning both in the United States and internationally as part of a strategy for population control, rather than women's empowerment.")

17. See, e.g., Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1339–40 (1997); Price, *supra* note 10.

18. See generally Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 613–45 (1991); Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law: Reflections From Another Century*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES (Doris Buss & Ambreena Manji eds., 2005).

19. Mindy Jane Roseman & Laura Reichenbach, *Global Reproductive Health and Rights: Reflecting on the ICPD*, in REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 4–9 (Laura Reichenbach & Mindy Jane Roseman eds., 2009); Eva Brems, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 HUM. RTS. Q. 136, 152 (1997); Rhonda Copelon, *Remarks of Rhonda Copelon*, 44 AM. U. L. REV. 1253, 1253 (1995); Nancy Northup, *Reproductive Rights at Home and Abroad*, 15 CUNY L. REV. 265, 265 (2012); Zampas & Gher, *supra* note 3, at 252; Beltrán y Puga, *supra* note 16, at 160.

20. International Conference on Population and Development, *Report of the International Conference on Population and Development*, Principle 4, U.N. Doc. A/CONF.171/13/Rev.1 (Sept. 13, 1994).

the ICPD, the Fourth World Conference on Women (FWCW) brought further attention to women's rights and reproductive rights.²¹ Although both stopped short of calling for abortion liberalization, the ICPD Programme of Action and FWCW Platform for Action were among the first human rights documents that referred to abortion explicitly and have been rallying points for reproductive rights supporters ever since.²² Safe and legal abortion, though still contentious, is now a priority for a range of international bodies and features prominently in contemporary human rights declarations.²³

Even though abortion law reform can be controversial, and by no means has had a uniform trajectory, strategies advancing women's reproductive rights have succeeded in many places.²⁴ At the national level, courts increasingly look to human rights texts and norms.²⁵ National and regional laws differ significantly, but cases decided by national courts have helped transform states' international human rights

21. Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, 2–4, U.N. Doc. A/CONF.177/20/Rev.1, Annex I (Sept. 15, 1995).

22. Marge Berer, *The Cairo "Compromise" on Abortion and its Consequences for Making Abortion Safe and Legal*, in REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 152–59 (Laura Reichenbach & Mindy Jane Roseman eds., 2009); ADRIENNE GERMAIN & THERESA KIM, EXPANDING ACCESS TO SAFE ABORTION: STRATEGIES FOR ACTION 3–4 (The International Women's Health Coalition ed., 1998); Joan C. Chrisler, *A Global Approach to Reproductive Justice—Psychosocial and Legal Aspects and Implications*, 20 WM. & MARY J. WOMEN & LAW 1, 1–2 (2013) [hereinafter Chrisler, *A Global Approach to Reproductive Justice*]; Cook & Dickens, *Human Rights Dynamics of Abortion Law Reform*, *supra* note 2, at 4. The ICPD Programme of Action calls on governments to address the consequences of unsafe abortion for women's health and to reduce the need for abortion through expanded family planning services. The International Conference on Population and Development, *supra* note 20, ¶ 8.25. The same provision begins, "In no case should abortion be promoted as a method of family planning." *Id.*

23. Rachel Rebouché, *Abortion Rights as Human Rights*, 25 SOC. LEGAL STUD. 765, 767–70 (2016) (citing the recommendations of the CEDAW Committee, HRC, CESCR, as well as text from Montevideo Consensus on Population and Development and ICPD Beyond 2014 Expert Meeting) [hereinafter Rebouché, *Abortion Rights as Human Rights*]. For example, a 2011 report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health states: "Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated." U.N. Special Rapporteur, *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ IV.1.21, U.N. Doc. A/66/254 (Aug. 3, 2011). The Rapporteur recommends that "legal and safe abortion services [be] available, accessible, and of good quality." *Id.* ¶ IV.1.29.

24. Rights discourse has not paved a one-way street toward abortion liberalization. Human rights arguments have been made on behalf of the rights of fetuses in several countries. Ryan G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIE L. REV. 123, 165–69 (2006). As Part III.A notes, human rights arguments are powerful, but their persuasiveness varies substantially by region and often depends on the cultural, religious, or political attachments of each place. A U.N. report demonstrated that governments in the global South are more than four times as likely to have restrictive abortion policies as those in "developed regions." UN DEPT OF ECON. & SOC. AFFAIRS, ABORTION POLICIES AND REPRODUCTIVE HEALTH AROUND THE WORLD, at 8, U.N. Doc. ST/ESA/SER.A/343, U.N. Sales No. E.14.XIII.11 (2014).

25. See Beltrán y Puga, *supra* note 16.

commitments into domestic interpretations of legislation or constitutional provisions.²⁶

International human rights law can help justify the inclusion of abortion rights as part of a duty to protect women's human rights.²⁷ Three principles—universality, consensus, and balancing rights—have supported the case for linking abortion to women's rights to equality, liberty, autonomy, health, and dignity.²⁸ First, describing the universality of reproductive rights, a 2016 decision of a panel of the Brazilian Supreme Federal Court described abortion as fundamental to universal human rights: “the criminalization of the termination of pregnancy in the first three months violates the nucleus around which a number of fundamental rights of women revolve.”²⁹ That nucleus includes universally-recognized rights to autonomy or self-determination, physical and psychological integrity, sexual and reproductive rights, and gender equality.³⁰ By describing abortion as indivisible from human rights protections, courts like the Brazilian Supreme Federal Court marry reproductive rights to the protection and promotion of women's dignity and equality.

Second, and distinct from claims of universalism, human rights arguments build on shared, contemporary values that gain legitimacy from consensus among countries. Sally Engle Merry argues that the consensus supporting human rights law confers its own unique culture—it is “a culture of transnational modernity.”³¹ To defend, to support, or to pass a permissive abortion law signals not only a state's commitment to women's rights, at least on paper, but also its affiliation with other states that have liberal abortion regimes.³² In turn, consensus about the importance

26. Rebouché, *Abortion Rights as Human Rights*, *supra* note 23, at 771–74.

27. *Id.* (categorizing three arguments on which courts tend to rely—universal rights, consensus, and balancing rights). Moreover, human rights arguments have helped transform abortion into a transnationally important issue rather than a local concern or personal choice. This is not an easy task given states' treatment of family law as a primarily national or domestic concern. See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 754 (2010); Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1556–57 (2006).

28. Cook & Dickens, *Human Rights Dynamics of Abortion Law Reform*, *supra* note 2, at 2–3; Davis, *supra* note 2, at 1673–74.

29. A panel of the Brazilian Supreme Federal Court held that clandestine abortion providers, performing terminations in violation of the penal code, could not be detained pre-trial. In reaching that holding, the panel decided that criminalization was incompatible with women's fundamental rights and does not meet the requirements of proportionality. Although the decision does not invalidate the penal code, it can serve as a model for other courts and may prompt the full court to consider the legality of abortion restrictions. S.T.F., Habeas Corpus No. 124.306, Relator: Min. Marco Aurélio, SUPREMO TRIBUNAL FEDERAL JURISPRUDENCIA [S.T.F.J.], 29.11.2016, 1, ¶ 20 (Braz.) [hereinafter Habeas Corpus n. 124.306].

30. The panel also held that criminal abortion disproportionately impacts poor women because they are unable to use the public health system, which does not offer abortion care except on very limited grounds, and instead must turn to self-induced methods or to underground services. The panel held this is a source of “social discrimination.” *Id.* ¶ 30.

31. Engle Merry, *Human Rights and Transnational Culture*, *supra* note 5, at 65.

32. See, e.g., UN DEP'T OF ECON. & SOC. AFFAIRS, *supra* note 24, at 1, 6; Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355, 359–60 (2012).

of women's reproductive rights affirms human rights as the way to communicate issues of global social justice.³³ The Brazil decision provides another example. The panel of the Supreme Federal Court emphasized that “the dominant view in the democratic and developed world is that the criminalization of voluntary termination of pregnancy seriously affects several fundamental rights of women, with inevitable impacts on human dignity.”³⁴ The panel then cited the laws of the United States, Germany, Belgium, France, Uruguay, and Mexico City as proof of consensus around legal permission for pre-viability abortion.³⁵ By decriminalizing early abortion and supporting rights essential to the protection of “human dignity,” the panel joins the “democratic and developed world,” comprised mainly of North American and Western European countries. Human rights arguments signal shared values that confer legitimacy.³⁶

Third, treaty-based bodies and national courts rely on human rights commitments to counter or to contest anti-abortion arguments.³⁷ Human rights obligations can insulate courts (and governments) from political fights over abortion. Courts can refer to the duty to implement abortion rights or decriminalize terminations even in the face of national opposition.³⁸ The same decision of the Brazil Supreme Federal Court cited iconic (and dated) abortion cases from the United States, Germany, and Canada for the proposition that “protection of the unborn life does not outweigh the fundamental right of the woman to perform an abortion.”³⁹ It further referenced counseling regimes in Germany, Portugal, France, and Belgium as a means to balance respect for potential life and women's fundamental rights.⁴⁰

These justifications also appear in regional and international decisions on abortion law.⁴¹ *Mellet v. Ireland*, a 2016 decision of the Human Rights Committee (HRC), provides examples of how human rights reasoning embraces universal, consensus-driven values that challenge the gendered assumptions of abortion restrictions.⁴² *Mellet* was twenty-one weeks pregnant when the fetus she was

33. See Rebouché, *Abortion Rights as Human Rights*, *supra* note 23, at 772.

34. Habeas Corpus n. 124.306, ¶ 20.

35. *Id.* ¶¶ 39, 41, 46, 47.

36. See *id.* ¶ 20.

37. Chrisler, *A Global Approach to Reproductive Justice*, *supra* note 22, at 4; Davis, *supra* note 2, at 1660.

38. See Rebouché, *Abortion Rights as Human Rights*, *supra* note 23, at 772.

39. Habeas Corpus n. 124.306, ¶¶ 39, 46. See generally Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85, 85 n.1, 88–89 (2012) (demonstrating that modern courts consistently cite cases decided by the courts of last appeal in the United States and Germany from the 1970s) [hereinafter Rebouché, *Comparative Pragmatism*].

40. Habeas Corpus n. 124.306, ¶ 41.

41. See, e.g., *id.* ¶ 20.

42. U.N. Human Rights Comm., Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2324/2013, ¶¶ 7.4–47.8, 7.11, 8–10, CCPR/C/116/D/2324/2013, (Nov. 17, 2016), http://www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/116/D/2324/2013&Lang=E [https://web.archive.org/web/20170411020725/http://

carrying was diagnosed with a fatal condition that would result in death *in utero* or shortly after birth.⁴³ Mellet's midwife and physician advised her that she could travel to another country for an abortion or "could carry to term knowing that the fetus would most likely die inside her . . ." ⁴⁴ Only in the latter scenario would her local hospital and healthcare professionals offer her medical care and counseling.⁴⁵

The HRC concluded that the impact of Ireland's almost-complete abortion ban violated Mellet's rights to equal protection, privacy, and freedom from cruel, inhuman, or degrading treatment under the International Covenant on Civil and Political Rights (ICCPR).⁴⁶ Under Article 26, the right to equal protection, "the differential treatment to which [Mellet] was subjected in relation to other similarly situated women failed to adequately take into account her medical needs and socioeconomic circumstances . . ." ⁴⁷ The majority's view was that the ICCPR's equal protection right does not permit a state to treat differently women in need of abortion for medical reasons from women similarly pregnant with nonviable fetuses who miscarry and may obtain the country's healthcare services.⁴⁸

Evoking the justification of universalism, the majority view focused on how abortion restrictions undermine women's equality as well as threaten women's privacy rights and freedom from inhumane treatment.⁴⁹ Then, referring to consensus, the majority view referenced Ireland's law as an outlier in Europe because Ireland criminalizes all terminations except those to save a woman's life.⁵⁰ The majority view of the HRC, in conclusion, balanced the burden imposed on women in the petitioner's situation against protecting the life of a fetus with a fatal medical condition.⁵¹

A concurring view authored by HRC member Sarah Cleveland elaborated on universal rights to gender equality and the prohibition of gender-based stereotypes.⁵² The refusal to provide reproductive health services that only women need resulted in, according to Cleveland, both direct and indirect gender discrimination.⁵³ Cleveland wrote:

www.un.org/ga/search/view_doc.asp?symbol=CCPR/C/116/D/2324/2013&Lang=E [hereinafter *Mellet v. Ireland*].

43. *Id.* ¶¶ 2.1, 2.2.

44. *Id.* ¶ 2.2.

45. *Id.* ¶¶ 7.4, 7.8.

46. *Id.* ¶ 7.11.

47. *Id.*

48. *Id.*

49. The Human Rights Committee (HRC) found that under Article 7, the toll of Mellet's travel and lack of aftercare "subjected [her] to conditions of intense physical and mental suffering." *Id.* ¶ 7.4. Also, the costs Mellet incurred by traveling to circumvent the Irish law amounted to an arbitrary interference with her right to privacy under Article 17. *Id.* ¶ 7.8. The HRC did not find violations of Mellet's rights under Articles 2 (sex discrimination), 3 (right to competent tribunal), or 19 (freedom of expression). *Id.* ¶ 7.12.

50. *Id.* ¶¶ 7.4, 7.8, 9.

51. *See id.* ¶ 7.8.

52. *Id.* Annex II, ¶¶ 6–7.

53. *Id.* Annex II, ¶ 7.

The right to sex and gender equality and non-discrimination obligates States to ensure that State regulations, including with respect to access to health services, accommodate the fundamental biological differences between men and women in reproduction and do not *directly or indirectly* discriminate on the basis of sex. They thus require States to protect on an equal basis, in law and in practice, the unique needs of each sex. In particular, as this Committee has recognized, nondiscrimination on the basis of sex and gender obligates States to adopt measures to achieve the “*effective and equal empowerment of women*.”⁵⁴

Cleveland adopted a substantive account of equality—a departure from formal equality (treating likes alike)—in assessing law’s impact on women’s lives.⁵⁵ Cleveland argued that abortion restrictions work against women’s empowerment and perpetuate stereotypes that “plac[e] the woman’s reproductive function above her physical and mental health and autonomy.”⁵⁶ She wrote that “differential treatment of women based on gender stereotypes” is what “can give rise to gender discrimination.”⁵⁷ For Cleveland, the ICCPR’s right to equal protection and protection against gender discrimination (which the HRC did not find a violation of) forbid just these kinds of “traditional stereotypes regarding the reproductive role of women.”⁵⁸ Moreover, states’ justifications for abortion restrictions based on “tradition, history and culture” cannot justify gender discrimination or gender stereotypes.⁵⁹ This is a view rooted in universalism: abortion restrictions rely on pervasive gender stereotypes that states may not justify in terms of their sovereignty or culture.⁶⁰ In making these arguments, Cleveland cited the work of several international treaty-based bodies, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) Committee; Committee on Economic, Social, and Cultural Rights; and Inter-American Commission on Human Rights, for instance.⁶¹

Cleveland’s view embodies the potential that reproductive rights advocates see in human rights, which connects abortion rights to women’s empowerment and

54. *Id.* (emphasis in the original) (footnote omitted).

55. Sandra Fredman, *Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights*, in TEMPORARY SPECIAL MEASURES: ACCELERATING DE FACTO EQUALITY OF WOMEN UNDER ARTICLE 4(1) UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 111, 112 (Ineke Boerefijn et al. eds., 2003). *See also* Rebecca J. Cook & Susannah Howard, *Accommodating Women’s Differences Under the Women’s Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1043–48 (2007) (explaining how provisions of CEDAW, for example, support substantive equality).

56. *Mellet v. Ireland*, *supra* note 42, Annex II, ¶ 14.

57. *Id.* Annex II, ¶ 15.

58. *Id.* Annex II, ¶ 14.

59. *Id.* Annex II, ¶ 15.

60. *Id.* Annex II, ¶¶ 11–13.

61. *Id.* Annex II, ¶¶ 11, 12, 15.

equality.⁶² As the next Part argues, that view is distinct from the traditional discourses around abortion in the United States.

II. FROM REPRODUCTIVE RIGHTS TO REPRODUCTIVE JUSTICE

This Part describes why the U.S. reproductive rights movement has looked to human rights to address the limitations of abortion constitutionalism. To highlight what advocates argue U.S. abortion rights lack, the first Section contrasts the *Mellet* case to a recent U.S. Supreme Court decision—*Whole Woman’s Health v. Hellerstedt*.⁶³ The Section then describes the emergence of reproductive justice as a departure from established U.S. abortion rights litigation.

A. *The Human Rights Gap*

U.S. abortion supporters have looked to human rights arguments to supplement and expand domestic constitutional rights, which they argue have not kept pace with the positive duties that human rights impose on states or with concepts of substantive equality.⁶⁴ Equality principles such as those expressed by Cleveland’s view in *Mellet*, or, for instance, the CEDAW Committee, “recogni[ze] . . . the reality of women’s differences” and are the more robust, progressive version of U.S. equal protection doctrine.⁶⁵ A human rights approach has been particularly attractive to reproductive rights groups that have confronted the shortcomings, in U.S. courts and statehouses, of a rights narrative grounded in privacy and autonomy rights.⁶⁶

The limitations of U.S. constitutional rights are noticeable even in victories for abortion supporters. Like *Mellet*, *Whole Woman’s Health v. Hellerstedt* concerned abortion restrictions that made women’s ability to gain access to termination services difficult.⁶⁷ The U.S. Supreme Court struck down a Texas law that required abortion clinics to be fitted as ambulatory surgical centers (ASC) and physicians to have admitting privileges at nearby hospitals.⁶⁸ Justice Breyer, writing for the majority, offered a “textured account” and “fact-saturated” picture of the

62. See Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 356 (2002) (“Rights-based narratives are not the only powerful narratives—and in some cultural contexts they may be much less effective than in others—but for many of the world’s women, they offer the best way to buttress arguments for change.”).

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

64. SILLIMAN ET AL., *supra* note 7, at 24–25.

65. See Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 487 (2008) (contrasting, for example, equal protection under the U.S. Constitution and substantive equality under CEDAW).

66. Price, *supra* note 10, at 46 (“Early reproductive justice activists were strongly influenced by international human rights discourse . . . [A] global, transnational women’s movement that placed human rights at the core of its organizing activities emerged. Many U.S. feminists were arguing that women should be involved in the international human rights scene.”).

67. *Whole Woman’s Health*, 136 S. Ct. at 2300.

68. *Id.* at 2310–11, 2316.

availability of termination services after passage of the Texas law.⁶⁹ In describing the realities of abortion access, the Court held that *Planned Parenthood v. Casey* requires courts to balance the benefits and burdens imposed by the law in applying *Casey*'s undue burden test.⁷⁰ For both admitting privileges and ASC requirements, there were no health-related problems to solve because abortion results in virtually no deaths and is safer than common, outpatient procedures like colonoscopies.⁷¹ The evidence also suggested there was no health benefit for patients.⁷² Patients rarely need to be admitted to a hospital or to be transferred to one; for medical abortion, complications result after women leave a clinic.⁷³

Conversely, the law exacted significant costs from patients and clinics, constituting an undue burden on the rights of women in Texas (and women in West Texas specifically).⁷⁴ The law would have forced all but seven or eight facilities to close, and remaining providers would have been concentrated in metropolitan areas (Houston, San Antonio, Austin, and Dallas-Fort Worth).⁷⁵ Over 290,000 women of reproductive age would have lived more than 150 miles away from an abortion provider; providers would have had to accommodate five times as many patients without the means to increase clinic capacity.⁷⁶ Rural, low-income women suffer the most under these laws because they cannot afford to travel the substantial distance to reach an abortion provider.⁷⁷ In the area that would have been most affected by the law, the Rio Grande Valley, close to 40% of residents live at or below the federal poverty level, which is roughly the equivalent of an individual earning around eleven thousand dollars per year.⁷⁸ Reproductive justice groups helped bring these facts to light by “agree[ing] to write amicus briefs, which resulted in a larger number of the briefs submitted highlighting the importance of abortion access for marginalized groups.”⁷⁹

69. CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA 35–36 (2017).

70. *Whole Woman's Health*, 136 S. Ct. at 2309.

71. *Id.* at 2311.

72. *Id.* at 2318.

73. *Id.* at 2311, 2315.

74. *Id.* at 2318.

75. *Id.* at 2316.

76. *See, e.g., id.* at 2302, 2318. *See also* Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER, L. & JUST. 76, 81–83 (2015).

77. Pruitt & Vanegas, *supra* note 76, at 77–78.

78. U.S. DEP'T OF HEALTH & HUM. SERVS., 2015 POVERTY GUIDELINES (2015).

79. Gemma Donofrio, *Exploring the Role of Lawyers in the Reproductive Justice Movement* 33 (May 17, 2017) (unpublished manuscript) (draft on file with author); *see, e.g.*, Brief for National Latina Institute for Reproductive Health et al. as Amici Curiae Supporting Petitioners, *Whole Woman's Health*, 136 S. Ct. 2292 (2016) (No. 15-274) (based on interviews with women who sought abortions in Texas and reporting that many interviewees took out loans, worked overtime, feared losing their jobs, found childcare, and felt stigmatized).

Rightly so, reproductive rights supporters count *Whole Woman's Health* as a victory that potentially gives the toothless undue burden test some bite.⁸⁰ But in contrast to *Mellet*, it is striking that neither Justice Breyer's majority opinion nor Justice Ginsburg's concurring opinion mentions women's equality.⁸¹

The absence of equality reasoning has not been lost on women's rights advocates; for many of them, the reason equality arguments—and substantive equality reasoning, specifically—are missing is the focus in U.S. courts on negative rights (rights to non-interference by the state, for instance).⁸² Feminist scholars such as Martha Fineman have demonstrated how liberal individualism produces a deficient and unrealistic conception of abortion (and other) rights.⁸³ Rights-based arguments tend to focus on individual agency and not on the contexts in which termination decisions occur. In this vein, Fineman and other feminist scholars have urged that rights should be understood as relational.⁸⁴ For instance, many women will weigh the interests of partners, parents, or children when deciding whether to continue a pregnancy. But abortion rights protected as private choices only give women a right to buy services and not a right to gain access to those services.⁸⁵ This has been a particularly salient critique in the aftermath of abortion restrictions like those struck down in *Whole Woman's Health*. Restrictive laws increase the cost of services, thus burdening women who cannot afford them, and there is no state

80. See, e.g., Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J.F. 149, 150 (2016) (arguing that “in *Whole Woman's Health* the Court applies the undue burden framework in ways that have the potential to reshape the abortion conflict”); cf. Lisa M. Kelly, *Abortion Travel and the Limits of Choice*, 12 FLA. INT'L U. L. REV. 27, 38 (2017).

81. On the other hand, *Whole Woman's Health* is immediately enforceable in Texas, whereas Ireland has not implemented the HRC's view that it “should amend its law on the voluntary termination of pregnancy, including if necessary its Constitution, to ensure compliance with the Covenant, ensuring effective, timely and accessible procedures for pregnancy termination” *Mellet v. Ireland*, *supra* note 42, ¶ 9.

82. See Kelly, *supra* note 80, at 45–46 (noting the negative rights approach to abortion rights and abortion access).

83. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 31–54 (2004) (arguing for conceptions of dependency that are collective and confer responsibility on the state, state bodies, and the market to support dependency and care work).

84. See, e.g., Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 272 (2010). See generally JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 30 (2011); ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* (rev. ed. 1990).

85. See, e.g., Davis, *supra* note 2, at 1665–66; see also Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1411 (2009).

responsibility to cover the costs of abortion care.⁸⁶ At the same time, parents have a patchwork system of state support for childcare.⁸⁷

As one response, reproductive justice advocates pledge “to ‘Bring Cairo Home’ by adapting agreements from the [ICPD] Programme of Action to a U.S. specific context.”⁸⁸ Tying that agenda to reproductive justice activism, Cynthia Soohoo and Suzanne Stolz assert that there is “value [in] learning from movements in other countries” and “learning from the experience had by advocates from other countries in using international human rights standards, especially economic, social, and cultural human rights”⁸⁹ This is the promise of human rights for advocates in the United States—abortion rights tethered to universal guarantees, substantive equality, and a capacious understanding of what human rights to health include. The last Part more fully explores why the U.S. reproductive rights and justice movements look to human rights to supplement U.S. constitutional rights. Exerting bidirectional influence, abortion laws and politics of the United States have served as both models and anti-models in transnational and international law reform.⁹⁰

Before turning to the influence of human rights law on reproductive justice activism, the next Section explains the reproductive justice movement’s challenge to mainstream reproductive rights advocacy—at least as carried out in the United States.

B. What’s Wrong with Reproductive Rights?

Reproductive justice, as distinguished from reproductive rights, has gained significant momentum.⁹¹ In increasing numbers, U.S. nonprofit groups have dropped “pro-choice” from their materials and incorporated “reproductive justice”

86. See, e.g., *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding that there is no constitutional requirement for states to fund medically necessary abortions and that the Hyde Amendment, which restricts federal funds for abortions only in cases of threat to life and rape, does not violate the Fourteenth Amendment). See generally REPROD. HEALTH TECHS. PROJECT, TWO SIDES OF THE SAME COIN: INTEGRATING ECONOMIC AND REPRODUCTIVE JUSTICE (2015), <http://rhtp.org/wp-content/uploads/2016/08/TwoSidesSameCoinReport.pdf> [<https://perma.cc/M3XE-5HAC>] (arguing that there is an insufficient safety net in the United States to help poor women needing abortions).

87. See LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 5, 85–114 (2006) (urging “an understanding of the social contract pursuant to which families’ contributions to social reproduction warrant public support”). Extending this argument, the right of an individual to end pregnancy, free from state interference, includes no corresponding duty on the state to provide social and economic support for mothers or for women’s other reproductive health needs. See West, *supra* note 85, at 1409–10.

88. Soohoo & Stolz, *supra* note 65, at 497–98; cf. Kelly, *supra* note 80, at 46–47 (arguing that reproductive justice groups, drawing on collective mobilization rather than rights, have responded with abortion funds that help cover the costs of low-income and rural women’s terminations).

89. *Id.* at 498.

90. Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women’s Health*, 63 ALA. L. REV. 1, 14–21 (2011) [hereinafter Rebouché, *The Limits of Reproductive Rights*].

91. Price, *supra* note 10, at 61 (reporting that the term “reproductive justice” is “gaining some momentum”).

into their organizations' names.⁹² This Section describes reproductive justice's origin and then sets out four movement commitments—the recognition of women's intersecting identities, the limits of “choice” and U.S. privacy rights, the inclusion of reproductive issues outside of abortion, and community or local management of reproductive healthcare services.⁹³ Reproductive justice commitments begin with references to human rights. Reproductive justice “[f]rom its inception” has been “globally conscious,”⁹⁴ and reproductive justice advocates draw from feminist ideas to support “indigenous movements of women, who are best able to develop solutions that fit their culture and situation.”⁹⁵

Most commentators describe the origin of reproductive justice as beginning with the leaders of nonprofit groups advocating for women of color, such as the SisterSong Women of Color Collective.⁹⁶ Advocates attended the ICPD where they were inspired by the human rights movement and the ICPD's focus on poverty, gender equality, and the empowerment of women.⁹⁷ However, they believed that their communities were not represented in the remarks of government delegates.⁹⁸ In the United States, mainstream reproductive rights organizations overlooked or undermined the experiences of marginalized populations of women.⁹⁹

92. Reproductive justice writings express a concern that the phrase “reproductive justice” has been co-opted by groups that do not share the reproductive justice movement's commitments. Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. SOC. SCI. 327, 343 (2013); Zakiya T. Luna, “*The Phrase of the Day: Examining Contexts and Co-optation of Reproductive Justice Activism in the Women's Movement*,” in RESEARCH IN SOCIAL MOVEMENTS, CONFLICT & CHANGE: CRITICAL ASPECTS OF GENDER IN CONFLICT RESOLUTION, PEACEBUILDING, AND SOCIAL MOVEMENTS 219, 236 (Anna Christine Snyder & Stephanie Phetsamay Stobbe eds., 2011).

93. One movement commitment that this Article does not address in detail is the work of reproductive justice organizations to invest in other social justice movements, such as lawyering for environmental justice and workers' rights. See, e.g., Asian Communities for Reprod. Just., *supra* note 16, at 9. For analysis at the intersection of environment, race, and reproduction, see Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 843–45 (2014).

94. Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL'Y 47, 61 (2014).

95. Chrisler, *A Global Approach to Reproductive Justice*, *supra* note 22, at 4.

96. *Id.* at 1; see also MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 518 (2015). Jennifer Nelson describes how U.S. women of color contested the focus on abortion and the focus on middle- or upper-class white women of mainstream reproductive rights organizations. In particular, she examines the activism of Loretta Ross, who worked for the first reproductive justice organization for women of color (the National Black Women's Health Project, founded in 1983), directed a program focused on women of color at the National Organization for Women, and, while coordinating the SisterSong Collective, formed the Women of African Descent for Reproductive Justice. JENNIFER NELSON, MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN'S HEALTH MOVEMENT 167–92 (2015). Then, after the ICPD, the Ford Foundation convened a meeting of sixteen organizations, which would form SisterSong: “The Collective included organizations led by women from the Native American, African American, Latina, and Asian American communities, and it continued to spread reproductive justice based on a human rights approach to legal advocacy.” Donofrio, *supra* note 79, at 14.

97. SILLIMAN ET AL., *supra* note 7, at 49; Wiley, *supra* note 94, at 61.

98. Luna, *supra* note 92, at 228; see also Chrisler, *A Global Approach to Reproductive Justice*, *supra* note 22, at 1.

99. Kimala Price lists the leading reproductive rights organizations as Planned Parenthood Federation of America, the National Organization of Women, Feminist Majority, and NARAL. Price,

Thus, a foundation of reproductive justice is critical race theory, and the movement “focuses on the intersectionality of oppression, that is, the ways in which aspects of social status and social identity (e.g., age, race/ethnicity, socioeconomic class, sexual orientation, gender identity, religion, ability) combine to impact women’s experiences.”¹⁰⁰ Jael Silliman, Marlene Gerber Fried, Loretta Ross, and Elena Gutierrez, in penning an early manifesto for reproductive justice, wrote:

Some women of color organizations are using “reproductive justice” to recognize that the control, regulation, and stigmatization of female fertility, bodies, and sexuality are connected to the regulation of communities that are themselves based on race, class, gender, sexuality, and nationality. This analysis emphasizes the relationship of reproductive rights to human rights and economic justice.¹⁰¹

As their last line indicates, although they believed participants at the ICPD could have gone further in recognizing the centrality of race, class, and sexuality to women’s reproductive health and choices, human rights provided a platform for addressing the needs of diverse women.

Second, the reproductive justice movement is explicitly critical of rights, though not necessarily *human* rights (a point elaborated in the next Part).¹⁰² Most materials on reproductive justice emphasize that the conventional rhetoric around abortion rights “fits best the situation of relatively privileged women in Western, industrialized nations” because a rights framework “requires that a woman know that she has reproductive rights, that her nation and her community acknowledge

supra note 10, at 54. Sarah London lists the Center for Reproductive Rights, Planned Parenthood Federation of America, and NARAL. London, *supra* note 9, at 80 n.59. Both authors give the example of the 2004 March for Women’s Lives in Washington, D.C., which drew over one million participants. Price recounts that the leaders of mainstream reproductive rights organizations intended to name the event the “March for Freedom of Choice” and had excluded women of color from planning. Price states:

Many activists were resentful that the ‘big four’ had decided to plan a march without any significant input from them and were dissatisfied that the march would address only abortion rights. Eventually, SisterSong, the Black Women’s Health Imperative, and the National Latina Institute for Reproductive Health would join the planning team of the 2004 march. These three groups are credited with broadening the march’s message beyond abortion and having it renamed the March for Women’s Lives.

Price, *supra* note 10, at 54–55.

100. Chrisler, *A Global Approach to Reproductive Justice*, *supra* note 22, at 4; see also Loretta J. Ross et al., *Just Choices: Women of Color, Reproductive Health and Human Rights*, in *POLICING THE NATIONAL BODY: SEX, RACE, AND CRIMINALIZATION* 147 (Jael Silliman & Anannya Bhattacharjee eds., 2002) (“control [over] what happens to our bodies is constantly challenged by poverty [and] racism”).

101. SILLIMAN ET AL., *supra* note 7, at 10.

102. *Id.* at 24 (“Like other US based organizations serving women of color, the SisterSong Women of Color Reproductive Health Collective uses the global human rights framework in its activism, recognizing that the United States lacks a sufficient legal framework to guarantee women of color safe and reliable access to healthcare. In order to ensure appropriate treatment and access to healthcare and to address the issues of class, race and gender that affect women of color, a comprehensive human rights-based approach to organizing that accounts for difference is necessary.”).

those rights, and that she is able to exercise them.”¹⁰³ A privacy right is only valuable to those who can exercise privacy and autonomy vis-à-vis the state. That is often not possible for those particularly vulnerable to state power, such as women subject to racial discrimination, receiving state assistance, or new to a country.¹⁰⁴

Third, reproductive justice supports an expansive agenda for reproductive health. Abortion rights advocacy has long been “the most visible activity associated with reproductive rights organizations.”¹⁰⁵ Reproductive justice advocates contend that concentrating on abortion law diverts attention from a range of other reproductive experiences.¹⁰⁶ For example, reproductive justice advocates have lobbied for better treatment of incarcerated, pregnant women (such as removing shackles during labor).¹⁰⁷ Reproductive justice initiatives address reproductive issues across the life span, including pre- and post-birth healthcare; the availability of sexual education, contraceptives, and reproductive technologies; and affordable childcare.¹⁰⁸ Zakiya Luna and Kristin Luker, in distinguishing reproductive rights from reproductive justice, define “reproductive justice [as] equally about the right to not have children, the right to have children, the right to parent with dignity, and the means to achieve these rights.”¹⁰⁹ And more broadly, reproductive justice emphasizes the linkages between present discrimination and the legacies of forcibly controlling the fertility of women of color and low-income women.¹¹⁰ Reproductive justice activists lament that mainstream reproductive rights organizations have not concentrated on the racial and income disparities that perpetuate racial injustice and continue to plague the delivery of reproductive healthcare.¹¹¹ Abortion rights victories, though important, are therefore not sufficient. As Lindsay Wiley writes, “Access to healthcare—not merely as a matter of the ‘right to choose’ contraception or abortion, but as a matter of the general affordability, availability, and cultural appropriateness of a wide range of health services for women and families—is a priority issue for the movement.”¹¹² Constitutional litigation can create a reliance

103. Joan C. Chrisler, *Introduction: What is Reproductive Justice?*, in *REPRODUCTIVE JUSTICE: A GLOBAL CONCERN* 1 (Joan C. Chrisler ed., 2012).

104. Luna & Luker, *supra* note 92, at 329.

105. Luna, *supra* note 92, at 222. Martha Davis argues that major nonprofit organizations in the United States now have turned to bundling abortion with other reproductive health issues, partly in response to the criticisms raised by groups like the SisterSong Collective, but also, Davis argues, because an issue like postpartum care is arguably less controversial than abortion. Davis, *supra* note 2, at 1658–60.

106. West, *supra* note 85, at 1422–23.

107. Luna & Luker, *supra* note 92, at 341.

108. Chrisler, *A Global Approach to Reproductive Justice*, *supra* note 22, at 4–5.

109. Luna & Luker, *supra* note 92, at 343.

110. *Id.* at 341; Price, *supra* note 10, at 59. See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 56–57, 100–03 (1997) (summarizing past and present population control measures imposed on women of color and the racism that underpins the reproductive rights movement: “the movement to expand women’s reproductive options was marked by racism from its very inception . . .”).

111. London, *supra* note 9, at 78; Price, *supra* note 10, at 46.

112. Wiley, *supra* note 94, at 63.

on courts, lawmakers, and lawyers. Yet courts may not have the tools to implement remedies for systemic social or structural problems, and they do not make political and policy decisions that affect directly the delivery of health services.¹¹³

This is not to suggest that the reproductive justice movement has abandoned abortion advocacy. But rather than focusing on litigating privacy rights, reproductive justice prioritizes community engagement with vulnerable populations of women,¹¹⁴ and focuses on the experiences of those living under abortion laws.¹¹⁵ Accordingly, a fourth commitment, related to affordable and accessible healthcare, is the insistence that advocacy must address the various avenues by which women meet their reproductive health needs. This entails, according to writings on reproductive justice, sustained community engagement and research into how law shapes women's health.¹¹⁶

U.S. reproductive justice advocates, for instance, have turned their attention to women who terminate pregnancies outside of law and without the direct assistance of a healthcare provider.¹¹⁷ In an innovative strategy explicitly aligned with reproductive justice values, the Berkeley Center on Reproductive Rights and Justice has undertaken a five-year project to expand access to self-induced abortion.¹¹⁸ Some states have longstanding laws that punish women who self-inflict abortion, but some states do not and will not prosecute women for ending a

113. Ciara O'Connell, *Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like?*, 16 HEALTH & HUM. RTS. J. 116, 118 (2014); London, *supra* note 9, at 84 nn. 83 & 85 (discussing the cyclical role of litigation).

114. Orfeneo notes, for instance, strategies in the Philippines tied to mobile health clinics and to family planning assistance delivered by women working in the informal economy, both of which a new reproductive health bill encouraged. Rosalinda Pineda Orfeneo, *Economic and Reproductive Justice in the Context of Women in the Informal Economy*, 2 ASIAN BIOETHICS REV. 19, 32–34 (2010).

115. See Patrick Adams, *Spreading Plan C to End Pregnancies*, N.Y. TIMES, Apr. 27, 2017; Wiley, *supra* note 94, at 57. Lindsay Wiley summarizes a reproductive justice framework and argues that it incorporates a health justice perspective by:

[R]eject[ing] siloed, narrowly defined priorities in favor of a broad understanding of the social determinants of inequality[;] . . . offer[ing] an internal critique of the influence of social and cultural biases on the aims and strategies of the progressive reform project that preceded it[;] . . . [and] balanc[ing] the role of experts in prioritizing and achieving substantive reforms with a commitment to community engagement and participatory parity.

Id. For Wiley, the key innovation of reproductive justice is the “commitment to participatory engagement by the poor and socially marginalized in decision-making *processes*,” which is a “shift away from substantive law reform . . . and toward a process-based conception of social justice lawyering as a democratic, participatory, collaborative project to ensure recognition of and self-determination for marginalized individuals.” *Id.* at 101 (emphasis in the original).

116. Luna & Luker, *supra* note 92, at 338. Zakiya Luna and Kristin Luker call for “best practices” in research, such as interviews and participatory techniques “from design to execution to publication to evaluation.” Research should evaluate evidence of the country's healthcare infrastructure and the resources pregnant women have at their disposal. *Id.* at 344. See also Scott Burreis et al., *Making the Case for Laws that Improve Health: A Framework for Public Health Law Research*, 88 MILBANK Q. 169, 170 (2010).

117. See, e.g., JILL ADAMS & MELISSA MIKESELL, PRIMER ON SELF-INDUCED ABORTION (2017), <https://www.law.berkeley.edu/wp-content/uploads/2016/01/SIA-Legal-Team-Primer.pdf> [<https://perma.cc/2HF4-D3ZR>] (last visited Feb. 13, 2018).

118. *Id.*

pregnancy.¹¹⁹ The Center’s goals are to use litigation and legislation to counter prosecutions or investigations of self-induced abortions and to “build a cadre of lawyers and scholars poised to fight for self-determined abortion care.”¹²⁰ Numerous practical impediments keep women out of the medical system—clinic closures, clinic protesters, language barriers, a desire for secrecy, the stigma that attaches to abortion, a preference to avoid the medical sector, and, of course, state and federal legal restrictions.¹²¹ Specifically, the Center notes that a significant deterrent to abortion care at clinics or provided by physicians is cost, which can average \$450 for an abortion in the first trimester.¹²² Self-induced abortion, by comparison, can cost little more than one dollar.¹²³

Reproductive justice seeks to circumvent the harsher effects of anti-abortion laws while meeting the needs of diverse communities of pregnant women.¹²⁴ This Article, in the last Part, asks if a human rights approach helps to advance these goals. Reproductive justice materials note that human rights protections address a range of reproductive health issues, and human rights advocacy urges states to adopt positive measures to meet women’s economic and social needs (not just their civil and political rights).¹²⁵ I argue in the following Part that human rights rhetoric may in fact limit efforts to redistribute power and resources at both the global and local levels. Without wrestling with the field’s hard questions, reproductive justice may unwittingly replicate the shortcomings of reproductive rights advocacy through their embrace of human rights.

119. See Suzanne M. Alford, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1011–12, 1022–23 (noting that fifteen states, at one time, punished women for self-inducing abortion and citing *State v. Ashley*, 701 So. 2d 338, 342 (1997)). Moreover, there are an increasing number of state officials willing to prosecute women for all manner of conduct during pregnancy. See Goodwin, *supra* note 93, at 789–819 (citing cases brought against pregnant women—who refused Caesarean sections, fell down stairs, or elected to have chemotherapy, for example—under states’ fetal-protective laws).

120. ADAMS & MIKESELL, *supra* note 117, at 4.

121. *Id.*; see also Rebecca J. Cook & Bernard M. Dickens, *Reducing Stigma in Reproductive Health*, 125 INT’L J. GYNECOLOGY & OBSTETRICS 89, 89 (2014). Eighty-seven percent of U.S. counties are without a provider; ninety percent of abortion care is provided by a clinic. Emily Bazelon, *The New Abortion Provider*, N.Y. TIMES MAG., July 18, 2010, at 32, 46.

122. ADAMS & MIKESELL, *supra* note 117. In a recent study of the costs of abortion care (the Turnaround Study), half of the study’s participants paid a third of their monthly income for terminations and attendant travel. REPROD. HEALTH TECHS. PROJECT, *supra* note 86, at 2. One in four participants carried to term but would not have had a child if they had received Medicaid funding for abortion. *Id.* at 15–16, 18 (noting also that two-thirds of the participants receive some amount of financial assistance—thirty-four percent from Medicaid (only seventeen states require Medicaid assistance for abortion), seven percent from private insurance, and twenty-nine percent from charitable organizations).

123. Compare the price of medical abortion administered in clinic to the price of an ulcer drug—just over one dollar when ordered from a pet pharmacy—that induces abortion. ADAMS & MIKESELL, *supra* note 117.

124. Luna & Luker, *supra* note 92, at 326, 344–345.

125. See, e.g., SILLIMAN ET AL., *supra* note 7, at 311 (“Working to improve women’s health in a social justice or human rights framework meant that groups could more easily build alliances with other movements working on civil rights, community empowerment, . . . and health care access, whether or not there was a reproductive rights or gender component.”).

III. REPRODUCTIVE JUSTICE AND THE LIMITATIONS OF HUMAN RIGHTS

As noted in the last Part, reproductive justice grounds the movement's commitments in human rights.¹²⁶ Loretta Ross, a co-founder of the SisterSong Collective, defined reproductive justice as a demand for the “protection of women's human rights to achieve the physical, mental, spiritual, political, economic and social well-being of women and girls” and a cause “embedded in a human rights and social justice framework.”¹²⁷ SisterSong and similar organizations are not taking human rights cases; they refer to human rights “to locate reproductive freedom within a broad movement for human rights.”¹²⁸ Similar to the dicta of national courts, advocates likewise use human rights rhetoric to tether their cause to the values of universality, consensus, and legitimacy.¹²⁹ In some materials, this rhetoric refers to the foundations of human rights advocacy—state duties and individual rights.¹³⁰ The SisterSong website states, for example, “[Reproductive justice] is based on the United Nations' internationally-accepted Universal Declaration of Human Rights, a comprehensive body of law that details the rights of individuals and the responsibilities of government to protect those rights.”¹³¹

Often reproductive justice advances an expansive view of human rights to argue for change. In *Undivided Rights*, Silliman and her co-authors write, “Linking civil, political, economic, sexual and social rights” can “bridge[] the gap between having legal rights and lacking the economic resources to access those rights.”¹³² In the same passage, they chastise “the mainstream movement” for being “unfamiliar with the Universal Declaration of Human Rights and international treaties that

126. Interviews with reproductive justice movement leaders led Kimala Price to conclude “[h]uman rights doctrine has taken center stage in the reproductive justice framework.” Price, *supra* note 10, at 47, 49. Silliman and her colleagues similarly connect reproductive justice “to the global human rights movement.” SILLIMAN ET AL., *supra* note 7, at xiv.

127. Loretta J. Ross, *The Color of Choice: White Supremacy and Reproductive Justice*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 53, 53 (INCITE! Women of Color Against Violence eds., 2006).

128. SILLIMAN ET AL., *supra* note 7, at 24.

129. Rebouché, *Abortion Rights as Human Rights*, *supra* note 23, at 772.

130. *Id.* at 769, 771.

131. *Reproductive Justice*, SISTERSONG, <http://sistersong.net/reproductive-justice/> [<https://perma.cc/Y9JU-FBJ9>] (last visited Feb. 13, 2018) (emphasis added). Kimala Price also notes that SisterSong distributes free copies of the Universal Declaration of Human Rights to its grassroots constituencies. Price, *supra* note 10, at 49.

132. SILLIMAN ET AL., *supra* note 7, at 24–25. Silliman and her co-authors also argue: Many women of color reproductive rights activists increasingly find the human rights framework, successfully used by anti-racist and anti-fascist movements worldwide, to be one of the best ways of articulating and advancing their rights. . . . Those women of color who embrace the existing global human rights framework do so in order to locate reproductive freedom within a broad movement for human rights.

Id. See also Rosalind P. Petchesky, *Human Rights, Reproductive Health and Economic Justice: Why They Are Indivisible*, 8 REPROD. HEALTH MATTERS 12, 12–13 (2000) (calling for indivisibility of women's civil and political rights and socioeconomic rights) [hereinafter Petchesky, *Human Rights, Reproductive Health, and Economic Justice*].

protect women's reproductive rights."¹³³ Indeed, human rights advocacy is described as a way to protest to U.S. resistance to signing international treaties, like CEDAW.¹³⁴

Human rights, however, are not necessarily synonymous with progressive or radical agendas for social justice.¹³⁵ There are two common critiques of human rights described in this Section: human rights law often privileges ideologies associated with North American and Western European feminism and it also may offer an impoverished vision for the allocation of wealth and societal resources. Both limitations belie the missions of inclusivity and on-the-ground access of reproductive justice.¹³⁶ Indeed, describing human rights and social justice as interchangeable may distract from strategies that focus on economic inequalities, potentially obscuring synergies between reproductive justice and the social determinants of health or health justice.¹³⁷ Human rights, understood in a narrow sense, may not produce the "rededication to radical politics" that reproductive justice seeks.

133. SILLIMAN ET AL., *supra* note 7, at 24–25 (“Although [a human rights-based approach] is the global direction in which reproductive rights activism is moving, the mainstream movement in the [United States]—except for its more progressive wing—has yet to adopt it. Its emphasis on individualism and civil and political rights neglects economic, social, sexual, and cultural rights that address group or collective needs. Activists are unfamiliar with the Universal Declaration of Human Rights and international treaties that protect women’s reproductive rights. Their failure to adopt the human rights framework inadvertently abets the Conservative movement that fiercely opposes the [U.S.] government’s signing international treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women, which would make the United States accountable to international norms and standards.”).

134. *Id.* at 25.

135. Despite modern emphasis on collective and social rights, individual entitlements and state-centered protections still largely define the field. Wendy Brown, “*The Most We Can Hope For . . .*”: *Human Rights and the Politics of Fatalism*, 103 S. ATLANTIC Q. 451, 455 (2004) (“[T]o the extent that human rights are understood as the ability to protect oneself against injustice and define one’s own ends in life, this is a form of ‘empowerment’ that fully equates empowerment with liberal individualism.”); see also JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ & HILA SHAMIR, GOVERNANCE FEMINISM: AN INTRODUCTION (forthcoming 2018) (manuscript at 24) (on file with author) (“Freedom and equality in American liberal-centrist feminism are recurrently understood to inhere in rights. This brings a constitutive legal formalism and a willingness to rely on the state into the project. It also structures in, at the foundation, an emphasis on the individual rather than the collective as the primary subject of moral and political concern.”).

136. Hope Lewis notices that human rights law generally has been attacked for the same lack of intersectionality as the reproductive rights movement by treating race and gender, in documents like CEDAW, as distinct categories. Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUM. J. GENDER & L. 510, 514–515 (2003).

137. Susan Marks refers to human rights as “blinders’ that narrow our field of vision and prevent us from seeing (and hence from challenging) the wider scene.” Marks, *Human Rights and Root Causes*, *supra* note 5, at 59.

A. Challenges to Universal Rights

The universality of human rights has long been the subject of lively debate.¹³⁸ A well-known contention among feminists is how to square universalism with perspectives outside of the global North and with the diversity of the world's women.¹³⁹ Karen Engle summarized “Third World feminist” objections to reform, in the name of women's rights, that “misrepresent[ed] Third World women through [] near exclusive focus on—and essentialization of—culture” and “displace[d] those issues that have the greatest importance to women in the Third World.”¹⁴⁰ Post-colonial feminists have challenged human rights campaigns that target “harmful cultural practices” and cast women in the global South as victims of their communities (or of an omnipresent patriarchy) and in need of saving by international human rights law.¹⁴¹ And in the name of universal women's rights, some feminists observed that only certain issues received attention, such as violence against women.¹⁴² As a consequence, other issues, like making a living wage, were not the priorities of the women's rights activism that gained momentum in the 1990s.¹⁴³

Thus, when reproductive justice advocates urge compliance with CEDAW or other international standards, they signed onto an agenda for women's rights that may not necessarily advance the movement's commitments to intersectionality and inclusivity. Recall, for example, Cleveland's argument in *Mellet*: culture and tradition cannot justify practices that perpetuate gender stereotypes.¹⁴⁴ That universal rights to gender equality (as defined by international human rights law) always trump culture is at the heart of post-colonial critiques.¹⁴⁵ This is not to suggest that reproductive justice is deaf to the longstanding debate between universalism and relativism. Reproductive justice materials refer to the importance of including the

138. See, e.g., Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNAT'L LEGAL THEORY 31, 44 (2010) (questioning the universality of human rights in light of poor or non-existent enforcement mechanisms).

139. See Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 6 (2002); Lewis, *supra* note 136, at 513; L. Amede Obiora, *Feminism, Globalization, and Culture: After Beijing*, 4 IND. J. GLOBAL LEGAL STUD. 355, 368–69 (1997).

140. Karen Engle, *Feminist Governance and International Law: From Liberal to Carceral Feminism*, in GOVERNANCE FEMINISM: NOTES FROM THE FIELD 9 (Janet Halley et al. eds.) (forthcoming 2019) (on file with author).

141. See Paula C. Johnson & L. Amede Obiora, *How Does the Universal Declaration of Human Rights Protect African Women?*, 26 SYRACUSE J. INT'L L. & COM. 195, 207 (1999) (Obiora's remarks); Kapur, *supra* note 139, at 6–7; Lewis, *supra* note 136, at 516–517; Uma Narayan, *Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women*, in A MIND OF ONE'S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY 418, 418 (Louise M. Antony & Charlotte E. Witt eds., 2d ed. 2002); Obiora, *supra* note 139, at 369–70 (citing work on “feminist imperialism”); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 296 (Cary Nelson & Lawrence Grossberg eds., 1988).

142. Engle, *supra* note 140, at 1–2.

143. *Id.* at 7–8.

144. See *supra* notes 58–59 and accompanying text.

145. Engle, *supra* note 140, at 6–7.

voices and experiences of women from the global South. These references echo the responses of women's rights activists, who embraced diversity at the level of rhetoric, but did not change their agendas.¹⁴⁶ That is, feminists in the global North avoided essentializing cultural practices, but did not shift their focus from issues like violence against women.¹⁴⁷

Another purpose for citing human rights standards is to disrupt U.S. conservatism and exceptionalism. Of course, when Silliman and her colleagues write in this vein, they have in mind the U.S. government's practice of refusing to ratify contemporary human rights treaties, largely to avoid limits on U.S. power.¹⁴⁸ It is worth noting, however, that despite the official refusal to sign or to ratify international standards, U.S. interests and priorities have shaped human rights law. As noted in Part I, the influence of U.S. reproductive rights activism on documents like the ICPD is clear. Moreover, U.S.-based advocates write briefs and lead litigation before international treaty bodies and national courts.¹⁴⁹ They make use of international human rights texts to argue for constitutional or legislative rights to abortion.¹⁵⁰ National court decisions then incorporate those examples, citing advocates' briefs, which draw from the abortion reform trajectories of the global North and the United States specifically.¹⁵¹ So while U.S. advocates seek to "bring human rights home," they may take for granted how the United States influenced international and transnational campaigns for abortion law reform.¹⁵² To illustrate the point, over the last forty years, courts across the world have consistently cited

146. Karen Engle describes the feminist response to post-colonial critique as "culturally sensitive universalism." Engle writes:

The culturally sensitive [universalism] . . . failed to respond to the most radical potential of [Third World feminists'] critiques, which was their refusal to separate the cultural from the economic. Taken seriously, such critiques require attention to the gendered and cultural dimensions of the global distribution of wealth and to the economic dimensions of politics and policies about gender and culture.

Id. at 11–12.

147. Perhaps to state what may be obvious, bifurcating the globe into "north" and "south" obscures the diversity within each.

148. SILLIMAN ET AL., *supra* note 7, at 24–25.

149. Rebouché, *Abortion Rights as Human Rights*, *supra* note 23, at 769.

150. See Ruth Rubio-Marín & Martha I. Morgan, *Constitutional Domestication of International Gender Norms: Categorizations, Illustrations, and Reflections from the Nearside of the Bridge*, in GENDER AND HUMAN RIGHTS 121 (Karen Knop ed., 2004); see also Julia L. Ernst, Laura Katzive & Erica Smock, *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 763–64, 785 (2004).

151. See Rebouché, *Comparative Pragmatism*, *supra* note 39, at 123–30. Also, *Roe v. Wade*, 410 U.S. 113 (1973), proved influential in the abortion law reform of different countries (whether embracing or rejecting abortion rights) in the 1970s and the 1980s. Reva B. Siegel, *The Constitutionalization of Abortion*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057–58 (Michel Rosenfeld & András Sajó eds., 2012).

152. The Guttmacher Institute's multi-country study of abortion law implementation notes that advocacy groups based in the United States, such as Ipas, the Population Council, the Guttmacher Institute, and the Center for Reproductive Rights, played primary roles in organizing educational campaigns, litigating cases, seeking funding, and conducting research in transnational abortion law reform. GUTTMACHER INST., MAKING ABORTION SERVICES ACCESSIBLE IN THE WAKE OF LEGAL REFORMS: A FRAMEWORK AND SIX CASE STUDIES 38 (2012).

Roe v. Wade as an example of permissive and progressive abortion law.¹⁵³ Interestingly, those same courts ignore other U.S. Supreme Court decisions that upheld various abortion restrictions or undermined constitutional protection for abortion, perhaps making *Roe* a dated and potentially inapt example.¹⁵⁴

By embracing human rights, the reproductive justice movement may permit the United States to shape its international commitments and inadvertently may relegate perspectives from the global South or from a “global women’s movement.”¹⁵⁵ This can produce blind spots. For one, the means by which women gain access to abortion outside of the law or through informal means—issues of concern to reproductive justice—can disappear.¹⁵⁶ Consider how religious and cultural forces shape abortion policies and practices.¹⁵⁷ Local practices may include early termination of pregnancy as an unspoken part of “menstrual regulation,” but not because of attachments to women’s human rights.¹⁵⁸ More pointedly, women in some communities will not support reproductive justice reform, especially if that advocacy includes rights to abortion, but would support reproductive health interventions framed differently.

References to the global South that do not engage with local politics or interests reduce the “global South” to one of many populations deserving recognition, and fail to recognize the diversity of actors who contest and resist rights-based narratives of gender, family, and procreation.¹⁵⁹ Simplifying the experiences of women in a variety of contexts and countries could mirror the co-

153. Rebouché, *Comparative Pragmatism*, *supra* note 39, at 124–130. For example, the Brazilian Supreme Federal Court, referenced in Part I of this Article, cited *Roe v. Wade* to demonstrate an approach in which the rights of women outweigh potential rights of a fetus. Habeas Corpus n.124.306, at ¶ 46.

154. More broadly, reproductive rights litigation draws examples from the United States, like *Roe* or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and then the decisions of other national courts refer to those U.S. cases, which no longer reflect the state of U.S. abortion rights. Rebouché, *Comparative Pragmatism*, *supra* note 39, at 124–130.

155. Soohoo & Stolz, *supra* note 65, at 498.

156. Rebouché, *Comparative Pragmatism*, *supra* note 39, at 154 n.389.

157. *Cf.* Kapur, *supra* note 139, at 29–32 (calling for feminist scholarship that recognizes multiple subjectivities and the “peripheral subject,” and that focuses on “moments of resistance” to women’s subjugation).

158. Lynn P. Freedman & Stephen L. Isaacs, *Human Rights and Reproductive Choice*, 24 *STUD. IN FAM. PLAN.* 18, 27–28 (1993) (noting countries in which the “interplay of state, religious, and customary law” governs abortion and where abortion early in pregnancy is permitted). The practice of “menstrual regulation” is effectively an early abortion by causing menstruation to begin; however, it is not labeled a termination and thus may fall outside of legal regulation. *See* Amit Bhandari, Nang Mo Hom, Sabina Rashid & Sally Theobald, *Experiences of Abortion in Nepal and Menstrual Regulation in Bangladesh: A Gender Analysis*, 16 *GENDER & DEV.* 257, 265–69 (2008).

159. Kapur, *supra* note 139, at 29–32; *see* Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 *MICH. J. INT’L L.* 259, 323 (2011) (concluding, “[t]ransnational collaborations must make space for subaltern agents to speak and act. If they do not, they risk disempowering poor women further and failing to reach the potential of feminist transnational advocacy.”); *see also* Engle Merry, *Human Rights and Transnational Culture*, *supra* note 5, at 58 (describing how the principles of consensus and universality can be the tools of “cultural homogenization”).

optionation of “justice” by mainstream reproductive rights organizations.¹⁶⁰ Reproductive justice advocates are troubled by reproductive rights groups adopting the phrase “reproductive justice” without reconfiguring their strategies or politics.¹⁶¹ Perhaps something similar happens when reproductive justice relies on human rights ideology without any of the attendant critiques.¹⁶² Although reproductive justice purports to take post-colonial feminism into account, it may not contest how the abortion politics of the global North continue to shape transnational reform and advocacy priorities.¹⁶³ That is, rights have defined U.S. abortion politics (and the broader U.S. approach to reproductive health, as reproductive justice materials lament) and human rights rhetoric could bolster equal protection and substantive due process arguments under the U.S. Constitution. But human rights may not matter as much to projects that seek to improve women’s reproductive health in places for which rights are not part of procreative discourses. Thus, a consequence of a human-rights orientation is that present power imbalances—in which the interests of powerful nations like the United States shape advocacy agendas—remain in place.

B. Socioeconomic Inequality and Health Resources

As noted in the previous Part, reproductive justice materials “reject the lawyer-driven focus of the pro-choice movement on a narrow legal right to abortion” and the “lawyer-centeredness and the government-centered strategies that lawyers tend to favor.”¹⁶⁴ However, announcing and implementing principles that define human rights can depend on courts or other adjudicative forums.¹⁶⁵ Human rights, when expressed as abstract truisms, may cede authority to the legal system rather than

160. Brown, *supra* note 135, at 460 (“[I]t is hard both to parse cynical from sincere deployments of human rights discourse and to separate human rights campaigns from legitimating liberal imperialism.”). In the health law field, see Peter D. Jacobson & Soheil Soliman, *Co-opting the Health and Human Rights Movement*, 30 J.L. MED. ETHICS 705, 705–06 (2002) (arguing that human rights rhetoric has been co-opted by opponents to public health law reform to shift the focus to individual, rather than collective or socioeconomic rights, and urging public health advocates to reclaim human rights for community-based interventions).

161. See *supra* note 92.

162. See London, *supra* note 9, at 72 n.8; cf. Petchesky, *Human Rights, Reproductive Health and Economic Justice*, *supra* note 132, at 12 (arguing sexual rights “will remain unachievable if they are not connected to a strong campaign for economic justice and an end to poverty”).

163. For example, attention to the legacies of colonialism is part of reproductive justice’s commitment to intersectionality:

Because reproductive justice takes into account matters of race, class, and colonization in ways that a pro-choice stance does not, it is more in tune with current interdisciplinary scholarship that traces how certain methods of birth control and particular health care policies have been implemented in ways that disadvantage and target communities of color.

Mason, *supra* note 8, at 234 (emphasis omitted).

164. Wiley, *supra* note 94, at 62.

165. For instance, when Soohoo and Stolz describe the success of reproductive rights advocates in the United States in using human rights arguments, their examples focus almost entirely on pulling the legal levers of the treaty system. Soohoo & Stolz, *supra* note 65, at 492 (describing U.S. reproductive rights advocates’ success in having the UN Committee on the Elimination of Racial Discrimination “comment on pervasive racial disparities in reproductive health outcomes and access to services”).

mediate public debates about budgets and shared values.¹⁶⁶ Those are conversations important to reproductive healthcare and they are central to community organizing.

Reproductive justice advocates might ask if human rights arguments and practices have the capacity to redistribute income and societal resources or address the “harsh social distress of most of the world’s population.”¹⁶⁷ A perennial issue for human rights law, as many have noted, concerns implementation.¹⁶⁸ As human rights advocates well know, rights-based strategies can face difficulties guaranteeing effective access to healthcare.¹⁶⁹ Human rights approaches may fail to solve problems in the delivery of health services, and may not answer questions about infrastructure, resources, or professional ethics.¹⁷⁰ Writings on reproductive justice refer to socioeconomic rights as one means to take account of pregnant women’s standard of living,¹⁷¹ which draws from literature on the right to effective and accessible healthcare.¹⁷²

But even the most expansive rights to reproductive health can fall short of achieving meaningful change. A recent survey of the funding policies of eighty countries, all with liberal or liberally interpreted abortion laws, found that less than half of women in these countries have access to full funding for abortion; most women in liberal abortion law regimes have no funding, partial funding, or funding

166. See MOYN, *THE LAST UTOPIA*, *supra* note 14, at 5 (arguing that human rights ascended because they offered moral justifications for an apolitical alternative to communism); Brown, *supra* note 135, at 458 (“Rights, especially those as dependent on a universal moral vocabulary as human rights are, hardly guarantee local political deliberation about how we should live together; indeed, they may function precisely to limit or cancel such deliberation with transcendental moral claims [or] refer it to the courts”); see generally Susan Marks, *Four Human Rights Myths* (LSE Law Working Papers, LSE Legal Studies Working Paper No. 10/2012, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2150155 [<https://perma.cc/V8YM-VEHM>].

167. Flood & Gross, *Introduction*, *supra* note 14, at 3. Similarly, Joanna Erdman queries whether the human rights approach in family planning—of choice and access—is “[t]he right to survive the worst effects of an unjust world?” Erdman continues that, “human rights in choice and access neglect the fact that unwanted and unremunerated reproduction is part of a legacy and a reality of the exploitation, domination and dispossession of women.” Joanna Erdman, *Human Rights and the Contraceptive Imperative*, 10 (April 29, 2016) (unpublished article) (on file with author).

168. See Engle Merry, *Rights Talk and the Experience of Law*, *supra* note 5, at 365; Luna, *supra* note 92, at 240–41; see, e.g., Obiora, *supra* note 139, at 366, 377–78; see also Rachel Rebouché, *A Functionalist Approach to Comparative Abortion Law*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES* 98, 116–117 (Rebecca J. Cook et al. eds., 2014).

169. See Alicia Ely Yamin, *Promoting Equity in Health: What Role for Courts?*, 16 *HEALTH & HUM. RTS. J.* 1, 4 (2014) (noting the limitations of litigation in affecting systemic changes in health systems and drawing an example from the litigation reiterating the constitutional parameters for legal abortion in Colombia).

170. See Ciara O’Connell, *Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like?*, 16 *HEALTH & HUM. RTS. J.* 116, 118 (2014).

171. SILLIMAN ET AL., *supra* note 7, at 24.

172. See Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 *AM. J. PUB. HEALTH* 1156, 1157 (2005); see also Petchesky, *Human Rights, Reproductive Health, and Economic Justice*, *supra* note 132, at 13–14 (calling for an integrative approach to human rights and health and recognition of the “various economic and social enabling conditions that must be realised for [reproductive and sexual] rights to become effective”).

for exceptional cases.¹⁷³ Even if the state provided full or partial funding, researchers noted a variety of impediments to abortion—bureaucratic procedures, restrictions based on income level, or demands for informal payments by providers—made otherwise covered services difficult to receive.¹⁷⁴ In countries where state healthcare systems pay for termination services, public health studies still demonstrate consistent problems of meaningful access and availability.¹⁷⁵

The challenge of access cannot be addressed necessarily by a robust set of rights; the problem is one of politics—how communities and countries decide to allocate social goods and social assistance. Reproductive justice’s reliance on community and grassroots mobilization engages these political considerations.¹⁷⁶ To take one example, the nonprofit group Asian Communities for Reproductive Justice, has focused on labor organizing in the United States.¹⁷⁷ Indeed, reproductive justice writings insist on including income level and class alongside race or other characteristics when emphasizing the importance of community lawyering.¹⁷⁸ Reproductive justice approaches, with the commitment to improving low-income women’s lives, may not need human rights to accomplish the movement’s goals.

The UDHR, CEDAW, and other human rights documents make important statements about equality or non-discrimination and individual dignity, but they may not address deep socio-economic inequality.¹⁷⁹ As Samuel Moyn writes, “One could imagine one man owning everything—an absolute overlord—and he would not violate the current scheme of human rights, so long as everyone had their basic rights fulfilled. Even perfectly realized human rights are compatible with radical inequality.”¹⁸⁰ Public health work on poverty does not begin with rights, but rather

173. Daniel Grossman et al., *Public Funding for Abortion Where Broadly Legal*, 94 CONTRACEPTION 453, 453–54 (2016).

174. *See id.* at 456–57. The exceptions to the trend that high-income countries provide at least partial funding were Austria, Japan, and the United States. *Id.* at 459.

175. *See* GUTTMACHER INST., *supra* note 152, at 37–38.

176. Petchesky, *Human Rights, Reproductive Health and Economic Justice*, *supra* note 132, at 15 (noting women’s rights groups in India that focus on “community organising, self-help and local empowerment”); *see also* Orfeneo, *supra* note 114, at 33 (noting the work of women organizing for informal workers and for reproductive health in the Philippines). A recent example of such mobilization in the United States is the work of local groups to establish abortion funds that help women meet the costs of terminations. Jackie Calmes, *Activists Help Pay for Patients’ Travel to Shrinking Number of Abortion Clinics*, N.Y. TIMES, Nov. 27, 2014, <http://www.nytimes.com/2014/11/28/us/advocates-help-pay-for-travel-to-a-shrinking-number-of-abortion-clinics.html> [<https://perma.cc/7U3U-FHD3>].

177. Asian Communities for Reprod. Just., *supra* note 16, at 9–10.

178. Reproductive justice materials, for example, urge that repeal of the Hyde Amendment should be a priority for the reproductive rights movement and call for community lawyering that can provide social benefits for low-income women. *See* London, *supra* note 9, at 97–101.

179. *See* Luna, *supra* note 92, at 240–41; Engle Merry, *Rights Talk and the Experience of Law*, *supra* note 5, at 365; *see also* Rebouché, *A Functionalist Approach to Comparative Abortion Law*, *supra* note 168, at 116–117 (Rebecca J. Cook et al. eds., 2014).

180. Samuel Moyn, *Human Rights and the Age of Inequality*, OPENDEMOCRACY (Oct. 27, 2015), <https://www.opendemocracy.net/openglobalrights/samuel-moyn/human-rights-and-age-of-inequality> [<https://perma.cc/XGH3-CK8U>].

starts at the level of policy by measuring health outcomes.¹⁸¹ Consider the social determinants of health. Social determinants are the class and income inequalities that perpetuate cycles of poor health and poor access to health resources.¹⁸² Social epidemiologists describe the relationship between income and health as the social gradient in that health outcomes “line up on a steady slope from the have-leasts to the have-mosts.”¹⁸³ When individuals have income security, their health improves significantly, and increases in income at the lowest end of the socioeconomic scale produce the greatest improvements in population health.¹⁸⁴

Law plays a crucial role in producing the social gradient, and social determinants research looks to background rules and related areas of law—governing work places, the environment, taxation, to name a few—that influence health. For instance, research demonstrates that inequality in health correlates inversely to the generosity of income-transfer programs: measures that strengthen economic security, through the tax system or employment benefits, correlate with improved health of low-income families.¹⁸⁵ When human rights and social determinants intersect, Audrey Chapman writes:

[H]uman rights analysis tends to consider the underlying determinants of health individually and sequentially, thus missing the impact their interacting and cumulative effects can have on individuals and communities. Nor does a human rights approach link inadequacies and injustices in the distribution of the social determinants to a structural

181. Wiley, *supra* note 94, at 74 (quoting Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 62 (1999); LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 4 (3d ed. 2016)) (“[P]ublic health law has evolved from a narrow field focused primarily on ‘communicable disease law’ to the ‘study of the legal powers and duties of the state to assure the conditions for people to be healthy.’”); cf. Gwendolyn Roberts Majette, *Global Health Law Norms and the PPACA Framework to Eliminate Health Disparities*, 55 HOW. L.J. 887, 909 (2012) (citing a 2009 resolution of the World Health Assembly—a body of the WHO—calling for policies that were “(1) pro-poor, (2) gender responsive, and (3) human rights focused”). Majette notes the various human rights reports and documents that address health equality and the social determinants of health, including a report of the Special Rapporteur for Health on strengthening public health systems. *Id.* at 898–99.

182. Social determinants “generate stratification and social class divisions in the society, and . . . define individual socioeconomic position within hierarchies of power, prestige, and access to resource. . . . [The] goal is to bring the level of those who are worst off to the level of those in society who are best off.” Audrey R. Chapman, *The Social Determinants of Health, Health Equity, and Human Rights*, 12 HEALTH & HUM. RTS. J. 17, 22 (2010) (footnotes omitted).

183. See Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1652 (2011).

184. See Kelli A. Komro, Scott Burris & Alexander C. Wagenaar, *Social Determinants of Child Health: Conceptual and Measurement Directions for Research*, 6 HEALTH BEHAV. & POL'Y REV. 432, 433 (2014).

185. See Leonard E. Burman, *Taxes and Inequality*, 66 TAX L. REV. 563, 589–90 (2013). To take an example from the United States, the income tax experiments of the 1970s demonstrated that providing low-income pregnant women with additional cash correlated with higher birth weights. Hilary W. Hoynes et al., *Income, the Earned Income Tax Credit, and Infant Health* (Nat'l Bureau of Econ. Research, Working Paper No. 18206, 2012).

analysis of the way political, social, and economic forces in society shape life opportunities, as [determinants] do. . . . [T]here has been little in-depth research on poverty and health from a human rights perspective.¹⁸⁶

Writings in the emergent and related field of health justice complement social determinants research by offering structural explanations for why some populations and individuals lead healthier lives than others.¹⁸⁷ And health justice advocates, though not uniformly, also express doubt regarding the ability of human rights to ensure a just allocation of limited resources.¹⁸⁸ Research in the area calls for “social change that transforms the current systems of neglect, bias, and privilege into system[s]—policies, practices, institutions—that truly support health for all.”¹⁸⁹ In terms of redistribution, health justice is not only concerned with access to healthcare, but also with policies that ensure the poorest do not shoulder disproportionate burden in a healthcare system.¹⁹⁰ The pioneering Turnaround Study, which documented patients who were denied abortion care because of time or cost constraints, assessed the consequences for low-income women who bear the brunt of abortion restrictions.¹⁹¹ Two-thirds of the study’s participants lived under or at 100% of the federal poverty level and were three times as likely to live in poverty a year later after carrying an unwanted pregnancy to term.¹⁹² The study

186. Chapman, *supra* note 182, at 21–24. *But see* Roberts Majette, *supra* note 181, at 905–06 (noting the convergence of social determinants and human rights and citing the work of the Commission on Social Determinants of Health).

187. *See, e.g.*, Wiley, *supra* note 94, at 97.

188. *See* Colleen M. Flood & Aeyal Gross, *Conclusion: Contexts for the Promise and Peril of the Right to Health*, in *THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY* 451, 470 (Colleen M. Flood & Aeyal Gross eds., 2014) [hereinafter Flood & Gross, *Conclusion*]. Health justice writings call for political solidarity and strategy beyond the legal battles of courtrooms—a focus, instead, on the “transfer of money, food, and drugs.” *Id.* at 473 (citing the scholarship of Paul Farmer). Health advocates also describe the challenges of health rights that depend on progressive realization. *Id.* at 474 (citing the scholarship of Lucie White). Alicia Ely Yamin notes that demands for equality in human rights have largely been divorced from calls for equity or equality in public health. Alicia E. Yamin, *Shades of Dignity: Exploring the Demands of Equality in Applying the Human Rights Frameworks to Health*, 11 *HEALTH & HUM. RTS. J.* 1, 2 (2009). She argues that although non-discrimination and equality rights are important protections against identity-based exclusion, they may not address “underlying inequalities in power, access, and socio-economic and political circumstances.” *Id.* at 6. *But cf.* Aeyal Gross, *Is There a Human Right to Private Health Care?*, 41 *J.L. MED. & ETHICS* 138, 140 (2013) (“[An expansive conception of rights might] interpret ‘accessibility’ as including economic accessibility and as focused, as suggested in General Comment 14 [of the Committee on Economic Social and Cultural Rights], on socially underprivileged groups, and ‘equity’ as mandating that the health expenditure burden borne by poor households not be disproportionate to that borne by wealthier households . . .”).

189. YOUTH MEDIA COUNCIL, *COMMUNICATING FOR HEALTH JUSTICE: A COMMUNICATIONS STRATEGY CURRICULUM FOR ADVANCING HEALTH ISSUES* 25 (2011), <https://www.thepraxisproject.org/sites/default/files/Miles/201204/Communicating%20for%20Health%20Justice.pdf> [<https://perma.cc/NH49-PNGF>]. *See generally* JENNIFER PRAH RUGER, *HEALTH AND SOCIAL JUSTICE* (2009); SHLOMI SEGALL, *HEALTH, LUCK, AND JUSTICE* (2010); SRIDHAR VENKATAPURAM, *HEALTH JUSTICE: AN ARGUMENT FROM THE CAPABILITIES APPROACH* (2011).

190. *See* Flood & Gross, *Conclusion*, *supra* note 188, at 480.

191. *See* REPROD. HEALTH TECHS. PROJECT, *supra* note 86, at 1.

192. *Id.* at 11–14.

makes a socioeconomic case for abortion—the costs of unintended pregnancy and childrearing are high, and abortion is “a critical component . . . to get out of poverty.”¹⁹³ Reproductive justice responds to income disparities, as seen in the creation and proliferation of abortion funds, which pool money from donors to cover the costs of terminations for women in need.¹⁹⁴ But analysis and activism should not end there. The next step is to understand the structural impediments that configure abortion as a poverty reduction strategy. Part of the answer to that question is clear in the United States—parenting is expensive, there is little help from the state, and vital social institutions, which should provide adequate education, accessible healthcare, urban and rural infrastructure, workplace flexibility and a working wage, are broken. That a right to abortion is a solution to economic stress and vulnerability reflects U.S. bias and U.S. politics. Strengthening the social safety net and rebuilding benefits programs are not easy tasks accomplished quickly, whereas litigating and implementing rights can appear to produce immediate results. But, tracking the post-colonial critique set out in the last Section, rights-based reasoning leads to patterned conclusions, and may cabin one’s thinking about what is the problem and how to solve it.

At present, there is little overlap between research on social determinants or health justice and reproductive justice writings.¹⁹⁵ This lack of dialogue is unfortunate because the reproductive justice movement has commitments that are shared by health justice. And health justice and social determinants thinking could be helpful to reproductive justice causes. For one, health justice approaches might emphasize what is often missing from human rights strategies—how issues of income, class, and power shape women’s life opportunities.¹⁹⁶ Social determinants

193. *Id.* at 14. The main reason women give for terminating pregnancies is not feeling financially prepared. *Id.* at 13.

194. See Kelly, *supra* note 80, at 47–48 (“Through [abortion funds’] initiatives, travel becomes an expression of collective will to secure reproductive justice for all women, and no longer merely an individual undertaking of stigmatized exile from one’s home jurisdiction. . . . Rather than framing abortion as a matter of individual right, travel networks mobilize collective resources in order to secure real access for poor, rural, migrant, and young women, in the process revealing the material supports that women need to access abortion in the United States.”).

195. See Chapman, *supra* note 182, at 17. It is beyond the scope of this Article to explore the gaps, at the international level, between public health and reproductive rights or reproductive justice approaches. Certainly diverse factors are at work, including the role of empirical study, the “NGO-ization” of public health, and the agendas of donors and organizations that fund causes related to reproductive health and rights. See generally MICHELLE MURPHY, SEIZING THE MEANS OF REPRODUCTION: ENTANGLEMENTS OF FEMINISM, HEALTH, AND TECHNOSCIENCE (2012). Petchesky notes that fragmentation among women’s rights groups, born out of professionalization and donor-driven agendas, leads to a compartmentalization of issues. Petchesky, *Human Rights, Reproductive Health and Economic Justice*, *supra* note 132, at 12.

196. Chapman writes,

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

Chapman, *supra* note 182, at 23.

research might uncover further how current policies (not just the regulation of healthcare, but also of workplace fairness, for example) make it difficult for pregnant women to seek abortion, to receive the prenatal care they need, or to raise the children they have.

CONCLUSION

“Reproductive rights as human rights” have given advocates opportunities to shape national laws and international documents—a significant achievement given the controversy that can surround abortion.¹⁹⁷ This productivity has occurred despite success being hard-won and with the realization that today’s victories can be lost in future legal battles. There is the understandable fear that any gains in abortion law reform are fragile at best.¹⁹⁸

Despite that fragility, the turn to reproductive justice demonstrates increasing enthusiasm for new approaches to abortion rights and to women’s reproductive health. Reproductive justice is a movement with a claim on the rhetorical power of human rights and a plea for contextualized, local approaches to policy reform; how it will marry the two is a work in progress and a number of tools are available to advocates. What would a social determinants analysis of abortion care look like? It might start with the provision of birth control and sex education, but also consider the multiple stressors on termination decisions and services, such as environmental and employment regulations, and grapple with the gaps in how individuals and families, across income levels, are supported.¹⁹⁹ Which tool advocates use would depend on what approach challenges the power relations and hierarchies that perpetuate and sustain inequality.²⁰⁰ And human rights can help in this regard. Human rights perform important work in connecting social movements, and many of those movements deploy human rights to engage in struggles over power and

197. See Zampas & Gher, *supra* note 3, at 255. For an example of the reach of reproductive rights in international human rights advocacy, see THE WORLD BANK, WORLD DEVELOPMENT REPORT 2012: GENDER EQUALITY AND DEVELOPMENT 348 (2011) (drawing a connection between access to legal abortion and narrowing the gender gap in employment).

198. Several courts, mostly in Central and South America, have struck down abortion laws or upheld abortion restrictions based on a “right to life at conception” in national constitutions. Examples include countries such as Chile, Costa Rica, the Dominican Republic, Ecuador, Honduras, Hungary, and Peru. Wilkins & Reynolds, *supra* note 24, at 151 n.92.

199. For example, Joanna Erdman identifies informal working conditions, sexual division of care work, and public expenditures for basic services and infrastructure as the varied forces women negotiate in reproduction—forces such as “ecology, economy, migration, warfare, globalization etc.” Erdman, *supra* note 167, at 14.

200. Brown, *supra* note 135, at 461 (“[I]f [the global problem today] is diagnosed as the relatively unchecked globalization of capital, postcolonial political deformations, and superpower imperialism combining to disenfranchise peoples in many parts of the first, second, and third worlds from the prospects of self-governance to a degree historically unparalleled in modernity, other kinds of political projects, including other international justice projects, may offer a more appropriate and far-reaching remedy . . .”). *Id.* at 461.

resources.²⁰¹ These connections among social movements are powerful, and reproductive justice's commitments could tie its invocation of human rights discourses to local, political engagement. As a complement to human rights rhetoric, the concrete strategies that reproductive justice advocates pursue can strengthen solidarities between causes for social justice and advance new roles for institutions. Advocates will need to weigh the costs and limits of human rights advocacy—sometimes human rights will provide the necessary tools to galvanize decision makers and communities; in other instances, different tactics and frames will be necessary to achieve distributive goals.

201. O'Connell, *supra* note 13, at 3 n.13; *see* Chapman, *supra* note 182, at 21 (describing reproductive justice and economic justice discourses as indivisible, like human rights).

