

INTRODUCTION

NANCY NORTHUP*

This volume is the outgrowth of a panel discussion on New Scholarship on Reproductive Rights held at Columbia Law School on October 20, 2008¹ to celebrate the establishment of a new joint fellowship program of the Center for Reproductive Rights² and Columbia Law School—The CRR-CLS Fellowship³—as well as an initiative by the Center to stimulate scholarship and teaching on reproductive health and human rights.⁴ In the last decade, there have been groundbreaking cases from national courts as well as regional and international human rights bodies. These cases are not widely taught in U.S. law schools nor widely

* President, Center for Reproductive Rights and Lecturer-in-Law, Columbia Law School. I am indebted to Diana Hortsch and Laura Katzive for their excellent editing, Suzanne Stolz, Rebecca Hart, Meredith Parrish, and Genevieve Scott for their research assistance, and the past and present legal staff at the Center for Reproductive Rights whose bold thinking, outstanding legal skills, and tireless commitment have shaped much of the emerging transnational law that I cite in this piece.

¹ The panel was convened by the Center for Reproductive Rights and the *Columbia Journal of Gender and Law*. Not represented in this volume but enlivening the panel discussion was Vicki Jackson.

² The Center for Reproductive Rights is a global human rights organization that uses constitutional and international law to promote women's equality by establishing access to reproductive health care and control over reproductive decisions as fundamental rights that all governments around the world must respect, protect, and fulfill. The Center has brought groundbreaking cases before national courts, U.N. committees, and regional human rights bodies, and has partnered with women's rights advocates in over forty-five countries.

³ The CRR-CLS Fellowship is a two-year, post-JD fellowship offered by the Center for Reproductive Rights and Columbia Law School. The Fellowship is designed to prepare recent law school graduates for legal academic careers, with a focus on reproductive health and human rights. Fellows are affiliated with the Center and the Law School and participate in the intellectual life of both institutions.

⁴ The Center for Reproductive Rights has established a Law School Initiative to stimulate new thinking, scholarship, and research on reproductive rights, to bring a transnational law perspective to the field, and to support teaching in this area at U.S. law schools. Components of the Initiative include the CRR-CLS Fellowship, roundtables, symposia and conferences, course materials, and the Center for Reproductive Rights Innovation in Scholarship Award, which has been awarded to Professor Reva Siegel for the 2009–2010 academic year.

incorporated into legal scholarship. The emerging norms stemming from these cases, grounded in rights to equality, dignity, health, autonomy, freedom from cruel and degrading treatment, and non-discrimination, arguably provide more robust protection for women's health and reproductive self-determination than constitutional rights in the United States. Whereas the U.S. Supreme Court has ruled in the past that pregnancy discrimination does not violate equal protection guarantees,⁵ foreign courts and international tribunals have recognized that discrimination against pregnant women is sex discrimination,⁶ and that it is a violation of guarantees of non-discrimination to restrict access to health services necessary to women.⁷ The underlying premise of the fellowship is that there are paradigm-shifting developments in transnational law on reproductive health and human rights that could invigorate scholarship in the U.S. legal community.

Before I introduce the articles in this volume, I want to bring you back to the spring of 1986. I was a first year Columbia Law student learning constitutional law at the feet of Professor Peter Strauss. I remember so vividly sitting in that classroom when we got to the section of the course on "Substantive Due Process, For Noneconomic Rights: Privacy; Autonomy; Family Relations." I studied late into the night briefing every case in the section because I knew that, Brennan clerk though he had been, Professor

⁵ *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (ruling that the denial of insurance benefits for work loss resulting from a normal pregnancy did not violate the Fourteenth Amendment). In 1978, Congress addressed some aspects of pregnancy discrimination when it enacted the Pregnancy Discrimination Act, making employment discrimination on the basis of pregnancy actionable. See 42 U.S.C.S. § 2000e(k) (LexisNexis 2009).

⁶ See, e.g., *Brooks v. Canada Safeway Ltd.* [1989], 1 S.C.R. 1219 (Can.); S. AFR. CONST. 1996 § 9 (prohibiting discrimination on the basis of pregnancy as part of the right to equality); Convention on the Elimination of All Forms of Discrimination Against Women, arts. 11, 12, Dec. 18, 1978, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Covenant on Civil and Political Rights, art. 23, Mar. 23, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The U.N. Human Rights Committee has recognized women's equality rights to access to contraception and reproductive health care under the International Covenant on Civil and Political Rights. See, e.g., Human Rights Committee, *Concluding Observations for Argentina* ¶ 14, U.N. Doc. CCPR/CO/70/ARG (Mar. 11, 2000); Human Rights Committee, *Concluding Observations for Georgia* ¶ 12, U.N. Doc. CCPR/C/79/Add.75 (Jan. 4, 1997); Human Rights Committee, *Concluding Observations for Poland* ¶ 11, U.N. Doc. CCPR/C/79/Add.110 (July 29, 1999).

⁷ See Office of the High Comm'r of Human Rights, *CEDAW General Recommendation 24*, U.N. Doc. A/54/38/Rev.1 (May 2, 1999); Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1048, 1051 (2007).

Strauss was going to grill me in a skeptical exchange on *Griswold v. Connecticut*⁸ and *Roe v. Wade*,⁹ and the legitimacy—or not—of pouring fundamental values into the due process clause that are not traceable to constitutional text or history.¹⁰

Thinking about that initial engagement with reproductive rights cases, I pulled off the shelf my 11th edition of Gunther's *Constitutional Law*¹¹ that I had used in the course. I was drawn to some notes that I had made on page 528, footnote six. I had highlighted, underlined, made two stars, and written "right!" next to the following sentences: "laws governing reproduction implicate equality concerns" and "a growing body of literature [is] tying the substantive due process issues raised in cases such as *Roe* to . . . sex discrimination."¹² I think now of all the expectation that I had packed into that "right!" It was an expectation that the "growing body of literature"¹³ would, well, grow. It was the expectation that the "growing body of literature"¹⁴ would yield a complex understanding about the relationship of women's reproductive lives and health to our full equality and flourishing in political, social, and economic life.

When I look back at myself in that classroom in 1986, I see a young woman who had no idea of what was to come, in the political and social life of this nation, that would undercut her reasonable expectation that a range of legal bases to protect and support women's reproductive rights would be articulated and accepted in the near future.

March 1986. Justice Scalia had just joined the Court; the Bork hearings were years into the future, as were *Webster v. Reproductive Health Services*,¹⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶

⁸ 381 U.S. 479 (1965).

⁹ 410 U.S. 113 (1973).

¹⁰ For a discussion of Professor Strauss's approach to constitutional interpretation, see, for example, Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1574 (2008) (arguing for a "dynamic approach to constitutional interpretation—one that sees as the judicial task understanding and enforcing constitutional text in a manner that, embodied with its general spirit, finds that meaning best suited both to continuity with established understandings and to the exigencies of the present").

¹¹ GERALD GUNTHER, CONSTITUTIONAL LAW 528 n.6 (1985).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 492 U.S. 490 (1989).

and the “undue burden”¹⁷ analysis that weakened *Roe v. Wade*’s strict scrutiny standard.¹⁸ *Carhart II*¹⁹ was over twenty years into the future, a decision that Justice Ginsburg would call “alarming”²⁰ because it refused to seriously consider precedent,²¹ failed to safeguard women’s health,²² and “reflect[ed] ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”²³ But in 1986, the religious right was on the ascendency, and Pat Robertson’s Christian Coalition was soon to make its mark on U.S. politics.²⁴ These subsequent developments would erode support for the understanding that women’s reproductive lives are connected to a range of human and civil rights, and to a broader set of rights for equality, health, and dignity.

But what was still to come after 1986 beyond the United States’ borders was much more heartening. In contrast to the progressive undermining of constitutional protections in the United States, there was a

¹⁶ 505 U.S. 833 (1992).

¹⁷ *Id.* at 876–79.

¹⁸ *Roe v. Wade*, 410 U.S. 113, 170 (1973).

¹⁹ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

²⁰ *Id.* at 170 (Ginsburg, J., dissenting).

²¹ *Id.* (Ginsburg, J., dissenting).

²² *Id.* at 181 (Ginsburg, J., dissenting).

²³ *Id.* at 185 (Ginsburg, J., dissenting).

²⁴ The Christian Coalition was incorporated in the State of Virginia on April 30, 1987. Commonwealth of Va. State Corp. Comm’n, CIS Corporate Data Inquiry, <http://www.scc.virginia.gov/clk/bussrch.aspx> (last visited Oct. 1, 2009) (follow “Name Search All Entities” command; then search “Christian Coalition”; then follow “Christian Coalition” command; then follow “Data Summary” command). It was founded by Reverend Pat Robertson with two central goals: “to control the agenda of the Republican party by working from the grassroots up; and to train and elect ‘pro-family, Christian candidates’ to public office.” Right Wing Watch: Christian Coalition of America, <http://www.rightwingwatch.org/content/christian-coalition> (last visited Oct. 1, 2009). It produces voter guides, actively lobbies Congress and the White House on numerous issues, and holds grassroots training seminars and events around the country to organize activists. Christian Coalition of America: About Us, http://www.cc.org/about_us (last visited Oct. 1, 2009). It proclaims itself “the largest conservative grassroots political organization in America.” *Id.*

revolution underway to position both reproductive rights, generally, and access to safe abortion, specifically, as human rights issues.²⁵

I. TRANSNATIONAL LEGAL DEVELOPMENTS ON REPRODUCTIVE RIGHTS AS HUMAN RIGHTS

Still to come after 1986 was the landmark U.N. International Conference on Population and Development in Cairo, Egypt in 1994, where governments around the world explicitly recognized that reproductive health is a basic human right.²⁶ The Programme of Action, adopted by 179 governments including the United States, explicitly recognized for the first time that reproductive rights are basic human rights and urged governments to strengthen their commitment to women's health and to "deal with the health impact of unsafe abortion as a major public health concern."²⁷ At the following year's U.N. Conference on Women in Beijing, the Platform for Action took the language of Cairo a step further by recognizing the problem of illegal abortions and noting that "unsafe abortions threaten the lives of a large number of women [and] represent[] a grave public health problem [because] it is primarily the poorest and youngest who take the highest risks."²⁸ These international consensus documents from Cairo and Beijing "represent[ed] years of concerted effort by women's health movements

²⁵ See, e.g., REBECCA J. COOK, BERNARD M. DICKENS & MAHMOUD F. FATHALLA, REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS AND LAW (2003); WORLD HEALTH ORG. (WHO), ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT (2008); Reed Boland & Laura Katzive, *Developments in Laws on Induced Abortion: 1998–2007*, 34 INT'L FAMILY PLANNING PERSPECTIVES 110 (2008); Luisa Cabal et al., *What Role Can International Litigation Play in the Promotion and Advancement of Reproductive Rights in Latin America?*, 7 HEALTH & HUM. RTS. 50 (2003); Rebecca J. Cook et al., *Obstetric Fistula: The Challenge to Human Rights*, 87 INT'L J. GYNECOLOGY & OBSTETRICS 72 (2004); Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1, 21–29 (2003); Alicia Ely Yamin & Deborah P. Maine, *Maternal Mortality as a Human Rights Issue: Measuring Compliance with International Treaty Obligations*, 21 HUM. RTS. Q. 563 (1999); see also Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459 (2008).

²⁶ Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5–13 1994 ¶ 8.20, U.N. Doc. A/CONF. 171/13/Rev. 1 (1995).

²⁷ *Id.*

²⁸ Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women* ¶ 97, U.N. Doc A/CONF.177/20/Rev.1 (1996).

around the world to gain recognition of women's reproductive and sexual self-determination as a basic health need and human right."²⁹ This movement was based in stark facts about women's lives: the average woman will need to use contraception for approximately three decades if she is seeking to have only two children;³⁰ the risk of death in childbirth in Afghanistan can be as high as one in seven.³¹ These statistics make real the connection between reproductive healthcare and women's basic life and health rights.

In the wake of this political consensus among nations at Beijing and Cairo, human rights lawyers began applying this rights framework to issues such as: coercive sterilization; female genital mutilation; family size limits; access to contraception, emergency obstetrics care, assisted reproductive technologies, and abortion; and information on sexuality and sexual health. These issues implicate rights already guaranteed in binding regional and international human rights treaties: women's right to life;³² the right to health;³³ the right to equality and non-discrimination;³⁴ the right to be free from cruel, inhuman, and degrading treatment;³⁵ the fundamental right to

²⁹ Rosalind P. Petchesky, *From Population Control to Reproductive Rights: Feminist Fault Lines*, 6 REPROD. HEALTH MATTERS 152, 152 (1995).

³⁰ GUTTMACHER INST., FULFILLING THE PROMISE: PUBLIC POLICY AND U.S. FAMILY PLANNING CLINICS 10 (2000), available at <http://www.guttmacher.org/pubs/fulfill.pdf> (looking at women in the U.S. and stating that most women, "want only two children. To achieve this goal, the typical American woman spends roughly three decades—or about 75% of her reproductive life—trying to avoid unintended pregnancy.").

³¹ UNICEF, THE PROGRESS OF NATIONS 48 (1997), available at <http://www.unicef.org/pon97/40-49.pdf> (noting that "in Afghanistan . . . a woman faces a 1-in-7 lifetime risk of dying due to pregnancy or childbirth"); see also Press Release, UNICEF, Afghanistan's Maternal and Child Mortality Rates Soar (Aug. 4, 2005), available at http://www.unicef.org/media/media_27853.html (noting that in 2005, 1600 out of every 100,000 Afghan mothers died while giving birth or because of related complications).

³² ICCPR, *supra* note 6, at art. 6.

³³ CEDAW, *supra* note 6, at art. 12; International Covenant on Economic, Social and Cultural Rights, art. 12, Dec. 16, 1966, 993 U.N.T.S. 3.

³⁴ CEDAW, *supra* note 6, at art. 2; ICCPR, *supra* note 6, at art. 26.

³⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 2007 WL 2371946, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; ICCPR, *supra* note 6, at art. 12.

dignity;³⁶ the right to liberty, self-determination and privacy;³⁷ the right to physical integrity;³⁸ and freedom of conscience.³⁹

Human rights lawyers sought to hold governments accountable through mechanisms such as the periodic review of a country's compliance with its treaty obligations,⁴⁰ authoritative interpretations of the treaty by its

³⁶ Convention Against Torture, *supra* note 35, at pmb1. (stating that “[t]he States and Parties to the Convention [recognize] that the [equal and inalienable rights of the human family] derive from the inherent dignity of the human person”); ICCPR, *supra* note 6, at art. 10.

³⁷ ICCPR, *supra* note 6, at arts. 9, 17.

³⁸ Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* ¶ 2, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004) (stating that the aim of the provision of Article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual); see *Tysiac v. Poland*, App. No. 5410/03 art. 107 (2007) available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (search “Tysiac v. Poland”, then follow “Case of Tysiac v. Poland” hyperlink) (holding that “private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity”); *X & Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) ¶¶ 22, 23 (1985) (holding that the right to privacy “covers the physical and moral integrity of the person, including his or her sexual life” and that this right may impose positive obligations upon the State to adopt “measures designed to secure respect for private life”); Human Rights Committee, *Concluding Observations: Yemen* ¶ 6, U.N. Doc. CCPR/CO/75/YEM (2002) (stating that Yemen should . . . promote a human rights culture within the society along with greater awareness of the rights of women, especially the right to physical integrity”).

³⁹ ICCPR, *supra* note 6 at art. 18. Only one international treaty—the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa—specifically mentions abortion. Organisation of African Unity [OAU], *Optional Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, art. 14, Sept. 13, 2000, Doc. CAB/LEG/66.6 (2003) (“[S]tates Parties shall take all appropriate measures to . . . protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”).

⁴⁰ At the U.N., countries’ compliance with the international human rights treaties that they have ratified is reviewed by treaty monitoring bodies (“TMBs”). At periodic intervals, a country must report to the respective TMBs on their efforts to respect, protect, and fulfill the human rights guaranteed in each particular treaty. As part of this process, non-governmental organizations (“NGOs”), such as the Center for Reproductive Rights, are able to file submissions to the TMB, often called “shadow reports,” and in some cases testify in person before the treaty committee. Following in-person dialogues with government representatives and NGOs, committee members issue “concluding observations” to the reporting government and each year these observations are compiled in a report and sent to the General Assembly of the U.N. These concluding observations become one important

overseeing bodies,⁴¹ and individual cases in which treaty rights have been violated.⁴² The norms being articulated through these processes provide

basis for interpreting state parties' treaty obligations under international law. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS 706–07 (2d ed. 2000); United Nations High Commissioner for Human Rights, *Human Rights Treaty Bodies*, <http://www2.ohchr.org/english/bodies/treaty/index.htm> (last visited Oct. 1, 2009); CTR. FOR REPROD. RIGHTS, BRINGING RIGHTS TO BEAR: THE HUMAN RIGHT TO INFORMATION ON SEXUAL AND REPRODUCTIVE HEALTH (2008), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/BRB_SexEd.pdf. A similar set of accountability mechanisms operates at the regional level. These bodies enforce a number of human rights treaties. See, e.g., African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3, rev. 5, 21 I.L.M. 58, 1520 U.N.T.S. 217; African Commission on Human and Peoples' Rights, <http://www.achpr.org> (last visited Oct. 1, 2009); Inter-American Commission of Human Rights, <http://www.cidh.oas.org/DefaultE.htm> (last visited Oct. 1, 2009). The Inter-American Commission on Human Rights has duties which stem from the Charter of the Organization of American States, Feb. 27, 1967, O.A.S. Off. Re. OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222; European Court of Human Rights, http://www.echr.coe.int/echr/Homepage_EN (last visited Oct. 1, 2009).

An example of the country review process in the context of the U.S. is the 2008 review of the United States by the U.N. Committee on the Elimination of Racial Discrimination (CERD), in which the Center for Reproductive Rights highlighted serious racial disparities in access to reproductive health care and health outcomes. It submitted a letter to the CERD Committee highlighting racial disparities in reproductive health, noting that African American women are nearly four times more likely to die in childbirth than white women. Letter from Nancy Northup, President, Center for Reproductive Rights, to Nathalie Prouvez, Secretary, Committee on the Elimination of Racial Discrimination, at 1–2 (Dec. 19, 2007), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/CERD%20Shadow%20Letter%20Final_07_08_0.pdf. They are also twenty-three times more likely to be infected with HIV/AIDS and fourteen times more likely to die from the disease. *Id.* at 4. The CERD Committee expressed concern that “wide racial disparities continue to exist in the field of sexual and reproductive health,” validating charges that the U.S. has failed to actively combat racial discrimination in reproductive health care. Int’l Convention on the Elimination of All Forms of Racial Discrimination, Comm. on the Elimination of All Forms of Racial Discrimination, *Consideration of Reports Submitted by State Parties Under Article 9 of the Convention* ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008). The CERD Committee called on the U.S. government to reduce high rates of maternal and infant mortality, unintended pregnancies leading to higher abortion rates, and the growing epidemic of HIV/AIDS among women of color. *Cf. id.* (issuing recommendations to improve access and education concerning family planning and sexual education). This is the first time that the CERD Committee has made reference to access to family planning.

⁴¹ The TMBs issue “general recommendations” or “general comments,” which elaborate a treaty’s broadly worded human rights guarantees in order to guide government efforts to implement the treaty, providing a working interpretation of the rights in each of the major treaties. United Nations High Commissioner for Human Rights, Human Rights

complementary,⁴³ and at times alternative⁴⁴ ways to understand the rights implications of reproductive and sexual health issues.⁴⁵

Bodies—General Comments, <http://www2.ohchr.org/english/bodies/treaty/comments.htm> (last visited Oct. 1, 2009). Success has been found in this realm as well, with the notable finding by the Committee on Elimination of All Forms of Discrimination Against Women that denying women access to necessary health care is gender discrimination and that “[s]tate parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.” Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence against Women* ¶ 24, U.N. Doc. A/47/38 (Jan. 29, 1992).

⁴² Some of the U.N. human rights treaties allow for individual cases to be brought before the relevant TMB if the country has agreed to be held so accountable by ratifying a special protocol to the treaty. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1, U.N. Doc. A/6316 (Dec. 16, 1966); Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. Res. A/54/4, art. 2 (Oct. 6, 1999); Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res A/RES/63/117, art. 2 (Dec. 10, 2008). Similar mechanisms can also be found under the Inter-American and European systems. See Inter-American Commission on Human Rights, *supra* note 40.

⁴³ For an example of a complementary analysis, see *Tysiāc v. Poland*, App. No. 5410/03 (2007) available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/> (search “Tysiāc v. Poland”; then follow “Case of Tysiāc v. Poland” hyperlink). In *Tysiāc*, the European Court of Human Rights found Poland in violation of the European Convention on Human Rights for failure to allow access to a therapeutic abortion. *Id.* Alicja Tysiāc, a Polish woman who suffered from severe myopia, had been warned by her doctors that unless she terminated her pregnancy she faced potential blindness. *Id.* ¶ 7–17. Three other doctors confirmed that she needed to have an abortion. *Id.* While Polish law permits therapeutic abortion, she was denied a health certificate to terminate, carried the pregnancy to term, and her eyesight deteriorated precipitously. *Id.* ¶ 9–10. The European Court of Human Rights held that governments have a positive obligation to make sure that women can access exceptions to abortion laws; the therapeutic exception could not be illusory. *Id.* ¶ 118. The Court relied on Article 8 of the European Convention, the rights to private life, which encompasses, among other things, “aspects of an individual’s physical and social identity including the right of personal autonomy, personal development . . . [and] a person’s physical and psychological integrity.” *Id.* ¶¶ 105–106 (citing European Convention of Human Rights, *supra* note 40, at art. 8). The Court found that these different aspects of private life were implicated in the case of therapeutic abortion and that the government has a positive obligation “to secure the physical integrity of mothers-to-be.” *Id.* ¶ 107.

⁴⁴ See *infra* text accompanying notes 46–60 (using *K.L. v. Peru* and *In re Colombian Abortion Law* as examples).

⁴⁵ The impact of these legal developments and treaty interpretations can also be seen in the human rights movement more generally. Two leading human rights organizations have taken on abortion as a human rights issue in the last five years. In June 2005, Human

In the case of *K.L. v. Peru*, a seventeen-year-old Peruvian woman learned that her fetus had anencephaly, a fatal anomaly.⁴⁶ Although Peru has very restrictive abortion laws, there is an exception for therapeutic abortions.⁴⁷ Her obstetrician recommended that she terminate the pregnancy to preserve her physical health and a psychiatrist concurred with respect to her mental health, but her multiple attempts to secure an abortion were denied and K.L. had to carry to term.⁴⁸ K.L.'s case was taken to the U.N. Human Rights Committee,⁴⁹ which oversees the International Covenant on Civil and Political Rights.⁵⁰ In the first abortion ruling by that body, the Committee ruled that Peru had violated K.L.'s right to privacy, and her right to be free from cruel and degrading treatment.⁵¹ The Committee found

Rights Watch, one of the most respected human rights organizations worldwide, took the position that decisions about abortion belong to pregnant women without interference by the state or others. Human Rights Watch, *Decisions Denied: Women's Access to Contraceptives and Abortion in Argentina*, Vol. 17, No. 1 (B) (June 2005). Amnesty International, which has 2.2 million members, supporters, and subscribers in over 150 countries around the world, Amnesty International: Who We Are, <http://www.amnesty.org/en/who-we-are> (last visited Oct. 1, 2009), has also begun to address criminal abortion laws as a human rights issue. Press Release, Amnesty International, Amnesty International Defends Access to Abortion for Women at Risk (June 14, 2007), available at <http://www.amnesty.org/en/library/asset/POL30/012/2007/en/c917eede-d386-11dd-a329-2f46302a8cc6/pol300122007en.pdf>.

⁴⁶ *KL v. Peru*, Comm. No. 1153/2003 ¶ 2.1, Oct. 24, 2005, U.N. Doc. CCPR/C/85/D/1153/2003.

⁴⁷ See *id.* ¶ 3.9 (discussing the exception under Peruvian criminal law for therapeutic abortion and under what circumstances a therapeutic abortion may take place).

⁴⁸ *Id.*

⁴⁹ *K.L. v. Peru* was filed before the U.N. Human Rights Committee by the Center for Reproductive Rights, a Peruvian NGO (the Counseling Center for the Defense of Women's Rights (DEMUS)), and a regional NGO (the Committee for the Defense of Women's Rights (CLADEM)). Most of the regional and international human rights treaties allow for TMBs to hear individual complaints via either an optional protocol that state parties must sign or through a similar mechanism found in the treaty itself. Under this process, the TMB complaint mechanism allows an individual to file complaints against a state party by alleging a violation of the treaty's provisions. The Committee then reviews the case, investigates if necessary, determines whether a treaty violation occurred, and then issues recommendations to the state party. STEINER & ALSTON, *supra* note 40 at 706–07; United Nations High Commissioner for Human Rights, *supra* note 40; CTR. FOR REPROD. RIGHTS, *supra* note 40.

⁵⁰ ICCPR, *supra* note 6, at art. 2.

⁵¹ *K.L.*, Comm. No. 1153/2003 ¶¶ 6.3–6.4 (finding violations of Article 7 and 17 of the ICCPR). The Committee also found violations of Article 24 of the ICCPR, which affords

that Article 7 of the ICCPR relates not only to physical pain but also to mental suffering, and that government officials could have foreseen that denying K.L. an abortion would cause her pain, distress, and ultimately the deep depression that beset her after the delivery.⁵² While the first ground is unsurprising to those familiar with U.S. constitutional standards, the second provides an additional lens to understand the scope of her suffering as a result of the government's actions.

In 2006, the Constitutional Court of Colombia struck down a law banning all abortions as unconstitutional, relying on international standards to shape the protections under Colombia's Constitution.⁵³ The court held that the total ban on abortion was a violation of Colombia's Constitution, and that there had to be broad exceptions for mental and physical health, for fetal abnormalities, for rape, and for incest.⁵⁴ The court found that the abortion ban infringes more than necessary on a range of rights of pregnant women which are protected by Colombia's Constitution and international human rights treaties, including the right to dignity, the right to free development of the individual, and the rights to life, health, and bodily integrity.⁵⁵ The court also discussed other fundamental rights, such as the right to work and the right to education, which are impacted by women's ability to control their reproductive lives.⁵⁶ In reaching its decision, the court reviewed the governmental agreements at the U.N. conference at Cairo and Beijing and the statements of the U.N. treaty monitoring bodies.⁵⁷ The court explained that "women's sexual and reproductive rights have

special protections to minors, *id.* ¶ 6.5; and Article 2 of the ICCPR, which requires state parties to ensure that effective remedies exist for violations of protected rights. *Id.* ¶ 6.6. The Committee held that Peru should furnish K.L. with an effective remedy, including compensation, and should establish procedures so the similar violations do not occur in the future. *Id.* ¶ 6.8.

⁵² *Id.* ¶ 6.3. The Human Rights Committee is the U.N. treaty monitoring body responsible for monitoring the implementation of the ICCPR.

⁵³ In re Colombian Abortion Law, (2006) C-355/06 (Colom.), as reprinted in WOMEN'S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA (Maria Catalina Rodríguez trans., 2007), available at http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf.

⁵⁴ *Id.* at 39, 52–53.

⁵⁵ *Id.* at 36–40.

⁵⁶ *Id.* at 27.

⁵⁷ *Id.* at 33–35.

finally been recognized as human rights.”⁵⁸ The court also said that “sexual and reproductive rights emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity’s advancement towards social justice.”⁵⁹ Notable for its divergence from U.S. constitutional law on this point, the Colombian government now funds abortion services under the range of circumstances in which it is permissible.⁶⁰

I have given two examples that focus on abortion, the area of reproductive rights law and policy most contested in the United States, but these transnational developments are taking place in other areas of reproductive and sexual rights as well. For example, just this year, the European Committee of Social Rights, which monitors state compliance with the European Social Charter, found that Croatia’s abstinence-only sex education program discriminates on the basis of sexual orientation because the government has an obligation to ensure that educational materials do not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to social exclusion, embedded discrimination, and denial of human dignity.⁶¹

⁵⁸ *Id.* at 35.

⁵⁹ *Id.*

⁶⁰ Compare Ministerio De La Proteccion Social, Acuerdo 350 de 2006 (Colombia) available at <http://www.pos.gov.co/Documents/Normativa%20Regimen%20Subsidiado/acuerdo%20350.pdf>, and WOMEN’S LINK WORLDWIDE, LA LIBERALIZACION DEL ABORTO EN COLOMBIA (THE LIBERALIZATION OF ABORTION IN COLOMBIA) 3 (2007), available at http://www.despenalizacion.org.ar/pdf/Hojas_Informativas/02_WomensLinkWorldwide.pdf (stating that the service of voluntary interruption of pregnancy was incorporated into POS (the Obligatory Health Plan) through agreement 350 of 2006, published in the official daily 46501 of January 4, 2007)) with *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment’s prohibition on the use of any federal funds to reimburse the cost of abortions under the Medicaid program, except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service).

⁶¹ International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia ¶ 60, No. 45/2007, (March 30, 2009), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC45Merits_en.pdf (noting that statements found in the curriculum “stigmatize homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes”); European Committee for Social Rights, http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp (explaining

This developing transnational law on reproductive rights provides both a different framework—be it the focus on dignity, equality, or cruel and degrading treatment—and a reminder by example of the serious consequences that follow when women do not have access to reproductive healthcare. At the time of the constitutional challenge in Colombia, for example, unsafe abortion was the third leading cause of maternal mortality in the country.⁶² This more complex picture of realities and rights implicated provides fertile ground for new scholarship and coursework on reproductive health and rights issues in the United States.

II. REPRODUCTIVE RIGHTS IN THE LEGAL ACADEMY

Despite the recent trend of integrating international and comparative law into the law school curriculum, these emerging developments in transnational law on reproductive rights have not been widely analyzed in scholarship nor incorporated in classroom teaching.⁶³

For example, look at the scholarship following the two groundbreaking abortion rights cases discussed above—the U.N. Human Rights Committee's decision in *K.L. v. Peru* and the Colombian Constitutional Court's 2006 abortion decision.⁶⁴ There are only twelve U.S. law review articles that discuss either of these cases⁶⁵ and four were

that the mission of the European Committee of Social Rights (ECSR) is to judge that states are in conformity in law and in practice with the provisions of the European Social Charter).

⁶² WORLD HEALTH ORG. (WHO), SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS, GENEVA (2003), available at <http://whqlibdoc.who.int/publications/2003/9241590343.pdf>; WOMEN'S LINK WORLDWIDE, ABORTION: A PUBLIC HEALTH ISSUE IN LATIN AMERICAN AND THROUGHOUT THE WORLD 3, available at http://www.womenslinkworldwide.org/pdf_programs/prog_rr_col_factsheets_pubhealth.pdf.

⁶³ See Martha F. Davis, *Reproductive Rights in the Legal Academy: A New Role for Transnational Law*, 59 J. LEGAL EDUC. (forthcoming 2009).

⁶⁴ See *supra* text accompanying notes 46–60.

⁶⁵ Robert John Araujo, *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L.J. 571 (2007); Rev. Robert John Araujo, *John Paul II and the Rule of Law: Bringing Order to International Disorder*, 45 J. CATH. LEGAL STUD. 293 (2006); Luisa Cabal & Pardiss Kebriaei, *Using Litigation to Address Gender Violations in the HIV/AIDS Context*, 13 U.C. DAVIS J. INT'L L. & POL'Y 9 (2006); Rebecca J. Cook, *Human Rights Dimensions of Health Security*, 97 AM. SOC'Y INT'L L. PROC. 101 (2003); Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039 (2007); Jocelyn E. Getgen, *Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban*, 41 CORNELL INT'L L.J. 143 (2008); Sarah Joseph, *United Nations Human Rights Committee: Recent Cases*, 6 HUM. RTS. L. REV. 361

authored by staff or board members of the Center for Reproductive Rights.⁶⁶

In *Reproductive Rights in the Legal Academy: A New Role for Transnational Law*, Professor Martha Davis examines the extent to which comparative and international law on reproductive health and rights are included in law school curriculum both as freestanding courses and as integrated into traditional law school courses such as constitutional law, family law, and bioethics.⁶⁷ Currently, there are few opportunities for law students to study reproductive health issues in-depth in law school courses, and there are even fewer opportunities to learn about the transnational perspective. Only nine of the top ranked thirty-one law schools offer freestanding reproductive rights courses, and they are largely taught by adjunct professors and are often not offered every year.⁶⁸ Currently, there are only five courses at the top ranked thirty-one schools that integrate a human rights and global focus to reproductive rights.⁶⁹ There is no casebook on reproductive rights with either a U.S. constitutional or transnational law focus.⁷⁰

Davis also reviewed casebooks in the areas of constitutional law, family law, bioethics, children's law, women's rights, public health, torts,

(2006); Sarah Helena Lord, *The Nicaraguan Abortion Ban: Killing In Defense Of Life*, 87 N.C. L. REV. 537 (2009); Tatyana A. Margolin, *Abortion as a Human Right*, 29 WOMEN'S RTS. L. REP. 77 (2008); Beate Rudolf & Andrea Eriksson, *Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT'L J. CONST. L. 507 (2007); Patty Skuster, *Implementing the Mental Health Indication to Help Ensure Access to Safe Abortion*, 28 MED. & L. 419 (2009); Christian Zampas & Jaime M. Gher, *Abortion as a Human Right: International and Regional Standards*, 8 HUM. RTS. L. REV. 249 (2008).

⁶⁶ Cabal & Kebriaei, *supra* note 65; Cook, *supra* note 65; Cook & Howard, *supra* note 65; Zampas & Gher, *supra* note 65.

⁶⁷ Davis, *supra* note 63.

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 6. The majority of the transnational courses are taught by staff, former staff, or board members of the Center for Reproductive Rights: Columbia (Nancy Northup), Center for Reproductive Rights: Nancy Northup, <http://reproductiverights.org/en/profile/nancy-northup>, Harvard (Mindy Jane Roseman), Human Rights Program Staff Biographies, http://www.law.harvard.edu/programs/hrp/clinical_staff.html, (last visited Oct. 1, 2009) (detailing Roseman's affiliation with the Center), University of Toronto (Rebecca Cook), Center for Reproductive Rights: Rebecca Cook, <http://reproductiverights.org/en/profile/rebecca-j-cook> (last visited Oct. 1, 2009).

⁷⁰ Davis, *supra* note 63, at 6.

international law, and comparative constitutional law to analyze their treatment of reproductive health.⁷¹ While casebook authors are increasingly cognizant of the need to address international and comparative law, few have applied that emerging understanding to reproductive rights.⁷² Constitutional law casebooks, from which most U.S. law students encounter reproductive rights, included little comparative law discussion on reproductive rights, with some notable exceptions.⁷³ Davis argues that integrating transnational perspectives on reproductive health issues into existing law school curriculum provides a fertile ground for teaching in this area. First, “sexual and reproductive health raise questions concerning the human condition that cross international boundaries.”⁷⁴ Laws and policies vastly differ across borders, but biological facts about pregnancy are the same. Women need access to emergency obstetrics care for life-threatening conditions such as hemorrhage, pre-eclampsia, and obstructed delivery no matter where they live.⁷⁵ Second, the absence of freestanding courses suggests that integration into existing curriculum has the most power to transform the subject and expose more students.⁷⁶ Finally, a transnational lens provides a critical perspective that better prepares students to engage in public debates on these issues once they embark on their legal careers.⁷⁷

This volume is a welcome addition to the reinvigorated academic investigation of reproductive health and law issues.

In *Decisional Dignity: Abortion, Bypass Hearings, and the Misuse of Law*, Carol Sanger explores the right to abortion for minors and the parental notification-judicial bypass requirements that have been implemented in many U.S. states.⁷⁸ Looking closely at judicial bypass hearings, this article suggests that they serve no purpose other than to

⁷¹ *Id.* at 5 n.16.

⁷² *Id.* at 6.

⁷³ *Id.*

⁷⁴ *Id.* at 3.

⁷⁵ United Nations Population Fund (UNFPA), Providing Emergency Obstetric and Newborn Care to All in Need, <http://www.unfpa.org/mothers/obstetric.htm> (last visited Oct. 1, 2009).

⁷⁶ Davis, *supra* note 63, at 3.

⁷⁷ *Id.* at 4.

⁷⁸ Carol Sanger, *Decisional Dignity: Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009).

shame and humiliate girls who mistakenly become pregnant.⁷⁹ Professor Sanger ultimately makes the case for *decisional dignity* as well as decisional autonomy in the abortion rights jurisprudence.⁸⁰

In *Reproductive Rights as Health Care Rights*, Jessie Hill asserts that abortion can be thought of as a *negative right* to health and non-interference with medical treatment.⁸¹ Drawing on international cases and U.S. Constitutional jurisprudence, Professor Hill explores what a negative right to healthcare might look like in the U.S. context and explains what it could contribute to the abortion rights debate.⁸²

In *The Meaning Of "Life": Belief and Reason in the Abortion Debate*, Caitlin E. Borgmann examines inconsistencies in the abortion debate, urging both liberals and conservatives to reflect on their positions and to engage the question of when life begins.⁸³ Borgmann suggests new areas of potential in which to find common ground.⁸⁴

In *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, Khiara M. Bridges blends critical race and post-colonial theory in the study of poor pregnant women who rely on state assistance.⁸⁵ Bridges examines three federal social assistance programs,⁸⁶ and suggests that aspects of each program call into question whether poor minority women have an actual *right to reproduce*.⁸⁷ Exploring the gulf between wealthy and poor women's experiences with pregnancy and pre-natal care, Bridges concludes that poor women have a

⁷⁹ *Id.* at 418.

⁸⁰ *Id.* at 415–16.

⁸¹ B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501 (2009).

⁸² *Id.* at 504.

⁸³ Caitlin E. Borgmann, *The Meaning Of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551 (2009).

⁸⁴ *Id.* at 556–57.

⁸⁵ Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609 (2009).

⁸⁶ *Id.*

⁸⁷ *Id.* at 611.

diminished set of reproductive rights, with welfare programs transforming them from mothers into laborers.⁸⁸

In *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (and Other Countries Don't)*, Linda C. Fentiman looks at the prosecution of pregnant women with drug and alcohol addictions under fetal protection and engagement statutes.⁸⁹ She argues that responding to addiction through such harsh measures, in the face of their questionable constitutionality, is an example of prosecutorial indiscretion—conduct designed to appeal to anti-abortion constituencies who urge for earlier and earlier conceptions of when life begins under law.⁹⁰

III. CONCLUSION

Twenty-three years after I first engaged in law school with reproductive health and rights issues they remain contested both within and outside the academic community. In the recent Congressional debate over health care reform, even the notion of whether pre-natal and obstetrics care should be a required service in every health insurance plan was debated.⁹¹ Meanwhile there is a growing body of international and comparative law on reproductive rights as human rights. That law can bring an interesting counterpoint to academic writing and the study of reproductive health and rights issues. Let's hope that when law students twenty-three years from now are pulling the newest edition of *Gunther on Constitutional Law*⁹² off their shelves, a broader analysis of women's reproductive rights will have moved from a footnote into the text.

⁸⁸ *Id.* at 643–44.

⁸⁹ See Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (and Other Countries Don't)*, 18 COLUM. J. GENDER & L. 647 (2009).

⁹⁰ *Id.* at 657–58.

⁹¹ See *Senate Finance Comm. Health Care Markup* (C-SPAN television broadcast Sept. 25, 2009), available at <http://www.c-span.org/Watch/Media/2009/09/25/HP/A/23568/Senate+Finance+Cmte+Health+Care+Markup.aspx> (including Senator Kyl's statement that he "[doesn't] need maternity care, and so requiring that to be in [his] insurance policy is something that [he doesn't] need and will make the policy more expensive").

⁹² The current edition is KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (16th ed. 2007).

