

**THE MODERN HIV/AIDS EPIDEMIC AND HUMAN RIGHTS
IN THE UNITED STATES: A LENS INTO LINGERING
GENDER, RACE, AND HEALTH DISPARITIES AND
CUTTING EDGE APPROACHES TO JUSTICE.**

Brook Kelly[†]

I. INTRODUCTION

Disparities experienced by women of color living with HIV are a lens through which the failures of current HIV policies and anti-discrimination laws to address racial, gender, disability, and economic disparities can be viewed. Research has confirmed what is already known by people living with HIV: The HIV epidemic is driven by the same social and structural factors that perpetuate current inequalities found in the United States, and as the epidemic shifted from a majority white, gay male disease to a disease that permeates the black community,¹ the public health, policy, and legal response has not kept pace. As a result, new incidence rates are highest among poor people of color in the United States,² who also

[†] Brook Kelly, J.D., HIV Human Rights Attorney for the U.S. Positive Women's Network, a project of Women Organized to Respond to Life-Threatening Disease (WORLD). Acknowledgements: Thank you to the U.S. Positive Women's Network, a project of WORLD, especially the staff Naina Khanna and Sonia Rastogi, and the Steering Committee for the conversations that have deepened my understanding of what human rights really mean for women and the opportunity to research and write about these issues over the last two years; to the staff at the Center for HIV Law and Policy, Catherine Hanssens and Beirne Roose-Snyder, for the opportunity to work with them on issues of HIV criminalization and women and for providing incredible and hard to find legal resources on HIV and the law; to Deon Haywood and Women with a Vision for sharing the story of their journey; to the Global Commission on HIV and the Law for the opportunity to document human rights abuses against women living with HIV in the United States; to the University of Baltimore School of Law Feminist Legal Theory Conference where I first presented and received feedback on this article; and, finally, to the dedicated editors of the *University of Baltimore Law Review*.

1. H. Irene Hall et al., *HIV Infection—United States, 2005 and 2008*, MORBIDITY & MORTALITY WKLY. REP., Jan. 14, 2011, at 87, 87–88.
2. See NAT'L CTR. FOR HIV/AIDS, HEPATITIS, STD, AND TB PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, HIV AMONG AFRICAN AMERICANS (2010), available at <http://cdc.gov/hiv/topics/aa/PDF/aa.pdf>.

have the worst health outcomes, including a disproportionate number of AIDS-related illnesses and high mortality.³

Over the last three years, I have worked as a Ford Foundation Fellow policy and advocacy attorney for organizations focused on issues faced by women living with and affected by HIV. Working with women on the front lines of the epidemic—women who are living with and affected by HIV and who are also advocating on their own behalf and for others for the full realization of their human rights—has made clear that the inequalities that drive both the epidemic and socioeconomic, gender, and race disparities are not fully addressed by the current legal service structures or by antidiscrimination laws that were the great wins and backbone of antipoverty and inequality campaigns of the last fifty to sixty years. The inability of this legal regime, based in civil and political rights, to account for and alleviate the economic, racial and gender disparities that drive the HIV epidemic is the crux of the issue. Adoption of a legal analysis that takes into account not only civil and political rights but also economic, social, and cultural rights is necessary to stem the current economic and health disparities plaguing the United States. The HIV human rights movement among people living with and affected by HIV in the United States is a powerful example of what can be accomplished using a multidisciplinary approach to legal advocacy as well as what remains to be done.

II. BROADENING THE U.S. LEGAL REGIME—RIGHTING THE WRONGS

Although the adoption of economic, social, and cultural rights into a U.S. legal and policy regime may seem foreign to the domestic legal profession, the seeds of these rights were planted in the United States during a time of great social change in the 1940s. The Universal Declaration of Human Rights (UDHR),⁴ adopted by United Nations members in 1948, is the backbone of international human rights law.⁵ The principles of the UDHR are based in large part on principles the First Lady Eleanor Roosevelt and U.S. President

3. Marcie S. Rubin et al., *Examination of Inequalities in HIV/AIDS Mortality in the United States from a Fundamental Cause Perspective*, 100 AM. J. PUB. HEALTH 1054, 1054 (2009).

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

5. See *History*, UDHR.ORG, <http://www.udhr.org/history/default.htm> (follow “Overview” hyperlink; then follow “Standard of Achievement” hyperlink) (last updated Aug. 27, 1998).

Franklin Delano Roosevelt helped to establish during his presidency.⁶ In a speech to Congress in 1944, President Roosevelt proposed a second Bill of Rights that focused on guarantees of work; adequate housing and income; medical care; education; “protection from the economic fears of old age, sickness, [injuries], and unemployment;” and a market free “from unfair competition and domination of monopolies.”⁷ These principles were integrated into the drafting of the UDHR under the leadership of First Lady Eleanor Roosevelt.⁸

The UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹ and the International Covenant on Civil and Political Rights (ICCPR)¹⁰ make up the body of formally recognized human rights. In addition to the UDHR, ICESCR, and ICCPR, which protect the civil, political, social, cultural, and economic rights of all people, conventions have been established to address specific issues such as racism and gender discrimination: the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹¹ and the International Convention on the

6. *See id.*

7. President Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16518#axzz1YE80GIPrl>.

8. *See id.*; Universal Declaration of Human Rights, *supra* note 4, at arts. 17, 22–26; *History*, *supra* note 5.

9. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966) [hereinafter ICESCR]. The ICESCR was signed by the United States on October 5, 1977, but not ratified. *Chapter IV Human Rights: 3. International Covenant on Economic, Social and Cultural Rights*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Jan. 2, 2012) (opened for signature Dec. 19, 1966, and entered into force Jan. 3, 1976).

10. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49, 52–53 (Dec. 16, 1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm>. The ICCPR was signed by the United States on October 5, 1977, and ratified June 8, 1992. *Chapter IV Human Rights: 4. International Covenant on Civil and Political Rights*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Jan. 2, 2012).

11. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 47 (Dec. 21, 1965) [hereinafter CERD]. CERD was signed by the United States on September 28, 1966, and ratified October 21, 1994. *Chapter IV Human Rights: 2. International Convention on the Elimination of All Forms of Racial Discrimination*, UN TREATY COLLECTION, <http://treaties.un.org/Pages/ViewDetails.aspx?src>

Elimination of All Forms of Discrimination against Women (CEDAW).¹²

The U.S. HIV epidemic has increasingly taken on the same profile as many of the injustices the founding human rights documents sought to eliminate. A problem of racial, gender, and economic disparities, as well as disparities attributable to geographic location, the HIV epidemic is stubbornly infused with stigma, discrimination, and persistent misinformation about routes of HIV transmission.¹³ A large majority of HIV-positive women are women of color who live in low-income urban areas in the Northeast¹⁴ with a growing level of incidence among women in the South where health care systems have been traditionally underfunded.¹⁵ 65% of U.S. women diagnosed with AIDS in 2008 were black women, who made up 12% of the general female population, and 17% were Latina women, who made up 13% of the general female population.¹⁶ Women living with HIV tend to have worse health outcomes than men and suffer greater AIDS-related illnesses as well as greater mortality rates.¹⁷ This is largely attributed to structural factors such as poverty driven by race and gender discrimination, caretaking responsibilities, and stressors

=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited Jan. 2, 2012) (adopted Dec. 21, 1965, and entered into force Jan. 4, 1969).

12. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193–94 (Dec. 18, 1979) [hereinafter CEDAW]. CEDAW was signed by the United States on July 17, 1980, but not ratified. *Chapter IV Human Rights: 8. Convention on the Elimination of All Forms of Discrimination Against Women*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Jan. 2, 2012) (opened for signature Mar. 1, 1980, and entered into force Sept. 3, 1981).
13. See Meditz et al., *Sex, Race, and Geographic Region Influence Clinical Outcomes Following Primary HIV-1 Infection*, 203 J. INFECTIOUS DISEASES 442, 450 (2011); Wendy S. Armstrong & Carlos del Rio, *Gender, Race, and Geography: Do They Matter in Primary Human Immunodeficiency Virus Infection?*, 203 J. INFECTIOUS DISEASES 437, 438 (2011).
14. Meditz et al., *supra* note 13, at 443; Armstrong & del Rio, *supra* note 13, at 437; HENRY J. KAISER FAM. FOUND., HIV/AIDS POLICY FACT SHEET: WOMEN AND HIV/AIDS IN THE UNITED STATES (2010) [hereinafter WOMEN AND HIV/AIDS IN THE UNITED STATES], available at <http://www.kff.org/hivaids/upload/6092-08.pdf>.
15. HUMAN RIGHTS WATCH, SOUTHERN EXPOSURE: HUMAN RIGHTS AND HIV IN THE SOUTHERN UNITED STATES 7–13 (2010), available at http://www.hrw.org/sites/default/files/related_material/BPapersouth1122_5.pdf.
16. WOMEN AND HIV/AIDS IN THE UNITED STATES, *supra* note 14.
17. Meditz, et al., *supra* note 13, at 449; Sally L. Hodder et al., *Challenges of a Hidden Epidemic: HIV Prevention Among Women in the United States*, J. ACQUIRED IMMUNE DEFICIENCY SYNDROME S69, S70 (2010).

such as gender-based violence.¹⁸ 64% percent of HIV positive women receiving medical care are living on less than \$10,000 per year, with 76% supporting children under eighteen in their household.¹⁹ The Center for Disease Control and Prevention (CDC) recently released data showing that poverty is one of the biggest predictors of contracting HIV.²⁰

Some of the most basic human rights pertain directly to the HIV epidemic in the United States and by association to the greater economic and health disparities currently found in the United States.

*A. Nondiscrimination and Equality Before the Law*²¹

Nondiscrimination and equality before the law includes (1) protections against discrimination when seeking help for services, benefits, or housing regardless of HIV status, sex, gender, sexual orientation, or occupation and (2) freedom from discrimination before the law, including laws that have a disparate impact on people living with HIV.

*B. Right to Privacy and Physical Integrity*²²

The right to privacy and physical or bodily integrity includes protection against mandatory or coercive testing; the right to confidentiality in testing and disclosure of status; the right to marry and start a family regardless of HIV status; the right to decide when and whether to have a child; and access to the information and services needed to make a voluntary and informed decision regarding whether to have a child.

18. Hodder et al., *supra* note 16 at S70.

19. See WOMEN AND HIV/AIDS IN THE UNITED STATES, *supra* note 14.

20. Press Release, Ctrs. for Disease Control & Prevention, New CDC Analysis Reveals Strong Link Between Poverty and HIV (July 19, 2010), *available at* <http://www.cdc.gov/nchhstp/newsroom/povertyandhivpressrelease.html>.

21. See, e.g., ICCPR, *supra* note 10, arts. 3, 4.; CERD, *supra* note 11, at 47; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, OEA/Ser.L.V/II.82 doc.6 rev.1, art. II (April 1948); ICESCR, *supra* note 9, arts. 2, 3; CEDAW, *supra* note 12.

22. The right to privacy is enshrined in art. 17 of the ICCPR and art. V of the American Declaration of the Rights and Duties of Man; the right to physical integrity and security appears in art. 6 of ICCPR, and art. 3 of the Universal Declaration of Human Rights, *supra* note 4.

C. *Right to Liberty, Dignity, and Freedom from Cruel, Inhumane, and Degrading Treatment*²³

The right to liberty, dignity, and freedom from cruel, inhumane, and degrading treatment includes: protection against imprisonment, segregation, or isolation in a special hospital, or prison ward; freedom from violence, abuse, and harassment, including sexual violence; freedom from mandatory testing; and the right not to be harassed, arrested or imprisoned on the basis of HIV status.

D. *Right to Information and Education*²⁴

The right to information and education includes the right to access all HIV prevention and treatment education and information; sexual and reproductive health information, including access to accurate, comprehensive, accessible, and linguistically and culturally appropriate information and education about HIV prevention; and treatment and care, including prevention of vertical transmission and risk reduction methods.

E. *Right to Health*²⁵

The right to health includes the right to available, accessible, acceptable, and quality health care; the right to access all health care prevention and treatment services, including voluntary testing and counseling for HIV and other sexually transmitted infections (STIs), pregnancy and STI prevention methods, such as male or female condoms; the right not to be denied the highest quality health care or treatment on the basis of HIV status; and the full range of reproductive options and services.

23. The right to liberty is mandated by art. 3 of UDHR and art. 9 of ICCPR; the right to dignity and to be free from degrading treatment appears in nearly every human rights document, including treaties ratified by the United States. *See, e.g.*, ICCPR, *supra* note 10 art. 7; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 art. 16, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987), *available at* <http://www1.umn.edu/humanrts/instree/h2catoc.htm>.

24. The right to access and impart information is enshrined in art. 19(2) of the ICCPR and art. 19 of UDHR. The right to education is enshrined in art. 26 of UDHR.

25. The right to non-discrimination in healthcare is mandated by art. 5(e)(iv) of CERD; the right to health is included in art. 12 of the ICESCR and art. 25 of UDHR.

F. *Right to Participate in Public Life and Decision-Making*²⁶

The right to participate in public life and decision-making includes the right of affected communities and individuals to participate in the formulation and implementation of HIV policy at every level; participation, especially by disadvantaged and marginalized groups, must be meaningful.

What becomes apparent when reviewing the above fundamental human rights is the necessity for an intersectional analysis²⁷ in order to understand and address a public health crisis such as the HIV epidemic in the United States. Sadly, this type of discussion remains largely absent from legal and policy discourse. Current policies and initiatives to address the HIV epidemic, especially those coming out of the first U.S. National HIV/AIDS Strategy released in July 2010, do mention the social and structural drivers of the HIV epidemic but fail to articulate how structural changes can be operationalized to effect meaningful improvements in the HIV epidemic.²⁸ The National HIV/AIDS Strategy has three goals: (1) reducing the number of persons who become infected with HIV, (2) increasing access to care and optimizing health outcomes for people living with HIV, and (3) reducing HIV-related health disparities.²⁹ Yet neither the Strategy nor the corresponding implementation plan incorporates any meaningful gender, race, or economic analysis of the epidemic and its drivers. With inadequate analysis of these structural factors, these goals will remain unattainable.

To address this complex epidemic, legal advocates must begin to use an intersectional analysis and multidisciplinary approach that is based in a Critical Race and Critical Feminist Realism.³⁰ This type of analysis includes a multidisciplinary approach that combines legal and social science disciplines to (1) critically deconstruct and evaluate laws systematically along race and gender lines and (2) constructively create policy platforms that include progressive racial

26. See, e.g., UDHR, *supra* note 4, art. 27.

27. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–45 (1991).

28. WHITE HOUSE OFFICE OF NAT'L AIDS POLICY, NATIONAL HIV/AIDS POLICY FOR THE UNITED STATES at vii, 2 (2010).

29. *Id.* at vii–ix.

30. See, e.g., Gregory S. Parks, *Critical Race Realism: Towards an Integrative Model of Critical Race Theory, Empirical Social Science, and Public Policy* 30, 32, 70–71, (Cornell Law Faculty Working Paper No. 23, 2007), available at http://scholarship.law.cornell.edu/clsops_papers/23.

and gender analysis. In line with a critical race praxis,³¹ attorney advocates must also move beyond the traditional legal realm of legal theory and litigation to embrace and incorporate other forms of advocacy into their work. Gay McDougal, an attorney who began her legal work with domestic social justice issues and later became a leader in the international human rights field, explained that U.S. attorneys have “demonstrated . . . the shortsightedness of limiting social justice advocacy to litigation.”³² She “impressed upon civil rights lawyers the need to use a more multidimensional approach, one that combines documentation and fact-finding, grassroots outreach and organizing, public education and media, and public lobbying with litigation to achieve social change.”³³

This article will discuss the rights violations commonly experienced by women living with or affected by HIV in the United States with whom I have worked over the last three years; the rights implicated in these violations and the approaches taken by legal advocates in the HIV community to address these issues using a multidisciplinary approach; and how using a human rights approach that is more multidimensional can fill gaps in current legal advocacy.

III. BREACHING THE RIGHTS OF PEOPLE LIVING WITH HIV IN THE UNITED STATES—VIOLATIONS AND SOLUTIONS

People living with and at risk for HIV suffer multiple rights violations that complicate and hinder an effective HIV response. International bodies such as the Joint United Nations Programme on HIV/AIDS (UNAIDS) have advocated that policy makers identify laws and policies that hinder the HIV response by violating the rights of people living with HIV.³⁴ UNAIDS suggests that no HIV response

31. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 830–31 (1997).

32. Vanita Gupta, *Blazing a Path from Civil Rights to Human Rights: The Pioneering Career of Gay McDougall*, in 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 145, 147 (Cynthia Soohoo et al. eds., Praeger 2008).

33. *Id.*

34. UNAIDS, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS, at 12, U.N. Doc. HR/PUB/06/9, U.N. Sales No. E.06.XIV.4 (2006), available at http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf. This version of the International Guidelines on HIV/AIDS and Human Rights consolidates the Guidelines first published in 1998, following the Second International Consultation on HIV/AIDS and Human Rights, Geneva, Switzerland, September 23–25, 1996, and revised Guideline 6 first published in 2002 following the Third International

can be effective without first addressing these issues head on and working to change legal barriers to equality and nondiscrimination.³⁵ This section will focus on an area in which people, especially women living with HIV, face frequent rights violations: the criminalization of their sexuality and reproductive health and freedom.

As defined by resolutions drafted at the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women held in Beijing, reproductive health is “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.”³⁶ The rights implicit in this definition are therefore the right to

have a satisfying and safe sex life and . . . the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.³⁷

An effective HIV response must take into account these basic rights and treat the resolution of any violations as inseparable from a larger public health response.

Consultation on HIV/AIDS and Human Rights, Geneva, Switzerland, July 25-26, 2002. *Id.*

35. *Id.* at 79–80.

36. Int’l Conference on Population & Dev., Rep. of the Int’l Conference on Population & Dev. (Cairo, 5–13 Sept. 1994), ¶ 7.2, U.N. Doc. A/Conf.171/13, (Oct. 18, 1994) [hereinafter Rep. of the ICPD], available at <http://www.un.org/popin/icpd/conference/offeng/poa.html>; REP. OF THE FOURTH WORLD CONFERENCE ON WOMEN (BEIJING, 4-15 SEPT. 1995), ¶ 94, U.N. DOC A/CONF.177/20/REV.1, U.N. Sales No. 96.IV.13 (1996) [hereinafter REP. OF THE FOURTH WORLD CONFERENCE ON WOMEN], available at <http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>.

37. Rep. of the ICPD, *supra* note 36, at ¶ 7.2; REP. OF THE FOURTH WORLD CONFERENCE ON WOMEN, *supra* note 36, at ¶ 94.

A. *Does Living with HIV Come with a Legal Obligation to Leave Your Sexuality Behind?*

UNAIDS has stated that “[t]here are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights.”³⁸ Yet states across the United States have laws and practices that do just that—criminalize people living with HIV because of their HIV-positive status.³⁹

38. JOINT U.N. PROGRAMME ON HIV/AIDS, POLICY BRIEF: CRIMINALIZATION OF HIV TRANSMISSION 1 (2008), *available at* http://data.unaids.org/pub/BaseDocument/2008/20080731_jc1513_policy_criminalization_en.pdf.

39. For more information on HIV-specific criminal laws, see THE CTR. FOR HIV LAW AND POLICY, POSITIVE JUSTICE PROJECT, 1 ENDING & DEFENDING AGAINST HIV CRIMINALIZATION, A MANUAL FOR ADVOCATES: STATE AND FEDERAL LAWS AND PROSECUTIONS (2010), *available at* www.hivlawandpolicy.org/resources/view/564 (download document). “One of the more troubling and persistent issues for people with HIV has been the prospect of criminal prosecution for acts of consensual sex and for conduct, such as spitting or biting, that poses no significant risk of HIV transmission. The Positive Justice Project is CHLP’s response to this issue: a truly community-driven, multidisciplinary collaboration to end government reliance on an individual’s positive HIV test result as proof of intent to harm, and the basis for irrationally severe treatment in the criminal justice system.” *A new Strategy to End Civil and Criminal Punishment and Discrimination on the Basis of HIV Infection*, POSITIVE JUSTICE PROJECT, www.hivlawandpolicy.org/public/initiatives/positivejusticeproject (last visited Jan. 2, 2012); *see, e.g.*, ARK. CODE ANN. § 5-14-123 (West 2011); CAL. HEALTH & SAFETY CODE §§ 1621.5, 120291 (West 2011); COLO. REV. STAT. ANN. §§ 18-7-201.7, 18-7-205.7 (West 2011); FLA. STAT. ANN. §§ 381.0041(11)(b), 775.0877, 796.08 (West 2011); GA. CODE ANN. § 16-5-60(c), (d) (West 2011); IDAHO CODE ANN. § 39-608 (West 2011); 720 ILL. COMP. STAT. ANN. § 5/12-5.01 (West 2011); IND. CODE ANN. § 35-42-1-7 (West 2011); IOWA CODE ANN. § 709C.1 (West 2011); KAN. STAT. ANN. § 21-3435 (West 2010); KY. REV. STAT. ANN. § 529.090(3) & (4) (West 2011); MICH. COMP. LAWS ANN. § 333.5210 (West 2011); MISS. CODE ANN. § 97-27-14(1) (West 2011); MO. ANN. STAT. §§ 191.677, 567.020 (West 2011); NEV. REV. STAT. ANN. §§ 201.205, 201.358 (West 2010); N.D. CENT. CODE ANN. § 12.1-20-17 (West 2009); OHIO REV. CODE ANN. §§ 2903.11, 2907.24 2907.241, 2921.38 (West 2011); OKLA. STAT. tit. 21, §§ 1031, 1192.1 (West 2011); 18 PA. CONS. STAT. ANN. §§ 2704, 5902 (West 2011); S.C. CODE ANN. § 44-29-145 (2010); S.D. CODIFIED LAWS § 22-18-31 (2011); TENN. CODE ANN. §§ 39-13-109, 39-13-516 (West 2011); UTAH CODE ANN. § 76-10-1309 (West 2011); VA. CODE ANN. § 18.2-67.4:1(A) (West 2011); WASH. REV. CODE ANN. § 9A.36.011 (West 2011). A number of additional states have similar laws with misdemeanor penalties. Some states have sentence or penalty enhancement for HIV exposure. *See, e.g.*, ALASKA STAT. ANN. § 12.55.155(c)(33) (West 2010); CAL. PENAL CODE §§ 647f, 12022.85 (West 2011); COLO. REV. STAT. ANN. § 18-3-415.5 (West 2011); WIS. STAT. ANN. § 973.017 (West 2011).

Shannon of South Carolina had firsthand experience with the consequences of conviction under South Carolina's HIV criminalization law.⁴⁰ This law makes it a crime to have sexual relations without disclosing one's HIV-positive status.⁴¹ Shannon was diagnosed with HIV in the 1990s. She was in a relationship for many years with an abusive man. In that relationship, she became pregnant and had a child. He knew her HIV status and had accompanied her on visits to her HIV specialist as well as to her OB/GYN. When Shannon was finally ready to leave him, his abuse and harassment escalated—a common occurrence in abusive situations. He began disclosing Shannon's HIV status to her family, people at her work, and to anyone who would listen until a temporary restraining order was filed against him to stop the harassment. However, this only escalated his behavior, and he filed charges against Shannon under South Carolina's HIV-specific criminalization law.⁴² Shannon, who had never had significant brushes with the law, was sentenced to six years in prison. The judge gave little consideration to her testimony or to the testimony given in her defense. It appeared to the judge that Shannon was guilty solely by virtue of being HIV-positive.

Shannon served the full six years in prison. After her release, she found re-entry quite difficult. Shannon has been fighting to regain custody of her son from her former abusive partner. She has also been struggling to find employment. Although she was in a managerial position before her conviction, she has been unable to secure even entry-level positions such as a cash register clerk at a gas

40. Shannon's story can be heard by listening to a December 16, 2010 teleconference call "Why Should Criminalization Matter to You" sponsored by the U.S. Positive Women's Network and the National Association of People Living with AIDS. *Why Should HIV Criminalization Matter to You?*, POSITIVE WOMEN'S NETWORK (Dec. 16, 2010), available at <http://www.pwn-usa.org/tools-and-resources-2/tool-kits-and-presentations>.

41. S.C. CODE ANN. § 44-29-145 (2010) ("It is unlawful for a person who knows he or she is infected with HIV to: (1) knowingly engage in sexual intercourse, vaginal, anal, or oral, with another person without first informing that person of his HIV infection; (2) knowingly commit an act of prostitution with another person; (3) knowingly sell or donate blood, blood products, semen, tissue, organs, or other body fluids; (4) forcibly engage in sexual intercourse vaginal, anal or oral without the consent of the other person, including one's legal spouse; or (5) knowingly share with another person a hypodermic needle, syringe, or both . . . without first informing that person that the needle, syringe, or both has been used by someone infected with HIV."). Such acts are felonies punishable by a fine of not more than \$5,000 or imprisonment for not more than 10 years. *Id.*

42. *See generally id.*

station. This is likely because Shannon must disclose on job applications that she was convicted of a felony and state the nature of the crime, thereby disclosing her offender status as well as her HIV status, every time she applies for a job. In a location like South Carolina, where HIV stigma is intense,⁴³ Shannon's economic opportunities have been severely curtailed by the consequences of being prosecuted and charged under a felony HIV criminalization law. To make the situation worse for women like Shannon living with HIV, especially in southern states with HIV medication waiting lists and underfunded Medicare and Medicaid systems,⁴⁴ being unemployed, underemployed, or in a position that does not provide quality health care is a matter of life and death.

B. Health Departments or Morality Police?

Another example of strictures on HIV-positive people's sexuality is in the context of state health department practices. The Mississippi State Department of Health's "acknowledgement form" for people who test positive for HIV stated, until late 2010, that this is "a legal document," and required a pledge formalized with the client's signature and date to uphold the imperative of "the necessity of not causing pregnancy or becoming pregnant."⁴⁵ These forms can be used as evidence against HIV-positive women for non-disclosure of their HIV status or intent to expose or transmit HIV to another person under Mississippi's felony HIV exposure and transmission law.⁴⁶ The form also serves to spread outdated and misinformed ideas about acquiring or living with HIV—the form does not acknowledge that vertical transmission (from mother to child) is largely preventable

43. See CTR. HIV LAW & POLICY, SOUTHERN STATES MANIFESTO: UPDATE 2008, HIV/AIDS AND SEXUALLY TRANSMITTED DISEASES IN THE SOUTH 5–7 (2008), available at <http://www.hivlawandpolicy.org/resources/download/462>.

44. See HUMAN RIGHTS WATCH, SOUTHERN EXPOSURE: HUMAN RIGHTS AND HIV IN THE SOUTHERN UNITED STATES 10–11 (2010), available at http://www.hrw.org/sites/default/files/related_material/BPapersouth1122_5.pdf.

45. MISS. STATE DEP'T OF HEALTH, HIV INTERVIEW FORM NO. 917 (2009), available at <http://www.hivlawandpolicy.org/resources/download/556>.

46. MISS. CODE ANN. § 97-27-14(1), (3), (5) (2011) ("It shall be unlawful for any person to knowingly expose another person to a human immunodeficiency virus (HIV) Prior knowledge and willing consent to the exposure is a defense to a charge brought under this paragraph. . . . Any person convicted of a felony violation of this section shall be imprisoned for not less than three (3) years nor more than ten (10) years and a fine of not more than Ten Thousand Dollars (\$10,000.00), or both. . . . The provisions of this section shall be in addition to any other provisions of law for which the actions described in this section may be prosecuted.").

with accessible and quality medical care; nor does it provide information or referrals for women on how to address the potential for vertical transmission.⁴⁷ Additionally, the form does not acknowledge that HIV-positive people can continue to enjoy healthy, safe, and satisfying sexual and personal lives post-diagnosis with access to the most up to date information and medical care.⁴⁸ These types of practices can be found across the country from Mississippi to Michigan.⁴⁹

Recently, through direct advocacy with the Mississippi Health Department, the local Mississippi American Civil Liberties Union (ACLU) and the U.S. Department of Justice (DOJ) were successful in convincing the Health Department to remove this illegal constriction on men and women's reproductive rights from the acknowledgment form.⁵⁰ Still troubling, however, is that no program has been instituted to educate Mississippi's public health workers about the illegality of the previous form and the potential for misinformation it spreads among people living with HIV and those that serve them.⁵¹ Misinformation that comes directly from state public health workers is arguably some of the most dangerous. If a woman living with HIV does become pregnant, in order to have a safe and healthy pregnancy and give birth to a healthy baby, she will need to have a trusting, ongoing relationship with medical professionals. These types of laws and policies in place across the United States chill the relationship

47. Int'l Treatment Preparedness Coalition, *Failing Women, Failing Children: HIV, Vertical Transmission and Women's Health*, 7 MISSING TARGET 1, 1–2 (2009) available at http://www.itpcglobal.org/images/stories/doc/full_report.pdf; HIV INTERVIEW FORM NO. 917, *supra* note 45.

48. HIV INTERVIEW FORM NO. 917, *supra* note 45; WORLD HEALTH ORG. & U.N. POPULATION FUND, *SEXUAL AND REPRODUCTIVE HEALTH OF WOMEN LIVING WITH HIV/AIDS: GUIDELINES ON CARE, TREATMENT AND SUPPORT FOR WOMEN LIVING WITH HIV/AIDS AND THEIR CHILDREN IN RESOURCE-CONSTRAINED SETTINGS 2* (2006), available at <http://www.who.int/entity/hiv/pub/guidelines/sexualreproductivehealth.pdf>.

49. *See, e.g.*, HIV INTERVIEW FORM NO. 917, *supra* note 45; KALAMAZOO CNTY. HEALTH & CMTY. SERVS., CLIENT ACKNOWLEDGEMENT FORM, (2007), available at <http://hivlawandpolicy.org/resources/download/555> (requiring clients that test positive for HIV to sign and date the form acknowledging that they understand they are required to disclose their HIV status to sex partners). The Michigan form states that failure to do so can result in the Health Department's use of Michigan's HIV-specific criminal law, MICH. COMP. LAWS ANN. § 333.5210 (West 2011), which makes it a felony for a person who knows that she or he has tested HIV-positive to engage in sexual penetration.

50. HUMAN RIGHTS WATCH, *RIGHTS AT RISK: STATE RESPONSE TO HIV IN MISSISSIPPI 46* (2011), available at http://www.hrw.org/sites/default/files/reports/us0311web_0.pdf.

51. *See id.* at 6, 44–46.

between doctor and patient and put the people that health departments serve at great risk.

Within the last year, however, an example of a truly multidisciplinary legal approach has been taken to stem many of the criminal laws affecting people living with HIV. The Center for HIV Law and Policy, based in New York City, along with a host of organizations and individuals devoted to the human rights of people living with HIV founded the Positive Justice Project (PJP). The PJP has begun to capture the true spirit of a multidisciplinary and human rights approach to legal advocacy by bringing together a diverse group of experts on HIV and the law.⁵² As described by the PJP:

The Positive Justice Project (PJP) is a working consortium devoted to ending the abuse of the criminal law against HIV-positive people. PJP includes HIV advocates, researchers, health and social service providers, media representatives, policy analysts, law enforcement and people living with HIV. We engage in federal and state policy advocacy, legal resource creation and support, and on educating and mobilizing communities and policy makers in the United States. . . .

There are seven Positive Justice Project work groups with specific areas of focus to help meet the PJP goals.⁵³

Those work group areas are Federal Advocacy, State Advocacy, Constituency Outreach, Communication, Research, Public Health, and Legal.⁵⁴

One of the recent successes of the PJP is an example of attorneys and advocates working to create a progressive policy platform. A leading congressional advocate for people living with HIV, Congresswoman Barbara Lee, from the 9th District of California, introduced a bill to assist states in eliminating laws that discriminate against people living with HIV that focuses on the specific criminalization of people living with HIV: Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act (REPEAL HIV Discrimination Act).⁵⁵ The bill states:

52. *Positive Justice Project*, CENTER HIV L. & POL'Y, <http://www.hivlawandpolicy.org/public/initiatives/positivejusticeproject> (last visited Jan. 2, 2012).

53. *Id.* (emphasis omitted).

54. *Id.*

55. REPEAL HIV Discrimination Act, H.R. 3053 112th Congress (introduced Sept. 23, 2011), available at <http://hivlawandpolicy.org/resources/view/663>.

Studies amply demonstrate that HIV-specific laws do not influence the behavior of people living with or at risk of HIV in those States where these laws exist. Furthermore, placing legal responsibility for preventing the transmission of HIV and other pathogens exclusively on people diagnosed with HIV undermines the public health message that all people should practice behaviors that protect themselves and their partners from HIV and other sexually transmitted diseases.⁵⁶

The drafting and introduction of the bill to Congress marks a creative way to incorporate human rights into U.S. domestic policy and effect change in a way litigation alone could not accomplish.

C. *Criminalizing Sex Workers*

Despite treatises from both the United States and abroad denouncing the use of criminal law to regulate sexual behavior,⁵⁷ laws, policies, and practices in jurisdictions from Tennessee to the District of Columbia tend to target some of the poorest and most underserved communities, sex workers in particular.⁵⁸ In general, sex workers constitute a community that is disproportionately comprised of poor people of color.⁵⁹ The same community is at great risk for contracting HIV and is prone to being a target of abuse by both clients and the state.⁶⁰

Women, men, and transgender people around the country find their rights abrogated, resulting in negative consequences for their access to HIV prevention, treatment, care, and support. In Tennessee, like in many states, sex workers who are living with HIV face accelerated prostitution charges that can increase the usual misdemeanor solicitation charge to a felony offense and force them to

56. *Id.* § 3(13).

57. CRIMINALIZATION OF HIV TRANSMISSION, *supra* note 38, at 2–5; *see also* Thomas W. Tierney, *Criminalizing the Sexual Transmission of HIV: An International Analysis*, 15 HASTINGS INT’L & COMP. L. REV. 475, 487–88 & n.105 (1992); Zita Lazzarini et al., *Evaluating the Impact of Criminal Laws on HIV Risk Behavior*, 30 J.L. MED. & ETHICS 239, 251–52 (2002).

58. D.C. CODE § 22-2731 (2007); TENN. CODE ANN. § 39-13-516 (2010). *See* Anna Forbes, *Sex Work, Criminalization, and HIV: Lessons from Advocacy History*, BULL. OF EXPERIMENTAL TREATMENT OF AIDS, Summer/Fall 2010, at 20, 23.

59. Forbes, *supra* note 58, at 21.

60. *Id.* at 24.

register on sex offender lists.⁶¹ Because so many public benefits programs are not available to convicted felons,⁶² once a sex worker is sentenced as a felon they are no longer able to access the life-saving services many might need, such as substance-use treatment, subsidized housing, or food assistance, thereby creating a cycle of vulnerability and HIV risk. Similarly, in Washington, D.C., police are known to use the possession of multiple condoms on a person as evidence of solicitation.⁶³ Such practices have the impact of pushing sex workers into more remote—and often more dangerous—settings, thereby increasing the potential of unchecked violence and abuse that can lead to coerced unprotected sex and exposure to HIV.⁶⁴ In a location with the highest HIV rate per capita in the country, on par with some developing nations,⁶⁵ penalizing people for carrying multiple condoms risks not only their human rights but their lives.

The most vulnerable communities in New Orleans, Louisiana, have dealt with years of police harassment.⁶⁶ For sex workers in New Orleans, the usual police harassment has become compounded by the increasing use of Louisiana's Solicitation Crimes Against Nature (SCAN) law, which is used to bring felony charges and place sex workers on sex offender registries.⁶⁷ Being charged under SCAN

-
61. TENN. CODE ANN. § 39-13-516 (“A person commits aggravated prostitution when, knowing that such person is infected with HIV, the person engages in sexual activity as a business or . . . in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity. . . . Aggravated prostitution is a Class C felony.”); § 40-39-202 (2010) (including aggravated prostitution in the list of offenses for which offenders must be entered in Tennessee’s sex offender list).
 62. See Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL’Y 299 (2005), Part II for a discussion about how the collateral consequence laws affect ex-offenders by restricting access to welfare, food stamps, housing, employment and financial aid for higher education.
 63. Aziza Ahmed & Brook Kelly, *D.C.’s Punitive Sex Work Laws Endanger Women*, RH REALITY CHECK (Jan. 7, 2010), <http://www.rhrealitycheck.org/print/12180>.
 64. *Id.*
 65. Jose Antonio Vargas & Darryl Fears, *At Least 3 Percent of D.C. Residents Have HIV or AIDS, City Study Finds; Rate Up 22% From 2006*, WASH. POST, Mar. 15, 2009, at A1.
 66. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (Mar. 16, 2011), at v; Dan Baum, *Deluged: When Katrina Hit, Where Were the Police?*, NEW YORKER, Jan. 9, 2006, at 50, 52 available at http://www.newyorker.com/archive/2006/01/09/060109fa_fact?printable=true.
 67. LA. REV. STAT. ANN. § 14:89 (2011) (“[A c]rime against nature is the unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal . . . the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.”). *A crime against nature* includes “solicitation by

increases a misdemeanor solicitation charge to a felony, increases financial penalties, and imposes sex offender status on sex workers whose clients have, by definition, consented to sex.⁶⁸ In some cases, women who were previously charged under this law but who are now legally employed have found themselves put on sex offender lists and subject to the attached administrative costs despite having already served their jail time or paid their fines years earlier.⁶⁹ The consequences of these police and judicial tactics for current and former sex workers are tremendously detrimental to their health, well-being, and ability to financially support themselves and their families.⁷⁰ Like in most places around the globe, sex workers in New Orleans are one of the populations most vulnerable to HIV;⁷¹ the addition of a felony charge and sex offender status turns a bad situation worse.

Being a registered sex offender in New Orleans comes with a variety of requirements, beginning with the mandatory bright orange “SEX OFFENDER” label on the right hand corner of one’s driver’s license or identification card.⁷² Sex offender lists were originally developed to keep track of habitual sex offenders such as rapists and child molesters.⁷³ In this context, an indicator on one’s license might, arguably, make sense. However, for sex workers who engage in consensual sex acts with adults, these identifying stickers only serve

a human being of another with the intent to engage in any unnatural carnal copulation for compensation.” *Id.* § 14:89.2. This is the law used to convict sex workers of a felony offense for intending to perform or performing oral sex with a client. “Sex offense” is included in the definitions of a crime against nature as defined in section 14:89 of LA. REV. STAT. ANN. *Id.* § 15:541(24) LA. REV. STAT. section 15:542 (A)(1)(a) mandates that a person defined as a sex offender under section 15:541 register as a sex offender. This law also describes the various requirements and restrictions placed on convicted sex offenders. *Id.* § 15:542 LA. REV. STAT. section 15:544 sets the length of time that convicted sex offenders must be registered on the sex offender list. The length of time seems to be from fifteen years to the duration of a lifetime, with some room for pardons. *Id.* § 15:544.

68. See NO JUSTICE, JUST A TALKING CRIME: POLICY BRIEF IN SUPPORT OF THE REPEAL OF LOUISIANA’S SOLICITATION OF A CRIME AGAINST NATURE (SCAN) STATUTE 1 (2011), available at <http://wwav-no.org/publications/no-justice-policy-brief>.

69. See *id.* at 5.

70. See *id.* at 1, 4.

71. See Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 FORDHAM INT’L L.J. 1178, 1213 (2010); Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269, 292 (2006).

72. See NO JUSTICE, *supra* note 68, at 5.

73. See Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 885, 888 (1995).

to increase the stigma many already live with and decrease opportunities for economic advancement or access to quality nondiscriminatory testing, treatment, and support programs for HIV, housing, or drug use.⁷⁴ Attaching a felony sentence and sex offender status to this list of already formidable barriers makes the prospect of obtaining economic stability and security more daunting.

Moreover, because women are often the primary caretakers or sole parents of young children,⁷⁵ their families also suffer the consequences of discrimination. Parenting can become increasingly difficult, if not impossible, for someone registered as a sex offender. Sex offenders cannot live near or enter schools, parks, or other locations where children gather; worse, custody of one's children can be at stake as a result of being a registered sex offender.⁷⁶ For sex workers who already struggle with economic survival, transitioning to legal means of employment will become an even more unattainable option. A felony sex offender is often ineligible for housing assistance, educational assistance, or drug treatment programs.⁷⁷ Jobs traditionally held by women—child day care, teaching—are off limits to registered sex offenders because of the close contact with children.⁷⁸

Over the past two years, a multidisciplinary group of advocates and lawyers has successfully challenged these laws using a human rights approach. The work began at a community-based organization in New Orleans, Women with a Vision (WWAV), which was founded to meet the HIV prevention needs of New Orleans's most

74. See, e.g., JJ Stambaugh, *HIV-Positive Knoxville Woman a Walking Felony*, KNOXVILLE NEWS SENTINEL (June 30, 2009), <http://m.knoxnews.com/news/2009/jun/30/hiv-positive-knoxville-woman-a-walking-felony/> (discussing how, as a sex offender convicted under TENN. CODE ANN. § 39-13-516, Moore cannot take part in some residential drug treatment programs available to other addicts because she is not allowed to live at any place that also houses juveniles).

75. TIMOTHY S. KRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007 2 (2009), available at <http://www.census.gov/prod/2009pubs/p60-237.pdf> (presenting data on custodial parents); NAT'L ALLIANCE FOR CAREGIVING IN COLLABORATION WITH AARP, CAREGIVING IN THE U.S. 2009, at 14 (2009), available at http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf (presenting data on caregivers).

76. KELLY ET AL., WOMEN & CRIMINAL HIV EXPOSURE AND TRANSMISSION LAWS: ORIGINS, EFFECTS & ALTERNATIVES, POSITIVE WOMEN'S NETWORK 4 (2010), available at <http://www.pwn-usa.org/wp-content/uploads/2011/02/ABA-Crim-Hearing-Testimony-Nov-2010.pdf>.

77. NO JUSTICE, *supra* note 68, at 4.

78. See KELLY ET AL., *supra* note 76, at 4.

marginalized women in the late 1980s.⁷⁹ Post Hurricane Katrina, the organization began to hear stories of women being prosecuted under SCAN and began to document the women's stories.⁸⁰ Through this human rights documentation method, attorneys from the Center for Constitutional Rights in New York City and Loyola University New Orleans College of Law Legal Clinic became involved and filed a federal lawsuit challenging SCAN as unconstitutional and discriminatory.⁸¹ Although the lawsuit is still pending,⁸² the pressure created by the lawsuit resulted in Louisiana State Representative, Charmaine Marchand Stiaes, co-authoring a bill removing the Solicitation of a Crime Against Nature from the sex offender registry.⁸³ The bill passed.⁸⁴ Now, one of the remaining legal issues in the lawsuit is the removal of people previously convicted under SCAN from sex offender lists.

D. Reproductive Health Information Is a Right

Despite a legal duty to serve patients regardless of HIV status,⁸⁵ HIV specialists and general medical practitioners routinely fail to educate HIV-positive female patients about their fertility, conception, and contraception options.⁸⁶ The lack of information provided to women living with HIV about their reproductive options limits their full range of reproductive choice and violates their sexual and reproductive rights under both international and domestic law.

The following United Nations human rights bodies have acknowledged sexual and reproductive rights as a fundamental

79. See *Our History*, WOMEN WITH A VISION NEW ORLEANS (Sept. 17, 2011), <http://wwav-no.org/about/history>; *Our Mission*, WOMEN WITH A VISION NEW ORLEANS, <http://wwav-no.org/about/mission> (last visited Jan. 2, 2012).

80. See *Why NO Justice?*, WOMEN WITH A VISION NEW ORLEANS, <http://wwav-no.org/programs/no-justice/why> (last visited Jan. 2, 2012).

81. See *Constitutional Challenge Launched*, WOMEN WITH A VISION NEW ORLEANS, <http://wwav-no.org/programs/no-justice/constitutional-challenge-launched> (last visited Jan. 2, 2012).

82. See *Doe, et al. v. Jindal, et al.*, CENTER CONST. RTS., <http://www.ccrjustice.org/crime-against-nature> (last visited Jan. 2, 2012).

83. Ed Anderson, *House Throws Out Plan to Seize Vehicles Involved in Dumping; Death Benefit, Sex Crimes Bills Pass*, TIMES-PICAYUNE, Jun. 20, 2001, at A3.

84. Anderson, *supra* note 83.

85. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (holding that the HIV infection qualifies as a disability under the ADA).

86. Memorandum from Brook Kelly, U.S. Positive Women's Network, a Project of WORLD, to Global Commission on HIV and the Law (Aug. 7, 2011), available at <http://www.pwn-usa.org/wp-content/uploads/2011/02/PWN-Submission-Global-Comm-on-HIV-Law-Repro-Rights-8-7-11.pdf>.

human right: the Committee Against Torture;⁸⁷ the Committee on Economic Social and Cultural Rights;⁸⁸ the Committee on the Elimination of Discrimination against Women;⁸⁹ the Committee on the Elimination of Racial Discrimination;⁹⁰ the Committee on the Rights of the Child;⁹¹ and the Human Rights Committee.⁹²

The 1995 Platform for Action of the Fourth World Conference on Women in Beijing, China (Beijing Platform),⁹³ in which governments, including the United States, pledged to uphold the sexual and reproductive rights of women, states, in paragraph ninety-four, that reproductive health includes the ability “to have a satisfying and safe sex life” and the opportunity to “have the capability to reproduce and the freedom to decide if, when and how often to do so.”⁹⁴ This means that both women and men have the right “to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law.”⁹⁵

The United States Constitution protects the fundamental right to decide whether or not to have children.⁹⁶ In 1972, the Supreme Court held that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted

87. See *Conclusions and Recommendations of the Committee Against Torture: Peru*, ¶ 23, U.N. Doc. CAT/C/PER/CO/4 (July 25, 2006).
88. See Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶ 8, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).
89. Rep. of the Comm. on the Elimination of Discrimination Against Women, 20th Session, Jan. 5–Feb. 5, 1999, 21st Session, June 7–25, 1999, ¶ 1, U.N. Doc. A/54/38/Rev.1 (Apr. 20, 1999).
90. See *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).
91. Comm. on the Rights of the Child, *General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, ¶¶ 28, 31, 39, 40, U.N. Doc. CRC/GC/2003/4 (July 1, 2003).
92. See *Concluding Observations by the Human Rights Committee: Ecuador*, ¶¶ 9, 12, U.N. Doc. CCPR/C/ECU/CO/5 (Nov. 4, 2009).
93. Fourth World Conference on Women, Beijing, China, Sept. 4–15, 1995, *Beijing Declaration and the Platform for Action*, U.N. Doc. A/CONF.177/20 (1995) [hereinafter *Beijing Declaration and Platform for Action*].
94. *Id.* ¶ 94.
95. *Id.*
96. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–51 (1992); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.”⁹⁷ That right continues to be upheld by the Court and applies to all people, regardless of HIV status.⁹⁸

HIV-positive people’s right to the information and care necessary to decide if and when to have a child is also protected under the amended Americans with Disabilities Act (ADA),⁹⁹ as well as the ADA’s precursor, the Rehabilitation Act of 1973.¹⁰⁰ The ADA prohibits the denial of medical services based solely on a person’s HIV status,¹⁰¹ and the Rehabilitation Act prohibits such discrimination by the federal government or federally funded entities.¹⁰²

E. Living with HIV Does Not Need to Mean Living Without Children

HIV positive women are able to live long and healthy lives and give birth to healthy children.¹⁰³ There are a number of medical options for sero-discordant couples (couples where one partner is HIV-positive and the other is HIV-negative) and HIV-positive mothers that greatly minimize the risk of HIV transmission and make a healthy pregnancy and the birth of a healthy child possible.¹⁰⁴ Some options for sero-different couples include sperm washing,

97. *Eisenstadt*, 405 U.S. at 453.

98. *See, e.g., Planned Parenthood*, 505 U.S. at 846–51 (confirming that the right applied to procreation matters).

99. *See Bragdon v. Abbott*, 524 U.S. 624, 631, 638 (1998) (holding that the HIV infection qualifies as a disability under the ADA and that reproduction is a major life activity).

100. *See id.* at 642–44 (noting that HIV-positive status qualifies as disability under the Rehabilitation Act); *Lesley v. Hee Man Chie*, 250 F.3d 47, 52–53 (1st Cir. 2001) (noting that under the Rehabilitation Act, a pregnant patient could not be denied medical services because of her HIV-positive status).

101. *See* Americans with Disabilities Act of 1990 §§ 301-302, 42 U.S.C. §§ 12181(7)(F), 12182(a) (2006); *see also Bragdon*, 524 U.S. at 655 (holding that HIV infection constitutes a disability under the ADA).

102. *See* 29 U.S.C. § 794(a); *see also Lesley*, 250 F.3d at 52–53 (noting that under the Rehabilitation Act, a pregnant patient could not be denied medical services for the sole reason of her HIV-positive status by a doctor who constituted a federally funded entity due to his receipt of Medicaid funds).

103. Memorandum from Brook Kelly, *supra* note 86; *see also* NAT’L INST. OF HEALTH, HIV AND PREGNANCY, HIV-INFECTED WOMEN AND THEIR BABIES AFTER BIRTH (2010), *available at* www.aidsinfo.nih.gov/contentfiles/Perinatal_FS_en.pdf (explaining that, in the United States, less than 2% of babies born to HIV-infected mothers are infected with the virus).

104. *See generally* HIV AND PREGNANCY, *supra* note 103.

artificial insemination, and unprotected sex when both partners have been screened and treated for any secondary sexually transmitted infections and the HIV-positive partner is on HIV treatment and has a low to undetectable viral load.¹⁰⁵ Antiretroviral therapy during prenatal and postnatal care is an effective prevention strategy to protect the child.¹⁰⁶ To successfully take advantage of these options, ongoing counseling, support, and treatment by well-informed medical professionals is required.¹⁰⁷

Despite the reproductive options available in the United States, when inquiring into their sexual and reproductive choices or attempting to exercise their sexual and reproductive rights, women living with HIV frequently suffer from the mis-informed judgment of the public and their communities about reproductive options, lack of information or misinformation about reproductive options, and outright discrimination from medical providers. A 2007 Foundation for AIDS Research (amFAR) survey of Americans found that one-third of Americans would not support an HIV-positive woman's choice to become pregnant despite antiretroviral therapy to prevent mother-to-child transmission, and only 14% believed HIV-positive women should be able to have children.¹⁰⁸

The U.S. PWN conducted a survey and issued a report, *Diagnosis, Sexuality, Choice*, on HIV-positive women's experiences with reproductive health choices and found discouraging results.¹⁰⁹ The survey indicated that many doctors are either uninformed about HIV-positive women's reproductive options, choosing to forego any conversation about reproductive options or care for HIV-positive women, or are entirely unsupportive of an HIV-positive woman's right to reproductive choice, which includes the right to have a

105. See Hadley Leggett, *Becoming a Positive Parent: Reproductive Options for People with HIV*, BULL. OF EXPERIMENTAL TREATMENT OF AIDS, Winter/Spring 2011, at 47, available at <http://www.sfaf.org/hiv-info/hot-topics/beta/2011-beta-winterspring-fertility.pdf>.

106. See generally HIV AND PREGNANCY, *supra* note 103.

107. See generally *id.*

108. See *Women and HIV: Still Burdened by Stigma*, AMFAR (Mar. 31, 2008), <http://www.amfar.org/hill/article.aspx?id=7088>. For a PDF version of a powerpoint presentation issued by the American Foundation for AIDS Research, see WOMEN, HIV AND STIGMA: RESULTS FROM A NATIONAL SURVEY (2008), available at <http://www.hivlawandpolicy.org/resources/download/194>.

109. KELLY ET AL., U.S. POSITIVE WOMEN'S NETWORK, DIAGNOSIS, SEXUALITY AND CHOICE: WOMEN LIVING WITH HIV AND THE QUEST FOR EQUALITY, DIGNITY AND QUALITY OF LIFE IN THE U.S. 2-3 (2011), available at <http://www.pwn-usa.org/wp-content/uploads/2011/03/PWN-HR-Survey-FINAL.pdf>.

child.¹¹⁰ One woman reported, “My primary care doctor looked at me like I was sick for even thinking of becoming pregnant. I just felt that the consensus was that I should not, that I was selfish and irresponsible for even thinking about it.”¹¹¹

Another woman reported: “I seemed to be the educator in most of these areas. I was more up to date on any of the information than any doctor I found.”¹¹² And another responded: “My doctor had little context or experience so it was up to me and the internet. Searching for an OB/GYN who was supportive was even more difficult. I was even offered an abortion by one OB.”¹¹³

Some respondents experienced outright stigma and discrimination. As one woman said:

I was told by several doctors to abort the pregnancy. I was almost in my 2nd trimester before I knew I was pregnant. I ran out of many a doctor’s offices in tears after being told I was “selfish” or “if that were my wife, I’d make her have an abortion.”¹¹⁴

A study conducted in 2008 of 181 HIV-positive women of reproductive age in urban health clinics, confirms some of the PWN’s findings.¹¹⁵ Namely, only 31% of the HIV-positive women of reproductive age had discussed their reproductive options with health care providers.¹¹⁶ Of those 31%, 64% had themselves initiated the conversation with the health care provider.¹¹⁷ Yet “between 25% and 45% of HIV positive individuals of reproductive age report wanting to have a baby in the future, compared with about 35% in the general population.”¹¹⁸

On top of provider attitudes, the costs of reproduction—sperm washing, artificial insemination—are high and are often not covered

110. *Id.* at 8–10.

111. *Id.* at 9.

112. *Id.*

113. *Id.*

114. *Id.* at 9–10.

115. Sarah Finocchiaro-Kessler et al., *Do HIV-Infected Women Want to Discuss Reproductive Plans with Providers, and Are Those Conversations Occurring?*, 24 AIDS PATIENT CARE & STDs 317, 317–18 (2010).

116. *Id.* at 317.

117. *Id.*

118. Leggett, *supra* note 105, at 43.

by health insurance plans.¹¹⁹ This makes safe reproduction for some HIV-positive women altogether unattainable.

F. Parental Rights of Women Living with HIV

Women face abrogation of their parental rights based on HIV status. This includes loss of child custody based solely on HIV status—often a result of unchecked judicial attitudes and assumptions about HIV, poverty, and accompanying factors—but also a result of prosecutions under HIV-specific criminalization laws.¹²⁰ Women who are prosecuted under these laws find it difficult to impossible to regain custody of children once released from prison sentences.¹²¹

Additionally, there has been a rise in cases where the custody of women's existing children is threatened by child services agencies when an HIV-positive woman becomes, or expresses the desire to become, pregnant.¹²² These instances are especially hard to document because the coercion often takes place off the record.¹²³

Women living with HIV in the United States continue to experience violations of their sexual and reproductive rights, international human rights, and domestic anti-discrimination protections when seeking to exercise their fundamental right to choose when and whether to have a child. It is my hope that the United States and state governments can comply with international human rights norms as well as our own domestic legal protections in order to create an environment that reflects the evidence-based advances made in HIV and sexual and reproductive healthcare for women, while taking into account the financial barriers to care faced by many women. Care systems serving women with HIV must truly adopt sexual and reproductive rights as a framework and train providers to ensure that those rights are upheld.

Changing discriminatory medical provider attitudes is a complex and difficult undertaking. HIV advocates are working on multiple levels to bring awareness to the issue. Through my work with the U.S. PWN, we found that there was little information on the reproductive health experiences of women living with HIV in the United States. Using a human rights documentation method to report

119. *See id.* at 47.

120. *See Aziza Ahmed, HIV and Women: Incongruent Policies, Criminal Consequences*, 6 *YALE J. INT'L L.* 32, 39 (2011).

121. *See id.*

122. Memorandum from Brook Kelly, *supra* note 86.

123. *Id.*

on the experiences HIV-positive women face when seeking reproductive health information, we began the process by surveying the HIV-positive women members of the PWN. The documentation resulted in the aforementioned report *Diagnosis, Sexuality, and Choice: Women Living with HIV and the Quest for Equality, Dignity and Quality of Life in the U.S.*¹²⁴ This report led to an invitation to testify before the Global Commission on HIV and the Law (Global Commission), High Income Countries Dialogue regarding the human rights of women living with HIV in September 2011. The Global Commission is a United Nations commission tasked with interrogating

the relationship between legal responses, human rights and HIV. The Commission shall also focus on some of the most challenging legal and human rights issues in the context of HIV, including criminalisation of HIV transmission, behaviours and practices such as drug use, sex work, same-sex sexual relations, and issues of prisoners, migrants, children's rights, violence against women and access to treatment. The Global Commission on HIV and the Law will develop actionable, evidence-informed and human rights-based recommendations for effective HIV responses that protect and promote the human rights of people living with and most vulnerable to HIV.¹²⁵

The documentation by a U.N. commission of HIV-positive women's experiences suffering reproductive rights in the U.S. context will be a powerful advocacy tool going forward in the fight to eliminate discrimination against people living with HIV.

IV. INTERNATIONAL HUMAN RIGHTS AND THE LIMITS OF THE U.S. LEGAL REGIME

The international human rights framework offers a multidimensional approach that addresses many of the rights violations that women living with and affected by HIV experience better than U.S. law alone. In the United States, our domestic legal regime formally protects people from discrimination based on their

124. KELLY et al., *supra* note 109, at 3.

125. GLOBAL COMMISSION ON HIV AND THE LAW, <http://hivlawcommission.org/> (last visited Jan. 2, 2012).

race, ethnicity, gender, or disability.¹²⁶ Some states and municipalities go further under their local antidiscrimination laws to protect people based on sexual orientation or appearance.¹²⁷ While these laws have helped to protect the rights of people in protected classes from formal or intentional discrimination, they do not work to promote and fulfill people's rights and they leave many people, such as undocumented residents, without any protections. For example, the ADA¹²⁸ protects people living with HIV from being discriminated against in contexts such as hiring, firing, or seeking medical attention.¹²⁹ But the ADA does not obligate states to go any further than those protections to promote the rights of people with disabilities.¹³⁰ Comparatively, the Convention on the Rights of Persons with Disabilities obligates state parties to protect people living with HIV from discrimination.¹³¹ But in contrast to the ADA, the Convention goes further to obligate state parties to promote and fulfill the rights of people with disabilities by helping them to, for example, find employment opportunities and live independently, or to decrease stigmas against people with disabilities by promoting positive images of people with disabilities in the media.¹³²

The difference in approach becomes clear when seeking redress for systemic problems. An apt example is the case of the Mississippi HIV acknowledgment form.¹³³ The obvious reproductive rights violation—the ban on HIV-positive people getting someone or becoming pregnant—was removed from the form.¹³⁴ But the state

126. *E.g.*, Civil Rights Act, 42 U.S.C. §§ 1981-2000H-6 (2010); *Laws Enforced by EEOC*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Jan. 2, 2012).

127. *Your Rights Against Sexual Orientation Discrimination in the Workplace*, FINDLAW, <http://employment.findlaw.com/employment/employment-employee-discrimination-harassment/employment-employee-gay-lesbian-discrimination.html> (last visited Jan. 2, 2012).

128. 42 U.S.C. §§ 12101-13213 (2010).

129. *See* *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998) (holding that a person with HIV is protected by the ADA "from the moment of infection").

130. *Cf.* 42 U.S.C. §§ 12101-13213 (2010) (enumerating the protections provided under the ADA).

131. U.N. HUMAN RIGHTS, WORLD HEALTH ORGANIZATION & UNAIDS, *DISABILITY AND HIV POLICY BRIEF 5* (2009), http://www.who.int/disabilities/jc1632_policy_brief_disability_en.pdf.

132. *Id.* at 4-7.

133. *See* HIV INTERVIEW FORM NO. 917, *supra* note 45.

134. *HIV Interview Form No. 917, Mississippi State Department of Health*, CENTER FOR HIV LAW & POLICY (Aug. 13, 2009), <http://www.hivlawandpolicy.org/resources/view/556>.

has not been tasked with protecting HIV-positive people from future discrimination based on misinformation and stigma spread by years of use of the discriminatory acknowledgment form.

A. *International Laws and Mechanisms in the United States*

As a member of the United Nations, the United States has a range of obligations, from customary international law, to formal treaty obligations, to progressively realizing the principles elaborated in the Universal Declaration of Human Rights and subsequent human rights conventions.¹³⁵ Of the most relevant treaties to women living with HIV, ICESCR, ICCPR, CERD, and CEDAW, the United States has ratified the ICCPR¹³⁶ and CERD¹³⁷ and signed but not ratified ICESCR¹³⁸ and CEDAW.¹³⁹

The U.S. process of international treaty ratification has been established in both the U.S. Constitution and by the executive branch. Article VI of the U.S. Constitution addresses the treaty ratification process requiring the U.S. Senate to ratify an international human rights treaty or convention in order for it to become the “supreme law of the land.”¹⁴⁰ Executive Order 13,107 affirmed that “[i]t shall be the policy and practice of the Government of the United States” to fully “implement its obligations under the international human rights treaties to which it is a party.”¹⁴¹

Because the United States has ratified ICCPR and CERD, federal and state actors are legally bound to respect the rights established in those treaties and ensure those rights “to all individuals in their territory and subject to their jurisdiction” and to “take appropriate measures or to exercise due diligence to prevent, punish, investigate, or redress” violations of the rights protected therein.¹⁴²

135. See Marselha Gonçalves Margerin, Keynote Address at the Public Universities of Madrid Symposium on Western Sahara: The Legal Obligations of the United Nations and Its Member States to Uphold Human Rights in Western Sahara (May 28, 2010), available at <http://www.rfkcenter.org/node/542>.

136. See *supra* note 10 and accompanying text.

137. See *supra* note 11 and accompanying text.

138. See *supra* note 9 and accompanying text.

139. See *supra* note 12 and accompanying text.

140. U.S. CONST. art. VI § 2.

141. Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

142. U.N. Human Rights Comm’n, *General Comment No. 31 [80] Nature of the General Legal Obligation on States Parties to the Covenant*, ¶¶ 2–8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>; see *supra* notes 10–11, 135–36 and accompanying text.

Because the HIV epidemic has taken on a distinctly racial pattern, the United States¹⁴³ obligations under CERD are implicated. Under Article 2(1) of CERD, the United States is expressly obligated to not only “ensure that all public authorities and public institutions, *national and local*, shall act in conformity” with the Convention but also to “take effective measures to review governmental, *national and local policies*, and to amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”¹⁴⁴ The U.S. government noted in its 2007 report on its compliance with CERD that even where the United States has yet to explicitly recognize certain economic, social, and cultural rights, Article 5 of CERD requires that it take immediate action to “prohibit discrimination in the enjoyment of those rights to the extent they are provided in domestic law.”¹⁴⁵

Although HIV is not directly addressed in the founding human rights documents, the United Nations General Assembly has adopted a consensus document—the 2001 Declaration of Commitment on HIV/AIDS—in which the 192 U.N. member states, including the United States, a founding member,¹⁴⁶ have committed “to combat HIV/AIDS” both domestically and globally.¹⁴⁷ The 2001 Declaration does not constitute legally binding obligations, but it does represent the consensus of the community of nations. The Declaration states, “gender equality and the empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS,”¹⁴⁸ and “that the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment, and that it reduces

143. See WOMEN AND HIV/AIDS IN THE UNITED STATES, *supra* note 14.

144. International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Dec. 21, 1965, 660 U.N.T.S. 195, available at <http://www2.ohchr.org/english/law/pdf/cerd.pdf>.

145. See U.S. DEP’T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, ¶ 148 (2007), available at <http://www.state.gov/documents/organization/83517.pdf>.

146. See *U.N. Member States*, WELCOME UNITED NATIONS, <http://www.un.org/depts/dhl/unms/founders.shtml> (last visited Jan. 2, 2012).

147. Declaration of Commitment on HIV/AIDS, G.A. Res. S-26/2, ¶ 90, U.N. Doc. A/RES/S-262 (Aug. 2, 2001), available at <http://www.un.org/ga/aids/docs/aress262.pdf>.

148. *Id.* ¶ 14.

vulnerability to HIV/AIDS and prevents stigma and related discrimination against people living with or at risk of HIV/AIDS.”¹⁴⁹

In addition to the United Nations General Assembly, U.N. agencies and international organizations, such as the World Health Organization (WHO), UNAIDS, and the U.N. Office of the High Commissioner for Human Rights (OHCHR), create high-level policy documents, often with input from people living with HIV, in order to set priorities and specific frameworks in which an HIV response can be carried out by policy makers and public health officials in member states.¹⁵⁰ The *International Guidelines on HIV/AIDS and Human Rights* state that an “essential lesson learned from the HIV epidemic is that universally recognized human rights standards should guide policymakers in formulating the direction and content of HIV-related policy and form an integral part of all aspects of national and local responses to HIV.”¹⁵¹

The United States is also part of a system of regional human rights frameworks. It is bound by the founding treaty of the Organization of American States¹⁵² and the American Declaration of the Rights and Duties of Man, which upholds core civil, political, and social rights.¹⁵³ Although the Declaration has not been ratified by the United States, the Inter-American Commission on Human Rights has held that the Declaration is binding upon the United States.¹⁵⁴

B. *Using International Law in Domestic Courts to Enforce Human Rights*

How can one enforce these rights? There are a number of ways to use international human rights law directly and indirectly to achieve

149. *Id.* ¶ 16.

150. *See, e.g.*, INTERNATIONAL GUIDELINES ON HIV/AIDS AND HUMAN RIGHTS, *supra* note 34, at 63.

151. *Id.* at 79.

152. Charter of the Organization of American States, *opened for signature* Apr. 30, 1948, 119 U.N.T.S. 47.

153. *See* American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (April 1948).

154. *See, e.g.*, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 35–45 (July 14, 1989), *available at* http://www1.umn.edu/humanrts/iachr/b_11_4j.htm; *White v. United States*, Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, OEA/Ser.L.V/II.54, doc. 9 rev. 1 ¶ 16 (1981), *available at* <http://www.cidh.org/annualrep/80.81eng/USA2141.htm> (“As a consequence [of ratifying the Charter of the OAS] the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force.”).

positive human rights outcomes. The international human rights treaties ratified by the United States are part of U.S. domestic law.¹⁵⁵ The rights established in the UDHR are considered customary international law and are also binding.¹⁵⁶ Both customary international law and ratified U.S. treaties trump conflicting state, local, or older federal laws.¹⁵⁷ Legislators and courts have concrete obligations to uphold these laws.¹⁵⁸ The United States also has an obligation to not act contrary to the rights established in treaties signed but not yet ratified, such as the ICESCR and CEDAW.¹⁵⁹ U.S. legal advocates have successfully framed domestic legal arguments in the context of global human rights issues, and the Supreme Court has explicitly affirmed the importance of international human rights law in interpreting issues affecting fundamental rights, such as privacy, freedom from degrading treatment and torture, and non-discrimination.¹⁶⁰ For example, the Court in *Roper v. Simmons* rejected the continued application of the death penalty to juveniles, and “referred to the laws of other countries and to international authorities as instructive for its interpretation” of the U.S.

155. Tai-Heng Cheng, *The Universal Declaration of Human Rights: Is It Still Right for the United States?*, 41 CORNELL INT’L L.J. 251, 254 (2008).

156. *Id.* at 253 n.6.

157. *See, e.g.*, *Cook v. United States*, 288 U.S. 102, 119 (1933) (holding a later-in-time treaty supersedes a federal statute if there is a conflict); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.”); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

158. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–30 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (“[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.”); *The Paquete Habana*, 175 U.S. at 700 (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is a part of the law of the land.”).

159. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (explaining that the United Nations Convention on the Rights of the Child, although not ratified by the United States, can be instructive in determining the constitutionality of capital punishment for juveniles).

160. *See THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS: AN OVERVIEW AND RECOMMENDATIONS FOR LEGAL ADVOCACY* 5 & n.7 (2008), available at http://opportunityagenda.org/report_state_courts_and_human_rights_2008_edition.

Constitution.¹⁶¹ The Court went on to find it “proper [to] acknowledge the overwhelming weight of international opinion against the juvenile death penalty,” stating that “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for [the Court’s] conclusions.”¹⁶² *Boehm v. Superior Court* is an example of state courts looking to international customary law for guidance in interpreting domestic legal standards.¹⁶³ The California Supreme Court cited to the UDHR, holding that state assistance and benefits must be kept at sufficient levels for survival and requiring local authorities to consider citizens’ rights to food, housing, transportation, clothing, and medical care.¹⁶⁴

C. *Advocacy Principles and Strategies*

The human rights framework also provides tools for a multi-dimensional approach to legal advocacy. Advocacy principles such as equality and non-discrimination, participation and inclusion of those most affected, and government accountability can help advocates and communities to identify the locus of human rights violations and serve as guidelines or tools in an advocacy campaign that seeks to make systemic and holistic social change.

Equality and Non-discrimination: All individuals have inherent dignity and are thereby equal to one another. For this reason, no person should be discriminated against on the basis of race, color, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, nationality, social or geographical origin, disability, property, birth, or other status as established by human rights standards, such as job occupation. For people living with HIV, this principle is familiar as it is a fundamental freedom under domestic law,¹⁶⁵ but it is also a way to identify and name inequalities that result based on HIV-positive status. With the knowledge that HIV-positive status should not result in differing treatment, women living with HIV are more cognizant that their fundamental right to start and maintain a family is being abrogated by policies such as those found in Mississippi that seek to control women’s reproductive choices. With that knowledge, women may be more willing to bring their

161. *Roper*, 543 U.S. at 575.

162. *Id.* at 578.

163. *Boehm v. Superior Court*, 178 Cal. App. 3d 494, 502 (1986).

164. *Id.* at 497, 501–02.

165. *See* 42 U.S.C. §§ 1981, 2000a, 2000a-1, 2000d, 2000e-2 (2006).

experiences to light and help to begin the process of documenting a pattern of rights violations.

Participation and Inclusion: All people, and especially those most affected, have the right to participate in and access information relating to decisions that affect their lives and well-being. A rights-based approach requires a high degree of meaningful participation by communities, civil society, minorities, women, young people, indigenous peoples, and other identified groups. For people living with HIV, this means being at the table when decisions are being made that affect their lives and having the information and support to meaningfully participate.

Accountability: States are answerable for their human rights obligations. They must comply with the legal norms and standards enshrined in international human rights instruments. When this does not happen, rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator. The international community, civil society, the media, and individuals all play an important role in holding governments accountable for upholding their human rights obligations.

Legal advocates in the United States can play an important role in this advocacy framework. By working closely with affected communities, attorneys can help to identify and analyze the underlying structural causes of human rights violations, develop strategies and goals to address these violations, and educate community members on their rights and the government's obligation to uphold their rights.

D. Filling the Gaps with International Human Rights Advocacy in the United States

The international human rights framework offers opportunities for legal advocacy that the domestic legal regime alone cannot. There are several formal routes established by the United Nations for extra-judicial advocacy as well as community-based approaches to legal reform.

The United Nations has Special Rapporteurs for various areas such as housing, health, and violence against women.¹⁶⁶ Special Rapporteurs can conduct fact-finding missions to countries in order to investigate allegations of human rights violations.¹⁶⁷ Countries must invite the Special Rapporteur to visit.¹⁶⁸ The Special Rapporteur on Adequate Housing and the Special Rapporteur on Violence Against Women recently visited the United States.¹⁶⁹ These visits offered community and legal advocates the chance to organize and testify before a high-level U.N. official on rights violations they experience in their communities.¹⁷⁰ With such testimony, the Special Rapporteurs publish an official report of their human rights review and have access to high-level U.S. officials to whom they can relate their findings.¹⁷¹

The recent Universal Periodic Review of the United States by the United Nations Human Rights Council (UNHRC) offered a chance for community and legal advocates to document and compile rights violations for submission to the UNHRC.¹⁷² The Universal Periodic

-
166. Office of the United Nations High Comm'r of Human Rights, Special Procedures Assumed by the Human Rights Council: Thematic Mandates (May 1, 2011), <http://www2.ohchr.org/english/bodies/chr/special/themes.htm>.
167. Office of the United Nations High Comm'r of Human Rights, Seventeen Frequently Asked Questions About the United Nations Special Rapporteurs 1, 8–10 (Apr. 2001), www.ohchr.org/Documents/Publications/FactSheet27en.pdf.
168. *See id.* at 9; Office of the United Nations High Comm'r of Human Rights, *Special Procedures of the Human Rights Council*, www2.ohchr.org/english/bodies/chr/special/index.htm (last visited Jan. 2, 2012).
169. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, *Rep. of the Special Rapporteur: Mission to the United States of America*, Human Rights Council, U.N. Doc. A/HRC/13/20/Add.4 (Feb. 12, 2010) [hereinafter *Rep. on Adequate Housing*] (by Raquel Rolnik), available at www2.ohchr.org/English/bodies/hrcouncil/docs/13session/A.HRC.13.20.Add.4_en.pdf; Special Rapporteur on Violence Against Women, its Causes and Consequences, *Rep. of the Special Rapporteur: Mission to the United States of America*, Human Rights Council, U.N. Doc. A/HRC/17/26/Add.5 (June 1, 2011) [hereinafter *Rep. on Violence Against Women*] (by Rashida Manjoo), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.26.Add.5_AEV.pdf.
170. *See Rep. on Violence Against Women*, *supra* note 169, ¶¶ 3–6, 14, 35, 59; *Rep. on Adequate Housing*, *supra* note 169, ¶¶ 2, 30, 40, 78.
171. Office of the United Nations High Comm'r of Human Rts., *supra* note 167, at 10–11; *see Rep. on Adequate Housing*, *supra* note 169; *Rep. on Violence Against Women*, *supra* note 169.
172. *See* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, WORKING WITH THE UNITED NATIONS HUMAN RIGHTS PROGRAMME: A HANDBOOK FOR CIVIL SOCIETY, at 137–38, 147–48, U.N. Doc. HR/PUB/06/10/Rev.1 (2008), available at http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf.

Review (UPR) is a new human rights mechanism that allows the UNHRC to periodically review all the Member States of the United Nations on their fulfillment of human rights obligations and commitments.¹⁷³ The Human Rights Council is made up of forty-seven seats distributed among the United Nation's regional groups and recently elected the United States to serve a three-year term starting in June 2009.¹⁷⁴ Unlike the review process of the treaty bodies such as CERD, the UPR is a peer review conducted by delegates from other countries who comprise the UPR Working Group of the Human Rights Council.¹⁷⁵

The United States submitted its report on U.S. human rights, which was reviewed in 2010.¹⁷⁶ This review offered opportunities for non-governmental U.S. organizations to document and submit shadow reports on human rights issues in the United States, including racial health disparities, reproductive rights abuses, and access to adequate housing.¹⁷⁷ These reports were used by peer reviewers to direct the review of the United States and ultimately lead the United States to include broader human rights commitments to some of its most marginalized communities, such as sex workers.¹⁷⁸

On a community level, organizations in New Orleans have been using a human rights approach to successfully advocate for the rights

173. G.A. Res. 60/251, ¶¶ 5, 9, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

174. Press Release, General Assembly, United States Elected to Human Rights Council for First Time, with Belgium, Hungary, Kyrgyzstan, Norway, as 18 Seats Filled in Single Round of Voting, U.N. Press Release GA/10826 (May 12, 2009).

175. *Basic Facts About the UPR*, OFF. HIGH COMM'R HUMAN RTS. (Nov. 2008), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>; *Committee on the Elimination of Racial Discrimination: Monitoring Racial Equality and Non-Discrimination*, OFF. U.N. HIGH COMM'R HUMAN RTS., <http://www2.ohchr.org/english/bodies/cerd/index.htm> (last visited Jan. 2, 2012).

176. See Press Release, U.S. Dep't of State, Release of the U.S. Universal Periodic Review (UPR) Report (Aug. 24, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/08/146233.htm>.

177. U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW 18–19 (2010), available at <http://www.state.gov/documents/organization/146379.pdf>; *Report on the United States' Compliance with Its Human Rights Obligations in the Area of Women's Reproductive and Sexual Health*, CENTER REPROD. RTS. (June 1, 2010), <http://reproductiverights.org/en/document/report-on-the-united-states%E2%80%99-compliance-with-its-human-rights-obligations-in-the-area-of-wo>.

178. Press Release, Women with a Vision, Sex Worker Advocates at United Nations, (Nov. 4, 2010), available at <http://wwav-no.org/news/press-releases/united-nations>.

of sex workers.¹⁷⁹ A far-reaching coalition of individuals and organizations that was eventually named “NO Justice” worked to advocate and bring a lawsuit to challenge the Louisiana crimes against nature laws that require sex workers to register as sex offenders.¹⁸⁰ Using a multi-pronged, human-rights-based approach, Women with a Vision, a community-based organization in New Orleans that serves women with low incomes, began documenting the disproportionate impact of crimes against nature prosecutions on the sex worker community and found that gay men, trans-women, and women were carrying the burden of prosecutions and residual consequences.¹⁸¹ Through a bottom-up approach, the NO Justice coalition worked with the community most affected to advocate for change through pressure on policy makers and, most recently, by filing a lawsuit against the State of Louisiana.¹⁸² The coalition’s activities gained the attention of the U.S. Department of Justice, which recently released a report on police abuses in New Orleans and wrote:

transgender residents reported that officers are likelier, because of their gender identity, to charge them under the state’s ‘crimes against nature’ statute—a statute whose history reflects anti-LGBT sentiment. . . . [F]or the already vulnerable transgender community, inclusion on the sex offender registry further stigmatizes and marginalizes them, complicating efforts to secure jobs, housing, and obtain services at places like publicly-run emergency shelters. Of the registrants convicted of solicitation of a crime against nature, 80 percent are African American, suggesting an element of racial bias as well.¹⁸³

V. CONCLUSION

No one approach can solve the complex problems evidenced in the U.S. HIV epidemic. A human rights approach, however, accounts for

179. *Id.*

180. *Why NO Justice?*, *supra* note 80; Press Release, Women with a Vision & The Ctr. for Constitutional Rights, Constitutional Challenge Launched (Feb. 16, 2011), <http://www.wav-no.org/programs/no-justice/constitutional-challenge-launched>.

181. *No Justice*, *supra* note 68, at 3, 6; *Why NO Justice?*, *supra* note 80.

182. Constitutional Challenge Launched, *supra* note 180.

183. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT, at x (2011), *available at* http://www.justice.gov/crt/about/spl/nopd_report.pdf.

the complex and indivisible nature of the drivers of the HIV epidemic such as race, gender, and poverty. International human rights declarations and treaties, the documentation and review processes, and framework for legal advocacy can contribute to more effective legal advocacy in the United States with the goal of long-term and systemic change.

