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.

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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, 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, who also

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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

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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.

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

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


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

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. A large majority of HIV-positive women are women of color who live in low-income urban areas in the Northeast with a growing level of incidence among women in the South where health care systems have been traditionally underfunded. 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. Women living with HIV tend to have worse health outcomes than men and suffer greater AIDS-related illnesses as well as greater mortality rates. This is largely attributed to structural factors such as poverty driven by race and gender discrimination, caretaking responsibilities, and stressors.


such as gender-based violence.\textsuperscript{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.\textsuperscript{19} The Center for Disease Control and Prevention (CDC) recently released data showing that poverty is one of the biggest predictors of contracting HIV.\textsuperscript{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. \textbf{Nondiscrimination and Equality Before the Law}\textsuperscript{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. \textbf{Right to Privacy and Physical Integrity}\textsuperscript{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.

\begin{itemize}
\item \textsuperscript{18} Hodder et al., supra note 16 at S70.
\item \textsuperscript{19} See \textit{Women and HIV/AIDS in the United States}, supra note 14.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{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.
\end{itemize}
C. Right to Liberty, Dignity, and Freedom from Cruel, Inhumane, and Degrading Treatment

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

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

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.
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 analysis 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. 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. 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. 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.
29. Id. at vii–ix.
and gender analysis. In line with a critical race praxis, 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.”

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.”

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. UNAIDS suggests that no HIV response

33. Id.
can be effective without first addressing these issues head on and working to change legal barriers to equality and nondiscrimination.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.

\textsuperscript{35} Consultation on HIV/AIDS and Human Rights, Geneva, Switzerland, July 25-26, 2002. \textit{Id.}

\textsuperscript{36} \textit{Id.} at 79–80.


\textsuperscript{37} Rep. of the ICPD, \textit{supra} note 36, at ¶ 7.2; REP. OF THE FOURTH WORLD CONFERENCE ON WOMEN, \textit{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.” 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. 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.\textsuperscript{40} This law makes it a crime to have sexual relations without disclosing one’s HIV-positive status.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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. \textit{Why Should HIV Criminalization Matter to You?}, \textsc{Positive Women’s Network} (Dec. 16, 2010), available at http://www.pwn-usa.org/tools-and-resources-2/tool-kits-and-presentations.

\textsuperscript{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. \textit{Id.}

\textsuperscript{42} \textit{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, 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, 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.” 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. 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.

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. 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. These types of practices can be found across the country from Mississippi to Michigan.

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. 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.

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.

49. See, e.g., HIV INTERVIEW FORM No. 917, supra note 45; KALAMAZOO CNTY. HEALTH & CMNTY. 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, MIC. 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.
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. 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.

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

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).

The bill states:

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53. Id. (emphasis omitted).
54. Id.
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).
59. Forbes, supra note 58, at 21.
60. Id. at 24.
register on sex offender lists. Because so many public benefits programs are not available to convicted felons, 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. 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. In a location with the highest HIV rate per capita in the country, on par with some developing nations, 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. 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. Being charged under SCAN...
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. 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. 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. Like in most places around the globe, sex workers in New Orleans are one of the populations most vulnerable to HIV; 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. Sex offender lists were originally developed to keep track of habitual sex offenders such as rapists and child molesters. 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 to label a human being of another with the intent to engage in any unnatural carnal copulation for compensation.” 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. This law also describes the various requirements and restrictions placed on convicted sex offenders. The length of time seems to be from fifteen years to the duration of a lifetime, with some room for pardons. See id. at 5.

69. See id. at 5.
70. See id. at 1, 4.
72. See No Justice, supra note 68, at 5.
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.\(^\text{74}\) 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,\(^\text{75}\) 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.\(^\text{76}\) 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.\(^\text{77}\) Jobs traditionally held by women—child day care, teaching—are off limits to registered sex offenders because of the close contact with children.\(^\text{78}\)

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).


\(^{77}\) NO JUSTICE, supra note 68, at 4.

\(^{78}\) See KELLY ET AL., supra note 76, at 4.
marginalized women in the late 1980s. Post Hurricane Katrina, the organization began to hear stories of women being prosecuted under SCAN and began to document the women’s stories. 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. Although the lawsuit is still pending, 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. The bill passed. 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, HIV specialists and general medical practitioners routinely fail to educate HIV-positive female patients about their fertility, conception, and contraception options. 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

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84. Anderson, supra note 83.
human right: the Committee Against Torture;\textsuperscript{87} the Committee on Economic Social and Cultural Rights;\textsuperscript{88} the Committee on the Elimination of Discrimination against Women;\textsuperscript{89} the Committee on the Elimination of Racial Discrimination;\textsuperscript{90} the Committee on the Rights of the Child;\textsuperscript{91} and the Human Rights Committee.\textsuperscript{92}

The 1995 Platform for Action of the Fourth World Conference on Women in Beijing, China (Beijing Platform),\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{95}

The United States Constitution protects the fundamental right to decide whether or not to have children.\textsuperscript{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


\textsuperscript{92} See Concluding Observations by the Human Rights Committee: Ecuador, ¶¶ 9, 12, U.N. Doc. CCPR/C/ECU/CO/5 (Nov. 4, 2009).


\textsuperscript{94} Id. ¶ 94.

\textsuperscript{95} Id.

governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.\textsuperscript{97} That right continues to be upheld by the Court and applies to all people, regardless of HIV status.\textsuperscript{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),\textsuperscript{99} as well as the ADA’s precursor, the Rehabilitation Act of 1973.\textsuperscript{100} The ADA prohibits the denial of medical services based solely on a person’s HIV status,\textsuperscript{101} and the Rehabilitation Act prohibits such discrimination by the federal government or federally funded entities.\textsuperscript{102}

\textit{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.\textsuperscript{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.\textsuperscript{104} Some options for sero-different couples include sperm washing,

\textsuperscript{97} \textit{Eisenstadt}, 405 U.S. at 453.
\textsuperscript{98} See, e.g., \textit{Planned Parenthood}, 505 U.S. at 846–51 (confirming that the right applied to procreation matters).
\textsuperscript{99} See \textit{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).
\textsuperscript{100} See id. at 642–44 (noting that HIV-positive status qualifies as disability under the Rehabilitation Act); \textit{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).
\textsuperscript{101} See Americans with Disabilities Act of 1990 §§ 301-302, 42 U.S.C. §§ 12181(7)(F), 12182(a) (2006); see also \textit{Bragdon}, 524 U.S. at 655 (holding that HIV infection constitutes a disability under the ADA).
\textsuperscript{102} See 29 U.S.C. § 794(a); see also \textit{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).
\textsuperscript{103} Memorandum from Brook Kelly, \textit{supra} note 86; see also \textit{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).
\textsuperscript{104} See generally \textit{HIV and Pregnancy}, \textit{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.\textsuperscript{105} Antiretroviral therapy during prenatal and postnatal care is an effective prevention strategy to protect the child.\textsuperscript{106} To successfully take advantage of these options, ongoing counseling, support, and treatment by well-informed medical professionals is required.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{106} See generally HIV AND PREGNANCY, supra note 103.

\textsuperscript{107} See generally id.


child.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{115} Namely, only 31\% of the HIV-positive women of reproductive age had discussed their reproductive options with health care providers.\textsuperscript{116} Of those 31\%, 64\% had themselves initiated the conversation with the health care provider.\textsuperscript{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.”\textsuperscript{118}

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

\textsuperscript{110} Id. at 8–10.
\textsuperscript{111} Id. at 9.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 9–10.
\textsuperscript{116} Id. at 317.
\textsuperscript{117} Id.
\textsuperscript{118} Leggett, supra note 105, at 43.
by health insurance plans. 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. Women who are prosecuted under these laws find it difficult to impossible to regain custody of children once released from prison sentences.

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. These instances are especially hard to document because the coercion often takes place off the record.

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.
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.* 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.

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

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124. KELLY *et al.*, *supra* note 109, at 3.
race, ethnicity, gender, or disability. Some states and municipalities go further under their local antidiscrimination laws to protect people based on sexual orientation or appearance. 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 ADA protects people living with HIV from being discriminated against in contexts such as hiring, firing, or seeking medical attention. But the ADA does not obligate states to go any further than those protections to promote the rights of people with disabilities. Comparatively, the Convention on the Rights of Persons with Disabilities obligates state parties to protect people living with HIV from discrimination. 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.

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

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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").
132. *Id.* at 4–7.
133. *See HIV Interview Form No. 917, supra note 45.
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. Of the most relevant treaties to women living with HIV, ICESCR, ICCPR, CERD, and CEDAW, the United States has ratified the ICCPR and CERD and signed but not ratified ICESCR and CEDAW.

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.” Executive Order 13,107 affirmed that “it 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.”

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.

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.
Because the HIV epidemic has taken on a distinctly racial pattern, the United States’ 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.” 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.”

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, have committed “to combat HIV/AIDS” both domestically and globally. 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,” 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.
148. Id. ¶ 14.
vulnerability to HIV/AIDS and prevents stigma and related
discrimination against people living with or at risk of HIV/AIDS.”

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. 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.”

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 States and the American Declaration of the Rights
and Duties of Man, which upholds core civil, political, and social
rights. 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.

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,
United States, Case 2141, Inter-Am. Comm’n H.R., Report No. 23/81,
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.\textsuperscript{155} The rights established in the UDHR are considered customary international law and are also binding.\textsuperscript{156} Both customary international law and ratified U.S. treaties trump conflicting state, local, or older federal laws.\textsuperscript{157} Legislators and courts have concrete obligations to uphold these laws.\textsuperscript{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.\textsuperscript{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.\textsuperscript{160} For example, the Court in \textit{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.


\textsuperscript{156} \textit{Id.} at 253 n.6.

\textsuperscript{157} \textit{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); \textit{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 . . .”).

\textsuperscript{158} \textit{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.”); \textit{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.”); \textit{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.”).


Constitution. 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.”

Boehm v. Superior Court is an example of state courts looking to international customary law for guidance in interpreting domestic legal standards. 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.

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, 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.
164. Id. at 497, 501–02.
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. Special Rapporteurs can conduct fact-finding missions to countries in order to investigate allegations of human rights violations. Countries must invite the Special Rapporteur to visit. The Special Rapporteur on Adequate Housing and the Special Rapporteur on Violence Against Women recently visited the United States. 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. 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.

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.

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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.

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. 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. 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.

The United States submitted its report on U.S. human rights, which was reviewed in 2010. 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. 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.

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

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of sex workers. 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. 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. 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. 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. For 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.

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.
181. No Justice, supra note 68, at 3, 6; Why NO Justice?, supra note 80.
182. Constitutional Challenge Launched, supra note 180.
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.