
26. Human rights and abortion access for people living in poverty: implications for the United States and globally

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Reproductive rights are human rights. There is clear consensus by UN human rights treaty bodies and independent experts that human rights protections in areas including access to contraception, maternal health care, infertility care, and abortion are essential to achieving good health, gender equality, and empowering people¹ to determine their futures.

Less clear is how this wide recognition of reproductive rights as human rights might influence national jurisprudence to protect the reproductive rights of people in marginalized communities, including people living in poverty, as well as people of color, immigrants, people with disabilities, and other people experiencing multiple and intersecting forms of discrimination.

Abortion access in the United States offers an important point of inquiry for this analysis. In the United States, poverty disproportionately impacts marginalized communities. For people with marginalized identities, discrimination and poverty are often inter-related, threatening multiple human rights at once and leaving them more vulnerable to poor reproductive health outcomes and violations of their reproductive rights. UN human rights experts have issued numerous findings and recommendations with respect to reproductive rights violations in the United States and access to abortion for women living in poverty, in particular.² Crises, such as the COVID-19 pandemic, only heighten the inequities and challenges that people living in poverty face in accessing abortion in the United States.

Yet, U.S. constitutional law offers limited protection for people living in poverty to access abortion care. The U.S. Supreme Court has held that the government is not required to fund abortions under federal or state Medicaid programs. More generally, while the U.S. Supreme Court has repeatedly affirmed the constitutional right to abortion established in *Roe v. Wade*,³ including more recently in *Whole Woman's Health v. Hellerstedt*,⁴ it has not interpreted the U.S. Constitution to impose affirmative obligations on the government to protect economic and social rights, including reproductive health care access.

¹ Throughout, this chapter uses gender inclusive language to acknowledge that transgender men and some gender nonconforming people require access to contraception, maternal health care, infertility care, and safe abortion services. People of all gender identities experience reproductive rights violations.

² United Nations General Assembly 'Report of the Working Group on the issue of discrimination against women in law and practice on its mission to the United States of America' (7 June 2016) UN Doc A/HRC/32/44/Add.2 para 90, vii, x, xvi; UNGA 'Report of the Special Rapporteur Philip Alston on extreme poverty and human rights on his mission to the United States of America' (4 May 2018) UN Doc A/HRC/38/33/Add.1, para 56.

³ 410 US 113 (1973).

⁴ 136 S Ct 2292 (2016).

How might human rights make a difference in this jurisprudential approach? This chapter examines the potential impact of human rights on constitutional and other legal protections for reproductive rights. Using abortion access in the United States as a case study, this chapter seeks to identify opportunities for future research to evaluate where and how a human rights-based approach to litigation and supportive advocacy can advance a more holistic jurisprudential approach to reproductive rights, with particular implications for people living in poverty.

Section I provides an overview of the normative framework protecting reproductive rights as human rights, focusing on how human rights law engages an analysis of poverty in its protection of the right to abortion access. Section II explores the impact of human rights framing on jurisprudence to protect access to abortion for people who are living in poverty. Section III turns the focus to the United States. After setting the stage for how U.S. law and policy has failed to protect access to abortion care for people living in poverty, we survey the jurisprudential approaches (and potential approaches) to poverty and reproductive rights in the United States, as well as the potential impact of human rights in this area of U.S. jurisprudence. The concluding section discusses implications for future research.

I. REPRODUCTIVE RIGHTS AS HUMAN RIGHTS

Reproductive rights are human rights, as formally recognized in the 1994 International Conference on Population and Development (ICPD) Programme of Action.⁵ This consensus landmark document, signed by 179 states, spurred remarkable progress in international legal and human rights protections for women and girls' access to reproductive health care and their ability to make reproductive decisions.⁶ It was confirmed and strengthened at the 1995 Fourth World Conference for Women in Beijing,⁷ and subsequent review conferences.⁸ Since then, human rights law has more fully explicated that reproductive rights are grounded in numerous fundamental human rights, including the rights to health, life, equality, information, educa-

⁵ 'Programme of Action of the International Conference on Population and Development' (Cairo 5–13 Sept 1994) UN Doc A/CONF.171/13/Rev.1 paras 7.2–7.3.

⁶ See Katherine Mayall and Johanna B Fine, 'Briefing Paper: Abortion Worldwide: 20 Years of Reform' (Center for Reproductive Rights 2014) <www.reproductiverights.org/sites/crr.civicactions.net/files/documents/20Years_Reform_Report.pdf> accessed 7 June 2020; Laura Reichenbach and Mindy Jane Roseman (eds), *Reproductive Health and Human Rights: The Way Forward* (University of Pennsylvania Press 2009).

⁷ 'Beijing Declaration and Platform for Action' The 1995 Fourth World Conference on Women: Action for Equality, Development and Peace (Beijing 4–15 Sept 1995) UN Doc A/CONF.177/20 para 94.

⁸ UNGA 'Key Actions for the Further Implementation of the Programme of Action' International Conference on Population and Development (New York 30 June–2 July 1999) 21st Special Session UN Doc A/S-21/5/Add.1 para 3, 40–41 [ICPD+5 Key Actions Document]; *Further actions and initiatives to implement the Beijing Declaration and the Platform for Action (Annex, Draft Resolution II)*, 'Report of the Ad Hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly' (New York, 5–9 June 2000) UN Doc A/S-23/10/Rev.1 para 72 (i)–(k) [Beijing+5 Review Document]; See Lucia Berro Pizzarossa, 'Here to Stay: The Evolution of Sexual and Reproductive Health and Rights in International Human Rights Law' (2018) 7 *Laws* 1, 10–11.

tion, privacy, freedom from discrimination and violence, and freedom from torture and cruel, inhuman, and degrading treatment.⁹

Human rights law recognizes and protects access to safe and legal abortion, in particular, noting its centrality to achieving autonomy and reproductive health. In recent years, UN human rights experts have expressed concern about the impact of severe legal restrictions, barriers, and stigma on abortion access. They have called on governments to amend legislation, lift barriers, remove criminal penalties, and prevent stigmatization of women and girls seeking abortion, so as to ensure effective access to safe, legal abortion services.¹⁰

UN human rights treaty-monitoring bodies have been particularly attentive to the barriers people living in poverty face in accessing abortion. They have established that when abortion is legal under domestic law, it must be available, accessible (including affordable), acceptable, and of good quality.¹¹ They have specified that states are obliged to abolish procedural barriers to abortion services, including third-party authorization requirements, mandatory delay periods, and biased counseling.¹² They have urged countries to provide financial support for those who cannot afford abortion services, guarantee the availability of skilled health care providers who can offer safe abortion services, and ensure that provider refusals on the grounds of religion or conscience do not interfere with access to services.¹³

And, importantly, the treaty bodies recognize that laws prohibiting abortion—thereby forcing people to choose between continuing a pregnancy and traveling to another country to access legal abortion services—can cause anguish and suffering, including financial, social, and health-related burdens and hardships.¹⁴

The Committee overseeing implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) frames the right to abortion as an aspect of women's autonomy,¹⁵ and emphasizes that a state's failure or refusal to provide reproductive health services constitutes gender discrimination.¹⁶ In articulating the contours of states'

⁹ See 'Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights' (Center for Reproductive Rights 2020) <www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/Breaking-Ground-2020.pdf> accessed 7 June 2020.

¹⁰ See 'Breaking Ground' (n 9). See also Charles G. Ngwena, 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 Hum.Rts.Q. 783, 787–94; Christina Zampas and Jaime M. Gher, 'Abortion as a Human Right—International and Regional Standards' (2008) 8 H.R.L.Rev. 249, 256–61; Lucia Berro Pizzarossa and Katrina Pehudoff, 'Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights' (2017) 19 Health & Hum.Rts.J. 279, 280–82.

¹¹ See 'Breaking Ground' (n 9); Human Rights Committee 'General Comment 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life' (2018) UN Doc CCPR/C/GC/36 2018 para 8.

¹² See 'Breaking Ground' (n 9).

¹³ *ibid.*

¹⁴ See *Siobhán Whelan v Ireland* (2017) Communication No. 2425/2014 UN Doc CCPR/C/119/D/2425/2014 para 7.5–7.7, 7.9, 7.11–7.12; *Amanda Jane Mellet v Ireland* (2016) Communication No. 2324/2013 UN Doc CCPR/C/116/D/2324/2013 paras 7.4–7.6, 7.8, 7.10–7.11.

¹⁵ See e.g. Convention on the Elimination of Discrimination against Women Committee 'Concluding Observations on New Zealand' (2012) UN Doc CEDAW/C/NZL/CO/7 para 35(a); CEDAW Committee 'Concluding Observations on Sierra Leone' (2014) UN Doc CEDAW/C/SLE/CO/6 para 32.

¹⁶ CEDAW Committee 'General Recommendation 24: Article 12 of the Convention (women and health)' (2008) UN Doc HRI/GEN/1/Rev.9 Vol. II para 11; see e.g., *L.C. v Peru* (2011) Communication No. 22/2009 UN Doc CEDAW/C/50/D/22/2009 para 8.17, 9, 12(iii).

obligations to realize the right to sexual and reproductive health, the Committee overseeing implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR) notes that equality is a cross-cutting objective requiring states to devote resources to traditionally neglected groups, including women living in poverty, in order to address systemic discrimination.¹⁷

In 2018, the UN Human Rights Committee made clear that the right to life includes the right to access safe and legal abortion.¹⁸ The right to life requires states to provide safe, legal, and effective access to abortion, *inter alia*, where the life and health of the pregnant woman or girl is at risk or when carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering.¹⁹ States may not introduce new barriers to abortion and should remove existing barriers that deny effective access by women and girls to safe and legal abortion.²⁰ States should likewise prevent the stigmatization of women and girls seeking abortion.²¹

The UN treaty bodies have also made clear that countries cannot roll back established rights. The Committee on Economic, Social and Cultural Rights (CESCR) has noted the particular importance of avoiding retrogressive measures in the area of sexual and reproductive health and rights, including the imposition of barriers to sexual and reproductive health information, goods, and services.²²

UN human rights experts have reiterated concerns related to abortion access for people living in poverty. For example, in the context of efforts by some U.S. states to restrict abortion access during the COVID-19 pandemic, the UN Working Group on Discrimination Against Women and Girls noted that restrictions on access to abortion ‘constitute human rights violations and can cause irreversible harm, in particular to low-income women and those belonging to racial minorities and immigrant communities.’²³

Regional human rights systems likewise address access to abortion as a human rights concern. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) requires states to ensure women’s right to abortion, at a minimum, in instances of ‘sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.’²⁴ The African Commission on Human and Peoples’ Rights recognizes that inadequate access to safe abortion and post-abortion care can result in violations of the rights to privacy, confidentiality, and freedom from discrimination and cruel, inhuman, or degrading treatment.²⁵ The

¹⁷ UNESCR Committee ‘General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)’ (2016) UN Doc E/C.12/GC/22 ss 2, 23, 34, 40. See also Berro Pizzarossa and Pehudoff (n 10) 282.

¹⁸ ‘General Comment 36’ (n 11) para 8.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² ‘General Comment 22’ (n 17) para 38.

²³ UN OHCHR ‘United States: Authorities manipulating COVID-19 crisis to restrict access to abortion, say UN experts’ (27 May 2020) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25907&LangID=E> accessed 19 June 2020.

²⁴ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2nd Ordinary Session Assembly of the Union (adopted 11 July 2003, entered into force 25 Nov 2005) CAB/LEG/66.6 (2000) art 14, para 2(c) [hereinafter Maputo Protocol].

²⁵ See African Commission on Human and Peoples’ Rights, ‘General Comment 2 on Article 14.1 (a), (b), (c) and (f) and Article 14.2 (a) and (c)’ of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 55th Ordinary Session (adopted 2014).

European Court of Human Rights is developing a robust body of jurisprudence on abortion,²⁶ and the Inter-American Commission on Human Rights has articulated important standards regarding access to safe and legal abortion.²⁷

These human rights bodies recognize that safe and legal abortion services are essential for guaranteeing the full range of human rights.²⁸ Scholars suggest that, in doing so, they require states to affirmatively address the particular impact of abortion access barriers on people living in poverty.²⁹

II. IMPACT OF HUMAN RIGHTS ON JURISPRUDENCE REGARDING ABORTION ACCESS

Human rights principles do not automatically translate into change in people's lives. A wide body of literature explores the ways in which human rights law gets internalized and implemented domestically.³⁰ One mode of norm internalization is through national courts' integration of human rights principles.

National courts have drawn upon human rights law and normative principles in addressing reproductive rights concerns.³¹ As Rachel Rebouché notes, courts rely on human rights 'to

²⁶ Mayall and Fine, 'Briefing Paper: Abortion Worldwide' (n 6); Council of Europe Commissioner for Human Rights, 'Women's sexual and reproductive health and rights in Europe' (Issue Paper 2017); Johanna B Fine, Katherine Mayall, and Lilian Sepulveda, 'The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally' (2017) 19 *Health & Hum.Rts.* 69, 72; Johanna Westeson, 'Reproductive Health Information and Abortion Services: Standards Developed by the European Court of Human Rights' (2013) 122 *Int'l J.Gynecology & Obstetrics* 173; Federico Fabbrini, 'The European Court of Human Rights, The EU Charter of Fundamental Rights, And The Right To Abortion: Roe v. Wade on the Other Side of the Atlantic' (2011) 18 *Colum.J.Eur.L.* 1, 16–25.

²⁷ Alma Beltran Y Puga, 'Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law' (2012) 3 *Creighton Int'l & Comp.L.J.* 158, 163–69; Ciara O'Connell, 'Litigating Reproductive Health Rights in the Inter American System: What Does Winning a Case Look Like?' (2014) 16 *Health & Hum.Rts.* 116, 121–22.

²⁸ See 'Breaking Ground' (n 9); Zampas and Gher (n 10) 250–62, 268–84.

²⁹ Martha F. Davis, 'Abortion Access in the Global Marketplace' (2010) 88 *N.C.L.Rev.* 1657, 1661, 1671; Barbara Stark, 'The Women's Convention, Reproductive Rights, and the Reproduction of Gender' (2011) 18 *Duke J.Gender L. & Pol'y* 261, 301; Lance Gable, 'Reproductive Health as a Human Right' (2010) 60 *Case W.Res.L.Rev.* 957, 986–87.

³⁰ See e.g. Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (OUP 2011); Wayne Sandholtz, 'How Domestic Courts Use International Law' (2015) 38 *Fordham Int'l L.J.* 595, 603–05; Zachary Elkins, Tom Ginsburg, and Beth A Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harv.Int'l L.J.* 61, 63; Cynthia Soohoo and Suzanne Stolz, 'Bringing Theories of Human Rights Change Home' (2008) 77 *Fordham L.Rev.* 459, 474–79; Sarah H Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26 *Yale J.Int'l L.* 1, 87–88; Harold Hongju Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998) 35 *Hous.L.R.* 623, 642.

³¹ Rebecca J Cook and Bernard M Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Hum.Rts.Q.* 1, 21–52; Fine, Mayall, and Sepulveda (n 26) 72–75; Reed Boland and Laura Katzive, 'Developments in Laws on Induced Abortion: 1998–2007' (2008) 34 *Int'l Family Planning Perspectives* 110, 117.

strengthen the legitimacy of their decisions and to align their opinions with universal, modern norms.³² This approach has potential to address access to abortion for people living in poverty.

A notable example is the *Lakshmi Dhikta* case, in which the Supreme Court of Nepal drew upon human rights to guarantee economic access to safe and legal abortion services for women living in poverty in Nepal.³³ Despite the decriminalization of abortion in Nepal in 2002, and the subsequent constitutional recognition of reproductive rights as fundamental rights, many people in Nepal remained unable to obtain abortions because of prohibitive fees, physically inaccessible facilities, and because they were unaware of the legal status of abortion.

Lakshmi Dhikta v. Nepal was filed in Nepal's Supreme Court on behalf of a pregnant woman with five children who was denied an abortion because she could not afford the fee. One central goal of the litigation was to ensure that abortion was available to all women, regardless of socioeconomic status and geographic location.³⁴ In 2009, the Supreme Court of Nepal issued a decision reiterating the inextricable link between the right to abortion and other rights, including the rights to self-determination, freedom, dignity and personal liberty, health, family planning, privacy, non-discrimination, and freedom from cruel, inhuman and degrading treatment. Stating that 'the right to abortion can be realized only if it is accessible and affordable,' the Court noted that 'it is the primary obligation of the state to prioritize the implementation of these rights.'³⁵ Based on these positive obligations, the Court directed the government to introduce a comprehensive abortion law and create a fund to cover the cost of services for low-income women or women without income.

Melissa Upreti examines the *Lakshmi Dhikta* decision through the lens of 'transformative equality,' and explores the ways in which the Court integrates human rights principles articulated by the CEDAW Committee to emphasize the government's positive obligation to address barriers, including economic, that women face in accessing safe abortion.³⁶ Others note the Court's reliance on the ICESCR in recognizing the need to ensure affordability, accessibility, and availability of abortion services.³⁷ The resulting decision by the Court obligates the government to address the multiple barriers women face in accessing abortion and ensure that all women, including those who face economic barriers, have access to safe abortion services.³⁸

While this chapter focuses on jurisprudence, human rights are also core to law reform and other advocacy related to legalization of abortion and access for marginalized communities. For example, human rights influenced the legalization of abortion in democratic, post-Apartheid South Africa, and focused attention on social and economic conditions that impede meaningful access to safe abortion. Cathi Albertyn has noted the ways in which South African human rights advocates 'latched upon the spirit of the ICPD's Cairo Declaration' and its linking of reproductive rights and reproductive health to advance a legal right to abortion

³² Rachel Rebouché, 'Abortion Rights as Human Rights' (2016) 25 S. & L.S. 765, 766.

³³ Supreme Court of Nepal, *Lakshmi Dhikta v Government of Nepal*, Writ petition no. WO-0757, 2067 (2009) <www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Lakshmi%20Dhikta%20-%20English%20translation.pdf> accessed 7 June 2020.

³⁴ Melissa Upreti, 'Toward Transformative Equality in Nepal: The Lakshmi Decision' in Rebecca J Cook, Joanna N Erdman, and Bernard Dickens (eds), *Abortion Law in Transnational Perspective* (University of Pennsylvania Press 2014) 284.

³⁵ Supreme Court of Nepal, *Lakshmi Dhikta v Government of Nepal* (n 33).

³⁶ Upreti (n 34) 282.

³⁷ Fine, Mayall, and Sepulveda (n 26) 69, 74.

³⁸ Upreti (n 34) 279–300.

grounded in an understanding of substantive equality and the effects of race and class on the realities of access to abortion for Black women and rural women living in poverty.³⁹

Despite this potential, there are substantial critiques of human rights as a basis for addressing needs of marginalized people, including through jurisprudential approaches. One scholar argues that a human rights approach may, in fact, ‘distract from strategies that focus on economic inequalities.’⁴⁰ Indeed, it has been suggested that human rights lack both a normative basis for and ideological commitment to addressing issues of redistribution.⁴¹ Others note that human rights lawyering, like other modes of social justice lawyering, has the potential to reify and essentialize the victimization of marginalized communities, including people living in poverty.⁴² Importantly, scholars and advocates note that efforts to achieve the realization of reproductive rights as human rights will be successful only if connected to grassroots campaigns for economic justice and an end to poverty.⁴³ Such critiques significantly inform the concluding section of this chapter, on implications for further research.

III. CASE STUDY: THE VALUE-ADD OF HUMAN RIGHTS IN REPRODUCTIVE RIGHTS ADVOCACY FOR PEOPLE LIVING IN POVERTY IN THE UNITED STATES

Within the United States, led and inspired by decades of work by reproductive justice advocates,⁴⁴ a deep well of scholarship explores the ways in which Black and ‘[p]oor women’s inadequate access to reproductive health services is bolstered by traditional [U.S.] constitutional jurisprudence.’⁴⁵ Instead of holding the government accountable for remedying

³⁹ Cathi Albertyn, ‘Claiming and Defending Abortion Rights in South Africa’ (2015) 22 *Direito GV L.Rev.* 429, 436–39; but see Lucia B Pizzarossa and Ebenezer Durojaye, ‘International Human Rights Norms and the South African Choice on Termination of Pregnancy Act: And Argument for Vigilance and Modernisation’ (2018) 35 *SAJHR* 50, 57–68.

⁴⁰ Rachel Rebouché, ‘Reproducing Rights: The Intersection of Reproductive Justice and Human Rights’ (2017) 7 *U.C.Irvine L.Rev.* 579, 598. See also Rebouché, ‘Abortion Rights’ (n 32) 776.

⁴¹ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (The Belknap Press of Harvard University Press 2018).

⁴² Caroline Bettinger-Lopez and others, ‘Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice’ (2011) 18 *Geo.J.Poverty L. & Pol’y* 337, 361–62.

⁴³ Rosalind P. Petchesky, ‘Human Rights, Reproductive Health and Economic Justice: Why they are indivisible’ (2000) 8 *Reproductive Health Matters* 12, 15–16; This is consistent with scholarship offering a critical lens on human rights lawyering more generally. See Caroline Bettinger-Lopez and others (n 42); Benjamin Hoffman and Marissa Vahlsing, ‘Collaborative Lawyering in Transnational Human Rights Advocacy’ (2014) 21 *Clin.L.Rev.* 255.

⁴⁴ Loretta J. Ross, ‘Understanding Reproductive Justice’ (SisterSong: Women of Color Reproductive Health Collective 2006) 2–5. <https://d3n8a8pro7vhnmx.cloudfront.net/rrfp/pages/33/attachments/original/1456425809/Understanding_RJ_Sistersong.pdf?1456425809> accessed 7 June 2020; see also nn 90–93.

⁴⁵ Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (20th Anniversary edn, Vintage Books 2017) 229. See also Melissa Murray, Katherine Shaw, and Reva B. Siegal (eds), *Reproductive Rights and Justice Stories* (Foundation Press 2019); Michele Goodwin and Erwin Chemerinsky, ‘Pregnancy, Poverty, and the State’ (Review of *Poverty of Privacy Rights* by Khiara M. Bridges) (2018) 127 *Yale L.J.* 1270, 1329; Jill E Adams and Melissa Mikesell, ‘And Damned If They Don’t: Prototype Theories To End Punitive Policies Against Pregnant People Living in Poverty’ (2017)

reproductive oppression, U.S. court decisions have legitimized and reinforced laws, policies, institutions, and cultural norms that strip people living in poverty and women of color of their reproductive autonomy, thereby diminishing their economic and social well-being, political equality, and human dignity.⁴⁶

While this problem extends beyond abortion rights,⁴⁷ the debate over the source and scope of the right to safe and legal abortion has shaped many of the government policies and court decisions impacting the health, lives, and rights of people living in poverty. Thus, consideration of how abortion and poverty intersect in U.S. law and constitutional doctrine can inform jurisprudential efforts to advance a transformative, human rights-based approach to reproductive rights and justice in the United States.

A. Demographics of Abortion Access: Economic Barriers and Impacts

In the United States, nearly one in four women will have an abortion in their lifetime.⁴⁸ While abortion is a common component of comprehensive reproductive health care, there are notable disparities in rates of abortion across different populations.⁴⁹ The greatest demographic disparity is economic. Among all women obtaining abortions, a disproportionate share, 75 percent, are living in poverty or near poverty.⁵⁰ Government programs designed to subsidize medical costs for those with limited resources do not meet the need for abortion services, disproportionately impacting people living in poverty and women of color.⁵¹

For people living in poverty, denial of health-care coverage for abortion is rooted in numerous federal and state policies. This began with the Hyde Amendment, a law that—since 1977—has prohibited federal funding of abortion care in almost all circumstances. Under Hyde, Medicaid (the national program funding medical care for people living in poverty in the United States)⁵² may cover abortion services only when pregnancy is the result of rape or incest or causes a ‘physical condition’ that would ‘place the woman in danger of death

18 Geo.J.Gender & L. 283, 287–95; Khiara M. Bridges, ‘Towards a Theory of State Visibility: Race, Poverty, and Equal Protection’ (2010) 19 Colum.J.Gender & L. 965, 968, 1008.

⁴⁶ See nn 51–61 and accompanying text. See also nn 69–70 and accompanying text.

⁴⁷ Some examples outside the abortion context include lack of access to non-coercive and affordable contraception; systemic barriers to autonomous decision-making and non-biased maternal health care; and punitive treatment of women for their conduct during pregnancy or childbirth. See Adams and Mikesell (n 45).

⁴⁸ ‘Abortion is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates’ (Guttmacher Institute, 19 October 2017) <www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates> accessed 7 June 2020.

⁴⁹ For details on disparities by race, see Rachel K Jones and Jenna Jerman, ‘Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014’ (2017) 107 Am.J.Pub. Health <<https://ajph.aphapublications.org/doi/10.2105/AJPH.2017.304042>> accessed 7 June 2020.

⁵⁰ Jenna Jerman, Rachel K Jones, and Tsuyoshi Onda, ‘Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008’ (Guttmacher Institute 2016) <www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf> accessed 18 December 2019.

⁵¹ *ibid* 12; Megan K Donovan, ‘In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact’ (2017) 20 Guttmacher Pol’y Rev. 1, 2 <www.guttmacher.org/sites/default/files/article_files/gpr2000116.pdf> accessed 7 June 2020.

⁵² ‘Medicaid’s Role for Women’ (Fact Sheet, *Henry J. Kaiser Family Foundation*, 28 March 2019) 1 <www.kff.org/womens-health-policy/fact-sheet/medicaids-role-for-women/> accessed 18 December 2019.

unless an abortion is performed.⁵³ Enacted just three years after the *Roe v. Wade* decision constitutionalized the right to abortion, this funding ban has been in place every year since and expanded beyond Medicaid. For people living in poverty and others who rely on government programs, such as Indian Health Services, or people who are incarcerated in federal prisons and detention centers, similar restrictions block federal funding for almost all abortion care.⁵⁴

While Hyde does not prohibit states from authorizing state funds and programs to cover abortion, most do not.⁵⁵ In addition to the lack of Medicaid coverage for poor and low-income residents in most states, half of the states also ban health insurance coverage for abortion in plans offered, or regulated, under the state Health Insurance Marketplace established under the Affordable Care Act.⁵⁶

These policies, coupled with an ever-increasing web of state restrictions on abortion access,⁵⁷ disproportionately burden low-income people, women of color, and young women.⁵⁸

For people already experiencing financial hardship, paying for abortion—and related travel costs—requires relying on family, friends, and private funding networks, while also diverting scarce personal funds needed for basics like food, housing, childcare, and transportation. That, in turn, can mean skipping or delaying payments for food, utilities, rent, childcare, and other essentials.⁵⁹ Often, by the time a person scrapes enough resources together, their pregnancy has advanced to a point when the abortion costs more or at which abortion services are not available or legal in the state.⁶⁰ Not all who need an abortion can overcome these obstacles. Research estimates indicate that about one-fourth of pregnant women who qualify for Medicaid give birth instead of having an abortion because Medicaid does not cover the costs.⁶¹

⁵³ Hyde Amendment Codification Act 2013 (USA).

⁵⁴ Terri-Ann Thompson and Brianna Keefe-Oates, 'Abortion coverage bans on public and private insurance: Access to abortion care limited for millions of women' (Ibis Reproductive Health 2017) 1–2 <<https://ibisreproductivehealth.org/sites/default/files/files/publications/Impact%20of%20insurance%20bans%20formatted%208.17.pdf>> accessed 7 June 2020 (citing sources).

⁵⁵ 'State Funding of Abortion Under Medicaid' (*Guttmacher Institute*, as of 1 June 2020) <www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid> accessed 7 June 2020.

⁵⁶ Thompson and Keefe-Oates (n 54) 1.

⁵⁷ For an overview of the types and numbers of abortion restrictions in each state, see 'An Overview of Abortion Laws' (*Guttmacher Institute*, as of 1 August 2019) <www.guttmacher.org/state-policy/explore/overview-abortion-laws> accessed 7 June 2020; 'Last Five Years Account for More Than One-quarter of All Abortion Restrictions Enacted Since Roe' (*Guttmacher Institute* 13 January 2016), at <www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe> accessed 7 June 2020.

⁵⁸ Thompson and Keefe-Oates (n 54) 2.

⁵⁹ See Rachel K Jones, Ushma D Upadhyay, and Tracy A Weitz, 'At What Cost? Payment for Abortion Care by U.S. Women' (2013) 23 *Women's Health Issues* e173, e176–177 <[www.whijournal.com/article/S1049-3867\(13\)00022-4/fulltext](http://www.whijournal.com/article/S1049-3867(13)00022-4/fulltext)> accessed 7 June 2020.

⁶⁰ *ibid* e174; Ushma D Upadhyay and others, 'Denial of Abortion Because of Provider Gestational Age Limits in the United States' (2014) 104 *Am.J.Pub.Health* 1687, 1689 <<https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301378>> accessed 7 June 2020.

⁶¹ Sara CM Roberts and others, 'Estimating the proportion of Medicaid-eligible pregnant women in Louisiana who do not get abortions when Medicaid does not cover abortion' (2019) 78 *BMC Women's Health* 1 <<https://bmcmomenshealth.biomedcentral.com/articles/10.1186/s12905-019-0775-5>> accessed 7 June 2020; Stanley K Henshaw and others, 'Restrictions on Medicaid Funding for Abortions: A Literature Review' (*Guttmacher Institute* 2009) <www.guttmacher.org/sites/default/files/report_pdf/medicaidlitreview.pdf> accessed 7 June 2020.

For these women, evidence suggests economic insecurity and hardship will increase over the longer-term.⁶²

B. Jurisprudential Landscape

In the United States, the legal right to abortion, particularly for people living in poverty, has been hollowed out by decades of restrictive state and federal laws and Supreme Court decisions affirming them. In particular, the U.S. Supreme Court has refused to recognize, under the U.S. Constitution, an affirmative state obligation to ensure all people, regardless of economic status, can effectively exercise their fundamental right to abortion.⁶³ Yet, strands of U.S. constitutional jurisprudence offer the potential for a more expansive judicial understanding of the impact of poverty on access to abortion, consistent with human rights.

Leading scholars have argued that the U.S. Constitution can and should provide heightened protection for people living in poverty.⁶⁴ Indeed, in the first half of the twentieth century, the Supreme Court was responsive to claims that the government was obligated, at least in certain contexts, to ensure individuals had resources necessary to exercise their fundamental rights. This approach is most evident in the Court's line of criminal due process 'access to justice' cases that peaked in the mid-1950s through 1960s.⁶⁵ Around this time, the Court took a similar approach in other contexts as well, including for poor people exercising their right to vote and to freely travel and establish residency in another state.⁶⁶

However, the Court declined to adopt the view that laws that discriminate on the basis of poverty, or target the poor as a class, should be presumed 'suspect' and—on that basis alone—trigger a stricter level of constitutional scrutiny.⁶⁷ Instead, only where a liberty or other fundamental right was at stake did the Court invoke heightened protection for the indigent. Although the access to justice cases remain controlling law today, the Court declined to further expand rights for people living in poverty in a line of cases decided in the early 1970s.⁶⁸

⁶² Diana Greene Foster and others, 'Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States' (2018) 108 *Am.J.Pub.Health* <<https://ajph.apublications.org/doi/10.2105/AJPH.2017.304247>> accessed 7 June 2020.

⁶³ Laurence H Tribe, 'The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependency' (1985) 99 *Harv.L.Rev.* 330, 336–37; Peter B Edelman, 'The Next Century of Our Constitution: Rethinking Our Duty to the Poor' (1987) 39 *Hastings L.J.* 1, 39–42.

⁶⁴ See e.g. Frank I Michelman, 'Foreword: On Protecting The Poor Through the Fourteenth Amendment' (1969) 83 *Harv.L.Rev.* 7, 11–13; Edelman (n 63) 3–8; Erwin Chemerinsky, 'Making the Right Case for a Constitutional Right to Minimum Entitlements' (1993) 44 *Mercer L.Rev.* 525, 525–28; Martha C Nussbaum, 'Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism' (2007) 121 *Harv.L.Rev.* 5, 7, 21–46; Julie A Nice, 'Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection' (2012) 60 *Drake L.Rev.* 1023, 1050–66.

⁶⁵ These cases protect the rights of people who cannot afford legal counsel or court-related fees in criminal judicial proceedings. See *Douglas v California*, 372 US 353 (1963); *Gideon v Wainwright*, 372 US 335 (1963); *Griffin v Illinois*, 351 US 12 (1956).

⁶⁶ See *Harper v Virginia State Bd of Elections*, 383 US 663 (1966); *Shapiro v Thompson*, 394 US 618 (1969); *Memorial Hosp v Maricopa Cty*, 415 US 250 (1974).

⁶⁷ Mario L Barnes and Erwin Chemerinsky, 'The Disparate Treatment of Race and Class in Constitutional Jurisprudence' (2009) 72 *LCP* 109, 123–25.

⁶⁸ In these cases, the Court refused to closely scrutinize laws that did not involve an established fundamental right, but did disproportionately burden people living in poverty as they sought adequate educational opportunities, public benefits, housing, and economic stability. See, e.g., *San Antonio Indep*

Those cases were quickly closing the courthouse door to poverty-based claims by the time the right to abortion was recognized in 1973, in *Roe v. Wade*. Then, in a series of abortion funding cases, the Court held that the government did not violate the Constitution when denying public funding or medical services to pregnant women living in poverty who sought to end, rather than continue, a pregnancy. In each of four cases, beginning with *Beal v. Doe* and *Maier v. Roe*, decided together in 1977, followed by its decisions in *Harris v. McRae* and *Williams v. Zbaraz*, both in 1980, the Court held that neither federal law nor the Constitution required state or federal Medicaid programs to fund abortion.⁶⁹ Notably, in *Harris*, plaintiffs had raised related equal protection and liberty rights claims together, to persuade the Court that even if there was no ‘entitlement’ to a system of welfare benefits in the first instance, these laws impermissibly discriminated against people living in poverty as they sought to exercise a fundamental right.⁷⁰ Relying on its earlier decision in *Maier*, the Court rejected the claims and upheld the Hyde Amendment’s ban on federal funding for abortion in almost all circumstances.

Yet, even as the Court decisively shifted away from recognizing poverty as a suspect class, and despite the abortion funding decisions, the Court continued to consider financial disadvantage in a series of cases in which family-relationship rights were at stake for people living in poverty.⁷¹ In so doing, it averted a roll-back of the access to justice doctrine and cemented its expanded protection of fundamental liberty rights.⁷² And while not as apparent in the Court’s opinions, a body of scholarship and historical writings document how concern for women living in poverty and lacking legal and political power drove successful reproductive rights litigation and informed the substantive due-process doctrine that protects liberty rights.⁷³ Cary Franklin, in particular, has examined how the class-based equality concerns driving the reproductive rights cases—the same concerns underlying the access to justice and family relationship cases—implicitly shaped the jurisprudence and continue to animate elements of modern abortion jurisprudence.⁷⁴

The rationale underlying these cases is relevant in the context of protecting abortion access for marginalized communities, including people living in poverty. The threat of poverty to

Sch Dist v Rodriguez, 411 US 1, 28, 40 (1973); *Ortwein v Schwab*, 410 US 656, 660 (1973); *Dandridge v Williams*, 397 US 471, 475 (1970); *United States v Kras*, 409 US 434, 447–55 (1973); *Lindsey v Normet*, 405 US 56, 70–74 (1972).

⁶⁹ See *Beal v Doe*, 432 US 438 (1977); *Maier v Roe*, 432 US 464 (1977); *Harris v McRae*, 448 US 297 (1980); *Williams v Zbaraz*, 448 US 358 (1980).

⁷⁰ Rhonda Copelon and Sylvia A Law, “‘Nearly Allied to Her Right to Be’—Medicaid Funding for Abortion: The Story of *Harris v. McRae*” in Elizabeth M Schneider and Stephanie M Wildman (eds), *Women & the Law: Stories* (Foundation Press 2011).

⁷¹ See *Boddie v Connecticut*, 401 US 371 (1971); *Little v Streater*, 452 US 1 (1981); *Lassiter v Dep’t of Soc Servs of Durham*, 452 US 32 (1981); *MLB v SLJ*, 519 US 102 (1996).

⁷² See generally Kenneth Agran, ‘When Government Must Pay: Compensating Rights and the Constitution’ (2005) 22 Const. Comment. 97, 109. For analysis of the doctrinal intersection of the liberty rights of parenting, marriage, family formation, and procreation, see ‘Roe and the Intersectional Liberty Doctrine’ (Center for Reproductive Rights 2018) 4, 9 <<https://reproductiverights.org/sites/default/files/documents/Liberty-Roe-Timeline-spread-for-web.pdf>> accessed 7 June 2020.

⁷³ Linda Greenhouse and Reva B Siegel, ‘The Unfinished Story of *Roe v. Wade*’ in Melissa Murray, Katherine Shaw, and Reva B Siegal (eds), *Reproductive Rights and Justice Stories* (Foundation Press 2019); Cary Franklin, ‘The New Class Blindness’ (2018) 128 Yale L.J. 1, 17–46; Reva B Siegel, ‘*Roe*’s Roots: The Women’s Rights Claims that Engendered *Roe*’ (2010) 90 B.U.L.Rev. 1875, 1879–94.

⁷⁴ Franklin (n 73) 17–82.

family and personhood is harshly evident in the historical struggle of women to control and define their reproductive lives in the United States. In the early contraception and abortion cases of the 1960s and 1970s, advocates centered their evidence, arguments, and public narratives on the criminal risks and financial barriers preventing poor and low-income women from accessing contraception and abortion.⁷⁵ Ultimately, however, ‘concerns about the lived experience of financially disadvantaged women seeking reproductive healthcare did not appear on the surface’ of the Court’s opinion in these cases.⁷⁶ Rather, the Court grounded reproductive rights in a right of privacy⁷⁷ and a broader liberty interest,⁷⁸ rather than equal protection.⁷⁹ Thus, coming on the heels of the Court’s seminal decisions rejecting heightened scrutiny of laws preventing equitable access to non-fundamental rights,⁸⁰ *Roe v. Wade* secured heightened constitutional scrutiny for abortion in theory, though not always in fact.

Even as the abortion funding cases held that the Constitution does not generally require states to fund abortion, they did not foreclose constitutional consideration of how laws burden the rights of people who are financially disadvantaged. In the 1992 decision of *Casey v. Planned Parenthood*, the Court articulated the ‘undue burden’ standard for reviewing abortion restrictions.⁸¹ Under this standard, if a law’s requirements mean people living in poverty will face obstacles accessing abortion, then that is the relevant group for assessing the law’s constitutionality. Problematically, the Court failed to adequately apply this test to the facts in *Casey* itself—despite extensive evidence in the lower court record.⁸² Without rejecting the relevance of these facts, it concluded that even ‘for those women who have the fewest financial resources,’ a mandated waiting period of 24 hours between receiving informed consent and obtaining an abortion was not unconstitutional.⁸³ Nonetheless, as seen in subsequent decisions, *Casey* ‘preserved the law’s ability to respond to class-related deprivations of the fundamental right to abortion.’⁸⁴

Nearly 25 years later, in *Whole Woman’s Health v. Hellerstedt*, the Court reaffirmed *Casey*’s real-world context inquiry.⁸⁵ Under both *Casey* and *Whole Woman’s Health*—and consistent with the class-equality concerns built into reproductive rights doctrine ‘on a fundamental level’⁸⁶—courts can, and often must, engage in exactly this analysis.

⁷⁵ *ibid* 40–63.

⁷⁶ *ibid* 56.

⁷⁷ *Griswold v Connecticut*, 381 US 479, 484–87 (1965).

⁷⁸ *Roe v Wade*, 410 US 113, 153 (1973).

⁷⁹ Siegel, ‘*Roe*’s Roots’ (n 73) 1900–03.

⁸⁰ See n 68.

⁸¹ *Planned Parenthood of Se Pennsylvania v Casey*, 505 US 833, 894 (1992).

⁸² The district court struck down a mandatory waiting period on the grounds it was ‘particularly burdensome to those women who have the least financial resources.’ *Planned Parenthood of Se Pennsylvania v Casey*, 744 F Supp 1323, 1352 (ED Pa 1990).

⁸³ *Casey* (n 81) 886.

⁸⁴ Franklin (n 73) 69; see ‘The Undue Burden Standard After *Whole Woman’s Health v. Hellerstedt*’ (Center for Reproductive Rights 2018) <www.reproductiverights.org/sites/crr.civicactions.net/files/documents/WWH-Undue-Burden-Report-07262018-Edit.pdf> accessed 7 June 2020.

⁸⁵ *Whole Woman’s Health* (n 4) 2308–10; *Casey* (n 81) 892–94.

⁸⁶ Franklin (n 73) 46.

Much has been written on why the abortion funding decisions are analytically wrong, unsound, and morally indefensible.⁸⁷ And scholars continue to debate the utility of constitutionalizing abortion rights.⁸⁸ Moreover, with a newly cemented 6–3 majority of jurisprudentially conservative justices on the U.S. Supreme Court, there is deep concern that it will soon move to substantially weaken and undo longstanding protection for abortion rights.⁸⁹ Nevertheless, for theorists and practitioners who seek a constitutional jurisprudence that actively protects the reproductive rights of all people, including people living in poverty, interlocking due process, equal protection, and liberty doctrines continue to offer possibilities for a human rights-based approach, beyond the confines of the current jurisprudence. Indeed, more than ever, planting these jurisprudential seeds is necessary for achieving constitutional change over the long-term.

C. **Potential Impact of Human Rights on Litigation Efforts to Advance Access to Abortion for Marginalized Communities, including People Living in Poverty in the United States**

Whether invoking equality, due process, liberty, or examining the ‘real world context’ of abortion restrictions on people’s lived experiences, judges and litigators engaging in U.S. constitutional analysis can draw on human rights norms to harmonize these interests and realize a more positive-rights vision that ensures abortion access for marginalized communities, including people living in poverty in the United States.

Reproductive justice advocates in the United States have engaged a human rights analysis for decades. Developed in the 1990s by Black women who were inspired by the 1994 ICPD,⁹⁰ the reproductive justice framework draws on human rights to articulate the inherent dignity and humanity of all people and illuminate the ways in which structural and systemic discrim-

⁸⁷ See Julie A Nice, ‘No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default’ (2008) 35 *Fordham Urb.L.J.* 629, 645–52; Edelman (n 63) 40, 42; Tribe (n 63) 336–38; Jill E Adams and Jessica Arons, ‘A Travesty of Justice: Revisiting *Harris v. McRae*’ (2014) 21 *Wmj. & Mary J. Women & L.* 5, 6–7, 12.

⁸⁸ cf Robin West, ‘From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights’ (2009) 118 *Yale L.J.* 1394 with Franklin (n 73) 70–71; see generally Nice, ‘No Scrutiny Whatsoever’ (n 87) 633–65, 663–70.

⁸⁹ In the last abortion case decided before a major shift in the Court’s membership, *June Medical Services v. Russo*, a bare majority of justices adhered to controlling precedent to strike down a restriction. The Chief Justice joined, but also wrote a separate opinion expressing his alternative view of how the undue burden should be applied, one that would allow many more restrictions to stand. *June Medical Services LLC v Russo*, 140 S. Ct. 2103, 2112–33 (2020) (plurality opinion); *ibid.* at 2133–42 (Roberts, C.J., concurring in the judgement). Several months after that decision, Justice Ruth Bader Ginsburg – a staunch defender of gender equality and reproductive rights – died and her seat was filled by Justice Amy Coney Barrett, who adheres to a judicial philosophy that rejects constitutional protection for abortion and other liberty rights. See generally Report of the Center for Reproductive Rights on the Nomination of Judge Amy Coney Barrett to be Associate Justice of the Supreme Court of the United States (Oct 2020) <https://reproductiverights.org/sites/default/files/documents/FINAL_Public%20Barrett%20Analysis%20%281%29.pdf> accessed 23 December 2020. This transformation of the Court means that, at the time of publication, there are currently enough votes not only to follow Chief Justice Robert’s opinion, but even more drastically upend abortion jurisprudence.

⁹⁰ ‘Reproductive Justice’ (*SISTERSONG, Women of Color Reproductive Justice Collective*) <<http://sistersong.net/reproductive-justice/>> accessed 7 June 2020.

ination lead to reproductive rights and justice violations for women of color.⁹¹ This holistic framework recognizes that sexual and reproductive rights often depend upon the realization of other economic and social rights and embraces the concept of positive rights and the government's obligation to ensure their realization.⁹² Importantly, the reproductive justice movement was founded, in part, because of the insufficiencies of the reproductive rights movement's 'singular focus' on abortion.⁹³ Human rights have been central in reproductive justice campaigns for access to reproductive health care in the United States.⁹⁴

But there are specific challenges to advancing human rights frameworks in U.S. courts. Because of U.S. treaty ratification practice, international human rights treaty provisions are not directly enforceable in United States courts.⁹⁵ And there is a deep skepticism by some jurists of the relevance of international and foreign comparative law in U.S. courts, including in the context of abortion.⁹⁶ Nevertheless, international law and the reasoning of international and regional human rights bodies and experts can be invoked in and by federal and state courts as persuasive authority or to otherwise inform analysis when assessing constitutional questions

⁹¹ 'A New Vision for Advancing our Movement for Reproductive Health, Reproductive Rights, and Reproductive Justice' (Asian Communities for Reproductive Justice 2005) <<https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf>> accessed 7 June 2020; 'Reproductive Justice' (n 90). See also Loretta J Ross and Rickie Solinger, *Reproductive Justice: An Introduction* (University of California Press 2017) 10–17; Sarah London, 'Reproductive Justice: Developing a Lawyering Model' (2011) 13 Berkeley J.Afr.Am.L. & Pol'y 71, 76; 'What We Do: Reproductive Justice' (*National Latina Institute for Reproductive Health*) <www.latinainstitute.org/en/what-we-do/reproductive-justice> accessed 7 June 2020; Courtney Chappell, 'Reclaiming Choice, Broadening the Movement: Sexual and Reproductive Justice and Asian Pacific American Women, A National Agenda for Action' (National Asian Pacific American Women's Forum 2005) <www.napawf.org/uploads/1/1/4/9/114909119/napawf_reclaiming_choice.pdf> accessed 7 June 2020; Marsha Jones, 'Executive Report, The State of Black Women In Texas: Maternal Mortality' (The Afiya Center 2019) 2 <<https://static1.squarespace.com/static/5c6a3f48c46f6d34a488a0e9/t/5cdc9e64e4966b830c87eff4/1557962364157/State+of+Black+Women2019.pdf>> accessed 7 June 2020; 'Our Work' (*Black Mamas Matter Alliance*) <<https://blackmamasmatter.org/our-work/>> accessed 7 June 2020.

⁹² Ross and Solinger (n 91) xxi. See also Soohoo and Stolz (n 30) 497–98.

⁹³ *ibid.* See also West (n 88).

⁹⁴ See e.g. 'Black Maternal Health Week' (*Black Mamas Matter Alliance*) <<https://blackmamasmatter.org/bmhw/>> accessed 7 June 2020; 'Learning from Nuestro Texas: A Community-Centered Human Rights Campaign for Reproductive Justice in the Rio Grande Valley' (Center for Reproductive Rights and National Latina Institute for Reproductive Health 2018) <www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Learning-From-Nuestro-Texas.pdf> accessed 7 June 2020.

⁹⁵ Louis Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1955) 89 AJIL 341, 342–48.

⁹⁶ See e.g. *Roper v Simmons*, 543 US 551 (2005) (Scalia, dissenting).

and dealing with novel legal issues. A wide body of scholarship explores this practice⁹⁷ and associated hesitance and critique.⁹⁸

For example, as discussed previously, human rights norms can internalize and advance a more expansive understanding of substantive equality that recognizes the intersection of gender, race, and poverty. In contrast, U.S. constitutional jurisprudence has failed to extend heightened scrutiny to poverty-based claims.⁹⁹ Scholars note that rigorous application of CEDAW to the U.S. context would provide a framework for courts to articulate affirmative reproductive rights protections, in order to truly secure women's equality.¹⁰⁰ Such an analysis would, for example, lend support to a constitutional norm that recognizes a government duty to provide financial assistance for abortion care for people living in poverty.¹⁰¹

In addition to offering a more robust analysis and understanding of substantive equality, the human rights framework could strengthen courts' evaluation of liberty interests, especially in the context of determining whether abortion restrictions impose an 'undue burden' for people who experience financial disadvantage. Here, the right to life and the right to be free from inhuman, cruel, and degrading treatment can be instructive. The UN Human Rights Committee recently affirmed that the right to life requires governments to ensure access to essential goods and services such as food, water, shelter, and health care.¹⁰² The right to life includes the right to reproductive health care and autonomy, including access to quality prenatal health care and safe, legal, and effective access to abortion.¹⁰³ Consistent with the norm of non-retrogression, the right to life prohibits governments from introducing new barriers to abortion and also requires them to remove existing barriers that deny effective access to safe and legal abortion.¹⁰⁴ In addition, the Human Rights Committee recently affirmed that the denial of legal abortion services can amount to cruel, inhuman, and degrading treatment.¹⁰⁵ Abortion restrictions and bans recently imposed by U.S. states represent a significant rollback in the right to access safe and legal abortion. A human rights analysis drawing on the right to life, the right to freedom from cruel, inhuman, and degrading treatment, and the principle of non-retrogression would help to highlight how these restrictions, such as those requiring people to travel far distances to a clinic and either make a return trip or stay overnight, are

⁹⁷ Sarah H Cleveland, 'Our International Constitution' (2006) 31 *Yale J.Int'l L.* 1, 11–88; Martha F Davis, 'The Spirit of Our Times: State Constitutions and International Human Rights' (2006) 30 *N.Y.U.Rev.L. & Soc.Change* 359, 368–89; Honorable Margaret H Marshall, "'Wise Parents Do Not Hesitate to Learn from their Children": Interpreting State Constitutions in an Age of Global Jurisprudence' (2004) 79 *N.Y.U.L.Rev.* 1633, 1639–43; Cathy Hollenberg Serrette, 'Invoking International Human Rights Law in Litigation: A Maryland Judge's Perspective' (2011) 45 *Clearinghouse Rev.* 238, 239–42; I India Thusi and Martha F Davis, 'Human Rights in State Courts' (Northeastern University School of Law, Program on Human Rights in the Global Economy and The Opportunity Agenda 2016) <www.northeastern.edu/law/pdfs/academics/phrge/state-courts-2016.pdf> accessed 7 June 2020.

⁹⁸ See e.g. Frank I Michelman, 'Integrity-Anxiety?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2009) 241; Roger P Alford, 'Misusing International Sources to Interpret the Constitution' (2004) 98 *AJIL* 57.

⁹⁹ See n 67–68 and accompanying text.

¹⁰⁰ Stark (n 29) 297–303.

¹⁰¹ *ibid.*

¹⁰² 'General Comment 36' (n 11) para 26.

¹⁰³ *ibid* para 8.

¹⁰⁴ *ibid.*

¹⁰⁵ *Whelan v Ireland* (n 14) paras 7.5–7.7, 8; *Mellet v Ireland* (n 14) paras 7.4–7.6, 8.

counter to government's affirmative obligations and also have direct and particular impact on access to abortion care for people in marginalized communities, including people living in poverty, as well as women of color, immigrants, people with disabilities, and other people experiencing multiple and intersecting forms of discrimination. Indeed, the Human Rights Committee recently acknowledged the human rights violations that stem from the financial, social, and health-related burdens and hardships that are placed on women forced to travel far from home in order to obtain abortion care.¹⁰⁶

IV. CONCLUSION AND IMPLICATIONS FOR FUTURE RESEARCH

The human rights framework holds potential for shaping jurisprudence to ensure a more holistic approach to protecting access to abortion for all people. Within the United States, judges and advocates can integrate human rights principles into their constitutional analysis to develop an understanding of U.S. constitutional principles that recognizes the interlinkages between reproductive rights and other rights and more fully acknowledges and rectifies the impact of abortion restrictions and barriers on access to abortion for people living in poverty, in particular.¹⁰⁷ By embedding human rights in this way and over the long term, courts can build more robust legal guarantees to ensure reproductive autonomy and health for people living in poverty.

In order to more fully understand this potential, both in the United States and globally, future research will need to explore and test specific strategies for effective integration of human rights principles into litigation advocacy. This might include case studies investigating the synergies between contemporaneous reproductive justice advocacy and litigation campaigns within one jurisdiction.¹⁰⁸ Research should also explore strategies to ensure that policy wins are implemented and that rights are fully realized in practice.¹⁰⁹ And, importantly, future research should build on efforts exploring best practices to ensure that advocacy strategies seeking to advance reproductive rights as human rights both center and are led by the communities that are most impacted.¹¹⁰

¹⁰⁶ *ibid.*

¹⁰⁷ See e.g. Brief *Amici Curiae* of Organizations and Individuals Dedicated to the Fight for Reproductive Justice—Women With a Vision et al.—in Support of Petitioners *June Medical Services LLC v Russo* (2019) (Nos. 18-1323 and 18-1460) <https://reproductiverights.org/sites/default/files/documents/Reproductive%20Justice%20Advocates_1.pdf> accessed 7 June 2020.

¹⁰⁸ See e.g. 'Learning from Nuestro Texas' (n 94) 18.

¹⁰⁹ Rachel Rebouché, 'Reproducing Rights' (n 40) 603.

¹¹⁰ 'Lawyering for Reproductive Justice: Convening Report' (if/when/how 2016) <www.ifwhenhow.org/resources/lawyering-for-rj-convening-report/> accessed 7 June 2020; Gemma Donofrio, 'Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement' (2018) 42 N.Y.U.Rev.L. & Soc. Change 221, 251–52.