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Beyond a Beautiful Fraud: Using a Human Rights Framework to Realize the Promise of Democracy

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BEYOND A BEAUTIFUL FRAUD: USING A HUMAN RIGHTS FRAMEWORK TO REALIZE THE PROMISE OF DEMOCRACY

"[Politics] is a beautiful fraud that has been imposed on the people for years . . . ."
-The late Honorable Shirley Chisholm[1]

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INTRODUCTION

A democracy dominated by a "majority" is bound to fail most of its people. The experiment of democracy as a political movement in the United States is testament that participation is not enough; inclusion and equality are central. If this is so, then the "mainstream"[3] reproductive rights movement in the United States, the movement that for decades has focused on "decisional" privacy rights centered around abortion, has failed women of color,[4] poor women,[5] and

1. SHIRLEY CHISHOLM, UNBOUGHT AND UNBOSSED 37 (1970).
2. The opinions and views expressed are the author's own and are made in her individual capacity, and not in her capacity as a congressional employee. The author wishes to thank Professor Julia Ernst for her support and inspiration. The author also wishes to thank the Women's Law and Public Policy Fellowship Program and the National Asian and Pacific American Women's Forum (NAPAWF). Thanks to Kiran Ahuja and Courtney Chappell; wishing you each a daily dose of outrage at injustice.
3. Throughout this article, the term '"mainstream" reproductive rights movement' is used to refer to the popular movement in the United States centered around securing the legal right to abortion.
4. While women of color is a broad term that could refer to anyone of non-Caucasian descent, in the context of this article, it refers to ethnic "minorities" most prominent in the United States, including African American Women, Asian and Pacific Islander women (and the related ethnic sub-groups), Latina women, and Native American women. *See* APRYL CLARK ET AL., JACOBS INSTITUTE OF WOMEN'S HEALTH, HEALTH DISPUTES AMONG U.S. WOMEN OF COLOR: AN OVERVIEW 2 (2012), *available at* http://www.jiwh.org/attachments/Health%20Disparities%20Overview.pdf.
5. According to the 2012 Poverty Guidelines for the 48 Contiguous States and the District of Columbia, for a family of 3, an annual income of $19,090 is considered the poverty guideline. Annual Update of the HHS Poverty Guidelines, 77 Fed. Reg. 4034, 4035 (Jan. 26, 2012), *available at* http://aspe.hhs.gov/poverty/12poverty.shtml. Low-income women are considered to be within the federal poverty threshold guidelines (varies by family size and annual income).

immigrant women,[6] whose concerns have not been addressed or embraced by a mainstream agenda formulated by mostly white, middle class, educated, U.S.-born women. Known as the mainstream reproductive rights movement, the Pro-Choice movement, as well as the reproductive freedom movement, among other terms, this movement has historically focused on an individual woman's autonomy and efficacy to make her own choices about her body and child-bearing capacity, primarily using litigation as the chief strategy to secure these individual or private reproductive rights, such as the right to a legal abortion.[7] While women of color, poor women, and immigrant women have undoubtedly benefitted from some of the mainstream movement's victories, such as securing the right to legal abortion,[8] their ability to fully realize these victories is thwarted by a movement that has not acknowledged or advocated for the basic human rights essential to their ability to exercise reproductive freedom.[9] These rights include access to regular affordable reproductive health care, the right to decide the number and spacing of children, access to linguistically and culturally appropriate services, freedom from coercive contraception, toxin-free workplaces, and clean living environments to name a few.[10]

The narrow focus of the mainstream reproductive rights movement is what scholar Dorothy Roberts deems a focus on "liberty" rather

6. In the context of this article, the term "immigrant women" refers to non-U.S. born immigrant women now residing in the United States as undocumented or new legal citizens who must wait for at least five years before accessing federal "means-tested" benefits in the United States per the Personal Responsibility and Work Opportunity Act of 1996 (PRWORA). Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (1996). Passage of PRWORA was a victory for the Conservative Movement's Contract with America and was championed by Rep. E. Clay Shaw, Jr. (R-FL) who attributed immigration to availability of welfare. *See* Richard Lacayo, *Down on the Downtrodden*, TIME, Dec. 14, 1994, at 32–33.

7. *See* Loretta Ross, *Understanding Reproductive Justice*, SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, http://www.trustblackwomen.org/our-work/what-is-reproductive-justice/9-what-is-reproductive-justice?format=pdf (last updated Mar. 2011). "Reproductive Rights is a legal and advocacy-based model that serves to protect an individual woman's legal right to reproductive health care services." *Id.* at 6. Further explaining, "[i]t addresses the lack of legal protection or enforcement of laws implemented to protect an individual woman's legal right to reproductive health care services." *Id.* at 6-7.

8. *See* Roe v. Wade, 410 U.S. 113 (1973).

9. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 295 (Vintage Books 1999) (1997).

10. *See generally Reproductive Freedom*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/reproductive-freedom (last visited Jan. 11, 2013).

than equality.[11] She writes, "The dominant view of liberty reserves most of its protection only for the most privileged members of society."[12] Within this paradigm, the mainstream movement has focused on "decisional" rights, such as the right to access abortion, but has not addressed the social injustices[13] that impair the ability of women of color, poor women, and immigrant women to exercise those rights, such as anti-immigrant policies, welfare caps on children, and racist stereotypes of black motherhood.[14] Scholar Lance Gable also notes, "[T]he reproductive rights model . . .—and the jurisprudential precedents it often follows—centers its analysis on rights protecting the decisional autonomy of women in matters of reproduction."[15]

This is not to assert that decisional rights, such as access to safe abortions, are not elemental; however, those rights have little resonance when they are impacted by unjust social structures that thwart the exercise of those rights for so many women in the United States.[16] The exclusion of women of color, poor women, and immigrant women from the mainstream movement has resulted in separate advocacy efforts with women of color groups, immigrant women's groups, and low-income women's groups advocating for access and acknowledgement outside of the mainstream movement's continued emphasis on decisions about abortion as the full realization of reproductive health.[17]

For women of color, immigrant women, and low-income women, the challenge has been advocating within a myriad of what scholar

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11. ROBERTS, *supra* note 9, at 294.
12. *Id.*

> This approach superimposes liberty on an already unjust social structure . . . . Liberty protects all citizens' choices from the most direct and egregious abuses of government power, but it does nothing to dismantle the social arrangements that make it impossible for some people to make a choice in the first place. Liberty guards against government intrusion; it does not guarantee social justice.

Id.

13. *See* Ross, *supra* note 7, at 4.
14. *Id.* at 297.
15. Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957, 960 (2010).
16. *See* Ross, *supra* note 7, at 7 (explaining a major fault of the "choice" or privacy-based approach: "Choice does not speak to the complexities of women's lives. It excludes the lack of access women face and the depth of women's experiences").
17. *See* ROBERTS, *supra* note 9, at 297–98.

Patricia Hill-Collins calls "interlocking systems of oppression"[18] that cannot be neatly divorced from the fight for reproductive health and freedom, such as racial discrimination, legalization for immigrants, and affordable health care and safe housing for the low-income. The need for women of color, immigrant women, and low-income women to advocate for broader social justice issues, along with reproductive health issues has resulted in a separate movement, termed the "reproductive justice movement," which has contextualized the quest for attainment of reproductive health and freedom within the quest for other social justice goals. The term "reproductive justice" is inherently broad and encompasses efforts to address the intersection of reproductive health and racial justice issues, economic justice issues, and immigrant rights issues.[19] As Loretta Ross, former head of the SisterSong Women of Color Reproductive Justice Collective notes:

> Reproductive justice is a positive approach that links sexuality, health, and human rights to social justice movements by placing abortion and reproductive health issues in the larger context of the well-being and health of women, families, and communities because reproductive justice seamlessly integrates these individual and group human rights particularly important to marginalized communities.[20]

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18. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 225 (1991). "The significance of seeing race, class, and gender as interlocking systems of oppression is that such an approach fosters a paradigmatic shift of thinking inclusively about other oppressions, such as age, sexual orientation, religion, and ethnicity." *Id.* Collins also points out, "Domination operates by seducing, pressuring, or forcing African-American women and members of subordinated groups to replace individual and cultural ways of knowing with the dominant group's specialized thought." *Id.* at 229. "Women of color in the U.S. negotiate their reproductive lives in a system that combines various interlocking forms of oppression. . . . Our ability to control what happens to our bodies is constantly challenged by poverty, racism, environmental degradation, sexism, homophobia, and injustice in the United States.'" JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE 4 (2004).

19. *See* Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL'Y & L. 59, 68 (2005).

20. Ross, *supra* note 7, at 2. "Reproductive justice addresses issues of population control, bodily self-determination, immigrants' rights, economic and environmental justice, sovereignty, and militarism, and criminal injustices that limit individual human rights because of group or community oppressions." *Id.* at 2.

The term reproductive justice, therefore, goes beyond the public-private concerns of the traditional reproductive rights. As Ross notes, "In short, reproductive justice is an intersectional theoretical analysis defined by the human rights framework applicable to everyone, and based upon concepts of intersectionality . . . ."[21]

This article argues that a human rights framework is a more fitting framework to unite the goals of the mainstream reproductive rights movement and the reproductive justice movement because the human rights framework acknowledges and encompasses the myriad social justice issues important to all women, not just the few in the "majority." Part I looks at the history and development of the mainstream reproductive rights movement in the United States. The legal battles and victories of the mainstream movement will be explored through an analysis of their impact on and exclusion of women of color, immigrant women, and low-income women.[22] Part II examines reproductive health issues central to these women, and the ways in which these issues have been absent from the mainstream reproductive rights agenda. The resulting effects of this exclusion are examined.[23] Finally, this section highlights the reproductive justice movement that emerged among women of color, immigrant women, and low-income women.[24] Part III will explore a human rights framework as a more fitting paradigm for the full realization of reproductive justice, arguing that such a framework is necessary to encompass the issues important to women of color, immigrant women, and low-income women. Human rights instruments and how they address reproductive justice will be examined in Part III. Part IV explores the benefits and pitfalls of applying the human rights framework in the United States. The article concludes by emphasizing that a human rights framework offers the most promise for shaping a reproductive justice agenda with the potential to successfully address and remedy the social inequalities, concerns, and challenges faced by women of color, immigrant women, and low-income women in the United States.

21. Ross, *supra* note 7, at 3.
22. *See infra* Part I.
23. *See infra* Part II.
24. *See infra* Part II.

I. THE TYRANNY OF THE MAJORITY: THE "MAINSTREAM" REPRODUCTIVE RIGHTS MOVEMENT IN THE UNITED STATES.

Like other political movements in the United States, the agenda of the reproductive rights movement has been largely proscribed by the "tyranny of the majority." The mainstream movement for reproductive rights has centered mainly on decisional rights and privacy rights, such as the right to abortion and contraception,[25] free from state intrusion.[26] Scholar Catharine MacKinnon observes the implications of this public–private split, analyzing the underlying assumptions of the public–private argument; the first being that women control their sexuality in the private sphere.[27] MacKinnon points out: "[A]bortion policy has never been explicitly approached in the context of how women get pregnant, that is, as a consequence of intercourse under conditions of gender inequality."[28] MacKinnon goes on to argue: "So women got abortion as a private privilege, not as a public right.... Abortion was not decriminalized; it was legalized."[29] This statement could not ring more true for poor women, women of color, and immigrant women, all of whom face daily assaults on their right to motherhood with stereotypes and stigmas imposed on their childbearing.[30]

Again, the importance of the legalization of abortion should not be minimized, but the public–private distinction is instrumental in realizing that this distinction provides full access to abortion to those who are privileged, not women who inhabit the public sphere of government authority or observation.[31] In addition, the focus on abortion and contraception to the exclusion of other issues, such as access to reproductive health facilities, high costs of contraception, language access, cultural competency, and lack of health insurance, has resulted in the virtual alienation[32] of many women, mainly

25. "By shaping reproductive rights around abortion and contraception, the current movement ignores the history and unique experiences of African American women." Melanie M. Lee, Comment, *Defining the Agenda: A New Struggle for African-American Women in the Fight for Reproductive Self-Determination*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 87, 88 (2000).

26. *See* Hooton, *supra* note 19, at 62–63.

27. Catharine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, *in* WOMEN AND THE LAW 663, 663, 666 (3d ed. 2004).

28. *Id.* at 664.

29. *Id.* at 667.

30. *See* SILLIMAN ET AL., *supra* note 18, at 6–7.

31. *See* MacKinnon, *supra* note 27, at 666–68.

32. Stereotypes about women of color have also contributed to the marginalization of women of color from the mainstream reproductive rights movement. For instance,

women of color, from the mainstream reproductive rights movement.[33] In fact, "'[t]his emphasis on individual choice . . . obscures the social context in which individuals make choices, and discounts the ways in which the state regulates populations, disciplines individual bodies, and exercises control over sexuality, gender, and reproduction.'"[34]

From its inception, the reproductive rights movement in the United States, an offshoot of the early women's rights movement, was white-women led and white-women focused.[35] In fact, "[c]ontraception from its conception was viewed as a means to improve the liberty of white women."[36] Contraception was limited by Congress' amendment of the Comstock Act in 1873, which made it a crime to sell contraceptives through interstate commerce or send them through the U.S. mail.[37] Several states passed laws limiting contraceptive use, even for married couples.[38] Margaret Sanger, one of the early leaders of the reproductive rights movement, viewed contraception as an essential element to women gaining freedom and equality in society.[39] However, her vision did not extend to women of color.[40]

"stereotypes of the APA [Asian Pacific American] community as the 'model minority' [and] stereotypes of Asian women and sexual behavior . . . prevent APA women from fully accessing reproductive health care services" and contribute to the myth that Asian women do not suffer poor reproductive health outcomes. *Reproductive Health Care and APA Women: A Fact Sheet*, NAT'L ASIAN PAC. AM. WOMEN'S FORUM (NAPAWF), (Feb. 2005), http://napawf.org/resources/archives (accessed through site archive by clicking the "Reproductive Healthcare and API Women Factsheet" link under the "Reproductive Justice" subheading). This misconception results in little attention being directed toward the reproductive health needs of Asian women, who are perceived as being healthy and wealthy, and therefore not in need of attention to their reproductive rights. *See id.*

33. "[C]riticism suggests that the mainstream movement is too narrowly focused on keeping abortion legal rather than ensuring that women have the ability to access the full range of reproductive health care services free from governmental coercion. . . . For women of color, the range of reproductive health issues extends well beyond abortion." Hooton, *supra* note 19, at 67–68.

34. SILLIMAN ET AL., *supra* note 18, at 5 (quoting Jael Silliman, *Introduction* to POLICING THE NATIONAL BODY ix, xi (Jael Silliman & Anannya Bhattacharjee eds., 2002)).

35. Lee, *supra* note 25, at 90–91.

36. *Id.* at 93.

37. SUPREME COURT HISTORICAL SOC'Y, SUPREME COURT DECISIONS AND WOMEN'S RIGHTS: MILESTONES TO EQUALITY 182–83 (Clare Cushman ed., 2001) [hereinafter SUPREME COURT DECISIONS AND WOMEN'S RIGHTS].

38. *Id.* at 183. In Connecticut, a criminal statute dating from 1879 expressly forbade the use or prescription of any form of contraception, even for married people. *Id.*

39. Lee, *supra* note 25, at 93. "According to Sanger, 'no woman can call herself free who does not own and control her own body. No woman can call herself free until she can choose consciously whether she will or will not be a mother.'" *Id.*

In fact, Sanger was a supporter of the eugenics movement and advocated for contraception as a way to gain "more children from the fit, less from the unfit."[41] Through her organization,[42] she recruited African American ministers to lead birth control committees, effectively using contraception to promote genocide in the African American community.[43] Eugenics supporters thought it their duty to preserve the "pure" white race and rid the country of undesirable populations who might procreate.[44] In addition to contraception, Eugenics supporters used a variety of tactics to discourage reproduction among "undesirables," and in fact, "[s]upporters advocated other 'negative' eugenics methods, including involuntary confinement and immigration restrictions to prevent 'undesirable' people from reproducing."[45] Concurrently, a "positive" eugenics movement encouraged white women to reproduce "worthy" stock.[46]

In fact, early Supreme Court decisions regarding reproductive rights reflected this eugenics approach. Early decisions centered on sterilization and contraception as a way to prevent less-desirables from reproducing.[47] Scholar Dorothy Roberts notes that "[t]he salient feature of eugenic sterilization laws is their brutal imposition of society's restrictive norms for childbearing."[48] Thus, these sterilization laws and the cases enforcing them were not mere exercises in legal reasoning, but impositions of social judgments on who was worthy to procreate.[49]

Early United States legal jurisprudence reflects this eugenics-influenced attitude and the assumptions underlying it, namely,

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40. *Id.* at 93–94.
41. *Id.* at 94.
42. Sanger's organization, the American Birth Control League was founded in Brooklyn, New York, in 1923. *History & Successes*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/about-us/who-we-are/history-and-successes.htm#Sanger (last visited November 19, 2012). In 1942, it joined with the Birth Control Clinical Research Bureau (also founded by Sanger) to form the Planned Parenthood Federation of America. *Id.*; *Our History*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/heartland/history-29880.htm (last visited Jan. 11, 2013).
43. *Id.*
44. *See* Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. & POL'Y REV. 385, 393 (2008).
45. *Id.*
46. *See id.* ("Neither movement believed women were capable of making their own reproductive decisions, and their distrust was grounded in the advancement of one ultimate goal: to protect the political and economic interest of 'old stock' elite.").
47. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 205–07 (1927).
48. ROBERTS, *supra* note 9, at 306.
49. *See id.*

distinguishing who is worthy to procreate and who is not.[50] In *Buck v. Bell*, the earliest Supreme Court case addressing reproductive rights (albeit indirectly), the Court upheld the forced sterilization of a woman in a mental hospital under the belief that her mental condition would be inherited by her child.[51] This reflected the eugenics belief in racial purity, where the forced sterilization of imbeciles and other less-desirables was upheld and even encouraged.[52] In his infamous opinion, Justice Oliver Wendell Holmes, Jr. proclaimed, "Three generations of imbeciles are enough."[53] However, fifteen years later in *Skinner v. Oklahoma*, the Court found an equal protection violation in the forced vasectomy of a man convicted of theft, citing that criminality was not an inherited trait.[54] Therefore, "less-desirables" found some constitutional protection against forced sterilization.[55] However, as Roberts notes, "When people deemed undeserving of procreation defy their state-prescribed role by bearing children, they are considered enemies of society."[56] These kinds of laws are not mere vestiges of the past; in fact they are still present in modern day prosecutions of drug-addicted mothers, as Roberts underscores: "[P]rocreation by those unfit for motherhood becomes a crime—both literally, as in the case of the prosecution of drug-addicted mothers or imposition of Norplant as a condition of probation . . . ."[57] Or, in an egregious case of an immigrant woman who was "accused" of trying to have a child born on American soil so that her child would be an American citizen as reported:[58] In 2006, thirty-two-year-old Zhen Xing Jiang, a Chinese immigrant, arrived at the Immigration and Customs Enforcement Agency for a routine check-in procedure.[59]

50. *See, e.g.*, *Buck*, 274 U.S. at 205–07; *see also* Ross, *supra* note 7, at 4 ("Many of the restrictions on abortion, contraception, scientifically-accurate sex education, and stem cell research are directly related to an unsubtle campaign of positive eugenics to force heterosexual white women to have more babies.").

51. *See id.*

52. *See, e.g.*, *id.*

53. *Id.* at 207.

54. *See* Skinner v. Oklahoma, 316 U.S. 535, 542 (1942).

55. *See id.* at 542–43. However, the forced sterilization of some women of color continued until the late 1970s. "Thousands of Latinas, specifically Puerto Rican, Dominican, and Mexican-American women, suffered from forced or coercive sterilization from the 1950s until the late 1970s. Many of these women were sterilized in public hospitals immediately following childbirth." Hooton, *supra* note 19, at 70.

56. ROBERTS, *supra* note 9, at 306.

57. *Id.* at 306–07.

58. *See generally* Huang, *supra* note 44, at 401–02 (discussing the possible motivations of immigration officials in the Jiang Zhen Xing incident).

59. *See id.* at 401.

When federal agents observed her pregnant condition, they separated her from her husband and informed her that she would be deported immediately and that her children would not be born in this country.[60] Federal agents mishandled Ms. Jiang until bystanders at John F. Kennedy Airport called for medical attention, but it was too late, she miscarried the twins she was carrying.[61] However, these are not cases that mainstream advocates highlight or protest; the women who inhabit the public sphere are somehow seen as culpable because they are poor, they are undocumented immigrants, or they are women of color with all of the accompanying judgments attached.[62] These cases are not within the scope of United States reproductive rights or privacy rights jurisprudence.

The private sphere, in fact, became the focus of the United States reproductive rights movement as the movement established legal precedence.[63] In the late 1960s and early 1970s, the United States Supreme Court's decisions regarding reproductive rights centered on the right to privacy, allowing for access to abortion services and contraception.[64] In 1965, in *Griswold v. Connecticut*, the Court struck down a Connecticut law denying the use or prescription of contraception, stating it infringed on the right to privacy of married persons.[65] In *Eisenstadt v. Baird*, the Court extended this right to contraception to unmarried persons finding that equal protection demanded that unmarried people should have the same rights as married people: "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike."[66] Justice Brennan's impassioned opinion was

60. *See id.* at 401–02.

61. *See id.* "Outraged by her treatment, a community of Asian-American activists and residents in the greater Pennsylvania area launched a campaign to bring national attention to Ms. Jiang's experience. Under increasing public and political pressure, ICE eventually agreed to drop Ms. Jiang's order of deportation." *Id.* at 402.

62. *See generally id.* at 401–02 (explaining the use of stereotypes to vilify immigrant women of color and justify oppressive deportation tactics used against pregnant immigrant women).

63. *See* Lee, *supra* note 25, at 88–89.

64. *See* Griswold v. Connecticut, 381 U.S. 479, 487–88 (1965) (holding that the right to privacy implicit in the Fourteenth Amendment forbids a law prohibiting the use of contraceptives by married couples); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending *Griswold*'s holding to non-married persons); Roe v. Wade, 410 U.S. 113, 164 (1971) (holding that the right of privacy forbids the state from criminalizing abortion in the first trimester of pregnancy).

65. *Griswold*, 381 U.S. at 485–86. "[C]ases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . . Various guarantees create zones of privacy." *Id.* at 484–85.

66. *Eisenstadt*, 405 U.S. at 439.

controversial and it set the stage for the ground-breaking decision in *Roe v. Wade* one year later.[67]

The 1973 decision of *Roe v. Wade* stands as the seminal victory for the mainstream reproductive rights movement in the United States.[68] It reflects the individualistic, privacy-based focus of the mainstream movement.[69] In fact, the "[m]ainstream feminist theoretical messaging behind the movement has [since] become rooted in a traditional, individual rights-based framework, which is consistent with how the Supreme Court has interpreted reproductive rights under the Constitution."[70] *Roe* secured the right for women to determine whether or not to have an abortion during their first and second trimesters.[71] The case was the first time that the Court recognized reproductive choice as a fundamental right.[72] The Court ruled that, in the third trimester, the state can regulate or prohibit abortion with an exception for cases in which an abortion is necessary to preserve a woman's life, because "the Court found that the state's interest in the potential life is very strong, but not stronger than the existing life of the mother."[73] Most importantly, *Roe* stands for the argument that "a fetus is not a person entitled to constitutional

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67. *Id.* at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis added)); *see also Roe*, 410 U.S. at 152–53.

68. Lee, *supra* note 25, at 89.

> Prior to *Roe*, the illegality of abortion made its access a real, private, and dangerous dilemma. Deaths and causalities resulting from illegal abortions shaped the abortion controversy for women. Many women joined in the reproductive rights movement because of direct or indirect experiences with illegal abortions. The right to open, accessible and free abortion became *paramount* for most feminists in the fight for reproductive rights.

Id.

69. Hooton, *supra* note 19, at 61–62.

70. *Id.* at 62.

71. *See Roe*, 410 U.S. at 162–63 (delineating the boundaries of the mother's privacy-based constitutional right to an abortion and the State's interest in protecting the potentiality of human life).

72. Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 753 (2004) ("[R]eproductive choice was recognized as a fundamental right, entitled to the same protection as guarantees of religious freedom and free speech, and afforded the highest standard of constitutional protection under the doctrine of strict scrutiny.").

73. Elisabeth H. Sperow, *Redefining Child Under the State Children's Health Insurance Program: Capable of Repetition, Yet Evading Results*, 12 AM. U. J. GENDER SOC. POL'Y & L. 137, 147 (2004).

protections."[74] Later cases further solidified the right to abortion by striking down laws that limited the right by requiring parental or spousal consent.[75]

This precedent was chipped away by *Planned Parenthood v. Casey*, a case in which the Court abandoned *Roe*'s trimester approach and substituted an "undue burden" test.[76] The Court also abandoned the high strict scrutiny standard used to review violations of the right to abortion under *Roe*.[77] The undue burden test allows states to regulate abortion prior to viability as long as they do not place an undue burden on women's right to choose.[78] Despite this significant step away from *Roe*'s precedent, the *Casey* Court still upheld *Roe*'s holding that a fetus was not a person.[79]

The precedent of *Roe* has been eroded by subsequent Supreme Court decisions denying abortion funding and hospital access to poor women.[80] In the 1977 case of *Maher v. Roe*, the Court upheld a Connecticut law that barred state Medicaid assistance for abortions in the first trimester of pregnancy unless the abortion was "medically necessary" to protect the woman's physical or mental health.[81] This signaled the new strategy for anti-choice advocates: to undermine *Roe* by waging legal assaults on the rights of poor women, who often depended on government-funded public clinics to access abortion and other reproductive health services.[82] Scholars from the Center for

74. *Id.*

75. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 37, at 193. *E.g.*, Bellotti v. Baird, 443 U.S. 622, 647, 651 (1979) (striking down a parental notification law); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 62, 71–74 (1976), (striking down a spousal consent provision by a 6-3 vote and invalidating a parental consent provision by a 5-4 vote). *But cf.* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 508, 519–21 (1990) (upholding a parental notification containing a judicial bypass by which a minor could obtain the permission of a judge to proceed with an abortion if it was determined by "clear and convincing evidence" that the procedure was in the minor's best interest and the minor was deemed mature enough to make such a decision).

76. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873, 876 (1992).

77. *Id.* at 878 ("Unless it [places a substantial obstacle on a women's] right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.").

78. *Id.* at 877–78; Hooton, *supra* note 19, at 63.

79. *Casey*, 505 U.S. at 877–78.

80. Lee, *supra* note 25, at 97.

81. Maher v. Roe, 432 U.S. 464, 479, 466 (1977). Justice Brennan stated that the decision reflected "a distressing insensitivity to the plight of impoverished pregnant women." *Id.* at 483 (Brennan, J., dissenting).

82. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 37, at 191–92; Chloe Williams, Safe Choices: An Examination of Contraceptive Choices of the Patient Population of Planned Parenthood of Central Ohio 10–11 (Jan. 1, 2010) (unpublished

Reproductive Rights in New York commented on this approach, "[A]bortion opponents have largely turned to more incremental tactics to erode women's ability to exercise their right to abortion. For example, they espouse restrictions primarily affecting those who are least likely to be able to exercise the franchise to have a voice in government, such as low-income women . . . ."[83] This strategy gained further support in *Harris v. McRae*, a case in which the Court upheld the federal Hyde Amendment, a provision prohibiting state use of federal Medicaid funds to perform abortions, unless it was necessary to save the life of the mother or in the cases of rape or incest.[84] The *Harris* Court found that the Amendment did not infringe on a woman's right to privacy by denying her an abortion, even if her health was at stake.[85] The Hyde Amendment was followed by several other restrictions on abortion funding for women in the United States; subsequent legislation and appropriations have limited "funding for abortions for women in federal prisons, low-income women in the District of Columbia, women serving in the Peace Corps, Native American women, and teenagers participating in the State Child Health Insurance Plan."[86] Another regulation, a 1988 federal regulation known as the "domestic gag rule," prohibited any abortion counseling in family-planning clinics receiving federal funds under Title X, a provision of the Public Health Service Act.[87] The Court upheld this regulation in *Rust v. Sullivan*, in an opinion led by the Reagan-appointed Chief Justice Rehnquist.[88] However, this domestic gag rule was later revoked by the Clinton administration in 2000.[89]

In 1989, *Webster v. Reproductive Health Services*, a case which concerned a law that prohibited state employees from performing abortions and banned abortions at public facilities, the Court upheld these restrictions and declared that life begins at conception.[90] The *Webster* opinion contained no discussion of the privacy right.[91] "In

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Master's thesis, Wright State University) (on file with Master of Public Health Program at CORE Scholar, Wright State University).

83. Ernst et al., *supra* note 72, at 754.
84. Harris v. McRae, 448 U.S. 297, 326–27 (1980).
85. *See id.*
86. Ernst et al., *supra* note 72, at 766.
87. *See* SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 37, at 192.
88. Rust v. Sullivan, 500 U.S. 173 (1991); SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 37, at 192.
89. Ernst et al., *supra* note 72, at 768.
90. Webster v. Reprod. Health. Servs., 492 U.S. 490, 499–501 (1989).
91. Lee, *supra* note 25, at 98.

effect, the Court transformed abortion from a privacy right into a privilege and laid the foundation for the practical overturning of *Roe*. The Court returned the abortion right to the list of luxuries enjoyed only by wealthy, privileged women."[92]

With the appointments of Ruth Bader Ginsburg and Stephen Breyer to the Court, the choice movement gained two critical supporters on the Court.[93] In *Stenberg v. Carhart*, the Court struck down a Nebraska partial-abortion ban and left it up to physicians to make the choice as to what procedures would be healthiest and safest for their patients.[94] This was a victory for choice advocates, and for physicians. It acknowledged that physicians, and not the courts, should make decisions about what options are best for their patients.[95]

Even with pro-choice justices on the bench and the legal advocacy of reproductive rights activists, the United States reproductive rights jurisprudence has remained narrow in its focus on abortion and decisional rights. The aforementioned and other United States reproductive rights cases signify a failure of United States courts to even address reproductive rights as fundamental human rights. In fact, "reproductive rights jurisprudence has rarely invoked explicitly international human rights obligations, instead favoring the use of constitutional arguments to challenge limitations on reproductive rights."[96] While United States courts have seldom referred to international instruments in deciding domestic cases, to do so in the context of reproductive health would perhaps lead to outcomes more cognizant of the needs of women of color, immigrant women, and low-income women to fully realize reproductive health and justice in the United States.

The focus of the mainstream movement on litigation[97] begs the question, Why has the movement undertaken a largely litigation-based strategy? Perhaps one reason is that this strategy has been largely successful in securing reproductive choice and autonomy, such as in the instance of legalizing abortion. Like the preceding civil rights movement, the reproductive rights movement has achieved monumental victories in the United States courts. However, for women of color, immigrant women, and poor women, whose

92. *Id.*

93. SUPREME COURT DECISIONS AND WOMEN'S RIGHTS, *supra* note 37, at 200.

94. Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000).

95. *Id.* at 937–38.

96. Gable, *supra* note 15, at 972.

97. *See* Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 CARDOZO J.L. & GENDER 477, 440 (2009). "The mainstream reproductive rights movement has focused primarily on challenging legislation that restricts abortion provision." *Id.*

reproductive health issues are not predicated on choice, but on more foundational issues, such as access to health care, litigation has its limitations. For instance, legalizing abortion does not ensure that a poor woman can afford an abortion, nor has it resulted in overturning restrictive legislation like the Hyde Amendment, which impacts poor Medicaid recipients. In addition, accessing the United States legal system takes time, money, and resources that many vulnerable women do not have access to.

The marginalization of poor women, women of color, and immigrant women from the mainstream movement does not mean that these women have not been active within the mainstream movement, nor does it deny the history of the distinct movements that have arisen out of these communities.

A. Mapping the Margins[98]: Women of Color

Issues impacting women of color have largely been excluded from the mainstream reproductive rights agenda. Many reproductive rights advocates fail to see how the legacy of racism in communities of color has impacted the full realization of reproductive freedom for women of color, low-income women, and immigrant women. As one scholar notes:

> Women of color have criticized the movement for not fully acknowledging the historical role that race has played in the birth control movement in the United States and abroad. These feminists argue that for women of color, the line between helping women control their reproductive lives and coercing them to reduce their number of children has never been very clear. Not enough attention has been paid to the history of coercive sterilization and contraceptive testing, or the current use of long-term contraception methods, all of which disparately affect communities of color.[99]

For instance, the health disparities that women of color suffer due to lack of access to reproductive health resources, the dearth of research on the specific reproductive issues impacting women of color, and the lack of resources dedicated to assisting women of color

98. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241 (1990).

99. Hooton, *supra* note 19, at 68.

in linguistically and culturally appropriate ways have not been addressed by the mainstream movement.[100]

In fact, the persistence of these issues is illustrative of the fact that these issues have not been the focus of the mainstream movement: "The difficulties women of color confront in exercising their rights and securing basic reproductive health care illustrate how the mainstream reproductive rights movement may not be effectively addressing the reproductive health needs of communities of color."[101] However, for women of color, reproductive health issues are intimately tied to other issues related to identity. For instance, for Latinas, issues such as "lack of health insurance, cultural and linguistic barriers, high rates of poverty, immigration status, unequal treatment by providers, and lack of information, all contribute to the reproductive health [status of] Latinas." [102] A "choice-only" approach does not accommodate these issues.[103] In fact, "women of color argue that pro-choice messaging does not resonate with certain communities of color because many women of color have never had real choices."[104] As activist Loretta Ross notes, "Choice is an individual concept that does not address the social problems that prohibit women from exercising their rights. Unplanned pregnancies and poverty aren't an individual woman's problem[s]."[105] For instance, black women had no autonomy over their reproductive lives during slavery when their wombs were seen as vessels of commerce.[106]

In fact, black women's reproductive rights history has been uniquely shaped by slavery and its resulting legacy. For black women, the struggle for reproductive justice is inextricably linked to the struggles for racial and economic justice. Black women's legitimacy to mother, especially poor black women's legitimacy to mother, is constantly questioned and undermined through policies

100. *Id.*

101. *Id.* at 60. "Women of color disproportionately suffer from inadequate reproductive health care, and, as a result, reproductive health disparities between women of color and white women remain an intractable problem." *Id.*

102. *Id.*

103. *Id.* at 65.

104. *Id.*

104. Ross, *supra* note 7, at 8.

106. Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 81–82 (2005).

and laws that disproportionately impact black women, notably poor black women.[107] As Dr. Khiara Bridges notes,

> [T]he lack of acknowledgement in legal, political, and popular discourse that motherhood is a *legitimate* choice for poor [b]lack women demonstrates that their right to reproduce is disparaged. Further, this censure of poor[,] [b]lack women's fertility ought to be understood not only as a failure of the reproductive rights movement, but also as a matter of racial injustice.[108]

Loretta Ross, long-time National Coordinator of the SisterSong Women of Color Reproductive Health Collective,[109] notes of black women, "[o]ur abortion experiences have been invisible. . . . Our history as slaves has given us a deep understanding of what it means to choose life for ourselves and our children. We made life and death 'choices' in wretched human conditions."[110] In fact, "[p]opulation control during slavery took the form of brutal and coercive efforts to increase African American women's reproduction, with slave owners using rape and forced marriages to achieve this end."[111] Slavery effectively commoditized the wombs of enslaved black women who were left without self-determination over their own reproductive choices.[112] Today, black women, like other women of color, face a myriad of issues impacting their realization of reproductive health, including the legacy of slavery, racial stereotypes about black motherhood and fertility, poverty, and lack of "choice" over their reproductive decisions.[113]

The mainstream movement has failed to acknowledge and encompass the myriad of other social justice issues impacting the reproductive health of women of color, poor women, and immigrant

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107. *See* Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609, 611 (2009).

108. *Id.* "That is, the struggle of poor [b]lack women to have their reproductive choices respected is a struggle for racial equality." *Id.*

109. As of December 31, 2012, Loretta Ross has stepped down as National Coordinator for SisterSong. *A Message from Loretta Ross*, SISTERSONG.NET, http://www.sistersong.net/index.php?option=com_content&view=article&id=159:a-message-from-loretta-ross&catid=4:latest-news&Itemid=64 (last visited Jan. 11, 2013).

110. Loretta Ross, *Raising Our Voices*, *in* FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 139, 139–40 (Marlene Gerber Fried ed., 1990).

111. SILLIMAN ET AL., *supra* note 18, at 7.

112. *See* Crusto, *supra* note 106, at 81–82.

113. *See* Bridges, *supra* note 107, at 609–11.

women. However, for women of color, other interlocking oppressions, such as economic inequalities or racial injustices, are indivisible from the struggle for reproductive freedom. For example, black women have struggled against the tension between the racial justice and the women's rights movements within and without the black community.[114] There has historically been tension in the black community regarding the struggle for women's reproductive rights and the struggle for racial justice.[115] Many in the community have argued that the two struggles are distinct, and the black church has been vocal in opposition to some pro-choice advocacy.[116] This is largely due to the fact that the racial justice and civil rights movements were male-led. Women, while active in the movements, were not visibly designated as leaders of the movements. As one scholar notes, "Many [b]lack feminists have noted that the paradigmatic subject of racial justice movements has been the [b]lack man, while the paradigmatic subject of gender justice movements has been the [w]hite woman."[117] Black women, while inhabiting both movements and struggling for acknowledgement and allegiance in both, have been repeatedly told to "pick sides."[118] However, both the racial justice and reproductive justice movements embody the same goals of autonomy and freedom, without judgments based on stereotype or discrimination. Ross notes the fracture and silence within the black community, centering largely around religious beliefs about abortion, while women negotiate against institutions and opponents who label abortion as "genocide" on the one hand, and delegitimize black motherhood on the other.[119] Many black civil rights activists viewed abortion as a "white women's issue,"[120] and urged black women to focus their attention on the broader racial justice struggle instead of the reproductive rights struggle.

In response, many black reproductive rights advocates have forged a movement that combines, as interconnected, issues of race, reproductive justice, economics, and overall health.[121] In fact, the

114. *See id.* at 611.

115. *See id.*

116. *Id. See generally* Leonard J. Nelson, III, *The Churches and Abortion Law Reform*, 4 J. CHRISTIAN JURISPRUDENCE 29, 39 (1984) (discussing various viewpoints on abortion throughout the Christian churches based on religious beliefs).

117. Bridges, *supra* note 107, at 611.

118. *See* Kimberle Crenshaw, *Demarginlizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152 (1989).

119. *See* Ross, *supra* note 110, at 141.

120. *Id.* at 142.

121. *Id.*

choice-focused approach does not help address the issues of women of color namely because "'[c]hoice' implies a marketplace of options in which women's right to determine what happens to their bodies is legally protected, ignoring the fact that for women of color, economic and institutional constraints often restrict their 'choices.'"[122] This, again, underscores the interrelationship of the issues impacting women of color, namely economic and other institutional constraints.

The mainstream movement has not acknowledged the impact of racial stereotyping on reproductive freedom. The persistence of stereotypes has had a debilitating effect on women of color's exercise of reproductive freedom and the policies and law negatively impacting it. For black women, the stereotypes labeling black women as "wily welfare queens" set out to "milk" the system by having more babies and exploiting government resources have been particularly punitive and pervasive.[123] The treatment of poor black women and the exposure of the judgments and stereotypes that accompany that treatment have been the subject of Dr. Khiara Bridges's research, which has grown out of her observational field experience in public hospitals in New York City.[124] Bridges notes that this treatment begins early in the process, when women seek subsidized prenatal care; "wily patients become *suspected* welfare queens—women whose pregnancies are not read as positive events, but rather are understood as the means that will enable the women to manipulate government systems."[125] She goes on to observe, "the pregnant wily patients at Alpha are treated with the same disdain that society shows for welfare queens."[126] Again, this demonstrates the application of judgments and racial stereotyping that devalue black motherhood, especially for those women inhabiting the public sphere as a result of economic need.[127]

For Asian Pacific American (APA) women, part of the struggle for reproductive justice has been demystifying the "model minority myth," which perpetuates the misperception that APA women do not "suffer from [reproductive] health disparities" or are not disadvantaged by policies negatively impacting access to

122. SILLIMAN ET AL., *supra* note 18, at 5.

123. *See* Bridges, *supra* note 107, at 617–18.

124. *Faculty Profiles: Khiara Bridges*, BOSTON UNIVERSITY, http://www.bu.edu/anthrop/people/faculty/k-bridges/ (last visited Jan. 11, 2013).

125. Bridges, *supra* note 107, at 618–19.

126. *Id.* at 619.

127. *Id.*

reproductive health.[128] Confronting such myths and stereotypes is central to women of color experiencing reproductive freedom. For instance, while APA women may confront the stereotype of the "model minority" or "docile and submissive Asian woman" myths,[129] black women confront the Mammy myth and Sapphire myths[130] (symbolizing both maternalism and promiscuity), Latinas confront the myth of the hot oversexed woman or the immigrant "breeder[],"[131] and so on for respective stereotypes for different ethnicities. These stereotypes are based on misperceptions and false judgments. In fact, APA women suffer from a variety of health disparities and reproductive health injustices, ranging from exposure to toxins and chemicals in unsafe workplaces (such as garment factories in New York and California or in nail salons where the majority of workers are APA women), to unsafe public housing facilities, to unusually high rates of cervical cancer, to lack of access to linguistically and culturally appropriate services.[132] In addition, because the APA population is extremely diverse and comprises approximately 30 ethnic subpopulations with over 200 languages and dialects, it is difficult to obtain research and statistics that properly disaggregate and represent the reproductive health concerns that APA women experience.[133]

Lack of research on the unique reproductive health care needs of women of color contributes to the persistence of the disproportionate reproductive health disparities impacting women of color. For example, for APA women, the dearth of research makes the pervasiveness of the reproductive health disparities APA women

128. *See* COURTNEY CHAPPELL, NAT'L ASIAN PAC. AM. WOMEN'S FORUM, RECLAIMING CHOICE, BROADENING THE MOVEMENT: SEXUAL AND REPRODUCTIVE JUSTICE AND ASIAN PACIFIC AMERICAN WOMEN 12 (2005), *available at* http://napawf.org/wp-content/uploads/2009/working/pdfs/NAPAWF_Reclaiming_Choice.pdf.

129. *Id.* at 12–13.

130. Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 116–19 (1999).

131. Mary Romero, *"Go After the Women": Mothers Against Illegal Aliens' Campaign Against Mexican Immigrant Women and Their Children*, 83 IND. L.J. 1355, 1367 (2008).

132. *See* CHAPPELL, *supra* note 128, at 4, 7, 11–12.

133. *Id.* at 1. "Because of the diversity of the APA population, and the limited research that often represents the APA community as one homogeneous group, it is difficult to generalize about the specific socioeconomic, health, and cultural concerns of APA women." *Id.* "For instance, the rate of cervical cancer among Vietnamese Americans is five times higher than that for white women, representing the highest rate for any racial or ethnic group." *Id.* at 4.

suffer invisible to most mainstream women's health advocates.[134] This lack of information leads to lack of funding and resources directed to address APA women's reproductive health needs. The National Asian Pacific American Women's Forum (NAPAWF), the leading national APA women's organization,[135] notes that "[t]he lack of research generally, gaps in data, and failure of studies to collect data by ethnic subpopulation and immigrant and refugee status can have detrimental consequences for the reproductive health care of APA women and girls."[136] This lack of information impacts not only the public perception and the perception of women's health advocates, but also the perception of reproductive health providers, who as a result, fail to screen APA women for certain diseases (such as cervical cancer, which Vietnamese women have disproportionately high rates of), or sexually transmitted diseases or infections.[137] In addition, providers are not properly trained to address the reproductive health care needs of APA women and APA women are not able to make fully informed decisions regarding their reproductive health care.[138] As a result, according to NAPAWF, "many APA women are left without the information and education necessary to make well-informed decisions about their overall health, including reproductive health, and could forgo routine check-ups, preventive care, and screenings."[139]

For women of color, access to reproductive health care is another significant barrier impacting their overall reproductive health. Studies that have been conducted addressing APA women's health needs, show that APA women suffer from some of the same barriers in accessing reproductive health care as other women of color, most significantly, lack of health insurance coverage. For instance, 2005 estimates showed that approximately 36% of APA women under the age of 65 lacked health insurance coverage, with Korean Americans more likely than any other ethnic subgroup to be uninsured.[140] This

134. *Id.* at 11.

135. The National Asian Pacific American Women's Forum (NAPAWF) was formally founded in 1996 at a gathering of 157 APA women in Los Angeles, CA, and "is the only national, multi-issue Asian and Pacific Islander (API) women's organization in the country." NAT'L ASIAN PAC. AM. WOMEN'S FORUM, http://napawf.org (last visited Jan. 11, 2013).

136. CHAPPELL, *supra* note 128, at 11.

137. *Id.* at 4, 6.

138. *Id.* at 11.

139. *Id.* at 11.

140. *Id.* at 10. "Among nonelderly uninsured [Asian Americans and Native Hawaiians and Pacific Islanders], 52[%] lack a usual source of care, compared to 46[%] of non-

high rate of uninsurance can be attributable to several factors, including high rates of employment in small businesses that do not offer health insurance or self-employment.[141] In addition, many APA immigrants are hesitant to access public benefits (even if they are eligible after the five-year bar imposed under the Personal Responsibility and Work Opportunity Reconciliation Act)[142] for fear of being deemed a "public charge."[143] Those who do wish to enroll in public programs, such as Medicaid or State Children's Health Insurance Program (SCHIP), may be further deterred due to language barriers or lack of assistance in filling out enrollment forms.[144] Couple this with fear of inquiries about immigrant status or fear of deportation and many APA women who could access public benefits are effectively deterred from doing so.

Another obstacle that women of color encounter in accessing reproductive health care is a lack of culturally competent services. Cultural competency encompasses understanding the beliefs and values of another culture to help enable the provider to know how to interact with and address the unique issues of a specific patient.[145] In fact, cultural competency is broader than merely understanding a particular language or dialect; it "requires an understanding of and

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Hispanic Whites." *Race, Ethnicity, and Health Care Fact Sheet: Health Care Coverage and Access to Care Among Asian Americans, Native Hawaiians, and Pacific Islanders*, THE HENRY J. KAISER FAMILY FOUND. (Apr. 2008), http://www.kff.org/minorityhealth/upload/7745.pdf. "From 2004 to 2006, 24% of Native Hawaiians and Pacific Islanders and 31% of Korean Americans were insured." *Health Care Access*, ASIAN & PAC. ISLANDER AM. HEALTH F., http://www.apiahf.org/policy-and-advocacy/focus-areas/health-care-access (last visited Jan. 11, 2013).

141. CHAPPELL, *supra* note 128, at 10.

142. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 403(a), 110 Stat. 2105, 2265 (1996) (codified in scattered sections of 42 U.S.C.). "Notwithstanding any other provision of law . . . an alien who is a qualified alien . . . and who enters the United States on or after the date of the enactment of this Act is not eligible for any [f]ederal means-tested public benefit for a period of 5 years . . . ." *Id.*

143. *Public Charge*, NAT'L IMMIGR.. L. CENTER, http://www.nilc.org/pubcharge.html (last visited Jan. 11, 2013); *see also* CHAPPELL, *supra* note 128, at 10 ("Those who are eligible often refrain from applying for benefits out of fear that enrolling themselves or their children will adversely affect their citizenship status and result in deportation.").

144. *Health Care Access*, ASIAN & PAC. ISLANDER AM. HEALTH F., http://www.apiahf.org/policy-and-advocacy/focus-areas/health-care-access (last visited Jan. 11, 2013) ("Many Asian Americans, Native Hawaiians, and Pacific Islanders that qualify for public programs remain uninsured because of language and cultural barriers in the enrollment process, misinformation about eligibility, and other family hardships such as food and housing insecurity. Others do not qualify even if they are low-income or legal immigrants.").

145. *See* CHAPPELL, *supra* note 128, at 17.

respect for the cultures, traditions, and practices of a community."[146] For instance, some APA communities harbor distrust or fear of providers, fear the stigma of certain diseases, distrust Western medicine, or fear certain screenings.[147] Another example is that of lesbian APA women, who may fail to disclose their sexual orientation to providers for fear of community rejection or "outing."[148] This failure to disclose sexual orientation prevents providers from being able to adequately meet their unique reproductive health care needs. Knowing these particular belief systems would help providers to better understand patients' reactions or reluctance to undergo certain screenings.

Coupled with lack of cultural competency, women of color also encounter language barriers in accessing reproductive health care. While the Civil Rights Act of 1964 has been interpreted by the Supreme Court as placing the affirmative requirement on government services to meet the needs of limited English-proficient or non-English speaking patients, few actually do so.[149] This affects a large number of non-English speaking women of color. The United States Census Bureau analyzed data from the 2007 American Community Survey and reported that, after English and Spanish, Chinese was the language most commonly spoken at home (2.5 million speakers), followed by Tagalog (a Filipino dialect) (1.5 million speakers), and Vietnamese (1.2 million speakers).[150] APAs also reported speaking twenty-two other Asian languages at home and thirty-nine Pacific Island dialects.[151] Without effective language interpreters, many women of color are without full access to health services, and left without the ability to understand the information providers may give them. The added embarrassment of admitting lack of understanding can be coupled with having the provider use a child or stranger to interpret intimate reproductive health information, which can be humiliating and further dissuade women of color from seeking reproductive health services.

Distrust of the formal systems that the mainstream movement uses to achieve reproductive freedom, such as the court system and the legislature, also impacts reproductive justice for women of color. For

146. SILLIMAN ET AL., *supra* note 15, at 6.

147. CHAPPELL, *supra* note 128, at 4–7, 9, 11, 17.

148. *Id.* at 9.

149. *See id.* at 11.

150. *New Census Bureau Report Analyzes Nation's Linguistic Diversity*, U.S. CENSUS BUREAU (Apr. 27, 2010), http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb10-cn58.html.

151. *Id.*

instance, black women are less likely to use legal strategies or legislation to advance their reproductive freedom. As Ross notes:

> The health care system has never met our needs. The judicial system has systematically discriminated against [women of color] . . . . When women of color enter the post-*Webster* abortion rights movement, we are not, therefore, likely to be focused on legislative or legal strategies. Instead, we are asking how we can begin to take abortion and other aspects of our health and reproduction into our own hands.[152]

Therefore, the struggle for reproductive freedom for women of color has largely been a grassroots level movement, with organizing and dialoguing being essential elements. For instance, after the proliferation of billboards throughout Atlanta proclaiming abortion as "black genocide" and accompanying anti-choice legislation, several women of color organizations collaborated, spearheaded by a convening by SisterSong Reproductive Justice Collective, and launched the "Trust Black Women" campaign to defend the rights and liberties of black women to determine their own reproductive choices and "challeng[e] the negative attacks on [b]lack [w]omen's right to self-determination by the anti-abortion movement."[153]

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152. Ross, *supra* note 110, at 140.

153. Kathryn Joyce, *Is Abortion "Black Genocide"?*, SISTERSONG WOMEN OF COLOR REPRODUCTIVE HEALTH COLLECTIVE, COLLECTIVE VOICES [hereinafter SISTERSONG], Summer 2011, at 8, *available at* http://www.sistersong.net/documents/CollectiveVoices_Summer2011_rf2.pdf; Loretta Ross, *Message from the National Coordinator*, SISTERSONG, Summer 2011, at 3, *available at* http://www.sistersong.net/documents/CollectiveVoices_Summer2011_rf2.pdf. *See also* Dionne Turner, *The Right to Fight*, SISTERSONG, Summer 2011, at 10, *available at* http://www.sistersong.net/documents/CollectiveVoices_Summer2011_rf2.pdf; Belle Taylor McGhee, *Trust Black Women Talking Points*, SISTERSONG, Summer 2011, at 12, *available at* http://www.sistersong.net/documents/CollectiveVoices_Summer2011_rf2.pdf.

> Since February 2010, billboards have been splashed across the country attacking [b]lack women by claiming that we are responsible for the 'extinction' of African American children because we choose to control our bodies by using birth control and abortion . . . SisterSong sprang into action and quickly mobilized to fight the billboards and the subsequent anti-abortion legislation proposed in Georgia. We won in Georgia . . . .

Ross, *supra*, at 3.

> Trust Black Women (TBW) is a national partnership founded in July 2010 of [b]lack women's [r]eproductive [j]ustice organizations supporting a local, regional and national front to maintain and defend reproductive justice for women and girls.

B. Poor Women

Poverty is a primary indicator of access to reproductive health care, perhaps the most critical component of reproductive justice.[154] However, in the United States, policies and laws affecting the reproductive freedom of poor women are seldom viewed as infringements on reproductive freedom because the negative social judgments about a poor woman's choice to procreate are stronger than the belief that a poor woman's choice to mother is appropriate. For instance, welfare recipients in the United States are subject to family caps that condition the receipt of welfare benefits on the number of children a woman has.[155] This and similar policies, such as Temporary Assistance for Needy Families (TANF) work requirements,[156] were developed in response to a racially charged stereotype of a "wily and greedy welfare queen"[157] procreating in order to gain more money from the welfare system. These policies were developed as a way to dissociate any economic advantage from procreating while on government assistance.[158] This is an explicit infringement on a woman's ability to decide the number of children she wishes to have and an infringement on her right to privacy.[159] These policies underlie a social judgment that delegitimizes the choice of poor women to reproduce. As Dr. Bridges notes,

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> TBW organized in response to the [b]lack [g]enocide billboard campaign led by abortion opponents, including Priests for Life, Life Always, Issues4Life Foundation, and the Radiance Foundation.

McGhee, *supra*, at 12.

154. *See* Hooton, *supra* note 19, at 74; *Health & Justice Now! Women & Communities Demanding Health Care for All!*, CALIFORNIA LATINAS FOR REPROD. JUST., http://www.californialatinas.org/wp-content/uploads/2012/12/ACCESS_CLRJ_Health_Reform_Messages_12.01.09.pdf (last visited Jan. 11, 2013).

155. Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 151 (2006).

156. Bridges, *supra* note 107, at 610 n.3, 643–44.

> For the phenotypically [b]lack women who disproportionately receive TANF, the TANF work requirements reiterate that the identity of "mother" is not a legitimate one for them, to the same extent as enjoyed by wealthier [w]hite women throughout this nation's history. White mothers are recognized as empowered to provide for the quotidian needs and desires of the child within the home, and they are lauded for doing so.

Id. at 642-43.

157. *See id.* at 618.

158. *See* Tonya L. Brito, *The Welfariztion of Family Law*, 48 U. KAN. L. REV. 229, 241 (2000).

159. *See id.*

"[M]otherhood for the poor woman—particularly the poor, unmarried woman—has traditionally been construed as an *illegitimate* choice . . . ."[160] Yet, the mainstream movement has not publicly criticized such policies.[161] In fact, policies affecting the public spheres that poor women inhabit, such as state Medicaid programs, welfare programs, public hospitals, and public clinics, are seldom if ever the focus of the mainstream movement's struggle for reproductive rights.[162] This is reflective of a movement focused on policies that affect women in the mainstream private sphere,[163] and in part, a result of the pervasive social beliefs that poor women should not reproduce, and when they do, they are making bad choices that only worsen their lot and impose more on taxpayers and other "responsible" citizens.[164] It is also reflective of what Dr. Bridges calls "racial reproduction," the socially-constructed and inaccurate racial stereotyping that is projected upon poor black women when they procreate.[165] As Dr. Bridges highlights, "Although privileged white women garner the 'legitimate intimate identity' of *mother* when they bear a child, poor [b]lack women become objects of disdain."[166]

However, women of color and other marginalized groups have criticized such policies impacting the reproductive freedom of poor women.[167] In fact,

> Women of color in the economic justice and reproductive rights movements have criticized family caps and other aspects of welfare reform, such as marriage promotion and funding for abstinence-only sexual education. These policies punish poor women for being poor by attacking their fertility while not offering any substantive relief from structural poverty.[168]

A "choice-only" approach does not address how such economic issues faced by poor women impact their ability to freely exercise

160. Bridges, *supra* note 107, at 619.
161. *See* Roberts, *supra* note 9, at 300–01.
162. *See id.*
163. *Id.* at 300.
164. *See* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 746 (1992).
165. *See* Bridges, *supra* note 107, at 622, 633. "The Alpha obstetrics clinic . . . is also a site where the critical scholar can observe the *reproduction* of race—that is, the reiteration of racialized differences and the meanings that attach to them." *Id.* at 622.
166. *Id.* at 621 (footnote omitted).
167. SILLIMAN ET AL., *supra* note 15, at 8.
168. *Id.*

their "choice."[169] For instance, "a woman who decides to have an abortion out of economic necessity does not experience her decision as a 'choice.'"[170] In fact, "[f]or women of color, reproductive and sexual health problems are not isolated from the socioeconomic inequalities in their lives."[171] Unfortunately, these are the racial and economic issues that have flown under the radar of the mainstream movement; "[t]he mainstream movement[] [has] not linked policies and practices dressed in the benign language of family planning and welfare reform to restrictions on reproductive freedom."[172] Again, however, issues of economic and racial inequality are indivisible for women of color and other marginalized groups. As Dr. Bridges concludes: "[I]t is futile to strive for reproductive justice without simultaneously imagining an end to racial inequality; likewise, it is folly to hope for racial justice without concurrently planning for reproductive freedom. Indeed, for poor black women and other racially subjugated women, those two goals are one and the same."[173]

In fact, the public–private divide accepts a construct of abortion access that limits, and even eliminates, abortion access for poor women in the public sphere. For instance, scholar Dorothy Roberts has written about the prosecution of drug-addicted mothers, noting that "[d]espite similar rates of substance abuse, however, black women were *ten times* more likely than whites to be reported to

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169. *See* Hooton, *supra* note 19, at 65–66.

> As a shorthand to describe the position that abortion should be a choice available to women, the term 'pro-choice' carries an assumption that having children is a default option for women. The term does not adequately reflect the fact that many poor women of color have been limited in their ability to bear children through coercive reproductive policies. For example, forced sterilization, family caps under state welfare laws, and a history of racism that devalues women of color and portrays them as undeserving mothers, have had profound effects on the ability of women of color to fulfill their reproductive choice to have children.

Id. (footnotes omitted). "Current welfare policies encourage family caps which place limits on the amount of welfare benefits that a woman may receive if she gives birth to additional children while on welfare. Thus, the government has decided to use economic power to control the reproductive choices of welfare recipients." Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 CARDOZO WOMEN'S L.J. 1, 28 (1998) (footnote omitted).

170. SILLIMAN ET AL., *supra* note 15, at 5–6.

171. *Id.* at 6.

172. *Id.* at 11.

173. Bridges, *supra* note 107, at 646.

public health authorities for substance abuse during pregnancy."[174] She points out that this is due, in large part, to these women's continuous interactions with public authority, whether through the public housing system, the welfare office, probation officers, or public hospitals.[175] However, the mainstream movement has not addressed this imposition on reproductive autonomy. It is not even clear that the mainstream movement views the prosecution of drug-addicted mothers as a reproductive rights issue.[176] When moral judgments, societal constructs, and deep-rooted ideas about motherhood are wrapped into constraints on reproductive health access, the mainstream movement often does not adopt these issues. They fall outside the "private" sphere and outside of the daily concerns of white, wealthy, educated women.[177] If the mainstream movement addressed the infringement on the reproductive rights of poor women, how then, could the movement not address the underlying issue of poverty itself? To do so would disrupt the neat silos that various movements have placed themselves within, leaving women who inhabit these multiple identities without recourse. Roberts concludes that "the prosecution of crack-addicted mothers diverts public attention from social ills such as poverty, racism, and misguided national health policy and implies instead that shamefully high [b]lack infant death rates are caused by the bad acts of individual mothers."[178]

C. The Immigrant Woman's Body: Battleground for America's Future[179]

Immigrant women also face significant barriers to reproductive freedom, including fear of deportation, lack of access to linguistically and culturally appropriate services, economic barriers, and discriminatory anti-immigrant policies that impact their full realization of reproductive justice.[180] Undoubtedly intrinsic to anti-immigrant policies and laws that negatively impact immigrant women's full realization of reproductive justice are racist

174. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1434 (1991).

175. *Id.* at 1432.

176. *See id.* at 1480.

177. *See id.*

178. *Id.* at 1436 (footnote omitted).

179. Huang, *supra* note 44, at 406 ("[I]mmigrant women's bodies have become the economic, demographic, and political background for America's future.").

180. Melissa L. Gilliam, Amy Neustadt & Rivka Gordon, *A Call to Incorporate a Reproductive Justice Agenda into Reproductive Health Clinical Practice and Policy*, 79 CONTRACEPTION 243, 244 (2009).

assumptions and economic fears.[181] Rooted in these fears are nativist attitudes that advocate for the reproduction of the white race and the suppression of the reproduction of non-white, or "inferior" immigrant races.[182] As Priscilla Huang notes, "Today's nativist policymakers and pundits continue to demonize non-Western immigrant women as 'unfit' and pressure white Christian women to fulfill their domestic duties and give birth to 'arrows for the war.'"[183] In fact, "[a]nti-immigrant ideologues view reproductive-aged immigrant women as such a force, and blame them for breeding a host of social problems including excess government spending and environmental degradation."[184] These attitudes and the consequent negative implications for immigrant women's reproductive health have not historically been addressed in mainstream United States reproductive rights jurisprudence or policies. For instance, current legislation and policies that seek to overturn the Fourteenth Amendment's citizen birth right are seldom viewed through the reproductive rights lens.[185] In another example, the case of *Webster v. Reproductive Health Services* denied the ability of immigrant women to seek abortions at public facilities, such as clinics, which usually offer cheaper services than private hospitals.[186] Impoverished immigrant women's reproductive rights have been particularly impacted by their inability to access public health benefits, particularly prenatal care.[187] This barrier also exemplifies the interlocking systems of oppression that impact immigrant women's full access to reproductive health care—discriminatory anti-immigrant policies and economic hurdles. In 1996, the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (also known as "welfare reform") imposed a five-year bar on all federally means-tested public benefits for new immigrants.[188] This created "additional barriers to social services, particularly to health care, for immigrant women."[189] In

181. Huang, *supra* note 44, at 392–93.
182. *Id.* at 404.
183. *Id.* at 405.
184. *Id.* at 398.
185. The Fourteenth Amendment states, in part "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the [s]tate wherein they reside." U.S. CONST. amend. XIV, § 1. *See* Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011).
186. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 509–11 (1989).
187. Gilliam et al., *supra* note 180, at 244.
188. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 403(a), 110 Stat. 2105, 2265 (1996).
189. Huang, *supra* note 44, at 389.

addition, a fear of becoming a "public charge," a designation that could lead to an immigrant's denial of citizenship, discourages many immigrant women from accessing public health care, even after expiration of the five-year bar.[190] In addition to deportation, confusion about what benefits immigrant women are eligible to obtain has led many to forgo accessing the public benefits that they are eligible for.[191] Consequently, immigrant women access health services only when in dire need or if paying out-of-pocket for services.[192] In fact, a choice-only approach ignores the fact that there is little choice for an immigrant woman who faces deportation if she attempts to access the reproductive health care she may desperately need.

In *Doe v. Wilson*, the California Court of Appeals found that it would be contrary to congressional intent to uphold state laws providing benefits to undocumented immigrants after passage of the Welfare Reform Act because the Act expressly pre-empted such existing laws.[193] "Prior to enactment of the Welfare Reform Act, the state of California provided non-emergency prenatal care to undocumented [immigrant women]."[194] However, to be in compliance with section 411(a) of the Welfare Reform Act (making undocumented immigrants ineligible for state-funded public benefits except in the case of emergency care), the California Department of Health officials prepared regulations to change the previous law.[195] In response to these proposed regulations, 70,000 indigent immigrant women residing in California, who were eligible for prenatal care under the previous law, brought a class action against enactment of the regulations.[196] The court found against the plaintiffs, arguing that the California law allowing prenatal care to immigrant women was pre-empted by the Welfare Reform Act and stating that the

190. *See id.* at 390–91. "Pregnant immigrant women also refused free and low-cost prenatal care because they were afraid that receiving such care would put them at risk of being considered public charges and jeopardize their immigration statuses or the statuses of close family members." *Id.* at 391.

191. *Id.* at 391. "Although the State Department and INS subsequently issued guidance and a proposed rule clarifying that receipt of non-cash public benefits would not jeopardize the immigration status of a recipient or her family members, widespread confusion and concern about the application of public charge rules remain." *Id.*

192. *Id.* "[T]he more than three million undocumented women and children currently in the United States continue to pay out of pocket for health services or forego health care altogether." *Id.*

193. Doe v. Wilson, No. C 97-2427 SI, 1997 U.S. Dist. LEXIS 21137, at *19–20 (N.D. Cal. Dec. 15, 1997).

194. *Id.* at *4.

195. *Id.*

196. *Id.* at *5–6.

"legislative history, together with the explicit language of the Welfare Reform Act, make it clear that Congress intended to deny undocumented immigrants public benefits in order to remove an incentive for illegal immigration."[197] Quoting the introductory section of the Act, the court upheld this clearly economically motivated reasoning; "'[i]t continues to be the immigration policy of the United States that . . . aliens within the Nation's borders not depend on public resources to meet their needs . . . and . . . the availability of public benefits not constitute an incentive for illegal immigration . . . provided by the availability of public benefits.'"[198] Despite clear evidence that immigrants are not motivated by public benefits to immigrate to the United States,[199] the court supported this argument, without discussion of the repercussions to the health of pregnant women seeking prenatal care.[200]

Later, in a move that both undermined the legal gains of the mainstream reproductive rights movement and provided pregnant immigrant women with access to prenatal care, the Centers for Medicare and Medicaid Services (CMS) revised the definition of "child" to include an "unborn child."[201] This designation of personhood on the fetus inadvertently enabled immigrant women, who were otherwise ineligible to access public benefits, to access

197. *Id.* at *20.

198. *Id.* at *16–17 (quoting 8 U.S.C. § 1601 (Supp. V 1994)).

199. *See* Huang, *supra* note 44, at 396. "In fact, between one-half and three-quarters of the undocumented immigrant population pays federal and state income taxes, Social Security taxes, and Medicare taxes." *Id.* "The Office of the Inspector General of the Social Security Administration has even noted that undocumented immigrants 'account for a major portion' of the billions of dollars paid into the Social Security system, which are benefits that immigrants can never collect while undocumented." *Id.*

200. *See Doe*, 1997 U.S. Dist. LEXIS 21137, at *20.

201. Huang, *supra* note 44, at 391 (citing State Children's Health Insurance Program; Eligibility for Prenatal Care and Other Health Services for Unborn Children, 67 Fed. Reg. 61956 (October 2, 2002)). It is unclear whether CMS actually considered the consequence on this definition change on immigrant women's access to prenatal care.

> The accidental coverage of undocumented immigrant women came to light when Louisiana submitted its initial claim for reimbursement for prenatal services provided to undocumented immigrant women. At first, CMS denied the claim, stating that SCHIP was a federally funded program and could not be used to provide services for undocumented women. CMS later reversed its position, yet the dispute *made it clear that undocumented immigrant women were never intended to be the beneficiaries of SCHIP expansion.*

Id. at 391–92 (emphasis added) (footnotes omitted).

prenatal care for their unborn children, but also undermined the significant pro-choice legal victories that established personhood after birth.[202] This also discounted the importance of the pregnant immigrant woman's ability to obtain health care for conditions affecting her and not her fetus, or other determinants that could affect her reproductive health, by only recognizing the right to provide health care to the citizen fetus.[203] Again, this illustrates the interlocking nature of oppression, because there are underlying racial implications along with the anti-immigrant sentiments that accompany seemingly "benign" policies that undermine reproductive gains, while seeking to impact the reproductive freedom of immigrant women.[204] In this instance, immigrant women inadvertently benefitted from the policy aimed at undermining reproductive rights.[205]

However, the accompanying message of this and other anti-immigrant and discriminatory policies is one that encourages white procreation, while discouraging procreation of "less desirables," such as women of color and immigrants.[206] For instance, "[t]he myth capitalizes on the stereotype that immigrant women [of] color are overly fertile and conspire to give birth to 'anchor babies.'"[207] As Priscilla Huang notes, "The underlying nativism of the anti-immigration movement remains largely unrecognized and is being played out through the bodies of immigrant women in subtle and seemingly neutral ways."[208] Similar attacks to overturn the Fourteenth Amendment echo this nativism argument, but are seldom cited in reproductive rights discourse as infringing upon reproductive freedom. If the movement for reproductive justice is to be effective, the racist and nativist agendas of such policies must be exposed. But, anti-immigrant policies are not within the scope of the decisional rights agenda; dismantling such policies is a human rights priority that calls for recognition of immigrant women's rights to reproductive health services simply because of their humanity.

The marginalization of poor women and women of color from the mainstream movement has allowed for anti-choice organizations to chip away at hard-won reproductive rights almost undetected by mainstream reproductive rights organizations. Conservative forces have attacked women's ability to exercise reproductive choice by

202. *Id.* at 391.
203. *See id.* at 392.
204. *See id.* at 403–04.
205. *Id.* at 391.
206. *See id.* at 386.
207. *Id.* at 400.
208. *Id.* at 398.

eliminating choice for the most vulnerable women, such as poor women.[209] Because of the fragmented nature of the movement, the "divide-and-conquer" strategy of conservative anti-choice forces has proven largely successful in eroding full access to reproductive health care for immigrant women.

Additionally, the absence of federal constitutional protection in the United States for the reproductive health and autonomy of some immigrant women, particularly undocumented immigrant women, leaves these international instruments as one of the few viable ways to secure reproductive justice for immigrant women in the United States.[210] International law is therefore a more appropriate forum to find the legal support for the concept of women's reproductive rights as human rights and to seek redress for the United States' violations of these rights.[211]

A choice-only approach is narrowly focused. It addresses the privacy issues impacting a small subset of women in the United States.[212] This analysis, however, does not intend to minimize the importance of decisional rights, as they are fundamental and foundational elements of realizing reproductive freedom and justice. In fact, "[i]n settings where decisional rights are undermined or constrained, women's reproductive health may suffer."[213] However, a narrow focus not only excludes a large number of women from the United States reproductive health movement, but also undermines many women's realization of reproductive justice by ignoring the foundational elements essential to their realization of reproductive justice.[214]

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209. *See id.* at 406.

210. *See* Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"*, 71 S. CAL. L. REV. 547, 566 (1998). "[R]ecent welfare and immigration reforms will likely be upheld as not violative of noncitizens' substantive constitutional rights . . . ." *Id.*

211. *See* Johns, *supra* note 169, at 6. "While certain international documents have encompassed this broader definition of reproductive health, the current legal construct of reproductive health in the United States has focused almost exclusively around the issue of abortion, rather than addressing all aspects of reproductive health for women." *Id.*

212. *See* Gable, *supra* note 15, at 986.

213. *Id.* at 984. "There is little indication, however, that the decisional and foundational human rights aspects of reproductive health are inherently incompatible. Indeed . . . these categories may instead be mutually reinforcing, provided that the decisional aspects of human rights continue to receive sufficient protection." *Id.* at 984–85.

214. *See id.* at 986.

II. YOUR MOVEMENT AIN'T LIKE MINE: THE FIGHT FOR REPRODUCTIVE JUSTICE

Due to their unique reproductive health experiences and struggles for meaningful reproductive freedom, a different kind of reproductive rights movement emerged among women in communities of color.[215] In fact, this "'colored' reproductive rights movement has fought to expand the feminist movement's definition of reproductive rights and to include [issues important to] women of color with[in] the mainstream reproductive rights [agenda]."[216] This movement focuses on issues that women of color, immigrant women, and poor women encounter in attempting to exercise their reproductive rights, such as barriers in accessing reproductive health services because of racial bias, lack of translation services for non-English speakers, immigration status, and poverty, and focuses on strategies to transcend these barriers.[217] This movement acknowledges that while women of color may face similar issues such as racial discrimination and poverty, they each experience these forms of discrimination differently based on their particular socio-economic statuses, cultures, and geographic locations.[218] Organizations have used this work to "recognize that the control, regulation, and stigmatization of female fertility, bodies, and sexuality are connected to the regulation of communities that are themselves based on race, class, gender, sexuality, and nationality. This analysis emphasizes the relationship of reproductive rights to human rights and economic justice."[219] This movement has been termed the "reproductive justice movement" and more appropriately addresses and encompasses the issues and concerns of immigrant women, women of color, and poor women than the "mainstream" reproductive rights movement.[220]

The concept of reproductive justice demands that reproductive rights be contextualized in a broader setting of economic and political realities. This movement more broadly strives for the realization of reproductive freedom that includes: "access to adequate prenatal care;

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215. Lee, *supra* note 25, at 96. Many women of color have criticized the mainstream reproductive rights movement, a product of the women's rights or feminist movement, for its exclusion of women of color. *See id.*

216. *Id.*

217. *See* Hooton, *supra* note 19, at 60. "[P]roviding all women with reproductive freedom necessitates addressing concerns about sterilization, medical treatment, and access to fertilization, to access prenatal care, and access to per-natal care. This broader definition called upon by many scholars demands that race and class be considerations in the fight for reproductive rights." Lee, *supra* note 25, at 96 (footnote omitted).

218. *See* Hooton, *supra* note 19, at 65–66.

219. SILLIMAN ET AL., *supra* note 18, at 4.

220. *See id.*

access to sex education and appropriate contraceptives; access to infertility services; concern about surrogacy and the potential exploitation of women of color; freedom from coerced or ill-informed consent to sterilization; freedom from reproductive hazards in the workplace . . . ."[221] For instance, "prior to the *Roe* decision, which granted the right to abortion to women, the realization of reproductive rights was limited to women of wealth. Economic realities, therefore, shape the extent and nature of a woman's ability to obtain reproductive health."[222] It is arguable that this is still the case and that full access to abortion is riddled with economic barriers. Women of color, immigrant women, and poor women have forged movements that address the unique myriad of issues impacting their full realization of reproductive choice.[223] In fact, they "created the visions and gained the support necessary to raise the visibility of their reproductive health concerns in their communities and in the broader society."[224]

To address the myriad issues impacting women of color, poor women, and immigrant women, the definition of reproductive justice has been necessarily broad, malleable, and constantly evolving, as women continue to recognize their various needs, identities, and the multiple barriers that impact their reproductive freedom.[225] For instance, even nontraditional issues, such as environmental issues, have been addressed as barriers to the full realization of reproductive health for some communities.[226] For example, "Asians and Pacific Islanders for Reproductive Health responded to the threats from environmental toxins in their neighborhood and constructed a very

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221. *See* Hooton, *supra* note 19, at 68.

222. Johns, *supra* note 169, at 26–27 (footnote omitted).

> A lack of financial resources often hinder poor women from obtaining some reproductive options . . . Thus, regardless of the status of the law, or of the "legally" available reproductive options, the financial resources needed to secure reproductive rights limit, and often prohibit, African American women from obtaining the reproductive rights to which all women are "entitled."

Lee, *supra* note 25, at 94 (footnote omitted).

223. *See* Hooton, *supra* note 19, at 60. "Notions of reproductive freedom, reproductive justice, and reproductive health expand beyond the relatively focused debate on abortion rights to include a broader range of issues that promote good reproductive health, as well as equal and adequate access to reproductive health services." Gable, *supra* note 15, at 976.

224. SILLIMAN ET AL., *supra* note 18, at 13.

225. *See id.* at 4–5.

226. *See id.* at 6.

broad definition [of reproductive health] that explicitly encompasses the right to safe food and a clean environment."[227] The National Asian Pacific American Women's Forum is one of three convening organizations of the National Healthy Nail Salon Alliance,[228] coordinating local, regional, and national initiatives to improve nail salon worker health and safety. This Alliance arose out of recognition of the "correlation between health problems in nail salon workers and daily exposure to chemicals in nail care products."[229] Reproductive health consequences of exposure to toxins in nail salons, including to toluene, formaldehyde, and dibutyl phthalate (DBP), lead to reproductive problems in male fetuses of pregnant women and decreased sperm count in men.[230] While not within the sphere of mainstream reproductive rights discourse, environmental issues and workplace exposure to toxins are significant to the reproductive health of women of color in their communities and workplaces.[231]

For mainstream white women's reproductive rights organizations to embrace reproductive justice, they will be required to "fight for causes that do not *directly* affect affluent white women."[232] In fact, reproductive justice coexists with other social justice movements, such as the racial justice movement, the immigrant justice movement, the antipoverty movement, and the human rights movement.[233] This reflects the definition of reproductive health set out in the 1998 report by the World Health Organization, which recognized that "[w]omen's reproductive health depends on the enforcement of their human rights because the concept of health is not simply a biological process of individual responsibility . . . the attainment of the highest

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227. *Id.*

228. *National Healthy Nail Salon Alliance*, NAT'L ASIAN PAC. AM. WOMEN'S FORUM, http://napawf.org/programs/national-healthy-nail-salon-alliance (last visited Jan. 11, 2013).

229. NAT'L HEALTHY NAIL SALON ALLIANCE, PHASING OUT THE "TOXIC TRIO": A REVIEW OF POPULAR NAIL POLISH BRANDS, 1 (May 2009), *available at* http://napawf.org/wp-content/uploads/2009/working/pdfs/Toxic_trio_nail_factsheet2009.pdf.

230. *Id.*

231. *See* Hooton, *supra* note 19, at 67–68.

232. Lee, *supra* note 25, at 96.

233. *See id.* at 92–93.

> [R]eproductive rights are civil rights. Reproductive freedoms are as important as the freedom to choose a seat on a public bus, to attend a public school, or to live or work without restriction. African American women view reproductive rights as a struggle against the oppressive forces that denied them other civil rights.

Id. (footnote omitted).

standard of sexual and reproductive health depends greatly on social, economic, and political factors."[234]

A movement that embraces the myriad economic, racial, and other social justice issues impacting poor women, immigrant women, and women of color is daunting at first glance. For instance, to address reproductive access for immigrant women, one must consider comprehensive immigration reform and a path to citizenship.[235] To address reproductive health services access for poor women, one must consider economic inequities and the public "policing" of poor women's bodies.[236] Also, to address reproductive access for women of color, one must address the underlying racist assumptions and attitudes impacting policies that criminalize, dehumanize, or ignore the right to motherhood of women of color.[237] A broader approach is, in fact, more complicated, but it is also premised on the simple idea that we all share a common humanity, and with that comes fundamental human rights.

III. WOMEN'S RIGHTS ARE HUMAN RIGHTS

Contextualizing women's reproductive health rights as human rights demands viewing these rights as elemental and foundational rights not predicated on social status or other social constructs; by a woman's humanity, she is conferred reproductive health rights. Human rights laws form the framework that protects these human rights.[238] These laws come in the form of international instruments and covenants, as well as national and local laws.[239] It is worth examining existing human rights instruments to explore how they embody the human right to reproductive health and how a human rights framework is more inclusive and appropriate for women of color, immigrant women, and low-income women.

234. Dina Bogecho, *Putting It to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health*, 13 S. CAL. REV. L. & WOMEN'S STUD. 229, 236 (2004).

235. *See* Hernández-Truyol & Johns, *supra* note 210, at 574.

236. *See* Allison S. Hartry *Birthright Justice: The Attack on Birthright Citizenship and Immigrant Women of Color*, 36 N.Y.U. REV. L. & SOC. CHANGE 57, 97–98 (2012).

237. *See id.* at 81–84.

238. LAW STUDENTS FOR REPRODUCTIVE JUSTICE, HUMAN RIGHTS LAW PRIMER 8 (2d ed. 2011), *available at* http://lsrj.org/documents/resources/LSRJ_HR_Primer_2nd_Ed.pdf. "Human rights law, then, refers to the system(s) of laws designed to protect these basic human rights." *Id.*

239. *See id.* at 9–10, 64.

A. Defining Reproductive Health As a Human Right: How International Instruments Articulate the Right to Reproductive Health

Several human rights instruments embody the right to reproductive health and autonomy, including the Convention on the Rights of Persons with Disabilities,[240] the Convention on the Elimination of All Forms of Discrimination Against Women,[241] the International Covenant on Civil and Political Rights,[242] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[243] The Beijing Platform Papers, the Universal Declaration of Human Rights, and the Programme of Action Report from Cairo also embody the idea of women's reproductive rights as human rights.[244] Under these instruments, this human right is applicable to immigrant women because it is not limited to citizens of a state, but to all "persons."[245]

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240. United Nations Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 46 I.L.M 443 [hereinafter CRPD]; *see also Convention on the Rights of Persons with Disabilities*, U.N. ENABLE, http://www.un.org/disabilities/default.asp?navid=14&pid=150 (last visited Jan. 11, 2013).

241. Convention on the Elimination of All Forms of Discrimination Against Women, pmbl., Dec. 18, 1979, 1249 U.N.T.S. 13, 15 [hereinafter CEDAW]. The United States has signed but not ratified this document. *About CEDAW*, GLOBALSOLUTIONS.ORG, http://globalsolutions.org/human-rights/cedaw (last visited Jan. 11, 2013).

242. International Covenant on Civil and Political Rights, art. 23(1)-(2), Dec. 19, 1966, 6 I.L.M. 368, 375. The United States has signed and ratified this document. Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, THE CARTER CENTER (Jun. 29, 1992), http://www.cartercenter.org/news/documents/doc1369.html.

243. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3, 7 [hereinafter ICESCR]. The United States has signed but not ratified this document. *United States*, CENTER FOR ECON. & SOC. RTS., http://www.cesr.org/section.php?id=26 (last visited Jan. 11, 2013).

244. *See* Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and the Platform for Action*, ¶ 14, U.N. Doc.A/CONF.177/20/Rev.1 (1996) [hereinafter *Beijing Declaration*], *available at* http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf; Universal Declaration of Human Rights, art. 16(1), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR], *available* at http://www.un.org/en/documents/udhr/index.shtml; International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *ICPD Programme of Action*, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994) [hereinafter *ICPD Programme of Action*], *available at* http://www.un.org/popin/icpd/ conference/offeng/poa.html.

245. *See* Hernández-Truyol & Johns, *supra* note 210, at 569–70.

> [T]he repeated use of the term "persons" in international human rights instruments emphasizes the goal of eliminating discrimination based upon such characteristics with respect to all persons, citizens and non-citizens alike. This overarching principle of non-discrimination circumscribes and limits the

The Convention on the Rights of Persons with Disabilities, which the United States Senate recently failed to ratify,[246] specifically addresses the right to reproductive and sexual health as a human right.[247] This convention calls on states to ensure that persons with disabilities are assured equal access to health services, specifically naming "the area of sexual and reproductive health and population-based public health programs."[248]

Article 12, section 1 of the Convention on the Elimination of All Forms of Discrimination Against Women articulates the right to reproductive health through its call for states to eliminate discrimination in the area of health care, including allowing women access to health care on an equal basis with men.[249] This convention also calls on states to ensure access to health services for women in rural areas in article 14, section 2.[250]

The Convention on the Rights of the Child recognizes the right to reproductive health by calling on states to ensure access to pre-and post-natal care, preventive health services, and family planning for mothers.[251]

> reasons and basis pursuant to which states may distinguish between citizens and non-citizens in an attempt to legislate and govern, even in immigration-related matters . . . . International human rights documents that extend protection to "persons" rather than only to "citizens" entitle non-citizens to receive the same basic human rights as citizens of a country.

Id. (footnotes omitted).

246. The Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly in December 2006. *See Status of the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (last visited Jan. 11, 2013) (providing a list of all of the countries that have signed and ratified this Convention). President Obama signed the treaty in 2009, and as of January 2013, the Convention has 155 signatories and 127 ratifying parties. *Id.* The Senate Foreign Relations Committee favorably reported the treaty out of Committee on July 31, 2012. JOHN KERRY, SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (TREATY DOC. 112-7), S. EXEC. DOC. NO. 112-6 (2d Sess. 2012). A December 4, 2012, vote in the U.S. Senate for U.S. ratification failed by a margin of 61-38, requiring a two-thirds majority to ratify. *See Treaties: 112th Congress (2011-2012) 112-7*, THOMAS, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:112TD00007: (last visited Jan. 11, 2013).

247. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 240.

248. *Id.* art. 25.

249. CEDAW, *supra* note 241, art. 12(1).

250. CEDAW *supra* note 241, art. 14(2).

251. Convention on the Rights of the Child, art. 24(2), Dec. 12, 1989, 28 I.L.M. 1448, 1446.

While not explicitly recognizing the right to reproductive health, the International Covenant on Civil and Political Rights recognizes a woman's right to equality in marriage, including in decisions about starting a family.[252]

The International Convention on Economic, Social, and Cultural Rights embodies the idea of reproductive health as a human right by calling on states to protect mothers before, during, and after pregnancy, taking action to reduce infant mortality, and ensuring enjoyment of physical and mental health for all.[253]

In addition, the Convention on the Elimination of All Forms of Against Racial Discrimination calls on states to ensure access to public health and medical care.[254]

The Universal Declaration of Human Rights, while not explicitly recognizing a right to reproductive health, does address the fact that "motherhood and childhood are entitled to special care and assistance."[255] The Universal Declaration of Human Rights, as Professor Gable notes, also protects other rights that indirectly impact reproductive health, including "equal rights in marriage, to be free from discrimination based on gender, and to not be subjected to torture or cruel, inhuman or degrading treatment or punishment."[256]

The human right to health has been recognized by the United Nations Commission on Human Rights and is embodied in the 1994 International Conference on Population and Development (ICPD).[257] Paragraph 7.3 of the ICPD Programme of Action outlines reproductive rights as human rights:

> [R]eproductive rights embrace certain human rights . . . . These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing, and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.[258]

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252. International Covenant on Civil and Political Rights, *supra* note 242, arts. 23(2), 23(4).

253. CESCR, *supra* note 243, arts. 10(2), 12(1), 12(2).

254. Convention on the Elimination of All Forms of Racial Discrimination, art. 5, Dec. 21, 1965, 5 I.L.M.32.

255. UDHR, *supra* note 244, art. 25(2).

256. Gable, *supra* note 15, at 974.

257. *ICPD Programme of Action*, *supra* note 244.

258. *Id.* ¶ 7.3; *see also* CTR. FOR REPROD. RIGHTS, REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS (2009), *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RRareHR_final.pdf (last visited Jan. 11, 2013).

Principle 8 of the ICPD Programme of Action also recognizes that "[e]veryone has the right to the enjoyment of the highest attainable standard of physical and mental health."[259] The ICPD Programme of Action also calls on states to ensure access to reproductive health care, free from coercion.[260]

The Beijing Platform for Action recognizes women's rights to attain the highest "attainable standard of physical and mental health."[261] The Platform also calls for a woman's right to health throughout her life cycle on an equal basis with men,[262] access to pre- and post-natal services,[263] access to health services,[264] and affirmative action by governments to remove barriers to accessing services.[265]

Gable contextualizes what it means to view reproductive health through a human rights framework by stating that "[t]he human rights paradigm provides an important perspective on the relationship between reproduction and health, as well as an essential tool for ensuring that reproductive health is achieved and reproductive rights are protected."[266] This right to health has been interpreted broadly to include "the highest attainable standard of health," as well as "both health care and other determinants on which health depends, such as access to water and food, freedom from violence, and a healthy environment."[267]

In fact, "[r]eproductive health is widely recognized as an inseparable part of the human right to health."[268] In fact, many cite the 1994 conference in Cairo as the birthplace for the term "reproductive justice," which was coined by many women of color organizations as an organizing framework for reproductive health and

259. *ICPD Programme of Action*, *supra* note 244, princ. 8.
260. *Id.*
261. *Beijing Declaration*, *supra* note 244, ¶ 89.
262. *Id.* ¶ 92.
263. *Id.* ¶ 94.
264. *Id.* ¶¶ 106(e), 106(i).
265. *Id.* ¶ 106(c).
266. Gable, *supra* note 15, at 959.
267. Special Rapporteur on the Econ., Soc. & Cultural Rights, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Comm'n on Human Rights*, ¶¶ 24, 25, U.N. Doc. E/CN.4/2003/58 Feb. 13, 2003 [hereinafter Special Rapporteur], *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/109/79/PDF/G0310979.pdf; IPAS ET AL., THE HUMAN RIGHT TO HEALTH AND WOMEN'S REPRODUCTIVE HEALTH POLICY 1 (2009), *available at* http://napawf.org/wp-content/uploads/2009/11/Womens_RH_HR_Ipas.pdf.
268. IPAS ET AL., *supra* note 267, at 2.

rights issues.[269] This right denotes access to reproductive health information and services, as well as the decisional rights focused on by the mainstream United States reproductive rights movement.[270]

A more detailed analysis of this framework, as outlined in the 2000 International Covenant on Economic, Social, and Cultural Rights, emphasizes accessibility, availability, and acceptability of services central to attaining health or the social determinants of health.[271] Availability in this framework means the availability not only of reproductive health facilities and services, but also lack of policies that impede the availability of reproductive health services, such as policies that prevent women from accessing providers or abortion services.[272] Accessibility in this context means accessibility "in law and in fact."[273] This means that even marginalized groups must have access to services regardless of language ability or immigrant status.[274] This also includes physically accessible services for the disabled, for imprisoned women, and for women in rural areas.[275] This also includes economic accessibility of services and access to health information and education, regardless of age or language ability.[276] Acceptable services include a right to a health-care workforce that is linguistically and culturally competent, and access to services that are confidential.[277]

B. Why a Human Rights Framework should be adopted by the Reproductive Rights and Justice Movements in the United States

A human rights framework provides a unifying paradigm for the reproductive rights and justice movements, ensuring that the issues important to a broad constituency of women are addressed and insulating the unified movement from attacks on the most vulnerable

269. *See* Ross, *supra* note 7, at 1. "[R]eproductive justice provides a political home for a set of ideas, aspirations, and visions in language that encompasses all the social justice and human rights issues." *Id.*

270. *ICPD Programme of Action*, *supra* note 244, ¶ 7.2.

271. United Nations Comm. on Econ., Soc., & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights, General Comment 14: The Right to the Highest Attainable Standard of Health*, ¶ 12, U.N. Doc. E/C.12/2000/4 (Aug. 8, 2000), *available at* http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En.

272. *Id.* ¶¶ 12, 14.

273. *Id.* ¶ 12(b).

274. IPAS ET AL., *supra* note 267, at 1.

275. *Id.*

276. *Id.*

277. *Id.* at 2.

women. First, a human rights framework moves beyond the decisional aspects of reproductive rights and embraces reproductive rights from a foundational perspective.[278] This distinction is elemental for women of color, poor women, and immigrant women. This ensures that the foundational elements of reproductive freedom, so often overlooked by the mainstream reproductive rights movement, are addressed. For women of color, immigrant women, and poor women, these foundational aspects (as detailed in prior portions of this article), such as adequate housing, proper nutrition, and culturally and linguistically appropriate health care are intrinsic to the realization of reproductive freedom.[279] The broader context of a human rights framework has been examined by scholars. For instance, Lance Gable clarifies the distinction between the scope of the mainstream reproductive rights movement and that of reproductive health and justice within a human rights framework, "[s]pecifically, the reproductive rights model primarily considers the decisional aspects of human rights, while the right to health model focuses on the foundational aspects of human rights."[280] The difference in the scope of these two models is significant. As noted, reproductive rights is focused on decisional aspects, while the right to health has developed "primarily as an economic, social, and cultural right, with an attendant focus on the provision of affirmative access to health services[,] and more recently, on guarantees to uphold the underlying determinants of health."[281] These underlying determinants, such as housing and nutrition, are the foundational aspects that are so essential to women of color, poor women, and immigrant women; however, they are so often overlooked in the mainstream reproductive rights discourse.[282]

Along with this broader foundational framework, a human rights context does not project moral or social judgments about who is worthy to possess such rights; these rights are inherently based on one's humanity. This is a significant distinction, especially for women of color, immigrant women, and low-income women, who under a human rights framework, are granted the right to reproductive health and autonomy simply by virtue of their

278. Gable, *supra* note 15, at 987.
279. *See id.* at 976; *supra* Part I.A.
280. Gable, *supra* note 15, at 961.
281. *Id.* at 969.
282. *See id.* at 961, 980.

humanity.[283] This differs from the mainstream United States legal framework, which places moral judgments on the right to privacy in which the mainstream United States reproductive rights movement centers its focus.[284] This focus deems certain individuals worthy of privacy rights and reproductive rights, while excluding those deemed not worthy of such rights, particularly women inhabiting the public domain, such as poor women on welfare, undocumented immigrant women, or women of color who are believed to be stereotypically irresponsible mothers and incapable of making their own reproductive health decisions.[285] This distinction is important because the narrow mainstream focus places an obligation upon the woman to prove her "worthiness" of her reproductive rights, while a human rights framework creates an assumption of these rights based simply upon her humanity, no litmus test or moral judgments applied.[286]

In addition, a human rights framework places affirmative obligations upon a state to protect reproductive health and to address the underlying determinants of reproductive health.[287] Gable goes on to elaborate more broadly on what the right to reproductive health in a human rights context encompasses, as explained in General Comment 14, interpreting the right to health under article 12 of the International Covenant on Economic, Social, and Cultural Rights:

> [R]eproductive health rights should encompass efforts to refrain from "limiting access to contraceptive and other means of maintaining sexual and reproductive health," and to prevent and treat diseases affecting women that may impact reproductive functioning, to provide access to a full range of high quality and affordable reproductive health services, to reduce women's health risks by lowering rates of maternal mortality and protecting women from domestic violence, to remove "all barriers interfering with access" to reproductive health services, education, and information, and "to undertake preventive, promotive, and remedial action to shield women from the impact of harmful

283. *Id.* at 968. "[C]ertain rights apply to all humans by virtue of their humanity and that these rights can be claimed from governments, which have a legal obligation to uphold them." *Id.*

284. *See* discussion *supra* pp. 5, 10.

285. *See* Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 14 WOMEN'S RTS. L. REP. 305, 308 (1992).

286. *See* Gable, *supra* note 15, at 968.

287. *Id.* at 975.

> traditional cultural practices and norms that deny them their full reproductive rights."[288]

As Gable argues, addressing these underlying determinants of reproductive health go a long way to addressing health disparities and achieving reproductive justice; "deficiencies in reproductive health indicators are largely conditions that can be alleviated with a combination of better access to health services, improvement in economic and social conditions, and increased protection of human rights related to reproductive health."[289]

In fact, a major criticism of a human rights framework for reproductive health is that it is so broad.[290] However, as Gable and others note, all aspects of reproductive health do not have to be realized at once, "[r]ather, [the human rights framework] implores governments to take all of these factors into account when addressing reproductive health so as to understand the complexity and interrelated effects that the conditions have on realizing the right to reproductive health."[291]

C. Should the Perfect be the Enemy of the Good?: Pitfalls and Limitations of Adopting a Human Rights framework for Reproductive Health in the United States

The idea of reproductive health as a right under human rights instruments, while it has been recognized in some international law circles, remains "in flux, its development unfinished, its contours uncertain, and its widespread international acceptance tenuous."[292] In fact, there has been some discussion in United States legal circles about the consequences of the application of international instruments, their impact on the United States Constitution and on United States case law, and the potential negative implications of binding the United States to international instruments.[293] While these

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288. *Id.* at 982 (footnote omitted).

289. *Id.* at 962.

290. Gable, *supra* note 15, at 984.

291. *Id.*

292. Gable, *supra* note 15, at 959.

293. *Id.* at 972.

> In the United States . . . reproductive rights jurisprudence has rarely invoked explicitly international human rights obligations, instead favoring the use of constitutional arguments to challenge limitations on reproductive rights. This strategy is understandable given the lack of established international human rights standards when many of the initial

concerns may persist, analyzing reproductive health as a human right is a worthy exercise because the right embodies a broader understanding of the complexities involved in achieving reproductive health and the nuances necessary to encompass the concerns of a myriad of women who aspire to achieve reproductive health.[294] In fact, this paradigm is broader, more inclusive, and more cognizant of the social equalities that must exist in order to support full realization of reproductive health.

Contrary to the mainstream United States reproductive rights movement, a human rights framework calls for a participatory movement, in which all those affected by health policies have a say in shaping those policies.[295] More significantly, such a participatory movement is essential "[b]ecause poor women, immigrant women[,] and women of color are disproportionately affected by U.S. public policy on reproductive health programs and services, their input in policy matters is particularly important to upholding the right to health."[296]

While the United States is not obligated under these international instruments to honor the reproductive health of women, these international instruments implicate the United States for violating immigrant women's right to reproductive justice.[297] These instruments also provide a "conceptual framework and a shared language for advocates and policymakers both inside and outside the United States."[298] As one scholar observes, "[w]hile noting that the international law forum is itself inherently androcentric, many feminist scholars nonetheless feel that the best approach to combating domestic injustice is increased attention to international human rights law with the goal of creation or revision of customary international norms."[299]

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legal challenges were being advanced and the historical reluctance of United States courts to apply international law to resolve domestic constitutional issues.

Id. (footnote omitted).

294. *See supra* Part I.A.

295. *Id.*

296. *Id.*

297. *See* JULIE STANCHIERI ET AL., THE APPLICATION OF HUMAN RIGHTS TO REPRODUCTIVE AND SEXUAL HEALTH: A COMPILATION OF THE WORK OF INTERNATIONAL HUMAN RIGHTS TREATY BODIES 1286 (2005) [hereinafter HUMAN RIGHTS].

298. IPAS ET AL., *supra* note 267, at 1.

299. R. Christopher Preston & Ronald Z Ahrens, *United Nations Convention Documents in Light of Feminist Theory*, 8 MICH. J. GENDER & L. 1, 2 (2001) (footnote omitted).

> During the last decade, this women's human rights approach has met with some success within the international community. At recent United Nations (U.N.) conferences in Nairobi, Istanbul, and Beijing, non-

International human rights instruments are not perfect, but they do provide a broader and more foundational framework through which to view the human right to reproductive health.[300] There are no sanctions for violating these instruments, instead they function as guidance for governments.[301] Many criticize these instruments for their lack of enforcement mechanisms.[302] For instance, the Convention on the Elimination of All Forms of Discrimination Against Women has been criticized for its embodiment of negative rights, such as requiring states to eliminate discrimination in employment and marriage, without placing an affirmative obligation on states to, for instance, provide access to health services.[303] These are the same kinds of criticisms leveled at United States legal jurisprudence, which often requires the state to eliminate a negative behavior (such as overt discrimination), but does not place an affirmative action on states to provide resources or services to ensure that women can exercise their right to reproductive health.[304]

IV. ASPIRATIONAL OR ACHIEVABLE? IS A HUMAN RIGHTS APPROACH REALISTIC IN THE UNITED STATES?

While many may interpret the rights embodied in human rights instruments as merely aspirational, they in fact provide the best framework to view rights, based upon the common humanity of all, and superseding any race, ethnic, or language boundaries.[305] Implicit in all human rights are the principles of equality and dignity.[306] These principles convey an affirmative duty on governments in their treatment of individuals rather than just a demand that governments not infringe upon the recognized rights of individuals. This embodies the affirmative duty of governments to ensure equal access to health services and to protect third parties from violating the right to

governmental organizations (NGOs) and supporters within the U.N. system, have focused large amounts of attention on issues affecting women, including reproductive rights, poverty, armed conflict, and participation in the political and economic arenas.

Id. at 3–4 (footnotes omitted).

300. *See* Gable, *supra* note 15, at 978, 983–84.
301. *See id.* at 968 n.44, 984.
302. *Id.* at 984.
303. *Id.* at 976.
304. Johns, *supra* note 169, at 24.
305. *See* Gable, *supra* note 15, at 984–86.
306. *See id.* at 983 n.120.

health.[307] Moreover, these affirmative duties call on governments to "respect, protect[,] and fulfill the right to health without discrimination on grounds such as race, sex, national origin, language ability, disability, and sexual orientation."[308] Without such a broad standard for the attainment and achievement of reproductive justice, many individuals and groups will be excluded, as has been evidenced in the United States reproductive rights movement.[309]

In fact, the framework is fitting because it underscores the interconnectedness that reproductive health as a human right has with other fundamental human rights. Gable eloquently states, "Several factors support the idea of considering reproductive health as a human right: its centrality to human functioning; its contribution to overall human health; its interconnectedness with numerous other human rights; and its relationship with social factors involving sexuality, gender, and power."[310] Further, as Gable notes, recognizing reproductive health as a human right elevates it to the status of other human rights and demands the same legal and social protections afforded these rights.[311]

This still begs the question, What concrete and realistic gains can be made from adopting a human rights framework for contextualizing the right to reproductive health in the United States, especially when the United States is not a signatory to most international instruments?[312]

There are several reasons why a human rights framework would be useful for encompassing the reproductive rights and justice movements. First, adopting human rights instruments adds legitimacy to human rights claims.[313] Such instruments place additional pressure and affirmative obligations on states and put them on notice of their obligations under the applicable instruments.[314] For instance, a state adhering to the Universal Declaration of Human Rights must concede the enumerated rights the instrument

307. *Id.* at 981.

308. IPAS ET AL., *supra* note 267, at 1.

309. *See* Gable, *supra* note 15, at 993.

310. *Id.* at 985.

311. *Id.*

312. *See, e.g.*, HUMAN RIGHTS WATCH, THE UNITED STATES RATIFICATION OF INTERNATIONAL HUMAN RIGHTS TREATIES 1–2 (2009).

313. *See* Gable, *supra* note 15, at 992.

314. *Id.* "It puts states on notice that they must accommodate a wide range of rights and determinants to satisfy their human rights obligations. These norms can encourage the establishment of more robust and innovative rights-based approaches to reproductive health, which can then be tested and shared." *Id.*

recognizes, such as the right to a "standard of living adequate for [one's] health and well-being."[315]

Second, for states that are signatories, individuals have legally enforceable claims.[316] This, as Gable notes, "may expand the possibilities for justiciable recourse for violations of reproductive health rights."[317] This is one of the most controversial issues surrounding United States adoption of human rights treaties and was exemplified during the debate around United States support of the Convention on the Rights of Persons with Disabilities.[318]

Moreover, and perhaps most significant for women of color, poor women, and immigrant women who have historically participated in grassroots movements, the human rights framework is a viable organizing tool.[319] However, unlike the current reproductive rights movement in the United States, the human rights paradigm provides a broader and more inclusive framework.[320] Premised on the commonality of our shared humanity, it is inclusive of the economic, social, and ethnic and cultural differences we share, while at once underscoring our undeniable link to each other.[321] It deconstructs the silos that currently characterize the organization of reproductive rights in the United States and calls for a shared movement. As activist Loretta Ross notes, a broad human rights framework is important for women of color because it ends the separation of abortion rights from other social justice issues, thereby mobilizing broader communities. "[I]t is difficult—if not impossible—to mobilize communities in defense of abortion rights if abortion is taken out of the context of empowering women, creating healthier families, and promoting sustainable communities."[322] This paradigm shift, as Ross notes, is instrumental for creating a "more inclusive and catalytic vision of how to move forward in building a new movement for women's human rights."[323] This helps to broaden the movement's focus, to reach out to broader constituencies, thereby

315. UDHR, *supra* note 244, art. 25.
316. *See* Gable, *supra* note 15, at 992.
317. *Id.*
318. United Nations Convention on the Rights of Persons with Disabilities, *supra* note 240.
319. *Id.* at 959–60.
320. *Id.* at 960–61.
321. *See What Are Human Rights?*, UNITED NATIONS HUM. RTS.: OFF. OF THE HIGH COMM'R FOR HUM. RTS., http://www.ohchr.org/en/issues/Pages/Whatare HumanRights.aspx (last visited Jan. 11, 2013).
321. Ross, *supra* note 7, at 4.
322. *Id.* at 4.

refocusing the movement to a more grassroots approach to achieve systemic change.[324]

Therefore, the benefit of this paradigm is not just a symbolic one calling for the contextualization of reproductive rights within other human rights, but it is also useful as an organizing tool that secures legitimacy and buy-in from broader communities. This paradigm resonates with women of color, poor women, and immigrant women who recognize human rights issues as more relevant to their lives, even those human rights issues not directly affecting individual women.

A human rights framework as an organizing tool is important, especially now when the reproductive rights and reproductive justice movements are arriving at meaningful junctures. As activists like NARAL's Nancy Keenan and SisterSong's Loretta Ross step down,[325] change is incumbent upon the next generation of leaders to help steer the debate and reformulate the advocacy paradigm for future generations. This is a unique time for these two movements to fully coalesce and focus on a human rights agenda.

Activist Loretta Ross points to the success of the 2004 March for Women's Lives as an example of when a more unified reproductive justice framework helped to bring together broad constituencies of activists.[326] As Ross notes, the event addressed broad issues, including domestic violence, the global gag rule,[327] the spread of HIV/AIDS, the Iraq war, and gay marriage, among many other cross-cultural, multi-class, even international, issues.[328] The fact that this event was able to draw over 1 million activists speaks to the efficacy of a broader paradigm as an effective organizing tool. As Ross notes, "The success of the March was a testament to the power of human rights to mobilize and unite diverse sectors of the social justice

323. *Id.* Noting, "Using this analysis, we can integrate multiple issues and bring together constituencies that are multi-racial, multi-generational, and multi-class in order to build a more powerful and relevant grassroots movement that can create systemic change." *Id.* at 9.

324. Loretta Ross, *A Message of Thanks and Transition from SisterSong National Coordinator, Loretta Ross*, SISTERSONG.NET, http://www.sistersong.net/index.php?option=com_content&view=article&id=159:a-message-from-loretta-ross&catid=4:latest-news&Itemid=64 (last visited Jan. 11, 2013); Sam Baker, *Abortion-rights Champion Stepping Down*, THE HILL, HEALTHWATCH (Dec. 27, 2012, 5:00 AM), http://thehill.com/blogs/healthwatch/abortion/274597-pro-choice-champion-stepping-down.

325. Ross, *supra* note 7, at 9 ("As an example of the reproductive justice framework in action, more than 1.15 million people participated in the April 25, 2004 March for Women's Lives, making it the largest protest march in U.S. history.").

326. *Id.*

327. *Id.*

movement to unite diverse sectors of the social justice movement to support women's human rights in the United States and abroad."

International human rights instruments and the resulting human rights framework exemplify the ways the United States can affirmatively protect and honor women's reproductive health and autonomy.

V. CONCLUSION

The human rights approach to reproductive health and autonomy, reflected in international instruments, also embodies the broader concept of reproductive justice to the inclusion of other social justice movements; it "reflects the indivisibility and interdependence of all human rights."[329] Only with this kind of pluralistic approach can we hope to address the myriad issues and instruments of oppression that negatively impact reproductive health. This paradigm holds the promise of transcending the "beautiful fraud" of the reproductive rights movement, coalescing the disjointed movements into a more cohesive, unified, and powerful movement. As one activist notes:

> Americans of any demographic cannot continue to separate themselves from issues that affect any group within a system and act as if it does not or will not touch their communities. To do so, colludes with the system as it is and continues its inequities . . . .[330]

This broad and holistic human rights approach is needed as the reproductive rights and justice movements face unique opportunities to broaden their agendas and unify and reframe their movements.

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329. Aart Hendriks, *Promotion and Protection of Women's Right to Sexual and Reproductive Health Under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123, 1129 (1995).

> [T]he extent to which women can benefit from sexual and reproductive health does not depend exclusively on the efforts a State makes to realize the right to health. The enhancement of women's sexual and reproductive health also requires that other rights – mostly civil and political rights – are maximally observed. These include the right to private life; the right to life; the right to be free from inhuman and degrading treatment; the right to have, and to avoid, information; the right to marry or not to marry; the right to found or not found a family.

Id.

330. Candice Cabbil, *Black Abortion: A Systemic Perspective*, SISTERSONG, Summer 2011, at 38, 38, *available at* http://www.sistersong.net/documents/CollectiveVoices_Summer2011_rf2.pdf.

While there is controversy surrounding the United States' adoption of human rights instruments, a paradigm shift from disjointed agendas to a unified human rights framework is a good first step in terms of organizing and refocusing the reproductive rights and justice agendas. This shift may reposition the strategy from a jurisprudence-based approach to a community-based approach; it may require a change of venue from the courtroom to communities, neighborhoods, and kitchen tables. But, such a shift is necessary to transcend the "beautiful fraud" of the "mainstream" movement. Like many other political movements, the reproductive rights and justice movements must necessarily evolve and change, and a human rights framework offers a hopeful framework for the future.