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## Stereotyping Women in the Health Sector: Lessons from CEDAW

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# Stereotyping Women in the Health Sector: Lessons from CEDAW

Simone Cusack\* and Rebecca J. Cook\*\*

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\*\* Professor of Law, Chair in International Human Rights Law, and Co-Director of the International Reproductive and Sexual Health Law Programme, Faculty of Law, University of Toronto. The arguments presented in this Article build on those developed in: REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2010). The authors are grateful to Bernard Dickens and Linda Hutjens for their insightful comments and help, and the anonymous reviewers for their useful comments.

### I. Introduction

Lessons from the Convention on the Elimination of All Forms of Discrimination against Women<sup>1</sup> ("CEDAW") for the interpretation and application of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>2</sup> ("African Protocol") are multiple, and will vary according to the issue. This Article argues that Article 12 of CEDAW,<sup>3</sup> which guarantees women's right to the highest attainable standard of health, including reproductive health, has to be interpreted in light of that treaty's foundational articles, particularly Articles 2(f)<sup>4</sup> and 5(a),<sup>5</sup> which require the elimination of wrongful gender stereotyping. Since the African Protocol also requires States Parties to ensure women's right to the highest attainable standard of health<sup>6</sup> and to eliminate wrongful gender stereotyping,<sup>7</sup> it is hoped that some insights

1. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Simone Cusack & Rebecca J. Cook, *Combating Discrimination Based on Sex and Gender*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK (Catarina Krause & Martin Scheinin, eds., 2009).

2. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Sept. 13, 2000, O.A.U. Doc. CAB/LEG/66.6 [hereinafter African Protocol]; Fareda Banda, *Protocol to the African Charter on the Rights of Women in Africa*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE (Malcolm Evans et al. eds., 2d ed. 2008).

3. See CEDAW, Art. 12 (requiring States Parties to: "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning;" and, "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation").

4. See *id.* Art. 2(f) (requiring States Parties to: "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women").

5. See *id.* Art. 5(a) (requiring States Parties to take all appropriate measures to: "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women").

6. See African Protocol, Art. 14 (requiring States Parties to respect, protect and fulfill women's right to the highest attainable standard of health, including sexual and reproductive health).

7. See *id.* Arts. 2(2) (requiring State Parties to: "modify the social and cultural patterns of conduct of women and men . . . with a view to the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."), 4(2)(d) (requiring States Parties to: "take appropriate and effective measures to . . . eradicate

might be derived from CEDAW that are useful to the interpretation and application of that Protocol.

This Article examines how stereotyping women can impair or nullify their access to reproductive health care, in violation of CEDAW. In so doing, it argues that in order to eliminate discrimination against women, and indeed to prevent other violations of their human rights in the reproductive health context, greater priority needs to be given to combating wrongful stereotyping of women. The Article begins in Part II by examining some of the most socially pervasive and persistent gender stereotypes that impact the availability, accessibility, acceptability and quality of reproductive health care for women. It explores the contextual factors of those stereotypes, and examines how their application, enforcement, or perpetuation in various laws, policies and practices can discriminate against women, or violate other human rights and fundamental freedoms. Using the framework set forth in CEDAW, Part III explores States Parties' obligations to eliminate wrongful gender stereotyping that violates women's access to reproductive health care. It continues by canvassing some of the measures that States Parties might adopt in order to dismantle the stereotypes that continue to thwart women's equal exercise and enjoyment of the right to the highest attainable standard of health. The Article concludes in Part IV by reflecting on some of the lessons learned under CEDAW regarding States Parties' obligations to eliminate stereotyping.

## *II. Understanding Gender Stereotyping in the Health Sector*

### *A. Wrongful Gender Stereotyping: An Obstacle to Women's Reproductive Health*

Women regularly face obstacles in accessing reproductive health care services and information, especially in the area of family planning. The nature, frequency and immutability of obstacles vary greatly, depending on such factors as a woman's age, race, religion, sexual orientation, and geographical location. A woman with a disability might experience difficulty in gaining access to a doctor with expertise in women's

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elements in traditional and cultural beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women"), and 12(1)(b) (requiring States Parties to: "take all appropriate measures to eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate such discrimination").

reproductive health, in a clinic that meets her physical access or other needs.<sup>8</sup> A woman living in a rural area might have difficulty gaining timely access to emergency contraception, and therefore be denied the opportunity to decide freely and responsibly on the number and spacing of her children, due to the unavailability of that contraceptive in a geographically accessible pharmacy.<sup>9</sup> Similarly, a lesbian<sup>10</sup> or single<sup>11</sup> woman might be denied access to assisted reproductive technologies on account of her sexual orientation or marital status, respectively.

While the obstacles that impair or nullify women's access to reproductive health care are undeniably varied, this Article contends that wrongful gender stereotyping is a socially pervasive and persistent obstacle that requires closer scrutiny. The stereotype of women as primarily mothers, for example, has been applied, enforced, and perpetuated through laws, policies and practices that deny or restrict women's access to affordable contraceptives and related health care services and information.<sup>12</sup> Opponents of abortion rights have sought to perpetuate the stereotype of women as weak and vulnerable and therefore in need of protection (the "woman-protective" argument), in support of their efforts to abolish or restrict women's access to abortion.<sup>13</sup> The stereotype of women as incompetent decision-makers has been enforced through laws, policies and practices that, *inter alia*, allow the forcible sterilization of women.<sup>14</sup>

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8. Sue Salthouse, *The Sick State of Health for Women with Disabilities*, Paper Presented at the Australian Women's Health Network 5th Australian Women's Health Conference (April 20–22, 2005).

9. Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZ. L. REV. 469, 522 (2006); Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2 UTAH L. REV. 421 (2007).

10. Assisted Reproductive Treatment Act 2008 (Vic.) (Austl.), No. 76 of 2008, § 10 (explicitly granting, for the first time in Victoria, Australia, lesbians access to assisted reproductive treatment).

11. *McBain v. Victoria*, 99 FCR 116 (Federal Court of Australia 2000) (invalidating section 8(1) of the (now repealed) Infertility Treatment Act 1995 (Vic.) (Austl.), No. 63 of 1995, which denied single women access to infertility treatment).

12. See *infra* notes 65–91 and accompanying text.

13. See *infra* notes 94–119 and accompanying text.

14. CEDAW Committee (*A.S. v. Hungary*), Communication No. 4/2004, U.N. Doc. CEDAW/C/36/D/4/2004 (2006) (finding Hungary in violation of its obligations under CEDAW to protect women against forcible sterilization); *Maria Mamérita Mestanza Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R. Report No. 71/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003) (finding Peru in violation of its obligations under the Inter-American human rights system to protect women against forcible sterilization).

Stereotyping is not necessarily problematic. Stereotyping can, for example, be a useful tool to help process the social complexity of the world.<sup>15</sup> As one commentator has explained:

[T]he real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations. And although we have to act in that environment, we have to reconstruct it on a simpler model before we can manage with it.<sup>16</sup>

Stereotyping can also provide predictability and security. One can feel comforted by the familiarity that arises from the repeated use of stereotypes.<sup>17</sup>

Yet, history has shown that stereotyping has had particularly egregious consequences for women. One feminist legal scholar has observed that a

useful way of examining the continued disadvantage of women is to identify the assumptions and stereotypes which have been central to the perpetuation and legitimation of women's legal and social subordination. Such assumptions have roots which stretch deep into the history of ideas, yet continue to influence the legal and social structure of modern society. Indeed, the continuity is startling, given the extent and fundamental nature of change in the political and economic context.<sup>18</sup>

So, while stereotyping is not inherently problematic, it becomes problematic when it operates to ignore individual women's characteristics, abilities, needs, wishes, and circumstances in ways that deny them their rights, and when it creates gender hierarchies by constructing women as inferior to men.<sup>19</sup>

Uncovering how laws, policies and practices apply, enforce, or perpetuate stereotypes of women is critical to understanding their gendered experiences of discrimination and inequality. Examining how women are stereotyped in the health context can provide important insights that foster understanding of how, and in what ways, women are disadvantaged in relation to the availability, accessibility, acceptability, and quality of health care services and information.

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15. Cusack and Cook, *supra* note 1, at 13–16.

16. WALTER LIPPMANN, PUBLIC OPINION 16 (1922; repr. 1957).

17. *Id.* at 95.

18. SANDRA FREDMAN, WOMEN AND THE LAW 3 (1997).

19. Cusack and Cook, *supra* note 1, at 59–68.

If discrimination against women and other violations of their rights are to be prevented in the health sector, greater priority needs to be given to eliminating wrongful gender stereotyping. The ability to eliminate gender stereotyping in the health sector is contingent on the wrong first being named<sup>20</sup> or, to borrow a medical metaphor, an ailment first needs to be diagnosed in order for it to be treated.<sup>21</sup> Exposing the operative gender stereotypes, examining their origins, contexts, and means of perpetuation, and analyzing how their application, enforcement, or perpetuation harms women, are critical to this process.<sup>22</sup> Once wrongful gender stereotyping has been named, it is then possible to identify if, and how, operative gender stereotypes impair or nullify women's rights to non-discrimination and equality, and/or violate their other human rights.<sup>23</sup> Assuming that a rights violation is identified, efforts can also be made to work toward the elimination of operative gender stereotypes, through the adoption of legal and other measures.<sup>24</sup>

It is helpful at this juncture to consider what is meant by the terms "gender stereotype" and "gender stereotyping." The term "gender stereotype" is used in this Article to describe a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, men and women, respectively.<sup>25</sup> In this view, a gender stereotype presumes that all individuals in the social groups of men or women possess certain attributes or characteristics, behave in a certain way, and/or perform specific, pre-determined roles. The term "gender stereotyping" is used to describe a process of ascribing to an individual person certain attributes, characteristics, or roles only by reason of his or her membership in the social group of men or women.<sup>26</sup>

A particular characteristic of gender stereotypes is that they are resilient; they are socially pervasive (by which is meant articulated across social sectors and cultures) and persistent (meaning articulated over time).<sup>27</sup>

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20. RUTH HALPERIN-KADDARI, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 7 (2004); see also William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...*, 15 *LAW & SOC'Y. REV.* 631 (1980).

21. Cusack and Cook, *supra* note 1, at 3.

22. *Id.* at 45–58.

23. *Id.* at 59–70, 104–130.

24. *Id.* at 93–99.

25. *Id.* at 20–24.

26. PENELOPE J. OAKES, S. ALEXANDER HASLAM, & JOHN C. TURNER, *STEREOTYPING AND SOCIAL REALITY* 1 (1994).

27. Reva B. Siegel, *Discrimination in the Eyes of the Law: How 'Color Blindness' Discourse Disrupts and Rationalizes Social Stratification*, 88 *CAL. L. REV.* 77, 82 (2000)

Indeed, one commentator has recalled how an expert of the Committee on the Elimination of Discrimination against Women ("CEDAW Committee") (the UN treaty body established to monitor States Parties' compliance with CEDAW) observed that "she found it striking that in all the countries they had considered, . . . gender stereotypes had proved extremely resistant to change. While there was clearly greater equality in some countries than others, stereotypes about men and women persisted . . ." <sup>28</sup> Another commentator has explained that gender stereotypes are among the obstacles that states most frequently cite to the elimination of discrimination and the realization of substantive equality. <sup>29</sup> Stereotypes, she said, not only perpetuate harmful practices, but also contribute to "a pervasive climate of discrimination and at times backlash. Examples range from the continued devaluation of women's labour in the home, to disadvantaged position in the labour market to attacks on women's reproductive rights." <sup>30</sup> She described how, even in states where important strides have been made toward the achievement of substantive equality, "gender roles and identities continue to be shaped by patriarchal notions of 'femininity' and 'masculinity' . . . . Hence, progress toward gender equality continues to be fragile and under constant threat from a conservative coalition, operating globally and nationally . . ." <sup>31</sup>

Conditions for social stratification and subordination of women exist when practices, such as gender stereotyping, are both socially pervasive and persistent. <sup>32</sup> The conditions for social stratification and subordination are exacerbated when stereotypes are institutionalized in states' laws, policies, and practices. An example is the widespread institutionalization, through judicial reasoning, of sexual stereotypes of women that condone and justify sexual assault. <sup>33</sup> The saturation of law with sexual stereotypes, such as the

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[hereinafter Siegel, *Eyes of the Law*]; see also DAVID B. GRUSKY, ED., *SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE* (3rd ed. 2008).

28. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 75 (2006).

29. Yakin Ertürk, *Considering the Role of Men in Gender Agenda Setting: Conceptual and Policy Issues*, 78 *FEMINIST REVIEW* 3, 7 (2004).

30. *Id.*

31. *Id.*

32. Siegel, *Eyes of the Law*, *supra* note 27, at 82.

33. *R v. Ewanchuk*, 1 S.C.R. 330 (Can., Supreme Court 1999) (L'Heureux-Dubé J., concurring) (naming the sexual stereotypes enforced by the lower courts, explaining how stereotyping harmed the complainant, and identifying how stereotyping influenced the lower courts' decision to acquit the defendant); see also The Hon. Madame Justice Claire L'Heureux-Dubé, *Beyond the Myths: Equality, Impartiality, and Justice*, 10 *JOURNAL OF*



stereotype that women are in a state of perpetual consent to sexual activity, has contributed to the frequent blaming of victims and survivors of sexual assault<sup>34</sup> and, for example, the denial of female sexual agency and the privileging of male sexuality.<sup>35</sup>

Gender stereotypes are shaped by the contexts in which they operate. In order to accurately diagnose and effectively treat them, it is therefore important to understand the underlying context in which they are applied, enforced, or perpetuated. One approach to understanding context is to think about it in terms of individual factors, situational factors in different sectors, and broader factors.<sup>36</sup> Understanding these factors can help to explain how gender stereotyping contributes to the conditions for the social stratification or subordination of women,<sup>37</sup> how it is perpetuated, and the process by which it might be eliminated.<sup>38</sup>

As *individuals*,<sup>39</sup> we absorb stereotypes through our everyday interactions with people and exposure to culture.<sup>40</sup> Repeated encounters embed those stereotypes deep into our subconscious minds,<sup>41</sup> where we (often) come to accept them uncritically as a "normal" understanding of the world and begin to act in conformity with them.<sup>42</sup> *Situational* factors<sup>43</sup> provide insights into how an individual is "affected by and adapts to social contexts, ranging from proximal influences (e.g., the norms of one's immediate work group) to more distal influences (e.g., the division of male

SOCIAL DISTRESS & THE HOMELESS 87 (2001), at 89–90.

34. CEDAW Committee, Report on Mexico Produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply From the Government of Mexico, CEDAW, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (2005), paragraph 67.

35. See, e.g., *R. v. Ewanchuk*, 1 S.C.R. 330 (Can., Supreme Court 1999).

36. Cusack and Cook, *supra* note 1, at 31–36.

37. Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & LAW 2, 39–55 (1998).

38. Cusack and Cook, *supra* note 1, at 36–38.

39. *Id.* at 32.

40. L'Heureux-Dubé, *supra* note 33, at 89.

41. *Id.*

42. Deborah L. Rhode & Joan C. Williams, *Legal Perspectives on Employment Discrimination*, in *SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES* 235, 245 (Faye L. Crosby, Margaret S. Stockdale & S. Ann Ropp, eds., 2007); Peter Glick & Susan T. Fiske, *Sex Discrimination: The Psychological Approach*, in *SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES* 155, 157–58 (Faye L. Crosby, Margaret S. Stockdale & S. Ann Ropp, eds., 2007).

43. Cusack and Cook, *supra* note 1, at 32–33.

and female roles in society)."<sup>44</sup> In the health sector, for instance, stereotypes about women emerge in regard to their capacity to make free and informed decisions about their health care, moral agency to make decisions about their reproduction and sexuality, and autonomy to determine their own roles in society. *Broader* factors,<sup>45</sup> such as historical, cultural, religious, and legal considerations, can provide important insights into how a group, community, or culture integrates a stereotype into its social structures and meanings, and unearth the means to achieving their elimination.<sup>46</sup>

There are many different means of perpetuating gender stereotypes and understanding the different means is critical to dismantling stereotypes.<sup>47</sup> When a state applies, enforces, or perpetuates a gender stereotype in its laws, policies, or practices, or fails to adopt legal measures to eliminate and remedy wrongful gender stereotyping through means such as school curricula or textbooks, it institutionalizes that stereotype and gives it the force and authority of the law. As an institution of the state, the law condones its operation and creates an environment of legitimacy and impunity around its use. When a state legitimizes a gender stereotype in this way, it creates a legal framework to enable the perpetuation of discrimination against women.

#### *B. Exposing Wrongful Gender Stereotyping in the Health Sector and Understanding How it Impedes Women's Access to Health Care*

This section analyzes three of the most socially pervasive and persistent stereotypes of women that operate to impair or nullify their access to reproductive health care. These are:

- *the stereotype of women as primarily mothers*, which implies that women (and, conversely, not men) should prioritize childbearing and childrearing over all other roles they might perform or choose;
- *the stereotype of women as weak and vulnerable*, which implies that women are in need of protection, through restrictive laws, policies and practices; and,

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44. Glick & Fiske, *supra* note 42, at 156.

45. Cusack and Cook, *supra* note 1, at 33–36.

46. Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 2 WIS. L. REV. 303, 305, 313–25 (1995).

47. Cusack and Cook, *supra* note 1, at 36–38.

- *the stereotype of women as incompetent decision-makers*, which implies that women are irrational and lack the capacity for moral agency and reproductive self-determination, and should therefore be denied access to certain reproductive health services (e.g., abortion services).

In addition to naming these stereotypes, this section examines their contexts and means of perpetuation. It also analyzes how their application, enforcement or perpetuation harms women and impairs or nullifies their rights, on the basis of equality of men and women, to the highest attainable standard of health, and to decide freely and responsibly on the number and spacing of their children.

### *1. Impeding Women's Access to Contraceptives by Stereotyping Women as Primarily Mothers*

In 1872, in *Bradwell v. Illinois*,<sup>48</sup> Justice Bradley of the U.S. Supreme Court infamously reasoned that "[t]he constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."<sup>49</sup> He continued: "[t]he harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."<sup>50</sup> As if to avoid any potential confusion regarding his understanding of women's value and "proper" role within society, Justice Bradley concluded that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."<sup>51</sup> In these three short sentences, Justice Bradley perpetuated a number of different stereotypes of women—namely, the stereotype of women as homemakers, the stereotype of women as wives and the stereotype of women as mothers. It is this last stereotype of women as mothers that is addressed here.

The stereotype of women as primarily mothers ascribes to women the role of motherhood. It implies that women—and, conversely, not men—

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48. *See Bradwell v. Illinois*, 83 U.S. 130, 137–38 (1872) (holding that a state court did not violate the Privileges or Immunities Clause because it refused to admit a woman to practice law).

49. *Id.* at 141 (Bradley J., concurring).

50. *Id.*

51. *Id.*

should prioritize childbearing and childrearing over all other roles they might perform or choose. It further implies that women (but not men) should make their children the centre of their universe and always put the needs and interests of those children above their own. According to the stereotype, nothing should be more important for women than the bearing and rearing children, and ensuring their wellbeing.

At times, the use of the stereotype of women as primarily mothers is descriptive, by which is meant that the stereotype is used to describe a role (i.e., motherhood) that the overwhelming majority of women perform. At other times, as in the case of Justice Bradley's reasoning, the stereotype is used prescriptively—that is, to prescribe to women the role of motherhood. Understood in this way, motherhood is something that all women—irrespective of their distinctive reproductive health capacity, their individual reproductive or other priorities (e.g., education or career aspirations), or physical and emotional circumstances—ought to desire and "do." For Justice Bradley, it was inconceivable that Myra Bradwell, the petitioner in *Bradwell v. Illinois*, would want a career in the legal profession. In his mind, she was a mother (whether actual or potential); she was not an individual woman who might wish to pursue "a distinct and independent career from that of her husband"<sup>52</sup> or from that of motherhood.

It is significant that Justice Bradley seeks to justify his reliance on the sex-role stereotype of women as primarily mothers by appealing to "the divine ordinance," and by describing women's role as mothers as "the nature of things" and "as that which properly belongs to the domain and functions of womanhood."<sup>53</sup> Motherhood, at least in his opinion, is "[t]he paramount destiny and mission of woman."<sup>54</sup> In equating motherhood with "the nature of things,"<sup>55</sup> Justice Bradley attempts to put his reasoning about women's role as mothers beyond reproach. He wants us to believe that since this is "the way things are" for women, there is no point in arguing that women might want to perform or choose some other role for themselves, or to prioritize some, if not all, of their own needs and interests above those of their children. According to Justice Bradley, women, including Myra Bradwell, should just get on with the business of doing what they should be doing, by virtue of their birth into the social group of women. Motherhood, in other words, is beyond questioning.

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

It is easy to dismiss Justice Bradley's reasoning as anachronistic, an uncomfortable reminder, perhaps, of a time when women were preconceived of as primarily homemakers, wives, and mothers. However, the stereotypes that underpin his reasoning—especially the stereotype of women as primarily mothers—have worn a well-trodden path throughout history and across cultures, and have regularly been institutionalized into states' laws, policies and practices, sowing the seeds for the social stratification and subordination of women. Indeed, as one feminist legal scholar and former member of the CEDAW Committee has explained, the stereotyping of women as primarily mothers is "globally pervasive."<sup>56</sup>

One can point to many modern uses of the stereotype of women as primarily mothers. Yet, one example that stands out, because of its incorporation into a national constitution, the highest and most authoritative law that underpins a state's entire existence, is the Constitution of Ireland of 1937 ("Irish Constitution").<sup>57</sup> Article 41.2 of the Irish Constitution provides:

1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

As in Justice Bradley's reasoning, the Irish Constitution equates women with mothers; it prescribes to women the role of motherhood and commends them for the "common good" they serve by performing their "natural" roles and fulfilling their destiny as mothers. Yet, more than this, the Government of Ireland, through its Constitution, imposes on women its preference for how women should behave and the role they should perform in Irish society, by proactively discouraging women from pursuing a role other than motherhood: "mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."<sup>58</sup> In this way, the Irish Constitution not only sends a message that women ought to be mothers, but it also stigmatizes mothers who, without economic

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56. Frances Raday, *Culture, Religion, and CEDAW's Article 5(a)*, in *THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN* 68, 71 (Hanna Beate Schöpp-Schilling & Cees Flinterman, eds., 2007).

57. CONSTITUTION OF IRELAND, 1937, Art. 41.2.

58. *Id.* Art. 41.2.1.

need, pursue a career in the paid workforce or their own interests outside the home.

Evidence of the perpetuation of the stereotype of women as primarily mothers can be found throughout time, in almost all sectors of society, from the education sector,<sup>59</sup> to marriage and family relations,<sup>60</sup> to the employment sector.<sup>61</sup> Health is one sector, however, where its presence has been particularly marked, but little explored. The stereotype of women as primarily mothers has been applied in this sector, particularly in the reproductive health context, to deny or impede women's access to safe and lawful abortion,<sup>62</sup> contraceptives, including emergency contraception,<sup>63</sup> and, for example, family planning information.<sup>64</sup> Its application has harmed

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59. See, e.g., *Haines v. Leves*, 8 NSWLR 442 (Austl., Court of Appeal of New South Wales 1987) (holding that it was discriminatory to segregate students in single sex schools in order to ensure curricula differences that reflected sex-role stereotypes of men as breadwinners and women as homemakers, because this limited girls' future choices of education, vocations and careers); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (finding that the University's decision to deny admission to its all-female nursing program to an otherwise qualified male applicant because of his sex violated the Fourteenth Amendment to the U.S. Constitution.).

60. See, e.g., *Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001) (finding that, in enforcing sex-role stereotypes in marriage and family relations, the impugned provisions of the Civil Code of the Republic of Guatemala discriminated against the complainant); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007); Michelle O'Sullivan, *Stereotyping and Male Identification: 'Keeping Women in Their Place,'* in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 185 (Christina Murray, ed., 1994).

61. See, e.g., *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (discussing the existence of the stereotype in the employment setting while ruling on the State's failure to comply with the Family and Medical Leave Act); Joan C. Williams, et al., *The Evolution of 'FRED': Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008); Joan C. Williams et al., *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Careers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31 (2006).

62. See, e.g., *Tysiac v. Poland*, no. 5410/03 ECHR 219 (finding Poland had violated the right to private life in Article 8 of the European Convention of Human Rights, in failing to ensure effective mechanisms capable of determining whether the conditions for a lawful abortion had been satisfied); Rebecca J. Cook & Susannah Howard, *Accommodating Women's Differences Under the Women's Anti-Discrimination Convention*, 56 EMORY L.J. 1039, 1040 (2007).

63. Smearman, *supra* note 9, at 540.

64. Declaring Total Commitment and Support to the Responsible Parenthood Movement in the City of Manila and Enunciating Policy Declarations in Pursuit Thereof, Exec. Order No. 003 (2000) (Phil.) [hereinafter Exec. Order No. 003]; see also LIKHAAN, ET AL., REPROCEN & CENTER FOR REPRODUCTIVE RIGHTS, IMPOSING MISERY: THE IMPACT OF MANILA'S CONTRACEPTION BAN ON WOMEN AND FAMILIES (2007).

women in countless ways, including by neglecting their need for sex-specific health services, expropriating their bodies, reducing their moral agency and autonomy, and scripting them into traditional sex-roles regardless of their individual reproductive health capacity and physical and emotional circumstances, or their individual priorities.

A particularly harmful application of the stereotype of women as primarily mothers can be seen in "Executive Order No. 003: Declaring Total Commitment and Support to the Responsible Parenthood Movement in the City of Manila and Enunciating Policy Declarations in Pursuit Thereof," adopted in 2000 by the former Mayor of Manila City, Jose L. Atienza, Jr. The Executive Order stipulates that Manila City "promotes responsible parenthood and upholds natural family planning not just as a method but as a way of self-awareness in promoting the culture of life while discouraging the use of artificial methods of contraception like condoms, pills, intrauterine devices, surgical sterilization, and others."<sup>65</sup> It requires Manila City to, *inter alia*, establish programs and activities that "promote and offer as an integral part of their functions counseling facilities for natural family planning and responsible parenthood."<sup>66</sup> The Executive Order has significantly impaired women's access to "artificial" methods of contraception and related health care services in Manila City by prohibiting their distribution in public health facilities.<sup>67</sup>

In issuing the Executive Order, Atienza enforced the prescriptive stereotype of women as primarily mothers; that is, he prescribed the role of motherhood to women. The Executive Order sent a clear message that women's natural role and destiny (at the very least in Manila City) is to be mothers, meaning that women (and, conversely, not men) should prioritize childbearing and childrearing over all other roles they might perform or choose in that community. The implication is that women in Manila City should be treated first and foremost as mothers (whether actual or potential) and not according to their individual needs not to become mothers at certain points in their lives. According to this stereotypical thinking, it is not essential that women have access to affordable methods of artificial contraception, since this could potentially deny women the opportunity to fulfill their "duties" as mothers.

In order to fully understand the stereotype's application in the Executive Order, it is important to consider the broader and situational

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65. Exec. Order No. 003, *supra* note 64, paragraph 1.

66. *Id.* paragraph 2.

67. LIKHAAN ET AL., *supra* note 64, at 14.

contextual factors that surrounded its application.<sup>68</sup> For example, it is significant that, at the time the Executive Order was introduced, there had been a "growing Catholicization of public health policies,"<sup>69</sup> and several prominent state figures, including President Arroyo, justified the Order on the ground that denying women access to artificial contraceptives is consistent with the Catholic Church's teachings on family planning.<sup>70</sup> State officials sought to impose their views about women's "proper" role by invoking Catholicism.

It is also significant that the Order was introduced in the broader context of a legal culture that perpetuates stereotypes within family and marriage relations with impunity. For example, in providing that, in the case of disagreements over marital property or parental authority over children, the husband's/father's decision shall prevail over that of the wife's/mother's, the "Family Code of the Philippines of 1987" perpetuates the prescriptive stereotype that men should be decision-makers and therefore bear ultimate power and authority, including in reproductive and sexual matters.<sup>71</sup> In so providing, the Family Code limits women's reproductive and sexual choices, and makes reliance on natural family planning, as practically required under the Executive Order,

[A]n inadequate, and potentially empty, choice for women, because their ability to decide the number and spacing of their children depends completely on the willingness of their partners to abstain from having sex. This lack of a genuine choice deprives women of their right to decide the number and spacing of their children.<sup>72</sup>

Situational factors, including the widespread state practice of rewarding women, through monetary compensation and other gifts, for stereotype-conforming behavior (i.e., for fulfilling their natural "destiny" to be mothers), has facilitated the institutionalization of the stereotype of women as primarily mothers.<sup>73</sup> For example, one report has described how "[t]he mayor [of Manila City] gives prizes for having the most number of children, and the current champion has 21 kids."<sup>74</sup> In addition, the state

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68. Cusack and Cook, *supra* note 1, at 54-56.

69. LIKHAAN, ET AL., *supra* note 64, at 12.

70. *Id.* at 14-15.

71. The Family Code of the Philippines, Exec. Order No. 209, arts. 96, 211 (1987) (Phil.).

72. LIKHAAN, ET AL., *supra* note 64, at 41.

73. *Id.* at 23.

74. *Id.* at 27.



practice of harassing and intimidating health providers that give women access to contraceptives has further facilitated the stereotype's institutionalization. These practices have enabled the imposition of the state's views of women's "proper" role in society; they have restricted women to the role of motherhood and the behavior expected of mothers (i.e., the prioritization of the needs of children over women). This has taken place even where those practices pose serious—even fatal—risks to women.

The introduction of the Executive Order has caused significant harm to women, especially indigent women, in Manila City.<sup>75</sup> Denying women access to essential reproductive health care, particularly artificial contraceptives, is the immediate and most obvious harm to women. As one report has explained:

For most Filipinos, the government is the major source of family planning services, with about 70% of people relying on the public sector for services . . . . People who are living in poverty and marginalized in society are especially dependent on government institutions to provide affordable family planning services and other basic health care. The policy declarations of the [Executive Order], which in essence ban all artificial methods of family planning in city-funded health facilities, affect all women in Manila who want to control their fertility, but especially women who are poor. It is these women who face the greatest barriers in accessing family planning methods, and tend more often to suffer the physical, psychological, economic and social consequences of unintended pregnancies.<sup>76</sup>

The effect of denying women access to artificial means of contraception has been to deprive them of the right to make an autonomous decision to become, or not to become, mothers. Assuming that an individual woman does want to become a mother at some point in her life, its effect has also been to deprive her of the right to decide freely and responsibly on the number and spacing of her children. Put simply, the Order has harmed women by forcing them into the role of motherhood and reducing them to their physiological capacity to bear children.<sup>77</sup>

Forcing women into motherhood, particularly in the case of multiple pregnancies, has further harmed women by jeopardizing their lives, compromising their health through the imposition on them of the physical

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75. *Id.* at 16–25.

76. *Id.* at 16.

77. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 361–62 (1992).

burdens of procreation, and threatening their economic stability. Health complications associated with too-frequent deliveries, limited spacing between births, and underlying health conditions often associated with complications during prior pregnancies have increased the potential for harm to individual women.<sup>78</sup> Moreover, it has been explained that, "[e]ven in cases where women were advised that another pregnancy would threaten their life or health, health personnel in Manila city hospitals could not provide for the necessary medical intervention because of the [Executive Order]."<sup>79</sup> In some cases, limited access to artificial contraceptives has forced women to seek out underground and unsafe abortions, resulting in the hospitalization of thousands, and the deaths of hundreds, of Filipino women each year.<sup>80</sup> Women who have tried to avoid pregnancy by refusing sex with their partners have described the strain this puts on their relationships and explained how this increases their risk of suffering sexual violence.<sup>81</sup>

In actively discouraging use of artificial methods of contraception, the Executive Order has stigmatized the distribution of those methods and their use throughout the health system in Manila.<sup>82</sup> Even where contraceptives are available, the stigma associated with their use has prevented many women from accessing and using them.<sup>83</sup> There is also evidence that the Order has had a "chilling effect" on women's access to contraceptives in other areas of the Philippines and in independent facilities not legally affected by the Executive Order.<sup>84</sup> Moreover, when health providers and other actors have enabled women, through the provision of contraceptives, to defy the prescriptive stereotype of women as mothers, they have been subject to harassment and intimidation.<sup>85</sup> In the most serious of cases, this has resulted in the closure of facilities that provide contraceptives to women, thereby further impeding women's equal ability to access essential health care and decide freely and responsibly on the number and spacing of their children.<sup>86</sup>

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78. LIKHAAN, ET AL., *supra* note 64, at 21.

79. *Id.* at 20.

80. Susheela Singh et al., *Unintended Pregnancy and Induced Abortion in the Philippines: Causes and Consequences* 21–22 (Guttmacher Institute 2006).

81. LIKHAAN, ET AL., *supra* note 64, at 22–23.

82. *Id.* at 9; Exec. Order No. 003, *supra* note 64.

83. LIKHAAN, ET AL., *supra* note 64, at 34–35.

84. *Id.* at 9.

85. *Id.* at 27–31.

86. *Id.* at 28–30.

Further, the Executive Order rests on an underlying stereotypical assumption that women are neither capable of fulfilling, nor should they pursue, a role apart from motherhood. The act of confining women to motherhood prevents them from pursuing an education or career outside the domestic sphere of the family home and impedes their "full development and advancement . . . ."<sup>87</sup>

In addition to the aforementioned harms, the reinforcement by the Executive Order of the prescriptive stereotype of women as primarily mothers has resulted in indirect discrimination against women, by which it is meant that, although the Order is neutral on its face, (facially neutral), the perpetuation of that stereotype has a detrimental and disproportionate effect on women.<sup>88</sup> Consequently, while the Executive Order affects both men and women in that it restricts access to contraceptives for both sexes, "only women are exposed to the risk of unintended pregnancy and its health consequences. Women also often disproportionately suffer its economic and social consequences. In this way, the [Executive Order] deprives women of their rights and development on a basis of equality with men."<sup>89</sup>

Enforcement of the prescriptive stereotype of women as primarily mothers is discriminatory when it implies that all women should be treated only as mothers or potential mothers, and not according to their individual needs not to become mothers at certain points in their lives. When states incorporate such stereotypes into laws and policies that govern the delivery of health care services, they discriminate against women.<sup>90</sup> Such stereotypes limit the ability of individual women to make autonomous decisions about their health and their private and family lives, which may conflict with their role as mothers or future mothers.<sup>91</sup> Women's voluntary role as mothers should always be taken into serious account, but women

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87. CEDAW Art. 3.

88. *Id.* Art. 1; CEDAW Committee, General Recommendation No. 25, Art. 4 (30th sess., 2004), Temporary Special Measures, U.N. Doc. CEDAW/C/2004/I/WP.1/Rev.1 (2004), paragraph 7 n.1 [hereinafter CEDAW Committee, General Recommendation No. 25]; Committee on Economic, Social and Cultural Rights, General Comment No. 20, Art. 2, Non-discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (2009), paragraph 10 [hereinafter CESCR Committee, General Comment No. 20]; Committee on Economic, Social and Cultural Rights, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2005/4 (2005), paragraph 13 [hereinafter CESCR Committee, General Comment No. 16].

89. LIKHAAN, ET AL., *supra* note 64, at 37.

90. Exec. Order No. 003, *supra* note 64.

91. LIKHAAN, ET AL., *supra* note 64, at 16–27.

should not be condemned by stereotyping when they choose to refrain from having children or to space their children through use of artificial methods of contraception. Women should be as free as men to select parenthood.

A state policy or a passive acceptance of institutional norms that relies on stereotypical views of women as mothers restricts women's private and family choices in a discriminatory manner. It has been explained that:

[T]he notion . . . that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality . . . . It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of . . . patriarchy . . . .<sup>92</sup>

It has been further explained that:

One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalization that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.<sup>93</sup>

Women's private choices of the design and composition of their families should not be dictated by state authorities through the denial of sex-specific health care services, or through the advancement of gender-differentiated roles for women based on religious or cultural ideologies. The design and composition of women's family lives is a matter of deep personal and emotional significance. A state should not use its laws, policies, and practices to impose stereotyped roles on women in ways that diminish their capacity to make their own decisions regarding pregnancy and parenthood.

## *2. Impeding Access to Abortion by Stereotyping Women as Weak, Vulnerable and Incompetent Decision-makers*

Just as the stereotype of women as primarily mothers has been used to deny women access to contraceptives, and therefore deny their rights to non-discrimination and equality and to decide freely and responsibly on the number and spacing of their children, so, too, has it been used to deny

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92. President of the Republic of S. Afr. v. Hugo, CCT11/96 (S. Afr. 1997), paragraph 80.

93. *Id.*

women access to abortion.<sup>94</sup> The anti-abortion movement has consistently advocated criminalization of abortion as a means of protecting unborn life.<sup>95</sup> However, the movement has not advocated the adoption of laws and policies to protect prenatal life that are also compatible with women's rights, such as clinical interventions to reduce miscarriages or health systems measures to decrease neonatal deaths.<sup>96</sup> A hidden—or perhaps not so hidden—agenda of this movement was to ensure that women fulfilled their prescribed role as mothers.<sup>97</sup> As one feminist legal scholar has explained, "criminal restrictions on abortion were enacted as caste legislation, for the purposes of enforcing gender-specific family roles."<sup>98</sup>

Many opponents of abortion rights have relied recently on the stereotype of women as weak and vulnerable, and therefore in need of protection, in support of their efforts to abolish or severely restrict women's access to abortion.<sup>99</sup> This is known as the "woman-protective argument."<sup>100</sup> The implication of this stereotype is that, owing to their weaknesses and vulnerability, women need to be "protected" through restrictive abortion laws, policies and practices, so that they do not succumb to the misrepresentations, coercion, or pressure of their doctors, partners, or family members who want them to obtain an abortion, or to their own mistaken or flawed decision-making.<sup>101</sup> Implicit in this reasoning is the further stereotype of women as incompetent decision-makers, which implies that women are irrational and lack the capacity for moral agency and reproductive self-determination, and should therefore be denied access to reproductive health services.

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94. Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 992–93 (2007) [hereinafter Siegel, *New Politics*].

95. *Id.* at 999–1000.

96. Cook & Howard, *supra* note 62, at 1050.

97. Siegel, *New Politics*, *supra* note 94, at 1001.

98. *Id.* at 1002.

99. Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) [hereinafter Siegel, *The Right's Reasons*]; see also Siegel, *New Politics*, *supra* note 94, at 1008–09.

100. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) [hereinafter Siegel, *Dignity*]; Siegel, *New Politics*, *supra* note 94, at 992; see also Siegel, *The Right's Reasons*, *supra* note 99, at 1649; *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal legislation prohibiting partial-birth abortion in part to protect the women choosing to have the abortion).

101. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

It has been argued that the woman-protective rationale for restrictive abortion laws, policies and practices is substantiated by narrative evidence, including stories of women who have been led "unknowingly" into having abortion, and empirical evidence comprised of reports of psychological distress following the abortion, known as post-abortion syndrome.<sup>102</sup> This evidence, however specious and incorrect, has been used to buttress the false stereotype of women as weak and vulnerable, and therefore in need of protection.<sup>103</sup>

There are situational and broader factors that help to perpetuate the stereotype of women as weak and vulnerable and the stereotype of women as incompetent decision-makers in the reproductive health context. The health sector tends to be very hierarchical in that men generally fill the higher, more prestigious positions of medical doctors, while the lower, less prestigious positions of nurses tend to be filled by women.<sup>104</sup> This gender hierarchy adds to a tendency of privileging men's medical decision-making and ignoring women's interests and needs to make their own health decisions.<sup>105</sup> These situational factors in the health sector are further exacerbated by a broader ideology of patriarchy that enables the subordination of women generally, and the control of their sexuality and reproduction more specifically.<sup>106</sup>

In 2007, in *Gonzales v. Carhart*,<sup>107</sup> the U.S. Supreme Court upheld the prohibition of a particular method of late term abortion in the federal "Partial-Birth Abortion Act of 2003."<sup>108</sup> In so holding, a majority of the Court perpetuated the stereotype of women as weak and vulnerable and the stereotype of women as incompetent decision-makers. Justice Kennedy, delivering the majority opinion, reasoned that it is permissible to outlaw the particular method, even if indicated to protect women's health, on the basis that if women could use such a method, they would come to regret their decision:

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102. Siegel, *The Right's Reasons*, *supra* note 99, at 1651–56.

103. See *Gonzales*, 550 U.S. at 159 (admitting a lack of evidence regarding the effect abortions have on women yet concluding that some women do regret their choice to have an abortion); Siegel, *The Right's Reasons*, *supra* note 99, at 1686–88.

104. SUSAN SHERWIN, NO LONGER PATIENT: FEMINIST ETHICS & HEALTH CARE 228–29 (1992).

105. *Id.* at 229.

106. *Id.* at 99–108.

107. *Gonzales*, 550 U.S. at 156; Cusack and Cook, *supra* note 1, at 87–88.

108. *Gonzales*, 550 U.S. at 159–60.

Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.<sup>109</sup>

In so reasoning, Justice Kennedy demonstrated his receptiveness to the woman-protective argument. In his view, if women were stronger and less vulnerable and if they were competent decision-makers, they would not opt to have the abortions that many of them "come to regret" and that result in "[s]evere depression and loss of esteem . . . ."<sup>110</sup> As women are weak and vulnerable as well as incompetent decision-makers, according to this reasoning, the Court was justified in "protecting" women by upholding the prohibition on a late-term abortion method, even though the method had been indicated to promote women's health.<sup>111</sup>

The immediate effect of this stereotypical reasoning was to deny women access to a particular method of late-term abortion that might well be safer and more acceptable for them.<sup>112</sup> Prohibiting access to this method severely restricted the ability of women in the later stages of pregnancy to make an autonomous decision about the selection of an abortion method, and sent a clear message that women and their decision-making abilities are less valued in society.<sup>113</sup>

In upholding the ban on "partial-birth" abortion, the majority in *Carhart* violated the dignity of women who are neither weak and vulnerable nor incompetent decision-makers and who, therefore, are not in need of "protection" in the form of restrictive abortion laws and policies. Justice Kennedy failed to recognize women's intrinsic and equal worth as human beings; his reasoning treats women as less capable or competent than men in respect of their decision-making capacities, by virtue only of the fact that they are women.<sup>114</sup>

In a well-reasoned dissenting opinion, Justice Ginsburg, the Court's only female justice at the time of the decision, challenged the majority's

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109. *Id.* at 159.

110. *Id.*

111. *See id.* (declaring that the "lack of information concerning the way in which the fetus will be killed . . . is of legitimate concern to the state . . . . The state has an interest in ensuring so grave a choice is well informed").

112. *See id.* at 161 (discussing evidence which supports the medical advantages of partial-birth abortion procedures).

113. *Id.* at 163.

114. Siegel, *Dignity*, *supra* note 100, at 1698.

reliance on stereotypes of women as a legitimate basis for denying women their agency and autonomy.<sup>115</sup> She noted how "at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.'"<sup>116</sup> Women, she explained, have the talent, capacity, and right to participate equally with men in public life and their ability to realize their full potential

is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.<sup>117</sup>

Justice Ginsburg also noted:

[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the . . . procedure. The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.<sup>118</sup>

Justice Ginsburg discredits the majority's use of paternalistic stereotypes of women as weak and vulnerable, and incompetent decision-makers in need of protection through legislation. She helpfully says the stereotype denies women "equal citizenship stature . . .," laying the groundwork to hold in a possible future decision that the use of this paternalistic gender stereotyping in the health sector is a form of discrimination that the U.S. Congress is obligated not to perpetuate in federal law.<sup>119</sup>

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115. *Gonzales v. Carhart*, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

116. *Id.* at 171.

117. *Id.* at 171–72.

118. *Id.* at 183–85.

119. *Id.* at 191.



### III. State Obligations to Eliminate Gender Stereotyping in the Health Sector

Notwithstanding the considerable harms that women have experienced as a result of wrongful gender stereotyping in the health sector, there has been limited discussion in legal scholarship or jurisprudence to date regarding states' obligations to eliminate this practice. Part III seeks to explore those legal obligations, using the normative framework set forth in CEDAW.<sup>120</sup> In so doing, it asks:

- What are the nature and scope of States Parties' obligations under CEDAW to eliminate gender stereotyping?
- What is the application of those obligations in the health care context, particularly respecting women's reproductive health?
- What steps are States Parties required to take to eliminate stereotypes, such as those that stereotype women as primarily mothers, as weak and vulnerable, or as incompetent decision makers, which inhibit or prohibit women's access to health services or otherwise compromise their health?<sup>121</sup>

States Parties are obligated, under CEDAW, to "eliminate all forms of discrimination against women with a view to achieving women's de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms."<sup>122</sup> In order to fulfill their CEDAW obligations, States Parties must satisfy three core obligations:

Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination—committed by public authorities, the judiciary, organizations, enterprises or private individuals—in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies. Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes. *Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.*<sup>123</sup>

120. CEDAW Arts. 1–5, 12, 16(1)(e).

121. *See supra* Part II.B.

122. CEDAW Committee, General Recommendation No. 25, *supra* note 88, paragraph 4.

123. *Id.* paragraph 7 (emphasis added) (footnotes omitted).

It is thus important, but not sufficient, for States Parties to adopt a formal (i.e., *de jure*) approach to equality.<sup>124</sup> In addition to treating men and women identically where their interests are substantially similar, States Parties must approach equality in a substantive (i.e., *de facto*) way, by which is meant that they must address past discrimination against women, accommodate biological and socially and culturally constructed differences between men and women, and eliminate the root causes and consequences of discrimination.<sup>125</sup> For the purpose of the present discussion, it is particularly significant that not only are States Parties required to eliminate wrongful gender stereotyping, but that that obligation is also *central* to their full compliance with CEDAW.<sup>126</sup>

States Parties' obligations to eliminate wrongful gender stereotyping derive principally from Articles 5(a) and 2(f) of CEDAW. Article 5(a) of CEDAW requires States Parties to take all appropriate measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 2(f) requires States Parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women." Article 5(a) of CEDAW is applicable to a prejudice or practice that is based on a stereotype related to the inferiority or superiority of men or women or a sex-role stereotype of either sex, whereas Article 2(f) is applicable only upon showing that a law, regulation, custom, or practice applied a gender stereotype that resulted in discrimination against women.<sup>127</sup>

Consistent with CEDAW's definition of discrimination against women, *direct discrimination* on the ground of gender stereotyping may occur when a distinction, exclusion, or restriction is made on the basis of a stereotype that has the purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, on a basis of equality of men and women, of their human rights.<sup>128</sup> Judicial reasoning that denies women

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124. *Id.* paragraph 8; see also CESCR Committee, General Comment No. 16, *supra* note 88, paragraph 7.

125. CEDAW Committee, General Recommendation No. 25, *supra* note 122, at paragraphs 8, 10, 14.

126. *Id.* paragraph 6.

127. Cusack and Cook, *supra* note 1, at 5, 72.

128. See CEDAW Art. 1 (defining "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing

access to certain abortion services because of a stereotypical belief that they are weak and vulnerable or a belief that they are incompetent decision-makers, as seen in *Gonzales v. Carhart*, is an example of direct discrimination.<sup>129</sup>

*Indirect discrimination* against women may occur when a law, policy, or practice is facially neutral but has the effect of impairing or nullifying the recognition, enjoyment, or exercise by women, on a basis of equality of men and women, of their human rights and fundamental freedoms because it perpetuates a gender stereotype.<sup>130</sup> An example of indirect discrimination is the Manila City Executive Order, which, although it neutrally denies men and women access to contraceptives in public health facilities, exposes only women to the risk of unintended pregnancy and its health consequences.<sup>131</sup>

Because gender stereotyping does not occur in a vacuum, the obligations imposed on States Parties under Articles 2(f) and 5(a) of CEDAW should be read together with the other obligations in CEDAW, as well as with the obligations imposed on States Parties in other international human rights treaties.<sup>132</sup> Even where there is no explicit textual support in CEDAW for eliminating wrongful gender stereotyping, the CEDAW Committee has interpreted different substantive rights and freedoms as requiring the elimination of gender stereotyping.<sup>133</sup> For example, in its General Recommendation No. 19, the CEDAW Committee stated that States Parties are required to eliminate wrongful gender stereotyping that fosters and/or condones gender-based violence against women.<sup>134</sup>

In the reproductive health context, it is imperative that Articles 2(f) and 5(a) of CEDAW are read in conjunction with Article 12. Article 12 of CEDAW requires States Parties to eliminate all forms of discrimination

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or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"); *see also* CESCR Committee, General Comment No. 20, *supra* note 88, paragraphs. 20, 35; CESCR Committee, General Comment No. 16, *supra* note 88, paragraphs 11–13, 19; Cusack and Cook, *supra* note 1, at 114–15.

129. *See supra* Part II.B.

130. Cusack and Cook, *supra* note 1, at 115–17.

131. LIKHAAN ET AL., *supra* note 64, at 37.

132. RIKKI HOLTMAAT, TOWARDS DIFFERENT LAW AND PUBLIC POLICY: THE SIGNIFICANCE OF ARTICLE 5A CEDAW FOR THE ELIMINATION OF STRUCTURAL GENERAL DISCRIMINATION 74–75 (2004); *see also* Cusack and Cook, *supra* note 1, at 75.

133. CEDAW Committee, General Recommendation No. 19: Violence against Women, U.N. Doc. A/47/38 (1992), paragraphs 1, 2, 11, 12.

134. *Id.* paragraphs 10–11.

against women in the health sector. Article 12(1) requires States Parties to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." Article 12(2) further requires States Parties to "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation." Related to Article 12 of CEDAW is Article 16(1)(e), which provides that States Parties shall take all appropriate measures to ensure that men and women have "[t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." The CEDAW Committee has amplified the content and meaning of these rights in its General Recommendation No. 24, noting that where health systems fail to provide health services that only women need, such as emergency contraception and safe and lawful abortion services, it is a form of discrimination that States Parties are obligated to remedy.<sup>135</sup>

Neither Articles 12 nor 16(1)(e) of CEDAW expressly requires States Parties to eliminate gender stereotyping in the health context. However, when those provisions are interpreted in light of CEDAW's overarching object and purpose to eliminate all forms of discrimination against women, and the principle that human rights treaties are to be interpreted generously is taken into account, it is apparent that eliminating wrongful gender stereotyping is critical to States Parties' full compliance with CEDAW.

As the obligations in Articles 2(f) and 5(a) are overarching and cross-cutting, the nature and extent of obligations imposed on States Parties to eliminate wrongful gender stereotyping will vary according to each obligation in CEDAW that is implicated. One way to conceptualize the scope of States Parties' obligations to eliminate wrongful gender stereotyping in the reproductive health context is through the tripartite framework of state obligations, which incorporates the obligation to respect, protect, and fulfill fundamental human rights and freedoms.<sup>136</sup>

*Obligation to respect.* The obligation to respect requires all branches of government to refrain from gender stereotyping that impairs or nullifies

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135. CEDAW Committee, General Recommendation No. 24, Art. 12 (Twentieth sess., 1999), Women and Health, U.N. Doc. A/54/38Rev. (1999), paragraph 11 [hereinafter CEDAW Committee, General Recommendation No. 24].

136. CESCR Committee, General Comment No. 16, *supra* note 88, paragraphs 17–21; *see also* Cusack and Cook, *supra* note 1, at 76–84.

women's equal rights to the highest attainable standard of health, including reproductive health, and to decide freely and responsibly on whether and when to have children.<sup>137</sup> Legislatures must ensure that they refrain from stereotyping women when enacting laws<sup>138</sup> that impact the availability, accessibility, acceptability and quality of reproductive health care services and information. For example, they must ensure that proposed laws do not stereotype women solely into childbearing and childrearing roles, and are not based on gendered assumptions that degrade women in the clinical setting or infringe on or deny their access to reproductive health care.

Executive branches must ensure that they do not rely on gender stereotypes in their policies, practices, or programs, so as to nullify or impair women's equal rights to the highest attainable standard of health and to decide freely and responsibly on the number and spacing of their children.<sup>139</sup> In introducing the Manila City Executive Order, Mayor Atienza explicitly enforced a stereotype of women as primarily mothers, thereby denying women these rights.<sup>140</sup> The act of introducing the Order thus not only violated Articles 2(f) and 5(a) of CEDAW, but also Articles 12 and 16(1)(e).

Judiciaries must refrain from gender stereotyping in their reasoning<sup>141</sup> in ways that harm women's reproductive health and autonomy. Court decisions that apply, enforce, or perpetuate gender stereotypes not only deny the rights of the individual woman who is before the court, but also degrade similarly situated women by perpetuating wrongful gender stereotypes of the subgroup of women to which they belong. Stereotyping of this nature thus creates individual and collective harms and defeats the judicial commitment to justice. In prohibiting a particular method of late term abortion in *Gonzales v. Carhart*, a majority of the U.S. Supreme Court chose to perpetuate stereotypes of women as weak and vulnerable and as incompetent decision-makers, rather than to refrain from wrongful gender stereotyping.<sup>142</sup>

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137. *Id.* paragraph 18.

138. L'Heureux-Dubé, *supra* note 33, at 99.

139. CESCRC Committee, General Comment No. 16, *supra* note 88, paragraph 18.

140. Exec. Order No. 003, *supra* note 64; LIKHAAN ET AL., *supra* note 64, at 39–44.

141. See *R v. Ewanchuk*, 1 S.C.R. 330 (Can. Supreme 1999), paragraph 95 (L'Heureux-Dubé, J., concurring) (noting that "[c]omplainants should be able to rely on a [judicial] system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions"); L'Heureux-Dubé, *supra* note 33, at 92.

142. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

*Obligation to protect.* The obligation to protect requires all branches of government to take appropriate measures to prevent wrongful gender stereotyping by non-state actors.<sup>143</sup> As the Committee on Economic, Social and Cultural Rights has explained, "[t]he obligation to protect requires States parties to take steps aimed directly at the elimination of prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes, and stereotyped roles for men and women."<sup>144</sup> This obligation extends to providing ongoing training programs and educational campaigns regarding the harms of stereotyping and introducing laws, policies, and programs that seek to deter non-state actors from wrongful gender stereotyping in the health sector. This would require identifying, naming and eliminating wrongful gender stereotyping in health services, including private hospital corporations that operate within publicly funded health insurance schemes and other non-state actors that exercise influence over women's access to reproductive health services and information.

*Obligation to fulfill.* The obligation to fulfill women's equal rights to the highest attainable standard of health and to decide freely and responsibly on the number and spacing of their children, requires States Parties to take appropriate legislative, judicial, administrative, budgetary, economic, and other measures to ensure the elimination of wrongful gender stereotyping.<sup>145</sup> This obligation requires States Parties to establish the legal, policy, and programmatic frameworks to understand, name, and eliminate such stereotyping. States Parties might adopt positive measures to name the operative gender stereotypes in the health sector, show how they operate to women's detriment, and provide appropriate measures to dismantle and eliminate them.

The Executive, through its health ministry, might establish a review to determine if and, if so, how, its laws, policies, and programs are grounded in gender stereotypes. In an effort to ensure women's equal right to health, the ministry might also produce guidelines that name common gender stereotypes in the health context, explain how those stereotypes operate to the detriment of women's health in general, and reproductive health in

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143. See CEDAW Art. 2(e) (requiring States Parties to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise"); see also Aoife Nolan, *Addressing Economic and Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect'*, 9(2) HUMAN RTS. L. REV. 225 (2009).

144. CESCR Committee, General Comment No. 16, *supra* note 88, paragraph 19.

145. CEDAW Arts. 2(f), 5(a).

particular, and identify whether they discriminate against women and impede their access to essential, evidenced-based reproductive health care. Guidelines might help to educate health personnel about the importance of avoiding stereotypes when treating women.

Court opinions can be an important means of dismantling wrongful stereotypes of women. By identifying the gender stereotypes implicit in the reasoning of past decisions and exploring their historical and ideological contexts, court opinions can assist in dismantling gender stereotypes and thus prevent their legal perpetuation. An example of an opinion that dismantled a gender stereotype is Justice Ginsburg's dissent in *Gonzales v. Carhart*, which names and rationally condemns the stereotypical thinking implicit and explicit in the majority's reasoning, and identifies past decisions where stereotypical thinking has been identified and dismantled.<sup>146</sup>

Another example is the 2006 opinion of Justices Araújo Rentería and Vargas Hernández of the Colombian Constitutional Court, which liberalized Colombia's restrictive abortion law.<sup>147</sup> In that case, their Honors found that there are limits on the power of the Legislature in criminal matters. The Legislature is, for instance, prohibited from violating the rights to dignity and to the free development of the individual, even when it seeks to protect other constitutional values such as life.<sup>148</sup> The Justices reasoned that "when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will."<sup>149</sup> In naming the stereotype of women "as a reproductive instrument for the human race," the Justices identified and described the harmful assumption about women that had been embedded in the criminal law. By refusing to allow that stereotypical assumption to be perpetuated in their own reasoning, their Honors laid the foundation to dismantle the stereotype of women as reproductive instruments and, in so doing, affirmed women's right to substantive equality.

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146. *Gonzales*, 550 U.S. at 171–87 (Ginsburg, J., dissenting).

147. C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA (2006), [http://www.womenslinkworldwide.org/pdf\\_pubs/pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf) (last accessed Oct. 27, 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

148. *Id.* at 36–37.

149. *Id.* at 36.

#### IV. Conclusion

The use of wrongful gender stereotypes in the health sector is rarely explicit. As a result, there is a lack of understanding and consciousness of how stereotypes operate to impede women's access to reproductive health services and information, undermine women's ability to make decisions concerning their own reproductive health, or otherwise compromise their health and well-being. It is hoped that the methodology presented in this Article of naming gender stereotypes in the health sector, and identifying how they compromise women's health, discriminate against women, or otherwise violate their human rights, will make it more likely that wrongful gender stereotyping will be eliminated in the health context.

Moreover, it is hoped that the application of this methodology will help to prevent the use of wrongful gender stereotyping as a backlash tactic against women who do not conform to stereotypic roles or behavior, or as a backlash tactic to undermine the empowering effects of laws enacted to ensure women's access to reproductive health services. For example, in Manila City, women are denied contraceptives through public health facilities because contraceptives can prevent them, at least temporarily, from conforming to a stereotypic role of motherhood or a role of a mother sacrificing herself to the rearing of multiple children.<sup>150</sup> Another example of the use of wrongful gender stereotyping as a backlash tactic against women is when health services deny them anesthesia in abortion services because they allegedly do not conform to the stereotypic behavior of chastity.<sup>151</sup>

Hostile stereotypes may also emerge in the wake of law reform that liberates women to move beyond stereotypes. For example, the view that women are weak and vulnerable has emerged in the health context to restrict women's access to certain forms of abortion services. The stereotype of women as incompetent decision-makers, with its implication that women lack moral agency, emerges with regularity in post-reform eras.<sup>152</sup> Reforms include those that come with the expansion of distribution of contraceptives, such as the distribution of emergency contraception

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150. Exec. Order No. 003, *supra* note 64.

151. CHILDBIRTH BY CHOICE TRUST, NO CHOICE: CANADIAN WOMEN TELL THEIR STORIES OF ILLEGAL ABORTION 154 (1998); *see also* NORTHWEST TERRITORIES, DEPARTMENT OF HEALTH, ABORTION SERVICES REVIEW COMMITTEE, REPORT OF THE ABORTION SERVICES REVIEW COMMITTEE (1992).

152. Siegel, *Dignity*, *supra* note 100, at 1773-95.



through pharmacies,<sup>153</sup> or those reforms that liberalize abortion laws, such as in Colombia.<sup>154</sup> Efforts to undermine these reforms are instigated by those health care providers who try to deny women their moral agency. They invoke their conscience to refuse to provide services to women, and often refuse to refer women to alternative willing providers, ignoring their professional responsibilities to respect patients' needs.<sup>155</sup>

The stereotypes of women that are explored in this Article are only some of the ways in which societies generalize about women's roles and capacities and, in so doing, deny them access to essential health services or otherwise compromise their health. There is no doubt that other wrongful gender stereotypes exist, and others will emerge depending on particular situational factors in the health sector and the general articulation of patriarchy in a particular country. The degree to which hostile stereotypes are used as a backlash tactic against women who try to break free of traditional female roles, or as a backlash technique to undermine legal reforms to eliminate gender discrimination, will also vary.

Finally, it is also hoped that the insights on how CEDAW can be more effectively applied to name, identify, and eliminate the gender stereotypes that operate to deny health services to women, will contribute to a more robust use of the African Protocol to dismantle the stereotypes operative in various African countries that violate women's rights relating to their health.

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153. See *Pichon & Sajous v. France*, App. No. 49853/992001-X Eur. Ct. H.R. 3 (holding that French pharmacists could not refuse to sell contraceptives on the basis of religious freedom); Smearman, *supra* note 9.

154. C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED ABORTION IN COLOMBIA (2006), [http://www.womenslinkworldwide.org/pdf\\_pubs/pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf) (last accessed October 27, 2009) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

155. Rebecca J. Cook, Mónica Arango Olaya & Bernard M. Dickens, *Healthcare Responsibilities & Conscientious Objection*, 104 INT'L J. GYNECOLOGY & OBSTETRICS 249 (2009).