

# Pushing Past the Tipping Point: Can the Inter-American System Accommodate Abortion Rights?

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## ABSTRACT

While anti-abortion activists have been successful in pushing to restrict access to abortion across the USA, reproductive rights activists have been mobilizing across Latin America to push for the easement of strict anti-abortion policies. These opposing directions of travel have renewed interest in which human rights arguments would best support the expansion of access to abortion in Latin America. To date, progress in this area has mostly relied on understanding that the prohibition of cruel, inhuman and degrading treatment requires states to allow abortions in the direst of circumstances. However, the vast majority of women in the region who seek abortions do not qualify for the small exemptions contained in the law. Activists looking to expand abortion provisions beyond the cruelty paradigm therefore need to find arguments that can stand firm in a generally conservative Latin American region. In this search, the Inter-American System could, somewhat surprisingly, provide keys to constructing a new discourse surrounding reproductive rights based on a nuanced understanding of structural discrimination and a willingness to visibilise the suffering of women.

**KEYWORDS:** Inter-American Human Rights System, Reproductive Rights, Abortion, Latin America

‘... the Court underlines that suffering is a personal experience for each individual and, in that sense, will depend on multiple factors that make each person an individual being’.<sup>1</sup>

## 1. INTRODUCTION

Some years ago, I published an article where I criticized the lack of gender justice in the rulings of the Inter-American Court of Human Rights (‘the Inter-American Court’ or ‘the Court’). I theorized that the poor case law in terms of women’s rights was due to a lack of gender-aware judges on the bench for most years that the Court had

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1 *Case of IV. v Bolivia* IACtHR Series C 329 (2016) at para 267. My translation.

operated.<sup>2</sup> At the time of publishing that piece, change was beginning to manifest after the election of a woman judge who was a gender expert and much has happened in the past decade in terms of the gender content of rulings.<sup>3</sup> Recent case law has made huge strides towards recognizing the gendered aspects of human rights violations including why these violations occur and how to repair them.

The case load of the Inter-American Court was, until recently, dominated by political violence and mass atrocity but as Latin American states have made their way slowly towards democracy, both the Inter-American Commission on Human Rights ('the Inter-American Commission' or 'the Commission') and the Inter-American Court have seen an increase in petitions and cases that refer to the consequences of social inequality. The Court has, most notably, made rulings and handed down advisory opinions on the rights of women,<sup>4</sup> the rights of migrants and asylum seekers,<sup>5</sup> LGBTQ rights,<sup>6</sup> patients'

- 2 Palacios Zuloaga, 'The Path to Gender Justice in the Inter-American Court of Human Rights' (2008) 17 *Texas Journal of Women and the Law* 227.
- 3 See in general: Abi-Mershed, 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American system' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (2008) 127; Jaichand and O'Connell, 'Bringing It Home: The Inter-American System and State Obligations Using a Gender Approach Regionally to Address Women's Rights Violations Domestically' (2010) 3 *Inter-American and European Human Rights Journal* 49; Rubio-Martin and Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment' (2011) 33 *Human Rights Quarterly*, 1062; Celorio, 'The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting' (2011) 65 *University of Miami Law Review* 819; Schönsteiner, Beltrán y Puga and Lovera, 'Reflections on the Human Rights Challenges of Consolidating Democracies: Recent Developments in the Inter-American System of Human Rights' (2011) 11 *Human Rights Law Review* 362; Beltrán y Puga, 'Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law' (2012) 3 *Creighton International and Comparative Law Journal* 158; Acosta López, 'The Cotton Field Case: Gender Perspective and Feminist Theories in the Inter-American Court of Human Rights' (2012) 21 *Revista Colombiana de Derecho Internacional* 17; O'Connell, 'Engendering Reproductive Rights in the Inter-American System' in Lalor, Mills, Sánchez García and Haste (eds), *Gender, Sexuality and Social Justice: What's Law Got to Do With It?* (2016) 58; Pires, 'Procreative Autonomy, Gender Equality and Right to Life: The Decision of the Inter-American Court of Human Rights in Artavia Murillo v. Costa Rica' (2017) 13 *Revista Direito GV* 1007; Contesse, 'Sexual Orientation and Gender Identity in Inter-American Human Rights Law' (2019) 44 *North Carolina Journal of International Law* 353; Saez, 'In the Right Direction: Family Diversity in the Inter-American System of Human Rights' (2019) 44 *North Carolina Journal of International Law* 317.
- 4 *Case of González et al. ('Cotton Field') v Mexico* IACtHR Series C 205 (2009); *Case of Fernández Ortega et al. v Mexico* IACtHR Series C 215 (2010); *Case of Rosendo Cantu et al. v Mexico* IACtHR Series C 216 (2010); *Case of Atala Riffo et al. v Chile* IACtHR Series C 239 (2012); *Case of Artavia Murillo et al. v Costa Rica* IACtHR Series C 257 (2012); *Case of Espinoza González v Peru* IACtHR Series C 289 (2014); *Case of Veliz Franco et al. v Guatemala* IACtHR Series C 277 (2014); *Case of Velásquez Paiz et al. v Guatemala* IACtHR Series C 307 (2015); *Case of IV. v Bolivia* supra n 1.
- 5 OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants* IACtHR Series A 18 (2003); OC-21/14, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* IACtHR Series A 21 (2014); OC-25/18, *The Institution of Asylum, and its Recognition as a Human Right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights)* IACtHR Series A 25 (2018).
- 6 *Atala Riffo et al. v Chile*, supra n 4; *Case of Duque v Colombia* IACtHR Series C 310 (2016); *Case of Flor Freire v Ecuador* IACtHR Series C 315 (2016); OC-24/17, *Gender Identity, and Equality and Non-Discrimination with Regard to Same-Sex Couples. State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship between Same-Sex Couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)* IACtHR Series A 24 (2017).

rights<sup>7</sup> and sexual and reproductive rights.<sup>8</sup> At the same time that this jurisprudential turn was happening in the Court, on the ground Latin American reproductive rights activists continued to organize against some of the most restrictive abortion laws on the planet.<sup>9</sup> While Guyana, Cuba, Uruguay, Mexico City, Oaxaca and most recently Argentina allow for abortion on demand during a defined period of time,<sup>10</sup> most Latin American and Caribbean states allow it only in a small number of very closely defined circumstances. Most commonly across the region, abortion is allowed where the pregnancy threatens the pregnant woman's life,<sup>11</sup> where the foetus has a fatal abnormality or when the pregnancy is the result of rape. Some states allow abortions where the health of the pregnant woman is at risk.<sup>12</sup> All forms of abortion are banned in Nicaragua, Honduras, El Salvador, the Dominican Republic, Suriname and Haiti.<sup>13</sup> Despite strict regulations, rates of illegal abortion remain high across all states that do not allow for abortion on demand.<sup>14</sup> Across the region, illegal abortion entails serious repercussions including death or serious injury for those that undergo the procedure, and prosecution and imprisonment for those that survive it and those that perform it.<sup>15</sup>

7 *Case of Poblete Vilches v Chile* IACtHR Series C 349 (2018); *Case of Cuscul Pivaral et al. v Guatemala* IACtHR Series C 359 (2018).

8 *Artavia Murillo et al. v Costa Rica*, supra n 4; *IV. v Bolivia*, supra n 1.

9 Kelly, 'Latin America's Fight to Legalise Abortion: The Key Battlegrounds' *The Guardian*, 9 August 2018; Brigida, 'Abortion Rights Activists Have Made Strides in Latin America. Is a Backlash Coming?' *World Politics Review*, 8 January 2019; Center for Reproductive Rights, *Abortion and Reproductive Rights in Latin America: Implications for Democracy* (2015), available at [www.reproductiverights.org/sites/crr.civicactions.net/files/documents/IAD9794%20Repro%20Rights\\_web.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/IAD9794%20Repro%20Rights_web.pdf) [last accessed 04 March 2021]; Reif, *Sexual and Reproductive Rights in Latin America and the Caribbean: Where are we Now?* *The Dialogue*, 13 December 2017, available at [www.thedialogue.org/analysis/sexual-reproductive-rights-in-latin-america-the-caribbean-where-are-we-now/](http://www.thedialogue.org/analysis/sexual-reproductive-rights-in-latin-america-the-caribbean-where-are-we-now/) [last accessed 4 March 2021].

10 Cuba decriminalised abortion in 1965 (and made it more accessible in 1979), Guyana decriminalized abortion in 1995, Mexico City did so in 2007, Uruguay in 2012, Oaxaca in 2019 and Argentina in 2020.

11 While most pregnant people are women, some pregnant people do not identify as women. My use of the term 'women' and the term 'pregnant women' should not be understood as excluding the fact that transmen and non-binary persons can become pregnant and can also therefore be negatively affected by the lack of safe and legal abortion services.

12 E.g. Bolivia, Costa Rica, Ecuador and Peru allow for abortion to preserve physical health. Colombia's Constitutional Court Ruling C-355/06 of 2006 allows for abortion to preserve the physical or mental health of the pregnant person.

13 World Health Organization, 'Global Abortion Policies Database' available at <https://abortion-policies.srhr.org/> [last accessed 4 March 2021]; Center for Reproductive Rights, 'The World's Abortion Laws' available at <https://reproductiverights.org/worldabortionlaws> [last accessed 4 March 2021]; Guttmacher Institute, 'Fact Sheet: Abortion in Latin America and the Caribbean' available at [https://www.guttmacher.org/site/default/files/factsheet/ib\\_aww-latin-america.pdf](https://www.guttmacher.org/site/default/files/factsheet/ib_aww-latin-america.pdf) [last accessed 4 March 2021].

14 The Guttmacher Institute estimates the incidence of Abortion in Latin America to be 44 per 1000 women aged 15–44, Guttmacher Institute, *Abortion Worldwide 2017: Uneven Progress and Unequal Access* (2018) at 9, available at [https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-worldwide-2017.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf) [last accessed 4 March 2021]; see also *ibid.* at 9–11.

15 From 2010–14 76.4 per cent of abortions performed in Latin America and the Caribbean were unsafe, Ganatra et al., 'Global, regional, and subregional classification of abortions by safety, 2010–14: estimates from a Bayesian hierarchical model' (2017) 390 *The Lancet* 2372 at 2376; the Guttmacher Institute estimates that 'In 2014, at least 10 per cent of all maternal deaths (or 900 deaths) in Latin America and the Caribbean were from unsafe abortion'. Guttmacher Institute, supra n 13; See also Paxman et al., 'The Clandestine Epidemic: The Practice of Unsafe Abortion in Latin America' (1993) 24 *Studies in Family Planning* 205; Kulczycki, 'Abortion in Latin America: Changes in Practice, Growing Conflict, and Recent Policy Developments' (2011) 42 *Studies in Family Planning* 199. With regards to criminalization see Committee

Recent advocacy efforts have centred on two objectives: (i) to relax the total bans on abortion, including efforts to secure the release of women imprisoned for the crime of abortion and (ii) where only so-called therapeutic abortion exists, to open up the law to allow for abortion on demand. While both objectives seek to achieve the relaxing of abortion laws, the human rights arguments used to support them have been different. There seems to be an understanding that forcing a woman to continue a pregnancy that could threaten her life or her health, or is the product of rape, or to carry an unviable foetus to term, would be cruel, inhuman and degrading. However, to force a woman to continue with a pregnancy in any other circumstances would not rise to the level of cruelty required to trigger a violation of this right. Therefore, the defence of the right to abortion on demand, where it exists in the world, has generally relied upon the idea that banning it would violate the right to autonomy which in many jurisdictions resides within the right to privacy.<sup>16</sup> Undoubtedly, the refusal to understand most forced pregnancy as cruel needs to be interrogated for at least two reasons. First, because on the part of legislators it exemplifies the lack of willingness to recognize the shape and the intensity of women's pain.<sup>17</sup> Second because from a practical point of view, basing access to abortion on the right to privacy has left it vulnerable to attacks from anti-abortion groups, which in the USA have resulted in dramatic curtailments of the provision of sexual health services.<sup>18</sup>

In this article, I examine the human rights arguments available to activists who seek to expand access to abortion in a Latin American region that is generally hostile to sexual and reproductive rights. I will look at whether there is reason to follow the privacy doctrine that has suffered enormous setbacks in the USA and I will ultimately argue that the Latin American context requires the deployment of legal arguments that have a stronger footing in the region. I will argue that, despite the wording of the

Against Torture, Conclusions and Recommendations, Chile, 14 June 2004, CAT/C/CR/32/5 at para 6. (j); Committee on the Elimination of Discrimination against Women, 'Concluding observations on the combined eighth and ninth periodic reports of El Salvador' 9 March 2017, CEDAW/C/SLV/CO/8-9 at paras 36-37.

- 16 In Canada, since *R. v Morgentaler*, (1988) 1 SCR 30, the right is generally understood to be located within the right to security of the person under section 7 of the Canadian Charter of Rights and Freedoms
- 17 There is significant amount of literature that details the feminist critique of the construction of torture and cruel, inhuman or degrading treatment and specifically that holds that denial of abortion should be considered cruel, inhuman and degrading. Examples of the former include: Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 at 627-631; Charlesworth and Chinkin, *The Boundaries of International Law* (2000) at 231-237; Copelon, 'Recognizing the Eggregious in the Everyday: Domestic Violence as Torture' (1994) 25 *Columbia Human Rights Law Review* 291; Byrnes, 'The Convention Against Torture' in Askin and Koenig (eds) *Women and International Human Rights Law II* (1999) 183. Examples of the latter include: Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (2016); Zureick, '(En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment' (2015) 38 *Fordham International Law Journal* 99; Mayall, Afulukwe and Thomasen, 'Reproductive Rights Violations as Torture or Ill-Treatment' in Center for Human Rights and Humanitarian Law, *Gender Perspectives on Torture: Law and Practice* (2018) 265 at 273-276; Isabella Moore 'Indignity in unwanted pregnancy: denial of abortion as cruel, inhuman and degrading treatment' (2019) 23 *International Journal of Human Rights* 1010.
- 18 Center for Reproductive Rights, Submission to the UN Universal Periodic Review: United States of America, Reproductive Health, Rights, and Justice (2020) at paras 1-4 and 27-35, available at <https://reproductiverights.org/sites/default/files/2020-01/3rd%20US%20UPR%20-%20repro%20rights%20and%20justice%20stakeholder%20report.pdf> [last accessed 9 March 2021].

American Convention on Human Rights that recognizes life before birth, both Inter-American system organs—the Inter-American Commission and the Inter-American Court—have provided key jurisprudence in the areas of sexual and reproductive rights, health, life, integrity and cruel, inhuman and degrading treatment, and equality, which can support an approach that holds that forcing someone to be pregnant when they do not want to be pregnant is a violation of their human rights. While there is a significant body of literature from the global north that suggests that access to abortion services on demand should be based on the prohibitions of discrimination and ill treatment,<sup>19</sup> the present article examines how those theoretical arguments can be contextualised and applied by advocates on the ground in Latin America. In doing so, it provides a jurisprudential map towards decriminalisation based on the case law of the Inter-American system, which has demonstrated that it is uniquely able to conceptualise and validate human suffering. In this way I will build upon the literature that criticizes the foundation of sexual and reproductive rights on the doctrine of privacy and I will contribute to the discussion on how to provide the most robust protection of sexual and reproductive rights in a way that pays close attention to context.

## 2. ABORTION RIGHTS IN THE USA AND IN LATIN AMERICA: A TALE OF TWO ARCS

It is interesting to observe how the trajectories of abortion rights in the USA and in Latin America are currently running in opposite directions. In the USA, where abortion on demand has been legal (subject to time, viability and other considerations) since *Roe v Wade* in 1973, we are currently observing a large and effective push-back of these rights by conservative activist groups who are bolstered by the recent appointment to the US Supreme Court of three Justices who are widely perceived to oppose abortion. These groups are lobbying conservative state governments to enact reforms that are restrictive of access to abortion in order to force reproductive rights activists to challenge those reforms in court. They then hope to use the appeals process to push these cases all the way to the Supreme Court, where they will challenge the *Roe v Wade* precedent with a view to overturning it.<sup>20</sup>

Conversely, the enormous influence of the Catholic Church and the growing influence of Evangelical Protestant churches, along with decades of government by authoritarian regimes tied to conservative sectors of society, have meant that Latin American states are generally hostile to the idea of allowing access to abortion. Six of the 26 states in the world where abortion is forbidden under any circumstances are located in the region.<sup>21</sup> However, social and political movements that advocate for the easing of abortion laws have gained traction in recent years, with some notable successes.<sup>22</sup>

19 For literature regarding denial of abortion services as cruel, inhuman and degrading treatment see supra n 17; as discrimination see Cook, Dickens and Fathalla, *Reproductive Health and Human Rights* (2008) at 349, 351; Siegel, 'Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1991) 44 *Stanford Law Review* 261; Bader Ginsburg, 'Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, (1985) 63 *North Carolina Law Review* 375; MacKinnon, 'Privacy v. Equality: Beyond *Roe v. Wade* (1983)' in *Feminism Unmodified*, (1987) at 93.

20 Center for Reproductive Rights, supra n 18 at para 7.

21 Center for Reproductive Rights, supra n 13.

22 Note, for example, the relaxing of strict anti-abortion laws in Mexico City, Uruguay, Oaxaca and Argentina (supra n 10), Colombia (supra n 12) and Chile (infra n 49–55).

However, with few exceptions, this success has been tied to the discourse of cruelty and has hit a wall when it comes to abortion on demand. In many areas of life and the law, Latin America has tended to follow trends set by its neighbour to the north. When visualizing advocacy strategies for achieving the legalization of abortion on demand, this tendency is problematic not least because the privacy argument has proven to be vulnerable in the face of the anti-abortion discourse that exists in both regions and that is based on the right to life of the foetus.

### A. USA and the Privacy Doctrine

*Roe v Wade*, the landmark precedent that legalized abortion on demand in the USA in 1973, was decided on the issue of privacy. The plaintiff in the case was a 21-year-old woman who was denied an abortion in Texas, where abortion was only legal where necessary to save the life of the pregnant woman.<sup>23</sup> The main holding of the Supreme Court was that privacy, understood to be included in the due process clause of the Fourteenth Amendment to the US Constitution, was broad enough to encompass the right of a pregnant woman to terminate her pregnancy without state interference.<sup>24</sup> The Supreme Court also recognized that the state of Texas had a legitimate interest in banning abortion, but that the weight of that interest varied across the length of the pregnancy, meaning in practice that the decision to have an abortion should not be challenged by the state during the first trimester of the pregnancy.<sup>25</sup> Further case law surrounding access to safe and legal abortion in the USA has centred on the nuances of the state's ability to regulate abortion provision but the core finding of *Roe*, namely that the right to decide to have an abortion is constitutionally protected under the right to privacy, has held strong so far.<sup>26</sup> State restrictions on abortion have largely either attempted to shorten the length of time during which an abortion can be performed legally or attempted to place obstacles in the path of access, by requiring abortion providers to comply with varied regulations before carrying out abortions. Laws examined by the US Supreme Court have required, for example, abortion providers to wait 24 hours between a request and the procedure,<sup>27</sup> to obtain the consent of a spouse or parent,<sup>28</sup> doctors who perform abortions to have admission privileges at local hospitals,<sup>29</sup> or abortion clinics to comply with strict building regulations applicable to hospitals.<sup>30</sup> The constitutionality of these measures is dependent on whether the courts deem that

23 *Roe v Wade*, 410 U.S. 113. The plaintiff gave birth before the Supreme Court decision was handed down and the child was given up for adoption.

24 *Ibid.* The inclusion of reproductive rights in the US Constitution dates back to 1965 in *Griswold* where a law prohibiting contraception was found to be unconstitutional because it violated the right to so-called marital privacy. A majority of Justices found that there was a right to privacy in the US Constitution, although they did not all agree on where specifically to locate it. *Griswold v Connecticut* 381 U.S. 479.

25 *Roe v Wade* supra n 23 at para 3(a)(b). *Planned Parenthood v Casey* later replaced the trimester framework with a framework based on the viability of the foetus and replaced the strict scrutiny standard with a standard that requires laws restricting abortion to not impose an undue burden on women seeking abortions. *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 U.S. 833.

26 See e.g. *ibid.*; *Whole Woman's Health v Hellerstedt* 579 U.S. \_\_\_\_ (2016).

27 *Planned Parenthood v Casey*, supra n 25.

28 *Ibid.*

29 *Whole Woman's Health v Hellerstedt* supra n 26; *June Medical Services, LLC v Russo* 591 U.S. \_\_\_\_ (2020).

30 *Whole Woman's Health v Hellerstedt*, supra n 26.

they place an undue burden on the enjoyment of a constitutional right.<sup>31</sup> However, since the confirmation of Supreme Court Justices that are perceived as anti-abortion, several US states that are hostile to abortion rights 'are enacting increasingly extreme and unconstitutional abortion bans and restrictions in an effort to ask the Supreme Court to overturn or decimate *Roe*.'<sup>32</sup>

The ruling in *Roe* was undoubtedly pivotal for reproductive rights. It legalized abortion on demand in the USA during the first trimester of pregnancy. It also served as a beacon for the imagination of activists around the world, offering a strategic pathway to legalization in states that did not allow for legal abortion in all circumstances. In the USA it had a particular virtue of locating abortion rights within a right to privacy in a society that values autonomy and the restriction of the role of the state in the affairs of individuals. The discursive message was one requiring the state to not interfere in an issue that was not of its concern.

In the decades following the ruling in *Roe*, feminists and other scholars have criticized the location of abortion rights within the area of privacy. Many feminists see access to abortion as an equality issue, not only because pregnancy is a burden that is (mostly) carried by women<sup>33</sup> but also because in patriarchal societies women do not control the exercise of their own sexuality in the same way that men do and therefore being forced to carry the consequences of that sexuality is manifestly unfair.<sup>34</sup> Furthermore, the focus on privacy and on limiting the ability of the state to interfere in the decision to abort reinforces the public/private paradigm that allows the state to abstain from action and therefore not provide or fund reproductive healthcare in the way that it does other forms of healthcare.<sup>35</sup> The privacy/choice model also contributes to understanding reproductive rights as a matter that affects individuals, thereby invisibilising the fact that the restriction of these rights affects a broad social group in a structural way.<sup>36</sup>

More recently there has been a swing towards understanding the issue of access to abortion within the broader scope of reproductive justice which rejects the pro-choice/pro-life paradigm and links decisions on reproduction to broader issues of social inequality that influence whether or not a pregnant person has the social (including economic) capacity to carry a pregnancy to term without it causing unjust harm in their lives.<sup>37</sup> Reproductive justice would, therefore, examine the broader issues affecting access to reproductive healthcare and parenting instead of reducing the issue to a snapshot in time of the decision to abort.

31 *Planned Parenthood v Casey*, supra n 25.

32 Center for Reproductive Rights, supra n 18 at para 27.

33 Recall that not all pregnant people identify as women.

34 See supra n 19 for scholarship on abortion as an issue of equality.

35 *Harris v McRae* 448,448 U.S. 297 where the US Supreme Court found that states were not required to fund abortions not covered by federal funds and that the Hyde Amendment, which prohibited the use of federal funds to pay for abortion services, did not violate the US Constitution. See also *Webster v Reproductive Health Services* 492 U.S. 490.

36 Bader Ginsburg, supra n 19; Siegel, 'Siegel, J., Concurring' in Balkin (ed), *What Roe Should Have Said* (2005) 63; Sunstein, 'Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)' (1992) 92 *Columbia Law Review* 1 at 36–41.

37 Luna and Luker, 'Reproductive Justice' (2013) 9 *Annual Review of Law and Social Science* 327; Ross and Solinger, *Reproductive Justice: An Introduction* (2017); Smith, 'Beyond Pro-Choice Versus Pro-Life: Women of Color and Reproductive Justice' (2005) 17 *National Women's Studies Association Journal* 119.

Discursively, the privacy doctrine has two major flaws that have contributed to the steady erosion of the right to access safe and legal abortion in the USA. First, the narrative of choice as the way to operationalize privacy does not stand strongly against the counter-narrative of life. Second, the focus on abortion as a choice does not allow us to visibilise or to understand the suffering of women forced to continue pregnancies they do not want to continue. I will examine both of these weaknesses in turn.

First, certainly, one of the greatest achievements of the anti-abortion movement was the ability to frame the discussion surrounding abortion as a discussion about life, specifically, about the value of human life. In establishing themselves as ‘pro-life’ and reproductive rights activists as ‘pro-choice’, they managed to reduce discussion surrounding an incredibly complex social dynamic to a simple binary. This binary became about identity and was closely tied to religious and political affiliations in a society that was becoming increasingly polarized by the simplification of social issues moulded for swift consumption.<sup>38</sup> In this way, our position on access to safe and legal abortion became about whether or not we valued life; not every life, just unborn life which, within this religiously infused narrative, is more vulnerable and more valuable as it is untainted by sin. Valuing life is not an exclusively religious endeavour; all domestic legal systems protect life and the protection of life is paramount in all human rights discourse. However, the success of the anti-abortion activist movement was in reducing the term ‘pro-life’ or ‘*pro-vida*’ to the exclusive realm of abortion. In posing this narrative dichotomy (you are either pro-life or you are pro-choice) ‘choice’ is always a morally inferior option. Choice, as conceived by the anti-abortion discourse, is devoid of moral substance; it is about convenience. Furthermore, in narratively framing access to abortion as an issue about life, they are able to equate abortion with death and, considering that it is motivated by convenience, they are able to hold that abortion is murder. This narrative, though simple, has proven to be devastatingly effective in driving political and legal change in post *Roe* USA.<sup>39</sup>

The second major defect of the privacy argument in the discursive arena is that it does not allow for the visibilization of the suffering caused by the denial of abortion services. In conceptualizing access to abortion as only a privacy issue, the denial of abortion is seen as an intrusion on the ability of a pregnant person to exercise an autonomous choice, nothing more. If that intrusion is carried out to save a human life, then it appears easy to justify. Denying a choice, conceived in abstract terms, says nothing about pain. In fact, the abortion debate as it stands in the USA does not generally speak to the very real suffering that pregnancy, childbirth and motherhood bring about for those who are unwilling, unsupported or unprepared to go through with it. There are social and economic sanctions placed upon pregnancy and motherhood that are not contemplated in the life/choice paradigm, neither are the physical and psychological effects of carrying an unwanted pregnancy. After childbirth (a physically traumatic event in all cases) the only options available to those who did not want to

38 For a discussion of the role of abortion in US political discourse see: Hinkson Craig and O’Brien, *Abortion and American Politics* (1993); Francome, *Abortion in the USA and the UK*, (2004) at Chapter 6; McBride Stetson, ‘US Abortion Debates 1959–1998: The Women’s Movement Holds On’ in McBride Stetson (ed), *Abortion Politics, Women’s Movements, and the Democratic State* (2001) 247; Adell Cook, Jelen and Wilcox, *Between Two Absolutes: Public Opinion and The Politics of Abortion* (2018).

39 McBride Stetson, *supra* n 38 at 255–262.

be pregnant are to raise the child themselves or to resort to adoption. Both of these scenarios can involve enormous psychological suffering for the woman, not to mention the child, and all of this suffering remains invisible to the life/choice paradigm.<sup>40</sup>

In practice, the grounding of abortion in the right to privacy, where the obligation of the authorities is to merely not intervene, has justified the refusal of the federal government as well as states to fund its provision, making it inaccessible to poor women.<sup>41</sup> This understanding of access to abortion as a matter of personal choice, as opposed to a human right, has also allowed the US government to use its foreign policy to require organisations in receipt of aid to refrain from even advocating for abortion law reform.<sup>42</sup> Domestically, the states that are hostile to abortion but that cannot outlaw abortion (because of the *Roe* precedent) have instead resorted to passing laws that regulate and restrict the provision of abortion services to such an extent as to make them unavailable in practice. This has forced reproductive rights organisations to spend their resources opposing these laws in Court. The Center for Reproductive Rights (CRR), in a submission made to the UN Human Rights Council in the context of the Universal Periodic Review of the USA, asserted that ‘in 2019, states . . . enacted 46 laws restricting abortion access’ including ‘unconstitutional pre-viability bans on abortion, such as laws banning abortion around six weeks of pregnancy.’<sup>43</sup> The CRR contends that the purpose of these restrictive laws is ‘to ask the Supreme Court to overturn or decimate *Roe*’.<sup>44</sup> While the abortion-as-privacy doctrine was initially strong and while it has the virtue of simplicity, it is apparent that its weaknesses have been exploited to such an extent that a change of discourse appears necessary if access to abortion is to endure.

### B. Latin America and the Caribbean: the Limits of Cruelty

Conversely, suffering is at the centre of the legalization of abortion in Latin America and the Caribbean. The only states where abortion on demand is available are Cuba, Guyana, Uruguay and Argentina;<sup>45</sup> every other state restricts the availability of abortion services; six states ban it completely under any circumstance. The remaining states, those that allow for some so-called therapeutic abortions, do so because of the cruelty associated with forcing certain, very well-defined pregnancies to continue. In Latin America, the focus of this article, life is the main discursive value at play in the abortion debate. The strength of this position has much to do with the enormous political importance of the Catholic Church—and more recently newer evangelical Protestant churches—and their centuries-long ability to permeate political discourse throughout the region. Catholic doctrine regarding gender and sexuality, particularly regarding gender roles and reproduction, can be seen throughout Latin American law

40 See *infra* n 136.

41 *Harris v McRae* *supra* n 35.

42 Starrs, ‘The Trump Global Gag Rule: An Attack on US Family Planning and Global Health Aid’ (2017) 389 *The Lancet* 485.

43 Center for Reproductive Rights, *supra* n 18 at para 28, and regarding the efforts to restrict access to abortion services, see paras 27–35.

44 *Ibid.* at para 27.

45 In Mexico where criminal conduct is regulated by state law, Mexico City and Oaxaca have also decriminalised abortion, in 2007 and 2019 respectively.

and politics.<sup>46</sup> Indeed, the American Convention on Human Rights famously requires states to protect life 'by law and, in general, from the moment of conception.'<sup>47</sup>

During years of authoritarian rule, the Catholic Church was often able to mediate and to lobby for human rights, as it was respected by all sides of social conflicts. As a result, during the most repressive years of dictatorial rule, the Church was often the only NGO that could advocate for human rights,<sup>48</sup> and it was thus able to set the agenda for human rights advocacy for decades. Therefore, while the Church focused its voice on denouncing murder, torture and arbitrary detention, and lent a voice to assisting migrants and the poor, the rights of women and of LGBTQ people were mostly ignored, and in the case of reproductive rights, actively opposed. The end of authoritarian regimes and the growing use of electronic communication are leading to a decrease in the overall number of government-sponsored atrocities, to greater freedom to mobilise and to greater possibilities for international networking for human rights advocates in Latin America. This greater freedom has allowed reproductive rights activists to pursue the relaxation of laws restricting abortion, with differing levels of success. For example, in 2006 Colombia moved from a total ban on all abortions to allowing abortions in the event of risk to the physical or mental health of the pregnant woman, malformation of, or risk to, the foetus, and in the event that the pregnancy is due to rape or incest. Uruguay decriminalized abortion in the first 14 weeks of pregnancy in 2012. In several other states in the region decriminalization is finally being talked about at different levels: in grassroots mobilization, in law schools and medical schools, in court and even in congress. This is, in itself, a change from an era where abortion was simply not spoken of outside of church.

However, despite the newfound openness to talk about it, two recent examples illustrate the complexities of decriminalization in Latin America. In Chile, laws criminalising abortion were brought in by the military regime and were among the strictest in the world. I myself distinctly recall sitting in my criminal law class at the University of Chile in the nineties and learning that if my pregnancy were to threaten my life, I was constitutionally obligated to die. The total ban was enforced often, largely because medical professionals were legally required to report women who came to hospital suffering complications after obtaining illegal abortions.<sup>49</sup> I remember watching the police raid clandestine abortion clinics live on breakfast television. After the fall of the regime, women's rights activists worked tirelessly to lobby for the relaxation of laws

46 See, in general, Htun, *Sex and the State: Abortion, Divorce and the Family Under Latin American Dictatorships and Democracies*, (2003) at Chapter 6; Shephard, 'The "Double Discourse" on Sexual and Reproductive Rights in Latin America: The Chasm between Public Policy and Private Actions' (2000) 4 *Health and Human Rights* 110 at 113.

47 Article 4.1 American Convention on Human Rights 1969, 1144 UNTS 123.

48 Cleary, *The Struggle for Human Rights in Latin America* (1997) at 1–25 (regarding the role of the Catholic Church in the resistance to Pinochet's regime), at 3 (regarding Chile after the coup of 1973, stating 'In Chile citizens formed organizations rapidly through churches, which were the one institution left standing with their civil rights largely intact'). See also 64–5, 92.

49 Casas-Becerra, 'Women Prosecuted and Imprisoned for Abortion in Chile' (1997) 5 *Reproductive Health Matters*, 29; Casas and Vivaldi, 'Abortion in Chile: the Practice under a Restrictive Regime' (2014) 22 *Reproductive Health Matters* 70 at 76–77 (regarding mandatory reporting of abortion by healthcare providers); UN Committee against Torture, *supra* n 15 at para. 6(j) (regarding withholding of medical care until the patient provides information about the alleged abortion they received).

banning divorce and the legalization of emergency contraception. It was a slow and arduous process but both objectives were ultimately achieved. In their effort to broaden and stabilise access to the morning after pill they found an ally in Michelle Bachelet, a medical doctor, who was at the time in her first term as president.<sup>50</sup>

Shortly after being elected to the presidency for the second time in 2014, Bachelet's government announced that it would propose a bill that allowed for abortion in three situations: if the life of the pregnant woman was at risk, in cases of fatal foetal abnormality or where the pregnancy was the result of rape. Passage of the bill through Congress galvanized the attention of the public domestically and garnered much international attention too. The relaxation of the abortion ban, which had broad public support in socially conservative and deeply religious Chile, had been unthinkable only a short number of years earlier. The bill passed through both houses of the centre-left congress and was quickly challenged by right wing lawmakers before the state's Constitutional Court. During the Constitutional case 176 *amicus curiae* briefs were presented by concerned third parties.<sup>51</sup> Ultimately, after applying a proportionality test to the rights of pregnant women *vis á vis* the rights of the unborn, the Constitutional Court allowed most of the bill to continue and become law. It declared unconstitutional the section that rejected the ability of medical professionals to declare themselves conscientious objectors to abortive procedures.<sup>52</sup>

What is most interesting in the case of the Chilean easement was the ability of reproductive rights advocates to shift the focus of the discourse surrounding abortion from one cruelty (the murder of the unborn child) to another (forcing women in desperate situations to continue with pregnancies that are causing them pain). It was their ability to frame the issue in terms of victimhood (as opposed to choice) that created a crack in a discursive wall that had seemed impenetrable.<sup>53</sup> This framing

50 For an analysis of the difficulties in achieving access to reproductive healthcare in Chile see Brito Peña, Cid Aguayo and Donoso Orellana, 'Ruling the Womb: The Sexual and Reproductive Struggle during the Bachelet Administration' (2012) 39 *Latin American Perspectives* 145; Maira, Casas and Vivaldi, 'Abortion in Chile: The Long Road to Legalization and its Slow Implementation' (2019) 21 *Health and Human Rights* 121. For a description of the process to legalise the morning after pill see Casas, *La Saga de la Anticoncepción de Emergencia en Chile: Avances y Desafíos*, (2008) 2 *FLACSO Serie de Documentos Electrónicos*.

51 I led a team of students from the University of Essex in presenting an *amicus* brief on Chile's obligations in the field of abortion under international human rights law. For a list of *amicus* briefs see Tribunal Constitucional Chile, Rol 3729 available at <<https://www.tribunalconstitucional.cl/expediente> [last accessed 9 March 2021].

52 *Ibid.*

53 For example, Dides Castilla and Fernandez write about the mobilization of domestic civil society organisations that, among other strategies 'raised cases of women who had asked the Chilean state for abortions'. Dides Castillo and Fernández, 'Aborto en Chile: Avances en Derechos Humanos' (2018) 43 *Revista de Bioética y Derecho* 61 at 67, my translation. Piquer Romo describes Amnesty International Chile's campaign titled 'Chile Does Not Protect Women', part of which involved publicising testimonial narratives of women who had been in one of the three situations covered by the bill and had been denied abortions. Piquer Romo, 'La Épica de Una Oportunidad Mínima' in Casas Becerra and Maira Vargas (eds), *Aborto en Tres Causales en Chile: Lecturas del Proceso de Despenalización* (2019) 233 at 240. Bachelet herself, in the first presidential address of her second term said: 'We routinely hear news of women who risk their lives by having clandestine abortions, which undoubtedly mark their lives with pain and anguish. And we have recently been informed of a woman who is in critical condition. And every abortion in this country is a sign that as a society we have arrived late, because prevention has not worked.' Maira Vargas and Carrera Ferrer (quoting Michele Bachelet) in 'Estrategias Feministas para la Despenalización del Aborto en Chile. La experiencia de la Mesa Acción por el Aborto' in Casas Becerra and Maira Vargas (eds), *ibid.* 181 at 193, my translation.

of decriminalisation as an act of mercy was widely accepted by the community and therefore it was a discourse that politicians wary of losing votes could get behind.<sup>54</sup> The endorsement of a large bloc of progressive politicians was key to passing the bill. The number of women who will benefit from the new law is very small. Even among other Latin American states, the Chilean law is still among the strictest, as the threat to the pregnant woman must be death and not the broader concept of health. Still, the crack is something that activists can and will work with because, as I argue below, it allows social imagination to begin to perceive that bans on reproductive healthcare can and do cause serious harm.<sup>55</sup>

The second example that illustrates the obstacles in the way of decriminalization is the case of Argentina where abortion was, until very recently, only legal where the life or the health of the pregnant woman was at risk (and there was no other way to avoid this risk) or where the pregnancy was the result of rape or was the result of an indecent assault against a woman with intellectual disabilities or intellectual impairment.<sup>56</sup> As in all Latin American countries, in Argentina the rates of illegal abortion remained very high despite the ban and as a result, the levels of maternal mortality and morbidity resulting from unregulated and unsafe abortion were some of the highest in the world.<sup>57</sup> In 2018, a bill to decriminalize abortion up to 14 weeks of gestation got almost all the way through Congress, only to be narrowly defeated in the Senate. The bill was fruit of grassroots mobilization by reproductive rights activists that had rallied against the deaths of women caused by unsafe abortions and was fiercely opposed by anti-abortion movements, including the Catholic Church, that relied on the overriding right to life of the unborn to justify their opposition.<sup>58</sup> Argentinian media reported that high-ranking bishops lobbied members of congress to oppose the bill<sup>59</sup> and two days after the bill was approved by the lower house, the Pope himself, during an event at the Vatican, compared abortion based on foetal malformation to Nazi efforts to achieve racial purity.<sup>60</sup>

54 Robledo Hoecker, Valdés Echenique and Viera Bernal, 'Proceso de despenalización de la interrupción del embarazo en tres causales de Chile. Mirada desde la salud' in Casas Becerra and Maira Vargas (eds), *ibid.* 27 at 40, n 17 (referring to a survey of public opinion carried out in 2017 where over 70 per cent of respondents stated they would decriminalise abortion in the three situations covered by the bill).

55 Chilean feminist authors recognized the reluctance of the feminist movement to support such a limited bill of decriminalization. Those that did were moved by the idea that this would be an opening which would lead to further liberalization down the road. Piquer Romo, *supra* n 53 at 238–241; Maira Vargas and Carrera Ferrer *supra* n 53 at 182–183.

56 Articles 85–88, Código Penal de la Nación Argentina (1921) (Amended by Ley 11.179 of 1984).

57 Romero, Abalos, and Ramos, 'La Situación de la Mortalidad Materna en Argentina y el Objetivo de Desarrollo del Milenio 5' (2013) 8 *Hoja Informativa Observatorio de Salud Sexual y Reproductiva* at 6 (demonstrating that from 2007–2011 death resulting from abortion was the leading cause of maternal mortality in Argentina).

58 Booth, Argentina Votes on Bill to Legalise Abortion up to 14 Weeks, (2018) 391 *The Lancet* 21; Sherwood, 'Argentina Abortion Defeat Shows Enduring Power of Catholic Church' *The Guardian*, 9 August 2018; Editorial: Catholic Church *v.* Women's Rights in Argentina, (2018) 392 *The Lancet* 532; Sutton, and Borland, 'Abortion and Human Rights for Women in Argentina' (2019) 40 *Frontiers: A Journal of Women Studies* 27.

59 Rubin, 'Debate Histórico. Aborto: la Iglesia, el Actor Clave que Logró Frenar la Ley' *El Clarín*, 9 August 2018.

60 El Clarín, El Papa Francisco Comparó el Aborto con las Prácticas Nazis para Conservar la Pureza de la Raza, 16 August 2018.

The year after the bill was rejected by Congress, the Argentine electorate voted in a new president, who had promised to back a new bill, again decriminalising abortions performed before 14 weeks of gestation. With the support of the new government, along with its legislators, the bill finally passed shortly before the publication of this article.<sup>61</sup> Just 22 days later, in what was widely understood as a reaction to the Argentinian decriminalisation vote, the Honduran Congress voted to require a supermajority of two-thirds to alter the constitutional ban on abortion, effectively rendering it virtually impossible that legal access to abortion could be achieved by electing legislators that would favour that move.<sup>62</sup>

Prior to the very recent Argentine decriminalisation vote, the cases of Chile and Argentina were emblematic of one of the major issues faced by the decriminalization movement in Latin America, namely that there is a disconnect between the arguments used to successfully lobby for access to abortion in the most dire circumstances and arguments used to justify abortion on demand. Indeed, the decriminalisation of abortion in Argentina came after decades of struggle by women's rights advocates and remains a distant target for most Latin American women. For those interested in formulating legal strategies to broaden access to reproductive healthcare in Latin America to be successful, it becomes imperative to understand the discourse surrounding gender and motherhood in the region. Specifically, why is it possible to relax the ironclad protection of unborn life in some cases and not in others and what can be done to formulate a decriminalization strategy that takes into account the idiosyncrasies of the region?

In Latin America family is tremendously important. Several domestic constitutions<sup>63</sup> and indeed the American Convention on Human Rights hold that family is the fundamental nucleus of society.<sup>64</sup> This is likely the result of how important organised religion is in the region with Catholic and Evangelical churches attracting followers from across political and class spectrums. While much diversity exists between Latin American nations, and while younger generations are bucking traditional trends—as evidenced by the broad public support of efforts to widen access to abortion in Chile and Argentina, it remains undeniable that in general the region is socially conservative, and that religious doctrine remains a strong influence for the generation that currently wields political and judicial power. In Latin America Catholic—and, to an increasing extent, Evangelical Christian—doctrine is strong, and it teaches that sex should be aimed at reproduction within a heterosexual marriage.<sup>65</sup> Furthermore, it teaches that motherhood is a woman's natural destiny.<sup>66</sup> This translates to a social expectation that women become mothers and—for women—motherhood is the logical consequence of sex. Furthermore, women are understood to be mothers as soon as they become pregnant, so a woman's attitude towards a foetus is equated to their attitude towards her child.<sup>67</sup> In most families, the role of the mother as nurturer is central. Given that the role

61 Ley 27,610, Acceso a la Interrupción Voluntaria del Embarazo, 30 December 2020.

62 Booth, 'Honduras Changes Constitution to Ban Abortion' 397 *The Lancet* 360.

63 See Article 42, Constitución Política de Colombia; Article 1, Constitución Política de Chile; Article 67, Constitución Política del Ecuador; Article 51, Constitución Política de Costa Rica.

64 American Convention on Human Rights, supra n 47 at Article 17.1.

65 See e.g. Pope John Paul II, *Evangelium Vitae*, (1995).

66 See e.g. Pope John Paul II, *Mulieris Dignitatem* (1988).

67 For an examination of Catholic doctrine regarding the role of women, including in sex and motherhood and with regards to abortion, see Lemaitre, 'Catholic Constitutionalism on Sex, Women and the Beginning of Life' in Cook, Erdman and Dickens (eds), *Abortion Law in Transnational Perspective* (2014) 239.

of mother is assigned as soon as conception occurs, the archetype of the bad mother—the mother who rejects her child—therefore extends to pregnant women who wish to abort.

A couple of examples from the case law of the Inter-American Court can help to illustrate this social construction of motherhood and its consequences. In the *Artavia Murillo* case, which dealt with the ban on IVF procedures by Costa Rica, the Court received expert testimony that explained the harm that the ban caused to infertile women because ‘motherhood has been assigned to women as an essential part of their gender identity, transformed into their destiny’.<sup>68</sup> A few years earlier, in the ruling on the case of the *Castro Castro* prison—where the state of Peru attacked the women’s wing of a prison to target members of Shining Path—Brazilian Judge Antonio Cançado Trindade described in a concurring opinion the abuse suffered by women in the following terms:

something sacred that has been violated in the present case: the project as well as the experience of maternity. Maternity, which must be surrounded by special cares, respect, and acknowledgment . . . was violated in the present case in a brutal form . . . In even another dimension, many of the women who survived the bombing of the Prison of Castro Castro . . . have not been able to be mothers yet, since . . . they have since then used all their existential time in searching for truth and justice. Thus, we are facing here a maternity that has been denied or postponed (a damage to a life project), forced upon them by the cruel circumstances.<sup>69</sup>

Latin America is also characterised by a cultural trait found all over the world: the inability to perceive the suffering of women as real. Structural oppression of women has made our physical and psychological pain invisible. The suffering of women is ubiquitous, normalised and invisible in most societies around the world. It is often trivialized (for example, domestic violence legislation establishes a separate, conciliatory procedure for abuse that would otherwise be considered criminal assault<sup>70</sup>), questioned (for example, attitudes towards rape and sexual assault involve an interrogation of the behaviour of the victim<sup>71</sup>) and ignored (for example, studies demonstrate that medical professionals are more reticent to prescribe pain relieving medication to women than they are to men<sup>72</sup>). The Inter-American Court has itself, once again, provided examples of this attitude in its past case law. In the *Caballero Delgado and Santana* case the Court received testimony

68 *Artavia Murillo et al. v Costa Rica*, supra n 4 at para 298.

69 *Case of the Miguel Castro Castro Prison v Peru*, IACtHR Series C 160 (2006), concurring op. J Cançado Trindade at paras 61–63. See also, Palacios Zuloaga, supra n 2 at 243–244.

70 See, in general, Macaulay, ‘Judicialising and (de) Criminalising Domestic Violence in Latin America’ (2006) *S Social Policy and Society* 103.

71 Contreras et al., ‘Sexual violence in Latin America and the Caribbean: A desk review’ Sexual Violence Research Initiative/Pan American Health Organization (2010) at 41–42, available at [https://www.paho.org/hq/dmdocuments/2010/sexual\\_violence\\_LA\\_Caribbean\\_e.pdf](https://www.paho.org/hq/dmdocuments/2010/sexual_violence_LA_Caribbean_e.pdf) [last accessed 12 March 2021]; McGowan, ‘Chilean Anti-Rape Anthem Becomes International Feminist Phenomenon’ *The Guardian* 6 December 2019.

72 Calderone, ‘The Influence of Gender on the Frequency of Pain and Sedative Medication Administered to Postoperative Patients’ (1990) *23 Sex Roles* 713; Samulowitz et al., ‘Brave Men’ and ‘Emotional Women’: A Theory-Guided Literature Review on Gender Bias in Health Care and Gendered Norms towards Patients with Chronic Pain’ (2018) *Pain Research and Management* 1 at 5, 9–10; Hoffmann and Tarzian, ‘The Girl Who Chied Pain: A Bias Against Women in the Treatment of Pain’ (2001) *29 Journal of Law, Medicine and Ethics* 13.

of the forced nudity of a woman prisoner but found no evidence of cruel, inhuman and degrading treatment.<sup>73</sup> In *Loayza Tamayo* the Court acknowledged all of the victim's claims of abuse except her rape, which it held to a higher probative standard.<sup>74</sup>

These two social understandings of womanhood—the woman as a mother and the inability of society to properly grasp the gravity of women's pain—go a long way to explaining why, in the majority of Latin American states, the ban on abortion has been relaxed for a small group of women but not for the majority. In short, the social narrative states that the woman whose life is threatened and the woman who is carrying a fatally abnormal foetus have not rejected their children; they have merely been placed by fate in a heart-breaking situation. The woman who is pregnant as a result of rape did nothing wrong (she did not choose to have sex) and should not be reminded of her rape forever by being forced to carry and then raise the child of her rapist. All other women who seek abortion chose to have sex, became mothers, only to reject their children. The first three groups of women deserve compassion and the ability to end their pregnancies, the last group deserves neither. While feminists ultimately aim to change these attitudes, in the short and medium term, advocacy strategies designed to broaden access to safe and legal abortion in Latin America must be constructed with careful attention to the social understandings described above, if they have any chance of garnering enough support to succeed.

### 3. SEXUAL AND REPRODUCTIVE RIGHTS IN THE INTER-AMERICAN SYSTEM: THE STORY SO FAR

If we are to assess how the Inter-American System has protected sexual and reproductive rights, and ultimately if this protection can be extended to safe and legal abortion, we need to first consider the American Convention on Human Rights and the *Baby Boy* case. However, the story certainly does not end there, and the past fifteen years have seen the System make enormous strides in gender justice and in the realm of sexual and reproductive rights. I argue that these developments have created a tipping point in the jurisprudence of the System organs which should be taken into account by reproductive rights advocates seeking strategic avenues to advance the right to free and legal access to abortion services.

#### A. The American Convention and *Baby Boy*

The American Convention on Human Rights recognizes the right to life in its Article 4 in the following terms:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.<sup>75</sup>

73 Palacios Zuloaga, *supra* n 2 at 275–7 (referencing *Caballero Delgado and Santana v Colombia*, IACtHR Series C 22 (1995) at paras 36, 38–9, 53 (f)).

74 *Ibid.* at 275–7 (referencing *Loayza-Tamayo v Peru*, IACtHR Series C 33 at para 58).

75 American Convention on Human Rights, *supra* n 47 at article 4.1.

The American Convention is the only major general human rights treaty in the world to require states to protect the life of the unborn. For this reason, it was invoked by anti-abortion activists in 1977 when presenting a petition to the Inter-American Commission on Human Rights against the USA. The case became known as *Baby Boy v the USA* and was the first time that the system was called upon to determine whether abortion constituted a violation of the right to life.<sup>76</sup> The case revolved around the acquittal on appeal of a doctor in Massachusetts who performed an abortion in the months following the decision in *Roe v Wade*. The petitioners claimed (among other things) that this refusal to convict the doctor for manslaughter, based on the *Roe* precedent, was in violation of Baby Boy's right to life. The USA is not a party to the American Convention and could thus only be held to the standards set in the American Declaration on the Rights and Duties of Man, which does not include a similar prenatal life clause. However, the petitioners claimed that the American Convention should be used to clarify the content of the right to life contained in the American Declaration.<sup>77</sup>

The Commission responded only to the claim regarding the right to prenatal life, and in doing so provided a detailed study of the *travaux préparatoires* regarding the formulation of the right to life in both the Declaration and the Convention. It explained that reference to prenatal life was deliberately excluded from drafts of the Declaration in order to not place states that allowed for abortion in some cases immediately into non-compliance. At the time, 13 states and territories in the region allowed for terminations in some circumstances.<sup>78</sup> Similarly, the Commission explained that the *travaux* of the Convention demonstrated that while the protection of prenatal life was important for the drafters, the words 'in general' were inserted before the words 'from the moment of conception' to allow for ratification from states where abortion was legal in some circumstances.<sup>79</sup> For these reasons the Commission concluded that the formulation of both the Declaration and the Convention was never intended to limit the availability of abortion and found against the petitioners.<sup>80</sup>

The *Baby Boy* case, decided in 1981, remains the system's key piece of jurisprudence in terms of whether or not abortion violates the right to life of the unborn. There are, however, other areas in the broader field of sexual and reproductive rights where the system organs have established important case law that becomes relevant to strategic litigation in favour of broader abortion access.

### **B. Forced Sterilisation and the Legality of In Vitro Fertilisation**

The sterilisation of women as a way to limit women's reproduction, including where the woman is part of a group that the state deems undesirable, has unfortunately been a practice of Latin American states.<sup>81</sup> The first case to come before the system

76 Case 2141, *White and Potter ('Baby Boy') v the USA*, Inter-Am. Comm. H.R., Report No 23/81 (1981).

77 *Ibid.* at para 2.

78 *Ibid.* at para 19, note that the numeral is missing from the text but is presumed to exist where the letters start over.

79 *Ibid.* at para 25.

80 *Ibid.* at para 30.

81 Amnesty International, *The State as a Catalyst for Violence against Women: Violence against women and torture or other ill-treatment in the context of sexual and reproductive health in Latin America and the Caribbean*, (2016) at 25–30, available at [www.amnesty.org/download/Documents/AMR0133882016ENGLISH.PDF](http://www.amnesty.org/download/Documents/AMR0133882016ENGLISH.PDF) [last accessed 12 March 2021].

involved the death of a poor rural woman who was coerced by government officials into a sterilisation which caused her to develop sepsis and ultimately to die.<sup>82</sup> This case was the subject of a friendly settlement where the state acknowledged that its actions violated the victim's right to life, integrity and equality and agreed to several reparations measures including compensation for the victim's family as well as far reaching public policy reform in the field of informed consent and reproductive health.<sup>83</sup> While the Commission did not find on the merits itself, the fact that it authorised a settlement where the rights to integrity and equality were agreed to have been violated is significant for the purposes of this article.

Nine years after that friendly settlement, the Inter-American Court handed down a ruling where it examined the harm caused by a ban on *in vitro* fertilisation. In *Artavia Murillo et al v Costa Rica* the state supreme court banned IVF because it involved creating embryos in the full understanding that many of them would not survive the process. The supreme court held that this procedure 'clearly jeopardizes the life and dignity of the human being'<sup>84</sup> and cited Costa Rica's obligation to protect embryos from abuse and death<sup>85</sup> based in significant part on the American Convention's prenatal life clause.<sup>86</sup> The petitioners before the Inter-American System were infertile couples who were no longer able to access IVF in Costa Rica and who the Commission claimed had had their rights to privacy, their right to found a family and their right to equality violated by the ban.<sup>87</sup> As the case required a finding on the protection of prenatal life under the ACHR, the Court re-examined and then reaffirmed the *Baby Boy* precedent in much the same terms as the Commission had found over thirty years earlier, and complemented that finding with a survey of various sources of international law, in the sense that the protection of prenatal life contemplated in article 4.1 of the American Convention was not absolute.<sup>88</sup> Interestingly, the Court went on to rule that in banning IVF the state had violated more rights than those alleged by the Inter-American Commission. While the case was framed by the Commission in terms of the right to privacy, family and equality, the Court added violations of the right to integrity and the right to liberty after hearing arguments from the petitioners themselves.<sup>89</sup> Specifically, the Court found that the lack of access to reproductive healthcare compromised the rights to privacy (in the sense of autonomy), reproductive freedom and physical and mental integrity.<sup>90</sup> It also held that while the ban on IVF had been framed in gender neutral terms, it had a disproportionate impact on women.<sup>91</sup>

The culmination of this trend towards finding Latin American states responsible for restricting reproductive rights is found in the Court's first forced sterilisation case,

82 Case 12.191, *Maria Mamerita Mestanza v Peru*, Inter-Am. Comm. H.R., Report No 71/03 (2003) at paras 9–12.

83 *Ibid.* at para 14.

84 Constitutional Chamber of the Supreme Court of Justice (Costa Rica), Judgment No. 2000–02306, 15 March 2000, at 94.

85 *Ibid.* at 92.

86 *Ibid.* at 91.

87 *Artavia Murillo v Costa Rica*, *supra* n 4 at para 2.

88 *Ibid.* at paras 163–264.

89 *Ibid.* at para 141.

90 *Ibid.* at paras 147.

91 *Ibid.* at para 299.

*I.V. v Bolivia*, which was decided in 2016. In this case the victim was a refugee of Peruvian descent who had been tortured by Peruvian authorities and who, after settling in Bolivia was sterilised during a caesarean section without having given prior and informed consent. The victim survived this sterilisation and was thus able to convey to the Court the harm that she had suffered as a result of it.<sup>92</sup> The Court took the opportunity to examine the case using a sophisticated gender perspective that allowed it to find that many different violations of the victim's human rights had occurred and, importantly, that those violations had come about in part because of gender stereotypes that oppress women and because of the imbalance of power that exists between doctors and patients.<sup>93</sup>

The jurisprudential construction utilised by the court to find that the state had contravened the American Convention is interesting for the purposes of this article. Most interesting in this context is that the Court located the right to autonomy within the right to dignity (as opposed to the US doctrine of autonomy as privacy).<sup>94</sup> According to the Court, a person's right to self-determination and their ability to decide for themselves is included in the somewhat diffuse and underutilised 'right to have his honor respected and his dignity recognized.'<sup>95</sup> The Court then made a point of linking this concept of autonomy as dignity with the rights to liberty, privacy, family life, health and access to information,<sup>96</sup> meaning that the lack of respect for the victim's right to consent or not to consent to the sterilisation was in violation of all of those rights. It also made a point of finding that sterilisation without informed consent violated all of the rights above in conjunction with the American Convention's subordinate discrimination clause, meaning that State had failed to respect and guarantee the rights in question without discrimination.<sup>97</sup> Further, the Court then went on to hold that the forced sterilisation itself was cruel, inhuman and degrading treatment.<sup>98</sup> In doing so it referred to the importance of understanding how discrimination against women plays a role in determining whether their mistreatment constitutes torture and/or cruel, inhuman and degrading treatment. Crucially it held that:

Certainly, the healthcare context can involve a heightened risk that women may be subject to of acts in violation of article 5.2 of the American Convention, especially with regards to practices and policies that are primarily directed at women, that affect them disproportionately, or that women are especially vulnerable to due to negative or harmful gender stereotypes, including the social and cultural assignment of reproductive duties and contraceptive responsibilities to women.<sup>99</sup>

The development of the Court's jurisprudence from *Artavia Murillo* to *I.V.* demonstrates a progression in its gender analysis. It has moved from a focus on autonomy as privacy

92 *I.V. v Bolivia*, supra n 1 at para 269.

93 *Ibid.* at paras 185–188.

94 *Ibid.* at para 150.

95 American Convention on Human Rights, supra n 47 at article 11.1.

96 *I.V. v Bolivia*, supra n 1 at para 235.

97 *Ibid.* at paras 238–249.

98 *Ibid.* at para 270.

99 *Ibid.* at para 265. My translation.

and liberty to a focus on autonomy as dignity, which is an undertheorized right, whose content the Court is able to shape. Likewise, it has moved from recognising the imposition of infertility as a violation of personal integrity to recognising it as cruel, inhuman and degrading, all the while increasing the emphasis on structural discrimination and gender stereotypes as the root cause of these violations.

While all three of the preceding cases refer to the unlawful removal of a woman's reproductive capacity, the Court's evolution towards the construction of forced sterilisation around the right to dignity, the right to equality and the right to be free from cruel, inhuman and degrading treatment, coupled with the preponderance given to gender stereotypes in the adjudication of the case all suggest that the Court is willing to recognise that the mistreatment of women in the arena of reproductive healthcare goes well beyond their right to choose. Needless to say, this will be a key element in any Inter-American litigation pursuing the decriminalisation of abortion.

### C. The Requirement of So-Called Therapeutic Abortion

The final set of cases where the system organs have taken action in the field of reproductive rights have to do with the availability of so-called therapeutic abortion. These abortions are generally understood to be required for medical reasons to preserve the health of the patient, including ending a pregnancy that is the result of rape. I add the words 'so-called' because the term 'therapeutic abortion' suggests that all other forms of abortion are not acts of healthcare. In fact, the term is often used in contrast to the term 'elective abortion,' which would encompass those terminations that are the result of a choice rather than a medical requirement. This terminology establishes a false dichotomy that contributes to the understanding that most women don't actually *need* abortions and reinforces the stigma that surrounds them.<sup>100</sup>

The Inter-American System organs have been called upon to protect the rights of women and girls who have been denied abortions despite their urgent need for them. However, neither the Commission nor the Court have ever found on the merits of a case regarding the lack of available abortion services; the Commission has endorsed one friendly settlement and all other interventions have come about through the system's protective mechanisms, which are designed to provide urgent injunctive relief to prevent further harm without deciding on the merits.

The friendly settlement was with regards to a thirteen-year-old Mexican girl who was raped and who was subsequently denied an abortion.<sup>101</sup> The fact that the state was able to reach an agreement with the victim was likely due to the fact that abortion was legal where the pregnancy was the result of rape. The issue therefore was not the legality of the procedure but rather that the procedure was not available because state officials attempted to dissuade the victim and because doctors refused to perform the procedure and gave the victim and her mother misleading information regarding the risks involved. The Mexican state recognised its responsibility for 'the absence of an appropriate body of regulations concerning abortion.'<sup>102</sup> It went on to agree to provide

100 Watson, 'Why We Should Stop Using the Term "Elective Abortion"' (2018) 20 *AMA Journal of Ethics* 1175.

101 Case 161-02, *Paulina Del Carmen Ramirez Jacinto v Mexico*, Inter-Am. Comm. H.R., Report No 21/07 (2007).

102 *Ibid.* at Annex.

both the victim and her son with reparations including the provision of healthcare (including psychological care) various types of compensation, including housing and educational support, damages, and legal and policy reform. While the agreement does not include an explanation of the international legal construction of the human rights violations at play in this case, it does provide an understanding of the harm caused through the various reparations measures agreed upon. For example, the psychological care available to the victim and her son were available at any time and the educational scholarship for the victim's son went all the way up to university.<sup>103</sup> The reparations measures considered in total indicate an understanding that the denial of abortion caused long-term psychological suffering for the victim and her son as well as social and economic hardship for the family.

Three years later, in 2010, the Commission issued precautionary measures in favour of 'Amelia', a Nicaraguan woman who was already a mother and who was denied cancer treatment because of the adverse effects that chemotherapy and radiation could have on her pregnancy.<sup>104</sup> All forms of abortion are illegal in Nicaragua and no exceptions are made. The Commission requested that the state 'adopt the measures necessary to ensure that the beneficiary has access to the medical treatment she needs to treat her metastatic cancer.'<sup>105</sup> The State then agreed to begin the treatment. Strictly speaking, this case is not about providing abortion care but rather about prioritizing the health of the pregnant woman even where treatment will likely jeopardize a pregnancy. However, the following year the Commission issued a press release regarding its 141<sup>st</sup> Regular Session, and in an annex to that press release it included a paragraph on the situation of women's rights in the region where it stated that:

The IACHR also reminds the States that therapeutic abortion is recognized internationally as a specialized, necessary health services [sic] for women intended to save the mother's life when it is at risk due to pregnancy, and that denying this service constitutes an attack on the life and physical and psychological integrity of women.<sup>106</sup>

Two years later, in the case of *B v El Salvador* both the Commission and the Court saw fit to intervene to protect the life of B, a woman with lupus who was carrying an anencephalic foetus and whose pregnancy was threatening her life. Despite the fact that all forms of abortion are strictly forbidden in El Salvador, B's medical team had indicated that her pregnancy should be terminated.<sup>107</sup> The case was taken to the Supreme Court, which issued an interim order requiring measures to guarantee B's life and health by 'providing medical treatment that is necessary and appropriate for the preservation of those rights'<sup>108</sup> while the case was decided. However, while B was hospitalised

103 Ibid. at para 16 (SIX).

104 Case MC 43–10, 'Amelia', *Nicaragua*, Inter-Am. Comm. H.R. (2010).

105 Ibid.

106 Inter-Am. Comm. H.R. 'Annex to Press Release 28/11 on the 141<sup>st</sup> Regular Session of the IACHR', 1 April 2011, available at [https://www.oas.org/en/iachr/media\\_center/PReleases/2011/028A.asp](https://www.oas.org/en/iachr/media_center/PReleases/2011/028A.asp) [last accessed 12 March 2021].

107 *Matter of B, El Salvador*, Provisional Measures, Inter-Am. Ct H.R., 29 May 2013 at para 8 (c).

108 Ibid. at para 2.v).

and given medicine, an abortion was not performed. The Supreme Court ultimately rejected B's request. Unusually, both the Commission and the Court intervened in this case, through precautionary and provisional measures respectively, as the state failed to implement the measures ordered by the Commission. Neither of their orders mentions abortion specifically, but they both request that the state urgently adopt all necessary measures to avoid irreparable harm to B's life and integrity.<sup>109</sup> Six days after the Court's order, the state carried out a caesarean section to remove the foetus from B's womb. It was placed in an incubator and given fluids but died after five hours<sup>110</sup>.

The Commission also ordered precautionary measures in the case of *Mainumby*, a ten-year-old Paraguayan girl who was raped and then denied an abortion because it was deemed that her pregnancy did not pose a risk to her life. She was hospitalised while her mother, who had requested an abortion be performed, was detained for contributing to the abuse that the girl had suffered.<sup>111</sup> In this case the Commission once again did not use the term abortion, but it went further than it had in B by requesting that the state:

Protect the life and the personal integrity of the girl, in order to guarantee that she has access to medical treatment that is appropriate to her situation and that is recommended by specialists—in light of the technical guidelines of the World Health Organisation and other similar sources applicable in the field of the reproductive health of girls and adolescents—and in which all available options are ensured.<sup>112</sup>

The case garnered significant attention from news outlets,<sup>113</sup> human rights NGOs<sup>114</sup> and UN officials<sup>115</sup> but ultimately the state refused to allow the termination and the child gave birth via caesarean section.<sup>116</sup>

The preceding set of cases illustrates the core of the system organs' position on abortion. First, the fact that neither organ explicitly mentions the word 'abortion' in the set of measures they require states to take demonstrates that they are aware of, and perhaps wary of, the charged political environment that they are working in. The consequences of taking a decriminalisation stance became shockingly clear when in 2019 the Trump administration withdrew over US\$200,000 from the funding of the Commission for, in their view, lobbying in favour of abortion.<sup>117</sup> Second, the fact that

109 Ibid. at operational para 1.

110 Zabludovsky, 'A High-Risk Pregnancy is Terminated. But Was it an Abortion?' *The New York Times*, 4 June 2013.

111 Case MC 178/15, '*Mainumby*', *Paraguay*, Inter-Am. Comm. H.R., (2015) at para 3.G.

112 Ibid. at para 23. My translation.

113 Pressly, 'Pregnant at 10 and Abortion's Not an Option' *BBC*, 10 Sept. 2015; Blair and Carneri, 'It Destroyed the Girl She Was: The Toll of Pregnancy on Paraguay's Children' *The Guardian*, 19 July 2018.

114 See Guevara-Rosas, 'Lucky to be Alive after Rape and Childhood Pregnancy' Amnesty International, 14 August 2015; Equality Now, 'Paraguay: Protect the Rights of 11-Year Old Rape Victim and Give her Justice' 18 May 2015.

115 UN News, 'Paraguay: UN Experts Deplore Government's Failure to protect 10-Year-Old Rape Survivor' 11 May 2015.

116 Blair, 'Paraguayan 11-Year-Old Gives Birth After Pregnancy Sparked Abortion Debate' *The Guardian*, 13 August 2015.

117 Brice and Wroughton, 'U.S. Expands Abortion 'Gag Rule,' Cuts Funding to Regional Bloc: Pompeo' *Reuters* 26 March 2019.

both the Commission and the Court express serious concerns about states forcing women to continue with pregnancies in dire circumstances demonstrates that both organs are willing to consider at least some forms of abortion as necessary to protect the life and integrity of pregnant women. The question that remains is how do these cases, together with the jurisprudence on prenatal life, forced sterilisation and the ban on IVF, contribute to an understanding of the law that would require states to allow abortion on demand for more women than just those in the direst circumstances?

#### 4. BEYOND PRIVACY: WHAT STRATEGIES FOR CHANGE IN LATIN AMERICA?

Reproductive rights advocates in Latin America are looking to human rights discourse to build an alternative narrative surrounding access to safe and legal abortion for all pregnant people, beyond the limited options available in most states today. This discourse has the virtue of claiming universality as one of its primary characteristics and enjoys broad acceptance across the world. In particular, human rights doctrine had a central role in the resistance to authoritarian rule that allowed the region to transition to democracy, so it is a discourse that is widely understood and accepted.<sup>118</sup> The denial of abortion services is a complex violation that compromises several different human rights at once and it may seem tempting to simplify this reality to make the argument for decriminalisation more accessible to broader audiences. There also exists the temptation to follow the established doctrine of privacy, which has allowed for decriminalization in the USA. My contention is that this would be a strategic mistake.

To be clear, the denial of free and legal abortion services is a violation of the right to privacy, understood as the right to govern oneself with autonomy and to make decisions about the body and about a life plan without undue interference from the state. Deploying a narrative about abortion as autonomy sends a message about capability that is important for feminists: namely that women do not want or need tutelage and are perfectly capable of governing ourselves. It is important to recognize this but it is also important to not reduce forced pregnancy to only the realm of privacy because, as I stated earlier, this approach reinforces the idea that sexual and reproductive rights impose on states only the obligation to not interfere.<sup>119</sup> It also reinforces the public/private divide and contributes to the stigma suffered by women who have undergone abortions.<sup>120</sup> Furthermore, it contributes to the perception that reproductive rights are violated on a singular scale and does not facilitate the perception of these violations as the result of discrimination suffered by women as a group.<sup>121</sup> Furthermore, privacy alone would constitute a relatively weak approach in Latin America, where people are more accustomed to states that interfere in private life and where the Catholic and Evangelical doctrine of the primacy of prenatal life is so strong. In this sense, if the

118 Eg: Sutton and Borland, *supra* n 58 at 35–48 (regarding the strategic use of human rights discourse by reproductive rights advocates).

119 *Harris v McRae* *supra* n 35; *Webster v Reproductive Health Services* *supra* n 35.

120 Kumar, Hessini and Mitchell, 'Conceptualising Abortion Stigma' (2009) 11 *Culture, Health and Sexuality* 625; Shellenberg et al., 'Social Stigma and Disclosure about Induced Abortion: Results from an Exploratory Study' (2011) 6 *Global Public Health* S111; Hanschmidt et al., 'Abortion Stigma: A Systematic Review' (2016) 48 *Perspectives on Sex and Reproductive Health* 169.

121 Siegel, *supra* n 19; Bader Ginsburg, *supra* n 19; Sunstein, *supra* n 36 at 36–41.

privacy argument is being so effectively eroded in the USA, where there is a strong support for autonomy and limited government, it would not stand well against the protection of foetal life in Latin America.

In addition to privacy, a legal construction of the denial of access to safe and legal abortion services in Latin America that is able to address the harm caused by this denial would need to refer to at least the following issues:

### A. Health

A significant amount of scholarship exists that holds that abortion is healthcare.<sup>122</sup> In this sense it should be considered in the same way that the denial of any other medical procedure should be considered, namely as a violation of the right to health. General Comment 22 on the Right to Sexual and Reproductive Health by the UN Committee on Economic, Social and Cultural Rights refers throughout to the requirement that states decriminalise and provide access to safe abortion and holds specifically that:

Preventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, including for adolescents, liberalize restrictive abortion laws, guarantee women and girls access to safe abortion services and quality post-abortion care, including by training health care providers, and respect women's right to make autonomous decisions about their sexual and reproductive health.<sup>123</sup>

Likewise, the World Health Organisation holds that '[1]aws and policies on abortion should protect women's health and their human rights.'<sup>124</sup>

### B. Equality and Freedom from Discrimination

Abortion as an equality issue can be understood in three ways. First, the lack of access to abortion services is product of the structural discrimination faced by women in society. This structural discrimination creates power imbalances that oppress women in many ways, one of which is the inability to control our reproductive lives or to make unhindered decisions about whether and how we reproduce. One of the many ways in which this structural oppression operates is in the proliferation of gender stereotypes

122 Cook and Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1; Hill, 'Reproductive Rights as Health Care Rights' (2008) 18 *Columbia Journal of Gender and Law* 1; Lindgren, 'The Rhetoric of Choice: Restoring Healthcare to the Abortion Right' (2012) 64 *Hastings Law Journal* 385. See also, Report of the UN Special Rapporteur on the Right to Health, UN Doc. A/66/254 (2011) at para 21; CEDAW Committee, Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD Review, (2014) available at <https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf> [last accessed 12 March 2021]; Committee on Economic, Social and Cultural Rights, General Comment 22: The right to sexual and reproductive health (Article 12), 2 May 2016 at para 40; International Federation of Gynecology and Obstetrics, 'Safe Abortion is Healthcare' 27 Sep. 2019, available at [www.who.org/news/safe-abortion-healthcare-0016243](http://www.who.org/news/safe-abortion-healthcare-0016243) [last accessed 12 March 2021].

123 Committee on Economic, Social and Cultural Rights, *supra* n 122 at para 28.

124 World Health Organization, 'Safe Abortion: Technical and Policy Guidance for Health Systems, Legal and Policy Considerations' WHO/RHR/15.04 (2015) at 1.

surrounding the role of women as mothers first and foremost, stereotypes which influence the decisions made by legislators, policymakers and medical professionals when regulating the exercise of sexual and reproductive rights.<sup>125</sup> Second, in most societies around the globe maternity is associated with higher levels of poverty.<sup>126</sup> Women who have children tend to have smaller incomes, progress less and more slowly in their careers and work longer hours than men, and than women who do not have children.<sup>127</sup> The gender attainment gap that exists between men and women as a result of the structural oppression mentioned above is thus exacerbated by maternity.<sup>128</sup> While this is a problem that in any case requires urgent action from all states, forcing pregnant people to continue with pregnancies they do not want to continue with also forces them to bear the disproportionate social and economic burdens thrust upon mothers which would compound the discrimination that they already experience as women. A third, narrower, way to understand the denial of abortion services as discrimination is that cisgender men are not routinely denied any healthcare services. In this sense, the discrimination would be in the access to healthcare because ‘men are free to have recourse to medical means to advance important interests in their lives’<sup>129</sup>, whereas pregnant women, trans men and non-binary people are denied the right to terminate their pregnancies. Cook, Dickens and Fathalla hold that:

Men are not legally compelled involuntarily to give the facilities of their bodies in the service of others, for instance as bone marrow or blood donors, and the legal requirement that women serve involuntarily for this purpose constitutes discrimination against women on grounds of sex.<sup>130</sup>

### C. Maternal Mortality, Maternal Morbidity and Suffering

A more comprehensive human rights model of the denial of safe and legal abortion services should also refer to the concrete physical and psychological harm caused to the person who is refused an abortion. In this sense, understanding abortion as a choice invisibilises the anguish and the pain caused by being forced to be pregnant and the very real risk to life brought about by unsafe abortion. The concrete location of the harm can be understood in two broad areas. First, the criminalisation of abortion services, as well as the failure of the state to provide these services for free, pushes women to seek illegal and/or unsafe abortions. It is worth noting here that the legal

125 Cook and Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, (2010) at 85–6 (describing the stereotypes of women in the arena of reproductive healthcare as ‘promiscuous or immoral’, ‘incapable of making rational decisions’ and ‘weak and vulnerable’).

126 United Nations, Department of Economic and Social Affairs, Statistics Division, *The World’s Women 2015: Trends and Statistics*, (2015) at Chapter 8: Poverty.

127 I understand work to include not just paid employment but also caring responsibilities, including childcare. See International Labour Office, *Women at Work: Trends 2016*, (2016) at 19–21.

128 Grimshaw and Rubery, ‘The Motherhood Pay Gap: A Review of the Issues, Theory and International Evidence’, International Labour Office, (2015).

129 Cook, Dickens and Fathalla, *supra* n 19 at 351. See also 349 (‘men can serve their health needs, regarding treatment for hepatitis and other health conditions, without fear of committing a criminal offense’).

130 *Ibid.* at 381. See also 349.

status of abortion does not affect abortion rates or affect birth rates<sup>131</sup> but in states where abortion is restricted to only so-called therapeutic cases, a significant amount of maternal morbidity and mortality is caused by unsafe abortion.<sup>132</sup> This was the main claim made by reproductive rights activists who pushed for legislative reform in Argentina: that women were suffering and dying because they were forced to resort to unsafe abortion to terminate their pregnancies.<sup>133</sup> The UN Human Rights Committee has asked states, when reporting on their compliance with the right to life under the ICCPR, to include ‘any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions.’<sup>134</sup> More recently it held that while states parties to the ICCPR could regulate access to abortion services, they should not take measures that push pregnant women to procure unsafe abortions, including measures that criminalize abortion.<sup>135</sup>

The second locus of harm in denying access to free and legal abortion is the physical and psychological suffering and the heightened risk to life experienced by all those who are forced to continue a pregnancy, regardless of whether they seek out an illegal abortion. For some women this harm is considered by almost all states as too heavy a burden to impose and thus abortion is permitted for those whose life or health is threatened, those who are carrying foetuses with fatal abnormalities and for those whose pregnancies are the result of rape. In these limited cases there seems to be a large consensus around the idea that the physical and psychological suffering caused by the pregnancy would be too much to force on anyone. But forced pregnancy causes suffering in all cases, not just those that trigger so-called therapeutic abortions. Pregnancy and childbirth can be physically and emotionally difficult even if reproduction is very much wanted and all pregnancies carry a heightened risk of death. This risk and the common ailments suffered by pregnant women can cause severe distress in those who do not want to be pregnant. There is also the psychological anguish that is caused by the upheaval of life plans, the imposition of financial and social hardship, the knowledge that abortion is freely available to other women elsewhere and the need to decide whether to raise the child or to seek out adoption, both of which can bring about enormous suffering. Childbirth is always physically traumatic and when pregnancy is forced it can also be psychologically devastating. Studies show that forced pregnancy and forced motherhood can have long-lasting psychological effects on those who are denied abortions and, on the children born as a result of forced pregnancy.<sup>136</sup> It is this suffering that has been largely invisible until recently. It is a suffering that is deeply

131 World Health Organisation, *supra* n 124 at 2.

132 World Health Organization, Preventing Unsafe Abortion, 25 September 2020, available at [www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion](http://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion) [last accessed 12 March 2021]. Regarding Latin America, see: Guttmacher Institute, *supra* n 13.

133 Booth, *supra* n 58.

134 Human Rights Committee, General Comment 28: Equality of Rights between Men and Women (art. 3), 29 March 2000 at para 10.

135 Human Rights Committee, General Comment No. 36, Article 6: right to life, 3 September 2019 at para 8.

136 Dagg, ‘The Psychological Sequelae of Therapeutic Abortion—Denied and Completed’ (1991) 148 *American Journal of Psychiatry* 578; Gilchrist et al., ‘Termination of Pregnancy and Psychiatric Morbidity’ (1995) 167 *British Journal of Psychiatry* 243; Ludermitz et al., ‘Postnatal Depression in Women after Unsuccessful Attempted Abortion’ (2011) 198 *British Journal of Psychiatry* 237; Herd et al., ‘The Implications of Unintended Pregnancies for Mental Health in Later Life’ (2016) 106 *American Journal of Public Health* 421.

stigmatised, leading women to be very reticent to speak of it. It is also minimised and trivialised by social narratives around pregnancy that are prevalent in Latin America and that claim that all women grow into their roles as mothers and grow to love their children in the end. Even if these baseless claims are true, the love for a child does not erase the suffering caused by the denial of reproductive healthcare.

Human rights bodies around the world have been willing to call this suffering cruel, inhuman and degrading when referring to the denial of so-called therapeutic abortion<sup>137</sup> but have not generally come to the same conclusion regarding the broader group of women who simply don't want to be pregnant. However, the full understanding of the suffering caused by forced pregnancy would require an acknowledgement that forcing someone to be pregnant is cruel regardless of whether or not the pregnancy would trigger a so-called therapeutic abortion.

## **5. CAN THE INTER-AMERICAN SYSTEM ACCOMMODATE THE RIGHT TO SAFE AND LEGAL ABORTION?**

The first premise of the present article is that reproductive rights advocates in Latin America should seek to frame demands for access to safe and legal abortion in terms that are broader than simply relying on the right to privacy (as autonomy) as this argument is unlikely to succeed in the Latin American cultural context. Further, the example of the USA demonstrates that the privacy doctrine is being intensely eroded because it does not describe the full extent of the harm caused by denial of abortion services. The second premise is that the Inter-American system, which has not yet found on the legality of the criminalisation of abortion beyond protective measures in cases where women have required so-called therapeutic abortion, could provide important jurisprudential guidance in framing the denial of abortion services as a violation of human rights. Part of this guidance comes from the System organs' opinions on other sexual and reproductive rights and part of it comes from their established case law regarding life, health, integrity and equality rights which all provide jurisprudence that can be operationalised to support the decriminalisation of abortion services.

### **A. Sexual and Reproductive Rights**

The Commission and the Court's findings regarding prenatal life, forced sterilisation, IVF and so-called therapeutic abortion described above are the first port of call in the search for a path to broaden access to abortion in Latin America. In particular, the Court has chosen to construe reproductive rights as broadly encompassing several different human rights. It has evolved to locate the right to decide on reproductive health issues as part of the right to dignity,<sup>138</sup> meaning that to not allow a person to make decisions regarding their reproductive health is to not recognise the full extent of their humanity. Further, instead of isolating autonomy and consent only within the realm of dignity, it

137 Committee Against Torture, Concluding Observations: Nicaragua, 10 June 2009 CAT/C/NIC/CO/1 at para 16 (regarding the total ban on abortion that forces rape victims to carry pregnancies to term and causes 'serious traumatic stress and a risk of long-lasting psychological problems'); Human Rights Committee, supra n 134 at para 11 (requiring states to provide information as to whether access to safe abortion is provided to those who became pregnant as a result of rape, when reporting on compliance with article 7 of the ICCPR—the right to be free from torture or cruel, inhuman and degrading treatment).

138 *IV. v Bolivia* supra n 1 at para 150.

also made a point of linking autonomy to liberty, privacy, family life, health and access to information.<sup>139</sup> In this way, it created a nuanced vision of the violation of reproductive consent that went well beyond the choice paradigm and went a significant way towards reconceptualising reproductive healthcare and its denial as a complex social issue. This reformulation of reproductive health is an important first piece of the puzzle.

Another important finding is that the removal of reproductive capacity (through forced sterilisation or the ban on IVF) and the denial of so-called therapeutic abortion both compromise the protection of the right to integrity and can involve its corollary, the right to be free from cruel, inhuman and degrading treatment.<sup>140</sup> In this sense, all reproductive health cases that have been examined herein have involved the threat to or the violation of the right to integrity contained in Article 5 of the ACHR. This is significant because I have argued above that a more adequate framing of the right to safe and legal abortion in Latin America should include the assertion that to deny reproductive healthcare is cruel. The current case law of the system organs supports this argument so if access to safe and legal abortion on demand is framed as a reproductive healthcare issue, it is reasonable to suggest that the system organs could find that its' denial violates the rights to integrity as well as dignity liberty, privacy, family life, health and access to information.

## B. The Rights to Life and to Health

The Inter-American system has some of the most sophisticated case law regarding the right to life after decades of adjudicating cases where death has resulted from political violence.<sup>141</sup> For the purposes of supporting the decriminalisation of abortion, the Inter-American Court's understanding of the state obligation to ensure the free and full exercise of the right to life is particularly important. The Court, since *Velásquez Rodríguez*, has held that the state has a duty 'to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.<sup>142</sup> Given the correlation between unsafe abortion and maternal mortality, the obligation to ensure would require states to provide access to safe abortion services.

In addition, in the case of *Ximenes Lopes*, where a mentally ill man died while interned in a psychiatric institution, the Court held that:

As to the persons who are under medical treatment, and since health is a public interest the protection of which is a duty of the States, these must prevent third parties from unduly interfering with the enjoyment of the rights to life and personal integrity, which are particularly vulnerable when a person is undergoing health treatment. The Court considers that the States must regulate and supervise all activities related to the health care given to the individuals under the

139 Ibid. at para 235.

140 See supra sections 3.B. and 3.C.

141 See Cavallaro et al., *Doctrine, Practice, and Advocacy in the Inter-American Human Rights System*, (2019) at chapter 6.

142 *Case of Velásquez Rodríguez v Honduras*, IACtHR Series C 4 (1988) at para 166 (dealing with forced disappearance; this was the Inter-American Court's first merits ruling).

jurisdiction thereof, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity giving such health care.<sup>143</sup>

Both of these rulings support the idea that under the American Convention on Human Rights, states must take positive measures to regulate healthcare services in order to protect life, which in turn can support not only the decriminalisation of abortion but also the state provision of abortion services.

Furthermore, assuming that the right to access abortion services on demand is duly framed as an issue of reproductive healthcare, the Court has recently held that the right to health is justiciable under the American Convention on Human Rights. This is a remarkable precedent considering that the right to health, along with other economic, social and cultural rights, has long been understood as removed from the protection of the strongest international human rights treaties. In fact, article 26 of the American Convention requires only that states ‘undertake to adopt measures . . . with a view to achieving progressively . . . the full realization’ of a set of unnamed economic, social and cultural rights. Despite this lack of specificity, the Court in 2018 found a violation of Article 26 for the first time in the case of *Poblete Vilches* which involved the death of an elderly man as a result of surgery that neither he nor his family consented to. The Court held in this case that the right to health was autonomous and protected under Article 26 and that the state had violated this right.<sup>144</sup> It also laid out the requirements that the right to health imposes on states including the obligation to ensure equality in the access to healthcare.<sup>145</sup> Later on that year, in the case of *Cuscul de Pivaral*, the Court again found that the right to health under Article 26 had been violated, this time because the state had failed to progressively implement the right to health in a case regarding the denial of HIV medication.<sup>146</sup> In deciding this case, the Court considered the rights to health, integrity and life together.<sup>147</sup>

All these cases can serve as useful precedents in framing access to abortion as a human right under the American Convention. In particular, the Inter-American Court’s consistent jurisprudence regarding the obligation to ensure the right to life through positive measures, its willingness to consider the right to health as justiciable and its willingness to consider the right to health together with the rights to life and to integrity (see *infra*) all contribute to a framing of the issue of access to reproductive health services, including access to safe and legal abortion, as a human right.

### **C. The Right to Integrity and the Prohibition of Torture and Cruel, Inhuman and Degrading Treatment, Including the Recognition of a Life Plan**

One of the most important areas where the established case law of the Inter-American system organs can aid in the framing of access to safe and legal abortion as a human right is in their sophisticated jurisprudence on the right to integrity and on torture and cruel, inhuman and degrading treatment. Much like the Inter-American System’s

143 *Case of Ximenes Lopes v Brazil*, IACtHR Series C 149 (2006) at para 89.

144 *Case of Poblete Vilches et al. v Chile*, IACtHR Series C 349 (2018) at paras 100–118.

145 *Ibid.* at para 123.

146 *Case of Cuscul Pivaral et al. v Guatemala*, IACtHR Series C 359 (2018) at para 148.

147 *Ibid.* at paras 65–164.

case law with regards to the right to life, this particular jurisprudence has been built up since the beginning of the individual petitions process as the majority of the individual petitions dealt with by the Inter-American system have involved political violence that often manifested as forced disappearances, extrajudicial executions, torture and arbitrary detention. In dealing with case after case of violence committed by powerful governments against oppressed populations, the Commission and the Court became very good at providing a legal and narrative framework within which to understand suffering. Instead of copy-pasting rulings in cases that dealt with the same types of violations, the Commission and the Court opted to examine the intricacies of each specific case and to identify the nuances of each victim's suffering. Therefore, Court rulings—for example—often include long descriptions of the facts of the case and the effect that the state's abuse had on victims, they often include transcripts or excerpts of victims' testimony and more recently they include expert testimony on how the state's action caused the suffering that it did. The System organs have taken full advantage of the particular formulation of article 5 of the ACHR which, unlike other major human rights treaties, includes the right to respect for a person's physical, mental and moral integrity as distinct from the prohibitions of torture and cruel, inhuman and degrading treatment that follow it. The notion of integrity suggests that there is a baseline of well-being that should not be adversely affected by the state. This concept allows for a much broader understanding of suffering. The Commission and the Court can and do find violations of the right to integrity without having to satisfy the higher substantive threshold required by a finding of torture or cruel, inhuman and degrading treatment.<sup>148</sup> Article 5 also expressly includes mental and moral integrity which can be broadly construed as psychological or emotional suffering. This concept has allowed the Court to hold that the family members of the disappeared are victims in their own right,<sup>149</sup> that the placement of a detainee in the trunk of a car in and of itself constitutes a violation of Article 5<sup>150</sup> as does handcuffing a woman detainee to a bed<sup>151</sup> among other examples.<sup>152</sup> With regards to sexual and reproductive rights, the Inter-American Court has found violations of Article 5 with regards to sexual and reproductive rights. First, in the *Artavia Murillo* ruling, which included expert testimony on the social stereotypes of motherhood that heightened the suffering of women and men who were denied the chance of becoming parents when the state banned IVF.<sup>153</sup> Second, in the *I.V.* ruling, which included an excerpt of the victim's testimony where she detailed the extent and the particularities of her suffering in the years that followed her forced sterilisation.<sup>154</sup>

148 See Cavallaro et al, supra n 141 at chapter 9.

149 *Case of Blake v Guatemala*, IACtHR Series C 36 (1998) at paras 114–126.

150 *Case of Castillo Páez v Peru*, IACtHR Series C 34 (1997) at para 66.

151 *Case of Maritza Urrutia v Guatemala*, IACtHR Series C 103 (2003) at para 92.

152 *Case of Castillo Petruzzi v Peru*, IACtHR Series C 52 (1999) at para 192 (the use of hoods and restraints in a courtroom as well as poor conditions of detention); *Castro Castro v Peru*, supra n 69 at paras 319, 332–33 (the lack of pre and postnatal care); *Case of the Moiwana Community v Suriname*, IACtHR Series C 124 (2005) at paras 94–103, 108, 126 (impunity surrounding a massacre, which was particularly harmful to the indigenous community due to its belief that justice was necessary for the spiritual peace of the dead; inability to properly honour the dead in indigenous rituals and; displacement from their ancestral lands); *Case of the Xákmok Kásek Indigenous Community v Paraguay*, IACtHR Series C 214 (2010) at para 244 (loss of the traditional lands of an indigenous community).

153 *Artavia Murillo et al. v Costa Rica*, supra n 4 at para 298.

154 *I.V. v Bolivia*, supra n 1 at para 269.

In short, the Inter-American System organs have constructed a vast and detailed jurisprudence on the violation of the right to integrity that is particularly sensitive to individual suffering. This focus on the intricacies of suffering is not something that other international adjudicative bodies have implemented. It appears to be part of the Inter-American system organs' commitments to truth and to justice born from their decades-long work to address gross and systematic violations of human rights committed by authoritarian regimes that relied on propaganda and the dehumanisation of political opponents. The Commission and the Court's insistence on revealing the nature and the extent of suffering is therefore a way to return the lost humanity of the victims and to restore them in dignity.

The Court has also developed an interesting body of jurisprudence when dealing with cases of torture surrounding what it calls a person's 'life plan', which it has defined as:

... akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.<sup>155</sup>

For the purposes of constructing a human-rights based narrative surrounding the denial of abortion services, the fact that the system organs have previously found the alteration of life plans relevant to understanding harm (even though they have not consistently repaired this harm) suggests that they may be willing to do so with regards to forced pregnancy.

I have argued above that the narrative distance between allowing women in dire situations to access so-called therapeutic abortions and allowing all pregnant people to access abortion on demand is in part due to an inability to perceive women who are denied abortions as people who are suffering, because abortion has been construed as an issue of choice. One way to visibilise the physical and psychological pain caused to these people is to present their cases to a system that is uniquely willing and demonstrably able to incorporate their suffering into an understanding of the law.

#### **D. The Right to Equality and the (Now) Established Doctrine on Gender Justice**

The final jurisprudential puzzle piece that suggests that the Inter-American system could support a claim that the denial of abortion services violates the human rights

155 *Case of Loayza Tamayo v Peru*, IACtHR Series C 42 (1998) at para 148, 147–154; *Maritza Urrutia v Guatemala*, supra n 151 at para 168; *Case of Cantoral Benavides v Peru*, IACtHR Series C 8 (2001) at para 88; *Case of Gutiérrez Soler v Colombia*, IACtHR Series C 132 (2005) at para 89. The Court has also included considerations regarding life plans in cases of massacre and forced disappearance, *Case of Las Dos Erres Massacre v Guatemala*, IACtHR Series C 211 (2009) at para 226; *Case of Ibsen Cárdenas and Ibsen Peña v Bolivia*, IACtHR Series C 217 (2010) at para 277.

of pregnant people is the system organs' progressive understanding of the right to equality and their willingness to apply it in practice. This characteristic sets them apart from, for example, the UN Human Rights Committee that has tended to apply a narrow understanding of non-discrimination,<sup>156</sup> and the European Court of Human Rights that has been rightly criticised for its past reticence to examine whether states discriminate at all.<sup>157</sup>

In a broad Advisory Opinion on the rights of migrants issued in 2003 the Court boldly declared that:

this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable.<sup>158</sup>

Given that the principle of equality and the prohibition of discrimination appear in virtually all human rights treaties, including those that are almost universally ratified, the assertion that they are also peremptory norms of international law has little practical effect. The importance of this statement is found in its narrative value: its assertion that there can be no derogation from the equal protection of the law is surely valuable to an advocacy strategy that seeks to frame the denial of abortion services as, among other things, discriminatory.

I have argued in previous writings that the Inter-American Court's turn towards gender justice did not begin to manifest until the *Plan de Sánchez Massacre* reparations ruling where the Court, for the first time, recognised that women victims suffered in distinct ways<sup>159</sup> and the *Castro Castro* ruling in 2006 where the Court found gendered violations of human rights for the first time and where it rendered the Belem Do Pará Convention justiciable.<sup>160</sup> Since that time the Court has made enormous progress in

156 The UN Human Rights Committee uses a similar/difference model of discrimination which compares subjects and decides whether differences in treatment are objective and reasonable. Human Rights Committee, General Comment 18, Non-Discrimination, 10 November 1989. See also Palacios Zuloaga, *La No Discriminación: Estudio de la Jurisprudencia del Comité de Derechos Humanos sobre la Cláusula Autónoma de No Discriminación* (2006); Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, (2005) at 43–62.

157 Harris, O'Boyle, and Warbrick, *Law of the European Convention on Human Rights*, 4th edn (2018) at 803–804; Goldston, 'Race Discrimination in Europe: Problems and Prospects' (1999) 5 *European Human Rights Law Review* 462, 465–466. For an examination of how recent case law has improved, see Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16 *Human Rights Law Review* 273.

158 OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*, supra n 5 at para 101.

159 Palacios Zuloaga, supra n 2 at 275–7 (referencing the *Case of the Plan de Sánchez Massacre v Guatemala*, IACtHR Series C 116 (2004)).

160 *Ibid.* at 277–285 (referencing *Castro Castro Prison v Peru*, supra n 69). The Belem do Pará Convention refers to the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 1994, 33 ILM 1534.

terms of gender justice and is today at the forefront of its peers. One of the most important precedents in all of international human rights law is the Inter-American Court's ruling in *Gonzalez et al v Mexico*, commonly known as the *Cotton Field* case.<sup>161</sup> The case, which was ruled upon in 2009, dealt with femicides in the border territory of Juárez and has many salient findings. For the purposes of this article, the most important are the acknowledgement of the structural discrimination of women in Mexico and the ordering of transformative reparations. The court found that the context of violence against women that prevailed in the area at the time, the indifference of state officials to this violence and their negligence in dealing with it contributed to perpetuating it.<sup>162</sup> The Court went on to say that the violations of human rights evidenced by this case required that the state implement transformative reparations aimed at changing the prevailing environment of gender bias in order to prevent further violations.<sup>163</sup> This was the beginning of a jurisprudential trend that recognised that structural discrimination against women was the root of many violations of women's rights.

The trend continued with regards to violence against women in the case of *Espinoza González v Peru* where the Court recognised gender stereotypes in the state response to allegations of torture of a political prisoner,<sup>164</sup> in *Veliz Franco v Guatemala* where the Court constructed a narrative of gendered violence against women that went back decades to explain how gender stereotypes affected the police investigation of an abduction and femicide<sup>165</sup> and in *Velásquez Paiz v Guatemala* where the Court held that femicide required a gender sensitive investigation.<sup>166</sup> In this ruling the word 'gender' appears 109 times. Since the 2009 ruling in the *Cotton Field* case, reliance on gender stereotypes as a way to explain violations of women's rights have transcended femicide and now also play a significant role in the abovementioned rulings in *Artavia Murillo and I.V.* which deal with reproductive rights. The primordial role given to the principle of equality along with the understanding that women are structurally oppressed in Latin America and the recognition of gender stereotypes as facilitators of the violation of women's rights, could make the Inter-American system particularly open to recognising that the denial of safe and legal abortion is violation of the human rights of women and other pregnant people.

The preceding overview of case law serves to illustrate the path offered by the Inter-American System to advocates looking to pursue the decriminalisation of abortion in Latin America. While the System lacks case law that affirms abortion rights per se, it has copious jurisprudence on the rights violated by abortion bans that, when considered together, make a strong case for decriminalisation. More importantly, the Inter-American System has experienced a turn towards gender justice that has meant that recent rulings are based on an understanding of structural oppression that is simply not present in the case law of other domestic or international courts. It is this awareness

161 *Gonzalez et al. v Mexico*, supra n 4.

162 *Ibid.* at para 402.

163 *Ibid.* at para 450. However, as Rubio-Marín and Sandoval point out, the Court missed a valuable opportunity to operationalise transformative reparations in the ruling. Rubio-Martin and Sandoval, supra n 3.

164 *Espinoza González v Perú*, supra n 4 at para 278.

165 *Veliz Franco et al. v Guatemala*, supra n 4 at para 65–90.

166 *Velásquez Paiz et al. v Guatemala*, supra n 4 at paras 173–203.

of gendered oppression that should make this forum appealing for reproductive rights advocates.

## 6. DO THE POTENTIAL BENEFITS OUTWEIGH THE RISKS?

Having argued that the Inter-American System could accommodate the understanding that denial of abortion services is a violation of human rights, the question that remains is whether activists *should* pursue strategic litigation before the System organs. Here, the example of *Roe* in the USA is once again helpful, this time to illuminate some of the pitfalls of pursuing policy change through strategic litigation.

First, strategic litigation that argues for decriminalisation of abortion by visibilising a broad understanding of the harm caused by forced pregnancy (as opposed to privacy as autonomy/choice) risks reinforcing the narrative of women as victims and the social stereotypes that accompany that understanding. While this argument could seem convincing, part of the problem faced by women who are denied abortions is that the harm caused to them is not well understood or given the weight that it deserves under the autonomy model. This has led to a trivialisation of that harm, which in turn has allowed legislators and judges to continue to restrict women's reproductive rights in order to privilege the protection of prenatal life narrative. If the experience of those forced to be pregnant is ever going to be understood, valued and repaired, we need to stop hiding its complexity within the narrow confines of just one element of it, the autonomy argument.

Second, some would argue that there is no textual basis to hold that the American Convention protects the right to terminate a pregnancy, in much the same way that the US Constitution does not explicitly recognise even the right to privacy, much less the right to have an abortion. This could weaken the decriminalisation precedent. While it is true that the Convention does not explicitly allow for abortion on demand, it would not be the first time that the system organs have demonstrated considerable creativity in interpreting the Convention where it proved inadequate. Recall that both the Commission and the Court found that abortion and IVF do not violate the explicit requirement to protect prenatal life. The Court has declared that human rights treaties are live instruments, which must evolve with the times<sup>167</sup> and has not shied away from updating the content of the American Convention. For example, the Inter-American Court created the figure of forced disappearance in *Velásquez Rodríguez*<sup>168</sup> and read the human right to truth into the American Convention in *Barrios Altos*.<sup>169</sup> More recently it declared the right to health justiciable under the American Convention even though that right is not explicitly mentioned therein.<sup>170</sup> Furthermore, on at least two occasions it rendered treaties justiciable where no textual basis existed.<sup>171</sup> Most importantly, this judicial creativity has not been met with much of a pushback from states; only two states have permanently withdrawn from the Court's jurisdiction in over thirty years of

167 *Case of the Mayagna (Sumo) Awas Tigni Community v Nicaragua*, IACtHR Series C 79 (2001) at para 146.

168 *Velásquez Rodríguez v Honduras*, supra n 142 at paras 150–188.

169 *Case of Barrios Altos v Peru*, IACtHR Series C 75 (2001) at para 48.

170 *Poblete Vilches et al. v Chile*, supra n 144; *Cuscul de Pivaral et al. v Guatemala*, supra n 146.

171 *The Inter-American Convention to Prevent and Punish Torture in the Case of the 'White Van' (Paniagua Morales et al.) v Guatemala*, IACtHR Series C 37 (1998) at para 136; the Belém do Pará Convention in *Castro Castro v Peru*, supra n 69.

case law.<sup>172</sup> That said, one could argue that states may not have pushed back against the Court because there was no domestic lobby in favour of forced disappearance, torture or violence against women whereas, in the event of a decision that requires states to decriminalise abortion, the anti-abortion lobby could mobilise enough support to compel states to withdraw from the system's monitoring. Importantly though, when states have complained about overreach from the system organs, and even when they have withdrawn from monitoring, the Commission and the Court have not changed their approach to the law.

Another argument against seeking this type of pronouncement from the Inter-American system is that it would be more advisable for the Court to apply a margin of appreciation to states instead of forcing change from outside. Some may argue that this approach would be more democratic and ultimately more effective in cementing permanent change. However, it would be reasonable to say that, given the amount of suffering that abortion bans create, time is a luxury that reproductive rights advocates do not have, and the passage of time has not softened the abortion debate in the USA since *Roe*. In any case, this distinctly European approach to human rights adjudication was rejected early on by the Inter-American organs, which have consistently dealt with states that have used political violence to govern. Interestingly, where cases have come before the Court which deal with socially disputed issues (as opposed to repression) the Court has continued to refuse to apply a margin of appreciation.<sup>173</sup> When it comes to determining state obligations under the American Convention, deference to states and consensus among states are not part of the System organs' ethos. It is precisely because of the Inter-American System's organs willingness to interpret the American Convention progressively, and because of their rejection of the margin of appreciation doctrine, that this forum provides such a clear opportunity for reproductive rights advocates.

Having said that, strategic litigation is never a sure thing and activists may be reticent to risk an adverse ruling before the Court. In this sense, a loss may set the movement back years. Recall that some feminists in Chile were reticent to support the bill that decriminalised abortion only very narrowly, because it did not include most women.<sup>174</sup> In that case, reproductive rights advocates preferred to push for the more restrictive rule change because a more inclusive bill would not have passed Congress. The difference between that case and the presentation of a case to the Inter-American System is that the System organs seem much more open to finding in favour of women's reproductive rights. In that sense, the gap to bridge is smaller than that which existed in the Chilean congress. Another risk is that states may not comply with a favourable ruling, which is a distinct possibility in a region where full compliance rates remain generally low. An argument could be made that smaller, incremental change domestically would be more effective in the long term than seeking a favourable ruling from the System that might

172 Trinidad & Tobago denounced the IACHR in May of 1998 and Venezuela did so in September of 2012. Inter-American Commission on Human Rights, *Annual Report 2018* (2018) at 9.

173 Regarding LGBTQ rights see supra n 6; regarding prior censorship see *Case of 'The Last Temptation of Christ' (Olmedo Bustos et al.) v Chile*, IACtHR Series C 73 (2001). See also McGoldrick, 'Affording States a Margin of Appreciation: Comparing the European Court of Human Rights and the Inter-American Court of Human Rights' in Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law Approaches of Regional and International Systems* (2016) 323.

174 Supra n 55.

be ignored by the state and that might galvanise the anti-abortion lobby. It is important to remember, however, that strategic litigation is never only about the ruling and never only about compliance. Advocates in Latin American states that fall under the jurisdiction of the Court have long understood that win or lose, recourse to international adjudication can provide much needed exposure to their positions. Where a ruling is favourable to them, they have become skilled at making use of that ruling in ways that facilitate domestic change regardless of the level of state compliance.<sup>175</sup> Support from the Commission and the Court can lend these advocates much needed validation and can become a tool to be used to mobilise domestically.<sup>176</sup> Finally, a favourable ruling will likely not change the minds of those that oppose the decriminalisation of abortion, but it will provide authoritative support to the discourse that removes the decriminalisation debate from the life/choice paradigm which in turn will bolster domestic advocates in their efforts to produce change.

## 7. CONCLUSION

Narratives that situate access to abortion services as part of privacy rights have the virtue of asserting that women and other pregnant people are best placed to make decisions regarding their own reproduction. While these narratives have led to successful legal defences of abortion rights in the USA they have also been eroded by counter-narratives that stress a prevailing right to life of the unborn.

In Latin America, where the cultural and religious context is generally conservative, the privacy/autonomy/choice narrative does not appear to be able to stand against the social construction of the unborn as requiring of protection under all circumstances. Reproductive rights advocates that seek to mobilise for broader access to abortion services in the region should therefore frame their claims in terms that recognise the broad array of human rights that are compromised by such a ban. In particular, it is important to visibilise the very real suffering that these bans impose on pregnant people who do not want to be pregnant. A narrative that frames the denial of abortion in terms of oppression and suffering could resonate in Latin America because the historical, social and political context has made the understanding of other types of oppression accessible to the broader population.

Once that narrative has been formulated, it would be useful to attempt to obtain support from the region's authoritative human rights bodies. In 2007 I wrote an article that was critical of the lack of gender justice in the Inter-American Court of Human Rights. It feels distinctly odd to be sitting at my desk thirteen years later writing an article that suggests that the Inter-American System is an excellent forum within which to pursue a ruling that declares that the denial of access to safe and legal abortion is a violation of human rights. And yet here I am. Despite the System's initial lack of gender awareness and despite the fact that the American Convention explicitly requires states to protect unborn human life, longstanding and recent developments in the jurisprudence of the Commission and the Court strongly suggest that the System could be well positioned to support a claim that holds that the criminalisation of

175 Palacios Zuloaga, 'Judging Inter-American Human Rights: The Riddle of Compliance with the Inter-American Court of Human Rights' (2020) 42 *Human Rights Quarterly* 392.

176 *Ibid.*

abortion is a violation of the American Convention on Human Rights. I have come to this conclusion because the System organs are showing themselves as capable of transcending the life/choice paradigm and are moving closer to an understanding of sexual and reproductive rights that forms part of a broader concept of reproductive justice. While strategic litigation in the field of reproductive rights entails the risk of loss or non-compliance (and while a favourable ruling will likely not change the minds of staunch anti-abortion activists), it has the potential to provide reproductive rights advocates with valuable discursive support and important tools to continue to mobilise domestically.

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