

SEXUAL HEALTH AND HUMAN RIGHTS: UNITED STATES & CANADA

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I) METHODOLOGY

This part discusses the laws and jurisprudence of Canada and the United States (please see the introduction for information about why these nations are discussed separately). The specific laws and cases described below have been chosen because they illustrate some key legal issues in each of the sub-topics. We have tried to highlight those statutes and cases that confront these legal issues in a way sensitive to sexual health and human rights. Ideally, these laws should promote sexual health as broadly defined by the WHO. In other words, the laws should not only promote appropriate health interventions for individuals and support effective public health policies, but should *also* promote dignity, equality, autonomy and well-being. Laws favoring positive sexual health outcomes must also follow international standards, and should be in accord with the highest standards under U.S. and Canadian law. Such laws should promote the human rights of individuals, and should not impermissibly limit their rights.

Depending on the particular law or case, this paper may consider not only the outcome but also the reasoning or motivation behind a particular statute or decision. Because the U.S. and Canada have common law systems and thus rely heavily on case law, judicial reasoning can have far-reaching effects. And the relevance of these strains of legal reasoning is not limited to other common law countries: the rich case law of the U.S. and Canada can show the benefits and pitfalls of relying on particular legal theories and arguments to promote sexual health and sexual rights.

Even imperfect laws can be instructive, if they provide a sturdy legal framework which can be subsequently expanded by including additional rights, remedies, or protected groups. The U.S. and Canada have robust methods for evaluating everything from discrimination to asylum cases—legal structures capable of growing to accommodate new protections. These countries also have very developed evidentiary law, since their use of juries in trials requires definitive evaluation of what evidence is admissible. Each of these facets of legal doctrine can be instructive to law makers in other jurisdictions, if appropriately contextualized.

We have also included laws and cases that demonstrate flawed responses to sexual health issues, with the hope that readers will find it useful to see the negative consequences of specific laws or jurisprudence. Included among these examples are laws that discriminate based on sex, sexual orientation, gender identity, marital status, and other categories; laws that penalize consensual sexual relationships; and laws that discourage people from seeking medical care; among other problems. Sometimes, inadequate statutes are described in order to show how they have been reformed or reinterpreted over time.

1) U.S. and Canadian Sources

Whenever possible, this paper relies on the decisions of the Supreme Court of the United States and the Supreme Court of Canada, although lower court decisions are sometimes cited (see below for an explanation of the court systems). Because the U.S. and Canada are federalist systems, this paper cites both federal and state/provincial law, depending on which entities have jurisdiction (administrative regulations and decisions are occasionally cited when appropriate).

The authors consulted the databases LexisNexis and Westlaw for case law and statutes from both countries; in addition, Canadian decisions and legislation are available online from the Canadian Legal Information Institute, a nonprofit organization managed by the Federation of Law Societies

of Canada, and LexUM, a website hosted by the University of Montreal which, among other things, provides Supreme Court opinions.¹ Secondary sources, primarily law review articles, were found through LexisNexis, Westlaw, and the academic databases JSTOR, Hein Online, and the Social Science Research Network. For analysis of recent U.S. legislation, we looked at some reports from the Congressional Research Service, a branch of the national Library of Congress which provides nonpartisan research to members of Congress. Although this paper cites a few more recent developments, the majority of the research is accurate as of 9/31/2009.

II) INTRODUCTION TO THE LEGAL SYSTEMS OF THE UNITED STATES AND CANADA

1) The Shared Legal History of the United States and Canada

As former British colonies, the U.S. and Canada have fairly similar legal systems. Both nations based their legal systems on British common law (with the exceptions of the formerly French-colonized Quebec in Canada and Louisiana in the United States). Each country is governed by its Constitutional documents, which gives each nations' Supreme Court the last word on interpreting those documents. Each country has both federal laws and laws passed by state or provincial legislatures (for the purposes of this document "provincial" can be assumed to include the Canadian territories).

Beneath the Supreme Court, both countries have both federal and state/provincial/territorial courts, including appellate courts. Both countries also have administrative agencies that carry out certain statutory schemes. These agencies and their administrative judges (U.S) and tribunals (Canada) often have adjudicatory or quasi-adjudicatory power, and are also sometimes empowered by statute to create legally binding regulations.²

In several sections, this paper mentions tort remedies available under U.S. and Canadian law—as this is a distinctive part of the common law system, the concept of torts bear some explaining. The U.S. and Canada provide a private right of action for many civil wrongs, to provide compensation for the injured party, deter certain behavior, and sometimes to enforce statutory or constitutional rights. Unlike criminal laws, which usually require a certain amount of intent, civil tort liability hinges on the concept of negligence, i.e. a failure to act reasonably under the circumstances.³ A person or entity whose negligence causes harm to another in a way that could have been foreseen beforehand, may be liable for damages suffered by the victim.⁴

2) U.S. Federalism

In the U.S., a system of federalism defined by the U.S. Constitution divides powers between the national government and the individual states. A few powers are reserved exclusively to the

¹ <http://www.canlii.org/en/> [CanLII]; <http://scc.lexum.umontreal.ca/en/index.html> [Judgments of the Supreme Court of Canada].

² Likewise, even though the judiciary is the branch of government empowered to interpret the law, administrative agencies may have policies that determine how the agencies carry out their obligations. This paper, will therefore refer to executive branch statements of legal interpretation on a few occasions, since those policies can determine the actions of the administrative state.

³ The elements of common law negligence are 1) a legal duty to the person harmed (whether a general duty to act reasonably or a special duty, for instance that of an adult to a child in his or her care) and 2) a breach of that duty which 3) causes injury to the plaintiff. 88 AmJur Trials 153.

⁴ See Rest. 2d Torts §§282-283.

national legislative body, Congress, such as the power to establish immigration and bankruptcy laws, maintain a military, and declare war.⁵

The U.S. Constitution gives states the power to legislate in areas not specifically assigned to the federal government, including the passage of “health laws of every description” that protect the public health, safety, and morals.⁶ When the federal government gets involved in public health, it generally does so through its power to “regulate Commerce among the several States” or, by attaching requirements to federal grants, through its power of collecting taxes for the “general Welfare of the United States.”⁷ This means that there are some overlapping areas of state and local law, and any analysis of U.S. law as a whole must contend with both state and federal legislation.⁸

Areas of law (all subject to Constitutional constraints)

Type of Law	State or Federal?
Military law	Federal
Foreign policy	Federal
Criminal law	The federal government prosecutes many crimes, but the vast majority of criminal prosecutions are brought under state law
Family law	State, almost exclusively
Immigration and asylum	Federal
Civil rights, discrimination and tort law	Both state and federal laws may apply
Regulation of medical services	Both state and federal laws may apply

3) Canadian Federalism

Canada is a federal parliamentary democracy with a constitutional monarchy. Laws are enacted in the name of the Queen, who is represented by the Governor-General at the federal level, Lieutenant-Governors at the provincial levels. However, this representation is symbolic; the actual governing power resides in the head of government: the Prime Minister. Canada is a federation of ten provinces and three territories: the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, Quebec, Saskatchewan and Nova Scotia, and the Yukon Territory, Northwest Territories and Nunavut.

The Canadian Constitution consists of the *Constitution Act 1867*,⁹ an Act of the British Parliament formerly known as the British North America Act, and the *Constitution Act 1982*.¹⁰ The *Constitution Act 1982* was enacted by the Canadian parliament. Together with parallel legislation

⁵ U.S. Const. Art. I §8 cl. 4. [naturalization and bankruptcy]; cl. 11 [war]; cl. 12 [army]; cl. 13 [navy]; cl. 18 [power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States....”]

⁶ Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

⁷ U.S. Const. art. I § 8 cl. 1, cl. 3; Jess Alderman, *Words to Live by: Public Health, the First Amendment, and Government Speech*, 57 BUFF. L. REV. 161, 167 (Jan. 2009).

⁸ While almost all the territory of the U.S. is constituted into states, there a few entities which have slightly different structures of governance—e.g. Puerto Rico; the District of Columbia; American Samoa—but which are still bound by federal law.

⁹ The Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3.

¹⁰ The Constitution Act, 1982 (C.A.), being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11

of the British Parliament, the *Canada Act 1982*,¹¹ it ended jurisdiction of the Imperial Parliament over Canada.

The *Canadian Charter of Rights and Freedoms* was also enacted as part of the *Constitution Act 1982*, and contains a number of essential legal principles discussed in this paper. The Supreme Court of Canada has held that the Canadian Constitution also includes some unwritten conventions that are an inherent to the nature of the parliamentary democracy Canada inherited from Britain.¹²

The Constitution Act, 1867 establishes the powers of the federal government in section 91 and the powers of the provincial government in section 92. Section 91 grants to the federal government the exclusive power to “make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”¹³

The traditional purview of federal legislation includes: the regulation of trade and commerce; the establishment of the military; the issuance of patents and copyright; the regulation of banking, navigation, shipping, the maintenance of postal service; and in contrast to the US, the regulation of marriage and divorce.

Provincial governments, under section 92, have exclusive power to incorporate companies; on of companies with provincial objects; solemnize marriage in the province; and regulate property and civil rights in the province and generally all matters of a merely local or private nature in the province.

As a general rule, and in contrast to the US, anything not explicitly elaborated as falling to provincial legislatures belongs to the jurisdiction of federal law. Concomitant powers reside at federal and provincial levels to tax and run prisons (called penitentiaries at the federal level), where provincial governments can directly tax residents of its province to raise revenue for provincial purposes. Additionally, both the federal parliament and provincial legislatures have power to regulate agriculture and immigration, and in certain cases, natural resources. If a conflict arises in these cases, federal law prevails. For old age, disability, and survivors’ pensions, provincial regulations supersede federal ones where there is a conflict. Health is within the exclusive jurisdiction of provinces, subject to the Health Act.¹⁴

4) The U.S. and International Law

Although the U.S. is a party to some relevant international instruments, international law has extremely limited influence on legal standards and jurisprudence within the country. Even for treaties ratified by the U.S., “they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.”¹⁵ “Even when treaties are self-executing in the sense that they create

¹¹ Canada Act 1982 (U.K.).

¹² *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319.

¹³ The Constitution Act (The British North America Act) 30 & 31 Victoria c. 3 (1867).

¹⁴ See section on health, below.

¹⁵ *Medellin v. Texas*, 552 U.S. 491 (2008), 128 S. Ct. 1346, 1356 [quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (2005)] [article 94 of the U.N. Charter providing that member states “undertak[e] to comply” with ICJ decisions was “not a directive to domestic courts” and thus was not self-enforcing.]

federal law, the background presumption is that ‘international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’¹⁶ Because the U.S. has not promulgated any authoritative law based on international instruments, and because U.S. judges rarely rely on those instruments when creating case law¹⁷, this document will concentrate on U.S. domestic law.

In 1984, the U.S. withdrew itself from the compulsory jurisdiction of the International Court of Justice (ICJ), and in 2005 the U.S. rejected the ICJ’s jurisdiction over disputes arising from the Vienna Convention on Consular Relations.¹⁸ The US has signed but not ratified International Covenant of Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the American Convention on Human Rights (ACHR). The U.S. has ratified the following:¹⁹

- Geneva Conventions , 1- IV, 1949, but not the 1977 Protocols.²⁰
- Convention on the Prevention of Genocide (1988)
- International Covenant on Civil and Political Rights (1992)
- The International Covenant on the Elimination of Racial Discrimination (1994)
- The Convention against Torture (1994)
- The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (2000)²¹
- The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. (2000)
- The Convention on the Status of Refugees, and its 1969 Protocol (1980)
- Some ILO Conventions, including: C87 Freedom of Association and Protection of the Right to Organize Convention (fundamental Convention 1948); C100 Equal Remuneration Convention (fundamental Convention 1951); C105 Abolition of Forced Labour Convention, (fundamental Convention 1957); C111 Discrimination (Employment and Occupation) Convention (1958); C182 Worst Forms of Child Labour Convention, (fundamental Convention 1999). The U.S. has not ratified all fundamental Conventions.²²

The U.S. has ratified the OAS Charter and acceded to the American Declaration of the Rights and Duties of Man., and therefore participates in the InterAmerican Commission on Human Rights. No decisions of the Commission are as yet relevant to the U.S. on the topics of this review,

¹⁶ *Id.* at 1357 [quoting Restatement (Third) of Foreign Relations Law of the United States §907, Comment a, p. 395 (1986).]

¹⁷ Occasionally, higher courts will cite foreign or international law that is not binding on the U.S., but it is not standard practice. See, *Lawrence v Texas* 539 U.S 558 (2003), as an example of referencing foreign law; *Grutter v. Bollinger*, 539 U.S. 306 (2003) [referencing CERD and CEDAW].

¹⁸ *Id.* at 1354.

¹⁹ This is not an exhaustive list of all U.S. international obligations.

²⁰ Geneva Convention, July 27, 1929, 47 Stat. 2021.

²¹ The U.S. has signed but not ratified the Convention on the Rights of the Child, despite ratifying this optional protocol.

²² The U.S. has not ratified the C29 Forced Labour Convention (1930); the C98 Right to Organize and Collective Bargaining Convention (1949); or the C138 Minimum Age Convention (1973).

although a pending petition²³ addresses violence against women in the context of domestic violence and police duty of protection (See Sec. VII(2)(B).) The U.S. has not ratified the Inter-American Convention on Human Rights it is not subject to the jurisdiction of the Court.

5) Canada and International Law

As in the U.S., treaties are not self-executing even when ratified—a treaty it does not become a part of Canadian law unless and until a Canadian legislature enacts legislation implementing the treaty. Nonetheless, international law may be relevant to legislative interpretation and shape the development of the common law, and for these purposes, Canadian courts are renowned for their receptiveness of international law. Some provisions of the Canadian Charter of Rights and Freedoms contain language very similar to the language of the international human rights treaties, so authoritative interpretation of the treaty provisions by international bodies is particularly relevant to interpretation of the Charter.

Canada accepts the compulsory jurisdiction of the International Court of Justice and is a member of the ILO. Canada is also a party to the Geneva Conventions and the Rome Statute of the International Criminal Court, and it has ratified the following:²⁴

- International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol, the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child and both of its Optional Protocols.
- Convention on the Status of Refugees (Refugee Convention)
- Geneva Conventions and their Optional Protocols
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol).
- Some ILO Conventions, including ILO87 - Freedom of Association and Protection of the Right to Organize Convention, ILO 100 - Equal Remuneration Convention, 1951; ILO105 - Abolition of Forced Labour Convention, 1957; ILO111- Discrimination (Employment and Occupation) Convention, 1958; ILO182 - Worst Forms of Child Labour Convention, 1999.²⁵

With one exception, Canada has ratified these conventions without reservations. On ratifying the Convention on the Rights of the Child, Canada reserved the right not to detain children separately

²³ Jessica Ruth Gonzales v. The United States of America, Petition P-1490-5 (Hearing report 3/2/200&) at:

<http://www.aclu.org/womens-rights/jessica-ruth-gonzales-v-united-states-america-observations-concerning-march-2-2007-hea>

²⁴ This is not an exhaustive list of all Canadian international obligations.

²⁵ Canada has not ratified a few fundamental ILO conventions including ILO29 - Forced Labour Convention, 1930; ILO98 - Right to Organise and Collective Bargaining Convention, 1949 and ILO138 - Minimum Age Convention, 1973. Under the 1998 ILO Declaration on Fundamental Principles and Rights at Work, all ILO members, regardless of whether they have ratified fundamental Conventions, “have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions”.

from adults where that would be inappropriate or infeasible, and emphasized that customary forms of care in aboriginal communities would influence the way that Canada implements the Convention's provision on adoption.

Canada's Supreme Court has cited the Universal Declaration of Human Rights,²⁶ International Covenant on Civil and Political Rights,²⁷ the International Covenant on Economic, Social and Cultural Rights,²⁸ the Convention on the Rights of the Child²⁹ in several cases concerning sexual health rights.

Canada is a signatory to the Convention on the Rights of Persons with Disabilities (CRPD), but yet to ratify, and has not signed the Convention of the Protection of the Rights of All Migrant Workers and Members of their Families (MWC) and the Convention on the Protection of All Persons from Enforced Disappearance.

Canada has not ratified the Inter-American Convention on Human Rights, but it has acceded to the American Declaration on Human Rights, as a member of the Organization of American States. Consequently, Canada participates in the Inter-American Commission on Human Rights but is not subject to the jurisdiction of the Inter-American Court of Human Rights.³⁰

A) International Adjudication of Canadian Law

Individual communications to the treaty bodies have rarely resulted in findings that Canada has violated one of the human rights conventions, but there is some relevant jurisprudence. In *Lovelace v Canada*,³¹ the Human Rights Committee found a violation of Article 27 of the ICCPR, which provides that ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. Sandra Lovelace was an ethnic Maliseet Indian, but lost the status of an Indian under Canada's *Indian Act* when she married a non-Indian. Consequently she lost many rights, including the right to live on Indian reservations. A male Indian who married a non-Indian retained those rights. Because Lovelace married before the ICCPR came into force in Canada, the Committee confined its views to the ongoing violation of Lovelace's rights under Article 27 of the Covenant, but noted that she arguably had a claim under other rights, including the right to be free discrimination on the basis of sex.

In *N.T. v Canada*³² the Human Rights Committee found that the complainant and her daughter's rights had been violated when the daughter was removed from the complainant's custody and eventually adopted by another family. The Committee found that several aspects of the child protection authorities and court's handling of the case breached the complainant's and her

²⁶ *R. v Sharp*, [2001] 1 S.C.R. 45 (discussed below).

²⁷ *Chan v Canada* [1995] 3 S.C.R. 593 (discussed below); *R v Sharpe*, [2001] 1 S.C.R. 45; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 (discussed below) .

²⁸ See *R. v. Sharp*; *Trinity Western University v BC College of Teachers* [2001] 1 S.C.R. 772

²⁹ See *R v Sharpe*.

³⁰ There is currently significant interest in Canadian non-governmental organizations and within some sectors of the Canadian Government to ratify the American Convention: see e.g. "Enhancing Canada's Role in the OAS: Canadian adherence to the American Convention on Human Rights; Report of the Standing Senate Committee on Human Rights" (May 2003), available at <http://www.parl.gc.ca/37/2/parlbus/commbus/senate/com-e/huma-e/rep-e/rep04may03-e.htm>, [recommending ratification by July 2008].

³¹ Human Rights Committee Communication No. R.6/24*/, 30 July 1981.

³² CCPR/C/89/D/1052/2002/Rev.1

daughter's rights under articles 14 (equality before the law), 17 (arbitrary or unlawful interference with privacy, family or correspondence), 23 (protection of the family) and 24 (special protection of children).

III) EQUALITY AND NONDISCRIMINATION AS IT IS RELEVANT TO SEXUALITY AND SEXUAL HEALTH

1) Section Introduction: an International Perspective on Discrimination and Sexual Health

The right to non-discrimination is a fundamental principle in all human rights, as it is the obligation of the state both to ensure equal protection of the law and to take steps to eliminate discrimination by others to achieve equality.³³ This section focuses primarily on protections in law and their positive action against discrimination. In addition, this section highlights some laws which fail to offer sufficient guarantees to ensure diverse people equal access to the resources and services needed to enjoy sexual health. Later sections of the report address more indirect (but no less causal) issues of discrimination, such as whether laws treat victims of sexual assault the same, regardless of sex or marital status.

This principle of non-discrimination has multiple associations with sexual health. Inequality among and between persons and groups is a strong predictor of the burdens of ill health, including sexual health. Inequalities are manifest through differential access to services and resources, in people's abilities to participate in the policies and laws that govern their lives and to seek remedies for abuses committed against them. Discrimination operates through processes of inequality that are rarely linked solely to one characteristic of a person, but are often fuelled by multiple factors of sex, age, class, race, sexual orientation, marital status, national status, disability as well as health status, including HIV status, among others.

Laws which discriminate –or fail to protect against discrimination (on the basis of sexual orientation, marital status, or sex, for example) in access to health services can result in people being excluded from vital treatment for sexually transmitted infections and other diseases, as well as contributing to the possible homelessness and deprivation of social capital among stigmatized people. These deprivations in turn make breaks in accessing critical sexual health services and treatment more likely. Similarly, laws which discriminate or fail to protect against discrimination in employment, housing, commercial services, and other aspects of social and economic life impoverish and/or isolate the excluded groups. This limits these groups' access to health care and keeps them from exerting political power to change policies with negative health consequences. Economic inequality also limits sexual autonomy: to give one example, a woman who is dependant on her male partner will be less able to assert authority over her own sexual and reproductive decisions.

Laws which both reserve key social relationships like marriage to a specific pool of adults, and then condition core rights (to insurance or social benefits, for instance) on entering into marriage have discriminatory impacts. Persons excluded from marriage, such as same-sex couples, are

³³As noted in the international legal standards, international human rights, humanitarian, criminal and labor law all are premised on principles of equality and non-discrimination.

thereby excluded from social benefits and services, including health care linked to insurance, which are essential to sexual health.

Research demonstrates that mandatory HIV testing, particularly when separated from therapeutic intervention, is unjustified on public health grounds, as it has not been proven to result in greater access or sustained use of treatment, nor more effective sharing of information with sexual partners.³⁴ Moreover, such testing also violates rights: to privacy and security of the person, but it is often also discriminatory, as such laws often selectively target marginalized groups believed to be at higher risk of HIV infection, such as people in sex work or prisoners. Because the testing is done in ways that violate privacy (such as when police officials receive results for registered prostitutes) and which do not result in either treatment of the affected persons or good preventive practices more generally, such tests can be criticised as discriminatory.

Beliefs about the appropriate gender roles of women and men, which in turn dictate expected sexual conduct, are significant sources of discrimination against women in particular. Laws must also recognize and counteract discrimination against people who transgress social rules about feminine or masculine social behaviour (gender expression), and people whose sexual conduct is deemed unsuitable (sex without reproduction, sex outside of marriage, or gender-non-conformity in regard to sexual practices). This includes cultural norms about women's sexuality, for instance granting more credibility to a woman with a 'good reputation' (i.e, chaste) than one with a 'bad reputation' (i.e., sexually promiscuous.)

Men may also run foul of these cultural rules, when they fail to conform to gender roles of masculinity, confront gender-based dress regulations, or face laws criminalizing their same-sex sexual behaviour. These laws tend to produce both stigmatized persons (whose mental health as well as physical health may suffer) and render health services to such persons harder to deliver.

At national and international levels, one of the critical developments in anti-discrimination law is the recognition that sexual harassment (unwanted sexuality-based verbal or physical activities in workplace or educational settings which create a hostile environment) functions as a barrier to equality, and as such counts as a form of discrimination. Sexual harassment can have health effects in two ways: first, the harassment itself can be coercive or abusive enough to have direct mental or physical health effects; second, in driving the harassed workers out of their employment, it may remove them from a key source of health benefits. Women are disproportionately the targets of this form of harassment, although men may also face this abuse.

While States are obligated, under the rights to non-discrimination and equality, to treat the similar interests of individuals in the same way, they must also treat their significantly different interests in ways that adequately respect and accommodate those differences in line with principles of autonomy, respect for diversity and regardless of gender or racial stereotypes. The assumption that all persons can be reached by the same public health messages about sexually transmitted infections constitutes one example of failed formal equality: married adolescent girls, unmarried

³⁴ S. Gruskin, E. Mills, D. Tarantola, *History, principles, and practice of health and human rights*, THE LANCET, 370: 9585, Pages 449-455 (2007); UNAIDS Guidance Note on provider-initiated HIV testing and counselling in health facilities (May 2007), available at http://www.unaids.org/en/KnowledgeCentre/Resources/PolicyGuidance/OperationGuidelines/20070517_policies_testing_keyoperationalguidelines.asp

women, and men who have sex with men may all need specific, tailored outreach and actions to obtain equivalent health information.

2) Prohibition on Discrimination by the Government

A) Non-discrimination in the Canadian Charter of Rights

The Canadian Charter of Rights and Freedoms includes “fundamental freedoms” of conscience, religion, thought, expression, peaceful assembly, and association as well a democratic, mobility, legal and equality rights. Section 15(1) of the Charter states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Supreme Court of Canada has held that section 15(1) of the Charter protects equality on the basis of *characteristics analogous to those explicitly protected by that section*, including sexual orientation,³⁵ marital status³⁶ and citizenship.³⁷

The Charter rights are not absolute. The first section states that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Consequently, in deciding whether any governmental act infringes the Charter, the Canadian courts ask first whether the act is “prescribed by law” and the second whether it is “reasonable and demonstrably justified in a free and democratic society.”³⁸ To decide whether a limitation on a Charter right is “justified” Courts apply an analysis that: “generally includes four steps: (1) pressing and substantial objective, (2) rational connection, (3) least drastic means and (4) proportionality.”³⁹

In order to be judged “proportional”, a measure must: be designed to achieve the objective in question and not be unfair or biased; and impair “as little as possible” the right in question. There must also be proportionality between the effect of the measure which limits the Charter right or freedom and the objective identified as of “sufficient importance.”⁴⁰

B) Non-discrimination in the U.S. Constitution

The Equal Protection clause of the United States Constitution states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

³⁵ Egan v. Canada [1995] 2 S.C.R. 513; Vriend v. Alberta [1998] 1 S.C.R. 493.

³⁶ Miron v. Trudel [1995] 2 S.C.R. 418.

³⁷ Andrews v. Law Society of British Columbia [1989] 1 S.C.R. 143; for a summary of the jurisprudence, with citations, see also Kaelen Onusko, *Equality Rights Background*, Center for Constitutional Studies, available at <http://www.law.ualberta.ca/centres/ccs/issues/equalityrightsbackground.php> [last visited April 26, 2010].

³⁸ R. v. Oakes, 1 S.C.R. 103 (1986). For a summary of the jurisprudence, with citations see also Erin Jackson, Section *One of the Canadian Charter of Rights and Freedoms*, Center Constitutional Studies,” available at

<http://www.law.ualberta.ca/centres/ccs/issues/sectiononeofthecanadiancharterofrightsandfreedoms.php> [last visited April 26, 2010].

³⁹ *Id.*

⁴⁰ *Id.*

The “equal protection clause” has been used by the U.S. Supreme court to strike down discriminatory laws: see Sec. III(11)(B) [prohibitions on interracial marriage in *Loving v. Virginia*] and Sec. VIII(5)(A) [development of the right to contraception and abortion] for some examples. If a law categorizes people based on race, alienage, national origin, or religion, it is subject to judicial “strict scrutiny” –in other words, it will be found unconstitutional unless it is narrowly tailored to serve a substantial government interest, *and* it is the least restrictive means of achieving that interest.⁴¹ If a law classifies people by gender, it is subject to intermediate scrutiny: the government must show that the classification is substantially related to an important government objective—and such laws cannot be justified by “archaic and overbroad generalizations” about men and women.⁴²

Even laws which do not classify people according to a “suspect class,” under the equal protection clause must be rationally related to a legitimate government interest (the “rational basis test”).⁴³ Although the U.S. Supreme Court has not yet applied strict or intermediate scrutiny to laws that classify people on the grounds of sexual orientation, by applying the rational basis, the Court has struck down an amendment to the Colorado constitution which forbid the passage of any anti-discrimination laws designed to protect sexual minorities.⁴⁴ The Court found that “animosity toward the class of persons affected” is not a legitimate government interest.⁴⁵

CONCLUSIONS

- Both Canada and the U.S. promote equality in their primary federal documents. Canada has addressed discrimination explicitly, while the U.S. has gradually built up constitutional jurisprudence to address that issue.
- Canada’s explicit listing of protected groups is broader than those protected by the U.S. constitution according to current case law. Canadian law also allows new groups to be added to the enumerated ones, by allowing “analogous” groups to be included in the Charter protections.
- To determine whether laws or other government acts violate the Charter or the U.S. Constitutional, these nations have established multi-pronged tests to carefully evaluate the government actions at issue. This provides guidance to lower courts and restricts legislation that impinges on equality with insufficient justification *and* legislation with a legitimate goal that could be written to achieve the same ends by less discriminatory means.

3) Protections Against Discrimination by Private Actors

A) The Canadian Human Rights Act

⁴¹ *Loving v. Virginia*, 388 U.S. 1 (1967); *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-533 (1993).

⁴² *Craig v. Boren*, 429 U.S. 190, 197-199 (1976).

⁴³ *Romer v. Evans*, (1996) 517 U.S. 620.

⁴⁴ *Id.*

⁴⁵ *Id.* at 634.

Although the Charter supersedes other federal and provincial human rights legislation, such anti-discrimination legislation remains relevant. The *Canadian Human Rights Act*⁴⁶ provides that:

[A]ll individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

The Act's reach is limited by federalism (see above): it protects anyone living in Canada against discrimination by federally regulated employers or service providers, federal agencies, and the particular entities/industries under federal jurisdiction. For other industries, provincial antidiscrimination laws hold sway.

B) Human Rights Laws in the Canadian Provinces

Canadian provinces have their own anti-discrimination statutes. Ontario, for instance, has a Human Rights Code intended to recognize “the inherent dignity and the equal and inalienable rights of all members of the human family...in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations.”⁴⁷ Unlike the Charter, these laws apply beyond the public sphere: “Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.”⁴⁸ Likewise, equal treatment is required with respect accommodation, employment, ability to contract, and membership in a trade union or other occupational association.⁴⁹ These statutes expressly include prohibitions on harassment, including harassment by landlords or other tenants on the basis of one of the enumerated grounds, and sexual harassment in accommodation or in the workplace.⁵⁰

C) Federal Law, Including Title VII Protections Based on Race, Color, Religion, Sex, and National Origin

The civil rights movement in the U.S. led to the passage of a federal, omnibus civil rights bill in 1964, which applied to both public and private entities.⁵¹ The bill included a section (Title VII) prohibiting employers with at least 15 employees, labor unions, and employment agencies from discriminating based on race, color, religion, sex, and national origin (the “protected classes”).⁵²

⁴⁶ R.S.C. 1985, c. H-6.

⁴⁷ R.S.O. 1990 ch. H.19, preamble.

⁴⁸ R.S.O. 1990, c. H.19, s. 1.

⁴⁹ R.S.O. 1990, c. H.19, s. 2-6.

⁵⁰ R.S.O. 1990, c. H.19, s. 2-7.

⁵¹ The entire 1964 Act can be found at 88 P.L. 352 (July 2, 1964), 78 Stat. 241. Among other provisions, the Act prohibited discrimination based on race, color, religion, or national origin by states and municipalities (42 USC §2000b et. seq), by programs or activities receiving federal financial assistance (42 U.S.C. §2000d et. seq) or by “places of public accommodation” that were engaged in interstate commerce (42 USC §2000a). The Act further declared that All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.” 42 USC § 2000a-1.

⁵² Title VII of the Civil Rights Act of 1964, codified at 42 USCS § 2000e-2.

Notably absent from the Title VIII protected classes are sexual orientation, gender identity, and marital status, although some states have included those groups in their own antidiscrimination laws, which supplement federal anti-discrimination standards.

Under that statute, it is illegal for an employer to “fail or refuse to hire or discharge any individual, or otherwise discriminate” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” based on membership in a protected class.⁵³ The federal Equal Employment Opportunity Commission can investigate claims of discrimination under Title VII and bring charges, but it intervenes in only a small number of cases.⁵⁴ The rest of the time, civil lawsuits are brought by the individual victims of discrimination.⁵⁵ Similarly, other federal anti-discrimination statutes may be enforced by federal agencies but are often enforced by civil suits or administrative proceedings initiated by individuals.⁵⁶

In addition to Title VII, another Federal law addresses sex discrimination in the workplace. The Equal Pay Act of 1963 provides that employers cannot pay employees “a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions,” unless the difference in pay is caused by “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”⁵⁷ The term “equal work” does not mean “identical”—the jobs need only have “substantially similar” duties and responsibilities.⁵⁸

In addition to employment, U.S. Federal law declares, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁵⁹ This statute, popularly known as Title IX, makes exceptions for educational programs run by “religious organizations with contrary tenets” and military schools.⁶⁰ It allows schools that have traditionally been single-sex to maintain that tradition.⁶¹

Federal law makes it unlawful to discriminate based on “race, color, religion, sex, familial status, or national origin” in connection with the sale or rental of housing.⁶² The statute lays out many categories of action that fall within its purview: it is unlawful to “sell or rent after the making of a

⁵³ 42 U.S.C. §2000e-2(a).

⁵⁴ 42 U.S.C. §2000e-5(b) [EEOC can investigate and promote informal resolution], (f)[EEOC may file civil action against private employer; Attorney General may file civil action against public employer; the aggrieved individual can intervene (i.e. make his or her own claims) in the litigation].

⁵⁵ See 42 U.S.C. §2000e-5(f)(1) [the individual making the claim can bring suit if the EEOC/Attorney General does not].

⁵⁶ See 42 U.S.C. §§ 3612, 3613, 3614 [housing discrimination statutes can be enforced by the Secretary of Housing and Urban Development, the aggrieved individual, or, where there is a “pattern or practice” of discrimination, the Attorney General].

⁵⁷ 29 U.S.C. § 206(d).

⁵⁸ *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 592 (11th Cir. 1994) [positions of corporate department heads could be substantially similar despite some differences in client relations].

⁵⁹ 20 U.S.C. §1681. Other federal laws cover discrimination in education against other protected classes.

⁶⁰ 20 U.S.C. §1681(a)(3),(4).

⁶¹ 20 U.S.C. §1681(a)(5).

⁶² 42 U.S.C. §§3604-3606.

bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling” based on a protected class; to create “any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference” for or against a class; to pretend that a home is unavailable because of the prospective inhabitant’s membership in a protected class; or to “attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person” of a particular protected class.⁶³

D) Employment Discrimination: an Example of Robust Anti-Discrimination Law in the U.S. and Canada

Canada and the United States have similar laws prohibiting employment discrimination (albeit different protected classes---see above). One major difference is that most Canadian provinces require an employee to make a complaint to a human rights commission which investigates and attempts to mediate the claim.⁶⁴ If the commission decides to refer the matter to a human rights tribunal, the commission rather than the individual employee is usually a party to the case.⁶⁵ Ontario and British Columbia are more similar to the U.S. process of civil litigation, in that individuals may bring themselves bring complaints before the tribunal.⁶⁶

E) Employment Discrimination: Openly Discriminatory Practices in the Workplace

U.S. law follows the general principle that an employer may not impose requirements on one protected class of people that it does not impose on others. In states with laws against sexual orientation and gender identity discrimination, this principle holds true for those groups, as well.⁶⁷ There is a very narrow exception to this rule, however, for those rare occasions when a discriminatory requirement is actually a “bona fide occupational qualification.”⁶⁸ For instance, an especially overcrowded and dangerous men’s prison could legitimately hire only male guards for positions that required continual contact with the inmates to be male, while a safer prison could not.⁶⁹

In *UAW v. Johnson Controls, Inc.*, a battery manufacturer forbid fertile women from holding jobs that involved lead exposure, while fertile men were not excluded.⁷⁰ The U.S. Supreme Court found that this policy was discriminatory on its face: “The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job....Respondent does not seek to protect the

⁶³ 42 U.S.C. §3604 [also includes provisions to prevent housing discrimination based on handicap]; see also 42 U.S.C. §3605 [no housing discrimination by real estate businesses on the basis of race, color, religion, sex, handicap, familial status, or national origin]; 42 U.S.C. §3606 [no housing discrimination by brokers on same grounds]

⁶⁴ Jeffrey Goodman and Peter Mantas, *Northern Exposure: An American Employer’s Guide to Discrimination Claims in Canada*, 799 PLI/LIT 247, 267-268 (2009).

⁶⁵ *Id.*

⁶⁶ *Id.*; R.S.O. 1990, c. H.19, s. 34(1) [Ontario].

⁶⁷ See Cal. Gov. C. §12940, discussed below in subsection (g).

⁶⁸ International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200-201 (1991); 42 U.S.C. 2000e-2(e).

⁶⁹ *Griffin v. Michigan Dept. of Corrections*, 654 F.Supp. 690, 700-701 (E.D.Mich 1982) [discussing *Dothard v. Rawlinson*, 433 U.S. 321 (1977)]. Some courts have recognized gender as a bona fide occupational qualification under some circumstances in which guards must be the same sex as the inmates to protect inmates’ privacy. *Id.* at 702-703 [discussing state and federal cases]. Courts have disagreed about the extent of inmates’ right to privacy as it relates to guards of the opposite sex.

⁷⁰ *UAW v. Johnson Controls, Inc.* 499 U.S. at 191-192.

unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees.”⁷¹

Johnson Controls argued that it was not liable, because under the statute a discriminatory policy was not unlawful “in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”⁷² The court noted that this defense is written narrowly,” stating, “Each one of these terms -- certain, normal, particular -- prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is ‘occupational’; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.”⁷³ Indeed, a bona fide occupational qualification must relate to the “essence of the business.”⁷⁴ Since employees’ sex did not relate to their ability to do their jobs, it was unlawful: “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy....”⁷⁵

Canada also has its own version of the “bona fide occupational qualification” defense. To establish a “bona fide occupational requirement” under Canadian law, an employer must show that the requirement at issue is “rationally connected to the performance of the job.”⁷⁶ Once that is established, the employer must also show that it adopted the particular standard in good faith, not out of an intent to discriminate, and that the standard is “reasonably necessary for the employer to accomplish its purpose....”⁷⁷

Conclusions

- U.S. and Canadian employers may not institute policies that discriminate based on employees’ membership in a protected class, including gender/sex (though not necessarily gender identity—see below). No matter how benevolent the employer’s motives, it cannot substitute its own judgment about the needs of the sexes for the decisions of individuals.
- U.S. and Canadian law recognizes that there may sometimes be a real, nondiscriminatory reason to exclude members of a certain class, but also considers this to be an extremely rare situation. For that reason, the “bona fide occupational qualification” (aka “bona fide occupational requirement”) defense is narrowly written and construed.

F) Employment Discrimination, Disparate Treatment, and Neutral Policies with Discriminatory Effects

Of course, even when a company has no openly discriminatory policies, it may still engage in discrimination. In the U.S. case *Price Waterhouse v. Hopkins*, the plaintiff was a female senior manager at an accounting firm who was denied partnership.⁷⁸ Ms. Hopkins had won praise for her

⁷¹ *Id.* at 197-198.

⁷² *Id.* at 200-201; 42 USC 2000e-2(e).

⁷³ *UAE v. Johnson Controls, Inc.* 499 U.S. at 201.

⁷⁴ *Id.* at 203.

⁷⁵ *Id.* at 199.

⁷⁶ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 3 S.C.R. ¶ 57 (1999).

⁷⁷ *Id.* at ¶¶ 60-62.

⁷⁸ *Id.* at 231-232.

work in the past, but she was not promoted to partner because the existing partners felt that she was too “macho” and aggressive: “in order to improve her chances for partnership, [a member of the decision-making board] advised, Hopkins should ‘walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.’”⁷⁹ The U.S. Supreme Court found that this was unlawful: except when sex is a bona fide occupational qualification (see above), “a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities.”⁸⁰ A job requirement founded on stereotype can never be a bona fide qualification: “the federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes....”⁸¹

U.S. plaintiffs can show discrimination through the usual means of testimony and records, or through statistical evidence that shows patterns of discrimination in an employer’s workforce.⁸² Once the plaintiff has made an initial showing of disparate treatment, the burden shifts to the defendant to give a legitimate, nondiscriminatory reason for its employment decision.⁸³ If the defendant can do so, then the plaintiff can only prevail by showing that the proffered reason is a mere pretext for discrimination.⁸⁴ When legitimate reasons are mixed with discriminatory ones, the employer may still be held liable: “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁸⁵

The policy in *Price Waterhouse* clearly distinguished between employees on the basis of sex, but what about seemingly-neutral policies that negatively affect a protected group? In the 1999 Canadian case *British Columbia v. BCGSEU*, a female forest firefighter performed her job well for three years, but then lost her job when she was unable to pass a newly-implemented fitness.⁸⁶ Although the test was gender-neutral and was implemented without any discriminatory intent, it had the effect of excluding far more women than men. The Canadian Supreme Court noted that the new fitness tests were based on firefighters’ average performance, but “[t]here was no credible evidence showing that the prescribed aerobic capacity was necessary for either men or women to perform the work....”⁸⁷ To establish that the test was a bona fide occupational requirement “reasonably necessary” for the employer’s purpose, “the employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship.”⁸⁸ Because the employer had neither determined the minimal fitness requirements necessary for firefighting nor determined whether women needed to meet the same standards as

⁷⁹ *Id.* at 235.

⁸⁰ *Price Waterhouse*, 490 U.S. at 242.

⁸¹ *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) [discussed below].

⁸² *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) [prima facie case of discrimination where blacks were large part of local population but tiny proportion of employer’s workforce, and those blacks were employed by defendant were disproportionately represented in the less desirable jobs]

⁸³ *Scheidemantle v. Slippery Rock University State System of Higher Education*, 470 F.3d 535, 539 (3rd Cir. 2006) [citing the seminal case on burden-shifting in employment discrimination cases, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)].

⁸⁴ *Id.* at 539 [defendant explained that it failed to promote female plaintiff because she lacked the requisite years of experience; this was not a legitimate reason since the male employees who received the promotion also lacked the required experience]

⁸⁵ 42 U.S.C. §2000e-2.

⁸⁶ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 3 S.C.R. 3 (1999) ¶1.

⁸⁷ *Id.* at ¶12.

⁸⁸ *Id.* at ¶62.

men in order to be sufficiently fit for their jobs, the neutral-seeming policy was found to be discriminatory.

Canadian jurisprudence subjects all potentially discriminatory job standards to the same legal test (see Sec. III(3)(E)) in regardless of whether or not the standards are neutral or openly discriminatory. Originally, Canada followed the U.S. practice of distinguishing between the two categories of discrimination, imposing a different burden-shifting scheme on each.⁸⁹ But “[t]he distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in effect is difficult to justify, simply because there are few cases that can be so neatly characterized. For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterized as either *directly* discriminatory (because it means that no workers whose religious beliefs preclude working on Fridays may be employed there) or as a neutral rule that merely has an *adverse effect* on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays) [italics in original].”⁹⁰ The Canadian Supreme Court therefore abandoned the legal dichotomy in the *British Columbia* case.

CONCLUSIONS

- U.S. and Canadian courts have recognized that discrimination is not always a visible part of company policy and have therefore developed a procedure to examine employment decisions that are not openly discriminatory, yet still have a discriminatory effect.
- The countries’ burden-shifting procedures respond to the fact that employers may provide false explanations for discriminatory acts. Under *Price Waterhouse*, once a plaintiff has made a preliminary showing of discrimination, the employer must explain why its actions were not actually discriminatory. This increases the plaintiff’s chances of uncovering a discriminatory motive, without sacrificing the employer’s ability to defend itself.
- U.S. and Canadian courts can examine even facially neutral employment policies for discrimination. This prevents employers from instituting unnecessary job requirements that bar qualified members of a protected class. Importantly, this applies even to employers who do not *intend* to discriminate.

4) Pregnancy Discrimination

The Supreme Court of Canada has held that both discrimination on the basis of pregnancy and sexual harassment are forms of sex discrimination prohibited by the Charter.⁹¹ In the U.S., after that nation’s Supreme Court ruled that excluding pregnancy from a disability plan was not sex discrimination, Congress amended Title VII in 1978 to “re-establish the principles of Title VII

⁸⁹ *Id.* at ¶19-24. The United States’ method of addressing facially neutral standards with discriminatory affect is laid out but Title VII. The plaintiff must demonstrate that the employer “uses a particular employment practices that causes a disparate impact on the basis of [a protected class],” and either 1) the employer “fails to demonstrate the challenged practice is job related for the position in question and consistent with business necessity,” or 2) the plaintiff demonstrates that that there is an “alternative employment practice” with less discriminatory impact, yet the employer “refuses to adopt such alternative employment practice. 42 U.S.C. §2000e-2(k). See also *Dothard v. Rawlinson*, 433 U.S. at 232 [no evidence that minimum height and weight requirements for prison guards correlated to strength or job ability, and requirements disproportionately eliminated female job candidates].

⁹⁰ *British Columbia*, 3 S.C.R. at ¶27.

⁹¹ *Brooks v. Canada Safeway*, 1989 1 S.C.R. 1219 (holding that discrimination on the basis of pregnancy is sex discrimination prohibited by the Charter); *Robichaud v. Canada (Treasury Board)*, 1987 2 S.C.R. 84 (holding that sexual harassment is sex discrimination prohibition of the Canadian Charter of Rights and Freedoms).

law” as they were understood before that court decision.⁹² The Pregnancy Discrimination Act added a provision to Title VII declaring, “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work....”⁹³

CONCLUSIONS

- Both the U.S. and Canada consider pregnancy discrimination to be a type of sex discrimination.
- The U.S. Congress discovered that it had to *explicitly* list pregnancy and childbirth discrimination as sex discrimination. Without that statutory language, the Supreme Court would not consider those conditions to encompassed by sex discrimination law.

5) Sexual Orientation and Gender Identity Discrimination

A) Canadian Provincial and Charter Prohibitions on Sexual Orientation Discrimination

In *Egan v. Canada*,⁹⁴ the Supreme Court of Canada unanimously held that sexual orientation is an analogous classification to those explicitly listed in Section 15. The Court found that sexual orientation “is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.”⁹⁵ Consequently, discrimination based on sexual orientation is prohibited under the Canadian Charter for Rights and Freedoms.

When the province of Alberta neglected to follow *Egan* by including sexual orientation in its own anti-discrimination statute, the Supreme Court held in *Vriend v. Alberta* that Canadian courts have the power to “read into” a statute a prohibited ground of discrimination, consistent with the purpose of the statute.⁹⁶

In that case, Mr. Vriend alleged that he was dismissed from his job because of his homosexuality. His attempt to seek a remedy under the Alberta Individual Rights Protection Act (IRPA) was unsuccessful, because sexual orientation was not a prohibited ground of discrimination under that statute. The Court found that this absence violated s. 15 of the Charter: “The ‘silence’ of the IRPA with respect to discrimination on the ground of sexual orientation is not ‘neutral’. Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. The

⁹² *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 [discussing *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) and Congress’ subsequent enactment of the Pregnancy Discrimination Act].

⁹³ Pregnancy Discrimination Act, codified at 42 U.S.C. § 2000e(k). This section also states that it does not require an employer to pay for health benefits for abortion, exception when the life of the mother is endangered, although employers are free to do so if they choose.

⁹⁴ [1995] 2 S.C.R. 513.

⁹⁵ *Id.* at ¶5.

⁹⁶ [1998] 1 S.C.R. 493 ¶ 166-172; see also Kaelen Onusko, *Equality Rights Background*, Center for Constitutional Studies, available at <http://www.law.ualberta.ca/centres/ccs/issues/equalityrightsbackground.php>.

latter, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.”⁹⁷

Other cases in which the Supreme Court of Canada has found discrimination on the basis of sexual orientation include *Canada (Attorney General) v Hislop*,⁹⁸ which concerned survivor pensions for same-sex couples, and *M. v H.*⁹⁹, a case predating the legalization of same-sex marriage, which found a violation of the *Charter* because the *Family Law Act* only applied to marriages between a “man and a woman” and thus not the family of separating lesbian partners.

In *Trinity Western University v BC College of Teachers*,¹⁰⁰ a leading freedom of religion case, the Supreme Court quashed a decision of the BC College of Teachers, which had denied TWU full accreditation for the teacher’s training program at a private university, on the grounds that the university condemned homosexuality and required students to sign a statement that they would not commit “sexual sins...including homosexual behavior.” In essence the College of Teachers weighed rights related to religious belief less important than rights related to non-discrimination. The Supreme Court thought otherwise. The Court found that the College of Teachers had based its decision on the University’s religious teaching instead of the actual impact of these beliefs on the school environment. In requiring the College of Teachers to reconsider its decision in light of the Court’s judgment, the Court emphasized that the College of Teachers could consider whether the educational environment was free from bias, prejudice and intolerance. The Court also explained that, although the *Charter* does not apply to the discriminatory actions of private actors, the College of Teachers was free to look to the *Charter* in order to determine whether it would be in the public interest to grant the accreditation.

B) Gender Identity Discrimination in Canada

The Human Rights Act of the Northwest Territories is the only human rights legislation in Canada that explicitly prohibits discrimination on the basis of gender identity.¹⁰¹ As stated above, consistent with the purpose of anti-discrimination legislation, Canadian courts have the power to interpret the legislation to include prohibited grounds of discrimination that are not explicitly included in the statute. Agencies of the executive government may apply the same principles when deciding questions of legislative interpretation that have not been resolved by the Courts. The Manitoba Human Rights Commission interprets the *Human Rights Code* of Manitoba to prohibit discrimination on the basis of gender identity.¹⁰²

Bills have been introduced in the Canadian Parliament to amend the Canadian Human Rights Act to include gender identity and expression as prohibited grounds of discrimination.¹⁰³ There are also proposals at the Provincial level to include gender identity and expression as prohibited

⁹⁷ [1998] 1 S.C.R. 493 ¶ 86.

⁹⁸ [2007] 1 S.C.R. 429.

⁹⁹ [1999] 2 S.C.R. 3.

¹⁰⁰ [2001] 1 S.C.R. 772.

¹⁰¹ Human Rights Act, S.N.W.T. 2002, c. 18, s 5(1).

¹⁰² Manitoba Human Rights Commission, “Policy and Procedures Manual” available at <http://www.gov.mb.ca/hrc/english/publications/policies/L2.pdf>, interpreting s 9(1)(a) of the *Human Rights Code*, C.C.S.M. c. H175.

¹⁰³ See New Democratic Party, Press Release, *Siksay tables bill to protect Transsexual and Transgender people*, (15 May 2009), available at <http://www.ndp.ca/press/siksay-tables-bill-to-protect-transsexual-transgender-people>.

grounds of discrimination in provincial human rights legislation.¹⁰⁴ In at least one case, a Canadian Court has found that an instance of discrimination on the basis of sex/gender identity was justified.¹⁰⁵

C) Sexual Orientation and Gender Identity Discrimination in the U.S.

In the U.S., neither sexual orientation nor gender identity is a protected class under Title VII. The federal government has taken some steps to protect those groups—for instance, it will not discriminate against its own civilian employees on the basis of sexual orientation—but some states have gone considerably farther.¹⁰⁶ Some states and municipalities have gone considerably further.¹⁰⁷

California prohibits discrimination by employers and labor unions based on “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation...”¹⁰⁸ The term “sex” is defined as including, but not limited to, pregnancy, childbirth, “gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”¹⁰⁹ Likewise, the classes protected under California law “are free and equal, and ...entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”¹¹⁰ Additional statutes protect people from housing discrimination, both in real estate sales and rentals.¹¹¹

When sexual orientation or gender identity is a protected class, anti-discrimination laws function as they would for any other group. However, laws against same-sex marriage (see Sec. III(11)(B)) have complicated matters considerably. If an employer in a state that only recognizes marriages between men and women provides benefits to its employees’ spouses, is it discriminating against homosexuals and their partners? Several courts have answered no—one Wisconsin court explained that spousal benefits rules apply equally to unmarried hetero- and homosexual couples, and thus are not discriminatory.¹¹² California, a state with domestic partnership but not same-sex marriage, responded to this issue by passing a law requiring group health insurance plans,

¹⁰⁴ See Ontario Human Rights Commission, *Discussion Paper: Toward a Commission Policy on Gender Identity*, at http://www.ohrc.on.ca/en/resources/discussion_consultation/genderidentity?page=dfhh-Backgrou.html, discussing the work of the Canadian Taskforce for Transgender Law Reform.

¹⁰⁵ See Vancouver Rape Relief Society v. Nixon, 2005 BCCA 601 (discussed below).

¹⁰⁶ Exec. Order No. 13087 (May 28, 1998), 63 Fed. Reg. 30097 (June 2, 1998) [amending Executive Order 11478 (1969)].

¹⁰⁷ 20 states and the District of Columbia outlaw sexual orientation discrimination in employment, while 12 states also prohibit gender identity discrimination. Tanya A. De Vos, Ed., *Tenth Annual Review of Gender and Sexuality Law: Employment Law Chapter: Sexuality and Transgender Issues in Employment Law*, 10 GEO. J. GENDER & L. 599, 612-619 (2009).

¹⁰⁸ Cal. Gov. C. §12940.

¹⁰⁹ Cal. Gov. C. §12926 [defining “sex” to include childbirth, pregnancy, and “gender”]; Cal. Penal C. §422.56(c) [defining “gender”].

¹¹⁰ Cal. Civ. C. §51(b); Cal. Civ. C. §51.5 [“No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed ...[in] Section 51...”]; Cal. Civ. C. §52 [whoever violates §51 or 51.5 is liable for three times the amount of general and special damages, plus the . cost of plaintiff’s attorneys’ fees]

¹¹¹ Cal. Govt. C. §12955, 12955.7

¹¹² Phillips v. Wisconsin Personnel Commission, 167 Wis.2d 205 (1992) [Wisconsin law prohibited employment discrimination based on marital status, gender, and sexual orientation, among other classes, but also limited marriage to heterosexual couples].

including plans purchased by employers, to provide equal insurance coverage to registered domestic partners and spouses.¹¹³

CONCLUSIONS

- Canada’s flexibility in interpreting Section 15 of its Charter—its ability to include new groups analogous to those already listed—has allowed its Supreme Court to include sexual orientation in the same category of protected groups as race, sex, religion etc. Likewise, the Supreme Court’s ability to interpret provincial statutes in a way consistent with both the Charter and the statutory purpose has given the Court an opportunity to expand existing law to cover persons of diverse sexualities and gender identities.
- In the U.S., federal discrimination laws have an extensive body of case law and include statutes directed at many issues. But those laws are limited by the fact that the “protected classes” do not include people discriminated against based on sexual orientation, gender identity, or marital status. States like California have benefited from Federal law by building on the established anti-discrimination legal structure while adding new protected classes.
- In U.S. states that prohibit same-sex marriage *and* prohibit sexual orientation discrimination in employment, conflicts between the two policies have arisen in the context of spousal employment benefits.

6) Marital Status Discrimination

Title VII in the U.S. does not prohibit discrimination based on marital status, although a marital status policy does violate Title VII if it is applied to only one gender.¹¹⁴ Some states do consider marital status a protected class—California’s law, discussed above, includes marital status but provides that employers may still “reasonably regulate” spouses working in the same section or department “for reasons of supervision, safety, security, or morale...”¹¹⁵

In *Miron v. Trudel*¹¹⁶ the Supreme Court of Canada held that marital status is an “analogous ground” comparable to the prohibited grounds of discrimination in Section 15 of the Canadian Charter of Rights and Freedoms; thus marital status discrimination is prohibited by the Charter. Marital status discrimination is also explicitly prohibited by Section 2 of the Canadian Human Rights Act. The Canadian Human Rights Commission, which administers the Act, defines “marital status” as the condition of being: single; legally married; common-law spouses (whether opposite-sex or same-sex); widowed; or divorced.”¹¹⁷

Section 2 of the Canadian Human Rights Act also prohibits discrimination on the basis of “family status.” The Canadian Human Rights Commission defines family status as “the inter-relationship that arises from bonds of marriage, consanguinity or legal adoption, including of course, the

¹¹³ Cal. Ins. C. §10121.7

¹¹⁴ *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971);

¹¹⁵ Cal. Govt. C. §12940(3)(A).

¹¹⁶ [1995] 2 S.C.R. 418.

¹¹⁷ See Canadian Human Rights Commission, *Marital Status*, at http://www.chrc-ccdp.ca/complaints/marital_status-en.asp.

ancestral relationship, whether legitimate, illegitimate, or by adoption, as well as the relationships between spouses, siblings, in-laws, uncles or aunts, and nephews or nieces, cousins, etc.”¹¹⁸

Interestingly, these provisions apply not only to those who are discriminated against because of a particular *type* of marital or family status, but also to those who are discriminated against because of the *individual identity* of a particular spouse or family member. In *B v. Ontario (Human Rights Commission)*, the Supreme Court held that a man was unlawfully terminated from his employment when he was fired because his daughter accused the vice-president of the business of sexual molestation.¹¹⁹

CONCLUSIONS

- As with sexual orientation, the Canadian Supreme Court has used the flexibility of Canadian law to include marital status in the Charter’s list of protected classifications. Canada provides much more protection for discrimination on this basis than does the United States, where only certain states include marital status in their anti-discrimination statutes.
- Canada also protects against discrimination based on family status, a broad category which can include not only children but other relatives as well.

7) Access to Health Services and Information for Specific Populations

A) Incarcerated People’s Access to Contraception and Abortion

For information about condom access in prison, especially in Canada, see Sec. IV(10) on sexual health during incarceration. Federal prisons in the U.S. are forbidden from spending federal funds to provide abortion, except in cases of rape or when the life of the mother is endangered.¹²⁰ U.S. prison staff must provide information to inmates interested in birth control, but prison policy deems birth control itself to be generally unnecessary unless hormonal replacement is medically required.¹²¹

B) Disability

Under U.S. federal law, no one may be “excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity” because of a disability.¹²² The Canadian Charter provides that people with “mental or physical disability” have “the right to the equal protection and equal benefit of the law without discrimination....”¹²³ For information about discrimination by private entities based on disability, see the section on HIV services.

C) Refugees: a Canadian Example

¹¹⁸ See Canadian Human Rights Commission, *Family Status*, at http://www.chrc-ccdp.ca/discrimination/family_status-en.asp.

¹¹⁹ *B. v. Ontario*, [2002] 3 S.C.R. 403.

¹²⁰ U.S. Dept. of Justice, Federal Bureau of Prisons *Birth Control, Pregnancy, Child Placement and Abortion*, Program Statement no. 6070.05 (Aug. 9, 1996)

¹²¹ *Id.*

¹²² 42 U.S.C. § 12132.

¹²³ Canadian Charter of Rights and Freedoms s. 15(1).

Under the Interim Federal Health (IFH) Program, the Canadian Federal Government funds refugees' access to a full range of health services, including access to contraception, until they are eligible for coverage under the health plan of province where they reside. Once their provincial coverage has started, the IFH continues to provide supplemental coverage, including emergency dental, vision and pharmaceutical coverage.¹²⁴

HIV-positive people: see Sec. III(7).

Transsexuals: see Sec III(3)(C)

Incarcerated People: see Sec. IV(10).

8) Mandatory HIV Testing

The U.S. military mandates that active duty personnel be tested for HIV at two year intervals.¹²⁵

There are some U.S. laws mandating HIV testing for prisoners and defendants in sex crimes cases; see Sec. IV(10).

See Sec. V(6) for information about STI testing requirements for marriage.

9) Access to Adoption (Same Sex Couples, Marital Status)

Adoption in Canada falls within provincial jurisdiction, so it is regulated differently in each province and territory. Adoption by same-sex couples is legal in British Columbia, Manitoba, Newfoundland, Nova Scotia, Ontario, Quebec, Saskatchewan, New Brunswick, Prince Edward Island and the Northwest Territories. Individuals over the age of 18 can adopt; one need not be married.¹²⁶ The law of British Columbia, for instance, states that “A child may be placed for adoption with one adult or 2 adults jointly.”¹²⁷ In Alberta and other provinces, people in same-sex relationships may adopt their partner's child.¹²⁸

In the U.S., the federal government prohibits any “person or government involved in adoption or foster care placements” from delaying or denying a child's adoption or placement in foster care based on the race, color, or national origin of either the child or the prospective adoptive/foster parents.¹²⁹ Other than that, adoption—like family law in general—is government by state statutes.

States vary in their adoption rules. A few ban adoption by unmarried, cohabitating couples, while a few others ban adoption by same-sex couples.¹³⁰ Other states are more inclusive: the case *In Re*

¹²⁴ Citizenship and Immigration Canada, “Interim Federal Health Program,” available at <http://www.cic.gc.ca/english/refugees/outside/resettle-assist.asp>; see also FAS Benefit Administrators Ltd, <http://www.fasadmin.com/>.

¹²⁵ William Winkenwerder, Jr., Assistant Secretary of Defense, *Policy Memorandum: Human Immunodeficiency Virus Interval Testing* (March 29, 2004).

¹²⁶ See e.g. <http://www.children.gov.on.ca/htdocs/English/topics/adoption/index.aspx>, stating that one need only be 18 years of age and a legal resident of Ontario to adopt in Ontario.

¹²⁷ Adoption Act pt.2 s. 4 (1996 British Columbia).

¹²⁸ For extensive discussion of this issue, see Mary C. Hurley, “Sexual Orientation and Legal Rights” (2007) available at <http://www.parl.gc.ca/information/library/PRBpubs/921-e.htm>.

¹²⁹ 42 U.S.C. § 1996b.

¹³⁰ National Gay and Lesbian Task Force, Issue Map, Adoption Laws in the U.S., Nov. 4, 2008, available at http://www.thetaskforce.org/reports_and_research/adoption_laws.

MMD concerned a Washington D.C. law that permitted adoption by “any person.”¹³¹ The court found that this encompassed unmarried couples, including the petitioners, two unmarried gay men.¹³² The standard for adoptions was “the best interests of the child,” which meant that, “The focus is on how the child shall best thrive, not on what the particular family format shall look like.”¹³³

In 17 states the law is still unclear about whether the unmarried partner of an adoptive parent can also adopt the child.¹³⁴ And in states that explicitly exclude same-sex or unmarried people from adopting, litigation is wending its way through the courts. In 2004, the Eleventh Circuit upheld a Florida law prohibiting homosexuals from adopting, but in 2009 a federal trial court judge held the same statute unconstitutional under the Equal Protection Clause (see Sec VI(2)(A) for a discussion of that clause).¹³⁵ The government plans to appeal the decision, so more case law may be forthcoming.

CONCLUSIONS

- There are no national laws regarding adoption in either the U.S. or Canada, and state/provincial law varies. Canada has overall more favorable laws for adoption by either single people or same-sex couples.
- The “best interests of the child” standard can be favorable to same-sex and single parent adoptions.

10) Access to In-vitro fertilization (IVF)/Assisted reproduction technologies (ART)

No U.S. federal law addresses ART; bills have been introduced on the state level but none have become law.¹³⁶ In a recent California case, a lesbian couple sued a medical practice, North Coast, after doctors refused to perform intrauterine insemination (IUI): one doctor said she had a religious objection to performing IUI on an unmarried woman, although the plaintiffs believed that the doctor really objected to their sexual orientation.¹³⁷ California’s Civil Rights Act prohibits discrimination based on sexual orientation or marital status, but the doctors claimed that their actions were protected by the U.S. Constitution and the California Constitution provisions guaranteeing freedom of speech and free exercise of religion.

The court found that North Coast was not exempt from the antidiscrimination law: “To avoid any conflict between their religious beliefs and the state Unruh Civil Rights Act’s antidiscrimination provisions, defendant physicians can simply refuse to perform the IUI medical procedure at issue here for any patient of North Coast, the physicians’ employer. Or, because they incur liability under the Act if they infringe upon the right to the ‘full and equal’ services of North Coast’s

¹³¹ *In re M.M.D. & B.H.M.*, 662 A.2d 837, 842 (D.C. 1995) [citing D.C. Code §§ 16-302].

¹³² *Id.* at 858-859.

¹³³ *Id.* at 859.

¹³⁴ National Gay and Lesbian Task Force, Issue Map, Second-Parent Adoption in the U.S., Nov. 4, 2008, *available at* http://www.thetaskforce.org/reports_and_research/second_parent_adoption_law. See *In re M.M.D. & B.H.M.*, 662 A.2d 837, 859 (D.C. 1995) for a case involving adoption by the same-sex partner of the biological parent.

¹³⁵ Cecily Waters, *Ban on Gay Adoption is Unconstitutional, Florida Judge Rules*, 45 TRIAL 64 (American Assoc. for Justice, Feb. 2009).

¹³⁶ Susan B. Apel, *Access to Assisted Reproductive Technologies*, 12 MICH. ST. U. J. MED. & L 33, 37-39 (2008).

¹³⁷ *North Coast Women’s Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145, 1150-1151 (2008).

medical practice, defendant physicians can avoid such a conflict by ensuring that every patient requiring IUI receives ‘full and equal’ access to that medical procedure though a North Coast physician lacking defendants’ religious objections [citations omitted].”¹³⁸

Assistive reproductive technologies in Canada are regulated by the *Assisted Human Reproduction Act*.¹³⁹ In a section of the Act titled ‘Principles’, the parliament ‘recognizes and declares that’:

- (a) the health and well-being of children born through the application of assisted human reproductive technologies must be given priority in all decisions respecting their use;
- (b) the benefits of assisted human reproductive technologies and related research for individuals, for families and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;
- (c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies;
- (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;
- (e) persons who seek to undergo assisted reproduction procedures must not be discriminated against, including on the basis of their sexual orientation or marital status;
- (f) trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition; and
- (g) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.¹⁴⁰

The Act prohibits: the creation of human embryos for any purpose other than “creating a human being or improving or providing instruction in assisted reproduction procedures,” engineering of inheritable genetics, the creation of hybrids and chimeras using human gamete material, all use of somatic cell nuclear transfer or cloning, sex selection except to treat a sex-linked disease,¹⁴¹ commercial surrogacy contracts,¹⁴² and the sale of sperm, eggs and embryos.¹⁴³

In addition, the Act creates the Assisted Human Reproduction Agency of Canada, which is authorized to license and regulate fertility clinics and research institutions using human gamete material in their research endeavors.¹⁴⁴ There are no requirements in terms of sexual orientation or marital status to access other ART or to (theoretically) benefit from a purely altruistic surrogacy arrangement, although, as noted above, commercial surrogacy arrangements are prohibited by law.

CONCLUSIONS

- Canada has addressed the issue of assisted reproduction through a national act that explicitly outlaws discrimination on the basis of sexual orientation or marital status.

¹³⁸ *Id.* at 1159.

¹³⁹ Assisted Human Reproduction Act, S.C. 2004, c. 2

¹⁴⁰ *Id.* s. 2.

¹⁴¹ *Id.* s. 5.

¹⁴² *Id.* s. 6

¹⁴³ *Id.* s. 7.

¹⁴⁴ *Id.* s. 21-59.

- In the U.S., California has proved willing to apply its own, expansive antidiscrimination law to ART providers, but issues related to ART and discrimination have yet to be addressed by most U.S. state courts and are not addressed by federal law.

11) Same-Sex Marriage

A) Same Sex Marriage in Canada

Same-sex marriage was legalized in Canada in 2005, via amendments to the Civil Marriage Act, after several provincial supreme courts had already ruled in favor of same-sex couples.¹⁴⁵ The Act stated that “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.”¹⁴⁶ The Canadian Government referred questions regarding the constitutionality of the legislation to the Supreme Court.¹⁴⁷ The Court held that the proposed legislation would be constitutional, and had a purpose which “far from violating the *Charter*, flows from it.”¹⁴⁸ The Court also stated that, in general, the *Charter’s* protection of religious freedom would protect religious officials from being compelled by the State to perform same-sex marriages, and that no religious freedoms were risked by the decision. “The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another.”¹⁴⁹

B) Same-Sex Marriage in the United States

In the 1967 U.S. Supreme Court case aptly titled *Loving v. Virginia*, the court found that marriage was a “fundamental right” which states could not restrict to people of the same race.¹⁵⁰ But same-sex couples in the U.S. have not been as successful as the interracial couple in *Loving*. Federally, the Defense of Marriage Act (“DOMA”) specifies that marriage may only exist between a man and a woman for purposes of federal law, and allows states to refuse to recognize same-sex marriages performed in other states.¹⁵¹ Since the mid-1990s, over forty states have passed “mini-DOMAs” that limit marriage within the state to heterosexual couples, either by statute or by amending state constitutions.¹⁵² Some states have gone even further, enacting “super DOMAs” which prohibit not just same-sex marriage but also alternative legal relationships such as domestic partnerships and civil unions.¹⁵³

One of the few U.S. states where same-sex couples may marry is Massachusetts, where the state’s Supreme Court overturned a law limiting marriage to opposite-sex couples in the 2003 case *Goodridge v. Department of Public Health*. The state had justified its ban on same-sex marriage in part by arguing that the ban promoted procreation and two-parent families.¹⁵⁴ The court pointed out that state policy “affirmatively facilitates bringing children into a family regardless of whether

¹⁴⁵ Bill C-38, 2005.

¹⁴⁶ *Id.*

¹⁴⁷ Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698.

¹⁴⁸ *Id.* at ¶43.

¹⁴⁹ *Id.* at ¶46.

¹⁵⁰ 388 U.S. 1 (1967).

¹⁵¹ Defense of Marriage Act, codified at 1 U.S.C. §7 and 28 U.S.C. §1738C.

¹⁵² National Gay & Lesbian Task Force, Issue Map: Anti-Gay Marriage Measures in the U.S. (Nov. 4, 2008), available at http://www.thetaskforce.org/reports_and_research/marriage_map.

¹⁵³ *Id.*; Florida Stat. §741.212 [no same-sex marriages; no recognition of any same-sex marriage or other “relationships between persons of the same sex which are treated as marriages.”].

¹⁵⁴ *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 331 (Mass. 2003).

the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means.”¹⁵⁵

The state had also argued that its legislature should be able to define marriage as it chose, because of the strong government interest in “the institution of marriage as a stabilizing social structure....”¹⁵⁶ Looking back to *Loving*, the court responded: “Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.”¹⁵⁷

Goodridge was decided on the basis of the Massachusetts’ own constitution, rather than the U.S. Constitution. In a number of jurisdictions, voters have amended their state constitutions to prevent same-sex marriages. In California, for instance, a California Supreme Court decision overturning a same-sex marriage ban was itself overturned by a referendum that amended that state’s constitution.¹⁵⁸

C) Marriage Alternatives in the United States

Despite California voters’ rejection of same-sex marriage, the state allows same-sex couples to register as domestic partners.¹⁵⁹ A comprehensive statute declares that domestic partners “have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law...as are granted to and imposed upon spouses.”¹⁶⁰ However, this does not alter federal law, which endows considerable benefits on married couples such as tax advantages and immigration privileges for non-citizen spouses. Furthermore, not all state statutes recognizing same-sex couples are as broad as California’s domestic partnership law.¹⁶¹

CONCLUSIONS

¹⁵⁵ *Id.* at 332-333.

¹⁵⁶ *Id.* at 337-338.

¹⁵⁷ *Id.* at 337.

¹⁵⁸ *In Re Marriage Cases*, 43 Cal 4th 757 (Cal. 2008) [same-sex couples must be allowed to marry under the California Constitution], overturned by Proposition 8, Cal. Const. art. I, §7.5 [“Only marriage between a man and a woman is valid or recognized in California.”] California gay rights activists are planning to seek a ballot measure reversing the same-sex marriage ban by 2012, and a lawsuit over the ban was set for trial in January, 2010. See: Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, NEW YORK TIMES, Nov. 5, 2009, at A25.

¹⁵⁹ Part of the court’s reasoning in the 2008 *In Re Marriage Cases* was that there was no rational reason for calling one set of relationships “marriage” and another “domestic partnership,” except to deprive same-sex couples of the social significance of the word “marriage.” *In Re Marriage Cases*, 43 Cal.4th at 846.

¹⁶⁰ California Family C. §297.5 [includes anti-discrimination provisions and explicitly gives domestic partners the same rights and obligations as spouses with regard to children and inheritance, and makes former domestic partners the equivalent of ex-spouses]. Other states use different terms for domestic partner status, such as “civil unions.”

¹⁶¹ See Hawai’i Attorney General Legal Opinion No. 97-10 (Dec. 10, 1997) [employers are not required to extend insurance benefits to “reciprocal beneficiaries,” Hawai’i’s version of domestic partnership/civil unions], *available at* <http://hawaii.gov/ag/calendar/main/opinions>.

- Canada has legalized same-sex marriage nationwide. In response to complaints that same-sex marriage was contrary to religious beliefs and thus limited religious freedom by forcing people to accept the married status of same-sex couples, the Supreme Court made the strong statement that recognizing the equality of one group cannot, by definition, be a violation of another group's rights.
- In deciding that same-sex couples have the right to marry, the Massachusetts Supreme Court built upon the state's past recognition of various family relationships—adoption, single parents, unmarried couples with children—suggesting that this increasing realism can provide a legal foundation for same-sex marriage. The fraught racial history of the U.S. also provided legal support: when anti-miscegenation statutes (i.e. laws against interracial sex and/or marriage) were struck down, courts established that individuals' intimate relationships should not be limited by state-sponsored discrimination.
- The Massachusetts court was also persuaded by the fact that same-sex marriage reinforced the importance of the institution. By expressing reverence for marriage, same-sex supporters effectively undermined the state's argument that its law fulfilled the governmental role of protecting and promoting marriage. (Nonetheless, most states in the U.S. do not recognize same-sex unions. Same-sex marriage opponents have successfully used popular referenda to limit marriage rights.)
- Marriage alternatives such as domestic partnership may not be equivalent to marriage, but they may still offer a path to significant legal protections in jurisdictions unwilling to recognize same-sex marriage.

12) Asylum Law and Persecution Based on “a Particular Social Group”

U.S. and Canadian asylum law are both based on the 1951 United Nations Convention and the subsequent 1968 U.N. Protocol Relating the Status of Refugees.¹⁶² Under the U.S. Immigration and Nationality Act [“INA”]¹⁶³ and the Canadian Immigration and Refugee Protection Act, “refugees” eligible for asylum are:

- 1) people outside the country of their nationality who are unable or unwilling to return;¹⁶⁴
- 2) who cannot avail themselves of the protections of their previous country because of “persecution or a well-founded fear of persecution”; and
- 3) whose persecution is “on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁶⁵

In the realm of sexual health and sexual rights, this legal formulation begs the question: what is a “particular social group?” How do women fleeing persecution, as well as people fleeing persecution on account of sexual conduct, orientation or gender expression constitute a possible group? Furthermore, the definition of “persecution” is critical—in particular, the degree to which abuse by which non-state actors is included.

¹⁶² *I.N.S. v. Stevic*, (1984) 467 U.S. 407, 416; Immigration and Refugee Protection Act S.C. 2001 c. 272 [Canada].

¹⁶³ The 1968 Protocol was codified by the INA in Title 8 of the United State Code. Decisions and other sources sometimes refer to these statutes by INA section and sometimes by U.S.C. citation.

¹⁶⁴ INA § 101(a)(42); Immigration and Refugee Protection Act S.C. 2001 c. 272 s. 96. Also included, in both nations, are people without nationality who are unable or unwilling to return to the last country in which they habitually resided.

¹⁶⁵ INA § 101(a)(42) [language is very similar to the 1951 U.N. Refugee Convention].

A) Sexual Orientation as a Particular Social Group

Canada's Supreme Court has defined "particular social group" to include (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.¹⁶⁶ Although the case that asserted this definition concerned an asylum applicant's former involvement in the Irish National Liberation Army, Justice La Forest listed gender and sexual orientation as examples of particular social groups under the first, "innate or unchangeable characteristic" category.¹⁶⁷

In the U.S., sexual orientation was first recognized as a particular social group in *Matter of Toboso-Alfonso*, in which a Cuban man was regularly detained by the government and eventually threatened with four years in jail for being a homosexual.¹⁶⁸ The Board of Immigration Appeals found that the applicant's homosexuality was an immutable characteristic; a few years later the Attorney General formally recognized that homosexuals constitute a particular social group.¹⁶⁹ In another notable case, *Pitcherskaia v. INS*, the court made it clear that persecution of sexual minorities is still persecution, even if it is intended as a "cure": a Russian lesbian woman was falsely diagnosed with schizophrenia while her girlfriend was institutionalized and subjected to shock therapy.¹⁷⁰ "That the persecutor inflicts the suffering or harm in an attempt to elicit information,...for his own sadistic pleasure, ...to 'cure' his victim, or to 'save his soul' is irrelevant. Persecution by any other name remains persecution [citations omitted]."¹⁷¹

In *Karouni v. Gonzales*, which concerned a gay male asylum applicant, the government argued that "the future persecution Karouni fears would not be on account of his *status* as a homosexual, but rather on account of him committing future homosexual *acts* [italics in original]," and so he was not being persecuted for his social group.¹⁷² The court did not agree, pointing out that the government was "saddling Karouni with the Hobson's choice of returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celibacy. In our view, neither option is acceptable."¹⁷³

B) People Who Violate Gender Norms as Members of Particular Social Group

¹⁶⁶ Ward v. Canada, [1993] 2 S.C.R. 689, ¶78.

¹⁶⁷ *Id.*

¹⁶⁸ 20 I. & N. Dec. 819, 820-821 (March 12, 1990).

¹⁶⁹ *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005) [citing Memorandum from Davin A. Martin, INS General Counsel, to All Regional and District Counsel (April 7, 1996)].

¹⁷⁰ *Pitcherskaia v. INS.*, 118 F.3d 641, 643-647 (9th Cir. 1997).

¹⁷¹ *Id.* at 647 ["Motive of the alleged persecutor is a relevant and proper consideration only insofar as the alien must establish that the persecution is inflicted on him or her 'on account of' a characteristic or perceived characteristic of the alien."]. See also *Mohammed v. Gonzalez*, 400 F.3d 785, 796 ft. 15 (9th Cir. 2005) [FGM can be persecution even though it is widely accepted and widely practiced: "Whether an act is or is not persecution cannot depend on whether it is rational from the point of view of the persecutors."]

¹⁷² *Id.* at 1172.

¹⁷³ *Id.* at 1173.

Although there is a dearth of case law concerning transsexuals or discussing gender identity as a particular social group, one leading U.S. case provides some guidance. In *Hernandez-Montiel v. INS*, a gay Mexican man who dressed and behaved like a woman was raped by police officers.¹⁷⁴ The IJ found that Mr. Hernandez-Montiel had failed to show that he was part of a particular social group: “If he wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity.”¹⁷⁵ The Ninth Circuit disagreed, stating, “Sexual identity is inherent to one’s very identity as a person.”¹⁷⁶ The court went on to criticize the BIA for using “homosexual males who dress as females” in lieu of the proper social group “gay men with female sexual identities,” pointing out that gay men with sexual identities are not persecuted “simply because they may dress as females or because they engage in homosexual acts. Rather, gay men with female sexual identities are singled out for persecution because they are perceived to assume the stereotypical ‘female,’ i.e. passive role in gay relationships.”¹⁷⁷ While *Hernandez-Montiel* is more about sexual identity than gender identity, the court’s language should also apply to other asylum applicants who do not live according to gender norms.

Under Canada’s standard for particular social groups, gender identity could fall under either the “innate or unchangeable characteristic” category or perhaps be considered a group formed for reasons “fundamental to their human dignity.”¹⁷⁸

C) Women as a Particular Social Group: a Canadian Example

In 1993, Canada issued guidelines for women seeking refugee status; these were updated in 1996.¹⁷⁹ These guidelines state, “Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.”¹⁸⁰ The Guidelines place female refugee claimants into four (non-exclusive, non-exhaustive) categories:

1. Women who fear persecution on the same Convention grounds, and in similar circumstances, as men. That is, the risk factor is not their sexual status, per se, but rather their particular identity (i.e. racial, national or social) or what they believe in, or are perceived to believe in (i.e. religion or political opinion). In such claims, the substantive analysis does not vary as a function of the person's gender, although the nature of the harm feared and procedural issues at the hearing may vary as a function of the claimant's gender.

¹⁷⁴ *Hernandez-Montiel v. INS*, (9th Cir. 2000) 225 F.3d 1084, 1088.

¹⁷⁵ *Id.* at 1089 [quoting immigration judge’s decision].

¹⁷⁶ *Id.* at 1093.

¹⁷⁷ *Id.* at 1094.

¹⁷⁸ See *Ward v. Canada*, [1993] 2 S.C.R. 689, ¶78.

¹⁷⁹ *Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Updated version of the Guidelines issued by the Chairperson of the Board in accordance with subsection 65(3) of the Immigration Act) (Ottawa: 25 Nov. 1996) [updating Canadian Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, 9 Mar. 1993)]

¹⁸⁰ *Id.* § A(I)

2. Women who fear persecution solely for reasons pertaining to kinship, i.e. because of the status, activities or views of their spouses, parents, and siblings, or other family members . Such cases of "persecution of kin" typically involve violence or other forms of harassment against women, who are not themselves accused of any antagonistic views or political convictions, in order to pressure them into revealing information about the whereabouts or the political activities of their family members. Women may also have political opinions imputed to them based on the activities of members of their family.

3. Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons. In the refugee law context, such discrimination may amount to persecution if it leads to consequences of a substantially prejudicial nature for the claimant and if it is imposed on account of any one, or a combination, of the statutory grounds for persecution. The acts of violence which a woman may fear include violence inflicted in situations of domestic violence and situations of civil war.

4. Women who fear persecution as the consequence of failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin. Such laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions for the existence of a gender-defined social group. The religious precepts, social traditions or cultural norms which women may be accused of violating can range from choosing their own spouses instead of accepting an arranged marriage, to such matters as the wearing of make-up, the visibility or length of hair, or the type of clothing a woman chooses to wear.¹⁸¹

The guidelines note that “The circumstances which give rise to women’s fear of persecution are often unique to women. The existing bank of jurisprudence on the meaning of persecution is based, for the most part, on the experiences of male claimants.”¹⁸² To remedy this void, at least partly, the Guidelines point out particular evidentiary difficulties faced by women, for instance social standards that shame women prevent who report rape or domestic violence.

Although the Guidelines are not issued as law, they are authoritative: authorized by the Immigration Act, cited by courts, and must be followed unless circumstances require a different analysis.¹⁸³ In *Narvaez v. Canada (Ministre de la Citoyenneté et de l’Immigration)*, an Ecuadorian woman fled domestic violence after she learned that the local police had been bribed to eliminate records of her complaints against her husband.¹⁸⁴ When she was denied asylum, the Court reversed, noting some key provisions in the Guidelines: women may not be denied asylum just because their come from a country where women are *generally* subject to oppression, rather than one where their oppression is more individually targeted; decision-makers must keep in mind that claims based on sexual violence might be difficult to prove using “statistical data” about the home country; and decision-makers must consider evidence that the governing authorities may have ignored incidents of sexual violence.¹⁸⁵

D) Persecution by Non-State Actors and Domestic Violence

¹⁸¹ *Id.*

¹⁸² *Id.* §A(III).

¹⁸³ *Narvaez v. Canada (Ministre de la Citoyenneté et de l’Immigration)* [1995] 2 FC 55 (TD), *available at* the U.N.H.C.R. “Refworld” website, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=printdoc&docid=3ae6b6e61c> [last visited April 24, 2010].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

The Canadian guidelines' statement that decision-makers should consider whether governments have ignored sexual violence is very important in domestic violence cases, since the individual perpetrating the violence is usually a private actor rather than an agent of the state.¹⁸⁶ Asylum requires either state involvement or evidence that the government was unwilling or unable to control the persecutors.¹⁸⁷

In the U.S., attorneys have had a long struggle to fit domestic violence claims within the "particular social group" category. In the *Matter of L-R-*, a Mexican woman fled a man who beat her, raped her, and forced her to live with him.¹⁸⁸ This case provided the newly elected Obama administration with an opportunity to lay out its policy on domestic violence-based asylum claims. In its brief, the Department of Homeland Security declared that a "particular social group" could be defined according to the way in which an applicant's abuser and home country viewed the applicant's role in the domestic relationship.¹⁸⁹ The Department provided two examples of cognizable groups: "Mexican women in domestic relationship who are unable to leave" and "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."¹⁹⁰

But the Department's brief emphasized how difficult it can be to prove state involvement or state unwillingness/inability to act in the context of domestic violence claims.¹⁹¹ L-R- apparently did not report the worst abuses to the authorities, and evidence of her negative encounters with judges was diminished by the fact that a Mexican court had given her custody of her children and use of a home belonging to her abuser.¹⁹² This was insufficient to show that the government of Mexico would not or could not protect her.¹⁹³

Conclusions

- Asylum cases in US and Canada have developed a relatively responsive jurisprudence to sexual orientation and sex-based persecution, which takes into account the rights protections that are owed to persons in their home country regardless of sexual orientation or sex. Canada's broad guidelines concerning female refugees provides a particularly good example of this.¹⁹⁴ Transgender identity and gender expression are less well protected, but

¹⁸⁶ The definition of "persecution" can also be relevant in cases based on applicants' sexuality: see *Pitcherskaia*, ft. 70, and discussion in text.

¹⁸⁷ *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1071-1072 (9th Cir. 2005) [woman who was raped by gang member and did not report rape to the authorities did not show that government could not/would not intervene].

¹⁸⁸ Amended Declaration of L.R. in Support of Application for Asylum at 5-9 [redacted; no citation available], available at <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-support.pdf>.

¹⁸⁹ *Id.* at 14-16.

¹⁹⁰ *Id.* at 14.

¹⁹¹ *Id.*

¹⁹² Dept. of Homeland Security Supplemental Brief, *Matter of L.R.* at 26.

¹⁹³ *Id.* at 26-27. Not all situations require that a victim seek assistance from the authorities in her own country before requesting asylum. See *In Re S-A-* 22 I. & N. Dec. 1328, 1355 (June 27, 2000), Interim Decision No. 3433 [evidence showed Moroccan woman could not seek protection from the authorities from her violent father, or her circumstances could have worsened].

¹⁹⁴ For a summary of many cases relying on the Guidelines, see "Compendium of Decisions: Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution: Update (Feb. 2003) available from the website of the Immigration and Refugee Board of Canada, <http://www.irb.gc.ca/eng/brdcom/references/legjur/rpdspr/compendium/Pages/index.aspx> [last visited April 21, 2010].

national law is evolving to engage with an understanding of gender diversity as worthy of rights protections in the form of asylum

- Requirements for state action (or state acquiescence) may exclude asylum claims based on domestic violence. The amount of evidence a decision-maker demands in order to prove that the applicant's home country was unwilling/unable to act will determine how many domestic violence-related applications are granted. For instance, whether a woman must prove she sought police intervention unsuccessfully—and if so, whether she must do so multiple times or seek help from multiple sources—will make a big difference in the number of applications granted.
- As *Pitcherskaia* demonstrates, the definition of persecution cannot require that the persecutor intends to punish or harm. Otherwise, refugees fleeing attempts to change their sexual practices or identity will be denied protection.
- The case law of the U.S. and Canada includes sexuality as a “particular social group” by firmly declaring that sexuality is a characteristic that both *cannot* be changed (i.e. an immutable characteristic) and which people *should not have to repress* (i.e. it is still persecution even if the home country only punishes certain sexual acts, not sexual orientation per se).

IV) DECRIMINALIZATION OF SEXUALITY AND SEXUAL ACTIVITIES

1) Section Introduction: an International Perspective on Decriminalization of Sexual Activities

In almost every state, criminal law can be used not only to deter and prosecute sexual conduct understood to be violent or otherwise coercive, but also to limit private, consensual sexual conduct between adults. In the second case, criminal law is used selectively to enforce certain moral, religious or cultural standards, with arbitrary (i.e., not necessary or justifiable in a democratic society) negative impact on rights¹⁹⁵ and grave impact on sexual health. The criminalization of consensual sexual conduct between adults in private constitutes direct state interference with respect to private life; it also violates the right to equality and non-discrimination. Criminalization of consensual conduct between adults can proscribe sexual practices ('sodomy', 'unnatural offenses'¹⁹⁶), sexual conduct between same-sex partners, sexual conduct between unmarried partners, and sexual conduct outside of marital relationships.

In addition to discrimination on the basis of marital status or the partner's sex, regimes of criminalization often impose penalties on women, though not on men, for the same behavior (departures from virginity or chastity), thus constituting additional discrimination on the basis of gender. Criminal statutes prohibiting sexual conduct are often vague and non-specific in their use of language, often using euphemism instead of clear descriptions of sexual activity, thus making it

¹⁹⁵ As numerous international rights cases and authorities have noted, the use of the criminal law to impose religious or moral beliefs on citizens in regard to sexual conduct is an arbitrary and discriminatory use of the power of the state which cannot be sustained under rights review. See International human rights §, esp, discussion of Toonen and the Siracusa Principles at>>><<.

¹⁹⁶ Definitions of sodomy can include both same-sex and heterosexual anal or oral sex; definitions of unnatural sexual practices are often even broader, but generally capture a range of non-reproductive sexual practices.

difficult to know what exactly is forbidden and violating a basic principle of criminal law that laws give clear notice of what actions are prohibited.¹⁹⁷

Repeal and revision of these laws can improve sexual health. Persons whose sexual behavior is deemed a criminal offense strive to hide their behavior and relationships from agents of the state and others, not availing themselves of sexual health services on offer.¹⁹⁸ Research has documented that those engaged in sexual behavior deemed criminal evade or do not take full advantage of HIV and STI services for prevention and treatment of disease, fearing compromised medical privacy or doubting health providers' respect for confidentiality. These consequences are often exacerbated by other characteristics of the person, which render them more vulnerable to abuse by authorities under the criminal law such as disfavored sex, gender, race, ethnicity or national status. Many legal systems fail to create remedies that both eliminate immediate barriers (i.e., the stigma that criminalization causes or exacerbates) and reach the underlying basis for abuse (race, national status, sex or gender).

Similarly, seeking out sex education, contraceptive information and services, STI testing and treatment, pregnancy-related care or abortion (even when it is legally permitted) is compromised by fear of identification, arrest, and prosecution for engaging in consensual and desired sexual behavior. Furthermore, sexual practices conducted quickly and secretly to avoid detection do not foster safer sex practices or good communication between partners. Criminalization of consensual behavior is a direct impediment and barrier to the ability to access appropriate care and services for sexual health, leading to no care, self-care, or care at the hands of non-professionals, with predictably poor results.

Paradoxically, legal and policy reform to remedy discrimination against sexually stigmatized persons in other branches of the law (for example, in administrative law or constitutional equality protections) often coexist with continued criminal enforcement in some nations, leading to incomplete enjoyment of rights and continued ill-effects on health.¹⁹⁹

Moreover, the criminalization of consensual sexual conduct has additional consequences beyond its direct effect on access to and quality of care for sexual health. Criminalization intensifies and reinforces stigma against persons engaging in, or imagined to engage in, sexual conduct which is against the law. Persons or groups of persons thus stigmatized are targets of violence (sexual and non-sexual), extortion, and other violations by state and non-state agents. Blackmail is possible, with stigmatized persons afraid to report blackmail to the police or other authorities for fear of arrest. Those committing 'consensual sexual crimes' are thus targets for a range of abuses, which can be committed against them with impunity. Persons stigmatized through real or imagined violation of laws against consensual sex face reduced enjoyment of the full range of other rights, particularly rights to bodily integrity, education, expression and association, and employment. For example, impunity for police abuse has been associated with many criminal laws against same-sex conducts as well regimes criminalizing prostitution.²⁰⁰

¹⁹⁷ See the international law paper in this series.

¹⁹⁸ Sexual health services include access to health care in regard to sexually transmitted infections, HIV, contraception, abortion, and sexual function and dysfunction, as well as access to comprehensive and accurate information about sexuality. Sexual health services must incorporate principles of non-discrimination, in regard to educational content as well as access.

¹⁹⁹ [See the African paper in this series, especially South African equality of marriage cases and same sex sodomy laws.]

²⁰⁰ [see the international paper in this series, section 5 on violence , especially the Special Rapporteur on Torture]

The criminalization of sexual conduct in prison (or other custodial facilities) is complex: in some cases it claims to seek to reduce or eliminate violent, non-consensual sexual relations between prisoners or between prisoners and guards. However, it also functions as a system of control, invasion of privacy and erosion of sexual rights for persons in prison. In addition to protecting detainees from coerced sex, prisons must also create an enabling environment for maintaining sexual health. This includes, at minimum, the provision of sexual health information, including information about HIV prevention and safer sex; condoms; and contraceptives (as appropriate). Some prison systems provide for conjugal visits as a way to maintain sexual health and well-being.

The criminalization of sexual conduct between a person deemed sufficiently mature and a person deemed 'below the age of consent' is accomplished in many locations through criminal law regarding 'statutory rape', that is, criminalizing sexual conduct with a person below the age at which the younger person is deemed able to give consent. Legal frameworks regarding statutory rape are complex and vary across national contexts regarding the age at which the young person can give consent, to which sexual practices, and with what age difference between the younger and older partners. In addition, these laws often vary greatly in what sexual conduct is prohibited. Statutory rape laws often have a restrictive effect on health and rights. Their existence is used to justify denying young people their rights to health information and services essential to protecting their reproductive and sexual health, as well as their decision-making capacity. Thus, statutory rape laws must balance the objective of protecting younger persons in situations of vulnerability, while not interfering with their ability to access sexual information and engage in sexual behavior appropriate to their ages and evolving capacities.

While human rights standards set the age of marriage at 18 for men and women, the age of consent for sex is generally understood in international rights standards to be lower than the age of marriage.²⁰¹ To avoid discrimination, statutory rape laws must not impose different standards for boy and girls, or for homosexual or heterosexual activities, for differently-gendered partners, or assume *a priori* that the 'offender' in the case of two young people close in age is the male.

Criminal laws proscribing incest are found in many jurisdictions, but they reflect extremely diverse conceptions of kinship, social appropriateness, and risk. Prohibitions against incest vary greatly regarding the type of kin one must avoid having sexual relations with, reflecting important social principles of proximity and distance rather than degrees of biological relatedness. Indeed, some incest laws prohibit sexual relations between individuals who have no biological relationship whatsoever, although they are legal relatives (like step-parents or in-laws). Some incest laws prohibit sexual contact between adults and young people under the age of consent (in which case the sexual contact could not be seen as consensual), and the law serves as protection against abuse. Other laws more expansively forbid sexual conduct between persons in specified kinship relationships, even if they are all adults and without evidence of abuse.

Specific criminalization of HIV transmission (through sexual and other behavior) has recently become a popular state response to HIV, although a rights and health analysis suggests many problems with this approach and that the appropriate application of existing criminal law (on

²⁰¹ See the international law paper in this series.

assault, for example) is more suitable and effective. Criminal statutes vary greatly in terms of what is prohibited: intentional sexual conduct (i.e., intending to cause transmission and infection) or sexual behavior that is deemed reckless. To avoid criminal penalty, some laws require the infected person to announce his or her status to the potential partner prior to sexual relations, while others require taking protective steps (using a condom). Across such laws, the definition of prohibited sexual practices is often vague, violating basic principles of criminal law (that conduct must be described with sufficient clarity to give notice). Other laws explicitly (or de facto) are used to address only specific populations perceived to be particularly prone to ‘risky behavior’ (for example, persons in sex work or men who have sex with men), such that the laws may be discriminatory in substance or application.

Although laws criminalizing intentional or careless HIV transmission might serve as strong statements of social disapproval about harmful or reckless sexual behavior, the most significant effect on sexual health is that such laws discourage people from being tested and knowing their HIV status. Weighing the very small number of cases prosecuted under these laws against their impact suggests legislators turn to them as symbolic rather than functional interventions—nonetheless, their negative rights and health consequences, in part through discriminatory policing and associated abuses, are felt by already stigmatized populations.

2) Decriminalization of Same-Sex Conduct and Other Consensual Sexual Acts in Canada

After a widely-publicized Supreme Court decision upholding criminal punishment for consensual homosexual conduct provoked a public outcry, Canada’s criminal code was amended in 1969 in an omnibus reform bill.²⁰² Previously, “buggery” and “gross indecency with another person” were both punishable offenses.²⁰³ The new bill exempted from punishment “any act committed in private between (a) a husband and his wife or (b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act.”²⁰⁴ At this time, the age of consent for anal intercourse was 21, but it was lowered to 18 in 1988.²⁰⁵

3) Age of Consent in Canada

The 1969 reforms still left illegal consensual sex involving more than two people or homosexual sex under the age of twenty-one.²⁰⁶ A discrepancy exists today, in a somewhat different form: according to the current Criminal Code, the age of consent for sexual activity in general is 16, but the age of consent for anal sex is 18, except between a married couple.²⁰⁷ The law does not

²⁰² David Kimmel and Daniel J. Robinson, *Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada*, 16(1) CANADIAN JOURNAL OF LAW AND SOCIETY 147 (2001) [discussing *Klippert v. Queen*, [1967] S.C.R. 822 and Criminal Law Amendment Act, 1968-1969 S.C., ch. 38, § 7 (Can.), known as Bill C-150.]

²⁰³ *Id.* at 149.

²⁰⁴ *Id.* at 160 [quoting former Criminal Code S. 149A(1)]. The current law, R.S.C. 1985, c. C-46, s. 159(1),(2), states that “Every person who engages in an act of anal intercourse is guilty of an indictable offence” unless the act was performed “in private, between (a) husband and wife, or (b) any two persons, each of whom is eighteen years of age or more.”

²⁰⁵ Criminal Law Amendment Act, 1968-1969 S.C., ch. 38, § 7 [Can.] For a more thorough discussion of the developments leading up to the amendment, known as Bill C-150, see David Kimmel and Daniel J. Robinson, *Sex, Crime, Pathology: Homosexuality and Criminal Code Reform in Canada*, 16(1) CANADIAN JOURNAL OF LAW AND SOCIETY 147 (2001) and *Klippert v. Queen*, [1967] S.C.R. 822.

²⁰⁶ Kimmel and Robinson, p. 163.

²⁰⁷ R.S.C. 1985, c. C-46, s. 151(1), 159

distinguish between hetero- or homosexual anal sex. Both the Ontario High Court and the Quebec Court of Appeal have held that this provision of the Criminal Code is unconstitutional. In *R v C.M.*,²⁰⁸ the Ontario High Court held that the provision is inconsistent with s 15 of the Canadian Charter of Rights and Freedoms because it unjustifiably discriminates on the basis of age. Judge Abella went further, saying that the provision:

arbitrarily disadvantages gay men by denying them until 18 a choice available at the age of 14 to those who are not gay, namely, their choice of sexual expression with a consenting partner ... Anal intercourse is a basic form of sexual expression for gay men. The prohibition of this form of sexual conduct...accordingly has an adverse impact on them. Heterosexual adolescents 14 or over can participate in consensual intercourse without criminal penalty; gay adolescents cannot.²⁰⁹

In *R. v. Roy*,²¹⁰ adopting Judge Abella's reasoning, found the provision of the Canadian Criminal Code setting the age of consent at 18 unconstitutional both on privacy and equality grounds. The Court was not convinced that anal intercourse, as compared with other (oral and vaginal) forms of sexual relations engaged in by young people, presented a particular health risk necessitating special treatment under the criminal law.

4) Decriminalization of Same-Sex Conduct in the United States

The road to decriminalization of same-sex conduct was much longer in the United States. In 1986, the US Supreme Court decided *Bowers v. Hardwick*, which upheld a Georgia statute outlawing oral and anal sex.²¹¹ Although the law applied to both hetero- and homosexual couples, the court dealt only with the latter, finding no "fundamental right to engage in homosexual sodomy."²¹²

Despite this ruling, state legislatures and courts moved toward removing prohibitions on same-sex conduct throughout the 1980s and 1990s.²¹³ Then, in 2003, the U.S. Supreme Court struck down a Texas law criminalizing oral and anal intercourse between people of the same sex.²¹⁴ The case, *Lawrence v. Texas*, involved two men convicted of engaging in sexual acts in the home of one of the defendants.²¹⁵

Lawrence v. Texas overturned *Bowers*, following the line of cases (*Griswold, Eisenstadt, Roe, Casey*—all discussed in Section III(5)) which found a constitutional right to privacy.²¹⁶ The *Lawrence* court relied on the Due Process Clause of the U.S. Constitution, which holds that no one may be "deprived of life, liberty, or property, without due process of law..."²¹⁷

"The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making private sexual conduct a crime. The Due Process Clause gives them the full right to engage in their conduct without intervention of the government."²¹⁸

²⁰⁸ (1995) 23 O.R. (3d) 629

²⁰⁹ at [21].

²¹⁰ [1998] R.J.Q. 1043

²¹¹ 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003) (see below).

²¹² *Id.* at 191.

²¹³ *Lawrence v. Texas*, 539 U.S. 558, 570 (2003) [describing changes to state statutes]; *People v. Onofre* (1980) 51, N.Y.2d 467, 415 N.E.2d 936 [New York the first state to decriminalize sodomy by declaring unconstitutional a penal statute which outlawed both homosexual and heterosexual sodomy (i.e. oral and anal sex).]

²¹⁴ *Lawrence*, 539 U.S. 558.

²¹⁵ *Id.* at 562-563.

²¹⁶ *Id.* at 559-560.

²¹⁷ U.S. Constitutional Amend. 5, 14.

²¹⁸ *Lawrence*, 539 U.S. at 578.

It is significant that a plurality of the *Lawrence* court did not analyze the Texas law under the Equal Protection Clause, which among other things deals with discrimination between classes of people. Instead, the decision stated that the Texas law would be invalid even if applied equally to homosexuals and heterosexuals.²¹⁹ The issue was the invasion of individuals' rights, not the discrimination between groups.²²⁰

5) Decriminalization of Other Consensual Sexual Acts in the United States

About half the states have laws the books criminalizing adultery, but they are unenforced.²²¹ Indeed, the American Law Institute, a body which proposes influential and oft-adopted model codes, described the crime of adultery to be "a dead-letter statute" in 1955.²²² There are also unenforced laws outlawing sex between unmarried adults still languishing in the penal codes. Although *Lawrence* did not expressly overturn these laws, some courts have found them unconstitutional. The Virginia Supreme Court, for instance, found that a law criminalizing intercourse between unmarried people "improperly abridge[d] a personal relationship that was within the liberty interest of persons to choose."²²³

6) Age of Consent in the United States

The age of consent in U.S. states is usually between 14 and 18 years old.²²⁴ Like Canada, U.S. courts have been similarly skeptical of laws that assign a different age of consent to same-sex acts than to heterosexual sex.

In *Kansas v. Limon*, the Kansas Supreme Court examined a statutory rape law that provided reduced penalties when the individuals involved were close in age—but only for people of opposite sex.²²⁵ The defendant, Mr. Limon, was a week shy of his 18th birthday when he had oral sex with a boy who was about to turn 15.²²⁶

²¹⁹ *Id.* at 575 ["Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."] One Justice, although concurring in the majority judgment, argued that the Texas law should be overturned based on the Equal Protection Clause, while leaving the *Bowers* in place. *Id.* at 579-583 [concurrency of Justice O'Connor].

²²⁰ An earlier, seminal U.S. Supreme Court case on same-sex rights, the 1996 decision *Romer v. Evans*, struck down an amendment to Colorado's state constitution precluding any laws giving gays, lesbians, and bisexuals protection against discrimination. *Romer v. Evans*, 517 U.S. 620, 624 (1996). *Romer* relied on the U.S. Constitution's Fourteenth Amendment, which declares that no state can "deny to any person within its jurisdiction equal protection of the laws," finding that the Colorado amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.... A State cannot so deem a class of persons a stranger to its laws." (*Id.* at 635; U.S. Constitutional Amend. 14.)

²²¹ Melissa Ash Haggard, *Adultery: a Comparison of Military Law and State Law and the Controversy this Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469 (1998). For a particularly archaic example see Minnesota Stat. Ann. §609.36 [adultery is a married women having sex with a man not her husband]; for a list of these laws, see Haggard, ft.4.

²²² Haggard, 37 Brandeis L.J. 469 at 481.

²²³ *Martin v. Zihlerl*, (2005) 269 Va. 35, 41-42, 607 S.E.2d 367, 370 [applying *Lawrence*]. See also *People v. Onofre*, 51, N.Y.2d 467 (1980), 415 N.E.2d 936 (N.Y. 1980)[penal statute which outlawed both homosexual and heterosexual sodomy found unconstitutional].

²²⁴ See Montana C. §45-5-501(ii)(d) [age of consent is 16]; Massachusetts Gen. Laws ch. 272 §4 [criminal to induce someone under 18 "of chaste life" to have sexual intercourse]; see also 10 USCS §920 [military law defines rape of a child as a sexual act with anyone under 12; no one under 16 can consent to sexual activity.]

²²⁵ 280 Kan. 275, 122 P.3d 22, 24.

²²⁶ *Id.* at 277.

The court acknowledged that the state has broad powers to protect minors, but declared that *Lawrence v. Texas*, “did not discuss the often-cited justifications of public health and morality, [which] tells us that those interests are either not legitimate interests at all, or more likely, that they are not sufficient to overcome an individual’s right to liberty and privacy.”²²⁷ Since there is nothing to suggest that these justifications are more persuasive when applied to minors, the state’s interest in distinguishing between hetero- and homosexual sex “fails under the holding in *Lawrence* that moral disapproval of a group cannot be a legitimate state interest.”²²⁸ The court struck down the law as unconstitutional under the Equal Protection clauses of the U.S. and Kansas Constitutions.²²⁹

But other state supreme courts have upheld laws which criminalize only certain types of juvenile sex. The Supreme Court of North Carolina considered a law that penalized teenagers’ commission of “crimes against nature”— the boy and girl in question could legally engage in vaginal penetration, but oral sex was a “crime against nature” prohibited by law.²³⁰ The court stated that the government had a legitimate interest in “promoting proper notions of morality” and fostering “a healthy young citizenry.”²³¹ The court did not explain why oral sex could be rationally considered less moral or less healthy than vaginal intercourse.

CONCLUSIONS

- *Lawrence v. Texas*, and the chain of privacy cases that preceded it, demonstrates U.S. courts’ gradual recognition of sexual privacy. Although *Lawrence* rests on the particular language of the U.S. Constitution—and thus may be of limited relevance to other nations—the debate about why the Texas law should be struck down illustrates two different ways of considering decriminalization of same-sex activity. If discrimination is the primary focus, laws may still restrict consensual activities in a nondiscriminatory fashion.²³² But when an individual right such as sexual privacy is the central issue, criminal anti-sodomy laws cannot survive, no matter how broadly or impartially written.
- Taking a much faster route to decriminalization, Canada decriminalized both same-sex and opposite-sex sexual conduct by statute. However, Canada’s criminal law still has a higher age of consent for anal sex than for all other sexual activities. A similar disparity has appeared in the U.S., as states attempt to impose different penalties on underage sexual activity depending on the sex of the people involved or the type of sex act. Some state and provincial courts have addressed this disparity by ruling such laws unconstitutional on one or both of the grounds discussed in *Lawrence*: equality and privacy.

²²⁷ *Id.* at 298.

²²⁸ *Id.* at 296-300.

²²⁹ *Id.* at 306-307.

²³⁰ *In Re R.L.C.*, 361 N.C. 287, 294 (2007), 643 S.E.2d 920, 923-924. (N.C. 2007) NOTE: the court did not address whether the statute was unconstitutional on its face under *Lawrence*, because that issue had not been presented at a lower court level. For a discussion of other post-*Lawrence* decisions related to teenage sex, see Daniel Allender, *Applying Lawrence: Teenagers and the Crimes Against Nature*, 58 DUKE L. J. 1825 (April 2009)

²³¹ *In Re R.L.C.* 361 N.C. at 296.

²³² See Justice O’Connor’s concurrence in *Lawrence*, 539 U.S. at 581-582 [under the Equal Protection Clause, moral disapproval is not sufficient basis for criminalizing homosexual sodomy when heterosexual sodomy is not punished].

- Another issue raised by these cases is the question of how much justification a government needs in order to enact a law that intrudes on protected rights—specifically, what *kind* of justification can be offered when regulating sexual behavior. The Kansas Supreme Court has suggested that moral disapproval of a group is never an adequate justification.

7) Statutory Rape Laws in the U.S. and Canada

Some U.S. states simply deem all sex with people under a given age to be criminal, the age of consent generally being between 14 and 18.²³³ The severity of the crime is usually based on the difference in age between the two individuals.²³⁴ Many states, however, are moving away from a blanket criminalization of teenage sex. Instead, they now require an age disparity before the sex activity is deemed to be statutory rape.²³⁵ These provisions, sometimes called “Romeo and Juliet” statutes, create an exception to statutory rape laws for people close in age. The size of this disparity determines whether the law criminalizes consensual sex between peers, or only sex between children/teenagers and significantly older adults.

Canada’s criminal code is similar to the states with “Romeo and Juliet” exceptions. In May 2008, the Canadian Criminal Code²³⁶ was amended to raise the age of consent to engage in sexual activity from 14 to 16 years (with the exception of anal sex—see above).²³⁷ It is a criminal offense to touch “for a sexual purpose,” a person under 16, either directly or with an object, or to invite “with a sexual purpose” a person of that age to touch themselves or anyone else, whether directly or with an object.²³⁸ However, children aged twelve or thirteen cannot be prosecuted for those crimes, absent special circumstances.²³⁹ Furthermore, consent is a full defense to the crime when the alleged victim is 12 or 13 years old, and the accused is less than two years older, and when if the victim is 14 or 15 years old, and the accused is less than 5 years older.²⁴⁰ There is also an exception if the alleged victim is at least 14 and married to the accused, or if the two individuals are common-law spouses, or if they have been cohabiting and are expecting a child.²⁴¹

In any case, consent will *not* be valid if the accused and the victim are in a relationship of trust, authority or dependency, or a relationship that is exploitative of the alleged victim.²⁴² Again, the difference in ages between the individuals is critical: “A judge may infer that a person is in a

²³³ See Montana C. §45-5-501(ii)(d) [age of consent is 16]; Massachusetts Gen. Laws ch. 272 §4 [criminal to induce someone under 18 “of chaste life” to have sexual intercourse]; see also 10 USCS §920 [military law defines rape of a child as a sexual act with anyone under 12; no one under 16 can consent to sexual activity.]

²³⁴ Cal. Penal Code §261.5 [criminal to have sex with someone under 18; if less than three years between individuals it is a misdemeanor, more than three can be a misdemeanor or felony];

²³⁵ W. Va. Code § 61-8B-3, 61-8B-5 [felony sexual assault in the first degree includes intercourse with a person under 12 when the perpetrator is over 14; sexual assault in the third degree includes intercourse with a person under when the perpetrator is over 16, at least 4 years older than the victim, and not married to the victim]; Colorado §18-3-402 [criminal if one person is under 15 and the other person at least four years older; also criminal if one person is at least 15 and the other person 10 years older, although that incurs less prison time];

²³⁶ R.S.C. 1985, c. C-46

²³⁷ Section 150.1(2), (2.1).

²³⁸ R.S.C. 1985, c. C-46, s. 151 [sexual interference]; 152 [invitation to sexual touching], R.S.C. 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 3; 2008, c. 6, s. 54(b)

²³⁹ R.S.C. 1985, c. C-46, s. 151.1(3) [“No person aged twelve or thirteen years shall be tried for an offence under section 151 or 152 or subsection 173(2) unless the person is in a position of trust or authority towards the complainant, is a person with whom the complainant is in a relationship of dependency or is in a relationship with the complainant that is exploitative of the complainant.”]

²⁴⁰ R.S.C. 1985, c. C-46, s. 151

²⁴¹ *Id.* s. 150.1(2.1)(b), (2.2).

²⁴² *Id.* s. 150.1 (2) and (2.1).

relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including (a) the age of the young person; (b) the age difference between the person and the young person; (c) the evolution of the relationship; and (d) the degree of control or influence by the person over the young person.”²⁴³

A) Statutory Rape and Gender

In *Michael M. v. Superior Court of Sonoma County*, a 1981 case, the U.S. Supreme Court upheld a gender-specific statutory rape law which defined the crime as intercourse with a woman under 18 who was not the perpetrator’s spouse.²⁴⁴ Since that time, however, nearly all the states have moved away from gender-based statutory rape definitions to the age-based statutes described above. In Canada, the laws described above are all gender-neutral.

Still, gender issues persist. When laws criminalize an activity as common as teenage sex, not everyone can be prosecuted—so prosecutors must decide who is a victim and who a perpetrator.²⁴⁵ In a recent Massachusetts case, a 14-year-old boy was convicted of statutory rape for consensual sexual activity with two 12-year-old girls and one girl who was about to turn 12.²⁴⁶ Though Massachusetts had an age-of-consent law which made the girls’ behavior equally illegal, the girls were not prosecuted; the Massachusetts Supreme Court declared that the boy should have been allowed to investigate a possible selective (i.e. discriminatory) prosecution claim.²⁴⁷ And in Canada, debate surrounding the passage of the law that raised the age of consent suggested that the legislature was particularly focused on preventing sexual behavior by adolescent girls.²⁴⁸ Proponents of the bill concentrated on the internet predators and pedophiles rather than addressing the health consequences of imposing criminal penalties on a 15 year-old who has consensual sexual contact with a 13 year-old or the 20 year old who has consensual sexual contact with a 15 year old.²⁴⁹

B) Underage Sex and Sex Offender Registration Laws

When statutory rape laws intersect with sex offender registration laws (see Sec. VIII(4)(D)), people can become permanently tarred with the title of sex offender even for consensual sex acts.²⁵⁰ A few U.S. states have made efforts to exclude statutory rape by juveniles from registration requirements, in recognition of this problem, and the federal sex offender registration statute states that “an offense involving consensual sexual conduct is not a sex offense...if the

²⁴³ R.S.C. 1985, c. C-46, s. 153(1.2).

²⁴⁴ 450 U.S. 464. The case was brought under the 14th Amendment to the U.S. Constitution, which requires that no citizen be denied equal protection of the laws. California has since revised its law, which is no longer gender specific. Cal. Penal Code §261.5.

²⁴⁵ For issues of selective prosecution of statutory rape, see Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313, 320-329 (2003) [arguing that race, gender, and class effect chances of prosecution] .

²⁴⁶ *Commonwealth v. Bernardo B.*, 453 Mass. 158, 160 (2009), 900 N.E.2d 834, 837 (Mass. 2009); M.G.L.A. 265 §23 [“rape and abuse of a child” includes sexual intercourse with a child under 16].

²⁴⁷ *Commonwealth v. Bernardo B.*, 453 Mass. at 173, 900 N.E.2d at 846.

²⁴⁸ Carol Dauda, *Legislating Morality Through the Age of Consent: the Comparative Politics of Generation in Canada, the UK and the US*, APSA 2009 Toronto Meeting Paper p. 25-27, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451701.

²⁴⁹ *Id.* at 21.

²⁵⁰ See *Sex Laws: Unjust and Ineffective*, THE ECONOMIST, Aug. 6, 2009. [describing the case of a 17 year-old girl in Georgia who had to register as a sex offender after have consensual oral sex with a 15 year-old boy; Georgia later enacted a Romeo and Juliet clause].

victim was at least 13 years old and the offender was not more than 4 years older than the victim.”²⁵¹ Canada has prevented sexual offender registrations from being open to the public, which helps to protect underage offenders (see Sec. VII(4)(D).)

CONCLUSIONS

- Canada and the U.S. wanted to prevent older people from sexual contact with minors, under the assumption that this behavior could be exploitative. By exemptions people who were close in age from statutory rape laws, Canada and some U.S. states narrowed the statutory rape statutes to avoid criminalizing consensual sexual activity between peers.
- When sexual activity between minors close in age is a criminal offense, prosecutors must either 1) consider both participants in sex act to be criminal or 2) decide who is the victim and who the perpetrator, often without any legal guidelines. In the former situation, the protective aspect of statutory rape laws is defeated, while in the latter situation traditional assumptions about gender (or other categories) may undermine a statute’s neutrality.
- The U.S. has started to recognize that the advent of sexual offender registration and related restrictions is on a collision course with the country’s penalties for statutory rape. States may revise the sexual offender registration requirements without addressing the underlying statutory rape/age of consent laws that defined the crimes in the first place.

8) Penalties for Transmission of HIV in Canada

Non-disclosure of known²⁵² HIV status by an infected person is considered criminal, if engaging in some forms of sexual activity. The leading case on HIV transmission as a criminal act is *R. v. Cuerrier*,²⁵³ in which the accused was charged with aggravated assault, having allegedly had unprotected sexual intercourse with two non-infected partners, neither of whom had contracted the virus. The Supreme Court of Canada held that:

[the] accused’s failure to disclose that he is HIV-positive is a type of fraud which may vitiate consent to sexual intercourse... The dishonest action or behaviour must be related to the obtaining of consent to engage in sexual intercourse -- in this case unprotected intercourse... Without disclosure of HIV status there cannot be a true consent. The consent cannot simply be to have sexual intercourse. Rather, it must be consent to have intercourse with a partner who is HIV-positive. The extent of the duty to disclose will increase with the risks attendant upon the act of intercourse.²⁵⁴

This holding has been applied to convict several HIV positive people who have sexual intercourse with non-infected individuals of aggravated assault²⁵⁵ and aggravated sexual assault.²⁵⁶ In all but one of these cases, at the trial the victim tested negative for the HIV virus. Penalties can be severe:

²⁵¹ 42 U.S.C. § 16911(5)(C); Hawai’i Rev. Stat. §846E-1 [no registration for conduct that is criminal only because of the age of the victim, if the perpetrator was under 18 at the time]; Kentucky Stat. §17.500(3)(b) [no registration for conduct that is criminal only because of the age of the victim, if the perpetrator was under 18 at the time].

²⁵² No cases have settled whether the standard is known or “should have known.” Because fraud is the underlying offense, the presumption is that the accused did have actual knowledge and chose to omit sharing that knowledge. If one has reason to believe s/he has been exposed to HIV and does not disclose, whether or not s/he has been tested or received a result, that individual may be under a duty to disclose his/her uncertain status.

²⁵³ [1998] 2 S.C.R. 371.

²⁵⁴ *Id.* at 3.

²⁵⁵ *R. v. Smith*, 2004 BCCA 657; *R. v. Williams*, 2006 ONCJ 484; *R. v. Lamirande*, 199 Man. R. (2d) 299.

²⁵⁶ *R. v. Nduwayo*, 2006 BCSC 1972.

conviction for aggravated assault where the defendant had unprotected intercourse and failed to disclose his or her HIV-positive status usually results in between one and eleven years of incarceration.²⁵⁷

As a result of the holding in *R. v. Cuerrier*, subsequent cases turn on the “significant risk” non-disclosure of HIV status may pose for transmission. Non-disclosure need not lead to the transmission of HIV for a criminal charge if precautionary measures are taken, for example, criminal penalty may depend on whether the intercourse involved the use of condoms (or, in the language of the opinions, whether the intercourse was “protected” or “unprotected”).²⁵⁸ In *R. v. Edwards*, the Court said, “The Crown acknowledges the unprotected oral sex is conduct at a low risk that would not bring it within s.268(1) of the Criminal Code and had only unprotected oral sex taken place, no charges would have been laid.”²⁵⁹ Thus, there seems to be no legal duty to disclose HIV status to partners if the sexual acts pose “no risk.” (e.g. mutual masturbation).

9) Penalties for Transmission of HIV in the United States

With a few exceptions, U.S. law only considers unlawful actions to be crimes when the people acting have the requisite mental state: when they *intend* to act or, in some cases, when they know about a significant risk but recklessly ignore it.²⁶⁰ HIV exposure can sometimes fall within generally applicable criminal laws, when the HIV-positive individual acts with a sufficiently culpable mental state. For instance, a 1998 case concerned a man who was indicted for “wanton endangerment,” the crime of creating “a substantial danger of death or serious physical injury to another person” with conscious disregard for the risk involved.²⁶¹ The defendant was accused of repeatedly having sex with his lover over a two year period; he knew he was HIV-positive but kept that information to himself.²⁶² A Kentucky appellate court found that these allegations fell within the criminal statute.²⁶³

Despite the fact that HIV exposure can sometimes be prosecuted under general criminal laws, states have also enacted statutes that refer specifically to HIV. From 1994 to 2000, the U.S. federal government provided funds to states for HIV prevention and treatment, on the condition that states certify that their criminal laws were “adequate to prosecute any HIV infected individual” who knowingly exposed someone through sexual activity, needle-sharing, or the donation of blood,

²⁵⁷ *R. v. Williams*, 2006 ONCJ 484 at 7.

²⁵⁸ See *R. v. Edwards*, 2001 NSSC 80, 4-10: “X’ evidence is that the anal sex was unprotected. Mr. Edwards’ evidence is that the anal sex was protected”...“What this case is about is whether or not the Crown has established beyond a reasonable doubt that “unprotected” anal intercourse took place between these two men”; *R. v. Nduwayo*, 2006 BCSC 1972 at 3: “The jury was instructed that there was a legal duty on Mr. Nduwayo to disclose his HIV positive status if he had unprotected sexual intercourse with any complainant. They were instructed that there was no legal duty on Mr. Nduwayo to disclose his HIV positive status if he used condoms at all times.”

²⁵⁹ *R. v. Edwards*, 2001 NSSC 80 at 4.

²⁶⁰ See generally Model Penal Code §2.02 [defining different mental states]

²⁶¹ *Hancock v. Commonwealth of Kentucky*. 998 S.W.2d 496, 498 (Ky. App. 1998) [citing KRS §§ 501.020(3), 508.070(1).]

²⁶² *Id.* at 497.

²⁶³ *Id.* at 499.

semen or breast milk.”²⁶⁴ By the time that particular provision was repealed in 2000, all the states had met the certification requirement.²⁶⁵

Some of these laws criminalize HIV exposure only when the infected person intentionally tried to give someone the virus.²⁶⁶ More commonly, states criminalize the broader category of *knowingly* exposing someone to HIV.²⁶⁷ In either case, the focus is on the mindset of the defendant rather than the results of his or her act: exposure is criminalized regardless of whether the victim is actually infected.²⁶⁸

Another frequent strategy employed by U.S. states is “sentence enhancements” (i.e. longer sentences) when someone knowingly/intentionally exposes another person to HIV while sexually assaulting that person. Although there are exceptions, HIV exposure is usually only prosecuted in conjunction with other sexual crimes such as sexual assault and prostitution—when it is prosecuted at all.²⁶⁹ A recent attempt to find all criminal prosecutions of HIV-related crimes, whether under general laws or HIV-specific statutes, turned up only 316 prosecutions over a fifteen-year period.²⁷⁰ In most states, HIV exposure is not a crime as long as infection was disclosed beforehand—HIV positive people may have sex without running afoul of the law, but it must be consensual and fully informed sex.²⁷¹

Type of law	Transmission required?	State of mind required	Defense available	Penalty
General criminal statutes such as assault, battery, wanton/reckless	Some (but not all) general criminal statutes require	Would depend on the language of the statute, but criminal laws usually require some degree of	Would depend on the language of the statute, but knowing consent by a	Criminal sentence

²⁶⁴ Ryan White CARE Act, 42 U.S.C. 300ff-47 (repealed 2000) [though the certification requirement was repealed, the Act as a whole has been reauthorized].

²⁶⁵ Leslie E Wolf and Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?* 25 WHITTIER L. REV. 821, 840-841 (2004). Not all states have laws that refer specifically to HIV, instead having broader laws that also apply to other STDs.

²⁶⁶ See Rev. Code Washington §9A.36.011 [assault in the first degree includes HIV exposure or transmission “with the intent to inflict great bodily harm”]

²⁶⁷ See Iowa Code §709C.1 [it is a crime for a person who knows he or she is HIV positive to have sexual contact, donate bodily fluids, or share drug needles, unless the exposed person knew the infected person was HIV-positive]; Florida Stat. §796.08 [prostitution or procurement of prostitution is a felony if the person knows he or she is HIV positive]. For a chart of states’ current laws, including the penalties imposed, see Andrew M Francis and Hugo M. Mialon, *The Optimal Penalty for Sexually Transmitting HIV* 10 AM. L. & ECON. REV. 388, 396 (2008) [arguing for penalties for both knowing and unknowing transmission, with no penalty for exposure alone].

²⁶⁸ Only one state criminalizes transmission rather than exposure, in a broad law that criminalizes the knowing introduction of any “communicable or infection disease into any county, municipality, or community....” Utah C. §26-6-5; see Francis and Mialon chart at 396.

²⁶⁹ Wolf and Vezina at 865-868. In some states knowing HIV exposure is prosecuted as a sentence-increasing factor in other crimes, rather than a distinct offense.

²⁷⁰ Scott Burris, Leo Beletsky, Joseph Bursleson, Patricia Case and Zitz Lazzarini, *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZONA STATE L.J. 467, 488-489 (2007) [relying on news reports and reported cases.] One significant case in which an HIV-specific statute actually was prosecuted was the recent Iowa Supreme court case *State v. Musser*, 721 N.W. 2d 734, 741 (Iowa 2006) [25 year sentence not unconstitutional “cruel and unusual punishment” even though sexual partner was not actually infected].

²⁷¹ Iowa Code § 709C.1(5); See Francis and Mialon at 396. Disclosure of HIV status is generally an affirmative defense, not an aspect of the prosecutor’s initial case.

endangerment, attempted murder ²⁷²	bodily harm	intent or at least a conscious disregard for the risk to another person	competent adult is usually a defense to a crime ²⁷³	
HIV-specific statutes	No	Intent to expose or knowing exposure, depending on the state	Disclosure of status, and consent by partner	Criminal sentence
HIV-specific “sentence enhancements”	No	Intent to expose or knowing exposure, depending on the state	Disclosure of status, and consent by partner ²⁷⁴	Increase in the length of a related sexual crime
General civil tort law	Plaintiff must show some compensable harm	Negligence: knew or reasonably should have known	Any steps that were reasonable under the circumstances	Payment of damages to partner

Outside of criminal law, states also provide civil remedies for people injured by the transmission of sexually transmitted diseases, including HIV (see the introduction for a brief explanation of the U.S. tort system). Since the civil system is concerned with negligence rather than knowing or intentional crime, people infected with STDs (including HIV) may be held financially responsible when they knew *or reasonably should have known* about the infection yet failed to take reasonable steps to protect their partners.²⁷⁵ In other words, people with reason to believe they are infected may have a duty to inform their partner, even before they receive a conclusive diagnosis.²⁷⁶

CONCLUSIONS

- People can sometimes be prosecuted for HIV exposure under generally applicable criminal statutes, provided that the defendant had the necessary mental state (knowing or intentional, depending on the jurisdiction).
- In Canada, failure to inform a partner about one’s known HIV status can constitute criminal assault. However, this has been somewhat limited: some Canadian cases have found that nondisclosure would not be criminal as long as the HIV-positive individual used a condom.
- U.S. state statutes that specifically criminalize HIV exposure do so only when the exposure was knowing or intentional—accidental or reckless exposures are not included. Theoretically, this has the advantage of protecting defendants who unwittingly expose their

²⁷² The Model Penal Code, adopted in some states, defines assault as “attempts by physical menace to put another in fear of imminent serious bodily injury.” Model Penal Code §211.1(1)(c). Assault also includes purposely, knowingly, or recklessly (i.e. with conscious disregard for the risk) causing or attempting to cause bodily injury to another—in some jurisdictions this is a separate crime called “battery.” Model Penal C. §211.1(1)(b).

²⁷³ See Model Penal C. §2.11 [defense of consent as a general principle].

²⁷⁴ Sentence enhancements are often imposed in conjunction with crimes of nonconsensual sex, but in situations such as prostitution this defense would apply

²⁷⁵ *John B. v. Superior Court*, 38 Cal.4th 1177 (Cal. 2006) [a person may be liable for the negligent transmission of HIV in the same way he or she would be liable for the transmission of other infectious diseases: if he/she knew or should have known about the infection and failed to act reasonably]; *M.M.D. v. B.L.G.* 467 N.W.2d 645 (Minn. 1991) [recurring genital sores and a medical evaluation that the sores might be herpes gives rise to a duty to abstain from sex or warn sexual partners].

²⁷⁶ *Id.*

partner, but the disadvantage of creating a disincentive for HIV testing. Realistically, the reach of these laws is limited by the fact that they are rarely enforced.²⁷⁷

10) Sexual Health in Custody

A) Sexual Health in Custody in Canada

The Correctional Services of Canada, a federal government agency, establishes health service standards, relating to the physical facilities, personnel and their training.²⁷⁸ On January 1, 1992, condoms were officially made available at all federal prisons.²⁷⁹ Initially, inmates were hesitant to pick up condoms for fear of being identified as engaging in homosexual activity and resultant discrimination. In response, and as a result of a recommendation by the Expert Committee on AIDS and Prisons, the federal prison system announced in 1994 that condoms, dental dams and water-based lubricant would become more easily and discreetly available. In 2004, the Correctional Service of Canada (CSC) also issued a Commissioner's Directive mandating that "non-lubricated, non-spermicidal condoms, water-based lubricants, dental dams and bleach are [to be] discreetly available to inmates at a minimum of three locations, as well as in all private family visiting units."²⁸⁰

Both federal and provincial prisons allow conjugal visits.²⁸¹ Indeed, the national Corrections and Conditional Release Act states, "an inmate is entitled to have reasonable contact, including visits and correspondence, with family, friends and other persons from outside the penitentiary," subject to "reasonable limits."²⁸² However, the provincial prison systems do not necessarily have the same emphasis on discreet provision of provision of condoms and related items as the federal system. Ontario, Alberta, Newfoundland and Nova Scotia make condoms available only through their prison health services and Saskatchewan allows each prison to decide how it will distribute condoms. In New Brunswick, Nunavut and Prince Edward Island condoms and dental dams are not made available to prisoners.²⁸³

B) Sexual Health in Custody in the U.S.

Sexual contact between inmates and staff is forbidden, since such sex could involve coercion or affect prison operations.²⁸⁴ But many states go even further, outlawing sexual contact between

²⁷⁷ See Burris et al. [finding that HIV-related criminal laws had no effect on sexual behavior].

²⁷⁸ <http://www.csc-scc.gc.ca/text/prgrm/fsw/hlthstds/healthstds7-eng.shtml>

²⁷⁹ Mary McLean Jordan, *Care to Prevent HIV Infection in Prison: A Moral Right Recognized By Canada, While the U.S. Lags Behind*, 37 UNIVERSITY OF MIAMI INTER-AMERICAN L. REV. 319, 323 (2006).

²⁸⁰ CANADIAN HIV/AIDS LEGAL NETWORK, HIV AND HEPATITIS C IN PRISONS, (4th ed. 2008) available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1309>.

²⁸¹ Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 357 (2009).

²⁸² Corrections and Conditional Release Act, S.C. 1992, c.71(1).

²⁸³ CANADIAN HIV/AIDS LEGAL NETWORK, HIV AND HEPATITIS C IN PRISONS, (4th ed. 2008), available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1309>; See also, Ralph Jurgens, *HIV/AIDS in Prison: Final Report, HIV/AIDS Legal Network and Canadian AIDS Society* (1996) available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=585>.

²⁸⁴ Pennsylvania Dept. of Corrections, *Sexual Harassment of our Sexual Contact with Prisoners*, Policy No. DC-ADM008 ["A claim of consent will not be accepted as an affirmative defense for engaging in sexual harassment or sexual contact with an inmate."]; Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUMBIA J. GENDER & L. 185, 200 (2005).

prisoners as well.²⁸⁵ States are also free to limit prisoners' conjugal visits: "while the basic right to marry survives imprisonment, most of the attributes of marriage—cohabitation, physical intimacy, and bearing and raising children—do not."²⁸⁶ Indeed, federal prisons do not allow conjugal visits.²⁸⁷

Perhaps it should not be surprising that a country with many prohibitions on incarcerated sex would have trouble acknowledging the public health implications of the sex that goes on regardless of the rules. Prisoners have a higher rate of HIV infection than the general population, yet hardly any states make condoms available to inmates.²⁸⁸ Although cities have stepped into the breach, distributing condoms to prisoners themselves or working with nonprofits to do so, prisoners outside of those municipalities have no access to condoms.²⁸⁹

Although inmates have a constitutional right to adequate medical care, the Third Circuit has found that they have no right to STD testing upon request.²⁹⁰ In that case, a Kentucky policy dictated that only prisoners with a strong likelihood of HIV exposure were tested upon request; an inmate who was not deemed high-risk sued when a nurse refused to test him.²⁹¹ The court found no constitutional violation: the nurse's actions did not constitute "deliberate indifference to [a] strong likelihood" of serious illness or injury.²⁹²

On the other hand, many states have mandatory HIV/STD prisoner screening.²⁹³ In California, inmates must be tested for HIV if they were convicted of sexual assault crimes or prostitution, or if custodial staff learn of risky behaviors.²⁹⁴ Even before conviction, defendants accused of sexual crimes can be ordered by a court to undergo HIV testing upon the request of the alleged victim.²⁹⁵

11) Sexual Assault in Custody

A) U.S. and Canadian Federal Responses to Sexual Assault in Custody

In 2003, the U.S. Congress enacted the Prison Rape Elimination Act [PREA], an attempt to "establish a zero-tolerance standard" for prison rape.²⁹⁶ The Act required data collection and other information gathering about rape in federal and state prisons; a series of studies followed, confirming that sexual abuse was a significant problem in adult prisons, jails, and immigrant detention centers, and even more likely in juvenile facilities.²⁹⁷ As a result of this research, in June

²⁸⁵ Smith at 200; see 15 Cal. C. Reg. §300 [excluding inmates from laws decriminalizing private, consensual sexual activity].

²⁸⁶ Gerber v. Hickman, 291 F.3d 617, 621 (9th Cir. 2002) [incarcerated man had no constitutional right to artificially inseminate wife, who was not incarcerated].

²⁸⁷ Ellenbogen, *supra*, at 356.

²⁸⁸ Leslie R. Ramos, *Beyond Reasonable: A Constitutional and Policy Analysis of Why it is Necessary and Prudent to Allow Nonprofits or Health Care Agencies to Distribute Sexual Barrier Protection Devices to Inmates*, 39 McGEORGE L. REV. 329, 336-338 (2008); Theodore M. Hammett, Sofia Kennedy & Sarah Kuck, NATIONAL SURVEY OF INFECTIOUS DISEASES IN CORRECTIONAL FACILITIES: HIV AND SEXUALLY TRANSMITTED DISEASES (2007) available at www.ncjrs.gov/pdffiles1/nij/grants/217736.pdf.

²⁸⁹ *Id.* at 336-337.

²⁹⁰ Doe v. Wigginton, 21 F.3d 733 (3rd Cir. 1994).

²⁹¹ *Id.* at 738-739.

²⁹² *Id.* at 738-739.

²⁹³ Hammett et al., *supra*.

²⁹⁴ California Penal C. §§1201.6, 1202.1, 7516.

²⁹⁵ California Health and Safety C. §121055.

²⁹⁶ 42 U.S.A. §15602(1).

²⁹⁷ Prison Rape Elimination Act (PREA), codified at 42 U.S.C. § 15601-15609; National Prison Rape Elimination Commission Report (June 2009), available at <http://www.nicic.org/prea> pp. 4-5, 16-24.

of 2009 The National Prison Rape Elimination Commission proposed a number of standards; the Attorney general has one year to review these proposed standards and promulgate a binding set of rules.²⁹⁸

The proposed standards impose evidence-gathering protocols, prohibit the hiring or promotion of staff who have engaged in coercive sex, require evaluations of whether the physical grounds contributed to abuse, and limit searches by opposite-sex staff.²⁹⁹ The standards also include specialized training requirements, require screening of inmates at risk of victimization, and impose a reporting process that allows inmates to report abuse easily and privately while receiving “unimpeded access emergency medical treatment and crisis intervention services.”³⁰⁰ The investigation process must be “prompt, thorough, objective and conducted by investigators who have received special training in sexual abuse investigations,” and any outside business or agencies that provide services to the custodial institution must be contractually bound to follow the PREA standards.³⁰¹ Once the Attorney General issues the final rules, states’ access to PREA grant money will be contingent on their compliance with those rules.³⁰²

The principles guiding Canadian corrections, according to statute, include “that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence” and “that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements.”³⁰³ By statute, “The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person’s sense of personal dignity.”³⁰⁴ In practice, prison rape is not well documented in Canada, which makes it difficult to determine the effectiveness of Canadian policies.³⁰⁵

B) Civil Remedies for Sexual Assault in Custody

Civilly, U.S. inmates may sue the government for damages for sexual assault suffered while in custody, even if the attack comes from a fellow prisoner, although such suits are difficult to win. In *Farmer v. Brennan*, Ms. Farmer, a male-to-female transsexual, was beaten and raped while housed with male inmates.³⁰⁶ She claimed that the prison’s failure to protect her constituted a violation of the U.S. Constitution’s Eighth Amendment protection against “cruel and unusual

²⁹⁸ *Id.* at 23-24.

²⁹⁹ *Id.* at appendix B [NPREC standards for adult institutions, juvenile facilities, and community corrections facilities], 215-236 [see standards PP-4, PP-6, RP-1, OR-3 for first responder duties].

³⁰⁰ *Id.* See standards TR-2 through TR-3 [training], SC-1 [screening] RE-1 [inmate reporting], RE-3 [third party reporting], RE-3, OR-5 [protection against retaliation], MM-1 [access to emergency medical and mental care].

³⁰¹ *Id.* See standards IN-2 [investigations] PP-2 [contracting with other entities].

³⁰² 42 U.S.C. §15605(d).

³⁰³ Corrections and Conditional Release Act, C-44.6 (assented to June 18, 1992), 1992 c. 20, s. 4; 1995, c. 42, s. 2(F).

³⁰⁴ *Id.* s. 70; see also s. 69 [“No person shall administer, instigate, consent to or acquiesce in any cruel, inhumane or degrading treatment or punishment of an offender.”]

³⁰⁵ Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 344-346 (2009) [the Correctional Services of Canada and the bureau responsible for national statistics, Statistics Canada, do not record incidents of inmate sexual victimization].

³⁰⁶ 511 U.S. 825, 829-830 (1994).

punishments.”³⁰⁷ “Prison officials have a duty to protect prisoners from violence at the hands of other prisoners” under the Eight Amendment, since “[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.”³⁰⁸

However, the Supreme Court held that U.S. prison officials must have acted (or failed to act) with “deliberate indifference,” which means that the official actually knew of a substantial risk of serious harm.³⁰⁹ An official who should have known of the risk, even one who recklessly disregarded the truth, could not be held liable.³¹⁰ The court noted that evidence of Ms. Farmer’s young age and feminine appearance, along with prison’s history of violence, could be used to show that prison officials were aware of the risk of sexual assault.³¹¹ In cases with less visible risk factors, however, victims would be hard pressed to demonstrate officials’ actual knowledge.

Canada has a lower standard for holding correctional institutions liable, requiring only negligence.³¹² Furthermore, the Corrections and Conditional Release Act, quoted above, creates legal duties to Canadian prisoners that may result in liability when negligently breached.³¹³ However, these legal remedies seem to be infrequently used.³¹⁴

CONCLUSIONS

- Canada provides condoms and other contraception to incarcerated people and allows conjugal visits. The U.S. has no such policy. Indeed, states have been willing to introduce mandatory H.I.V. testing in jails and prisons—yet some states have been unwilling to provide testing to all inmates who request it. Even where H.I.V. testing programs are in place, (and HIV prevalence demonstrated), those programs have not led to the obvious next step of providing condoms.
- According to the PREA-initiated investigations, sexual assault is rampant in U.S. custodial institutions. If the Attorney General enacts the Commission’s recommendations, they will provide a framework for prison rape reform. The emphasis on specific processes—multiple channels for reporting assault, forensic standards, data collection and audits—will hopefully provide a practical backbone for the broad “zero tolerance” standard of the original law.
- Canada’s efforts to eliminate sexual assault in prisons includes statutory guidance requiring penitentiaries to respect the needs of different groups of inmates and to ensure a safe environment. Significantly, people retain all their rights while incarcerated, except those which are *necessarily limited* as a part of incarceration.

³⁰⁷ *Id.* at 832-833.

³⁰⁸ *Id.* at 833-834 [citations omitted].

³⁰⁹ *Id.* at 843.

³¹⁰ *Id.*

³¹¹ *Id.* at 848-849.

³¹² *Wild v. Canada*, 2004 FC 342, 256 F.T.R. 420 ¶ 32 [correctional facilities owe a duty of care to inmates, which is breached whenever “the acts of omissions of the defendant fall below the standard of conduct of a reasonable person of ordinary prudence under the circumstances.”]

³¹³ *Id.* ¶29-32 [citing provisions including s. 70, quoted above, requiring “safe, healthful” living conditions.]

³¹⁴ Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 352 (2009).

- Although U.S. case law recognizes that custodial staff have a duty to protect inmates from sexual harm, the “deliberate indifference” standard means that staff may not be civilly liable for assaults by fellow inmates even where the staff acted unreasonably or recklessly. Although Canada’s standard is lower (negligence), civil lawsuits based on harm to inmates are also rare in that country. Even if inmates are not limited in their ability to sue, their ability to recover damages can be limited or precluded by the difficulty of suing government entities.

V) STATE REGULATION OF MARRIAGE AND FAMILY

1) Section Introduction: an International Perspective on Legal Regulation of Marriage and Family Laws as Relevant to Sexual Health

International human rights standards note the fundamental right to ‘marry and found a family’ and reiterate the centrality of the family as a core unit of society.³¹⁵ Marriage is an important institution in many societies, although in practice its structure is diverse. While marriage can be the basis of family, it is increasingly recognized that marriage is not the only basis of family; moreover, families can take many forms. And while both marriage and family are important institutions, persons wishing not to marry or found a family must be acknowledged as full participants in society and entitled to full rights, including sexual rights.

While marriage and family are often treated as linked institutions in both law and in many social and religious systems, they also need to be considered separately to assess fully their impacts on the sexual health and rights of all affected persons, including parent(s), children, and guardians. Marriage and family law play a major role in promoting or restricting the health and rights, including sexual health, of many people, both married and unmarried, and their children and other dependents. In addition, marriage regulations may promote or be detrimental to physical, emotional or social well-being of the spouses.

In contemporary rights terms, marriage can be generally understood as a voluntary union which creates specific bonds of legal rights and responsibilities, and which, as a consensual union, can also be dissolved by decision of either partner with due process and respect for the rights of the partners. Importantly, under rights principles, the legal bonds of marriage are created through contracts made by persons endowed by law with equal powers of “free and full consent” to enter marriage.

In human rights, the focus on equal, free and full consent for all persons, female and male, to decide if, when, and with whom to enter into, or dissolve marriage as an aspect of their dignity and rights, has important consequences for sexual health. Marriage partners have equal rights to determine their sexual conduct in marriage, and should have the means to act on their decisions, including through access to services and with the support of the law, for voluntary sexual conduct. Equality of rights in marriage is an especially important aspect of rights for the sexual health of women, and it is important to note that equality between men and women in marriage may require affirmative actions by the state.³¹⁶ The equal right of women and men to control their fertility,

³¹⁵ UDHR article 16; ICESCR article 10, ICCPR article 23, CRC Preamble, CRPD article 23.

³¹⁶ CEDAW, for example, notes the importance of temporary special measures to ensure substantive equality between men and women, noting that equality does not mean identical treatment in many areas of public and private life, See, General

therefore, underscores the importance of laws that promote access to sexual and reproductive health information and services; women's and men's right to access and use family planning, and rights to legal and other remedies for any abuses that may occur within marriage and on its dissolution.

A health and rights approach has implications for state practices (de jure or de facto) that exclude adults from marriage or conversely allow persons to be coerced into marriage. Mandatory, pre-marital health tests (to determine HIV status, for example) or other tests of physical characteristics (virginity tests, which may be privately administered but tolerated by the state) are unjustified interferences with privacy and impede core rights to bodily integrity. Categorical exclusion from marriage on these or other grounds linked to health and physical characteristics (disability, for example) violates principles of non-discrimination.³¹⁷ Other laws which allow persons to be coerced into marriage by abuse or disadvantage, such as when an accused or convicted rapist is absolved by marriage to his victim, should be seen to violate non-discrimination rights as well as being harmful to the personal well-being of the coerced person.

The focus on legally meaningful consent of adults as the basis of marriage has important implications for the rights and health of adolescents and young women in particular, as 18 years is now the internationally agreed upon minimum age for marriage.³¹⁸ Early marriage has been linked to early childbearing, with increased rates of morbidity and maternal death for young women and girls. In addition, married young women lose access to resources, including education, health services, and mobility.³¹⁹ Using law as a tool for rights and health, states are working toward the elimination of child marriage, with best practices coupling law reform, registration of births and other administrative changes with outreach and strong legal, social and health supports for young married girls and women.

Moreover, while marriage is a key site for sexual activity for many people, rights and health protections must extend to consensual sexual conduct before or outside of marriage (see criminalization of consensual sexual conduct, above). In addition, procreative sex and reproduction are not limited to married couples, with implications for the rights and health of both parents and children born outside of marriage. (See below for discussion of rights of children).

Increasingly, it is clear that a rights and health approach to marriage invalidates constructions of marriage that require sexual activity between spouses as a matter of proprietary right. Obligatory or coerced sex in marriage has many negative health consequences including unprotected and unsafe sex, unwanted pregnancy and HIV transmission, with implications for mental as well as physical health. [See marital rape in §5 on violence]. Rights and health-based approaches support the trend toward laws supporting consensual sexual activity within marriage,³²⁰ which is linked

Recommendation 25, UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), 2004, available at: <http://www.unhcr.org/refworld/docid/453882a7e0.html> [accessed 29 March 2010]

³¹⁷ Advocacy of mandatory premarital HIV-testing as a way of protecting women's health and rights in marriage is misplaced; interventions are better directed to supporting women's full and free decision to marry, or when and under what conditions to have sex within marriage.

³¹⁸ See the discussion of CEDAW and CRC at International section <<>>; See also "Early Marriage, Child Spouses", Innocenti Centre Digest, No. 7 (2001) and WHO reports/in public health literature review.

³¹⁹ *Id.*

³²⁰ These include laws such as marital rape laws, equality between women and men and laws providing for services for married women seeking to exercise their rights to speech, association, property etc. See WHO VAW report>>>><<<<

with each partner's ability to negotiate for and use condoms; have access to and the means to use comprehensive family planning, and access to comprehensive and accurate sexual health information.

A wide range of laws may regulate marriage in any given country: family, personal status, and criminal laws, as well as health regulations and customary laws. In addition, an extensive set of legal rights may depend on marital status, such as rights to immigration, social security, healthcare, insurance rights, and access to confidential medical records, as well as inheritance, property disposition, custody and control of children, visitation rights, and decision-making for incompetent patients.

These various regimes have grave impacts on the rights and sexual health of marriage partners, and are often gender-specific in their discriminatory effect. Many legal regimes governing entry and exit from marriage operate so that often women are not only denied bodily autonomy but also face conditions which undermine their sexual health: when they are coerced into marriage, or are compelled by custom or law when widowed to re-marry, or conversely when law or custom allows them to be shunned or otherwise socially ostracized after divorce or widow-hood. In places where sexual activity outside of marriage is strongly stigmatized, widowed or divorced women who are constrained from marriage may in effect be excluded from the ability to enjoy sexual relations in the future.

Of particular importance to health are marriage regimes which treat married women as legal minors or dissolve their rights into the rights and privileges of the male spouse, particularly those regimes which disallow women access to healthcare services (through requiring male or spousal consent); which bar in law or in practice prosecution or other intervention against an abusive spouse, including for coercive sex; or which restrict widows or divorced women from equal powers over property, inheritance, or control or decisions over children, etc.³²¹

On a different note, constitutional or family law provisions that recognize or deny access to marriage to same sex couples not only heavily condition the way the state regulates sexuality and sexual life (see above, section 1), but also may either deny or grant specific health-related benefits based on marital status. In many countries, marriage defines the entitlement to a wide range of social rights and benefits; excluding same-sex partners from health benefits or other legal entitlements deprives them of services and conditions essential to the highest attainable standards of health because of relationship status or sexual orientation.³²²

Moreover, health and rights analyses increasingly highlight the need for recognition of alternative forms of family, as these varied forms of family provide important economic resources and social support to many people. States must ensure that access to appropriate services, as well as conditions of equality, security and freedom necessary for health for all members of the family, are available to all kinds of families. Families formed outside of marital or other intimate partner relationships, such as when a grandparent or other kin cares for children of their extended family,

³²¹ [from S. Fabeni, 5-2009 Concept paper for WHO]

³²² Notably, some state regimes allocating social benefits conditional to marriage may also deny unmarried, cohabiting heterosexual partners access to benefits; others accept unmarried cohabiting heterosexual partners as akin to spouses (if meeting other conditions such as duration of cohabitation) for the purpose of benefits. Such disparate treatment—particularly in regard to pensions, access to housing and other conditions for health-- have been determined to be discriminatory. (see §§§ international human rights and Young v Australia, discussed in the other papers in this series.)

need recognition and support, including appropriate authority to make decisions in the child’s best interest, and access to the means to ensure their sexual health and freedom from abuse.

Because single women are often in this caregiver role in alternative families, sex-based discrimination against the caregiver has negative effects on the well-being of children. Same-sex couples who are raising children and whose relationship is not recognized as a marriage also fall into this concern for alternative families. Conversely, persons in alternative families who face domestic violence or sexual exploitation (as when members of extended families work as domestics, e.g.) also need to be recognized as persons deserving of legal interventions and safeguards such as protection or other orders intervening in the family. Such provisions are essential to promoting basic health and rights, as well as specific sexual health concerns.

It is clear, however, that children have full rights regardless of the marital status of their parents.³²³ In many circumstances, the health, of the child (including her or his sexual health and protection from abuse) requires respect and equal protection for parents’ ability and right, irrespective of marital status, or different or same-sex partnership. to make decisions for and with the child, in his or her best interest,, including on access to services, treatment and information.

2) Legal Regulation of Marriage and Divorce in the United States

A) U.S. State Law, Limited by the Constitution: Prohibition on Racial, National Origin, and Religious Restrictions on Marriage

Family law in the United States, including marriage, is generally regulated at the state level. State laws prohibit incest and plural marriage, determines age requirements, and dictate whether people of the same sex can marry.

As a result of U.S. history (namely slavery and the Civil War), the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution (“no state shall...deny to any person within its jurisdiction the equal protection of the laws”) dictates that no law can prohibit marriages based on racial classifications.³²⁴ Writing about the “anti-miscegenation” laws—relics of slavery and segregation that prohibited sex or marriage between people of different races—the U.S. Supreme Court wrote:

Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteen Amendment, is sure to deprive all the State’s citizens of liberty without due process of law.”³²⁵

Equal Protection clause jurisprudence treats laws classifying people by national origin and alienage to be the same way as laws based on racial classification, and religious classifications are also just as constitutionally suspect.³²⁶

³²³ CRC, articles 1 and 2.

³²⁴ 14th Amend. U.S. Const.; *Loving v. Virginia*, 388 U.S. 1 (1967).

³²⁵ *Id.* at 12.

³²⁶ *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971)[state welfare laws conditioning welfare benefits on citizenship and imposing residency requirement on aliens violated Equal Protection Clause]; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-533 (1993).

B) Marital Property and Divorce in the United States

Either spouse can seek a “no-fault” divorce in the U.S., meaning that a court may grant divorce based only on the breakdown of the marriage relationship (the only exception is the state of New York).³²⁷ Some states, particularly in the western part of the country, were influenced by Spanish colonial law and established a community property system. In those states, assets acquired during a marriage are usually “community property” owned and controlled equally by both spouses, and which must be divided equally upon dissolution of the marriage. Wisconsin’s statute, for instance, states:

- (1) **General.** All property of spouses is marital property except that which is classified otherwise by this chapter
- (2) **Presumption.** All property of spouses is presumed to be marital property.
- (3) **Spouse's interest in marital property.** Each spouse has a present undivided one-half interest in each item of marital property....³²⁸

Among the states that do not use the community property system, laws often require an equitable division of property between the spouses. According to Florida’s law, “in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors....”³²⁹ These factors include the duration of the marriage, the parties’ financial circumstances, “contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker,” interruptions of a spouse’s career or education and the “contribution of one spouse to the personal career or educational opportunity of the other,” among other things.³³⁰ Other states do not have any presumption in favor of equal division.³³¹

3) Legal Regulation of Marriage and Divorce in Canada

Canada, like the U.S., has no-fault divorce—but unlike the U.S., this is established by a *national* Canadian divorce law.³³² However, the provinces have jurisdiction over property distribution at the end of a relationship.³³³ Marital property is treated similarly to the community property system

³²⁷ See for example Michigan Compiled Laws §552.6(1) [“A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. In the complaint the plaintiff shall make no other explanation of the grounds for divorce than by the use of the statutory language.” Some states also let spouse file for divorce on fault-based grounds, which may affect the award of spousal support.

³²⁸ Wisconsin Statute 766.31.

³²⁹ Florida Stat. §61.075(1)

³³⁰ *Id.*

³³¹ Massachusetts General Law 208 §34 [in determining amount of alimony or assignment of property, the court should consider “the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.”]

³³² Divorce Act §8 [divorce may be granted if there is a “breakdown of a marriage,” which may be established if “the spouses have lived separate and apart for at least one year immediately preceding the divorce and were living separate and apart at the commencement of the proceeding,” among other grounds].

³³³ JAMES G. MCLEOD & ALFRED A. MAMO, ED. MATRIMONIAL PROPERTY LAW IN CANADA, ch. I-3.

described above, in which property is generally divided equally between the spouses during a divorce.³³⁴

A) Marital Property and the Death of a Spouse

Although the U.S. and Canada have different rules for the distributions of assets after death, both nations have protections for the surviving spouse. In both Canadian province and U.S. community property states, a surviving spouse is entitled to his or her one-half share of the community property.³³⁵ The surviving spouse may well receive more than that amount, either by will or by the rules of intestacy, but this rule ensures that, at a minimum, a spouse cannot be deprived of his or her half of the marital property, regardless of the wishes of the deceased.

CONCLUSIONS

- Both Canada and the United States allow no-fault divorce, which allows spouses to legally end their relationship without having to prove adultery, violence, or some other specific cause.
- Laws for division of property after divorce (or after the death of one spouse) are designed to promote an equitable division of assets between the two parties.

4) Structures of Marriage and Family (Consent/Incest/Plural Marriage)

A) Consent

U.S. residents may marry persons of the opposite sex at the age of majority (18), though some states allow people under 18 to marry with the permission of their parents and/or the courts.³³⁶ The age requirements are the same for men and women.³³⁷

The age of consent to marriage in Canada is governed by the provinces and territories.³³⁸ In each region, the age of consent to marriage is either 18³³⁹ or 19³⁴⁰ years, with exceptions. In most regions, people over the age of 16 years can marry with parental consent.³⁴¹ In Alberta, the

³³⁴ See for example Family Law Act (Ontario) R.S.O. 1990, c. F.3, s. 5 (7) “The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties....”

³³⁵ *Beudoin v. Trudel*, O.R. 1 (Ontario 1937), 1 D.L.R. 216.

³³⁶ Richard A. Leiter, ed. *Annulment and Prohibited Marriage*, in NATIONAL SURVEY OF STATE LAWS at 463 (The Gale Group, 2008). The only exception to the age of 18 is Mississippi, which has a marriage age of 21.

³³⁷ *Id.*

³³⁸ Since 2005, this includes same-sex marriage: see above.

³³⁹ Alberta: Marriage Act, R.S.A. 2000, c. M-5, s 18; Manitoba: Marriage Act, C.C.S.M. c. M50, s 18; New Brunswick: Marriage Act, R.S.N.B. 1973, c. M-3, s 19(1); Ontario: Marriage Act, R.S.O. 1990, c. M.3, s 5(2); Prince Edward Island: Marriage Act, R.S.P.E.I. 1988, c. M-3, s 18; Quebec: Civil Code of Québec (C.C.Q.), S.Q. 1991, c. 64, Saskatchewan: Marriage Act, 1995, S.S. 1995, c. M-4.1, s 25(1).

³⁴⁰ British Columbia: Marriage Act, R.S.B.C. 1996, c. 282, s 28; Newfoundland: Solemnization of Marriage Act, R.S.N.L. 1990, c. S-19, s 19; Northwest Territories: Marriage Act, R.S.N.W.T. 1988, c. M-4, s 43; Nova Scotia: Solemnization of Marriage Act, R.S.N.S. 1989, c. 436, s 17(1)(c); Yukon: Marriage Act, R.S.Y. 2002, c. 146, s 40(1).

³⁴¹ Alberta: Marriage Act, R.S.A. 2000, c. M-5, s 17; British Columbia: Marriage Act, R.S.B.C. 1996, c. 282, s 29; New Brunswick: Marriage Act, R.S.N.B. 1973, c. M-3, s 19(1); Newfoundland: Solemnization of Marriage Act, R.S.N.L. 1990, c. S-19, s 18(a); Nova Scotia: Solemnization of Marriage Act, R.S.N.S. 1989, c. 436, s 20(1)(a); Ontario: Marriage Act, R.S.O. 1990, c. M.3, s 5(2); Prince Edward Island: Marriage Act, R.S.P.E.I. 1988, c. M-3, s 19(1); Quebec: Civil Code of Québec (C.C.Q.), S.Q. 1991, c. 64; Saskatchewan: Marriage Act, 1995, S.S. 1995, c. M-4.1, s 25(1).

Northwest Territories and Prince Edward Island couples can marry at any age if the young woman is pregnant or has given birth³⁴² and in Newfoundland, a court can grant a couple at any age permission to marry if the young woman is pregnant.³⁴³ In Nova Scotia, Manitoba and Saskatchewan, courts can grant people under the age of 16 permission to marry for other reasons.³⁴⁴ In the Northwest Territories, the consent of the responsible Minister is required for a person under 15 to marry. In both the Yukon and the Northwest Territories a marriage of anyone under the age of 19 years is valid if “the marriage has been consummated or the contracting parties have, after the ceremony, cohabited as husband and wife.”³⁴⁵

B) Common-Law Marriage and Formal Marriage

Historically, U.S. states allowed “common-law marriages,” i.e. the legal recognition of a marriage relationship created by agreement and cohabitation rather than ceremony, license, or contract. Common law marriage has declined: of the few states that recognize it today, some restrict it to marriages before a given date.³⁴⁶ In lieu of common law marriage, all states have created a formal process by which the government legally recognizes a couple’s relationship.

Although marriages may be performed during a civil or religious ceremony of the participants’ choice, U.S. states treat marriage as a legal relationship conferred by the government: marriage license requirements allow the state to confirm that the marriage is legal and is entered into with the full consent of both parties.³⁴⁷ The Uniform Marriage and Divorce Act, enacted in several states, requires that the parties to a marriage pay a fee to satisfy the appropriate clerk that they are the correct age and not otherwise legally barred from marrying before receiving a marriage license.³⁴⁸

In addition to the legal obligations and privileges created by marriage, married couples also enjoy a special evidentiary privilege: in both the U.S. and Canada, spouses cannot be compelled to testify in court about private communications between them.³⁴⁹ “[C]ivil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution.”³⁵⁰ “A marriage may be contracted, maintained, invalidated or dissolved only as provided by law.”³⁵¹

In most of Canada, couples may register a common-law relationship, and even without registering they will be legally considered common-law partners under the law after a certain number of years

³⁴² Alberta: Marriage Act, R.S.A. 2000, c. M-5, s 17(1); Northwest Territories: Marriage Act, R.S.N.W.T. 1988, c. M-4, Marriage Act, R.S.N.W.T. 1988, c. M-4, s 21; Prince Edward Island: Marriage Act, R.S.P.E.I. 1988, c. M-3, s17(2).

³⁴³ Newfoundland: Solemnization of Marriage Act, R.S.N.L. 1990, c. S-19, s 12(8).

³⁴⁴ Manitoba: Marriage Act, C.C.S.M. c. M50, s 18(1)(d); Nova Scotia: Solemnization of Marriage Act, R.S.N.S. 1989, c. 436, s 21(2); Saskatchewan: Marriage Act, 1995, S.S. 1995, c. M-4.1, s 19(1); Northwest Territories: Marriage Act, R.S.N.W.T. 1988, c. M-4,

³⁴⁵ Northwest Territories: Marriage Act, R.S.N.W.T. 1988, c. M-4, s 43(4); Yukon: Marriage Act, R.S.Y. 2002, c. 146, s 40(4).

³⁴⁶ Dan Gatti, ed., *Eight Annual Review of Gender and Sexuality Law: Family Law Chapter: Marriage and Divorce*, 8 GEO. J. GENDER & L. 669, 673-674 (2007).

³⁴⁷ See Arkansas C. §9-11-203 [county clerks must confirm that marriage applicants are entitled to a marriage license before providing one]; 9-11-212 [criminal misdemeanor to apply for and obtain a marriage license without the consent of the other party]; 9-12-201 [marriage void if a party is incapable of consent because of age or understanding, or because consent was obtained by force or fraud].

³⁴⁸ U.L.A. MARR & DIVORCE §203.

³⁴⁹ Trammel v. U.S., 445 U.S. 40 (1980) [one spouse is free to waive this evidentiary privilege without the consent of the other spouse]; Canada Evidence Act R.S. 1985 c. C-5 s.4(3).

³⁵⁰ Goodridge v. Dept. of Pub. Health, 440 Mass 309, 321 (Mass. 2003) [discussing marriage in the state of Massachusetts].

³⁵¹ U.L.A. Marr & Divorce §201.

of conjugal cohabitation.³⁵² These partners have statutory property rights and responsibilities.³⁵³ This stands in sharp contrast to the United States, where courts have fashioned limited, equitable remedies to allow unmarried partners a shared property interest. Although about half of the states have case law creating some kind of legal relationship between cohabitants, an unmarried plaintiff seeking a share of his or her partner's property will face an uphill battle.³⁵⁴

C) Consanguinity

In most U.S. states, family members may not marry if they are more closely related than second cousins; in a few states, first cousins may marry.³⁵⁵ These marriage laws are reinforced with criminal statutes penalizing knowing incest.³⁵⁶ Some jurisdictions apply their consanguinity statute even to people who are related by adoption rather than blood.³⁵⁷

In Canada, linear relatives, siblings and half-siblings, including by adoption, are not permitted to marry.³⁵⁸ Incest is a crime, defined as: 'knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person' except that 'no accused shall be determined by a court to be guilty of an offence under this section if the accused was under restraint, duress or fear of the person with whom the accused had the sexual intercourse at the time the sexual intercourse occurred.'³⁵⁹ "Brother" and "sister" are defined to include half-siblings.³⁶⁰

CONCLUSIONS

- Although there are some exceptions, in general Canadian and U.S. jurisdictions allow people under 18 to marry only in certain, specific cases (parental/court consent, childbirth, pregnancy). In addition, some jurisdictions set a lower age limit, under which people cannot marry under any circumstances.
- In practice, the childbirth/pregnancy criteria suggest that heterosexual marriage is granted different age exceptions than same-sex marriage—and that, even in countries that have moved away from equating marriage with procreation, that concept still lingers.
- By moving from informal common law marriage to government-issued marriage licenses, U.S. states formalized marriage. This allowed states to ensure that all legal requirements were met, including consent. However, it can pose a problem for

³⁵² See for example, R.S.M. 1987 c. L90 s. 1 [3 years required in Manitoba]

³⁵³ See for example R.S.M. 1987 c. M45 s. 2.1 [Manitoba Family Property Act]

³⁵⁴ Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309 (2008).

³⁵⁵ *Id.* at 385; See Ariz. Rev. Stat. §25-101 [prohibits marriages between "parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews and between first cousins," but allows first cousins to marry if both are over the age of 65 or if one partner is sterile].

³⁵⁶ See Alabama C. §13A-13-3 [incest is marriage or intercourse with someone known to be an ancestor or descendant, sibling, step-child or step-parent by blood, half blood or adoption; or an aunt, uncle, nephew or niece by blood or half blood.]

³⁵⁷ Uniform Marriage & Divorce Act §207(a)(2). A marriage is prohibited "between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or the whole blood, or by adoption." This Act, a model code, was adopted by several states.

³⁵⁸ Marriage (Prohibited Degrees) Act, S.C. 1990, c. 46, s 2(2).

³⁵⁹ Criminal Code, R.S.C. 1985, c. C-46, s 155.

³⁶⁰ *Id.* s. 155(4).

couples who never marry. Canada has addressed those couples by creating legal rights and responsibilities for partners who register and/or cohabit. This prevents unfair outcomes when an income-generating partner leaves the relationship or dies, or whenever one partner needs legal recognition of the relationship (for instance, to make health care decisions, receive pension benefits, etc.)

5) Polygamy: Conflicts Between Freedom of Religion and Criminal Law

Polygamy is illegal in the U.S. and Canada. In both countries, polygamy prosecutions have arisen from the practices of dissenting Mormon sects.

A) Polygamy in the United States

Bigamy and polygamy became a significant legal and political issue in the nineteenth century, with the rise of Mormonism in the United States.³⁶¹ In the 1878 U.S. Supreme Court case *Reynolds v. U.S.*, one of the few marriage cases decided on constitutional grounds, a man convicted of being married to two women argued that his faith in the Church of Jesus Christ of the Latter-Day Saints (also known as the Mormon Church) demanded plural marriage.³⁶² Although the First Amendment to the U.S. Constitution guarantees the free exercise of religion, the court found that Mr. Reynolds was not exempt from the criminal law against bigamy and polygamy.³⁶³

Over the years, U.S. jurisprudence has developed to navigate situations in which a religious practice is incompatible with the general laws. The current standard holds that a generally applicable law is valid even when it incidentally burdens a particular faith.³⁶⁴ No law can be targeted at a specific religious practice, however, unless the law is narrowly tailored to serve a compelling government interest.³⁶⁵

Today, U.S. states continue to outlaw bigamy and polygamy through statutes and state constitutions.³⁶⁶ Federally, “[a]ny immigrant who is coming to the United States to practice polygamy” is ineligible for admission into the country.³⁶⁷

B) Polygamy in Canada

Practicing polygamy is a criminal offense in Canada, as is celebrating, assisting or being a party to a rite, ceremony, or contract purporting to sanction a polygamous marriage.³⁶⁸ To be guilty of polygamy, it is not necessary that the parties to the relationship had or intended to have sexual intercourse, and “no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or on the trial of the accused.”³⁶⁹ Nonetheless, there are communities in Canada that openly practice polygamy, such as

³⁶¹ See *Reynolds v. U.S.*, 98 U.S. 145 (1878).

³⁶² *Id.* at 161-162. The contemporary Church of the Latter Day Saints does not endorse polygamy.

³⁶³ *Id.* at 167.

³⁶⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-533 (1993) [Florida ordinance intended to outlaw the animal sacrifices practiced by a Santarí congregation was unconstitutional].

³⁶⁵ *Id.*

³⁶⁶ See *White v. State of Utah*, 41 Fed.Appx. 325 (Utah 2002) [challenge to constitutionality of Utah’s law against polygamy failed under *Reynolds* and more recent 10th Circuit precedent]; Uniform Marriage and Divorce Act §207(a)(1).

³⁶⁷ 8 USC § 1182(a)(10)(A).

³⁶⁸ *Ibid.*, s 293(1).

³⁶⁹ *Ibid.*, s 293(2).

the Fundamentalist Church of Jesus Christ of Latter Day Saints (known as the FLDS), in Bountiful, British Columbia. Although polygamy in that community first came to the attention of the government in 1990, it was not until 2008 that FLDS leaders were charged with violation of the polygamy statute.³⁷⁰

Following the unsuccessful prosecution of Winston Blackmore, the head of a group that split off from the FLDS, Mr. Blackmore filed suit for unlawful prosecution. As part of this case, the Supreme Court of British Columbia has been asked to determine whether the law criminalizing polygamy is consistent with the Canadian Charter of Rights and Freedoms; the case is still pending.³⁷¹ Some scholars have argued that the prohibition of polygamy should continue and is indeed required by international human rights law, while others believe that the prohibition may not withstand constitutional challenges based on religious freedom or national origin.³⁷²

CONCLUSIONS

- In Canada and the U.S., laws against plural marriage have clashed with the principle of freedom of religion. Canadian courts are still addressing the issue today, although bigamy and polygamy remain illegal in that country. In the U.S., they Supreme Court has distinguished between valid laws that apply to everyone, but which happen to restrict religious practice, and laws intended to limit the practices of a particular group. Laws prohibiting polygamy and bigamy remain in the former category under U.S. case law.

6) HIV/STI Testing Before Marriage

Blood tests or medical disclosures are not required to obtain marriage licenses in Canada, though a small minority of U.S. states require testing for syphilis before marriage.³⁷³ More commonly, U.S. states or municipalities give couples written information about STIs and other health information at the time of marriage.³⁷⁴

In the 1980s, many U.S. states considered bills mandating premarital HIV tests, but the few that actually enacted such laws soon repealed them over concerns about effectiveness and cost.³⁷⁵ Illinois rescinded its law after discovering that it had spent \$243,000 for each HIV-positive individual identified by premarital screening.³⁷⁶

³⁷⁰ Reference re: Criminal Code, s. 293, 2009 BCSC 1668 (Docket No. S097767, Dec. 4, 2009), ¶ 9-13.

³⁷¹ *Id.* at ¶ 1.

³⁷² Arguing for the prohibition: THE ALBERTA CIVIL LIBERTIES RESEARCH CENTRE, *SEPARATE AND UNEQUAL: THE WOMEN AND CHILDREN OF POLYGAMY*, available at http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683-4_1_e.html; Rebecca J. Cook and Lisa M. Kelly, *Polygyny and Canada's Obligations under International Human Rights Law* (2006) available at <http://www.justice.gc.ca/eng/dept-min/pub/poly/index.html>. Arguing for recognition of polygamous marriages: Bailey, Baines, Amani, and Kaufman, *Expanding Recognition of Foreign Polygamous Marriages: Policy Implications for Canada*, available at http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683-3_1_e.html.

³⁷³ Memorandum from Matthew Ranelli, Associate Attorney, Connecticut General Assembly Office of Legislative Research, *Re: Mandatory Premarital HIV Testing* (Oct. 14, 2003), available at <http://search.cga.state.ct.us/dtsearch.asp?cmd=getdoc&DocId=12813&Index=I%3A\zindex\1998&HitCount=0&hits=&hc=0&req=&Item=8414>.

³⁷⁴ See 750 Ill. Comp. Stat 5/204 [county clerks must give marriage license applicants brochures on sexually transmitted diseases and inherited metabolic disorders].

³⁷⁵ Michael Closen et al., *Mandatory Premarital HIV Testing: Political Exploitation of the AIDS Epidemic*, 69 TULANE L. REV. 71, 73-74. (1994) [arguing against mandatory premarital HIV screening].

³⁷⁶ *Id.* at 98-99.

VI) GENDER IDENTITY, INCLUDING THE TRANSGENDERED AND INTERSEX

1) Section Introduction: an International Perspective on Gender Identity and the Law

This section examines the way that state regulation of gender identity and expression influences the health of individuals and groups. Gender, gender relations, and gendered characteristics are important features through which health, including sexual health, is mediated.³⁷⁷ Gender identification can be both assigned or assumed by individuals, the latter in part by acting in socially gendered ways, i.e., by exercising one's right to expression by means of gendered speech, deportment, or identification/self-naming. When people enact or express gendered conduct, it can conform to or clash with social conventions for male- or female-identified bodies.

To become fully human in society requires the acquisition of gender traits, so that persons are socially recognizable. No one lives untouched or outside of gender systems, yet all human rights are meant to be enjoyed equally by all persons regardless of their sex, and ultimately their gender. The inability to live one's life fully and with security in accord with one's preferred gender expression and identity has a negative effect on well being. In addition, state violence, discrimination, and efforts to mandate gender identity and expression exclude or diminish the access of gender non-conforming persons from the social institutions necessary to live a life with dignity: education; regular employment; the social institutions of family and marriage; and access to appropriate and quality health care.

Two streams of rights-based work address gender as a place of rights and health violations. The analysis of *gender-based violations* tends to focus on girls and women, while the work on *gender identity* or *gender expression* tends to focus on persons called 'gender non-conforming' and 'transgender',³⁷⁸ i.e., persons whose gender expression differs from that which is socially normative, based on their perceived body characteristics at birth (sex assigned at birth). Both streams of rights work challenge culturally stereotyped thinking, norms, and expectations about men and women, including but not limited to their sexual behavior.

As noted in the sections on violence (supra), gender-based violence often functions to reinforce gender inequality and discrimination. Violence is directed at non-conforming persons, such as women who transgress local gender norms by enrolling in school or acting sexually outside of marriage, for example, or men who fail to behave in sufficiently masculine ways³⁷⁹.

State-sponsored violence and discrimination against gender non-conforming persons, toleration of such acts committed by non-state actors, including relatives and community members, or taking (or failing to) take steps to reduce and prevent discrimination and abuse are ways in which state action in the context of gender expression affects sexual health.

Violence, especially sexual violence, is directed at gender non-conforming persons of all kinds and ages. It is prevalent globally, and committed with impunity, including by the authorities

³⁷⁷ Nancy Krieger, *Genders, sexes, and health: what are the connections--and why does it matter,?* INT. J. EPIDEMIOLOGY 2003 Aug; 32(4):652-7.

³⁷⁸ Some gender non-conforming persons seek to alter their bodies to conform to a chosen gender (often called transsexuality); others adopt speech, dress, or habits associated with one gender but do not alter or wish to alter their bodies.

³⁷⁹ Normative rules regarding masculinity and femininity (dress, appropriate work, modes of verbal and non-verbal expression, for example) are not uniform but can vary across historical period and culture.

themselves, often but not only when gender non-conforming persons are in detention or state care. Non-sexual and sexual violence produces a host of physical and psychological injuries, as well as death. The harm of this violence is compounded when the sexual assault is not treated in the law seriously or when fear of violence drives gender non-conforming persons away from health services needed to treat the sequelae of violence.

The social rules of gender are codified and maintained in law, so that there are legal consequences—often quite serious, through the criminal law -- in transgressing the rules regulating gender.³⁸⁰ These laws can in themselves be abusive of rights of privacy, equality before the law, expression³⁸¹ and association, with effects on the health of the gender- nonconforming person. For example, laws which provide for the arrest and/or corporal punishment for cross-dressing persons have direct effects on their health through the effects of incarceration, and indirect effects through stigmatizing persons covered by these laws, such that forms of violence—rape and assault are especially frequently documented—are committed against them with impunity by state and non-state actors.

In addition, many gender rules seem to assume a connection between non-conforming gender expression and non-conforming sexual behavior: criminal laws regulating dress for women and men are often conflated with policies against homosexuality. Indeed, it is often wrongly assumed that gender non-conformity—such as cross-dressing, or a desire to take on masculine or feminine characteristics different from those culturally associated with one’s assigned sex at birth—automatically indicates homosexual behavior.

States also regulate gender expression by permitting, mandating, controlling, or forbidding surgeries and medical interventions for the purpose of modifying the bodies of persons to align with specific expectations about gender.

Current rights claims include the freedom to access medical technologies and interventions for bodily modification, to better reflect the person’s perceived or chosen gender, congruent with prevailing standards of professional practice and patient consent. In addition, claims include the ability to transition to a new gender without submitting to compulsory surgeries, particularly sterilization, or other state-mandated procedures that infringe on rights of privacy, and to reproduce and found a family. In addition, basic protections against discrimination in the right to access mental and physical health services must apply.

³⁸⁰ The social rules of gender, called gender systems³⁸⁰ that organize the assignments and valuations of persons may vary between and within societies, and may also change historically. Nonetheless, they are implemented through powerful rules, incentives, and socialization, operating through social institutions (church, family, state, health and education, e.g.), which assign status, govern behavior, and determine access to resources and social legitimacy based on conformity to local gender norms.

³⁸¹ While international human rights law has not fully responded to gender expression as a form of expression, the basic reasoning articulated in the Siracusa Principles, which constrain the arbitrary use of state power to restrict expression can be fruitfully applied. These principles would protect gender non-conforming non-verbal expression such as cross-dressing, and physical deportment as well as verbal expression of gender variance from state regulation, especially from penalization in the criminal law, as an unjustified and arbitrary interference with fundamental rights. State justification by recourse to broad claims of public health and morality, especially where such claims rest on gender stereotypes forbidden under article 5 of CEDAW, would not be sustainable.

Contemporary rights and health work on gender expression and transgendered persons³⁸² imply corresponding state obligations, such as providing for the possibility to change one's name and legal gender, and recognition of the right to marry or to remain married after assuming one's new gender. Some legal systems simply disallow name changes, or other measures supporting the ability of persons to determine—and change – their gender identity regardless of their sex at birth, through a range of civil administrative laws, including regulations controlling birth registries, state identity cards, passports, and other socially important identity documents .

In many societies, the transgender population is marginalized through discrimination and violence, often pushed to the edges of survival with decreased access to basic health services, housing and employment. This exclusion is compounded for minority groups and low-income people. The attempts by transgendered persons to generate income through selling sex or engaging in other criminalized practices renders them more at risk of violence, including sexual violence.

Human rights as a system has evolved to address many of the serious rights implications of laws and state practices regulating gender. First, it increased its capacity to address gendered harms to women. More recently, formal human rights practice has recognized police abuse of transgender persons, or the unwillingness of the law to recognize transition from one sex to another, or living with a gender which is not bounded in the fixed binary. In the last decade, many human rights courts at national and regional level have recognized privacy, health and non-discrimination rights in striking down laws which exclude transgendered persons from the basic protection of the law. [See Europe/Westeson and Western Pacific/Cusak, and Diwan and Bhardwaj/SEARO]

Persons born with genitalia or bodies deemed gender-ambiguous or gender non-conforming fall under the broad label of “persons with intersex conditions”. The causes of these developments are diverse, including a variety of genetic anomalies and hormonal over- and under-exposures, during fetal development, many of which are discovered shortly after birth or during childhood. Although most manifestations are not life-threatening, it has become common to alter the infant's or child's body, particularly sexual organs, to conform to gendered physical norms, including through (repeated) surgeries, hormonal interventions, and other measures. The rationale for gender-reassignment or “normalizing” surgery for minors includes reducing gender confusion for the child and parents, responding to parental concerns that the child be normal and accepted, and to promote the child's social integration and happiness.

Until recently, states have generally given minimal attention to these interventions, requiring only parental consent (assumed to be motivated by the ‘best interests of the child’) and in conformity with locally accepted, general standards of medical care. Intersex advocates have emphasized the insufficiency of these conventional standards, highlighting the lack of the child's consent for

³⁸² The term “transgender” is an umbrella term for people whose gender identity and/or gender expression differs from what is normative, given the sex they were assigned at birth, including cross-dressers, pre-operative, post-operative or non-operative transsexuals. Transgender people may define themselves as female-to-male (FTM, assigned a female biological sex at birth but who have a predominantly male gender identity) or male-to-female (MTF, assigned a male biological sex at birth but who have a predominantly female gender identity); others consider themselves as falling outside binary concepts of gender or sex. Transgender people may or may not choose to alter their bodies hormonally and/or surgically: the term is not limited to those who have the resources for and access to gender reassignment through surgery. Transgender is not about sexual orientation; transgender people may be heterosexual, lesbian, gay or bisexual. [from: GLOBAL RIGHTS: DEMANDING CREDIBILITY AND SUSTAINING ACTIVISM: A GUIDE TO SEXUALITY –BASED ADVOCACY (2009)].

drastic interventions that are irreversible; life-long in their consequence for physical and mental health, particularly sexual response; and the absence of medical justification for imposing these interventions in childhood, before the person has the opportunity and mature judgment to determine the advantages and disadvantages of these procedures. Legally and politically, the claims of persons with intersex conditions engage not only with children's rights, but also more generally with claims to the highest attainable standard of health, non-discrimination and autonomy-privacy rights around determining one's own gender.

2) Discrimination Based on Gender Identity

Neither Canada nor the United States has federal legislation outlawing discrimination on the basis of gender identity at the federal level (see Sec. III(5)). As already mentioned, one jurisdiction in Canada (the Northwest Territories) expressly prohibits discrimination on the basis of gender identity,³⁸³ and elsewhere in Canada, due to deep integration of the non-discrimination norm, there is a tendency to include gender identity. (e.g. Manitoba³⁸⁴, but c.f. case of justifiable discrimination on the basis of gender identity³⁸⁵). There are proposals to amend both the Canadian Human Rights Act and provincial legislation to prohibit discrimination on this basis.³⁸⁶ There is also one case on point in Canada: *Vancouver Rape Relief Society v. Nixon*. There, the British Columbia Court of Appeals found that a rape-crisis center could exclude workers who identified as post-operative transsexual females, as this discrimination bore a rational relationship to the interests and objectives of the rape crisis center.³⁸⁷

3) Gender Transitioning

A) Changing Civil Status of Names and Genders

U.S. states have liberal policies about name changes, which may be used by transgender and transsexual people to the same extent as anyone else. People may change their legal name to conform to a new gender.³⁸⁸ However, both legal names changes and gender changes, for the purposes of official documents, are principally a matter for the states. Many states do not recognize transsexuals as such—and will not alter gender on official documents—unless sex reassignment surgery has taken place.³⁸⁹ Many government agencies will not change a person's gender on identification or other official documents absent genital surgery.³⁹⁰ Similarly, in Canada, it is provincial and territorial law that governs procedures for legal name changes and

³⁸³ HUMAN RIGHTS ACT, S.N.W.T. 2002, c. 18, s 5(1).

³⁸⁴ MANITOBA HUMAN RIGHTS COMMISSION, POLICY AND PROCEDURES MANUAL *available at* <http://www.gov.mb.ca/hrc/english/publications/policies/L2.pdf>, interpreting s 9(1)(a) of the *Human Rights Code*, C.C.S.M. c. H175.

³⁸⁵ See *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 (discussed below).

³⁸⁶ See above notes 23-24.

³⁸⁷ *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601. The court held that exclusion of transsexual women constituted discrimination under their human rights code, but that a women's crisis center, under S. 41 of the Human Rights Code, that allows a "protected group" to prefer its sub-group, provided its actions have a rational relationship to its work, could exclude a sub-group of women—i.e. transsexuals—according to their preferences..

³⁸⁸ *Matter of McIntyre*, 552 Pa. 327 (Pennsylvania 1998) [trial court's denial of pre-operative transsexual's name change was improper].

³⁸⁹ Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731, 771-773, Appendix 1 (2008).

³⁹⁰ *Id.* at 768-769 [all states that allow a change of gender on birth certificate require proof of surgery, but the type of surgery varies in different jurisdictions].

changing the sex listed on a birth certificate, and the provinces require that two physicians to attest via a signed statement that a sex reassignment surgery took place and was completed.³⁹¹

B) Decriminalizing Cross-Dressing: a U.S. Example

In *City of Chicago v. Wilson*, the defendants were convicted of violating a city ordinance which prohibited people from wearing clothes of the opposite sex with the intent to conceal their sex.³⁹² The Illinois Supreme Court found the law unconstitutional, because the government had insufficient reasons for infringing on the defendants' choice of dress.³⁹³ The court was unconvinced by the City's claims that the law was necessary for preventing fraud and other crimes or identifying criminals: the defendants were not engaging in any crimes, but merely preparing for sex-reassignment surgery—and there was no evidence that cross-dressing as part of a gender transition was harmful to society.³⁹⁴ “The notion that the State can regulate one’s personal appearance, unconfined by an constitutional strictures whatsoever, is fundamentally inconsistent with ‘values of privacy, self-identity, autonomy and personal integrity that the Constitution was designed to protect.’”³⁹⁵

C) Medical Services and Gender Reassignment

Gender Identity Disorder is widely recognized in the U.S. health professional community.³⁹⁶ It is defined in an authoritative text as “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role” severe enough to cause “clinically significant distress or impairment in social, occupational, or other important areas of functioning.”³⁹⁷ Despite this medical recognition, U.S. transsexuals seeking sex reassignment surgery (SRS) face health insurance exclusions in both public and private insurance. For example, the Eighth Circuit found that the state of Iowa could legally exclude that surgery from coverage, as long as the state’s rulemaking process marshaled some evidence to back up the state’s assertion that the procedure is unnecessary.³⁹⁸ A U.S. tax court, however, recently held that hormone therapy and SRS were deductible medical expenses under the federal tax code, rather than cosmetic surgery (although related breast augmentation was found not deductible).³⁹⁹

³⁹¹ See for example The Vital Statistics Act, 1995, ch. V-7.1 of the Statutes of Saskatchewan (effective April 1, 1997) §§29-30 [application for change of sex on birth certificate can be made by “person who has undergone transsexual surgery” with certification from medical practitioners].

³⁹² *City of Chicago v. Wilson*, 75 Ill. 2d 525, 528 (Illinois 1978).

³⁹³ This decision was based on the Due Process Clause of the 14th Amendment to the U.S. Constitution. See the discussion of *Lawrence v. Texas*.

³⁹⁴ *Id.* at 533.

³⁹⁵ *Id.* at 231 [quoting *Kelley v. Johnson*, (1976) 425 U.S. 238].

³⁹⁶ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 576, 581 (4th ed. rev. 2004) [commonly known as the DSM-IV-TR].

³⁹⁷ *Id.*

³⁹⁸ *Pinneke v. Preiser*, 526 F.2d 546, 549 (8th Cir. 1980) [overruled as described by *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001), discussed below] This case law, however, did not last: after Iowa underwent a formal rulemaking process, considering the opinions of the medical community before excluding surgeries for gender identity disorder, the court upheld the exception. This time, the court pointed out that a medical foundation consulted by the Iowa Department of Health “reported a lack of consensus on definition, diagnosis, and treatment and referred to post-*Pinneke* research that indicated that hormone treatments, psychotherapy, and situational treatment may be more appropriate, and at times more effective, than sex reassignment surgery.”

³⁹⁹ *O’Donnabhain v. Commissioner*, 134 T.C. No. 4 (Feb. 2, 2010).

Even states that require proof of surgery before gender can be changed in official records may deny Medicaid coverage for such surgery, arguing that the procedures are cosmetic or experimental.⁴⁰⁰ Transsexuals may thus find their state claiming on the one hand that the procedure is unnecessary and on the other hand that it is required for an official change of gender.

Canada, because it provides universal health insurance coverage, approaches medical services differently; the provincial and territorial governments determine which procedures are subsidized. There is substantial variation: in some provinces SRS and chest reconstruction are covered (Alberta, Saskatchewan and Manitoba; in Ontario, electrolysis for facial hair had also at one point been subsidized). In British Columbia, SRS was de-listed in 1988 and then re-listed in 1993.⁴⁰¹ In 2003, the British Columbia Human Rights Tribunal held that a female-to-male SRS performed in the United States should be covered by the provincial insurance.⁴⁰²

4) Intersex

No statutes or information of a normative level (e.g. medical management) could be located for intersex individuals specific to Canadian physicians, while U.S. organizations suggest various standards of care.⁴⁰³ There is also little statutory information in the U.S. When Congress passed a law criminalizing female genital mutilation/cutting (see Section VII (5)), it explicitly excluded medically necessary surgeries, thereby seeking to keep intersex surgeries outside the sweep of that law.⁴⁰⁴ No U.S. laws directly regulate the treatment of intersex children; in practice, parents have considerable power over normalizing treatment, although the number of such childhood surgeries is decreasing.⁴⁰⁵

CONCLUSIONS

- Neither the U.S. nor Canada consistently and explicitly extends its non-discrimination norm to gender identity, though emerging trends in some of the provinces and states would indicate in time, gender identity will be an expressly protected category.
- Barriers to changing a gender classification or name on official government issued documents raise issues of rights in the security of the person, privacy, and bodily integrity, especially when such changes require proof of sexual reassignment surgery (SRS). Not all gender non-conforming individuals wish to have such procedures.
- Law in the U.S. and Canada does not regulate medical protocols regarding intersex individuals. Medical procedures assigning sex to intersex infants and/or children implicate those individuals' power to consent to those procedures and their sexual health as adults.

⁴⁰⁰ Dean Spade, *Documenting Gender*, 59 HASTINGS L. J. 731, 783 (2008).

⁴⁰¹ EGALE CANADA, SEX REASSIGNMENT SURGERY (SRS) BACKGROUNDER, (October 2004), available at <http://www.egale.ca/index.asp?lang=E&item=1086>; see also Joshua Goldberg, Coverage of Sex Reassignment Surgery (SRS) Across Canada as of January 23, 2004, (unpublished).

⁴⁰² *Waters v. BC Medical Services Plan*, 2003 BCHRT 13.

⁴⁰³ Two conflicting standards of care for intersex children: Hughes, I.A., et al. *Consensus Statement on Management of Intersex Disorders*, Archives of Disease in Childhood (2006); CONSORTIUM ON THE MANAGEMENT OF DISORDERS OF SEXUAL DEVELOPMENT, CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD (2006), available at <http://www.dsdguidelines.org/files/clinical.pdf>.

⁴⁰⁴ 18 U.S.C. §116.

⁴⁰⁵ Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 78-81 (2006).

- In both the U.S. and Canada, sexual reassignment surgery for adults seeking to transition genders is available; however, the surgery might not be affordable given the lack of uniform health insurance coverage. A number of Canadian provinces cover SRS, based on its national health policy derived in part on the recognition of the right to health. The U.S. does not recognize the right to health, and as non-discrimination norms do not extend to gender identity/transsexuality, SRS is not always covered by private or government paid health insurance.

VII) VIOLENCE AS IT IS RELEVANT TO SEXUALITY AND SEXUAL HEALTH

1) Section Introduction: an International Perspective on Violence and Sexual Health

Violence committed against persons violates and diminishes the fundamental human rights recognized in all international conventions, most notably the right to life and bodily integrity. Persons may be deprived of life or liberty only in accordance with the law. All nations have made formal commitments to protect persons against violence through their national laws and international obligations. All treaty bodies have agreed that states are required to prevent violence by state and non-state actors. The types of violence considered in this review include sexual violence, as well as non-sexual violence directed at persons because of their real or imagined sexual practices, expressions, associations, or identities.

Forms of sexual violence include rape, coerced sex, child sexual abuse, sexualized forms of domestic and intimate partner violence, FGM, so-called honor crimes, and trafficking into forced prostitution. It is important to recognize that sexual violence can be and is directed at women, men, girls and boys, and at any group in a position of vulnerability, though women and girls are often among the most vulnerable. Sexual violence in its diverse forms impairs sexual health through physical injury, psychological trauma, transmission of disease through unprotected sex, particularly HIV and STIs, unwanted pregnancy and subsequent unsafe abortion or maternal mortality⁴⁰⁶. Victims of sexual violence are often held responsible, in part or in whole, for the violence, feeling shame, dishonor, spoiled identity, and guilt that make it difficult to report incidents of violence and seek treatment and care for related physical and psychological injuries. Sexual violence is thus responsible for a significant disease burden from the national and global perspective, some portion of which becomes chronic. The extensive social and health system costs stemming from sexual violence, however, may be significantly reduced through prevention and earlier, more effective state intervention.

A comprehensive review of sexual health must also consider violence committed against persons because of their real or imagined sexual characteristics, even though delivered through *non-sexual means* (i.e., non-sexual assault or injury). These real or imagined sexual characteristics or attributes might include sexual behavior or practices, same-gender sexual partner, lack of virginity, extramarital sex, sexual contact with social 'inferiors' or members of 'enemy' groups, 'bad reputation', 'dishonor' to the kin group, and sexual 'disobedience'. Although the delivery of violence may not utilize rape or sexual injury as its medium, the physical and psychological

⁴⁰⁶ WORLD HEALTH ORGANIZATION, WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH AND DOMESTIC VIOLENCE AGAINST WOMEN: INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES AND WOMEN'S RESPONSES, (2005); LORI HEISE, WITH ADRIENNE GERMAIN AND JACQUELINE PITANGUY, VIOLENCE AGAINST WOMEN: THE HIDDEN HEALTH BURDEN (World Bank, 1994).

effects are otherwise similar: injury, reduced ability to access health care for these injuries, and increased disease burden.

In addition to representing an assault on fundamental rights to life and bodily integrity, violence may be both a sign and consequence of gender discrimination. Sexual violence against women and girls reduces freedom of movement, association, and speech, as well as reducing their access to education, work, and the public sphere and political participation. Sexual violence, however, is directed not just at women and girls, but also at men, boys, and transgender persons, who are thought to transgress social norms of appropriate masculine or feminine behavior (in dress, manner, speech, or work). Sexual violence reinforces and stems from other forms of inequality as well, serving to reinforce hierarchies of power based on class, race, ethnicity, caste, or other important social divisions. Sexual violence thus serves as an extra-legal form of punishment and control, which may be administered informally by state agents or by non-state actors (family members, neighbors, or workmates). It is a draconian form of extra-legal punishment, intended to induce shame and diminish the reputation of the victim of violence, resulting in social exclusion, damaged reputation, and diminished life prospects.

In addition, sexual and non-sexual violence directed at sexually stigmatized persons reduce the capacity of persons to access and utilize other rights--the right to health and health services, freedom of movement, expression, political participation, livelihood, and free and unforced marriage. Sexual and non-sexual violence directed at sexually stigmatized persons promotes fear and terror, especially in conditions of conflict and ethnic cleansing, erodes personal agency, and serves as a marker of stigma and subordination. National and international law must provide for effect prevention, investigation, and forms of response. The bodies of law that address law violence more directly include human rights, humanitarian, refugee, and international criminal law.⁴⁰⁷

2) Domestic Violence Laws in the U.S. and Canada

Although some U.S. states and Canadian provinces have laws that apply specifically to domestic violence, those nations also apply their general criminal statutes to address that problem, using a range of felonies and misdemeanors such as assault, battery, sexual assault, stalking, and murder (or attempts at those crimes), depending on the state and the factual circumstances involved.⁴⁰⁸ In both the U.S. and Canada, these general laws apply regardless of the gender or marital status of the parties.⁴⁰⁹

Some Canadian jurisdictions, such as Ontario, have established a domestic violence court program to facility the prosecution of domestic violence cases, using teams of specialized police,

⁴⁰⁷ See international law section. Labor law may include some forms of violence in working conditions as well.

⁴⁰⁸ See generally Criminal Code, R.S.C. 1985, c. C-46 part. VIII [offenses against the person and reputation] (Can.); Model Penal Code §211.1 et. Seq. [defining assault and aggravated assault]; For examples of specific provincial legislation, see Domestic Violence Protection Act 2000, S.O. 2000, c. 33 - Bill 117 [Ontario]; Domestic Violence Intervention Act. 2001, c. 29, s. 1 [Nova Scotia,], available at <http://www.gov.ns.ca/legislature/legc/statutes/domestcv.htm>; Family Violence Protection Act, S.N.L. 2005 ch. F-3.1 [Newfoundland and Labrador]; Victims of Domestic Violence Act, 1994 Statutes of Saskatchewan Ch. V-6.02 available at <http://www.qp.gov.sk.ca/documents/English/Statutes/Statutes/V6-02.pdf>; The Domestic Violence and Stalking Act ,C.C.S.M. c. D93 [Manitoba], available at <http://web2.gov.mb.ca/laws/statutes/ccsm/d093e.php>.

⁴⁰⁹ *Id.*; See generally Criminal Code, R.S.C. 1985, c. C-46 part. VIII [Can.] [offenses against the person and reputation]; Model Penal Code §211.1 [U.S.] [defining assault and aggravated assault].

prosecutors, and community agencies.⁴¹⁰ Some U.S. states have also instituted specialized domestic violence courts, with specially trained attorneys and staff.⁴¹¹

These two nations have not always been as interested in punishing domestic violence as they are today; it was not until the 1970s and 80s that the U.S. and Canadian criminal justice systems began to treat domestic violence as a crime rather than a private matter.⁴¹² The laws described in parts a) and b) below were instituted in reaction to this history of government and police inaction.

A) Civil Protective Orders

Rather than rely exclusively on police and the criminal justice system, the U.S. provides a procedure for abused spouses and partners to acquire a protective order (also called a restraining order) through the civil courts. Judges have broad authority to tailor the orders to the facts of the case at hand. The orders may include monetary compensation, but they also provide injunctive relief: the court can order the abuser to cease particular behaviors, limit contact between the parties, require the abuser to leave a shared home, and make family law-related orders concerning the couple's children.⁴¹³ These orders can be issued on a temporary, expedited basis, allowing immediate relief.⁴¹⁴ A longer-term order can also be issued, but the subject of the order must first have an opportunity to challenge the order in court.⁴¹⁵

In Canada, courts can issue emergency *ex parte* protection orders: in Alberta, for instance, a judge can issue an order without notice to the restrained party if he or she determines that family violence has occurred, the claimant has reason to believe the violence may resume, and the "seriousness or urgency" of the situation demands immediate intervention.⁴¹⁶ The emergency order may even be granted by telephone, but just as in the U.S., this emergency order must be followed by a hearing, providing the person subject to the order notice and an opportunity to present his or her own evidence.⁴¹⁷

Longer-term orders known as "peace bonds" are available in Canada when a person "fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property." The complainant may request an order that a person "keep the peace and be of good behavior" and comply with other "reasonable conditions," for a period up to one year.⁴¹⁸ These orders may be sought by a family

⁴¹⁰ Larry C. Wilson, *Independent Legal Representation for Victims of Sexual Assault: A Model Delivery of Legal Services*, 23 WINDSOR Y.B. ACCESS JUST. 249, 283 [arguing for independent legal representation of sexual assault victims in criminal proceedings].

⁴¹¹ Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197 (2008) [discussing the domestic violence courts established in Massachusetts and New York and arguing in favor of specialized courts].

⁴¹² *Id.* at 439-441; SPOUSAL ABUSE POLICIES AND LEGISLATION: FINAL REPORT OF THE AD HOC FEDERAL-PROVINCIAL-TERRITORIAL WORKING GROUP REVIEWING SPOUSAL ABUSE POLICIES AND LEGISLATION (April 2003), pp. 9-10.

⁴¹³ See Maryland Fam. L. C. §4-506 [provides a long list of possible relief, including ordering the subject of the order to stay away from the home, place of employment, or school of the other party, establishing temporary custody of or visitation with a minor child, and directing either party to participate in counseling].

⁴¹⁴ Md. Fam. L. C. 4-505(c) [temporary protective orders may be issued for 7 days, which may be extended for up to six months].

⁴¹⁵ Md. Fam. L. C. §4-506 ["A respondent...shall have an opportunity to be heard on the question of whether the judge should issue a final protective order."];

⁴¹⁶ Alberta Protection Against Family Violence Act, R.S.A. 2000 c. P-27 s. 2.

⁴¹⁷ *Id.* s. 3, 6(2);

⁴¹⁸ Canada Criminal Code, R.S.C., ch. C 46, 810 (1985) s. 810.

member of the endangered person, can include the same types of injunctive protections as those included in similar U.S. orders, and may also require the subject of the order to post a bond to ensure compliance.⁴¹⁹

Civil protection order laws are usually gender-neutral and apply to a broad range of relationships, including former spouses, cohabiting couples, and dating couples.⁴²⁰ In New Mexico, U.S.A. for instance, domestic violence can be inflicted by a “spouse; former spouse; family member, including a present or former stepparent, present or former in-law, child or co-parent of a child; or a person with whom the petitioner has had a continuing personal relationship. Cohabitation is not necessary....”⁴²¹

B) Mandatory Arrest, Prosecution, and No-Contact Orders

Although U.S. law usually requires a warrant for misdemeanor offenses unless the officer personally witnessed the crime, all states have an exception allowing police officers to make warrantless arrests for domestic violence or protective order violations.⁴²² Some U.S. states and Canadian provinces have gone even further, removing police officers’ discretion altogether by forcing them to make an arrest whenever a restraining order has been violated.⁴²³ These laws have been controversial. Proponents argue that mandatory arrest protects victims and sends a clear message to abusers, while opponents argue that the laws will discourage victims from reporting violence—undocumented immigrants and minority groups may be mistrustful of the police and reluctant to request their services.⁴²⁴ Opponents also object that mandatory arrest laws often result

⁴¹⁹ Alberta Protection Against Family Violence Act, R.S.A. 2000 c. P-27 s. 3, 2(1); Duhamie, “Family Violence—Legal Remedies” 20 October 2006, available at <http://www.duhaimie.org/LegalResources/FamilyLaw/LawArticle-33/Family-Violence-Legal-Remedies.aspx>. When someone is reasonable grounds to believe that someone will commit a sexual offence against someone under 16 years of age, or that someone will commit a serious personal injury, an order may be requested and issued without naming the prospective victim. Canada Criminal Code, R.S.C., ch. C 46, 810 (1985) s. 810.1, 810.2.

⁴²⁰ Not all statutory schemes are this broad. In Alberta, Canada, people who are not related by blood, marriage, shared parentage or adoption are only subject to the emergency protection order statute if they are current or former “adult interdependent partners,” live or have lived together in an intimate relationship, or are cohabitants and one person has court-ordered custody over the other. This seems to exclude couples who dated or otherwise had an intimate relationship but never lived together or shared an interdependent partnership. S. 1(1)(d).

⁴²¹ New Mexico Stat. Ann. §40-13-2(D). For a description of state laws limiting domestic violence to heterosexual couples and/or cohabiting couples, see Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WILLIAM & MARY L. REV. 1841, 1858-1860 (2006) [arguing that domestic violence law is under-protective because it applies mainly to spousal or spouse-like relationships]. For a Canadian example, see Alberta 1(1) (d) [order can be granted for violence, threats, forced confinement, sexual abuse, or stalking between current or former spouses, current or former “adult interdependent partners,” cohabitants in an intimate relationship, and their children; co-parents; relatives by blood, marriage or adoption and their children; and cohabitants when one person has court-ordered custody of the other.]

⁴²² Anne Rousseve, *Sixth Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Domestic Violence and the States* 6 GEORGETOWN J. OF GENDER & L. 431, 442-443; See Rev. Wash. C. §10.31.100(2). Under U.S. constitutional law, even warrantless arrests cannot be performed unless there is “probable cause” that the offense has been committed.

⁴²³ See Washington Rev. Code §10.31.100(2) [a police officer “shall arrest and take into custody” a person whom the officer has probable cause to believe has violated a restraining order]; Alaska Stat. §18.65.530; for a list of state statutes see Rousseve, *supra*. In Canada, these mandatory arrest policies are known as “pro-arrest” policies. See SPOUSAL ABUSE POLICIES AND LEGISLATION: FINAL REPORT OF THE AD HOC FEDERAL-PROVINCIAL-TERRITORIAL WORKING GROUP REVIEWING SPOUSAL ABUSE POLICIES AND LEGISLATION (April 2003), p. 1.

⁴²⁴ Rousseve, 6 GEORGETOWN J. OF GENDER & L. at 44-445.

in dual arrests, when police officers cannot determine which party is the abuser and which the victim.⁴²⁵

Some U.S. state and local jurisdictions have also enacted mandatory prosecution policies and mandatory “no-contact” orders (like protective orders, these limit interactions between the defendant and victim, but they are issued by the court as part of a criminal prosecution.)⁴²⁶ In most Canadian jurisdictions, prosecution decisions are made independent of the victim’s wishes, but policies strongly discourage compelling the victim to testify.⁴²⁷ British Columbia’s policy, for instance, states:

“Crown Counsel are responsible for the decision to prosecute. The charge assessment policy requires Crown Counsel to examine the case at each stage of the prosecution and decide whether there is a substantial likelihood of conviction and, if so, whether prosecution is required in the public interest. This cannot be determined solely by the victim’s wishes....Crown Counsel should not apply for a material witness warrant for a victim who has failed to appear – unless there is some likelihood the victim will testify and the circumstances of the case are severe, including the need to protect children or others. Crown Counsel should request that the police make all reasonable efforts to alleviate any hardship on the victim in the execution of a warrant.”⁴²⁸

Recently, the U.S. Supreme Court considered whether a mandatory arrest policy made the police liable for civil damages, when the police violated that policy by failing to enforce a protection order (see Sec. VII(6)(B) for more on this issue). In *Castle Rock*, Jessica Gonzales summoned the police to enforce the protection order against her estranged husband, after he kidnapped their children.⁴²⁹ The police response was extremely delayed and ended in a shoot-out where three of her children were killed, along with the husband.⁴³⁰ The concerned U.S. limits on government immunity in civil cases, specifically whether arrest of the husband was discretionary or mandatory. The Court found that the mandatory arrest policy did not make enforcement mandatory *for immunity purposes*, precluding Ms. Gonzales’ suit.⁴³¹ A petition has been filed with the Inter American Commission on Human Rights against the U.S., and the matter is pending.⁴³²

C) Recent National Responses to Domestic Violence in the U.S. and Canada

The U.S. Congress passed the federal Violence Against Women Act [VAWA] in 1994 and re-authorized it in 2000.⁴³³ A wide-ranging bill, VAWA is discussed in the rape shield, sex offender registration, and statutory rape sections of this document. VAWA includes grants to state and local

⁴²⁵ *Id.* Some jurisdictions have introduced statutes to limit dual arrest. See Wash. Rev. C. §10.31.100(c) [States that officer “shall arrest the person whom the officer believes to be the primary physical aggressor” and provides a list of factors for the officer to consider];

⁴²⁶ 6 GEORGETOWN J. OF GENDER & L.at 446-449.

⁴²⁷ “SPOUSAL ABUSE POLICIES AND LEGISLATION: FINAL REPORT OF THE AD HOC FEDERAL-PROVINCIAL-TERRITORIAL WORKING GROUP REVIEWING SPOUSAL ABUSE POLICES AND LEGISLATION (April 2003), p. 13.

⁴²⁸ Criminal Justice Branch, Ministry of Attorney General of British Columbia, *Crown Counsel Policy Manual* policy code SPO 1, file no. 56680-00 (effective May 1, 2003).

⁴²⁹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

⁴³⁰ *Id.* at 753-754.

⁴³¹ *Id.* at 756-765.

⁴³² Jessica Gonzales and Others, Inter-Am. C.H.R. Report no. 52/07, OEA/Ser/L/V/II.128, petition 1490-05 (July 24, 2007) [finding that case was admissible].

⁴³³ Violence Against Women Act (VAWA), codified at 42 U.S.C. §§ 13981-14043.

governments to strengthen enforcement of violent crimes against women and victims' services.⁴³⁴ The Act authorizes funding to both government and nonprofit programs dedicated to domestic violence, sexual assault, and child abuse prevention.⁴³⁵ In the legal sphere, VAWA authorized grants to train judges and court personnel about gender-related crimes and to provide legal assistance to victims.⁴³⁶ Despite the title of the Act, the language of the statute is gender-neutral and intended to apply to both sexes.⁴³⁷

Recent efforts to strengthen Canada's domestic violence laws include amendments in to the Criminal Code in 1997 to strengthen the criminal harassment (stalking) laws.⁴³⁸ Canada now has a particularly strong criminal harassment statute, revised in 1997 as part of an effort to revamp domestic violence laws.⁴³⁹ The following conduct is prohibited whenever it knowingly or recklessly causes another person to "reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them": "(a) repeatedly following from place to place the other person or anyone known to them; (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or (d) engaging in threatening conduct directed at the other person or any member of their family."⁴⁴⁰ This was enacted out of concern that the preexisting statutes could not address non-violent yet harassing behavior, so long as the harasser did not make a direct threat.⁴⁴¹

D) Evidentiary Issues When Domestic Violence Victims Do Not Participate in Criminal Prosecutions: A U.S. Example

When domestic violence victims are unwilling to testify, prosecutors may be left with little evidence beyond the victim's initial statements to police, medical professionals, and the staff of emergency or domestic violence-specific hotlines that have been set up by the government.⁴⁴² In

⁴³⁴ For a description of the grant provisions, see Garrine P. Laney, *Violence Against Women Act: History and Federal Funding*, Congressional Research Service Report No. RL30871 at 4-10 (Aug. 7, 2008).

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Schwenk v. Hartford*, 204 F.3d 1187, 1199-1200 (8th Cir. 2000) [discussing legislative history of VAWA]. *Schwenk* was based in a provision of the act later found unconstitutional in *United States v. Morrison* 529 US 598 (2000) [striking down provision allowing civil lawsuits in federal court for victims of "gender motivated violence"; such violence did not substantially affect interstate commerce and so could not be regulated by the federal government].

⁴³⁸ The criminal harassment offence was introduced by Bill C-126 (proclaimed into force on August 1, 1993); see also Asia Pacific Forum on Women Law and Development, *Domestic Violence Legislation in Canada* available at http://www.apwld.org/pdf/DV_legislation_Canada.pdf.

⁴³⁹ Bill C-126 (proclaimed into force on August 1, 1993); see below for cites to specific code sections.

⁴⁴⁰ Criminal Code R.S. 1985 c. C-46 s. 264(1); R.S., 1985, c. 27 (1st Supp.), s. 37; 1993, c. 45, s. 2; 1997, c. 16, s. 4, c. 17, s. 9; 2002, c. 13, s. 10. There is no specific Canadian legislation regarding "cyberstalking," but a 2002 Statistics Canada publication on cyber-crime defined it as "a criminal offence involving a computer as the object of the crime, or the tool used to commit a material component of the offence." As such it would be a form of criminal harassment conducted through the use of a computer system, including the Internet. According to the Canadian Department of Justice, this type of conduct falls within Canada's definition of criminal harassment. MELANIE KOWALSKI, CYBER-CRIME: ISSUES, DATA SOURCES, AND FEASIBILITY OF COLLECTING POLICE-REPORTED STATISTICS. (Statistics Canada, 2002), available at <http://www.statcan.ca/english/freepub/85-558-XIE/free.htm> ; <http://www.justice.gc.ca/eng/pi/fv-vf/pub/har/part1.html>.

⁴⁴¹ The statute against direct threats states: "Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat (a) to cause death or bodily harm to any person; (b) to burn, destroy or damage real or personal property; or (c) to kill, poison or injure an animal or bird that is the property of any person." Criminal Code R.S. 1985 c. C-46 s. 264.1(1); R.S., 1985, c. 27 (1st Supp.), s. 38; 1994, c. 44, s. 16.

⁴⁴² See 42 USC §3796gg(b)(13)[authorizing grants under VAWA for domestic violence hotlines].

the U.S. Supreme Court case *Davis v. Washington*, prosecutors of a domestic violence case wanted to introduce evidence of a woman's call to emergency services, when the woman herself did not show up for trial.⁴⁴³ But the Confrontation Clause of the Sixth Amendment to the U.S. Constitution gives criminal defendants the right to confront any witnesses against them, "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding."⁴⁴⁴ This bars most statements made by witness who does not appear at trial, unless the defendant had already had a chance to cross-examine a witness who later became unavailable.⁴⁴⁵ The purpose of these evidentiary restrictions is to protect defendants' rights and avoid unreliable hearsay.

In *Davis*, the Supreme Court held that statements made by the witness as part of an interrogation intended to establish facts for a criminal prosecution were *not* admissible, but statements made "to enable police assistance to meet an ongoing emergency" *were* admissible.⁴⁴⁶ A call to emergency services was likely to be reliable, even without cross-examination, because the witness was presumably concerned about getting prompt emergency help.

CONCLUSIONS

- The U.S. and Canada have developed civil procedures allowing domestic violence victims to seek court intervention themselves, without waiting for the police to act. Both nations have a specialized process designed to allow courts to issue orders quickly, while still providing the subjects of such orders fair notice and an opportunity to object. While this procedure of injunctions and other civil orders may not be useful in legal systems that offer less comprehensive civil remedies and less court oversight—or where police corruption and state control are more of a problem—it does at least suggest an alternative to an exclusively criminal response to domestic violence.
- Although laws vary in different state/provincial jurisdictions, both countries have recognized that domestic violence can occur in a wide variety of personal, familial, and romantic relationships.
- Mandatory arrest/prosecution policies were a response to past failures to pursue crimes of domestic violence. However, these policies risk discouraging victims from reporting violence. Victims who merely wish the assistance of police or medical services may be reluctant to seek help, if doing so means certain criminal charges against a family member.
- On the national level, the U.S. has used federal funding to promote state enforcement of domestic violence prosecution and victim services. Canada has revised its criminal law to outlaw harassing behavior that stops short of physical violence or direct threat.
- The *Davis* case illustrates the conflict between defendants' right to confront the witnesses against them, and the fact that domestic violence victims may be unwilling to cooperate with criminal prosecutions. The balance struck by the U.S. Supreme Court may not be relevant to nations with different rules concerning hearsay and other out-of-court

⁴⁴³ *Davis v. Washington*, 547 U.S. 813, 818-819 (2006).

⁴⁴⁴ *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

⁴⁴⁵ *Davis* at 821 [citing *Crawford v. Washington*, 541 U.S. 36 (2004)]. "Testimonial" statements cannot be presented at trial when the witness does not appear—these are statements that are made as part of a criminal investigation. *Id.* at 822.

⁴⁴⁶ *Id.*

statements (or where defendants' rights are less stringently defended), but at least it provides one illustration of a court's attempt to navigate these issues.

3) Provocation Defense

A) "Honor Crimes," Provocation, and Heat-of-Passion Defense

Historically, English common law recognized a provocation defense to murder, which was used to mitigate the consequences for men who murdered their female partners because the women were unfaithful and so "provoked" a jealous rage.⁴⁴⁷ In modern times, this has evolved into the gender-neutral crime of voluntary manslaughter: a killing "committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse"⁴⁴⁸ or, in a different formulation, "in the heat of passion caused by sudden provocation."⁴⁴⁹ Prison sentences for voluntary manslaughter, while still considerable, are less than sentences for murder.

Sexual jealousy is no longer an automatic "reasonable" basis for a defendant's emotional disturbance—in Maryland, U.S.A. a statute specifically states that "the discovery one's spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter...."⁴⁵⁰ And Canada's Criminal Code states that "no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do...."⁴⁵¹ While that is not as clear-cut as Maryland's statute, it does limit the provocation defense. To the extent that so-called 'honor killings' can also be considered analogous to the (now discredited) provocation defense, it is interesting to note that the Canadian government has also responded to media reports of "honor killings" of women by issuing a study guide for new citizens/immigrants entitled "Discover Canada: the rights and responsibilities of citizenship."⁴⁵² Under the rubric "The Equality of Women and Men" the pamphlet rather baldly states:

Canada's openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, 'honour killings,' female genital mutilation or other gender-based violence. Those guilty of these crimes are severely punished under Canada's criminal laws.

B) Battered Woman Syndrome: a Canadian Example

⁴⁴⁷ Emily L. Miller, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 671-673 [arguing that the Model Penal Code provocation defense is too inclusive].

⁴⁴⁸ Model Penal C. §210.3(1)(b) [the MPC has been adopted in many states. Non-MPC states have different definitions of voluntary manslaughter, although they share the concept of a killing committed in the heat of passion].

⁴⁴⁹ Canada Criminal Code, R.S.C., ch. C 46 s. 232(1) (1985).

⁴⁵⁰ Maryland Crim. L. C. §2-207(b). In one U.S. case from New York, a Laotian refugee who killed his wife argued that his wife's affection for another man was so shameful in Laotian culture that it caused "extreme emotional disturbance." While the court in that case ruled that the defendant should have been allowed to present expert testimony about Laotian culture, evidence is one thing and reduced charges another. *People v. Aphaylath*, 68 N.Y.2d 945, 946 (1986). For the most part, U.S. courts have not been receptive to culture-based attempts to mitigate killings and domestic violence, and defendants making such claims have not been successful in persuading juries. Levine at 57-61 [includes description of a notable exception to this rule].

⁴⁵¹ Canada Criminal Code, R.S.C., ch. C 46 s. 232 (1985).

⁴⁵² STUDY GUIDE – DISCOVER CANADA: THE RIGHTS AND RESPONSIBILITIES OF CITIZENSHIP, available at <http://www.cic.gc.ca/english/resources/publications/discover/section-04.asp> [last accessed April 2, 2010].

Provocation, as a concept, is not the exclusive domain of perpetrators of domestic violence. The Canadian Supreme Court case *R. v. Lavallee* concerned a woman who shot and killed her live-in boyfriend in the back of the head, in the midst of an intense argument and after suffering years of violence.⁴⁵³ The defendant made a statement to the police that her boyfriend had told her that he would kill her if she didn't kill him first.⁴⁵⁴ Under the Criminal Code, "Everyone who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes and (b) he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."⁴⁵⁵

The Court declared that expert evidence about "the psychological effect of battering on wives and common law partners" was "both relevant and necessary" to the case and thus admissible.⁴⁵⁶ A doctor had testified during the trial that the defendant's state of mind must be understood "in terms of the cumulative effect of months or years of brutality" which can lead to "escalating terror"—in other words, an apprehension of death or grievous bodily harm that may be reasonable under the circumstances.⁴⁵⁷

"The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man?...Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals."⁴⁵⁸ The Court continued: "The implication of the [lower court]'s reasoning is that it is inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is actually in progress....expert testimony can cast doubt on these assumptions as they are applied in the context of a battered wife's efforts to repel an assault."⁴⁵⁹

C) "Gay Panic" Defense

In recent years, there has been increasing concern that people who kill after discovering the target of their crime is gay or transgendered might be convicted of only voluntary manslaughter rather than murder by invoking a provocation defense, especially in response to a claimed sexual overture from the victim. Some courts and legislatures have explicitly rejected this defense. California enacted a statute permitting any party to request jury instructions stating that bias against the victims should not be considered as a mitigating factor, while a Pennsylvania court refused to allow a defendant to present evidence that he had been provoked by the sight of lesbian sex.⁴⁶⁰

⁴⁵³ *R. v. Lavallee*, [1990] 1 S.C.R. 852 p. 7-8.

⁴⁵⁴ *Id.* at 9.

⁴⁵⁵ *Id.* at 18-19 [quoting Criminal Code, R.S.C. 1985 c. C-46 s. 34]

⁴⁵⁶ *Id.* at 21.

⁴⁵⁷ *Id.* at 29.

⁴⁵⁸ *Id.* at 23.

⁴⁵⁹ *Id.* at 27.

⁴⁶⁰ *Commonwealth v. Carr*, 398 Pa. Super. 306 (1990); Gwen Araujo Justice for Victims Act, Cal Pen Code § 1127h ["Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes bias against the victim or victims, witnesses, or defendant based upon his or her disability, gender, nationality, race or ethnicity, religion, gender identity, or sexual orientation."].

CONCLUSIONS

- The U.S. and Canada have abandoned the old common law idea that a man may justifiably murder his wife if she provokes sexual jealousy. However, these countries wished to retain the principle that some killings, while still criminal and subject to severe punishment, could be somewhat mitigated by the extreme emotional state of the defendant. The common law rule thus gradually transformed into today's gender-neutral laws, which reduce murder to voluntary manslaughter under some circumstances. Courts and legislatures have also limited the use of this defense, refusing to allow defense arguments that infidelity or sexual orientation could reasonably provoke violent rage.
- Ironically, victims of domestic violence may now derive legal benefit from these "heat-of-passion" type defenses. Evidence of the long-term psychological effects of domestic violence, when considered by courts, can be used to mitigate victims' violent reactions to their abusers.

4) Sexual Violence

A) Sexual Assault, Including Rape

Early common law defined rape as a man having sexual intercourse, by force, with a woman who was not his wife—and whose unwillingness could only be inferred by the utmost physical resistance.⁴⁶¹ Canada and the U.S. have since removed the marital exception and broadened the rape law dramatically.⁴⁶² Sexual assault is now gender-neutral; both sexes can legally be victims or perpetrators.⁴⁶³ As one U.S. court explained, the marital exception is "based upon archaic notions about the consent and property rights incident to marriage," while gendered rape laws were "grounded in long-standing stereotypical notions of the differences between the sexes" and could not meet constitutional muster.⁴⁶⁴

Nor do U.S. and Canadian laws envision rape as exclusively vaginal penetration by a penis: the state of Florida describes the crime of "sexual battery" as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object..."⁴⁶⁵ Other kinds of unwanted sexual touching, such as intentionally touching the "genitalia, anus, groin, breast, or buttocks" directly or through clothing with the intent to "molest, arouse or gratify," (or forcing another person to touch one's own intimate body parts) are also criminalized, although sentences for unwanted touching of an adult are shorter than for rape.⁴⁶⁶

⁴⁶¹ Michelle Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 628 (2005); *In the Interest of M.T.S.*, 129 N.J. 422, 433-439 (N.J. 1992), 609 A.2d 1266 (N.J. 1992) [discussing the history of the spousal exception and the resistance requirement, and their abandonment].

⁴⁶² Canadian Criminal Code, R.S.C. 1985, c. C-46 s. 271 et seq.; Cal. Penal C. §262 [defining crime of rape of a spouse]. However, some U.S. states retain vestiges of the marital exception through additional requirements or reduced penalties. See Virginia C. Ann. § 18.2-61 [rape applies "whether or not" the victim is a spouse, but defendant spouse with no prior rape convictions may in some situations defer criminal proceedings while obtaining therapy].

⁴⁶³ Virginia C. Ann. § 18.2-61(A) [law applies to "any person"] .

⁴⁶⁴ *People v. Liberta*, 64 N.Y.2d 152 (1984), 1164-69485 N.Y.S. 2d 207 (N.Y. 1984).

⁴⁶⁵ Fl. St. §794.011(h).

⁴⁶⁶ Va. C. §18.2-67.10; See also 18 U.S.C. §2246(2) [federal criminal law defines "sexual act" as contact between penis and vulva or anus; contact between mouth and penis, vulva, or anus; penetration, however slight, of anal or genital opening by hand, finger or object]; 18 U.S.C. §2246(3) [lesser crimes of "sexual contact" involve intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks, directly or through clothing, with sexual intent or intent to humiliate or harass].

Canadian law defines all kinds of assaults, including sexual assaults, as occurring whenever a person “without the consent of another person...applies force intentionally to that person, directly or indirectly,” attempts or threatens to apply such force, or accosts another person while openly wearing or carrying a weapon.”⁴⁶⁷ Canadian caselaw has describe sexual assault as “unwanted sexual touching.”⁴⁶⁸

Sexual assault laws no longer require physical restraint of the victim or active resistance. In Virginia, for instance, rape includes sexual intercourse “against the complaining witness’s will, by force, threat or intimidation” or “through the use of the complaining witness’s mental incapacity or physical helplessness.”⁴⁶⁹

Although physical violence is not required, the emphasis of the Virginia law is still on the perpetrator’s coercive activity. Mississippi’s sexual battery law, in contrast, focuses instead on the victim’s unwillingness, by requiring only sexual penetration of “another person without his or her consent.”⁴⁷⁰ Most U.S. states that define sexual assault as nonconsensual penetration generally impose a lesser penalty if the assault does not include the coercive element typified by the Virginia statute.⁴⁷¹

Even where the sexual assault statute requires force or threat, courts may interpret that element broadly. In 1992, the New Jersey Supreme Court considered a state law defining second-degree sexual assault as penetration using “physical force or coercion.”⁴⁷² The victim testified that she was sexually penetrated while asleep, and the trial court determined that she had not consented to the sexual act.⁴⁷³ The court found that “physical force” was equivalent to “touching that occurs without permission,” and declared that all sexual penetration fell within the statute whenever “it was accomplished without the affirmative and freely-given permission of the alleged victim.”⁴⁷⁴

As described above, the Canadian assault statute includes elements of both force and consent. But Canadian jurisprudence suggests that Canada may be closer to requiring affirmative consent than most U.S. jurisdictions. Someone accused of sexual assault may present evidence that he or she honestly but mistakenly believed that the alleged victim consented.⁴⁷⁵ But in the 1999 sexual assault case *R v. Ewanchuk*, the Canadian Supreme Court wrote, “In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant

⁴⁶⁷ Canada Criminal Code, R.S.C., ch. C-46 s. 265.

⁴⁶⁸ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 ¶23.

⁴⁶⁹ Va. Stat. § 18.2-61 [applies whether the force, threat, or intimidation is directed at the victim or someone else]; See also New Hampshire Rev. Stat. §632-A:2. Virginia has separate statutes for vaginal penetration by a penis, “sodomy” i.e. forcible anal or oral sex, and penetration by an object, but they are all punished the same way. Va. C. §§18.2-61 [rape involves “sexual intercourse” and is punishable by five years to life], 18.2-67.1 [forcible sodomy involves cunnilingus, fellatio, anilingus, or anal intercourse and is punishable by five years to life] 18.2-62.2 [object penetration involves inanimate or animate object penetration of labia majora or anus and is punishable by five years to life], 18.2-67.5 [attempted rape, sodomy, and object rape all punished as class 4 felony].

⁴⁷⁰ Miss. C. §97-3-95(1).

⁴⁷¹ Anderson, *supra*, 79 ST. JOHN’S L. REV. at 632.

⁴⁷² In the Interest of M.T.S., 129 N.J. 422, 424 (New Jersey 1992) This requirement did not apply if the victim was incapacitated, in the custody of the defendant, or fell into several other categories.

⁴⁷³ *Id.* at 426-427.

⁴⁷⁴ *Id.* at 446-448.

⁴⁷⁵ Canada Criminal Code, R.S.C., ch. C-46 s. 265(d)(4) [“Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, to consider the presence or absence of reasonable grounds for that belief.”]

communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defense. [underline in original].”⁴⁷⁶ If someone does not want sexual touching to take place, regardless of how he or she acts, the other person cannot escape criminal liability unless “the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.”⁴⁷⁷

For the purposes of the Canadian *Criminal Code*, consent means a voluntary agreement to engage in the sexual activity in question, and there is no consent where:

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.⁴⁷⁸

B) Rape Shield Laws

Both the states and the U.S. federal government have enacted laws to exclude from evidence irrelevant information about sexual assault victims’ past, protecting victims from character assassination and preserving their privacy.⁴⁷⁹ State laws are similar to the federal statute, enacted as part of VAWA, which precludes evidence offered to prove either “any alleged victim engaged in other sexual behavior” or “any alleged victim’s sexual predisposition.”⁴⁸⁰

The law provides exceptions, however: criminal defendants may still present evidence of sexual behavior to prove that someone else was the source of semen or other physical evidence, and both defendants and prosecutors may offer evidence of “specific instances of sexual behavior by the alleged victim with respect to the person accused.”⁴⁸¹ In Canada, a law that lacked sufficient exceptions and thus excluded potentially relevant evidence was struck down in 1991.⁴⁸² The Canadian Supreme Court upheld a revised rape shield law excluded evidence of a complainant’s sexual history (other than the sexual act at issue in the case) when used to show that the complainant “is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or is less worthy of belief.”⁴⁸³ The Court referred to these as the “twin myths” which were “simply not relevant at trial.”⁴⁸⁴

Addressing a related issue, in *R. v. Mills*, the Canadian Supreme Court considered Bill C-46, which amended the Criminal Code to prevent the disclosure of victims’ confidential records in

⁴⁷⁶ *R. v. Ewanchuk* [1999] 1 S.C.R. 330 ¶46

⁴⁷⁷ *Id.* at ¶49.

⁴⁷⁸ s 273.1.

⁴⁷⁹ Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEXAS L. REV. 695, 726-727 (2007).

⁴⁸⁰ Fed. R. of Ev. 412(a).

⁴⁸¹ *Id.* If the evidence is offered by the defendant, it can be offered only to prove consent.

⁴⁸² *R. v. Darrach*, [2000] 2 S.C.R. 443 ¶1 [discussing *R. v. Seaboyer*, [1991] 2 S.C.R. 577.]

⁴⁸³ *Id.* at ¶17 [quoting *Criminal Code*, R.S.C. 1985 c. C-46 s. 276.]

⁴⁸⁴ *Id.* at ¶32-33.

sexual assault and other sexual criminal cases.⁴⁸⁵ Under the amended law, a defendant in such cases must first establish that the record is “likely relevant to an issue at trial or to the competence of a witness to testify” and that “the production of the record is necessary in the interests of justice.”⁴⁸⁶ The judge must then weigh the benefits of production against the witness’ privacy, considering among other things “the extent to which the record is necessary for the accused to make a full answer and defense; the probative value of the record; the nature and extent of the reasonable expectation of privacy with respect to the record; whether production of the record is based on a discriminatory belief or bias; [and] the potential prejudice to the personal dignity and right of privacy of any person to whom the record relates...”⁴⁸⁷ If the judge feels that the documents meet the necessary criteria, he or she will review them *in camera* and then again go through the analysis to determine whether they should be produced.⁴⁸⁸

The defendant in *Mills* argued that this law violated his *Charter* rights, including his right to a full defense.⁴⁸⁹ The court found that the law was valid: “[T]he Bill safeguards the efficiency and resources of the judicial system while furthering its objective of protecting, to the greatest extent possible, the rights of all those involved in sexual offence proceedings, by mandating that judges can only review the records in question once these records have been established as likely relevant and their production to the court has been established as necessary in the interests of justice.”⁴⁹⁰

C) Rape Kits: A U.S. Example of the Difficulty of Implementation

The forensic exams popularly called “rape kits” are a means of collecting physical evidence of sexual assault, including DNA. The DNA evidence, though of course unhelpful on the question of consent, can at least prove sexual activity occurred between specific individuals. In order to qualify for funding under the 2005 reauthorization of VAWA, states must provide and pay for rape kits for sexual assault victims.⁴⁹¹ Victims must be offered the exam even if they do not report the crime to the police or otherwise refuse to participate in criminal proceedings.⁴⁹²

Implementation of rape kit policies has not gone smoothly—police departments were apparently unprepared for a large increase in DNA testing needs, and DNA, like all evidence, must be carefully tracked to ensure a secure and credible chain of custody.⁴⁹³ Large backlogs of untested

⁴⁸⁵ *R. v. Mills*, [1999] 3 S.C.R. 668, ¶48-52. These records included “medical, psychiatric, therapeutic, counseling, education, employment, child welfare, adoption and social service records,” among others. ¶97 [quoting ss. 278.1 and 278.2(1).]

⁴⁸⁶ *Id.* ¶53 [quoting s. 278.5(1).]

⁴⁸⁷ *Id.* ¶ 53 [citing s. 278.5(2)]. The other factors are “society’s interest in encouraging the reporting of sexual offences;” “society’s interest in encouraging the obtaining of treatment by complainants of the sexual offences;” and “the effect of the determination on the integrity of the trial process.” For more details about the procedure involved in the court’s determination, please see the cited case.

⁴⁸⁸ *Id.* at ¶54.

⁴⁸⁹ *Id.* at ¶ 61.

⁴⁹⁰ *Id.* at ¶101.

⁴⁹¹ 42 U.S.C.A. §3796gg-4(d)(1). A word is missing from the statute, so that it appears to *allow* states to refuse rape kits to uncooperative victims, but the Department of Justice has interpreted the statute as if the word was included. See U.S. DEPT. OF JUSTICE OFFICE ON VIOLENCE AGAINST WOMEN, FREQUENTLY ASKED QUESTIONS: ANONYMOUS REPORTING AND FORENSIC EXAMINATIONS, (May 2008) available at <http://www.ovw.usdoj.gov/ovw-fs.htm>.

⁴⁹² *Id.*

⁴⁹³ Fed. R. Evid. §901 [for something to be admitted into evidence, it must have “authentication or identification...sufficient to support a finding that the matter in question is what the proponent claims.”]

rape kits have been reported nationally.⁴⁹⁴ This can lead to serious problems if prosecutors miss the deadline to file charges or victims miss their chance to file civil lawsuits.

[[NOTE: as of this writing, a bill has been introduced in Congress that would create monetary incentives to reduce rape kit backlogs and create a national system for tracking such backlogs]]

D) Sex Offender Registration and Related Laws

The federal Adam Walsh Act passed by the U.S. Congress in 2006 requires that states maintain registries of convicted sex offenders and “release relevant information that is necessary to protect the public....”⁴⁹⁵ Specifically, states must each maintain a website through which the public can look up the name, photograph, address, and place of employment of certain sex offenders.⁴⁹⁶ These laws can include a broad range of crimes, including nonviolent offenses, and may apply to misdemeanors along with felonies.⁴⁹⁷ Consensual sex can sometimes lead to sex offender registration—see the section on statutory rape for more details.

Two years before the Adam Walsh Act, Canada’s own national sex offender legislation came into force, augmented by provincial sex offender registration laws.⁴⁹⁸ Unlike the U.S. law, information gathered under the Canadian Sex Offender Information Registration Act (SOIRA)⁴⁹⁹ is for the most part not disseminated to the public: “the privacy interests of sex offenders and the public interest in their rehabilitation and reintegration into the community as law-abiding citizens require that (i) the information be collected only to enable police services to investigate crimes...and (ii) access to the information, and use and disclosure of it, be restricted.”⁵⁰⁰

In concert with these registries, U.S. states and municipalities have enacted zoning laws to prevent sex offenders from living or working close to schools, playgrounds, or other locations where children congregate.⁵⁰¹ This can put entire communities off-limits, and registered sex offenders can be uprooted whenever a new school or childcare center opens nearby.⁵⁰² Critics of these laws contend that these restrictions actually make sex offenders more difficult to track, by forcing them to move frequently and pushing them to rural or industrial areas with little police presence.⁵⁰³ Critics also question whether these laws actually *increase* recidivism by isolating offenders and depriving them of stability and/or employment.⁵⁰⁴

CONCLUSIONS

⁴⁹⁴ Richard Winton and Patrick McGreevy, *Funds are Lacking for Untested DNA Evidence*, LOS ANGELES TIMES, Nov. 30, 2007.

⁴⁹⁵ Adam Walsh Act, codified at 42 U.S.C. §14071(e)(2).

⁴⁹⁶ 42 U.S.C. §§16914, 16918.

⁴⁹⁷ For a discussion of offenses requiring registration, see Michale Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZONA STATE L. J. 651, 668 and ft. 138. (2008) [California includes sexual acts with a child under 14, “knowing solicitation of or distribution of explicit material to a minor,” prostitution of a minor, and child pornography; Arizona includes similar crimes and repeat violations of “public sexual indecency.”]

⁴⁹⁸ Mercedes Perez and Anita Szigeti, *Sex Offender Information Registries and the Not Criminally Responsible Accused: Have We Cast Too Wide A Net?*, 25 Windsor Rev. of L. and Soc. Issues 69, 71 (Sep. 2008).

⁴⁹⁹ Sex Offender Information Registration Act, S.C. 2004, c.10 (Assented to April 1, 2004).

⁵⁰⁰ *Id.* s. 2(c); Perez and Szigeti, 25 Windsor Rev. of L. and Soc. Issues at p. 76.

⁵⁰¹ Amber Leigh Bagley, *An Era of Human Zoning’: Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1353-1354.

⁵⁰² *Id.* at 1382.

⁵⁰³ *Id.* at 1381-1383.

⁵⁰⁴ Vitiello, 40 ARIZONA STATE L. J. at 676-679.

- The U.S. and Canada have abandoned archaic rules that permitted marital rape, required victims to show resistance, or failed to recognize that men could be victims of sexual assault. While the language of U.S. state sexual assault statutes vary, with some referring to assailant's behavior and others describing the crime in terms of lack of consent, U.S. law recognizes that sexual assault can occur without physical violence. In Canada, where the statutory emphasis is on consent, the victim's behavior is never a defense to sexual assault unless he or she *affirmatively* expressed consent.
- Whether grouping them in the same statute or naming them as different crimes, U.S. and Canadian jurisdictions criminalize unwanted intercourse, oral sex, anal sex, penetration by an object or body part, and unwanted sexual touching, even when it occurs through clothing.
- The U.S. and Canadian rape shield laws exclude irrelevant evidence of an accuser's sexual history, because admitting such testimony would suggest that sexually active people either cannot be raped or are not entitled to the protections of the law. Allowing testimony about a victim's sexual past would pander to prejudices about sexually active women and strongly discourage victims from coming forward.
- However, rape shield laws are not blanket prohibitions on inquiring into a witness' past but instead have exceptions to protect defendants' rights. Under the federal U.S. law, defendants can question the victim's sexual past when that history includes an ongoing sexual relationship with the defendant (thus suggesting consent) or provides an alternate explanation for physical evidence. In Canada, sexual activity with the defendant is excluded, as is anything that implies that past sexual activity could increase the likelihood of consent or make the witness less credible. Documentary evidence of an accuser's medical or psychological history can only be admitted after the court goes through an analytic procedure weighing the relevance of the documents, the defendant's rights, and the witness' privacy.
- Rape kits provide a valuable source of physical evidence, and the U.S. has made a concerted effort to make rape kits available to sexual assault victims, even those who do not report the rape or refuse to cooperate with police or prosecutors. But DNA testing requires money and resources, and the U.S. has not yet found a way of effectively managing the flood of DNA evidence.
- Federally and on the state/province level, the U.S. and Canada have lately imposed a variety of restrictions on convicted sex offenders after their release from custody. While the political appeal of these laws is obvious—potential repeat offenders can be avoided by individuals who check the registries online or by communities that enact zoning laws—these laws may not improve safety and may even increase the risk of recidivism. Canada has reduced some of these risks by not making sexual offender registries public.

E) Child Sexual Abuse

See Sec. IV(3),(6), and (7) for laws against sexual activity with children, including statutory rape/age of consent laws

(i) Mandatory Reporting of Child Abuse

U.S. States must adopt procedures for reporting child abuse and neglect in order to receive federal funds for prevention of those crimes.⁵⁰⁵ All states have adopted a child abuse reporting statute, which requires specific individuals to report suspected abuse.⁵⁰⁶ Required reporters vary from state to state, but generally include medical professionals, teachers, social workers, police officers, and mental health professionals.⁵⁰⁷ Reporting statutes in Canadian jurisdictions vary from place to place, but mostly impose reporting requirements on everyone.⁵⁰⁸ Some Canadian jurisdictions, however, only require reporting when the parents are unable or unwilling to protect the child.⁵⁰⁹

The American Bar Association has expressed concern that girls may avoid medical care rather than risk having their sexual partners arrested or deported.⁵¹⁰ This could delay prenatal care or abortion, access to contraceptives, STI treatment, and domestic violence-related services. This is especially a concern in states where statutory rape is subject to mandatory reporting: as discussed in Topic V Sec. 3, statutory rape laws often criminalize sex between people very close in age. A teenager in a consensual but illegal relationship with a slightly older person would be understandably reluctant to have her relationship reported to the state.⁵¹¹ Some states have limited their reporting laws to give mandated reporters some discretion: mandated reporters in Louisiana must report only if they have “cause to believe that a child’s physical or mental health or welfare is endangered as a result of abuse or neglect....”⁵¹²

Neither the U.S. nor Canada deals with child abuse exclusively through the criminal justice system, so a mandated report (or other report of abuse) generally triggers a multidisciplinary investigation.⁵¹³ Medical exams and mental health care may be provided to the child, and there are legal procedures by which a jurisdiction’s child protection agency can remove the child from the home and place him or her in foster care.⁵¹⁴

[[NOTE: mandatory reporting laws can abrogate privileges such as physician-patient and, in a few states, attorney-client. This is very significant in U.S. and Canadian law, but involves privilege issues tangential to this project]]

⁵⁰⁵ 42 U.S.C. §5106a(b)(2).

⁵⁰⁶ Jonathan Scher, *Out-of-Court Statements by Victims of Child Sexual Abuse to Multidisciplinary Teams: A Confrontation Clause Analysis*, 47 FAMILY COURT REVIEW 167, 169 (Assoc. of Family and Conciliation Courts Jan. 2009).

⁵⁰⁷ Virginia C. §63.1-248.3 [enumerated reporters must report if there is “reason to suspect that a child is abused or neglected”]; Massachusetts Gen. L. Ch. 119 § 21.

⁵⁰⁸ Ben Mathews and Maureen C. Kenney, *Mandatory Reporting Legislation in the United States, Canada and Australia: A Cross-Jurisdictional Review of Key Features, Differences, and Issues*, CHILD MALTREATMENT, Feb. 2008, at 53. Yukon is the only exception. A minority of U.S. states also apply reporting requirements to everyone, not just specific reporter. *Id.*

⁵⁰⁹ *Id.* at 56.

⁵¹⁰ Abigail English, *Statutory Rape Enforcement and Child Abuse Reporting: Effects on Health Care Access for Adolescents*, 50 DEPAUL L. REV. 827, 843-844 (2001).

⁵¹¹ See Texas Fam. C. §261.101(b) [mandated reporting of offense under 21.11 of Penal Code]; Texas Penal C. §21.11 [“indecency with a child” includes sexual contact with a person under 17 by a person more than three years older].

⁵¹² La. Children’s C. Art. 609(A)(1).

⁵¹³ For a sample multidisciplinary team protocol. See: AMY MILLER AND JULIE MCFARLANE, *A WORKBOOK FOR IMPROVING MDT INVESTIGATIONS*, (Juvenile Rights Project, Inc. 2007) [includes model protocol for adolescents in Oregon], available at <http://www.childwelfare.gov/responding/iia/investigation/multidisciplinary.cfm>. See also NICO TROCME ET AL. CANADIAN INCIDENCE STUDY OF REPORTED CHILD ABUSE AND NEGLECT (Minister of Public Works and Government Services Canada, 2001) [includes data on referrals to social services agencies and other non-policy agencies].

⁵¹⁴ Theodore P. Cross et al., *Evaluating Children’s Advocacy Centers’ Response to Child Sexual Abuse*, JUVENILE JUSTICE BULLETIN, Aug. 2008, at 5.

[[NOTE: This section does not discuss the administrative procedures of states' child protective services, but there are procedures to sever parental rights in cases of abuse, including sexual abuse. Nor does it include procedures designed to avoid tainting children's testimony by intentional or inadvertent suggestion, although there are government agencies with specific forensic policies about interrogations of children⁵¹⁵]]

(ii) Evidentiary Issues: Children's Competence to Testify at Trial

Under Canada's national evidence law, people over 14 are competent to testify as long as they can communicate the evidence and either understand their oath/affirmation *or* promise to tell the truth.⁵¹⁶ Even people under 14 are presumed competent.⁵¹⁷ Children of that age need not take an oath/affirmation, but may testify as long as "they are able to understand and respond to questions."⁵¹⁸

There is no U.S. federal minimum age requirement for witnesses.⁵¹⁹ Some U.S. states require a judicial determination of whether children of a certain age are competent to testify—in Colorado, children under 10 cannot be witnesses if they "appear incapable of receiving just impressions of the facts...or relating them truly," while in Minnesota a child of the same age is deemed competent "unless the court finds that the child lacks the capacity to remember or to relate truthfully" the facts about which he or she is being questioned.⁵²⁰ A few states single out victims of child sexual abuse, declaring that children are *always* competent to testify against their alleged abusers.⁵²¹

(iii) Evidentiary issues: Testimony and Out-of-Court Statements of Children

The Confrontation Clause of the U.S. Constitution (discussed above) poses particular difficulties in the prosecution of child abuse, as addressed by the U.S. Supreme Court in *Maryland v. Craig*. In that case, a six-year old child testified by closed-circuit television.⁵²² The child could be examined and cross-examined and the defendant could watch the proceedings, while sparing the child the emotional distress of sharing a room with the defendant.⁵²³ Noting that a majority of states had passed laws allowing child witnesses to testify by videotape, the court concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."⁵²⁴ The Confrontation clause allows a procedure without face-to-face

⁵¹⁵ The U.S. Dept. of Justice has a portable guide, INTERVIEWING CHILD WITNESSES AND VICTIMS OF SEXUAL ABUSE, PORTABLE GUIDES TO INVESTIGATING CHILD ABUSE SERIES, (Office of Juvenile Justice and Delinquency Prevention, July 2006), pub. No. NCJ214124.

⁵¹⁶ Canada Evidence Act R.S., 1985, c. C-5, s. 16; R.S., 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 26.

⁵¹⁷ R.S. 1985 c. C-5 s. 16.1; 2005, c. 32, s. 27.

⁵¹⁸ *Id.*

⁵¹⁹ Fed. R. Evid. §§ 601-603 ["Every person is competent to be a witness" as long as they have personal knowledge of the matter and take an oath to testify truthfully].

⁵²⁰ Colorado Rev. S. § 13-90-106; Minnesota S. §595.02(n).

⁵²¹ Utah C. §76-5-410 ["A child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding."]

⁵²² *Id.* at 840-841.

⁵²³ *Id.*

⁵²⁴ *Id.* at 853.

confrontation where a child witness testifies under oath, is subject to full cross-examination, and can be observed by the judge, jury, and defendant.⁵²⁵

Canadian law also provides special protections for child witnesses. Witnesses under 18 may have a “support person” present and physically close by during testimony.⁵²⁶ A judge may also allow a witness under 18 to testify outside the court room or behind a screen, unless doing so would interfere with the administration of justice—and “administration of justice” includes “ensuring that...the interests of witnesses under the age of eighteen years are safeguarded in all proceedings....”⁵²⁷ The accused may not personally cross-examine a witness of that age without the judge’s approval, instead relying on counsel to do so, and the public may be excluded from the courtroom.⁵²⁸

As for children’s out-of-court statements, in the U.S. they may be admitted into evidence if they fall within a hearsay exception recognized by the jurisdiction—for instance, statements made in order to receive medical treatment or diagnosis.⁵²⁹ Canada, on the other hand, deems hearsay admissible, even if it does not fall within recognized hearsay exceptions, if it is both necessary and reliable.⁵³⁰ This approach has been used by the Supreme Court to admit the out-of-court statements of a young child concerning sexual abuse.⁵³¹

(iv) Child Pornography

Producing, transporting, shipping, receiving, distributing, and possessing child pornography is a crime under both Canadian and U.S. federal law.⁵³² Canada separately criminalizes “accessing” child pornography as well, while U.S. federal law imposes severe criminal penalties on anyone who induces a minor to participate in the production of child pornography, along with any parent or guardian who knowingly allows their child to participate.⁵³³

Under U.S. federal law, child pornography is “any visual depiction, including any photograph, film, video, picture, or computer...image” produced using “a minor engaging in sexually explicit conduct.”⁵³⁴ For the purposes of the anti-pornography law, “sexually explicit conduct” means actual or simulated “sexual intercourse, including genital-genital, oral-genital, anal-genital, or

⁵²⁵ *Id.* at 857.

⁵²⁶ Criminal Code, R.S. C. 1985 c C-46 s. 486.1 [this procedure is also available for disabled witnesses]. The support person may not communicate with the witness during testimony and can only be present if “necessary for the proper administration of justice.”

Id.

⁵²⁷ R.S.C. 1985 c. C-46 s. 486(2), 486.2.

⁵²⁸ R.S.C. 1985 c. C-46 s. 486, 486.3.

⁵²⁹ *White v. Illinois*, 502 U.S. 346, 356-357 (1992) [child sexual assault victim’s statements to emergency room doctor and nurse admissible]. In child abuse investigations, the line between criminal investigation and medical/social services can be blurry. See *State v. Krasky*, 736 N.W.2d 636, 638 (Minn. 2007) [admitting videotaped interview and examination performed at hospital at police request]; *State v. Bentley* 739 N.W. 2d 296 (Iowa 2007) [finding that Confrontation Clause excluded statements made by a child to a counselor at a Child Protection Center, when police participated in the interview and Center employees were part of multidisciplinary child abuse investigation teams].

⁵³⁰ *R. v. Khan*, [1990] 2 S.C.R. 531; see also *R. v. Smith*, [1992] 2 S.C.R. 915.

⁵³¹ *Id.*

⁵³² 18 U.S.C. §2252; s. 163.1

⁵³³ Criminal Code, R.S. c. C-46 s. 163.1(4.1); 18 U.S.C. §2251.

⁵³⁴ 18 USC §2252(8)(A).

oral-anal, whether between persons of the same or opposite sex; bestiality; maturation; sadistic or masochistic abuse; or lascivious exhibitions of the genitals or pubic area for any purpose.”⁵³⁵

Unlike pornography involving adults, child pornography may constitutionally be outlawed regardless of whether it meets the standards of legal obscenity.⁵³⁶ In the 2002 case *Ashcroft v. Free Speech Coalition*, the U.S. Supreme Court has found that child pornography can be distinguished from other sexually explicit images because of the government’s strong interest in prohibiting the exploitation of children.⁵³⁷ However, that case also held that the government may not outlaw non-obscene sexual images that merely *appear* to depict children, either because the actors look especially young or the images are artificially created.⁵³⁸

Canada’s law, in contrast, defines child pornography to include images that show either “a person who is *or is depicted as being* under the age of eighteen years [italics added]” either engaging in “explicit sexual activity” or with the “dominant characteristic” being the “depiction, for a sexual purpose, of a sexual organ or the anal region.”⁵³⁹ The law also includes written materials, visual representations, or audio records describing or advocating criminal sexual activity with someone under the age of eighteen.⁵⁴⁰ In *R v Sharpe*,⁵⁴¹ the Court considered a challenge to these provisions.⁵⁴² The Court found that the provisions do infringe freedom of expression, guaranteed by s. 2 of the *Charter*, but upheld the laws as sufficiently justified under s. 1 of the *Charter*.

CONCLUSIONS

- U.S. and Canadian jurisdictions have laws requiring people who interact with children professionally to report signs of child abuse; some of these laws require *everyone* to report suggest abuse. While the intention behind these laws is good, if the definition of “abuse” is too broad, young people may avoid medical care rather than risk the arrest of their sexual partners.
- Child witnesses in the U.S. and Canada are essentially subject to the same requirements as adult witnesses—they must be capable of knowing what happened and describing it honestly—although in some jurisdictions courts may have a statutory obligation to evaluate child witnesses’ competency more carefully than adults’.
- While the U.S. Constitution provides defendants with the right to confront their accusers in court, the U.S. Supreme Court has recognized that child sexual abuse victims could suffer additional psychological harm if forced to appear at trial. The Court forged a path between these two conflicting interests by holding that child witnesses testify via closed-circuit video—but that procedure was acceptable only because it did not impede cross-examination or prevent the jury from assessing the child’s credibility. In Canada, witnesses

⁵³⁵ 18 U.S.C. §2252(2).

⁵³⁶ *Ashcroft v. Free Speech Coalition*, 535 U.S. at 240.

⁵³⁷ *Id.* This case held that the government may not outlaw non-obscene sexual images that merely *appear* to depict children, either because the actors look especially young or the images are artificially created.

⁵³⁸ *Id.*

⁵³⁹ s. 163.1(1)(a).

⁵⁴⁰ s. 163.1(1)(d)

⁵⁴¹ [2001] 1 S.C.R. 45

⁵⁴² s 161(3).

under 18 may testify outside the courtroom or behind a screen, and judges are required to consider the well-being of such witnesses.

- Child pornography is illegal in both the U.S. and Canada, including its creation, possession, transmission, transportation, and sale. These nations may ban all child pornography, despite constitutional free speech protections, because these criminal laws are more about protecting minors than regulating expressive content. One difference between the two countries, however, is that the U.S. has limited its child-pornography laws to images involving actual children, rather than adults pretending to be younger or drawings, paintings, cartoons etc. that involve no human actors. This maximizes free speech expression without sacrificing the health and safety of exploited children.

5) Female Genital Mutilation/Cutting

U.S. Federal law states that “whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris” of a girl under 18 years of age is guilty of a crime” punishable by up to five years imprisonment.⁵⁴³ The statute makes an exception for surgeries “necessary to the health of the person,” but specifically states that “any belief...that the operation is required as a matter of custom or ritual” cannot satisfy that exception.⁵⁴⁴ The Canadian Criminal code was amended in May 1997 to explicitly categorize FGM as an existing crime: aggravated assault.⁵⁴⁵ Under the Criminal Code, any person who commits such an assault is liable to imprisonment up to fourteen years.⁵⁴⁶

A parent who performs FGM on his/her child may therefore be charged with aggravated assault under Canadian law. Although most U.S. state laws are similar to that country’s federal statute, a few states explicitly punishing parents or guardians who *allow* FGM to be performed on their daughters.⁵⁴⁷

The U.S. and Canada have also concerned themselves with FGM performed outside their borders. The Canadian Criminal Code has been used against the transportation of female children outside the country for the purposes of obtaining FGM.⁵⁴⁸ And U.S. case law provides a thorough analysis of FGM as a basis for asylum.

Refugees outside their home country are eligible for asylum if they cannot return home because of persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁵⁴⁹ An asylum applicant can create a rebuttable presumption of a “well-founded

⁵⁴³ 18 U.S.C. §116(a).

⁵⁴⁴ 18 U.S.C. §116(b), (c).

⁵⁴⁵ Criminal Code, R.S.C.1985, c. C-46, s. 268, as am. S.C. 1997, c.16, s. 5 [“(3) For greater certainty, in this section, “wounds” or “maims” includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where (a) surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or (b) the person is at least eighteen years of age and there is no resulting bodily harm.]

⁵⁴⁶ *Id.*

⁵⁴⁷ See New York Penal L. §130.85 [echoes federal law with additional provision for parent, guardian or custodian who “knowingly consents” to FGM of the child in their care]. For a discussion of different state laws, see Center for Reproductive Rights, *Legislation of Female Genital Mutilation in the United States* (2004).

⁵⁴⁸ Section 273, Criminal Code, R.S.C. 1985, c. C-46, as am. S.C. 1993, c. 45, s. 3, as am. S.C. 1997, c. 18, s. 13. See also FGM asylum section (fear of FGM is sufficient grounds for refugee status).

⁵⁴⁹ INA § 101(a)(42) [language of the U.S. statute is very similar to the 1951 U.N. Refugee Convention].

fear” of future persecution—a requirement of asylum law—based on past persecution.⁵⁵⁰ The government can rebut the presumption by showing “a fundamental change in circumstances” in the applicant’s home country, which removes the threat of future persecution.⁵⁵¹ Female genital cutting/mutilation (FGM) was first acknowledged by U.S. courts as a basis for an asylum claim in *Matter of Kasinga*.⁵⁵² A question arose, however, about whether women who had *already* suffered FGM were still subject to future persecution.

In 2007, the U.S. Board of Immigration Appeals [BIA] ruled that a past infliction of FGM was a fundamental change in circumstances—a woman, having suffered the mutilation, could not undergo it again.⁵⁵³ The Attorney General, vacating that decision the following year in *Matter of A-T-*, pointed out the BIA’s fundamental misunderstanding of FGM, an injury that can be inflicted multiple times over a woman’s life.⁵⁵⁴ More broadly, the Attorney General explained that “the Board was wrong to focus on whether the future harm to life or freedom that respondent feared would take the ‘identical’ form—namely female genital mutilation—as the harm she had suffered in the past. That is not what the law requires.”⁵⁵⁵ Instead, the question was whether she would suffer harm—any kind of harm—on account of her membership in a social group.⁵⁵⁶

CONCLUSIONS

- Canadian and U.S. federal law explicitly criminalizes FGM. U.S. law explicitly states that cultural background is not a defense to the crime, and some states penalize not just the people who actually do the cutting, but also the parents or guardians who perpetuate the practice by knowingly allow their children to be cut.
- The series of rulings culminating in *Matter of A-T-* illustrated that that adjudicative bodies might not understand that FGM is a harm that can be repeated—the BIA, for instance, analogized FGM to the loss of a limb.⁵⁵⁷ As recognized by the U.S. Attorney General, genital/sexual harms should not be isolated from the larger question of an asylum applicant’s persecution

6) Police Failure to Respond

A) Selected Police Negligence Issues in Canada

Although some claim the right to police response is enshrined in the Canadian Charter on Rights and Freedoms, there have been recent high profile instances of police failure to respond to family

⁵⁵⁰ Provided, of course, that the past persecution meets the other requirements: it must be on account of the applicant’s race, religion, nationality, social group, or political opinion, and it must have been either committed by the government or by forced the government cannot/will not control. 8 CFR 208.13(b)(1), 8 CFR 1208.13(b)(1), 8 CFR 208.16(b)(1), 8 CFR 1208.16(b)(1), *Navas v. INS*, 217 F.3d 646, 655-656 (9th Cir. 2000).

⁵⁵¹ 8 C.F.R. 208.13(b)(1)(i)(A), 8 CFR 1208.16(b)(1)(i)(A).

⁵⁵² 21 I.&N Dec. 357 p. 299 (BIA 1996) Since then, the “particular social group” in U.S. cases has generally been defined by gender combined with tribal, religious, or ethnic affiliation. See Yule Kim, *Female Genital Mutilation as Persecution: When Can it Constitute a Basis for Asylum and Withholding of Removal?* Congressional Research Services Report No. RL34587 at 3 (Congressional Research Service, Oct. 10, 2008).

⁵⁵³ *In re A-T-*, 24 I&N Dec. 296, 299 (BIA 2007), Interim Decision No. 3584.

⁵⁵⁴ *Matter of A-T-*, 24 I&N Dec. 617, 621 (A.G. 2008).

⁵⁵⁵ *Id.* at 621.

⁵⁵⁶ *Id.* at 622.

⁵⁵⁷ *In re A-T-* 24 I&N Dec. 296, 302.

or gendered violence resulting in death.⁵⁵⁸ Although the Canadian tort system does allow suits based on police negligence in some circumstances, litigants have found it difficult to prove that police both had a legal duty of care to the victim and that their failure to act actually *caused* violence.⁵⁵⁹

People injured as a result of police inaction may also make administrative complaints. Any member of the public may make a complaint to the Royal Canadian Mounted Police Public Complaints Commission about an employee of that agency, and the Commission may dispose of the matter informally with the consent of the complainant and the person whose conduct is at issue.⁵⁶⁰ Failing that, the complaint may be investigated; if the complainant is not satisfied with the result, he or she may refer the complaint to the Commission for review and possibly a hearing.⁵⁶¹

B) Selected Police Negligence Issues in the U.S.

Police officers may be convicted of generally applicable crimes such as assault, but some states also have criminal statutes targeted at police brutality. In California, “Every public officer who, under color of authority, without lawful necessity, assaults or beats any person,” commits a crime punishable by up to a year in jail.⁵⁶² Although criminal charges may be brought against police officers, the U.N. has complained that U.S. prosecutors rarely exercise their discretion to do so.⁵⁶³ Municipalities have procedures for filing complaints against police officers, but the process can be dauntingly byzantine.⁵⁶⁴

The Police Accountability Act of 1994 gave the federal Justice Department the authority to bring civil actions against police departments and other government entities with a “pattern or practice” of depriving people of Constitutional or federal protections.⁵⁶⁵ This has led to a number of “consent decrees” (court-enforced settlement agreements) addressing a wide variety of problems from strip-search practices to internal investigation procedures.⁵⁶⁶

The Justice Department, however, does not have the resources to investigate all police misconduct. Instead, the U.S. has created a legal structure so that individuals may bring suit on their own initiative. People may sue for damages if they are 1) deprived of rights, privileges or immunities guaranteed by the U.S. Constitution or federal law 2) by someone acting “under color

⁵⁵⁸ For example, in a high-profile Winnipeg case, in 2000 two aboriginal sisters died of stab wounds after placing five calls to 911 emergency services. There was a protection order previously issued against the perpetrator. This failure to respond sparked reaction on grounds of gender violence and race discrimination. Some charged that the failure to respond had more to do with the sisters’ aboriginal status and location in a primarily aboriginal area than gender alone. See: CBC News Online, “The Winnipeg 911 Murders,” 2 July 2004, *available at* <http://www.cbc.ca/news/background/aboriginals/winnipeg911.html>.

⁵⁵⁹ Margaret Isabel Hall, *Duty, Causation, and Third-Party Perpetrators: The Bonnie Mooney Case*, 50 MCGILL L.J. 597 (2005).

⁵⁶⁰ Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10 s. 45.36(1).

⁵⁶¹ Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10 s. 45.36 et. seq.

⁵⁶² Cal. Penal C. §149.

⁵⁶³ UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF COLOR IN THE UNITED STATES (Dec. 2007) [dealing specifically with race-based abuse]; see also AMNESTY INTERNATIONAL USA, STONEMALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S., (Amnesty International Publications 2005) at 110 [“In the U.S., very few criminal cases involving excessive use of force or discriminatory practices are brought against individual police officers.”]

⁵⁶⁴ Amnesty International USA, *supra*, at 101-103.

⁵⁶⁵ 42 U.S.C. §14141.

⁵⁶⁶ Amnesty International USA at 110-111.

of law” (i.e. with state power).⁵⁶⁷ These suits, called section 1983 actions, have been used successfully against police officers who used the power of their office to commit violent acts.⁵⁶⁸ These cases have limited ability to create institutional change, however: case law and rules of government immunity have narrowed the scope of section 1983, and government entities are not always liable for violations committed by their employees.⁵⁶⁹ (See Sec. VII(2)(B) and the *Castle Rock* case).

CONCLUSION

- The U.S. federal government’s Department of Justice can bring actions against local agencies with discriminatory practices, and Canada offers administrative remedies for complaints against police officers. In both countries, individuals can sue for damages in some circumstances, but the relevant legal standards make such cases difficult to win.

7) Hate Crimes

Both the U.S. and Canada have attempted to criminalize hate crimes. However, laws against hateful speech can intrude on constitutionally-guaranteed freedom of expression, especially in the United States. Thus, while Canada has outlawed the willful promotion of hatred, the U.S. has mostly limited its hate crime legislation to increased sentences for bias-motivated crimes.

A) Hate Crime Statutes in Canada

Advocating or promoting genocide, public incitement of hatred, and willful promotion of hatred are crimes in Canada.⁵⁷⁰ Genocide is defined as “killing members of the group; or...deliberately inflicting on the group conditions of life calculated to bring about its physical destruction,” with the intent to destroy the identifiable group in whole or in part, and where, “identifiable group” is defined as “any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.”⁵⁷¹

Public incitement of hatred involves statements in any public place...where such incitement is likely to lead to a breach of the peace...” and willful promotion of hatred requires statements “other than in private conversation” which “willfully” promote hatred.⁵⁷² In either case, the statements must be directed against an identifiable group.⁵⁷³ The *Criminal Code* contains certain defenses to these offences, including discussing true facts, good faith expression of a religious belief, discussions “relevant to any subject of public interest, the discussion of which was for the

⁵⁶⁷ 42 U.S.C. 1983.

⁵⁶⁸ *Bennett v. Pippin*, 74 F.3d 578, 583-584 (5th Cir. 1996) [affirming trial court decision that sheriff who raped criminal suspect while in uniform and in the course of an investigation committed the crime under color of state law].

⁵⁶⁹ For a discussion of the limits of 1983 actions, see UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF COLOR IN THE UNITED STATES (Dec. 2007) at 37.

⁵⁷⁰ *Canadian Criminal Code*, s 318-319 [upheld by *R. v. Keegstra*, [1990] 3 S.C.R. 697].

⁵⁷¹ Bill C-250, 37th Parliament, 3d Session 29 April 2004. s 118.

⁵⁷² *Criminal Code* s. 319.

⁵⁷³ *Criminal Code* s. 319.

public benefit,” and attempts to “point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.”⁵⁷⁴

B) Increased Sentences for Bias-Motivated Crimes in the U.S.

State and local governments in the U.S. have enacted hate crimes bills. These laws are directed at crimes motivated by bias against a victim and most commonly apply to prejudice based on race, ethnicity, religion or national origin—but gender and sexual orientation are also sometimes included.⁵⁷⁵ Although these laws take several forms, the most common are laws that increase sentences for crimes motivated by bias.⁵⁷⁶ Other versions may proscribe specific acts such as harassment or intimidation, and many include data collection requirements to track hate crimes within a jurisdiction.⁵⁷⁷ One particularly broad statute defines “bias-related crime” as one that demonstrates prejudice “based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, or gender identity or expressions, family responsibility, physical disability, matriculation, or political affiliation of a victim....”⁵⁷⁸

In 1994, Congress directed the U.S. Sentencing Commission to develop a system of increased penalties for crimes motivated by bias against a number of categories, including gender and sexual orientation.⁵⁷⁹ It was not until October of 2009, however, that the U.S. Congress passed a bill adding gender, sexual orientation and gender identity to the federal hate crimes statute.⁵⁸⁰ That bill authorizes grants and Justice Department assistance to states and local governments needing help with the prosecution or investigation of hate crimes.⁵⁸¹ It also set criminal sentences for designated violent offences committed “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person....”⁵⁸²

CONCLUSIONS

- Public incitement of hatred, willful promotion of hatred, and promotion of genocide are all crimes in Canada when directed at an identifiable group. To prevent this law from stifling free expression, the Criminal Code includes a number of expressions. Furthermore, the incitement and promotion of hate provisions do not apply to private conversations.
- Many U.S. jurisdictions impose more severe punishment when crimes are motivated by bias. This now includes prejudice based on sex, sexual orientation, and gender identity, an extension of the law that suggests a governmental commitment to prosecuting crimes

⁵⁷⁴ *Id.* s. 319.

⁵⁷⁵ See D.C. Code 22-3701(1).

⁵⁷⁶ Janna C. Roumaine, *Fourth Annual Review of Gender and Sexuality Law: Constitutional Law Chapter: Hate Crimes 4* GEORGETOWN J. GENDER & L. 115, 128-129(Fall 2002); See D.C. Code §22-3703 [bias-related crime receives up to 1.5 times the maximum fine and imprisonment term].

⁵⁷⁷ *Id.*

⁵⁷⁸ D.C. Code §22-3701(1).

⁵⁷⁹ P.L. 103-322 § 280003 (Sep. 13, 1994), 1994 HR 3355, 108 Stat. 2096, codified at 28 U.S.C. §994 note.

⁵⁸⁰ Mathew Shepard Hate Crimes Prevention Act, S. 909 §7 (April 28, 2009);

⁵⁸¹ *Id.* §4(b).

⁵⁸² *Id.* §7.

driven by prejudice against LGTB people. Nonetheless, increased punishment also raises questions about prosecutors' discretion to seek long sentences.⁵⁸³

8) U.S. Anti-Trafficking Legislation

A) Federal U.S. Anti-Trafficking Legislation: The Victims of Trafficking and Violence Protection Act

U.S. law reflects a comprehensive approach to trafficking, containing measures aimed at prosecuting traffickers, protecting trafficked persons, and preventing trafficking.⁵⁸⁴ As U.S. anti-trafficking laws have evolved over the past decade, the conceptual and legal distinctions between sex trafficking and trafficking for forced labor have been minimized in an effort to improve prosecution of traffickers and protect the rights of all victims of human trafficking. However, the conflation of sex trafficking with prostitution; the disproportionate focus on sex trafficking sidelining investigations of forced and bonded labor; and aid policies restricting eligibility for anti-trafficking grants to organizations adopting an anti-prostitution framework all operate to undermine anti-trafficking interventions, posing serious challenges to the protection of trafficked persons and the realization of their sexual rights and human rights.

In 2000, the U.S. Congress enacted the Trafficking Victim Protection Act (TVPA).⁵⁸⁵ The TVPA expanded the penalties for existing crimes related to servitude⁵⁸⁶ and created new offenses for forced labor, labor trafficking, sex trafficking, and unlawful use of documents for the purposes of trafficking (i.e. confiscating or destroying someone's passport or identification).⁵⁸⁷ The TVPA defines "severe forms of trafficking" as:

- a) sex trafficking in which a commercial sex act⁵⁸⁸ is induced by force, fraud, or coercion⁵⁸⁹, or in which the person induced to perform such an act has not attained 18 years of age; or
- b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services⁵⁹⁰, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude⁵⁹¹, peonage, debt bondage⁵⁹², or slavery.

⁵⁸³ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the U.S. Supreme Court held that a jury must determine, "beyond a reasonable doubt," the facts that supporting a hate crime provision which increased a criminal sentence beyond the statutory maximum.

⁵⁸⁴ As part of its effort to prevent trafficking abroad, the TVPA created a sanctions regime allowing the President to withhold U.S. non-trade-related, non-humanitarian financial aid from those countries who fail to demonstrate efforts to comply with certain "minimum standards for the elimination of trafficking, evaluated in an annual "Trafficking in Person" report by the Secretary of State which ranks countries' anti-trafficking efforts.

. TVPA, §108(a)-(b). Minimum standards include measures a country takes to criminalize and punish severe forms of trafficking in persons; efforts to investigate and prosecute traffickers; victim protection and assistance; anti-trafficking prevention and public education programs; extradition practices; investigations and prosecutions of corrupt officials. Subsequent reauthorizations of the TVPA have added criteria relating to training for law enforcement officials in the identification and treatment of victims, as well as assessments of whether governments have made efforts to reduce demand for commercial sex and participation of nationals in international sex tourism.

⁵⁸⁵ Pub. L. No. 106-386, 22 U.S.C. §§ 7101-7112 (2000)

⁵⁸⁶ The TVPA increases penalties for crimes including peonage (§1581(a)), obstructing enforcement of the peonage statute (§1581(b)), enticement into slavery (§1583), and involuntary servitude (§1584).

⁵⁸⁷ See 18 U.S.C. §§1590-1592) (TVPA §112)

⁵⁸⁸ 2000 TVPA, Section 103(3) defines "commercial sex act" as "any sex act on account of which anything of value is given to or received by any person."

⁵⁸⁹ 2000 TVPA, Section 103(2) defines "coercion" as "(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process."

The TVPA defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”⁵⁹³ Only victims of ‘severe forms’ of trafficking are eligible for assistance under the Act and, in regard to prosecution, only persons engaged in ‘severe forms’ of trafficking are federally prosecuted.⁵⁹⁴

The sex trafficking statute prohibits forms of coercion including force, fraud, threats of “serious harm” or physical restraint against any person, schemes or plans intended to cause one to believe they or another would suffer harm or restraint, and abuse of the law or legal process.⁵⁹⁵ The 2000 federal statutes addressing the crimes described in the Act against *forced labor* did not include force or fraud, but shared the remaining prohibited means identified in the sex trafficking statute.⁵⁹⁶ Subsequent reauthorizations of the TVPA addressed these gaps in the law. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (2008 TVPRA) amended the forced labor statute to add force and threats of force; fraud is included as a separate statute.⁵⁹⁷

The 2008 TVPRA also clarified the meaning of key terms such as “serious harm” and “abuse of the law,” forms of coercion prohibited by both the sex trafficking and labor trafficking statutes but left undefined in the 2000 TVPA. The expansive definition of “serious harm”⁵⁹⁸ allows prosecutors to establish a case of forced labor or sex trafficking with evidence of a range of physical and nonphysical methods of coercion, evaluated from the point of view of the victim.

⁵⁹⁰ Note that the term “services” remains undefined in U.S. anti-trafficking law, but see a sample working definition of “services” as including a variety of commercial sexual activities in the Model Law drafted by the U.S. Department of Justice, *infra*.

⁵⁹¹ 2000 TVPA, Section 103(5) defines “involuntary servitude” as including “a condition of servitude induced by means of (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process.”

⁵⁹² 2000 TVPA, Section 103(4) defines “debt bondage” as “the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”

⁵⁹³ 2000 TVPA, Section 103(9) defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”

⁵⁹⁴ State criminal laws could still be applied.

⁵⁹⁵ See TVPA 2000, § 1591(c)(A-C).

⁵⁹⁶ § 1589 of the 2000 TVPA defined the crime of forced labor as follows: “Whoever knowingly provides or obtains the labor or services of a person — (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.”

⁵⁹⁷ “Whoever knowingly and with intent to defraud recruits, solicits or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both.” 18 U.S.C. §1351 [Fraud in Foreign Labor Contracting].

⁵⁹⁸ See the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Sec. 222, amending TVPA 2000 § 1589 (Forced Labor) and § 1591 (Sex Trafficking) of United States Code title 18, defining “serious harm” as: “any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing [labor or services / commercial sexual activity] in order to avoid incurring that harm.”

The 2008 TVPA also defined “abuse or threatened abuse of the legal process.”⁵⁹⁹ This addresses common tactics traffickers and exploiters use to control victims, for example, by threatening to notify authorities as to a victim’s irregular immigration status, or telling a victim she will be arrested for prostitution and deported if she seeks help from police.

B) Intent and Knowledge Elements of Trafficking Offenses

Under the 2000 TVPA, prosecutors were required to prove that the defendant *actually knew* that force, fraud or coercion would be used to cause a person to engage in a commercial sex act. Amendments in the 2008 Act broadened the crimes of child sex trafficking and sex trafficking by force, fraud or coercion by expanding the intent requirement. Now, prosecutors can establish the crime by showing that the defendant either knew or acted in *reckless disregard* of the fact that force, fraud or coercion would be used. This lower standard of intent increases the likelihood of successful prosecution and conviction of traffickers and exploiters.

The 2008 amendments also eliminated the knowledge-of-age requirement for the crime of sex trafficking of minors. Under the new legal standard, prosecutors need only show that the defendant had a *reasonable opportunity* to observe the minor, rather than requiring the prosecution to prove the defendant actually knew the person was under age.

C) Protection and Assistance for Victims of Trafficking

U.S. legislation creates several protections and benefits for trafficked persons. However, the TVPA’s definition of “severe forms of trafficking in persons” is narrower than the UN definition of trafficking, in part, because lawmakers sought to limit eligibility for assistance and benefits under the bill to a particular class of trafficked persons.⁶⁰⁰ The TVPA and its subsequent reauthorizations contain measures relating to immigration relief, temporary or permanent residency status,⁶⁰¹ and other federal public assistance benefits for victims and their minor dependent children.⁶⁰² The TVPA requires mandatory restitution to victims and forfeiture of

⁵⁹⁹ See the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Sec. 222, amending TVPA 2000 § 1589 (Forced Labor) and § 1591 (Sex Trafficking) of United States Code title 18, defining “abuse or threatened abuse of law or legal process” as:

“use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.”

⁶⁰⁰ Huckerby, *United States in COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD*,” GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN (2007) [citing Ivy Lee and Mie Lewis, *Human Trafficking from a Legal Advocate’s Perspective: History, Legal Framework and Current Anti-trafficking Efforts*, U.C. DAVIS J. OF INT’L L. 169 (2003) (observing that such limitations were motivated by a desire to minimize the potential exploitation of such assistance and ensure successful prosecutions)].

⁶⁰¹ TVPA, §107(b)(1)(A), (B); 2003 TVPRA, §4(a)(2).L. No. 108-193, 117 Stat. 2875 [hereinafter 2003 TVPRA], and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter 2005 TVPRA] (codified at 22 U.S.C. §7101). §107(c)(3) provides for a “continued presence” status allowing victims to remain in the U.S. for up to one year to assist in prosecution efforts; id. §107(e) (creating a “T-visa” allowing victims to remain in the United States for three years, with the possibility of adjusting to lawful permanent residence in certain cases). To qualify for adjustment to permanent resident status, a T-Visa holder must demonstrate that he/she has been (1) continually present in the United States for three years, and (2) a person of good moral character; and (3) has complied with reasonable requests to aid investigation and prosecution of the trafficker, or would suffer extreme hardship involving unusual or severe harm upon removal from the United States. TVPA, §107(f).

⁶⁰² 2000 TVPA §107(b)(1)(A), (B); 2003 TVPRA, §4(a)(2).

criminal proceeds.⁶⁰³ The 2003 Reauthorization of the TVPA also created a new private right of action for victims of forced labor, labor trafficking, or sex trafficking to sue their traffickers to recover damages and reasonable attorneys fees.⁶⁰⁴

To access these benefits, however, trafficking victims must agree to cooperate with law enforcement efforts to investigate and prosecute their traffickers. For example, to qualify for lodging and protection in a designated anti-trafficking shelter, a victim must receive a “certification” from the Department of Health and Human Services that she “is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons” and “is a person whose continued presence in the U.S. the Attorney General is ensuring in order to effectuate prosecution of traffickers in persons.”⁶⁰⁵

Despite the potential benefits available to trafficked persons under the TVPA, its promise to protect victims of trafficking remains unfulfilled. Many victims remain unable to access protective services, and few have received visas. Although victims are not legally required to obtain law enforcement certifications for visa applications, in practice, applications without such a certification are more likely to be denied.⁶⁰⁶ The certification process is complicated by the fact that officials often misinterpret the requirement that the victim “cooperate with law enforcement” to mean that the victim is only certifiable if prosecutors actually choose to pursue the case.⁶⁰⁷

Subsequent reauthorizations of the TVPA are slowly amending the stringent requirements for immigration relief.⁶⁰⁸ Promisingly, the 2008 Reauthorization allows the issuance of a T-Visa for victims of severe forms of trafficking where the trafficked person is “unable to cooperate” with law enforcement requests for assistance in federal, state, or local investigations or prosecutions “due to physical or psychological trauma.”⁶⁰⁹ Such reforms reflect a growing responsiveness to advocates’ criticisms regarding the prioritization of prosecutorial goals over the protection of trafficked persons’ rights.

D) U.S. States’ Attempts to Combat Trafficking

Because local, rather than federal, officials will often be the first to encounter trafficking victims, many U.S. states have enacted anti-trafficking laws. Subsequent reauthorizations of the TVPA emphasize the need to strengthen the capacity of state and local law enforcement officials to

⁶⁰³ TVPA, § 112(a)(2).

⁶⁰⁴ 2003 TVPRA, § 4(4)(A). Note, however, that a victim’s private right of action is stayed pending the outcome of the criminal case against her trafficker. See 18 U.S.C. § 1595

⁶⁰⁵ TVPA § 107(b)(1)(E)(i).

⁶⁰⁶ Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIG. L. J. 337 (2007).

⁶⁰⁷ Dina Francesca Haynes, *Good Intentions are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L. J. 77 (2009). Haynes identifies several problematic gaps in implementation of the TVPA, and points out the following: 1) the decision to investigate an allegation of human trafficking should not be dependent upon law enforcement’s assessment as to the ultimate success of the prosecution; the Department of Homeland Security must stop as legitimate only those applications for T-visas that are accompanied by a law enforcement certification considering:

⁶⁰⁸ The 2003 TVPRA amended the requirement that trafficked persons between the age of 15 and 18 had to demonstrate a willingness to assist in investigations to be eligible for a visa.

⁶⁰⁹ TVPRA 2008, Sec. 201 A(1)(D)(bb), amending Section 101(a)(15)(T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)).

identify trafficking victims, investigate and prosecute the crime, and certify victims' cooperation in these processes.⁶¹⁰

(i) The Department of Justice Model Law

The U.S. Department of Justice created a model state anti-trafficking criminal statute, which largely mimics the federal law and has been adopted by 23 states, either entirely or in part. The Model Law sets out three separate criminal provisions: involuntary servitude (forced labor or services)⁶¹¹, sexual servitude of a minor, and trafficking of persons for forced labor or services. The following is a sample statute criminalizing trafficking of persons for forced labor or services:

Whoever knowingly:

- a) recruits, entices, harbors, transports, provides, or obtains *by any means*, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, *intending or knowing* that the person will be subjected to forced labor; or
- b) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of [sections addressing the crimes of involuntary servitude or the sexual servitude of a minor] . . . shall . . . be imprisoned for not more than [X] years.⁶¹²

Under this model definition of trafficking, the prosecutor must satisfy the intent requirement for involuntary servitude and trafficking by proving that the accused knowingly committed or attempted to commit the crime by any of the prohibited means. Criminalizing attempts also allows prosecutors to “focus on a defendant’s objectively observable intent to use coercion for compulsory service rather than on a victim’s subjective response to the coercion.”⁶¹³ As discussed

⁶¹⁰ TVPA §107(b)(1)(E)(i). The 2003 TVPRA added an additional clause mandating the Secretary of Health and Human Services to consider, when making certification decisions, statements from state and local law enforcement officials that the victim has been “willing to assist in every reasonable way” in the investigation and prosecution of state and local crimes such as kidnapping, rape, slavery, or other forced labor offenses where severe forms of trafficking appear to have been involved. 2003 TVPRA, amending TVPA §107(b)(1)(E).

⁶¹¹ The Model Law defines “forced labor or services” as labor (“work of economic or financial value”) or services (“an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of ‘services.’”). However, reflecting U.S. policies promoting the abolition of prostitution the fact that the majority of states criminalize prostitution, the Model Law differentiates between (legitimate) “labor” and “services” in (illegitimate) market sectors, such as commercial sex. Designating commercial sex as a “service” also clarifies that the provision should not be construed to “legitimize or legalize prostitution” as work. Model Law Sec. XXX.01(8). [[NOTE: “sexually-explicit performance” are defined as “a live or public act or show *intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.*” See the sections on obscenity and sexual expression for more information about how the U.S. defines and regulates sexually explicit material and performances.]]

The Model law prohibits forced labor or services that are “performed or provided by another person and are obtained or maintained through an actor’s a) causing or threatening to cause serious harm to any person; b) physically restraining or threatening to restrain another person; c) abusing or threatening to abuse the law or legal process; d) *knowingly* destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person; 3) blackmail; or f) causing or threatening to cause financial harm to [using financial control over] any person.”

⁶¹² The Model Law recommends different sentences ranging from three to twenty-five years, based on the type and level of coercion used against the victim, the length of time the victim was held in servitude and the injuries suffered, as well as the total number of victims involved in a particular case. The Law also encourages states to assess existing criminal laws that could be also used to combat trafficking, for example, prohibitions on involuntary servitude, kidnapping, or false imprisonment to enhance recognition and prosecution of trafficking cases.

⁶¹³ Model Law, Explanatory Notes, at 11. Note, however, that the provision criminalizing the sexual servitude of minors allows for prosecution without proof of coercion or overt force where the victim is under the age of legal consent.

above, policy makers may choose to broaden the intent requirement from “knowingly” to include acts in “reckless disregard” of the fact that the victim will be subjected to forced labor or services.

Grouping forced labor and forced sexual services together is a positive step, insofar as it encompasses a broader range of coercive practices and does not create disparities between victims of sex trafficking and victims of labor trafficking. The Model Law straddles the prostitution issue by acknowledging the seriousness of coerced labor in all sectors while avoiding legitimizing commercial sex activities as a form of work, per U.S. policies.

(ii) Prostitution, Sex Work, and U.S. State Laws Combating Human Trafficking

A brief survey of two state anti-trafficking laws illustrates the how competing feminist approaches to prostitution, sex work, and human trafficking have markedly different effects on the rights of trafficked persons, particularly labor trafficking victims.

New York’s anti-trafficking law (S.B. 5902) was strongly influenced by feminists seeking the abolition of prostitution. The law distinguishes between sex trafficking and labor trafficking, creating strict penalties for sex trafficking but far fewer, and lighter, penalties for labor trafficking. While convicted sex traffickers face up to twenty-five years imprisonment, the maximum sentence for labor trafficking is only seven years. New York’s anti-trafficking law also criminalizes all sex tour companies on the basis that they advance or profit from sex work activity, whether or not the work is legal in the jurisdiction where it occurs.

The law does provide protection for victims insofar as a victim “shall not be deemed an accomplice” in prosecutions of sex or labor trafficking cases, and mandates that law enforcement officials provide victims a declaration form in support of a T-Visa application upon a request by either the victim or his/her representative.

Although trafficking for forced prostitution is certainly a serious crime deserving a harsh penalty, the disparity between labor and sex trafficking sentencing under New York law effectively encourages traffickers to shift to forced labor to avoid criminal penalties. In fact, New York Department of Criminal Justice officials recommend that if local or state police encounter a labor trafficking case, they should transfer the case to federal law enforcement for investigation and prosecution due to the comparatively light penalties under New York law.

By contrast, California’s law (A.B. 22) makes no distinction between sex and labor trafficking, instead criminalizing “trafficking of a person for forced labor or services” or for “effecting or maintaining other specified felonies.”⁶¹⁴ The law reflects the influence of a set of feminist approaches viewing prostitution as a form of work and as part of a continuum of women’s labor exploitation. Although existing California law criminalizes a variety of practices related to the commercial sexual exploitation of females and minors,⁶¹⁵ California’s anti-trafficking law is written in gender-neutral language. The law recognizes the different vulnerabilities of adults and

⁶¹⁴ California A.B. 22, available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_22_bill_20050921_chaptered.pdf

⁶¹⁵ California A.B. 22 recognizes established offenses under state law for enticing an unmarried female minor for purposes of prostitution; procuring any female by fraudulent means to have “illicit carnal connection” with any man; and the “taking away” of minors for purposes of prostitution.

children to trafficking, providing longer penalties for violations against child victims (although sentences are fairly light – from three to five years for adult trafficking, and 4-8 years for trafficking of a minor). California’s law also allows trafficked persons to file a civil cause of action against their trafficker alongside mandatory criminal restitution.

9) Canadian Anti-Trafficking Legislation

A) Federal Canadian Anti-Trafficking Laws

Canada first enacted anti-trafficking legislation through the Immigration and Refugee Protection Act, which came into force in 2002.⁶¹⁶ Section 118 of the Act, the anti-trafficking provision, prohibits “knowingly organiz[ing] the coming into Canada of one or more persons by means of “abduction, fraud, deception, or use or threat of force or coercion.”⁶¹⁷ The term “organize” includes recruitment, transportation, receipt, and harboring of trafficked persons.⁶¹⁸ The offense is punishable by a maximum penalty of life imprisonment and a fine of up to \$CAN 1 million.⁶¹⁹

Although people who merely “organize, induce, aid or abet” illegal immigration are subject to a lesser punishment, they also risk severe criminal sanction under Canadian law.⁶²⁰ Indeed, someone convicted of organizing the illegal entry of more than ten people is subject to the same potential sentence as a trafficker who abducts, deceives, or threatens his or her victims.⁶²¹ Canada has been criticized for failing to sufficiently distinguish between smuggling and trafficking, out of concern that anti-smuggling campaigns could both exacerbate migrants’ difficult conditions and unfairly punish anyone who facilitates unlawful entry—even those who help a refugee legitimately fleeing persecution.⁶²²

Canada having ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations *Convention Against Transnational Organized Crime*, in 2005 it passed BILL C-49: AN ACT TO AMEND THE CRIMINAL CODE (TRAFFICKING IN PERSONS)⁶²³. Bill C-49 amended the *Criminal Code* to specifically prohibit trafficking in persons in Canada. Bill C-49 reframed trafficking in persons to be a criminal offense and created three created three trafficking-specific crimes: trafficking in persons (s.279.01), financial or materially benefitting from trafficking (s.279.02), and withholding or destroying documents to facilitate trafficking (s.279.03). Trafficking is defined to include “Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation...”⁶²⁴ The maximum sentence is 14 years imprisonment, unless the offense includes kidnapping, aggravated assault, aggravated sexual

⁶¹⁶ S.C. 2001, c. 27.

⁶¹⁷ S.C. 2001, c. 27 s.118(1).

⁶¹⁸ S.C. 2001, c. 27 s. 118(2).

⁶¹⁹ S.C. 2001, c. 27 s. 120.

⁶²⁰ S.C. 2001, c. 27 s. 117 [someone who organizes, induces, aids or abets the immigration of fewer than 10 persons without visa, passport, or other required documents is subject to up to 10 years of imprisonment and a fine of \$500,000 for a first offense].

⁶²¹ S.C. 2001, c. 27 s. 117.

⁶²² Constance MacIntosh, *Assessing human Trafficking in Canada: Flawed Strategies and the Rhetoric of Human Rights*, 1 Intercultural Hum. Rts. L. Rev. 408, 415-417 (2006).

⁶²³ Incorporated into the Criminal Code as s 279.01 et seq.

⁶²⁴ R.S., 1985, c. C-46 s. 279.01(1); 2005, c. 43, s. 3.

assault or the death of the victim, in which case the maximum penalty is increased to life imprisonment.⁶²⁵

Following the UN Protocol, a victim's consent to trafficking not a valid defense to a trafficking charge when there is evidence of exploitation—actions of force, fraud, or coercion—that are inherent in the trafficking offence.⁶²⁶ Section 279.04 defines exploitation:

a person exploits another if he or she causes them to provide, or offer to provide, labour or a service by engaging in conduct that could reasonably be expected to cause the other person to fear for their safety or the safety of someone known to them if they fail to comply.

Therefore, the trafficking offense does not require direct exploitation, since it also includes situations in which someone is coerced into *offering* labor or service, whether or not the offer is ever consummated.⁶²⁷

Clause 4 of Bill C-49 included trafficking offenses among the crimes for which special protections are extended to witnesses under 18 (see Sec. VII(4)(E)(iii) above).⁶²⁸ Bill C-49 also ensured that trafficking may form the basis of a warrant to intercept private communications or to take bodily samples for DNA analysis, and permits inclusion of the offender in the sex offender registry.⁶²⁹

Outside of the trafficking-specific provisions, other Criminal Code offenses can also be used to prosecute trafficking, depending on the facts: kidnapping, forcible confinement, uttering threats, extortion, (aggravated) sexual assault, assault, prostitution-related offenses, and criminal organization offenses. Canada also prohibits its nationals from engaging in child sex tourism in Section 7(4.1) of its Criminal Code. This law has extraterritorial application, and carries penalties up to 14 years in prison.⁶³⁰

B) Protections for Trafficked Persons Under Canadian Law

In terms of protection, Canada devolves victim support to each province and each province/territory has its own model of service provision. According to secondary sources,⁶³¹ common services include shelter, short-term counseling (including for sexual assault), and court

⁶²⁵ R.S., 1985, c. C-46 s 279.01 (a) and (b). The age of the trafficking victim can be an aggravating factor. A fuller picture of the legislation related to human trafficking can be found on the official websites: http://www.international.gc.ca/crime/human-traf-personne.aspx?menu_id=27&menu=R; <http://www.justice.gc.ca/eng/fs-sv/tp/index.html>; <http://www.rcmp-grc.gc.ca/imm-passp/htncc-cnctp-eng.htm>.

⁶²⁶ S.C. 2001, c. 27 s. 279.01(2); 2005, c. 43, s. 3.

⁶²⁷ S.C. 2001, c. 27 s 279.04; 2005, c. 43, s. 3.

⁶²⁸ Incorporated into the Criminal Code at s. 279.01 et seq.

⁶²⁹ Incorporated into the Criminal Code at s. 487.01(5), 487.04, 490.011(1). The same bill also expanded all crime victims' opportunity to seek restitution, by allowing restitution for not just physical injury, but also psychological injury. Incorporated into the Criminal Code at s. 738(1)(b).

⁶³⁰ Criminal Code, R.S.C. 1985, c. C-46, s. 7(4.1) [anyone who commits specified sexual offenses against children "shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident..."].

⁶³¹ United States Department of State, *Trafficking in Persons Report 2009 - Canada*, 16 June 2009, available at: <http://www.unhcr.org/refworld/docid/4a4214c732.html> [accessed 6 January 2010]. Refworld is an acknowledged source for information on international and national refugee legal frameworks and policy. It is affiliated with UNHRC and gathers information from UNHCR's global network of field offices, Governments, international, regional and non-governmental organizations, academic institutions and judicial bodies.

assistance. Trafficking victims are categorized as crime victims and have access to a government finances Victim's Fund (administered through a network of NGOs).

Temporary resident permits (TRP) are available for victims of trafficking; they provide non-Canadian nationals a 180-day grace period during which immigration authorities can decide to extend the permit for up to three years. TRP holders can also obtain work permits, and have access to essential and emergency medical, dental, and mental health care.⁶³² For foreign nationals seeking legal residency in Canada, they will not be found inadmissible "by reason only of the fact that [they] entered Canada with the assistance of a person who is involved in organized criminal activity."⁶³³

Despite the general high regard for Canada's anti-trafficking efforts, some criticism exists particularly around concerns about gaps in the victim protection scheme, and the overly broad nature of the definition of trafficking in persons.⁶³⁴ A report of Canada's Parliamentary Information and Research Service⁶³⁵ concludes:

Although the legislation is still new, it is important to note that very few prosecutions have been undertaken under either under the IRPA or through the specific *Criminal Code* provisions on trafficking. Data collection at the official level seems to be at somewhat of a standstill because of the extraordinarily clandestine nature of the activity, yet NGO service providers provide frequent anecdotal accounts of their interactions with trafficked persons. Beyond temporary resident permits, services and benefits to trafficked persons are ad hoc and vary from province to province, while those community groups that deal with trafficked persons at the grassroots level complain of lack of funding. Listening to the voices of those who work with individuals who are exploited for their labour and services across the country may be the next step in finding an effective solution for dealing with trafficking in persons in Canada.⁶³⁶

CONCLUSIONS

- Recent amendment to U.S. federal law create a more robust legal framework to combat trafficking in all its forms, and reflect increasing recognition of the diverse modes of coercion traffickers and exploiters use to manipulate, deceive, and control trafficked persons. However, the TVPA's emphasis on prosecution, with insufficient attention to victim support (especially for victims who do not cooperate with authorities), may prevent victims from effectively accessing services.
- Policy makers drafting laws to criminalize trafficking should pay particular attention to the standard of intent prosecutors must prove to establish the guilt of the defendant. When the TVPA was amended to allow prosecution of defendants who recklessly disregarded the force, fraud, or coercion used against trafficked people—rather than just defendants with actual knowledge—its scope was expanded considerably.

⁶³² *Id.*

⁶³³ Immigration and Refugee Protection Act, S.C. 2001 c. 27 s. 37(2)(b).

⁶³⁴ See LAURA BARNETT, *TRAFFICKING IN PERSONS* (Canada Parliamentary Information and Research Service, Law and Government Division, July 18, 2008) available at <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>.

⁶³⁵ The Parliamentary Information and Research Service (PIRS), a part of the Library of Parliament, provides reports at the request of Senators and Members of the House of Commons. For more information on this service, see <http://www2.parl.gc.ca/Sites/LOP/VirtualLibrary/ResearchPublications-e.asp>.

⁶³⁶ LAURA BARNETT, *TRAFFICKING IN PERSONS* (Canada Parliamentary Information and Research Service, Law and Government Division, July 18, 2008) at 23, available at <http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0624-e.pdf>.

- The U.S. Justice Department’s Model Law definition of “forced labor or services” characterizes commercial sex and sexually-explicit performances as a form of “services.”⁶³⁷ Not only does this definition avoid debates regarding the nature of consensual prostitution and its relation to trafficking; the definition also encompasses new forms of sex trafficking involving victims coerced into performing as erotic dancers or strippers, which is legal in many jurisdictions. Identifying commercial sex activities as “services” also establishes a metric to evaluate the value of the victims’ services to the trafficker, critical to establishing damages claims in private actions against their trafficker. Using a broad definition of “services,” also allows states to criminalize both sex and labor trafficking while maintaining existing laws regulating activities in the commercial sex industry.
- Laws such as California’s that encompass trafficking for the purposes of both labor and sexual exploitation helps protect all victims of trafficking. Otherwise, enforcement officials may focus their efforts on prosecuting sex trafficking to the detriment of victims trapped in forced labor. Moreover, a rigid distinction between sex trafficking and labor trafficking fails to capture evolving forms of exploitation and punish all traffickers equally. Cases are often difficult to classify as purely sex or labor trafficking, particularly where persons are victims of forced labor but also suffer sexual abuse, or where they are coerced to engage in legal sex-related industries, such as pornographic modeling or stripping, but are not forced into prostitution per se.
- As described above in the context of Canada’s laws, it is also important to make sure that anti-trafficking laws distinguish between traffickers and people who merely assist individuals to enter a country without proper documentation. A person who coerces the labor of another is hardly equivalent to someone who helps a persecuted relative enter the country to seek asylum.
- Canada’s anti-trafficking statute includes not only force or threat of force, but also trafficking by means of abduction, fraud, deception or coercion. This recognizes that physical danger is not traffickers’ only method of exploitation.

VIII) ACCESS TO HEALTH SERVICES RELATED TO SEX AND SEXUALITY

1) Section Introduction Part One: an International Perspective on Access to Sexual Health Services

Health services, as well as health systems which organize and ensure the appropriate delivery of health services and goods, are essential for the promotion of sexual health.

The structure and delivery of health care must be seen as contributing the experience of being a full member of one’s society, a valued person. A health and human rights-based approach to health services focuses not only on the technical and clinical quality of services, but also on the design, delivery and use of these services. In addition to evaluating the impact of health services on the rights to health and life of all persons without discrimination, a rights-based analysis

⁶³⁷ Model Law Sec. XXX.01(8), Sec. XXX.02(2)

examines how the structure and delivery of sexual health services follows other key values of human rights. Moreover, a rights-based framework recognizes that untreated or inadequately treated sexual health conditions are themselves often a source of stigma for affected persons and groups.

In addition to evaluating health services in regard to customary public health criteria, it is necessary to assess the legal and policy framework of health services with attention to values of equality, dignity, freedom and autonomy for all. Such evaluations would address the laws and policies determining the distribution, content, accessibility, delivery, and accountability for inadequate services. While the state is ultimately responsible for insuring the availability, accessibility, acceptability, and quality of health services, the state itself is not the only provider of these services. The state remains responsible, however, to ensure that non-state actors do not discriminate and that non-state actors providing services to marginalized populations are not themselves discriminated against nor face restrictions on their rights to association and expression.

Four key aspects of accessibility for health services have been spelled out in international human rights law and are applicable to services necessary for sexual health: (1) non-discrimination, by which is meant in the sexual health context that health services must be accessible without discrimination, including on the basis of sex, gender, sexual conduct, marital status or sexual orientation; (2) physical accessibility, which requires health services to be within safe physical reach of all persons, including persons in detention, refugees, and women facing restrictions on movement ; (3) economic accessibility, by which is meant that health services are affordable to all, including marginalized populations; and (4) information accessibility, meaning the right to seek, receive and impart information and ideas concerning sexual health, including the availability of relevant services, even services challenging dominant sexual mores.

Each of these four aspects must be considered in regard to the wide array of health services important to sexual health. The scope of these services includes the prevention and treatment of STIs and HIV/AIDS (including voluntary testing, and post-exposure prophylaxis, and access to anti-retroviral therapies); contraception, including condoms and emergency contraception; and abortion services. Laws that erect barriers to accessing contraception or safe abortion services have the affect of reducing the sexual wellbeing of girls and women, in that they are denied the fundamental right to determine if and when sexual activity will become reproductive. Other laws fail to provide adequate access to goods and services in the context of sexual assault (such as forensic tests as well as treatment of injuries and STIs).

Discriminatory exclusion of certain categories of persons (married women, men, adolescents, those assaulted in conflict situations, in detention, refugee or displacement settings) and thereby result in preventable ill health, compounding the initial abuse and falling disproportionately on marginalized populations. Other laws regulate access to assisted reproductive technologies and other infertility services on the grounds of individuals' marital status or perceived or actual sexual orientation. Excluding unmarried women and lesbians from access to infertility services violates non-discrimination standards and the rights to health.

In general, the analysis of health service laws must consider not only the necessary scope of the laws, but the barriers that specific populations and marginalized sub-groups may face: does the law on its face or in practice exclude unmarried women, from accessing contraception, for example? Does the law provide for information and distribution in ways that will reach young married women or men who have sex with men? Is the privacy of persons seeking information and services protected explicitly, or does the law subordinate their rights to police registration of HIV status of people in sex work? Are there other laws penalizing behaviour, such that a person seeking care would be reluctant to disclose his or her actual sexual practices? Do the services reach populations in prison and non-nationals, including both migrants and refugees? Are the insurance or social welfare schemes supporting access to health services non-discriminatory, and adequately held accountable to meeting health and rights protections?

HIV status (actual or imputed) can also function as a major barrier to accessing general health services, or conversely, HIV-positive status can result in coercive services (for example, mandatory testing). Other groups, such as persons in sex work or men having sex with men can, also be singled out for coercive health services (mandatory health checks and tests) which are often rationalized as public health measures but which in fact fail both on effectiveness and ethical grounds.

Persons under 18 years of age face particular barriers in accessing sexual health services, care, and information. The necessity of consent for health services and procedures is fundamental. While in regard to minors, parents or guardians may retain formal powers to consent, respect for the principles of the evolving capacity of the child and his or her best interest can result in under-18s accessing appropriate and necessary services without recourse to parental involvement or consent. The principle of evolving capacity suggests that older adolescents should be able to access services without consent of parents or guardians. In addition, the right to enjoy confidentiality in regard to sexual health services and care should be respected. Persons under 18 years of age have the right to accurate, comprehensive, and age-appropriate sexual health information, regardless of the nature of the provider (state or non-state actor). Sexual health information may not be restricted on discriminatory grounds (for example, sex, gender, or sexual orientation). Young persons' rights to information include information about sexual health services.

State obligation for non-discriminatory access to health services includes the obligation to eliminate both formal and substantive discrimination. Formal discrimination consists of codified differential access and treatment (both exclusion from treatment or services, or mandated and non-consensual treatment). Substantive discrimination includes practices, such as derogatory, humiliating, and inferior treatment in health facilities and programs, which are legally mandated but to which the law does not provide adequate redress. Both formal and informal discrimination excludes or reduces the access of persons from care, treatment, and information necessary for sexual health, increasing mortality and morbidity.

2) Section Introduction Part Two: an International Perspective on Health Access and Young People

Under international human rights law, states have different responsibilities toward people under 18 years of age from those over the age of 18. This age range in law overlaps with, but functions differently than, the public health/programmatic category of young people (age 15-24.) While tailoring services to young people does not stop at age 18, the specific legal obligation changes, and young people over 18 assert their rights under the full range of rights treaties and national law.

In regard to the access to health services, information and other rights important for sexual health, a rights analysis can highlight the state's responsibility to ensure these rights to persons under 18 in an age-appropriate, non-discriminatory and effective way. At the same time, the bright line of age 18 does not mean that all persons under 18 are treated identically. Article 5 of the Convention on the Rights of the Child emphasizes that the concept of 'evolving capacity' of children. This concept balances the recognition of children as active agents in their own lives, and as rights-bearers with increasing autonomy, while also being entitled to protection in accordance with their vulnerability. In regard to sexual health, it is critical that children be protected from sexual exploitation and abuse, but under 18's also have specific rights to information about sexuality and sexual health, as well as rights to expression and action contributing to their development.

3) Universal Health Care in Canada

Canada has a national, publicly financed health insurance program comprised of provincial and territorial insurance plans (details of this are beyond the scope of this study.) Health Canada is the government agency that is responsible for establishing and maintaining the national principles and standards of health as set forth in the Canada Health Act (CHA).⁶³⁸ The CHA establishes the financial transfer system to which provincial and territorial health insurance programs must conform: most importantly, the CHA requires universal coverage for all entitled persons (insured) for all "medically necessary" hospital and physician services. "Medically necessary" services include contraceptive information and services, STI/HIV testing and treatment, prenatal and maternity care and abortions (but see below, for information on some abortion-related coverage restrictions).⁶³⁹

Health Canada also is responsible for the delivery of health care services to First Nations and Inuit people. It works with the health agencies in the provinces and territories delivering health care services to specific groups (e.g., First Nations and Inuit).

Canada's universal health care system only pays for prescription drugs when administered in hospitals, so the provinces have established outpatient plans.⁶⁴⁰ About three-fourths of the country has private prescription drug coverage, and some Canadians also qualify for government reimbursement.⁶⁴¹

4) Paying for Sexual Health Services in the United States

⁶³⁸ Canada Health Act R.S. 1985 c. C-6.

⁶³⁹ Eleanor Maticka-Tyndale, Alexander McKay and Michael Barret, *Teenage Sexual and Reproductive Behavior in Developed Countries: Country Report For Canada*, Alan Guttmacher Institute (New York, Washington Nov. 2001) p. 28.

⁶⁴⁰ Virginie Demers et al, *Comparison of Provincial Prescription Drug Plans and the Impact on Patients' Annual Drug Expenditures*, Canadian Medical Assoc. Journal 178(4) (Feb. 12, 2008) p. 405.

⁶⁴¹ *Id.*

The U.S. has some federal health care plans that are limited in scope (for instance for current and former military personnel; senior citizens; disabled people; and low-income people.) Details concerning the 2010 federal health insurance law, which expanded insurance coverage considerably, are beyond the scope of this document. The bill enacting this reform was passed after the time period covered by this paper.

Federal law prohibits the use of any federal Medicaid funds for abortions, unless the mother's life is at stake, the pregnancy is ectopic, or the pregnancy is the result of rape or incest (Medicaid pays for health care for low-income people; it is a national program but administered by individual states).⁶⁴² States that want to cover abortion must do so using their own money.⁶⁴³ Medicaid is much more liberal when it comes to contraception: it provides "family planning services and supplies...to individuals of childbearing age (including minors who can be considered sexually active)... [parentheses in original]."⁶⁴⁴

Medicaid is the single largest source of public funding for family planning services in the U.S.; all states' programs cover oral contraceptives and gynecological exams, and most cover over-the-counter contraception and emergency contraception as well.⁶⁴⁵ Medicaid reimburses medical care providers for family planning services at 90%, a much higher reimbursement rate than for most other services (generally 50% to 75%), and Medicaid may not impose co-pays, deductibles or other forms of cost sharing for pregnancy-related services, including family planning.⁶⁴⁶ The federal government also provides grants for family planning through Title X (the Public Health Service Act); the majority of those funds are used for clinical services.⁶⁴⁷ Like Medicaid, Title X funds cannot be used "in programs where abortion is a method of family planning," yet the projects that receive grants must offer pregnant women the option of receiving information about pregnancy termination in a "neutral, factual,...and nondirective" way.⁶⁴⁸ In actual effect, the federal government monitors Title X programs to make sure that the funds are not used for abortion, but the grant recipients may offer abortion services in their clinics using non-federal funds.⁶⁴⁹

As for private insurance, about half the states require insurance plans to provide coverage for contraception.⁶⁵⁰ Iowa takes pains to prevent insurers from evading its coverage law, by also prohibiting insurance companies from denying policies to people based on contraceptive use, using incentives or penalties to encourage medical providers to stop offering contraception, or increasing patients' out-of-pocket costs for contraception relative to other prescriptions.⁶⁵¹

⁶⁴² 42 C.F.R. 457.475, aff'd by *Harris v. McRae* 448 U.S. 297 (1980).

⁶⁴³ 42 C.F.R. 457.475(b)(2).

⁶⁴⁴ 42 U.S.C.S. §1396d(a)(4)(C).

⁶⁴⁵ GUTTMACHER INST. & KAISER FAMILY FOUNDATION, *MEDICAID'S ROLE IN FAMILY PLANNING* (2007), available at <http://www.kff.org/womenshealth/7064.cfm>.

⁶⁴⁶ 42 C.F.R. §§432.50 [reimbursement], 447.53 [no cost-sharing].

⁶⁴⁷ Angela Napili, *Title X (Public Health Service Act) Family Planning Program* (Congressional Research Service Aug. 4, 2008) at 2-3 [Report No. RL33644].

⁶⁴⁸ 42 U.S.C. § 300a-6[no funding for abortion as family planning]; 42 C.F.R. §59.5 [requirements for family planning projects].

⁶⁴⁹ Angela Napili, *Title X (Public Health Service Act) Family Planning Program* (Congressional Research Service Aug. 4, 2008) at 6-7 [Report No. RL33644].

⁶⁵⁰ Deanna Pisona, ed. *Ninth Annual Review of Gender and Sexuality Law: Health Care Law Chapter: Access to Contraception* 9 GEORGETOWN J. GENDER & L. 1125, 1140 (2008).

⁶⁵¹ Iowa C. Ann. 514C.19.

Federal anti-discrimination laws also require contraceptive coverage in employers' self-insurance plans.⁶⁵² Under the Pregnancy Discrimination Act ("PDA"), illegal discrimination based on sex includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected..."⁶⁵³ The U.S. Employment Opportunity Commission has interpreted this to require equitable insurance coverage: "the fact that it is women, rather than men, who have the ability to become pregnant cannot be used to penalize them in any way, including in the terms and conditions of their employment. Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives."⁶⁵⁴ Court decisions have generally agreed, although the issue has been addressed in only a few jurisdictions and so remains unsettled.⁶⁵⁵

Employee benefit health plans are explicitly *not* required to provide coverage for abortion under the PDA, unless the mother's life is endangered.⁶⁵⁶ As a result, five states restrict private insurance plans' abortion coverage, and twelve states restrict abortion coverage in insurance plans for public employees.⁶⁵⁷ As the U.S. Congress debates health care reform, it is unclear what stance Congress will take on abortion coverage: as of this writing, the houses of Congress were considering health care bills, each with different implications for abortion access, and it was not unknown what changes would be made to the bills during the amendment process.

CONCLUSIONS

- Canada's Health Act requires the provinces and territories to provide insurance for all "medically necessary" hospital and physician services, including pregnancy-related care, STI testing and treatment, contraception, and abortion (but see below for some limits on abortion access/funding).
- In the U.S., the federal government provides significant funding for contraception, but no federal money for abortions. Private insurance plans may cover or exclude abortion as they chose, but a number of states have enacted laws to ensure contraception coverage. Federal anti-discrimination laws have been interpreted to require contraception coverage, since an exclusion of contraceptive costs essentially penalizes women because of their gender.

5) Abortion and Contraception

A) Decriminalization of Contraception and Abortion in the U.S.

⁶⁵² 42 U.S.C. §2000e(k).

⁶⁵³ *Id.*

⁶⁵⁴ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, DECISION ON COVERAGE OF CONTRACEPTION, (December 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

⁶⁵⁵ *Pisona* at 1142.

⁶⁵⁶ 42 USC §2000e(k).

⁶⁵⁷ THE HENRY J. KAISER FAMILY FOUNDATION, ABORTION IN THE U.S.: UTILIZATION, FINANCING AND ACCESS, (June 2008), available at <http://www.kff.org/womenshealth/coverage.cfm>.

The right to reproductive choice in the United States is founded on the concept of individual privacy. The 1965 Supreme Court case *Griswold v. Connecticut* found a constitutional right to privacy that covers the right of married couples to use contraception without interference from the state.⁶⁵⁸ This was extended to unmarried couples a few years later in *Eisenstadt v. Baird*.⁶⁵⁹ The court found no rational reason for distinguishing between married and unmarried couples under the Equal Protection Clause, a section of the U.S. Constitution that prevents laws from differentiating between classes of people based on criteria unrelated to the law's purpose.⁶⁶⁰ The court explained, "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁶⁶¹ In 1977, relying on *Eisenstadt* and *Griswold*, the U.S. Supreme Court struck down as unconstitutional a New York law that: 1) criminalized the sale of contraceptives to anyone under 16; 2) prohibited sale of contraceptives by anyone other than licensed pharmacist; and 3) banned the display and advertisement of contraceptives.⁶⁶²

The year after *Eisenstadt*, the Court decided *Roe v. Wade*, which stated that women have a constitutional right to terminate a pregnancy.⁶⁶³ The state could still regulate abortion in the second trimester to protect maternal health, and once the fetus became viable in the third trimester could outlaw abortion altogether (except when necessary to preserve the woman's life).⁶⁶⁴

This pregnancy timeline, however, was based on the medicine of its day. By 1992, when the Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, abortions could safely be performed later in pregnancy and neonatal care made fetuses viable at an earlier point (see below for more information on *Casey*).⁶⁶⁵ *Casey* upheld *Roe* but abandoned the trimester-based system, permitting abortion before viability but allowing regulation from the earliest stages of pregnancy.⁶⁶⁶ For instance, states may enact regulations of the type that would be imposed for any medical procedure.⁶⁶⁷

(i) Restrictions on Abortion in the U.S. Under *Casey*

Casey examined a number of state restrictions on abortion, and found that they were acceptable as long as the state did not impose an "undue burden" on a woman's right to end a pregnancy.⁶⁶⁸ "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a

⁶⁵⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965) 85 S.Ct. 1678.

⁶⁵⁹ *Eisenstadt v. Baird*, 405 U.S. 438 (1972), 92 S.Ct. 1029.

⁶⁶⁰ *Id.* at 447.

⁶⁶¹ *Id.* at 453.

⁶⁶² *Carey v. Population Services International*, 431 U.S. 678 (1977).

⁶⁶³ 410 U.S. 13 (1973).

⁶⁶⁴ *Id.* at 162-164

⁶⁶⁵ 505 U.S. 833, 860 (1992).

⁶⁶⁶ *Id.* at 872.

⁶⁶⁷ *Id.* at 878.

⁶⁶⁸ *Id.* at 874.

nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.”⁶⁶⁹

But despite this language, a plurality of the court upheld some significant restrictions on abortion. A statute imposing a 24-hour waiting period was upheld, despite evidence “that because of the distances women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that that a woman...make at least two visits to the doctor,” which would be particularly difficult for women of limited financial resources.⁶⁷⁰ Increased cost and delay did not constitute “substantial obstacles.”⁶⁷¹

Casey also upheld a parental notification statute requiring a parent’s consent before a girl under 18 could have an abortion.⁶⁷² An earlier case, however, required states to provide a judicial procedure by which a pregnant minor could seek a court order finding her capable of deciding to have an abortion without a parent’s input.⁶⁷³

(ii) Spousal Notification

Although other restrictions were permitted, *Casey* struck down a spousal notification provision: the court found women who are victims of domestic violence would have very good reasons to avoid telling their husbands about an abortion. “Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in [an earlier case].... The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”⁶⁷⁴

B) Decriminalization of Contraception and Abortion in Canada

In 1969, as part of the same law reforms that decriminalized consensual sodomy (see Sec. V(2)) abortions became legal—but only when performed in an accredited hospital, if a special hospital committee certified that the pregnancy would be likely to endanger the life or health of the pregnant woman.⁶⁷⁵ Contraception was also legalized, in the same Act—thus avoiding the lengthy litigation needed in the United States before contraception was universally legal.

In the 1988 case *R. v. Morgentaler*, the Supreme Court of Canada held that the section of the *Canadian Criminal Code* regulating abortions was in violation of Section 7 the Charter of Human Rights and Freedoms and thus invalid.⁶⁷⁶ Section 7 states: “Everyone has the right to life, liberty, and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The Court found that the complicated and often arbitrary

⁶⁶⁹ *Id.* at 877.

⁶⁷⁰ *Id.* at 885-886.

⁶⁷¹ *Id.* at 886-887.

⁶⁷² *Id.* at 899.

⁶⁷³ *Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 492-493 (1983).

⁶⁷⁴ *Id.* at 897-898.

⁶⁷⁵ R.S., 1985, c. C-46, s. 287; 1993, c. 28, s. 78; 1996, c. 8, s. 32; 2002, c. 7, s. 141 [this section is no longer enforceable, as described below]

⁶⁷⁶ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

procedures created by committee certification system and related requirements violated the right to security of the person.⁶⁷⁷

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. 23

Since a *Charter* violation was found, the Court then needed to determine whether this infringement on a *Charter* right was still acceptable, because it was consistent with the principles of fundamental justice.⁶⁷⁸ The committee system set up by the law, however, created arbitrary results and significantly delayed medical care, resulting in physical risk and psychological suffering.

The Court wrote, “‘Security of the person’ within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, her right to security of the person has been violated.” The court found that committee procedure outlined by statute was often arbitrary and unfair, and significantly delayed pregnant women’s access to medical treatment. “One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory....[T]he system regulating access to therapeutic abortions...is manifestly unfair. It contains so many barriers to its own operation that the defence it creates will in many circumstances be practically unavailable....”⁶⁷⁹ Because the Court has held that abortion is a matter of criminal law to be regulated by the federal government, and the relevant portions of the *Criminal Code* have been rendered unenforceable, criminal regulation of abortion does not currently exist in Canada.

Interestingly, the majority opinion in *Morganthaler* relied on women’s security interest, analyzing the law according to the harm caused by uncertainty and delay. Justice Wilson wrote separately to argue that the s. 7 right to *liberty* was violated by the law.⁶⁸⁰ Despite the fact that this was not part of the Court’s majority decision, Justice Wilson’s argument has been influential, and her arguments have been cited in other cases.⁶⁸¹

⁶⁷⁷ *Id.* at ¶¶20-23.

⁶⁷⁸ *Id.* at ¶ 21.

⁶⁷⁹ *Id.* at ¶ 46-50.

⁶⁸⁰ *Id.* at ¶ 240-241.

⁶⁸¹ Chris Kaposy and Jocelyn Downie, *Judicial Reasoning About Pregnancy and Choice*, 16 HEALTH L.J. 281, 290-294 (2008).

A year later, in *Tremblay v. Daigle*,⁶⁸² a woman wished to have an abortion after her relationship with the father deteriorated and became violent. The Court set aside an injunction obtained by the father to prevent the abortion. The injunction had been granted after a Quebec court found that a fetus is a person guaranteed life and security under the Quebec charter of human rights. The Court held that under Quebec's provincial charter and its civil law, a fetus was not a legal person. "The Court is not required to enter into philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood...The task of properly classifying a foetus in law and science are different pursuits." Since then, the Court has consistently refused to grant fetuses legal personhood.⁶⁸³ In *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*,⁶⁸⁴ the Supreme Court heard a case in which a lower court had ordered the detention in a health centre and compulsory treatment of a woman who was five months pregnant and addicted to sniffing glue, in order to protect her fetus. The Supreme Court held that, because Canadian law does not recognize a fetus as a legal person possessing rights, the Court had no power to order the woman's detention for the purpose of protecting it.

(i) Provincial Attempts to Limit Abortion

Once abortion was decriminalized, provinces enacted laws and regulations to limit government funding (see the discussion of the Canadian health care system above).⁶⁸⁵ The Canada Health Act requires provinces to provide all "medically necessary" hospital services and all "medically required" doctor services," but does not define either of those terms. [cite Only 17.8% of general hospitals in Canada provide abortion services, and there are no abortion providers on Prince Edward Island or Saskatchewan.⁶⁸⁶ Hospitals also have internal rules limiting abortion to certain gestational ages.⁶⁸⁷

In 2006, Quebec was ordered to reimburse almost 45,000 women for the expenses they paid out-of-pocket for private clinics.⁶⁸⁸ In New Brunswick, abortion is not covered unless "performed by a specialist in the field of obstetrics and gynaecology in a hospital facility approved by the jurisdiction in which the hospital facility is located and two medical practitioners certify in writing that the abortion was medically required."⁶⁸⁹ This forces women to pay for clinic abortions themselves; a challenge to

⁶⁸² 2 SCR 530.

⁶⁸³ See *R. v. Sullivan*, [1991] 1 S.C.R. 489 [midwives could not be charged under the Criminal Code for negligently causing the death of a child, because the death occurred during delivery, in the birth canal: the Criminal Code defined "human being" as a child who had "completely proceeded, in a living state, from the body of its mother"]

⁶⁸⁴ [1997] 3 S.C.R. 925.

⁶⁸⁵ Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093, 1094 (2007).

⁶⁸⁶ See CANADIAN ABORTION RIGHTS ACTION LEAGUE, FREEDOM OF CHOICE: PROTECTING ABORTION RIGHTS IN CANADA, (Ottawa 2003); NATIONAL ABORTION FEDERATION, ACCESS TO ABORTION IN CANADA, available at

<http://www.prochoice.org/canada/access.html>. However, in Saskatchewan and Prince Edward Island, insurance pays for travel to obtain an abortion elsewhere, although finding a doctor to make a referral may be difficult. *Id.*

⁶⁸⁷ *Id.* at 148. According to a collection of province and territory regulations compiled by the National Abortion Federation, abortions are available before 12 weeks gestation in every province and territory, with the limit ranging up to 23 weeks, although individual services may have lower limits. *Id.*

⁶⁸⁸ *Id.* at 1097; *Association pour l'accès à l'avortement c. Québec (Procureur General)*, 2006 QCCS 24694

⁶⁸⁹ New Brunswick Regulation 84-20 (filed Feb. 13, 1984) under the Medical Services Payment Act, R.S.N.B. 1973 c. M-7.

constitutionality of this regulation is pending.⁶⁹⁰ British Columbia, in contrast, requires all of its hospitals to provide abortion services, rather than forcing women to private clinics.⁶⁹¹

In 2001, a class action was filed challenging a Manitoba regulation that excluded therapeutic abortions from health insurance unless they were performed at a hospital, which required a lengthy wait.⁶⁹² Relying on *Morgentaler*, the plaintiffs Jane Doe 1 and Jane Doe 2 argued that they would have had to suffer weeks of delays if they had obtained their abortions at a hospital rather than a private clinic. As the judge decided,

In simple terms, delayed access for a woman wishing to have a safe, state-funded therapeutic abortion is the result of the impugned legislation. Needless to say, if the delay encountered is extended, a woman would be unable to have the abortion at all. Because of the impugned legislation, a woman who wishes to have a safe therapeutic abortion without having to undergo the physical risks and psychological harm associated with delay cannot rely upon the state to pay for that abortion. Rather, she must pay for same out of her own pocket.⁶⁹³

The judge found that this was a violation of the rights to both liberty and security of the person under s. 7 of the charter, along with freedom of conscience under s. 2 and equality rights guaranteed to women under s. 15.⁶⁹⁴ The decision also looked beyond the words of the regulation to determine legislative motive: “Looking at the impugned legislation and at all of the evidence before me, I have to conclude that the real objective the Government sought to achieve in enacting the impugned legislation was to keep [anyone] out of the business of operating a free-standing clinic that provides therapeutic abortions in the Province of Manitoba.”⁶⁹⁵

This judgment was later set aside by the Manitoba Court of Appeal on the basis that it should have been tried rather than decided by summary judgment; the case is ongoing.⁶⁹⁶ Nonetheless, the decision shows one court’s willingness to overturn province-imposed barriers on abortion.

(ii) Parental Consent

In *Tremblay v. Daigle*, described above, the Canadian Supreme Court determined that the father of a fetus did not have a right to prevent an abortion.⁶⁹⁷ The law about parental consent is less clear. There is currently no legislation requiring parental consent for young women who have not reached the age of majority (18) to access an abortion in Canada. Some provinces have adopted the common law “mature minor” rule, which establishes that a minor’s own consent is necessary and sufficient whenever the minor is capable of understanding the nature and consequences of a treatment

⁶⁹⁰ Erdman, 56 EMORY L.J. at 1096-1097.

⁶⁹¹ Hospital Act, R.S.B.C. 1996 c. 200 s. 24.1 [“Each hospital listed in the Schedule to this Act must provide the facilities and services, and be operated and maintained, as necessary to allow a qualified person to receive abortion services at that hospital.”]

⁶⁹² Jane Doe 1 v. Manitoba, [2004] M.J. No. 456 (Q.B.), rev’d [2005] M.J. No. 335 (C.A.) [*Jane Doe 1* (C.A.)], leave to appeal to S.C.C. refused [2005] S.C.C.A. NO. 513.

⁶⁹³ *Id.* ¶ 74-75.

⁶⁹⁴ *Id.* ¶ 78-79.

⁶⁹⁵ *Id.* ¶ 83.

⁶⁹⁶ Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093, 1097 (2007). Class certification granted by Jane Doe 1 v. Manitoba [2008] M.J. No. 292, 2008 MBQB 217, docket no. CI 01-01-24108 (July 31, 2008).

⁶⁹⁷ 2 SCR 530.

decision.⁶⁹⁸ However, some provinces have no provision allowing minors to consent to medical procedures without parental involvement, and some hospitals have internal policies requiring parental consent.⁶⁹⁹ According to the Canadian Federation for Sexual Health, some hospitals have policies requiring parental consent, at differing ages, whereas free-standing abortion clinics do not require only the young woman's own informed consent.⁷⁰⁰

(iii) Mifepristone and Medical Abortions

Mifepristone, or RU-486, is on the World Health Organization's list of essential medicines and is available in the United States, but it is not available in Canada.⁷⁰¹ It appears that there has never been an application to the Therapeutic Products Directorate to approve use of Mifepristone in Canada.⁷⁰² Only a drug manufacturer, not a healthcare provider, can seek approval for a new drug from the Therapeutic Products Directorate and experts interviewed in the Canadian media have suggested that there is insufficient economic incentive for manufactures or Mifepristone to do so.⁷⁰³ In the absence of Mifepristone, methotrexate and misoprostol are used to induce medical abortions, but these drugs are rarely used.⁷⁰⁴

CONCLUSIONS

- In the U.S., individual privacy provided the intellectual framework for the right to contraception and abortion. Although the concept of privacy as a constitutional right began in the context of the marital relationship, it was quickly recognized as a right belonging to individual people, not just married couples. Privacy, however, is a fairly amorphous concept. The idea of privacy, while not actually stated in the U.S. Constitution, was a way of protecting individual liberty in the absence of more explicit protections of reproductive freedom.
- As shown by *Roe v. Wade*, a definition of legal abortion that rests too heavily on the medical capabilities of its day risks being revised when medical technologies change.
- Canada's *Morgentaler* case illustrates two legal justifications for the decriminalization of abortion: harm to the pregnant woman's physical and mental security; and liberty to choose whether to continue a pregnancy. The strength of the first argument is limited by

⁶⁹⁸ Medical Consent of Minors Act, S.N.B. 1976 c. M-6.1 (New Brunswick) [consent of person under 16 is sufficient if, in the opinion of a qualified medical provider, "the minor is cable of understanding the nature and consequences of a medical treatment" and "the medical treatment and the procedure to be used is in the best interests of the minor and his continuing health and well-being."]; Jocelyn Downie and Carla Nassar, *Barriers to Access to Abortion Through a Legal Lens*, 15 HEALTH L.J. 143, 158 (2007).

⁶⁹⁹ *Id.* at 158-159. This article notes that the authors' review of various pro-choice organizations and clinics found much confusion about the actual state of the law regarding parental consent.

⁷⁰⁰ CANADIAN FEDERATION FOR SEXUAL HEALTH, ABORTION FAQs, (July 17, 2008), available at http://www.cfsh.ca/Sexual_Health_Info/Abortion/abortion-FAQs.asp.

⁷⁰¹ CANADIANS FOR CHOICE, CHOICE UPDATE, (January 26, 2006), available at <http://www.canadiansforchoice.ca/press.html>.)

⁷⁰² A search of the Therapeutic Products Directorate drug products database, available at <http://205.193.93.51/dpdonline/startup.do>, yielded no results for Mifepristone and RU 486.

⁷⁰³ Barbara Sibbald, *Will Canada Follow US lead on RU 486?*, CANADIAN MEDICAL ASSOCIATION JOURNAL (Jan 9, 2001), available at <http://www.cmaj.ca/cgi/content/full/164/1/82> [quoting Dr. André Lalonde, executive vice-president of the Society of Obstetricians and Gynaecologists of Canada (SOGC)]; Jennifer Laliberte, *Still no mifepristone for Canada: is it safe?*, by THE NATIONAL REVIEW OF MEDICINE (September 30, 2005) available at http://www.nationalreviewofmedicine.com/issue/2005/09_30/2_policy_politics02_16.html [quoting Dr Ellen Wiebe].

⁷⁰⁴ *Id.*

the fact that harm can be reduced—for instance, the committee procedure at issue in *Morgantaler* could have been revised, reducing dangerous delays while still denying abortions to some women. The second argument, though broader, is still limited by the fact that it does not address limits to women’s access to reproductive care: decriminalization does not necessary make abortion accessible.⁷⁰⁵ An example of this can be seen in the issue of Mifepristone: medical abortions are legal, but without drug approval, they cannot be performed. Another example is minors’ abortions: despite the fact that some provinces follow the “mature minor” rule, which does not require parental consent as long as the minor can understand the nature and consequences of the medical care at issue, individual hospitals can impose their own parental consent rules.

- This distinction between legality and accessibility is also visible in the U.S. *Casey* decision. The Supreme Court in *Casey* refused to recognize that financial barriers could restrict a woman’s access to abortion as surely as legal ones. Likewise, the *Casey* court was willing to allow a parental consent law, even though it would limit minors’ rights and delay medical care.
- The U.S. Supreme Court recognized that adult women who chose not to tell their partners about an abortion may be doing so in order to protect themselves from violence (it is unclear, however, why the court was unwilling to make the same assumption about minors, who could also be subjected to abuse or coercion as the result of an unplanned pregnancy). In striking down the spousal notification provision, the court asserted a wife’s autonomy and declined to give a husband power over her decision whether or not to bear children. In *Tremblay*, Canada’s Supreme Court also declined to recognize any “father’s right” to insist that a pregnancy be brought to term.

C) Additional Restrictions on Abortion in the United States

(i) Dilation and Extraction, Intact Dilation and Evacuation, and U.S. Restrictions on Second and Third Trimester Abortions

In the 2000 case *Stenberg v. Carhart*, the U.S. Supreme Court addressed a Nebraska law that criminalized all “partial birth abortion[s],” except to save the life of the mother.⁷⁰⁶ Partial birth abortion is a non-medical term coined by abortion opponents to refer to dilation and extraction (“D&X”) or intact dilation and evacuation (“intact D&E”), a late-term abortion procedure, as opposed to the more common dilation and evacuation (D&E).⁷⁰⁷ The Nebraska statute defined the procedure as “delivering into the vagina a living unborn child” for purposes of abortion.⁷⁰⁸

The court first addressed the lack of an exception for the health of the mother. The trial court had found that dilation and extraction can reduce risk of infection and complications.⁷⁰⁹ “[W]here substantial medical authority supports the proposition that banning a particular abortion procedure

⁷⁰⁵ For this analysis, see Chris Kaposy and Jocelyn Downie, *Judicial Reasoning About Pregnancy and Choice*, 16 HEALTH L.J. 281, 290-294 (2008).

⁷⁰⁶ 530 U.S. 914 (2000).

⁷⁰⁷ *Id.* at 921. That case referred to D&X; the later case of *Gonzales v. Carhart* 550 U.S. 124 (2007), discussed below, referred to intact D&E.

⁷⁰⁸ *Stenberg v. Carhart* 530 U.S. 914, 922 (2000).

⁷⁰⁹ *Id.* at 932.

could endanger women's health, *Casey* requires the statute to include a health exception....”⁷¹⁰ The court also addressed the problem of outlawing a procedure defined without reference to actual medical terms. The broad language could apply not only to the relatively rare dilation and extraction, but also the common dilation and extraction, a standard means of abortion.⁷¹¹ “[U]sing this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D & E procedures, the most commonly used method for performing pre-viability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional.”⁷¹²

Congress reacted to this decision by passing the Partial-Birth Abortion Ban Act of 2003, which had an exception to protect the life of the mother, but no health exception.⁷¹³ In order to avoid having the law struck down again, Congress defined the “partial-birth abortion” with more specificity and made factual findings that “a moral, medical, and ethical consensus” found that this type of abortion was inhumane and never medically necessary.⁷¹⁴ Meanwhile, the composition of the Supreme Court had changed. This time, in language expressing heavy disapproval of a procedure “laden with the power to devalue human life,” a plurality of the court found that the statute did not impose an undue burden, because the law outlawed only a procedure with particular ethical and moral implications.⁷¹⁵ Waxing effusive about the mother-child bond, the court in *Gonzales v. Carhart* found that some women must suffer particularly strong regret because of the outlawed procedure, despite admitting that there was no actual data supporting that point.⁷¹⁶ And because there was medical uncertainty about whether the procedure provided increased safety in some circumstances, Congress was free to determine otherwise by refusing to include a health exception.⁷¹⁷

(ii) “Informed Consent” as a Restriction on Abortion

Gonzales v. Carhart stated that it was constitutional for states to require doctors to provide disclosures that “expressed a preference for childbirth over abortion,” and did not concern the woman’s health, provided that the required disclosure was “truthful and not misleading.”⁷¹⁸ South Dakota responded with a law requiring physicians to provide a number of specific and medically suspect written disclosures, including “that the abortion will terminate the life of a whole, separate, unique, living human being” and that the risks of abortion include “increased risk of suicide ideation and suicide.”⁷¹⁹ The Eighth Circuit case decided whether the trial judge should

⁷¹⁰ *Id.* at 938.

⁷¹¹ *Id.* at 938-939.

⁷¹² *Id.* at 945-946.

⁷¹³ *Gonzales v. Carhart*, 550 U.S. 124, 132-133 (2007).

⁷¹⁴ *Id.* at 141-142 [the statute defined partial birth abortion as “deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus...”]

⁷¹⁵ *Id.* at 158.

⁷¹⁶ *Id.* at 159.

⁷¹⁷ *Id.* at 163-166.

⁷¹⁸ *Id.* at 883-882.

⁷¹⁹ *Planned Parenthood v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) [citing S.D.C.L. §34-23-A-10.1]. The American Psychological Association and other sources found no evidence that there was a causal relationship between abortion and mental

have issued a preliminary injunction preventing that statute from taking effect or instead allowed the law to stand until a final decision on the statute's constitutionality could be made—an issue that required the Eighth Circuit to determine the plaintiff's chances of success.⁷²⁰ The court stated that the plaintiff was unlikely to prevail on its claim that the statute was untruthful or misleading, since the statute defined "human being" accurately as an embryonic or fetal *Homo sapien*.⁷²¹ Notably, the court quoted extensively from *Gonzales v. Carhart*'s language abortion's supposed emotional cost to women.⁷²²

Because of the procedural posture of the case, the court did not discuss the inaccurate statement about suicide and depression. When the case returned to the trial court, the trial judge found that section of the law to be untruthful, since there was "no evidence...to show that it is generally recognized that having an abortion causes an increased risk of suicide ideation and suicide."⁷²³

Although standard medical practice already demanded informed consent for all procedures (indeed, failure to provide informed consent was and is the basis of many civil medical malpractice suits), many states passed informed consent laws explicitly targeting abortion.⁷²⁴ Some states demand that doctors show patients an ultrasound before performing an abortion, while five states' disclosure materials state that "[b]y 20 weeks' gestation, the unborn child has the physical structures necessary to experience pain" and make other pain-related statements.⁷²⁵ This is clearly intended to suggest that an abortion causes the fetus pain, even though those "physical structures" do not appear to be functional until the third trimester.⁷²⁶ The constitutional issues raised by all the variations of these informed consent statutes have yet to be resolved by the courts, and will certainly be litigated over the next few years.

CONCLUSIONS

- The two *Carhart* cases described above show the conflict between the medical definition of a procedure and the political definition—and how the political definition can triumph. Indeed, by failing to require a health exception, the court made the relative safety of a procedure into a legislative decision rather than a medical one.
- The second Supreme Court decision on "partial-birth abortion" is remarkable for its lengthy discussion of gruesome medical details and its paternalistic and unscientific assumption's about women's emotional response to abortion. As the strong dissent put it, "Because of women's fragile emotional state and because of the 'bond of love the mother

health problems. *Planned Parenthood v. Rounds* ---F.Supp.2d---, 2009 WL 2600753 p. 11 (D.S.D. 2009) no. Civ. 05-4077-KES (Aug. 20, 2009).

⁷²⁰ *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

⁷²¹ *Id.* at 736.

⁷²² *Id.* at 734.

⁷²³ *Planned Parenthood v. Rounds*, ---F.Supp.2d---, 2009 WL 2600753 p. 8 (D.S.D. 2009).

⁷²⁴ *Id.* at 8 ["The only difference between informed consent in abortion cases and informed consent in traditional medical malpractice cases is the requirement of materiality. While informed consent in traditional medical malpractice cases requires physicians to disclose 'all known material or significant risks inherent in a prescribed medical procedure,' informed consent in abortion cases requires physicians to disclose 'all known medical risks of the abortion procedure' [citations omitted]."; Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUMBIA J. GENDER & L. 111 (2008).

⁷²⁵ Georgia C. Ann. §31-9A-4(a)(3) (2009); Tobin at 141-142.

⁷²⁶ Tobin, *supra*, at 144.

has for her child,' the Court worries, doctors may withhold information about the nature of the intact D&E procedure. The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety [citations omitted]."⁷²⁷

- *Gonzales v. Carhart's* postured toward women's decision making (overt paternalism, according to the dissent) and its willingness to substitute political opinion for medical opinion—allowed U.S. state legislatures enact laws forcing doctors to make unnecessary, misleading, or inaccurate statements. The implications of this strategy go beyond the issue of abortion: in what future health controversies may states dictate health providers' speech?

D) Refusal Clauses

After *Roe v. Wade*, many U.S. states enacted "refusal clauses," which allowed medical providers to refuse to provide abortion or sterilization procedures that conflict with their convictions or religious beliefs.⁷²⁸ These laws have become a hot topic in recent years, as some states have expanded the laws to include pharmacists who refuse to provide contraception. Central to this issue is emergency contraception (known as the morning-after pill and sold under the name Plan B), which some people consider a type of abortion on moral or religious grounds, despite the fact that it is not medically an abortifacient.⁷²⁹

Some refusal clauses are so broad as to implicate procedures beyond birth control: in Mississippi, any health care provider "may decline to comply with an individual instruction or health-care decision for reasons of conscience."⁷³⁰ But a few states have gone in the opposite direction, taking steps to restrict refusals. Illinois has an unusually strong law, which states: "Upon receipt of a valid, lawful prescription for a contraceptive, a retail pharmacy serving the general public must dispense the contraceptive" to the patient "without delay, consistent with the normal timeframe for filling any other prescription..."⁷³¹ If the contraceptive is not in stock, the pharmacy must order more or, if the patient prefers, transfer the prescription elsewhere or return the unfilled prescription form to the patient. Furthermore, any pharmacy that sells contraception to the general public "shall use its best efforts to maintain adequate stock of emergency contraception..."⁷³² Meanwhile, individual pharmacists who object to dispensing emergency contraception must first seek out a non-objecting pharmacist at their own store, and if none is available must refer the patient to another location where the prescription is available.⁷³³ These protocols must be prominently displayed in the pharmacy, on a sign informing patients of their rights.⁷³⁴

⁷²⁷ *Id.* at 183-184 [dissent by Justice Ginsburg].

⁷²⁸ Claire A. Smearman, *Drawing the Line: The Legal, Ethical and Public Policy Implications of Refusal Clauses for Pharmacists*, 48 ARIZONA L. REV. 469, 476 (2006).

⁷²⁹ *Id.* at . 489.

⁷³⁰ Miss. C. Ann. §41-41-215 (2009).

⁷³¹ 68 Ill. Adm. C. §1330.91(j)(1).

⁷³² 68 Ill. Adm. C. §1330.91(j)(2).

⁷³³ 68 Ill. Adm. C. §1330.91(j)(3).

⁷³⁴ 68 Ill. Adm. C. §1330.91(k).

In Canada, a number of hospitals require physician referrals before performing abortions, and there have been reports of doctors refusing to provide referrals or even actively trying to block their patients' attempts to get referrals elsewhere.⁷³⁵ However, Canada's National Association of Pharmacy Regulatory Authorities has given Plan B full over-the-counter status, meaning that a woman can purchase emergency contraception without the intervention of a pharmacist.⁷³⁶ The Canadian Medical Association's policy regarding abortion states that "There should be no delay in the provision of abortion services" and that "A physician whose moral or religious beliefs prevent him or her from recommending or performing an abortion should inform the patient of this so that she may consult another physician."⁷³⁷

E) Clinic Access Laws

In both the U.S. and Canada, abortion providers have been subjected to threats, harassment, and violence. Canada's criminal harassment law (see Sec. VIII(2)(C)) has been used in British Columbia to prosecute anti-abortion intimidation.⁷³⁸ The same province also enacted the *Access to Abortion Services Act* in 1996, which creates "access zones" around the residence and office of every doctor who provides abortion services.⁷³⁹ Within an access zone, it is illegal to "engage in sidewalk interference; protest; beset" or to "physically interfere with or attempt to interfere with" or "intimidate or attempt to intimidate" a "service provider, a doctor who provides abortion services or a patient."⁷⁴⁰ "Sidewalk interference" means "advising or persuading, or attempting to advise or persuade, a person to refrain from making use of abortion services," or "informing or attempting to inform a person concerning issues related to abortion services."⁷⁴¹ It is also illegal to photograph, film, sketch or otherwise record a doctor, service provider, or patient within an access zone "for the purpose of dissuading that person from providing, facilitating...or using abortion services."⁷⁴² Both criminal penalties and civil damages are available for violations of this statute.⁷⁴³ In Ontario, although the province has no similar law, a court-ordered injunction prevents protests within specified zones in certain cities.⁷⁴⁴

In response to anti-abortion protests that prevented women from entering clinics, the U.S. federal Freedom of Access to Clinic Entrances Act (FACE) imposed criminal penalties against anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with...any person because that person is or has been...obtaining or providing reproductive health services," or attempts to do so.⁷⁴⁵ That law also punishes those who

⁷³⁵ Jocelyn Downie and Carla Nassar, *Barriers to Access to Abortion Through a Legal Lens*, 15 HEALTH L.J. 143, 144 (2007).

⁷³⁶ *Morning-after pill approved for over-the-counter sales*, CANWEST NEWS SERVICE (May 16, 2008).

⁷³⁷ CANADIAN MEDICAL ASSOCIATION, CMA POLICY: INDUCED ABORTION, (Dec. 1988), available at <http://policybase.cma.ca/PolicyPDF/PD88-06.pdf>.

⁷³⁸ Downie and Nassar, 15 HEALTH L.J. at 171-172.

⁷³⁹ Access to Abortion Services Act R.S.B.C. 1996 c. 1, upheld by the Supreme Court of British Columbia in *R. v. Watson and Spratt*, 2002 B.C.S.C. 786 [although Act impinged on free expression, it was justified under s. 1 of the Charter, because the Act protected citizen's access to a lawful medical service].

⁷⁴⁰ Access to Abortion Services Act R.S.B.C. 1996 c. 1 s. 2. [to avoid misapplication of this provision, it is a defense to this statute "if the defendant establishes that they were acting as (a) a service provider (b) a doctor who provides abortion services, or (c) a patient."]

⁷⁴¹ R.S.B.C. 1996 c. 1 s. 1.

⁷⁴² R.S.B.C. 1996 c. 1 s. 3.

⁷⁴³ R.S.B.C. 1996 c. 1 s. 9-14.

⁷⁴⁴ Downie and Nassar, 15 HEALTH L.J. at 172.

⁷⁴⁵ 18 U.S.C. § 248(a)(1).

intentionally damage the property of a reproductive health facility.⁷⁴⁶ FACE has been upheld against a number of constitutional challenges, including challenges based on the U.S. Constitution’s First Amendment guarantee of free speech.⁷⁴⁷ Courts have held that the law does not restrict a particular viewpoint, since “the law applies equally to all who interfere” with the provision of reproductive services.⁷⁴⁸ FACE also regulates *conduct* rather than speech or expressive activity, since it applies to force, threat of force, and physical obstruction.⁷⁴⁹

The U.S. Supreme Court also upheld a Colorado law that made it unlawful for anyone within 100 feet of the entrance of a health care facility to “knowingly approach” within 8 feet of another person without consent “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”⁷⁵⁰ The court found that the statute “places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners.”⁷⁵¹ The court continued: “Persons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions. The State of Colorado has responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction....”⁷⁵²

CONCLUSIONS

- U.S. states have struggled to balance the religious freedoms of medical providers and patients’ rights to reproductive care. The Illinois law does so by allowing pharmacists to refuse to provide contraception if their conscience so dictates, but they must ensure that the patient can acquire contraception elsewhere. This allows objecting pharmacists to avoid violating their religious beliefs while protecting patients’ access to their prescriptions. The Canada Medical Association’s policy regarding abortion, though less specific, similarly requires referral to a different doctor with no delay in services.
- Like the “informed consent” laws, refusal clauses could have implications for medical care beyond contraception. If broadly drafted, these policies could allow pharmacists to refuse to dispense any number of drugs, essentially substituting the pharmacists’ beliefs for doctors’ judgment.
- When contraceptive drugs are determined to be sufficiently safe, selling them over-the-counter makes them more accessible and avoids involving pharmacists, who might try to prevent their use. Canada has determined that emergency contraception (“Plan B”) can be sold over-the-counter, without a prescription or pharmacist consultation.
- The U.S. federal government has balanced anti-abortion activists’ right to free expression and women’s rights to reproductive services by allowing protests of health facilities but

⁷⁴⁶ 18 U.S.C. § 248(a)(3).

⁷⁴⁷ See *U.S. v. Gregg*, 226 F.3d 253 (3d Cir. 2000) and cases cited therein.

⁷⁴⁸ *Id.* at 267.

⁷⁴⁹ *Id.* at 268.

⁷⁵⁰ *Hill v. Colorado*, 530 U.S. 703, 707 (2000) [citing Colorado Rev. Stat. §18-9-122].

⁷⁵¹ *Id.* at 723.

⁷⁵² *Id.* at 729.

criminalizing behavior that obstructs clinic access. U.S. states have enacted laws that create “buffer zones” around medical facilities, in which protesters cannot approach unwilling listeners. While the Colorado law discussed above still allowed protest within the buffer area, people could not get too close to patients who wished to avoid a confrontation.

- The province of British Columbia has equivalent zones, but the type of activity prohibited within those zones is broader. Indeed, the province includes the type of viewpoint-focused prohibitions that would be unconstitutional in the U.S., since the law specifically outlaws behavior intended to persuade women not to have an abortion.
- Canadian provinces have also used other legal strategies to prevent intimidation of abortion providers and patients: zones created by court-ordered injunction rather than legislation; and use of the criminal harassment laws.

6) Sexually Transmitted Infections

STI testing and treatment are covered by Canada’s universal-coverage health plan.⁷⁵³ See above for other information on insurance coverage of contraception. U.S. federal Title X funds are also spent on STI education, testing and treatment, including HIV services.⁷⁵⁴

All U.S. jurisdictions allow minors to consent to STI services, without parental approval.⁷⁵⁵ Alabama’s law, for instance, states, “Any minor may give effective consent for any legally authorized medical, health or mental health services to determine the presence of, or to treat, pregnancy, venereal disease, drug dependency, alcohol toxicity or any reportable disease, and the consent of no other person shall be deemed necessary.”⁷⁵⁶ As discussed above, in Canada minors can consent to STI testing and treatment.

See Sec. IV(8) and (9) criminal transmission of HIV/STIs.

See Sec. IX(2) for sex education.

7) HIV Services

Mandatory HIV testing is discussed above. As for voluntary testing, Canada classifies HIV as a notifiable infection, so all Canadian provinces and territories report HIV and AIDS cases to the Public Health Agency of Canada (PHAC) without identifying information.⁷⁵⁷ All U.S. states also report cases, without identifying information, to the U.S. Center for Disease Control (CDC).⁷⁵⁸

⁷⁵³ Eleanor Maticka-Tyndale, Alexander McKay and Michael Barret, *Teenage Sexual and Reproductive Behavior in Developed Countries: Country Report For Canada*, Alan Guttmacher Institute (Nov. 2001) p. 28.

⁷⁵⁴ Angela Napili, *Title X (Public Health Service Act) Family Planning Program* (Congressional Research Service Aug. 4, 2008) at 2 [Report No. RL33644].

⁷⁵⁵ However, only about half of the states allow minors to consent to contraceptive services, and some states allow—but do not require—a physician to inform the parents of a minor patient that STI services have been provided, if the physician believes doing so is in the child’s best interest. GUTTMACHER INSTITUTE, *STATE POLICIES IN BRIEF: AN OVERVIEW OF MINORS’ CONSENT LAW*, (New York, April 1, 2010), available at <http://www.guttmacher.org/sections/adolescents.php>

⁷⁵⁶ Code of Ala. §22-8-6.

⁷⁵⁷ H. Irene Hall et. al *Epidemiology of HIV in the United States and Canada: Current Status and Ongoing Challenges* J. OF ACQUIR. IMMUNE DEFIC. SYNDR. v. 51 supp. 1, p. S14 (May 1, 2009). Both the physician who orders the test and the laboratory that carries it out are obligated to report positive test results in all regions except Yukon, where only the Physician is obligated to report. In New Brunswick, Prince Edward Island, the Northwest Territories and Nunavut, nurses are obliged to report positive tests: see

Canada has focused health surveillance on populations it considers high-risk, such as intra-venous drug users, men who have sex with men, and people born in countries with high rates of HIV.⁷⁵⁹ The U.S. CDC changed its guidelines in 2006 to advocate routine HIV screening for people aged 13-64, with individuals who are considered high-risk screened at least annually and all pregnant women screened unless they decline the test.⁷⁶⁰ These CDC recommendations are not binding, but they do set a national standard.

A) Discrimination by Health Care Providers on the Basis of HIV/AIDS Status

In the U.S. Supreme Court case *Bragdon v. Abbott*, a dentist refused to fill Ms. Abbott's cavity because he had a policy against treating HIV-positive patients in his office and would only provide care in a more expensive hospital setting.⁷⁶¹ Ms. Abbott filed suit under the Americans with Disabilities Act, which provides that, "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation..." and which applies to health care providers.⁷⁶² The court found that Ms. Abbott's HIV was a "disability" under the law, even though she did not yet show any symptoms.⁷⁶³ When the case was remanded to the appellate court to consider the remaining issues, the First Circuit decided that the dentist could not rely on an exception to the ADA that allows people to refuse to participate in something that poses a "direct threat" to the health or safety of others.⁷⁶⁴ The dentist was unable to refute the extensive evidence presented by Ms. Abbott—including Centers for Disease Control guidelines—that the procedure could be performed safely in a dental office.⁷⁶⁵

Based in part on the conclusions of the Canadian Medical Association, the Canadian Human Rights Commission has concluded that a patient's HIV is not a "bona fide justification" for denying goods, services or facilities under the Canadian Human Rights Act.⁷⁶⁶ Without such a justification, a denial of services is illegal discrimination.⁷⁶⁷

8) Selected Issues Concerning International Aid for HIV and AIDS Prevention and Treatment and Family Planning

A) The United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Act

PUBLIC HEALTH AGENCY OF CANADA, HIV TESTING AND REPORTING IN CANADA, (May 2004) at Table 1, *available at* http://www.phac-aspc.gc.ca/publicat/epiu-aepi/epi_update_may_04/3-eng.php.

⁷⁵⁸ *Id.*

⁷⁵⁹ *Id.* at S17.

⁷⁶⁰ Bernard M. Branson et al., *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings*, MORBIDITY AND MORTALITY WEEKLY REPORT, Sep. 22, 2006 (CDC 2006) ["Health-care providers should initiate screening unless prevalence of undiagnosed HIV infection in their patients has been documented to be <0.1%."], available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm>.

⁷⁶¹ *Bragdon v. Abbott*, 524 U.S. 624, 629 (1998).

⁷⁶² *Id.* at 629 [citing 42 U.S.C. §§ 12181(7)(F), 12182(a).]

⁷⁶³ *Id.* at 637-640.

⁷⁶⁴ *Abbott v. Bragdon* 163 F.3d 87, 88 (1st Cir. 1998) [citing 42 U.S.C. §12182(b)(3)].

⁷⁶⁵ *Id.* at 89-90.

⁷⁶⁶ CANADIAN HUMAN RIGHTS COMMISSION POLICY OF HIV/AIDS (Nov. 2007) *available at* http://www.chrc-ccdp.ca/legislation_policies/aids-en.asp ; Canadian Human Rights Act R.S. 1985, c. H-6 s. 15(1)(g).

⁷⁶⁷ Canadian Human Rights Act R.S. 1985, c. H-6 s. 5.

The United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008 renewed funding for the 2003 President's Emergency Plan for AIDS Relief (PEPFAR) and authorized contributions to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the U.N. Joint Programme on HIV/AIDS, and the International AIDS Vaccine Initiative.⁷⁶⁸ In the original 2003 version of PEPFAR, Congress recommended that 20% of HIV/AIDS funds be spent on prevention, and required that at least 33% of those prevention dollars be spent on abstinence-until-marriage programs.⁷⁶⁹ But in the 2008 version, the abstinence funding requirement was removed.⁷⁷⁰ Instead, the law only required that "activities promoting abstinence, delay of sexual debut, monogamy, fidelity and partnership" must be "implemented and funded in a meaningful and equitable way...based on objective epidemiological evidence as to the source of infections and in consultation with the government of each host country..."⁷⁷¹ Although the statute still "make[s] the reduction of HIV/AIDS behavior risks a priority of all prevention efforts" in part by "promoting abstinence from sexual activity and encouraging monogamy and faithfulness," it also "encourag[es] the correct and consistent use of male and female condoms and increase[es] availability of, and access to, these commodities..."⁷⁷²

A provision known as the "prostitution pledge" dictates that none of the funds authorized by the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking..."⁷⁷³ Furthermore, "No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," although the statute makes an exception for the Global Fund, the W.H.O., the International AIDS Vaccine Initiative and all U.N. agencies.⁷⁷⁴ This stands in opposition to UNAIDS' call for donors to "remove conditionality or policies that prevent their partners from supporting organizations that work with sex worker organizations."⁷⁷⁵

B) Restrictions on Aid for International Family Planning

Until recently, the "Mexico City Policy" (also called the "global gag rule") withheld USAID funds from organizations that used funding from any source to perform abortions; provide advice, counseling or information about abortion; or lobby for the legalization of abortion or its increased

⁷⁶⁸ Kellie Moss, *PEPFAR Reauthorization: Key Policy Debates and Changes to U.S. International HIV/AIDS, Tuberculosis, and Malaria Programs and Funding*, CRS Report for Congress at 2-3 (Congressional Research Service Jan. 29, 2009) [report no. RL34569]; P.L. 110-239 (July 30, 2008), H.R. 5501 [known as the "Lantos-Hyde Act"].

⁷⁶⁹ Moss, *supra*, at 6-7; See 22 USC §7622 [defining U.S. participation in and authorizing funding of the Global Fund].

⁷⁷⁰ However, the new act included an expanded "conscience clause" (also called a "refusal clause" –see sec. IV(5)(D)) stating that organizations that receive funding for HIV/AIDS prevention, treatment, or care are not required "to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS" or "to endorse, utilize, make a referral to...or otherwise participate in any program or activity to which the organization has a religious or moral objection." 22 U.S.C. §7631(d).

⁷⁷¹ 22 U.S.C. §7673(1)(B).

⁷⁷² 22 U.S.C. §7611(a)(12). Other behavior-based prevention goals are also listed in that section of the statute. Prevention goal not based on behavior modification are listed elsewhere in §7611.

⁷⁷³ 22 U.S.C. §7631(e). That prohibition cannot be construed "to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides." *Id.*

⁷⁷⁴ 22 U.S.C. §7631(f).

⁷⁷⁵ Commission on AIDS in Asia, *REDEFINING AIDS IN ASIA: CRAFTING AN EFFECTIVE RESPONSE*. p. 187 [Redefining AIDS in Asia, policy recommendation no. 5.3] (Oxford University Press, New Delhi 2008)

availability.⁷⁷⁶ President Obama rescinded that policy in January of 2009, stating that policy's provisions "have undermined efforts to promote safe and effective voluntary family planning in developing countries."⁷⁷⁷ However, international programs supported by the U.S. government still may not use U.S. funds "to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions."⁷⁷⁸ Nor may any funds "be used to pay for the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations."⁷⁷⁹

In March of 2010, Canada's Foreign Minister announced that Canada's initiative to improve the health of mothers and young children in poor countries (which will be presented in June 2010 at the G8 summit) would not include any family planning.⁷⁸⁰ After a firestorm of criticism, Prime Minister Harper reversed this decision, but declared that the government would not fund any new family planning initiatives that include abortion.⁷⁸¹ This has prompted comparisons to the global gag rule so recently abandoned by the United States.

CONCLUSIONS

- Courts in the U.S. have determined that HIV is a disability subject to antidiscrimination laws, even if the disease has not become AIDS. U.S. courts have also established that HIV does not pose such a threat to health and safety that medical providers can avoid treating HIV-positive patients. Canada's Human Rights Commission has also determined that HIV status is not a reason for denying goods, services or facilities. In short, both nations acknowledge that health care providers can be protected from HIV by other means than discrimination.
- The U.S. has recognized that restricting HIV and AIDS prevention funding to abstinence-before-marriage promotion limits programs' effectiveness, and no longer insists that a portion of its aid be used for that purpose. However, a U.S. "prostitution pledge" remains in effect. While this pledge ostensibly keeps U.S. donations in line with U.S. domestic law with regards to prostitution and sex trafficking, it forces legitimate organizations that disagree with the U.S. policy of criminalizing sex work—and those who merely wish to avoid wading into that political issue at all—to forgo U.S. funding. This is particularly problematic for organizations that provide health services to sex workers, and which may be forced to choose between losing funding or alienating the people they serve.
- The now-abolished U.S. "global gag rule" and Canada's recent refusal to include abortion in a maternal and child health program suggest that even countries where abortion is legal may be willing to limit access outside their borders. The global gag rule was especially pernicious, because it not only removed direct funding for abortions (indeed, U.S. law still prohibits this), but also precluded funding family planning clinics and other sexual health

⁷⁷⁶ Statement of President Barack Obama on Rescinding the Mexico City Policy, 74 Fed. Reg. 4903 (Jan. 23, 2009), available at http://www.whitehouse.gov/the_press_office/StatementofPresidentBarackObamaonRescindingtheMexicoCityPolicy/.

⁷⁷⁷ *Id.*

⁷⁷⁸ 22 U.S.C. §2151b(f)(1).

⁷⁷⁹ 22 U.S.C. §215b(f)(2).

⁷⁸⁰ John Ibbitson, *Ottawa changes course in wake of birth-control backlash; Contraception will be part of G8 initiative to protect mothers*, *PM Says*, THE GLOBE AND MAIL (March 19, 2010) at A1.

⁷⁸¹ *Id.*

services where abortion was even discussed. Thus medical providers who provided full information and care to their patients were excluded from funding.

IX) INFORMATION, EDUCATION AND EXPRESSION RELATED TO SEX AND SEXUALITY

1) Section Introduction Part One: an International Perspective on Sex Education

Rights to education, information and expression are inter-dependent, and the impact of each on sexual health must be addressed with an eye to their interrelation. Nonetheless, because education (both formal and informal) constitutes a specific right⁷⁸², a distinct field of law, specific state institutions, and a distinct field of practice (characterized by mutual exchange between teachers and students), we address education and sexuality education in a separate section from information and expression.

A rights approach to sexuality education is derived from the rights to health, education, to information and expression, as well as the right to participate in, and benefit fully from, scientific progress, combined with fundamental guarantees to equality, dignity and the right to participate in the cultural and political life of one's community and nation. Sexuality education, as a component of education, is understood to be essential to the full development of the human personality, in addition to being an essential means to protect oneself from sexual ill-health, whether from sexually transmitted infections, unwanted pregnancies, or sexual violence and abuse.⁷⁸³

Many different sectors of law are essential to ensure adequate education in general and adequate sexuality education in particular. These sectors include statutes and administrative regulations regarding educational curricula; constitutional provisions on rights to education; and non-discrimination law (regarding sex, gender, sexual orientation, race, religion, disability, health status and national status among other grounds). Other important laws engaged to support effective sexuality education include those protecting freedoms of speech and expression, and laws guaranteeing both teachers and students safe and non-discriminatory environments.

Sexuality education is understood to include not only accurate, age appropriate, scientifically supported *information* on health, sexual health and sexuality as an aspect of human conduct, but also *ideas* on non-discrimination and equality, tolerance, safety and respect for the rights of others, which are delivered through trained agents using age- and context-appropriate pedagogical *methods*. In particular, a rights-based approach to sexuality education requires the participation and contributions of young people, particularly adolescents and older teens. Sexuality education, coupled with comprehensive access to information, contributes to health through promoting individuals' ability to have preferences for, and act on decisions that protect their health, as well as determine the number and spacing of children. Sexuality education is also essential to each person's ability to develop themselves and their sense of self-worth, particularly in regard to any decision regarding their sexual and gender identity, and sexual behavior as an aspect of their

⁷⁸² See CRC, CESCRC articles 13 and 14 CEDAW article 10, CERD, article XX, and CRPD etc. Note that the persons covered by the CRC include children, adolescents and young people up till age 18. Young people according to the WHO range in age from 10 to 24 and make up an overlapping but separate category for policy makers.

⁷⁸³ See in particular CEDAW, CRC and CESCRC ad the discussion in the international section

personhood. Sexuality education is aimed at prevention⁷⁸⁴, as well as creating understanding of when and how to seek treatment or other forms of assistance for ill health, abuse, or other sexuality –related concerns. As a key component of effective prevention of sexual ill health, sexuality education is both less expensive than medical treatment and importantly highlights self-care through conditions of empowerment. Sex education, like all health education, promotes the values of well-being and autonomy.

Failures to develop and deliver accurate and comprehensive sexuality information, therefore, not only contribute to ill health, unwanted pregnancies, exposure and transmission of STI's, and increased rates of HIV infection, but also contributes to reduced use of services and treatment for STI's and HIV as well as reduced access to appropriate contraception and family planning services and services responding to pregnancy and complications of unsafe abortion. Accessible and good quality sexuality education also encourages people who suffer from sexual violence, sexual exploitation, or other abuse to seek assistance. Furthermore, sexuality education can serve as an important tool for equality and dignity in society: when presented in a non-discriminatory and non-judgmental manner, it can challenge gender stereotypes and fearful or negative attitudes towards sexuality and consensual but non-conforming sexual practices in particular.⁷⁸⁵

When law or policy excludes specific topics or persons from sexuality education as part of a larger policy of sex or gender stereotyping, or imposition of particular religious or cultural belief, these exclusions run counter to evidence-based evaluations of effective sexuality education and conflict with basic rights protections for education. Moreover, sexuality education should not replicate gender stereotyped understandings of sexual behaviour in the name of promoting respectful behaviours, such that girls are taught that their duty is to be chaste in the face of the 'natural' lust of boys.

Comprehensive sexuality education may include information and ideas regarding the effective use of contraception, protection against HIV, protections against sexual violence, understanding of sexual orientation and information on the diversity of sexual practices in society. This form of education is associated with better health outcomes for girls and women, as well as sexual minority populations. Comprehensive sexuality education requires strong protections in the law for freedoms of expression, education and the right to education as well as non-discrimination, as it relies on the dissemination of information that may challenge religious leaders and dominant but gender stereotyped beliefs in society around the roles of women and men, for example. For example, educational curricula that limit sexual education to a content promoting abstinence before marriage fail to provide the information that sexually active youth need, even if they delay sexual activity: evidence shows that while some delay may occur, when sexual activity follows that delay, condoms are used less often.⁷⁸⁶ Under international human rights standards it is clear that states must refrain from arbitrarily censoring scientifically accurate sexual health information or dispensing misinformation in sexuality education programs.⁷⁸⁷

⁷⁸⁴ Education must of course be paired with access to services and resources necessary to act on the knowledge gained, which includes links to other preventive systems, as relevant, such as HPV vaccine and cervical cancer screening

⁷⁸⁵ From Westeson, European region pp. 112.

⁷⁸⁶ Santelli, and SAM et al.

⁷⁸⁷ CRC, general comments 3 and 4, ADD

It is important to distinguish rights-based, necessary and affirmative measures that must be taken to reach targeted populations and the rights-denying and less effective tactics that assume categories of information are relevant to specific populations and deny comprehensive sexuality education. For example, assuming that only ‘gay-identified’ populations need information about anal sex or that only women need information about avoiding pregnancy is to provide insufficient sexuality education, and thus to fail to protect the health and rights of the general population.

Children have specific rights to age-appropriate and comprehensive sexuality education, which is made accessible to them regardless of gender, disability or national status. International rights standards elaborate the importance of sexuality education, especially for adolescents, to support them in determining their lives and identities, and to live free of abuse and preventable illness and unwanted pregnancy. Sexuality education, understood to be an obligation of the state which is often in constructive tension with the rights of parents and families. While families have the right to raise their children consistent with their religious and cultural beliefs, the rights of the child to objective and scientifically supported information (commensurate with their evolving capacity) is coupled with the duty of the state to present information and education in an objective and pluralistic manner to that child. This set of rights and duties means that parents cannot bar their children from receiving such critical information.⁷⁸⁸

It is important to note that education’s impact on sexual health is not limited to sexual health education. Education in general is a vehicle for realizing other rights⁷⁸⁹, and to contributing to all persons’ ability to live lives of equality, dignity and freedom.⁷⁹⁰ The importance of non-discriminatory access to education for all is critical to supporting the rights and sexual health of persons who might otherwise be stigmatized and excluded from formal and informal opportunities for education, so law should be designed to prevent discrimination against both students and teachers [see non-discrimination § 2 supra].

2) Sexuality Education

In Canada, educational control is exercised locally, and provincial authorities dictate the level and content of sexual education.⁷⁹¹ Similarly, U.S. education is handled by the states rather than the federal government, with states delegating their responsibilities to local school boards and school

⁷⁸⁸ See ECRC, GC 3 and 4 and ECHR Danish sex ed case (See, Europe region, Westeson). Parents can of course, provide their children with their vision of morality or skepticism in receiving this information.

⁷⁸⁹ See General Comments 11 and 13 of the ICESCR, G C 13 stresses that “education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence”. According to the Committee, “education in all its forms and at all levels shall exhibit the following interrelated and essential features: a) availability; b) accessibility; c) acceptability; and d) adaptability”.

⁷⁹⁰ UDHR article 26

⁷⁹¹ See Ali Withers, *Sex education pulled from Quebec high schools: Curriculum to be part of other subjects*, THE MCGILL TRIBUNE, (March 26, 2008).

districts.⁷⁹² However, the national governments of the U.S. and Canada are not entirely absent from issues of sexual educational. The Canadian Public Health Agency and Minister of Health publish guidelines for sexual health education for the nation as a whole.⁷⁹³ These guidelines do not provide specific curricula, but they do outline the agency's guiding principles and suggest methods for developing a sexual health education program.⁷⁹⁴ And in the U.S., the federal government can influence educational policy through its funding resources.⁷⁹⁵ In the 1980s, Congress began providing funding to states for programs that promoted sexual abstinence before marriage exclusively, without any mention of birth control.⁷⁹⁶ As a result, abstinence-only programs sprouted up throughout the country.

A) Sexual Education Programs in U.S. States

Some form of sex education is almost universal in U.S. public schools, but as school curricula are usually designed at the local rather than state or federal level, the content of the sex education programs vary from comprehensive instruction to minimal classes focused on fidelity, abstinence, and heterosexual relationships.⁷⁹⁷ A 2004 Congressional report found that the abstinence-only programs supported by the federal government contained false and misleading information, treated gender stereotypes as proven fact, and blurred the line between religion and science.⁷⁹⁸

Twenty-one states and the District of Columbia mandate sex education in public schools; 35 states mandate STI/HIV education.⁷⁹⁹ Even states that do not require sex education may still set the parameters for such instruction, when it is offered. California, for example, does not have a mandate, yet California school districts which *do* provide such instruction must teach about STIs (including HIV) and their transmission, the effectiveness of prevention methods, local resources for STI testing and treatment, and contraception (including emergency contraception).⁸⁰⁰ Although those school districts must teach “that abstinence from sexual activity is the only certain way to prevent unintended pregnancy...[and] sexually transmitted diseases,” the statute explicitly requires “medically accurate and objective” information and states that instruction may neither “teach or promote religious doctrine” nor promote discrimination on the basis of gender, sexual orientation, religion, or other protected categories.⁸⁰¹

⁷⁹² See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Most U.S. state constitutions impose educational obligations, but the U.S. Constitution is silent on the matter of education. See Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582 (1996).

⁷⁹³ MINISTER OF HEALTH, SEXUAL HEALTH EDUCATION, available at http://www.phac-aspc.gc.ca/publicat/cgshe-ldnemss/pdf/guidelines_e.pdf.

⁷⁹⁴ Canadian Guidelines for Sexual Health Education (Public Health Agency of Canada 2003, rev. 2008.)

⁷⁹⁵ See Alice M Miller and Rebecca A. Schleifer, *Through the Looking Glass: Abstinence-Only-Until Marriage Programs and Their Impact on Adolescent Human Rights*, 5 SEXUALITY RESEARCH AND SOCIAL POLICY 3 (Sep. 2008).

⁷⁹⁶ Adolescent Family Life Act, codified at 42 U.S.C. §300z; Personal Responsibility and Work Opportunity Reconciliation Act, codified at 42 U.S.C. § 710.

⁷⁹⁷ David J. Landry et al., *Factors Associated with the Content of Sex Education in U.S. Secondary Schools*, 35 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 6 at 261-269 (Dec. 2003), available at <http://www.guttmacher.org/pubs/journals/3526103.html>.

⁷⁹⁸ Comm. on Gov't Reform – Minority Staff, U.S. House of Representatives, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE-ONLY PROGRAMS (WAXMAN REPORT) (2004).

⁷⁹⁹ GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: SEX AND STI/HIV EDUCATION, (Dec. 1, 2009).

⁸⁰⁰ California Comprehensive Sexual Health and HIV/Aids Prevention Education Act, codified at Cal. Ed. C. §§51930-51939.

⁸⁰¹ Cal. Ed. C. § 51933(b)(2),(8), § 51933(d); § 220 [anti-discrimination law for educational institutions receiving state funds].

The majority of U.S. states allow parents to “opt-out” of sex education by removing their children from class.⁸⁰² A very few have an “opt-in” provision requiring parents to consent before sex education can be provided.⁸⁰³

B) Sexual Education Programs in Canadian Provinces

The Canadian Public Health Agency’s guidelines dictate that sexual education should be comprehensive and coordinated with access to clinical and social services.⁸⁰⁴

Under British Columbia’s School Act, schools “must be conducted on strictly secular and non-sectarian principles.”⁸⁰⁵ Although this does not mean that school boards should ignore the religious concerns of parents and communities—indeed, parental involvement is emphasized and encouraged—“[w]hat secularism does rule out is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community.”⁸⁰⁶ In *Chamberlain v. Surrey School District No. 36*,⁸⁰⁷ the Supreme Court of Canada considered this Act. The Court quashed a school board decision denying a teacher’s request to use books that depicted same-sex parented families. The Board’s justification for the refusal was that use of the books would cause controversy with some parents who had religious objections to homosexuality. The Court remanded the decision to the school board to be re-considered in light to the curriculum guidelines and the broad principles of tolerance and non-sectarianism underlying the legislation under which the Board was empowered to approve the use of books.

Conclusions

- Canadian provinces, like U.S. states, have more control over educational policy than the national government. In the province of British Columbia, a commitment to secular education prevented a local school board from deferring to parents’ religious beliefs by precluding the use of books describing same-sex families.
- In the U.S., funding for “abstinence-only” education led to the dissemination of inaccurate health information to students. Some states, however, require comprehensive sex education, including information on contraception and STIs. California, for example, attempted to protect its sex education classes from medical inaccuracies by legally requiring object, accurate, and nondiscriminatory information.

3) Sexual Health Information

As described below, the U.S. Constitution and the Canadian Charter significantly limit government restrictions of expression, including the provision of health information and the formation of associations for that purpose.⁸⁰⁸ Non-governmental organizations [NGOs] provide a

⁸⁰² GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: SEX AND STI/HIV EDUCATION, (Dec. 1, 2009).

⁸⁰³ *Id.*

⁸⁰⁴ PUBLIC HEALTH AGENCY OF CANADA, CANADIAN GUIDELINES FOR SEXUAL HEALTH EDUCATION (2003, rev. 2008.)

⁸⁰⁵ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 quoting sec. 76 of the School Act, R.S.B.C. 1996 c. 412

⁸⁰⁶ *Id.* at ¶19.

⁸⁰⁷ [2002] 4 S.C.R. 710.

⁸⁰⁸ See *Miller v. California*, 413 U.S. 15, 25 (1973) [Under the Constitution, medical and anatomical texts cannot be regulated as obscenity]; Canadian Charter of Rights and Freedoms part I §2.

wide variety of sexual health services, including the dissemination of public health information.⁸⁰⁹ NGOs are free to provide information and medical care to people engaging in criminal activities such as prostitutions or violations of obscenity law, and they regularly target groups at high risk for STIs.⁸¹⁰

See Sec. VIII(5)(C) on “informed consent” laws and laws related to interactions between medical professionals and patients.

See Sec. VIII(5)(D) about refusal clauses for pharmacists who refuse to be involved in contraceptive services/abortion.

4) Erotic Expression

[[See below for regulation of material containing sexual content]]

5) Decriminalization of Obscenity and Indecency

The U.S. and Canada attempt to strike the largest possible accommodation of freedom of expression rights against the notion that some production/distribution/consumption of sexual materials may involve harm and therefore be subject to regulation—the narrowest, most targeted sort of regulation. Apart from child pornography (discussed in section VIII(4)(E)), most attempts to restrict access to sexual images, books, films etc. have been found unconstitutional in both the US and Canada.

A) Basic Right to Freedom of Expression in the U.S. and Canada

Under the Canadian Charter of Rights and Freedoms, the “fundamental freedoms” possessed by everyone include “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication...”⁸¹¹ Similarly, the First Amendment to the U.S. Constitution states, “Congress shall make no law...abridging the freedom of speech, or of the press...”⁸¹² This applies to state governments as well.⁸¹³ These free speech protections are broad, but they are not limitless. Courts in both countries have found that certain, narrow categories of sexually explicit material may be prohibited.

B) The Evolution of Canadian Obscenity and Indecency Law: Subjective vs. Objective Standards

Originally, Canada’s test for obscenity was whether the materials would “deprave and corrupt” other members of society.⁸¹⁴ But this led to inconsistent and subjective decisions, so the Canadian

⁸⁰⁹ See generally Planned Parenthood (<http://www.plannedparenthood.org>); AIDS Action Coalition (<http://www.aidsactioncoalition.org>); Canadian Federation for Sexual Health (<http://www.cfsh.ca>).

⁸¹⁰ See CENTER FOR DISEASE CONTROL AND PREVENTION, DIVISION OF HIV/AIDS PREVENTION, PROCEDURAL GUIDANCE FOR COMMUNITY-BASED ORGANIZATIONS, (Rev. Aug. 2009), *available at* http://www.cdc.gov/hiv/topics/prev_prog/AHP/resources/guidelines/pro_guidance/index.htm.

⁸¹¹ Canadian Charter of Rights and Freedoms part I §2.

⁸¹² U.S. Const., Amend. I.

⁸¹³ The First Amendment has been applied to the states through the Fourteenth Amendment.

⁸¹⁴ *R. v. Labaye*, [2005] 3 S.C.R. 728, ¶ 15 [citing *R. v. Hicklin*, (1868), L.R. 3 Q.B. 360], Cockburn C.J.

legislature introduced a new obscenity test in 1959. The Canadian Criminal Code now states that any publication with a dominant characteristic of ‘undue exploitation of sex, or of sex and any one or more of the following...crime, horror, cruelty and violence, shall be deemed to be obscene.’⁸¹⁵ It is an offence to make, print, publish, distribute, circulate, sell, expose to public view or possessing for such a purpose: ‘any obscene written matter, picture, model, phonograph record or other thing whatever.’⁸¹⁶ It is also an offence to publicly exhibit a ‘disgusting object or an indecent show’ or to offer or have to sell, or advertising or publishing an advertisement for: ‘instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage.’⁸¹⁷ Further, it is an offence to advertise or publish an advertisement for ‘any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.’⁸¹⁸

The court interpreted “undue exploitation of sex” as a reference to societal norms, but the same problems of subjectivity persisted.⁸¹⁹ “On its face, the test was objective, requiring the trier of fact to determine what the community would tolerate. Yet once again, in practice it proved difficult to apply in an objective fashion...In a diverse, pluralistic society whose members hold divergent views, who is the ‘community’?”⁸²⁰

In 1992 in *R. v. Butler*, the Supreme Court of Canada analyzed whether the obscenity law violated the Charter provision quoted at the beginning of this section. The Court held that, although the obscenity law contravened the guarantee of freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms, the law could be demonstrably justified under s 1 of the Charter as a “reasonable limit prescribed by law” and was therefore constitutional.⁸²¹ The Court held that obscenity must be defined by community standards, but also included a harm-based analysis: “The courts must determine as best they can what the community would tolerate others being exposed to *on the basis of the degree of harm that may flow from such exposure* [emphasis added].”⁸²²

By 2005, Canada abandoned the rationale of “community” morals completely and focused entirely on the principle of harm. *R v. Labaye* held that “indecent criminal conduct will be established where the Crown proves beyond a reasonable doubt the following two requirements: 1) by its nature, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws [and] 2) the harm or risk of harm is of a degree that is incompatible with the proper functioning of society.”⁸²³

The Court identified three types of harm that had appeared in past case law: “(1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct;

⁸¹⁵ s 163(8) (formerly s. 150(8) of the Criminal Code, S.C. 1953-54 c. 51, added by S.C. 1959 c. 41 s. 11.)

⁸¹⁶ s 163.

⁸¹⁷ **R.S.C. 1985, c. C-46**, s 163(8).

⁸¹⁸ *Id.*

⁸¹⁹ *R. v. Labaye*, [2005] 3 S.C.R. 728. ¶¶ 17-20 [citing s. 150(8) of the Criminal Code, S.C. 1953-54 c. 51 (1959) and *Towne Cinema Theaters Ltd. V. The Queen* (1985) 1 S.C.R. 494.]

⁸²⁰ *Id.* ¶ 18.

⁸²¹ See James R. Robertson, “Obscenity: The decision of the Supreme Court of Canada in *R. v. Butler*,” March 1992, available at <http://dsp-psd.tpsgc.gc.ca/Collection-R/LoPBdP/BP/bp289-e.htm>.

⁸²² *R. v. Butler* (1992) 1 S.C.R. 452, 485.

⁸²³ *Labaye* 2005 SCC 80, [2005] 3 S.C.R. 728 ¶ 62.

(2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct.”⁸²⁴ In order to ensure that these categories were not applied too broadly, the Court noted that harm predisposing others to antisocial behavior must be proved, usually by expert evidence, rather than vaguely asserted.⁸²⁵ The earlier *Butler* case had outlined categories of material that could promote anti-social conduct: “explicit sex with violence,” which will almost always fall under the criminal statute, and “explicit sex without violence that is degrading or dehumanizing,” which will do so if the risk of harm is substantial.⁸²⁶

C) Obscenity Law and Discrimination Against Homosexual Content: a Canadian Example

Five years before *Labaye* was decided, in *Little Sisters Book and Art Emporium v. Minister of Justice* the Court considered the constitutionality of the obscenity law in the context of discriminatory treatment.⁸²⁷ Little Sisters was a gay and lesbian bookstore. The Canadian customs service, which had the discretion to block the importation of obscene articles at the Canadian border, began seizing books and videos being shipped to the store on the basis of a judgment that they were ‘obscene.’ The Court again upheld the obscenity law, but it held that the customs service had discriminated against Little Sisters by particularly targeting gay and lesbian erotica.⁸²⁸ “Government interference with freedom of expression in any form calls for vigilance. Where, as here, a trial judge finds that such interference is accompanied by the ‘systemic targeting’ of a particular groups in society...the issue takes on a further and even more serious dimension. Sexuality is a source of profound vulnerability, and the appellants reasonably concluded that they were in many ways being treated by Customs officials as sexual outcasts.”⁸²⁹

The Court also ruled that the onus is on the government to prove that imported materials are obscene.⁸³⁰ The decision also mentioned that even “degrading or dehumanizing” sexual content should be tolerated so long as it does not create a substantial risk of harm.⁸³¹

CONCLUSIONS

- The Canadian Supreme Court has gradually moved towards what it considers a more objective standard of obscenity, after finding that subjective rules allowed individual judges and juries to impose their own personal morals and beliefs on other people’s sexual expression. Although the current standard still leaves some room for subjectivity—what harm is significant? what harm impedes society’s ability to function?—the most recent standard at least attempts to separate obscenity law from cultural or religious disapproval of a given sexual practice. It

⁸²⁴ *Labaye* 2005 SCC 80, [2005] 3 S.C.R. 728 ¶ 36.

⁸²⁵ *Id.* at ¶58-60; See Jochelson, Richard, AFTER LABAYE: THE HARM TEST OF OBSCENITY, THE NEW JUDICIAL VACUUM, AND THE RELEVANCE OF FAMILIAR VOICES, 46 Alberta L. Rev. 741, 763 (2009) [“Arguably, the most substantial advance in respect of obscenity advocated by the Court is a new causal standard delineated by the Court....”]

⁸²⁶ *R. v. Butler* (1992) 1 S.C.R. 452, see Jochelson at 762-763 [arguing that these categories from *Butler* have not been altered by *Labaye*].

⁸²⁷ [2000] 2 S.C.R. 1120 (Little Sisters I).

⁸²⁸ *Id.* ¶ 40.

⁸²⁹ *Id.* ¶36.

⁸³⁰ [2000] 2 S.C.R. 1120 (Little Sisters I) ¶105

⁸³¹ *Id.* at ¶60.

does this in part by demanding particularized harms, as well as requiring expert evidence which can be examined in court.

- As the Butler decision said, “[E]xplicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex....”⁸³²
- The *Little Sisters* case illustrates how obscenity or indecency laws can interact with discrimination, to the disadvantage of sexual minorities. In that case, an ostensibly neutral law was enforced in a far from even-handed manner. Although the Court was unwilling to strike down the law itself, the *Little Sisters* decision still declared that discriminatory enforcement was unlawful.

D) Obscenity Law in the United States: the Changing Application of a Legal Standard

Laws aimed at controlling the content of speech are constitutionally suspect.⁸³³ Yet certain types of expression are outside of First Amendment protections, other types may be regulated in a content-neutral manner, and still others may be regulated based on content, as long as certain requirements are met. Because of the historical and contextual vagaries, we include this chart here:

U.S. First Amendment jurisprudence as it relates to sexually explicit expression⁸³⁴

Type of expression	Does the 1 st Amend. Apply?	Can the government regulate?
Obscenity (see below for definition)	No	Yes
Content-neutral restrictions (i.e., regulations that do not relate to the message expressed)	Yes	Yes, although courts will subject laws to “intermediate scrutiny” to ensure that 1) the regulation is narrowly tailored to serve a substantial government interest unrelated to the suppression of speech and 2) the regulation does not unreasonably limit avenues of communication. ⁸³⁵
Content-based restrictions	Yes	Only if the law passes the court’s “strict scrutiny” test: the law must be narrowly tailored to serve a substantial government interest, <i>and</i> must be least restrictive means of advancing that interest. ⁸³⁶ Strict scrutiny is the most stringent standard of review used by the Court.

The U.S. Supreme Court has found that obscene material is not protected by the U.S. Constitution’s First Amendment protection of free speech, so states are free to legislate against the

⁸³² R. v. Butler, (1992) 1 S.C.R. 452

⁸³³ Content-neutral speech restrictions are constitutional if the 1) serve a substantial government interest and 2) do not unreasonably limit the avenues of communication.

⁸³⁴ This is by no means a comprehensive chart of First Amendment law. Furthermore, the Supreme Court has not always been perfectly consistent in following these categories.

⁸³⁵ City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986).

⁸³⁶ U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) [law required cable operators to scramble sexually explicit channels in full, which was economically unfeasible, or limit the channels to certain hours; this was unconstitutional since there were less restrictive means of preventing children from seeing those television programs].

distribution of obscenity.⁸³⁷ The Supreme Court has determined, however, that not all material with sexual content is legally obscene.⁸³⁸ To be constitutional, an obscenity statute may only criminalize material if “(a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest (b)...the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law and (c)...the work, taken as a whole, lacks serious literary, artistic, political, or scientific value [citations omitted].”⁸³⁹ This is known as the *Miller* test, after the case in which it was first created.⁸⁴⁰

The difficulty of applying this test was demonstrated by *Jenkins v. Georgia*, in which a movie theater manager was convicted of violating a Georgia obscenity statute by exhibiting the film *Carnal Knowledge*.⁸⁴¹ The movie was widely shown and critically acclaimed—although sex was the primary theme of the movie, there was only occasional nudity.⁸⁴² The court found that the movie “is simply not the ‘public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain’ which we said was punishable in *Miller*,” and so no state could constitutionally outlaw the movie.⁸⁴³ As Justice Brennan’s concurrence pointed out, *Jenkins* proves that *Miller* “does not extricate us from the mire of case-by-case determinations of obscenity... as long as the *Miller* test remains in effect ‘one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so’ [citations omitted].”⁸⁴⁴ Yet *Miller* persists.

Despite the fuzzy nature of the rules regarding the *distribution* of obscene material, U.S. law is much clearer regarding the *personal possession* of such material. In *Stanley v. Georgia*, officers with a warrant to search a man’s home for illegal gambling activity instead came across pornographic film; the man was tried and convicted under a Georgia obscenity law.⁸⁴⁵ Overturning the conviction, the U.S. Supreme Court found that the “right to receive information and ideas, regardless of their social worth, is fundamental to our free society [citation omitted].”⁸⁴⁶ The Court continued: “[The appellant] is asserting the right to read or observe what he pleases.... He is asserting the right to be free from state inquiry into the contents of his library.... Whatever

⁸³⁷ *Miller*, 413 U.S. at 23. Also, states and municipalities may limit the locations of sexually explicit businesses such as adult theaters, because the Supreme Court has held that those laws are not aimed at the content of the movies being shown, but rather the “secondary effects” of such businesses on crime, retail, property values, and quality of life.” *City of Renton*, 475 U.S. at 47-48.

⁸³⁸ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002) [“as a general rule, pornography can be banned only if it is obscene....”].

⁸³⁹ *Id.* at 24.

⁸⁴⁰ This section concerns adult consumption of materials with sexual content. U.S. case law approaches such material differently when minors are involved. Material that would not be obscene when viewed by adults may be obscene when provided to minors. *Reno v. American Civil Liberties Union* 521 U.S. 844, 864-865 (1997) [citing *Ginsberg v. New York*, 390 U.S. 629 (1968)].

⁸⁴¹ *Jenkins v. Georgia*, 418 U.S. 153, 155 (1974).

⁸⁴² *Id.* at 159-161.

⁸⁴³ *Id.* at 162-165.

⁸⁴⁴ *Id.* at 162-165 [Justice Brennan’s concurrence, joined by two other justices, argued that the government could not constitutionally suppress material on the basis of obscenity, absent distribution to minors or “obtrusive exposure to unconsenting adults.”]

⁸⁴⁵ *Stanley v. Georgia*, 394 U.S. 557, 558-559 (1969).

⁸⁴⁶ *Id.* at 564.

may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."⁸⁴⁷

It may seem odd that the same material which is constitutionally protected inside a person's home can be subject to criminal sanction when it is dropped in the mail or sold in a shop. Yet a recent Third Circuit case confirmed this distinction: in *U.S. v. Extreme Associates, Inc.*, a distributor of online pornography challenged a federal obscenity law on behalf of its customers.⁸⁴⁸ The court reaffirmed that "the right recognized in *Stanley* to possess obscene material within the home (and, by logical implication, the ability to exercise that right) does not mean that there is a correlative right to distribute that material...."⁸⁴⁹

The peculiar nature of this divide—where does one get obscene material if not from a distributor?—may be responsible for the fact that obscenity prosecutions (except of child pornography) were basically abandoned in the U.S. until temporarily revived by Justice Department under the Bush administration.⁸⁵⁰ Material with erotic or other sexual content remains widely available in the U.S., and "contemporary community standards" have changed quite a bit over the years. In a 2000 U.S. Supreme Court case involving sexually explicit cable television, the parties all agreed that the sexually explicit programming on Playboy's cable television station was not obscene and thus entitled to First Amendment protection.⁸⁵¹ Further limiting the reach of obscenity laws, the Supreme Court has held that works have "serious literary, artistic, political, or scientific value" whenever a reasonable person would find such value in the work, "taken as a whole," even if only a minority of people would agree.⁸⁵² Indeed, a poem giving a "play-by-play" of a sexual encounter was found to be non-obscene when it had "some of the earmarks of an *attempt* at serious art [emphasis added]" even though, as the court dryly remarked, "many would conclude that the author's reach exceeded his grasp."⁸⁵³

(i) U.S. Regulation of Sexual Content in Broadcasting and on the Internet

As described above, content-based restrictions on speech are constitutionally acceptable only in very limited circumstances. The U.S. Supreme Court has treated broadcasting differently, however. Although still constrained by the Constitution, the federal government has unusual authority to regulate the content of broadcasts, because the airwaves are considered a limited public resource, are highly regulated, "[a]nd of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."⁸⁵⁴ The federal government may regulate broadcast sexual content, since "indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to

⁸⁴⁷ *Id.* at 565.

⁸⁴⁸ *U.S. v. Extreme Associates, Inc.*, 431 F.3d 150 (3rd Cir. 2005).

⁸⁴⁹ *Id.* at 156-157. The U.S. Supreme Court decline to reexamine the issue when it declined to hear this case. Cert. denied by 547 U.S. 1143 (2006), 126 S. Ct. 2048.

⁸⁵⁰ See Amy Adler, *Problems of Censorship in a New Technological Age: Introduction: All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007).

⁸⁵¹ *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. at 811.

⁸⁵² *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987).

⁸⁵³ *Kois v. Wisconsin*, 408 U.S. 229, 2321-232 (1972) [case also found that it was unconstitutional to apply state obscenity statute to small photographs of nudes accompanying newspaper story and described as similar to photographs seized during arrest].

⁸⁵⁴ *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) [Federal Communications Commission could penalize radio station for broadcasting "indecent but not obscene" monologue that included profanities.]

be left alone plainly outweighs the First Amendment rights of an intruder,” and because “broadcasting is uniquely accessible to children.”⁸⁵⁵

Yet the protection of minors does not outweigh adults’ right to sexually explicit content. In *Reno v. American Civil Liberties Union*, the Supreme Court considered provisions of the Communications Decency Act (“CDA”), which criminalized among other things the knowing sending or displaying of obscene or indecent messages to people under 18 using “an interactive computer service,” i.e. the Internet.⁸⁵⁶ Noting that viewing material online, unlike broadcasting, required a number of affirmative steps on the part of the viewer, the Court stated, “Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.”⁸⁵⁷ The law was so broad that anyone publishing sexual material online would have to risk criminal sanction: “Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality... or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.”⁸⁵⁸ The law was unconstitutional: “the Government may not reduce the adult population to only what is fit for children.”⁸⁵⁹

CONCLUSIONS

- Although the Supreme Court has allowed some limits on purveyors of sexually explicit material, the court has defined “obscenity” so as to encompass only a narrow category of sexual expression. Despite the reference to “community standards” in the *Miller* test, a work is not obscene just because most members of a community consider it to be so. As long as there is some amount of literary, artistic, political or scientific merit, a work cannot be outlawed. This prevents a community from dictating what is obscene based exclusively on local beliefs or preferences.
- The U.S. firmly protects an adult’s right to read or view sexually explicit material in his or her home, an area of particular privacy rights under the U.S. Constitution.
- The U.S. Supreme Court recognized the risk that the protection of children could be used to justify severe restrictions on adults’ access to sexually explicit materials. The court would not approve a sweeping law that could have reduced the information available to adults just to keep children from viewing sexual content. The Court was unwilling to countenance a law that could have encompassed far more expression than the narrow legal definition of “obscenity,” worrying that broad language could lead to reduced information about everything from contraception to rape statistics. Even if those topics were not

⁸⁵⁵ *Id.* at 748-749.

⁸⁵⁶ *Reno v. American Civil Liberties Union*, 521 U.S. at 859-860. The statute provided an affirmative defense to those who made a “good faith, reasonable, effective, and appropriate” effort to restrict access by minors or who used certain age-verification measures.

⁸⁵⁷ *Id.* at 868-869.

⁸⁵⁸ *Id.* at 871.

⁸⁵⁹ *Id.* at 875.

necessarily covered by the law, few people would publish online content concerning that posed *any* risk of criminal punishment.

- The U.S. Supreme Court also recognized the unique nature of the Internet (and its “vast democratic forums”), and refused to limit access in the name of obscenity or indecency.

X) SEX WORK

1) Introduction: an International Perspective on Legal Responses to Sex Work

This section examines how laws governing the exchange of sexual services for money or goods (often called “sex work” or “prostitution”) influence the sexual health of persons in sex work, as well as facilitate or prevent discrimination, abuse and violence against them. Analysis of the law’s influence on the health and rights of people in sex work requires careful attention to legal words and language: terms and their meanings have changed historically, and in addition do not have uniform meaning across nations and legal systems.

The authors of this WHO report mirror the original terminology when referring to the text or discussing the text of national and regional laws which regulate prostitution (often formally called prostitution laws, as well as debauchery or morals offense codes). Confusingly, some national laws prohibiting prostitution are called anti-trafficking laws (i.e., using the same expression as the contemporary international law term “trafficking”, which today has a different meaning entirely [see below].⁸⁶⁰ When such confusion of terms in the law is present, we highlight the problem. When not directly referencing specific national or regional laws, the authors use the terms ‘sex work’ and ‘sex workers’ to describe the practices of, and the people engaged in, exchanging sexual services for money or goods, either regularly or occasionally.⁸⁶¹

States vary in how they approach prostitution or sex work in the law. Some use criminal law to prohibit various aspects of prostitution. Other states permit buying and selling of sexual services, subject to administrative regulations that govern work and labor practices generally. Others have developed regulatory schemes directed specifically at the people, conditions, and venues involved in the exchange of sexual services for money or goods, with strong penalties for violating these rules. [See discussion below and fn 7 for further elaboration on these frameworks.] Prostitution laws may be gender-specific, punishing only women for selling sex. Nevertheless, men who sell sex in legal systems with sex-specific criminal prostitution codes may face penalties under other criminal laws prohibiting indecent conduct, same-sex sexual behavior or vagrancy, for example.

Criminalization in particular marginalizes people in sex work: to avoid arrest, detention, or conviction, as well as general harassment and surveillance, people may distance themselves or hide from authorities in law, health and education, as well as from family; migrate to other towns or countries; or otherwise organize their lives outside formal social structures. Criminal convictions for prostitution have lasting social consequences, in addition to their direct effects

⁸⁶⁰ See, e.g., the Indian code criminalizing prostitution, which is called the Immoral Trafficking (Prevention) Act of 1986 (ITPA) at pp>>>SEARO report.

⁸⁶¹ This definition of sex work is drawn from the UNAIDS Guidance Note on HIV and Sex Work (2009), citing UNAIDS Technical Update Sex Work and HIV/AIDS (2002). However, we acknowledge that sex workers might not be the best term to convey the multitude of people doing sex work or exchanging sexual services for money, as many people may not necessarily call themselves by this term, or have this ‘identity’.

through fines or detention. Criminal records may bar individuals from gainful employment, public housing, or other social benefits. Even in states that do not criminalize prostitution (and more so in states that do), people in sex work face significant social stigma. This stigma is variously linked to disapproval of sex for non-reproductive purposes or sex outside or before marriage, particularly for women, as well as the short-term exchange of sexual services for money outside domestic or 'private' locations. This stigma constrains sex workers from seeking support and operates through the condemnation of authorities in key institutions, enabling abuse with impunity at the hands of both state and non-state actors and generally erecting barriers to sex workers taking steps individually or through organizing to claiming their rights, including rights to health.

Research on 'sex work' finds that it takes protean forms. Most exchanges of sex for money, food, or resources occur in informal labor sectors, often in combination with other work, as a livelihood strategy. Sex work is found at all socio-economic levels, with corresponding differences in income, danger, and vulnerability.⁸⁶² The selling and buying of sexual services takes place in a range of physical environments, including brothels, bars, clubs, homes, hotels, cars, streets, and out-door settings. The context of sex work ranges from highly organized, with multiple participants, social differentiation, and inequality of power to individual workers operating independently in the informal sector. Sex work may be arranged through direct personal contact (involving the sex worker or a go-between) or via telephone, Internet, or other modes of solicitation or advertisement. The persons involved in sex work can be male, female or transgender and may range in age.⁸⁶³

This extensive variation in the people, places and practices which constitute 'sex work' has tremendous implications for health and rights-based policy interventions. Unequal and vastly different vulnerabilities and capacities of people in sex work defy any single characterization. Moreover, a health and rights-based evaluation also reveals that the participation of people in sex work is essential to devising the interventions needed to respond to their needs. As the WHO review of laws engaging with prostitution reveals, however, the dominance of criminalization as the legal response to sex work impedes cooperative and participatory measures.

Under conditions of criminalization, many people in sex work face steep barriers to realizing their fundamental rights, such as rights to health, equality, privacy, association, family life, housing and education, and participation in the cultural life of the community. Under regimes in which some forms of prostitution are legal, sex workers may continue to face social and practical exclusions because of the continued weight of stigma, or because the laws differentiating what is legal and what is criminal in regard to selling sex maintain surveillance over sex workers which render even legal sex workers vulnerable to both state and non-state abuse. Persons in systems that permit some forms of sex work, however, may have better opportunities to organize, share information, and to seek public redress for abuse and discrimination.

⁸⁶² Trafficking into prostitution or sex work is discussed in Section VII. Conditions discussed here include a range of abuses, denial of rights, and other injustices, which do not, however, meet the definition of trafficking. See discussion of trafficking, below.

⁸⁶³ While persons under 18 years of age may be involved in sex work, under international standards their involvement is deemed abuse or exploitation [see UN Palermo Protocol]. Thus, persons less than 18 years involved in sex work should --under no circumstances-- be treated as criminal offenders.

In many cases, the state and its agents are the primary abusers of persons in sex work. Arbitrary detention, irregular deportation, forced evictions and removal of children without due process are often committed under the claimed authority of law, but without formal warrant, arrest or other due process protection. Transgender sex workers, migrant sex workers and sex workers of minority racial or ethnic groups can be particularly vulnerable to abuse by law enforcement operating under the cover of the law. They face compounded barriers in seeking redress for these abuses. They also face additional hurdles in accessing health services and information.

The use of raids, and exemptions from the need for independent review of warrants for entering premises or arrest, are common in legal regimes regarding prostitution, demonstrating high levels of state disregard for people in sex work. Extralegal abuses by state agents, including rape, assault, murder, theft, and extortion, are committed with impunity. Revolving door arrests and mass arrests coupled with a high degree of state-generated sensational publicity reveal the extent to which the spectacle of ‘punishing the prostitute’ continues to serve an interest of the state in controlling sexual behaviour through the production of the ‘prostitute’ as moral scapegoat. Often, these public arrests are tied to claims of state action on behalf of public health or national morality

Health services, provided by both state and non-state actors, have historically not been a site of rights promotion for people in sex work. State health controls, through measures purportedly serving a public health purpose, are a frequent source of violations of sex workers’ rights: mandatory testing for STIs and HIV; routine infringements of confidentiality regarding HIV test results and other medical information (see Chapter III on discrimination); and mandatory health identity cards, which must be displayed to authorities on demand, thus violating the right to privacy. Moreover, the orthodox understanding of sex workers as a discrete and ‘findable’ sub-population of women (as opposed to an often diffuse and diverse population of women, men and transgendered persons as described earlier) has led to interventions tailored in ways that miss many people in sex work.⁸⁶⁴ Finally, the tendency of health programs designed for people in sex work to focus exclusively or disproportionately on STI and HIV prevention is a constraint on the right to health, and violates rights to equal treatment, as people in sex work need comprehensive health services for everything from contraception, pre-and post natal care, to dental care and overall care for physical and mental health.

The state tolerates abuses by non-state actors, such as violence by clients, abuse from neighbors and family members, or abuse as well as substandard care or humiliating treatment by health professionals. Discrimination gains justification by the imputation of ‘prostitution status’, real or imagined, reducing the ability of persons in sex work to function as full members of society. The inability of sex workers to access bank accounts, decent housing, social security schemes, or education for their children, because of discrimination and prejudice, contributes to their precarious livelihood and increases social exclusion.

The health status of many people in sex work can be quite variable: it is often relatively low, in part related to insecurity of income, food and housing for the most vulnerable persons in sex work, and because of the difficulty of accessing appropriate and respectful health services for prevention

⁸⁶⁴ Interventions also often presume that condom use with casual clients is always the greatest concern in sexual health, whereas some studies show that condom use is less frequent with intimate partners, posing a greater risk for STI and HIV transmission.

or treatment. The barriers to care and accurate information are proportionate to socially discriminatory attitudes and legal barriers. That said, people in sex work with higher socio-economic status may enjoy relatively good health status, especially if they also have access to adequate services (although they remain in jeopardy through police abuse and risk of incarceration.)

Having multiple sex partners under conditions of unsafe sex increases the risk of sexually transmitted infections, yet prevention efforts directed at sex workers for STIs and HIV are often demeaning, discriminatory, substandard, and ineffective. Effective prevention programs are often stymied by police practices under criminalization regimes: for example, while condom promotion is essential to HIV prevention efforts, in many settings possession of condoms is used as evidence of criminal activity (engaging in prostitution). In many states, ARV treatment is denied to sex workers entirely de facto, or persons deemed more 'innocent' are prioritized for treatment as a matter of policy.

Many people in sex work have little recourse to law to vindicate their rights, whether to custody of their children, rights to their wages, or prosecutions of perpetrators of violence. Often, police and other authorities will not register their complaints, and many sex workers come to believe that they do not enjoy the same status as other members of their community. Few legal defenses are mounted to challenge the arbitrary detentions or deportations of (alleged) sex workers or to investigate crimes committed against sex workers by law enforcement.

Much of what is termed 'prostitution law' (law directly prohibiting prostitution) is criminal law.⁸⁶⁵ However, many other laws (loitering, vagrancy, 'riotous behaviour' laws, zoning and housing laws, health codes⁸⁶⁶, bar or cabaret licensing laws, public indecency laws, etc.) also have a direct effect on the practice of sex work. The criminal laws on prostitution vary widely: in order to analyze the specific effects of law, it is critical to identify with great specificity what particular acts are prohibited. Inquiry into law must ask: is the actual exchange of sex for money or goods a crime?⁸⁶⁷ Are other activities (by the sex workers themselves or others) criminalized, for

⁸⁶⁵ The literature (English language) of the last two decades about prostitution law often characterizes legal approaches to prostitution with a set of terms claiming to delineate essential categories: *abolitionist*; *prohibitionist*; *regulationist*, as well as using the terms *to decriminalize*, *to legalize*, and *to regulate*. Despite their ubiquity, these categories do not enable careful analysis. First, the categories suggest that there are clear boundaries between 'types' of legal approaches, such that one can assign any national or local law to one category. These assignments are in fact very problematic; for example, does one consider systems that decriminalize the seller and criminalize the buyer "prohibitionist" or partial decriminalization? Further analysis grounded in empirical research reveals that it is mistaken to call this decriminalization, even of the seller, because in practice the person selling sex is not free of criminal surveillance. For example, sex workers may be taken into custody in order to be questioned or to ensure their evidence in any prosecution of the buyer.

Furthermore, this taxonomy attends exclusively to laws governing the exchange of sexual services, ignoring the many overlapping laws (found in other parts of the criminal code, such as statutes punishing vagrancy or indecent conduct, as well as health codes, zoning and other administrative laws) that effectively penalize sex work over and above the offences listed in the criminal code. Finally, even more confusion has been engendered over the meaning and distinctions between 'legalized' and 'regulated' prostitution, as some use the term 'regulation' to refer to prostitution-specific registration and surveillance schemes, while others use the term to refer to any system in which the government plays a role in setting the conditions of work (which may be comparable to state regulation of safety and health in restaurants or other service sectors.) As noted in the discussion in the text, different legalization schemes can vary greatly in their promotion of equality, autonomy and health, as well as in their impact on sexual health.

example, solicitation (the public attempt to seek clients or make an offer for a sex/money exchange), pandering (to act as a go-between in facilitating the sexual exchange), living off the earnings of a prostitute, managing or renting premises for the purposes of prostitution, etc. Many systems do not criminalize the exchange of money for sexual services, but rather the penumbra of conduct surrounding it.

Systems which permit sex work under regulatory codes vary widely in their impact on sexual health and rights. Some systems are rights and health violating, such as those which mandate health cards (as described above, for example), or which restrict the abilities of people registered as sex workers to choose their own housing or live with their families, or which condition limited health care services on registration. These systems transgress norms of equal protection of the law, as well as constraining the underlying rights of privacy, family life, and rights to housing and health. Many legal regimes also severely constrict freedom of movement (through regimes of zoning and registration, or provisions barring working from living together or assigning sex work to isolated areas, rendering persons in sex work more vulnerable to violence and other forms of abuse.

Other legal regimes are more rights and health promoting, particularly as they move toward greater integration with general labor regimes, so that the system ensures access to insurance and other social benefits, and ensures health and safety conditions akin to those found in other service sectors. Other key aspects of health and rights-promoting legal regimes for sex work are: ensuring access to health services for a full range of mental and physical health concerns (and not solely for sexually transmitted diseases), and guaranteeing rights to organize and access to the courts to vindicate a full range of rights.

Even legal systems which administer the conditions of sex work (i.e., permit it as labor) have not succeeded in disentangling sex work from criminal law. Some legal systems define only *some* forms of sex work as legal (brothel-based, or escort services, for example); street-based or independent sellers of sex may still face criminal sanctions. Some systems permit only nationals of their country (or from a limited number of other countries) to work in the sex sector: persons who fall outside the legally permissible status commit criminal offenses in selling sex.⁸⁶⁷ These complicated inter-relationships between legal and criminalized forms of sex work suggest that even systems often characterized as ‘legalized’ can put sex workers at risk of law enforcement monitoring (and concomitant harassment) to a very high degree, suggesting the need for close review of *all* regulatory and administrative systems regarding sex work from a health and rights perspective.

⁸⁶⁷ Many legal systems that are understood to “criminalize prostitution” do not, in fact, criminalize the specific acts of exchange—in part because the proof is so difficult to obtain, absent police surveillance in the private space where the sexual behavior occurs, or direct police participation in the sexual acts themselves. A key reason given for law reform decriminalizing prostitution is corruption by law enforcement agents and abusive or rights-violating methods of surveillance [CITE: OSI] Confusion arises about terminology, when sexual exchange per se is not criminalized, but the penumbral conduct is: some observers describe this as a legal environment in which ‘sex work is not a crime;’ while others deem the penalization of acts supporting the exchange of sex for money as ‘criminalization’.

⁸⁶⁸ This is distinct from many labor regimes, where the irregular immigrant commits an administrative violation in working out of status, but not a criminal offense.

The historical usage of the word ‘trafficking’ to mean all prostitution has produced a great deal of confusion in the analysis of the relationship between law, human rights, health and sex work. The 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others equated all movement into prostitution with the international crime of trafficking.⁸⁶⁹ As noted, however, this Convention has been supplanted in practice by the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons which focuses on trafficking as a crime defined by its use of force, fraud and coercion into a range of labor sectors, including but not limited to prostitution. (For persons under 18, however, movement into prostitution is deemed ‘trafficking’ even absent any force, fraud or coercion.⁸⁷⁰) Trafficking as defined in the Protocol is a serious human rights violation, and it has serious effects on health (see the Section on Violence for a discussion of the health and rights responses to trafficking). When the circumstances of persons in sex work fit the crime described in the Protocol, it is critical that authorities respond as they would to any other trafficked person: with full regard for their rights and with concern for the abuses they have suffered, including health consequences. Trafficked persons, including persons trafficked into prostitution, may face extreme abuse in their working conditions, lack of pay, inability to leave, and threats to selves and family members. Trafficked persons in sex work, therefore, are rarely able to organize, employ health promotion and disease prevention measures, and make decisions about clients, which lie at the core of successful sex worker-led health and rights based efforts.

From a health and rights perspective, both under-prosecution and over-prosecution in regard to persons in sex work constitute failures to respect rights, especially in creating the conditions for redress and restitution. On the one hand, many national laws and policies often fail to respond to abuses against sex workers, applying gender-stereotyped presumptions about sex workers’ credibility and dismissing their accounts of abuse. On the other hand, campaigns against trafficking into forced prostitution often mistakenly assume all people in sex work, particularly women, are victims of trafficking, and have no capacity to consent to exchange sexual services for money. During criminal investigations, people in sex work may be detained against their will or treated as accomplices in the trafficking of others. The equation of all prostitution with trafficking elides two very different conditions and circumstances. This confusion produces ineffective legal and health interventions such as ‘raid and rescue’ of un-trafficked sex workers, whose livelihoods, associations, and safety nets are torn apart by the raids.

As noted, there is agreement that persons under 18 should not engage in sex work.⁸⁷¹ More difficult to formulate, however, are the legal and policy responses that constructively engage with teenagers engaged in survival sex or other forms of regular or irregular sex work, not infrequently occasioned by ejection from their natal homes or attempts to escape abuse. At minimum, they need access to services to help them protect their health, as well as education, housing, and support that allows for rapid exit from sex work. Many health programs which target young persons aged 14-24 fail to offer services to address the needs and contexts of the diversity of young people in sex work. Transgender or homosexual youth, who are escaping violence in their

⁸⁶⁹ See International Law § 8 for more analysis of the international law of trafficking

⁸⁷⁰ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000) article 3.

⁸⁷¹ See, CRC, and First OP, ILO worst forms of child labor etc.

homes or communities, find both resources and abuse when they leave home and move to larger urban areas, where many engage in survival sex. Services should be designed for them that meet their particular needs and barriers to exiting sex work, and integrating into safer community settings.

Moreover, young persons in sex work should not be prosecuted as criminal offenders. Few legal regimes have incorporated this approach, especially in light of their reliance on punitive and non-rehabilitative juvenile justice systems. Rescues and raids on behalf of minor sex workers often place them in abusive conditions of detention in ‘rescue or remand homes’. Girls face particular problems when rescued from sex work, as they may be returned to communities in which they are culturally stereotyped as no longer ‘good’ women, assumed to be HIV positive unable to re-integrate. Moreover, the raid and rescue strategy has not proved sustainable in many sites, as debt structures that facilitated the minors’ entry into sex work motivates indebted families to send still-younger children in their place. Alternative livelihood strategies and education must be created.

2) U.S. State Law and Sex Work

All U.S. states but one have criminal statutes against prostitution, defined as the exchange of sexual services for financial compensation.⁸⁷² In most states, the mere offer or agreement to perform such acts is sufficient, making arrest and prosecution possible without a consummation of the deal.⁸⁷³ States statutes vary in how they define the sexual act involved, but some courts have excluded acts that did not involve physical contact.⁸⁷⁴

The sole outlier is Nevada, where counties of fewer than 400,000 people may decide to permit licensed brothels.⁸⁷⁵ For those counties that do so, Nevada law requires that “a person employed as a prostitute in a licensed house of prostitution shall require each patron to wear and use a latex prophylactic while engaging in sexual intercourse, oral-genital contact or any touching of the sexual organs or other intimate parts of a person.”⁸⁷⁶ Prostitutes can be licensed only after undergoing HIV, syphilis, gonorrhea and Chlamydia tests; to maintain their license, they must get the former two tests on a monthly basis, the latter two on a weekly basis.⁸⁷⁷ If a test is positive, “the person shall immediately cease and desist from employment as a prostitute....”⁸⁷⁸ County sheriffs can inspect brothel premises for violations; counties can revoke licenses from both brothels and individual prostitutes or even impose criminal penalties when state or local

⁸⁷² Drake Hagner, ed. *Tenth Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Prostitution and Sex Work*, 10 GEO. J. GENDER & LAW 433, 435 (2009) [discusses both Nevada and Rhode Island as states with at least some legal prostitution, but Rhode Island recently passed a law criminalizing all prostitution].

⁸⁷³ *Id.* at 436.

⁸⁷⁴ 63C AmJur 2d Prostitution §7 [citing *Commonwealth v. Bleigh*, 402 Pa. Super. 169 (1991)[self-masturbation for hire is not prostitution]; *People v. Georgia A.*, 163 Misc. 2d 634 [sodomasochistic acts that did not include intimate touching or intercourse was not prostitution]; See N.M. Stat. §30-9-2 [a “sexual act” for purposes of the prostitution statute means “sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse of the causing of penetration to any extent and with any object...”]

⁸⁷⁵ Nev. Rev. Stat. §24.345.

⁸⁷⁶ Nev. Admin. C. §441A.805.

⁸⁷⁷ Nev. Admin. C. §441A.800.

⁸⁷⁸ Nev. Admin. C. §441A.800(4); see also Nev. Admin. C. §441A.815 [reporting requirements for person in charge of a licensed house of prostitution who “knows of or suspects the presence of a communicable disease....”].

regulations have been violated.⁸⁷⁹ Counties have broad discretion to impose their own requirements, so local regulations vary widely.⁸⁸⁰

In the other states, laws criminalize not only prostitution but also patronizing a prostitute, living off the earnings of a prostitute and running a brothel/escort service; like prostitution statutes themselves, these laws are generally gender-neutral.⁸⁸¹ The economic crimes of pimping and/or running a prostitution business are sometimes punished more severely than simple prostitution: in Pennsylvania, pimps and owners/managers of prostitution businesses are guilty of a felony, while sex workers and patrons are only guilty of a misdemeanor.⁸⁸²

3) U.S. Federal Law and Sex Work

The Federal government criminalizes prostitution (and inducing prostitution), but because of constitutionally required limits on its jurisdiction, the acts must relate to interstate or foreign commerce, or must involve travel across state lines (see Introduction).⁸⁸³ The federal government also attempts to regulate its residents' behavior outside its own borders: "Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both."⁸⁸⁴ A person has engaged in "illicit sexual conduct" if he or she commits aggravated sexual abuse of a person under 18.⁸⁸⁵ "Illicit sexual conduct" also occurs if someone "recruits, entices, harbors, transports, obtains, or maintains a person" under 18 knowing that "force, threats of force, fraud or coercion" will be used to cause the person to engage in a commercial sex act," or if someone benefits "from participation in a venture which has engaged" in such an act.⁸⁸⁶ The federal government also denies admission to the country to aliens who have engaged in prostitution, procured or attempted to procure a prostitute, or received funds from prostitutions within the past 10 years, or those who are coming to the U.S. to engage in prostitution.⁸⁸⁷

For information on sex trafficking and its intersection with the criminalization of prostitution, see Sec. VII(8) and (9).

For mandatory HIV testing of people convicted of prostitution, see Sec. IV(10).

4) Canadian Law and Sex Work

⁸⁷⁹ See Storey County C. §5.16.180, 5.16.230, 5.16.240 ["any person violating any provision of this chapter [on local prostitution regulations] shall be guilty of a misdemeanor" punishable by up to \$1000 and up to six months' imprisonment].

⁸⁸⁰ Hagner at 444-445.

⁸⁸¹ See 18 Pa. C. §5902(d) [illegal to be person other than prostitute's minor child or dependant "who is knowingly supported in whole or substantial part by the proceeds of prostitution"; (e) [offense of patronizing a prostitute]. federal government also criminalizes prostitution related to interstate commerce, transporting people across .

⁸⁸² 18 Pa. C. §5902. However, under sections (a.1) and (e.1) prostitutes and patrons are guilty of a felony if they knew they were HIV-positive at the time of the act.

⁸⁸³ Mann Act, codified at 18 U.S.C. § 2421-2424. See the introduction for information about jurisdictional limits on the federal government.

⁸⁸⁴ 18 U.S.C. §2423(c).

⁸⁸⁵ 18 U.S.C. § 2423(f). "Aggravated" sexual abuse is a sexual act by force, threat, or administering of an intoxicant; or a sexual act with a person under 12 years; or a sexual act with someone at least 12 but not yet 16 when the perpetrator is at least four years older. 18 USC §2241.

⁸⁸⁶ 18 U.S.C. § 2423(f); 18 USC §1591.

⁸⁸⁷ 8 U.S.C. § 1182(a)(2)(D)

Certain aspects of sex work are prohibited in Canada. For example, the Criminal Code makes it an offense to be the owner, landlord, lessor, tenant, occupier, keeper, or inmate of a ‘common bawdy-house’ or to be in one without reasonable excuse.⁸⁸⁸ The code also criminalizes several kinds of ‘procurement,’ including:

- Procuring or attempting to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada;
- procuring or attempting to procure a person to become a prostitute, whether in or out of Canada;
- procuring a person to enter or leave Canada, for the purpose of prostitution;
- for the purposes of gain, exercising control, direction or influence over the movements of a person to aid, abet or compel that person to engage in or carry on prostitution;
- applying, administering or causing a person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person;
- living wholly or in part on the avails of prostitution of another person.⁸⁸⁹
- stopping or attempt to stop vehicular or pedestrian traffic in a public place in order to communicate with a person for the purpose of engaging in prostitution obtaining the sexual services of a prostitute.⁸⁹⁰

The Code establishes greater punishments for living off the avails of a prostitute under the age of 18, and prohibits individuals from obtaining, via sex trade, the sexual services of individuals under the age of eighteen.⁸⁹¹

Despite the wide array of offenses listed in Canadian criminal law, the specific act of exchanging sex for compensation is not illegal. As a justice of the Canadian Supreme Court put it, “We find ourselves in an anomalous, some would say bizarre, situation where almost everything related to prostitution has been regulated by the criminal law except the transaction itself.”⁸⁹² Nevertheless, the Canadian Supreme Court has recognized that these laws essentially outlaw the exchange of money for sexual services: “Section 193 effectively prohibits the sale of sex in private settings while s. 195.1(1)(c) makes it impossible to negotiate in public for the sale of sex.”⁸⁹³

In 1990 the Canadian Supreme Court issued an opinion, on a question referred by the Manitoba government, regarding the constitutionality of provisions of Manitoba’s Criminal Code prohibiting both keeping a common bawdy house and public communications for the purpose of prostitution.⁸⁹⁴ The court held that the prohibition on keeping a bawdy house was not inconsistent with the *Charter*, and that the prohibition on public communications for the purposes of

⁸⁸⁸ Criminal Code, R.S.C. 1985, c. s 210.

⁸⁸⁹ *Id.* at s. 212.

⁸⁹⁰ *Id.* at s. 213. Canadian law also prohibits: inveigling or enticing a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution;

knowingly concealing a person in a common bawdy-house; procuring or attempting to procure a person to leave their usual place of abode of that person in Canada, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada; and directing or causing a person, on their arrival in Canada, to be directed or taken to a common bawdy-house. *Id.* at s. 212.

⁸⁹¹ *Id.* at s. 212.

⁸⁹² Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), [1990] 1 S.C.R. 1123 (concurrency by Lamer J.)

⁸⁹³ Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), [1990] 1 S.C.R. 1123

⁸⁹⁴ Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), [1990] 1 S.C.R. 1123

prostitution, while inconsistent with the *Charter's* guarantee of freedom of expression, was justifiable in a free and democratic society under section 1 and thus not a violation of the *Charter*.

But Canadian law treats “swingers’clubs” differently from brothels. In 2005, the Canadian Supreme Court acquitted two private establishments of charges of operating “bawdy houses” for indecent purposes.⁸⁹⁵ The clubs provided a place for members to meet for group sex. The Court said that this activity was not “indecent” because the prosecution had failed to show that this sexual conduct, by its nature, harmed or posed a significant risk of harm to individuals or society to a degree incompatible with the proper functioning of society (see Sec. IX(5)(B) for more on this test and more about the *Labaye* case).⁸⁹⁶

CONCLUSIONS

- Neither the U.S. nor Canada provides an ideal example of a legal response to sex work. Both nations address sex work primarily through their criminal codes. Although Canada, does not criminalize the specific act of exchanging sexual services for compensation, preferring instead to that act illegal by criminalizing all the other features of sex work, both countries take a broad approach to criminalizing sex work. In both nations, a criminal act may have taken place even without an actual transaction or sex act.
- The example of Nevada’s limited permitting of brothel-based sex work is not a health and rights promoting model, as the regulations constrain the sex workers abilities to organize, rely on police surveillance of the health status of the persons selling sex only, and empower the owners rather than workers of brothels.
- These statutes are generally gender-neutral and limited to sexual acts that involve physical contact between one person and the intimate body parts of another person. For instance, the Canadian Supreme Court refused to treat a sex club the same way as a brothel, on the grounds that a sex club did not pose the same “harm or significant risk of harm.”
- The statues criminalize not only the exchange of sexual services for money, but also patronizing a prostitute, pimping, and running a prostitution business. Indeed, some of these anti-prostitution laws impose a greater penalty for financial exploitation of prostitution than for prostitution itself.

5) Sex Workers’ Access to Health and Other Services

See Sec. VIII(3),(4),(7) and (8).

⁸⁹⁵ R v Labaye (2005) 3 SCR 728; R v Kouri (2005) 3 SCR 789

⁸⁹⁶ R v Labaye (2005) 3 SCR 728 ¶62.