



## **BRIEFING PAPER**

RIGHTS AT RISK:  
THE TRUTH ABOUT  
PRENATAL PERSONHOOD

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An anti-personhood rally in opposition to the state Senate's passage of a bill that grants the rights of personhood to fertilized human eggs. *State Capitol, Oklahoma City, Feb. 28, 2012.*

(AP Photo/Sue Ogrocki)

## RIGHTS AT RISK: THE TRUTH ABOUT PRENATAL PERSONHOOD



Lorena Garcia, Executive Director of Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR) speaks at the kick-off rally for the "No Personhood" campaign for Colorado.

Photo credit: "No Personhood Campaign."

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# INTRODUCTION

In the United States, a battle is being waged over women’s reproductive health and rights. Although federal law has expanded access to many forms of reproductive health care, including contraception, numerous new restrictions on abortion and contraception have been enacted at the state and federal levels. As this onslaught of attacks on women’s health and constitutionally-protected reproductive rights has taken center stage politically, a fringe movement pursuing prenatal personhood has attempted to push forward its own radical agenda. This extremist minority seeks to entirely ban some reproductive health care—abortion, some contraceptive methods, and some fertility treatments—and to enshrine in state and federal law their belief that life begins at the moment of conception. At its core, the so-called “personhood” movement seeks to establish that fertilized eggs, embryos, and fetuses should be treated as full persons under the law, with rights equal to, and in some cases superior to, the rights of women.

In the United States, the prenatal personhood movement has to date been a complete failure—not one of the so-called “personhood” bills proposed in recent years has passed, and three ballot measures have been roundly rejected by voters. Nonetheless, the ideologues behind these proposals have made it clear that they are not deterred by the fact that their goals are out of touch with American values and law; they are continuing to push these ideas in legislatures, on ballots, and in the courts. As the proponents of these measures have seen their efforts fail time and again, they have tried to hide the implications of passing these laws, hoping to misdirect voters, legislators, and courts about their ultimate goals. But the potential impact of these proposals can be understood by looking at the experiences of the small number of countries that have enacted prenatal personhood measures, in violation of international human rights law.

Consider this snapshot of the consequences for women of prenatal personhood measures around the world: In 2012, a pregnant 16-year-old girl in the Dominican Republic died from complications due to leukemia after doctors delayed administering chemotherapy out of concern that they might harm the fetus. In 2000, the Costa Rican government prohibited a woman from accessing in vitro fertilization (IVF) after she unsuccessfully tried to become pregnant for eight years. Government officials in El Salvador accused a 33-year-old woman of having undergone an abortion and threw her in jail after she sought emergency care at a hospital while suffering severe complications giving birth. While still in prison years later, she died from Hodgkin’s lymphoma—a disease that likely led to her severe obstetric emergency. In every one of these cases, the country in question recognized prenatal personhood. Each story illustrates what can happen when the government, medical professionals, and health

systems prioritize a fertilized egg, embryo or fetus over the lives, health, and self-determination of women.

This briefing paper provides legal and contextual information to help advocates, legislators, and others understand and respond to these harmful proposals, including: details about some of the prenatal personhood measures in the United States and context for the U.S. prenatal personhood movement; discussion of the United States and international human rights law that reject prenatal personhood; and examples from several countries where prenatal personhood has been incorporated into law with tragic results.

Prenatal personhood measures are aimed at limiting or eliminating women's access to reproductive health care and they should be rejected. Instead, there is a need for rights-based policy approaches to ensure that women have access to the full range of reproductive health care so that they can stay healthy and have healthy families. As a counterpoint to the harmful potential of recognizing prenatal personhood, this paper concludes with recommendations for policymakers and advocates genuinely concerned with advancing the well-being of women and families.



Oklahoma state Sen. Constance N. Johnson, D-Oklahoma City, speaks at a rally in opposition to the state Senate's passage of a personhood bill. In front of her are dozens of pairs of shoes to symbolize Oklahoma women being treated as if they're "barefoot and pregnant."

*Feb. 28, 2012, State Capitol, Oklahoma City.*

(AP Photo/Sue Ogrocki)



# WHAT IS PRENATAL PERSONHOOD?

## A. Types of Prenatal Personhood Measures

Prenatal personhood measures attempt to secure legal rights for fertilized eggs, embryos, and fetuses by defining life as beginning at the moment of “fertilization” or “conception.”<sup>1</sup> Some prenatal personhood measures have been proposed as state constitutional amendments that would provide that “person” means “every human being from the moment of fertilization, cloning, or the functional equivalent thereof.”<sup>2</sup> Other prenatal personhood measures have been proposed as laws that would insert a similar definition of “person” into a state’s criminal code.<sup>3</sup> Prenatal personhood efforts have been proposed in the form of ballot initiatives and legislative bills and as both statutes and state constitutional amendments.<sup>4</sup>

### HOW COULD A PRENATAL PERSONHOOD MEASURE BECOME LAW? ALTHOUGH STATE LAW VARIES, THERE ARE FOUR MAJOR WAYS THAT PRENATAL PERSONHOOD MEASURES HAVE BEEN PROPOSED:

- i. **Legislative ballot initiative:** The legislature approves a measure, which is then placed on the ballot for voter approval.
- ii. **Citizen ballot initiative:** Citizens gather a minimum number of signatures in order for the measure to be placed on the ballot for voter approval.
- iii. **Legislative bill:** The legislature passes a bill which is approved by the governor.
- iv. **Constitutional amendment:** This usually requires the legislature to pass the proposed amendment by more than a simple majority (for example, two-thirds) and then submit the amendment to the state’s voters for their approval.

# THE EXTREMIST—AND UNSUCCESSFUL— AGENDA BEHIND PRENATAL PERSONHOOD

Those who promote prenatal personhood seek to establish that a zygote, embryo or fetus has equal or superior rights to a pregnant woman, threatening women's autonomy, dignity, right to life, and right to health. If the law vested an embryo or fetus with the status of a person as soon as a woman became pregnant, women's ability to make decisions about their reproductive health and fertility and to obtain critical health care, even when their lives or health were jeopardized, would be drastically limited. Prenatal personhood measures would—and are intended to—completely and absolutely ban abortion, with no exceptions. Many of these measures would also effectively ban common forms of contraception and restrict or even ban assisted reproductive technologies such as IVF.<sup>5</sup>

Moreover, the legal impact of prenatal personhood measures extends far beyond banning abortion and other forms of reproductive health care. Because extending legal rights to fetuses could criminalize any conduct that might harm a fetus, a prenatal personhood law could chill doctors from providing the best medical care to pregnant women. For example, in some cases an embryo implants in a fallopian tube, instead of in the uterus, and will not be able to continue to develop; all such pregnancies (one type of “ectopic pregnancy”) are health-threatening – and possibly life-threatening – for the pregnant woman, as there is a serious risk of fallopian tube rupture. Therefore, these pregnancies must be treated quickly.<sup>6</sup> However, a prenatal personhood law might put a physician at risk of criminal liability for treating the pregnant woman, despite the risks to her health and life. Physicians would similarly be at risk for helping a woman experiencing a miscarriage because they could be criminally prosecuted for harming the embryo or fetus.<sup>7</sup>

Further, a prenatal personhood measure might subject a woman who suffers a pregnancy-related complication or a miscarriage to criminal investigations and possibly jail time for homicide, manslaughter or reckless endangerment. And because so many laws use the terms “persons” or “people,” a prenatal personhood measure could affect large numbers of a state's laws, changing the application of thousands of laws and resulting in unforeseeable, unintended, and absurd consequences.<sup>8</sup>

Prenatal personhood measures are supported by the most extreme fringe of the anti-choice movement. These groups are vocal about their desire to ban abortion by overturning *Roe v. Wade*, the United States Supreme Court case holding that the right to privacy protected under the United States Constitution includes the

right of every woman to decide whether to terminate a pregnancy prior to viability and to do so after viability where necessary to protect her life or health.<sup>9</sup> Indeed, these groups promote an agenda so radical that many other national anti-choice groups do not support prenatal personhood initiatives.<sup>10</sup>

Although prenatal personhood measures have garnered much attention from media, not a single prenatal personhood measure that would ban abortion (or other reproductive health care) has been approved by a state legislature or a state electorate. In 2011, Mississippi voters rejected a prenatal personhood ballot initiative by a wide margin.<sup>11</sup> In Colorado, voters have rejected so-called “personhood” amendments twice—in 2010 and 2008—by overwhelming majorities.<sup>12</sup> And, in 2012, the Oklahoma Supreme Court refused to allow a prenatal personhood initiative to appear on the ballot in part because the measure would be “clearly unconstitutional” under settled U.S. precedent.<sup>13</sup> There have been some efforts in the U.S. Congress to enact a federal personhood measure, but those also have been unsuccessful.



# THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS LAW DO NOT RECOGNIZE PRENATAL PERSONHOOD

## A. The United States Constitution Does Not Recognize Prenatal Personhood

A prenatal personhood measure enacted in the United States would directly conflict with the United States Constitution, which protects individual liberty and privacy including a “cluster of constitutionally protected choices” at the “very heart” of which is the extraordinarily private decision of whether and when to beget or bear a child.<sup>14</sup> In addressing the scope of individual rights related to this important decision, the question of when life begins was placed squarely before the United States Supreme Court. In 1973, the Supreme Court held in *Roe v. Wade* that a fetus is not and has never been considered a person for purposes of the United States Constitution.<sup>15</sup> As the Court noted, “the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.... In short, the unborn have never been recognized in the law as persons in the whole sense.”<sup>16</sup> The Supreme Court specifically rejected the state’s argument that under the law “life begins at conception,” holding:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.<sup>17</sup>

The Court refused to adopt “one theory of life,”<sup>18</sup> acknowledging the “wide divergence of thinking on this most sensitive and difficult question.”<sup>19</sup> Moreover, the Court relied on the plain language of the Constitution, noting that the Fourteenth Amendment grants rights to persons “born or naturalized in the United States,”<sup>20</sup> and that where the word “person” appears, it is used “such that it has application only postnatally.”<sup>21</sup> Therefore, the Court ruled that a fetus does not have a right to life under the Fourteenth Amendment.<sup>22</sup> The *Roe* Court instead held that states have a valid interest in protecting the “potentiality of human life,” and may do so by proscribing abortion after the point of viability, except when necessary to protect the life or health of the pregnant woman.<sup>23</sup>

The Supreme Court has since reaffirmed its central holding in *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>24</sup> the Court imposed a new standard by which to assess the constitutionality of abortion restrictions: the government may not constitutionally impose an “undue burden” on the woman’s

choice to have an abortion before fetal viability.<sup>25</sup> But the Supreme Court again rejected imposing judicially a view of when life begins. The decision in *Casey* states:

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>26</sup>

Thus, the United States Constitution protects the right to life beginning at and not before birth, and the Constitution protects “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.”<sup>27</sup> By banning abortion and common contraceptive methods, restricting physicians’ ability to provide fertility treatments and treat ectopic and other high-risk pregnancies and miscarriages, a prenatal personhood measure would endanger women’s health and violate the constitutional rights of women to make their own decisions and “to participate equally in the economic and social life of the Nation.”<sup>28</sup>

## **B. Prenatal Personhood Is Not Recognized under International Human Rights Law**

International human rights law—as set forth in treaties and other international instruments the United States is bound by and interpretations by human rights experts and bodies—recognizes that human rights attach at birth. Article 1 of the Universal Declaration of Human Rights, the foundational human rights instrument that the U.S. helped to draft, declares that “[a]ll human beings are *born* free and equal in dignity and rights.”<sup>29</sup> The drafters of the Universal Declaration rejected a proposal to delete the word “born” and instead intentionally chose to exclude a prenatal application of human rights.<sup>30</sup> Thus, human rights as articulated in the Universal Declaration, are meant to apply at the moment of birth, and not before.

Following the adoption of the Universal Declaration in 1948, modern human rights treaties incorporated provisions protecting the right to life. The text of these treaties does not specify when life begins, but the histories of treaty negotiations and the work of treaty monitoring bodies charged with interpreting treaty texts make it clear that such provisions are not intended to protect a *prenatal* right to life. Instead, international human rights standards consistently emphasize the importance of protecting women’s right to life through the removal of barriers that interfere with their reproductive rights, such as laws restricting access to abortion and contraception. Governments also have an affirmative duty to ensure that women have access to preventive reproductive health services, such as prenatal care and cancer screenings.

### **i. International Human Rights Treaties**

The International Covenant on Civil and Political Rights (ICCPR),<sup>31</sup> one of the three major human rights treaties ratified by the United States, specifies in Article 6 that “[e]very human being has the inherent right to life.” The U.S. ratified the ICCPR in 1992 with a two-thirds vote of the Senate, making the treaty provisions

“the law of the land” under the Supremacy Clause of the U.S. Constitution.<sup>32</sup> The U.S. government is therefore bound to respect and implement the ICCPR just as it does other federal laws, and the authoritative interpretations made by the Human Rights Committee, the treaty’s monitoring body, that assist in its implementation.

The ICCPR rejects the proposition that the right to life, protected in Article 6(1), extends to prenatal life. The drafters of the ICCPR specifically rejected a proposal to amend this article to provide that “the right to life is inherent in the human person from the moment of conception, [and] this right shall be protected by law.”<sup>33</sup> And in its authoritative comments on the interpretation of this article, the Human Rights Committee has never interpreted the right to life to pertain to the fetus.<sup>34</sup> In contrast, the Committee has repeatedly stated that women’s right to life under Article 6 may be jeopardized by laws criminalizing abortion<sup>35</sup> and called on states to liberalize their abortion laws.<sup>36</sup> The Committee has emphasized that a government’s obligation to ensure gender equality includes taking positive steps to ensure that women do not resort to clandestine abortions at risk to their life.<sup>37</sup>

The Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) both embrace the Universal Declaration’s articulation of human rights as beginning at birth. The U.S. was instrumental in drafting these treaties<sup>38</sup> and has signed both, signaling its agreement with the terms and its intent to be bound by them,<sup>39</sup> though the Senate has not ratified either. Language in the Preamble of the CRC mentions the government’s obligation to safeguard the child “before as well as after birth,” but this provision has been narrowly interpreted to pertain to government duties to promote the health and nutrition of the pregnant woman. This interpretation is based on the drafters’ explicit recognition at the time of adoption that the language did not alter the definition of “child” under the Convention (defined as “every human being below the age of 18 years”), and that the purpose of the provision “was not to preclude the possibility of an abortion.”<sup>40</sup> The United Nations committee that monitors compliance with the treaty has consistently recognized the right of adolescent girls to access sexual and reproductive health services, including abortion, and has called on states to eliminate the criminalization of abortion, which leads to high maternal mortality rates.<sup>41</sup> Similarly, although CEDAW does not have a right to life provision, the treaty’s Preamble reaffirms the Universal Declaration’s language that human rights accrue at birth. The United Nations committee that monitors CEDAW has repeatedly found that criminal laws and other barriers to abortion jeopardize woman’s rights to equality, health, and life.<sup>42</sup>

## ii. Regional Human Rights Instruments

As a condition of its membership in the Organization of American States,<sup>43</sup> the U.S. has signed the American Declaration on the Rights and Duties of Man and recognizes the rights contained in that document. Mirroring the language of the Universal Declaration, the American Declaration acknowledges birth as the moment rights attach (for example, stating that “[a]ll men are *born* free and equal, in dignity and in rights”<sup>44</sup>). Article 1 of the American Declaration provides

that “[e]very human being has the right to life, liberty, and the security of his person.” Drafters of the American Declaration specifically rejected a proposal to adopt the following language: “Every person has the right to life. This right extends to the right to life from the moment of conception.”<sup>45</sup> The drafters reasoned that such a provision would have conflicted with existing abortion laws in the majority of the member states.

The American Convention on Human Rights, a human rights treaty the U.S. has signed but not ratified, protects the right to life “in general, from the moment of conception.”<sup>46</sup> The drafting history of the Convention makes it clear that the provision was *not* meant to alter the definition of “right to life” to pertain to the fetus.<sup>47</sup> When anti-abortion advocates in the U.S. brought a complaint to the Inter-American Commission on Human Rights, alleging that the American Convention’s right to life provision precluded abortion, the Commission dismissed their arguments and explicitly rejected the argument that the American Convention was intended to confer an absolute right to life before birth and thereby preclude legal abortion.<sup>48</sup>

### C. Consequences of Extending Legal Protection to the Fetus

Despite consensus in international human rights law that the right to life begins at birth and that women must be able to access reproductive health care—including abortion—to protect their own right to life, some countries have enshrined a prenatal right to life in their own law. In countries where the law defines personhood to begin at the moment of conception or fertilization rather than birth, women may face numerous violations of their fundamental rights, including their rights to life, health, equality, non-discrimination, privacy, family life, and freedom from violence and cruel or inhuman treatment. In many cases, altering the legal framework to grant legal personhood to fetuses has led to unintended, and often tragic, consequences. This section provides examples of the impact of prenatal personhood laws on women’s lives, from the denial of emergency medical treatment to the prosecution of women for murder when they have attempted abortion, miscarried, or delivered stillborn fetuses.

#### i. Denial of Life-saving Medical Care

The recognition of prenatal personhood in the Dominican Republic has complicated interpretations of the nation’s abortion laws and led health care professionals to deny care out of fear of prosecution for causing harm to the fetus. In 2010 the Dominican Republic adopted a new constitution recognizing personhood from the moment of conception,<sup>49</sup> and the courts have interpreted this provision as a strict ban on abortion. The law led to tragic consequences in the case of “Esperanza,”<sup>50</sup> a 16-year-old pregnant girl who died in August 2012 from complications due to acute leukemia.<sup>51</sup> Esperanza needed chemotherapy, but her doctors refused to provide that treatment because they feared it would cause the death of the fetus, and they would be at risk of prosecution for causing an abortion. Her health deteriorated, requiring hospitalization. The hospital doctors withheld treatment for 20 days until the government finally intervened and required that chemotherapy be provided. By then it was too late: the cancer had ravaged Esperanza’s body, and she failed to respond to the chemotherapy.



Shortly thereafter she miscarried, went into cardiac arrest, and died.

Poland's Family Planning Act provides that every human being has a right to life "from the time of conception," without clarifying that the woman's life and health should take priority over the fetus.<sup>52</sup> The vague language of the Family Planning Act, combined with Poland's highly restrictive abortion law, the strong influence of the Catholic Church hierarchy on Polish social norms and policy, the widespread acceptance for conscientious objection of providers, the lack of safeguards to guarantee access to care, and a criminal code that imposes a sentence of up to three years on physicians who perform illegal abortions, make it very difficult for a woman to obtain an abortion in practice even if she satisfies the strict legal criteria. Several international human rights bodies have found that the Polish government's failure to ensure women's access to abortion even when the law permits it violates women's fundamental rights.<sup>53</sup>

All of these factors led to tragedy in 2004, when a Polish woman in her second month of pregnancy, was diagnosed with ulcerative colitis. When she sought medical treatment for this serious and painful colon disease, she found that doctors were more concerned with the fetus than with her medical needs. Doctors in her hometown and nearby cities denied diagnostic and necessary medical care for this treatable condition, even though it was unlikely that the fetus would be harmed by the treatment. As her condition worsened and her pain intensified, she was transferred from hospital to hospital, each time with doctors denying her the aggressive treatment she needed and refusing to refer her to a physician who would provide it. In early September 2004, she was hospitalized with sepsis (blood poisoning) and symptoms of organ dysfunction. Doctors determined the fetus was dead. After many surgeries, she died in a few weeks later of kidney failure caused by a condition that could have been controlled with proper and timely treatment. In 2008, her mother brought this case to the European Court of Human Rights, asserting that by prioritizing the well-being of the fetus over that of her daughter, the government violated her daughter's rights to life, to freedom from inhuman and degrading treatment, and to non-discrimination.<sup>54</sup> The European Court has not yet issued a decision in this case.

## ii. Denial of Reproductive Health Services

### 1. Fertility Treatment

In 2000, the Constitutional Chamber of the Supreme Court of Costa Rica outlawed IVF based on its assessment that human life begins at conception—which the Court defined as the moment of fertilization—and from that point on is entitled to the protection of the law.<sup>55</sup> The Court found that IVF places human life at too great a risk because some of the embryos will not be used. The decision deprived many Costa Rican couples of the chance to start families with the help of IVF. Ana Cristina Castillo and her husband are one of those couples. They tried for eight years to get pregnant, hampered by her endometriosis damage and her husband's low sperm count. After three years of unsuccessfully

trying hormones, surgery, and insemination, the couple started IVF. Before they were able to conceive, the practice was outlawed. In 2010, the Inter-American Commission on Human Rights held that the Court's decision violated the rights of nine couples—including the Castillos—to be free from arbitrary interference with one's private life, to found a family, and to equality.<sup>56</sup> The Commission urged the government to adopt proportionate measures allowing IVF in a manner that balances fundamental rights with the state's interest in protecting life. Following the Commission's decision—which tracks international human rights law on access to fertility treatment<sup>57</sup>—the case was transmitted to the Inter-American Court of Human Rights, where it is currently under review.

## 2. Genetic Testing

Poland's recognition of prenatal personhood and its highly restrictive legal framework, in addition to the other factors described above, have resulted in the denial of reproductive health services in addition to abortion. A Polish woman named R.R. was 18 weeks pregnant when an ultrasound detected an irregularity in her fetus. She quickly sought genetic testing to determine whether this indicated a severe fetal malformation. However, instead of receiving a referral for appropriate tests, she was told to visit a doctor 300 kilometers away. That doctor performed an ultrasound and confirmed the irregularity but refused to provide genetic tests or a referral for them. This began an eight-week period during which R.R. was consistently refused the testing and referrals she was legally entitled to. R.R. visited 16 doctors, had five sonograms, and was hospitalized twice for non-conclusive diagnostic testing. Still doctors and hospital personnel refused R.R. the tests that would have provided her with the information relevant to her decision whether to seek an abortion or carry the pregnancy to term and parent a child with a disability. R.R. filed a case before the European Court of Human Rights, alleging that the government had violated her legal right to receive prenatal genetic testing. In 2011, the Court ruled that Poland violated R.R.'s rights to private life, non-discrimination, access to justice, and freedom from cruel, inhuman, and degrading treatment.<sup>58</sup>

## 3. Emergency Contraception

The Constitution of Honduras provides that the “unborn” will be treated as born persons in the context of individual constitutional rights, including the right to life.<sup>59</sup> On the basis of that provision and the scientifically-inaccurate belief that emergency contraception (EC) could potentially cause an abortion, a 2009 Honduran Ministerial decree prohibits the promotion, use, sale, purchase, and free distribution of EC and the dissemination of information about EC.<sup>60</sup> The prohibition applies to all individuals, including victims of sexual violence, thus denying women access to an effective means of preventing unwanted pregnancies and the related risks that unwanted pregnancies can present. This extreme ban was upheld by the Supreme Court of Honduras in February 2012. Although the ban is in effect, Congress must ratify the decree before the criminal sanctions take effect, and as of Fall 2012, public pressure successfully delayed this process. If the decree is eventually adopted by Congress, violations

will carry the same sanctions that are imposed for criminalized abortions under the Honduran Penal Code: three to ten year prison sentences for anyone who performs an abortion and three to six year prison sentences for women who undergo abortions.<sup>61</sup>

#### 4. Safe Abortion

The 1987 Philippine Constitution requires the government to “equally protect the life of the mother and the life of the unborn from conception.”<sup>62</sup> However, the penal code makes abortion a punishable offense in all cases with no clear exceptions.<sup>63</sup> The Constitution left ambiguous the issue of whether the obligation to “equally protect” permits abortion where necessary to save a woman’s life or health, and also failed to clarify the legal liability of medical professionals who perform abortions. The result is that access to medically- necessary abortion is not guaranteed, even when the life of a pregnant woman is at stake. For Haydee, a woman who faced a life-threatening pregnancy, the vague legal framework on the criminalization of abortion prevented her from obtaining a safe abortion, at great risk to her health and well-being. Haydee developed a grave medical condition during her first pregnancy.<sup>64</sup> During her second pregnancy, she suffered a hypertension-induced stroke and her health deteriorated quickly. A doctor recognized the imminent threat that this second pregnancy posed to her life and performed a safe abortion. Although she sought to prevent subsequent pregnancies, Haydee was unable to access affordable contraceptives that were safe and appropriate for her, given her high blood pressure. She experienced two more unplanned pregnancies and, after a doctor refused to perform another abortion, she resorted to taking medication to induce an abortion at home. Her last attempt to self-induce an abortion resulted in weeks of heavy bleeding and serious complications. When she sought emergency care at a hospital, a doctor told her “[Abortion] is a sin. You killed your own child.”<sup>65</sup> The medical staff proceeded to verbally abuse her, even after Haydee explained that she had taken the drugs for fear of dying from pregnancy complications. They threatened to report her and her husband to national authorities. Ultimately, she was not investigated, but she felt humiliated and frightened by the hospital workers who tried to “teach her a lesson.”<sup>66</sup>

Since 2007, when the Supreme Court of Mexico upheld a Mexico City law that decriminalized abortion up to 12 weeks of gestation, at least 16 Mexican states have amended their constitutions to protect the right to life from either fertilization or conception.<sup>67</sup> The Information Group on Reproductive Choice, a Mexican organization, reports that the constitutional amendments have generated confusion among women and reproductive health care providers in those states where the law has been changed.<sup>68</sup> Some providers are refusing to offer abortion services for fear of prosecution while others are referring women to the police when they come to clinics seeking abortions. Dozens of women across Mexico—usually poor and young—have been investigated for the crime of abortion to date. When women are refused a legal abortion, they often turn to illegal and unsafe abortion, which is a major source of maternal morbidity and mortality in Mexico.<sup>69</sup>

### iii. Criminal Prosecutions of Women

In 1999, El Salvador amended its constitution to define life as beginning at the moment of conception.<sup>70</sup> This action closely followed a national law passed in 1997 to criminalize abortion completely, eliminating all exceptions.<sup>71</sup> As a result, countless women are driven to clandestine and dangerous abortions, and many are thrown in jail for breaking the law—including those suffering from stillbirths, miscarriages, and complications in pregnancies they intended to carry to term. Manuela was a 33-year-old Salvadorian woman who suffered severe complications while giving birth. From the moment Manuela arrived at the hospital seeking emergency health care, slipping in and out of consciousness and hemorrhaging, doctors treated her as if she had attempted an abortion and immediately called the police. She was shackled to her hospital bed and accused of murder. Manuela was subsequently sentenced to more than 30 years in prison. After serving several months of her term, doctors discovered that the visible tumors Manuela had on her neck were from advanced Hodgkin's lymphoma, a disease that likely led to her severe obstetric emergency and could have been diagnosed at the time she was hospitalized had the doctors focused on Manuela's health needs. Manuela did not receive treatment for her disease and died in prison in 2010, leaving behind two young children. In March 2012, the Center for Reproductive Rights filed a petition to the Inter-American Commission on Human Rights on behalf of Manuela and her family, alleging that El Salvador's abortion ban violated her human rights, including her rights to life, personal integrity and liberty, humane treatment, and a fair trial.

These stories reveal the far-reaching consequences of enacting laws that confer legal personhood prior to birth. In these countries, recognition of prenatal personhood has paved the way for a range of laws and practices that violate women's fundamental human rights, from restrictions on access to contraception, abortion and reproductive technologies to the denial of life-saving medical treatment for conditions unrelated to pregnancy. These stories also demonstrate that—regardless of whether lawmakers envisioned such far-reaching consequences—health care providers' fear of prosecution deters them from giving women the appropriate standards of care. It is clear that when governments fail to prioritize a woman's life and health over any state interest in protecting prenatal life they open a Pandora's Box of human rights violations and legal liability.



Women in overcrowded conditions at El Salvador's Ilopango prison, where Manuela died.  
**Photo: Meridith Kohut**

# WHAT CAN LAWMAKERS DO TO GENUINELY PROTECT, NOT HARM, WOMEN AND FAMILIES?

The proponents of prenatal personhood measures are driving an anti-woman and anti-family agenda premised on their narrow view of when human life begins. Under the guise of “protecting life,” prenatal personhood measures would actually endanger women’s health and lives in the ways discussed above. Rather than support these dangerous and extreme prenatal personhood laws, legislators and advocates should promote the health policy measures mentioned below, which will advance women’s well-being and support healthy children and families.

## A. Promote Healthy Pregnancies and Address Health Inequalities

The United States has one of the highest ratios of maternal mortality among Western developed nations, and while most countries dramatically reduced their maternal mortality ratios between 1990 and 2010 for an average global decrease of 34%, the ratio in the U.S. grew 65%.<sup>72</sup> The high incidence of maternal death in the U.S. can be explained by persistent racial disparities in health outcomes and access.<sup>73</sup> For the past 50 years, African-American women have been dying from pregnancy-related causes at a rate four times that of non-Hispanic white women.<sup>74</sup> Unlike maternal mortality in developing countries, where unsafe abortion and lack of access to emergency obstetric services are leading causes of maternal death, complications leading to maternal death in the U.S. can largely be attributed to the health system’s failure to provide high quality, affordable, and accessible health care to women throughout their lives, including pregnancy.<sup>75</sup> At least half of maternal deaths in the U.S. are preventable.<sup>76</sup>

Research indicates that socio-economic factors impact access to health care, and limited access leads to higher maternal mortality rates.<sup>77</sup> Lack of affordable health care prevents many women from receiving quality care before and after they become pregnant. In 2009, 22% of women of reproductive age in the U.S. were uninsured.<sup>78</sup> African-American women are uninsured at twice the rate of white women, leading to delayed access to preventive and primary treatment and a cumulative toll of health problems over the life span.<sup>79</sup> Lack of access to health insurance also increases the risk of unintended pregnancy,<sup>80</sup> and women with unplanned pregnancies are more likely than women with planned pregnancies to face complications and experience worse outcomes for their own health and that of the infant.<sup>81</sup>

A 2009 Congressional study found that even when women do have insurance coverage, maternity coverage in individual plans is either uncommon or highly limited.<sup>82</sup> Early and regular access to prenatal care has been shown to dramatically improve health outcomes for women and children, but a significant number of U.S. women do not receive any or adequate prenatal care.<sup>83</sup> Women

who do not receive prenatal care are three to four times more likely to die from pregnancy complications than those who do, and women with high-risk pregnancies who go without such care are over five times more likely to die.<sup>84</sup> Women of color are at least twice as likely to have late or no prenatal care as white women.<sup>85</sup>

To reverse these poor indicators, states can adopt a human rights approach to combating maternal mortality.<sup>86</sup> Human rights policies and programs focus on two core government duties. The first is commonly referred to as a “negative” obligation to remove legal and regulatory barriers to sexual and reproductive health information, goods, and services, such as policies that restrict contraception access. The second duty requires governments to take “positive” measures to ensure that all women in the United States have healthy pregnancy outcomes, such as promoting universal insurance coverage and early prenatal care. Positive measures focus on the social determinants of health that are responsible for health inequalities, such as the social and environmental conditions in which people are born, live, and work, including their interactions with the health system.

The federal Affordable Care Act (ACA) aims to address inequalities in health care by ensuring that all individuals, regardless of gender or race, have access to the ten categories of Essential Health Benefits covered by their insurance plans.<sup>87</sup> These include not only maternity and newborn care but a full range of preventive services available without cost sharing, from “well woman” visits that keep women healthy prior to pregnancy to contraceptive coverage that allows women to plan their pregnancies. States have some flexibility to adjust benefits within these ten categories to reflect the scope of services offered under a typical employer plan in that state.<sup>88</sup> Plans can then modify coverage within each benefit category as long as they do not reduce the value of coverage. States seeking to promote healthy pregnancies can adopt a benchmark plan that includes comprehensive maternal and preventive services based on federal Department of Health and Human Services guidelines for implementation of the ACA.<sup>89</sup>

In addition to supporting full implementation of the ACA, states can take steps to address inequality such as: (1) funding further research into the causes of maternal mortality in vulnerable groups, especially women of color, and best practices for programmatic interventions; (2) making improvements to the quality of health care delivery to ensure all women, regardless of race or socio-economic status, receive high-quality, evidence-based, and affordable maternal health care, including preconception, intrapartum and postpartum care; (3) standardizing data collection on maternal deaths; and (4) establishing monitoring and accountability mechanisms, such as state maternal mortality review processes, to identify systemic problems and develop recommendations to address them.

## **B. Expand Access to Family Planning and Affordable Contraception**

Access to a full range of available contraceptive methods is essential to women’s health and well-being, and to the well-being of their families. In fact, the United States Centers for Disease Control and Prevention (CDC) considers family



Dr. Wayne Slocum, head of the Mississippi section of the American College of Obstetricians and Gynecologists, explains why he opposes a “personhood” initiative that seeks to amend the state constitution and declare that life begins when a human egg is fertilized. *Oct. 12, 2011, Tupelo, Mississippi.*

**(AP Photo/Alex Gilbert)**



planning, including modern contraception, to be one of the ten greatest public health achievements of the 20<sup>th</sup> century, noting that “smaller families and longer birth intervals have contributed to the better health of infants, children, and women, and have improved the social and economic role of women.”<sup>90</sup> Nonetheless, unintended pregnancy continues to present a serious public health concern in the United States, accounting for 49% of all pregnancies (excluding miscarriages) and 44% of pregnancies resulting in a live birth.<sup>91</sup> Unintended pregnancy can lead to adverse health outcomes for women and, if the pregnancy is carried to term, for the child.<sup>92</sup>

Therefore, ensuring that women have the tools they need to plan the number and spacing of their children is vital to their health and the health of their families.<sup>93</sup> Indeed, the CDC has stated that “[a]ccess to high quality contraceptive services will continue to be an important factor in promoting healthy pregnancies and preventing unintended pregnancy in this country.”<sup>94</sup> Policies that expand access to contraception can improve the health of women and their children by ensuring that pregnancies are spaced in a healthy way. Notably, the ACA has already expanded access to contraception by ensuring that it is part of the preventative health care that must be covered by insurance for almost all women.<sup>95</sup> Contraceptive access can be further expanded by laws and policies that (a) remove financial barriers, public education limits, and other impediments that make contraception difficult to obtain; (b) require emergency rooms to inform sexual assault survivors about emergency contraception; (c) mandate insurance coverage for prescription contraception (contraceptive equity laws); and (d) increase access to contraception and family planning services in publicly-funded health programs.

# CONCLUSION

Although voters, legislators, and courts around the country have rejected dangerous and unconstitutional prenatal personhood measures, fringe groups continue to insist that their beliefs about when life begins should become enshrined in law and imposed on everyone. While the idea of prenatal personhood may seem abstract, there is nothing abstract about the real harm these measures would have on women. Women's experiences in countries where prenatal personhood is recognized by law demonstrate all too clearly the real agenda behind the personhood movement and the chilling consequences of enacting these measures into law. Instead of entertaining these extreme, harmful, and unpopular proposals, legislators and advocates should turn their attention to creating and implementing policies that will help improve the health and well-being of women and families.

## Endnotes

- <sup>1</sup> “Fertilization” occurs when a sperm penetrates an egg cell. See, e.g., Merriam-Webster Medical Dictionary (accessed via Medline Plus website, a service of the U.S. National Library of Medicine), <http://www.merriam-webster.com/medlineplus/fertilization> (last visited Oct. 3, 2012). “Conception” is not a precise medical term: it is used to refer to fertilization or implantation of the fertilized egg in the uterine lining or both. See *id.* <http://www.merriam-webster.com/medlineplus/conception> (last visited Oct. 3, 2012).
- <sup>2</sup> See, e.g., Proposed Initiative Measure No. 26 (Miss. 2011).
- <sup>3</sup> See, e.g., H.B. 1450, 62nd Leg. Assemb., Reg. Sess. (N.D. 2011).
- <sup>4</sup> One state, Missouri, has enacted a personhood “policy statement,” declaring that the state considers “unborn children” to have the same rights as all other persons in the state. MO. REV. STAT. § 1.205.2 (1986). That statement was part of the preamble of a law imposing various restrictions on abortion and both the law and preamble were challenged as unconstitutional. *Id.*; Webster v. Reprod. Health Servs., 492 U.S. 490 (1989). The Supreme Court held that because the preamble language was ambiguous and could be read to express “simply . . . [a] value judgment,” judicial review was premature unless and until the language was interpreted or applied by the state. Webster, 492 U.S. at 506-07.
- <sup>5</sup> The mechanisms of action for hormonal contraception include preventing ovulation, preventing fertilization, or preventing implantation. See CUNNINGHAM ET AL., WILLIAMS’ OBSTETRICS 1521 (21<sup>st</sup> ed. 2001). Physicians considering prescribing some forms of the birth control pill, the birth control shot, IUDs or emergency contraception could not be sure that the method they were providing to their patient would not interfere with implantation of a fertilized egg. Therefore, they could be chilled from providing these types of contraception at all. Further, personhood measures could either ban or severely restrict fertility treatments including IVF. The very nature of IVF and some other infertility treatments requires doctors to handle many fertilized eggs, some of which will not be implanted into a woman’s uterus and some of which by necessity are discarded—but under a personhood measure that defined life as beginning at fertilization, each fertilized egg would be a “person,” so any loss of a fertilized egg would pose the risk of criminal liability, possibly even a murder charge. See Press Release, Am. Soc’y for Reprod. Med., Personhood Vote Looms in Miss. (Oct. 31, 2011), available at <http://www.asrm.org/news/article.aspx?id=7380>. Even if IVF were not entirely banned by such a measure, the risk of possible prosecution would likely cause physicians to fear providing that care to their patients.
- <sup>6</sup> AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, PRACTICE BULLETIN, MED. MGMT. OF ECTOPIC PREGNANCY (June 2008).
- <sup>7</sup> See, e.g., Lori R. Freedman et al., *When There’s a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1734, 1774-78 (2008).
- <sup>8</sup> For example, a personhood measure could lead to absurd results in many other contexts in which “person” is used in a state’s statutes and regulations—from who is a “person” for purposes of tax liability to how many “persons” are allowed in a room under a municipality’s building code.
- <sup>9</sup> Roe v. Wade, 410 U.S. 113, 164-65 (1973). See, e.g., Robert Muise, *Rethinking Pro-Life Strategy: The Human Life Amendment*, PERSONHOOD, [http://www.personhood.net/index.php?option=com\\_content&view=article&id=227&Itemid=595](http://www.personhood.net/index.php?option=com_content&view=article&id=227&Itemid=595) (last visited Oct. 3, 2012) (“[I]t cannot be gainsaid that the essential holding of *Roe v. Wade* remains the primary obstacle to any meaningful pro-life initiative that seeks to end abortion. To remove this obstacle, a case must be presented to the United States Supreme Court that challenges the central premise of *Roe*—that the unborn is not a person within the meaning of the law”).
- <sup>10</sup> See, e.g., Katharine Q. Seelye, *Mississippi Voters Reject Anti-Abortion Measure*, N.Y. TIMES, Nov. 8, 2011, available at <http://www.nytimes.com/2011/11/09/us/politics/votes-across-the-nation-could-serve-as-a-political-barometer.html> (anti-choice group National Right to Life and the Roman Catholic Bishops opposed Mississippi personhood ballot initiative on “strategic grounds”); NEVADA LIFE, *Joint Statement on the Nevada Personhood Petition* (Nov. 14, 2009), available at <http://www.nevadalife.org/News/personhoodstatement.html> (Nevada anti-choice group opposed 2009 personhood initiative because it would give “pro-abortion courts” more power to decide matters related to abortion and interfere with legislative efforts to stop abortion).
- <sup>11</sup> Proposed Amendment No. 26 (Miss. 2011) (proposing to amend the Mississippi Constitution to define a “person” in the Bill of Rights to include “every human being from the moment of fertilization.”).
- <sup>12</sup> Proposed Amendment No. 48 (Colo. 2008) (proposing to amend the Colorado Constitution by applying the term “person,” as used in the constitution’s provisions relating to inalienable rights, equality of justice and due process of law, to “any human being from the moment of fertilization”); Proposed Amendment No. 62 (Colo. 2010) (proposing to amend the Colorado Constitution by applying the term “person” as used in the same constitutional provisions as Amendment 48 to “every human being from the beginning of the biological development of that human being.”).
- <sup>13</sup> In Re Initiative Petition No. 395, 2012 OK 42, 2012 WL 1494675 (Apr. 30, 2012) (ruling on challenge to ballot initiative proposing to define “person” as “any human being from the beginning of biological development to natural death” for purposes of constitutional protection). Other courts have refused to allow a personhood measure to appear on the state’s ballot for technical reasons. For example, Nevada law requires proposed ballot initiatives to describe the effect the measure will have if it is approved by voters. NEV. REV. STAT. § 259.009. A court in Nevada ruled that a proposed personhood ballot initiative inadequately described the effect of the measure because it failed to include the measure’s impact on birth control, treatment of ectopic pregnancies, in vitro fertilization, and stem cell research. *Chen v. Nevada Prolife Coalition PAC*, Case No. 11-OC-00328-1B, slip. op. at 9 (Nev. 1st Jud. Dist. Ct. Dec. 19, 2011), available at <http://www.aclu.org/reproductive-freedom/chen-v-nevada-prolife-coalition-judgment>. The court ordered the initiative proponents to include in its statement of effect that it “will impact some rights Nevada women currently have,” including access to birth control and certain fertility treatments. *Id.* at 10.
- <sup>14</sup> *Carey v. Pop. Servs. Int’l*, 431 U.S. 678, 685 (1977); *accord Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ).
- <sup>15</sup> *Roe v. Wade*, 410 U.S. 113, 156-62 (1973) (recognizing that a fetus is not a person for the purposes of the United States Constitution). Notably, while the Supreme Court did not directly address the issue of prenatal personhood or the question of when life begins in its earlier case law on contraception, the holdings of *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), in which the Court struck down a ban on contraceptives because it violated married couples’ “right of privacy,” and *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972), holding the same for unmarried persons, describe a right to privacy found in the United States Constitution that is at odds with a notion of personhood beginning at the moment of fertilization.
- <sup>16</sup> *Roe*, 410 U.S. at 161. In its discussion of historical law, the Court noted that there have been a few, specific, and narrow contexts in which parents or the state have exercised some rights with regard to a fetus, including in the areas of abortion, homicide, tort recovery, and inheritance. *Id.* at 161-62. It should be noted that in recent years, many state and federal laws related to violence against pregnant women have been amended

- to allow criminal and civil prosecution of perpetrators of violence against a fetus, in some cases separately from the prosecution or tort suit related to the violence against the pregnant woman. See Mary Beth Hickcox-Howard, *The Case for Pro-Choice Participation in Drafting Fetal Homicide Laws*, 17 *TEX. J. WOMEN & L.* 317, 324-326 (2008). In some cases, such laws have been used as a justification for prosecuting women for their behavior during pregnancy, although criminal convictions in those cases have generally been overturned. Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse is Not the Answer—A Comparative Legal Analyses*, 15 *MICH. J. GENDER & L.* 389, 398-399 (2009); see also, e.g., *State v. Luster*, 419 S.E.2d 32, 34-35 (Ga. Ct. App. 1992) (finding that “the word ‘person’ in a criminal statute may not be construed to include a fetus unless the legislature has expressly included it,” and therefore the defendant could not be guilty of delivery of a controlled substance for ingesting cocaine while pregnant); *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992) (holding that cocaine passing through umbilical cord was not punishable under statute prohibiting delivery of controlled substances to minors); *Reyes v. Superior Court*, 141 Cal. Rptr. 912, 915 (Cal. Ct. App. 1977) (holding that pregnant woman’s drug use was not prohibited by child endangerment statute because fetus was not a “child” within the meaning of statute). Despite the absence of successful prosecutions, however, these types of prosecutions have continued. Fentiman, *supra* at 399. None of these laws establish that the fetus has the rights of a “person.” However, the way that these laws have been used to prosecute pregnant women for their own behavior pose other problems, as they violate a woman’s rights to her own bodily integrity, liberty, autonomy, dignity and equality. See CTR. FOR REPROD. RIGHTS, PUNISHING WOMEN FOR THE BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN’S HEALTH AND CHILDREN’S INTERESTS 3-4 (2000), available at [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_bp\\_punishingwomen.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_punishingwomen.pdf).
- 17 *Roe*, 410 U.S. at 159.
- 18 *Id.* at 162.
- 19 *Id.* at 160.
- 20 *Id.* at 157.
- 21 *Id.* The Fourteenth Amendment provides: “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.” U.S. CONST. amend. XIV, §1.
- 22 See *Roe*, 410 U.S. at 158.
- 23 *Id.* at 162-64.
- 24 *Casey*, 505 U.S. 833 (1992).
- 25 *Id.* at 878-879.
- 26 *Id.* at 851.
- 27 *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10th Cir. 2005) (quoting *Eisenstadt*, 405 U.S. at 453).
- 28 *Casey*, 505 U.S. at 856.
- 29 Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), art. 1, U.N. Doc. A/810 at 71 (1948).
- 30 U.N. GAOR 3rd Comm., 99th mtg. at 110-24, U.N. Doc. A/PV/99 (1948). See generally Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 *REPROD. HEALTH MATTERS* 120, 121 (2005)
- 31 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
- 32 When it ratified the ICCPR, the U.S. Senate attached certain Reservations, Understandings and Declarations that express its intention to enforce the treaty subject to these provisions. One of these is a “not self-executing” provision which precludes an individual from filing a claim in court based on one or more of the treaty provisions. U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01, III(i) (daily ed., April 2, 1992).
- 33 UN GAOR Annex, 12th Sess., Agenda Item 33, at 96, U.N. Doc. A/C.3/L.654 (1957); UN GAOR, 12th Sess., Agenda Item 33, at 113, U.N. Doc. A/3764 (1957).
- 34 See the Committee’s two General Comments on the right to life, neither of which recognizes a prenatal application of this right. Human Rights Comm., *Gen. Comment No. 06: The Right to Life* (art. 6) (Apr. 30, 1982); Human Rights Comm., *Gen. Comment No. 14: Nuclear Weapons and the Right to Life* (art. 6) (Sept. 11, 1984).
- 35 Human Rights Comm., *Gen. Comment No. 28, Equality of Rights Between Men and Women*, para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); see also, e.g., Human Rights Comm., *Concluding Observations: Colombia*, para. 19, U.N. Doc. CCPR/C/COL/CO/6 (2010); *El Salvador*, para. 10, U.N. Doc. CCPR/C/SLV/CO/6 (2010); *Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL (2004).
- 36 See, e.g., Human Rights Comm., *Concluding Observations: Argentina*, para. 13, U.N. Doc. CCPR/C/ARG/CO/4 (2010); *Ireland*, para. 13, U.N. Doc. CCPR/C/IRL/CO/3 (2008); *Mexico*, para. 10, U.N. Doc. CCPR/C/MEX/CO/5 (2010); *Monaco*, para. 10, U.N. Doc. CCPR/C/MCO/CO/2 (2008); *Nicaragua*, para. 13, U.N. Doc. CCPR/C/NIC/CO/3 (2008); *Panama*, para. 9, U.N. Doc. CCPR/C/PAN/CO/3 (2008); *Poland*, para. 12, U.N. Doc. CCPR/C/POL/CO/6 (2010).
- 37 Human Rights Comm., *Gen. Comment 28, Equality of Rights Between Men and Women* (art. 3), para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).
- 38 Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 *EMORY INT’L L. REV.* 185, 185 (2006); *What’s In It For Us: The United States and CEDAW*, CEDAW 2012, <http://www.cedaw2010.org/index.php/whats-in-it-for-us> (last visited Aug. 17, 2012).
- 39 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, arts. 11-12 (entered into force Jan. 27, 1980).
- 40 U.N. Comm’n on Human Rights, *Question of a Convention on the Rights of a Child: Report of the Working Group*, 36th Sess., U.N. Doc. E/CN.4/L/1542 (1980).
- 41 Comm. on the Rights of the Child, *Concluding Observations: Argentina*, paras 58-59, U.N. Doc. CRC/C/ARG/CO/3-4 (2010); *Costa Rica*, paras 63-64, U.N. Doc. CRC/C/CRI/CO/4 (2011); *El Salvador*, paras 60-61, U.N. Doc. CRC/C/SLV/CO/3-4 (2010); *Nigeria*, paras 61-62, U.N. Doc. CRC/CO/NGA/CO/3-4 (2010); *North Korea*, para 46, U.N. Doc. CRC/C/PHR/CO/4 (2009).
- 42 CEDAW Comm., *Gen. Recommendation 24: Women and Health* (20th Sess., 1999), in *COMPILATION GEN. COMMENTS AND GEN. RECOMMENDATIONS BY HUMAN RIGHTS TREATY BODIES*, at 274, para. 14, U.N. Doc. HRI/GEN/1/Rev.7(2004); See also CTR. FOR REPROD. RTS. & UNIV. OF TORONTO INT’L PROGRAMME ON REPROD. & SEXUAL HEALTH LAW, *BRINGING RIGHTS TO BEAR: AN ANALYSIS OF THE WORK OF THE U.N. TREATY MONITORING BODIES ON REPROD. AND SEXUAL RIGHTS* (2002).
- 43 The Organization of American States is a membership organization of the 35 independent states of the Americas and constitutes the main political, juridical and social governmental forum in the Western Hemisphere. It was established in 1948 with the signing of the OAS Charter and with the purpose of achieving “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.” Charter of the Org. of Am. States, art. 1, 119 U.N.T.S. 3 (entered into force December 13, 1951).
- 44 Am. Declaration of the Rights and Duties of Man, O.A.S. Res.

- XXX, adopted by the Ninth Int'l Conference of Am. States (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AM. SYSTEM, Preamble, OEA/Ser.L/V/II.82 doc.6 rev.1 at 17 (1992) (emphasis added).
- 45 *Baby Boy v. United States*, Res. No. 23/81, Case 2141, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981) (explaining the drafting history of Article 1's right to life provision in the American Declaration on Human Rights).
- 46 Am. Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6, at art. 4 (*entered into force* July 18, 1978).
- 47 *Baby Boy* case, *supra* note 46, paras. 20-31 (explaining the drafting history of the right to life provision contained in Article 4, paragraph 1 of the American Convention on Human Rights).
- 48 *Id.*, para. 30.
- 49 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA [C.P.] art. 37 (2010) (Dom. Rep.).
- 50 The girl's name was withheld by the hospital in order to protect her identity, but the local press has referred to her as Esperanza.
- 51 Rafael Romo, *Pregnant Dominican Teen at Center of Abortion Debate Dies*, CNN.com, (Aug. 17, 2012) <http://www.cnn.com/2012/08/17/world/americas/dominican-republic-abortion/index.html> (last visited Aug. 21, 2012).
- 52 Law of Jan. 7, 1993 on Family Planning, Human Embryo Protection, and Conditions of Legal Pregnancy Termination, as amended Dec. 23, 1997, art. 1 (Pol.) (unofficial translation on file with the Center for Reproductive Rights).
- 53 Human Rights Comm., *Concluding Observations: Poland*, para. 8, U.N. Doc. CCRP/CO/82/POL (2004) and para. 12, U.N. Doc. CCRP/CO/POL/CO/6 (2010); Comm. on the Elimination of Discrimination against Women, *Concluding Observation: Poland*, para. 25, U.N. Doc. CEDAW/C/POL/CO/6 (2007); Comm. on Economic, Social & Cultural Rights, *Concluding Observations: Poland*, para. 28, U.N. Doc. E/C.12/POL/CO/5 (2009); Council of Europe, Comm'r for Human Rights, *Memorandum to the Polish Government: Assessment of the Progress Made in Implementing the 2002 Recommendations of the Council of Europe Commissioner for Human Rights*, para. 95, CommDH (2007) 13, available at <https://wcd.coe.int/ViewDoc.jsp?id=1155005&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>.
- 54 *Z v. Poland*, App. No. 46123/08, (2008) (Eur. Ct. H.R.).
- 55 Constitutional Chamber of the Costa Rican Supreme Court, Decision No. 2000-02306, Mar. 15, 2000.
- 56 Gretel Artavia Murillo et al. (In Vitro Fertilization), Costa Rica, Case 12.361, Merits, Inter-Am. Comm'n H.R., Report No. 85/10 (July 14, 2010).
- 57 *Dickson v. United Kingdom*, App. No. 44362/04, Eur. Ct. H.R., Judgment of Dec. 4, 2007, para. 78. The CEDAW Committee had also found Costa Rica's ban on IVF implicated women's right to decide freely and responsibly on the number of their children and urged the State to implement the Inter-American Commission's decision. CEDAW Comm., *Concluding Observations: Costa Rica*, para. 33, U.N. Doc. CEDAW/C/CR/CO/5-6 (2011).
- 58 *R.R. v. Poland*, App. No. 27617/04, [2011] Eur. Ct. H.R. 828 (May 26, 2011).
- 59 CONST. (1982), art. 67 (Honduras).
- 60 Decree No. 54-2009, Article 3 (Honduras).
- 61 Article 126, CÓDIGO PENAL (Honduras).
- 62 Phil. Const., Art. II, § 12 (1987).
- 63 Revised Philippines Penal Code (1930), Act No. 3815 (Phil.).
- 64 For more information about Haydee's case, see CTR FOR REPROD. RIGHTS, FORSAKEN LIVES: THE HARMFUL IMPACT OF THE PHILIPPINE CRIMINAL ABORTION BAN, 38-41 (2010), available at [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/phil\\_report\\_Spreads.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/phil_report_Spreads.pdf).
- 65 *Id.*
- 66 *Id.*
- 67 GRUPO DE INFORMACIÓN EN REPRODUCCIÓN ELEGIDA (GIRE), REFORMAS APROBADAS A LAS CONSTITUCIONES ESTATALES QUE PROTEGEN LA VIDA DESDE LA CONCEPCIÓN/FECUNDACIÓN 2008-2011 [Approved Constitutional State Reforms that Protect Life from Conception/Fertilization] (2011).
- 68 GIRE, DERECHOS HUMANOS DE LAS MUJERES Y PROTECCIÓN DE LA VIDA PRENATAL EN MÉXICO [Human Rights of Women and Protection of Prenatal Life in Mexico] (forthcoming 2012).
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- 86 For more information about the international consensus and benefits of using a human rights approach to address maternal mortality and morbidity, see the three resolutions adopted by the U.N. Human Rights Council on "Preventable maternal mortality and morbidity and human rights," as well as two accompanying reports by the Office of the High Commissioner on Human Rights. Human Rights Council: Res. 11/8, U.N. Doc. A/HRC/RES/11/8 (2009); Res. 15/17, U.N. Doc. A/HRC/RES/15/17 (2010); Res. 18/2, U.N. Doc. A/HRC/RES/18/2 (2011); *Report of the Office of the United Nations High Commissioner for Human Rights on Preventable Maternal Mortality and Morbidity and Human Rights*, U.N. Doc. A/HRC/14/39 (Apr. 16, 2010); *Technical Guidance on the Application of a Human Rights-based Approach to the Implementation of Policies and Programmes to Reduce Preventable Maternal Morbidity and Mortality* (Report of the High Comm'r for Human Rights), U.N. Doc. A/HRC/21/22 (July 2, 2012).
- 87 The Patient Protection and Affordable Care Act (ACA) requires that all new health insurance plans offered in the individual and small group markets provide 10 categories of "essential health benefits": ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care. 42 U.S.C.A. § 18022(b)(1) (2010).
- 88 The ACA grants authority to the Secretary of Health and Human Services to further define the scope of essential health benefits. 42 U.S.C.A. § 18022(b)(2)(A) (2010). As of September 2012, the Department of Health and Human Services had not yet issued final regulations on this matter. For more information on HHS' approach to grant states flexibility in implementing the ACA, see Dep't of Health & Hum. Servs., Ctr. for Consumer Information & Insurance Oversight, *Essential Health Benefits Bulletin* (Dec. 16, 2011), available at [http://ccio.cms.gov/resources/files/Files2/12162011/essential\\_health\\_benefits\\_bulletin.pdf](http://ccio.cms.gov/resources/files/Files2/12162011/essential_health_benefits_bulletin.pdf).
- 89 For more information on how states can ensure the benchmark plan provides maximum maternity benefits, see Nat'l Partnership for Women and Families & Childhood Connection, *Guidelines for States on Maternity Care in the Essential Health Benefits Package* (2012), available at [http://www.nationalpartnership.org/site/DocServer/REPRO\\_Guidelines\\_for\\_States\\_on\\_Maternity\\_Care7.30.12.pdf?docID=11181](http://www.nationalpartnership.org/site/DocServer/REPRO_Guidelines_for_States_on_Maternity_Care7.30.12.pdf?docID=11181).
- 90 U.S. Ctrs. for Disease Control, *Ten Great Public Health Achievements—US 1900 to 1999*, (Apr. 2, 1999), available at <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf>. U.S. Ctrs. for Disease Control, *Achievements in Public Health, 1900-1999: Family Planning, Morbidity & Mortality Weekly Rep.* 1073-80 (Dec. 3, 1999), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm>. See also Wendy Chavkin & Sara Rosenbaum, *Women's Health and Healthcare Reform: The Key Role of Comprehensive Reproductive Healthcare* (2008), available at <http://www.prch.org/womens-health-and-health-care-reform-report>.
- 91 Inst. of Med. (IOM), *Clinical Preventive Services for Women: Closing the Gaps* (2011), available at <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx> [hereinafter IOM, *Closing the Gaps*]. Notably, this rate of unintended pregnancy is far higher than in other developed countries, and 42% of unintended pregnancies in the U.S. end in abortion.
- 92 For example, there is an increased risk of adverse outcomes if a pregnancy follows too closely (within 18 months) after a prior pregnancy, such as prematurity and low birth weight. Unintended pregnancy is also associated with shorter or no breastfeeding. Women with unintended pregnancy are at increased risk of experiencing physical violence, and infants born of an unintended pregnancy are more likely than those born of intended pregnancies to be abused. An unintended pregnancy can also have a profound impact on a woman's life, including on educational and career opportunities – at a minimum, if carried to term, childbearing implies a lifetime of responsibility and care for the child and is one of the most serious, if not the most serious, commitments a person can make. See generally *id.*; Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010); Nat'l ACADEMY OF SCIENCES, COMM. ON UNINTENDED PREGNANCY, IOM (SARAH S. BROWN & LEON EISENBERG, EDs.), *THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES* (1995); Nat'l Health Law Program, *Health Care Refusals: Undermining Quality Care for Women* (2010); A.P. Mohlajee et al. *Pregnancy Intention and Its Relationship to Birth and Maternal Outcomes*, 109 AM. J. OBSTETRICS & GYNECOLOGY 678-86 (2007); L. Kuroki et al., *Is a Previous Unplanned Pregnancy a Risk Factor for a Subsequent Unplanned Pregnancy?*, 199 AM. J. OBSTET. GYNECOL. 517.e1-7 (2008); I.M. Bennett et al., *Unintended Rapid Repeat Pregnancy and Low Education Status: Any Role for Depression and Contraceptive Use?*, 194 AM. J. OBSTETRICS & GYNECOLOGY 749-54 (2006); Kay Johnson et al., *Recommendations to Improve Preconception Health and Health Care — United States: A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care*, 55 MORBIDITY & MORTALITY WEEKLY REP. 1-23 (2006).
- 93 Moreover, the right to decide the number and spacing of one's children is recognized in both international and United States law. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (married couples have a constitutional right to access contraception); *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1972) (extending same right to unmarried persons). See also CTR. FOR REPROD. RIGHTS, FAMILY PLANNING IS A HUMAN RIGHT (2008), available at [http://reproductiverights.org/sites/default/files/documents/BRB\\_Contra.pdf](http://reproductiverights.org/sites/default/files/documents/BRB_Contra.pdf) (cataloguing the various human rights treaty bodies that have recognized family planning as a human right).
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- 95 42 U.S.C.A. § 18022(b)(1) (requiring essential benefits offered by health plans to cover "preventive . . . services").



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