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CHANGE IS POSSIBLE: THE LAW AS A BARRIER AND A TOOL

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It is a central principle for me that change is possible, and that law helps make it happen. However, as advocates and legal advisors for women's rights, we are constantly forced to confront the limits of the law as a tool for change. Today I will explore where and why the law is not enough, and look at what we can do to move beyond the law and effectively generate the change we want to see.

The truth of the matter is that the law can be very inadequate when it comes to the protection of reproductive rights. One example of this includes laws that impose punitive measures on drug use during pregnancy.

Last year, Amnesty International worked on a case in Norway involving a woman who is a recovering opiate user.[1] The woman was in opiate substitution therapy, which is entirely legal in Norway. She was not under the Norwegian government program, and it is also entirely legal in Norway to be on a privately sponsored opiate substitution program. She was getting her prescription drugs in Belgium, and that is also entirely legal as long as you are under medical supervision, which this woman was.

At the same time, Norway's social services law empowers the state to take anybody into its custody if it feels the person is in imminent danger of doing damage to herself or to a third person, including an unborn child.[2] There is no appeals procedure and there is also no definition of risk levels required or of what kind of danger a person must be in for the state to take custody of her. In fact, there is not even a definition of the substance use that could

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1 *See Norwegian Woman Forced to Endure Painful and Dangerous Withdrawal While Pregnant*, NAT'L ADVOCATES FOR PREGNANT WOMEN (Dec. 6, 2011), http://advocatesforpregnantwomen.org/issues/punishment_of_pregnant_women/norwegian_woman_forced_to_endure_painful_and_dangerous_withdrawal_while_pregnant.php; Roy Vilmar Svendsen & Per Christian Magnus, *Tvangsinnleggelse av gravide Marlene kan være brudd på menneskerettighetene* [Forced Detention of Pregnant Marlene May Violate Human Rights], NORWEGIAN BROAD. CORP. (Dec. 5, 2011, 8:00 PM), http://www.nrk.no/nyheter/distrikt/hordaland/1.7904082.

2 Lov om sosiale tjenester m.v. (sosialtjenesteloven) [Law on Social Services, etc. (The Social Service Law)], § 6-2(a) Tilbakeholdelse av gravide rusmiddelmisbrukere [Detention of pregnant drug users], http://www.lovdata.no/oll/tl-19911213-081-008.html.

be the basis for intervention. Essentially, the law is written in such a way that a chain smoker could be taken into state custody without warning, whether pregnant or not.[3]

Of course, chain smokers are not taken into custody. The individuals who are taken into custody are mostly poor, often on opiate substitution therapy, and frequently pregnant women.[4] These are the women society sees as unfit mothers, and as a result they are especially targeted with this law.

In this particular case, the woman we were working with was dealing with her opiate addiction the best she could. She did not want to be on the government program because, she argued, it would connect her with individuals from prior circles of abuse and threaten the integrity and success of her treatment. She engaged in alternative but comparable therapy, with the sole purpose of overcoming her addiction and having a healthy child—something she very much longed for. But the law empowers the state to lock her up regardless and arbitrarily. She was indefinitely detained in a hospital, and though a public lawyer was provided, there was no apparent possibility for her to be released in the short term. After a week in the hospital, the woman decided to have an abortion, because she could not stand the thought of being locked up for another six months.

To me, the most tragic part of this story is that this was not the first time the woman had tried to carry a pregnancy to term. She had previously been pregnant, on a privately sponsored opiate substitution therapy course, then detained by the Norwegian authorities, and essentially forced by the situation to terminate a very much wanted pregnancy. Looking at this from the outside, it seems likely that part of the problem this woman faces is a system that just does not hear her. To the system, she is a resource-poor addict, incapable of making responsible decisions about her health and life. In this scenario, her reasoning for being on a private opiate substitution program did not register. The law allowed this percep-

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[3] The word "drug" (rusmiddel) in Norwegian refers to any substance that produces a sense of euphoria, drunkenness, or stupor. This word is routinely applied to alcohol, nicotine, or other substances in legal circulation in Norway, as well as to opiates, cocaine, or other substances not in general legal circulation.

[4] *See generally* Hanan Koleib, GRAVIDE RUSMIDDELAVHENGIGE: EN VURDERING AV KUNNSKAPSSTATUS OG BEHANDLINGSTILBUD [PREGNANT DRUG ADDICTS: AN EVALUATION OF THE KNOWLEDGE BASE AND TREATMENT OPTIONS], *available at* http://www.helse-stavanger.no/omoss/avdelinger/regionalt-kompetansesenter-for-rusmiddelforskning/Documents/Publiserte%20rapporter/publrapport%20Gravide%20rusmiddelavhengige%20En%20vurdering%20av%20kunnskapsstatus%20og%20behandlingstilbud.pdf.

tion to stand. The law can arbitrarily detain a person because of his or her status as undesirable, resource-poor, or otherwise "wrong." In short: law can be inadequate.

Another problem with law is that it can change, even when it is not inadequate. It can change both for the better and for the worse. We can see it happening in real time. This week a Canadian appeals court in *Bedford v. Canada* handed down a decision.[5] This case was brought by current and prospective sex workers, challenging the legality of criminal law provisions that make it more difficult for sex workers to protect themselves and to operate in a safe environment by doing so-called in-calls (receiving clients in their homes) or by hiring receptionists, bouncers, or bodyguards. The provisions were stricken as incompatible with the Canadian Human Rights Charter, which certainly is reason for celebration.

At the same time, the court repeatedly clarified that the outcome of the appeal had turned on the Parliament's objectives in passing the law, which the court noted was not to eradicate sex work but rather to eradicate street nuisance and public disturbance.[6] If the Canadian Parliament were to declare its intention to eradicate sex work through the imposition of criminal sanctions, the court's ruling implies that the provisions would become entirely legal under the Canadian Human Rights Charter, even if it were an undisputed fact—also in the ruling—that the provisions contribute to making sex work unsafe.[7]

This example highlights the fact that law is the result of a political process and that this political process is ongoing. In short, law can change.

Finally, and perhaps most importantly, the law does not convince everyone. Sometimes it feels like the law does not convince *anyone*. For example, for someone who believes fervently that abortion is murder, it really does not help for them to know that international human rights law does not protect the right to life of the fetus, but that it has strong protections for women's equality, and health, and life. In the face of such convictions, international human rights law is both uninteresting and irrelevant.

To be more successful at promoting human rights in the area of reproduction, I believe we have to learn to talk about the law in a manner that speaks to the real reasons behind women's decisions regarding motherhood. This means we must de-isolate the issues

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5 [2012] O.N.C.A. 186 (Can. Ont. C.A.).

6 *See id.* ¶¶ 242–243, 272, 278.

7 *See id.* ¶ 539.

that have to do with controlling fertility. For example, the discussion on choice in the United States is narrowly focused on access to contraception and abortion, and there is very little discussion about lack of childcare, lack of paid sick leave, lack of paid parental leave—all issues that make it harder to parent. There is also very little discussion about the needs and desires of those who want to have more children and those who wish to parent differently: attentive parenting requires time, space and economic resources. Perhaps more to the point, when people make decisions about their reproductive lives, or about their sexuality, they do it with reference to how they live their lives in general, not just in the area of sexuality and reproduction. They think about education, health care, and jobs. They think about housing and the environment, more generally. These are issues that determine women's choices much more than the legality of abortion and the right to life.

That moves me to the second point: we already know what we need to say and what we need to do in order to convince those who are left unconvinced by the law.

Rhonda Copelon was adamant about this. She often said that most of the time when you look at a situation, you already know when it is wrong or unjust—it is not that complicated. We do not have to look to the very intricate opinions of the United Nations treaty monitoring bodies, and all the different resolutions of various U.N. bodies. It is not that complicated. It is often very visible what is wrong, and it is certainly very visible to the people who are suffering the human rights violation—they have clarity on the wrongs they suffer.

We also already know the barriers to change. Sometimes they have to do with the law, but often they do not. Instead they have to do with a failure to recognize context. This context includes the racialized use of the criminal justice system and the focus on reproduction only for those people who "deserve" to be parents—meaning not the poor, not people of color, and not those addicted to drugs.

This illustrates the fact that barriers to change often have to do with issues of power and money. We know this, of course, yet often we look at a situation and think we can convince people with information about the law. This is an ineffective approach because most decision makers or power holders already know that they are in the wrong. They already know that waterboarding is torture, or that defunding Planned Parenthood creates access barriers to health care for women of color and the resource-poor. The reason

they continue to torture or to discriminate is that they believe these actions will bring them power or money in some way. To move beyond the law, we have to realize how to influence those perceptions of power or money.

I want to leave on an optimistic note about our capacity for change. I have this T-shirt that says "Some Kids are Gay, and That is OK." I sometimes wear this T-shirt when I pick up my daughter from school. I have other T-shirts that are equally in your face, but this one T-shirt is the one that gets comments. Parents will come up to me and say "They called me from school the other day and said your boy is different because he just said he wanted to kiss another boy." Or kids will come over and ask "What is gay? What does that mean?" What is interesting to me about this situation is the urgent relief people seem to feel at bringing these issues up, almost as if they have been wondering who to talk to and my T-shirt advertises that I am willing to engage.

But this relief implicitly highlights the discomfort many still display with regard to their own children's sexuality. I think we are watching this change, very slowly, with marriage equality gaining ground and a push for better information in schools. However, the real frontier is accepting that when we agree that being gay or lesbian or bisexual or transgender is not something we choose to be—when we say "I was born this way"—we are implicitly saying that children can know who they are, with regard to their sexual orientation and gender identity. We have to battle for the right of our children to know that they are *not* heterosexual, or they are *not* gender conforming, regardless of where their parents are, or what their parents feel.

The law can get us part of the way by establishing once and for all that discrimination on the basis of gender identity and sexual orientation is unacceptable, in marriage, in parenting, in employment, in education, or wherever else lesbian, gay, bisexual, transgender, and intersex individuals are currently suffering legally sanctioned discrimination. But the discomfort many still feel around children's sexuality tells me that the law is not enough. To change, we have to change the way we think about sexuality and, dare I say it, sex. I believe we can do it.