

# Limitations of Advocacy and Exceptions to the Criminal Law in Brazil

## The Struggle for Reproductive and Sexual Health Rights

KERI BENNETT

*Étant impliquées dans la lutte pour les droits reproducteurs et de la santé sexuelle au Brésil, les activistes ont choisi de dénoncer la hausse des avortements thérapeutiques en raison d'une certaine malformation fœtale. Cette stratégie aura du succès parce qu'elle sort des chemins battus sur les droits à la vie en arguant qu'il n'y a pas de vie à protéger dans ces circonstances. Toutefois, les arguments utilisés à la Cour et par les acteurs au civil ne débouchent pas sur l'autonomie reproductrice des femmes mais créent une exception à l'interdiction de l'avortement basée sur le statut de la victime.*

*En Brasil, como parte de la lucha por los derechos sexuales y reproductivos, las activistas han elegido concentrarse en el acceso al aborto terapéutico en caso de malformación fetal. Esta estrategia tiene el potencial de ser exitosa porque usa el debate sobre el derecho a la vida argumentando que no hay vida que proteger en esas circunstancias. Sin embargo, los argumentos usados por la corte y los actores civiles no hacen avanzar la autonomía reproductiva de las mujeres; a la prohibición criminal del aborto solo crean un estado de excepción, basado en la situación de la víctima.*

The struggle for reproductive and sexual health rights in Brazil has been ongoing for several decades. Activists must contend with entrenched

societal beliefs about a woman's role, as well as with conservative religious actors who hold great political power. While Brazil has at times been more liberal than other countries in the region in areas such as sex education and access to emergency contraception, abortion continues to be a polemic issue.<sup>1</sup> Despite numerous proposals for amendment, the criminal provisions have remained unchanged since the Penal Code was written in 1940. Abortion is prohibited under the Brazilian Penal Code except in cases of rape or risk to the life of the mother.<sup>2</sup> Even though abortion is medically recommended in cases of severe foetal malformation, women cannot directly access the procedure. They must first seek judicial authorization, a difficult and time-consuming process without a guaranteed outcome. If authorization is denied, women often give birth before the case reaches the appellate level.<sup>3</sup>

In the last few years activists in Brazil have been working to increase access to therapeutic abortion, particularly in cases of anencephaly. This focus on anencephaly is also being used as a strategic tactic to increase public awareness and take steps towards liberalization of abortion laws in general. Anencephaly is a foetal malformation, defined as "a serious developmental defect of the central nervous system in which the

brain and cranial vault are grossly malformed,"<sup>4</sup> or "congenital absence of all or a major part of the brain and spinal cord."<sup>5</sup> The foetus will spontaneously abort, will be still-born, or will live a few short hours, up to a maximum of two or three days outside the womb.<sup>6</sup> Parents often find seeing the foetus to be overwhelming, given the severity of the malformation. Women who are forced to carry the pregnancy to term are, if the foetus does not spontaneously abort, forced to undergo the debilitating experience of a high-risk pregnancy, along with the trauma of knowing that the foetus is incapable of survival.

Brazil has one of the highest rates of anencephalic pregnancies in the world.<sup>7</sup> In order to relieve the suffering of women in this situation, activists have pushed for a broadening of the traditional interpretation of the exceptions outlined in the Penal Code<sup>8</sup> by bringing forward a constitutional challenge that argues that judicial authorization should not be required in cases of anencephaly.<sup>9</sup>

Expanding interpretations of existing exceptions to the criminal law can be seen as a stepping stone towards liberalization. As anencephaly is seen as easily invoking compassion, activism around this particular issue can be used to raise overall public awareness of abortion issues as a whole. However, the efficacy of this

strategy, as well as the impact on the women who are granted exceptions under criminal laws must be critically examined. Focusing on anencephaly does not provide protection for women carrying foetuses with other malformations. Additionally, when women have to justify their actions as an exception to or excuse for otherwise criminal behaviour, the arguments used by activists and courts can actually entrench traditional hierarchies and stigma as well as existing abortion laws.

### **The Effects of Stigma**

Stigma functions through negative stereotypes to separate the individual from the dominant culture or group. Individuals are left with a “spoiled identity,”<sup>10</sup> which can affect their mental and physical health.<sup>11</sup> Stigma associated with illegal abortion can be easily understood. Scott Burris says that, “[M]aking almost any behaviour a crime ... probably both reflects and supports the tying of those who engage in the behaviour to stereotypes of deviance and social threat. ... Stigma and law can be used to maintain or strengthen otherwise important group identities.”<sup>12</sup>

By criminalizing abortion, society is presented with a view of abortion as abhorrent, murder, the taking of life. Society must therefore be protected from this dangerous act through the criminal law and the justice system. Women who choose abortion in this context are seen at a minimum as unwomanly, breaking down societal norms about a woman’s role,<sup>13</sup> or at the other extreme, as murderers. Women who choose clandestine abortion are subject to threats to their life and health, as well as familial and societal stigma, and even stigma from health care professionals. Women also suffer stigma and discrimination from public health care workers when they seek treatment for the effects of illegal abortion.<sup>14</sup> The attitude on the part of these health care workers seems to be that women who have

had an abortion somehow deserve whatever threats to their health they may encounter because they have committed a criminal act which threatens the fabric of society.

Along with social isolation and discrimination, stigma has a concrete effect on health. Burris states that it is widely accepted that disease stigma is an impediment to public health because it drives an epidemic

---

**While Brazil has at times been more liberal than other countries in the region in areas such as sex education and access to emergency contraception, abortion continues to be a polemic issue.**

---

underground.<sup>15</sup> In Brazil, illegal abortion is now the third main cause of maternal mortality and in the past five years, some 1,205,361 women sought treatment from the public system for the consequences of unsafe abortion.<sup>16</sup> Women with sufficient economic resources have access to safe, even if illegal, abortion and do not suffer the same risk to life and health as women of lower socioeconomic status,<sup>17</sup> providing support for the argument that a higher socioeconomic position places an individual in better health status.<sup>18</sup>

Even if women escape from a clandestine abortion without complications, they still suffer effects to their mental and physical health. They have committed a criminal act for which, if caught, they can be prosecuted. This reality is intensified for women of lower economic position who cannot afford adequate defence. Women in these

situations must thus conceal their actions, causing stress and insecurity in social relationships.

Scott Burris, Ichiro Kawachi and Austin Sarat argue that psychosocial effects and the intersection between law and culture also have physiological impacts on health.<sup>19</sup> “[L]aw embedded in culture may broadly regulate social status and social meaning in ways that heighten individual feelings of social insecurity.”<sup>20</sup> That social insecurity transforms into an allostatic load,<sup>21</sup> the accumulation of daily burdens which have long term consequences for women’s health. Women who have had a clandestine abortion must always carry the weight of breaking legal and cultural prohibitions.

### **Stigma under Exceptions to Criminal Abortion Laws**

In the context of exceptions to existing abortion laws it is important to examine how women’s view of themselves as doing something which is considered a criminal act, even if an exception to that criminality, can also affect their self-perception and their psychosocial well-being.

Rebecca Cook and Susannah Howard discuss the fear that women will exploit exceptions to criminal abortion laws. Legislatures commonly implement regulations to guard against abuse.

These regulations, which often include medical certification of risk to life, or forensic proof of rape, place the onus on women to prove their lack of criminality, or justify their excuse for abortion.<sup>22</sup> While typically the burden is on the state to prove an individual has committed a criminal act, the burden in these cases shifts to the woman.

Forcing women to seek exceptions to criminal abortion laws can entrench the stigma of abortion.<sup>23</sup> Instead of challenging the overall hierarchy and social control of women’s sexual and reproductive health, exceptions carve out the granting of permissions in specific

situations where women are deemed to be deserving. Instead of entitlement to self-determination in their own health care, women have to become “worthy” victims. They must have been a victim of a violation, a victim of potentially fatal health issues, or if carrying an anencephalic foetus, a victim of an exceptionally tragic circumstance.

### Efforts to Expand Existing Exceptions in the Brazilian Penal Code

Abortion is prohibited under the Brazilian Penal Code<sup>24</sup> as a crime against the person.<sup>25</sup> It is a criminal offence for either the pregnant woman or a third party to induce an abortion, punishable by up to three years imprisonment.<sup>26</sup> Lengthier terms of imprisonment can be applied for abortion performed without the pregnant woman’s legal consent or when it results in her physical harm or death.<sup>27</sup>

Abortion performed by a medical doctor is legally permitted in only two situations: when there is no other way to save the life of the pregnant woman (necessary abortion), or if the pregnancy was the result of a rape (sentimental abortion).<sup>28</sup> Even though abortion is medically recommended in cases of severe foetal malformation, women cannot directly access the procedure. They must first seek judicial authorization from the court.<sup>29</sup>

There is a great deal of inconsistency in judicial interpretation of these provisions, even in identical medical circumstances. In cases of anencephaly, some judges will grant authorization, arguing that the penal law does not expressly *prohibit* therapeutic abortion in these circumstances.<sup>30</sup> Others will deny it, reasoning that in fact the penal code does not expressly *permit* therapeutic abortion in these circumstances.<sup>31</sup> An analysis of these decisions often exposes the moral beliefs which underlie the determination to grant or deny authorization for the procedure.

In order to combat this inconsistency, the *Arguição de Descumprimento de Preceito Fundamental (ADPF)*,<sup>32</sup> a constitutional challenge, which as yet has not been decided, was brought forward to argue that abortion in cases of anencephaly should not require judicial authorization. The case was admitted in July of 2004, along with preliminary permission for legal termination of

---

## Brazilian human rights organizations submitted a brief, which argues that forcing a woman to carry an anencephalic foetus to term is equivalent to torture.

---

anencephalic pregnancies without judicial authorization. In October of 2004, the Court affirmed the admissibility of the case, but overturned the preliminary authorization, once again forcing women to undergo delay and uncertainty of access to the procedure.

Conectas Direitos Humanos and Centro de Direitos Humanos, two Brazilian human rights organizations, submitted an amicus (“friend of the court”) brief<sup>33</sup> as part of this action, which highlighted important information to the court in terms of a broad overall understanding of abortion in history, in practice in other countries, the issue of abortion and maternal mortality in Brazil, and a discussion of the right of the woman to health, liberty, and dignity as well as balancing interests of the right to life.<sup>34</sup> The amicus argues that forcing a woman to carry an anencephalic foetus to term is

equivalent to torture.<sup>35</sup> While five years later, the court has not judged the merits of the case, this action brought essential evidence regarding abortion issues to the notice of the Federal Supreme Court. Lower Courts in Brazil are still denying access to abortion in cases of anencephaly. A positive decision on the ADPF petition would create a standard juridical interpretation of the issue throughout the country and at least allow women with anencephalic foetuses to escape the traumatic process of requesting authorization.

Civil actors have also worked to increase public awareness of the plight of women in this situation. Severina Maria Ferreira was the mother of an anencephalic foetus, who had been admitted to hospital for the procedure, when she was informed that the general preliminary authorization based on the ADPF petition had been overturned. She was discharged from hospital, returned home and gave birth prior to achieving authorization through judicial channels.<sup>36</sup> Her story has become a touchstone for the issue and was made into a documentary by Eliane Brum and Débora Diniz and disseminated through countless newspaper and magazine articles.

The benefit of this type of coverage is that it creates awareness of the impact of the criminal law on the lives of women. Activists must combat those in power who have no compunction about forcing a woman to suffer, such as Cezar Peluso, minister of the Federal Supreme Court who, quoted in regards to his position on the ADPF challenge, says, “[S]uffering doesn’t degrade human dignity. On the contrary, it is essential—remorse is also suffering. The justice system only repudiates suffering for unjust acts, which is not this case.”<sup>37</sup>

Judge Laurita Vaz, in a judgment denying authorization for therapeutic abortion states that “morality and immorality are outside of the jurisdiction of the court—the court only discusses what the laws establish.”<sup>38</sup>

and then continues with a diatribe about how neither deformity nor ugliness can “hinder the affection and love that flows to the life because it exists and will exist while it can.”<sup>39</sup> There is no mention of the suffering of the mother and her family, but rather Vaz implies that she has been blessed to have been granted life, even if for a short time. Vaz ends by saying “This, thanks to God is beyond science.”<sup>40</sup> When authorities place personal moral beliefs over the interests of the parties, and where a woman’s suffering is not considered worthy of judicial relief, it is worthwhile and even necessary to counter with a position that is equally forceful, dramatic and provoking, especially given the Catholic Church’s recent push to ban abortion in all circumstances.<sup>41</sup>

Oscar Vilhena, Director of Conectas, and one of the lawyers who submitted the amicus brief, explains that Brazil is a society that changes more in society than in law.<sup>42</sup> He argues that it is unlikely that abortion law will be changed by the legislature, given the fear of the Catholic and conservative right, nor would the government ever call a referendum as was done in Portugal.<sup>43</sup> Therefore, he says, it is in the adaptation of the practice of abortion that will lead to legal reform.<sup>44</sup> Once the practice of abortion becomes more normalized in society, the legislature will eventually follow suit. Maria Wilza Villela and Maria Jose Araujo clearly state that there was a strategic choice in Brazil to focus on widening access in public health services to legal abortion on the permitted grounds as part of a greater strategy to raise awareness and influence opinion and policy makers.<sup>45</sup>

Certainly in the context of fierce opposition to general abortion rights both socially and politically, choosing to focus on anencephaly, a situation that is seen to more easily garner public compassion, can be seen as a worthwhile tactic. As well as creating access to legal abortion for women who are in this tragic

situation, focusing on exceptions in cases of anencephaly could in the long term potentially raise public awareness of women’s human rights, create a wider interpretation of the law, and serve as stepping stone for further legislative change.

Yet, the focus on anencephaly is problematic. First of all, even if successful, a Supreme Court decision precluding the necessity of judicial

---

**Activists must combat those in power who have no compunction about forcing a woman to suffer, who say, “[S]uffering doesn’t degrade human dignity. On the contrary, it is essential.”**

---

authorization in cases of anencephaly is of no assistance to women carrying foetuses with different anomalies. Nor does the reasoning in court decisions providing authorization in these cases seem to leave an opening for the expansion of or change of abortion laws.

#### **Legal Reasoning in Decisions which Grant Therapeutic Abortion in Cases of Anencephaly**

Alexandre Marques, public defence lawyer and Coordinator of the Human Rights Division of the State of Rio de Janeiro, says there are common strategies and arguments used by lawyers to obtain a positive result in cases of anencephaly.<sup>46</sup> It is first argued that anencephaly creates a risk to the life of the mother, thereby falling within the exculpatory provision in Article 128 (I). Clinical con-

ditions such as diabetes, or the risk of infection if the foetus dies in the womb are presented as a concrete risk to life of the mother.<sup>47</sup>

However, the risk to life provision is commonly interpreted narrowly as risk of death.<sup>48</sup> While Marques argues that there is a grammatical possibility of arguing risk to life under the Brazilian Penal Code,<sup>49</sup> Dr. Thomas Gollop, gynecologist, geneticist and Director of the Institute of Fetal Medicine and Human Genetics in São Paulo, states that anencephaly does not commonly create a risk of the mother’s death, although she can suffer from complications such as obstetrical trauma or hemorrhaging.<sup>50</sup> It is therefore possible for courts to deny authorizations by stating that the mother will not actually suffer a risk of death if forced to carry the foetus to term.

Carmen Campos addresses this issue by focusing on the right to health in the Brazilian constitution. She provides a framework for how the risk to life provision under the Brazilian Criminal Code could be interpreted more broadly as a risk to health, which includes both physical and mental health, based on international interpretations of health in human rights instruments.<sup>51</sup> However, a dramatic change in Brazilian judicial interpretation will be required to implement this framework. While some courts have granted authorization under the risk to life provision, these judges only considered the risk to the pregnant woman’s health once medical evidence established the in-viability of the foetus.<sup>52</sup> This reasoning precludes termination in other situations on physical or mental health grounds.

Alexandre Marques also outlines other arguments which have achieved a successful result. One is to argue that termination of an anencephalic foetus does not fit the legal definition of abortion. Courts once again rely on the medical and scientific evidence of complete in-viability of the foetus to show that there is no life to be protected in

this circumstance.<sup>53</sup> Termination of an anencephalic pregnancy is not found to be a death sentence imposed by the pregnant woman or the judge and therefore is not found to be a criminal act.<sup>54</sup> Courts have also found the pregnant woman to be in a state of necessity, precluding criminality.<sup>55</sup> Finally, many courts apply a supra-legal excuse, “the inability of other conduct.”<sup>56</sup> These courts find that while termination of an anencephalic pregnancy is not expressly permitted in the criminal code, because of the medical evidence of inviability, the state cannot demand that the woman carry the pregnancy to term.<sup>57</sup>

Overall, the reasoning underlying authorizations in cases of anencephaly is that they are “not really abortion.”<sup>58</sup> While occasionally touching on the issue of human dignity, saying it is unreasonable to expect heroism of a woman carrying a foetus that she knows will die,<sup>59</sup> on the whole, courts make it clear that they are not authorizing abortion in general, and not even in other cases of foetal malformation.<sup>60</sup> Each different anomaly therefore becomes its own battle. While a recent Superior Federal Court decision granted therapeutic abortion in the case of Meckel Gruber Syndrome, this decision is also not binding on lower courts, nor does it include a broad interpretation of authorization for foetal malformation.<sup>61</sup> Even in one of the most liberal of the judgments on anencephaly in Brazil, the Federal Supreme Court still focuses on the fact that this is not abortion but rather an anticipation of the already certain death of the child.<sup>62</sup>

While to this point we have focused on Brazil, the Supreme Court of the Province of Buenos Aires follows the same line of reasoning. The court says that in a case of anencephaly:

It is not a case of abortion, or even eugenic abortion, but rather the induction of a birth, which result, the death of the

child, depends not on human action but rather on the condition of the child who cannot subsist autonomously.<sup>63</sup>

In this case, because there is not a killing being authorized, but rather an anticipation of a few days, the ethical perspective is morally acceptable.<sup>64</sup>

Burris states that, “The content of court decisions can be important parts of the development and maintenance of stigma.”<sup>65</sup> In these cases there is no examination of the societal norms underpinning the criminal abortion laws, nor do courts address the right of women to self-determination. Instead, by refusing to address overall issues of abortion and focusing on contextual excuse, courts reinforce the “rightness” of societal control over women’s bodies and choices. The *ADPF* petition also does not challenge this framework. Instead of questioning the criminal prohibition on abortion, it attempts to step out of the right to life debate by arguing there is no life to be protected in cases of anencephaly.<sup>66</sup>

In contrast, the decision of the Colombian Constitutional Court which liberalized one of the strictest abortion laws in Latin America focused on the dignity of the woman:

Therefore, when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.<sup>67</sup>

While focus on civil activism in Colombia is outside the scope of this paper, this type of reasoning raises the question how the strategies of civil actors and lawyers may have influenced society and the judiciary in Colombia, especially in contrast to the trajectory in Brazil.

## Creation of the Worthy Victim

Framing ideas and issues in ways that are more easily palatable can be a valid technique in the face of blatant disregard for women’s physical and mental well-being. Strategic choices however, can have unforeseen negative consequences. Sally Engle Merry’s anthropological work shows how the creation of the “worthy victim” has been one of the most effective means of human rights claiming. One example is the Female Inheritance Movement in Hong Kong.<sup>68</sup> Indigenous women deprived of land inheritance rights by male relatives were unable to achieve redress without the assistance of women’s groups and transnational elites who “translated” their complaints in a way that politicians would be willing to hear. Instead of family disputes over property, the issue was presented as one of gender equality and human rights.<sup>69</sup> In the background was the fact that Hong Kong was about to return to China and the social repositioning that entailed. Presenting the male relatives in this situation as feudal, or backward, appealed to members of the legislature who wanted to see themselves as modern. The women were coached by social workers as to how to present themselves and became “worthy victims” of tradition. Promoting gender equality was therefore seen as a modern, enlightened action.<sup>70</sup> While transforming the issue in a way that appealed to political currents was effective, many of the indigenous women subsequently were unable to reintegrate into their communities. The end result for these women was not a clear victory.<sup>71</sup>

Miller also outlines the way that feminist actors were able to place violence against women on the international agenda. In the context of a United Nations that considered violence against women a “women’s issue” and not a human rights issue, feminist actors began using the concept of torture and the style of

human rights reporting (individual case focus) common in the 1980s.<sup>72</sup>

Alice Miller says that *Violence Against Women* became a successful claim to rights through global attention to rape in armed conflicts in the 1990's. It became acceptable in the mainstream partly because the image of women as "without power and in need of protection"<sup>73</sup> could be reaffirmed in the stories of rape atrocities. Once again, creation of a worthy victim is effective in advocacy as well as dealing with criminal justice systems. A young innocent girl who was raped, or a woman duped into prostitution has more sympathetic value than a sex worker who was exploited and garners more purchase from society and legal actors.<sup>74</sup>

In the Severina case which has been instrumental in raising the issue of anencephaly in Brazilian civil society, Severina, is presented as the ultimate worthy victim: a hard-working, religious, married young woman who is a cleaner for Chã Grande in Pernambuco, the mother of one child who was eagerly awaiting the second when she discovered the tragedy of her foetus' diagnosis. The magazine *Creativa* includes dramatic pictures of Severina in hospital, and large bold type insets stating that "[T]he priest said, if the [foetus] didn't have life, it was not a sin [to abort]."<sup>75</sup>

Débora Diniz, who has been one of the main advocates in this issue in Brazil, emphasizes the fact that many of the women she interviewed in her research are Catholic, and says that all the women she interviewed did not consider this to be abortion.<sup>76</sup> Juiz Torres, a fairly liberal judge in Campinas, when discussing reasons for granting authorization in cases of anencephaly, also stressed that cases before him were of married people who had wanted a child and were now suffering from that loss.<sup>77</sup> In this way, the public and the judiciary are presented with women who have done no wrong according to the traditional, Catholic view of society, and who would

never actively choose to abort, but as the victims of circumstance, deserve compassion and therefore exception to the criminal law.

Miller argues however, that activists must examine the outcomes of their strategies.

Women's groups tried to gain legitimacy through "respectability" in human rights advocacy on sexual violence. This focus, however, instead of challenging gender norms and hierarchies, inadvertently reinforced them, leaving "less respectable" women without redress.<sup>78</sup>

Therefore, even when trying to protect the rights of women, the way information is presented can reinforce traditional morality. In an article that explores the issue of access to abortion for anencephalic fetuses, Dr. Thomas Gollop is quoted as saying, "it is not ethical to send clients with this diagnosis to clandestine abortion clinics."<sup>79</sup> This statement can easily be taken to infer that other women potentially do deserve whatever consequences may occur from using clandestine abortion clinics.

The public health project by FLASCO in Argentina deals with this somewhat better. In an educational document a mythical person is created. "Joanna" is single, fairly well educated and likely has access to contraception, but for various possible reasons (numerous are listed, but none are narrowed in on) she did not use contraception.<sup>80</sup> Joanna does not fit the stereotype of the eager mother, but no judgment on her situation or choices is made. If anything, she is presented as a possible reality for many women who find themselves with an unwanted pregnancy. However, the final recommendations call for cases of anencephaly to be interpreted as "unpunishable" cases of abortion.<sup>81</sup> Once again, women in this situation are not granted choice, legitimacy or power, but rather a contextual excuse to what is considered to be an overall valid imposition on women's control of their bodies.

## **Individual Women and the Reinforcement of Stigma**

Stigma in law and in society can also be internalized and enforced by the stigmatized people themselves.<sup>82</sup> In personal interviews, patients stressed that they were anti-abortion. They had no desire to challenge the status quo, only to show how their case was exceptional. One patient described the extreme traumatic impact her anencephalic pregnancy had on her life. She left the Catholic Church, divorced her husband and fell into a deep depression. Despite rearranging certain beliefs as a result of the experience, however, she insisted she is still anti-abortion. When questioned on whether she would support abortion for psychological reasons, she said each decision would need to be made on a case-by-case basis. She was willing to grant that individual circumstances may indicate choices that are contrary to strongly held societal norms, but was unwilling to challenge those norms on a more global level. Instead, she found it necessary to fit her situation into the prevailing societal framework and present herself as a worthy victim.<sup>83</sup>

## **Conclusion**

As discussed, there is definite benefit in tailoring advocacy to existing norms. When the opposition is unwilling to even encounter the idea of women's human rights, a focus on anencephaly tracks traditional views and at least allows some women to obtain a legal abortion. It is unlikely however, that this focus will challenge moral hegemony in the area of abortion so as to push the legislature and society towards decriminalization.

By maintaining criminal laws, women cannot see themselves as making reasonable choices for their health based on medical recommendations. Instead they must frame their experiences and themselves in ways that society and the criminal system will accept, reinforcing abor-

tion stigma and causing a serious impact on their well-being.

*Acknowledgements: Thanks to Regiane Garcia, Carmen Campos, Joanna Erdman and Martin Hevia. Special thanks to Dean Mayo Moran.*

*Keri Bennett is a third year JD student at the Faculty of Law, University of Toronto. She has worked on women's rights and reproductive and sexual health issues with several organizations in the Americas and is particularly interested in the Latin American Region.*

<sup>1</sup>In March of 2008, a clandestine abortion clinic in Mato Grosso do Sul was raided and nearly 10,000 women were accused of the crime of abortion. Current information indicates that 36 have been sentenced to trial. Further clinic raids in other cities have since taken place. Controversy around the issue instigated a hearing in the House of in July 2008 and a bill to legalize abortion was defeated. IPAS BRASIL, Informe Especial—Julho 2008, “Aborto é tema de discussão no Congresso Nacional.” Online: <<http://www.ipas.org.br/revista/informe0708.html>> Accessed 30 July, 2008. See, also, Guedes, Alessandra Cassanova “Abortion in Brazil: Legislation, Reality and Options” (2000) 18 (16) *Reproductive Health Matters* 66 at 69.

<sup>2</sup>Brasil. Código Penal. Decreto-Lei 2.848 de 07/12/1940, Arts. 124-128.

<sup>3</sup>See e.g. Superior Tribunal de Justiça . Habeus Corpus. Impetrante: Luiz Carlos Lodi da Cruz. Impetrado: Tribunal de Justiça do Estado de São Paulo Relatora: Laurita Vaz. 18 de dezembro, 2003. online: Supremo Tribunal de Justiça <<http://www.stj.gov.br>> [HC 32.159 2003 STJ]

<sup>4</sup>Best, Robert G. Ph.D., FACMG, Director, Department of Obstetrics and Gynecology, Division of Genetics, Professor, University of South Carolina School of Medicine, EMedicine Online: <<http://www.emedicine.com/neuro/topic639.htm>> Accessed 12 December, 2007

<sup>5</sup>*American Heritage Dictionary.*

<sup>6</sup>*Supra* note 5.

<sup>7</sup>Brazil has the fourth highest rate of anencephaly at 8.62 children per 10,000 births. *World Atlas of Birth Defects*, 2003. <[http://www2.eur.nl/fgg/medbib/WHO\\_world\\_atlas\\_of\\_birth\\_defects.html](http://www2.eur.nl/fgg/medbib/WHO_world_atlas_of_birth_defects.html)>. Accessed 2 January 2008.

<sup>8</sup>Brasil. Código Penal. Decreto-Lei 2.848 de 07/12/1940, articles 124-128.

<sup>9</sup>Supremo Tribunal Federal. Arguição de Descumprimento de Preceito Fundamental. Argente: Confederação Nacional dos Trabalhadores na Saúde. Relator: Marco Aurélio. Relatório. 20 de outubro, 2004. online: Supremo Tribunal Federal <<http://www.stf.gov.br>> [ADPF]

<sup>10</sup>Burris, S. “Disease Stigma in Public Health Law and Research.” *Journal of Law, Medicine and Ethics* 30 (2002): 179-190 at 256.

<sup>11</sup>Burris, S., I. Kawachi and A. Sarat, “Integrating Law and Social Epidemiology.” (2002) 30 (4) *Journal of Law, Medicine and Ethics* 510 at 513.

<sup>12</sup>*Supra* note 11 at 257.

<sup>13</sup>Cook, R.J and S. Howard, “Accommodating Women's Differences under the Women's Anti-Discrimination Convention.” *Emory Law Journal* 56(4) (2007): 1039-1092 at 1044-1046 and 1049.

<sup>14</sup>*Ibid.* at 1078.

<sup>15</sup>*Supra* note 11 at 179.

<sup>16</sup>Evandro Éboli, “Aborto de alto risco é terceira causa de morte materno no país” *O Globo* 20 de maio de 2007: 3.

<sup>17</sup>*Ibid.*

<sup>18</sup>*Supra* note 12 at 512.

<sup>19</sup>See *supra* note 12 at 513 for a discussion on how psychosocial well being has physiological impact.

<sup>20</sup>*Ibid.*

<sup>21</sup>*Ibid.*

<sup>22</sup>*Supra* note 14 at 1063.

<sup>23</sup>See Burris, “Law is a medium for the exercise of power, and so a means of enforcing stigma.” *Supra* note 11 at 185.

<sup>24</sup>Brasil. Código Penal. Decreto-Lei 2.848 de 07/12/1940

<sup>25</sup>*Ibid.* Título 11: Dos Crimes Contra a Pessoa, Capítulo 1: Dos Crimes Contra a Vida.

<sup>26</sup>*Ibid.*

*Abortion induced by the pregnant woman or with her consent:*

Article 124. Induce an abortion on herself, or consent to another person inducing it. Punishment: Detention of one to three years.

*Abortion induced by a third party (with consent):*

Article 126. Induce an abortion, with the consent of the pregnant woman Punishment: Imprisonment of one to three years.

<sup>27</sup>*Abortion induced by a third party:*

Article 125. Induce an abortion, without the consent of the pregnant woman. Punishment: Reclusion of three to ten years.

Art. 127. The punishment established in the two prior articles will be augmented by a third if, as a consequence of the abortion or the measures taken to induce it, the pregnant woman suffers serious physical harm; the punishment will be doubled if, for any of these reasons, she dies.

<sup>28</sup>*Ibid.* Art. 128. An abortion carried out by a medical doctor will not be punished IF:

I—There is no other way to save the life of the pregnant woman (NECESSARY ABORTION);

II—if the pregnancy is the result of rape and the abortion is preceded by the consent of the pregnant woman, or by her legal representative, if she is unable to give her consent (SENTIMENTAL ABORTION).

<sup>29</sup>See Marques, Alexandra Paranhos Pinheiro “Anencefalia Permite A Interrupcao da Gravidez? “*Abortamento Eugênico ou Eugênico—Possível ou Não em Nosso Odenamento Jurídico?*” Revista De Direito De Defensoria Pública. 19 (20) (2006): 43-58 for discussion on the various legal arguments used to seek judicial authorization.

<sup>30</sup>See. e.g. Rio Grande do Sul. Tribunal de Justiça. Apelação Crime. n.º70012840971. Apelante: Marli da Sivla dias Dariva. Apelado e Alvaro Joel Dariva: Ministério Público. Relator: Des. Marcel Esquivel Hoppe. Acórdão, 5 de outubro de 2005. online: Tribunal de Justiça de Rio Grande

do Sul <<http://www.tj.rs.gov.br/>>. [AC 70012840971 (2005) TJRS]

<sup>31</sup>See, e.g. Rio Grande do Sul. Tribunal de Justiça. Apelação Crime. n.º 70011918026. Apelante: M.C.A.S. Apelado: M.P.V. Relatores: Des. Danúbio Edon Franco e Des. Newton Brasil de Leão. Acórdão, 9 de junho de 2005. online: Tribunal de Justiça de Rio Grande do Sul <<http://www.tj.rs.gov.br/>>. [AC 70011918026 (2006) TJRS]

<sup>32</sup>Supremo Tribunal Federal. Arguição de Descumprimento de Preceito Fundamental. Argente: Confederação Nacional dos Trabalhadores na Saúde. Relator: Marco Aurélio. Relatório. 20 de outubro, 2004. online: Supremo Tribunal Federal <<http://www.stf.gov.br/>> [ADPF]

<sup>33</sup>Amici Curiae na ADPR 54, Conectas Direitos Humanos e Centro de Direitos Humanos

<sup>34</sup>*Ibid.* at 26.

<sup>35</sup>*Ibid.* at 14.

<sup>36</sup>Termero, María “História Severina.” *Criativa* (Novembro 2005) at 83.

<sup>37</sup>*Ibid.* at 84.

<sup>38</sup>Superior Tribunal de Justiça. Habeus Corpus. Impetrante: Luiz Carlos Lodi da Cruz. Impetrado: Tribunal de Justiça do Estado de São Paulo Relatora: Laurita Vaz. 18 de dezembro, 2003. online: Supremo Tribunal de Justiça <<http://www.stj.gov.br/>> [HC 32.159 2003 STJ] at 7.

<sup>39</sup>*Ibid.* at 7-8

<sup>40</sup>*Ibid.* at 9.

<sup>41</sup>Matsuura, Lilian “Ilegalidade inútil: Proibição não impede aborto, diz advogada em parecer” *Consultor Jurídico* (8 setembro 2007) at 2. online: Consultor Jurídico <[http://conjur.estadao.com.br/static/text/59273?display\\_mode=print](http://conjur.estadao.com.br/static/text/59273?display_mode=print)>. Accessed 29 March, 2008.

<sup>42</sup>Interview with Oscar Vilhena, Director Jurídico of Conectas Direitos Humanos, Wednesday, July 18, 2007. Location, Conectas, Rua Pamplona 1197 casa 04, São Paulo, SP, Brasil.

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid.*

<sup>45</sup>Villela, Wilza Maria, Araujo, Maria Jose “Making abortion available in

Brazil: partnership and practice.” *Reproductive Health Matters* 8 (16) (2000): 77-82 at 78.

<sup>46</sup>Interview with Alexandre Paranhos Pinheiro Marques, Coordinator of the Human Rights Division of the State of Rio de Janeiro, Tuesday, July 10, 2007. Location: Governo do Estado do Rio de Janeiro, Defensoria Pública do Estado do Rio de Janeiro Av Marechal Câmara, 314-2 andar, Centro, Rio de Janeiro, RJ, Brasil.

<sup>47</sup>*Supra* note 30 at 47.

<sup>48</sup>See for example Rio Grande do Sul. Tribunal de Justiça. Apelação Crime. n.º 70016886509. Apelante: Vera Maria Dias Fontura. Apelado: A Justica. Acórdão, 28 de setembro de 2006. online: Tribunal de Justiça de Rio Grande do Sul <<http://www.tj.rs.gov.br/>>. [AC 70016886509 (2006) TJRS], where not even the possibility of threat to life of a mother with gestational diabetes is seen to be sufficient to authorize a therapeutic abortion.

<sup>49</sup>*Supra* note 30 at 47.

<sup>50</sup>Interview with Dr. Thomas Gollop, gynecologist, geneticist and Director of the Institute of Fetal Medicine and Human Genetics in Sao Paulo, Genetica Clinic, Rua Feliz de Souza 321 Campo Belo Sao Paulo, SP, Friday July 20, 2007.

<sup>51</sup>Carmen Campos, Master’s thesis, University of Toronto, *Therapeutic Abortion: The Brazilian Case of Anencephaly* (2006) at 51.

<sup>52</sup>Rio Grande do Sul. Tribunal de Justiça. Habeus Corpus. n.º 7001543098. Impetrante/Paciente: Rita Adriana Soares Pereira. Impetrado: Juiz de Direito da 1ª Vara do Júri. Relator: Newton Brasil de Leão. Acórdão, 17 de fevereiro de 2005. Online: Tribunal de Justiça de Rio Grande do Sul <<http://www.tj.rs.gov.br/>>. [AC 7001543098 (2005) TJRS].

<sup>53</sup>*Supra* note 31.

<sup>54</sup>*Ibid.* at 7. This was also the reasoning used in the main case of anencephaly which reached the Supreme Court. “One does not need to be a specialist to understand that without a vital organ that commands the basic functions of the human body,

as well as the feelings and emotions, extra-uterine life is impossible.” This decision is not binding on lower courts, however. Supremo Tribunal Federal. Habeus Corpus. Paciente: Gabriele Oliveira Cordeiro. Impetrante: Fabiana Paranhos e Outro(a)s. Coator(a/s)(es): Superior Tribunal de Justiça. Relator: Joaquim Barbosa. Acórdão. 4 de março, 2004. online: Supremo Tribunal Federal <<http://www.stf.gov.br/>> [STF].

<sup>55</sup>Rio de Janeiro. Tribunal de Justiça. Habeus Corpus n.º 2004.059.06681. Impetrantes: Dr. Fernando José Aguiar de Oliveria, Defensor Público, Renata Ferreira Porto (estagiária da Defensoria). Paciente: Gisele Barbose da Silva. Relatora L. Rea. Suely Lopes Magalhães Acórdão, 27 de janeiro de 2005. online: Tribunal de Justiça de Rio de Janeiro <<http://www.tj.rj.gov.br/>>. [HC 2004.059.06681 TJRS]

<sup>56</sup>*Supra* note 30 at 52.

<sup>57</sup>Rio Grande do Sul. Tribunal de Justiça. Apelação Crime. n.º 70011400355. Apelante: Leandra Ganbin. Apelado: Ministerio Publico. Relatora: Desa. Elba Aparecida Nicolli Bastos. Acórdão, 14 de abril de 2005. Online: Tribunal de Justiça de Rio Grande do Sul <<http://www.tj.rs.gov.br/>>. at 9. [AC 70011400355 (2005) TJRS].

See also at 8, “In this case—when there is no possibility of life, it is legitimate for the doctor to anticipate birth, basing authorization not in the expressed law, but in the supra-legal cause, principles of rights independent of the law—dignity of the woman, her mental and physical health, excluding criminality for lack of culpability.

<sup>58</sup>*Supra* note 4.

<sup>59</sup>*Supra* note 31

<sup>60</sup>*Ibid.*

<sup>61</sup>“STJ permite aborto de criança com problema letal.” (da Agencia Estado) Online: <<http://noticias.correioweb.com.br/>> Accessed 07 December, 2007.

<sup>62</sup>*Supra* note 10.

<sup>63</sup>*C.R.O v. Estado de Buenos Aires*, 2002 Corte Suprema del Estado de Buenos Aires at 2, quoting T., S. c.

“Gobierno de la Ciudad de Buenos Aires,” sentencia del 11-I-2001, publicado en “El Derecho,” Diario de Jurisprudencia y Doctrina n° 10.213, supl. del 13 de marzo de 2001.

<sup>64</sup>*Ibid.*

<sup>65</sup>*Supra* note 11 at 258.

<sup>66</sup>*Supra* note 10 at 7

<sup>67</sup>English Summary of c-355/3006 Women’s Link Online [http://www.womenslinkworldwide.org/pdf\\_pubs/pub\\_c3552006.pdf](http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf) at 19. Accessed 15 December, 2007.

<sup>68</sup>Merry, Sally Engle, *Human Rights and Gender Violence: Translating International Law into Local Justice* Chicago: University of Chicago, 2005, c.6 at 193.

<sup>69</sup>*Ibid.* at 199.

<sup>70</sup>*Ibid.* at 200.

<sup>71</sup>*Ibid.* at 216.

<sup>72</sup>Miller, A “Sexuality, violence against women, and human rights: women make demands and ladies get protection.” (2004) 7(2) *Health and Human Rights* 16 at 28.

<sup>73</sup>*Ibid.* at 21.

<sup>74</sup>*Ibid.* at 38.

<sup>75</sup>María Termero, “História Severina.” *Criativa* (Novembro 2005) at 83.

<sup>76</sup>Diniz, Débora. *Severina Tortuada*. Série Anis. 2006. Online: <[http://www.anis.org.br/serie/artigos/sa43\\_diniz\\_severina.pdf](http://www.anis.org.br/serie/artigos/sa43_diniz_severina.pdf)>. Accessed 22 December 2007.

<sup>77</sup>Interview with Judge José Henrique Rodriguez Torres, Director of the Fórum de Comarca de Campinas, Campinas, SP. July 12, 2007.

<sup>78</sup>*Supra* note 50 at 37.

<sup>79</sup>Juliane Zaché, *Médico com Causa*, ISTOÉ (February 9 2005) at 83.

<sup>80</sup>Florencia Luna...[et al.], *Salud pública y anencefalia*, Observatorio Argentino de Bioética (Flasco) (2004) at 11. Online: <[http://www.flasco.org.ar/uploaded\\_files/Publicaciones/dt1\\_Salud.Publica.y.Anencefalia.pdf](http://www.flasco.org.ar/uploaded_files/Publicaciones/dt1_Salud.Publica.y.Anencefalia.pdf)>. Accessed 22 December 2007.

<sup>81</sup>*Ibid.* at 22.

<sup>82</sup>*Supra* note 1 at 256

<sup>83</sup>Interview with patient, anonymity requested, Caierias, SP, July 19, 2007.

## RONNIE R. BROWN

### Puss in Boots

#### Part II (In Boots)

Knee-high lace ups, florescent purple suede  
with a platform sole—no one *needs*  
*boots like these* she thinks  
as she bags them for the trash, but *oh*,  
*how I wanted them*  
*once!*

They’d spotted the boots  
in a little boutique on Ste. Catherine Street.  
Half price! And he was so anxious  
to buy them, so anxious  
to please. Later  
she would discover the boots  
leaked when it rained, the lacings  
left purple criss-crosses up  
and down her legs and,  
if she walked to far, her feet  
paid the price. Later still  
she would learn that he  
had been cheating on her  
all along, had bought her bought the boots  
to ease his conscience.

“Why  
did you keep these ugly things  
so long? her daughter asks  
as she ties off another garbage bag.  
“A reminder,” she says. Her daughter  
is eager to hear more, but she  
grabs the bag and, smiling to herself,  
tosses it to the curb.

Ronnie R. Brown is an Ottawa writer whose work has appeared in over one hundred magazines and anthologies including: *Arc*, *Geist*, *Matrix*, as well as *Canadian Woman Studies*. The author of four previous books of poetry, her fifth, *Night Echoes* was recently short-listed for The Acorn-Plantos People’s Poetry Award.