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The Women's Convention, Reproductive Rights, and the Reproduction of Gender

BARBARA STARK*

Traditionalists, whether working within a religious or a "scientific" framework, have regarded women's subordination as universal, God-given, or natural, hence immutable The traditionalist explanation focuses on women's reproductive capacity and sees in motherhood woman's chief goal in life Thus the sexual division of labor based on biological differences is seen as functional and just.¹

—Gerda Lerner, *The Creation of Patriarchy*, 16-17

INTRODUCTION

President Barack Obama has asked Senator John Kerry, Chair of the Senate Foreign Relations Committee, to move forward on the Convention on the Elimination of All Forms of Discrimination Against Women² ("CEDAW" or the "Women's Convention"),³ which President Jimmy Carter signed in 1978.⁴ This Article focuses on the consequences of ratification for reproductive rights. Under CEDAW, I argue, the United States would be required to fully assure these rights, including subsidized family planning services and abortion.

Part I of this Article describes CEDAW's broad prohibition against what I call 'the reproduction of gender,' including the "sexual division of labor based on biological differences" that historian Gerda Lerner⁵ and other feminist

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1. GERDA LERNER, *THE CREATION OF PATRIARCHY* 16-17 (1986).

2. G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

3. Letter from Richard R. Verma, Assistant Sec'y, Bureau of Legislative Affairs, to John F. Kerry, Senator, U.S. Senate (May 11, 2009), available at http://globalsolutions.org/files/general/White_House_Priorities_List.pdf.

4. As a signatory, under Article 18 of the Vienna Convention on the Law of Treaties (VCLT), the United States must refrain from any action that would "defeat the object and purpose of a treaty." Vienna Convention on the Law of Treaties art.18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

5. See LERNER, *supra* note 1, at 17.

scholars identify as the bedrock for women's subordination.⁶ Part II explains why the denial of reproductive rights necessarily reproduces gender hierarchy, whether by the state or by non-state actors. Part III explains how this plays out, internationally and in the United States. It does so by drawing on recent work regarding the fragmentation of international law. This fragmentation has led to the proliferation of national applications. It then situates this law in U.S. constitutional jurisprudence, showing how the argument set out in this Article resonates with the arguments of Justice Ruth Bader Ginsburg, and Professors Sylvia Law, Reva Siegel and others, to ground reproductive rights in equality, rather than privacy. Efforts to do so under the U.S. Constitution have failed. As this Article demonstrates, CEDAW provides equality on steroids, equality that can do the work necessary to assure reproductive rights.

It should be noted that many American proponents of CEDAW oppose my argument. Rather, it is their view that CEDAW does not require support for family planning services and is "abortion neutral."⁷ Indeed, pro-life *opponents* of ratification argue, as I do, that CEDAW requires support for family planning services and abortion.⁸ I agree, although in my view this is another reason why the United States should ratify CEDAW.

6. See, e.g., Alison M. Jaggar, *Globalizing Feminist Ethics*, HYPATIA, Spring 1998, at 7-31 (1998) (noting consensus among feminists in the developing world that "the abolition of the sexual division of labor [and] freedom of choice over childbearing" are necessary to overcome women's subordination) (citation omitted); MAJA KIRILOVA ERIKSSON, *REPRODUCTIVE FREEDOM* 166 (2000) (arguing that, "Reproductive freedom is *sine qua non* for the attainment of any real equality between women and men"); Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853, 867 (1999) ("Birth control is at the very heart of male/female relationships, and of any society's future, and few other facets of life have the same emotional depth, as John Stuart Mill and others understood so well. Safe and effective birth control and related information, including information on abortion, threatens a system as old as human life."); see also Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in FEMINIST ANTHROPOLOGY 87, 90 (Ellen Lewin ed., 2006) (drawing on Claude Lévi-Strauss, Sigmund Freud, and Jacques Lacan to develop a theory of "a sex/gender system," found in every society, consisting of "a set of arrangements by which the biological raw material of human sex and procreation is shaped by human, social intervention"); Carla Makhoul Obermeyer, *A Cross-Cultural Perspective on Reproductive Rights*, 17 HUM. RTS. Q. 366 (1995) (seeking commonalities between Western and Islamic approaches to gender rights). But see Fraser, *supra*, at 899 (noting different views regarding the "roots of [gender] inequality" of the LDCs, western industrialized states, and the Soviet bloc at the Copenhagen Conference); Rosalind P. Petchesky, *Negotiating Reproductive Rights*, in SEXUALITIES AND SOCIETY 227, 230 (Jeffrey Weeks et al. eds., 1998) ("Despite its widespread use since the Cairo conference, the concept of reproductive rights is by no means universally accepted among feminist groups around the globe. For some, it evokes a highly westernized and narrow frame of reference that reduces reproduction at best to fertility control and at worst to the single issue of abortion; or it evokes an even more devious scenario that masks racist and eugenic population control behind 'a feminist face.'") (citation omitted).

7. LUISA BLANCHFIELD, CONG. RESEARCH SERV., THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 13 (2009) ("[T]he Clinton Administration . . . declared the treaty abortion neutral in 1994. Supporters [of CEDAW] also emphasize that many countries where abortion is regulated or illegal, including Burkina Faso, Colombia, and Ireland, ratified the Convention without associated reservations, understandings, or declarations (RUDs), and regularly report to the CEDAW Committee.").

8. *Id.* at 14 (noting that, "opponents of U.S. ratification argue that . . . [CEDAW] could lead to the abolishment of state parental notification laws, require federal funding for abortions, or obligate the U.S. government to promote and provide access to abortion."). I view these arguments as a

Both positions reflect their proponents' strategies regarding ratification of CEDAW.⁹ They may be right, but I am not arguing that the United States should or should not ratify CEDAW, or that relying on CEDAW is or is not a useful strategy for furthering reproductive rights in the United States. It may well have the opposite effect.¹⁰ Rather, my argument is that the Women's Convention bars the reproduction of gender, which, as a matter of law, requires the assurance of women's reproductive rights in the United States and everywhere else.

I. THE REPRODUCTION OF GENDER¹¹

A. Reproductive Rights Under International Law

Women's rights are relatively new in international law. While the International Bill of Rights¹² requires states to treat women and men 'equally,'

welcome concession, which should facilitate the actual provision of such support following ratification. As pro-life advocates further observe, "In 1998, for example, the Committee recommended to Mexico that 'all states . . . should review their legislation so that, where necessary, women are granted access to rapid and easy abortion.' More recently, in 2007, the Committee urged Poland 'to ensure that women seeking legal abortion have access to it, and that their access is not limited by the use of the conscientious objection clause.'" *Id.* at 15.

9. Jeffrey Toobin, *Not Covered*, NEW YORKER, Nov. 23, 2009, at 37 (pointing out that pro-choice Democrats, including President Obama, have "worked so hard to be respectful of [their] opponents . . . [that they] sometimes seem[] to cede them the moral high ground . . . [Obama] announce[d] 'Abortion vexes.' The opponents of abortion aren't vexed—they are mobilized, focused, and driven to succeed. The Catholic bishops took the lead in pushing for the Stupak amendment, and they squeezed legislators in a way that would do any K Street lobbyist proud."); see Ann Shalleck, *Offspring and Bodies: Dependency and Vulnerability in the Constitutional Jurisprudence of Rights*, 77 GEO. WASH. L. REV. 1620, 1621 (2009) (urging a "move . . . beyond the rigid and distorting legal framework of competing maternal and fetal rights that dominates the jurisprudence of and argument surrounding abortion").

10. See BLANCHFIELD, *supra* note 7, at 15. The politics of abortion are complicated. Justice Ruth Bader Ginsburg viewed *Roe v. Wade* as a political mistake, for example, which "prolonged divisiveness and deferred stable settlement of the issue." Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in WHAT ROE V. WADE SHOULD HAVE SAID 3, 11 (Jack M. Balkin ed., 2005). Justice William Brennan also thought it would have been wiser to wait and see what the legislatures might do, rather than set out *Roe's* trimester framework. *Id.* at 10. More recently, Neal Devins has argued that public opinion drives the law in this context, so public opinion should be addressed before legal reform is attempted. See generally Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318 (2009). Reva Siegel has carefully documented the ways in which "constitutional culture channels social movement conflict." Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) (explaining how "equal protection doctrine prohibiting sex discrimination was forged in the Equal Rights Amendment's defeat"). See generally Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (documenting how the Right has tailored its arguments to reflect cultural change).

11. This includes the sexual division of labor based on biological differences. See *supra* text accompanying notes 5-6. As explained below, it may extend beyond the sexual division of labor to stereotypes arguably unrelated to it, but which nevertheless signal gender in a particular culture. For example, in the United States, dressing babies in pink signals that they are girls.

12. This consists of the Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration]; the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 [hereinafter Civil Covenant or ICCP]; and the

this assumes and confirms a male norm.¹³ The Covenants and the Universal Declaration protect rights in the public sphere, that is, the rights of individuals in their relations with the state. Some family rights are recognized,¹⁴ but even here the focus is to protect the family from the state, rather than to protect women within the family from men.¹⁵ As the Committee responsible for monitoring CEDAW notes, "historically, human activity in public and private life has been viewed differently and regulated accordingly. In all societies, women who have traditionally performed their roles in the private or domestic sphere have long had those activities treated as inferior."¹⁶

A similar dynamic has been noted in U.S. law, where constitutionally-protected civil and political rights have been championed by men for more than 200 years. These rights are worth most to those women whose lives are most like men's. When women seek "formal" equality, when they demand the same rights as men to freedom of speech, for example, they can rely on well-developed equality jurisprudence. When women assert reproductive rights, they are in less well-charted territory. These rights address issues historically and almost universally relegated to the private sphere, left to the determination of the married couple. Reproductive rights in the United States were first articulated in the 1960s in *Griswold v. Connecticut*,¹⁷ which protected the couple's freedom from state intrusion in the marital bedroom. As a practical matter, this reflected and perpetuated women's subordination within the marriage, since the husband was the decision maker in the traditional couple.¹⁸ Reproductive rights were not extended to *individuals* until *Eisenstadt v. Baird*¹⁹ in 1972.

International Covenant on Economic, Social and Cultural Rights, 999 U.N.T.S. 3 [hereinafter Economic Covenant].

13. This is one reason equality jurisprudence lacks the muscle to assure reproductive rights in the United States. See *infra* Part III.B; HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW* 32 (2000).

14. See, e.g., Economic Covenant, *supra* note 12, art. 10.

15. Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881 (2000).

16. CEDAW Comm., General Recommendation No. 21, U.N. GAOR, 49th Sess., Supp. No. 38, ¶¶ 11-12, U.N. Doc. A/49/38 (Apr. 12, 1994), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> [hereinafter General Recommendation No. 21].

17. 381 U.S. 479 (1965) (striking Connecticut law barring the provision of contraceptives and medical advice regarding their use); see, e.g., JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* 3 (2005). As explained *infra* Part III.B., in the United States, privacy doctrine has been widely criticized.

18. LERNER, *supra* note 1. Many of the world's women, including women in the United States, still spend much of their lives in the private sphere of the home and the family. See General Recommendation No. 21, *supra* note 16, ¶ 8. As the Committee further observes:

As such activities are invaluable for the survival of society, there can be no justification for applying different and discriminatory laws or customs to them. Reports of States parties disclose that there are still countries where de jure equality does not exist . . . Even where de jure equality exists, all societies assign different roles, which are regarded as inferior, to women. In this way, principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated.

General Recommendation No. 21, *supra* note 16, ¶ 12.

19. 405 U.S. 438 (1972) (striking Massachusetts law allowing doctors and pharmacists to provide contraceptives only to married persons); see Elizabeth M. Schneider, *The Dialectic of Rights and*

Reproductive rights are of similarly recent vintage in international law. The basic concept first appeared in 1968, in the final document approved by the Teheran Conference on Human Rights in 1968:²⁰ "[T]he rights to decide freely and responsibly on the number and spacing of their children and to have the access to the information, education and means to enable them to exercise these rights."²¹ But it was not until the World Conference on Population in 1994 ("Cairo Conference") that reproductive rights were clearly articulated.²² Although convened to address population issues, the participants in the Cairo Conference recognized that: (1) family-planning programs should not involve any form of coercion, (2) government-sponsored economic incentives and disincentives were only marginally effective, and (3) governmental goals "should be defined in terms of unmet needs for information and services," rather than quotas or targets imposed on service providers.²³ The aim "should be to assist couples and individuals to achieve their reproductive goals and give them the full opportunity to exercise the right to have children by choice."²⁴ The Cairo Conference required states to meet the family planning needs of their populations as soon as possible, but no later than 2015.²⁵ The Cairo Conference recognized that reproductive rights include both "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, and to have the information and means to do so" and

Politics: Perspectives from the Women's Movements, 61 N.Y.U. L. REV. 589, 634-42 (1986) (explaining how the struggle for reproductive rights shaped, and was shaped by, the women's movement). See generally Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994).

20. For a cogent overview, see generally Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991).

21. Proclamation of Teheran, May 13, 1968, art. 16, available at http://www.unhchr.ch/html/menu3/b/b_tehern.htm; see Reed Boland, *Symposium on Population Law: The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1158-60 (1997). Reproductive rights encompass a wide range of activities. These include surrogacy, other forms of assisted conception, female genital surgeries, and the health needs of women with HIV/AIDS. For a comprehensive overview, see REBECCA COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS* (2003). See generally IVAR BLEIKLIE ET AL., *COMPARATIVE BIOMEDICAL POLICY: GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGIES* (2004). The focus of this Article, like that of CEDAW, is on core reproductive rights, including those set out in the African Protocol. See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted July 11, 2003, CAB/LEG/66.6 (entered into force Nov. 25, 2005), available at <http://www1.umn.edu/humanrts/africa/protocol-women2003.html> [hereinafter African Protocol]. Whether CEDAW includes a right to assisted conception, or whether surrogacy perpetuates gender stereotypes, for example, is beyond the scope of this Article. See, e.g., Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, March 10, 2008, at A9. See generally Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (2009).

22. International Conference on Population and Development, Sept. 5-13, 1994, *Report of the International Conference on Population and Development*, ¶¶ 6.1, 7.12, U.N. Doc. A/CONF. 171/13 (Oct. 18 1994) [hereinafter Cairo Conference]; see NADINE TAUB, *INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, ISSUE PAPERS ON WORLD CONFERENCES* (1994); see also Barbara B. Crane & Stephen L. Isaacs, *The Cairo Programme of Action: A New Framework for International Cooperation on Population and Development Issues*, 36 HARV. INT'L L.J. 295 (1995).

23. Cairo Conference, *supra* note 22, ¶ 7.12.

24. *Id.* ¶ 7.16. A number of countries entered reservations, specifically objecting to the word "individuals" in ¶ 7.16.

25. *Id.*

"the right to obtain the highest standard of sexual and reproductive health."²⁶ This somewhat awkward formulation reflects the participating states' disparate approaches to reproductive rights as well as the failure of many states to address these rights at all.²⁷

The idea that women should have control over the number and spacing of their children remains controversial, especially in cultures where large families are viewed as desirable.²⁸ Nevertheless, reproductive rights are increasingly recognized in international human rights law.²⁹ These rights, including education about family planning and access to contraception, are now widely recognized throughout the world, often in connection with the right to health, a right which is not recognized in U.S. law.³⁰ Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit.³¹

Most states have not, however, fully assured women's reproductive rights.³² This would require them to "respect" these rights, that is, to refrain from violating them; to "protect" them, that is, to assure that no third party

26. *Id.* ¶ 7.3. These goals were reiterated at the United Nations, Fourth World Conference on Women. As set out in the Beijing Platform: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence." U.N. FOURTH WORLD CONFERENCE ON WOMEN, THE BEIJING DECLARATION AND PLATFORM FOR ACTION, ¶ 96 (1995).

27. D. MARIANNE BROWER BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY 819-20 (2009) (describing the absence of reproductive rights in Lebanon).

28. RUTH DIXON-MUELLER, POPULATION POLICIES AND WOMEN'S RIGHTS: TRANSFORMING REPRODUCTIVE CHOICE 107 (1993) (describing customs in the Sahel). "Women in the Sahel have a minimal choice as to whether or when to bear a child [because] . . . large families are highly esteemed and the social and religious pressures to bear many children are great." Abd-el Kader Boye et al., *Marriage Law and Practice in the Sahel*, 22 STUD. FAM. PLANNING 343, 347-48 (1991).

29. See, e.g., K.L. v. Peru, Comm. No. 1153/2003 P 2.1, Oct. 24, 2005, U.N. Doc. CCPR/C/85/D/1153/2003, ¶ 2.3 (2005). As Goldberg sums up:

In 2005, the U.N. Human Rights Committee decided its first abortion case, which dealt with a seventeen-year-old Peruvian girl who'd been forced to carry an anencephalic fetus—one missing most of its forebrain—to term, despite the fact that it had no chance of surviving more than a few days outside the womb. The committee ruled that Peru had 'an obligation to take steps to ensure that similar violations do not occur in the future.'

MICHELLE GOLDBERG, THE MEANS OF REPRODUCTION 17 (2009).

30. See Economic Covenant, *supra* note 12, at art. 12. This includes public health campaigns, whether conducted by the World Health Organization (WHO) or national agencies. See, e.g., Simone Grilo Diniz et al., *Not Like Our Mothers: Reproductive Choice and the Emergence of Citizenship Among Brazilian Rural Workers, Domestic Workers and Housewives*, in NEGOTIATING REPRODUCTIVE RIGHTS 69, 69 (Rosalind P. Petchesky & Karen Judd eds., 1998) (citing WHO study of fertility in Brazil); Sev S. Fluss, *The World Health Organization and Women*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 411 (Kelly D. Askin & Dorean Koenig eds., 2000) (describing work of the WHO). The United States, unlike the other industrialized democracies, has not yet ratified the Economic Covenant.

31. See BLAIR ET AL., *supra* note 27, at 794.

32. As Michelle Goldberg notes:

[I]n many poor countries, including large parts of Africa and Latin America and parts of Asia and the Middle East, abortion is either banned entirely or allowed only to save a woman's life. Twenty-six percent of the world's women and men live under such laws, which are largely the relics of colonial constitutions promulgated by European countries that have since abandoned such restrictions for themselves.

GOLDBERG, *supra* note 29, at 41.

restricts them; and to “fulfill” them, that is, to proactively assure their realization.³³ Traditional human rights discourse, as set out in the International Bill of Rights,³⁴ and even the provisions of the Women’s Convention which directly address reproductive rights,³⁵ allow states to fall short. Rather, it is CEDAW’s prohibition against the reproduction of gender which compels these rights, as explained below.

B. The Women’s Convention

1. Beyond Non-Discrimination

CEDAW explicitly guarantees women’s human rights, including their rights to participate in social, economic, cultural and political life on equal terms with men. These rights include the civil and political rights familiar to Americans from our own Constitution, such as the right to vote³⁶ and freedom of movement.³⁷ These rights also include less familiar economic and social rights, such as the right to work³⁸ and the right to health.³⁹

Thus, CEDAW assures positive as well as negative rights, imposing obligations on the state. Under CEDAW, moreover, rights are to be assured in fact as well as in law. That is, CEDAW goes beyond formal equality (equality of opportunity) to require outcome equality.⁴⁰ There is no required showing of discriminatory intent. Under CEDAW, “discrimination” is genuinely robust:

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis

33. The Committee explains the requirements to “respect, protect and fulfil” rights in the context of reproductive rights specifically:

14. The obligation to *respect rights* requires States parties to refrain from obstructing action taken by women in pursuit of their health goals. . . . For example, States parties should not restrict women’s access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried or because they are women. . . . 15. The obligation to *protect rights* . . . requires States parties . . . to prevent and impose sanctions for violations of rights by private persons and organizations. . . . 17. The duty to *fulfil rights* places an obligation on States parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to health care. Studies such as those which emphasize the high maternal mortality and morbidity rates worldwide and the large numbers of couples who would like to limit their family size but lack access to or do not use any form of contraception provide an important indication for States parties of possible breaches of their duties to ensure women’s access to health care.

CEDAW Comm., General Recommendation No. 24, U.N. GAOR, 20th Sess., ¶ 17, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter General Recommendation No. 24].

34. See *supra* note 12.

35. See *infra* text accompanying notes 44-46.

36. See BLANCHFIELD, *supra* note 7, at art. 2.

37. *Id.* at art. 15.4.

38. *Id.* at art. 11.

39. *Id.* at art. 12.

40. CHARLESWORTH & CHINKIN, *supra* note 13, at 217.

of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁴¹

Under Article 2, furthermore, “States Parties condemn discrimination against women in all its forms” and “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”⁴² Article 4 specifically provides for affirmative action “aimed at accelerating de facto equality.”⁴³ CEDAW, in short, requires the state to assure actual equality between women and men, sooner rather than later. As explained below, this is just the beginning.

2. The Sexual Division of Labor

As anthropologist Gayle Rubin notes, the sexual division of labor based on biological differences appears in “endless variety and monotonous similarity, cross-culturally and throughout history.”⁴⁴ As Rubin explains:

Although every society has some sort of division of tasks by sex, the assignment of any particular task to one sex or the other varies enormously . . . [the purpose] is to insure the union of men and women by making the smallest viable economic unit contain at least one man and one woman. The division of labor by sex can therefore be seen as a ‘taboo’: a taboo against the sameness of men and women, a taboo dividing the sexes into two mutually exclusive categories, a taboo which exacerbates the biological differences between the sexes and thereby *creates* gender.⁴⁵

The innumerable iterations of the sexual division of labor are often grounded in stereotypes of women as *reproductive* workers and men as *productive* workers. This includes the ‘female-as-caregiver’ and ‘male-as-rightsholder’ stereotypes described by Aristotle.⁴⁶ In his *polis*, men were citizens, and therefore rightsholders. A woman’s role was to reproduce male citizens, by raising them as well as literally producing them. For Aristotle, this was ‘natural.’ Rightsholders were male—never pregnant, never breastfeeding—and caregivers were female—always subject to the endless demands of caregiving, even if not actually pregnant or breastfeeding.

CEDAW, in contrast, treats this bifurcation as socially constructed. Under CEDAW, reproduction is both supported by the state and disaggregated from women’s traditional roles. That is, even as CEDAW protects women’s reproductive rights, it situates reproduction in a social and cultural context.

41. BLANCHFIELD, *supra* note 7, at art. 1.

42. *Id.* at art. 2.

43. *Id.* at art. 4. There is an enormous amount of literature on CEDAW. See, e.g., Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in HUMAN RIGHTS OF WOMEN 228 (Rebecca J. Cook ed., 1994); Andrew Byrnes, *Human Rights Instruments Relating Specifically to Women with Particular Emphasis on CEDAW*, in ADVANCING THE HUMAN RIGHTS OF WOMEN 38-57 (Andrew Byrnes et al. eds., 1997); LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (1993); Alda Facio & Martha I. Morgan, *Equity or Equality for Women? Understanding CEDAW’s Equality Principles*, 60 ALA. L. REV. 1133 (2009).

44. Rubin, *supra* note 6, at 90.

45. *Id.* at 94.

46. D. BRENDAN NAGLE, THE HOUSEHOLD AS THE FOUNDATION OF ARISTOTLE’S POLIS 85 (2006).

Article 11.2, for example, sets out the measures to be taken by states to “prevent discrimination . . . on the grounds of marriage or maternity and to ensure [women’s] effective right to work.”⁴⁷ These measures include the prohibition of dismissal for pregnancy or maternity leave,⁴⁸ maternity leave with pay or “comparable social benefits,”⁴⁹ and the “necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through the establishment . . . of childcare facilities.”⁵⁰ Article 12 requires the state to “ensure access to healthcare services, including those related to family planning” and, more specifically, to “ensure to women appropriate services in connection with pregnancy, confinement in the postnatal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation.”⁵¹ Article 14 reiterates the right to family planning services for rural women in particular. Finally, Article 16 requires states to “take all appropriate measure to eliminate discrimination against women in all matters relating to marriage and family relations.”⁵²

In addition to these specific guarantees, Article 5 more broadly demands recognition of maternity as a “social function.”⁵³ It also requires states to educate men to share in reproductive work:

States *shall*

[T]ake all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the *recognition of the common responsibility of men and women in the upbringing and development of their children . . .*⁵⁴

47. See CEDAW, *supra* note 2, at art. 11.2.

48. *Id.* at art. 11.2(b).

49. *Id.*

50. *Id.* at art. 11.2(c).

51. The Committee’s General Recommendation No. 24 elaborates on Article 12.1, addressing women’s access to health care, including family planning services. The Committee recommends that, “[w]hen possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion.” General Recommendation No. 24, *supra* note 33, ¶ 31(c). For a more detailed formulation of these rights, see the African Protocol, *supra* note 21. See generally CTR. FOR REPROD. RIGHTS, THE PROTOCOL ON THE RIGHTS OF WOMEN IN AFRICA: AN INSTRUMENT FOR ADVANCING REPRODUCTIVE AND SEXUAL RIGHTS (2006), available at http://www.reproductiverights.org/pdf/pub_bp_africa.pdf.

52. CEDAW, *supra* note 2, at art. 16. Article 16 has received an unprecedented number of reservations; Rebecca Cook, *Reservations to the Convention on the Elimination of All forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643 (1990). Two States Parties to the Convention—Malta and Monaco—stated in their reservations to CEDAW that they do not interpret Article 16(1)(e) as imposing or forcing the legalization of abortion in their respective countries. BLANCHFIELD, *supra* note 7, at 14.

53. CEDAW, *supra* note 2, at art. 5(b).

As noted in a leading human rights text, “the breadth and aspiration of this article can only be described as striking.”⁵⁵ CEDAW recognizes that the sexual division of labor is socially constructed, and that it is neither immutable nor ‘natural.’ At the same time, it remains widely internalized and over determined.⁵⁶ Article 5 requires states to identify their own cultural “division of tasks by sex”⁵⁷ and to eradicate them.⁵⁸ The “stereotyped roles” that Article 5

54. *Id.* at art. 5 (emphasis added); see Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817 (2007) (“Perhaps the most prominent feature of the sexual equality approach to reproductive rights is its attention to the social as well as physical aspects of reproductive relations. A sex equality analysis is characteristically skeptical of the traditions, conventions, and customs that shape the sex and family roles of men and women.”).

55. HENRY STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 184 (2008). The effects, if any, of this prohibition on beauty pageants, drag queens, what Robin West has called “women’s hedonic lives,” or pornography is beyond the scope of this Article. See Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 155, 158, 213 (2000). For a provocative account of the sexualization of popular culture in Eastern Europe after the fall of the Soviet Union, see CYNTHIA ENLOE, *THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR* 23-25 (1993).

56. Again, there is a vast literature on the internalization and over-determination of gender. See, e.g., IRIS MARION YOUNG, *THROWING LIKE A GIRL* (2005); NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1989); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* (1976); Katharine T. Bartlett, Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1564 (1974) (noting that “sex roles today are more deeply entrenched than race roles; it is still acceptable, after all, to teach sex roles at home and in school, long after instruction in racial bias has gone underground”). For a compelling study of the ways in which the sexual division of labor is overdetermined in law school, see LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997).

57. CEDAW, *supra* note 2, at art. 5. It is noteworthy that the U.S. delegate repeatedly stressed that the father’s responsibility for childcare be explicit in Article 5. REHOF, *supra* note 43, at 86-87.

58. In Slovakia, for example, the Committee concluded:

While welcoming measures taken by the State party to eliminate gender segregation in the labour market, including through training programmes in the area of equal opportunities, the Committee is concerned about the persistence of traditional stereotypes regarding the roles and tasks of women and men in the family and in society at large . . . [and] recommends that policies be developed and programmes implemented to ensure the eradication of traditional sex role stereotypes in the family, labour market, the health sector, academia, politics and society at large.

CEDAW Committee, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Slovakia*, ¶¶ 32-33, U.N. Doc. CEDAW/C/SVK/CO/4 (2008) [hereinafter *Slovakia*].

Nigeria reported on six ambitions programs, undertaken to eliminate stereotypes pursuant to Article 5, including a new “National Policy on Education” which is “aimed at encouraging increased participation of the girl child in science and technology” and data indicating that women are “beginning to undertake those vocations which were previously considered masculine such as motor mechanic, welding, commercial drivers and motor-cyclists,” as well as efforts to publicize the Child’s Rights Act. CEDAW Committee, *Nigeria State Party Report*, art. 5.1, U.N. Doc. CEDAW/C/NGA/6 (Oct. 5, 2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/687/84/PDF/N0668784.pdf>. In its Concluding Observations, the Committee,

welcom[ed] the adoption by 18 states of the Child Rights Act, which sets the minimum age of marriage at 18 years, [noted] with concern section 29, paragraph 4, of the Constitution, which states that “a woman is deemed to be of full age upon marriage” and urged the repeal of the offending section without delay.

prohibits are specific to particular cultures' "division of tasks by sex," whether it is being a cashier in Saudi Arabia⁵⁹ or nursing in the United States.⁶⁰ This necessarily includes the assurance of women's reproductive rights, because the denial of these rights *creates* the sexual division of labor, as explained below.⁶¹ Article 5 bars all of these stereotypes, even as it recognizes women's unique reproductive capacity and men's responsibility for reproductive work. Rather, under CEDAW, women, like men, have rights, and men, like women, are expected to assume caregiving responsibilities.

Because reproductive rights focus on experiences—conception, pregnancy, childbirth—that affect women more directly than they affect men, these experiences are not reflected in traditional rights discourse.⁶² CEDAW corrects this omission by recognizing women's reproductive work and requiring the state—and men—to support it. Whether by a state or a non-state third party, whether by an affirmative act (such as coerced sterilization), or by an omission

CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Nigeria*, ¶ 318, U.N. Doc. CEDAW/C/NGA/CO/6 (July 8, 2008), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-NGA-CO-6.pdf>.

In addition, "[t]he Committee note[d] the continued high incidence of female genital mutilation in some areas of the country . . . [and] the absence of national legislation prohibiting this harmful traditional practice." *Id.* ¶ 318-19. It also went beyond the subjects addressed by Nigeria to focus on "the persistence of patriarchal attitudes and deep-rooted stereotypes concerning women's roles and responsibilities that discriminate against women and perpetuate their subordination within the family and society . . . [and] the persistence of entrenched harmful traditional and cultural norms and practices, including widowhood rites and practices." *Id.* ¶¶ 322, 324.

59. See, e.g., Fatima Sidiya, *Debate Rages over Saudi Women Working as Cashiers*, ARAB NEWS, Aug. 18, 2010, <http://arabnews.com/saudiarabia/article106238.ece> (describing online controversy regarding the announcement by the Panda supermarket chain that it planned to hire women as cashiers).

60. See, e.g., WORLD BANK, *GENDER ISSUES IN AGRICULTURAL LABOR* (2007); Bureau of Labor Statistics, *Some Occupations Becoming More Gender-Neutral*, 48 OCCUPATIONAL OUTLOOK Q. 48, 48 (2005), available at <http://www.bls.gov/opub/ooq/2004/winter/oochart.pdf> (noting that men in the United States increased their share of employment in nursing between 1983 and 2002, although the field remains dominated by women). But see Margarita Estévez-Abe, *Gendering the Varieties of Capitalism: A Study of Occupational Segregation by Sex in Advanced Industrial Societies*, 59 WORLD POL. 142, 143 (2006) (noting "genuine puzzles" in cross-national patterns). This does not mean, of course that women cannot nurse or that men cannot work as cashiers. It means that the state has an obligation to identify and rectify gendered stereotypes:

[W]hatever the motivation for different treatment, the result is to create a dual system of rights and responsibilities in which the rights of each group are governed by a different set of values. History and experience have taught us that in such a dual system one group is always dominant and the other subordinate. As long as woman's place is defined as separate, a male-dominated society will define her place as inferior.

Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 873-74 (1971):

61. See *infra* Part II. Men, too, have reproductive rights, and these, too, may be denied. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 649, 648 (1972) (holding unmarried father had custodial rights to his children after their mother died). The ways in which the denial—and the assurance—of men's reproductive rights reproduce gender are beyond the scope of this Article.

62. As Brenda Cossman argues, "citizenship has always been sexed." Brenda Cossman, *Sexual Citizens: Freedom, Vibrators, and Belonging*, in *GENDER EQUALITY* (Linda C. McClain & Joanna L. Grossman eds. 2009).

(such as the refusal to fund elective abortions),⁶³ whether imposed on all women or a discrete group, whether the objective is to disempower women or to promote women's equality, the denial of women's reproductive rights is barred by CEDAW.⁶⁴

C. International Equality Jurisprudence

The argument that CEDAW requires the full assurance of women's reproductive rights is further supported by two recent developments in international equality jurisprudence. The first is grounded in rigorous studies documenting women's economic subordination. The second focuses on the burgeoning case law and commentary on same-sex relationships. Both confirm that the sexual division of labor is socially, economically, and legally constructed, and that it can be deconstructed. However entrenched, the sexual division of labor can—and should—be dismantled by law.⁶⁵

1. Women's Poverty

As the CEDAW Committee explains, "public and private spheres of human activity have always been considered distinct, and have been regulated accordingly. Invariably, women have been assigned to the private or domestic

63. See, e.g., David D. Kirkpatrick & Robert Pear, *A Victory in Health Care Vote for Opponents of Abortions*, N.Y. TIMES, Nov. 9, 2009, at A1 (describing restriction on abortion coverage added to the health care bill passed by the House of Representatives).

64. CEDAW does not explicitly assure the right to abortion, reflecting the lack of consensus among states. See, e.g., Cons. Const. 1975 J.C.P. II, No. 18030 (Fr.) (upholding France's abortion law as consistent with Article 2 of the Declaration of the Rights of Man and of the Citizen); *Orzeczenie Trybunalu Konstytucyjnego z Dnia 28 May 1997 r.* (Sygn.akt K. 26/96) (Pol.) (decision of the Polish Constitutional Tribunal striking down legislation enacted to liberalize abortion citing, *inter alia*, Poland's Constitution, which protects human life even at the pre-natal stage and the preamble to the Convention on the Rights of the Child). See generally Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605 (1978); Florian Miedel, *Is West Germany's 1975 Abortion Decision a Solution to the American Abortion Debate? A Critique of Mary Ann Glendon and Donald Kommers*, 20 N.Y.U. REV. L. & SOC. CHANGE 471, 475 (1993-94); Law No. 239 of 24 March 1970 on the interruption of pregnancy, as amended by Law No. 564 of 19 July 1978 and Law No. 572 of 12 July 1985 (Fin.), available at <http://cyber.law.harvard.edu/population/abortion/Finland.abo.htm>. Finland's more restrictive laws reflect its "more conservative culture," despite its "common legal heritage and close ties with Sweden." David Bradley, *Convergence in Family Law: Mirrors, Transplants and Political Economy*, 6 MAASTRICHT J. EUR. & COMP. L. 127 (1999). The CEDAW Committee has criticized states for prohibiting abortion, however. See *supra* note 8. But see BLANCHFIELD, *supra* note 7, at 13-14 (noting that CEDAW has been ratified without RUDs by many states limiting abortion). "Currently, 61% of the world's people live in countries where induced abortion is permitted either for a wide range of reasons or without restriction as to reason. In contrast, 26% of all people reside in countries where abortion is generally prohibited." Ctr. for Reprod. Rights, *World Abortion Law Fact Sheet* (2009), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_abortionlaws2009_WEB.pdf (listing countries). The Committee has also pointed out that "it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women." General Recommendation No. 24, *supra* note 33, ¶ 11.

65. See, e.g., Reva Siegel, *Siegel, J., Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 10, at 66 (noting that "[s]ystems of dominion are neither total nor stable, especially in a society as skeptical of aristocracy and status as is ours"); DIXON-MUELLER, *supra* note 28, at 108 (describing success of family planning programs in Korea, Indonesia and the Philippines, despite unfavorable "[c]ultural and religious (as well as socio-economic) conditions").

sphere, associated with reproduction and the raising of children, and in all societies these activities have been treated as inferior.”⁶⁶ As Marilyn Waring and others show, women’s work is economically invisible—it does not appear in national statistics.⁶⁷ Women everywhere do all or most of the childcare, they clean and maintain the family home, they prepare the family’s food and nurse family members when they become sick. Even when women work outside the home, they continue to perform far more of this work than men. In the United States, for example, Arlie Hochschild and Anne Machung described “the second shift” worked by employed women in the home amounting to an extra month’s work each year compared to their husbands.⁶⁸ As sociologist Suzanne Bianchi and her colleagues have recently shown, the “second shift” persist twenty years later, albeit in more complicated forms: “Fathers’ increased childcare seems to have accelerated particularly in the 1990s . . . [but] [m]others still shoulder twice as much childcare and house work.”⁶⁹

When women work outside of the home, moreover, most work in lower-paid ‘female’ occupations, replicating the sexual division of labor within the family.⁷⁰ Because of the sexual division of labor, women remain relegated to a private sphere of home and family, poverty and powerlessness.⁷¹ They perform 66% of the world’s work,⁷² but they earn only 10% of the world’s income,⁷³ and own merely 1% of the world’s property.⁷⁴ The sexual division of labor is not the only cause of women’s poverty, but it is indisputably a major factor.⁷⁵ Thus, the

66. CEDAW Comm., General Recommendation No. 23, U.N. GAOR, 16th Sess., ¶ 8, U.N. Doc. A/52/38 (Jan. 31, 1997). The Committee concludes: “By contrast, public life, which is respected and honoured, extends to a broad range of activity outside the private and domestic sphere. Men historically have both dominated public life and exercised the power to confine and subordinate women within the private sphere.” *Id.*

67. MARILYN WARING, *IF WOMEN COUNTED* 74, 91 (1988); see also MARILYN WARING, *THREE MASQUERADES: ESSAYS ON EQUALITY, WORK AND HUMAN RIGHTS* 58 (1996). For a detailed description of women’s global economic subordination, see CHARLESWORTH & CHINKIN, *supra* note 13, at 4-14.

68. ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 4, 14 (1989).

69. SUZANNE M. BIANCHI ET AL., *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 177 (2006); see also Sarah M. Kendig & Suzanne M. Bianchi, *Single, Cohabiting, and Married Mothers’ Time with Children*, 70 J. MARRIAGE & FAM. 1228 (2008); Melissa A. Milkie et al., *The Time Squeeze: Parental Statuses and Feelings About Time With Children*, 66 J. MARRIAGE & FAM. 739 (2004).

70. CHARLESWORTH & CHINKIN, *supra* note 13, at 6. Even when women immigrate to find work, many continue to support their families, sending remittances back home. *Facts & Figures on Women, Poverty, and Economics*, U.N. DEV. FUND FOR WOMEN [UNIFEM], available at http://www.unifem.org/gender_issues/women_poverty_economics/facts_figures.php (last visited Oct. 15, 2009) (noting that in 2008 migrants worldwide sent US\$305 billion home, three times the volume of aid, and that women constitute 50 percent or more of migrant workers in Asia and Latin America).

71. See, e.g., CHARLESWORTH & CHINKIN, *supra* note 13, at 10 (noting that “in no country do women have equal political power to men”).

72. UNIFEM, *FACTS & FIGURES*, *supra* note 70, at 1. See generally WARING, *supra* note 67.

73. UNIFEM, *FACTS & FIGURES*, *supra* note 70, at 1.

74. *Id.*

75. Other factors include educational disparities and archaic laws and customs regarding employment, property ownership, inheritance, and marriage. See, e.g., MILLENNIUM DEVELOPMENT GOALS, Goal 3, Target 1 www.un.org/millenniumgoals/gender.shtml (noting that “[f]or girls in

elimination of the sexual division of labor is essential for women's economic and social equality.

In addition, by impoverishing women, the sexual division of labor impoverishes the families and communities in which they live. Women are less likely to spend money on alcohol or other forms of entertainment for themselves, and more likely to spend it in ways that benefit their children and families.⁷⁶ As the World Bank observes, "a host of studies suggest that putting earnings in women's hands is the intelligent thing to do to speed up development and the process of overcoming poverty."⁷⁷ Because women tend to reinvest more in their families and communities than men, the entire community benefits when women's poverty is reduced.

2. Same-Sex Relationships

The second development in international equality jurisprudence which supports the argument against the sexual division of labor is its recent focus on same-sex couples.⁷⁸ As Justice Albie Sachs explained in *Fourie*, extending the benefits of marriage to same-sex partners is fundamentally a matter of equality:

[O]ur Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage [A]t issue is a need to affirm the very character of our society as one based on tolerance and mutual respect.⁷⁹

some regions, education remains elusive" and that "poverty is a major barrier to education for girls"); Sidiya, *supra* note 59 (archaic laws and customs regarding employment); CYNTHIA GRANT BOWMAN & AKUA KUENYEHIA, WOMEN AND LAW IN SUB-SAHARAN AFRICA 143-66 (2003) (describing the ways in which plural legal systems in Africa operate to deprive women of access to land); *id.* at 167-220 (explaining problems of female inheritance in Africa); Julie Mertus, *State Discriminatory Family Law and Customary Abuses*, in WOMEN'S RIGHTS, HUMAN RIGHTS 135, 137-39 (Julie Peters & Andrea Wolper eds., 1995) (describing ongoing child marriage, polygamy, dowry and bridewealth practices). The precise extent to which such disparities, laws, and customs may themselves be traced to the changeable, and various, sexual divisions of labor described above is beyond the scope of this Article.

76. World Bank, *The World Bank and Gender Equality: At a Glance* [hereinafter World Bank, *Gender Equality*], <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTGENDER/0,,contentMDK:22386117~pagePK:210058~piPK:210062~theSitePK:336868,00.html> (last visited May 6, 2011).

77. *Id.* (noting further that this could be "one reason that countries with greater gender equality tend to have lower poverty rates").

78. International equality jurisprudence has not focused on reproductive rights because in most states where these rights have emerged, they have done so as part of a broader right to health. See *supra* notes 30-31.

79. Minister of Home Affairs v. Fourie [2005] (1) SA 1 (CC) (S. Afr.) (finding a right to same-sex marriage in the South African Constitution); see also Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (finding a right to same-sex marriage in the Massachusetts' constitution's right to equality). For a thoughtful comparison of *Goodridge* and *Fourie*, see Lisa Newstrom, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT'L

Like racial discrimination, discrimination on the basis of sexual orientation is grounded in intolerance and exclusion. In validating same-sex marriage, courts and legislatures throughout the world have rejected the notion of a 'natural' sexual division of labor requiring marriage to be restricted to a union between a man and a woman.⁸⁰ Rather, there is growing recognition that a state committed to democratic values, especially the equality of its citizens, can no longer endorse laws that discriminate against some of those citizens.

The European Union, with its twenty-seven member states, has been a leader in recognizing the equal rights of same-sex couples.⁸¹ The European Court of Human Rights, for example, has interpreted the European Convention on Human Rights to require contracting nations to recognize family rights of same-sex couples.⁸² The Court relied on Article 14, which provides that the rights set forth in the Convention are to be secured "without discrimination on any ground" to allow the surviving member of a gay couple to remain in his flat.⁸³ Under the 1997 Treaty of Amsterdam, similarly, the European Council passed Council Directive 2000/78/EC, which prohibits "any direct or indirect discrimination based on . . . sexual orientation."⁸⁴ In 2008, the European Court of Justice relied on this Directive to hold that the surviving partner of a German same-sex partner might be able to claim a pension.⁸⁵ The Treaty of Lisbon,⁸⁶ which entered into force on December 1, 2009, assures the right to marriage without any language limiting such right to "men and women" and expressly prohibits discrimination on the basis of sexual orientation.⁸⁷

L.J. 781, 803 (2007). For a discussion of developments in the United States, see Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J.L. & POL'Y 79, 120 (2007) (endorsing policy reform as an incremental but effective strategy and suggesting a range of sources for "policy-innovation ideas"). For a survey, see Note, *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2087-91 (2003).

80. See *infra* text accompanying note 110.

81. See generally Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949 (2008).

82. See, e.g., Application No. 40016/98 *Karner v. Austria* 24.7. In the case of Slovakia, the Committee stated:

While welcoming measures taken by the State party to eliminate gender segregation in the labour market, including through training programmes in the area of equal opportunities, the Committee is concerned about the persistence of traditional stereotypes regarding the roles and tasks of women and men in the family and in society at large... [and] recommends that policies be developed and programmes implemented to ensure the eradication of traditional sex role stereotypes in the family, labor market, the health sector, academia, politics and society at large.

Slovakia, *supra* note 58, at 95.

83. *Id.* The *Karner* Court also cited Article 8, which guarantees each individual "the right to respect for his private and family life." *Karner*, p. 7.

84. Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16

85. Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 2008 E.C.R. 1-1757.

86. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. The Treaty of Lisbon is also called the "Treaty on the Functioning of the European Union."

87. *Id.* at art. 21.1; see Elizabeth F. Defeis, *Current Development in the European Union: The Treaty of Lisbon and Human Rights*, 16 ILSA J. INT'L & COMP. L. 413, 419 (2010).

Same-sex couples in other regions have also drawn on human rights law to challenge discrimination. In South America, for example, same sex-couples have sought assistance from the Inter-American Commission on Human Rights. In *The Case of Marta Lucia Alvarez Giraldo*,⁸⁸ the Commission reviewed a complaint brought by the applicant against Colombia, alleging that the director of the prison in which the applicant was incarcerated had refused her request for intimate visits from her female life partner on the basis of her sexual orientation. Finding that Colombian law afforded prisoners a right to intimate visits, the Commission determined that the applicant had stated a colorable claim of arbitrary and abusive interference with her private life, in violation of Article 11(2) of the American Convention on Human Rights.⁸⁹

On June 3, 2008, the Organization of American States (OAS) General Assembly, with the support of thirty-four countries, adopted a *Resolution on Human Rights, Sexual Orientation, and Gender Identity*.⁹⁰ The resolution recognizes the significance of the adoption of the Yogyakarta Principles and stresses the core principles of universality and non-discrimination in international law. In addition, states "agreed to hold a special meeting 'to discuss the application of the principles and norms' of the inter-American system to abuses based on sexual orientation and gender identity."⁹¹

In North America, Canada passed the Civil Marriage Act in 2005 which recognizes same-sex marriage.⁹² The United States enacted the Defense of Marriage Act (DOMA) in 1996.⁹³ DOMA defines marriage as a union between a man and a woman, but it does not preclude states from recognizing same-sex marriage under their own laws. Five states currently allow same-sex marriage.⁹⁴ Forty-three states have laws explicitly prohibiting such marriages, including twenty-nine with constitutional amendments restricting marriage to one man and one woman.⁹⁵ In *Perry v. Schwarzenegger*,⁹⁶ Judge Vaughn Walker relied on the Fourteenth Amendment to strike down California's Proposition 8, which

88. *Giraldo v. Colombia*, Case No. 11.656, Inter-Am. C.H.R., Rep. No. 71/99 (1999).

89. *Id.* Following unsuccessful attempts to resolve the matter by friendly settlement, the Commission declared the case admissible, and agreed to publish the decision, to continue analyzing the merits of the case, and to renew its efforts to conclude a friendly settlement.

90. Rex Wockner, *Norway Legalizes Gay Marriage*, S.F. BAY TIMES, June 19, 2008, http://www.sfbaytimes.com/index.php?sec=article&article_id=8382.

91. *Id.*

92. Civil Marriage Act, 2005 S.C., ch.33 (Can.). See generally Peter Bowal & Carlee Campbell, *The Legalization of Same-Sex Marriage in Canada*, 21 AM. J. FAM. L. 37 (2007).

93. Pub. L. No. 104-199, 110 Stat. 2419 (1996), (codified at 1 U.S.C. § 7 and 28 U.S.C. 1738C (2006)).

94. They are: Massachusetts, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); Connecticut, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412-14 (Conn. 2008); Iowa, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); Vermont, Vt. Stat. Ann. tit. 15, § 8 (2011); and New Hampshire, N.H. REV. STAT. ANN., §§ 457:1 (2011). See generally Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. PA. L. REV. 2195, 2214 (2005); J. Thomas Oldham, *Developments in the US – The Struggle over the Creation of a Status for Same-Sex Partners*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 481 (Andrew Bainham ed., 2006).

95. BLAIR ET AL., *supra* note 27, at 144; see also *State by State: The Legal Battle over Gay Marriage*, NPR, Dec. 15, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=112448663>.

96. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

barred same-sex marriage. In doing so, Judge Walker raised the question of same-sex marriage in the United States to the constitutional level for the first time.⁹⁷

On the international level, too, the trend is clearly toward the recognition of rights for same-sex couples. In *Toonen v. Australia*,⁹⁸ for example, the Human Rights Committee determined that the provisions of the Tasmanian Criminal Code, which criminalized private same-gender sexual conduct between consenting adults, constituted an arbitrary interference with the author's privacy, in violation of Article 17 of the ICCPR.⁹⁹ The Committee also held, however, that the rights of same-sex couples to marry cannot be grounded in the Civil Covenant because of its specific language.¹⁰⁰

In part because of such limitations in existing human rights law,¹⁰¹ in 2006 the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, convened a meeting in Indonesia to develop a set of international principles regarding sexual orientation and gender identity. Twenty-nine distinguished experts in human rights law from twenty-five countries unanimously adopted the Yogyakarta Principles,¹⁰² which they agreed "reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity."¹⁰³ As set out in the Statute of the International Court of Justice

97. See Editorial, *Marriage is a Constitutional Right*, N.Y. TIMES, Aug. 5, 2010, at A26. On February 23, 2011, the Obama Administration advised the Speaker of the House that it would no longer defend the constitutionality of Sec. 3 of DOMA. *Obama: DOMA Unconstitutional, DOJ Should Stop Defending in Court*, HUFFINGTON POST (Feb. 23, 2011, 12:21 PM), http://www.huffingtonpost.com/2011/02/23/obama-doma-unconstitutional_n_827134.html.

98. *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 226, U.N. Doc. A/49/40 (1994).

99. The Committee further found that criminalization could not be justified by the intent to prevent the spread of AIDS. *Id.*

100. *Id.* As the Committee explained in another case:

Article 23, paragraph 2 of the Covenant is the only substantive provision . . . which defines a right by using the term 'men and women', rather than 'every human being', 'everyone', and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of the States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and woman

Joslin v. New Zealand, Human Rights Comm., Comm. No. 902/1999, P 8.3, U.N. Doc. CCPR/C/75/D/902/1999 (2002) (upholding New Zealand's refusal to permit same-gender couples to marry); *Quilter v. Att'y Gen.* [1998] 1 N.Z.L.R. 523 (C.A.). For a provocative discussion, see Vincent J. Samar, *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2007).

101. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 232 (2008) (noting that "[t]he High Commissioner for Human Rights, Louise Arbour, has expressed concern about the inconsistency of approach in law and practice . . . [regarding] . . . sexual orientation and gender identity").

102. YOGYAKARTA PRINCIPLES, <http://www.yogyakartaprinciples.org> (last visited May 10, 2011).

103. *Id.*

("ICJ"),¹⁰⁴ the views of such experts may be relied upon in determining rules of law. The Yogyakarta Principles, rigorously supported by sixty-six pages of jurisprudential annotations,¹⁰⁵ affirm a broad range of rights, including "the universal enjoyment of human rights, equality and non-discrimination . . . to which all human beings are entitled without distinction as to sexual orientation or gender identity."¹⁰⁶ The Principles also set out concrete measures states must take to assure these rights.

On December 18, 2008, sixty-six nations at the UN General Assembly supported a groundbreaking Statement confirming that international human rights protections apply to sexual orientation and gender identity. The Statement was read by Argentina and a Counterstatement, signed by fifty-nine states, was read by the Syrian Arab Republic.¹⁰⁷ The states opposing human rights for same-sex couples do not seek to ground their arguments in international law. Rather, they claim that the Statement endorsing these rights "lack[ed] . . . legal grounds [and] delves into matters which fall essentially within the domestic jurisdiction of States."¹⁰⁸ This is belied by the exhaustive research supporting the Yogyakarta Principles.¹⁰⁹ While there is no state consensus on the issue, there is a clear trend toward recognizing the rights of same-sex couples. Thus, although homosexuality remains a crime in seventy-six countries and is still punishable by death in five, a growing body of international equality jurisprudence increasingly supports these rights.¹¹⁰

104. I.C.J. Stat., art. 38.1(d) provides in pertinent part: "The Court . . . shall apply . . . the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

105. MICHAEL O'FLAHERTY, JURISPRUDENTIAL ANNOTATIONS TO THE YOGYAKARTA PRINCIPLES (2007), <http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf>.

106. YOGYAKARTA PRINCIPLES, *supra* note 102.

107. U.N. GAOR, 63rd Sess., 70th plen. mtg. at 30, U.N. Doc. A/63/PV.70 (Dec. 18, 2008). The Counterstatement, signed by 59 states, condemned the Statement, arguing further that:

More important, it depends on the ominous usage of two notions. The notion of orientation spans a wide range of personal choices that expand far beyond the individual sexual interest in a copulatory behavior between normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts, including paedophilia. The second notion is often suggested to attribute particular sexual interests or behaviours to genetic factors, a matter that has repeatedly been scientifically rebuffed.

Id. at 31.

108. *Id.* at 31; see also O'Flaherty & Fisher, *supra* note 101, at 238, 246-47 (describing the "[r]eaction by States and other [a]ctors within United Nations [f]lora").

109. See *supra* note 105; see also O'Flaherty & Fisher, *supra* note 101.

110. DANIEL OTTOSSON, HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME-SEX ACTIVITY BETWEEN CONSENTING ADULTS 4 (2010), available at http://www.rfsl.se/public/ILGA_State_Sponsored_Homophobia_2010.pdf. This jurisprudence includes the recent decision of the High Court of Delhi, which ruled in 2009 that section 377 of the Indian Penal Code could not be applied to sexual activities between consenting adults. *Id.* The ruling affects all of India, except Jammu and Kashmir, where a different penal code applies, and affects approximately one-sixth of the human population. *Id.*

The absence of consensus only matters in ascertaining customary international law, which is not in issue. It could be argued, however, that there is *regional* customary international law with respect to

II. HOW THE DENIAL OF REPRODUCTIVE RIGHTS REPRODUCES GENDER

This Part explains how the denial of reproductive rights reproduces gender.¹¹¹ Reproductive rights may be usefully conceptualized along a continuum. At one end, women have no choice as to when they will be impregnated or by whom.¹¹² This reproduces gender because women may, at any time, be assigned reproductive work which only women can do.¹¹³ This work does not end with childbirth. Rather, as the CEDAW Committee notes, “the responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women.”¹¹⁴ Women’s socially-constructed responsibilities for taking care of their children, as well as feeding, clothing, and nurturing the whole family, reproduce gender by perpetuating the stereotype of women as caregivers.¹¹⁵

Also at this end of the continuum are women involuntarily sterilized,¹¹⁶ forced to use contraceptives, or have abortions.¹¹⁷ First, these anti-natalist measures reproduce gender by denying women the choice to have children, perpetuating the stereotype of women as subordinates for whom such decisions can be made.¹¹⁸ Second, such measures reproduce gender by using women’s

same-sex relationships in Europe. See Anjuli Willis McReynolds, Comment, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073, 1110 (2006).

111. See *supra* note 11.

112. This is the fate of the “handmaids” in Margaret Atwood’s dystopia, *The Handmaid’s Tale*. See generally MARGARET ATWOOD, *THE HANDMAID’S TALE* (1985). Utopias and dystopias play an important role in the development of feminist theory. As Lerner notes, “utopian projections into the past serve an important function for those who wish to create theory—to know what might have been possible opens us up to new interpretations.” LERNER, *supra* note 1, at 38. See generally FRANCES BARTKOWSKI, *FEMINIST UTOPIAS* (1989). As MacKinnon muses, “Given the pervasiveness of inequality, imagination is the faculty required to think in sex equality terms. What would it be like if women had power, knowing what women know?” Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1327 (1991).

113. As Katharine T. Bartlett noted thirty-five years ago, “That women may and do become pregnant is the most significant single factor used to justify the countless laws and practices that have disadvantaged women for centuries.” Bartlett, *supra* note 56, at 1532.

114. See General Recommendation No. 23, *supra* note 66.

115. See, e.g., *supra* Part I.B.2 (describing female-as-caregiver stereotype). See generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Barbara Stark, *Nurturing Rights: An Essay on Women, Peace, and International Human Rights*, 13 MICH. J. INT’L L. 144 (1991).

116. See, e.g., *María Chávez v. Peru*, Case 12.191, Inter-Am. C.H.R., Report No. 71/03, Friendly Settlement Agreement (2003), available at <http://www1.umn.edu/humanrts/cases/71-03.html>; see also Martha F. Davis & Bethany Withers, *Reproductive Rights in the Legal Academy: A New Role For Transnational Law*, 59 J. LEGAL EDUC. 35, 43 (2009) (noting that “[the Chávez case] stemmed from Peru’s government policy of sterilizing poor, rural women in the 1980s and 1990s. Ms Chávez died from complications following a forced sterilization procedure.”).

117. As Sherry Colb points out, “[opposition to coerced abortions] is one of the few areas of absolute overlap between those who believe abortion is constitutionally protected and those who do not.” Sherry F. Colb, *To Whom Do We Refer When We Speak of Obligations to “Future Generations”?: Reproductive Rights and the Intergenerational Community*, 77 GEO. WASH. L. REV. 1582, 1589 (2009).

118. As Chandra Talpade Mohanty observes, this is a common experience for poor women of color throughout the developing world:

reproductive capacity against the racial or ethnic group of which they are a part, whether the aim is to limit the reproduction of the group or genocide.¹¹⁹ A woman has no control over her own capacity to reproduce; rather, that capacity is controlled by the state to reduce or eliminate the racial or ethnic group of which she is a member. This is explicitly recognized in the Statute of the International Tribunal for the Former Yugoslavia, Article 4(d), which defines “imposing measures intended to prevent births within the group” as a form of genocide.¹²⁰ Third, often overlapping but nevertheless distinct, anti-natalist measures may reproduce gender by using women’s reproductive capacity against the economic class of which they are a part. This was a major concern during the Cold War. As Goldberg explains, “fears of [a] swelling third world population” was the original impetus for U.S. family planning aid to poor

[B]ecause of the race- and class-based history of population control and sterilization abuse, women of color have a clearly ambivalent relation to the “abortion rights” platform. For poor women of color, the notion of a “woman’s right to choose” to bear children has always been mediated by a coercive, racist state.

Chandra Talpade Mohanty, *Introduction: Cartographies of Struggle: Third World Women and the Politics of Feminism*, in *THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM* (Chandra Talpade Mohanty et al., eds. 1991), at 1, 12. Goldberg provides a more graphic account: “Faced with fertility goals and targets set from above, family planning workers from India to Indonesia cajoled, bribed, and sometimes forced people into accepting birth control, and even sterilization. All over the world birth control clinics were upgraded while other health facilities languished, dirty and run-down.” GOLDBERG, *supra* note 29, at 67. See generally LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 334 (4th ed. 2007) (describing the infamous Dalkon Shield as “probably [responsible for] hundreds of thousands of severe infections and injuries, often leading to sterility and other permanent damage and long-lasting pain,” and noting that “as the awareness of dangers grew in the United States, [A. H. Robbins] dumped thirty-five thousand shields on the international market. The company later refused to notify third-world users of the IUD’s dangers, agreeing only to alert foreign embassies.”). In the United States, as Professor Roberts notes:

Slave masters’ control of Black women’s reproduction illustrates better than any other example I know the importance of reproductive liberty to women’s equality. Every indignity that comes from the denial of reproductive autonomy can be found in slave women’s lives – the harms of treating women’s wombs as procreative vessels, of policies that pit a mother’s welfare against that of her unborn child, and of government attempts to manipulate women’s childbearing decisions through threats and bribes.

DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 23 (1997). This troubled history has been exploited by anti-abortion groups. Anti-abortion groups have recently charged that, “Black children are an endangered species,” on 65 billboards in Georgia. Shaila Dewan, *Anti-Abortion Billboards on Race Split Atlanta*, N.Y. TIMES, Feb. 6, 2010, at A9. The groups note that black women in that state have a disproportionate number of abortions. *Id.* The claim about black children is dubious, however, since the fertility rate among black women remains higher than the national average. See *id.*

119. As Roberts notes, “reproductive policy affects the status of entire groups.” ROBERTS, *supra* note 118, at 23; see also e.g., Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, in RENATE BRIDENTHAL, *WHEN BIOLOGY BECAME DESTINY* 271, 277 (1984) (noting that “in 1936 . . . sterilization by X-rays was included in the [German] sterilization law. Later, officials favored this procedure as an easy method for mass sterilization of camp inmates without their knowledge.”). See generally Jeremy Telman, *Abortion and Women’s Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. REV. L. & SOC. CHANGE 91 (1998).

120. *Statute of the International Tribunal of the Former Yugoslavia*, reprinted in 14 HUM. RTS. L.J. 211 (1993).

countries.¹²¹ Reducing the number of poor people, in short was viewed as crucial to the fight against communism. For some women, accordingly, the reproduction of gender has been exacerbated by the reproduction of race and class subordination.

At the other end of the continuum are women who not only have the same legal rights as men, but rights assuring support for reproduction as well. Just as the larger community benefits from reproduction, it shares in its costs.¹²² Under CEDAW, this is accomplished by assuring women's right to health—and all other rights¹²³—before, during, and after pregnancy. In addition, as set out in Article 5, men as well as women are responsible for childcare,¹²⁴ and gendered stereotypes are barred.¹²⁵

The denial of reproductive rights reproduces gender because it takes control of their own reproductive capacity away from women, relegating them to a sexual division of labor based on biological differences. It puts their bodies at the service of men or the state. The denial of reproductive rights reproduces gender whether by a state or a non-state party, whether by explicit prohibitions¹²⁶ or by the failure to provide necessary services, including childcare.

121. GOLDBERG, *supra* note 29, at 41.

122. This is what sex equality looks like in feminist utopias, where it is often accomplished by technology that takes over reproductive work. See, e.g., CHARLOTTE PERKINS GILMAN, *HERLAND* (1915) (women reproduce asexually). MacKinnon describes it succinctly:

If sex equality existed, there would be no more forced sex; safe effective contraception would be available and the psychological pressures surrounding its use would be gone; whatever womanhood meant, women would need neither men nor intercourse nor babies to prove it; abortions for sex-selection as now practiced would be unthinkable; the workplace would be organized with women as much in mind as men; the care of children would be a priority for adults without respect to gender; women would be able to support themselves and their families (in whatever form) in dignity through the work they do.

MacKinnon, *supra* note 112, at 1326-27.

123. See, e.g., CEDAW, *supra* note 2, at art. 11.1(f) ("safeguarding of the function of reproduction" in connection with working conditions); *id.* at art. 11.2(b) (requiring states to "introduce maternity leave with pay or with comparable social benefits.").

124. See e.g., David Leonhardt, *A Labor Market Punishing to Mothers*, N.Y. TIMES, Aug. 4, 2010, at B1, <http://www.nytimes.com/2010/08/04/business/economy/04leonhardt.html> (noting that "the main barrier [to gender equality] is the harsh price most workers pay for pursuing anything other than the old-fashioned career path. 'Women do almost as well as men today,' [Columbia University Professor Jane] Woldfogel said, 'as long as they don't have children.'"); CEDAW, *supra* note 2, at art. 5(b); *id.* at art. 11.2(c) (requiring states to "encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities . . . [by promoting] a network of child-care facilities.").

125. CEDAW, *supra* note 2, at art. 5(a) ("To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.").

126. Sometimes bans on abortion and contraception blatantly violate reproductive rights, like the ban in Romania under Nicolae Ceausescu. According to one source, there were "over 10,000 deaths from illegally performed abortions and approximately 5.2 million cases of permanent sterility resulting from faulty . . . procedures." Abrams, *supra* note 15, at 897. In 1966, Council of State Decree No. 700 criminalized abortion and radically restricted access to contraceptives. Reed Boland, *The Environment, Population and Women's Human Rights*, 27 ENVTL. L. 1137, 1141-42 (1997). Birth rates soared, as did maternal mortality, mostly from illegal abortions. According to unofficial estimates,

A. Denial by the State

States have a legitimate interest in regulating reproduction to promote the health and general welfare of their citizens.¹²⁷ Unlike most of the world, the United States does not have a natalist policy.¹²⁸ 83% of the global population lives in a state that has demographic goals that are supported by government policies in order to achieve them.¹²⁹ Such policies may range from producing “soldiers for Islam,” as the Ayatollah exhorted Iranian women in the 1980s,¹³⁰ or workers for the state, as East Germany urged women in the 1950s.¹³¹ The state objective may be illegal, like the genocidal rapes in the former Yugoslavia.¹³² Or the state policy may simply institutionalize customs that enable men to control women’s sexuality.¹³³

Romanian women were likely to have five illegal abortions by the age of forty, resulting in an infertility rate of twenty percent. U.N. Population Div., Dep’t of Econ. & Soc. Affairs, *Abortion Policies: A Global Review*, Romania (2002), available at <http://www.un.org/esa/population/publications/abortion/doc/romania.doc>. The law was rescinded by the new government in 1989, *id.*, but there were grim consequences, including a sizable cohort of unwanted, neglected, and abandoned children. Stuart Rennie, *The Ethics of Research on Neglected Children in Romania*, GLOBAL BIOETHICS BLOG (Jan. 11, 2008, 11:18 PM), <http://globalbioethics.blogspot.com/2008/01/ethics-of-research-on-neglected.html>.

127. See Cairo Conference, *supra* note 22, Principle 5 (“Population-related goal and policies are integral parts of cultural, economic and social development, the principal aim of which is to improve the quality of life of all people.”).

128. This may be attributable, in part, to the fact that U.S. birth rates reach a “replacement level” of 2.1 children per woman, distinguishing the United States from other industrialized states. Russell Shorto, *No Babies?*, N.Y. TIMES MAG., June 29, 2008, at 36, 40, <http://www.nytimes.com/2008/06/29/magazine/29Birth-t.html>

129. State policies may focus on quality as well as quantity. China, for example, has adopted “healthy birth” policies. See Michael Palmer, *Caring for Young and Old: Developments in the Family Law of the People’s Republic of China, 1996-1998*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 95, 101-02 (Andrew Bainham ed., 2000); XIN MAO, *Chinese Geneticists’ Views of Ethical Issues in Genetic Testing and Screening: Evidence for Eugenics in China*, 63 AM. J. HUM. GENETICS 688 (1998). The U.S. program on eugenics in Cold Spring Harbor, New York was closed in 1938. The facility now houses a major research program on genetic engineering. PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND BUCK V. BELL*, 42-57 (2008) (discussing state-sponsored sterilization in the twentieth century).

130. Janet Larsen, *Iran’s Birth Rate Plummeting at Record Pace: Success Provides a Model for Other Developing Countries*, EARTH POL’Y INST. (December 28, 2001), http://www.earth-policy.org/plan_b_updates/2001/update4ss.

131. See, e.g., Barbara Stark, *Crazy Jane Talks with the Bishop: Abortion in China, Germany, South Africa, and International Human Rights Law*, 12 TEX. J. WOMEN & L. 287, 299 (2003); Eleonora Zielinska, *European Socialist Countries*, in ABORTION AND PROTECTION OF THE HUMAN FETUS 241, 241 (George F. Cole & Stanislaw J. Frankowski eds., 1987) (explaining that liberalized abortion policies were the result of implementing the idea of equality between men and women in all aspects of life).

132. *Kadic v. Karadzic*, 70 F.3d 232, 250 n.10 (2d Cir. 1995) (Plaintiffs claimed that defendants encouraged systematic mass rape to further “ethnic cleansing.”) The forced impregnation would produce children of their fathers’ ethnicity.

133. As Susan Moller Okin notes, this is not uncommon:

Although the powerful drive to control women—and to blame and punish them for men’s difficulty in controlling their own sexual impulses—has been softened considerably in the more progressive reformed versions of Judaism, Christianity, and Islam, it remains strong in their more orthodox or fundamentalist versions. Moreover, it is by no means confined to Western or monotheistic cultures. Many of the world’s traditions and cultures, including those practiced within formerly conquered or colonized nation-states—which

Even if it has a legitimate interest, the state may not violate specific provisions of CEDAW, including the perpetuation of stereotypes barred by Article 5.¹³⁴ The state interest may matter under the Civil Covenant or the Economic Covenant, both of which include provisions for derogation.¹³⁵ But the Women's Convention, like the Race Convention, which is also aimed at ending discrimination, does not provide for derogation. Whatever the scarcity or emergency, the state cannot rectify it at the expense of the protected group.¹³⁶

In addition to the violation of specific provisions, the state can deny reproductive rights by any acts or omissions that effectively restrict a woman's choice.¹³⁷ This includes the state's failure to enable women to make decisions independently of their husbands, families, and communities. It also includes the failure to provide affordable pre-natal and maternal healthcare and childcare. As Professor Dorothy Roberts observes, this explains the often divergent concerns of American women: "The primary concern of white, middle-class women are laws that restrict choices otherwise available to them, such as statutes that make it more difficult to obtain an abortion. The main concerns of poor women of color, however, are the material conditions of poverty and oppression that restrict their choices."¹³⁸ As Professor Roberts and others have shown, in the United States this has a long and ignominious history, beginning in slavery and continuing through the eugenics movement of the early twentieth

certainly encompasses most of the peoples of Africa, the Middle East, Latin America, and Asia—are quite distinctly patriarchal.

Susan Moller Okin, *Is Multiculturalism Bad For Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7, 14 (Joshua Cohen et al. eds., 1999). But see Homi K. Bhabha, *Liberalism's Sacred Cow*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra*, at 79, 81-82 ("Okin's ahistorical view of 'patriarchy' . . . and her monolithic, deterministic notion of culture itself . . . combine to form a dangerous presumption that many of the world's other cultures . . . exist in a time warp Her version of liberal feminism shares something of the patronizing and stereotyping attitudes of the patriarchal perspective.").

134. CEDAW, *supra* note 2, at art. 5.

135. See Civil Covenant, *supra* note 12, at art. 4; Economic Covenant, *supra* note 12, at arts. 4-5; LOUIS HENKIN ET AL., *HUMAN RIGHTS 207-08* (Robert C. Clark et al. eds., 1999) (explaining derogation).

136. This is not to say that the rights set out in the Women's Convention are guaranteed regardless of cost. Implementation of the Women's Convention, like that of all human rights treaties, may be constrained by a lack of resources. But a lack of resources does not justify coerced abortion, sterilization, or childbirth. A state might be unable to keep an infant with a severe infirmity alive, for example, but that would not justify forcing the mother to have an abortion. Nor could a state refuse to allow abortions on the basis of cost, since a live birth and support of the resulting child would cost even more. See, e.g., ROBERTS, *supra* note 118, at 241 (noting that "[I]t is easier for an indigent woman to come up with the money for an abortion than for an indigent family to support a child for years.").

137. See *supra* Part I. This does not mean that the state has an affirmative obligation to enable "Octomom." Recall the language in the Proclamation of Teheran, *supra* note 21, referring to the "right to determine freely and responsibly the number and the spacing of their children" (emphasis added).

138. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1461 (1991). See generally MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 310 (2d ed. 2003).

century.¹³⁹ More recently, it has surfaced in policies punishing pregnant addicts.¹⁴⁰ Policies that punish poor women reproduce gender by signaling that women's reproductive work is not valued. Rather, the only alternative to poverty for women is to emulate men, becoming what Joan Williams describes as "ideal workers," devoting themselves to their employers instead of their families.¹⁴¹

A state preference for birth, like that of the state in *Maher*,¹⁴² violates CEDAW because it does not allow women to choose abortion unless they can pay for it. Denying abortions to such women reproduces gender by forcing women to become mothers,¹⁴³ requiring them to perform nine months of reproductive work, suffer pain, and assume the risks of childbirth.¹⁴⁴ As a practical matter, moreover, it may well relegate them to the private sphere of the home and the family for much longer. In the United States, as Professor Siegel explains:

Hypothetically, a woman compelled to bear a child she does not want could give it up for adoption, abandon it, or pay someone to care for the child until maturity. In this society, however, . . . few women are able to abandon a child

139. See generally ROBERTS, *supra* note 118; LOMBARDO, *supra* note 129; JANET L. DOLGIN & LOIS L. SHEPHERD, *BIOETHICS AND THE LAW* (2d ed. 2009).

140. See Roberts, *supra* note 138.

141. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1-3 (2000) (explaining that becoming an "ideal worker" is next to impossible when one parent is responsible for most of the child and home care).

142. In *Maher*, the Supreme Court upheld a state law providing coverage for births, but not abortions. *Maher v. Roe*, 432 U.S. 464, 469, 474 (1977) (holding that neither state nor federal government must pay for an indigent woman's abortion). Presumably, it would also uphold a state law covering both.

143. CHAMALLAS, *supra* note 138, at 309 ("Nevertheless, the 'gender codes' that put pressure on women to become mothers, to keep and raise their children, and to subordinate their professional and personal interests for family have not disappeared.").

144. Gentler incentives, however, may be acceptable. Many countries in Western Europe have policies intended to make procreation more appealing to women, by subsidizing their decision to have and raise a child. A single mother in Denmark, for example, receives cash assistance, free kindergarten for her child, and subsidized housing. See Katarina Tomasevski, *Reproduction, Rights, and Reality: How Facts and Law Can Work for Women: European Approaches to Enhancing Reproductive Freedom*, 44 AM. U. L. REV. 1037 (1995). Austrian parents, regardless of marital status, are entitled to a family allowance for each child in their household. See The Clearinghouse on Int'l Devs. in Child, Youth, & Family Policies, *What Do Other Countries Provide for Parents?*, Issue Brief (Spring 2002) 2, 7 (tbl. 1), available at <http://www.childpolicyintl.org/issuebrief/issuebrief5table1.pdf>. Mothers are entitled to a maternity allowance of eight weeks after giving birth, and either parent may elect to stay home to care for the child and receive a government-funded parental allowance. *Id.* Parents are entitled to a child care allowance, whether or not they are employed. *Id.* Norway provides single-parent families with a universal family allowance and a birth grant for single mothers; the government also pays child support if the non-custodial parent defaults. Dan Keeton, *Progressive Social Policy in the Global Economy*, THE DEMOCRAT, Nov. 1998. See generally Shorto, *supra* note 128; Hans-Peter Kohler et al., *The Emergence of Lowest-Low Fertility in Europe During the 1990s*, 28 POPULATION & DEV. REV. 641, 659 (2002) (noting "quite widespread agreement in the literature that lowest-low fertility countries share an institutional setting that implicitly favors a relatively low quantum of fertility."); Davis & Withers, *supra* note 116, at 43 (describing a case in which the Supreme Court of India "upheld [a] 'child cap' for elective office, concluding that the paramount goal of population control overrode claims of fundamental rights").

born of their body. . . . Once compelled to bear a child against their wishes, most women will feel obligated to raise it.¹⁴⁵

Reproductive rights may also be denied by ostensibly neutral laws. Professor Carol Sanger has shown, for example, how safe haven laws¹⁴⁶ and informed consent laws¹⁴⁷ are intended to deter abortion. Such laws reproduce gender “[b]y connecting infant life to unborn life and infanticide to abortion,” and motherhood to pregnancy, evoking powerful stereotypes “to promote the political goal of the culture of life: the reversal of *Roe v. Wade*.”¹⁴⁸ Reproductive rights may be denied by the failure to carefully think through the actual, variable conditions of reproductive work. Professor Joanna Grossman has shown, for example, how even well-intentioned legislation like the Pregnancy Discrimination Act fails pregnant women by relying on a disability model.¹⁴⁹ Reproductive rights may be denied by the failure to maintain an environment in which they can be safely and freely exercised, where, for example, men control sex.¹⁵⁰

B. Denial by Non-State Parties

1. Cultural Traditions and Religious Beliefs

As the CEDAW Committee has pointed out:

In all nations, the most significant factors inhibiting women’s ability to participate in public life have been the cultural framework of values and religious beliefs, the lack of services and men’s failure to share the tasks associated with the organization of the household and with the care and raising of children. In all nations, cultural traditions and religious beliefs have played a part in confining women to the private spheres of activity and excluding them from active participation in public life.¹⁵¹

145. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 371-72 (1992); see also CHAMALLAS, *supra* note 138, at 305.

146. Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006).

147. See Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008) (arguing that mandatory ultrasound intrudes upon what should be a “protected area of decisionmaking”).

148. Sanger, *supra* note 146, at 753.

149. See Joanna L. Grossman, *Pregnancy, Work and the Promise of Equal Citizenship*, 98 GEO. L. REV. 567, 613-14 (2010); Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J. L. & FEMINISM 15, 26-27 (2009).

150. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 94-95 (1987) (“Sexual intercourse, still the most common cause of pregnancy, cannot simply be presumed coequally determined.”); see also Celia W. Dugger, *African Studies Give Women Hope in HIV Fights*, N.Y. TIMES, July 20, 2010 at A1, <http://www.nytimes.com/2010/07/20/world/africa/20safrica.html> (describing a World Bank study in which poor schoolgirls in Malawi were given small monthly payments. The research revealed that “[t]he likelihood that the girls would agree to sex in return for gifts and cash declined as the size of the payments from the program rose, suggesting the central role of extreme poverty in sexual choices.”).

151. General Recommendation No. 23, *supra* note 66.

Where such traditions and beliefs conflict with women's reproductive rights, the issue is whether a woman can opt out. This is not an issue where there is no legal capacity. In the case of child marriages, for example, there is no ability to opt out because a child lacks the capacity to consent.¹⁵² Nor, under CEDAW, do girls have the capacity to consent to female genital surgeries (FGS),¹⁵³ a range of practices involving total or partial removal of the external female genitalia.¹⁵⁴ Each year, an estimated two million girls undergo excision.¹⁵⁵ As noted by the non-government organization (NGO) PLAN, FGS is a cultural, rather than a religious practice, most common in sub-Saharan and Northeastern Africa and where immigrants from these areas re-settle. It is viewed as part of a woman's rite of passage into adulthood, and considered a prerequisite to marriage. The *purpose* of FGS is to reproduce gender in the starkest form. As PLAN observes, "the pain endured is seen as part of the girl's education. It is believed to change her into a respectful, calm, and less demanding person who accepts her role as a servant to her husband."¹⁵⁶

The CEDAW Committee has carefully set out measures intended to eradicate the practice of FGS without triggering a backlash.¹⁵⁷ In the United States, FGS on minors are illegal under federal law.¹⁵⁸ While few condone the

152. See U.N. CHILDREN'S FUND [UNICEF], *Early Marriage Child Spouses*, INNOCENTI DIG. (Mar. 2001), reprinted in BARBARA STARK, INTERNATIONAL FAMILY LAW 22, 25 (2005) (noting that although women are granted the right to consent to marriage by the law, "in a large number of countries, these legal provisions are merely symbolic"); Nicholas D. Kristof, Op-Ed, *New Life for the Pariahs*, N.Y. TIMES, Oct. 31, 2009, at WK10, <http://www.nytimes.com/2009/11/01/opinion/01kristof.html> (describing obstetric fistula, a childbirth injury suffered by teenagers in Africa and Asia whose pelvises are not fully grown, resulting in "steadily trickling urine and sometimes feces through their vaginal[s]," a condition which can be correct by a \$300 surgery).

153. The World Health Organization [WHO] and UNICEF refer to this practice as "female genital mutilation" (FGM). WHO, FACT SHEET NO. 241 (2000), reprinted in STEINER ET. AL., *supra* note 55, at 546. The CEDAW Committee refers to it as "female circumcision." See, e.g., CEDAW, *Female Circumcision*, General Recommendation No. 14, 9th Sess., 1990, U.N. Doc. A/45/38/1, Nov. 1, 1994 [hereinafter General Recommendation No. 14] (recommending that States parties "[t]ake appropriate and effective measures with a view to eradicating the practice of female circumcision").

154. *Id.*

155. *Id.* at 548.

156. *Id.* at 549. The West, too, has a long, miserable and recent history of punishing and exploiting women and girls for their sexuality. See, e.g., *THE MAGDALENE SISTERS* (Miramax 2002) (depicting the Magdalene Laundries, where Irish girls who had sex before marriage, or were suspected of having sex before marriage, or were raped, were sent for indefinite sentences of manual labor to "cleanse themselves of their sins," until the 1990s); Kate Taylor, *Artist's Daughter Seeks Return of Nude Video*, N.Y. TIMES, July 8, 2010, at C1, <http://www.nytimes.com/2010/07/08/arts/design/08rivers.html> (describing demands of New York artist Larry Rivers' daughter, Emma, for the return of nude videos taken of her by her father when she was an adolescent).

157. General Recommendation No. 14, *supra* note 154, (recommending that States parties "[t]ake appropriate and effective measures with a view to eradicating the practice of female circumcision."); see also, e.g., UNICEF, FEMALE GENITAL MUTILATION/CUTTING 28-29 (2005), available at http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf (noting that prevalence and attitudes are slowly changing in response to culturally-sensitive, country-specific programs).

158. Female Genital Mutilation, 18 U.S.C. § 116 (2006) (providing in pertinent part; "whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both."); see also Op-Ed, *Not Anyone's Daughter*, N.Y.

practice, many have criticized Western condemnation as paternalistic and heavy-handed.¹⁵⁹ This is an instructive reminder that the reproduction of gender is often contested and problematic, and that women themselves are often deeply invested in it.¹⁶⁰

Where the adult woman considers her religion¹⁶¹ or her cultural community¹⁶² more important than her right to bear a child or to terminate a pregnancy—that is her choice. If a woman chooses not to use birth control in accordance with her religious beliefs, for example, it is not necessarily a denial of reproductive rights. If, however, she is effectively barred from such a decision, it is. In some cases this is clear cut,¹⁶³ but in many cases it is not. Many

TIMES, July 1, 2010, at A30, <http://www.nytimes.com/2010/07/01/opinion/01thu4.html> (urging passage of legislation that would make it a felony to take a girl out of the country to have female genital surgery and suggesting “that ports of entry like Kennedy International Airport in New York City have informational signs, hot lines and a shelter . . . to save a girl from a lifetime of suffering and early death”).

159. See, e.g., Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 197-202 (1992).

160. See, e.g., Aida Seif El Dawla et al., *Women’s Wit Over Men’s: Trade-offs and Strategic Accommodations in Egyptian Women’s Reproductive Lives*, in NEGOTIATING REPRODUCTIVE RIGHTS, *supra* note 30, at 69 (noting the “dilemma [facing researchers] when certain traditions that we ourselves perceive as harmful or degrading for women received a very different response from many of the women we interviewed”); see also, Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1568-69 (1991) (explaining the internalization of subordination by women in the West).

161. Rishona Fleishman, Comment, *The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in Both International and Domestic Arenas*, 14 EMORY INT’L L. REV. 277, 308 (2000) (explaining that the Catholic Church’s present anti-abortion position “was started by Pope Pius IX in 1854 during his ‘affirmation of the immaculate conception of Mary, which elevated the status of women—particularly the “sacredness” of their child-bearing role in church dogma’”); see also *id.* at 283 (“The influence of the Catholic Church on reproductive rights is international The Catholic Church is the only religion with a permanent observer seat in the United Nations As an observer, the Holy See sends representatives to the United Nations and to conferences sponsored by the United Nations.”). See generally GOLDBERG, *supra* note 29, at 18 (“The globalized conflicts over women’s rights and religious authority that are playing out across the developing world have led to political realignments that complicate the simpler left/right divides of the Cold War years.”).

162. Abdullah An Na’im questions whether:

[liberal] theorists . . . have a clear understanding of the meaning of cultural membership in a minority culture in Western societies, as a daily existential experience . . . [i]f they encourage young women to repudiate the integrity and cohesion of their own minority culture, how can the theorists then help to sustain the identity and human dignity of those women?

Abdullah An-na’im, *Promises We Should All Keep in Common Cause*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 133, at 59.

163. Where, for example, she faces serious physical sanctions—such as stoning—from which the state either cannot or will not protect her, she has no real choice. If the sanction is moral or social, on the other hand, the question is whether, as a practical matter, women can opt out. As Dixon-Mueller puts it, “Religious values and social norms designed to limit the right to use any or all methods of fertility regulation such as artificial contraception or abortion may be freely accepted by individuals but cannot be imposed on those who choose not to accept such values and norms.” DIXON-MUELLER, *supra* note 28, at 14.

states, for example, allow religious laws, presumably including religious laws regarding reproduction, to govern marriage.¹⁶⁴

The determination whether or not she has a real choice, however difficult, must be considered from the individual woman's perspective. For an outsider to conclude that she suffers from 'false consciousness'¹⁶⁵ assumes a superiority that itself reproduces gender. As Professor Homi Bhabha explains:

[The] norm of Western liberalism becomes at once the measure and mentor of minority cultures—Western liberalism, warts and all, as a salvage operation, if not salvation itself. With a zealotry not unlike the colonial civilizing mission, the 'liberal' agenda is articulated without a shadow of self-doubt, except perhaps an acknowledgment of its contingent failings in the practice of everyday life.¹⁶⁶

As Katha Politt observes, however: "In its demand for equality for women, feminism sets itself in opposition to virtually every culture on earth. You could say that multiculturalism demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions."¹⁶⁷ Thus, the question of the individual woman's own choice, from her perspective, must itself be unpacked. Has she had access to education, including the 'family education' required under CEDAW,¹⁶⁸ so that she is aware of the parameters of that choice? The key to CEDAW's approach to cultural and religious challenges is in Article 10, which requires states to assure women equal "access to studies . . . in educational establishments of all categories in rural as well as urban areas" from pre-school through adulthood.¹⁶⁹ This includes, it should be recalled, the recognition of the common responsibility of men and women in the upbringing and development of their children.¹⁷⁰ Article 10 addresses the *content* of education, requiring the state to "eliminate any stereotyped concept of

164. See, e.g., Frances Raday, *Israel - The Incorporation of Religious Patriarchy in a Modern State*, in 4 INT'L REV. COMP. PUB. POL'Y 209 (1992); Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 989 (1998) (noting that South Africa, India, Egypt, Great Britain, and Israel all allow religious laws to govern marriage). Whether and when a woman can opt out of such marriages poses complicated legal questions, which few women have the resources to resolve. Some of the larger political cultures in which such religious laws are allowed are more supportive than others. See, e.g., Siegel, *The De Facto ERA*, *supra* note 10, at 1330 (explaining how "constitutional culture channels social movement conflict").

165. Cass Sunstein refers to:

internalized norms of subordination. The remedy of "exit"—the right of women to leave a religious order—is crucial, but it will not be sufficient when girls have been taught in such a way as to be unable to scrutinize the practices with which they have grown up. People's "preferences"—itself an ambiguous term—need not be respected when they are adaptive to unjust background conditions; in such circumstances it is not even clear whether the relevant preferences are authentically "theirs."

Cass R. Sunstein, *Should Sex Equality Law Apply to Religious Institutions?* in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 133, at 85, 88.

166. Bhabha, *supra* note 128, at 83.

167. Katha Politt, *Whose Culture?*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 133, at 27.

168. See *supra* text accompanying note 52.

169. CEDAW, *supra* note 2, at art. 10(a).

170. *Id.* at art. 5.

the roles of men and women at all levels and in all forms of education.”¹⁷¹ The drafters honed this provision carefully to make it as clear and forceful as possible. The U.S. delegate, supported by the UNESCO observer, suggested that “stress be given to early or career education of children in order to eliminate sex-stereotyped roles and images.”¹⁷² Even if children attend religious schools, or are home-schooled,¹⁷³ under CEDAW gender equality must be part of the curriculum.

Equally important, a woman cannot freely exercise reproductive rights as a practical matter if she is economically or socially dependent on her cultural community, or if she would not have a place to live or work outside of it. Thus, whether a woman truly enjoys reproductive rights cannot be ascertained without considering whether she can freely exercise other rights. Just as other rights depend upon reproductive rights for their realization, reproductive rights depend upon them.¹⁷⁴

2. Husbands, Partners, and Parents

As noted above,¹⁷⁵ CEDAW breaks new ground in human rights law by explicitly assuring women’s rights in the private sphere of the family. CEDAW recognizes that even where reproductive rights are legally assured by the state, as a practical matter they may be denied within the family. A husband or partner can violate a woman’s reproductive rights, reproducing gender in the process, in any number of ways, from rape, to physically preventing her from using contraception,¹⁷⁶ to forcing her to obtain an abortion by threatening her, to simply shirking childcare responsibilities. A girl’s parents, similarly, may prevent her from obtaining family education and access to reproductive health care.¹⁷⁷

The legal effect is the same as if the denial of rights were attributable to the state, and gender is reproduced in the same way. American law addresses this

171. *Id.* at art. 10(c). This includes “coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods.” *Id.*

172. REHOF, *supra* note 43, at 117.

173. Timothy Brandon Waddell, Note, *Bring It All Back Home: Establishing a Coherent Constitutional Framework for the Re-regulation of Homeschooling*, 63 VAND. L. REV. 541 (2010) (suggesting parameters for regulating homeschooling).

174. Such interdependence is commonplace in international human rights. See, e.g., *Indivisibility and Interdependence of Economic, Social, Cultural, Civil and Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/Res/44/130 (Dec. 15, 1989) (noting interdependence of the rights set out in the International Bill of Rights); see also *supra* Part I.B (describing CEDAW’s comprehensive approach to women’s rights.) It also resonates with the critiques of 14th Amendment equality by American feminists. See, e.g., *infra* Part III.B.2.

175. See *supra* Part I.C.

176. ABORTION IN THE DEVELOPING WORLD 31-32 (Axel I. Mundigo & Cynthia Indriso eds., 1999) (discussing societies in which men oppose women’s use of contraception).

177. CEDAW does not assure minors a right to engage in sexual activity, but it does require a state to provide a minor with education and healthcare. See, e.g., General Recommendation No. 24, *supra* note 33.

by providing for judicial override, at least in the case of abortion.¹⁷⁸ That is, a girl whose parents will not allow her to obtain an abortion, or who swears that she cannot ask them (because, for example, her father has impregnated her) can nevertheless obtain an abortion with the approval of a judge.¹⁷⁹ As Professor Martin Guggenheim explains, however, this is usually a partial and inadequate solution.¹⁸⁰ CEDAW contemplates a more comprehensive approach, but leaves the details of implementation to the states.

III. HOW THIS PLAYS OUT

International law, for the most part, has been made by men, for men—historically, politically, structurally, and normatively.¹⁸¹ The idea that reproductive rights are women's human rights is very recent. The extent to which states have recognized these rights, albeit rhetorically, is remarkable. That the resultant consensus is not on a par with freedom from torture is not. Nor is the gap between the law as written and the law as applied.

This does not mean, however, that the United States should join the list of hypocritical states that have ratified CEDAW with no intention of actually complying. Again, I am not arguing here that the United States should ratify CEDAW; but if we do, we should do so in good faith. The first section of this Part explains what CEDAW requires and why implementation remains problematic under international law. The second section explains why the United States should ratify CEDAW as a congressional-executive agreement. It concludes by describing how this would affect reproductive rights in the United States.

A. In International Law

1. What CEDAW Requires

The actual "elimination of *all* forms of discrimination against women" remains a radical proposition, promising a world we can scarcely imagine.¹⁸² But that is precisely the proposition to which states have consented by ratifying CEDAW. Since the denial of reproductive rights reproduces gender, by ratifying CEDAW states have agreed to assure reproductive rights, whether or

178. See, e.g., *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417, 427 (1990); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (upholding parental notice and consent requirements).

179. *Hodgson*, *supra* note 179, at 427.

180. Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 632-36 (2002).

181. As a leading human rights text notes, "Of the several blind spots in the early development of the human rights movement, none is as striking as that movement's failure to give violations of women's (human) rights, the attention [and] the priority . . . they require." STEINER ET AL., *supra* note 55, at 175; see also ERIKSSON, *supra* note 6, at 3. But see HENKIN ET AL., *supra* note 135, at 358 (noting that, "international human rights law has, from the outset, applied to men and women equally"). For an account of early efforts to internationalize women's rights, see Fraser, *supra* note 6, at 878 (describing convention in 1902 in Washington, D.C., which included delegates from the United States, England, Russia, Norway, Germany, Sweden, Turkey, Australia, Chile, and Canada).

182. See CEDAW, *supra* note 2.

not that was their original intention.¹⁸³ In fact, because the denial of these rights perpetuates the core stereotypes that CEDAW was drafted to eradicate, such denial is incompatible with CEDAW's "object and purpose."¹⁸⁴

While a sovereign state cannot be bound without its consent, ratifying states consented to CEDAW and Articles 2, 5, and 16 are unambiguous.¹⁸⁵ Just as the United States is liable under the Geneva Conventions¹⁸⁶ and the Convention Against Torture¹⁸⁷ (notwithstanding its subsequent insistence that water boarding was *not* in fact torture),¹⁸⁸ once a state promises to eliminate *all* forms of discrimination against women it cannot later argue that this does not require the assurance of reproductive rights.

Article 28.2 of CEDAW prohibits any "reservation incompatible with the object and purpose of the present Convention."¹⁸⁹ Reservations by states that effectively deny reproductive rights, accordingly, should not be allowed.¹⁹⁰ In fact, under the reasoning of the ICJ in *The Reservations to the Genocide Convention*

183. The conservatives in the U.S. Senate who added "sex" as a prohibited form of discrimination to Title VII in an effort to assure its defeat similarly found themselves bound when it passed. MacKinnon, *supra* note 112, at 1283-84 (noting that "sex discrimination in private employment was forbidden under federal law only in a last minute joking . . . attempt to defeat Title VII's prohibition on racial discrimination. [Sex absurdum] failed and the law passed anyway.").

184. See *infra* text accompanying notes 189-90 (explaining the significance of this term in the instant context).

185. Even if there were any ambiguity, under Article 32 of the VCLT this would merely permit recourse to supplemental materials, such as the *Travaux*. But there are no qualifications regarding reproductive rights in the *Travaux*. On the contrary, the states (including the United States) seem to be vying with each other to strengthen the norm against discrimination. See, e.g., REHOF, *supra* note 43, at 52-61. Morocco's modest attempt to temper the reference to "customs and practices" in 2(f) by the addition of "in their view," for example, was overwhelmingly rejected. *Id.* at 60.

186. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

187. Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51; see also Harold Hongju Koh, *America and the World, 2020*, in *THE CONSTITUTION IN 2020*, at 313, 318 (Jack M. Balkin & Reva B. Siegel eds., 2009) (noting that the *Hamdan* Court treated Common Article 3 of the Geneva Conventions as a "binding . . . universal treaty obligation").

188. See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President 35, 39 (Aug. 1 2002), available at <http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> (asserting that Congress could not constitutionally regulate the interrogation of battlefield combatants). But see *Hamdan v. Rumsfeld*, 548 U.S. 557, 611-13 (2006) (determining military commissions set up at Guantanamo violate Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding U.S. citizen could not be held indefinitely as enemy combatant); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding U.S. courts have jurisdiction over Guantanamo.); *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding fundamental rights apply at Guantanamo).

189. This incorporates Article 19(c) of the VCLT, *supra* note 4. The United States is not a party to the VCLT, but accepts it as binding customary international law. MARK W. JANIS & JOHN E. NOYES, *INTERNATIONAL LAW: CASES AND COMMENTARY* 307 (3d ed. 2006).

190. See VCLT, *supra* note 4, at art. 19(c).

Case,¹⁹¹ it could be argued that states that deny reproductive rights should not be considered parties to CEDAW.¹⁹² This is supported by the CEDAW Committee's Statement on Reservations,¹⁹³ in which it confirms that Articles 2 and 16 of the Convention are "core provisions of the Convention" to which reservations are impermissible. Denial of reproductive rights violates both.¹⁹⁴

As the Statement on Reservations further notes, the CEDAW Committee is "particularly concerned at the number and extent of reservations entered to those articles."¹⁹⁵ Several other state parties to the Convention have objected to these reservations on this ground.¹⁹⁶ These states have *not* said that they do not consider the reserving party a party to the treaty, which a state may do when it views a reservation as incompatible. Rather, they accept the reserving party as a party to the treaty, presumably for reasons similar to those articulated in the Genocide Case. There, notwithstanding reservations to which some states objected, they recognized the "intention of the General Assembly and of the [adopting states] that as many states as possible should participate [given the Genocide Convention's purely humanitarian and civilizing purpose]."¹⁹⁷ The CEDAW Committee takes a similar approach.¹⁹⁸

2. What Actually Happens

On the domestic level, every state determines the scope of its own obligations under CEDAW. While this is subject to the CEDAW Committee's monitoring, the Committee has no enforcement powers. Rather, enforcement in

191. 1951 I.C.J. 31, 1951 WL 3 (May 28).

192. Again, it is not my argument that this is the best strategy to further women's rights. See *supra* Introduction. Rather, it is my argument that because the denial of reproductive rights is fundamentally incompatible with CEDAW, refusing to recognize states that deny those rights as parties to CEDAW is allowed under the Opinion. Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28).

193. CEDAW Committee, Rep. of the Committee on the Elimination of Discrimination Against Women (Eighteenth and Nineteenth Sessions), U.N. Doc. A/53/38/Rev.1 at pt. 2 ¶¶ 1-25 (1998) (statements on reservations).

194. See *supra* Part II.B; see also ERIKSSON, *supra* note 6, at 146 n.903 (arguing that Article 16 is central to reproductive freedom).

195. CEDAW Committee, *supra* note 193, at pt. 2 ¶ 6. As of July 2007, thirty-seven states had entered reservations with respect to articles 2, 16 or other core obligations. HENKIN ET AL., *supra* note 135, at 820; see also General Recommendation No. 21, ¶ 41 ("The Committee has noted with alarm the number of States parties which have entered reservations to the whole or part of article 16, especially when a reservation has also been entered to article 2, claiming that compliance may conflict with a commonly held vision of the family based, inter alia, on cultural or religious beliefs or on the country's economic or political status."); *id.* ¶ 42 ("Many of these countries hold a belief in the patriarchal structure of a family which places a father, husband or son in a favourable position. In some countries where fundamentalist or other extremist views or economic hardships have encouraged a return to old values and traditions, women's place in the family has deteriorated sharply.").

196. HENKIN ET AL., *supra* note 135, at 822 (noting that Austria, Denmark, Estonia, Finland, France, Germany, Portugal, Spain, Sweden and the United Kingdom have been among the objecting states).

197. Reservations to the Convention on Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28).

198. See CEDAW Committee, *supra* note 193, at pt. 2 ¶¶ 1-25; see also Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 282 (1991).

domestic courts generally provides the most effective remedy, where it is available. Some countries, such as the Netherlands, adopt international human rights treaties as domestic law upon ratification. In these states, women would be able to bring suit in their own courts if they were denied their reproductive rights.¹⁹⁹ In some of these states, reproductive rights are already assured under domestic law. In others, however, those seeking to further these rights have successfully drawn on CEDAW. For example, a May 2006 decision by the Constitutional Court of Colombia cited CEDAW when it determined that abortion should not be considered a crime in all circumstances (such as rape, incest, or when the life of the mother is in danger).²⁰⁰

Since there is no international Supreme Court to resolve conflicting opinions, the interpretations and remedies of the national domestic courts may vary considerably. This 'fragmentation' of international law is a growing concern among international lawyers. As set out in the Report of the International Law Commission on the Fragmentation of International Law ("ILC Report"), international law is losing coherence, certainty, and predictability because it lacks dependable mechanisms for reconciling inconsistencies.²⁰¹

This fragmentation is exacerbated by the practice of some states, including the United States, which do not always automatically incorporate treaties. Although such states may have ratified the Women's Convention, accordingly, it is not enforceable as domestic law. This means that women in these states cannot claim their rights under CEDAW in their national courts.²⁰²

Nor is there any international tribunal before which women may do so. The ICJ only hears contentious cases between states.²⁰³ While the International Criminal Court ("ICC") has jurisdiction over rape and coerced pregnancy committed "as part of a widespread or systematic attack," this drastically limits

199. Where domestic courts do enforce CEDAW as part of domestic law, however, they should fully assure reproductive rights. As MacKinnon explains, this necessarily

include[s] the abortion right but [does] not center on it Women who are assaulted and miscarry, women who are forced to have abortions and women who are denied abortions, women who are sterilized, and women who are negligently attended at birth all suffer deprivation of reproductive control [as do women subject to] . . . nonconsensual sterilization, forced obstetrical intervention, supervision of women's activities during pregnancy under the criminal law, and denials of abortion through criminalization or lack of public funding where needed.

MacKinnon, *supra* note 112, at 1318-19.

200. BLANCHFIELD, *supra* note 7, at 15 (citing Ioana Ardelean, *An Ominous Sampling of International Efforts to Force Abortion on Reluctant Nations*, CULTURE OF LIFE FOUND., <http://culture-of-life.org//content/view/497/1/>). Excerpts from the Colombian Court's decision (C- 355/2006) are available at http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf.

201. Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskeniemi).

202. According to the CEDAW Committee, the failure to provide "an effective judicial" remedy constitutes a violation of Article 12. General Recommendation No. 24, *supra* note 33, ¶ 13.

203. Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1031, 1062, 1 U.N.T.S. 16.

the rapes and pregnancies over which it has jurisdiction.²⁰⁴ The ICC is a criminal tribunal, moreover. Its objective is to punish and deter crimes, not to further reproductive rights. 'Horizontal' legal process is usually a factor in international compliance, but it is conspicuously absent in human rights. That is, if a state fails to meet its obligations toward other states, those states typically refuse to meet their reciprocal obligations. But states rarely pressure other states to treat their women fairly.²⁰⁵ People who live in glass houses do not throw stones.

An Optional Protocol to the Women's Convention enables individual women to file complaints before the CEDAW Committee.²⁰⁶ This is only an option for women whose states have ratified the Protocol. Even in such cases, the Committee's enforcement powers remain limited. In sum, although states assume significant obligations under CEDAW, it costs them very little because of the absence of effective enforcement mechanisms.

B. In the United States

If the United States ratifies CEDAW, it should do so in good faith, and commit to its unqualified implementation. This may seem obvious to those unfamiliar with our long and shameful history of shirking international human rights obligations. This section will first explain how the United States can ratify CEDAW while complying with international as well as domestic law. It concludes by analyzing CEDAW's impact on existing domestic law governing reproductive rights.

1. Ratifying CEDAW as a Congressional-Executive Treaty

Historically, ratification of international human rights treaties has been opposed by those who feared that the federal government would use international law to limit states' rights. The United States was eager to declare its support for international human rights after World War II, and recognized the need for *other* states to guarantee them.²⁰⁷ But the United States was less eager to invite scrutiny of its own practices, especially racial segregation in the American South.²⁰⁸

204. Rome Statute of the International Criminal Court, 9th Sess., U.N. Doc. A/Conf. 183 (July 1, 2002). See generally SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006).

205. See generally CHARLESWORTH & CHINKIN, *supra* note 13.

206. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 15, 1999, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Annex, U.N. Doc A/RES/54/4, 39 I.L.M. 281; see, e.g., Heidi Gilchrist, Note, *The Optional Protocol to the Women's Convention: An Argument for Ratification*, 39 COLUM. J. TRANSNAT'L L. 763, 769 (2001).

207. DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS 121 (1991) (From 1945 until 1952, "the United States was determined to keep Charter language limited to vague generalities, resisting most of the efforts of smaller states and private groups in favor of more specific and demanding obligations.").

208. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-63 (1988) ("U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.").

While the executive branch was concerned about the international reaction to domestic practices,²⁰⁹ the Senate was more concerned about the domestic reaction to international law-making, as revealed in the debate in the U.S. Senate Foreign Relations Subcommittee on the Genocide Conventions: "If there is to be a succession of treaties from the United Nations dealing with domestic questions, are we ready to surrender the power of the States over such matters to the Federal Government?"²¹⁰ Many in Congress were emphatically not "ready to surrender the power of the states over... to the federal government"—and certainly not to the U.N.

Senator Bricker of Ohio proposed an amendment to the United States Constitution which would require an Act of Congress before any human rights treaty could become law in the United States.²¹¹ The Eisenhower administration was able to defeat the Bricker Amendment, but only by promising not to ratify any human rights treaties.²¹² It was not until 1992, after the end of the Cold War, and any possible claim that ratification might give the Soviets an advantage, that the United States finally ratified the Civil Covenant.²¹³ Even then, it did so with reservations, understandings and declarations ("RUDs") that ensure that the Civil Covenant cannot be relied on in U.S. courts,²¹⁴ and that it adds nothing to rights already assured under existing domestic law.²¹⁵ As Harold Koh has observed, we remain wary: "In the cathedral of human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but

209. Vicki Goldberg, *Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES, July 17, 1994, at H31, <http://www.nytimes.com/1994/07/17/arts/photography-view-remembering-the-faces-in-the-civil-rights-struggle.html> (noting that "[t]he Kennedy administration was extremely worried about damage to this nation's image abroad. Well it might have been: the Soviet Union broadcast 1,420 anti-American commentaries linked to the troubles in Birmingham in 1963" and "pictures of dogs and fire hoses were published in Europe, Africa, India, Japan. Photographs were especially powerful in countries where large parts of the population could not read.").

210. *The Genocide Convention: Hearings Before a Subcommittee of the Senate Committee on Foreign Relations*, 81st Cong., 206, 208 (1950) (statement of Carl B. Rix, Vice Chairman of Special Committee on Peace and Law Through United Nations, American Bar Association). For an excellent overview of the efforts to apply the human rights provisions of the U.N. Charter in state and federal United States courts from 1946 to 1955, see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

211. S.J. Res. 1, 83rd Cong., 99 Cong. Rec. 6777, 6777 (1953).

212. LOUIS B. SOHN & THOMAS BUERGENTHAL, *BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 964-65 (1973).

213. See Civil Covenant, *supra* note 12.

214. See, e.g., Senate Comm. on Foreign Relations, *International Covenant On Civil and Political Rights*, S. Exec. Rep. No. 102-23, at 19 (1992) ("[T]he [Civil] Covenant will not create a private cause of action in U.S. courts.").

215. See, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self Executing" Treaties*, 67 CHI-KENT L. REV. 515, 522 (1991) ("U.S. law taken as a whole (that is, considering federal and state laws in their totality) already complied with the Torture Convention, and only minimal gaps were identified to be filled by implementing legislation."); see also Catherine Redgwell, *U.S. Reservations to Human Rights Treaties: All for One and None for All? in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 392, 393 (Michael Byers & Georg Nolte eds., 2003).

without being willing to subject its own conduct to the scrutiny of that system.”²¹⁶

This arguably leaves the United States in violation of international law, since the failure to implement a treaty on the domestic level does not relieve a state of its obligations under international law.²¹⁷ The Obama Administration promises a new approach. Ratification of the Women’s Covenant as a congressional-executive treaty would be a good start. Congressional-executive treaties, which must be approved by a simple majority of the Senate and the House, have long served as a practical alternative to Article II treaties, requiring the approval of two-thirds of the Senate. As Professor Oona Hathaway points out, congressional-executive treaties are generally recognized as interchangeable with Article II treaties²¹⁸ among scholars²¹⁹ as well as lawmakers.²²⁰ Congressional-executive agreements avoid the political impasse often triggered by Article II’s supermajority requirement. They also have the advantage of what Professor Hathaway calls “one-stop shopping;”²²¹ that is, they are presumed to be self-executing under the Supremacy Clause.²²² Thus, they enable the United States to avoid debacles like the decision in *Medallin v. Texas*,²²³ in which the Supreme Court held that Texas law trumped U.S. international obligations because the treaties on which those obligations were based were non-self-executing.²²⁴

216. Harold Koh, *The Future of Lou Henkin’s Human Rights Movement*, 38 COLUM. HUM. RTS. L. REV. 487, 490 (2007). Scholars have long urged the United States to participate in international human rights treaty regimes. See, e.g., MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, WOMEN’S LEGAL RIGHTS: INTERNATIONAL COVENANTS AN ALTERNATIVE TO ERA? 50-63 (1987); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 66-72 (1978).

217. VCLT, *supra* note 4, at art. 46; see Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988) (explaining that the distinction between self-executing and non-self-executing treaties is entirely a judicially created notion and is inconsistent with the text of the U.S. Constitution).

218. Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1245-47 (2008); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303 (1987) (reporters’ note 8). “[I]n principle, a Congressional-Executive agreement must be within the powers of the President and Congress.” *Id.* § 303 (reporters’ note 7) (emphasis added).

219. Hathaway, *supra* note 218, at 1245-47 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 217 (2d ed. 1996)). But see Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1252-54 (1995) (arguing that congressional-executive treaties allow Congress more power than the Constitution permits).

220. Hathaway, *supra* note 218, at 1247 (noting that the North American Free Trade Agreement (NAFTA) and the treaties establishing the WTO and the Bretton Woods institutions were all congressional-executive treaties).

221. *Id.* at 1321.

222. *Foster v. Neilson*, 27 U.S. 253, 40 (1829) (explaining that in the United States, unlike other common law states, treaties function like federal law, unless this is not feasible in the case of a particular treaty).

223. 552 U.S. 491 (2008).

224. *Id.* (holding U.S. obligations were set out by the I.C.J. in *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12); see Carlos Manuel Vázquez, *Treaties As Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008) (explaining why the presumption that treaties are self-executing endures after *Medellin*). But see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (arguing that non-self-executing treaties are not at odds with the

In addition, as Professor Hathaway demonstrates, congressional-executive agreements are more “democratically legitimate.”²²⁵ They involve more elected representatives, including representatives from the more democratic chamber.²²⁶ In fact, most nation states only require a simple majority to enter into an international agreement.²²⁷ Finally, she suggests, the method she proposes for doing so is “both legally unproblematic and politically feasible. It is, as a mechanical matter, breathtakingly simple. . . . All that is necessary to end the use of the Article III process is for the President to cease proposing agreements as Article II treaties and instead to propose them as congressional-executive agreements.”²²⁸

Assuming that the United States ratifies the Women’s Convention, as set out above, the analysis set out in *III.A. In International Law*,²²⁹ would apply to the United States as well as to any other state party.²³⁰ In the alternative, domestic legislation would be necessary if the United States were to meet its international obligations because the Women’s Convention would not create a private right of action in the U.S. courts.²³¹ In either case, CEDAW would effectively be incorporated in U.S. law.²³² The result, for present purposes, would be national law, binding on the states under the Supremacy Clause,²³³ barring the reproduction of gender in connection with reproductive rights.

2. How CEDAW Would Affect Existing Law

This section explains how CEDAW would alter existing law. Under the Supremacy Clause, a treaty is as authoritative as federal law,²³⁴ subject only to

Constitution); John C. Yoo, *Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self Execution*, 99 COLUM. L. REV. 2218 (1999) (setting out textual argument for non-self-execution). See generally David J. Bederman, *Agora: Medellín: Medellín’s New Paradigm for Treaty Interpretation*, 102 AM. J. INT’L L. 529 (2008) (offering a scholarly range of views).

225. Hathaway, *supra* note 218, at 1337.

226. *Id.* at 1280.

227. *Id.* at 1272.

228. *Id.* at 1352 (suggesting that although this practice should replace the current practice, this need not be a rigid position. If, because of the composition of the Senate or the House, obtaining the support of a supermajority of the Senate is more feasible, an Article II treaty remains an option for the President.).

229. See *supra* Part III.A.

230. See *supra* Introduction.

231. See *supra* note 214. The United States has not enacted such legislation in connection with the Civil Covenant or the Race Convention, both of which it has ratified.

232. This assumes, perhaps too optimistically, that the United States would comply with international law. In fact, the reservations, understandings, and declarations (“RUDs”) already drafted in connection with U.S. ratification of CEDAW suggest otherwise. See Treaty Doc. 96-53; Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979 and Signed on Behalf of the United States of America on July 17, 1980; Hearing Before the S. Comm. on Foreign Relations, 107th Cong. 17 (2002); see JANET BENSHOOF, GLOBAL JUSTICE CTR., HOW INTERNATIONAL LAW COULD RADICALLY CHANGE THE DEFINITION OF GENDER EQUALITY IN THE UNITED STATES: CEDAW AND REPRODUCTIVE RIGHTS 4-6 (2008), available at <http://www.globaljusticecenter.net/projects/us-foreign-policy/CEDAWReproductiveRights.pdf> (arguing that ratification of the “guttred” CEDAW would be disastrous).

233. See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920).

234. *Foster v. Neilson*, 27 U.S. 253, 40 (1829).

the “restraints of the Constitution.”²³⁵ As noted above, the Supreme Court has held that reproductive rights in the United States are protected under the Ninth Amendment’s right to privacy.²³⁶ CEDAW would not change this. It would, however, provide a further basis for reproductive rights.

CEDAW would establish a comprehensive federal floor for the national assurance of reproductive rights, including education, access to contraception and medical care, and the full panoply of rights set out above.²³⁷ We currently have no national floor because the United States does not recognize affirmative reproductive rights. As noted above, the United States does not even recognize the human right to health.²³⁸ Instead, American women enjoy only the reproductive rights they can afford. As Professor Law points out:

More U.S. women confront unintended pregnancy than women in nearly every other developed country. One reason is that most employment-based health insurance programs in the United States exclude payment for contraceptives from otherwise comprehensive coverage for prescription drugs and medical services.²³⁹

Under CEDAW, all American women would have access to contraception, which would probably limit the need for abortion. Although data indicate that the majority of American women who have had abortions said that they were using contraceptives when they became pregnant,²⁴⁰ the recent developments of an after-sex pill that can prevent pregnancy if taken within five days of intercourse²⁴¹ may further reduce the number of abortions sought.²⁴² The use of

235. Reid v. Covert, 354 U.S. 1, 16 (1957) (holding that a treaty could not abrogate the right to a jury trial). *But see* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1806 (2009) (arguing that the “power to say what [international] law is” resides exclusively in the U.S. government).

236. *See supra* text accompanying notes 17-18.

237. *See supra* note 199.

238. *See supra* note 30.

239. Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 363 (1998).

240. Balkin, *supra* note 10, at 5.

241. Gardiner Harris, *Panel Recommends Approval of After-Sex Pill to Prevent Pregnancy*, N.Y. TIMES, June 18, 2010, at A14, <http://www.nytimes.com/2010/06/18/health/policy/18pill.html> (noting “dispute [as to] whether the [new] drug works by delaying ovulation . . . or by preventing a fertilized egg from implanting itself in the uterus”); Nicholas D. Kristof, Op-Ed, *Another Pill That Could Cause a Revolution*, N.Y. TIMES, Aug. 1, 2010, at WK8, <http://www.nytimes.com/2010/08/01/opinion/01kristof.html> (describing misoprostol); Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES MAG., July 14, 2010, at 30, 44, available at <http://www.nytimes.com/2010/07/18/magazine/18abortion-t.html> (noting that “almost 90 percent of the abortions in the U.S. are performed before 12 weeks; in addition, four years ago, the proportion of procedures performed before 9 weeks reached 62 percent”).

The morning-after pill, which is *not* a form of abortion, has been available for many years. *See, e.g.*, Editorial, *Respect for Women in Uniform*, N.Y. TIMES, Feb. 15, 2010, at A20, <http://www.nytimes.com/2010/02/15/opinion/15mon3.html> (commending Pentagon’s decision to make morning-after emergency contraception available to women in the military and criticizing remaining rules making abortions available only in cases of rape, incest, or when women’s lives are endangered, and requiring women to pay for such abortions).

242. Harris, *supra* note 241 (citing the Office of Population Research at Princeton University: “more than one million women who do not want to get pregnant are estimated to have unprotected

teleconferencing to enable women in the first nine weeks of pregnancy to obtain prescriptions for abortion pills,²⁴³ moreover, may reduce the number of surgical, as opposed to medical abortions.²⁴⁴ American abortion law, however, would also be affected.²⁴⁵

CEDAW would supersede, rather than overrule, the line of cases beginning with *Griswold*²⁴⁶ and including *Eisenstadt*,²⁴⁷ *Roe v. Wade*,²⁴⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁴⁹ and *Gonzalez v. Carhart*.²⁵⁰ That is, reproductive rights, including the right to contraception and abortion, would no longer be grounded exclusively in Ninth Amendment privacy. Rather, these rights would also be protected by CEDAW's broad and powerful bar on the reproduction of gender.²⁵¹

The privacy rationale for reproductive rights has been criticized since it was articulated. As Professor Linda McClain observes: "[P]rivacy connotes female seclusion and subordination, leading to women's under-participation in society and vulnerability to violence in the home."²⁵² These concerns are particularly pertinent in the context of reproductive rights. As Justice O'Connor noted in striking Pennsylvania's spousal notification law in *Casey*:

[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse Many may fear devastating forms of psychological abuse.²⁵³

sex every night in the United States, and more than 25,000 become pregnant every year after being sexually assaulted. Half of all pregnancies in the United States are unintended . . . ,").

243. Monica Davey, *Abortion Drugs Given in Iowa Via Video Link*, N.Y. TIMES, June 9, 2010, at A1, <http://www.nytimes.com/2010/06/09/health/policy/09video.html> (noting that 1500 abortions have been performed in Iowa using teleconferencing equipment at sixteen Iowa clinics since June 2008).

244. Bazelon, *supra* note 241, at 46 (noting that "Abortion remains the most common surgical procedure for American women; one-third of them will have one by the age of 45. The number performed annually in the U.S. has largely held steady: 1.3 million in 1977 and 1.2 million three decades later.").

245. See *supra* Part III.A.

246. 381 U.S. 479 (1965).

247. 405 U.S. 438 (1972).

248. 410 U.S. 113 (1973) (holding that under the Ninth Amendment protection of privacy, women had a right to abortion subject to the state's interest in protecting the developing fetus).

249. 505 U.S. 833, 846, 878 (1992) (affirming the "essential holding" of *Roe*, while allowing the state to promote its "profound interest in potential life, throughout pregnancy" "so long as the measures adopted by the state do not "constitute an undue burden").

250. 550 U.S. 124 (2007).

251. As noted above, this goes beyond non-discrimination to address the sexual division of labor itself. It includes economic, social and cultural rights as well as affirmative measures to compensate for past discrimination. Finally, it builds on a growing international equality jurisprudence, including recent developments addressing same-sex relationships. See *supra* Part I.

252. Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759, 762 (1999).

253. *Casey*, 505 U.S. at 893.

Second, "privacy" is negative; it requires the state to refrain from taking action rather than imposing any affirmative obligations. As Professor Frances Olsen and others note, grounding reproductive rights in privacy, accordingly, undercuts claims for public funding.²⁵⁴ Rather, American proponents have long argued that these rights should be grounded in "equality."²⁵⁵ As Professors Neil Siegel and Reva Siegel recently discovered, Justice Ginsburg relied on equality while representing a pregnant service woman in 1972.²⁵⁶ As Professor Anita Allen explains, the equality argument includes two propositions. First, "prohibiting abortion is a form of *prima facie* or *de jure* sex discrimination," and, second, it "results from constitutionally unacceptable stereotypes."²⁵⁷ Both propositions, as explained above, are encompassed by CEDAW.

But there are problems with equality under Constitutional doctrine. As Professor Law notes: "[T]he development of modern constitutional sex equality doctrine has suffered from a lack of focus on biological reproductive differences between men and women."²⁵⁸ In addition, sex-based classifications are only viewed as 'quasi-suspect' by the Supreme Court.²⁵⁹ Unlike race, they do not trigger strict scrutiny. As Professor Suzanne Goldberg has shown, this has produced a hopelessly convoluted jurisprudence.²⁶⁰ Like privacy doctrine, moreover, equal protection imposes no affirmative obligations on the state.

254. Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 113 (1989).

255. Balkin, *supra* note 10, at 19 (explaining Siegel's argument that exemptions show that "abortion restrictions are deeply tied to stereotypical views about the sexes and about the duties of women"); see, e.g., Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419 (1995). See generally CHAMALLAS, *supra* note 138, at 304; Balkin, *supra* note 10, at 35 (grounding reproductive rights in liberty and equality).

256. Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 773-74 (2010) (citing Ginsburg's brief on behalf of a pregnant service woman in a case that was settled); see also Ruth Bader Ginsburg, *A Postscript to Struck by Stereotype*, 59 DUKE L.J. 799, 800 (2010) (noting that "the authors have captured just what was on my mind and in my heart"). Katharine Bartlett, then a law student, made a similar argument. See Bartlett, *supra* note 56; Barbara Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893-94 (1971); Siegel, *supra* note 65, at 72 (noting that "[p]hysical differences between the sexes, in particular a women's [sic] unique capacity to gestate life, occasion some of the most persistent and deep-rooted assumptions about the different roles and worth of men and women").

257. Allen, *supra* note 255, at 437; see also *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

258. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955 (1984); see also Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 147-52 (discussing intersection between privacy and equality in the context of reproductive rights).

259. *Craig v. Boren*, 429 U.S. 190 (1976) (striking down Oklahoma law setting a higher age limit for males than for females to purchase 3.2% beer because the sex-based classification was not "substantially related" to an "important government purpose").

260. See generally Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (arguing for a single standard for equal protection analysis); Deborah Brake et al., *Centennial Panel: Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER SOC. POL'Y & L. 1 (1997). Law argues that the burden should be on the state in cases of sex discrimination: "Given how central state regulation of biology has been to the subjugation of women, the normal

Third, as Professors Martha Fineman, Robin West and Ruth Colker have argued, equality does not go far enough. As Professor Fineman explains, “[A]n impoverished sense of equality is embedded in our current legal doctrine. We understand equality in terms that are formal, focused on discrimination, and inattentive to underlying societal inequities.”²⁶¹ Instead, she argues for a “richer and more robust guarantee of equality,”²⁶² grounded in “the term ‘vulnerable’ for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.”²⁶³ Professor West, similarly, faults the legalistic safeguards of *Roe* and *Casey* for neglecting the social and economic circumstances in which reproductive choices are made.²⁶⁴ As Professor Colker concludes, “A woman in my view has the right to seek an abortion to protect the value of her life in a society that disproportionately imposes the burdens of pregnancy and child care on women and does not sufficiently sponsor the development and use of safe, effective contraceptives.”²⁶⁵

CEDAW addresses all of these issues. Equality under CEDAW is more muscular than equality under American equal protection doctrine. First, it is broader in scope. It bars *all* forms of discrimination; there is no requirement of intent, state action, or disparate impact.²⁶⁶ Second, it requires states to focus on the “underlying societal inequities” that concern Professor Fineman and to proactively address the social and economic circumstances in which reproductive choices are made, as Professor West urges. Thus, the refusal to pay for poor women’s abortions, which the Supreme Court upheld in *Maher v. Roe*²⁶⁷ and *Harris v. McRae*²⁶⁸ would be barred under CEDAW. Third, CEDAW

presumption of constitutionality is inappropriate and the state should bear the burden of justifying its rule” Law, *supra* note 258, at 1009.

Ratification of CEDAW would not necessarily subject gender-based regulations to the same standard as race-based regulations. As Professors Chinkin and Charlesworth have pointed out, for example, the obligations imposed on state parties under the Women’s Convention require them to take “all appropriate measures without delay” in contrast to the “immediately binding” obligations imposed under the Race Convention. CHINKIN & CHARLESWORTH, *supra* note 13, at 45.

261. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2 (2008).

262. *Id.* at 9.

263. *Id.* at 8; see also Shalleck, *supra* note 9.

264. See generally Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009) [hereinafter West, *From Choice*]. West argues elsewhere that “[M]othering children, as we presently socially construct that work, is incompatible with the basic rights and responsibilities of citizenship.” Robin West, *Robin West (Concurring in the Judgment)*, in WHAT ROE V. WADE SHOULD HAVE SAID, *supra* note 10, at 141. Assuring reproductive rights, for West, is “pathetically inadequate.” *Id.* But see Reva B. Siegel, *The Constitutional Law and Politics of Reproductive Rights*, 118 YALE L.J. 1312, 1314-15 (criticizing West, *From Choice, supra*).

265. Ruth Colker, *Feminism, Theology and Abortion: Toward Love, Compassion, and Wisdom*, 77 CALIF. L. REV. 1011, 1050 (1989); see also RUTH COLKER, *ABORTION AND DIALOGUE: PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW* (1992).

266. See *supra* Part I.B.1; Judith Resnik, *What’s Federalism For?*, in THE CONSTITUTION IN 2020, *supra* note 187, at 269, 275.

267. 432 U.S. 464, 469, 474 (1977) (holding that neither the state nor the federal government must pay for a poor woman’s abortion).

268. 448 U.S. 297, 316 (1980) (holding that “[t]he financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the

explicitly recognizes the social importance of reproduction, that is, the importance of reproduction to the larger community. Thus, under CEDAW, those claiming reproductive rights are not “left alone” in the private sphere,²⁶⁹ but welcomed into the public sphere with appropriate accommodations for workers, including pregnant or nursing workers, and their children. CEDAW further recognizes the obligation of the larger community to provide actual material support before, during, and after birth. As Professor Law explains, this is crucial to women’s equality. She understands, as did the CEDAW framers, that gender equality requires “transformation of the family, child-bearing arrangements, the economy, the wage/labor market, and human consciousness.”²⁷⁰

There is an additional issue. The abortion cases also recognize the “State’s interest in potential life.”²⁷¹ Ninth Amendment privacy does not outweigh this interest as long as the state statute or regulation does not place “a substantial obstacle in the path of a woman seeking an abortion.”²⁷² Under international human rights law, the state interest in “potential life” would probably not outweigh CEDAW-strength equality. As Professor Philip Alston has explained, a fetus is not considered a “person” under international law.²⁷³ As Professor Balkin notes, many American jurists have reached a similar conclusion.²⁷⁴

product not of governmental restrictions on access to abortions, but rather of her indigency.”). *But see* MacKinnon, *supra* note 112, at 1320 (arguing that “only women can be disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion. The denial of funding for Medicaid abortions obviously violates this right. The Medicaid issue connects the maternity historically forced on African American women integral to their exploitation under slavery with the motherhood effectively forced on poor women, many of whom are Black, by deprivation of government funding for abortions. For those who have not noticed, the abortion right has already been lost: this was when.”).

269. *See generally* McClain, *supra* note 252 (discussing limits of privacy doctrine).

270. Law, *supra* note 258, at 956; *see* Leonhardt, *supra* note 124 (noting that “[w]ith Australia’s recent passage of paid [parental] leave, the United States has become the only rich country without such a policy”).

271. *See generally* *Roe v. Wade*, 410 U.S. 156 (1973).

272. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). As Johnsen notes, “*Casey* allowed the government substantially greater authority to interfere with women’s reproductive choices. The Court overruled protective rulings from the 1980s and upheld the very types of restrictions it previously had held to be unconstitutional.” Dawn E. Johnsen, *A Progressive Reproductive Rights Agenda for 2020*, in *THE CONSTITUTION IN 2020*, *supra* note 187, at 255, 257. *But see* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 996 (2003) (arguing that *Casey* “implicates the human existence of millions of lives a year” (referring to “human unborn child[ren]”)).

273. Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 173 (1990).

274. As Balkin and others have pointed out, if a fetus is a person from the moment of conception, allowing abortion in the case of incest or rape makes no more sense than excusing murder because the victim was produced from a coerced or incestuous union. Jack M. Balkin, *Jack M. Balkin (Judgment of the Court)*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 10, at 63; Mark Tushnet, *Mark Tushnet (Concurring)*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 10, at 86, 89 (citing Justice Clark: “[n]o prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life.”).

Professor Siegel suggests that statutes permitting abortion in cases of rape or incest implicitly concede the point.²⁷⁵

Where, like here, international law provides *greater* protection than that afforded by domestic law, the state should not prevail. As Professor Lori Damrosch explained with respect to the Torture Convention:

If the Administration is correct about the substantial conformity of U.S. law to the Convention's requirements, then there is no reason to erect an artificial barrier to the application of the Convention as a complementary but fully compatible source of law. On the other hand, to the extent that the Convention may provide greater protection than Constitution or statutory law . . . it is all the more important to allow the Convention to operate of its own force.²⁷⁶

Whether CEDAW's more muscular equality would lead to a different standard would be an open question to be decided by the Roberts Court. As journalist Adam Liptak recently observed, the Roberts Court is the "most conservative Court in decades,"²⁷⁷ and it seems willing to leave reproductive rights to the states.²⁷⁸ As Dawn Johnsen notes, "Since *Casey*, states have adopted literally hundreds of abortion restrictions, reflecting an incremental, multitiered strategy to create 'abortion-free' states and to deter women from having abortions, often through deception."²⁷⁹ The Supreme Court has also expressed doubts about drawing on international law although, as Professor Martha Davis and Bethany Withers point out, "Justice Scalia cited transnational law on abortion rights in his dissent in *Atkins v. Virginia*, using it to argue that the U.S. law on the subject was relatively liberal."²⁸⁰

275. "The statutory exception allowing women to have abortions if they conceive by rape indicates that the state's decision to prohibit abortion rests on unarticulated assumptions about how women are to comport themselves sexually—a code the state enforces by selectively allowing women access to abortion." Siegel, *supra* note 65, at 77.

276. Damrosch, *supra* note 215, at 522.

277. Adam Liptak, *Court Under Roberts is Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1, <http://www.nytimes.com/2010/07/25/us/25roberts.html> (noting that "[a]bortion rights are likely to be curtailed."); see also Johnsen, *supra* note 272, at 258 (noting that while "litigation has served as the primary and most effective weapon against dangerous abortion restrictions . . . A Court-centered strategy for the coming decades would be dangerously inadequate").

278. Liptak, *supra* note 277; see Resnik, *supra* note 266, at 273 (noting that "federalism" is often relied upon by opponents of U.S. ratification of human rights conventions, including CEDAW). See generally Balkin, *supra* note 10, at 3–4 (noting that "[t]hirty years after *Roe*, Americans remain divided over abortion rights. Polling data consistently show majority support for some form of abortion right, and overwhelming majorities favor the legal availability of abortion in cases of rape, incest, or when a woman's life or health would be jeopardized.").

279. Johnsen, *supra* note 272, at 261.

280. Davis & Withers *supra* note 116, at 38. As the authors further note, "recent scholarly writing on the role of 'human dignity' in domestic abortion adjudication underscores the ways in which U.S. jurisprudence in [the area of reproductive rights] already draws significantly from transnational human rights norms." *Id.*; see also Vicki C. Jackson, *Progressive Constitutionalism and Transnational Legal Discourse*, in THE CONSTITUTION IN 2020, *supra* note 187, at 285, 285 (noting the "United States' long history of using foreign law and the 'law of nations' in constitutional interpretation").

CONCLUSION

This Article has explained how CEDAW bars the reproduction of gender, and why that requires nothing less than the full assurance of women's reproductive rights. It has explained how earlier human rights law recognized women's reproductive rights, and how that law fell short. CEDAW goes beyond mere non-discrimination to assure equality on steroids; it situates reproductive rights in the public sphere, and requires states—as well as non-state actors—to respect, protect, and fulfill them. CEDAW challenges, and firmly rejects, the sexual division of labor in its endless cultural variations.

Part I drew on decades of rigorous empirical work to show the depths of women's poverty and how, exactly, that poverty is grounded in the sexual division of labor. This Part concluded by describing the trend in international equality jurisprudence toward recognition of same-sex relationships. Like CEDAW's bar on the reproduction of gender, this jurisprudence exposes the sexual division of labor as a human construct, which can and should be repudiated.

Part II showed how the denial of women's reproductive rights specifically reproduces gender. It takes control of their own reproductive capacity away from women, relegating them to a sexual division of labor based on biological differences. It puts their bodies at the service of men or the state. The denial of reproductive rights reproduces gender whether by a state or a non-state party, whether by explicit prohibitions or by the failure to provide necessary services, including childcare.

Part III explained how this plays out, internationally and in the United States. Part III first drew on recent work on the fragmentation of international law to describe the proliferation of national applications. It concluded by situating this law in U.S. constitutional jurisprudence, showing how the arguments set out in this Article resonate with the arguments of Justice Ginsburg, and Professors Law, Siegel and others, to ground reproductive rights in equality, rather than privacy. Efforts to do so under the U.S. Constitution have failed. As this Article demonstrates, CEDAW's broad and powerful bar on the reproduction of gender is stronger than equal protection. It can do the work necessary to assure reproductive rights, the bedrock of women's equality.