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Crazy Jane Talks with the Bishop: Abortion in South Africa, China, Germany, South Africa and International Human Rights Law

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CRAZY JANE TALKS WITH THE BISHOP: ABORTION IN CHINA, GERMANY, SOUTH AFRICA AND INTERNATIONAL HUMAN RIGHTS LAW

Barbara Stark*

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I met the Bishop on the road
 And much said he and I.
 'Those breasts are flat and fallen now
 Those veins must soon be dry;
 Live in a heavenly mansion,
 Not in some foul sty.'
 'Fair and foul are near of kin,
 And fair needs foul,' I cried.
 'My friends are gone, but that's a truth
 Nor grave nor bed denied,
 Learned in bodily lowliness
 And in the heart's pride.
 'A woman can be proud and stiff
 When on love intent;
 But Love has pitched his mansion in
 The place of excrement;
 For nothing can be sole or whole
 That has not been rent.'
 —William Butler Yeats,
*Crazy Jane Talks with the Bishop*¹

I. Introduction

Feminists involved in international human rights law have long recognized that reproductive rights are an essential part of any larger struggle for women's human rights.² As noted at the World Conference on Population

1. *Crazy Jane Talks with the Bishop*, in VARIORUM EDITION OF THE POEMS OF W. B. YEATS 512, 513 (Peter Allt & Russell K. Alspach eds., 1957). Yeats had a lifelong fascination with gender and gender roles, and a substantial body of criticism demonstrates his continuing importance to feminists. See, e.g., YEATS AND WOMEN (Deirdre Toomey ed., 2d ed. 1997); ELIZABETH BUTLER CULLINGFORD, GENDER AND HISTORY IN YEATS'S LOVE POETRY (1993). Yeats also provides a useful window on the tension between the global discourse of human rights and national critiques, since he is both an icon of Western culture and, as an Irish nationalist, one of the earliest and most outspoken opponents of the British Empire. As Edward Said has explained, "Yeats is a poet who belongs to a tradition . . . of the colonial world ruled by European imperialism . . . during the late nineteenth and early twentieth centuries—bringing to a climactic insurrectionary stage, the massive upheaval of anti-imperialis[m]." Edward W. Said, *Yeats and Decolonization*, in TERRY EAGLETON, ET AL., NATIONALISM, COLONIALISM, AND LITERATURE 69-70 (1990).

2. "The risks mothers ran did not diminish until family planning was made possible via effective contraception, and prenatal care and obstetric practices improved. When that happened, pregnancy, childbirth, and childbed not only became less hazardous; they were now no longer the determining factors of the female experience." UTE FREVERT, WOMEN IN GERMAN HISTORY: FROM BOURGEOISIE EMANCIPATION TO SEXUAL LIBERATION 318 (1988).

in Cairo in 1994³ and reiterated at the World Conference on Women in Beijing in 1995,⁴ control over their own reproduction is a prerequisite for any meaningful conception of women's human rights.⁵

At the same time, feminists have recognized that reproductive rights, in fact, involve a range of related but distinct rights—from access to birth control for minors to environmental safeguards that protect women from involuntary sterilization from industrial pollutants.⁶ These rights play out in an equally broad range of contexts—from intimate decision making within the nuclear family to state family-planning policy making.

This paper focuses on the right to abortion and the inability of feminists to generate consensus regarding that right on the international level, despite widespread agreement as to its basic importance.⁷ This inability can be traced partly to the different functions abortion serves in different countries and partly to the different strategies that feminists have employed at the national level to safeguard or limit the right to abortion.⁸ This paper

3. Report of the International Conference on Population and Development, U.N. International Conference on Population and Development at 15, U.N. Doc. A/CONF. 171/13 (1994). For an insightful analysis, see NADINE TAUB, INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, ISSUE PAPERS ON WORLD CONFERENCES, No. 1 (1994).

4. U.N. FOURTH WORLD CONFERENCE ON WOMEN, THE BEIJING DECLARATION AND PLATFORM FOR ACTION (1996).

5. For a cogent overview, see Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991). See also, Jill M. Bracken, Comment, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 IND. INT'L & COMP. L. REV. 197 (1995).

6. See Sev S. Fluss, *The World Health Organization and Women*, in WOMEN IN INTERNATIONAL HUMAN RIGHTS LAW (Askin & Koenig, eds., 2000).

7. See, e.g., REPORT OF THE WORLD CONFERENCE OF THE UN DECADE FOR WOMEN paras. 145, 146 (1980) A/CONF. 94/35 reprinted in THE UN AND THE ADVANCEMENT OF WOMEN 1945-1996 at 250, 268 (affirming as "priority areas" accessibility [to] family planning. . . to enable women to . . . decide freely and responsibly for the number and spacing of their children"); Maria Isabel Plata, *Reproductive Rights as Human Rights; The Colombian Case*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 515, 516 (Rebecca Cook ed. 1994) (noting that, "[because] all contraceptives have failure rates . . . some women will always need safe abortions"). Compare Mary ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987) [hereinafter GLENDON, ABORTION AND DIVORCE] (arguing that states that fail to support pregnant single women and single mothers are more likely to condone abortion) with Udo Werner, *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, 18 LOY. L. A. INT'L & COMP. L. REV. 571, 572 (1996) (arguing that "the U.S. Supreme Court decisions [on abortion] reflect more societal consciousness than Glendon admits. Furthermore, the language of the German judgments is more influenced by 'rights talks' and competing individual interests than Glendon argues."). See generally, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989).

8. This inability to generate consensus is over-determined. For a partial list of relevant factors, see text accompanying note 13, *infra*. This inability also reflects different conceptions regarding the role of law. See, e.g., GLENDON, ABORTION AND DIVORCE, *supra* note 7, at 7 ("In England and the United States the view that law is no more or less than a command

examines the political and social constructions of abortion in China, Germany, and South Africa⁹—states that have all reformed their abortion laws within the last ten years¹⁰—to show how subversions of national abortion policies have effectively subverted attempts to produce an intelligible international position.¹¹

By way of caveat, this paper does not attempt to provide the rigorous immersion in each culture necessary to understand reproductive rights within a particular cultural context.¹² Such an immersion would necessarily include a full account of reproduction within that culture, including an examination of state population policy, available contraception, access to healthcare, and analysis of women's status.¹³ As Vivian Curran has argued, such an immersion necessarily requires an understanding of the language as well as the culture.¹⁴ My purpose here is much more limited; this paper simply explores the kinds of obstacles feminists confront in reaching an international consensus. The international project must take the underlying cultures into account, but it should not be *driven* by them.¹⁵ Rather, if the

backed up by organized coercion has been widely accepted. The idea that law might be educational, either in purpose or technique, is not popular among us. But on the European continent . . . [t]he rhetorical method of law making appears. . . in all sorts of contemporary European legislation. It is most especially evident in continental family law.”).

9. For other comparisons see Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 STAN. L. REV. 1027 (1988) [hereinafter Savage, *Women's Rights*]; Bonnie L. Hertberg, Note, *Resolving the Abortion Debate: Compromise Legislation, An Analysis of the Abortion Policies of the United States, France, and Germany*, SUFFOLK TRANSNAT'L L. REV. 513 (1993).

10. Cf. GLENDON, ABORTION AND DIVORCE, *supra* note 7, at 11 (noting that “[a] fundamental change has occurred in [abortion regulation] all over the Western world . . . [w]ithin less than two decades”).

11. The lack of international consensus on abortion is traced to different national and regional approaches to the issue. LOUIS HENKIN ET AL., *HUMAN RIGHTS* (1999). The argument here focuses on the different feminist perspectives on those national approaches, and the resulting difficulty of reaching political consensus among feminists on the international level.

12. GLENDON, ABORTION AND DIVORCE, *supra* note 7, at 4 (observing that “[t]he use of comparative law as a heuristic device was brought to its highest form in the legal sociology of Max Weber”).

13. See Plata, *supra* note 7, at 516.

14. Vivian Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).

15. In theory, for example, states could agree to disavow their respective nationalist agendas in favor of a common agenda that better serves them all, as the six original members of the European Community did in the Treaty of Rome. When a bureaucratic “agenda” is replaced with emotionally-loaded “culture”, the plot thickens, especially if one’s own “culture” is challenged by someone else’s notion of “universal rights.” The ideal of a comparativist as someone above the fray can be very appealing. “At least historically, the comparativist has been viewed more as a neutral detached observer—more like a historian and a scientist than an advocate.” Florian Miedel, *Is West Germany's 1975 Abortion Decision a*

international project is realized, it will become the driving force to which the respective cultures must conform. The relationship between the international project and the underlying culture is obviously subject to a shifting dynamic. A key question for international human rights is how to protect the most vulnerable, especially during transition. Yeats's "Crazy Jane" is a crone, a poor woman who somehow gets by, a defiant outsider. She challenges the Bishop to show that his abstract theology addresses her very earthy needs. In the "Crazy Jane" series, written near the end of his life, Yeats assumes a woman's voice to express the range and complexity of women's experience. Just as Crazy Jane challenges the Bishop, the pragmatic strategies adopted by feminists on the national level¹⁶ challenge the abstract, universal constructions of international human rights law.¹⁷

"Abortion" includes a broad range of procedures, depending in part upon the stage of fetal development at which it is performed.¹⁸ Abortion includes a similarly broad range of social and political meanings.¹⁹ In South Africa, the debate over the new abortion law became a microcosm of national politics as Islamic, tribal, and other factions struggled with the rhetoric of equality and the bitter legacy of apartheid.²⁰ In China, abortion is both a human rights rally cry against the coerced abortions performed pursuant to the one-child policy (and a ground for asylum claims²¹) and a privilege limited to those who can afford the sex-selective abortions that

Solution to the American Abortion Debate?: A Critique of Mary Ann Glendon and Donald Kommers, 20 N.Y.U. REV. L. & SOC. CHANGE 471, 510 (1993-94).

16. These strategies reflect feminists' relationships with their respective states as well as political alliances—and schisms—among feminists, nationally and internationally. See, e.g., Marion Kaplan, *Sisterhood Under Siege: Feminism and Anti-Semitism in Germany 1904-1938*, in RENATE BRIDENTHAL, *WHEN BIOLOGY BECAME DESTINY* 174 (1984) (describing the relationship of the Jewish feminist movement in Germany to its German counterpart, and the developments through which Jewish women were divided from other feminists).

17. Yeats refuses to essentialize women, showing instead a rare awareness of their complexity and range. As one critic observes, "Yeats's feminine masks are stunning in their range." JANIS TEDESCO HASWELL, *PRESSED AGAINST DIVINITY: W.B. YEATS'S FEMININE MASKS* 5 (1997).

18. Abortion refers to the termination of a pregnancy after the fertilized egg has become attached to the uterine wall. Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 173 (1990).

19. As of 1988 in the Soviet Union, abortion remained the primary method of birth control as contraceptives were unavailable. Savage, *Women's Rights*, *supra* note 9, at 1063.

20. See *infra* Part III.B. Cf. Kaplan, *supra* note 16, at 193 ("Ultimately, in a period of crisis, racial identity prevailed over female solidarity not only among Jews, where the identity was imposed, but also among German Gentile women, who accepted and sometimes embraced racist divisions.").

21. See, e.g., Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 Hous. J. INT'L L. 557, 558 (1996); Charles E. Schulman, Note, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B. C. THIRD WORLD L. J. 313 (1996).

remain technically illegal.²² In Germany, unification forced a problematic synthesis between pro-natalists and those eager to exorcise any trace of the Nazi policies in the West and the far more liberal abortion laws of the formerly socialist East.²³

Part II establishes the backdrop of the abortion debate, briefly describing and contrasting the law in each state before the reforms.²⁴ Part III explains what feminists wanted, whether expressed in private interviews with feminists in China or in the very public lobbying and advocacy of women's groups in South Africa and Germany. Part IV describes what they got. Part V explains how the resultant laws, whether incorporating feminist arguments in their respective national debates or silencing them, exemplify the range of discordant approaches that preclude consensus on abortion in international human rights law.

II. What They Had

Before the reforms in the 1990s, there were dual systems governing abortion for German, South African, and Chinese women. For German and South African women, this reflected the dual legal systems in which abortion laws were embedded. East and West Germany were separate political entities, with distinct laws and distinct conceptions of women's role in society. South Africa under apartheid had two similarly distinct legal systems, one for Blacks and one for Whites. Although China had a unified legal system, that system functioned in two very distinct urban and rural contexts. Thus, the same one-child policy that allowed urban women to participate in economic life subjected rural women to forced abortions and sterilizations. The two-tiered systems in each state were serviceable for some women, but disastrous for others. (See Appendix, Fig. 1.)

A. In China

1. The Population Crisis

Historically, large families were the ideal in China, especially for the vast majority of the population that lived in rural areas.²⁵ As in most agrar-

22. See *infra*, e.g., Part II.A.3.

23. See *infra*, e.g., Part II.C.

24. See generally Stanislaw J. Frankowski & George F. Cole, *Introduction to ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE*, at ix-xv (Stanislaw J. Frankowski & George F. Cole eds., 1987) (describing the complex policy process through which various models of abortion are adopted).

25. Abortion was illegal in China from 1949 until 1953; legal under limited circum-

ian, pre-industrial societies, children were valued as laborers. Children were also valued as members of the family, the most important unit of social organization.²⁶ In part because girls joined their husbands' families upon marriage, boys were considered more important to their parents. Sons were their parents' social security and old age insurance.²⁷ The birth of a boy was regarded as a "big happiness"; the birth of a girl was viewed as a "small happiness."²⁸

By 1980, however, China's communist leadership viewed the burgeoning population as a major national crisis,²⁹ putting all other national policies, including those regarding modernization and economic stability, at risk.³⁰ Fertility rates of over five live-births per woman would make it impossible to maintain, let alone improve, an already dismal standard of living. The country faced imminent disaster, including widespread famine.³¹

Although the statistics compiled by the government were challenged by demographers outside of China at the time,³² and later by Chinese demographers,³³ the state mobilized its vast bureaucracy to cope with the emergency.³⁴ In what Chinese feminists³⁵ have described as the state's nar-

stances from 1953 until 1965; a form of fertility control between 1965 and 1978; and a form of fertility control, sometimes compulsory, from 1978 to 1988. Savage, *Women's Rights*, *supra* note 9, at 1069, 1081.

26. KAY JOHNSON, HUANG BANGHAN, & WANG LIYAO, INFANT ABANDONMENT AND ADOPTION IN CHINA 475 (1998).

27. *Id.*

28. See, e.g. Barbara Jones, *A Small Happiness*, at <http://www.fwcc.org/smallhappiness.html> (last visited May 13, 2003).

29. China's first modern census in 1953 put the population at 583,000,000. This more than doubled in less than 50 years to 1,252,800,000 in 1999. China's Population, *available at* <http://www2.newpaltz.edu/~knapp/EACP/population.htm> (last visited Oct. 2, 2000) (on file with author). More than 1/5 (20.8%) of the world's population, which exceeded 6 billion in October 1999, lives in China. *Id.* at 1.

30. See generally JUDITH BANISTER, CHINA'S CHANGING POPULATION (1987); EDWIN A. WINCKLER, *Re-enforcing State Birth Planning*, in TRANSITION FROM COMMUNISM IN CHINA: INSTITUTIONAL AND COMPARATIVE ANALYSES 181 (1999).

31. "In the Chinese way of thinking, personal problems are by definition trivial ones. 'People simply would not think to question the government's assessment of the size and seriousness of the population problem.'" Susan Greenhalgh, *Fresh Winds in Beijing: Chinese Feminists Speak Out on the One-Child Policy and Women's Lives*, 26 SIGNS 847, 866 (Spring 2001) (internal citation omitted).

32. STAFF OF JOINT ECONOMIC COMM., 97th CONG. 2d Sess., CHINA UNDER THE FOUR MODERNIZATIONS, PART I, 201-202. (Joint Comm. Print 1982) [hereinafter JOINT ECONOMIC COMM.].

33. *Id.* at 203.

34. "China presents the world's most conspicuous and consequential case of a top-down, demographic-targeting approach to population control. . . . Unlike the more familiar family planning program, in which the individual couple is enjoined to plan its family, China has created a state birth planning program, in which social engineers in the state planning apparatus effectively plan the birth(s) of every couple in the nation." Greenhalgh, *su-*

rative of “crisis and salvation,”³⁶ the government crafted a comprehensive population control policy: “[L]ocal party cadres [were ordered] to ‘grasp’ birth control work ‘firmly,’ to make it part of the ‘fierce struggle between the two classes [and]’ to reassert ‘the dictatorship of the proletariat’ in family planning work.”³⁷

2. Women’s Equality

Under communism, Chinese women are equal to men.³⁸ This represented a radical departure from the traditional Chinese view, in which women were considered men’s inferiors and subordinates. Modern women were “comrades,” and they were entitled to the same education and employment opportunities as men, at least in theory.³⁹ The official state narrative of women’s equality both supported the narrative of population control and was supported by it.⁴⁰ Women would no longer be expected to spend their most productive years birthing and caring for children. Rather, after one or two births, women would take their places beside their husbands in the fields, factories, universities, and laboratories of the new China.⁴¹

pra note 31, at 852.

35. For an explanation of the ways in which “feminism” and “feminist” have been politically problematic terms in China, see Greenhalgh, *supra* note 31, at 849 n.5. Although one of her interviewees denies that she is a feminist, Greenhalgh nevertheless includes her because her “long history of writing on problems faced by women and girls marks her as a feminist in the sense of one actively committed to improving the position of females in Chinese society.” *Id.*

36. Greenhalgh, *supra* note 31, at 863.

37. JOINT ECONOMIC COMM., *supra* note 32, at 201-202. Article 53 of the new Constitution adopted in March 1978 provided in pertinent part: “Women enjoy equal rights with men in all spheres of political, economic, cultural, social, and family life Men and women shall marry of their own free will. The state protects marriage, the family, and the mother and child. The state advocates and encourages family planning.” Savage, *Women’s Rights*, *supra* note 9, at 1081 n.282 (translated from 1 Laws & Regulations of the People’s Republic of China (1982)).

38. See Greenhalgh, *supra* note 31, at 851 (describing “two foundational narratives of nation—the narrative of national crisis and salvation and the narrative of women’s liberation”).

39. *Id.*

40. “[I]n China, as in many third-world countries, the feminist movement for women’s liberation first arose in conjunction with the nationalist movement against colonialism and imperialism, only to be subordinated once political power was reconsolidated.” Greenhalgh, *supra* note 31, at 850.

41. “Family planning also helps liberate women from onerous household chores to enable them to take a direct part in socialist construction.” Savage, *Women’s Rights*, *supra* note 9, at 1083 (citing Chairman Hua). “Although it failed to fulfill its promises to women, Maoism at least championed the goal of gender equality. In the post-Mao era, the advance of global capitalism coupled with the retreat of the state from direct intervention in many areas of life have been accompanied by a backlash against (state) feminism.” Greenhalgh, *supra* note 31, at 875.

3. The One-Child Policy

Draconian population control measures were viewed as necessary to counter traditional preferences for large families. The infamous one-child policy was adopted in 1980,⁴² limiting each family to one or at most two children.⁴³ This policy was enforced through a broad range of methods,⁴⁴ including onerous fines on excess children, forced sterilizations and abortions,⁴⁵ the refusal to register "unauthorized" children, and oppressive campaigns in which committees would monitor women's menstrual cycles and pay unwelcome visits to women who became pregnant, sometimes harassing them for hours until they agreed to abortions.⁴⁶

An unintended consequence of the one-child policy is a large group of missing baby girls.⁴⁷ Birth rates predict almost a million more infant girls than appear in Chinese statistics.⁴⁸ An estimated fifteen percent, approxi-

42. In 1980, the Marriage Law was amended to require husbands and wives to practice family planning. The one-child policy was introduced two weeks later in an open letter to all members of the Party and the Communist Youth League. Savage, *Women's Rights*, *supra* note 9, at 1084-85.

43. In 1978, the Chairman of the Chinese Communist Party set a definite numerical limit on population growth. Savage, *Women's Rights*, *supra* note 9, at 1081 (urging the National People's Congress to "strive to lower the annual rate of growth of China's population to less than one percent within three years"). *Id.* at 1081 n.283. Ellen Keng, *Population Control Through the One-Child Policy in China: Its Effects on Women*, 18 WOMEN'S RTS. L. REP. 205 (1997). For an account of earlier, less effective efforts, see Xizhe Peng, *Population Policy and Program in China: Challenges and Prospective*, 35 TEX. INT'L L. J. 51 (2000) (describing earlier population policy which had had less dramatic success). See Jessica L. Singer, *Intercountry Adoption Laws: How Can China's One-Child Policy Coincide with the 1993 Hague Convention on Adoption?* 22 SUFFOLK TRANSNAT'L L. REV. 283 (1988).

44. As Marianne Blair points out, there is "conflicting information about the coerciveness of the policy. On the one hand there are reports of forced abortions and forced sterilizations. On the other hand, some of these reports are false." MARIANNE BLAIR & MERYL WEINER, *INTERNATIONAL FAMILY LAW*, ch. 13 at 17.

45. This included operations performed in "rushed, high pressured campaigns." Greenhalgh, *supra* note 31, at 870. Cf. Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, in BRIDENTHAL *supra* note 16, at 277 ("[I]n 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.").

46. The extent of opposition to the one-child policy, and thus the need for coercive measures to impose it, is unknown. See generally Schulman, *supra* note 21, at 317. Scholars have documented a resurgence of interest in domesticity among young women in China, which has been linked to a backlash against state feminism. Susan Greenhalgh found one Chinese feminist who supported the state's policy. In her view, Western critics "failed to appreciate the seriousness of China's population and developmental problems." Greenhalgh, *supra* note 31, at 861.

47. Greenhalgh, *supra* note 31, at 873.

48. *Id.* at 872 n.26.

mately 191,089, are missing because of “excess female mortality”; i.e., sex-selective abortion, infanticide, or neglect.⁴⁹ Although the “missing” baby girls are a matter of growing state concern, no one can account for them.⁵⁰ Nor have Chinese feminists addressed this issue.⁵¹ According to one Chinese feminist, “to solve the infant girl problem . . . would entail nothing less than changing the entire economic and social structure, including the family and inheritance system.”⁵²

In terms of population, the one-child policy was an unprecedented success. Fertility rates fell dramatically. By 1990, the child-bearing rate had dropped to 2.31 from 5.81 in 1970.⁵³ The one-child policy, however, was never formally rescinded.⁵⁴ Indeed, in a recent statement by the State Family Planning Commission, the government reiterated its commitment to family planning work.⁵⁵ But the recent clarification of the policy insists that “family planning personnel . . . perform their duties in accordance with the law and . . . in a just and civilized way [so] that the legitimate rights and interests of the people are protected.”⁵⁶ Rather, the focus is to be on education and publicity, to change public attitudes, especially in rural areas, and

49. *Id.*

50. *Id.* at 872.

51. Most of the feminists interviewed by Greenhalgh accepted “the official narrative that depicts the [plight of infant girls] as minor and attributes it to traditional culture, with no consideration of the role of state policy.” *Id.* at 872. As Greenhalgh notes:

Curiously, only one of my interviewees, the population specialist Zhu, attached much importance to the distorted sex ratio and the related issue of ‘excess female mortality’. . . [T]he plight of the infant girls did not loom large in the minds of the other feminist commentators on the birth program.

Id. at 872. It is a popular concern, in contrast, that because of the dearth of females, one million Chinese men a year may in the future be unable to find brides. *Id.* “Scholars are already investigating the sociological impact of the looming ‘bride shortage’ in China. One argues that ‘forced marriages, girls stolen for wives, bigamy, visiting prostitutes, rape, adultery . . . homosexuality . . . and weird sexual habits appear to be unavoidable.’” Ryiah Lilith, *Buying a Wife But Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoption*, 9 BUFF. WOMEN’S L.J. 225, 260 (2000/2001).

52. Greenhalgh, *supra* note 31, at 873.

53. Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 266 n.59 (1991-92). The child-bearing rate of 2.1 is the rate at which the population does not grow, but merely replaces itself. *Id.*

54. “China’s leaders remain deeply committed to a policy that largely achieved its demographic goals almost a decade ago. . . .” Greenhalgh, *supra* note 31, at 851-52. *But see* China Eases the One-Child Policy, available at <http://www.adoption.about.com/library/blchinaew.htm> (last visited Feb. 8, 2003).

55. STATE FAMILY PLANNING COMMISSION, THE NATIONAL FAMILY PLANNING PROGRAM OF CHINA (1995-2000), available at www.unefcat.org/pop/database/law-china/ch-record015.htm (last visited 9/27/02) (on file with author).

56. *Id.*

to explicitly draw women into the process.⁵⁷

B. In South Africa

In 1975, South Africa enacted the Abortion and Sterilization Act⁵⁸ which medicalized the abortion decision, basically leaving it to the woman's doctor.⁵⁹ Only if the doctor determined that the pregnancy posed a "serious threat" or actually caused "permanent damage" to the woman was abortion permitted, and then only following compliance with a rigid set of procedural requirements.⁶⁰ During the 1980s, approximately sixty percent of those who applied for abortions were denied.⁶¹ The forty percent (approximately 800-1,000 women annually) who were approved were overwhelmingly white. Of these, more than seventy percent were approved on psychiatric grounds.⁶² As Najma Moosa observes, "Access was thus largely affected by class position and racial background. Very few black women who might have qualified had access to psychiatric assessment or knowledge of the qualifications."⁶³ Wealthy South African women had the option of going abroad to obtain an abortion,⁶⁴ but for the vast majority, the difficulty of obtaining a legal abortion only increased the number of illegal abortions.⁶⁵ As Dr. Norman Walker observed at a symposium on abortion in Durban in 1973:

It is too late for cabinet ministers, Church dignitaries or the hierarchy of the legal and medical profession to decide there will or

57. *Id.*

58. Act 2 of 1975. At the time of the 1975 Act, "very few women in South Africa knew that a law about abortion had been proposed, and was being debated and considered by Parliament." Jeremy Sarkin, *Patriarchy and Discrimination in Apartheid South Africa's Abortion Law*, 4 BUFF. HUM. RTS. L. REV. 141, 154 (1998).

59. The final South African Constitution establishes the right "to make decisions concerning reproduction" and the right to "security in and control over [the] body." S. AFR. CONST. § 12(2).

60. Sarkin, *supra*, note 58, at 154.

61. Najma Moosa, *A Descriptive Analysis of South African and Islamic Abortion Legislation and Local Muslim Community Responses*, 21 MED. & L. 257, 260 (2002).

62. *Id.* at 261.

63. *Id.*

64. *Id.*

65. The statistics testify to the ineffectiveness of the Act, reveal that between 100,000 and 500,000 South African women underwent illegal abortions annually. The statistics also reflect the near impossibility of obtaining a legal abortion, both in terms of the grounds on which an abortion can legally be obtained and the extremely arduous procedures that had to be followed. Another aspect of these figures is what they show about the demographic distribution of those having abortions; the women who sought illegal abortions in South Africa were mostly very young, poor, black women while the majority of women who obtained legal abortions were white women from more privileged socio-economic backgrounds. Sarkin, *supra* note 58, at 182.

will not be abortion. That decision has long since been taken. The women of the world, the women at risk, decided all that irrevocably at least 4,000 years ago. . . . Only one decision remains to be taken. Will the current practice of abortion be permitted to remain the hazardous affair it certainly is now, or will it be made safe?⁶⁶

C. *In Germany*

During the Nazi regime,⁶⁷ there were both state-coerced abortions⁶⁸ for those considered “unfit” to procreate because of hereditary defects or “racial inferiority,”⁶⁹ and a pro-natalist policy, including strict laws prohibiting abortion for “racially valuable” women.⁷⁰ After World War II, the Allies partitioned Germany. East Germany joined the Soviet bloc and West

66. *Id.* at 155.

67. Prior to the Nazis, during the Weimar years (1919-33), the Social Democratic Party adopted an “approach to the issue of reproductive freedom [that] derived not from a concern with women’s rights but from a concern with the living conditions of working class citizens of both sexes.” When the Nazis came to power, “[i]n June 1933, the Federation of German Women’s Associations disbanded itself rather than face . . . the process by which all leaders were replaced by Nazi activists and all organizations were forced to participate in Nazi programs.” Kaplan, *supra* note 16, at 189. See generally BRIDENTHAL, *supra* note 16; D.A. 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, 102 (1998). For a discussion of earlier approaches, see FREVERT, *supra* note 2, at 320 (noting, inter alia, that, “[a]ll social and religious groups had begun to adopt methods of family planning and contraception by the 1920s, if not earlier, even though the Catholic Church still forbids its followers to use any form of mechanical, chemical or hormonal contraception”).

68. Approximately 400,000 people were involuntarily sterilized during the Nazi regime. Telman, *supra* note 67, at 111. “By the end of World War I, when German aggrandizement and stability seemed at its lowest . . . sterilization was widely and passionately recommended as a solution to urgent social problems: shiftlessness, ignorance, and laziness in the workforce; deviant sexual behavior such as prostitution and illegitimate births; the increasing number of ill and insane; poverty; and the rising costs of social services.” Bock, *supra* note 45, at 274.

69. “[T]he Nazis . . . allowed and encouraged abortion if either of the parents was believed to carry hereditary defects.” Telman, *supra* note 67, at 109. See also Bock, *supra* note 45, at 272 (describing “eugenics, or, as it was called before and during the Nazi regime and sometimes also in Anglo-Saxon literature, ‘race hygiene’ [that] comprises a vast field of more or less popular, more or less scientific, traditions, which became the core of population policies throughout the Nazi regime”).

70. “The Nazi abortion policy thus imposed heavy sanctions on healthy, racially ‘valuable’ women who sought abortions, while subjecting the racially undesirable and ‘unfit’ to coercive abortions or sterilization.” Telman, *supra* note 67, at 111. See generally Bock, *supra* note 45, at 275 (stating that “[t]he proposed remedy was to reverse both trends: to impel the ‘superior’ to have more children and the ‘inferior’ to have fewer or none This policy was sexist in its demand for state control of procreation, and racist in its differential treatment of superior and inferior procreation.”).

Germany soon became part of the European Community. Although they shared a common culture and law before partition,⁷¹ their very different trajectories, toward capitalism and democracy in the West and toward socialism in the East, led to very different roles for women.⁷² These different roles were reflected in their respective abortion laws.⁷³

East Germany hoped to increase population after the war. In 1950, accordingly, a very restrictive abortion law was enacted under which abortion was permitted only "if the life or health of the mother was endangered or if either parent suffered from a severe hereditary defect."⁷⁴ After five years, during which an estimated 20,000 to 100,000 illegal abortions were performed annually,⁷⁵ the law was replaced by a much more liberal law.⁷⁶

Like women in China, women in East Germany were to be equal to men under communism.⁷⁷ They were expected to join their husbands in building the socialist state.⁷⁸ The government recognized that women

71. This was subject to geographical and historical differences even when they were part of the same political entity. See FREVERT, *supra* note 2, at 311 (describing the pressure on housewives in the late 19th century, when "[d]octors, the clergy, industrialists, and politicians all opined that wifely virtues would determine whether a man turned into a drunkard or a reliable worker; that a family's health depended on the domestic skills of the mother; that her care decided whether a baby survived or not; that her educational aptitude and the love and attention she lavished on her children would have a decisive impact on their future careers").

72. See generally *id.* at 309 (noting that although "the ranks of the female factory labor force were progressively swelled by mothers and married women [from 1900 onwards] . . . a clear distinction between men's and women's spheres, between men's and women's jobs, between men's and women's wages, persisted also in the blue-collar industries"); Bock, *supra* note 45, at 272 (noting that, "[t]he race hygiene discourse since the end of the nineteenth century deals with women much more than do most other social or political theories, since women have been hailed as 'mothers of the race,' or, in stark contrast, vilified as the ones guilty of 'racial degeneration'").

73. "Regardless of the two German states' articulated aims in regulating abortion as they did, women in the two Germanies [sic] drew their own conclusions regarding their legal status and rights to self-determination as a consequence of the abortion regulatory scheme under which they lived." Telman, *supra* note 67, at 93.

74. *Id.* at 122-23.

75. *Id.* at 122.

76. For an overview of abortion law in East Germany, see Eleonora Zielinska, *European Socialist Countries*, in ABORTION AND PROTECTION OF THE HUMAN FETUS 241, 301 (1987).

77. "In addition to the constitutional provisions guaranteeing women political equality and economic opportunity, the East German constitution also emphasized that men and women [were] of 'equal standing' regarding marriage and family." Telman, *supra* note 67, at 116. For a list of the laws enacted in the GDR allowing "discrimination in favor of women, and especially mothers, in order to obliterate any trace of existing discrimination against them," see Elizabeth J. Kapo, Comment, *Abortion Law Reform: The Nexus Between Abortion and the Role of Women in the German Democratic Republic and The Federal Republic of Germany*, 10 DICK. J. INT'L L. 137, 146 (1991).

78. First trimester abortions "made sense in the context of a society that wanted to make it as easy as possible for women to continue to participate in economic life. The East Ger-

workers had to have control over their own reproduction.⁷⁹

The government also recognized that motherhood had to be accommodated if women were to participate fully in the labor force. For example, in 1975 the East German government introduced the "baby year," which allowed women, beginning with their second child, to "take a year off from work with 65-90% pay and with a guaranteed right to return to their job with accumulated seniority. State-supported daycare was guaranteed at a [reasonable cost]."⁸⁰

In West Germany, in contrast, women were relegated to the private sphere of the home and the family.⁸¹ As Telman observes:

[W]omen never achieved full social equality in West Germany, and political and cultural practices conspired to make it impossible for them to do so German shops routinely closed at 6 P.M., making it impossible for working people to shop in the evenings . . . true to its male-dominated labor-union constituency and aiming to protect workers from shift-work and over-time, the [Social Democrats] had not pushed for longer shop hours.⁸²

In a related, but distinct process, West Germany was grappling with its shameful past. Strongly repudiating the eugenics laws and ethnic cleansing of the Nazis, the Basic Law (Grundgesetz) of the Federal Republic provides in Article 1(1), "Human dignity shall be inviolable."⁸³ Article 2(2) similarly guarantees, "Everyone shall have the right to life and inviolability of his person."⁸⁴ Abortion was strictly regulated. In 1974, following energetic lobbying,⁸⁵ the Reform Act, which liberalized abortion, was passed. It was soon challenged by opponents who thought it was inconsistent with

man government supplemented its liberal abortion policy, however, with liberal labor laws, enabling women to have children without sacrificing their careers." Telman, *supra* note 67, at 112.

79. The preamble to the 1972 East German abortion law provides in pertinent part: "The equality of women in their education and careers, marriage and family, requires that the woman herself decides about pregnancy and the continuation of pregnancy." Miedel, *supra* note 15, at 485 n.91 (internal citations omitted).

80. Telman, *supra* note 67, at 117.

81. *Id.* at 112 ("West German women were encouraged to focus on the family and the home.").

82. *Id.* at 120.

83. HENKIN ET AL., *supra* note 11, at 936.

84. *Id.* Cf. Bock, *supra* note 45, at 276 (describing the law passed in 1933 "against propagation of 'lives unworthy of life' [which] . . . ordered sterilization for certain categories of people [and] its notorious Paragraph 12 allowing the use of force against those who did not submit freely").

85. For an account of early abortion law reform in Germany, which "occurred simultaneously with the commencement of the struggle for equal rights for women," see Kapo, *supra* note 77, at 141-42.

German Basic Law.⁸⁶ Reimposing stringent limitations, the Federal Constitutional Court reiterated its commitment to “human dignity” in the First Abortion Decision,⁸⁷ noting that “the categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the ‘destruction of life unworthy to live,’ the ‘final solution,’ and ‘liquidations’ that the National Socialist regime carried out as government measures.”⁸⁸

These two trends in West Germany; i.e., one, encouraging women to take care of their homes and families (and, as a corollary, discouraging the participation of married women in the labor force) and two, rejecting the Nazi past, resulted in a very restrictive abortion law. Rather than supporting reproductive choice, the emphasis was on providing single women with the support to raise children on their own.⁸⁹ The proximity of the Netherlands, where abortion was readily available, provided a safety valve—an alternative to dangerous back street abortions.⁹⁰

By the time of reunification, women in East Germany had relied on unrestricted access to first trimester abortion for 20 years.⁹¹ They “realized that their position in the East German economy and society was better protected than it would be in the Federal Republic.”⁹²

III. What They Wanted

Determining “what feminists wanted” in South Africa, China, and Germany prior to the respective abortion laws is problematic. First, who was a “feminist” in each state and how is that determined? This raises a

86. For a list of the five states that joined one hundred Christian Democrat members of the Bundestag in challenging the Reform Act of 1974, see Hertberg, *supra* note 9, at 557.

87. First Abortion Decision, Federal Constitutional Court of Germany, First Senate, 1975, 39 BVerfGE 1.

88. HENKIN ET AL., *supra* note 11, at 934. “[A] revolutionary woman’s group bombed the constitutional courthouse in Karlsruhe” to protest the decision of the Federal Constitutional Court in 1975. Hertberg, *supra* note 9, at 565 n.290. Cf. UN Population Division Home Page, Country Profiles: Japan, available at <http://www.un.org/esa/population/publications/abortion/index.htm> (last visited Nov. 11, 2002) (describing major revision of what was known as the “Eugenics Protection Law” in Japan in 1996, removing all eugenic features, including a statement that the purpose of the law was to “prevent an increase in inferior descendants” and provisions for the involuntary sterilization of mental patients) (on file with author).

89. HENKIN ET AL., *supra* note 11, at 944.

90. “Ironically, Germany has suffered this problem since the 1975 decision. Women trying to obtain abortions in Bavaria or Baden-Württemberg have been forced to travel abroad or to other parts of Germany.” Miedel, *supra* note 15, at 513 n.320 (citing Naomi Morris, *Tough Challenge for Germany—A Unified Abortion Law*, S. F. CHRON., Feb. 11, 1992, at A10).

91. Telman, *supra* note 67, at 115.

92. *Id.* at 119.

now familiar range of questions within each national feminist community,⁹³ which become increasingly complicated when approached from a range of different cultural perspectives.⁹⁴ Second, how can any feminist voice be identified in China, where there are rigid restrictions on expression and virtually no transparency in politics? For present purposes, a feminist will be defined as one who recognizes “that the oppression of women exists, and [whose] normative project is to make the world better for women.”⁹⁵ Under this definition, tensions can be identified, as well as similarities among them. A chart showing this can be found in the Appendix, Figure 2.

A. In China

In China, the human rights issue was not access to abortion,⁹⁶ but coerced abortions and other restrictions on reproductive rights. This was not as much of an issue for urban feminists as it was for rural women. Indeed, reproductive rights have not been a priority for Chinese feminists—a self-selected group which has benefited disproportionately from policies aimed at improving women’s equality.

As Susan Greenhalgh notes in a recent article in *Signs*, “With the official line stating that birth planning was an unmitigated good for women, arguing in print that the program also had deleterious effects was politically risky.”⁹⁷ As of late 1999, none of the well-known feminists in China were overtly questioning the official narrative about the population problem and the state’s solution.⁹⁸ As Professor Greenhalgh observes:

All of my interlocutors concurred that the one-child policy and birth control program have had huge and still largely unexamined effects on women’s lives. They also agreed that those effects have been not exclusively good, as the state has insisted, but contradictory, with harmful consequences mixed in with the beneficial ones. Where they disagreed was on whether the good out-

93. These include questions of essentialism, sex versus gender, and other categories of oppression, such as imperialism. See, e.g., JUDITH GREENBERG ET AL., *FRUG’S WOMEN AND THE LAW* (2d ed. 2002); MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* (1994).

94. See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 38-59 (2000).

95. Regenia Gagnier, *Feminist Postmodernism: The End of Feminism or the Ends of Theory?* in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 21, 24 (Deborah L. Rhode ed., 1990). As Gagnier continues, “On this point feminists agree, although many of us would extend the emancipatory project beyond women.” *Id.* at 24.

96. In 1979, China became the only country which permitted abortion under any circumstances. Savage, *Women’s Rights*, *supra* note 9, at 1083.

97. Greenhalgh, *supra* note 31, at 860.

98. *Id.* at 863.

weighed the bad.⁹⁹

Their dilemma is that the one-child policy both violates human rights and promotes them. While some of the measures used to enforce the one-child policy violate reproductive rights, the one-child policy furthers women's equality by counteracting traditional social and cultural imperatives to bear sons.¹⁰⁰ As many commentators have observed, moreover, women's equality is key to any real enjoyment of reproductive rights.¹⁰¹ Access to information and education regarding contraception is a crucial first step. But if a woman does not enjoy equal rights within the family, the reproductive rights of the couple are apt to be exercised by the husband. If a woman cannot support herself, but is dependant on her husband for her sustenance, her "reproductive rights" are likely to be illusory.

In addition, it should be kept in mind that earlier, less comprehensive, and less determined efforts to curb population growth failed in China.¹⁰² Indeed, the one million baby girls missing annually in China suggest that too much may not be enough; even if the government has gone too far in implementing the one-child policy, it has not gone far enough to counter traditional preferences.¹⁰³ The government is not abandoning these baby girls; rather, it has explicitly criminalized such abandonment. A recent publication by the State Family Planning Commission mandates "[c]onstant efforts . . . [to] put an end to infanticide and abandonment of girl babies."¹⁰⁴ But families, particularly in rural areas, continue to abandon girls hoping to have a boy instead. As Greenhalgh concludes:

Liu's reflections made it clear that the absence of a shared feminist narrative about the missing girls reflected more than just the hegemony of the official narrative and the Commission's politics of secrecy around embarrassing data; it also reflected the en-

99. *Id.* at 868.

100. "[E]very one of my interlocutors lauded the one-child policy for multiplying women's options, but none noted that the same or similar freedoms could have been won with a less drastic policy." *Id.* at 870.

101. Joshua Cohen et al., *Introduction: Feminism, Multiculturalism, and Human Equality*, in SUSAN MOLLER OKIN ET AL., *IS MULTICULTURALISM BAD FOR WOMEN?* 3, 14 (Joshua Cohen et al. eds., 1999) [hereinafter *BAD FOR WOMEN?*] (noting that "many of the world's traditions and cultures, including those practiced . . . [in Asia] are quite distinctly patriarchal. They, too, have elaborate patterns of socialization, rituals, matrimonial customs, and other cultural practices . . . aimed at bringing women's sexuality and reproductive capabilities under men's control. Many such practices make it virtually impossible for women to choose to move independently of men, to be celibate or lesbian, or to decide not to have children.").

102. See Peng, *supra* note 43.

103. See, e.g., Bonnie Honig, "My Culture Made Me Do It," in *BAD FOR WOMEN?*, *supra* note 101, at 35, 40 (noting that "supporting a culture's own efforts 'to alter itself so as to reinforce the equality,' rather than the inequality, of women [] is much more promising").

104. State Family Planning Commission, Population Planning for 1995-2000.

trenched nature of the problem and the real difficulties of ameliorating it in a cultural and institutional environment that is growing ever more masculine as global capital penetrates deeper into the Chinese economy.¹⁰⁵

B. *In South Africa*

Although the 1975 law had serious consequences for South African women, especially poor black women unable to go abroad for safe, legal abortions, abortion remained a divisive issue. In part, this may be attributed to a range of Muslim and Christian religious beliefs.¹⁰⁶ As Najma Moosa observes, neither the Qu'ran nor Sunna provides "a clear directive on abortion. While classical jurists and religious authorities do deal with the subject, juristic rulings on abortion differ between the legal schools."¹⁰⁷ While most Muslim scholars agree that abortion is permitted in certain circumstances, "they disagree as to the circumstances . . . when an abortion may be permitted."¹⁰⁸ According to one interpretation of Islamic law, for example, "the period of gestation before which abortion can be allowed is deemed to be 120 days (16 weeks or 4 months) . . . [after which] the fetus is considered to possess a soul or spirit (ruh), the possession of which sets human life above other life forms."¹⁰⁹ However, "a second 'authentic' Hadith relating to conception and also reported in Muslim texts . . . [set the cut-off time for abortion at seven weeks]."¹¹⁰

While abortion will be allowed if it is necessary to preserve the life of the mother, rape or incest is not grounds for abortion under Islamic law.¹¹¹ This is further complicated by the different positions on abortion taken by the four schools of law. For example, "social abortions to protect the health of existing children or to ensure a better standard of living for the family during the first 40 days of pregnancy if it occurred by mistake and her husband consents thereto" is permitted by the Maliki School. The Hanafi School approves abortion "before the 4th month of pregnancy, if the survival of an already nursing infant depends on it."¹¹² Christian pro-life

105. Greenhalgh, *supra* note 31, at 873.

106. See generally Kapo, *supra* note 77, at 138 n.7 (quoting J. Jacobson for the proposition that "although the Roman Catholic Church equates embryonic life and the life of the mother and forbids abortion, Islamic law allows abortion through the fourth month of pregnancy. The Orthodox and Hasidic sects of Judaism forbid abortion, but the Reform and Conservative groups allow it.").

107. Moosa, *supra* note 61, at 268.

108. *Id.* at 271.

109. *Id.* at 270.

110. *Id.* at 270.

111. *Id.* at 271-72.

112. *Id.* at 271 n.75.

groups in South Africa similarly opposed liberalized abortion.¹¹³

The African National Congress (ANC), on the other hand, championed liberalized abortion as part of its comprehensive platform to promote human rights.¹¹⁴ This platform expressly included women's equal rights in general and reproductive rights more particularly.¹¹⁵ It also explicitly included economic rights, such as the right to health. The ANC had strong feminist support and a strong feminist contingent within the organization.¹¹⁶

C. In Germany

Women in East Germany had no desire to relinquish the right to control their own reproduction that they had taken for granted for twenty years.¹¹⁷ At the same time, however, most East Germans were eager for reunification and the more liberal political climate, increased affluence, and restoration of German culture that reunification promised.¹¹⁸

In West Germany, in contrast, there was a broad range of positions, and no one could claim to speak exclusively for "feminists." These positions ranged from that of the Christian Social Union (CSU), which argued that even the restrictive extant model was too permissive, to that of the Green Party, which insisted that women should have complete freedom of choice throughout the pregnancy.¹¹⁹

IV. What They Got

In each state, the abortion law reforms of the 1990s were shaped by the larger domestic political contexts from which they emerged. In China, globalization and the accompanying scrutiny from the international community resulted in a rhetorical nod toward human rights.¹²⁰ In South Af-

113. UN POPULATION DIVISION, Country Profiles, *available at* <http://www.un.org/esa/population/publications/abortion/index.htm> (last visited Nov. 5, 2002) (on file with author) [hereinafter Country Profiles].

114. *Id.* at South Africa/Background.

115. *Id.*

116. See, e.g., THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope Andrews & Stephen Ellmann eds., 2001) [hereinafter POST-APARTHEID CONSTITUTIONS] (essays describing the process through which the Constitution was written, the particular rights addressed, and the institutions created by the new constitution).

117. See Miedel, *supra* note 15, at 485 (establishing reproductive rights of East German women).

118. *Id.*

119. *Id.* at 486 n.102.

120. See *supra* text accompanying notes 41-46 (describing recent clarification of policy in the People's Republic of China). This Part has no separate section on "What They Got"

rica, abortion was reconstructed within the rhetorical frameworks of human rights and liberation, to which the new government was authentically committed. In Germany, the Court (which actually set out the parameters of the new law) crafted an uneasy synthesis between women's rights and the recognition of fetal rights urged by Christian groups and grounded, like the First Abortion Decision,¹²¹ in the recognition of the Basic Law's "human dignity."¹²² (See Appendix, Fig. 3.)

A. *In South Africa*

The ANC had promised to decriminalize abortion and to eliminate the onerous procedures that effectively precluded legal abortion for the vast majority of South African women. After the ANC won the election, the old abortion law was discarded along with apartheid. Indeed, reproductive rights were explicitly assured in the new South African Constitution, which establishes the right "to make decisions concerning reproduction" and the right to "security in and control over [the] body."¹²³

The Choice on Termination of Pregnancy Act (CTOP) was enacted in South Africa in 1996.¹²⁴ It requires the state to provide an abortion on request during the first twelve weeks of pregnancy. Women were deliberately made part of the drafting process.¹²⁵ Fifteen women were on the 1995 parliamentary committee which reviewed the restrictive 1975 Act; eleven committee members were men.¹²⁶ But polls showed that the majority of South Africans did not want the new, liberalized law.¹²⁷ Although most of those who had had illegal abortions, and most of those who died from

in China, because current data regarding the implementation of these policies is not available.

121. First Abortion Decision, Federal Constitutional Court of Germany, First Senate, 1975, 39 BVerfGE 1.

122. See *supra* text accompanying note 79.

123. See Moosa, *supra* note 61, at 262 (noting that § 12(2) was "the result of a compromise reached after much debate over whether the Constitution should expressly provide for a right to abortion. While a pregnant woman does not have an absolute constitutional right to an abortion on request, this section of the Constitution . . . nevertheless encompasses her decision to terminate a pregnancy.").

124. *Id.* "The enactment of the CTOP in 1996, and which came into force in 1997, finally and officially ensured the right to an abortion."

125. For a detailed account of the participants in the constitution drafting process, see Katherine Savage, *Negotiating South Africa's New Constitution: An Overview of the Key Players and the Negotiation Process*, in POST-APARTHEID CONSTITUTIONS, *supra* note 116, at 164.

126. Moosa, *supra* note 61, at 263 n.33.

127. 48% consider CTOP morally wrong, 41% condone it only in the case of rape, and 10% consider it a woman's right. *Id.* at 265-66. As Moosa further notes, "Attitudes varied sharply along racial lines with the black majority, in comparison to the white minority, being more inclined to a pro-life attitude." *Id.* at 266.

them, were black, "the black majority was more likely than the white minority to be pro-life."¹²⁸

B. In Germany

Under the terms of the German Reunification Treaty, West German law replaced inconsistent East German law.¹²⁹ As Florian Miedel notes, however, "The abortion case was different."¹³⁰ The Aid for Pregnant Women and Families Act of July 27, 1992 (the "1992 Act")¹³¹ represented a compromise between the very liberal abortion laws of the socialist East and the very restrictive abortion laws of the democratic West. Under the new law, extensive counseling was provided with the express goals of protecting the unborn fetus and preventing future unwanted pregnancies.¹³² Like the 1974 Reform law before it, the new law was challenged before the Constitutional Court on the ground that it conflicted with the German Basic Law.¹³³ The Court found that the law was indeed in conflict with the Basic Law and established a new model.¹³⁴

The core principle of the new law was to prevent abortion through counseling and to simultaneously decriminalize abortion.¹³⁵ Some features of the 1992 Act were retained by the Court. Abortions within the first twelve weeks, after counseling, for example, are not criminal. Since criminal sanctions have basically been eliminated in the new law, it is enforced for the most part by denial of state insurance benefits. Women will not be reimbursed for abortions unless they are authorized by certificates of indication.¹³⁶ An exception is made, however, for poor women who cannot otherwise afford abortions.¹³⁷ The new law is in continuing tension with other provisions of German law, however, because of its characterization of

128. *Id.* at 266.

129. Treaty on the Establishment of German Unity, Aug. 31, 1990, F.R.G.-G.D.R., 1990 Bundesgesetzblatt, Teil II [BGB. II] [Federal Statute, part II] 889 (F.R.G.).

130. Miedel, *supra* note 15, at 485; Kapo, *supra* note 77, at 156 (noting that the "dispute, which was the last issue resolved in the treaty, was finally decided at midnight on August 31 . . . [in] effect, the final decision in the treaty delays the dispute over the legality of abortion for two years").

131. Aid for Pregnant Women and Families Act, v. 27.7. 1992 (BGBI. I S. 1398).

132. HENKIN ET. AL, *supra*, note 11, at 944.

133. See *supra* text accompanying notes 77-79.

134. Judgment of May 28, 1993, 88 BVerfGE 203 (reprinted in HENKIN ET. AL, *supra*, note 11, at 944-47).

135. See Werner, *supra* note 7, at 595 (explaining that "with a counseling concept, all abortions not justified by one of the acknowledged indications . . . must remain 'illegal' but can be exempted from criminal punishment at the same time").

136. 1992 BVerfGE 88 at 315-20.

137. Country Profiles (Germany), *supra* note 113.

fetuses as legal persons and bearers of rights.¹³⁸

V. The New Laws and International Human Rights Law

In general, reproductive rights are not as well-established in international human rights law as equality rights, which have been championed by men for more than 200 years.¹³⁹ When women seek “formal” equality, accordingly, they can rely on well-developed equality jurisprudence.¹⁴⁰ Reproductive rights, in contrast, address issues—including conception, pregnancy, and childbirth—historically relegated to the private sphere; that is, such matters have been viewed as better left to the determination of the married couple. This perception both reflects and perpetuates women’s subordination within marriage. The idea that women should have control over the number and spacing of their children has been controversial,¹⁴¹ especially in cultures where large families are viewed as desirable. Nevertheless, reproductive rights are increasingly recognized in international human rights law.¹⁴² These rights, including education about family planning, access to contraception, and freedom from gender discrimination, are widely recognized throughout the world. Almost every state allows access to contraception, and several states provide contraceptives as a free public health benefit.¹⁴³

While reproductive rights are widely recognized as a general principle, the implementation of reproductive rights is more problematic. Major issues include: whose rights they are—that is, are reproductive rights to be exercised by a couple or by each individual within a couple? Second, under what conditions, and through what mechanisms, can these rights be cir-

138. *Id.*

139. See, e.g., GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969) (noting that equality comprised the “life and soul” of eighteenth century republican thinking). *Id.* at 1770.

140. As feminists have pointed out, this kind of analysis privileges women who are most like men. MARTHA FINEMAN, THE ILLUSION OF EQUALITY (1990). But cf. Penelope Andrews, *Spectators at the Revolution? Gender Equality and Customary Law in a Post-Apartheid South Africa*, in 7 LAW & ANTHROPOLOGY: INTERNATIONAL YEARBOOK FOR LEGAL ANTHROPOLOGY 261, 261 (René Kuppe & Richard Potz eds., 1994) (describing the social and political construction of women’s inferiority with respect to the promise of equality for South African women of color).

141. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 307 (arguing that “the feminist demand to ‘keep my body, and its uses, in my absolute right’ was no abstract statement of allegiance to principles of autonomy. It was a far-ranging critique of the social relations of reproduction embodied in institution of marriage.”).

142. See *supra* text accompanying notes 2-6.

143. UNESCO RECHPEC, *Access to Family Planning/Reproductive Health Services and Contraceptives*, available at <http://www.unescobkk.org/ips/arh-web/resources/> (on file with author).

cumscribed by the state? Are state population control policies, for example, inconsistent with these rights?¹⁴⁴

The controversy is grounded in the belief in some states that abortion involves two lives, that of the fetus as well as that of the mother, unlike contraception, which affects only the mother.¹⁴⁵ Among those states which recognize a state interest in the fetus, moreover, there is a range of views as to when fetal life comes into being.¹⁴⁶ The American Convention on Human Rights, for example, refers to "a right to life from the moment of conception."¹⁴⁷ German law, in contrast, accepts as a matter of scientific fact that life begins fourteen days after conception.¹⁴⁸

A. *The Civil Covenant*

The International Covenant on Civil and Political Rights (the "Civil Covenant") addresses civil and political rights, such as freedom of expression and freedom of religion, familiar to Americans from our own Constitution.¹⁴⁹ While Article 3 of the Civil Covenant requires states to "ensure the equal right of men and women to the enjoyment of all civil and political rights," there is no explicit reference to reproductive rights.¹⁵⁰ While Article 17 recognizes a right to "privacy," unlike the right to privacy which the U.S. Supreme Court has found in the U.S. Constitution,¹⁵¹ the international

144. "'Right' in [China] is *quan*, a Chinese word which signifies in alternative meanings both the rights of citizens and the power of the State." Savage, *Women's Rights*, *supra* note 9, at 1069.

145. *See id.*

146. *Id.* at 173 (defining fertilization as "the union of an ovum and sperm which can take place shortly after intercourse"). *See generally* Dinah Shelton, *International Law on Protection of the Fetus, in ABORTION AND THE PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE 1* (Maria Frankowski & Cole eds., 1987).

147. O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, January 7, 1970, 9 I.L.M. 101 (1970), 65 A.J.I.L. 679 (1971), 9 I.L.M. 673 (1970).

148. First Abortion Decision, Federal Constitutional Court of Germany, First Senate, 1975, 39 BVerfGE 1. *Cf.* Alston, *supra* note 18, at 173 (defining conception as "occurring only at the time of implantation in the uterine mucosa, a process which is not complete until around fourteen days after fertilization has occurred"). Even where abortion is legal, moreover, there is growing condemnation of sex-selective abortions as a "cleaner" form of female infanticide. *See, e.g.,* Celia W. Dugger, *Modern Asia's Anomaly: The Girls Who Don't Get Born*, N.Y. TIMES, May 6, 2001, at 4.

149. 999 U.N.T.S. 171, 6 I.L.M. 368 (1966), G.A. Res. 2200 (entered into force Mar. 23, 1976) available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> (last visited Oct. 9, 2003) [hereinafter Civil Covenant].

150. *But see* Siegel, *supra* note 141, at 263 n.5 (noting growing recognition of abortion regulation as an issue of sexual equality). U.S. Supreme Court Justice Blackmun described abortion as "vital to the full participation of women in the economic and political walks of American life." Webster v. Reproductive Health Servs., 492 U.S. 557 (1989) (cited in Siegel, *supra* note 141, at 349 n.359).

151. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that married cou-

version has not been construed to include the right to reproductive privacy.¹⁵²

The final South African Constitution explicitly contemplates an expanded conception of equality. As Valerie Bodjik has explained, while section 9(1) assures equal protection, section 9(2) expressly provides for affirmative measures to bring those historically "disadvantaged by unfair discrimination" up to the starting line.¹⁵³ Nor does the Constitution require any 'intent' to discriminate.¹⁵⁴

Article 23 of the Civil Covenant assures the "right of men and women of marriageable age to marry and to found a family" and requires the state to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution."¹⁵⁵ This applies to state family planning policies, as the Human Rights Committee has pointed out:

The right to found a family implies, in principle, the possibility to procreate and live together. When States' parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.¹⁵⁶

China's one-child policy appears to violate even this minimal standard, since it is both "compulsory" and "discriminatory" and the burden of contraception is borne almost exclusively by Chinese women. In times of "public emergency," however, states may derogate from certain rights, including reproductive rights, under the Civil Covenant.¹⁵⁷ As explained above, China certainly viewed the population crisis in the early 1980s as a

ples had a constitutional right of privacy that included access to contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1971) (extending the right to individuals).

152. Cf. Miedel, *supra* note 15, at 502-03 (noting that the German Constitution takes an affirmative view of privacy, which is defined as "the right to develop one's personality within the community without violating the rights of others or the constitutional order").

153. Valerie Bodjik, *Transformative Justice and Gender Equality in Post-Apartheid South Africa*, presentation at the Subversive Legacies Conference, University of Texas School of Law, Nov. 23, 2002.

154. *Id.*

155. Civil Covenant, *supra* note 149.

156. General Comment No. 19, Article 23, Para. 5 (1990).

157. While such derogation is precluded with respect to certain core rights (regarding the right to life, to be free of torture, slavery, imprisonment for debt, retroactive criminalization, or denial of personhood), there is no international precedent for including reproductive rights in this category. See, e.g., Reed Boland, *Civil and Political Rights and the Right to Non-Discrimination: Population Policies, Human Rights, and Legal Change*, 44 AM. L. REV. 1257 (1995). For a description of the ways in which domestic politics enabled "the entry of feminist voices into the public space of population policy debate," see Greenhalgh, *supra* note 31, at 857.

“public emergency.”¹⁵⁸ While forced abortions or sterilizations should be prohibited even under this standard, fines for unauthorized children might be acceptable, if they are not onerous.¹⁵⁹ Even if the population crisis is no longer considered a “public emergency,” international human rights laws permit states to limit some rights, if necessary to ensure “the public welfare.”¹⁶⁰ Even if incentives are viewed as limits on rights, accordingly, they would arguably be permissible under this standard. Such permissible limits might include incentives for families with only one child, such as preferred housing or bonuses like those currently offered in some regions.

Like the Chinese government, the South African government considers the fertility rate (of 3.3 children per woman) to be too high.¹⁶¹ Its goal is to reduce the fertility rate to the replacement rate of 2.1 children per woman by 2010. Unlike the Chinese government, the South African government has attempted to do so in a manner compatible with women’s rights under the Civil Covenant. Rather than imposing criminal or other sanctions on women, the government supports family planning services and provides free contraceptives at all government medical establishments.¹⁶²

The German government has a different problem. It considers the fertility rate of 1.3 children per woman too low.¹⁶³ Reflecting both respect for women’s reproductive rights under international human rights and German law, as well as the lack of consensus among the German political parties on this issue, the government has not intervened with respect to fertility levels, although it does provide indirect support for contraceptive use.¹⁶⁴

158. China did not, of course, comply with the procedural requirements for officially declaring such a state of public emergency under the Civil Covenant, since it was not (and is not) a party to the treaty. See Ratification Information, International Covenant on Civil and Political Rights at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html (last visited Oct. 9, 2003). China has signed, but not ratified, the Civil Covenant. *Id.*

159. These fines would be analogous to the German refusal to pay for unauthorized abortions, i.e., abortions that are not “indicated” under the Constitutional Court’s framework, as long as the refusal to do so did not effectively deny an abortion to a woman who could not afford one. See *supra* Part IV.B. Cf. *Maier v. Roe*, 432 U.S. 464 (1977) (holding that the Constitution did not require the state to pay for indigent women’s abortions, since the Constitution did not require the state to pay for any medical expenses, and that the state could permissibly encourage normal childbirth by funding it and not funding abortion). See also *Harris v. McRae*, 448 U.S. 297 (1980) (upholding constitutionality of the Hyde Amendment, limiting federal Medicaid reimbursement to abortions where mother’s life was in danger or pregnancy was the result of rape or incest).

160. HENKIN ET AL., *supra* note 11, at 324-28.

161. Country Profiles (South Africa), *supra* note 113.

162. *Id.*

163. Country Profiles (Germany), *supra* note 113.

164. *Id.*

B. *The Economic Covenant*

The International Covenant on Economic, Social, and Cultural Rights (the Economic Covenant) is the other half of the International Bill of Human Rights.¹⁶⁵ It assures basic economic and social rights, including the right to health¹⁶⁶ and the right to an adequate standard of living.¹⁶⁷ Unlike the Civil Covenant, it has no counterpart in U.S. jurisprudence.¹⁶⁸ Article 2 and Article 3 of the Economic Covenant require states to “ensure the equal right of men and women to the enjoyment of all economic, social, and cultural rights.”¹⁶⁹

Article 10 of the Economic Covenant requires states to ensure “family rights,” and Article 12 requires states to ensure the “right to health.”¹⁷⁰ Reproductive rights are crucial to any meaningful understanding of either article. Without reproductive rights, parents cannot determine the most fun-

165. International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 (entered into force Jan. 3, 1976) *available at* <http://www1.umn.edu/humanrts/instrree/b2esc.htm> (last visited Oct. 9, 2003) [hereinafter Economic Covenant].

166. *Id.* at Article 12.

167. Economic Covenant, *supra* note 165, at Article 11. *See, e.g.*, Asbjørn Eide & Allan Rosas, *Economic, Social, and Cultural Rights: A Universal Challenge*, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A TEXTBOOK 3, 5 (Asbjørn Eide et al. eds., 1995) [hereinafter ECONOMIC, SOCIAL AND CULTURAL RIGHTS] (viewing economic, social, and cultural rights as raising “question[s] of income distribution” and “protection of vulnerable groups, such as the poor”). *See also* Danilo Türk, *The United Nations and the Realization of Economic, Social, and Cultural Rights*, in THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS 95, 106-07 (Franz Matscher ed., 1991) (employing the term “economic rights” as part of a set of “economic rights, social, and cultural rights” that guarantee a minimum welfare system).

168. For arguments that economic rights can be grounded in the Constitution, see Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1104-05 (1986); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1627-28 (1988); Frank I. Michaelman, *Forward: On Protecting the Poor Through the 14th Amendment*, 83 HARV. L. REV. 7, 33 (1969). For a thoughtful analysis of the Supreme Court’s resistance to grounding economic rights in the Constitution, see Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and ‘Other’ Rights Under the United States Constitution*, in ECONOMIC RIGHTS 141, 141-145 *passim* (Ellen Frankel Paul et al. eds., 1992).

169. Economic Covenant, *supra* note 165, at Art. 3. Article 2 provides that “the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, . . . or other status.” As Craven notes, however, Article 2 only appears to apply to rights “recognized” in the Covenant. *See id.* at 26. Article 3, in contrast, requires the state to “ensure” rights. *See id.* MATTHEW C. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (1995).

170. Economic Covenant, *supra* note 165, at Art. 2-3. *See* Alston, *supra* note 18, at 178 (noting that the “rights of the mother (including those to life, mental and physical health, and privacy) recognized by a wide range of international human rights treaties, are fully preserved by the savings clause contained in Article 41 of the [CRC]”).

damental issues of family membership, such as the spacing or number of children. Section 27 of the final South African Constitution “guarantees every person, inter alia, the right to adequate housing, medical care, *including reproductive health care*, food, water, and education” (emphasis added).¹⁷¹

The right to health can also be invoked to argue against state limits on abortion. As the World Health Organization (“WHO”) has noted, the absence of safe, dependable contraception and abortion present grave risks to the health of women, whether through unsafe abortions (20 million annually), severe maternal morbidity (20 million cases annually), or perinatal deaths (7.2 million annually).¹⁷² The South African government has expressed particular concern about the complications of child bearing and child birth. The government does not consider morbidity and mortality resulting from induced abortion a serious problem.¹⁷³ The German government, in contrast, does not consider complications of child bearing and child birth to be a major problem.¹⁷⁴ Indeed, the maternal mortality rate is 22 (per 100,000 live births in 1990), notably less than the 27 median among developed countries.¹⁷⁵ Morbidity and mortality from induced abortion, similarly, are not a governmental concern.¹⁷⁶

While it is clear that state-sponsored or state-sanctioned coerced abortions or sterilizations violate the Covenants,¹⁷⁷ it is not clear what kinds of incentives and disincentives, short of brute force, amount to coercion. It has been argued that any incentives or disincentives by the state should be considered impermissible.¹⁷⁸ This assumes a neutral background, a level playing field. Where there is strong *social* coercion, however, like the pressure on women in rural China to bear sons, it can be argued that some incentives may be necessary as a counter-weight.

Articles 4 and 5 of the Economic Covenant, which address the non-derogation of economic, social, and cultural rights, suggest the parameters

171. Bodjik, *supra* note 153. “Article 20 of the German Constitution states that Germany ‘is a democratic and social federal state.’ While this provision may seem merely descriptive, it has led to the creation of a wide-ranging social service net that includes minimum welfare rights, a national health care system, and free public education through the university level.” Miedel, *supra* note 15, at 503.

172. Sev S. Fuluss, *The World Health Organization and Women*, in *WOMEN IN INTERNATIONAL HUMAN RIGHTS LAW* 397, 411 (Kelly D. Askin & Doreen M. Koenig eds., 2000).

173. Country Profiles (South Africa), *supra* note 113.

174. Country Profiles (Germany), *supra* note 113.

175. *Id.*

176. *Id.*

177. These do not present health *risks*; rather, the infirmity the individual seeks to avoid in each case is a certainty, guaranteed by the state. Indeed, an argument could be made that coerced abortions or sterilizations are a form of torture.

178. See Boland, *supra* note 157, at 1263.

for such counterincentives. Article 4 provides that "the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."¹⁷⁹ As Philip Alston notes, this imposes a rigorous standard; "[L]imitations must, in the first place be 'determined by law' in accordance with the appropriate national procedures and must not be arbitrary or unreasonable or retroactive. The limitations must also 'be compatible with the nature' of these rights."¹⁸⁰

Article 5 extends the prohibition against derogation in three important ways. First, it extends this prohibition to non-State third parties.¹⁸¹ Thus, while a violation under the Civil Covenant requires a showing of state practice, the "over-zealous" local official defense is expressly anticipated here. Second, it extends the prohibition to activities indirectly aimed at derogation.¹⁸² A monetary inducement for a late-term abortion posing significant risk to the mother's health would arguably violate this standard. Third, it prohibits derogation from any other rights on the "pretext" that the Covenant requires such derogation.¹⁸³

C. *The Women's Convention*

The Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention)¹⁸⁴ is considerably more expansive. Article 1 begins by defining the term "discrimination against women" to 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 . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."¹⁸⁵

Article 2 of the Women's Convention further requires the state "to

179. Economic Covenant, *supra* note 165, at Art. 4.

180. Philip Alston, *The International Covenant on Social, Economic, and Cultural Rights*, in *MANUAL ON HUMAN RIGHTS REPORTING* (1991), 45 U.N. DOC. HR/PUB/91/1 at 48.

181. See Economic Covenant, *supra* note 165, 993 U.N.T.S. at 6 (extending protection to a "group or person"). As Craven notes, "[i]t must be assumed that where the State is not in a position to ensure the rights itself, it must regulate private interaction to ensure that individuals are not arbitrarily deprived of the enjoyment of their rights by other individuals." CRAVEN, *supra* note 169, at 112.

182. See Economic Covenant, *supra* note 165, 993 U.N.T.S. at 6.

183. See *id.*

184. G.A. Res. 180 (XXXIV 1979), 19 I.L.M. 33 (1980) (entered into force Sept. 3, 1981) [hereinafter *Women's Convention*].

186. *Id.* at Art. 1.

take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."¹⁸⁶ This is an extremely broad formulation, effectively holding the state responsible for all discrimination on the basis of gender, whether through state policy or private prejudice.¹⁸⁷ Thus, the Women's Convention imposes an affirmative obligation on the state to take whatever steps are necessary to counteract discrimination against women.

While women's equality is officially endorsed by all three governments, its meaning is very different in Germany, South Africa, and China. In Germany, formal equality is modified by a system of pro-natalist incentives that reflect and perpetuate women's inequality in the labor force. The view of women in the former West Germany, in short, has prevailed over the view of women in the former East Germany.

South Africa's view of women's equality, in contrast, is among the most progressive in the world. Under the South African Constitution, as under the Women's Convention, *de facto* inequality is to be addressed by affirmative measures.¹⁸⁸ The new abortion law permits abortion on demand during the first trimester and also allows abortion

through the twentieth week of pregnancy on very broad grounds, including socio-economic grounds. The law is firmly based on a notion of individual human rights. The preamble provides that South Africa's Constitution protects the rights of persons to make decisions concerning reproduction and to achieve security in and control over their bodies; that both men and women have the right to have access to safe, effective, and acceptable methods of fertility control of their choice; and that women have a right of access to appropriate health care services to ensure safe pregnancy and childbirth. It also makes the State responsible for providing reproductive health to all, contraception and termination of pregnancy services, as well as safe conditions under which the right of choice can be exercised without fear or harm.¹⁸⁹

South Africa's abortion law has been challenged, however, on the ground

186. *Id.* at Art. 2 (f).

187. Susan Moller Okin, *Is Multiculturalism Bad For Women?* in *BAD FOR WOMEN?*, *supra* note 101, at 7, 22 (noting that "the subordination of women is often informal and private At least as important to the development of self-respect and self-esteem is our place within our culture. And at least as pertinent to our capacity to question our social roles is whether our culture instills in us and forces on us particular roles.").

188. For a critical analysis of the gap between the rights assured in theory and the wrongs endured in practice, see Penelope Andrews, *The Stepchild of National Liberation: Women and Rights in the New South Africa*, in *POST-APARTHEID CONSTITUTION*, *supra* note 116, at 326, 341-44 (describing the ubiquity of gender-based violence against women in South Africa, including the highest rape incidence in the world).

189. Country Profiles (South Africa), *supra* note 113.

that it violates the right to life of the fetus.¹⁹⁰

While China has arguably gone further than either of the other two states to promote women's equality,¹⁹¹ the one-child policy remains problematic, raising several issues under the Women's Convention. To the extent that it is enforced through measures which specifically impair women's rights to health, it violates the Convention. Article 11.2 further prohibits the state from penalizing women for pregnancy.¹⁹² Since the purpose of the Women's Convention is to prohibit discrimination against *women*, however, it is unclear whether penalizing the family for a pregnancy violates the Convention, because women are not being singled out.

Article 12 explicitly 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."¹⁹³ Article 14 reiterates the right to family planning services for rural women in particular. Article 16, relating generally to women's rights within marriage, again emphasizes that women have "the same rights [as men] to decide freely and responsibly on the number and spacing of their children."¹⁹⁴

While the Women's Convention provides a clear statement of reproductive rights, and measures to be taken to assure them, enforcement in domestic courts is a separate issue. Although some countries, such as the Netherlands, adopt international human rights treaties as domestic law upon ratification, many, including China and Germany, do not. Although China and Germany have ratified the Women's Convention, it is not enforceable as domestic law in either country. This means that neither Chi-

190. This argument was rejected by the Transvaal Provisional Division of the High Court in *Christian Lawyers Association v. Minister of Health* (cited in Country Profiles (South Africa), *supra* note 116).

191. See *supra* Part II.A.2.

192. Women's Convention, *supra* note 184, Art. 11.2.

193. Women's Convention, *supra* note 184, Article 13.2. Katha Pollitt, *Whose Culture? in BAD FOR WOMEN?*, *supra* note 101, at 27 ("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.").

194. Women's Convention, *supra* note 184, Article 16.1.e. It should be noted that more states have taken reservations to Article 16 than to any other article, not only in the Women's Convention but in any other human rights convention. Rebecca I. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 702 (1990). Pollitt, *supra* note 193, at 29 ("That cultural-rights movements have centered on gender is a telling fact about them . . . [I]t's also partly due to the fact that gender and family are retrograde areas of most majority cultures . . . [T]hese are accommodations majority cultures have often been willing to make. How far would an Algerian immigrant get, I wonder, if he refused to pay the interest on his Visa bill on the grounds that Islam forbids interest on borrowed money?").

nese nor German women can claim their rights under the Convention in their national courts.¹⁹⁵

Nor is there any international tribunal before which they may do so. An Optional Protocol to the Women's Convention¹⁹⁶ enables individual women to file complaints before CEDAW,¹⁹⁷ the Committee responsible for implementation of the Convention. But this is not an option for Chinese women because China is not a party to the Protocol. Although Germany signed the Optional Protocol on December 10, 1999, it has not yet ratified it.¹⁹⁸

Since the death of Mao Tse-tung in 1976, China has slowly but inexorably been opening its doors. The same forces that led China to develop relations with Western adoption agencies have led to a new era in trade, foreign investment, and educational exchanges.¹⁹⁹ China has become an active participant in U.N. conferences, sending a large delegation to the U.N. World Conference on Population in Cairo in 1994, at which "population" was recast in terms of "women's human rights."²⁰⁰ China hosted the World Conference on Women in Beijing in 1995, which reaffirmed the im-

195. Absent domestic legislation, neither can women in the United States claim their international human rights in domestic courts. See, e.g., S. EXEC. DOC. NO. 102-23 (1992), U.S. RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS CONCERNING THE 1966 COVENANT ON CIVIL AND POLITICAL RIGHTS, ("[T]he [Civil] Covenant will not create a private course of action in U.S. courts."). See also JORDAN PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 193-95 (2000) (explaining the significance of reservations, understandings, and declarations).

196. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A.Res. 54/4, U.N. GAOR, 54th Sess., Annex, U.N.Doc. A/Res/54/4 (1999), 39 I.L.M. 281 (2000). Heidi Gilchrist, Note, *The Optional Protocol to the Women's Convention: An Argument for Ratification*, 39 COLUM. J. TRANSNAT'L L. 763, 773 n.38 (2001).

197. "Article 2 of the Optional Protocol allows a communication to be submitted on behalf of individuals . . . without their consent No similar provision can be found in the other existing instruments This is significant, as women in many parts of the world are in a particularly disadvantaged position to bring a complaint." Gilchrist, *supra* note 200, at 768-69. It is unclear whether the legal capacity to do so would actually result in any complaints in China. As Greenhalgh observes, while "critics of state birth planning practice have been emerging from widely differing social spaces . . . these critical voices arose only in the mid-to late 1990s, long after the problems they focus on developed. Their articulation at this time reflects the impact of the Cairo and Beijing conferences as well as the growing role of foreign NGOs in China's social development." Greenhalgh, *supra* note 31, at 862.

198. Gilchrist, *supra* note 196, at 773 nn.38-39.

199. The Ford Foundation brought together a group of Chinese women who translated *Our Bodies, Ourselves* into Chinese with the cooperation of the Boston Women's Health Collective. Greenhalgh, *supra* note 31, at 860.

200. *Id.* at 852. "The Cairo process gave supporters of change a vocabulary of reform that dovetailed neatly with concerns that were developing domestically [in China]. In the wake of the conference, contacts and collaborations with foreign organizations advancing reproductive health agendas multiplied as never before." *Id.* at 855.

portance of reproductive rights.²⁰¹ As a result, women in China are increasingly aware of human rights in general and reproductive rights in particular. The extent to which this has curtailed the early abuses of the one-child policy is unclear.

VI. Conclusion

As this Article has explained, while China, South Africa, and Germany have all undergone significant reforms in their abortion law in the past ten years, and all have been influenced by international human rights, these reforms were grounded in different cultures and subject to different political processes.

The three states began with three very different dual systems.²⁰² Within each of the dual systems, there were multiple, conflicting constituencies and “women” were dispersed among them; they were not a monolithic group. “What feminists wanted” depended upon who was asked and who was considered a feminist.²⁰³ Women who still viewed it as their duty to bear sons in China, like religious women in Germany and South Africa, in general did not view themselves as “feminists.” “What they got”²⁰⁴ reflected the larger domestic political context in which the reforms were crafted. For American feminists, abortion is often viewed as a symbol of women’s autonomy.²⁰⁵ I refer here not to some abstract notion of autonomy, but a profound sense of the social realities in which such a claim is necessarily embedded. In each of these countries, abortion similarly carried great symbolic weight, but the underlying meanings were dramatically different. In South Africa, “abortion” was equated with “liberation,” if not by the pro-life black majority who disapproved of it. In Germany, abortion was viewed as a terrible reminder of the Nazis’ “lives unworthy of life,” and as a desperate measure to which women should have a full range of alternatives. In China, abortion is still perceived, at least by some, as a modern, scientific answer to both the demographic nightmare of overpopulation and the ancient practice of female infanticide.

The inability to reach consensus on this issue is not necessarily a bad thing. Rather, the inability of international law to subvert local subversions highlights both the always questionable claims of “universal” human rights and indicates ongoing feminist ambivalence regarding this very difficult

201. *See id.* at 856 (describing the multiplying links to transnational agencies and feminist and reproductive health networks forged at the Fourth World Conference on Women held in Beijing in 1995).

202. *See supra* Part II.

203. *See supra* Part III.

204. *See supra* Part IV.

205. *See* Siegel, *supra* note 141.

issue. It also reflects the powerful and well-financed coalition opposing abortion on the international level, including the Vatican and, under the Bush administration, the United States.²⁰⁶ Focusing on other aspects of reproductive rights—such as universal access to the “morning-after pill”²⁰⁷ or the right to otherwise legal abortions for poor women²⁰⁸—may well be a more constructive short-term strategy for internationalists.

206. See, e.g., *Center for Reproductive Law & Policy v. Bush*, 304 F. 3d 183 (2d Cir. 2002) (rejecting challenge to the Bush administration’s reinstatement of the Mexico City Policy, which bars aid to any foreign NGO which includes abortion or abortion counseling in its services).

207. This prevents fertilization or implantation of a fertilized egg in the uterus which induces a miscarriage up to 9 weeks after a woman’s last menstrual period. PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *YOUR ABORTION OPTION IS IN THE FIRST TRIMESTER—QUESTIONS AND ANSWERS* (Dec. 2002), available at <http://www.plannedparenthood.org/abortion/030213-ab1trimester.html>.

208. See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 93 (1987) (explaining that *Harris v. McRae* erroneously assumes that women control sex).

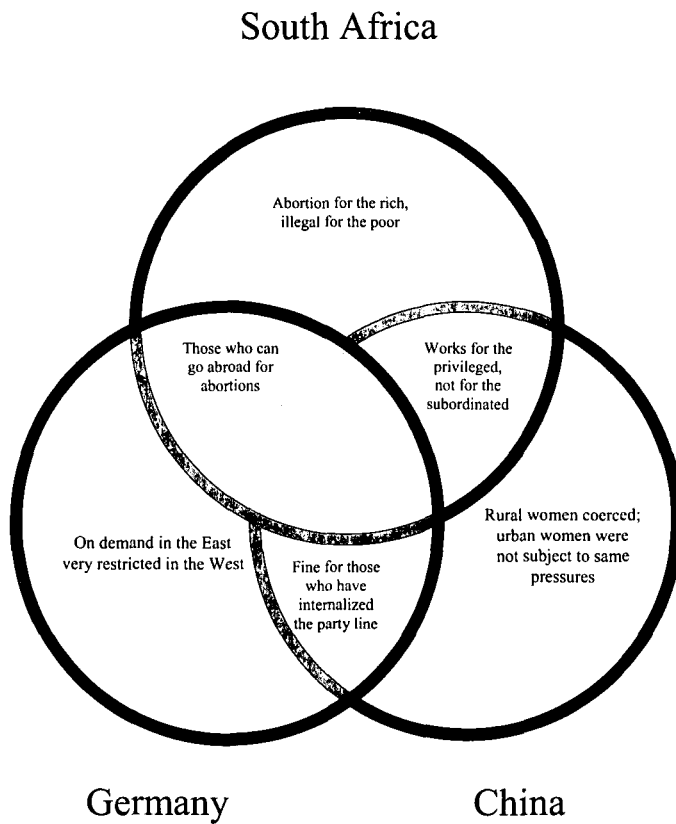
Appendix*Figure 1*

Figure 2

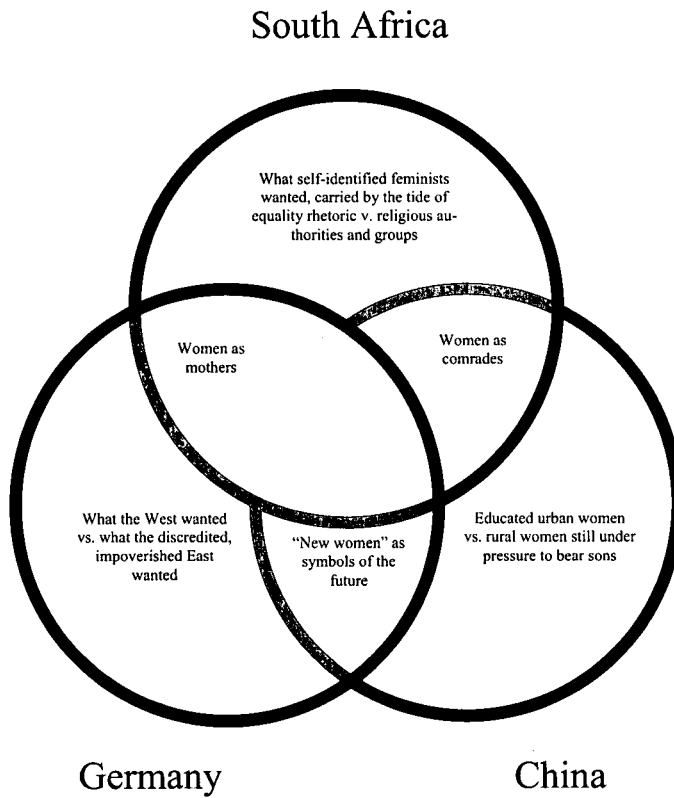


Figure 3

