

REPRODUCTIVE RIGHTS OF WOMEN: CONSTRUCTION AND REALITY IN INTERNATIONAL AND UNITED STATES LAW

KIMBERLY A. JOHNS*

She cannot have the joy of a pregnancy that is wanted, avoid the distress of a pregnancy that is unwanted, plan her life, pursue her education, undertake a productive career, or plan her births to take place at optimal times for childbearing, ensuring more safety for herself, and better chances for her child's survival and healthy growth and development.¹

I. INTRODUCTION

The worldwide emergence of women's rights is a recent event. The current focus of the women's rights movement is on securing freedom from discrimination on the basis of gender, increasing political power, preventing gender violence, and gaining reproductive rights.² The women's rights movement has created many paper rights that have, to a limited degree, been realized as actual

* J.D. *summa cum laude*, St. John's University School of Law, 1997; B.A., Johns Hopkins University, 1994. Many thanks to Berta Hernández for her constant support, advice, and encouragement.

¹ Mahmoud F. Fathalla, *Family Planning Services*, 44 AM. U. L. REV. 1179, 1180 (1995).

² See, e.g., *Report on the Fourth World Conference on Women, Beijing Declaration and the Platform for Action*, Beijing, China, 4-15 Sept. 1995, at 36 (reproductive rights), U.N. Doc. A/CONF.177/20 (1996) [hereinafter *Beijing Declaration*]; *Report of the International Conference on Population and Development, Programme of Action*, Cairo, 5-13 Sept. 1994, at 12 (reproductive rights), U.N. Doc. A/CONF.171/13 (1994) [hereinafter *Cairo Conference*]; *Declaration on the Elimination of Violence Against Women, adopted* Dec. 20, 1993, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/RES/48/104 (1994), reprinted in 33 I.L.M. 1049, *passim* (violence) (1994); *United Nations, World Conference on Human Rights: Vienna Declaration and Programme of Action*, Vienna, Austria, 14-25 June 1993, at 12 (political rights), U.N. Doc. A/CONF.157/23 (1993), [hereinafter *Vienna Declaration*]; *The Nairobi Forward-Looking Strategies for the Advancement of Women, World Conference to Review and Appraise the Achievements of the U.N. Decade for Women: Equality, Development and Peace*, Nairobi, Kenya, 15-26 June 1985, adopted Dec. 13, 1985, ¶¶ 86-92 (political rights), G.A. Res. 40/108, U.N. Sales No. E.85.IV.10 (1985) [hereinafter *Nairobi*]; *id.* ¶ 156 (reproductive rights); *Convention on the Elimination of All Forms of Discrimination Against Women, adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1980), reprinted in 19 I.L.M. 33, at art. 7 (political rights) (1980) (entered into force Sept. 3, 1981) [hereinafter *Women's Convention*]; *id.* at art. 16 (reproductive rights); *Final Act of the International Conference on Human Rights*, Teheran, 22 Apr. to 13 May 1968, Res. IX, at 10-11 (reproductive rights), U.N. Doc. A/CONF.32/41 (1968) [hereinafter *Teheran Proclamation*]. See generally Elisabeth Friedman, *Women's Human Rights: The Emergence of a Movement*, in WOMEN'S RIGHTS, HUMAN RIGHTS 19 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter *WOMEN'S RIGHTS*] ("[T]he achievement of women's rights in the interrelated

rights.³ The realization of women's rights to reproductive health has been a low priority, especially given the societal view of women as wives and mothers.⁴ While the movement toward obtaining full and free exercise of reproductive rights has been a low priority politically, it is of great importance socially. The current status of reproductive health among women, and the effects of its inadequacies, is having grave consequences upon populations around the world.

The realization of the reproductive rights of women is affected by the construction of the articulation of the reproductive rights themselves, as well as by cultural and economic factors. A stark contrast between the construction and the realization of the rights of women appears in the juxtaposition of reproductive rights in the United States and those in the international arena. Under international law, reproductive rights are to be shared equally between men and women. However, the reality of the power imbalance between men and women strips women of their ability to exercise these articulated rights. United States law, on the other hand, grants women the ability to exercise reproductive rights on their own, without undue interference from the government. Yet, economic realities prevent most women from having the true ability to exercise these rights. While reproductive rights are constructed and articulated quite differently under international and United States law, the reality is the same under either law — women still do not have the ability to enjoy or exercise their reproductive rights.

Part II of this Article examines what is actually encompassed by the term reproductive rights, and why such rights are important to women and to society as a whole. Part III introduces the background of international human rights documents, how reproductive rights are constructed in those documents, and the truths women face in trying to exercise those reproductive rights. Part IV

areas of political, civil, economic, social, and cultural rights. . . ."); *infra* notes 49-73 and accompanying text.

³ See THE HUMAN RIGHTS WATCH WORLD REPORT 1997, at 338 (Human Rights Watch 1996) ("[E]xpose the gap between government rhetoric on women's human rights and the reality of the continuing abuse of those rights"); Jo Lynn Southard, *Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women*, 8 PACE INT'L L. REV. 1, 17 (1996) ("[T]oday the status of women worldwide remains inferior to that of men. Although women represent approximately half of the world's population, they receive one-tenth of the world's income and own less than one-hundredth of the property throughout the world."); see also *infra* notes 93-95 and accompanying text.

⁴ See Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 645 (1992) [hereinafter Cook, *International Protection*]; see also *infra* notes 116-22 and accompanying text.

looks at the construction of reproductive rights under United States law and analyzes the reality of women's attempts to exercise those rights. Part V offers recommendations, under both international and United States law, on how to turn reproductive paper rights into reproductive realities.

II. REPRODUCTIVE RIGHTS

Reproductive rights encompass human rights,⁵ including the right to make reproductive decisions free from gender discrimination and the right to sexual and reproductive health.⁶ The ability to make reproductive decisions free of gender discrimination requires equality between men and women.⁷ This equality extends

⁵ See Berta E. Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991).

⁶ See MARIA JOSE ALCALA, FAMILY CARE INT'L, COMMITMENTS TO SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS FOR ALL, FRAMEWORK FOR ACTION 17 (1995). The International Conference on Population and Development defines reproductive health care to include: [F]amily-planning counselling [sic], information, education and services for prenatal care, safe delivery, and post-natal care, especially breast-feeding, infant and women's health care; prevention and appropriate treatment of infertility; . . . treatment of reproductive tract infections; sexually transmitted diseases and other reproductive health conditions; and information, education, counselling, as appropriate, on human sexuality, reproductive health and responsible parenthood.

Meredith Marshall, *United Nations Conference on Population and Development: The Road to a New Reality for Reproductive Health*, 10 EMORY INT'L L. REV. 441, 471 (1996) (citing *Report of the International Conference on Population and Development*, Int'l Conference on Population and Development, ¶ 7.6, U.N. Doc. A/CONF. 171/13 (1994)). But see Lynn P. Freedman, *Censorship and Manipulation of Reproductive Health Information*, in THE RIGHT TO KNOW, HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION 5 (Sandra Coliver ed., Article 19 1995) [hereinafter THE RIGHT TO KNOW] ("By reproductive and sexual rights, we mean constellations of legal and ethical principles that relate to an individual woman's ability to control what happens to her body and her person by protecting and respecting her ability to make and implement decisions about her reproduction and sexuality.") (emphasis added).

⁷ See *Women's Convention*, *supra* note 2, at art. 1.

"[D]iscrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Id.; see also *International Covenant on Civil and Political Rights*, adopted Dec. 16, 1966, 999 U.N.T.S. 171, at art. 4(1) (entered into force Mar. 23, 1976) [hereinafter *ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 16, 1966, 993 U.N.T.S. 3, at art. 2 (entered into force Jan. 3, 1976) [hereinafter *Economic Covenant*]; *Report of the World Summit for Social Development, Declaration on Social Development*, Copenhagen, 6-12 March 1995, adopted April 19, 1995, at 2, U.N. Doc. A/CONF.166/9 (1996), [hereinafter *Copenhagen Summit*] ("[E]quality and equity between women and men is a priority . . ."); *Cairo Conference*, *supra* note 2, at 12 ("[T]he eradication of all forms of discrimination on grounds of sex, are priority objectives of the international community."); *Vienna Declaration*, *supra* note 2, at 7 ("[T]he eradication of all forms of discrimination on grounds of sex are priority objectives of the international community."); *Convention on the Rights of the Child*, adopted Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166,

far beyond the isolated issues of reproductive decisions. Given the integral nature of reproduction to all areas of life, women must have equality with men in all respects before their reproductive decisions can truly be free from gender discrimination.

Women are often denied food and health care because they are deemed to be of lesser value than the men of the family.⁸ These denials contribute to the poor reproductive health of women,⁹ making them less able to bear the physical demands of childbirth and increasing maternal mortality.¹⁰ Additionally, denials to female infants raise the infant mortality rate among girls.¹¹ As a result, females, adults and children alike, die from senseless deprivations solely because of their gender.

This societal preference for males is also found in the extreme practice of female infanticide, where newborn babies are murdered simply because they are female.¹² Prenatal testing is also being used to ascertain the sex of fetuses prior to birth so that females may be aborted.¹³ The end result is the startling absence

U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1448 (1989), at art. 2 [hereinafter *Children's Convention*]; *American Convention on Human Rights*, Nov. 22, 1969, O.A.S. Off. Rec. OEA/Ser.K/XVI/1.1, doc. 65, rev. 1, corr. 2, (entered into force July 18, 1978), reprinted in 9 I.L.M. 673 (1970), at art. 1(1) [hereinafter *American Convention*]; *Teheran Proclamation*, supra note 2, at 4 ("The discrimination of which women are still victims in various regions of the world must be eliminated."); *American Declaration of the Rights and Duties of Man*, May 2, 1948, Res. XXX, at 38, Final Act, Ninth Int'l Conf. of American States, Bogota, Colombia, Mar. 30 - May 2, 1948 (Pan American Union 1948), O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (English 1979), reprinted in 43 AM. J. INT'L L. SUPP. 133 (1949), at art. 2 [hereinafter *American Declaration*]; *Universal Declaration of Human Rights*, adopted Dec. 10, 1948, G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., (Resolutions, part I) at 71, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. SUPP. 127 (1949), at art. 2 [hereinafter *Universal Declaration*].

⁸ REBECCA J. COOK, WOMEN'S HEALTH AND HUMAN RIGHTS 6 (World Health Organization 1994) [hereinafter COOK, WOMEN'S HEALTH]; UNITED NATIONS, WOMEN: CHALLENGES TO THE YEAR 2000, at 23 (1991) [hereinafter WOMEN: CHALLENGES] ("In societies where boys are more valued than girls, the latter are more likely to be affected by reduced access to health care."); Hilary Charlesworth, *What Are "Women's International Human Rights"?* [hereinafter Charlesworth, *What Are*], in HUMAN RIGHTS OF WOMEN 71-72 (Rebecca J. Cook ed., 1996).

⁹ See WOMEN: CHALLENGES, supra note 8, at 23 ("[Women's] health needs are almost everywhere inadequately addressed . . . men and boys eat first; whatever is left is then distributed among the women and girls."); Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in WOMEN'S RIGHTS, supra note 2, at 16; Indira Jaising, *Violence Against Women: The Indian Perspective*, in WOMEN'S RIGHTS, supra note 2, at 51; Cook, *International Protection*, supra note 4, at 647; Marshall, supra note 6, at 454 ("Women receive less health care and less food than men and boys.")

¹⁰ See Cook, *International Protection*, supra note 4, at 647.

¹¹ See Cook, *Women's Health*, supra note 8, at 8; Bunch, supra note 9, at 16.

¹² See WOMEN: CHALLENGES, supra note 8, at 23; Jaising, supra note 9, at 51.

¹³ See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 7 (1995) [hereinafter HUMAN DEVELOPMENT REPORT 1995]; WOMEN: CHALLENGES, supra note 8, at 24 ("In 1984-85 alone, some 16,000 female fetuses were aborted in a single Bombay clinic, following amniocentesis."); Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1274 (1995) ("It is believed that every year ten

of women around the world.¹⁴ An unnatural imbalance in the world population has thus been artificially created. The consequences of such a gender-crafted population will only be realized with the passage of time.

Additionally, health care¹⁵ is often focused on the male norm¹⁶ and does not account for the biological differences of women.¹⁷ Research regarding treatment and the effects of diseases is geared toward men, often completely ignoring women.¹⁸ Those who provide health care services and those who conduct research regarding reproduction often view women as inferior to men or are clouded by gender stereotypes.¹⁹ Thus, women often do not receive the care that they, as women, need.

Reproductive health is a "state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system."²⁰ Specif-

percent of all Indian women undergo sex preselection tests and 50,000 female fetuses are aborted."); see also Cook, *Women's Health*, *supra* note 8, at 8.

¹⁴ See *Beyond Beijing*, ISSUES QUARTERLY, Fall/Winter 1996, at 10 ("In China, some 49 million women appear to be 'missing.' Worldwide, approximately 100 million women are 'missing.'"); Boland, *supra* note 13, at 1274 ("Due to all causes of neglect, an estimated thirty-seven million women are 'missing' in India").

¹⁵ Numerous international human rights documents guarantee the right to health. See *Economic Covenant*, *supra* note 7, at art. 12; *Children's Convention*, *supra* note 7, at art. 24; *Women's Convention*, *supra* note 2, at art. 12; *American Declaration*, *supra* note 7, at art. 11; *Universal Declaration*, *supra* note 7, at art. 25; *African Charter on Human and Peoples' Rights*, adopted June 26, 1981, O.A.U. Doc. CAB/LEG/67/3/REV.5 (1981), reprinted in 21 I.L.M. 58, at art. 16 (1982) (entered into force Oct. 21, 1986) [hereinafter *African Charter*].

¹⁶ See Hilary Charlesworth, *Human Rights as Men's Rights* [hereinafter Charlesworth, *Human Rights*], in *WOMEN'S RIGHTS*, *supra* note 2, at 103-10; Aart Hendriks, *Promotion and Protection of Women's Right to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women's Convention*, 44 AM. U. L. REV. 1123, 1126-27 (1995) ("[I]n a male-dominated society, white, able-bodied, heterosexual, fertile men are the self-proclaimed norm. The overwhelming majority of people who deviate from this 'norm' are consequently labeled as 'different,' and have to carry the burden of their difference, without being granted a right to be different."); Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights - Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 651 (1996) [hereinafter Hernández-Truyol, *Rules*] ("This 'norm' is the well-entrenched perspective by which all is analyzed and measured: a white, Western/Northern European, Judeo-Christian, heterosexual, propertied, educated, male ideology."); see also Kathleen Mahoney, *Theoretical Perspectives on Women's Human Rights and Strategies for Their Implementation*, 21 BROOK. J. INT'L L. 799, 805 (1996) (discussing the male norm in legal rights).

¹⁷ See COOK, *WOMEN'S HEALTH*, *supra* note 8, at 7 ("Women have different body shape, organ size and volume, and distribution of body fat . . ."); Hendriks, *supra* note 16, at 1139 ("Studies have demonstrated that health promotion and disease prevention campaigns were often primarily focused on the health needs of men, and that women were almost systematically excluded from biomedical research.");

¹⁸ See COOK, *WOMEN'S HEALTH*, *supra* note 8, at 7 (noting that the exclusion of women from medical research has been blamed on a woman's menstrual cycle).

¹⁹ See Hendriks, *supra* note 16, at 1141 ("Deep-rooted, stereotyped roles for women are probably among the main obstacles for the enhancement of health equality between women and men.");

²⁰ *Cairo Conference*, *supra* note 2, at 40.

ically, the reproductive health of women goes beyond the usually highlighted issue of pregnancy.²¹ Reproductive health considers and deals with issues of contraception, infertility, and sexually transmitted diseases. All of the issues of reproductive health must be considered collectively, before women can truly enjoy reproductive health. While certain international documents have encompassed this broader definition of reproductive health, the current legal construct of reproductive health in the United States has focused almost exclusively around the issue of abortion, rather than addressing all aspects of reproductive health for women.²²

Pregnancy and childbirth, while often dismissed as commonplace and worry free in the United States, is a major cause of death in many countries throughout the world.²³ "[P]regnancies that come too early, too late, too often and at intervals that are too closely spaced in women's reproductive lives" present serious dan-

Reproductive health care in the context of primary health care should, inter alia, include: family planning counselling, information, education, communication and services; education and services for prenatal care, safe delivery, and post-natal care, especially breast-feeding, infant and women's health care; prevention and appropriate treatment of infertility; abortion as specified in Paragraph 8.25, including prevention of abortion and the management of the consequences of abortion; treatment of reproductive tract infections; sexually transmitted diseases and other reproductive health conditions; and information, education and counselling, as appropriate, on human sexuality, reproductive health and responsible parenthood.

Id. at 41-2 (emphasis omitted). See *Copenhagen Summit*, *supra* note 7, at 14; *Beijing Declaration*, *supra* note 2, at 35-36; *Women's Convention*, *supra* note 2, at art. 12; see also Marshall, *supra* note 6, at 469; Nadine Taub, *Population and Development: Cairo: Its Achievements and Challenges*, 1995 ST. LOUIS-WARSAW TRANS NAT'L L.J. 51, 54 ("[R]eproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.").

²¹ See Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975, 984 (1995) [hereinafter Cook, *Self-Determination*] ("An exclusive focus on motherhood is dysfunctional to women in that, if the value of women is perceived to arise solely through motherhood, women acquire status only through pregnancy and childbirth."); Hernández-Trujol, *Rules*, *supra* note 16, at 622 (noting the reproductive rights approach of "women as wombs").

²² See *infra* notes 142-62 and accompanying text.

²³ See *Beyond Beijing*, *supra* note 14, at 34 ("Approximately 585,000 women die each year in pregnancy or childbirth, with most deaths caused by preventable or treatable problems."); UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1996, at 19 (1996) [hereinafter HUMAN DEVELOPMENT REPORT 1996] ("The average maternal mortality rate for developing countries is 384 per 100,000 live births, with the rates varying considerably — from 95 in East Asia to nearly 1,000 in Sub-Saharan Africa."); Cook, *International Protection*, *supra* note 4, at 648 ("In the industrialized countries maternal deaths are now rare: the average life time risk for a woman dying of pregnancy-related causes is between 1 in 4,000 and 1 in 10,000. For a woman in developing countries, the average risk is between 1 in 15 and 1 in 50."); Marshall, *supra* note 6, at 455 ("Five hundred thousand women world-wide die annually from pregnancy-related causes, and ninety nine percent of these deaths occur in developing countries."); see also WOMEN: CHALLENGES, *supra* note 8, at 15, 20 ("Pregnancy is a gamble and giving birth is a life-and-death struggle.") (quoting a Bambara proverb, West Africa).

gers to the health of women and infants.²⁴ For example, child bride marriages result in girls, who are not yet physically mature, becoming pregnant too early in their lives.²⁵ These early pregnancies increase the risk of death in childbirth or other medical complications such as obstetric fistula and vesico-vaginal fistula.²⁶ Women who do not have information regarding contraception often find themselves facing unwanted pregnancies without legally or easily obtainable safe abortions. As a consequence, women submit to illegal, unsafe abortions that may result in death or other physical and mental suffering.²⁷ Additionally, as women age or the number of births they experience increases, women face a heightened maternal mortality rate.²⁸

Without proper family planning counseling, women easily fall victim to sexually transmitted diseases.²⁹ The rampant spread of sexually transmitted diseases, both in developed and developing countries, has serious physical consequences for women including pain, infertility, stillbirths, cancer, and death.³⁰ In particular, the spread of human immunodeficiency virus (HIV)/acquired immu-

²⁴ COOK, *WOMEN'S HEALTH*, *supra* note 8, at 10; *see also* WOMEN: CHALLENGES, *supra* note 8, at 21 ("Although an adolescent girl runs twice the risk of dying in childbirth as an adult woman, it is not uncommon for girls in [some] regions to marry soon after reaching puberty and to be expected to begin bearing children at once."); Sandra Coliver & Sofia Gruskin, *Global Overview*, in *THE RIGHT TO KNOW*, *supra* note 6, at 89 ("[H]aving four or fewer children, and not having children after the age of 35. . . directly correlate to reduced maternal, infant and child mortality."); Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, in *WOMEN'S RIGHTS*, *supra* note 2, at 258 [hereinafter Cook, *Reproductive Health*] (stating that these health risks are supported by epidemiological data).

²⁵ Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 *HARV. HUM. RTS. J.* 201, 219 (1995).

²⁶ *See id.*; *see also* Fitnat Naa-Adjetey Adjetey, *Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture*, 44 *AM. U. L. REV.* 1351, 1361 (1995); Cook, *International Protection*, *supra* note 4, at 649; Coliver & Gruskin, *supra* note 24, at 89 (stating that risks to teenage mothers include anemia, toxemia, miscarriage, stillbirths, fetal and infant deaths, and hemorrhage); Marshall, *supra* note 6, at 455 (stating that teenage mothers are twice as likely to die in childbirth as women ages 20 to 24 and children of teenage mothers are more than twice as likely to die within their first year of life); Julie Mertus, *State Discriminatory Family Law and Customary Abuses*, in *WOMEN'S RIGHTS*, *supra* note 2, at 138.

²⁷ *See* Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice Under International Law*, 44 *AM. U. L. REV.* 1279, 1297 (1995) (estimating that fifteen million illegal abortions are performed each year causing the deaths of 60,000 to 200,000 women each year); Freedman, *supra* note 6, at 9 (estimating between 67,000 to 200,000 deaths each year from unsafe and illegal abortions).

²⁸ *See* Coliver & Gruskin, *supra* note 24, at 89; Maria Isabel Plata, *Reproductive Rights as Human Rights: The Colombian Case*, in *HUMAN RIGHTS OF WOMEN*, *supra* note 8, at 522 (describing factors that contribute to maternal mortality).

²⁹ *See* Coliver & Gruskin, *supra* note 24, at 93 ("Women are at higher risk than men of becoming infected with HIV . . ."); Freedman, *supra* note 6, at 10.

³⁰ *See* Freedman, *supra* note 6, at 10; *see also* Coliver & Gruskin, *supra* note 24, at 94 ("STDs are estimated to be at least 10 times more prevalent in developing than in industrialized countries.").

nodeficiency syndrome (AIDS)³¹ has been increasing among women.³² The increase in heterosexual transmission and the vulnerability of women to the disease has led to a steady increase in the number of female victims.³³

Contraceptives, which help control reproduction, are, to a large extent, available to women.³⁴ However, these contraceptives have serious side effects³⁵ which are often not disclosed or explained to women. Additionally, while contraceptive use is often deemed the responsibility of the woman, efforts are not being made to make these contraceptives safer for women to use.

Access to family planning information and services, as well as the actual use of both, is essential to prevent the occurrence of these detrimental effects.³⁶ Therefore, these reproductive services are not needed simply to have women exercise a "right." Rather, the use of family planning services contributes to, and is essential to, the improvement of the general health of women.³⁷ These services help reduce mortality rates linked to pregnancy, childbirth, and unsafe reproductive health procedures.³⁸ Only when women can have access to and implement family planning services can they protect themselves and their children from the deadly effects of reproduction.

³¹ See HUMAN DEVELOPMENT REPORT 1996, *supra* note 23, at 22 (noting that 18 million people are infected with HIV and 2.5 million have died of AIDS).

³² See WOMEN: CHALLENGES, *supra* note 8, at 22; Sofia Gruskin, *Negotiating the Relationship of HIV/AIDS to Reproductive Health and Reproductive Rights*, 44 AM. U. L. REV. 1191, 1192 (1995).

³³ See COOK, WOMEN'S HEALTH, *supra* note 8, at 11 ("Women may be disadvantaged in protecting themselves against HIV infection. . . through lack of power to deny partners intercourse, to insist that partners use condoms or to obtain supplies of the new female condom."); WOMEN: CHALLENGES, *supra* note 8, at 22; Gruskin, *supra* note 32, at 1193 ("[W]omen as a group are more vulnerable to HIV infection because of social, cultural, economic, and political realities at the international, national, and community level, not simply because of their immune systems or biology."); see also Hnin Hnin Pyne, *AIDS and Gender Violence: The Enslavement of Burmese Women in the Thai Sex Industry*, in WOMEN'S RIGHTS, *supra* note 2, at 223 (describing the increased spread of AIDS among women due to trafficking of women).

³⁴ See Coliver & Gruskin, *supra* note 24, at 89 (estimating that 75% of couples of reproductive age use contraception in developed countries while 55% of couples in developing countries do, although individual regions varied greatly).

³⁵ *Id.* at 91 (noting side effects of contraceptives such as heart attack, stroke, menstrual irregularities, pelvic inflammatory disease, sterility, and ectopic pregnancy).

³⁶ See Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice Under International Law*, in THE RIGHT TO KNOW, *supra* note 6, at 41 (noting that family planning services protect against sexually transmitted diseases and promote maternal and infant health).

³⁷ See Coliver & Gruskin, *supra* note 24, at 89; Hendriks, *supra* note 16, at 1128-29.

³⁸ See WOMEN: CHALLENGES, *supra* note 8, at 16 (stating that more than half a million women a year die due to such reproductive matters).

Also included in reproductive rights is the right to sexual health, which is the ability to have a safe and satisfying sex life.³⁹ The right to sexual health includes the right to decide when, how, and with whom to have sexual relations.⁴⁰ The right to sexual health recognizes that women can have and can enjoy sexual relations without those relations being for the sole purpose of producing offspring.⁴¹ However, international documents have failed to explicitly include sexuality rights as part of the articulation of women's rights.⁴² Specifically, the Cairo Conference failed to adopt the term "sexual rights" in its articulation of reproductive rights.⁴³ Additionally, the United States has never found a fundamental right to sexual relationships that deviate from the heterosexual norm.⁴⁴

Beyond promoting better health, access to and use of family planning and reproductive health services also contribute to the economic and social status of women. Thus, the importance of the realization of reproductive rights is manifested through its impact on economic, civil, social, and political rights.⁴⁵ Because their lives are centered around the family, the impact of laws regarding reproductive rights falls heavily on women, affecting their social and economic status as well as their access to education and employment.⁴⁶ Women, without control over their own reproduction, are restricted to the societal role of mother. Women stay at home raising children rather than work outside the home earning income,

³⁹ See *Cairo Conference*, *supra* note 2, at 40; Marshall, *supra* note 6, at 469.

⁴⁰ Lai & Ralph, *supra* note 25, at 202.

⁴¹ *Id.* at 202; see also THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S RIGHTS 338, 417-18 (Human Rights Watch 1995) [hereinafter GLOBAL REPORT] ("States may not breach these rights to compel women to conform to particular sexual norms, or to engage in or refrain from sexual activities, whether for the purpose of reproduction or other ends."); Taub, *supra* note 20, at 54-55 ("It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases.").

⁴² See GLOBAL REPORT, *supra* note 41, at 417 ("International human rights law does not address directly or indirectly the issue of sexuality per se outside the context of reproduction.").

⁴³ See Lai & Ralph, *supra* note 25, at 208; see also *Cairo Conference*, *supra* note 2, at 40 ("Reproductive health therefore implies that people are able to have a satisfying and safe sex life . . ."); GLOBAL REPORT, *supra* note 41, at 418 ("Their omission was, in large part, due to concerns that recognition of sexual rights would promote extramarital and premarital sex as well as gay and lesbian relationships.").

⁴⁴ See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there is no fundamental right of homosexuals to engage in sodomy).

⁴⁵ See Anika Rahman, *Toward Government Accountability for Women's Reproductive Rights*, 69 ST. JOHN'S L. REV. 203, 204 (1995); see also Taub, *supra* note 20, at 55 ("[R]eproductive health and autonomy are both crucial to the liberty and dignity of women and necessary preconditions to women's exercise of their other civil, political, economic, social and cultural rights.").

⁴⁶ Mertus, *supra* note 26, at 135.

participating in the political or social life of the community, or attending school to obtain an education.⁴⁷ Thus, women are confined to a subordinated role economically, socially, and politically. With control over their own reproductive health, women can have more time and energy to devote to their lives outside of familial duties, thus improving their role in society.⁴⁸

The enjoyment of reproductive health has a great impact upon women and society as a whole. Without the widespread exercise of reproductive rights women will continue to suffer negative effects on their health as well as on their economic and social status. The end result is a world population lacking a balanced, healthy, and fully productive society.

III. INTERNATIONAL HUMAN RIGHTS

International human rights are "fundamental and inalienable rights which are essential for life as a human being."⁴⁹ International human rights are those rights vital to the moral, social, and political lives of individuals.⁵⁰ The primary body of international human rights documents includes the Universal Declaration of Human Rights (Universal Declaration),⁵¹ the International Covenant on Civil and Political Rights (ICCPR),⁵² and the International Covenant on Economic, Social and Cultural Rights (Economic Covenant).⁵³ Other international documents have continued to strengthen and broaden the protection of human rights.⁵⁴ How-

⁴⁷ See JEANNE VICKERS, *WOMEN AND THE WORLD ECONOMIC CRISIS* 18 (1991) (noting the need to include the economic activities of women in the definition of economic contribution).

⁴⁸ See Coliver, *supra* note 36, at 41; Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 136 (1995) ("[R]eproductive rights, perhaps more than anything else, define the degree to which women can control the course of their lives."); Mertus, *supra* note 26, at 135; Taub, *supra* note 20, at 55-56 ("Indeed, the United Nations has itself said that 'the ability to regulate the timing and number of births is one central means of freeing women to exercise the full range of human rights to which they are entitled.'") (quoting *Report of the Special Rapporteur; Study on the Interrelationship of the Status on Women and Family Planning*, U.N. ESCOR, Comm. on the Status of Women, 25th Sess., ¶ 31, U.N. Doc. E/CN. 6/5/575/REV. 1 (1973)).

⁴⁹ REBECCA WALLACE, *INTERNATIONAL LAW* 175 (1986).

⁵⁰ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. b; Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision?: An International Human Rights Strategy*, in *Immigrants Out! The New Nativism and the Anti Immigrant Impulse in the United States* 256 (Juan F. Perea, ed., 1997).

⁵¹ *Universal Declaration*, *supra* note 7.

⁵² See *ICCPR*, *supra* note 7.

⁵³ See *Economic Covenant*, *supra* note 7.

⁵⁴ See, e.g., *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter *Race Convention*]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol 3, E.T.S. 45, Proto-

ever, despite some isolated provisions that provide for freedom from discrimination based on sex,⁵⁵ women were not considered in the construction of international human rights.⁵⁶ Thus, women's rights are virtually absent in the formation of any of these international human rights norms.⁵⁷

Recently, however, there has been a movement to recognize that "women's rights are human rights."⁵⁸ The dominant international document on women's rights is the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention).⁵⁹ The Women's Convention requires the elimination of discrimination against women in civil, political, economic, social, and cultural rights.⁶⁰ Included among the specific rights are health care and family planning.⁶¹ Unfortunately, the signatory States have taken more reservations⁶² to the provisions of the Women's Convention than to any other international document.⁶³ Thus, many wonder how effective such a tattered document can be in protecting women's rights.⁶⁴

The Women's Convention, however, does not stand alone in the international arena as the sole expression of the rights of women. The international body of women's rights documents includes, among others, the conference documents arising out of

col No. 5, E.T.S. 55. and Protocol No. 8, E.T.S. 118 [hereinafter *European Convention*]; *African Charter*, *supra* note 15; *American Convention*, *supra* note 7. See generally Asbjørn Eide, *Economic, Social and Cultural Rights as Human Rights*, in *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 21* (Asbjørn Eide, et al. eds., 1995) [hereinafter *ES&CR*].

⁵⁵ See *ICCPR*, *supra* note 7, at art. 3; *Economic Covenant*, *supra* note 7, at arts. 2-3; *Race Convention*, *supra* note 54, at 195; *European Convention*, *supra* note 54, at art. 14; *African Charter*, *supra* note 15, at art. 2; *American Convention*, *supra* note 7, at art. 1; *Universal Declaration*, *supra* note 7, at art. 2.

⁵⁶ See Hernández-Trujol, *Rules*, *supra* note 16, at 630 ("Women were not present when the rules were being crafted and thus the rules were not made *by* women *for* women or *with* women in mind.") (emphasis in original).

⁵⁷ See *id.* at 609.

⁵⁸ *Beijing Declaration*, *supra* note 2, at 3.

⁵⁹ *Women's Convention*, *supra* note 2.

⁶⁰ *Id.* at art. 1.

⁶¹ *Id.* at art. 12.

⁶² A reservation is a "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State." Vienna Convention on the Law of Treaties, May 23, 1962, 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980). Such a reservation, however, may not violate the "object and purpose of the treaty." *Id.* at 337.

⁶³ See Anne F. Bayelsky, *General Approaches to the Domestic Application of Women's International Human Rights Law*, in *HUMAN RIGHTS OF WOMEN*, *supra* note 8, at 352 ("Approximately 40 states have made roughly 105 reservations and declarations to the Convention."); see also Southard, *supra* note 3, at 18 (describing the nature of the substantive reservations to the *Women's Convention*).

⁶⁴ Katarina Tomasevski, *Women*, in *ES&CR*, *supra* note 54, at 275 ("The numerous and wide-ranging reservations made when ratifying the Convention cast doubt on the willingness of governments to accept equal rights for women in all relevant areas.")

Nairobi,⁶⁵ Cairo,⁶⁶ Copenhagen,⁶⁷ Vienna,⁶⁸ and Beijing.⁶⁹ Additionally, primary international human rights documents also guarantee other broad rights which lay at the heart of the foundation of reproductive rights. The Universal Declaration,⁷⁰ ICCPR,⁷¹ and Economic Covenant⁷² contain rights to health, to privacy, and to freedom from discrimination based on sex which are implicit in the reproductive rights needed for women.⁷³

A. Construction of Reproductive Rights

In various international human rights documents, reproductive rights are couched in terms of gender equality so that reproductive rights are to be accorded equally to both genders. The Women's Convention, often touted as a great stride in the international recognition of women's rights as human rights,⁷⁴ states that "access to health services, including those relating to family planning" should be available "on a basis of equality of men and wo-

⁶⁵ *Nairobi*, *supra* note 2. The Forward-Looking Strategies of *Nairobi* presented a "comprehensive social action plan to bring women into full and equal participation in a peaceful society by the year 2000." Moira L. McConnell, *Violence Against Women: Beyond the Limits of the Law*, 21 BROOK. J. INT'L L. 899, 900 (1996).

⁶⁶ *Cairo Conference*, *supra* note 2. The *Cairo Conference* focused on the integration and interdependence of population, development, and the environment. See Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1021 (1995).

⁶⁷ *Copenhagen Summit*, *supra* note 7. The *Copenhagen Summit* supported both the Cairo and Vienna Conferences while calling for greater participation of women in society and recognizing problems of the girl-child. See REED BOLAND, THE CENTER FOR REPRODUCTIVE LAW, PROMOTING REPRODUCTIVE RIGHTS: A GLOBAL MANDATE 12 (Anika Rahman ed., 1997) [hereinafter BOLAND, PROMOTING REPRODUCTIVE RIGHTS].

⁶⁸ *Vienna Declaration*, *supra* note 2. The Vienna Conference focused on democracy, development, and human rights. See Zulficar, *supra* note 66, at 1021.

⁶⁹ *Beijing Declaration*, *supra* note 2. The Beijing Conference acknowledged the principle of women's human rights and governments' responsibilities toward those rights. See BOLAND, PROMOTING REPRODUCTIVE RIGHTS, *supra* note 67, at 12.

⁷⁰ *Universal Declaration*, *supra* note 7, at art. 2 (discrimination based on sex); *id.* at art. 25 (health); *id.* at art. 12 (privacy).

⁷¹ *ICCPR*, *supra* note 7, at art. 2(1) (discrimination based on sex); *id.* at art. 17 (privacy).

⁷² *Economic Covenant*, *supra* note 7, at art. 2(2) (discrimination based on sex); *id.* at art. 12 (health).

⁷³ See Hernández, *supra* note 5, at 325-44 (discussing rights to privacy, health, and equality as part of the right to reproductive freedom); see also Cook, *Self-Determination*, *supra* note 21, at 993-1013. Other rights implicit in reproductive rights are the rights to life and survival, to liberty and security of the person, to freedom from torture and ill-treatment, to marry and found a family, and to enjoyment of private and family life, see *id.* at 993-1000, rights to the benefits of scientific progress and to education, see *id.* at 1000-06, rights to nondiscrimination on grounds of sexual orientation, see *id.* at 1009-10, rights to receive and impart information, to freedom of thought, conscience and religion, to political participation, and to assembly, see *id.* at 1010-13.

⁷⁴ See, e.g., Cook, *International Protection*, *supra* note 4, at 652 ("the primary modern human rights treaty"); Friedman, *supra* note 2, at 23 ("One of the most effective tools for promoting women's equality . . ."); Julie Peters and Andrea Wolper, *Introduction*, in WOMEN'S RIGHTS, *supra* note 2, at 4 [hereinafter Peters & Wolper] ("a major step").

men.”⁷⁵ The Women’s Convention repeats “equality of men and women” as the basis for its construction of the right to determine the number and spacing of children⁷⁶ and the rights and responsibilities of parents.⁷⁷ This gender equality principle for reproductive rights is also repeated through a number of other international human rights documents.⁷⁸

However, by couching reproductive rights in “gender neutral” provisions these international human rights documents actually provide support for States to refuse to extend benefits or rights to women regarding reproductive health or decisions.⁷⁹ This gender-neutral language, which was intended to secure for women improved reproductive health care and autonomy in reproductive decisions, can in fact be used by States to justify the denial of benefits related to, for example, maternity, because men are precluded from the use of such services.⁸⁰ Biological facts demand that women have different needs than men in the area of reproductive health.⁸¹ However, because rights are measured against the male norm,⁸² these gender-neutral provisions fail to provide or recognize these different needs of women.⁸³

Additionally, human rights documents have articulated reproductive rights, in particular the right to decide the number and

⁷⁵ *Women’s Convention*, *supra* note 2, at art. 12.

⁷⁶ *See id.* at art. 16.

⁷⁷ *See id.*

⁷⁸ *See, e.g., Copenhagen Summit*, *supra* note 7, at 14 (“Take appropriate measures to ensure, on the basis of equality of men and women, universal access to the widest range of health-care services, including those relating to reproductive health care”); *Cairo Conference*, *supra* note 2, at 12 (“States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health.”); RECOMMENDATION FOR THE FURTHER IMPLEMENTATION OF THE WORLD POPULATION PLAN OF ACTION AT MEXICO CITY, ¶ 17, U.N. Sales No. E. 8.4XIII.8 (1984) (taking into account “the need for actions to ensure that women can effectively exercise rights equal to those of men in all spheres of economic, social, cultural and political life, and in particular those rights which pertain most directly to population concerns.”).

⁷⁹ *See* Natalie Hevener Kaufman & Stefanie A. Lindquist, *Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination Against Women*, in *WOMEN’S RIGHTS*, *supra* note 2, at 114.

⁸⁰ *See id.* at 121; *see also* *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that pregnancy-based classifications are not based on sex); *Boland*, *PROMOTING REPRODUCTIVE RIGHTS*, *supra* note 67, at 19; Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, in *FEMINIST JURISPRUDENCE* 27 (Patricia Smith, ed., 1994).

⁸¹ *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, in *FEMINIST JURISPRUDENCE*, *supra* note 80, at 354 (“The central biological difference between men and women is that only women have the capacity to create a human being.”).

⁸² *See supra* note 16 and accompanying text.

⁸³ *See* Cook, *International Protection*, *supra* note 4, at 679; *see also* *COOK*, *WOMEN’S HEALTH*, *supra* note 8, at 21 (arguing that laws that deny women’s health needs because of their biological distinction from men are still discrimination against women because of the deleterious impact on women).

spacing of children, as a shared decision between two people. The Teheran Proclamation,⁸⁴ the first declaration of the human right to family planning, states that "[p]arents have a basic human right to decide freely and responsibly on the number and spacing of their children."⁸⁵ This construction, granting the right to "parents," clearly leaves the decision regarding the number and spacing of children as one shared between two persons — a man and a woman. Subsequent human rights documents, which articulate the right to decide number and spacing of children, contain language that vests the right with "couples and individuals."⁸⁶ Again, however, the construction of the right leaves in doubt whether women are granted the right, on their own, to make decisions regarding the number and spacing of children, without the consent/permission of their male partners.⁸⁷

Additionally, through the use of the phrase "their children", these international human rights provisions confirm the intention that the family planning decision regarding the number and spacing of children be a joint and shared right.⁸⁸ "Their children" indicates that the right to family planning decision-making is not located in an individual, as would be indicated by the use of the phrase "his or her children." Alternatively, if the right to family

⁸⁴ *Teheran Proclamation*, *supra* note 2.

⁸⁵ *Id.* ¶ 16. See *Report of the United Nations World Population Conference, Bucharest, 19-30 August 1974*, at 11, U.N. Doc. E./CONF.60/19 (1975) [hereinafter *Bucharest Conference*] (recognizing the "necessity of ensuring that all couples are able to achieve their desired number and spacing of children . . .") (emphasis added); Declaration on Social Progress and Development, at art. 4 (UN 1969), excerpted in A THEMATIC GUIDE TO DOCUMENTS ON THE HUMAN RIGHTS OF WOMEN 213 (Gudmundur Alfredsson & Katarina Tomasevski, eds. 1995) [hereinafter THEMATIC GUIDE] ("Parents have the exclusive right to determine freely and responsibly the number and spacing of their children."); *U.N. Declaration on the Elimination of Discrimination against Women*, adopted by G.A. Res. 2263 (XXII), U.N. GAOR, 22nd Sess., art. 6(2)(c), at 35, U.N. Doc. A/6880 (1967) [hereinafter *Women's Declaration*] ("Parents shall have equal rights and duties in matters relating to their children."); *Parental Responsibilities*, Council of Europe, 1984, at princ. 5, excerpted in THEMATIC GUIDE, *supra*, at 232 ("Parental responsibilities for a child of their marriage should belong jointly to both parents."); see also Coliver, *supra* note 36, at 54.

⁸⁶ See *Beijing Declaration*, *supra* note 2, at 36 ("[T]he basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of children."); *Cairo Conference*, *supra* note 2, at 12 ("All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children."); *Nairobi*, *supra* note 2, ¶ 156 ("[A]ll couples and individuals have the basic human right to decide freely and informedly [sic] the number and spacing of their children.");

⁸⁷ See Coliver, *supra* note 36, at 55; Tomasevski, *supra* note 64, at 282 ("In quite a few countries the husband is empowered by law to veto his wife's access to family planning."). But see *Paton v. United Kingdom*, decision of 13 May 1980, reprinted in 19 Eur. Comm'n H.R. 244 (1980) (reports and decisions) (holding that a husband could not veto his wife's choice to have an abortion).

⁸⁸ See *Cairo Conference*, *supra* note 2, at 12; *Nairobi*, *supra* note 2, ¶ 156; *Bucharest Conference*, *supra* note 85, at 11; *Teheran Proclamation*, *supra* note 2, at 4; *Women's Declaration*, *supra* note 85, at art. 6(2).

planning and reproductive autonomy lay solely with women, as a woman's right, the phrase would read "her children." Rather, the construction of the right uses the possessive "their," reinforcing the concept of a joint or shared right.

The construction of international human rights regarding reproductive health care and family planning decisions as a shared decision, however, ignores the reality of power imbalances between the sexes.⁸⁹ These international documents grant rights premised on equality in making decisions about reproduction and family planning. However, this premise ignores the inherent inequality between men and women.⁹⁰ Granting joint rights, coupled with such gender power imbalances, may actually work to deny women an equal or independent choice in making such decisions or exercising such rights.⁹¹ Women will, in effect, be forced to seek the permission of their husbands/partners before they may exercise reproductive rights.⁹²

B. *Reproductive Realities*

These paper rights, as articulated by international human rights documents, require equality between the sexes in order to be realized. However, in actuality, no such equality exists to permit such a realization.⁹³ Despite the articulation of reproductive rights, States often promulgate rules and regulations that perpetuate the inequality that interferes with a woman's enjoyment of such rights.⁹⁴ Additionally, even when the State does not actively perpetuate the subordination of women, the State often allows cul-

⁸⁹ See HUMAN DEVELOPMENT REPORT 1996, *supra* note 23, at 32 ("[N]o society treats its women as well as its men."); Berta Esperanza Hernández-Trujol, *Concluding Remarks, Making Women Visible: Setting an Agenda for the Twenty-First Century*, 69 ST. JOHN'S L. REV. 231, 236 (1995) [hereinafter Hernández-Trujol, *Concluding Remarks*] ("[S]exual inequality is a global reality.").

⁹⁰ See Mertus, *supra* note 26, at 137 ("Men have been granted the right to make all important decisions for women, unilaterally determining when they shall marry and divorce, when and how often they shall bear children, and whether they shall be educated and permitted to work outside the home.").

⁹¹ See Coliver, *supra* note 36, at 55; Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1052 (1996).

⁹² See Adjetej, *supra* note 26, at 1358 (noting that in Swaziland, for example, a woman must present written permission from her husband before she may receive family planning counseling or health care services).

⁹³ See Hernández-Trujol, *Rules*, *supra* note 16, at 629. "As George Orwell put it in *Animal Farm*: 'All Animals are equal, but some animals are more equal than others.' This metaphor accurately reflects the discrepancy between the equality guaranteed women by law and their actual status in society." WOMEN: CHALLENGES, *supra* note 8, at 7-8 (citation omitted).

⁹⁴ See Global REPORT, *supra* note 41, at 410.

tural practices to continue, augmenting the inequality that tramples these reproductive rights.⁹⁵

(i) Culture⁹⁶

The Economic Covenant, as well as other human rights documents, grant cultural rights.⁹⁷ Cultural rights guarantee participation in the cultural life of the community, protection of artistic, literary, and scientific works, and the right to freedom of expression, religion, belief, association, and education.⁹⁸ However, the recognition of cultural rights actually harms the ability of women to realize their reproductive rights.⁹⁹

⁹⁵ See *id.* at 411. The *Women's Convention* addresses this cultural subordination of women as follows:

State parties shall take all appropriate measures:

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

Women's Convention, *supra* note 2, at art. 5.

⁹⁶ There is a debate about the role of culture in the application of international human rights. Universalists believe that human rights norms should not be changed or applied differently because of the culture to which they are imposed. See Southard, *supra* note 3, at 4. Relativists, on the other hand, believe that human rights norms should take individual cultures into account. *Id.*; see also Eide, *supra* note 54, at 23.

⁹⁷ See *Economic Covenant*, *supra* note 7, at art. 15; *African Charter*, *supra* note 15, at art. 17(2); *American Declaration*, *supra* note 7, at art. 13; *Universal Declaration*, *supra* note 7, at art. 27.

However, economic, social, and cultural rights have not been embraced unconditionally. Some countries, especially Western nations, have been reluctant to accept these rights. A prime example of this reluctance was exhibited during the drafting of a universal bill of human rights when the United Nations General Assembly decided to prepare two separate human rights covenants; one on civil and political rights and the second on economic, social, and cultural rights. See Eide, *supra* note 54, at 22.

⁹⁸ See *Economic Covenant*, *supra* note 7, at art. 15 (cultural life); *id.* at art. 13 (education); *African Charter*, *supra* note 15, at art. 8 (religion); *id.* at art. 10 (association); *id.* at art. 17(1) (education); *id.* at art. 17(2) (cultural life); *American Declaration*, *supra* note 7, at art. 3 (religion); *id.* at art. 12 (education); *id.* at art. 13 (cultural life); *id.* at art. 22 (association); *Universal Declaration*, *supra* note 7, at art. 20 (association); *id.* at art. 18 (religion); *id.* at art. 27 (cultural life); see also Rodolfo Stavenhagen, *Cultural Rights and Universal Human Rights*, in *ES&CR*, *supra* note 54, at 63.

⁹⁹ See Charlesworth, *What Are*, *supra* note 8, at 74; Lai & Ralph, *supra* note 25, at 206 ("These concerns are particularly relevant to attempts to define women's rights under international human rights law, as many gender-specific human rights violations are grounded in, or strongly identified with, cultural and religious practices.").

Culture,¹⁰⁰ as a defense to noncompliance with articulated women's human rights,¹⁰¹ prevents women from attaining full enjoyment of reproductive rights and health. Many cultural practices must be eliminated in order to provide women with the opportunity to freely exercise their reproductive rights. Unfortunately, such practices have existed for centuries and will not easily be undone.¹⁰² So firmly embedded in the society, these cultural practices need not be officially approved by the State government in order to be pervasive and systematically enforced.¹⁰³ The lack of affirmative State involvement has allowed States to maintain a hands-off approach, while the practices continue and thrive.¹⁰⁴

a) Violence Against Women¹⁰⁵

Violence against women, including infanticide, rape, sexual abuse, battering, and bride burning, subordinates women to the wishes of men through fear and the eradication of self-esteem.¹⁰⁶ Domestic violence — violence against women perpetrated by a man in the private environment of the home — is designed to perpetuate male superiority and female inferiority.¹⁰⁷ This perpetuation of women's subordination through the use and threat of violence has cyclical effects — the fear of violence subordinates women to the wishes of men, thus decreasing a woman's ability to

¹⁰⁰ Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN'S RIGHTS*, *supra* note 2, at 173 ("[C]ulture is a series of constantly contested and negotiated social practices whose meanings are influenced by the power and status of their interpreters and participants."). *But see* GLOBAL REPORT, *supra* note 41, at 413 (arguing that the culture defense to practices is really a political power tactic). Culture is the "accumulated material heritage of humankind as a whole or of particular human groups, including monuments and artifacts." Stavenhagen, *supra* note 98, at 65. Culture is seen as the "process of artistic and scientific creation," *id.* (emphasis omitted), and as the "sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups." *Id.* at 66 (emphasis omitted).

¹⁰¹ *See* Hernández-Trujol, *Concluding Remarks*, *supra* note 89, at 234 ("Sadly, culture is sometimes used either to shield these realities from scrutiny or to justify or explain these violations.").

¹⁰² *See* Southard, *supra* note 3, at 28.

¹⁰³ *See* Lai & Ralph, *supra* note 25, at 203.

¹⁰⁴ *See id.*

¹⁰⁵ "Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, sexually abused and raped. Such violence is a major obstacle to the achievement of peace and the other objectives of the Decade, and should be given special attention." *Forward-Looking Strategies of Implementation for the Advancement of Women and Concrete Measures to Overcome Obstacles to the Achievement of the Goals and Objectives of the United Nations Decade of Women*, ¶ 181, U.N. Doc. A/CONF.116/PC/21 (1984).

¹⁰⁶ *See* Marshall, *supra* note 6, at 452.

¹⁰⁷ *See* Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in *HUMAN RIGHTS OF WOMEN*, *supra* note 8, at 120; *see also* GLOBAL REPORT, *supra* note 41, at 341 ("[Domestic violence] primarily affects women and operates to diminish women's autonomy and sense of self-worth.").

exercise reproductive rights, thus leaving them more vulnerable to subordination to males.

Violence against women plays a large role in shaping the use of reproductive health services.¹⁰⁸ Women often are forced to forego the use of contraceptives to control their own fertility out of fear of physical violence as a reprisal for their decision.¹⁰⁹ Additionally, violence in the form of rape is a powerful male weapon that has the capability of undermining any autonomous decisions by a woman about reproduction.¹¹⁰

Significantly, among the violent cultural practices that greatly interfere with a woman's enjoyment of reproductive health is the practice of female genital mutilation.¹¹¹ Female genital mutilation — which is performed to ensure chastity and fidelity, to suppress sexuality, to ensure subjugation, and to control reproduction¹¹² — causes subsequent complications in childbirth, infections, incontinence, painful sexual intercourse, and death.¹¹³ In addition to these physical problems, women who endure female genital mutilation are forced to suffer sexual and psychological problems, such as fearing or not enjoying sex, as well as other psychological symptoms due to the mutilation.¹¹⁴

¹⁰⁸ See Lori L. Heise, *Freedom Close to Home: The Impact of Violence Against Women on Reproductive Rights*, in *WOMEN'S RIGHTS*, *supra* note 2, at 241-42.

¹⁰⁹ *See id.* at 242 (noting that men sometimes view a wife's desire to use contraception as an intention of infidelity).

¹¹⁰ *See* Adjetey, *supra* note 26, at 1359-60 (noting that there is no marital rape because "all sex within a customary marriage is 'consensual,' whether or not the woman consents."); Heise, *supra* note 108, at 240 ("[R]ape can have serious consequences for [a woman's] reproductive health. Along with physical injury and emotional trauma, rape survivors run the risk of becoming pregnant or contracting STDs, including AIDS.")

¹¹¹ *See* Nahid Toubia, *Female Genital Mutilation*, in *WOMEN'S RIGHTS*, *supra* note 2, at 224-37. There are two broad categories of female genital mutilation — clitoridectomy and infibulation. *See id.* at 226. Clitoridectomy involves the partial or total removal of the clitoris or the clitoris and inner lips. *See id.* Infibulation involves the removal of the clitoris and all or part of the labia minora, and raw surfaces in the labia minora are created. *See id.* These surfaces are then stitched together covering the urethra and vagina. *See id.* at 226-27. An opening must be created in order to allow for urination and menstruation. *See id.* at 227. Cutting and stitching recur to allow for intercourse and birth. *See id.*

¹¹² *See* MARILYN FRENCH, *THE WAR AGAINST WOMEN* 113 (1992) (noting that some believe the mutilation increases the sexual pleasure for men during intercourse); *WOMEN: CHALLENGES*, *supra* note 8, at 22; Toubia, *supra* note 111, at 224; Adjetey, *supra* note 26, at 1362 (to protect women from rape and sexual assault).

¹¹³ *See* *WOMEN: CHALLENGES*, *supra* note 8, at 22; Adjetey, *supra* note 26, at 1362 ("acute pain, post operative shock, urine retention, and bladder infection resulting from lacerations of the bladder, the anal sphincter, urethra, vagina walls, and Bartholin's glands. . . hemorrhaging, tetanus, septicemia and infection that could lead to death, and vulva abscesses. . . keloid formation, infertility, chronic infections of the uterus and vagina, incontinence, painful sexual intercourse (dyspareunia), retention of blood, painful menstrual periods (dysmenorrhea), growth of implantation dermoid cysts, fistula formation, and obstructed childbirth.")

¹¹⁴ *See* Toubia, *supra* note 111, at 229-30.

Violence against women is often ignored by the State, as evidenced by failure to arrest, prosecute, or punish those who commit these acts.¹¹⁵ As violence is allowed to persist, women continually are forced into a role of subordination out of fear and pain. Subordination by the threat of violence prevents women from exercising reproductive rights that they need in order to take control of their own lives. Therefore, paper rights that guarantee women reproductive health and decision-making are useless in the face of the painful reality of violence that ultimately undermines these articulations.

b) Traditional Roles

Many cultural practices regarding women define women as wives and mothers, and thereby restrict their sexuality and reproduction.¹¹⁶ The traditional view of women as mothers and wives also contributes to the inability to freely exercise reproductive rights.¹¹⁷ Their societal role and biology force women to bear the consequences of reproduction without the authority to make the decisions that control their own reproduction.¹¹⁸ The role of women as housewives, staying at home, raising children, and not producing outside income, leaves a woman in a subordinated position to her husband due largely to economic realities.¹¹⁹ Due to a lack of financial independence, a woman is often forced to comply with her husband's wishes in order to guard against the retaliation of abandonment or removal of financial support.¹²⁰ Additionally, the cultural views of male virility, as evidenced through the number of children a man begets, especially sons, forces women to submit to their partner's desire to uphold his masculinity, thus sacrificing her reproductive control.¹²¹

Inferiority of the female role in society thus leaves women undervalued and overlooked in important decisions regarding repro-

¹¹⁵ See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 8, at 100 ("State failure to arrest, prosecute, and imprison perpetrators of violence against women can be interpreted as acquiescence in (or ratification of) the private actor's conduct.").

¹¹⁶ See Southard, *supra* note 3, at 13 (noting cultural practices of female genital mutilation, purdah, dowry, and wife beating).

¹¹⁷ See Adjetey, *supra* note 26, at 1356 ("For instance, African female children are taught from a very early age that the man is the head of the household, and are advised by their mothers to remain in complete subjugation to their husbands.").

¹¹⁸ See *id.* at 1352.

¹¹⁹ See Mertus, *supra* note 26, at 137; see also Cook, *Self Determination*, *supra* note 21, at 983 (noting that these activities of women have a low socioeconomic status).

¹²⁰ See Romany, *supra* note 115, at 95 ("Women's legal, economic, and social dependency has made them historically subordinated.").

¹²¹ See Heise, *supra* note 108, at 242.

duction.¹²² Women are forced to constrain their lives to a stereotypical role based on their gender. This traditional role of women as mothers and wives inhibits women from exercising reproductive decisions that run counter to this stereotyped conception.

c) Religion

Cultural practices and their effect on reproductive rights are compounded by religious beliefs and practices. Many Middle Eastern countries, for example, use Islam as an excuse to continue discriminatory treatment of women. Very few Muslim countries have ratified the Women's Convention, and those that have ratified it have taken broad reservations based on the Shari'a.¹²³ The Shari'a, premised on the guardianship of men over women, promotes inequality between the sexes, particularly in regard to the family.¹²⁴ The religious belief in the subordination of women completely prevents women from ever having the power to exercise reproductive rights.

The Muslim faith, however, is not the only religion that poses obstacles to equality between men and women and prevents women from fully enjoying reproductive rights. Fundamentalist or extreme sects of religions which use dogma to perpetuate the subordination of women pose the same hindrance to women's exercise of reproductive rights.¹²⁵ Religion, as an excuse for the continued subordination of women in society, stands as a strong barrier to women's ability to enjoy reproductive health.

¹²² See COOK, WOMEN'S HEALTH, *supra* note 8, at 6.

¹²³ See LARS ADAM REHOF, GUIDE TO THE TRAVAUX PRÉPARATOIRES OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 253 (1993). Reservations to the *Women's Convention* by Muslim countries are as follow: Bangladesh, "as they conflict with Sharia law based on Holy Quran and Sunna." *Id.* at 254; Egypt "provided that such compliance does not run counter to the Islamic Sharia." *Id.* at 256; Iraq "without prejudice to the provisions of the Islamic Shariah . . ." *Id.* at 261; Libya "cannot conflict with the laws on personal status derived from the Islamic Shariah." *Id.* at 263; but see Ann Elizabeth Mayer, *Cultural Particularism as a Bar to Women's Rights: Reflections on the Middle Eastern Experience*, in WOMEN'S RIGHTS, *supra* note 2, at 181.

One should also bear in mind that the versions of Islam invoked by various UN delegations to justify reservations to [the *Women's Convention*] represent official constructs of Middle Eastern/Islamic culture that are in almost all cases imposed by undemocratic regimes, which raises doubts about whether they should be taken as representative of the societies they dominate.

Id.

¹²⁴ Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF WOMEN, *supra* note 8, at 181-82.

¹²⁵ Sajeda Amin & Sara Hossain, *Women's Reproductive Rights and the Politics of Fundamentalism: A View From Bangladesh*, 44 AM. U. L. REV. 1319, 1336-38 (1995) [hereinafter Amin & Hossain].

(ii) Official Population Policy

Beyond cultural practices that States do not prohibit, some States also take affirmative steps to inhibit women's ability to obtain reproductive health. China's "One Child Policy"¹²⁶ is a prime example of how a State, in practice, controls all reproductive decisions of women as well as men. This "One Child Policy" was imposed in order to restrict population growth and increase economic and political stability.¹²⁷ China has made reproductive counseling and contraception widely available to women.¹²⁸ However, the Chinese policy has taken away any autonomous reproductive decisions and has exposed women to physical and economic attack. Women who become pregnant "out-of-plan" are physically forced, without much care or sympathy, to have abortions, no matter how late in their pregnancy.¹²⁹ Such late term abortions can cause serious physical and emotional harm to women.¹³⁰ In addition to the brutal physical enforcement of the policy, the government also imposes coercive economic tactics that sabotage an individual's reproductive decisions. People can be fined, disqualified for benefits such as day care, health care, housing and education, and demoted or dismissed from employment, for not complying with the "One Child Policy."¹³¹

The Chinese policy is a stark and disturbing example of what States are capable of mandating and the extent to which States can eliminate a woman's autonomous reproductive decisions. How-

¹²⁶ China has recently been changing its "One Child Policy" to a "Two Child Policy." See Joseph Kahn, *China Eases Up on Its One-Child Policy*, Wall St. J., Oct. 20, 1997, at A20. This change in official population policy does not appear to be a significant alteration toward improved reproductive rights of women. The problems of the "One Child Policy," discussed *infra* notes 129-31 and accompanying text, will not disappear with this change in policy.

¹²⁷ See *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 WOMEN'S RTS. L. REP. 285, 294 (1996) [hereinafter *Caught*].

¹²⁸ See *id.*

¹²⁹ See *id.* at 297; Zhu Hong, *The Testimony of Women Writers: The Situation of Women in China Today*, in WOMEN'S RIGHTS, *supra* note 2, at 97; Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALF J.L. & FEMINISM 145, 163 (1996). Other physical violence includes detention and beatings. See *id.* at 154.

¹³⁰ See *Caught*, *supra* note 127, at 297.

One Chinese woman described . . . how doctors in a Xi'an hospital performed an abortion on her when she was eight-and-a-half months pregnant: "I was held down on the operating table. One doctor injected through my belly into my uterus formaldehyde liquid . . . I knew my child was to die in a few minutes . . . 48 hours later, after being induced into labor, in front of a room full of people, I gave birth to a live boy. . . but the doctors immediately killed him while I watched helplessly. They then took him out to be thrown away."

Id. See also Li, *supra* note 129, at 171 (noting that such procedures cause pelvic infections, extravasated blood in the pelvis, and pelvic hematoma).

¹³¹ See Li, *supra* note 129, at 154.

ever, the Chinese "One Child Policy" does not stand alone as the only state-sponsored regulation that affirmatively interferes with a woman's reproductive rights.¹³² Other States, like India, have also imposed coercive abortions in an effort to curb its population problems.¹³³ On the other side of population control policies are countries like Romania and Albania that, until very recently, outlawed abortions and contraceptive devices in order to increase population.¹³⁴

Beyond these manipulative population programs, States have implemented family planning services that focus narrowly on contraceptive delivery and use.¹³⁵ These programs ignore, and in turn do not provide to women, services regarding sexually transmitted diseases, gynecological care, sexuality, and infertility.¹³⁶ By not providing services and information crucial to the enjoyment of overall reproductive health, these States have in effect denied reproductive health to women through their narrow construction of family planning programs.

IV. UNITED STATES LAW

By failing to ratify important international human rights documents, the United States has refused to commit itself to the international articulation of women's rights.¹³⁷ The reproductive rights guaranteed by international documents, therefore, are not a

¹³² See GLOBAL REPORT, *supra* note 41, at 410-11 (noting forced virginity exams in Turkey, forced sterilizations of Romany women in Czechoslovakia during the Communist era, and revoking physicians' licenses for performing abortions); Hernández-Truyol, *Rules*, *supra* note 16, at 652-54 (noting historical examples of State policies regarding population that have ignored women's personal rights).

¹³³ See Sen, *supra* note 91, at 1059. In India, even though not a part of "official policy," officials use verbal threats, withhold poverty and maternal benefits, withhold health care, and forbid people from running for political office to coerce compliance with family planning policies. See *id.*; see also THE CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: FORMAL LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES 23 (1995) [hereinafter WOMEN OF THE WORLD] (noting that India still uses official incentives such as cash incentives, opening schools, providing drinking water, and building roads as well as taking away the privilege of holding political office to enforce population control); Hernández-Truyol, *Rules*, *supra* note 16, at 653.

¹³⁴ See Boland, *supra* note 13, at 1259-60. In Romania, the forced childbearing policy resulted in the highest European maternal mortality rate, highest European infant mortality rate, women dying and suffering from unsafe, illegal abortions, and a flood of unwanted children in orphanages. *Id.* at 1259.

¹³⁵ See Rahman, *supra* note 45, at 207-11; see also Amin & Hossain, *supra* note 125, at 1324 ("[W]omen's groups have frequently criticized the family planning program for its overzealous commitment to increasing contraceptive prevalence for fertility control, because the program diverts attention from meeting the full range of women's reproductive health needs.")

¹³⁶ See Rahman, *supra* note 45, at 210-11.

¹³⁷ See Dorothy Q. Thomas, *Women's Human Rights: From Visibility to Accountability*, 69 ST. JOHN'S L. REV. 217, 223-25 (1995).

source of entitlement for women in the United States.¹³⁸ Rather, women must look to the constitution of the United States for the articulation of reproductive rights to which they are entitled. Unfortunately, however, the United States constitution has no explicit reference to women's rights or to reproductive rights. Instead, women must rely on the United States Supreme Court's interpretation and construction of the constitution to determine the extent of their reproductive rights, as deemed to have been created by the unarticulated penumbral right to privacy.

A. Construction of Reproductive Rights

The United States constitution does not explicitly guarantee the right to privacy. However, the United States Supreme Court has recognized a penumbra of unarticulated rights which includes the right to privacy. Included within this realm of privacy are decisions regarding marriage, procreation, and family matters.¹³⁹ This right to privacy was first announced in the case of *Griswold v. Connecticut*,¹⁴⁰ which held that a state law that banned the use of contraception by married couples was unconstitutional.¹⁴¹

The right to privacy was dramatically expanded to recognize the right to abortion in the case of *Roe v. Wade*.¹⁴² This landmark Supreme Court case declared that a woman had a personal privacy right that included the decision to have an abortion.¹⁴³ The Court, consistent with the United States' history of promotion of negative rights,¹⁴⁴ couched the right in terms of the extent to which the

¹³⁸ Although the United States has not ratified these international documents, the norms contained within them can be enforceable in the United States if such human rights rise to the level of an international customary norm. However, given United States courts' construction of what constitutes an international customary norm, the reproductive rights of women probably would not meet this standard. See *The Paquete Habana*, 175 U.S. 677 (1900) (looking to over four hundred years of history to establish the exemption of fresh fishing vessels from prizes of war as a customary international norm); *Filartiga v. Penabaz*, 630 F.2d 876, 881 (2d Cir. 1980) (looking to "the general assent of civilized nations" to hold the prohibition of official torture as a customary norm).

¹³⁹ See Patrick Smith, *On Freedom: Restriction, Regulation and Reproductive Autonomy*, in *FEMINIST JURISPRUDENCE* 299, 300 (Mary Becher ed., 1994).

¹⁴⁰ 381 U.S. 479 (1965).

¹⁴¹ *Id.*

¹⁴² 410 U.S. 113 (1973).

¹⁴³ *Id.* at 154.

¹⁴⁴ See Hendriks, *supra* note 16, at 1133 ("Governments have often thought that it is easier to comply with 'negative' rights — rights that oblige the State to refrain from interfering with individual freedoms — than with the obligations enshrined in 'positive' rights — rights that require actual State action."); see also Yveffe Marie Barksdale, *And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries*, 14 *LAW & INEQ. J.* 1, 20 (1995) ("[A]lthough the government constitutionally cannot prohibit, burden, or penalize an individual's constitutional rights, the government is not required to affirmatively bankroll the rights.").

state could not interfere with that decision, rather than what the state had to do to ensure that right.¹⁴⁵

In subsequent Supreme Court cases, the Court has affirmed the negative right to be free from government interference in the realm of the abortion decision. In *Maher v. Roe*,¹⁴⁶ the Court held that states could deny Medicaid funding for abortions while fully funding childbirth.¹⁴⁷ In *Harris v. McRae*,¹⁴⁸ the Court upheld a federal statute that lacked federal funding for medically necessary abortions to protect the mother's health except if her life was in danger or she was a rape or incest victim.¹⁴⁹ Additionally, the Court in *Webster v. Reproductive Health Services*¹⁵⁰ upheld the prohibition against using public funds, employees, or facilities for performing abortions or counseling a woman to have an abortion unless necessary to save the woman's life.¹⁵¹ The fundamental premise underlying these cases is that as long as the government does not impose obstacles it has no duty to remove obstacles from the path of women trying to exercise reproductive rights.¹⁵²

Reproductive rights in the United States are thus framed as a negative right, rather than a positive right. While the government cannot unduly interfere with the exercise of reproductive rights, the government need not affirmatively act to ensure the exercise of those rights. Therefore, negative rights reinforce the status quo of women's subordination in society.¹⁵³ By constructing privacy rights to reproductive choices in terms of negative rights the government does not intervene in order to ensure that women truly have the power to exercise these articulated rights.¹⁵⁴

¹⁴⁵ See *Roe*, 410 U.S. at 163-65.

¹⁴⁶ 432 U.S. 464 (1977).

¹⁴⁷ *Id.*

¹⁴⁸ 448 U.S. 297 (1980).

¹⁴⁹ See Hyde Amendment, Pub. L. No.96-123, 93 Stat. 926.

[N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service . . .

Id. §109.

¹⁵⁰ 492 U.S. 490 (1989).

¹⁵¹ See *id.*

¹⁵² See *Maher*, 432 U.S. at 475 ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy."); see also *Harris*, 448 U.S. at 316 ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.").

¹⁵³ See Romany, *supra* note 115, at 93.

¹⁵⁴ See Frances Olsen, *Unraveling Compromise*, in *FEMINIST JURISPRUDENCE*, *supra* note 80, at 337-38.

The Supreme Court's original construction of rights regarding reproduction granted such rights only to married couples.¹⁵⁵ The Supreme Court later moved away from this construction. For example, the fundamental right to contraception was later rephrased by the Court as one belonging to an individual.¹⁵⁶ Additionally, the Court stated in *Carey v. Population Services International*¹⁵⁷ that an individual had a fundamental right to decide whether or not to procreate.¹⁵⁸

Moreover, the United States Supreme Court has continuously upheld the right to abortion as a right vested solely with a woman. This belief was confirmed by the Supreme Court's holding in *Planned Parenthood v. Casey*.¹⁵⁹ In *Casey*, the Court was faced with a number of statutory provisions enacted by Pennsylvania in an effort to limit access to and reduce the number of abortions.¹⁶⁰ One particular provision required a pregnant married woman to notify her husband of her decision to have an abortion.¹⁶¹ The Supreme Court struck down the husband notification as unconstitutional because it would unduly burden and interfere with a woman's right to have an abortion.¹⁶²

Therefore, in the United States, the articulation of reproductive rights is constructed as belonging solely to a woman, to be decided by her and without the need for the consent or permission of her husband or partner.¹⁶³ However, a problem with the construc-

¹⁵⁵ See *Criswold*, 381 U.S. at 479 (holding that a married couple has a privacy right to use contraception).

¹⁵⁶ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[T]he right of the individual, married or single, [is] to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis omitted).

¹⁵⁷ 431 U.S. 678 (1977).

¹⁵⁸ See *id.* at 685.

¹⁵⁹ 505 U.S. 833 (1992).

¹⁶⁰ See *id.* See also Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3203-20 (1990) (amended 1988, 1989).

¹⁶¹ See *id.* § 3209. The statute provided exceptions to the spousal notification if the woman provided a signed statement that her husband was not the man who impregnated her, her husband could not be located, reported spousal sexual assault caused the pregnancy, or she would be subject to physical harm if her husband was notified.

The act also required that a woman be given certain information at least twenty-four hours before the abortion could be performed, see *id.* § 3205, a minor was required to obtain consent from one parent or get a judicial bypass to that consent, see *id.* § 3206; and reporting requirements were imposed on facilities that provided abortions, see *id.* §§ 3207(b), 3214(a), 3214(f).

¹⁶² See *Casey*, 505 U.S. at 898 ("A husband has no enforceable right to require a wife to advise him before she exercises her personal choices."); see also *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (striking down requirement of spousal consent before a woman could obtain an abortion).

¹⁶³ See Joan R. Bullock, *Abortion Rights in America*, 1994 B.Y.U. L. REV. 63, 71 (arguing that by framing abortion as a woman's right society has removed itself from any responsibility).

tion of reproductive rights is that although such rights are vested in women, the Supreme Court does not recognize the needs of women in regard to those reproductive rights. The Supreme Court has previously been quick to use stereotypes of women in order to justify its decisions, such as the exclusion of women from certain jobs and military combat.¹⁶⁴ However, the same Court quickly turns a blind eye to the biological realities that make women different from men.¹⁶⁵ Without a realization of these differences incorporated into the construction of reproductive rights there can be no true equality between men and women.¹⁶⁶ Without such equality, the granting of rights to women rather than to couples does not aid women in realizing reproductive rights.

B. *Reproductive Realities*

The broad articulation of reproductive rights as belonging to just women does not necessarily equal a broad realization of these rights. Without a recognition of the special needs of women, and without active involvement by the government to secure such rights, women are unable to access the rights to which they are entitled. The realities that prevent the realization of reproductive rights in the international arena are also present to some extent in the United States. However, the reproductive rights of women in the United States are to a large degree restricted by economic realities.

In the United States, reproductive services "are generally available, at least to those who can pay."¹⁶⁷ Even prior to the *Roe* decision, which granted the right to abortion to women, the realization

¹⁶⁴ See *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding selective service registration of men but not women because women are not allowed in military combat); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding regulation preventing women from being guards in state penitentiaries because male prisoners may assault them).

¹⁶⁵ See *Ceduldig v. Aiello*, 417 U.S. 484 (1974) (holding that pregnancy did not constitute a sex-based classification); see also Daly, *supra* note 48, at 136 ("any equal protection claim [is doomed] to failure, because men and women are inherently dissimilarly situated with respect to the biological capacity to procreate"); Law, *supra* note 81, at 361 ("An equality doctrine that ignores the unique quality of [pregnancy, abortion, and reproduction] implicitly says that women can claim equality only insofar as they are like men.").

¹⁶⁶ See Law, *supra* note 81, at 357.

¹⁶⁷ Rachael N. Pine & Lori F. Fischler, *The United States of America*, in *THE RIGHT TO KNOW*, *supra* note 6, at 289. In addition to questions of providing services to the poor, there are grave concerns about the ability of minority women to access reproductive services. One particularly blatant hindrance to the availability of services and counseling is language. Counselors and information pamphlets, which are not bilingual, create problems for women who cannot speak English, or who are not comfortable speaking English. See Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low Income Women*, in *FEMINIST JURISPRUDENCE*, *supra* note 80, at 324-35.

of reproductive rights was limited to women of wealth.¹⁶⁸ Economic realities, therefore, shape the extent and nature of a woman's ability to obtain reproductive health.

Because the United States has no national health care system, most people pay for medical care costs out of their own pocket or through private insurance.¹⁶⁹ Two-thirds of American women receive family planning services through private physicians or HMOs, while the remaining one-third rely on public health clinics, Planned Parenthood, and other community health organizations.¹⁷⁰ Only the very poor have government-funded medical care.¹⁷¹ Even those who have access to private insurance and managed care organizations do not have a full range of reproductive services available to them.¹⁷²

The United States federal government funds family planning services primarily through Medicaid and Title X.¹⁷³ Medicaid, the largest public funding of family services, provides reimbursement for health care.¹⁷⁴ In order to receive Medicaid in most states, a woman must have a child or be pregnant, be single, and have an income less than 50% of the poverty level.¹⁷⁵ Thus, the ability to obtain care through Medicaid is restricted by program requirements, as well as by the limited number of physicians that will accept Medicaid patients.¹⁷⁶ Title X, on the other hand, is a subsidy program that only provides for family planning services.¹⁷⁷ Voluntary family planning projects are established through Title X funding to public and private organizations.¹⁷⁸ Both programs, however, are restrictive in the types of services provided to women. In particular, Medicaid only covers the costs of abortion in nar-

¹⁶⁸ See Deborah L. Rhode, *Reproductive Freedom*, in FEMINIST JURISPRUDENCE, *supra* note 80, at 308 ("Fertility control emerged as a right for the privileged and a duty for the poor."). Women with money were able to pay for illegal but safe abortions as well as pay doctors to justify legal abortions for them. *Id.*

¹⁶⁹ See Pine & Fischler, *supra* note 167, at 291.

¹⁷⁰ See *id.* at 292.

¹⁷¹ See *id.*

¹⁷² See WOMEN OF THE WORLD, *supra* note 133, at 35 (describing coverage for reproductive services and contraceptives as uneven and arbitrary).

¹⁷³ See *id.*

¹⁷⁴ See *id.*; see also Pine & Fischler, *supra* note 167, at 291.

¹⁷⁵ See WOMEN OF THE WORLD, *supra* note 133, at 35.

¹⁷⁶ See Pine & Fischler, *supra* note 167, at 291 (noting that only 56% of doctors who provide contraceptive services accept Medicaid because the reimbursement is much smaller than the normal charge for the service provided).

¹⁷⁷ See WOMEN OF THE WORLD, *supra* note 133, at 35 (services include contraceptive information, contraception, gynecological examinations, and pregnancy, STD, and HIV tests).

¹⁷⁸ See *id.*; see also Pine & Fischler, *supra* note 167, at 291 ("Through Title X, the federal government provides funds to 76 per cent of the 2,600 public and private nonprofit family planning agencies which together, operate more than 5,400 clinics for low-income clients.").

rowly defined situations¹⁷⁹ and Title X does not fund abortions.¹⁸⁰ These funding programs are permitted because under the negative rights construction the government has no affirmative duty to pay for all reproductive services that women may want.

The extremely poor are also limited in the choices they can make due to financial constraints. Current welfare policies encourage family caps which place limits on the amount of welfare benefits that a woman may receive if she gives birth to additional children while on welfare.¹⁸¹ Thus, the government has decided to use economic power to control the reproductive choices of welfare recipients.¹⁸² However, under the negative rights construction, the government's withholding of economic resources does not interfere with a woman's reproductive right, even though it greatly influences that right.

Women without economic resources cannot afford to see private physicians in order to obtain access to a full range of reproductive counseling and services.¹⁸³ Instead, women with little money are forced to restrict their choices of family planning to those available over the counter at pharmacies — typically the most unreliable contraceptives.¹⁸⁴ Additionally, cost is a primary obstacle to women who seek abortion services today.¹⁸⁵ Poor women, without the ability to pay for abortion services or contraceptive devices, will be faced with unplanned pregnancies that bring children into the world they cannot afford, forcing the cycle of poverty to continue.¹⁸⁶ The added economic impact of welfare program fam-

¹⁷⁹ See *WOMEN OF THE WORLD*, *supra* note 133, at 37. *But see* Bullock, *supra* note 163, at 71 n.32 (stating that for every \$1 the government spends on abortions for poor women the government saves \$4 in welfare expenses for an unplanned birth).

¹⁸⁰ See Pine & Fischler, *supra* note 167, at 292.

¹⁸¹ See Barksdale, *supra* note 144, at 34.

¹⁸² See *id.* at 4; see also Melynda G. Broomfield, *Controlling the Reproductive Rights of Impoverished Women: Is this the Way to "Reform" Welfare?*, 16 B.C. THIRD WORLD L.J. 217, 228-29 (1996) ("Supporters of a benefits cap feel that the current system of granting additional benefits with the birth of additional children bribes impoverished women to behave irresponsibly."). Other studies, however, show that the family cap has no effect on the birth rate. *Id.* at 229.

One wonders how different the United States family cap is from the often-condemned Chinese measures to control population. See *supra* note 131 and accompanying text (describing coercive economic disincentives used by China to force compliance with its one child policy).

¹⁸³ See Pine & Fischler, *supra* note 167, at 293.

¹⁸⁴ See *id.*; see also Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 342 ("[P]oor adolescents may have no affordable way to obtain the contraceptive pill, which is generally considered to be the most appropriate birth control option . . .").

¹⁸⁵ See Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 FAM. PLAN. PERSP. 246, 248-49 (1991) (estimating average costs of abortion at between \$245 in an abortion clinic and \$1,757 in a hospital).

¹⁸⁶ See Bullock, *supra* note 163, at 68.

ily caps results in women without assistance facing the task of caring for children that they had no financial means to keep from being born.

Additionally, reproductive services are not widely available in all parts of the United States. In particular, nearly ninety percent of the counties in the United States do not have abortion providers.¹⁸⁷ The location of service providers greatly contributes to the inability to obtain abortion services.¹⁸⁸ Therefore, the concentration of reproductive services primarily in metropolitan areas leaves women in the South and in rural areas without access to a full array of services or options.¹⁸⁹ Women with the financial means are able to pay for the costs of traveling long distances and staying in remote cities in order to obtain the desired services. Women without economic resources, however, are unable to meet the expense of traveling to obtain those same services.

The restrictions on services and choices that are inherent in government programs greatly shape the decisions of women who, because of their lack of money, are forced to rely on these government programs. The services and options available to women regarding reproductive health are thus controlled by the size of their own purse. Poor women, therefore, are unable to realize reproductive rights that are guaranteed under the United States constitution.¹⁹⁰

V. RECOMMENDATIONS

The inherent inequalities facing women in today's society prevent women from fully and freely exercising these reproductive rights. As a consequence of not being able to exercise their reproductive rights, women are further subordinated to men in social, political, and economic aspects of life. Thus the cycle of inequality and subordination continues.

The realities of life that interfere with the realization of reproductive rights in both the international arena and the United States are factors that cannot be removed by women on their own. Due to centuries of subordination, women are in a position of powerlessness to, entirely on their own, overcome intrinsic barriers to equality that lay at the heart of culture, official policies, and economics. However, even though women are not able on their own

¹⁸⁷ See Nsiah-Jefferson, *supra* note 167, at 324; see also Elizabeth A. Reilly, *The Rhetoric of Disrespect: Uncovering the Faulty Premises Infecting Reproductive Rights*, 5 AM. U. J. GENDER & L. 147, 148, n.3 (1996).

¹⁸⁸ See Henshaw, *supra* note 185, at 252.

¹⁸⁹ See *id.*

¹⁹⁰ See Rhode, *supra* note 168, at 313.

to change those factors, they must be an integral part in the construction of the plan to negate these factors.¹⁹¹

Most importantly to the creation of reproductive realities, States must take a proactive role in securing reproductive rights for women. States must ensure true equality of women in society, in practice and in theory.¹⁹² Primarily, this means that the term equality should not be viewed as same treatment to men and women when measuring by an opposite-sex standard.¹⁹³ Rather, the term equality should be viewed as a principle of equity that rejects the adverse treatment of women based on their gender but that understands and accounts for the needs specific to women because of their gender.¹⁹⁴ Women can only truly enjoy equality when they are treated with recognition of their differences from men, but not stereotyped by traditional conceptions of their gender.

Changing the construction of laws to recognize the equal position of women in society will not be enough to lift most women out of their subordinated role in society. States must take affirmative actions to change the cultural views and practices regarding traditional gender roles, religion, and violence that continue to prevent women from reaching a position in society so that they can exercise their reproductive rights.¹⁹⁵ Primarily, States must unconditionally reject those concepts and practices that perpetuate the subjugation of women. States must remove any permission, either through failure to enact legislation or failure to prosecute actions, that allows such practices to remain imbedded in society.¹⁹⁶ States,

¹⁹¹ See Charlesworth, *Human Rights*, *supra* note 16, at 110 ("It is important, as a strategy for the advancement of women, to ensure that women's voices and experiences are included in the definition of all human rights norms."); Hernández-Truyol, *Rules*, *supra* note 16, at 669-74 (encouraging women's presence in making women's issues and concerns recognized and solved).

¹⁹² See BOLAND, PROMOTING REPRODUCTIVE RIGHTS, *supra* note 67, at 41 (recommending that States Ratify the *Women's Convention* without reservation and enact legislation prohibiting the discrimination of women).

¹⁹³ See Nadine Taub & Wendy W. Williams, *Will Equality Require More than Assimilation, Accommodation, or Separation from the Existing Social Structure*, in FEMINIST JURISPRUDENCE, *supra* note 80, at 50 (noting that critiques of the current legal construct based on the male norm "promotes the assimilation of women into a predefined world.").

¹⁹⁴ See Christine A. Littleton, *Reconstructing Sexual Equality*, in FEMINIST JURISPRUDENCE, *supra* note 80, at 113 (describing the asymmetrical approaches to sexual equality as including special rights, accommodation, acceptance, and empowerment).

¹⁹⁵ *Women's Convention*, *supra* note 2, at art. 3.

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Id.

¹⁹⁶ See Peters & Wolper, *supra* note 74, at 1 ("Gender-based abuse and discrimination may be sanctioned by society, made into law, or simply tolerated.").

along with taking away implicit permission, must take affirmative steps to prevent and to punish such actions through enforcement of laws prohibiting such practices as violence against women.¹⁹⁷ Second, States must educate both men and women about the detrimental effects of such practices and dispel the underlying misconceptions about the genders that lay at the heart of such practices.¹⁹⁸

In addition to focusing efforts on the elimination of inequality between men and women that inhibits exercise of reproductive rights, States must take affirmative steps to guarantee access to reproductive services. Only with control over reproductive health will women be able to improve their status in society socially, politically, and economically.¹⁹⁹ Initially, this will require the elimination of official State population policies that use force and coercion to make reproductive decisions for women.²⁰⁰ Secondly, States must provide services, and access to such services, that allow women to exercise reproductive decisions.²⁰¹ Family planning programs cannot be limited to just providing contraceptive devices. All aspects of reproductive health must be adequately addressed by family planning programs.²⁰²

States must also remove the economic barriers that prevent women from taking advantage of available reproductive health services.²⁰³ The importance of reproductive health and its impact on society must be realized and must be provided for. The resources spent by States to give women full access to reproductive services will quickly be paid back in increased production by women, as well as by reduced expenses for complications and emergencies that arise because less costly preventative measures were not taken.

¹⁹⁷ See BOLAND, PROMOTING REPRODUCTIVE RIGHTS, *supra* note 67, at 42 (recommending States enact and enforce legislation regarding violence against women); WOMEN: CHALLENGES, *supra* note 8, at 25 (recommending the elimination of female genital mutilation and imposition of severe penalties for female infanticide and gender selective abortions).

¹⁹⁸ See BOLAND, PROMOTING REPRODUCTIVE RIGHTS, *supra* note 67, at 9 (recommending the promotion of educational campaigns regarding the rights and equality of women).

¹⁹⁹ See *supra* notes 45 - 48 and accompanying text (describing the importance of reproductive health to all aspects of women's lives).

²⁰⁰ See *supra* notes 126 - 135 and accompanying text (describing the official population policies of China and other countries).

²⁰¹ See WOMEN: CHALLENGES, *supra* note 8, at 25 (recommending increased spending for health care and research regarding family planning devices).

²⁰² See BOLAND, PROMOTING REPRODUCTIVE RIGHTS, *supra* note 67, at 18 (recommending comprehensive family planning programs).

²⁰³ See WOMEN: CHALLENGES, *supra* note 8, at 25 (encouraging improvement of access of females to health care and nutrition).

Only when women no longer occupy a subordinated role in society will they truly be able to fully and freely exercise reproductive rights. This subordination will only be dispelled when affirmative steps are taken by States to not only remove barriers to equality, but also to provide assistance to women in obtaining equality. The end result of these State actions will be the improvement not only of women as individuals, but of society as a whole.

VI. CONCLUSION

Reproductive rights are granted in both the international arena and under United States law. The construction of these rights, however, is quite different. The international documents grant reproductive rights to men and women, equally and jointly.²⁰⁴ The United States construction, on the other hand, grants these reproductive rights to women on their own.²⁰⁵ Despite these differences in construction, women are still unable to fully and freely exercise their reproductive rights.

The articulation of reproductive rights is undermined by realities that interfere with the exercise of these rights. Power imbalances between men and women, which are perpetuated by cultural views of traditional gender roles, religion, and violence, as well as official policies, prevent women from exercising rights under the equality construct of international human rights.²⁰⁶ In the United States, the lack of economic resources perpetuates the inability of women to exercise reproductive rights, even though granted to women as individuals.²⁰⁷

The underlying similarity between the paper rights and realities of the international arena and the United States is the lack of positive, affirmative actions on the part of States. States that do not take steps to eliminate cultural views of traditional gender roles, violence, and religion, as well as their own population programs, are complicit in the subordination of women that prevents the realization of reproductive rights. Similarly, as long as the United States does not assist women in financially securing a full range of family planning services women's articulated paper rights are useless. Only when States take positive, affirmative actions, will women be able to realize the reproductive rights to which they are entitled.

²⁰⁴ See *supra* notes 74 - 92 and accompanying text.

²⁰⁵ See *supra* notes 137 - 166 and accompanying text.

²⁰⁶ See *supra* notes 93 - 136 and accompanying text.

²⁰⁷ See *supra* notes 167 - 190 and accompanying text.