NOTES & COMMENTS

ABORTION RIGHTS AS (INTER)NATIONAL HUMAN RIGHTS: *DOBBS* AND THE NONCOMPLIANCE OF U.S. ABORTION POLICIES UNDER INTERNATIONAL HUMAN RIGHTS LAW

by
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The current state of reproductive rights in the United States following Dobbs v. Jackson Women's Health Organization *constitutes yet another chapter in the saga of the United States' hypocrisy in failing to uphold international human rights at the domestic level. International human rights law unequivocally provides that safe and legal abortion access is a fundamental human right. Yet, applying treaty body guidance to the cruel and irrational legislation enacted in* Dobbs*' wake, it is clear: the United States has wholly and dangerously failed to comply with its international commitments to protect and uphold the fundamental rights at stake in regulating abortion. If the United States has pledged to uphold human rights at the international level, why then can U.S. states so fragrantly perpetuate human rights violations within U.S. borders? This Comment confronts the challenges of domestic implementation and enforcement of international human rights law. Despite the structural and ideological impediments, international obligations create binding* intra*national obligations, and U.S. domestic institutions have the legal authority*

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and responsibility to bring the country as a whole into compliance with its international human rights law commitments. As such, international human rights law will be an essential tool in the ongoing fight for reproductive rights in the United States.

INTRODUCTION

> "*When Roe and Casey disappear, the loss of power, control, and dignity will be immense . . . . After today, young women will come of age with fewer rights than their mothers and grandmothers had.*"[1]

Abortion rights are human rights. Comprehensive abortion care is a basic healthcare need for millions of women, girls, and individuals who can become pregnant.[2] Worldwide, an estimated 6 in 10 unintended pregnancies end in an abortion every year.[3] In the United States, about one in four women will have an abortion by the age of 45.[4]

Despite the prevalence of abortion and the physical, mental, and socioeconomic risks of restrictive abortion policies, a small minority of countries impose cruel and dangerous abortion restrictions.[5] By forcing pregnant individuals to either continue their pregnancy and give birth, or resort to clandestine and unsafe abortions,[6] these policies contravene international human rights law, which unequivocally provides that safe and legal abortion access constitutes a critical part of human rights.[7]

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2346–47 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[2] Throughout this paper, the terms "women" or "girls" include people who can become pregnant and pregnant people or individuals. While the majority of scholarly and legal sources address cisgender women and girls' personal experiences with abortion, it is important to recognize that people with other gender identities, including intersex people and transgender men and boys, may have the reproductive capacity to become pregnant and may have abortions.

[3] Jonathan Bearak, Anna Popinchalk, Bela Gantra, Ann-Beth Moller, Özge Tunçalp, Cynthia Beavin, Lorraine Kwok & Leotine Alkema, *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019*, 8 LANCET GLOB. HEALTH e1152, e1157 (2020).

[4] GUTTMACHER INST., FACT SHEET: INDUCED ABORTION IN THE UNITED STATES 1 (2019).

[5] *The World's Abortion Laws*, CTR. FOR REPROD. RTS., https://www.reproductiverights.org/maps/worlds-abortion-laws (last visited May 11, 2023); Brief for Human Rights Watch et al. as Amici Curiae Supporting Respondents at 12, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

[6] *End Forced Pregnancy*, ACLU (Sept. 20, 2022), https://www.aclu.org/news/topic/end-forced-pregnancy ("Policies that force people to remain pregnant and give birth are unconscionable, cruel, and dangerous."); WHO, *Safe Abortion: Technical & Policy Guidance for Health Systems*, at 1, WHO/RHR/15.04 (2015), https://apps.who.int/iris/handle/10665/173586 ("Almost all deaths and morbidity from unsafe abortion occur in countries where abortion is severely restricted in law and/or in practice.").

[7] *See, e.g.*, U.N. Off. of the High Comm'r for Hum. Rts., Hum. Rts. Comm., *International Covenant on Civil and Political Rights, General Comment No. 36 on Article 6: Right to Life*, ¶ 8, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter HRC, *General Comment No. 36*]; *Safe Abortion: Technical & Policy Guidance for Health Systems*, *supra* note 6, at 1 (discussing the

On June 24, 2022, the United States joined this small minority of countries.[8] The Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* constituted an unprecedented and significant attack on reproductive rights in the United States.[9] By failing to recognize safe, legal, and effective access to abortion as a fundamental right, the Court blatantly "disregarded the United States' binding legal obligations under international human rights law."[10] The effects of the ruling were immediate and far reaching, with nearly half of U.S. states passing legislation that restricted access to, and in some cases outright prohibited, abortion.[11] With the current state of reproductive rights in the United States, pregnant individuals have, and will continue to, unnecessarily and arbitrarily lose their rights, and in some cases, their lives.[12]

The purpose of this Comment is to confront the challenges of domestic implementation and enforcement of international human rights law through the lens of reproductive rights. I assert that the current state of reproductive rights in the United States contravenes the United States' binding international commitments, and that, despite the structural and ideological impediments, U.S. domestic institutions have the legal authority and responsibility to bring the country as a whole into compliance with its international human rights law obligations.

Part I sets the foundation for applying international law to the U.S. legal system, discussing the primary sources of international human rights law that inform and, to an extent, bind the United States domestically. Part II addresses reproductive rights in international human rights law, first identifying the human rights at stake and the international instruments and norms that guarantee them, and then provid-

"inextricable link between women's health and human rights and the need for laws and policies that promote and protect both").

[8] *See* Brief for Human Rights Watch et al., *supra* note 5, at 8 (noting that *Dobbs* marked an "unmistakable step" in the direction of the small minority of countries that ban abortion without exception).

[9] Melissa Upreti, Dorothy Estrada Tanck, Elizabeth Broderick, Ivana Radacic & Meskerem Geset Techane (Working Group on Discrimination Against Women and Girls), Tlaleng Mofokeng (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health) & Reem Alsalem (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Joint Web Statement by UN Human Rights Experts on Supreme Court Decision to Strike Down* Roe v. Wade (June 24, 2022), https://www.ohchr.org/en/statements/2022/06/joint-web-statement-un-human-rights-experts-supreme-court-decision-strike-down [hereinafter *Statement by UN Human Rights Experts*].

[10] *Id.*

[11] *See Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies (last visited May 31, 2023).

[12] Caitlin Gerdts, Loren Dobkin, Diana Greene Foster & Eleanor Bimla Schwarz, *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth After an Unwanted Pregnancy*, 26 WOMEN'S HEALTH ISSUES 55, 58 (2016).

ing an overview of the current state of abortion rights in the United States, highlighting some of the most restrictive policies. Against this backdrop, I analyze the noncompliance of U.S. abortion policies, utilizing treaty body guidance as a framework. Finally, Part III focuses inward, describing the authority and responsibility of U.S. states and the federal executive, legislative, and judicial branches to bring the country as a whole into compliance with its international human rights law obligations.

The United States must allay its resistance to submitting to international human rights law by joining the growing body of countries that condemn restrictive abortion laws. Indeed, lives and futures are at stake.

I. SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW AND THE DOMESTIC STATUS OF U.S. INTERNATIONAL COMMITMENTS

Dobbs opened the door for states to enact legislation that flagrantly contravenes international human rights law, thus constituting a violation of the country's international human rights commitments to U.S. citizens. In order to engage in a meaningful discussion of the United States' domestic human rights law violations, it is first helpful to contextualize the mechanics of international law's status within the U.S. legal system.

By joining international treaties and otherwise participating in international trade and politics, the United States acquires binding legal commitments—both internationally *and* domestically.[13] However, while the United States tends to pride itself on its commitment to human rights in the rest of the world, the country has largely failed to uphold the same commitment at the domestic level.[14] Indeed, *Dobbs* and the U.S. approach to abortion regulation is but another saga in a long history of U.S. hypocrisy.[15]

Two primary sources of international law inform, and to an extent, bind U.S. law: (1) international agreements and (2) customary international law.[16] Both sources impose binding *international* obligations; however, they do not necessarily impose binding *domestic* obligations—rather, international laws' domestic legal status depend

[13] *See generally* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2018).

[14] Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 477, 492–93 (Louis Henkin & John Lawrence Hargrove eds., 1994); Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard—Explanation, Example, and Avenues for Change*, 4 N.Y.C. L. REV. 59, 59–64 (2001).

[15] Harfeld, *supra* note 14, at 62–63 ("While the U.S. wields enormous power in influencing other nations to further their protection of human rights, we have not yet taken the initiative and courage to turn the lens inward and solve our human rights contradictions.").

[16] MULLIGAN, *supra* note 13, at 1–2, 29.

on each individual country's own domestic laws.[17] In the United States, despite the strong constitutional and jurisprudential bases for enforcing international law at the domestic level,[18] the status of international agreements and customs in the U.S. legal system is complicated by a number of exceptions and deviations.[19]

A. International Treaties and Agreements

International human rights treaties enshrine the fundamental rights first outlined in the Universal Declaration of Human Rights (UDHR) in 1948.[20] Under the international treaty regime, countries may not invoke their own domestic law to justify noncompliance with their treaty commitments.[21] Further, international treaty bodies monitor countries' compliance with their treaty obligations and provide country-specific guidance on the fulfillment of rights.[22]

Under U.S. law, the Supremacy Clause of the U.S. Constitution provides that, when the United States ratifies a treaty, the treaty becomes the "supreme Law of the Land,"[23] and the United States is legally obligated to uphold and implement the treaty's requirements as it would any other domestic legislation.[24] Accordingly, by

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[17] Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 320–21 (1997).

[18] Both treaties and international customs supersede all inconsistent state and local laws, and all earlier inconsistent federal laws, but not the Constitution. Louis Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States*, *in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS 189, 203 (Benedetto Conforti & Francesco Francioni eds., 1997).

[19] *See* Hoffman & Strossen, *supra* note 14, at 479–87; MULLIGAN, *supra* note 13, at 1–2.

[20] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) [hereinafter UDHR] (reflecting the consensus that "[a]ll human beings are born free and equal in dignity and rights").

[21] Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

[22] *Treaty Bodies*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/en/treaty-bodies (last visited May 11, 2023). For example, the Human Rights Committee (HRC) is charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), and makes recommendations in individual cases, reviews member-state reports, and issues General Comments that provide guidance on the ICCPR's terms. International Covenant on Civil and Political Rights, art. 40, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171, 181 [hereinafter ICCPR].

[23] U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[24] Flores v. S. Peru Copper Co., 414 F.3d 233, 256 (2d Cir. 2003) (citing Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869)).

ratifying a treaty, the United States acquires binding obligations to protect human rights and provide remedies for violations of human rights at all levels of government, including at the state level.[25] Similarly, although the United States is not formally bound by the treaties it has signed but not ratified, under the Vienna Convention, it must nevertheless refrain from taking actions that "defeat the object and purpose of the treaty."[26]

Despite this constitutional foundation, international treaty law has had little impact in the U.S. domestic context for a variety of structural and ideological reasons.[27] First, the United States has failed to fully ratify significant human rights instruments.[28] Of the more than 40 core international human rights treaties, the United States has only ratified three.[29]

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[25] *See* U.N. Off. of the High Comm'r for Hum. Rts., Hum. Rts. Comm., *International Covenant on Civil and Political Rights, General Comment No. 31 on the Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter HRC, *General Comment No. 31*]. Because U.S.-ratified treaties are binding on individual states under the Supremacy Clause, the federal government has a legal obligation to reconcile violative state laws with international human rights law. Brief of U.N. Mandate Holders as Amici Curiae in Support of Respondents at 6, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

[26] Vienna Convention on the Law of Treaties, *supra* note 21, art. 18. Note that, although the United States is not a party to the Vienna Convention, the treaty's provisions are considered customary international law. Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 79 n.8 (2d Cir. 2005).

[27] *See* Hoffman & Strossen, *supra* note 14, at 491–92 (noting one reason for the United States' general lack of participation in human rights treaties is "the widespread—and generally accurate—attitude that U.S. civil rights and civil liberties law is more protective of individual rights than the laws of any other country, so Americans do not need these international protections"); *see also* Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights?*, 23 HASTINGS CONST. L.Q. 727, 820 (1996) ("[B]ehind the invocations of its Constitution, there lurks a banal preference for upholding domestic laws and policies that afford weaker protections . . . than are found in international law."). For a discussion of the way in which U.S. "constitutional exceptionalism" (i.e., that U.S. constitutional rights reign superior above all else) has been used to trick Americans into believing that international human rights are at best useless, and at worst a dangerous threat to our freedom and autonomy, see Robert E. Cushman, *Our Civil Rights Become a World Issue*, N.Y. TIMES MAG., Jan. 11, 1948, at 12.

[28] Harfeld, *supra* note 14, at 62 (noting that the United States is "the only major world power [that] has failed to fully ratify or adhere to any of the significant human rights instruments introduced by the U.N. or other human rights bodies"). For example, the United States is the only country in the world that has failed to ratify the Convention on the Rights of the Child. *Ratification Status for CRC—Convention on the Rights of the Child*, U.N. HUM. RTS. TREATY BODIES: UN TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en (last visited May 11, 2023).

[29] The United States has ratified (1) the ICCPR, *supra* note 22; (2) the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. EXEC.

Further, where the United States has chosen to ratify a treaty, Congress uniformly limits the treaty's domestic force with reservations, understandings, and declarations (RUDs).[30] Where a treaty provision conflicts with existing U.S. laws, or where compliance with the treaty would require the United States to conform or amend its domestic laws, the United States will qualify its ratification with an RUD that ensures that the provision will not create rights directly enforceable in U.S. courts.[31] For example, the United States uniformly attaches so-called "federalism" RUDs to address the federal government's limited ability to enact nationwide legislation that would intrude upon states' rights.[32]

Relatedly, when Congress has qualified a treaty ratification with an RUD declaring the treaty to be non-self-executing, courts will not give the treaty domestic force. In general, U.S. courts only consider a treaty provision to be the "law of the land" if it is deemed to be "self-executing," meaning that the provision has the force of domestic law without the need for subsequent congressional action.[33] On the other hand, U.S. courts consider "non-self-executing" provisions to be unenforceable and incapable of displacing conflicting state or federal law, unless Congress has

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DOC. C, 95-2 (1978), S. TREATY DOC. 95-18, 660 U.N.T.S. 195 [hereinafter CERD]; and (3) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT]. The United States has also signed (but has not ratified): (1) the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; (2) the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; and (3) the International Covenant on Social, Economic, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[30] 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 that State." Vienna Convention on the Law of Treaties, *supra* note 21, art. 2(1)(d). Theoretically, a country may not qualify its ratification with a reservation that is prohibited by the treaty, or one that is incompatible with the object and purpose of the treaty. *Id.* art. 19.

[31] The United States has qualified all of its human rights treaty ratifications with RUDs. *See* S. EXEC. REP. NO. 102-23, at 10 (1992) (qualifying ratification of the ICCPR); 140 CONG. REC. S7634 (qualifying ratification of CERD); 136 CONG. REC. S17491–92 (qualifying ratification of the CAT).

[32] Federalism RUDs typically declare that certain treaty provisions may only be exercised by the federal government to the extent that the federal government has control over the states in such matters. Harfeld, *supra* note 14, at 83.

[33] *See* Cook v. United States, 288 U.S. 102, 119 (1933) ("For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); Medellín v. Texas, 552 U.S. 491, 505 n.2 (2008) ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification."). At the same time, even a ratified self-executing treaty provision is deemed inferior to the U.S. Constitution. MULLIGAN, *supra* note 13, at 20.

enacted legislation implementing the treaty's mandate.[34] Accordingly, until implementing legislation is enacted, existing domestic law that conflicts with a non-self-executing provision remains unchanged and controlling law in the United States.[35] However, "[t]he United States has never passed comprehensive legislation to implement its human rights obligations, either under the treaties to which it is a party or customary international law."[36]

Thus, U.S. domestic obligations arising from international treaties and agreements are limited. By ensuring that ratification of a treaty will not require any changes in U.S. law, policy, or practice, even where U.S. domestic policy falls below internationally accepted standards, the United States' international law commitments are seemingly rendered meaningless and toothless.[37] Nevertheless, while the self-execution doctrine limits how a treaty provision is implemented into U.S. domestic law, the doctrine does not affect the country's obligation to comply with its treaty commitments under international law. By ratifying a treaty, the United States acquires international law obligations regardless of self-execution, and it may nevertheless be in default of its obligations unless implementing legislation is enacted.[38]

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[34] MULLIGAN, *supra* note 13, at 15–16; *Medellín*, 552 U.S. at 505 ("[W]hile treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'" (quoting Igartúa-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))). U.S. courts frequently point to non-self-executing declarations as the reason for which they will not afford a treaty judicially enforceable domestic legal effect. *See, e.g.*, Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2d Cir. 2005); Sosa v. Alverez-Machain, 542 U.S. 692, 735 (2004); Pierre v. Gonzales, 502 F.3d 109, 119 (2d Cir. 2007).

[35] *See, e.g.*, *Medellín*, 552 U.S. at 504.

[36] ABILA SUBCOMM. ON U.S. COMPLIANCE WITH INT'L HUM. RTS. L., AARON FELLMETH, MADALINE M. GEORGE, THOMAS OBEL HANSEN, LEILA SADAT & KRISTIN SMITH, U.S. COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW OBLIGATIONS 10 (Sept. 30, 2019) (submitted during the 36th Session to the U.N. Hum. Rts. Council) [hereinafter ABILA].

[37] The U.S. practice of qualifying its treaty ratifications with non-self-executing RUDs has engendered much criticism among scholars. For the assertion that non-self-executing RUDs are unconstitutional, see Louis Henkin, Commentary, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995) ("The Framers intended that a treaty should become law *ipso facto*, when the treaty is made; it should not require legislative implementation to convert it into United States law."). *Contra* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 446, 449–51 (arguing that the Constitution does not prohibit the Senate from defining the domestic scope and applicability of a treaty through the use of non-self-executing RUDs).

[38] Medellín v. Texas, 552 U.S. 491, 504 (2008) (explaining that an International Court of Justice judgment nevertheless created "an international law obligation" for the United States). In early constitutional jurisprudence, debate arose over whether Congress was obligated, rather than merely empowered, to enact implementing legislation. *Compare* Enclosure to Letter from Alexander Hamilton to George Washington (Mar. 29, 1796), *in* THE PAPERS OF ALEXANDER HAMILTON, JANUARY 1796–MARCH 1797, at 8 (Harold C. Syrett ed., 1974) ("[T]he house of

B. Customary International Law

Superseding any treaty obligation, customary international law imposes binding domestic legal commitments. By participating in international trade and politics, the United States has implicitly committed to uphold a set of customary international legal rules.[39] Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."[40] An internationally accepted practice becomes binding customary law when all, or nearly all,[41] countries consistently follow and adopt a practice because they believe themselves legally bound.[42] Further, some customary norms are so fundamental, the practice being extensive and virtually uniform, that they are held to be "peremptory," or *jus cogens*.[43]

In determining whether a principle has achieved the general recognition necessary to constitute customary international law, U.S. courts may look to resolutions by treaty bodies, the general usage and practice of nations, and analyses of international

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representatives have no moral power to refuse the execution of a treaty . . . and have no legal power to refuse its execution because it is a law—until at least it ceases to be a law by a regular act of revocation of the competent authority."), *with* 5 ANNALS OF CONG. 771 (1796) (proposed resolution of Rep. Blount) ("[I]t is the Constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect.").

[39] Harfeld, *supra* note 14, at 84–85 ("[C]ustomary law may be said to become supreme federal law and will supersede all inconsistent state and local law."); Hoffman & Strossen, *supra* note 14, at 483 (describing customary international law as "the international analogue to unwritten common law in the domestic sphere").

[40] RESTATEMENT (THIRD) OF FOREIGN RELS L. OF THE U.S. § 102(2) (AM. L. INST. 1987); *see also id.* § 702(a)–(g) (noting that prohibitions against genocide, murder, torture, prolonged arbitrary detention, and systemic racism have been found to be customary international law).

[41] There is no established rule for the precise number of countries that must follow a practice for it to become customary law; complete universality is not required, but the practice must still be "common and widespread." Roach v. United States, Case 9647, Inter-Am. Comm'n H.R., Report No. 3/87, OEA/Ser.L./V/II.71, doc. 9 rev. 1 ¶ 52 (1987).

[42] This is referred to as *opinio juris sive necitatis* (or *opinio juris*). On the other hand, if nations generally follow a particular practice but do not feel bound, then the practice does not constitute customary international law. RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102 cmt. c (AM. L. INST. 1987).

[43] *Id.* § 702 cmt. n (noting that the international prohibitions against genocide, slavery, murder and forced disappearances, torture, prolonged and arbitrary detention, and systematic racial discrimination constitute *jus cogens* norms). *See* Buell v. Mitchell, 274 F.3d 337, 372–73 (6th Cir. 2001) (citing RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102 cmt. k & cmt. n.6 (AM. L. INST. 1987)); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMPAR. L. REV. 411, 427–41 (1989).

jurists.[44] Nevertheless, defining customary international law, and determining how firmly established it must be in order to bind U.S. courts, can be difficult.[45]

Customary international norms transcend treaty law; these principles are so widely accepted that they are binding on countries that have not ratified the treaties embodying them.[46] A country may only derogate from customary norms by persistently objecting to a particular norm,[47] or, in the United States, by passing a peremptory statute.[48] *Jus cogens* norms, however, are not derogable; even if a country has explicitly and consistently rejected an internationally accepted practice, it may not take any judicial, executive, or legislative action that violates a *jus cogens* principle.[49]

As with international treaty jurisprudence, the status of customary international law in U.S. courts is uncertain.[50] Theoretically, where there is no controlling executive or legislative act or judicial decision, customary international law is binding as U.S. domestic law under *The Paquete Habana*.[51] Nevertheless, "[d]espite the

[44] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820); Statute of the International Court of Justice, art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 1060 (1945); *see also* Sosa v. Alverez-Machain, 542 U.S. 692, 734 (2004) (declining to apply UDHR protections because the UDHR "does not of its own force impose obligations as a matter of international law").

[45] *See* Hamdan v. United States, 696 F.3d 1238, 1250 (D.C. Cir. 2012); Bradley & Goldsmith *supra* note 17, at 329 ("[T]he enormous proliferation of the multilateral human rights treaties and United Nations human rights resolutions on which CIL is based suggests that CIL is expanding rapidly and may already be substantially broader than the *Restatement (Third)*'s list.").

[46] Hoffman & Strossen, *supra* note 14, at 483.

[47] RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102 cmt. d & n.2 (AM. L. INST. 1987). *But see* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985) (discussing the limited role that the "persistent objector" principle has played in international law).

[48] This is referred to as the "last-in-time" rule. MULLIGAN, *supra* note 13, at 28 (citing Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

[49] Parker & Neylon, *supra* note 43, at 418–19 ("As a stronger than ordinary rule of customary law, *jus cogens* nullifies acts and treaties that contravene its rules.").

[50] Whereas the U.S. Constitution expressly addresses treaties, it does not mention customary international law, referred to as part of the "law of nations" at the time of founding. Bradley & Goldsmith, *supra* note 17, at 321 (citing U.S. CONST. art. VI, cl. 2; *id.* art. III, § 2, cl. 1); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 508 n.16 (2d ed. 1996) (noting that the Supremacy Clause "does not easily include [customary] international law").

[51] The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice."). The Supreme Court's ruling in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938), complicated customary international law's status in U.S. courts. Some scholars have argued that, because customary law is the international analogue to unwritten common law, *Erie* forecloses application of customary international law in U.S. courts. *See, e.g.*, Bradley & Goldsmith, *supra* note 17, at 325 ("Nothing on the face of the Constitution or any federal statute appears to authorize the modern position's

solid legal foundation for [directly] incorporating customary international human rights norms into domestic law, [U.S.] courts actually do so only rarely,"[52] thus severely limiting the impact of customary international law at the domestic level. Although U.S. courts rarely view customary international law as binding domestic law (i.e., as providing a stand-alone basis for a claim or defense),[53] U.S. courts frequently rely on international norms to assist in interpreting domestic law.[54] These cases illustrate customary law's import in the domestic fight for human rights.[55] Indeed, no matter the weight U.S. domestic legal institutions afford customary international law, repeated reference to and formulation of arguments based on customary international law increases the chance that these universally recognized norms will

envisioned wholesale application of [customary international law] by the federal judiciary."). *Contra* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397 (1997) ("[T]he suggestion that Erie tossed the law of nations out of federal court along with the general common law rests on several misconceptions.").

[52] Hoffman & Strossen, *supra* note 14, at 484; Parker & Neylon, *supra* note 43, at 413 ("[T]he term *jus cogens* is practically absent from the United States' legal arena, even in human rights actions."). *See* Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 27–28 (1992) (explaining that courts' and attorneys' unfamiliarity "manifest[s] a deep reluctance to embrace international human rights law and to use it as an effective tool to redress abuses"). Bayefsky and Fitzpatrick assert that the problem is one of institutional competence—courts are rarely presented with international rights norms, and as result, have little experience in adjudicating them. *Id.* at 28.

[53] The primary case in which a claimant successfully based his claim on customary international human rights norms is *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795–98 (D. Kan. 1980), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), wherein the district court ordered relief based solely on customary international law. Because the appellate court affirmed the lower court's ruling on another rationale, the district court's specific holding had no precedential effect. Moreover, other circuit courts have expressly rejected the argument that similarly situated claimants had an actionable claim under international human rights law. *See, e.g.*, Gisbert v. U.S. Att'y Gen., 988 F.2d 1437 (5th Cir. 1993); Alvarez-Mendez v. Stock, 941 F.2d 956 (9th Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1448, 1455 (11th Cir. 1986).

[54] This interpretive reliance on customary international human rights law is consistent with the canon of construction that domestic law should be construed to avoid a violation of international law. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). *But see* Hoffman & Strossen, *supra* note 14, at 488 ("Despite the fact that U.S. courts have relied upon customary international norms to assist in interpreting domestic law with relative frequency . . . this reliance has not been done in a sufficiently clear, consistent, and principled fashion.").

[55] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–76 (2005) (identifying prevailing legal norms regarding the juvenile death penalty by looking at international agreements, including the Convention on the Rights of the Child (CRC) and the ICCPR); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (emphasizing the increasingly significant role of international law in U.S. courts); Graham v. Florida, 560 U.S. 48, 80–82 (2010); Kadic v. Karadžić, 70 F.3d 232, 243 (2d Cir. 1995); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988).

continue to gain traction in domestic law.[56] In this way, customary international law may be seen as "compensat[ing] for the abstinence of the United States *vis-à-vis* ratification of international human rights treaties."[57]

In sum, the United States has structurally and ideologically resisted incorporating international human rights law at the domestic level, effectively reinforcing the notion that international human rights law should not play an important role in domestic human rights issues. Worse, the United States has imposed and defended a host of domestic practices that directly contravene its international human rights law commitments.[58] In the next Part, I illustrate the extent of this contravention in a matter of particular relevance and importance: reproductive rights.

II. RESTRICTIVE ABORTION LEGISLATION AND COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

Access to safe, legal, and effective abortion is essential healthcare and pivotal to pregnant individuals' enjoyment of some of the most fundamental human rights. Applying treaty body jurisprudence and guidance to U.S. abortion bans and restrictions in force across the country makes clear that the United States has, and continues to, violate its international commitments to protect the human rights of U.S. citizens.

A. The Rights at Stake: Reproductive Rights in International Human Rights Law

The international community's first unequivocal recognition of reproductive health as a human right occurred in the mid-1990s.[59] Since then, the overwhelming

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[56] This view of international human rights law is embraced by scholars who criticize the "legalistic approach" to human rights progress. *See, e.g.*, Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327, 337 (2000) (noting that the two most influential human rights instruments—the UDHR and the Helsinki Accord—were not legally binding, but nevertheless succeeded in arousing domestic groups, helping them to organize, and inciting countries to action).

[57] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 87 (1992).

[58] *See* James C. Harrington, *The Two Sides of Humanity*, L.A. TIMES, Feb. 28, 1993, at M6 (describing the United States as "the country in which the highest court of the land permits execution of possibly innocent people and individuals with mental retardation, allows police to search vehicles on a neighbor's word of suspicion, upholds the kidnapping of foreigners for trial . . . and pardons police brutality in the name of 'good faith'").

[59] *See* International Conference on Population and Development, *Report of the International Conference on Population and Development*, ch. VII, ¶¶ 2–11, U.N. Doc. A/CONF.171/13/Rev.1 (Sept. 5–13, 1994) (noting the need for states to address the consequences of rampant unsafe abortion rates); Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ch. 1, ¶¶ 94–95, U.N. Doc. A/CONF.177/20/Rev.1 (1996) (stating that access to safe, effective, affordable, and acceptable methods of family planning is implicit to the right to life).

trend in countries around the world has been to explicitly recognize the health and social risks of restricting abortion access, and to amend domestic laws and constitutions to allow abortion on broad grounds.[60]

International law has likewise kept pace with the trend. Treaty bodies have clarified that human rights treaty obligations encompass reproductive rights, and have increasingly criticized restrictive abortion laws as undermining pregnant individuals' human rights, calling for the expansion of abortion services in countries around the world—including in the United States.[61] Thus, by denying pregnant individuals the legal protection necessary to ensure fulfillment of their fundamental human rights, "it is American States that [have] become international outliers."[62]

Access to safe and legal abortion is essential to guaranteeing the full spectrum of human rights, including the rights to life, to nondiscrimination, to be free from torture, and to privacy, among other rights.[63] The following discussion of the rights

[60] Since 1985, over 50 countries have liberalized their abortion laws. *See The World's Abortion Laws*, *supra* note 5. On the other hand, a small minority of countries have imposed further restrictions. Reed Boland & Laura Katzive, *Developments in Laws on Induced Abortion: 1998–2007*, 34 INT'L FAM. PLAN. PERSPS. 110 (2008). The "trend" in abortion regulation around the world was a point of contention in *Dobbs*. *Compare* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 n.15 (2022) (noting that the United States is one of only seven countries in the world to permit elective abortion past 20 weeks) (citing ANGELINE BAGLINI, CHARLOTTE LOZIER INST., GESTATIONAL LIMITS ON ABORTION IN THE UNITED STATES COMPARED TO INTERNATIONAL NORMS 6–7 (2014)), *with id.* at 2340 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (renouncing the majority's finding and noting that the global trend has been toward increased provision of legal and safe abortion care). While the Charlotte Lozier Institute report cited in the majority opinion has been confirmed as legitimate, it is also true that it simplifies the complicated nature of comparing and contrasting complex regulatory schemes. *See* Michelle Ye Hee Lee, *Is the United States One of Seven Countries that 'Allow Elective Abortions After 20 Weeks of Pregnancy?'*, WASH. POST (Oct. 9, 2017, 3:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy.

[61] *See* Hum. Rts. Watch, *Submission to Commission on Unalienable Rights*, 12–13 n.57 (May 2020) (listing Human Rights Committee reports in countries around the world where the Committee expressed concern with countries' restrictive abortion laws, and called for expanded access to abortion services); Hum. Rts. Council, Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice on its Mission to the United States of America, ¶¶ 28–30, 65–74, U.N. Doc. A/HRC/32/44/Add.2 (Aug. 4, 2016).

[62] *Dobbs*, 142 S. Ct. at 2341 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[63] Other affected rights include: the right to decide, freely and responsibly, the number and spacing of one's children, CEDAW, *supra* note 29, art. 16; the right to sexual and reproductive health, Comm. on Econ., Soc. & Cultural Rts., General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social, and Cultural Rights), ¶¶ 1–2, U.N. Doc. E/C.12/GC22 (May 2, 2016) [hereinafter CESCR, General Comment No. 22]; and the right to comprehensive sexuality education and information, Comm. on the Rts. of Child, General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence, ¶¶ 59–61, U.N. Doc. CRC/C/GC/20 (Dec. 6, 2016).

at stake when abortion is banned or otherwise restricted is not exhaustive. Rather, I focus on some of the most fundamental rights that the United States is domestically obligated to uphold—whether via treaty commitments or customary international law.[64]

1. The Right to Life

The right to life is the most fundamental human right,[65] and is expressly guaranteed in almost every major international human rights instrument.[66] Human rights treaty bodies have consistently asserted that regulations that unduly restrict abortion access contravene the right to life by imperiling the lives and health of pregnant individuals.[67] Inaccessibility to "safe, affordable, timely, and respectful abortion care," and the stigma fueled by restrictive abortion policies, imperil pregnant individuals' physical and mental wellbeing throughout life.[68]

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[64] Even for the rights set out in treaties that the United States has signed but not ratified (i.e., CEDAW, the ICESR, and the CRC), the United States must nevertheless refrain from taking actions that defeat the object and purpose of those treaties. *See* HRC, *General Comment No. 31*, *supra* note 25, ¶¶ 5, 17 and accompanying text.

[65] *See* W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of* Jus Cogens, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 121 (B.G. Ramcharan ed., 1985). Whether the right to life constitutes *jus cogens* in the abortion context raises the question of *whose* life (i.e., the fetus's life or the woman's life). In general, treaty body jurisprudence holds that the right to life does not apply to an unborn fetus. *See, e.g.*, Brüggeman v. Germany, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, 116 (1977); X v. United Kingdom, App. No. 8416/79, 19 Eur. Comm'n H.R. Dec. & Rep. 244, 250 (1980); *see also* Rhonda Copelon, Christina Zampas, Elizabeth Brusie & Jacqueline deVore, *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPROD. HEALTH MATTERS, Nov. 2005, at 120.

[66] *See, e.g.*, UDHR, *supra* note 20, art. 3 ("Everyone has the right to life, liberty and the security of the person."); ICCPR, *supra* note 22, art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

[67] *See* HRC, *General Comment No. 36*, *supra* note 7, ¶ 8; U.N. Off. of the High Comm'r for Hum. Rts., CCPR General Comment No. 28, Article 3 (The Equality of Rights Between Men and Women), ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) [hereinafter HRC, CCPR General Comment No. 28]; Anand Grover (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Interim Report*, ¶ 21, U.N. Doc. A/66/254 (Aug. 3, 2011) ("Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated.").

[68] *Fact Sheet: Abortion*, WHO (Nov. 25, 2021), https://www.who.int/news-room/fact-sheets/detail/abortion.

The statistical relationship between restrictive abortion policies and maternal mortality is well-documented[69] and widely-recognized.[70] Barriers to safe, legal, and respectful abortion care lead to unsafe abortions.[71] Unsafe abortion, in turn, is one of the leading causes of maternal mortality.[72] Consequently, a country's rates of maternal mortality directly correlate to the degree to which its abortion laws are restrictive or punitive.[73] Short of death, complications from unsafe abortions can also lead

[69] *See generally* SUSHEELA SINGH, LISA REMEZ, GILDA SEDGH, LORRAINE KWOK & TSUYOSHI ONDA, ABORTION WORLDWIDE 2017: UNEVEN PROGRESS AND UNEQUAL ACCESS (2018), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf.

[70] *See, e.g.*, U.N. OFF. OF THE HIGH COMM'R ON HUM. RTS., INFORMATION SERIES ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS: ABORTION 2 (2020) [hereinafter U.N. OHCHR, ABORTION] ("Criminal regulation of abortion serves no known deterrent value. When faced with restricted access, women often engage in clandestine abortions, including self-administering abortifacients, at risk to their life and health." (quoting Comm. on the Elimination of Discrimination Against Women, Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 59, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018))); Grover, *supra* note 67, ¶ 21 ("[S]uch laws consistently generate poor physical health outcomes, resulting in deaths that could have been prevented.").

[71] SINGH ET AL., *supra* note 69, at 51, tbl.2 (noting that the rate of unsafe abortions is nearly 45 times higher in countries with highly restrictive abortion laws than in countries where abortion is legal and otherwise unrestricted). The World Health Organization defines "unsafe abortion" as a "procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal [medical] standards, or both." Jane Norman & William Winfrey, *Impact of HRP Research in Medical (Non-Surgical) Induced Abortion: A Case-Study*, 1, WHO, WHO/RHR/HRP/08.06 (2008).

[72] WHO, *supra* note 68 (reporting that 45% of all induced abortions are unsafe, and one-third of these are performed in the least safe conditions (i.e., by untrained persons using dangerous and invasive methods)); Lale Say, Doris Chou, Alison Gemmill, Özge Tunçalp, Ann-Beth Moller, Jane Daniels, A Metin Gülmezoglu, Marleen Temmerman & Leontine Alkema, *Global Causes of Maternal Death: A WHO Systematic Analysis*, 2 LANCET GLOB. HEALTH e323, e331 (2014).

[73] *Safe Abortion: Technical & Policy Guidance for Health Systems*, *supra* note 6, at 2. *See, e.g.*, *Rape Victims as Criminals: Illegal Abortion After Rape in Ecuador*, HUM. RTS. WATCH (Aug. 23, 2013), https://www.hrw.org/report/2013/08/23/rape-victims-criminals/illegal-abortion-after-rape-ecuador (finding that Ecuador's restrictive abortion policies directly led pregnant people to resort to illegal and unsafe abortions). This statistical correlation is also present in the U.S. states with restrictive abortion policies, such as Mississippi, the state at issue in *Dobbs*. The *Dobbs*' dissent noted:

> Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death. It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion.

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2340 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

to severe physical and mental health risks.[74] Further, on a socioeconomic level, compelling an individual to carry a pregnancy to term "diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life."[75]

On the other hand, abortion "has emerged as one of the safest procedures in contemporary medical practice."[76] Thus, nearly 10% of annual maternal deaths can be prevented.[77] Studies of countries that have amended their domestic laws and constitutions to allow greater access to abortion services reveal dramatic decreases in abortion-related deaths,[78] thus underscoring the correlation between abortion policies and the right to life. These studies further reveal that restrictions on abortion do not result in fewer abortions; rather, "they compel women to risk their lives and health by seeking out unsafe abortion services."[79]

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[74] Grover, *supra* note 67, ¶ 25 ("[The] short- and long-term injuries due to unsafe abortions, includ[e] haemorrhage; sepsis; trauma to the vagina, uterus and abdominal organs; cervical tearing; peritonitis; reproductive tract infections; pelvic inflammatory disease and chronic pelvic pain; shock and infertility."); WHO, MENTAL HEALTH ASPECTS OF WOMEN'S REPRODUCTIVE HEALTH: A GLOBAL REVIEW OF THE LITERATURE 9 (2009), https://www.who.int/publications/i/item/9789241563567 (noting that the unavailability of safe abortion poses risks of severe anguish and suicide).

[75] *Dobbs*, 142 S. Ct. at 2344 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (noting that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings") (quoting Brief for Economists as Amici Curiae Supporting Respondents at 13, *id.* (No. 19-1392)).

[76] David A. Grimes, Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatra, Friday E. Okonofua & Iqbal H. Shah, *Unsafe Abortion: The Preventable Pandemic*, 368 LANCET 1908, 1908 (2006); *Key Facts on Abortion*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts (last visited May 11, 2023) ("When undertaken by a trained health-care provider in sanitary conditions, abortions are one of the safest medical procedures available, safer even than child birth.").

[77] *Key Facts on Abortion*, *supra* note 76 ("[U]nsafe abortions are the third leading cause of maternal deaths worldwide and lead to an additional five million largely preventable disabilities.").

[78] *See, e.g.*, Rachel Jewkes, Helen Rees, Kim Dickson, Heather Brown & Jonathan Levin, *The Impact of Age on the Epidemiology of Incomplete Abortions in South Africa After Legislative Change*, 112 BJOG: INT'L J. OBSTETRICS & GYNECOLOGY 355, 358 (2005) (reporting that following South Africa's legalization of abortion, annual deaths from unsafe procedures fell by 91%); Brooke R. Johnson, Mihai Horga & Peter Fajans, *A Strategic Assessment of Abortion and Contraception in Romania*, 12 REPROD. HEALTH MATTERS 184, 184–85 (2004) (noting the dramatic decrease in maternal mortality in Romania following the end of 28 years of draconian restrictions).

[79] CTR. FOR REPROD. RTS., WHAT IF *ROE* FELL 2019, at 11 (2019); *Safe Abortion: Technical & Policy Guidance for Health Systems*, *supra* note 6, at 2 ("Conversely, policies that facilitate access to safe abortion do not increase the rate or number of abortions.").

2. The Principle of Nondiscrimination and Equality

Nondiscrimination is a fundamental principle of international human rights law and is expressly guaranteed in multiple international human rights instruments.[80] Restrictive abortion laws, and the effects flowing therefrom, discriminate against women and exacerbate racial, social, and economic inequalities.[81] As such, the failure to provide adequate access to abortion services violates the principle of nondiscrimination and equality.

The denial of medical services that only certain individuals need (i.e., reproductive health services), is a form of discrimination.[82] Further, where the denial of or restrictions on abortion care force pregnant individuals to resort to unsafe abortions, these policies constitute a "gender-based arbitrary killing, only suffered by women, as a result of discrimination enshrined in law."[83]

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[80] *See* ICCPR, *supra* note 22, art. 26; CERD, *supra* note 29, arts. 1, 2 ¶ 1, 5(e)(iv) (mandating that countries "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law," including in the provision of medical care); *see also* CEDAW, *supra* note 29, art. 12 ("States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.").

[81] *Statement by UN Human Rights Experts*, *supra* note 9 (noting that the *Dobbs* ruling "enables structural discrimination, which is already widely prevalent in the United States, where socio-economically disadvantaged women of color notably Black and indigenous women and others in situations of vulnerability, such as migrant women, those living with disabilities and victims of sexual violence and sex trafficking, face additional barriers to reproductive health care services"). *See, e.g.*, CTR. FOR REPROD. RTS., MARGINALIZED, PERSECUTED, AND IMPRISONED: THE EFFECTS OF EL SALVADOR'S TOTAL CRIMINALIZATION OF ABORTION 13–14 (2014) (noting the disproportionate effects of El Salvador's restrictive abortion laws on pregnant individuals of little or no income).

[82] *See* U.N. Off. of the High Comm'r for Hum. Rts., Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2324/2013, ¶ 3.15, U.N. Doc. CCPR/C/116/D/2324/2013 (Nov. 17, 2016) [hereinafter Mellet v. Ireland] ("The rights to equality and non-discrimination compel States to ensure that health services accommodate the fundamental biological differences between men and women in reproduction. Such laws are discriminatory also because they deny women the moral agency that is closely related to their reproductive autonomy. There are no similar restrictions on health services that are needed only by men."); *see also* U.N. Off. of the High Comm'r for Hum. Rts., Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2425/2014, ¶ 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (July 11, 2017) [hereinafter Whelan v. Ireland].

[83] Agnes Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, ¶ 94, U.N. Doc. A/HRC/35/23 (June 6, 2017).

Further, restrictive abortion policies disproportionately impact marginalized and disadvantaged groups, thereby exacerbating existing levels of inequality and increasing the burden of abortion-related maternal mortality on the populations already at greatest risk.[84] Specifically, restrictive abortion policies have a discriminatory impact against: people who have low incomes;[85] people who already face systemic racism and discrimination in this country, including people of color;[86] people with disabilities;[87] LGBTQ+ people;[88] and people who live in rural areas.[89]

3. The Right to Be Free from Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The prohibition against torture is one of the most firmly rooted principles of international human rights law—torture is widely recognized as contravening *jus cogens*,[90]

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[84] Juan E. Méndez (Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 43, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

[85] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2344–45 (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("When we 'count the cost of *Roe*'s repudiation' on women who once relied on that decision, it is not hard to see where the greatest burden will fall. In states that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot do so who will suffer most . . . . After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care."); U.N. OHCHR, ABORTION, *supra* note 70, at 3 ("[S]afe termination of pregnancy is a privilege of the rich."); Philip Alston (Special Rapporteur on Extreme Poverty & Human Rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, ¶ 56, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018) ("[L]ack of access to abortion services traps many women in cycles of poverty.").

[86] *Dobbs*, 142 S. Ct. at 2338 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting) ("Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase." (citing Lisa H. Harris, *Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of Roe v. Wade*, 386 NEW ENG. J. MED. 2061, 2063 (2022))).

[87] U.N. Off. of the High Comm'r for Hum. Rts., Comm. on the Rts. of Perss. with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, ¶ 38, U.N. Doc. CRPD/C/GC/3 (Nov. 25, 2016) (noting that abortion access is a prerequisite for equal protection of the law for women with disabilities).

[88] CESCR, General Comment No. 22, *supra* note 63, ¶ 30 (noting that lesbian, gay, bisexual, transgender, and intersex persons "may be disproportionately affected by intersectional discrimination in the context of sexual and reproductive health").

[89] U.N. OHCHR, ABORTION, *supra* note 70, at 3 ("[R]ural women are more likely to resort to unsafe abortion than women living in urban areas.").

[90] Peter Kooijmans (Special Rapporteur), *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 3, U.N. Doc. E/CN.4/1986/15 (Feb. 19, 1986) ("If ever a phenomenon was outlawed unreservedly and unequivocally it is torture."). The international prohibition against torture has also been consistently recognized and applied by U.S. courts. *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 716 (9th Cir. 1992).

and all major human rights agreements contain a prohibition against torture.[91] The criminalization and inaccessibility of abortion can cause severe physical and mental pain or suffering (i.e., the threshold requirement of cruel, inhuman, or degrading treatment).[92] Indeed, compelling an individual to continue a pregnancy against their will may even constitute a crime against humanity.[93]

In particular, abortion policies that prohibit abortion even in cases of incest, rape, or fetal impairment violate the right to be free from torture and ill-treatment.[94] Further, restrictions on access to legal abortions where the laws are unclear, where abortions require third-party authorizations, or where physicians or clinics refuse to perform abortions on the basis of conscientious objection, may cause "physical and mental anguish and distress" and violate the *jus cogens* prohibition of cruel and degrading treatment.[95]

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[91] *See, e.g.*, ICCPR, *supra* note 22, art. 7. To reinforce the prohibition against torture, the U.N. General Assembly promulgated the Torture Convention. CAT, *supra* note 29.

[92] Méndez, *supra* note 84, ¶ 43 (citing Grover, *supra* note 67); *see also* U.N. Off. of the High Comm'r for Hum. Rts., Hum. Rts. Comm., Views: Communication No. 1153/2003, ¶ 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005) [hereinafter Llantoy Huamán v. Peru].

[93] In a recent international law case, the International Criminal Court's (ICC) highest chamber recognized for the first time the crime of "forced pregnancy," which is defined as "the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment, ¶ 2722, n.7175 (Feb. 4, 2021), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01026.PDF (citing Rome Statute of the International Criminal Court, art. 7(2)(f), July 17, 1998, 2187 U.N.T.S. 90). In the wake of the *Dobbs* decision, some politicians and organizations asserted that abortion bans in U.S. states amounted to the international crime against humanity of forced pregnancy. *See, e.g.*, ACLU, *supra* note 6. Whether abortion bans constitute forced pregnancy as defined by the Rome Statute is beyond the scope of this Comment. Nevertheless, the *Ongwen* case is relevant to this Comment for at least two reasons. First, it illustrates the challenging interplay between international law and national laws in the context of reproductive rights. Prosecutor v. Ongwen, ICC-02/04-01/15, Amici Curiae Observations on the Rome Statute's Definition of 'Forced Pregnancy' by Rosemary Grey et al., ¶ 5, 14–15 (Dec. 23, 2021) [hereinafter Amici Curaie Observations by Rosemary Grey et al.] ("Victims in states with restrictive national laws relating to pregnancy and abortion do not enjoy lesser protections under [international law] than victims in states with more permissive laws relating to pregnancy and abortion."). Second, the seminal decision provides a useful point of comparison for grounding the fight for abortion rights in human rights that protect personal, sexual, and reproductive autonomy. *See infra* notes 152–155 and accompanying text.

[94] Méndez, *supra* note 84, ¶ 44 ("The denial of safe abortions and subjecting women and girls to humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount to torture or ill-treatment.").

[95] HUM. RTS. WATCH, *supra* note 61, at 20; Mellet v. Ireland, *supra* note 82, at ¶ 7.6.

4. The Right to Privacy and Personal Autonomy

Finally, restrictive abortion policies that force an individual to continue an unwanted pregnancy, or to resort to unsafe abortions, contravene the rights to privacy and bodily autonomy.[96] Personal, sexual, and reproductive autonomy are values of central importance in international human rights law.[97] The right to privacy is guaranteed in the ICCPR,[98] and treaty bodies have consistently interpreted the right to privacy to encompass personal autonomy in decision-making about pregnant individuals' own bodies.[99]

Relatedly, restrictive abortion policies also implicate the right to information, which encompasses critical information for making informed choices about one's sexual and reproductive health.[100] Comprehensive abortion care, which is included in the 2020 World Health Organization's list of *Essential Health Services*, includes

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[96] U.N. Hum. Rts. Council, Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice, ¶ 35, U.N. Doc. A/HRC/38/46 (May 14, 2018) ("The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights.").

[97] Amici Curaie Observations by Rosemary Grey et al., *supra* note 93, ¶ 38 ("'The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender.' Reproductive autonomy is a key aspect of human dignity." (quoting Prosecutor v. Furundžija, IT-95-17/1-T, Judgement, ¶ 183 (Dec. 10, 1998))).

[98] ICCPR, *supra* note 22, art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.").

[99] *See* HRC, *General Comment No. 36*, *supra* note 7, ¶ 8; U.N. Off. of the High Comm'r for Hum. Rts., Comm. on the Elimination of Discrimination Against Women, Rep. of the Comm. on the Elimination of Discrimination Against Women: Twentieth Session (19 January–5 February 1999), ¶ 31(e), U.N. Doc. A/54/38/Rev.1 (1999). In every case before the HRC concerning abortion policies that interfere with reproductive decision-making or abortion access, the HRC has found a violation of the right to privacy. *See* Llantoy Huamán v. Peru, *supra* note 92, ¶ 6.4 (finding that denying an adolescent girl access to abortion for a fatal fetal impairment was a violation of her right to privacy under the ICCPR); Mellet v. Ireland, *supra* note 82, ¶ 7.7.

[100] Tlaleng Mofokeng (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Sexual and Reproductive Health Rights: Challenges and Opportunities During the COVID-19 Pandemic*, ¶ 40, U.N. Doc. A/76/172 (Jul. 16, 2021) ("[A]ll persons capable of becoming pregnant have a right to make informed, free and responsible decisions concerning their reproduction, their body and sexual and reproductive health, free of discrimination, coercion and violence."); *see also* Mellet v. Ireland, *supra* note 82, ¶¶ 3.8–11, 7.5 (explaining that Ireland's Abortion Information Act, which regulated the conduct of healthcare providers in offering information likely to be required for women seeking abortions, had a "chilling effect" on providers who necessarily had to determine what information they were legally permitted to provide).

the provision of accurate, nonbiased, and evidence-based information on abortion.[101]

B. Reproductive Rights in the United States

Despite the fundamental rights at stake, and the widespread recognition that human rights treaty obligations encompass reproductive rights, the Supreme Court severely retrogressed U.S. citizens' reproductive rights in the *Dobbs* decision, without even a footnote acknowledging the country's binding legal commitments under international human rights law.[102] To contextualize the current abortion policies in force across the country, it is first helpful to illustrate the insidious erosion of reproductive rights in the United States over the last half-century.

1. The Evolution and Erosion of Reproductive Rights in the United States

While the *Dobbs* decision uprooted 50 years of reproductive rights precedent, U.S. citizens have faced real and severe barriers to abortion access for decades. Indeed, the near-total abortion bans enacted in *Dobbs*' wake are not the only way to compel an individual to continue a pregnancy; even when *Roe* was still intact, state legislation pushed abortion out of reach for millions of individuals across the country.[103]

Following the Supreme Court's 1973 decision in *Roe v. Wade* recognizing the right to an abortion as a "fundamental right" protected by the Due Process Clause of the Fourteenth Amendment,[104] subsequent decisions have gradually eroded the

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[101] *Maintaining Essential Health Services: Operational Guidance for the COVID-19 Context: Interim Guidance*, WHO, at 29–30 (June 1, 2020).

[102] Despite the submissions of a number of international law scholars as amici curiae detailing the United States' binding legal obligations, the Court's only discussion of international norms occurred in the back-and-forth regarding the *Charlotte Lozier Institute* report. *See supra* note 60.

[103] *See* Kelly Keglovits, *A Way Forward After* Dobbs*: Human Rights Advocacy and Self-Managed Abortion in the United States*, 18 DUKE J. CONST. L. & PUB. POL'Y 73, 74 (2022) ("Even in the era before *Dobbs*, wherein the Supreme Court repeatedly classified abortion as a 'fundamental right,' the ability to have an abortion was inaccessible in many parts of the United States. The irony that a 'fundamental right' was so difficult to exercise results from how constitutional rights are understood, which left many open-ended avenues for states to bring restrictions.").

[104] Roe v. Wade, 410 U.S. 113 (1973); U.S. CONST. amend. XIV, § 1. The Court recognized that "some state regulation" is appropriate, as the right to obtain an abortion is not unlimited. *Roe*, 410 U.S. at 154. Nevertheless, the Court affirmed the right of a pregnant individual to receive an abortion "free of interference by the State" until the point of viability, which was defined as the point where the fetus "has the capability of meaningful life outside the mother's womb." *Id.* at 163.

scope of the constitutionally protected right.[105] Significantly, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court employed the "undue burden" test to uphold state restrictions designed to increase the difficulty of obtaining an abortion.[106]

Conservative state legislatures responded to *Roe* and *Casey* by enacting increasingly "cruel" abortion restrictions.[107] Purporting to uphold *Roe* and *Casey*, the Court struck down state regulations deemed to place a "substantial obstacle" to receiving an abortion.[108] At the same time, the Court upheld a number of restrictions,[109] many of which pushed, if not exceeded, the constitutional minimum the Court had established in *Casey*.[110]

And then came *Dobbs*. In upholding Mississippi's restrictive abortion statute,[111] the Court formally overruled *Roe*, declaring that the U.S. Constitution does not protect the right to obtain an abortion.[112] The Court concluded:

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[105] *See* U.N. Hum. Rts. Council, *supra* note 61, ¶ 28 (noting the right to reproductive health was "constantly being challenged").

[106] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–77 (1992). The specific regulations at issue in *Casey* included "waiting periods, parental consent requirements, and burdensome and shame-inducing informed consent processes." David S. Cohen, Greer Donley & Rachel Rebouché, Essay, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 4–5 (2022).

[107] ACLU, *supra* note 6.

[108] *See, e.g.*, Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 481–82 (1983); Doe v. Bolton, 410 U.S. 179, 198–99 (1973) (striking down a Georgia statute requiring that abortions be conducted in accredited hospitals, the interposition of a hospital committee, and confirmation by other physicians to receive an abortion); Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 591 (2016) (striking down a Texas statute requiring abortion providers to have hospital admitting privileges at a hospital within 30 miles from their abortion facility); June Med. Servs. v. Russo, 140 S. Ct. 2103, 2132 (2020).

[109] *See, e.g.*, Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. at 485–86, 490, 493 (approving a Missouri statute requiring presence of a second physician during an abortion performed after viability, requiring pathology report for each abortion performed, and requiring minors to secure parental consent prior to the child's abortion); Gonzales v. Carhart, 550 U.S. 124, 124, 133 (2007) (approving the Partial-Birth Abortion Ban Act of 2003, which prohibited a practitioner from "knowingly performing a partial-birth abortion that is not necessary to save the life of the mother").

[110] *See* Cohen et al., *supra* note 106, at 5 (analyzing the abortion restrictions following *Casey*).

[111] The Mississippi Gestational Age Act provided:

> Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being [is] greater than fifteen (15) weeks.

MISS. CODE ANN. § 41-41-191(4)(b) (2023) (effective Mar. 19, 2018).

[112] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

> It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." . . . That is what the Constitution and the rule of law demand.[113]

The principal effect of overturning *Roe* was to leave the legality and extent of reproductive rights regulation to individual states.[114] States may now enact severely restrictive abortion legislation almost without constraint.[115] Further, and perhaps most concerning, "no language in today's decision stops the Federal Government from prohibiting abortions nationwide."[116] Thus leaving reproductive rights unprotected and vulnerable at the federal level, the *Dobbs* decision positions the United States as one of only four countries in the world to retrogress reproductive protections in over 25 years.[117]

2. Current State of Abortion Access in the United States

As the *Dobbs* dissent predicted, states moved quickly to codify highly restrictive abortion legislation.[118] On the other hand, some state legislatures went the opposite direction, implementing proactive abortion laws, policies, and programs designed

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[113] *Id.* at 2243 (quoting *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part)).

[114] *See id.* at 2279; *id.* at 2305 (Kavanaugh, J., concurring) ("[T]he Court's decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process."). Transferring the enforcement of abortion legislation from the judicial to the legislative branch is a regulatory approach akin to countries with some of the most restrictive abortion regulations, such as Nicaragua. *See* Noelle C. Cabral, *Comparative Analysis of Abortion Laws: Nicaragua, Guatemala, and the United States*, 28 ILSA J. INT'L & COMP. L. 337, 362–64 (2021).

[115] *Dobbs,* 142 S. Ct. at 2318 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (explaining that the decision permits states to criminalize abortion providers and women seeking to obtain an abortion, to block women from traveling out of state to obtain an abortion or even from receiving abortion medications from out of state, and as in Texas, to enlist fellow citizens in the effort to identify women seeking an abortion, or others who try to assist a woman in doing so).

[116] *Id.*

[117] *With Its Regression on Abortion Rights, the U.S. is a Global Outlier*, CTR. FOR REPROD. RTS. (Sept. 8, 2022), https://reproductiverights.org/us-a-global-outlier-on-abortion-rights. This retrogression violates the core human rights principle that countries may not rollback rights once they have been established. Human rights treaty bodies have specifically cautioned against retrogression in the area of sexual and reproductive health and rights. *See* CESCR, General Comment No. 22, *supra* note 63, ¶ 38.

[118] As of the time of this writing, nearly half of U.S. states have restricted access to reproductive care, and 12 states have outright banned the provision of abortion care. *See After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state (last visited May 6, 2023).

to increase abortion access.[119] The following discussion is not intended to provide a comprehensive survey of every state's approach to the *Dobbs* decision, as the current status of much of this legislation is still largely in flux,[120] and the legal foundation and contours of abortion bans and restrictions vary state by state.[121] Rather, the following discussion describes the various forms and prevalence of U.S. abortion bans and restrictions, as this context provides the necessary foundation to engage in a meaningful analysis of the current state of abortion as applied to international human rights law. Furthermore, these restrictions illustrate the immediate and lasting effects of *Dobbs*, as the decision opened the door for states to enact legislation that flagrantly contravenes the country's international commitments.

Restrictive abortion policies come in many shapes and sizes. Abortion bans refer to policies that make the provision or receipt of abortion services illegal.[122] Many state prohibitions ban abortions at certain points in pregnancy, known as "gestational age bans."[123] Others prohibit a specific method of abortion care, known as

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[119] *See* Elizabeth Nash & Peter Ephross, *State Policy Trends 2022: In a Devastating Year, US Supreme Court's Decision to Overturn* Roe *Leads to Bans, Confusion and Chaos*, GUTTMACHER INST. (Dec. 19, 2022), https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads ("Eighteen states adopted a total of 77 proactive provisions as of December 12 through the legislative process or executive orders that focused on abortion funding, clinic access and safety, and 'shield laws' to protect providers from out-of-state lawsuits for providing abortions."); *see also infra* notes 194–198 and accompanying text.

[120] Many state laws have been or are currently being challenged in the courts. *See, e.g.*, Texas v. Becerra, No. 22-CV-185, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022), *appeal docketed*, No. 23-10246 (5th Cir. Mar. 10, 2023). The outcome of these cases, and the lasting effects they will have on reproductive rights jurisprudence in the United States, is difficult to determine. *See* CTR. FOR REPROD. RTS., *supra* note 79, at 15–16. This Comment analyzes the state of reproductive rights in the United States as of December 2022.

[121] In general, state bans fall into three categories based on their legal foundation. First, pre-*Roe* bans refer to state legislation enacted before *Roe* was decided. With *Roe* overturned, these states may fully revive and enforce this legislation, unless a state court has ruled on it. CTR. FOR REPROD. RTS., *supra* note 79, at 4. Second, some states' abortion bans are codified in their state constitution. *See, e.g.*, ALA. CONST. art I, § 36.06 (West, Westlaw through June 2022 amendments). Finally, trigger bans refer to state legislation enacted since *Roe* was decided, and that automatically became effective when the U.S. Supreme Court overturned *Roe*. *See* CTR. FOR REPROD. RTS., *supra* note 79, at 4 (noting that 13 states had trigger bans at the time *Dobbs* was issued). For a comprehensive and regularly updated analysis of each state's abortion laws, see *After Roe Fell*, *supra* note 118, and *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST. (Apr. 15, 2022), https://www.guttmacher.org/state-policy.

[122] *See* CTR. FOR REPROD. RTS., *supra* note 79, at 4–5.

[123] Most states prohibit abortions at some point in pregnancy. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Mar. 18, 2023), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions. States with "fetal heartbeat" legislation ban abortion as early as six weeks of pregnancy. *See, e.g.*, GA. CODE ANN. § 16-12-141 (2022); OHIO REV. CODE ANN. § 2919.195 (2022); S.C. CODE ANN. § 44-41-680 (2022).

"method bans."[124] A few states have "reason bans," which prohibit abortion if sought for a particular reason, such as sex, race, and genetic anomaly.[125] As of December 2022, abortion—provided at any time, with any method, and for almost any reason—is illegal in 12 U.S. states.[126]

Short of complete bans, many states have imposed laws and policies that severely restrict access to abortion. Some restrictions target abortion providers and facilities,[127] but most restrictions are imposed with the purpose and effect of impeding pregnant individuals' ability to obtain an abortion. The most common and restrictive of these policies include: parental notification or consent requirements;[128] policies requiring pregnant individuals to wait a specific amount of time before receiving abortion care;[129] refusal laws that allow individual healthcare providers to refuse to perform an abortion;[130] and policies that require pregnant individuals to

[124] The most common method bans prohibit dilation and extraction procedures and dilation and evacuation procedures. CTR. FOR REPROD. RTS., *supra* note 79, at 4.

[125] *See, e.g.*, W. VA. CODE § 16-2Q-1(c) (2023) (prohibiting abortion if sought because the fetus has been diagnosed with or presumed to have a disability). Reason bans are often criticized as insidious methods to insert states' and physicians' subjective assessments into the provision of abortions, as there is no evidence that pregnant people seek abortions because of the sex or race of their fetus. CTR. FOR REPROD. RTS., *supra* note 79, at 5.

[126] *See* ALA. CODE § 13A-13-7 (2022); ARK. CODE ANN. § 5-61-304 (2023); IDAHO CODE § 18-622 (2022); KY. REV. STAT. ANN. § 311.723 (West 2022); LA. STAT. ANN. § 40.1061 (2022); MISS. CODE ANN. § 41-41-45; MO. REV. STAT. § 188.017 (2022); OKLA. STAT. tit. 63, § 1-745.52(2) (2022); S.D. CODIFIED LAWS § 22-17-5.1 (2022); TENN. CODE ANN. § 39-15-201(b)(1) (2022); TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021); W. VA. CODE § 16-2R-3 (2022). Near-total bans in Arizona, Indiana, Utah, and Wyoming have been temporarily blocked by district courts. Further, abortions are unavailable in North Dakota (the sole abortion clinic in the state has moved) and Wisconsin (clinics have stopped providing abortions because of a lack of clarity on Wisconsin's pre-*Roe* ban). Nash & Ephross, *supra* note 119.

[127] For example, TRAP Laws (or Targeted Restrictions on Abortion Providers) impose costly and often insurmountable facility and licensure requirements on abortion providers. Thirty states have some form of facility specifications (e.g., down-to-the-inch dimensions for exam rooms, hallways, and closets) or provider qualifications. CTR. FOR REPROD. RTS., *supra* note 79, at 5.

[128] A majority of states (36) mandate some form of parental involvement for abortions performed on minors, with 27 states requiring the consent of one orboth parents. *An Overview of Abortion Laws*, GUTTMACHER INST. (Mar. 1, 2023), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

[129] Nearly half of U.S.states (24) require a 24-hour waiting period. *Id.* (noting that half of these states have laws that "effectively require the patient make two separate trips to the clinic to obtain the procedure").

[130] Almost every state (45) allows an individual health care provider to refuse to perform an abortion. Further, most states (42) allow entire institutions to refuse to perform abortions. *Id.* (nothing that in 16 of these states, the institutional discretion is limted to private or religious institutions."

receive counseling or an ultrasound prior to receiving abortion care.[131] Additionally, constraints on insurance coverage of abortion care, particularly the federal Hyde Amendment,[132] further hinder pregnant individuals' ability to obtain an abortion.[133]

States differ in the methods by which they enforce abortion bans and restrictions. Most states impose civil and criminal penalties on abortion providers who violate state restrictions.[134] A few states criminalize pregnant individuals who self-

[131] Seventeen states mandate counseling prior to receiving abortion care, although the format and content of the counseling varies. *Id.* (noting that mandated counseling laws require pregnant individuals to receive "information on at least one of the following: the purported link between abortion and breast cancer (5 states), the ability of a fetus to feel pain (12 states), or long-term mental health consequences for the patient (8 states)"). The mandated counseling is often biased, inaccurate, and serves no medical purpose. Instead, the purpose of these laws is to "dissuade pregnant people from exercising bodily autonomy." CTR. FOR REPROD. RTS., *supra* note 79, at 5. *See,* e.g., GUTTMACHER INST., *supra* note 4, at 2 (concluding after "exhaustive reviews" that there is no link between abortion and cancer).

[132] The Hyde Amendment prohibits the use of public funds for abortions, except to preserve the pregnant person's life or in cases of rape and incest. Hyde Amendment, Pub. L. No. 117-103, §§ 506–07, 136 Stat. 496 (2022) (original version, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976)); *see also* Edward C. Liu & Wen W. Shen, CONG. RSCH. SERV., IF12167, THE HYDE AMENDMENT: AN OVERVIEW 1 (Version 2, 2022) ("As a statutory provision included in annual appropriations acts, Congress can modify, and has modified, the Hyde Amendment's scope over the years, both as to the types of abortions and the sources of funding subject to this restriction."). The Supreme Court upheld the Hyde Amendment in 1980 in *Harris v. McRae*, 448 U.S. 297, 326 (1980). Congress has renewed it every year since its introduction. *The Hyde Amendment: A Discriminatory Ban on Insurance Coverage of Abortion*, GUTTMACHER INST. (May 2021), https://www.guttmacher.org/fact-sheet/hyde-amendment. Accordingly, states must at a minimum provide public funding for abortions in medical emergencies and in cases of rape and incest. Nevertheless, "[i]n defiance of federal requirements, South Dakota limits funding to cases of life endangerment only." *An Overview of Abortion Laws, supra* note 128; S.D. CODIFIED LAWS § 28-6-4.5 (2022).

[133] States have no affirmative duty to fund abortions, except as required under the Hyde Amendment. Roe v. Crawford, 514 F.3d 789, 801 (8th Cir. 2008). Further, 12 states restrict *private* insurance plans' coverage of abortion. *An Overview of Abortion Laws*, *supra* note 128; *see also* Rachel Treisman, *States with the Toughest Abortion Laws Have the Weakest Maternal Supports, Data Shows*, NPR (Aug. 18, 2022, 6:00 AM), https://www.npr.org/2022/08/18/1111344810/abortion-ban-states-social-safety-net-health-outcomes (noting that "[s]tates with abortion bans tend to have . . . higher rates of uninsurance for women ages 19–64").

[134] *See, e.g.*, ARK. CODE ANN. § 5-61-304(b) (2023) (felony punishable by up to 10 years in prison or a fine up to $100,000, or both); ALA. CODE § 13A-13-7 (2022) (criminal offense punishable by fines up to $1,000 and imprisonment or sentence to hard labor for up to 12 months); IDAHO CODE § 18-622(2) (2022) (felony punishable by fines not less than $5,000 and imprisonment for not less than two years, or both). Some states additionally impose civil or criminal fines on third parties who assist pregnant individuals in obtaining an abortion. *See, e.g.*, IDAHO CODE § 18-606(2) (2022).

manage their abortions (i.e., perform it outside of a clinical setting).[135] And some states enforce their abortion bans and restrictions via vigilante laws modeled after Texas's S.B. 8, which authorizes members of the public to bring private rights of action against abortion providers and people who help others access abortion care.[136]

In sum, the proliferation of abortion bans and restrictions implemented in *Dobbs*' wake paint a bleak and precarious landscape for pregnant individuals and abortion providers in the United States. The litany of restrictions amounts to an almost insurmountable barrier to safe, legal, and effective access to abortion for the 17.8 million women of reproductive age who reside in the 12 states with near-total abortion bans.[137] Furthermore, restrictive policies fuel an additional and significant restriction that is more difficult to measure—namely, the stigmatization of abortion care.[138]

C. Noncompliance of U.S. Abortion Legislation

Current state legislation that imposes dangerous and medically unnecessary barriers to safe abortion care violates international human rights law. While there is no federal abortion ban (at least for now), these state policies nevertheless bring the United States as a whole into noncompliance with its international human rights obligations because, as discussed in Part I, the federal government has an affirmative obligation to reconcile violative state laws with international human rights law.[139]

Recognizing the complexity of monitoring abortion regulations around the world (i.e., different systems of government and the relative constraints on domestic

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[135] *See, e.g.*, IDAHO CODE § 18-606(2) (2022), *held unconstitutional by* McCormack v. Hiedeman, 900 F.Supp.2d 1128, 1150 (D. Idaho 2013), *aff'd sub nom.* McCormack v. Herzog, 788 F.3d 1017 (9th Cir. 2015) ("Every woman who knowingly submits to an abortion or . . . who purposely terminates her own pregnancy . . . shall be deemed guilty of a felony."). These policies are particularly concerning in the case of medication abortions. *See* Megan K. Donovan, *Self-Managed Medication Abortion: Expanding the Available Options for U.S. Abortion Care*, GUTTMACHER POL'Y REV. 41, 45 (2018); Jane Norman & William Winfrey, *Impact of HRP Research in Medical (Non-Surgical) Induced Abortion: A Case-Study*, 1, WHO, WHO/RHR/HRP/08.06 (2008) ("Medical abortion, that is abortion effected by drugs rather than a surgical procedure, is a safe and effective alternative to surgical abortion and can potentially play a major role in reducing unsafe abortion.").

[136] S.B. 8, 87th Leg., Reg. Sess., 2021 Tex. Gen. Laws 125 (codified as TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–12 (West 2021)). *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 1-745.38 (West 2023). Idaho's law permits family members of the fetus to take legal action against the abortion provider or medical professional to seek a minimum of $20,000 in damages. IDAHO CODE § 18-8807 (2022).

[137] Nash & Ephross, *supra* note 119.

[138] Grover, *supra* note 67, ¶¶ 31–35; *Key Facts on Abortion*, *supra* note 76 ("The mere perception that abortion is unlawful or immoral leads to the stigmatization of women and girls by health care staff, family members, and the judiciary, among others.").

[139] *See supra* note 25 and accompanying text.

implementation of international human rights laws[140]), the Human Rights Commission (HRC) issued General Comment No. 36 to provide guidance for countries in amending and redressing their human rights regimes to conform to international human rights law. The Comment specifically addresses, among other things, the implementation of abortion legislation.[141] Because HRC guidance is particularly useful in addressing U.S. compliance with its human rights commitments,[142] General Comment No. 36 provides a useful framework for analyzing the full spectrum of U.S. abortion policies within the context of the country's international human rights obligations.

1. Allow Minimum Exceptions

First and primarily, the HRC provides that countries must, at a minimum, provide safe, legal, and effective access to abortion in three situations:

> [1] where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably [2] where the pregnancy is the result of rape or incest or [3] where the pregnancy is not viable.[143]

In all three situations, U.S. state legislation contravenes international treaties and customary international law.[144]

a. Life-Saving Exceptions

Dobbs did not establish any minimum requirements, meaning "[s]tates may even argue that a prohibition on abortion need make no provision for protecting a

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[140] M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANN. SURV. INT'L & COMPAR. L. 27, 27 (2004) ("There exist widely divergent perceptions of the states regarding the relationship between international and domestic law.").

[141] HRC, *General Comment No. 36*, *supra* note 7, ¶ 8.

[142] U.S. courts have generally recognized treaty body guidance to be useful and authoritative when analyzing the mandates of U.S.-ratified treaties. *See, e.g.*, United States v. Duarte-Acero, 208 F.3d 1282, 1287–88 (11th Cir. 2000) ("The Human Rights Committee's General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR." (quoting Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999)); *see also* Harfeld, *supra* note 14, at 83 (noting that the ICCPR "is among the most powerful and significant human-rights instruments to which the U.S. is a ratified party").

[143] HRC, *General Comment No. 36*, *supra* note 7, ¶ 8. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women has called for these same minimum protections. The Organization of American States [OAS], Comm. of Experts of the Follow-Up Mechanism to the Belém Do Pará Convention (MESECVI), Declaration on Violence Against Women, Girls and Adolescents and Their Sexual and Reproductive Rights, 16, OEA/Ser.L/II.7.10 (Sept. 19, 2014).

[144] Almost all countries (95%) permit abortion to save the life of the pregnant individual, 67% permit abortion to preserve an individual's physical health, and 64% permit abortion to preserve an individual's mental health. *Safe Abortion: Technical & Policy Guidance for Health Systems*, *supra* note 6, at 2.

woman from risk of death or physical harm."[145] Nevertheless, in the 12 states with near-total abortion bans, the statutes all provide exceptions for a serious medical risk.[146]

At the same time, however, the statutory language describing the circumstances under which an emergency abortion is permitted is phrased differently across states,[147] and often requires physicians to comply with detailed administrative requirements.[148] This complicated and uncertain legal framework manifests a precarious and potentially life-threatening environment. Because physicians and providers face substantial legal risk (including fines, imprisonment, and loss of a medical license)[149] if they provide an abortion outside of the allowable circumstances, providers may delay an

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[145] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[146] *See supra* note 126 (collecting statutes). This is theoretically required under the Emergency Medical Treatment and Labor Act (EMTALA), which requires hospitals to provide abortion services when necessary to stabilize a pregnant patient's emergency medical condition. 42 U.S.C. § 1395dd(b)(1)(A). However, at least two states' trigger laws criminalized abortion regardless of the reason—including to prevent the death of the pregnant individual—thus creating a potential conflict when an abortion is mandated under EMTALA. *See, e.g.*, IDAHO CODE § 18-622(2)–(3) (2022) (criminalizing abortion in all circumstances and instead permitting physicians to raise two affirmative defenses). The U.S. Department of Justice sued the state of Idaho, and a district court granted a preliminary injunction blocking the enforcement of Idaho's proposed abortion law. United States v. Idaho, No. 22-CV-00329, 2022 WL 3692618, at *15 (D. Idaho Aug. 24, 2022). On the other hand, Texas recently sued the United States challenging guidance issued by the Department of Health and Human Services which declared that EMTALA preempts state laws that do not provide exceptions for an emergency medical condition. CTR. FOR CLINICAL STANDARDS & QUALITY, DEP'T OF HEALTH & HUM. SERVS., QSO-22-22-HOSPITALS, MEMORANDUM ON REINFORCEMENT OF EMTALA OBLIGATIONS SPECIFIC TO PATIENTS WHO ARE PREGNANT OR ARE EXPERIENCING PREGNANCY LOSS at 4 (2022) (issued pursuant to Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 8, 2022)); Texas v. Becerra, No. 22-CV-185, 2022 WL 3639525, at *2 (N.D. Tex. Aug. 23, 2022), *appeal docketed*, No. 23-10246 (5th Cir. Mar. 10, 2023) (blocking enforcement of the EMTALA guidance on the basis that it did not preempt state law).

[147] *Compare* ARK. CODE ANN. § 5-61-303(3) (2022) (defining medical emergency as "necessary to preserve the life of a pregnant woman whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself"), *with* KY. REV. STAT. ANN. § 311.720(9) (West 2022) (defining medical emergency as "any condition which, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant female as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function").

[148] *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 171.203(d), 205(b)–(c) (West 2022).

[149] *See, e.g.*, IDAHO CODE § 18-622(2) (2022) (providing that abortion providers face up to five years in prison and potential revocation of their medical license). Further, many states expressly place the burden of persuasion on physicians and providers to prove there was in fact a medical emergency. *See, e.g.*, MO. REV. STAT. § 188.017(3) (2022).

abortion until the patient has a dire medical emergency.[150] The "chilling effect" of wavering and uncertain state laws contravenes international human rights mandates by posing a substantial threat to pregnant individuals' lives.[151]

b. Rape or Incest Exceptions

The United States has further failed to fulfill its human rights obligations by withholding reproductive care from victims of rape and incest. Of the 12 states with near-total abortion bans, only three have exceptions for rape, and only two have exceptions for rape *and* incest.[152] Further, most states impose administrative requirements in order to invoke the exception—for example, requiring the victim to first report the crime to legal authorities, or placing the burden on the providers to prove the assault meets the requirements of the exception.[153]

Withholding abortion care from individuals who have become pregnant as a result of coerced or forced sexual acts constitutes torture,[154] the prohibition of which is *jus cogens*. Indeed, by restricting the victim's ability to decide whether to proceed with a pregnancy initiated by force, legislation of this sort may even amount to a crime against humanity—namely, forced pregnancy.[155]

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[150] *Key Facts on Abortion*, *supra* note 76. *See* Complaint at 3, United States v. Idaho, No. 22-CV-00329, 2022 WL 3692618 (D. Idaho Aug. 24, 2022) ("[E]ven in dire situations that might qualify for the Idaho law's limited 'necessary to prevent the death of the pregnant woman' affirmative defense, some providers could withhold care based on a well-founded fear of criminal prosecution.").

[151] HUM. RTS. WATCH, supra note 61, at 20; *Safe Abortion: Technical & Policy Guidance for Health Systems*, *supra* note 6, at 2 ("Saving a woman's life might be necessary at any point in the pregnancy and, when required, abortion should be undertaken as promptly as possible to minimize risks to a woman's health.").

[152] The bans with no exception for rape or incest are: ALA. CODE § 13A-13-7 (2022); ARK. CODE ANN. § 5-61-304 (2023); KY. REV. STAT. ANN. § 311.772 (West 2022); LA. STAT. ANN. § 40:1061 (2022); MO. REV. STAT. § 188.017 (2022); S.D. CODIFIED LAWS § 22-17-5.1 (2022); TENN. CODE ANN. § 39-15-201 (2022); TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021). The bans that include exceptions are: MISS. CODE ANN. § 41-41-45 (2022) (providing an exception for rape but not incest); IDAHO CODE § 18-622 (2022) (providing an affirmative defense for abortion provider if the woman reported rape or incest); OKLA. STAT. tit. 63, § 1-745.52(2) (2022) (providing an exception for rape or incest); W. VA. CODE § 16-2R-3(b) (2022) (providing an exception for rape or incest, but only within the first eight weeks of pregnancy).

[153] *See, e.g.*, W. VA. CODE § 16-2R-3(b) (2022) (requiring survivors of rape or incest to report the assault within 48 hours and present a copy of a police report or notarized letter to a physician before an abortion can be performed); OKLA. STAT. tit. 63, § 1-745.52(2) (2022); MO. REV. STAT. § 188.017(3) (2022) (explicitly placing the burden of persuasion on the physician); *see also* Nash & Ephross, *supra* note 119 ("Most of these exceptions require the crime to be reported to legal authorities, even though the majority of rape and incest cases go unreported and reporting can be traumatizing for survivors.").

[154] Callamard, *supra* note 83, ¶ 93.

[155] Discussing the origins of the Rome Statute's definition of "forced pregnancy," amici in the *Ongwen* case explained:

Further, human rights treaty bodies have specifically denounced the administrative requirements present in some U.S. legislation, as these requirements are more likely to lead pregnant individuals to resort to unsafe abortions.[156] Instead, "prompt [and] safe abortion services should be provided on the basis of [an individual's] complaint, rather than requiring forensic evidence or police examination."[157]

c. Non-Viability Exceptions

The United States has also failed to meet the minimum requirement of allowing abortion in cases of fatal fetal impairment. General Comment No. 36 defines a non-viable pregnancy as one capable of causing a pregnant person substantial pain or suffering, and provides, as an example, pregnancies in which the fetus has a life-threatening condition.[158] Only three states with near-total abortion bans have exceptions for fetal anomalies.[159]

Human rights bodies have consistently held that denying pregnant individuals access to abortion for fatal fetal impairments violates international human rights.[160]

> [F]orced pregnancy involve[s] more than forcible impregnation; it also involve[s] restricting the victim's ability to decide whether to proceed with a pregnancy initiated by force . . . . The focus on reproductive autonomy distinguishes 'forced pregnancy' from related crimes such as rape, enslavement or imprisonment. The harm recognised by the crime of forced pregnancy is therefore not forcing the victim to give birth but violating the victim's personal, sexual, and reproductive autonomy by unlawfully confining them, including by preventing them from accessing an abortion.

Amici Curiae Observations by Rosemary Grey et al., *supra* note 97, ¶¶ 36–37 (construing Rome Statute of the International Criminal Court, *supra* note 93, art. 7(2)(f)); *see also Forced Pregnancy*, EQUAL. NOW, https://www.equalitynow.org/forced_pregnancy (last visited Mar. 11, 2023) (asserting that the crime of forced pregnancy is meant to cover the situation where a person becomes pregnant "without having sought or desired it, and abortion is denied, hindered, delayed or made difficult"); ACLU, *supra* note 6 ("Laws that prevent people from making their own decisions about whether to continue a pregnancy or have an abortion amount to forced pregnancy.").

[156] *Safe Abortion: Technical & Policy Guidance for Health Systems*, *supra* note 6, at 5.

[157] *Id.* at 2.

[158] HRC, *General Comment No. 36*, *supra* note 7, ¶ 8 (citing Mellet v. Ireland, *supra* note 82 (addressing a claim wherein claimant was informed at 21 weeks that the fetus had a congenital heart defect and the fetus would die shortly after birth, but that even if the impairment proved fatal, she could not have an abortion in Ireland)).

[159] Mabel Felix, Laurie Sobel & Alina Salganicoff, *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (May 18, 2023), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services. *See, e.g.*, W. VA. CODE § 16-2R-3(a)(1) (2022).

[160] *See* Mellet v. Ireland, *supra* note 82, ¶ 3.1 (finding that denying a pregnant individual access to abortion for a fatal fetal impairment violated the ICCPR by: "(a) denying her the reproductive health care and bereavement support she needed; (b) forcing her to continue carrying a dying fetus; (c) compelling her to terminate her pregnancy abroad; and (d) subjecting her to intense stigma"); Llantoy Huamán v. Peru, *supra* note 92, ¶ 6.3 (ruling that forcing an adolescent

The HRC has specifically noted that denying safe abortion care and subjecting pregnant individuals to "humiliating and judgmental attitudes in such contexts of extreme vulnerability and where timely health care is essential amount[s] to torture . . . ."[161]

2. Decriminalize Abortion Services

The HRC further provides that, while countries may adopt measures designed to regulate abortion, countries "may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly."[162] The Comment then emphasizes, as an example of one measure that may compel pregnant individuals to resort to unsafe abortions: "applying criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them in doing so."[163] Current U.S. abortion policies undoubtedly contravene the United States' international human rights obligation to decriminalize the provision and receipt of abortion services. With *Roe* overruled, several states criminalize abortion providers, and some states even criminalize pregnant individuals and third parties who help others access abortion care.[164]

The criminalization of abortion and reporting requirements violate the right to privacy[165] and the principle of nondiscrimination.[166] Further, the prosecution and punishment of individuals who self-manage their abortions, and of providers who perform abortions even in emergency situations, constitutes cruel, inhuman, and degrading treatment, and may lead to discrimination within, and outright exclusion from, vital post-abortion healthcare.[167] Finally, the legal risks that abortion providers and

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to carry her pregnancy to term, despite confirmation of a severe fetal impairment, caused severe mental anguish and violated the ICCPR).

[161] Méndez, *supra* note 84, ¶ 44.

[162] HRC, *General Comment No. 36*, *supra* note 7, ¶ 8.

[163] *Id.*

[164] *See supra* notes 134–136 and accompanying text.

[165] Méndez, *supra* note 84, ¶ 44 ("The practice of extracting, for prosecution purposes, confessions from women seeking emergency medical care as a result of illegal abortion in particular amounts to torture or ill-treatment."); HRC, CCPR General Comment No. 28, *supra* note 67, ¶ 20 (noting that laws and practices that interfere with women's right to enjoy privacy (as protected by ICCPR) are ones "where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion").

[166] U.N. OHCHR, ABORTION, *supra* note 70, at 1 (noting that criminalizing medical procedures only needed by women is an act of discrimination). *See* HRC, CCPR General Comment No. 28, *supra* note 67, ¶ 20.

[167] *Key Facts on Abortion*, *supra* note 76; *see also* Manuela v. El Salvador, Case 13.069, Inter-Am. Comm'n H.R., Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175 (2018) (holding El Salvador responsible for the death of a Salvadoran woman sentenced to 30 years in prison for aggravated homicide after suffering an obstetric emergency, concluding the criminalization of an

pregnant individuals face manifest a dangerous chilling effect, which may ultimately cost pregnant individuals their lives.[168]

3. Remove Barriers to Effective Access

Recognizing that other regulatory impediments may additionally hinder access to safe, legal, and effective abortion services, the HRC further instructs countries to "remove existing barriers to effective access by women and girls to safe and legal abortion," and to not introduce new barriers.[169] Existing barriers include any regulation with the direct or indirect effect of causing pregnant individuals to resort to unsafe abortions.[170] For example, treaty bodies have noted that permitting individual medical providers to refuse to provide abortion services "as a result of the exercise of conscientious objection," requiring providers and pregnant individuals to comply with third-party authorization and notification provisions, and the provision of biased information or counseling all constitute barriers to access and lead to unsafe abortions.[171]

In its 2016 report on the United States, the HRC specifically denounced many of the U.S. restrictions discussed *supra* as violating international human rights, including TRAP laws, the Hyde Amendment, and medically unnecessary waiting periods and ultrasounds.[172] These restrictions do not provide any additional safety protections for pregnant individuals;[173] instead, they function to further impede pregnant individuals' ability to obtain abortion services, and contravene the rights

obstetric emergency constituted a violation of international human rights law, including obligations to prevents violence against women).

[168] *Safe Abortion: Technical & Policy Guidance for Health Systems*, *supra* note 6, at 4 ("Laws, policies and practices that restrict access to abortion information and services can deter women from care seeking and create a chilling effect (suppression of actions because of fear of reprisals or penalties)."); *Statement by UN Human Rights Experts*, *supra* note 9 ("[L]ack of clarity about the legal parameters of abortion . . . will now vary by geographic location and creates the risk of prosecution, faced by women and abortion providers, including those prosecutions triggered by private citizens.").

[169] HRC, *General Comment No. 36*, *supra* note 7, ¶ 8.

[170] *Id.*

[171] *Id.*; U.N. OHCHR, ABORTION, *supra* note 70, at 3; *see also* CTR. FOR REPROD. RTS., *supra* note 79, at 22 ("States should not jeopardize the safety of minors who decide not to involve their parents." (citing Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSPS. 196, 196–207, 213 (Sept.–Oct. 1992))).

[172] U.N. Hum. Rts. Council, *supra* note 61, ¶¶ 30, 68. ("The Working Group also regrets the adoption in 1976 of the Hyde Amendment prohibiting the use of certain federal funds for abortions except in cases of rape, incest or preserving the life of the mother. . . . [B]urdensome conditions for the licensing and operation of clinics result[] in the closing of clinics across the country, leaving women without access to sexual and reproductive health services. . . . [M]arketplace insurance coverage for the legal termination of pregnancy is far from universal.").

[173] *See, e.g.*, CTR. FOR REPROD. RTS., *supra* note 79, at 21 (noting that TRAP laws serve no medical purpose and do not provide increased safety for patients).

to life,[174] to nondiscrimination,[175] to be free from torture,[176] and to privacy.[177] Issued when *Roe* and *Casey* were still in force, the HRC's report underscores the fact that even in states with broader access to legal abortion, pregnant individuals may still face multiple restrictions that make abortion practically inaccessible.[178]

Further, the current reproductive rights landscape in the United States has fostered some more indirect barriers. For example, because most states with near-total bans are clustered in the same regions, millions of people living in "abortion deserts" must travel greater distances to obtain abortion services, imposing additional financial and emotional burdens.[179] Additionally, the patchwork of state laws and uncertainty arising from pending litigation fosters an overall lack of clarity for pregnant individuals who may resort to unsafe abortions on the mistaken assumption that their states do not permit it.[180]

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[174] WHO, *supra* note 68 ("[W]hen people with unintended pregnancies face barriers to attaining safe, timely, affordable, geographically reachable, respectful and non-discriminatory abortion, they often resort to unsafe abortion.").

[175] For example, waiting periods and insurance restrictions have a disproportionate and discriminatory impact on low-income and rural individuals. U.N. Hum. Rts. Council, *supra* note 61, ¶ 68 (expressing concern with unjustified medical procedures, "such as compelling women to undergo ultrasounds or to endure medically unnecessary waiting periods"); *see also* Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting* Harris v. McRae, 21 WM. & MARY J. WOMEN & L. 5, 50–51 (2014) (noting that funding restrictions are particularly devastating for poor women and women of color, who rely on Medicaid for health insurance).

[176] HUM. RTS. WATCH, supra note 61, at 20; Mellet v. Ireland, *supra* note 82, ¶ 7.6.

[177] U.N. Off. of the High Comm'r for Hum. Rts., Comm. on the Elimination of Discrimination Against Women, Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland Under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 59, U.N. Doc. CEDAW/C/OP.8/GBR/1 (Mar. 6, 2018); Llantoy Huamán v. Peru, *supra* note 92, ¶ 6.4.

[178] Keglovits, *supra* note 103, at 80 ("Funding restrictions, when paired with limits on abortion care permitted under the *Roe* and *Casey* regime, proved often to be complete barriers to access, especially due to the time limits on abortion care.").

[179] U.N. OHCHR, ABORTION, *supra* note 70, at 3; *see also* GUTTMACHER INST., *supra* note 4, at 3 (noting in 2019 that if *Roe* were overturned or weakened, abortion patients' average distance to the nearest facility would increase by 97 miles, preventing approximately 93,500 to 143,500 individuals each year from accessing abortion care).

[180] HUM. RTS. WATCH, *supra* note 61, at 20 n.93 (citing U.N. Off. of the High Comm'r for Hum. Rts., Comm. Against Torture, Concluding Observations on the Third Periodic Report of the Former Yugoslav Republic of Macedonia, U.N. Doc. CAT/C/MKD/CO/3 (June 5, 2015); U.N. Off. of the High Comm'r for Hum. Rts., Comm. Against Torture, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Peru, U.N. Doc. CAT/C/PER/CO/5-6 (Jan. 21, 2013); U.N. Off. of the High Comm'r for Hum. Rts., Comm. Against Torture, Concluding Observations on the Second Periodic Report of the Plurinational State of Bolivia as Approved by the Committee at its Fiftieth Session, U.N. Doc. CAT/C/BOL/CO/2 (June 14, 2013); U.N. Off. of the High Comm'r for Hum. Rts., Comm. Against Torture, Concluding Observations on the Combined Fifth and Sixth Periodic Reports of

4. Destigmatize Abortions

Finally, the HRC instructs countries to combat and prevent the stigmatization of individuals who seek abortion care.[181] Though more difficult to quantify, the stigma arising from the criminalization of abortion and other restrictive abortion laws and policies in the United States is undoubtedly pervasive and detrimental.[182] The stigmatization of abortion services affects both abortion providers, who may face threats of violence and clinic closures, as well as pregnant individuals, who may face intimidation, shame, and abuse.[183]

By fueling abortion stigma, restrictive abortion policies lead pregnant individuals to resort to clandestine and unsafe abortions.[184] Relatedly, the stigma surrounding the issue of abortion—and the potential for criminal sanctions—prevents the dissemination of vital information about legal abortion services, constituting a violation of the right to information.[185] Further, subjecting pregnant individuals to "humiliating and judgmental attitudes" in vulnerable and life-threatening contexts "amount[s] to torture or ill-treatment."[186]

Poland, U.N. Doc. CAT/C/POL/CO/5-6 (Dec. 23, 2013); and U.N. Off. of the High Comm'r for Hum. Rts., Comm. Against Torture, Concluding Observations on the Second Periodic Report of Kenya, Adopted by the Committee at its Fiftieth Session, U.N. Doc. CAT/C/KEN/CO/2 (June 19, 2013)).

[181] HRC, *General Comment No 36*, *supra* note 7, ¶ 8.

[182] U.N. Hum. Rts. Council, *supra* note 61,¶ 70 (expressing concern with the stigma attached to reproductive and sexual healthcare in the United States, as it frequently leads to "acts of violence, harassment and intimidation against those seeking or providing such care.").

[183] *Statement by UN Human Rights Experts*, *supra* note 9; U.N. Hum. Rts. Council, *supra* note 61, ¶ 70 ("[M]any of the clinics work in conditions of constant threats, harassment and vandalism, too often without any kind of protection from law enforcement officials, as the experts observed during their visits to Texas and Alabama. Alabama has a history of serious violence against abortion providers, including the killing in 1993 of Dr. David Gunn, the first doctor to be murdered for performing abortions in the United States. The massacre in the Colorado family planning centre that occurred just before the start of the visit once again demonstrated the extreme hostility and danger faced by family planning providers and patients.").

[184] Grover, *supra* note 67, ¶ 35 ("The stigma resulting from criminalization creates a vicious cycle. Criminalization of abortion results in women seeking clandestine, and likely unsafe, abortions. The stigma resulting from procuring an illegal abortion and thereby breaking the law perpetuates the notion that abortion is an immoral practice and that the procedure is inherently unsafe, which then reinforces continuing criminalization of the practice.").

[185] *Id.* at ¶ 30; Mellet v. Ireland, *supra* note 82, ¶ 3.13 ("[R]estrictions on the author's right to information were disproportionate because of their detrimental impact on her health and well-being. They caused her to feel extremely vulnerable, stigmatized and abandoned by the Irish health system at a time when she most needed support.").

[186] Méndez, *supra* note 84, ¶ 44.

III. BRINGING U.S. REPRODUCTIVE RIGHTS POLICY INTO COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS LAW

Dobbs and the noncompliance of U.S. abortion policies underscore the United States' failure to fulfill its international human rights law obligations domestically.[187] By tolerating and enforcing state legislation that restricts and impedes reproductive rights, the United States "has relegated itself to the bottom of the human-rights heap."[188]

Recognizing the structural and ideological barriers to implementing international human rights law at the domestic level, it is worth asking: Do international human rights serve any purpose for U.S. citizens? Indeed, if "institutions of international human rights law deserve our energetic support only to the extent they contribute meaningfully to the protection of rights,"[189] then, in the fight for reporductive rights, is international human rights law worthy of our attention?

The answer to both questions is emphatically "yes." International human rights law is an invaluable tool for achieving human rights protection at the domestic level—even in the United States.[190] Even if it is not possible for the United States to embrace all international human rights standards immediately and without reservation, it is nevertheless essential that U.S. domestic institutions incorporate these standards in practice to the maximum degree possible. Only then may the United States honestly hold itself out as the defender of human rights it purports to be.[191]

In this final Section, I discuss the steps that U.S. states and the federal executive, legislative, and judicial branches must take in order to bring the country's reproductive rights' regulations into compliance with its international human rights law obligations. These domestic institutions each possess the legal authority and responsibility to utilize international law to inform and aid in the protection of human rights.[192]

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[187] *Statement by UN Human Rights Experts*, *supra* note 9 (noting that the Supreme Court completely disregarded the United States' binding domestic legal obligations under international human rights law).

[188] Harfeld, *supra* note 14, at 88.

[189] Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 121 (2001).

[190] See, for example, the methods in which African Americans achieved greater domestic rights protections by appealing to international bodies for vindication of their basic human rights. Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOW. L.J. 641 (1997).

[191] *Id.* at 643 ("The United States must demonstrate a seriousness of purpose . . . and abandon the posture of international arrogance which has come to characterize its actions.").

[192] *Statement by UN Human Rights Experts*, *supra* note 9 ("All branches of government, office bearers and political actors are duty bound to fulfill these obligations. Those serving in a legislative,

A. States

U.S. states can, and frequently do, play a vital role in achieving human rights protections where the federal government has failed. Under the Supremacy Clause, states are bound to uphold U.S.-ratified treaty commitments,[193] and under the federal system of government, states are authorized to do so.[194] State action is particularly important in the context of "positive" Fourteenth Amendment rights, where states may reconcile the absence of fundamental rights protection at the federal level in state constitutions.[195] Indeed, the ability of states to fulfill the country's international human rights obligations is illustrated by the various state constitutions that explicitly afford protections for abortion.[196]

A number of states have enacted more concrete legislation to address the particular harms that the *Dobbs* decision spawned.[197] For example, to address the dangers of abortion deserts and the patchwork of laws following *Dobbs*, many states

executive or a judicial capacity equally carry these obligations and must not be complicit in violating human rights. Sufficient recognition to the right to health should be given in the national political and legal system to bring a human rights-based approach to their national public health strategy.").

[193] U.S. CONST. art. VI, cl. 2. Furthermore, an RUD declaring a treaty provision to be non-self-executing does not prohibit states from implementing and upholding the norms and rights at stake. *See* Medellín v. Texas, 552 U.S. 491, 530 (2008).

[194] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[195] ABILA, *supra* note 36, at 11 ("[T]he U.S. Supreme Court has repeatedly exonerated state actors from a duty to take even reasonable measures to protect human life, still less any other human right, even when they have a positive legal obligation to take protective measures. The Court has based these holdings on the claim that the U.S. Constitution does not protect positive rights. International law does, however." (first citing DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989), then citing Town of Castle Rock. v. Gonzales, 545 U.S. 748 (2005)); *see also* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2306 (2022) (Kavanaugh, J., concurring) ("[T]he Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments.").

[196] CTR. FOR REPROD. RTS., *supra* note 79, at 6 (noting that the highest court of the state in Alaska, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Montana, and New Jersey affirmed that their state constitution protects the right to abortion, separately and apart from the existence of any federal constitutional right).

[197] Examples of these legislative acts include: "expand[ing] state Medicaid funding for abortion, [providing] public money to private abortion funds, . . . decriminaliz[ing] adverse

have passed laws aimed at assisting pregnant individuals seeking abortions who reside in states where access is highly restricted.[198] Because the detriments of one state's restrictive abortion laws extend beyond the borders of that individual state,[199] these state actions illustrate the particular power that states have in shielding their residents from the policies and laws of other states. Further, cities within states with abortion bans have also taken affirmative steps to protect reproductive rights. For example, some Texas and Pennsylvania cities have deprioritized enforcement of criminal abortion laws, passed regulations to protect abortion providers, and regulated deceptive advertising of fake abortion clinics.[200]

Thus, while federalism can act as a major barrier in bringing the country as a whole into compliance with its international human rights obligations, it may also function as a vital tool. In the same way that state legislation may bring the United States out of compliance, it is equally capable of bringing the United States into compliance.

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pregnancy outcomes, and extend[ing] the rights of pregnant people . . . beyond [the abortion procedure itself] by bolstering support for workplace accommodations, government health plans, and other welfare benefits." Cohen et al., *supra* note 106, at 4. Additionally, some states have created a new cause of action where individuals may sue anyone who interferes with reproductive rights and access, including by bringing a lawsuit against them. *See, e.g.*, 2022 Mass. Acts ch. 127, § 4; N.Y. CIV. RIGHTS LAW § 70-b (McKinney 2022).

[198] For example, Oregon and New York pledged to allocate millions of dollars to support abortion patients, including those traveling from out of state because their home state has banned the procedure. Casey Parks, *States Pour Millions into Abortion Access*, WASH. POST (May 13, 2022, 12:22 PM), https://www.washingtonpost.com/dc-md-va/2022/05/13/oregon-new-york-funding-abortion. Connecticut, New York, Delaware, New Jersey, and Massachusetts passed laws that protect abortion providers who care for patients from out of state, and Massachusetts amended and fortified its telehealth rules to allow its providers to care for abortion patients in other states by telehealth. Cohen et al., *supra* note 106, at 8.

[199] Nash & Ephross, *supra* note 119 ("Even in states where abortion is available, the influx of patients from states with severe restrictions has created lengthy waiting times for the procedure."); SOC'Y OF FAM. PLAN., #WECOUNT REPORT 3 (2022) (reporting that states located near other states with near-total abortion bans provided more abortions post-*Dobbs* and "experienc[ed] a surge in number of abortions provided by a clinician").

[200] *See, e.g.*, PITTSBURGH, PA., CODE § 603.02 (2023); Council Res. 20220721-002, 2022 Austin, Tex. City Council (2022); *see also* Nicole Narea, *How Blue Cities in Red States Are Resisting Abortion Bans*, VOX (June 29, 2022, 5:10 PM), https://www.vox.com/policy-and-politics/2022/6/29/23188737/abortion-bans-austin-cincinnati-phoenix-tucson-raleigh; Morgan Severson, *Austin City Council Passes GRACE Act to Decriminalize Abortion Despite Statewide Ban*, DAILY TEXAN (July 25, 2022), https://thedailytexan.com/2022/07/25/austin-city-council-passes-grace-act-to-decriminalize-abortion-despite-statewide-ban; Chris Potter, *Pittsburgh City Council Passes Bills Affirming Abortion Rights in City Limits*, 90.5 WESA (July 19, 2022, 5:53 PM), https://www.wesa.fm/politics-government/2022-07-19/pittsburgh-city-council-passes-bills-affirming-abortion-rights-in-city-limits.

B. Executive

The executive branch wields enormous power in the international law arena and is thus well-positioned to realize domestic compliance.[201] The Treaty Clause vests the power to make treaties in the president, acting with the advice and consent of the Senate.[202]

Because ratifying human rights treaties is an "essential step" in making international human rights law meaningful at the domestic level, it is essential that the president endorse ratification of CEDAW, the CRC, and the ICESR.[203] Ratification—or at least consideration of ratification—will signal to both the rest of the world and U.S. citizens a seriousness of purpose in the United States' commitment to upholding human rights.[204] Indeed, if it is impossible to avoid the impediments to domestic implementation of international human rights law, the president may still nevertheless endorse ratification and garner broader political acceptance of international human rights standards within the political process. Further, for the U.S.-ratified treaties encumbered by RUDs, the executive branch should push for implementing legislation to ensure domestic enforcement of the treaties' mandates,[205] and take the reporting processes seriously.[206]

At the domestic level, the executive may work to achieve greater domestic compliance by issuing executive orders requiring all federal agencies to consider U.S. international human rights obligations and customary international law in connection with the promulgation of federal regulations.[207] Indeed, the Biden administration has made positive strides thus far by issuing an executive order and a variety of federal agency actions attempting to mitigate the harms of the influx of abortion

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[201] *See* Hoffman & Strossen, *supra* note 14, at 501 (discussing the importance of the government's support for the human rights plaintiffs in an Alien Tort Claims Act case, as it "made it easier for the court to find that torture was a violation of international customary law" (citing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980))).

[202] U.S. CONST. art. II, § 2, cl. 2.

[203] Hoffman & Strossen, *supra* note 14, at 493.

[204] *Id.* at 478.

[205] *Id.* at 494, 496–97.

[206] Pursuant to the ICCPR, the CAT, and CERD, the United States is required to file comprehensive reports with the United Nations on its domestic human rights compliance. *See* Taifa, *supra* note 190, at 683–84.

[207] Hoffman & Strossen, *supra* note 14, at 497–98 ("Such executive and administrative action can lead the way to a wider acceptance and understanding of international human rights law in the U.S. domestic legal system and make it more likely that the rights recognized in the major international human rights treaties will be fully enforced in the U.S. domestic legal system.").

restrictions.[208] Nevertheless, many have been met with state resistance,[209] and are but small steps toward bringing the United States into compliance with its international human rights obligations. Additional steps, including ensuring federal funding for individual states' provision of abortion services and combatting state restrictions on the movement of abortion seekers and providers across states lines, are necessary to protect the human rights at stake discussed *supra*.[210] Indeed, the executive branch is not only authorized, but also bound to protect the fundamental human rights of U.S. citizens.

C. Legislative

As the *Dobbs* dissent noted, nothing in the decision stops Congress from prohibiting abortions nationwide.[211] At the same time, this potentially daunting legislative power may also be employed to afford broader reproductive rights. Indeed, Congress is uniquely situated to implement international human rights laws,[212] especially where U.S. domestic compliance is limited by RUDs.[213]

As discussed *supra*, Congress has conditioned the United States' ratification of human rights treaties with RUDs designed to ensure that the treaties have no, or

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[208] *See, e.g.*, Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 8, 2022); Amy Dilcher & Arushi Pandya, *EMTALA in the Post*-Dobbs *World*, LEXBLOG (Sept. 13, 2022), https://www.lexblog.com/2022/09/13/emtala-in-the-post-dobbs-world.

[209] *See, e.g.*, Texas v. Becerra, No. 22-CV-185, 2022 WL 3639525, at *9–10 (N.D. Tex. Aug. 23, 2022), *appeal docketed*, No. 23-10246 (5th Cir. Mar. 10, 2023).

[210] *Statement by UN Human Rights Experts*, *supra* note 9.

[211] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2318 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

[212] Congress has the constitutional authority to bring U.S. domestic human rights into compliance with international norms under the Offenses Clause and the Enabling Clause. U.S. CONST. art. I, § 8, cl. 10 (providing that Congress has the power to "define and punish . . . Offences against the Law of Nations"); *id.* amend. XIV, § 5 (granting Congress the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment); *see also* Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1220 (1993) (noting that the Offenses Clause and the Enabling Clause of the Fourteenth Amendment serve as affirmative grants of legislative power to determine what laws are necessary to secure protections afforded to U.S. citizens—both domestically and internationally).

[213] In its monitoring report on the United States' compliance with the ICCPR, the HRC noted: "Taking into account its declaration that provisions of the [ICCPR] are non-self-executing, [the United States should] ensure that effective remedies are available for violations of the [ICCPR] . . . and undertake a review of such areas with a view to proposing to Congress implementing legislation to fill any legislative gaps." U.N. Off. of the High Comm'r for Hum. Rts., Hum. Rts. Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 4(c) U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

very limited, domestic effect within the United States.[214] Accordingly, it is essential that Congress formally withdraw the RUDs on the ICCPR, the CAT, and CERD, in order to give these treaties teeth and allow them to better function as effective tools to achieve domestic compliance with international human rights law.[215] At the very least, Congress should engage in a good faith debate about the extent to which the United States will guarantee the rights in these treaties in practice.[216]

Even with qualifying RUDs, Congress may avoid the impediments of the self-execution doctrine by enacting implementing legislation.[217] When Congress incorporates customary international law and non-self-executing treaty provisions into federal law via implementing legislation, that legislation becomes judicially enforceable domestic law under the "last-in-time" rule.[218] Thus, by enacting implementing legislation to afford international treaties domestic authority, Congress can bring U.S. law into compliance with international human rights law.

In accordance with this power, Congress should follow the lead of other countries that have employed international human rights law and norms as the basis for achieving reproductive rights reform and enact legislation that would protect abortion access at the federal level.[219] Specifically, Congress may achieve domestic compliance by creating a federal safeguard against the existing barriers to safe abortion in the United States, and by repealing the Hyde Amendment.[220] Federal legislation

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[214] *See supra* notes 30–36 and accompanying text.

[215] Hoffman & Strossen, *supra* note 14, at 496.

[216] *See id.* (acknowledging that without legitimate debate, mere ratification does not truly advance the cause of civil rights in the United States); *see also* 5 ANNALS OF CONG. 493 (1796) (statement of Rep. Madison) ("[T]his House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation. If it must carry all Treaties into effect, . . . it would be the mere instrument of the will of another department, and would have no will of its own.").

[217] Hoffman & Strossen, *supra* note 14, at 495 ("Ratification of human rights treaties should be viewed as a beginning of the process of incorporating international human rights standards and not as the end of the process.").

[218] MULLIGAN, *supra* note 13, at 20–21; *see also* Medellín v. Texas, 552 U.S. 491, 518 (2008). Indeed, Congress has exercised this power in a number of existing statutes, perhaps most notably in the Alien Tort Claims Act, 28 U.S.C. § 1350 (1988). *See* Posner & Spiro, *supra* note 212, at 1225 n.75 (1993) (listing the federal statutes that have been founded upon the Offenses Clause).

[219] *See* SINGH ET AL., *supra* note 69 (analyzing the 27 countries that broadened their legal grounds for abortion between 2000 and 2017). For a discussion of current legislation that would protect abortion access at the federal level, see CTR. FOR REPROD. RTS., *supra* note 79, at 20–21.

[220] The Equal Access to Abortion Coverage in Health Insurance (EACH Woman) Act of 2019 would achieve this. Introduced in 2015 and then again in 2019, the EACH Woman Act eliminates federal coverage restrictions on abortion services, such as the Hyde Amendment's ban on coverage for Medicaid enrollees, and protects insurance providers from interference in their decision to cover abortion. H.R. 1692, 116th Cong. (2019); H.R. 2972, 114th Cong. (2015).

addressing the most immediate and dangerous effects of the *Dobbs* decision is undoubtedly necessary to achieve domestic compliance with the United States' international human rights law obligations.

D. Judicial

Finally, the judicial branch serves an invaluable role in interpreting international human rights law mandates, and in holding U.S. domestic institutions accountable for their compliance. Despite the general reluctance among U.S. courts to declare U.S.-ratified treaties and customary international law directly enforceable, the judiciary is in fact constitutionally authorized to interpret and enforce international treaty law in U.S. courts.[221]

Perhaps the most significant role the judicial branch may serve in achieving domestic compliance is interpreting and incorporating customary international law into U.S. jurisprudence.[222] Although this judicial role is generally underutilized,[223] the few cases in which U.S. courts have relied on international norms illustrate the critical role the judiciary serves in bridging the gap between international human rights and U.S. constitutional rights.[224] Indeed, the judiciary's repeated reference to and formulation of arguments based on customary international law works to "legitimize and fortify" international norms.[225]

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[221] U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."). *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

[222] *See* M. Shah Alam, *supra* note 140, at 31; Hoffman & Strossen, *supra* note 14, at 499 ("The enforcement of international human rights will not truly become a reality in the United States until there are effective judicial remedies for the violation of these rights. This has been the U.S. experience in the context of enforcing civil rights and civil liberties.").

[223] Harfeld, *supra* note 14, at 89 ("Curiously, this power to enforce international standards domestically has been left untapped."). *See supra* notes 50–53 and accompanying text.

[224] *See* Lisa Kline Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 260 (1988) (asserting that if international law were used to assist in interpreting constitutional rights, "the right attains greater credence as one that has universal recognition").

[225] Cassel, *supra* note 189, at 122. *See, e.g.*, Margaret E. McGuinness, *Federalism and Horizontality in International Human Rights*, 73 MO. L. REV. 1265, 1270–71 (2008) (asserting that a major impetus for *Medellín v. Texas*, which was the first time in 20 years—despite widespread failure in previous decades—that the United States' issue of noncompliance with the Vienna Convention was raised, was "the emerging international norm prohibiting capital punishment").

By recognizing and invoking customary international law as the basis for a decision, the judicial branch is thus able to hold the United States domestically accountable for those obligations it has evaded with RUDs.[226] Accordingly, U.S. courts should follow the international trend in recognizing the international norms inherent in reproductive rights and strike down state legislation that contravenes customary international law.[227]

CONCLUSION

The current state of reproductive rights in the United States contravenes the United States' binding international legal obligations. Applying treaty body guidance to the current state of reproductive rights in the United States following *Dobbs* paints a bleak picture for U.S. citizens—undoubtedly, the United States has wholly and dangerously failed to comply with its international commitments to protect and uphold the fundamental rights at stake in regulating abortion. Despite the structural and ideological impediments to bridging the gap between international human rights and U.S. constitutional rights, the United States as a whole is legally bound to comply with U.S.-ratified treaties and customary international law. Absent affirmative action among U.S. domestic institutions at the state and federal executive, legislative, and judicial levels, U.S. states will continue to perpetuate flagrant violations of international human rights law and U.S. citizens will unnecessarily and arbitrarily lose their rights, and in some cases, their lives.

[226] Bradley & Goldsmith *supra* note 17, at 330–31 (explaining that customary international law "permits federal courts to accomplish through the back door of [customary international law] what the political branches have prohibited through the front door of treaties"); Harfeld, *supra* note 14, at 91 ("Separation of power principles and judicial review should prevent us from being condemned to ratifying treaties on paper and ignoring them in practice.").

[227] *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], Sala Plena febrero 21, 2022, Sentencia C-055-22, Expediente D-13.956 (Colom.) (decriminalizing abortion in Columbia up to 24 weeks of gestation, and basing the decision in part on prevailing international norms).