

January 1989

International Human Rights and Family Planning: A Modest Proposal

Barbara Stark

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Barbara Stark, International Human Rights and Family Planning: A Modest Proposal, 18 Denv. J. Int'l L. & Pol'y 59 (1989).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

International Human Rights and Family Planning: A Modest Proposal

Keywords

Family Planning, Human Rights Law, Civil Rights, Foreign Aid, States, Administration Law, Constitutional Law, International Law: History

International Human Rights And Family Planning: A Modest Proposal

BARBARA STARK*

INTRODUCTION

This paper proposes that the U.S. begin to take a more positive role in advancing international human rights by reaffirming its historic commitment to international family planning efforts. Specifically, I suggest that we rescind the Mexico City Policy ("MCP"),¹ repeal the Helms Amendment² and explicitly apply internationally accepted human rights norms to our population program. While the repudiation of the MCP and the Helms Amendment suggests a return to an earlier era in family planning, the focus on the human rights implications represents a substantial departure from our former policy. This reflects both the growing international sensitivity to human rights since the inception of that policy in the early seventies, and our own reevaluation of the "population problem" in the early eighties.³ Unlike Swift's scathing satire, this truly is a "modest proposal." I do not suggest that complex family planning problems can be solved by the availability of contraception, including abortion.⁴ But un-

* Visiting Assistant Professor and Coordinator, Legal Writing Program, Rutgers Law School. B.A., Cornell University, 1973; J.D., New York University, 1976; L.L.M., Columbia Law School, 1989.

1. The MCP terminated all U.S. aid to family planning services engaging in abortion related activities or speech. See *infra* text accompanying notes 18-27.

2. 22 U.S.C. § 2151b(f)(1)(2)(Supp. V 1982). The Helms Amendment prohibits direct funding of abortion through nongovernmental organizations. See *infra* text accompanying notes 14-15.

3. In the World Bank's 1984 WORLD DEVELOPMENT REPORT 155, a distinction is made between "family planning programs [which] provide information and services to help people achieve their own fertility objectives" and "population policy [which] involves explicit demographic goals." In this paper, unless otherwise specified, "population policy" and "family planning services" both refer to programs providing aid and services to individuals. Since a discussion of policy regarding aggregate fertility is beyond the scope of this paper, there is no need for separate terms here.

In any case, as suggested at text accompanying notes 104-11, *infra*, family planning policy affects population, albeit indirectly. This is not a simple issue. As Donald Strauss, former chair of Planned Parenthood Federation of America has observed, commenting on the Chinese government's efforts to reduce its population growth rate and resultant disregard of human rights: "One of the dilemmas of our times is to equate the near and poignant human rights of individuals now alive with the distant and difficult to imagine rights of those still to be born." N.Y. Times, May 11, 1989, letter to the editor by D. Strauss, at A28, col.6.

4. Rather, I agree with John Ratcliffe, who has argued that ". . . overpopulation and underdevelopment . . . can most effectively be resolved through a combination of widespread social advancement and availability of the full range of birth control methods.." Ratcliffe, *The Reagan Population Policy: An Error of the Third Kind*, 20 N.Y.U. J. INT'L L. &

less such contraception is available, it is difficult to even begin to address these issues.⁵

The utilization of human rights standards in this context is concededly problematic. What are the human rights that would be promoted? Are these rights recognized by the U.S.? What, if anything, is gained by analyzing family planning issues in terms of human rights, rather than as questions of public policy? I will argue that a rights analysis is essential here for three basic reasons.⁶ First, a clear focus on rights should help us avoid the rights violations that have marred family planning programs in the past. Second, the grave global problems of reproductive choice demand a principled, universal approach. Third, it is important that these issues are understood in terms of rights because the exercise of rights as such by Third World women, who are most affected by U.S. family planning policy, may help them to begin to address other aspects of their oppression.⁷ The experience of exercising rights itself contributes to empowerment.⁸ Family planning is a natural place to start because it involves issues central to the Third World woman's daily life.

This paper is divided into three parts. In the first part, I briefly describe the current U.S. position, its origins and consequences. In the second part, I suggest that U.S. family planning support be structured and evaluated in accordance with widely accepted international human rights norms and pertinent domestic constitutional standards. From this, I derive a "hybrid" rights formulation linking international notions of affirmative rights with the American idea of reproductive choice as a fundamental right. In the last part, I analyze the possible impact of the hybrid

POL. 267, 298 (1987).

5. See Farley & Tokarski, *Legal Restrictions on the Distribution of Contraceptives in the Developing Nations: Some Suggestions for Determining Priorities and Estimating Impact of Change*, 6 COLUM. HUM. RTS. L. REV. 415, 418 (1974-75) (significant numbers of people in developing countries have decided to limit family size but cannot do so because contraceptives are either physically or economically unavailable to them); R. REPETTO, *WORLD ENOUGH AND TIME: SUCCESSFUL STRATEGIES FOR RESOURCE MANAGEMENT* 43 (1986) (most households in Third World countries where birth and death rates are high do not have access to family planning services); Johnson-Acsadi, *The Scale of the Problem*, 15 PEOPLE 3 (1988) ("Among 22 developing countries, from 13-51% of women aged 15-49 reported having had an unwanted pregnancy or live birth in the two years before the survey took place . . .").

6. See generally *Symposium: The Civil Liberties and Human Rights Implications of United States International Population Policy*, 20 N.Y.U. J. INT'L L. & POL. 1 (1987); *Rights of Choice in Matters Relating to Human Reproduction: Part I of a Symposium on Law and Population*, 6 COLUM. HUM. RTS. L. REV. 273 (1974-75).

7. See generally G. LERNER, *THE CREATION OF PATRIARCHY*, 233-35 (1986) (comparing the terms "oppression" and "subordination" of women).

8. See Lefort, *Politics and Human Rights*, in *POLITICAL FORMS IN MODERN SOCIETY* (M.I.T. 1986) (arguing that awareness and assertion of rights as rights are a crucial part of a transformative political process). Third World women are among the most oppressed people on earth. See Hosken, *Toward a Definition of Women's Human Rights*, 3 HUM. RTS. Q. 1, 2 (1981).

formulation on some specific human rights.⁹ These include the rights to reproductive choice, equality, health and an "adequate" standard of living.

I. BACKGROUND

A. U.S. Support for International Family Planning

A brief history background of U.S. participation in international population planning efforts may be useful in evaluating the political feasibility of the proposal for a revised U.S. role.¹⁰ Even the most perfunctory review shows not only that until very recently the U.S. actively supported international family planning, but that dramatic shifts in policy in this area have been — and can be — implemented in a relatively short period of time.

The U.S. has supported international family planning services for more than twenty-five years. In 1961, AID (Agency for International Development) was established to coordinate U.S. economic and humanitarian aid programs.¹¹ In 1967, the Foreign Assistance Act of 1961 was amended by the passage of Title X. This authorized broad population planning support, including the construction of family planning clinics and funding for research programs. AID funding was increased from \$4.4 million to \$34.8 million.¹²

In 1973 the U.S. shifted the emphasis of its foreign aid program from large to small scale projects. Family planning was a keystone of this "New Directions" strategy, reflecting the general consensus among policymakers that Third World countries "could not effectively address pressing social and economic problems until modern methods of contraception were introduced on a mass scale."¹³

In the same year, the senate passed the Helms Amendment to the Foreign Assistance Act.¹⁴ The Helms Amendment prohibits direct funding of abortion through nongovernmental organizations ("NGOs").¹⁵ As a practical matter, such direct funding had never comprised a significant proportion of AID and was easily channeled elsewhere. Thus, the direct impact of the Helms Amendment on international population programs

9. Cf. Price-Cohen, *International Fora for the Vindication of Human Rights Violated by the U.S. International Population Policy*, 20 N.Y.U. J. INT'L L. & POL. 241, 248 (1987) (noting the analytic problems of demonstrating that existing policies violate human rights).

10. For a comprehensive discussion of the history of the program, see Fox, *American Population Policy Abroad: The Mexico City Abortion Funding Restrictions*, 18 N.Y.U. J. INT'L L. & POL. 609, 611 (1986).

11. Fox, *supra* note 10, at 611.

12. *Id.* at 614.

13. *Id.* at 611.

14. 22 U.S.C. § 2151b(f)(1)(2) (Supp. V 1982).

15. The constitutionality of the Helms Amendment has generally been conceded. Comment, *International Family Planning*, 8 Hous. J. INT'L L. 155, 170 (1985) [hereinafter "Houston Comment"].

was not great. Support for other forms of family planning remained high.

The U.S. had supported the International Planned Parenthood Federation ("IPPF") since 1968 and U.S. contributions constituted almost 25% of the IPPF's budget for 1984.¹⁶ In 1986, the U.S. was the largest single contributor to U.N. sponsored family planning programs.¹⁷ AID was the single greatest source of funding for overseas family planning.

B. *The Mexico City Policy ("MCP")*

In August, 1984, the U.N. Population Conference in Mexico City was convened to reevaluate the World Population Plan of Action adopted in 1974.¹⁸ The Reagan administration viewed the Mexico City Conference as an opportunity to demonstrate its vehement opposition to abortion to the world, as well as its right wing constituency.¹⁹ Promulgation of the MCP unequivocally showed that undermining support for international family planning had become a high priority of the Administration.²⁰ The MCP effectively extended the application of the Helms Amendment far beyond that which had been contemplated by the Senate. This was accomplished by the imposition of two additional conditions. First, foreign recipients were forbidden to engage in any abortion related activities or speech. Second, they were prohibited from doing so regardless of the funding source of such activities.²¹

This policy has had profound consequences for both the population planning NGOs and those they serve.²² As Sharon Camp points out, the MCP jeopardized over 120 family planning projects worth almost \$23 million annually.²³ The maneuvers required to remain eligible for funds dis-

16. Camp, *The Impact of the Mexico City Policy on Women and Health Care in Developing Countries*, 20 N.Y.U. J. INT'L L. & POL. 35, 37 (1987).

17. DKT Memorial Fund Ltd. v. Agency for Int'l Dev., No. 88-5243 (D. Cal. Oct. 10, 1989) (Ginsburg, J., concurring in part and dissenting in part).

18. Fox, *supra* note 10, at 628. For a description of the World Population Conference in Bucharest in 1974, see B. HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL AND REPRODUCTIVE CHOICE 107-10 (1987).

19. See B. HARTMANN, *supra* note 18, at 123-25; see also Fox, *supra* note 10, at 633 (noting that the MCP was "met with hostility" from most [Third World] delegates). See generally Cook & Dickens, *International Developments in Abortion Laws: 1977-78*, AM. J. PUB. HEALTH 1305, 1310 (1988) ("The prevailing U.S. initiative [as expressed in the MCP] runs counter to the evolving trend of worldwide abortion reform.")

20. The MCP has been criticized as a cynical political capitulation to the efforts of an activist minority, including substantial support from organized religion. See B. HARTMANN, *supra* note 18, at 244. For an incisive analysis of the role of the Catholic church in the formulation of family planning policy, see Benschhof, *The Establishment Clause and Government-Funded Natural Family Planning Programs: Is the Constitution Dancing to a New Rhythm?* 20 N.Y.U. J. INT'L L. & POL. 1 (1987).

21. *U.S. Population Policy as Announced in Mexico City, 1984: A Background Statement Prepared by the ACLU Reproductive Freedom Project* 3 [hereinafter "ACLU Statement"].

22. *Id.*

23. Camp, *supra* note 16, at 50. IPPF/WHR received a \$27 million extension of a

rupted the population establishment. IPPF, for example, initially took a unified approach, refusing to require its 117 member associations to stop all abortion activities. In 1985, however, the Western Hemisphere Region section of IPPF agreed to AID's restrictions, thus undermining Planned Parenthood Federation of America's efforts to reverse them.²⁴

According to the Population Crisis Committee ("PCC"), which undertook a study of the effects of the MCP in 1987, most of the agencies questioned were not yet operating under the anti-abortion restrictions. Those organizations which had implemented the MCP standards reported that they had: (1) incurred substantial increases in administrative costs (in connection with monitoring their subgrantees);(2) avoided certain countries and categories of foreign organization;(3) phased out research on the consequences of illegal abortions;(4) disassociated themselves from medical research that might be considered abortion-related;(5) were generally "chilled" in their provision of services, and (6) inadvertently violated the MCP.²⁵ As Camp observes:

In the end, however, the most pervasive and devastating effect of the policy will be felt by women in developing nations who rely on the integrity of the health professionals funded by the U.S. government. By depriving those women of all information about the availability and advisability of abortion, the [MCP] inevitably will prevent women from obtaining medically necessary abortions and will cause women to bear children at great risks to their physical health."²⁶

As this capsule history suggests, the risks and uncertainties to which the vagaries of our political system subject recipient states and NGOs is a very real problem. By its nature, the success of family planning depends on continuity.²⁷ Just as the community must be able to rely on the programs, they in turn must be able to count on their funding sources. This is an important reason for protecting such decisions from executive caprice. As I will argue in the next part of this article, one way to do so may be by giving such aid the status of rights.

C. "Overpopulation" or underdevelopment?

While deploring the anti-abortion focus of the MCP, Betsy Hartmann has observed that it raised important questions about the underlying premises of the Western population establishment. Moreover, it reflected a new recognition of the critical role of development in population programs.

Matching Grant from AID. 1987 ANNUAL REPORT IPPF/WHR 13.

24. B. HARTMANN, *supra* note 18, at 114.

25. Camp, *supra* note 16, at 41-48.

26. *Id.* at 50.

27. Farley & Tokarski, *supra* note 5, at 439. See Crossette, *Why India is Still Failing to Stop Its Population Surge*, N.Y. Times, July 9, 1989, § 4, at 2, col 1 (Indian experts attribute large families, in part, to "a dearth of sustained information and follow-up services.").

There are basically two views of population growth. One, as epitomized by the World Bank's Report on Population 1984,²⁸ may be referred to as the "population explosion" view.²⁹ Its adherents argue that overpopulation, resulting in intense competition for scarce resources, is a primary cause of poverty and starvation. They believe that the sheer number of human beings and the rate at which they are reproducing amounts to a global crisis.

The other view, which I will call the "development view," considers the high fertility rate that leads to burgeoning population more a symptom than a cause of poverty. As Hartmann explains, having many children is sensible and rational in an agrarian society dependent on child labor. Moreover, the lack of pensions or social security programs means that children are the only insurance for a couple's old age. High infant mortality makes it necessary to have many children in order to be sure that some will survive to adulthood. Finally, from the development view, the issue of the demand on global resources by an expanding Third World population is specious since we in the West still consume far more than they do, by any logical measure, because our per capita consumption is so high.³⁰ Thus, the argument continues, "population explosion" is the racist, elitist rallying cry of a West in fear of being overrun by dark hordes.³¹ Population control, according to proponents of the development view, requires both freely available family planning services and a more equitable distribution of wealth. Compelling statistics demonstrate that the correlation between lowered fertility and development depends more on the equitable distribution of resources than the GNP per capita.³² Where individual families benefit economically from development, they are apt to have fewer children.

The drafters of the MCP, while rejecting the economic analysis of the development view, denied that population growth presents a significant problem. Even if growth were undesirable, they argued, the correlation between increased industrialization and declining birthrate³³ indicates that the best way to deal with it is through economic development. The Reagan administration concluded that a vigorous free market economy was the best way to stimulate development, which it assumed would lead to lower birth rates. Even if this is so, as the World Bank has tersely observed, "many developing countries cannot afford to wait for fertility to

28. *Houston Comment*, *supra* note 15, at 156. See, e.g., Ratcliffe, *supra* note 4, at 267 n.1.

29. See P. EHRlich, *THE POPULATION BOMB* (1968).

30. OUR COMMON FUTURE: WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT 95 (1987) [hereinafter "*Our Common Future*"]. Close to 25% of the world's inhabitants consume less than five percent of the world's output; a similar percentage in the industrialized countries consume more than two-thirds. See R. REPETTO, *supra* note 5, at 42.

31. See B. HARTMANN, *supra* note 18, at 95-98 (discussing the confluence of the eugenics and birth control movements).

32. *Id.* at 273; *Our Common Future*, *supra* note 30, at 106.

33. *Houston Comment*, *supra* note 15, at 172.

decline spontaneously"³⁴ in response to projected economic development.

Both the development and the population explosion views may have human rights repercussions. To the extent the population explosion analysis is used to justify the abrogation of the individual's reproductive choice on the grounds of national necessity, it violates a human rights approach to family planning. To the extent that the development approach incorporates the neo-Malthusian view that population is self-regulating, through high mortality or natural family planning, it too becomes a mechanism for curtailing reproductive choice.

II. STANDARDS

Both the affirmative economic, social and cultural rights set forth in the international instruments and the fundamental privacy rights assured by the U.S. constitution are necessary to solve the problems of population policy. Neither approach is sufficient in itself in the international family planning context. Indeed, as I will show in this section, their inadequacies complement each other. This suggests the need for a "hybrid" formulation, a selective blend of the two rights traditions, in which the affirmative rights of the international instruments are qualified by the American notion of fundamental privacy rights, which they simultaneously expand. In developing this synthesis, this part of the paper attempts to provide a workable example of the constructive interplay of American and international conceptions of rights.

A. *International Instruments*

There are at least two basic reasons for considering questions of international family planning in terms of human rights, as these rights have been interpreted in the international human rights instruments. First, by utilizing these terms, we place these issues squarely in the context of internationally accepted norms. This clarifies and narrows the debate. Second, by recognizing the rights consequences of these policy decisions, we acknowledge and articulate the constitutive principles to which law, policy and even presidents must conform. If the U.S. is serious about human rights, and expects to be taken seriously by the rest of the world, we must consider the human rights implications of our policies. The following international treaties provide widely accepted and clearly articulated standards pertinent here: the International Covenant on Civil and Political Rights ("Civil Covenant"), the International Covenant on Social, Economic and Cultural Rights ("Economic Covenant") and the Convention on the Elimination of All Forms of Discrimination Against Women ("Women's Convention").³⁵

34. *Id.* at 162.

35. G.A. Res. 180 (XXXIV 1979), reprinted in 19 I.L.M. 33 (1980), adopted by the General Assembly on Dec. 18, 1979, entered into force on Sept. 3, 1981. See generally Cook, *The International Right of Nondiscrimination on the Basis of Sex - A Bibliography*, 14

We should adopt the norms established in these instruments as guidelines for the formulation of American international family planning policy for several reasons.³⁶ First, they provide an invaluable indication of the priorities and values held by most of the international community,³⁷ including the high priority given economic rights in the Third World. By demonstrating our commitment to these globally accepted principles,³⁸ we show good faith and thereby enhance our credibility. Other states would probably be more receptive to our criticism if we were more open to theirs.³⁹ Thus, we should adhere to these norms, unless they clearly conflict with our own principles,⁴⁰ because they express a global consensus against which the rest of the world will judge our actions.⁴¹

Second, Article 18 of the Vienna Convention on the Law of Treaties imposes a special obligation with respect to treaties we have signed: "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty [which] . . . it has signed . . . until it shall have made its intention clear not to become a party to the treaty. . . ."⁴² The Economic and Civil Covenants as well as the Women's Convention were among those signed by President Carter.⁴³

YALE J. INT'L L. 161 (1989); Byrnes, *The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1 (1989); Heller, *International Convention on Women's Rights: Bringing About Ratification in the United States*, 9 WHITTIER L. REV. 431 (1987).

36. See *supra* text accompanying notes 95-98 (applicable norms under the Civil Covenant, and notes 111-12 (applicable norms under the Economic Covenant *infra*). Cf. Coliver & Newman, *Using International Human Rights Law to Influence Population Policy: Resort to Courts or Congress?*, 20 N.Y.U. J. INT'L L. & POL. 53, 84 (1987) (discussing the derivation of "judicially manageable standards" from international law in this context).

37. See generally L. HENKIN, *THE RIGHTS OF MAN TODAY* (1978); J. NICKELS, *MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (1987). But cf. Galey, *International Enforcement of Women's Rights*, 6 HUM. RTS. Q. 463 (1984) (problems of enforcement of women's rights, and prospects for improvement).

38. See generally Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1 (1982).

39. "We should not give the impression that we are mainly interested in enforcing human rights elsewhere while avoiding any change in our own law or practice." SENATE COMM. ON FOREIGN REL., HUMAN RIGHTS TREATIES, SENATE ADVICE AND CONSENT, S. REP. NO. 381-14.2, 96th Cong., 1st Sess. 88 (1979) [hereinafter "*Senate Hearings*"] (Prepared Statement of Professor Oscar Schachter). But cf. Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 73 (1978) (General right of censure should not be limited to those states which are parties to the international rights instruments).

40. Cf. *infra* text accompanying notes 71-78 (discussing the abortion of female fetuses).

41. See generally, HENKIN, PUGH, SCHACHTER & SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 981-83 (1987) [hereinafter "*International Law*"]; Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31 (1978).

42. Vienna Convention on the Law of Treaties, May 22, 1969, art. 18, U.N. Doc. A/CONF. 39/27 at 17 (1969) (entered into force Jan. 27, 1980), reprinted in 8 I.L.M. 679, 686 (1969); accord 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 312, at 173 (1987) [hereinafter "*Third Restatement*"].

43. *President Carter Signs Covenants on Human Rights*, DEP'T. ST. BULL., Oct. 31,

The right to abortion, however, is conspicuous by its absence from the international instruments.⁴⁴ As Joan Fitzpatrick Hartman has pointed out:

None of the human rights instruments contain an explicit right of personal choice for women seeking to terminate their pregnancies. In the only international case directly confronting access to abortion as a privacy right, the European Commission on Human Rights did not find a choice of pregnancy termination within the right to privacy and family protection under the European Convention.⁴⁵

The failure of these instruments to recognize a woman's right to terminate her pregnancy may be attributed to several factors, including the prevalence of patriarchy⁴⁶ and the political influence of religions such as fundamental Islam⁴⁷ and Catholicism, which are opposed to abortion. Under local law, for example, abortion is illegal or permitted only where the woman's life is at stake in most of the Muslim countries of Asia, two-thirds of the Latin American countries and much of Africa.⁴⁸ As I will explain in the next section, the extent to which local laws conflict with rights well established in our jurisprudence, like a woman's right to choose whether or not to terminate a pregnancy, should be considered by the U.S. in allocating assistance.

B. *Domestic Standards*

The right to use contraception, including abortion, is predicated on privacy rights which have been found to be fundamental by the U.S. Su-

1977, at 586; Message from the President to the Senate transmitting the Convention on the Elimination of All Forms of Discrimination Against Women (Nov. 12, 1980).

44. One of the most creative approaches to this void has been devised by Coliver & Newman, who note that the cited instruments set forth general principles — including the right to health and the right of women to attain access to family planning — which may impose a duty on governments, as a matter of customary international law, to refrain from defunding NGOs when doing so is likely to “seriously threaten the health of a significant number of people,” Coliver & Newman, *supra* note 36, at 68-70. They concede, however, that, “Several instruments recognize interests that compete with a mother's interest in free choice,” *id.* at 67 (citing American Convention on Human Rights, art. IV, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, doc. 21 rev. 6 (1979), *reprinted in* 9 I.L.M. 673 (1970); art. 18 of the Civil Covenant).

45. See Hartman, *The Impact of the Reagan Administration's International Population Policy on Human Rights Relating to Health and the Family*, 20 N.Y.U. J. INT'L L. & POL. 169, 177 (1987) (citing Bruggemann and Scheuten v. Federal Republic of Germany, 10 EUR. COMM'N H.R. 100 (1978)).

46. See generally Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287 (1987) (historical overview of human rights and women's rights movements, urging a unified approach).

47. See generally An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987).

48. B. HARTMANN, *supra* note 18, at 245 (citing C. TIETZE, *INDUCED ABORTION: A WORLD REVIEW*, 1983. Indeed, if reproductive choice had been explicitly assured in the covenants, it is questionable whether they would have been as widely ratified in the Third World. At the very least, reservations probably would have been taken with respect to that right.

preme Court. In *Griswold v. Connecticut*,⁴⁹ the Supreme Court invalidated a state law that criminalized the use of contraceptives for married persons. In *Eisenstadt v. Baird*,⁵⁰ the protection was extended to single persons: "If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁵¹ In *Roe v. Wade*,⁵² the Court expressly found that the privacy right was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁵³ In *Webster v. Reproductive Health Services*,⁵⁴ the Supreme Court declined to overrule *Roe*, holding that the state could refuse to allow the use of facilities for abortions as long as it "places no obstacle — absolute or otherwise — in the pregnant woman's path to an abortion."⁵⁵ As Justice Blackmun notes in his dissent, the Court does not make a "single, even incremental, change in the law of abortion . . ."⁵⁶ Rather, the *Webster* Court simply persists in the fallacious distinction between a government imposed "obstacle" and indigency, for which the government is not responsible, but which may effectively preclude abortion.

While I agree with Justice Blackmun that the plurality "obscures the portent" of the decision, and that *Webster* is likely to have dire consequences at home,⁵⁷ the decision does not detract from the analysis here. Rather, I am concerned with precisely those obstacles decried by the *Webster* court; i.e., obstacles "placed in the path of women seeking abortions" by government. In the context of international family planning, I urge that the U.S. both avoid creating such obstacles and carefully consider those erected by recipient states.

The other element of the hybrid proposal, i.e., an affirmative economic obligation, is found not in domestic law, but in the international instruments discussed above. The U.S. has never found any constitutional obligation on the part of the state to provide contraception or to fund abortions. In *Harris v. McRae*,⁵⁸ the Supreme Court held that there was no constitutional entitlement to medicaid funding for abortions even if poor women could not otherwise obtain them. Although a compelling ar-

49. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

50. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

51. *Id.* at 453.

52. *Roe v. Wade*, 410 U.S. 155 (1973).

53. *Id.* at 153.

54. *Webster v. Reproductive Health Services*, 106 L.Ed. 2d 410 (1989); See generally Greenhouse, *Supreme Court, 5-4, Narrowing Roe v. Wade, Upholds Sharp State Limits on Abortions*, N.Y. Times, July 4, 1989, at 1, col. 6.

55. *Webster*, 106 L.Ed. 2d at 429, citing *Maher v. Roe*, 432 U.S. 464, 474 (1977).

56. *Webster*, 106 L.Ed. 2d, at 448 (Blackmun, J., dissenting).

57. "I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court." *Id.* at 449.

58. *Harris v. McRae*, 448 U.S. 297 (1980).

gument may be made that *McRae* represents a fundamental restriction of the right to choose an abortion, on its own terms it is less about limiting the right to choose than it is about the Supreme Court's refusal to recognize affirmative economic rights:

To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.⁵⁹

The Supreme Court has consistently refused to accord any economic rights constitutional status.⁶⁰ Thus, it is not surprising that the courts have for the most part rejected the argument that the MCP violates the U.S. constitution.⁶¹ If the affirmative economic rights established in the international instruments are recognized and applied in the context of U.S. international family planning programs, however, abortion may well be an entitlement⁶²— at least in those countries where a woman may choose to terminate her pregnancy without state interference.

C. *A Hybrid Formulation*

1. Towards a Constructive Synthesis

The international instruments do not recognize women's fundamental right to choose whether or not to terminate pregnancy, a right firmly established under the U.S. constitution.⁶³ The U.S. constitution, on the

59. *Id.* at 318.

60. *Dandridge v. Williams*, 397 U.S. 471 (1970). As Henkin has observed, our emergence in the twentieth century as what some characterize as a welfare state has been accomplished despite the constitution, rather than because of it. L. HENKIN, *supra* note 37, at 128.

61. See, e.g., Coliver & Newman, *supra* note 36, at 77-83; *Planned Parenthood Fed'n v. Agency for Int'l Dev.*, 670 F. Supp. 538 (S.D.N.Y. 1987), *rev'd on these grounds, aff'd on other grounds*, 838 F.2d 649 (2d Cir. 1988) (on remand, oral argument was scheduled for July 21, 1989, on defendant's motion to dismiss for failure to state a claim upon which relief may be granted); telephone interview with Roger Evans, Esq., counsel for plaintiff on June 9, 1989. See also *DKT Memorial Fund v. Agency for Int'l Dev.*, 630 F. Supp. 238 (D.D.C. 1986), 810 F.2d 1236 (D.C. Cir. 1987), *rev'd and remanded* 691 F. Supp. 394 (D.D.C. 1987).

62. This would probably not be an absolute right under any of the international conventions, which take a pragmatic approach to economic rights. Under Art. 2.1 of the Economic Covenant, for example, a state is required "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." In any case, for purposes of this paper I am assuming voluntary U.S. accession to international norms, rather than the imposition of any enforceable duty against the U.S. *But cf. Senate Hearings, supra* note 39, at 91 (statement of Professor Louis Sohn, explaining that this language is "obligatory . . . [creating] a legal duty to take such steps, and this duty needs to be fulfilled in good faith").

63. *But see, e.g., Greenhouse, Battle Over; Now, a War: Three New Cases Will Put*

other hand, fails to address the economic, social, and cultural circumstances which may well render the enjoyment of that right nugatory. Thus, I suggest a "hybrid" approach to international family planning, combining the affirmative rights described in the international covenants with the fundamental right to reproductive choice guaranteed under the U.S. constitution. Under such a hybrid rights formulation, U.S. funded family planning programs would treat reproductive choice, including abortion, as a fundamental right and would also recognize the affirmative economic, social and cultural rights of the individual program participants.⁶⁴

This is not the same obligation that the U.S. would assume by adhering to the international covenants. While ratification of the covenants might give rise to an inchoate right to development under Art. 2(1) of the Economic Covenant,⁶⁵ it would not necessarily require us to further the affirmative rights of citizens of other countries. Under the conventions, affirmative rights are to be provided by the individuals' own state. In addressing those rights, the U.S. would be contributing to the state's efforts to further the rights of its own people.⁶⁶

U.S. recognition of reproductive choice and affirmative rights means that the U.S. would not only refrain from imposing any constraints on family planning program participants which would interfere with their enjoyment of such rights, but also that the U.S. would evaluate family planning programs in terms of their rights consequences. A rights analysis would provide the basic framework in which the U.S. operated and assessed its family planning programs, subject to the pre-existing law of the local state.⁶⁷

Supreme Court on a Collision Course with Roe v. Wade, N.Y. Times, July 5, 1989 at 1, col. 4; Fein, "The Court is Ready to Overturn 'Roe'", *See id.* at A21, col.1; *cf.* Gross, *Goaded by Ruling, Groups Plot State-by-State Plan to Keep Abortion Rights*, *see id.* at A17, col. 1.

64. This would encourage, although it would not assure, the "extraordinary result" contemplated by the *McRae* Court; i.e., an "affirmative funding obligation" with regard to abortion notwithstanding the absence of specific legislation. *See generally* HALBERSTAM & DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS, AN ALTERNATIVE TO ERA?* (1987) (comparing women's rights under U.S. law with women's rights under the international covenants).

65. *See* SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 331- 32 (1985); *DRAFT DECLARATION ON THE RIGHT TO DEVELOPMENT*, U.N. Doc. A/40/277 (1985).

66. The vast majority of Third World U.N. member states have adhered to the covenants. *See supra* note 41, at 994. Even if the recipient state had not adhered to the covenants, however, under this proposal the U.S. would refer to the standards established in those instruments because of the global acceptance of these standards (*see infra* text accompanying notes 37-41) and because of their concrete importance to the Third World, especially Third World women. (*See infra* text accompanying notes 95-128.).

67. For tables showing circumstances under which abortion is permitted worldwide, see "Regional Developments in Abortion Laws: 1967-1988" (chart referencing countries that have changed abortion law since 1968, available from IPPF); C. TIETZE & S.K. HENSHAW, *INDUCED ABORTION: A WORLD VIEW* (6th ed. 1986); Cook & Dickens, *supra* note 19, at 1306-307 (chart showing "Legislative Developments in Indications for Abortion: 1977-1988")

U.S. recognition of these rights would not, of course, affect their status under local law. If local law imposed intolerable constraints on rights, however, the program could be terminated. It is beyond the scope of this paper to define "tolerable" rights parameters, which would probably have to be determined on a fact-specific, case by case basis. Local law punishing parents for having more than one child, for example, would probably be fatal to a program under a hybrid rights framework, as would the distribution of contraceptives posing a significant health risk. A strong argument could be made that a local bar on abortion would similarly so contravene basic rights as to mandate defunding by the U.S..⁶⁸ This contention would probably not prevail, however, in view of the historic U.S. support of family planning programs which have not included abortion and the practical consequences of terminating such programs.

There is no constitutional impediment to the synthesis urged, no constitutional proscription against a more expansive construction of the right to choose. Indeed, thirteen states currently pay for abortions with state Medicaid funds.⁶⁹ The adoption of affirmative economic rights, while resisted as a matter of constitutional jurisprudence, may be palatable in the limited context of international family planning for several reasons.⁷⁰ First, the political considerations underlying Congress' decision not to fund abortions at home may no longer be applicable abroad.⁷¹ Public policy justifications for supporting family planning programs, including those offering abortion, may be more compelling in an international than in a domestic context. It may be particularly crucial for a woman to have the option of terminating her pregnancy where access to effective forms of contraception may be limited, where the health risks associated with pregnancy and childbirth are great, and where the mother will almost invariably assume primary responsibility for the infant.⁷² Abortion

68. *Webster*, 106 L.Ed. 2d 410 (affirming that Texas statute in *Roe v. Wade* criminalizing all abortions, except where women's life was at stake, was unconstitutional under the Due Process Clause).

69. As of June 25, 1989, thirteen states paid for abortions without restrictions with state Medicaid funds: Alaska, California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Washington, West Virginia and Vermont. Four additional states will pay for abortions in cases of rape, incest or to save the woman's life. All of the remaining states will pay for abortions to save the woman's life. *Where Abortion Laws Stand Now, State by State*, N.Y. Times, June 25, 1989, at 20, col.4.

70. Affirmative economic rights are increasingly acceptable. As Professor Henkin has noted, "[Is] it not the case that people today have recognized and ordained that it is among the purposes of government to ensure every inhabitant — as of right, not by grace and charity — [receives] the basic human needs (food, shelter, health care, education) when the individual cannot provide them?" Henkin, *The United States Constitution as Social Compact*, 131 Proc. Am. Phil. Soc'y 261 (1987).

71. See *supra* note 20. Indeed, Congress recently voted funds for rape and incest victims, although it was unable to override President Bush's veto. N.Y. Times, Oct. 25, 1989, at A1. See also Wicker, *A President's Beholden*, N.Y. Times, Nov. 21, 1989, at A25, criticizing President Bush's veto of renewal of aid to the U.N. Population Fund for family planning services explicitly excluding abortion.

72. Cf. M. GLENDON, *DIVORCE AND ABORTION IN WESTERN LAW* 53-57 (1987) (describing

funding in the Third World may further be warranted by intolerably high infant and maternal mortality rates⁷³ and widespread destitution contributing to human misery on a scale inconceivable in this country.⁷⁴

This contextual approach to population issues finds support in Mary Ann Glendon's comparative study of abortion in western Europe and the U.S.⁷⁵ In her book, Professor Glendon compares the abortion laws of eighteen western European countries, the U.S. and Canada. She finds that most countries permit abortion for "cause," such as serious danger to the women's health, likelihood of serious disease or defect in the fetus,⁷⁶ or a "variety of circumstances which pose exceptional hardship for the pregnant woman."⁷⁷

As Professor Glendon points out, these findings parallel American public opinion polls over an extended period of time.⁷⁸ A recent poll again shows that support for the woman's right to choose abortion depends on the reason suggested for her decision. Eighty-seven percent of those polled thought a woman should be able to obtain a legal abortion if her health was seriously endangered by the pregnancy, while only twenty-six percent thought abortion should be available if the pregnancy interfered with work or education.⁷⁹ From a public policy perspective, Congress may be more willing to finance family planning, including abortion, abroad than at home because of the well-documented health risks associated with repeated pregnancies among women in the Third World. Even when the notion of entitlement was far less widely accepted than it is today, liberal theorists argued that society had some duty to those who would be otherwise unable to survive.⁸⁰

social services and financial support provided in Europe for mothers and infants); *see also* L. NSIAH-JEFFERSON, *Reproductive Laws, Women of Color and Low Income Women in REPRODUCTIVE LAWS FOR THE 1990's* (S. Cohen & N. Taub eds. 1989).

73. Cook, *U.S. Population Policy, Sex Discrimination and Principles of Equality Under International Law* 20 N.Y.U. J. INT'L L. & POL. 93 (1987) (quoting Dr. Hafdan Mahler's speech in which he noted that "[The developing] countries commonly have maternal mortality rates 200 times higher than those of Europe and North America — the widest disparity in all statistics of public health". *Id.* at 93).

74. I am assuming that the aggregate impact of these factors could be legitimately taken into account by Congress for purposes of supporting family planning services; i.e., services that assist individual women in avoiding or terminating a pregnancy. This is not to imply that such factors justify U.S. accession to foreign demographic goals.

75. M. GLENDON, *supra* note 72.

76. These are among what she characterizes as "hard grounds," which also include pregnancy resulting from rape or incest. *Id.* at 14.

77. Professor Glendon calls these "soft grounds." *Id.* at 14.

78. *Id.* at 41.

79. Dionne, *Poll on Abortion Finds the Nation is Sharply Divided*, N.Y. Times, Apr. 26, 1989, at 1, col. 6.

80. *See* J. LOCKE, *TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS* § 43, at 189 (P. Laslett ed. 1967); J.S. MILL, *The Province of Government* from *PRINCIPLES OF POLITICAL ECONOMY* Book V, Chap. XI (1871), *reprinted in* HELD, *PROPERTY, PROFITS AND ECONOMIC JUSTICE* 178, 182 (1980). *See also* R. HOPSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 340 (1948) ("The

2. Conflicts Between International and Domestic Norms

Under the U.S. Constitution, abortion may be elective until fetal viability. The state cannot inquire into the woman's motive for abortion. In the Third World, however, the overwhelming preference for male children raises the question of "discriminatory" abortion. In India and China, for example, abortion has been used to select the sex of the infant.⁸¹ The routine abortion of female fetuses arguably violates the Women's Convention, which requires party states to:

[T]ake all appropriate measures . . . [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes.⁸²

There appears to be a conflict between the two standards.

In ratifying treaties, it is well settled that the U.S. shall not bind itself with regard to provisions of dubious constitutionality.⁸³ While the treaty may be ratified, the U.S. will typically take reservations with respect to such provisions.⁸⁴ A similar approach could be adopted in determining which standard to apply here. One alternative would be to disregard the Women's Convention insofar as it conflicts with the right articulated in *Roe v. Wade*.⁸⁵ Thus, abortions for purposes of sex selection would not be challenged. After all, in the U.S. there is no legal proscription against such abortions. In the U.S., however, there is no widespread female infanticide. Nor is the perception that girls are worth less than boys so prevalent.⁸⁶

Perhaps the value of the international standards can best be appreciated in addressing this kind of situation, which is basically without analog in our society. Although Americans would presumably be offended by abortion to choose the sex of the child, individual decisions to do so (as opposed to legislative requirements) would probably not violate our Constitution. Sex selection as a "cleaner" method of female infanticide"⁸⁷

New Deal established the principle that the entire community through the agency of the federal government had some responsibility for mass welfare."); B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 267 (1980).

81. B. HARTMANN, *supra* note 15, at 247; see also McNamara, *The Population Problem: Time Bomb or Myth*, *FOREIGN AFFAIRS* 1107 (Summer 1984) (discussing abortion of female fetuses in response to coercive birth control programs in China).

82. Art. 5(2), *Women's Convention*, *supra* note 35.

83. *RESTATEMENT (THIRD)*, *supra* note 42, § 302, at 155; *Reid v. Covert*, 345 U.S. 1 (1957).

84. *RESTATEMENT (THIRD)*, *supra* note 42, §§ 313-14, at 179-89.

85. *Roe v. Wade*, 410 U.S. 113 (1973).

86. This perception, of course, is not unknown in the West. See, e.g., G. Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex* in *TOWARD AN ANTHROPOLOGY OF WOMEN* 160 (1975).

87. B. HARTMANN, *supra* note 18, at 248.

may well be barred, on the other hand, by the above-cited provision of the Women's Convention, which mandates the "elimination . . . of practices . . . based on the idea . . . of inferiority [of females]."⁸⁸ The Women's Convention provides a jurisprudential structure for our objections, enabling us to distinguish them from mere cultural bias and to grapple with the issue in a principled manner. While it is beyond the scope of this paper to attempt to resolve this dilemma,⁸⁹ the problem illustrates the indispensability of international norms in the formulation of international family planning policy.

III. HUMAN RIGHTS ADVANCED

This part focuses on the possible impact of the hybrid formulation on three significant human rights,⁹⁰ first describing the right and then discussing the ways in which it would be affected by the approach described in the preceding section. The three rights considered are: the right of reproductive choice for women; women's right to equality; and the right to health and an adequate standard of living. The first right is grounded most firmly in the U.S. constitution, the second is reflected in both U.S. constitutional and international jurisprudence and the third is found only in the international instruments. Analyzing these specific rights, accordingly, should enable us to consider the interplay of the domestic and international standards along a continuum, providing some perspective on the extent to which the hybrid formulation would both further and compromise the two conceptions of rights. Ideally, by addressing the needs and concerns of recipient states, family planning assistance could generate international goodwill as well as furthering the specific rights addressed. By fostering mutual respect between nations, such aid could contribute to an international environment more conducive to the exercise of all human rights.⁹¹ This kind of productive relationship may be particularly difficult to cultivate in this context because of the clash between Western and Third World views as to the position of women in society.⁹²

88. Art. 5(a), *Women's Convention*, *supra* note 35.

89. One possible response might be to decline to fund genetic screening for sex, except where justified by a suspected sex-linked defect. In China, for example, a procedure was developed for determining the sex of the fetus at seven weeks. The procedure was discontinued after twenty-nine of the first thirty women who chose to have abortions aborted female fetuses. Hartmann, *supra* note 18, at 247. Similarly problematic, information about the fetus' sex could be withheld.

90. For discussions of additional rights which would be advanced by revocation of the MCP, see Coliver & Newman, *supra* note 36, at 82 (right to receive and impart abortion information); *id.* at 124 (discrimination against children). See generally Eisler, *supra* note 46.

91. See Eisler, *supra* note 46.

92. Indeed, this may become an imbroglio because of Third World distrust of Western motives. During the 1970's, the population policy of the U.S. was decried by many states in the Third World as "genocide." Ironically, some of the same Third World countries subsequently adopted even more stringent methods of population control. Moreover, American renunciation of its family planning policy, as set forth in the MCP, was for the most part

As suggested below, the generally higher status of women in the West⁹³ may be attributed in part to the degree of reproductive choice which they already enjoy.

This part is divided into two sections. The first considers civil and political rights and the second focuses on economic and social rights.⁹⁴

A. *Civil and Political Rights*

1. Reproductive choice

The first civil right furthered by the hybrid formulation would be the right to reproductive choice. While this right is firmly established in American jurisprudence, its place in international law is more ambiguous. The Civil Covenant provides that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home,"⁹⁵ and, "[e]veryone has the right to the protection of the law against such interference or attacks."⁹⁶ Furthermore, "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."⁹⁷ There is neither a right to abortion nor a prohibition against it under international law.⁹⁸ But at least in those states which recognize a woman's right to choose whether or not to terminate a pregnancy, it should not be abrogated solely because a state lacks the resources to implement it if U.S. family planning assistance is available.

In considering how this right would be affected by the hybrid formulation, I will address two questions. First, what difference does it make whether reproductive choice is considered a right or a policy? Second, assuming it is a right, whose right is it?

a. Reproductive choice — right or policy?

It is far more advantageous for women seeking to exercise reproductive choice if such choice is protected as a right, especially a "fundamental" right under the U.S. constitution, rather than provided as a matter of public policy. First, state curtailment of a fundamental right is rigorously scrutinized. Under the hybrid proposal here, this would mean that the

opposed by Third World delegates at the Mexico City conference. See *supra* note 19.

93. See *infra* text accompanying notes 89-95. See generally *WOMEN IN THE WORLD 1975-1985: THE WOMEN'S DECADE* (L. Iglitzion & R. Ross, 2d ed. 1986).

94. This reflects the respective concerns of the Civil and the Economic Covenants, although the division is not precise here and other international instruments will also be discussed.

95. Art. 17.1, *accord* Art. 16, Universal Declaration of Human Rights, G.A. Res. 217 (III) 1948).

96. Art. 17.2, *Civil Convention*, *supra* note 35.

97. Art. 23.2, *Civil Convention*, *supra* note 35.

98. Coliver & Newman, *supra* note 36, at 83. But see notes 44-48, *supra* (citing, *inter alia*, American Convention on Human Rights, Art. IV., 1. which provides in pertinent part, "Every person has the right to have his life respected. This shall be protected by law and, in general, from the moment of conception.").

U.S. would be foreclosed from independently imposing any restraints on the right unless it demonstrated a compelling interest in doing so, and was unable to further that interest by less restrictive means. Restraints imposed under local law that did not satisfy this standard⁹⁹ would adversely affect the program's evaluation leading to reduced funding, contingent funding or actual termination.

U.S. supported family planning programs would accordingly stress that enhancement of the recipient's own decision-making capacity is the first priority of family planning efforts. This requires that the couple be fully informed as to the options available and their possible consequences. The state's interest in population control is "trumped" by the individual's right¹⁰⁰ and cannot justify its abrogation. Under a rights analysis, accordingly, population control policies that infringe on the individual's right to reproductive choice could lead to the loss of U.S. support for programs implementing such policies. This does not mean that local programs incorporating population goals would necessarily run afoul of the U.S. constitution. But unless public welfare concerns were "compelling," and could not be advanced by any "less restrictive means," U.S. funding could be withdrawn.¹⁰¹

In addition to program evaluation, recognition of reproductive choice as a right makes it more secure. If abortion is merely considered a policy preference, for example, women's access to abortion is likely to be contingent upon the changing priorities of external, usually male, decision-makers. Moreover, any derogation of reproductive choice legitimizes encroachment of the right. Abortion-based restrictions are likely to undermine a far broader range of family planning programs, just as the Helms Amendment, although limited in terms of its initial impact, provided a basis for the MCP's later sweeping attack against family planning. The Helms Amendment should be repealed more because of its role in the erosion of reproductive choice than because of its direct, relatively insignificant, consequences. As Hartmann has observed, banning abortion is merely the first step in the political agenda of the anti-family planning forces.¹⁰²

b. Whose right is it?

Where the couple disagrees on reproductive choice, the final decision

99. See generally, *And the Poor Get Sterilized*, THE NATION, June 30, 1984, at 798-99; Bishop, *Officials Debate Asylum for Chinese Fleeing Abortion Policy*, N.Y. Times, Apr. 3, 1989, at A13, col.1.

100. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

101. *But cf. Webster*, 106 L.Ed. 2d, at 437 (declining to "unnecessarily attempt[] to elaborate the abstract differences between a fundamental right to abortion . . . a 'limited fundamental constitutional right' . . . or a liberty interest protected by the Due Process Clause, which we believe it to be.") If abortion were held to involve merely a liberty interest, the 'strict scrutiny test' set forth in the text would not apply.

102. See B. HARTMANN, *supra* note 18, at 244, 293. See generally Cook & Maine, *Spousal Veto Over Family Planning Services*, 77 AM. J. PUB. HEALTH, 339 (1987).

must be the woman's since she is the one who will be pregnant and give birth.¹⁰³ As Hartmann has noted, however, this is rarely feasible in the Third World. The husband customarily controls the family's money and land, expects sons from his wife, and is likely to regard with hostility any innovation which reduces her dependence on him, particularly if it increases her sexual freedom — and his anxiety about her fidelity.¹⁰⁴ Planning services that exclude the husband in order to encourage the wife's independence simply leave the wife in the untenable position of convincing a suspicious husband of the benefits of birth control. Without support, from the program or her community, her efforts are likely to be futile and she may even risk physical abuse.

Some family planning services have attempted to involve the husband in the process and to educate him as to the benefits of contraception, for the family as well as the wife.¹⁰⁵ Although reproductive choice is the woman's right in theory, in practice she may not be able to exercise it without the consent and cooperation of her spouse. There is no technical violation of a rights' approach, however, as long as there is no legal impediment to the woman's exercise of the right. While it is unlikely that the husband's domination will be significantly undermined merely by explaining to the couple that the right is generally the woman's, such explanations may contribute to a changing perception of women's roles. Recognizing that the right is ultimately the woman's has other practical consequences; among them that no family planning program could require her to obtain spousal consent for contraception, including abortion, even if social pressure compels her to do so.

2. Reproductive choice as a prerequisite for equality and autonomy

It has been suggested that control over the body should be considered the first form of autonomy.¹⁰⁶ Feminists have argued, moreover, that in the reproductive context it is the necessary condition of all later forms. As Elizabeth Moen notes, "[t]he control of fertility by women as *individuals* is necessary for full and equal opportunity in society."¹⁰⁷ The critical

103. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) ("Clearly since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period."). Dixon-Mueller, *U.S. International Population Policy and 'The Woman Question'*, 20 N.Y.U. J. INT'L L. & POL. 143, 167 (1987); see generally *Symposium: Women and International Human Rights*, 3 HUM. RTS. Q. 1 (1981); Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978). *But cf. Where Abortion Laws Stand Now, State by State*, *supra* note 69 (Montana, Utah and Florida have laws requiring that husbands be notified).

104. See B. HARTMANN, *supra* note 18, at 48.

105. See, e.g., 1987 ANNUAL REPORT: IPPF/WHR 27-28 (describing contraception education program for Mexican men in "security institutions").

106. Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977).

107. Moen, *Women's Rights and Reproductive Freedom*, 3 HUM. RTS. Q. 53, 59 (1981); accord L. GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN*

question here is whether reproductive choice empowers women where political, economic and social constraints not only remain in place, but are so pervasive as to call into question even the possibility of "choice."¹⁰⁸

Even under such circumstances, a modicum of reproductive choice offers women the possibility of incremental change in their lives. Control over reproductive capacity is essential, if not sufficient, not only for equality but for any kind of transformation in women's role in the family and society in the Third World.¹⁰⁹ The experience of controlling her own fertility is directly and concretely empowering. Only if she can be free of pregnancy, nursing, and infant care long enough to regain her strength and consider her own needs, can a woman begin to question the political and social forces that circumscribe her life.¹¹⁰

B. *Social and Economic Rights*

1. Health

The Economic Covenant assures the right to health: "The States parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."¹¹¹ The Women's Convention is more specific:

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 . . . "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women . . . (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."¹¹²

The availability of contraception can improve health in three impor-

AMERICA 394 (1976).

108. See *supra* text accompanying notes 92-93, 104.

109. "The question of reproductive choice ultimately goes far beyond the bounds of family planning programs, involving women's role in the family and society at large. Control over reproduction is predicated on women having greater control over their economic and social lives and sharing power equally with men." B. HARTMANN, *supra* note 18, at 34.

110. Indeed, it has been suggested that this is precisely why reproductive choice has been so adamantly opposed by those embracing and incorporating patriarchal norms, including the Catholic Church. See generally Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980). See also Benschhof, *supra* note 20.

111. Art. 12.1, *Economic Convention*, *supra* note 35.

112. Art. 16.1; accord *Universal Declaration*, Art. 19. See Fraser, *Women and International Law*, 11 HARV. WOMEN'S L.J. 171, 174 (1988) (noting that more reservations to the Convention have been made on Art. 16 than on any other article and attributing this to conflict between "strong cultural norms" and the article's mandate). See generally Byrnes, *supra* note 35, at 51-56 (discussing problem of reservations to the Women's Convention).

tant ways. First, it can decrease maternal mortality rates,¹¹³ because it permits women to regain strength between pregnancies,¹¹⁴ to limit pregnancies¹¹⁵ and to avoid particularly dangerous pregnancies.¹¹⁶ Second, it benefits infants, who have higher birth weights and receive better care when there is longer spacing between children. As Dixon-Mueller has pointed out, mortality rates for children between one and two years old are as much as four times higher when there is another birth within eighteen months.¹¹⁷ Third, contraception prevents death from illegal abortions. Illegal abortions in the Third World represent a leading cause of death among women of childbearing age,¹¹⁸ demonstrating the urgent need for the repeal of the Helms Amendment and the MCP in order to safeguard women's right to health.¹¹⁹

The effect of family planning programs on health has not all been positive, however.¹²⁰ Even where contraception is freely chosen, it may have adverse effects on health. First, as our own experience has shown, IUDs and birth control pills are not without significant health risks. Absent adequate education and support personnel, these risks are likely to be compounded by ignorance as to proper use. Additional risks, including abrupt termination of supplies, instruction, and follow-up care, may result from reliance on funding sources subject to political whim. As discussed above, family planning services require an ongoing commitment.

These ill-effects are not inevitable results of family planning. Rather, they are problems resulting from poor administration or the inappropriate priorities of such programs. Health problems are especially prevalent in programs giving demographic goals precedence over individual rights, for example. Thus, the "failures" of family planning, from a health perspective, strengthen arguments for both an adequate level of funding and the need for an emphasis on the human rights consequences of the ser-

113. Mortality rates in excess of 500 per 100,000 live births are common in the Third World, compared to five to 30 per 100,000 in the west. B. HARTMANN, *supra* note 18, at 46; see also Dixon-Mueller, *supra* note 103, at 115. See generally Cook, *Reducing Maternal Mortality: A Priority for Human Rights Law*, in LEGAL ISSUES IN HUMAN REPRODUCTION 185 (1989).

114. See Cook & Dickens, *International Developments in Abortion Laws: 1977-78*, AMER. J. PUB. HEALTH 1305, 1309 (1988) (noting that "epidemiological evidence shows that sound child spacing assisted by availability of abortion contributed positively to reduction of maternal . . . mortality.").

115. Dixon-Mueller, *supra* note 103, at 109.

116. *Id.* at 108.

117. *Id.* at 112-13. See also Cook & Dickens, *supra* note 114, at 1309.

118. Rosenfeld, *Abortion: The Neglected Problem*, 15 PEOPLE 4 (1988) (an estimated 30-40% of 500,000 pregnancy related deaths (150,000-200,000) are attributable to complications of illegal abortions; citing survey of 60 developing countries in late 1970's, estimating 70,000-100,000 maternal deaths annually from complications of abortion).

119. As many commentators have noted, women have abortions whether or not they are legal. The difference is in the cost and the quality of care they receive. See, e.g., R. REPETTO, *supra* note 5, at 50; B. HARTMANN, *supra* note 18, at 47; Rosenfeld, *supra* note 118.

120. For a detailed description of the ill-effects of contraception, and their abuses by population planners in the Third World, see B. HARTMANN, *supra* note 18, at 176-207.

vices provided.

2. Adequate Standard of Living

In addition to health factors, the Economic Covenant assures a right to an adequate standard of living: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing" ¹²¹ The Economic Covenant further recognizes "the fundamental right of everyone to be free from hunger." ¹²² While these provisions have been used to support arguments for the redistribution of resources, ¹²³ it is equally clear that under the Economic Covenant the economic consequences of a growing population ¹²⁴ must be taken into account. ¹²⁵

As Camp has pointed out, the harm to family planning caused by the MCP was not so much loss of support, but the loss of support by specific countries that had spiraling populations. By rescinding those policies, accordingly, the U.S. would be able to reestablish family planning efforts in countries such as India, which "adds more people to the world population than any other country . . . more than all of sub-Saharan Africa combined." ¹²⁶

While national fertility levels reflect aggregate decision-making about population, individual reproductive choice has been shown to be a significant factor. Decisions about reproduction are a function of more than the availability of contraception or abortion, of course, ¹²⁷ but the unavailability of birth control is often pre-emptive. Control over reproduction is one of the major determinants of the individual family's standard of living. Such control, accordingly, is necessary if the family is to provide a "life with dignity" for its members. ¹²⁸

CONCLUSION

By renouncing the MCP and repealing the Helms amendment, and

121. Art. 11.1, *Economic Convention*, *supra* note 35.

122. Art. 11.2, *Economic Convention*, *supra* note 35.

123. See generally Barry, *Humanity and Justice in Global Perspective*, in *ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV* (J. Chapman & J. Pennock eds. 1982).

124. While global population is steadily growing, the rate of population growth is no longer increasing. Repetto, *Population, Resource Pressures and Poverty*, 131, 133, in *THE GLOBAL POSSIBLE: RESOURCES, DEVELOPMENT AND THE NEW CENTURY* (R. Repetto ed. 1985). This has not reassured proponents of the "population explosion" view. See, e.g., Gore, *An Ecological Kristallnacht*. *Listen*, N.Y. Times, Mar. 19, 1989, Op-Ed, § 4, at E27, col.1.

125. For an analysis of the relation between redistribution of resources and population control, see Ratcliffe, *supra* note 4.

126. Camp, *supra* note 16, at 45.

127. See Ratcliffe, *supra* note 4, at 279.

128. Dominguez, *Assessing Human Rights Conditions*, in *ENFORCING GLOBAL HUMAN RIGHTS* (1979); see generally Nielsen, *On the Need to Politicize Political Morality: World Hunger and Moral Obligation*, in *ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV* (J. Chapman & J. Pennock eds. 1982).

applying constitutional and internationally recognized human rights standards to its international family planning policy, the U.S. could substantially further international human rights. It would at least increase the possibility of reproductive choice for women currently without options. While such choice cannot assure equality, it is a prerequisite. Thus, revision of our family planning policy would potentially empower women. It would promote the right to health recognized under the Economic Covenant, especially, but not exclusively, for women and children. It would enable millions to take a critical first step toward an "adequate standard of living." Finally, by demonstrating respect for the concerns and priorities of the rest of the world, particularly Third World women, adoption of the family planning policy considered above would represent a fundamental and long overdue shift in the U.S. approach to international human rights.

This is the inaugural issue for a new section in the *Denver Journal of International Law & Policy*. The International Capital Markets Section will be a part of each issue of the *Journal* and will focus on international capital markets and international securities issues. The *Journal* is honored that Harold S. Bloomenthal will be advising the Section's Executive Committee.