KEYNOTE SPEAKERS

HUMAN RIGHTS AND REPRODUCTIVE SELF-DETERMINATION*

REBECCA J. COOK**

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** J.D. (Georgetown), LL.M., J.S.D. (Columbia), Associate Professor (Research) and Director, International Human Rights Programme, Faculty of Law, University of Toronto, Toronto, Canada.

INTRODUCTION

Women's interests and aspirations are gradually being translated into nationally and internationally recognized rights. One of these rights is the right to decide whether to reproduce or not to reproduce. This right has become "an integral part of modern woman's struggle to assert *her* dignity and worth as a human being."[1] Although women were historically valued only because of their childbearing capacity, women are now coming to value themselves and expecting others to value them as decisionmakers with regard to their own reproduction. Conservative traditions are not accustomed to recognizing women, and even less to valuing women, as decisionmakers in their own lives or in the lives of their children, families, or communities. The modern emphasis, however, is to respect and equip women to be responsible decisionmakers in the lives they centrally affect. There is a transition in the recognition and

1. Morgentaler v. The Queen, 1 S.C.R. 30, 172 (Can. 1988). As Madam Justice Wilson of the Supreme Court of Canada explained:

> [W]omen's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being.

Id.

respect that women are beginning to receive, and in acknowledgement of the legitimacy of women's claims to reproductive and related choice.

The translation of interests into rights has gained momentum through recent U.N. conferences, particularly the 1993 World Conference on Human Rights, held in Vienna,[2] and more recently the 1994 Conference on Population and Development, held in Cairo.[3] The momentum may continue through two U.N. conferences in 1995, the Social Summit in Copenhagen and the Women's Conference in Beijing. These conferences will provide important opportunities to recognize the abuses that women have suffered through denials of reproductive self-determination, physical integrity, and social justice, and to characterize such abuses as violations of particular human rights.

The documents these international conferences produce are important for the advancement of symbolic and educational values, but development of the human rights of women must go beyond the drafting of conference documents. States, the judiciary, nongovernmental organizations (NGOs), and professional legal organizations must ensure that the rights that these documents recognize in principle are respected in practice through effective legal protection at the national, regional, and international levels. Governments must be held politically and legally accountable for neglecting their duties to respect these rights, and for their own and others' violations of human rights. Governments must ensure that justice is accorded to women through the prevention or punishment of violations of women's rights, and through the provision of appropriate individual and collective remedies.

Human rights serve to protect the human dignity of individuals against the power of the State and of those who act under the authority of that power.[4] The significance of international human rights conventions is to recognize the rights of individuals who, without these conventions, would be vulnerable to the intrusions of governments, including governments serving the preferences of democratic majorities. In other words, human rights are rights that individuals can exercise by virtue of their inherent human dignity. Human rights are not dependent on privilege or the legal or democratic approval of others. These are rights that give equal power

2. Vienna Declaration and Programme of Action, *infra doc. biblio.*, ¶¶ 25-71.
3. ICPD Programme of Action, *infra doc. biblio.*
4. Universal Declaration of Human Rights, *infra doc. biblio.*, pmbl.

to each person, including persons who would otherwise be powerless. These rights present the challenge, to be resolved by state and international mechanisms, of balancing one person's rights against those of other persons, of communities, and of the State itself.

An emerging perception of human rights is that they are the instruments through which powerless and disenfranchised individuals and groups can claim and eventually enforce equality.[5] These rights are resisted by those accustomed to the privileges of power and security. Thus, the democratic claim to equal rights is unfamiliar to religious hierarchies that do not depend on democratic credentials for authority and that do not face the discipline of democratic accountability. Religious hierarchies that are accustomed to instructing individuals in their duties, and demanding obedience to the divine will as the religious hierarchies interpret it, are not equipped to protect or even recognize the rights that have resulted from the modern international human rights movement. The challenge of advancing reproductive rights is to accord religious authorities their spiritual influence, while granting the individual the right to reproductive choice legally protected through human rights instruments and institutions.

Absent from conventional discourse about reproductive self-determination have been the voices of women. States have addressed human reproduction through male perspectives, directed by spiritual perceptions and strategic values that award status to procreation and presume community and national strength to depend on numbers. According to these perspectives, the role of women is to bear men's children and to tend men's homes, as both a family and a national duty. Against this view, the physical costs of childbearing are measured both in statistics of maternal mortality and morbidity, and in qualitative considerations of women's satisfaction with their lives. At one extreme, women are exhausted by repeated pregnancy and the burdens of childcare, and at the other, infertile women may have no status or function in their communities or families. Between the extremes, women want to space and manage their pregnancies to maximize their survival and well-being and that of their children and families, and these women often seek reproductive health services for this purpose.

The Cairo Conference on Population and Development offered stark testimony concerning the centrality of women's reproductive self-determination to their human dignity. A conflict exists between

5. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

conservative forces that fear the impact of women's control of their reproduction on traditional visions of family and community life, and pragmatic forces that measure the quantitative and qualitative costs that communities, families, and women suffer through absence of that control. The pragmatic forces point out that there is no incompatibility between women's reproductive self-determination and the welfare of their families, and that, on the contrary, women's reproductive health is an advantage to their families and communities as well as an individual human right that it is beneficial for societies to recognize.

Most countries have committed themselves to respect human dignity and physical integrity through membership in international human rights conventions. The separate human rights that contribute to reproductive self-determination can be analyzed and abstracted in a variety of ways.[6] Human rights originating in the various international and regional human rights instruments are clustered around reproductive interests in Table I below. The reproductive interests are broadly categorized as:

* reproductive security and sexuality
* reproductive health
* reproductive equality
* reproductive decisionmaking.

These categories are fluid and can vary depending on the reproductive issue at stake. Sexuality, for example, can be expressed both as part of reproductive security and as part of reproductive health. The clustering of human rights around reproductive interests is also fluid and can be arranged differently. The right to education, for example, is relevant to the protection of both reproductive health and reproductive decisionmaking. Separately expressed rights are not insulated from but interact dynamically with and inform each other.

The purpose of clustering human rights around reproductive interests is to show how different human rights can be applied to advance reproductive interests. It does not suggest that there is any

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6. *See, e.g.*, RUTH DIXON-MUELLER, POPULATION POLICY AND WOMEN'S RIGHTS: TRANSFORMING REPRODUCTIVE CHOICE 12-15 (1993); KATARINA TOMAŠEVSKI, SWEDISH INTERNATIONAL DEVELOPMENT AGENCY, HUMAN RIGHTS IN POPULATION POLICIES (1994); Reed Boland et al., *Honoring Human Rights in Population Policies*, *in* POPULATION POLICIES RECONSIDERED: HEALTH EMPOWERMENT AND RIGHTS 89 (Gita Sen et al. eds., 1994); Rebecca J. Cook, *International Human Rights and Women's Reproductive Health*, 24 STUD. FAM. PLAN. 73 (1993); Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645 (1992); Sonia Correa & Rosalind Petchesky, *Reproductive and Sexual Rights: A Feminist Perspective*, *in* POPULATION POLICIES RECONSIDERED: HEALTH EMPOWERMENT AND RIGHTS, *supra*, at 107; Lynn P. Freedman & Stephen L. Isaacs, *Human Rights and Reproductive Choice*, 24 STUD. FAM. PLAN. 18 (1993); Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309 (1991).

TABLE: HUMAN RIGHTS APPLICABLE TO REPRODUCTIVE SELF-DETERMINATION

Conventions → / Rights ↓	Universal Declaration of Human Rights	Int'l Covenant on Civil & Political Rights	Int'l Covenant on Economic, Social & Cultural Rights	Int'l Convention on the Elimination of All Forms of Racial Discrimination	Convention on the Elimination of All Forms of Discrimination Against Women	Convention on the Rights of the Child	European Convention on Human Rights & its 5 Protocols & Social Charter	American Convention on Human Rights & its Protocol	African Charter on Human & Peoples' Rights
REPRODUCTIVE SECURITY AND SEXUALITY									
Right to Life & Survival	3	6				6	2	4	4
Right to Liberty & Security	3	9		5(b)		37(b)-(d)	5	7	6
Right to be Free from Torture or Ill-Treatment	5	7				19, 34, 37(a)	3	5	5
Right to Marry and Found a Family	16	23	10	5(d)(iv)	16	8, 9	12	17	18
Right to Private and Family Life	12	17	10		16	16	8	11	4, 5
REPRODUCTIVE HEALTH									
Right to Health Care	25		12	5(e)(iv)	11(f), 12, 14(b)	24	Charter: 13	26 Protocol: 9, 10	16
Right to Benefits of Scientific Progress	27(2)		15(1)(b), 15(3)					26	22
Right to Education	26		13, 14	5(e)(v), 7	10, 14(d)	28, 29	Protocol 1:2 Charter: 13	26	17

TABLE: HUMAN RIGHTS APPLICABLE TO REPRODUCTIVE SELF-DETERMINATION (continued)

Conventions → / Rights ↓	Universal Declaration of Human Rights	Int'l Covenant on Civil & Political Rights	Int'l Covenant on Economic, Social & Cultural Rights	Int'l Convention on the Elimination of All Forms of Racial Discrimination	Convention on the Elimination of All Forms of Discrimination Against Women	Convention on the Rights of the Child	European Convention on Human Rights & its 5 Protocols & Social Charter	American Convention on Human Rights & its Protocol	African Charter on Human & Peoples' Rights
REPRODUCTIVE EQUALITY									
Right to Non-Discrimination on the Grounds of ↓									
Sex	1, 2, 6	2(1), 3	2(2), 3		1, 2, 3, 4, 5	2(1)	14	1, 24	2, 3, 18(3), 28 (duty)
Marital Status	1, 2, 6	2(1)	2(2)		1		14	1, 24	2, 3, 18(3), 28
Sexual Orientation	1, 2, 6	2(1)	2(2)				14	1, 24	2, 3, 18(3), 28
Race	1, 2, 6	2(1)	2(2)	1, 2, 3		2(1)	14	1, 24	2, 3, 18(3), 28
Age	1, 2, 6	2(1)	2(2)			2(2)	14	1, 24	2, 3, 18(3), 28
REPRODUCTIVE DECISION-MAKING									
Right to Receive & Impart Information	19	19		5(d)(viii)	10(e), 14(b), 16(e)	12, 13, 17	10	13	9
Right to Freedom of Thought, Conscience & Religion	18	18		5(d)(vii)		14, 30	9	12, 13	8
Right to Political Participation	21	25		5(c)	7, 8		10, 11	16, 23	13
Right to Freedom of Assembly & Association	20	21, 22	8	5(d)(ix)		15	11	15, 16	10, 11

single approach to clustering human rights around reproductive interests or categorizing reproductive interests. As human rights are applied more vigorously to reproductive interests, there will in fact be a variety of ways of applying human rights to serve reproductive interests.

I. DEVELOPING THE CONCRETE SUBSTANCE OF ABSTRACT HUMAN RIGHTS

There is a need to develop the concrete substance of abstract human rights through the application of feminist methodologies in the standard setting function of treaty bodies. The challenge is to interpret human rights in a way that enables reproductive self-determination in every country and culture. This interpretive challenge is formidable. It requires an understanding of the causes of reproductive subordination and reproductive ill-health and an ability to understand the world through the eyes of those whose reproductive goals are frustrated or compromised, particularly women.

The discourses of public health and human rights are different and have evolved with separate goals in mind.[7] To begin, the public health discourse addresses the average health of populations while the human rights discourse addresses the rights of individuals. One needs to examine the impact of reproductive health policies and programs on the exercise of human rights. For example, health programs that only serve married individuals discriminate on grounds of marital status. The reproductive health impact of human rights violations, such as rape and domestic violence, also needs to be considered. The linkages between reproductive health and human rights are varied and complex, and our understanding of them will evolve over time. Perhaps the best way to start is to examine some methodologies that could be applied to develop a better understanding of women's perspectives on reproductive self-determination.

A. Feminist Methodologies

1. Sex and gender

Women suffer discrimination on both sex and gender grounds. Sex is determined as a matter of biology, but gender is a product of social construction, culture, and psychology. Many languages ascribe gender to objects, recognizing them to have a masculine or feminine

7. *See generally* Jonathan Mann et al., *Health and Human Rights*, 1 HEALTH & HUM. RTS. 6 (1994).

character, while some use a gender-neutral form. Beyond language, characteristics and activities can be classified as essentially masculine or feminine. Masculine activities are associated with strength, firmness of will, consistency, and, for instance, courage. Activities of law-making, politics, warfare, trade, and decisionmaking, including medical decisionmaking, are seen as masculine, and women who engaged in these activities once appeared to act unnaturally. Naturally feminine behaviour is artistic, emotional, fickle, and indecisive, but also sensitive, nurturing, and caring.

Occupations that depend on feminine-gendered qualities, such as nursing the young and caring for disabled and elderly persons, tend to have a low socioeconomic status. Homemaking, childcare, and cottage agriculture tend not to be included in national estimates of economic output. In more affluent economies, these activities do not accumulate pension entitlements because those who undertake them, most frequently women in their own homes, are not deemed members of the workforce. Occupations that are highly esteemed and rewarded, ranging from leadership in learned professions to participation in professional sports, are associated with masculine qualities.

Historically, laws were used to exclude women from membership in such male-gendered institutions as universities and medical schools, and to prevent them from joining the legal, military, and clerical professions. Women accordingly suffered explicit discrimination based on sex and implicit discrimination based on gender.

In the context of modern reproductive rights, women continue to suffer both sex and gender discrimination. Women are considered incapable of prudent decisionmaking concerning abortion, access to which remains widely governed by legislation shaped by male values, and women's resort to sterilization and contraception is frequently dependent on a husband's authorization.[8] The authority of men in their homes is often buttressed worldwide by governmental and social tolerance of violence directed against their wives.

Protection of women's collective reproductive rights requires States to undertake gender planning not simply to achieve the abstract value of justice, but to conform to legally binding international human rights standards. Gender planning requires meeting the practical and strategic needs of women,[9] a need unmet in most countries, includ-

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8. Rebecca J. Cook & Deborah Maine, *Spousal Veto over Family Planning Services*, 77 AM. J. PUB. HEALTH 339 (1987).

9. Caroline O. N. Moser, *Gender Planning in the Third World: Meeting Practical and Strategic Gender Needs*, 17 WORLD DEV. 1799 (1989).

ing those with advanced economies. Women's practical reproductive needs are served through programs to reduce unwanted pregnancy and the risk of sexually transmitted diseases, including HIV. The Safe Motherhood Initiative cosponsored by several United Nations agencies and international nongovernmental organizations is admirably intended for this purpose. It is not a criticism of the initiative to observe, however, that its practical emphasis on the need for safety in motherhood does not advance women's strategic needs to achieve full social, political, and related equality.

An exclusive focus on motherhood is dysfunctional to women in that, if the value of women is perceived to arise solely through motherhood, women acquire status only through pregnancy and childbirth.[10] Where women possess additional and alternative values through which they contribute to society, such as through their economic, professional, cultural, artistic, and other capacities, motherhood will be esteemed in balance with these other capacities. Societies as well as individual women will want more from women than their reproductive capacities, and will balance women's reproductive roles against the benefits of women's additional capacities that contribute to social flourishing.

Women have separate but related capacities for reproduction, production, and community management.[11] Societies whose legal and other structures liberate and equip women to serve in all three capacities will value motherhood no less, but will permit women to serve their families and societies in additional ways. The health damage to women and the demographic consequences for their societies of excessive childbearing will be reduced where women are able and expected to contribute to their families and communities by means in addition to motherhood. Families will be motivated to demand and employ family planning services, and governments and communities will be motivated to provide them.

Top-down programs of population control that do not incorporate into their planning perceptions of women at the grassroots compel women's compliance as merely a means to their ends. This control mentality is a male-gendered characteristic, which stands in contrast to female-gendered characteristics that focus on personal relationships and the ethics of care.[12] The control mentality can flourish where

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10. *See* Mahmoud F. Fathalla, *Women's Health: An Overview*, 46 INT'L J. GYNECOLOGY & OBSTETRICS 105 (1994).

11. *See id.*

12. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S MORAL DEVELOPMENT (1982).

women lack the power to influence governmental agencies. Even democratic governments tend to maintain patriarchal institutions, as conservative leaders lack incentives to empower women to make contributions that conservative leaders perceive would introduce emotion, indeterminacy, and irrationality.[13]

Population control programs may be insensitive to issues concerning contraceptive methods and mixes of methods that are most suitable for women in the circumstances of their lives and, for instance, the implications of women's failure to bear children according to their husbands' and wider families' expectations. Women more than men suffer from denials and abuses of their reproductive rights, experienced across a spectrum from nonconsensual birth control to inaccessibility of wanted family planning services.

Law-making and law enforcement have evolved as male-gendered activities. Within the national, international, and religious institutions from which laws have emerged, women have traditionally been absent, often by default but frequently by explicit barriers. Traditional religious institutions whose leaders claim appointment by divine authority or have ascended from orders below have denied or obstructed women's eligibility for senior participation. The history of democratic institutions also discloses the early disenfranchisement of women. Women were perceived to act unnaturally if they presumed to engage in affairs of men such as politics, social advocacy, and conflict management. The interests of women have, accordingly, been identified by, and represented in, law through the instrumentality of men, and have centered around men's perceptions and interpretations of women's needs. Both men and agencies designed to serve men's interests and perceptions of nature, justice, and well-being have spoken for women.

Legal institutions designed to identify, prevent, and remedy abuses of rights, in the past have not been directly informed of women's special interests, needs, and vulnerabilities. The peculiar injustices that women have suffered because they are women have been invisible and unrecognized; they have been unappreciated through the intelligence and sensibilities of men, or rationalized as natural consequences of women's innate characteristics, particularly their physiology and reproductive biology. Women's biology was their destiny. The injustices to reproductive rights that women have suffered through denial of services that contribute to human dignity,

13. *See* GERDA LERNER, THE CREATION OF PATRIARCHY (1986).

and depredations women have suffered against their physical integrity and self-determination, have been denied or ignored by men, justified in defense of the moral order or, for instance, found necessary for the promotion of economic development.

2. The woman question

A legal remedy for the compounded violations of reproductive rights suffered by women may be discerned by scrutinizing prevailing and proposed state practices affecting reproduction by reference to how they serve, advance, or retard women's reproductive self-determination. The features that facilitate women's self-determination can be understood by both sexes, but must be identified by personnel who are sensitized to women's interests and able to hear women's voices. It should be part of the discipline within those governmental agencies that propose social programs and policies that they ensure that intended programs affecting health, reproduction, and related matters have been reviewed from the perspectives of women. Similarly, legislatures must review legislative proposals in light of women's perspectives.[14]

When courts assess the compatibility of national legislation and administrative practices with those human rights obligations that the State claims to respect, courts may require evidence that such laws and practices neither discriminate on grounds of sex nor have a harmful impact on women's rights to reproductive self-determination.[15] Government lawyers advocating a particular law or practice, and their opponents claiming that a law or practice violates human rights standards, must both address how the law or practice impacts on women. In other words, they must ask themselves and inform the court how the law answers "the woman question."

What has been described and popularized as "the woman question" contests common assumptions of laws' gender neutrality, pointing to the emergence of almost all law from male-gendered institutions and value systems, and questions whether laws have the same impact within the environments that women experience as they have within those that condition men's perspectives. As a leading commentator on women's human rights has explained:

> In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem

14. *See* TOMAŠEVSKI, *supra* note 6, at 100-04 (discussing human rights checklist).

15. The Supreme Court of Canada declared restrictive criminal abortion legislation unconstitutional as violative of human rights in that it failed to respect women's own "priorities and aspirations." Morgentaler v. The Queen, 1 S.C.R. 30, 32 (Can. 1988).

> more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only non-neutral in a general sense, but also "male" in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected.[16]
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> Without the woman question, differences associated with women are taken for granted and, unexamined, may serve as a justification for laws that disadvantage women. . . . In exposing the hidden effects of laws that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.[17]

Parallel questions could be raised from perspectives of, for instance, adolescents, the poor, racial minorities, and the disabled. A notable feature of all of these groups, however, is the special vulnerability of their women members. An initial application of human rights law to reproductive health may be appropriately undertaken from a generalized perspective of women as such, in light of the burden that repressive and inadequate laws affecting reproductive health impose on women of all populations.

The special challenge of exposing the inequitable and oppressive impact on women of laws and practices is confronting not simply women's experiences throughout all levels of society, but also confronting conscientious, caring, and committed leaders engaged at the grassroots levels in communities. Those unfamiliar with analysis undertaken from women's perspectives tend to react with shock, denial, and outrage at the assertion that they have subscribed to, shaped, and operated oppressive institutions. One should not attempt to answer "the woman question" without investigating the context within which women of different socioeconomic, educational, and cultural communities can avail themselves of reproductive options. The investigation may require listening to unfamiliar voices, and giving voice to the silent and the silenced. Asking the initial question invites a cascade of further questions that relate to particular social structures, and the need to gather authentic responses before an answer can conscientiously be given for a particular country.

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16. Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).
17. *Id.* at 843.

B. Standard Setting

Standards need to be developed with respect to each human right in order to measure the degree of observance that satisfies States' obligations under international law, and to determine what a State needs to achieve to ensure effective protection of the right. The Vienna Declaration and Programme of Action of the 1993 World Conference on Human Rights specifically recommends that priority be given to the development of scientific standards and indicators for economic, social, and cultural rights.[18] Rights relating to reproductive health protection have yet to be clearly defined, and, therefore, indicators are particularly needed in this area.

The general dearth of international standards for observing rights relating to reproductive self-determination provides opportunities to develop and propose practical criteria that can be applied by States and adopted by committees created by various human rights treaties to monitor their observance. These bodies include the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women, and the various regional treaty monitoring bodies. Standards are needed to determine and measure States Parties' performance and progress. The Committee on Economic, Social and Cultural Rights, for instance, is currently drafting a General Comment on the Right to Health Care. The kind of standards that the Committee adopts will affect how States perceive their obligations with regard to reproductive health protection. The Committee on the Elimination of Discrimination against Women is also developing a General Recommendation on health.

General Comments or General Recommendations describe what States Parties must do in order to observe rights protected by conventions. They may set standards to establish the minimum conduct that States must undertake to comply with legal obligations and advance the realization of rights. These standards, or indicators, equip States to discharge reporting responsibilities under the various international human rights treaties, inform treaty-based committees of the types of data they may request and receive, and serve as advance notice to reporting States of the criteria by which compliance may be monitored.

In developing standards through General Comments or General Recommendations, treaty-based committees need to be encouraged

18. Vienna Declaration and Programme of Action, *infra doc. biblio.*, ¶ 98.

to rely on the Cairo Programme of Action as an important source of information on the linkages between reproductive self-determination and human rights. The significance of the Cairo Programme lies in its articulation of specific measures that countries have agreed to use to advance reproductive self-determination. Human rights conventions establish general laws that can be applied to reproductive self-determination, but the Cairo Programme spells out particular steps that countries have agreed to take within specified time periods.

C. Documenting Abuses

Rights are violated in a variety of different ways, and characterizations of violations vary. For purposes of this paper, violations will be analyzed in three categories:

1. violations resulting from direct government actions (*e.g.*, coercive sterilization programs, and conditioning access to services by, for example, making abortion services available only to women who agree to sterilization at the same time);
2. violations related to a State's failure to fulfil the minimum obligations of human rights (*e.g.*, neglecting to undertake measures for the prevention and reduction of maternal mortality, and not preparing and submitting reports required under human rights treaties);
3. violations related to patterns of discrimination (*e.g.*, policies that result in differential literacy rates, persistent and serious discrepancies in policies and/or budget allocations that cumulatively disadvantage the reproductive health status of certain groups (such as adolescents) or populations of regions (such as rural women).[19]

Category 1 violations, resulting from direct state actions, are the simplest to identify and are comparable to breaches of civil and political rights. These violations are "events" during which the State engages in activities that are contrary to rights relating to reproductive security and reproductive decisionmaking.

Violations in category 2, resulting from failures to fulfil minimum obligations, are comparable to violations of economic, social, and cultural rights. These violations require a definition of central obligations of the rights relating to reproductive health protection and are based on "standards," which in large part have yet to be

19. This categorization follows the categorization of violations by the Project on the Development of Improved Methods and Resources for NGOs to Monitor Economic, Social and Cultural Rights, of the Science and Human Rights Program, American Association for the Advancement of Science, Washington, D.C. (1994).

developed by the relevant human rights treaty-based monitoring bodies. In developing indicators for rights relating to reproductive health protection, regard might be paid to the World Health Organization's (WHO) Global Indicators for Monitoring and Evaluating Health for All by the Year 2000.[20] WHO's indicators include the reduction of maternal mortality by half in every country.[21]

Category 3 violations relate to patterns of discrimination regarding civil and political rights and also rights of an economic, social, and cultural nature, such as the right to health care. These violations relate to reproductive equality and the right to equal enjoyment of reproductive security and sexuality, reproductive health, and reproductive decisionmaking. Such violations can be based on both events-based and standards-based data, and require both negative directives to prevent discrimination and the positive allocation of resources to compensate for past discrimination. Monitoring and identifying patterns of reproductive discrimination will require the application of reproductive health data and perhaps the development of new statistical techniques.

Data, whether events-based or standards-based,[22] can play an instrumental role in triggering legal accountability of States for violations of internationally protected human rights of reproductive self-determination. While States may be held to account before international tribunals, evidence of abuse can be no less, and often more, relevant to the way in which one State conducts its relations with another. States resent, but also react to, their characterization as pariah states among the community of nations, and may amend their practices, while denying the justice of their condemnation, to maintain their international reputations. In this way, international human rights practice has the capacity to "promot[e] change by reporting facts."[23]

The nature of the violation to be investigated will define the data to be employed. Reports, including those developed by the United

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20. *See* REBECCA J. COOK, WORLD HEALTH ORGANIZATION, WOMEN'S HEALTH AND HUMAN RIGHTS 13-18 (1994).

21. WHO Res. EB85.R5 (1990); WORLD HEALTH ORGANIZATION, DEVELOPMENT OF INDICATORS FOR MONITORING PROGRESS FOR HEALTH FOR ALL BY THE YEAR 2000 (Health Series No. 4, 1981); WORLD HEALTH ORGANIZATION, IMPLEMENTATION OF THE GLOBAL STRATEGY FOR HEALTH FOR ALL BY THE YEAR 2000, SECOND EVALUATION AND THE EIGHTH REPORT ON THE WORLD HEALTH SITUATION, WHO Doc. A45/3 (1992).

22. *See generally* HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT (Thomas B. Jabine & Richard P. Claude eds., 1992) [hereinafter Jabine & Claude].

23. Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights Fact Finding*, 3 HARV. HUM. RTS. J. 83, 84 (1990).

Nations and its specialized agencies,[24] and nongovernmental organizations,[25] demonstrate how governmental action and neglect can implicate rights relating to reproductive self-determination. Events-based and standards-based data can be used to evaluate how effectively the right in question has been protected by the State, and whether an alternative approach would have been more effective.[26] In the reproductive health area, it has been suggested that data be viewed in personal, clinical, epidemiological, and political terms.[27] Careful documentation of data, whatever its sources, is needed to hold States accountable for violations of the range of rights relating to reproductive self-determination.

Meticulously documented events-based data can show that human rights abuses represent policies rather than merely individual aberrations. Cases can demonstrate the absence of government efforts to eliminate and remedy abuses, and can be employed to analyze trends over time. Cases before international and national tribunals, as well as events that are publicized by nongovernmental human rights organizations, can direct attention beyond their facts to the underlying conditions of abuse. Personalized individual testimony can be more effective than more abstract explanations of the history and dimensions of violations of rights relating to reproductive self-determination. Testimony presented at meetings such as the Women's Tribune at the nongovernmental Forum of the 1993 Vienna Human Rights Conference,[28] for instance, can generate names that will come to personify victimization by abuse of basic human rights.

Standards-based data are used in international human rights monitoring when States' programmatic obligations are the units of

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24. *See, e.g.*, CARLA ABOUZAHR & ERICA ROYSTON, WORLD HEALTH ORGANIZATION, MATERNAL MORTALITY: A GLOBAL FACTBOOK (1991); UNITED NATIONS STATISTICS OFFICE, THE WORLD'S WOMEN 1970-1990: TRENDS AND STATISTICS, U.N. Doc. ST/ESA/STAT/Ser.K, U.N. Sales No. E.90.XVIII.3 (1991); UNITED NATIONS, CENTER FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, VIOLENCE AGAINST WOMEN IN THE FAMILY, U.N. Doc. ST/LSDMA/2. U.N. Sales No. E.89.IV.5 (1989); UNICEF, THE GIRL CHILD: AN INVESTMENT IN THE FUTURE (1990).

25. *See, e.g.*, AMNESTY INTERNATIONAL, WOMEN IN THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN (1991); CENTER FOR REPRODUCTIVE LAW AND POLICY, VIOLATIONS OF WOMEN'S REPRODUCTIVE RIGHTS: A SELECTION OF TESTIMONIALS FROM AROUND THE WORLD (1994); USTINA DOLGOPOL & SNEHAL PARANJAPE, INTERNATIONAL COMMISSION OF JURISTS, COMFORT WOMEN: THE UNFINISHED ORDEAL (1994); HUMAN RIGHTS WATCH, PUNISHING THE VICTIM: RAPE AND MISTREATMENT OF ASIAN MAIDS IN KUWAIT (1992); HUMAN RIGHTS WATCH & MIDDLE EAST WATCH, CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL (1991).

26. *See* Jabine & Claude, *supra* note 22.

27. *See* Deborah Maine et al., *Risk, Reproduction, and Rights: The Uses of Reproductive Health Data, in* POPULATION AND DEVELOPMENT: OLD DEBATES, NEW CONCLUSIONS (Robert Cassen ed., 1994).

28. *See* Charlotte Bunch & Niamh Reilly, Center for Women's Global Leadership, Demanding Accountability: The Global Campaign and Vienna Tribunal for Women's Human Rights (1994).

analysis.[29] Such data is most useful when it includes accompanying references to the internationally defined standards at issue.[30] Disaggregation of data by sex is usually essential to prove a violation of internationally recognized standards that measure discrimination against women. Data exist in reliable published reports[31] that advocates for reproductive self-determination can effectively employ. In addition, however, advocates may have to generate new standards-based data by detached investigation in order to determine whether suspicions of discrimination have demonstrable substance, and to determine how violations of rights relating to reproductive self-determination can most reliably and effectively be proven.

Nongovernmental organizations concerned with reproductive self-determination may document human rights abuses with a credibility that justifies the demand for state accountability. Organizations preparing and presenting reports, however, must anticipate severe scrutiny by criticized States with a view to repudiation and condemnation of the data. The challenge is both to apply existing credible data and to generate new data to hold governments accountable. Reproductive health agencies need to build and maintain their own international reputations for rigor and balance, which will afford their reports sufficient reliability to found demands for state accountability.

II. THE APPLICATION OF HUMAN RIGHTS TO REPRODUCTIVE SELF-DETERMINATION

Rights within each of the four categories that compose reproductive self-determination warrant separate attention. Human rights tend to possess both negative and positive aspects. Negative rights are more easily observed by States, since they frequently require no more than governmental restraint from intervention in individuals' personal choices and family lives. International conventions, however, may require repeal of grounds of legal intrusion in private life by state officers and private persons, such as decriminalization of abortion.

Positive rights may require States' active engagement in the protection and promotion of rights, such as by the reallocation of public resources that the government considers would better serve the public through other uses. State responsibility for breaches of rights is more easily established when state intrusion violates the negative

29. Jabine & Claude, *supra* note 22.

30. Jabine & Claude, *supra* note 22, at 9-10.

31. *See, e.g.*, ABOUZAHR & ROYSTON, *supra* note 24; JOHN A. ROSS & ELIZABETH FRANKENBERG, FINDINGS FROM TWO DECADES OF FAMILY PLANNING RESEARCH (1993); NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 9-19 (1993).

aspect of rights, because a single incident may demonstrate the violation. State failure to fulfill a positive right, on the other hand, requires evidence of failure to provide services to those entitled. The State may present evidence that it is observing a general standard in accordance with which respect for the right is measured. Exercise of the right may be respected through state provision of a given level of facilities, personnel, and material supplies, even though a service may not be available at any particular instance. Violation of a positive right is evidenced by a lack of access to services objectively measured over a significant time and an eligible population.

What women seek from the state is "[a] guarantee of the basic conditions necessary for reproductive autonomy . . . . In essence, the government must assume greater responsibility for removing barriers to choice and expanding the range of choices available."[32] For this purpose "the state must assume a more affirmative role in establishing the social as well as the legal conditions for reproductive autonomy . . . . Promoting greater reproductive responsibility in men is crucial to ensuring equality for women."[33]

A. Rights Relating to Reproductive Security and Sexuality

Reproductive security and sexuality depend on respect for several related rights that are separately identified in human rights conventions. These rights include the right to life, the right to liberty and security of the person, the right to be free from torture and ill-treatment, the right to marriage and to found a family, and the right to enjoyment of private and family life. The individual and collective protection and promotion of these rights advance the sexuality and reproductive security necessary for reproductive self-determination.

These rights are identified below with brief discussions of their significance for sexuality and reproductive security. In a comprehensive review of the contribution that human rights could make to sexuality and reproductive security, each one would bear amplification in the contexts of different communities, societies, and socioeconomic groups and countries.

1. The right to life and survival

The right to life is a precondition of all other human rights, but the substance of the right in human rights law has been confined to the entitlement to due process of law before subjection to capital

32. Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1203 (1994).
33. *Id.* at 1205.

punishment. This approach fails to respond to the estimated 500,000 women each year who die for pregnancy-related reasons.[34] The right should be developed through the use of feminist methodologies, human rights jurisprudence, and General Comments, to serve each woman whose life is liable to end through avoidable or postponable pregnancy.

Death in childbirth remains a common hazard in many developing countries, where cultures and religious beliefs may serve to mask the incidence of maternal death that could be prevented by inexpensive and available interventions. Equal evaluation of the lives of girl children with those of boys and more equitable allocations of family and community resources between the sexes would mitigate the burden of malnutrition and anaemia that results in maternal deaths, as would postponement of marriage and pregnancy until later in adolescence. Much could be accomplished by changes in social practices and attitudes to protect women's survival of pregnancy long before conception. Prenatal care by appropriately trained personnel and similar management of delivery and post-partum care would also reduce maternal death.

Comprehensive reproductive health care services, including contraceptive services,[35] and requested terminations of life-endangering pregnancies and pregnancies that occur too soon after childbirth would contribute to survival of pregnancy. The lives protected by these measures would include those of young dependent children, whose own survival is severely prejudiced in many settings by the deaths of their mothers. Evidence indicates that one in five infant deaths could be avoided if women could space their pregnancies more than two years apart.[36]

2. *The right to liberty and security of the person*

The right to liberty and security is linked to the rights to life and reproductive health in that women's lack of access to effective means of birth spacing and fertility control is a violation of women's human right to liberty and security of the person[37] and endangers women's lives and longevity.[38] Reproductive integrity is a component of, but

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34. ABOUZAHR & ROYSTON, *supra* note 24, at 1.

35. JOHN A. ROSS & ELIZABETH FRANKENBERG, POPULATION COUNCIL, FINDINGS FROM TWO DECADES OF FAMILY PLANNING RESEARCH 85-87 (1993).

36. DEBORAH MAINE & REGINA MCNAMARA, COLUMBIA UNIVERSITY CENTER FOR POPULATION AND FAMILY HEALTH, BIRTH SPACING AND CHILD SURVIVAL (1985).

37. Rebecca J. Cook, *Women's International Human Rights: The Way Forward*, 15 HUM. RTS. Q. 230, 241 (1993).

38. Cook, *International Protection of Women's Reproductive Rights*, *supra* note 6, at 688-96.

does not exhaust, individual security. Implicit in the exercise of reproductive choice is security from assault at the hands of partners and others, including security against sexual violence and assault. Many women feel unsafe because they are subject to violence in their homes and in their communities, including their workplaces. Women's exposure to brutality, sexual abuse, and exploitation can begin early in their lives when they suffer neglect, malnutrition, and positive acts of physical violence and sexual exploitation. The systematic devaluation of girl children that characterizes many communities contributes to the sexual vulnerability and reproductive bondage of adolescent women, and to girl brides joining their husbands' families more as chattels than persons. Inequality in the home, related to both communal and cultural acceptance of male dominance and tolerance of domestic violence, denies women choices in many aspects of their lives.

The loss of liberty associated with inaccessibility of contraceptive services may seem minor compared to life- and health-endangering violence that women risk in many settings, from vicious war-zones torn by political, ethnic, and racial strife, to homes in pleasant suburbs maintained by comfortable incomes. The pregnant schoolgirl or the daughter in a family that considers her chastity a family asset, however, experiences a loss of liberty and security (both for her more distant future and for her immediate present) against which the enforcement of human rights law would afford protection. Loss of liberty and security includes not just physical incarceration, segregation, and low esteem in the eyes of others, but also vulnerability to hostile attitudes and a feeling of captivity in the face of inescapable social structures.

Government control of population growth may be expressed in crude programs, all of which implicate, if not actively violate, the right to liberty and security of the person. For instance, there have been programs to reduce population by openly compelled sterilization and abortion,[39] and for promotion of population by stringently enforcing against health service professionals and women prohibitions of abortion, and denial of voluntary sterilization and contraception services.[40] Control may also be achieved through more subtle or targeted means, such as by making the use of contraception a

39. *See generally* E. Tobin Shiers, Note, *Coercive Population Control Policies: An Illustration of the Need for a Conscientious Objector Provision for Asylum Seekers*, 30 VA. J. INT'L L. 1007, 1010-16 (1990).

40. *See* Charlotte Hord et al., *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, 22 STUD. FAM. PLAN. 231 (1991).

condition of receiving welfare payments, or allowing courts to offer convicted women offenders probation on the condition that they submit to invasive long-acting contraceptive implants.[41] Similarly, medical care may be arranged so that women who have accepted long-acting contraceptive implants cannot have them removed on simple request.[42]

Counterfoils to the control mentality in government are respect for democratic rights and the liberation of groups vulnerable to external reproductive controls. Where individuals enjoy the power to control key decisions in their own lives, such as decisions over their reproduction, they are less vulnerable to coercive governmental attempts to control or promote population growth. Governments that view the best interests of their nations as served by a decrease or increase in the rate of population growth are clearly entitled to announce their preferences and take steps towards them. Human rights, protected by international humanitarian conventions, however, limit the ability of governments to carry out their population plans. Governments cannot impose top-down programs to enforce population goals. Instead, they may offer incentives in light of which individuals can freely exercise reproductive self-determination.

3. The right to freedom from torture and ill-treatment

International testimony on the many forms of violence to which women are subject shows the pervasiveness of outrages against women's sexual and reproductive integrity.[43] Women are abused and raped as sexual objects. They are raped in front of their husbands, fathers, brothers, and other family members for purposes of humiliation and torture. They are also raped as a form of ethnic "cleansing" to make them unmarriageable in the communities in which they live as members of ethnic groups.[44] Women may be tortured in their own right, for instance as occupants of jails awaiting

41. *See* Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN'S L.J. 9 (1994); Steven S. Spitz, *The Norplant Debate: Birth Control or Woman Control?*, 25 COLUM. HUM. RTS. L. REV. 131 (1993).

42. Karen Hardee et al., *Contraceptive Implant Users and Their Access to Removal Services in Bangladesh*, 20 INT'L FAM. PLAN. PERSP. 59 (1994) (observing that of women requesting removal of implant, 48% received removal on first request, 22% on second request, and 15% on third request; remaining 15% made more than three requests or went elsewhere for removal).

43. *See* Center for Women's Global Leadership, Testimonies of the Global Hearing on Violations of Women's Reproductive Rights (forthcoming 1995) (presented at the Cairo Conference on Population and Development).

44. *See* INTERNATIONAL HUMAN RIGHTS LAW GROUP, NO JUSTICE, NO PEACE: ACCOUNTABILITY FOR RAPE AND GENDERED-BASED VIOLENCE IN THE FORMER YUGOSLAVIA (1993).

trial or after sentence,[45] or instrumentally to assist military and police interrogation of family members.[46] Women are exposed to these violations of dignity and integrity primarily because of their sexual vulnerability. Reproductive choice is further imperilled where abortion following rape is legally denied, practically obstructed, or unacceptable to victims themselves on religious or cultural grounds.

Women in these circumstances suffer the double cruelty of victimization by ethnic hatred, and then rejection by their families and communities, which value them only as reproductive vehicles. Ill-treatment by enemies is motivated by knowledge of women's liability to consequent ill-treatment by their own families and communities. Armed conflict serves to cast light on women's low status in their communities in peacetime. This low status compels women to conform to social rules that would, for instance, punish marriage and childbearing across ethnic, racial, or religious divisions.

When women are not valued in their own right, but only through their marriageability, premarital chastity may be enforced through bodily violations. The guarantee of chastity imposed through female genital mutilation exacts a toll on women's enjoyment of their lives and reproductive health[47] that denies liberty and security to women and subjects them, usually at a young age, to ill-treatment.[48] Private conduct does not directly incur the responsibility of States under international law. States have been held responsible, however, for violations of human rights that individuals suffer at the hands of other individuals when States have failed to take appropriate preventive action, including punitive measures against such violations.[49] Some countries have taken measures to prevent violations of the human right not to be subject to inhuman and degrading treatment or torture. Canada, for instance, has granted refugee status to a Somali woman fleeing her country because of a well-founded fear of persecution, in that her daughter would be circumcised.[50]

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45. *See* HUMAN RIGHTS WATCH, DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN (1992).

46. *See* ROBIN KIRK, HUMAN RIGHTS WATCH, UNTOLD TERROR: VIOLENCE AGAINST WOMEN IN PERU'S ARMED CONFLICT (1992).

47. *See* TOUBIA, *supra* note 31, at 9-19.

48. *See* Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155, 156-58 (1985).

49. *See, e.g.*, Velasquez Rodriguez v. Honduras, Inter-Am. C.H.R., OAS/ser. L/V/III.19, doc. 13 (1988); X & Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985).

50. Clyde Farnsworth, *Canada Gives Somali Mother Refugee Status*, N.Y. TIMES, July 21, 1994, at A14.

4. The right to marry and found a family

The right to marry and found a family has its origins in reaction to mid-twentieth century Nazi policies that prohibited marriages across racial and similar lines.[51] The right has yet to be applied to promote reproductive self-determination in marriage and family matters. For example, the right might be invoked to require state measures to modify social and cultural norms that render women unmarriageable because they have conceived out of marriage or lost their virginity. Where such women are denied equality of economic opportunities outside marriage, their only means to support themselves, their children, and dependent relatives may be through prostitution, which further denies them sexual self-determination and, through disease, risks their health and lives.

Women suspected to be infertile may be unmarriageable, and married women who are or become infertile may become liable to sudden divorce. When this leaves them without means of support, they may also be driven to prostitution, with the related loss of self-determination and secure health. In some parts of the world, the right to found a family, and the opportunity to maintain a marriage, are most threatened by infertility due to sexually transmitted diseases, also called reproductive tract infection. In Africa, for example, reproductive tract infection is the cause of up to fifty percent of cases of infertility.[52] The incidence of infection is identifiable in the countries in which it occurs, and governmental failure to address infertility from this cause constitutes a human rights violation against the community as a whole. The right to found a family is no less the right of a husband than of a wife. Although men are afforded more options if a wife is infertile than the wife herself enjoys, a husband's rights are violated when there are inadequate services to protect his right to found a family with a partner of his choice.

Individual adults are sometimes vulnerable through intellectual impairment, which makes them incapable of understanding or regulating their sexuality and procreative potential. The defense of the vulnerable against sexual exploitation and the unconsidered or unperceived risk of unwanted pregnancy is ethical, but requires

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51. *See* MAJA KIRILOVA ERIKSSON, THE RIGHT TO MARRY AND TO FOUND A FAMILY: A WORLDWIDE HUMAN RIGHT (1990); Caroline Forder, *Abortion: A Constitutional Problem in Europe*, 1 MAASTRICHT J. EUR. & COMP. L. 56 (1994); Ronald Thandabantu Nhlapo, *International Protection of Human Rights and the Family: African Variations on a Common Theme*, 3 INT'L J. L. & FAM. 1 (1989).

52. *See* Judith Wasserheit, *The Significance and the Scope of Reproductive Tract Infections Among Third World Women*, 3 INT'L J. GYNECOLOGY & OBSTETRICS (Supp.) 145 (1989).

detached scrutiny from, for example, the judiciary in order to conform to human rights standards. Maintaining adults in single-sex institutions may limit women's exposure to pregnancy, but may improperly deny both sexes opportunities for socialization and impoverish legitimate enjoyment of sexuality. In other words, such institutions deny maximum enjoyment of sexual health.[53] Some States that promote normalization in adult residential mixed-sex institutions severely restrict nonconsensual sterilization of mentally impaired persons,[54] while others find that the procedure can be judicially approved to enhance an individual's quality of life by allowing unchaperoned time with chosen partners of the other sex.[55]

In *In re Eve*,[56] the right to procreate is emphasized at the expense of an impaired women's right to experience sexuality without the threat of pregnancy. Colleen Olesen explains that "[h]ad the Court been willing to explore the benefits and detriments of both sterilization and its alternatives contextually, they would have recognized sterilization as the *least* restrictive alternative for Eve."[57] She goes on to explain that a contextual approach

> would have extended beyond the blind protection of the right to procreate, to consider the realities of Eve's circumstances. For feminist theorists, the legal method of "practical reasoning" provides an approach to conflict resolution based on the particulars of a given situation rather than the application of predetermined rules. Instead of treating problems as unique conflicts having only one solution, feminist practical reasoning mandates a consideration of the various divergent perspectives and calls for solution based on the contextual integration of these viewpoints.[58]

5. The right to enjoyment of private and family life

The right of private and family life may be infringed not only by aggressive enforcement of laws against use of contraception by married and unmarried partners, but also by the threat posed by the very existence of such laws.[59] Enjoyment of private and family life might appear to be a self-evident entitlement, but moralistic laws of

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53. Fathalla, *supra* note 10, at 1.

54. *See, e.g., In re* Eve, 31 D.L.R. 4th 1 (Can. 1987); Department of Health v. J.W.B. & S.M.B., 66 A.L.R. 300 (1992) (Austl.).

55. *In re* B., 2 All E.R. 206, 213-14, 219 (Q.B. 1987).

56. 31 D.L.R. 4th 1 (Can. 1987).

57. Colleen M. Olesen, *Eve and the Forbidden Fruit: Reflections on a Feminist Methodology*, 3 DALHOUSIE J. LEGAL STUD. 231, 235 (1994).

58. *Id.* at 236.

59. *See, e.g.*, Boland et al., *supra* note 6.

religious origin have, at times, not recognized the inviolability of the home and the bedroom.

The right to private life arguably also includes the right of private resort to abortion.[60] State laws allowing abortion on privacy grounds have been allowed under international human rights instruments.[61] Courts have rejected claims of husbands and putative fathers to veto abortion, and have held that respect for a wife's private life entitles her to resist discussing abortion with her husband or others.[62]

B. Rights Relating to Reproductive Health

1. The right to the highest attainable standard of health

The International Covenant on Economic, Social and Cultural Rights (Economic Covenant) recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[63] Article 12 further identifies some steps to be taken for its achievement, including "those necessary for . . . the reduction of the still-birth rate and of infant mortality and for the healthy development of the child."[64] In both its detail and its scope, the expression of this right discloses the intensity with which it is to be pursued and its interaction with other rights relevant to highest attainable standards.

To acquire substance, the right to the highest attainable standard of health requires considerable refinement. Refinement can come in a variety of ways, including by reference to WHO indicators, centered on *health status*, showing the maternal mortality rate, and *health coverage*, showing the availability of primary health care[65] or the unmet need for family planning services.[66] Indicators, whether of health status or health coverage, may, over time, demonstrate whether a particular country is meeting its legal obligation of progressive development towards fulfilling the right to health care in order to protect reproductive health.

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60. *See generally* Forder, *supra* note 51.

61. *See* Case 2141, Inter-Am. C.H.R. 25, OEA/ser. L./V./1154, doc. 9 rev. 1 (1981).

62. Paton v. United Kingdom, App. No. 8416/78, 3 Eur. H.R. Rep. 408, 416-17 (1980).

63. Economic Covenant, *infra doc. biblio.*, art. 12(1). For an insightful discussion on the naming of the right, see Virginia Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 25 (1994).

64. Economic Covenant, *infra doc. biblio.*, art. 12(2)(a).

65. World Health Organization, *Indicators to Measure the Realization of the Right to Health, Paper for the Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights*, HR/Geneva/Sem/BP.19 (1993).

66. Steven W. Sinding et al., *Seeking Common Ground: Unmet Need and Demographic Goals*, 20 INT'L FAM. PLAN. PERSP. 23 (1994) (estimating that 75% prevalence of contraceptive use would maintain population at replacement levels, and that if needs of women for contraceptive services were met, contraceptive prevalence would rise to between 60% and 65%).

In developing countries, an estimated 350 million of the 747 million married women of reproductive age are not using contraceptives. Of these, 100 million would prefer to space the timing of their next pregnancy, or not have more children. Worldwide, women would have preferred to delay or avoid about twenty-five percent of all pregnancies that occur.[67] Government programs to meet unmet needs can enhance a reproductive rights approach. A valuable feature of surveys of contraceptive needs is that they center on women respondents. These surveys also have the potential to be applied beyond contraception to other reproductive health needs, and beyond women in marriage to women and men with unmet reproductive health needs outside marriage.[68]

Refinement can also come by reference to the distinction between the negative and positive character of rights.[69] This distinction contrasts the negative right to health, meaning the right not to have innate health status harmed by the unwanted intrusions of others, with the positive right to health care, which requires others to provide care. A more comprehensive concept built on both of these elements is the right to health protection. This concept accommodates rights of self-care and access to necessary services, the benefits of scientific progress, the education necessary to understand the benefits of health protection, and information that others, bound by duties to render treatment only with informed consent of patients, are obliged to provide. The right to reproductive health protection transcends the medical model of health service delivery to embrace a more holistic health promotion model. A health promotion model aims to include an understanding of the behavioral, social, psychological, and environmental components of personal health.

Refinement of the right to health care can also come by reference to a specific health area. Drawing upon WHO's characterization of "health," Dr. Mahmoud Fathalla has described reproductive health as

> a condition in which the reproductive process is accomplished in a state of complete physical, mental and social well-being and is not merely the absence of disease or disorders of the reproductive process.
>
> Reproductive health, therefore, implies that people have the *ability* to reproduce, to regulate their fertility and to practice and

67. Margaret Catley-Carlson, *The Challenges of Population: Reflections on the Eve of Cairo, in* NEW WORLD 1-3 (1994).

68. Ruth Dixon-Mueller & Adrienne Germain, *Stalking the Elusive 'Unmet Need' for Family Planning*, 23 STUD. FAM. PLAN. 330 (1992).

69. *See* introduction to Part II *supra.*

> enjoy sexual relationships. It further implies that reproduction is carried to a *successful outcome* through infant and child survival, growth, and healthy development. It finally implies that women can go *safely* through pregnancy and childbirth, that fertility regulation can be achieved without health hazards and that people are safe in having sex.[70]

The provision in the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) on equal health care concludes with an explicit recognition of the significance of family planning services to women's health by providing:

> 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.[71]

The Women's Convention mandates appropriate services for pregnancy, confinement, and the post-natal period, as well as adequate nutrition during pregnancy and lactation.[72] The need for reproductive health care, however, begins with preservation of the potential for fertility and sexual interactions long before liability to conception.

Human rights documents could better promote reproductive health through a more precise and authoritative explanation of the duties these rights impose on governmental agencies and the duties of restraint these rights impose on authorities committed to enforce perceptions of public morality and good order. The bodies created by international human rights instruments to monitor their implementation and to assist States Parties to understand and observe their meaning could provide detail and authority in their interpretation.

2. The right to the benefits of scientific progress

The right prescribed in the Economic Covenant "[t]o enjoy the benefits of scientific progress and its applications"[73] reinforces reproductive health care as a component of general health care. Scientific research on physical and mental health, health service delivery systems, and preventive health care, undertaken through biological, pharmaceutical, and related medical sciences, but also through psychological, sociological, and, for instance, economic and

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70. Mahmoud Fathalla, *Reproductive Health: A Global Overview*, ANNALS N.Y. ACAD. SCI., June 28, 1991, at 1.

71. Women's Convention, *infra doc. biblio.*, art. 12(1).

72. Women's Convention, *infra doc. biblio.*, art. 12(2).

73. Economic Covenant, *infra doc. biblio.*, art. 15(1)(b).

information sciences, all contribute to reproductive health protection. The human right underpinning this entitlement is not simply that of patients and potential patients but also of researchers in relevant sciences. States Parties should "undertake to respect the freedom indispensable for scientific research."[74]

The pursuit of the benefits of scientific progress in reproductive health, including the prevention and promotion of human fertility, requires protection because research activities may arouse strong sentiments concerning the sanctity and risk of abuse of human life. Several influential committees considering new reproductive technologies have condemned the deliberate creation of pre-embryos for research purposes. Some have approved pre-embryo research only on the condition that the pre-embryo is intended for implantation and gestation, while most have approved pre-embryo research only on the condition that the pre-embryo not subsequently be placed in the body. Stronger feelings have been aroused regarding production of human-animal hybrids. Potential developments in genetic research, particularly research on gene cells that would affect future generations, have also raised opposition, even when potential use would spare future generations severe genetic disabilities and intrusive somatic-cell therapies.

Routine reproductive health care and protection, in both under-researched and regularly examined populations, frequently exposes conditions that require urgent study. The impact of human immunodeficiency virus (HIV) infection and its transmission have highlighted the needs for study of female sexuality and for scientific progress.[75] The opportunity to gain improved knowledge to develop superior care is frequently accompanied, however, by related risks of unintended harmful effects, and of questionable secondary uses of means of improved care. The conscientious and dedicated pursuit of scientific progress is not certain to succeed, or even to maintain the current level of advance. It is, however, usually considered an advance to recognize limits and dysfunctions of treatments currently accepted as therapeutic.

A recently recognized feature of medical research is its exclusion of models based on women's characteristics and needs, outside studies of women's reproductive functions and organs. The applicability to women of research data developed through studies from which

74. Economic Covenant, *infra doc. biblio.*, art. 15(3).

75. Malcolm Potts, *The Urgent Need for a Vaginal Microbicide in the Prevention of HIV Transmission*, 84 AM. J. PUB. HEALTH 890 (1994).

women were excluded is being questioned, because of, among other reasons, the differences between the reproductive physiology of men and women. The bioavailability of drugs in men and women may differ affecting, for instance, whether dosages levels suitable for men are appropriate for women. Beyond biology, the acceptability of male-derived therapeutic regimes in the social, employment, and emotional contexts in which women function may be significant but unresearched. Women were historically excluded from study populations because the hormonal effects of the menstrual cycle and the possibility or fact of pregnancy introduced confounding variables to studies. The studies were possibly dangerous to fetal life. It is now accepted, however, that although women who are known to be or likely to be pregnant are justifiably excluded from studies of substances or techniques known to be harmful to fetal life, women of reproductive age should be subjects of studies that develop products or techniques intended for use by women of reproductive age.

3. The right to education

The right to education is expressed universally in the Economic Covenant, suggesting that education is relevant to economic, social, and cultural participation.[76] Literacy, comprehension, and awareness of the broader implications and contexts of the choices one has to make are also, however, of central importance in health protection and promotion. Access to health information, understanding which symptoms require medical examination, following medical advice given in written instructions, and correctly using health products available without prescription, are all dependent on the educated skill to read and comprehend. It is commonly found that health status is higher among more educated people, not necessarily because of literacy itself but because education opens opportunities for self-advancement in economic and other regards and for promotion of self-protection. Education is beneficial in itself, although women's education may aggravate women's social dissatisfaction by deepening awareness of their low status, limited opportunities, and inability to penetrate or be heard within centers of political, economic, religious, and social power.

When children's schooling is neglected or inaccessible, the right to education and to all of the opportunities that education brings is violated. Education is not a right only of the young, however. People of all ages must be able to receive contemporaneous information

76. Economic Covenant, *infra doc. biblio.*, art. 13.

relevant to their health and reproduction. Including reproductive health information in school curricula can be a matter of profound controversy because teachers may explain sexual functions in ways parents oppose, at a time that parents consider premature, or with the effect of causing children to ask questions at home with which parents are uncomfortable. The European Court of Human Rights has recognized that sensitivity to parents' views should be shown, but has upheld a compulsory sex-education course that was found not to exceed the limits of enlightened public tolerance.[77]

The right to education is more than the right to attend school. To take advantage of the expansion of understanding and talents that education promises, students must be made aware of opportunities for personal development and achievement. When students are educated to perceive that there are boundaries they must not cross and areas they should not aspire to enter, education is frustrated and students' horizons are narrowed. It is a denial of education rather than an achievement for students to be instructed that they cannot succeed in fields of endeavour because of their sex, race, religion, other characteristic, or their family or social origins. Teaching that reinforces conventional sexual stereotypes violates the right to education in that it narrows ambitions. States offend the Women's Convention if their educational systems fail to attempt "[t]he elimination of any stereotyped concept of the roles of men and women," including revision of stereotypes in textbooks.[78] School programs that overemphasize domestic skill training for girls and omit or underemphasize such training for boys will render States responsible under the Women's Convention.[79]

States may approach the pervasive problem of adolescent sexuality by implementing educational programs in sexual and reproductive health that will be available to and understood by the young, and by providing access to contraceptive counselling and services, including those related to sexually transmitted diseases. Governments must have the political will and courage to discharge their human rights obligations to the young in order to confront the religious and conservative forces in their community that resist sex education for the young.[80] It is a common paradox that community institutions most vocal against adolescent pregnancy outside marriage are also most resistant to the educational and community programs that could

77. *See* Kjeldsen v. Denmark, 1 Eur. H. R. Rep. 711 (1976).
78. Women's Convention, *infra doc. biblio.*, art. 10(c).
79. Women's Convention, *infra doc. biblio.*, art. 10(c).
80. *See Kjeldsen*, 1 Eur. H.R. Rep. 711.

significantly contribute to its reduction. Their advocacy of sexual abstinence is worthy, but should be a component of, rather than the only tolerated alternative to, adolescent sex education programs. Fears that explanations of reproduction and of pregnancy prevention will encourage sexual relations can be addressed by educating older generations to understand that such programs reinforce rather than challenge preferences for abstinence and avoidance of untimely pregnancy.

C. Rights Relating to Reproductive Equality

1. The right to sexual nondiscrimination

Sex is a prohibited ground of discrimination under the international human rights covenants[81] and the regional human rights conventions. Moreover, leading legal scholars have argued that the prohibition of sexual discrimination is now part of customary international law,[82] which binds all States even without their express ratification and acceptance. The Women's Convention develops the legal norm on nondiscrimination from a women's perspective. The Convention moves from a sex-neutral norm that requires equal treatment of men and women, usually measured by how men are treated, to a recognition of the fact that the particular nature of discrimination against women is worthy of a legal response. The Women's Convention progresses beyond the earlier human rights conventions by addressing the pervasive and systemic nature of discrimination against women's reproductive health interests and self-determination. The Convention identifies the need to confront the social causes of women's inequality by addressing "all forms" of discrimination that women suffer. The Convention is thereby able to address the particular nature of women's reproductive and related disadvantages.[83]

Understanding of discrimination against women in the area of reproductive and sexual health will evolve with empirical information, perspectives, and insights on how women are subordinated within

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81. *See generally* Anne Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1 (1990).

82. *See* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 81 (1983). Brownlie observes that "it is worth looking at some recent developments of customary international law. One such development, which is now firmly established, is the principle of non-discrimination, which applies in matters of race and sex . . . . [T]he principle represents a contribution to the law arising from concepts of human rights." *Id.*

83. Rebecca J. Cook, *Women in the United Nations Legal Order*, *in* THE UNITED NATIONS LEGAL ORDER 433 (Oscar Schachter & Christopher Joyner eds., 1995).

different legal, social, and religious traditions. Reproductive and sexual equality will require that men and women have equal capacities for reproductive self-determination. At a most basic level, it means ensuring that women have equal access with men to reproductive health services. This would require the elimination of spousal authorization requirements which exist in many countries and require wives, but not husbands, to have the authorization of their spouses in order to obtain reproductive health services, including contraception and sterilization.

The availability of voluntary sterilization services in some countries, for instance, is contingent on the number of cesarean sections that a woman has undergone; in others, it depends on the application of requirements such as the "rule of 80," which permits a woman to be sterilized only when the number of her living children multiplied by her age exceeds eighty. Generally, there is no comparable rule of eligibility for men seeking a vasectomy. The rule would be difficult to apply to men fairly or reliably, because the number of a woman's living children may be more readily known than for a man. Furthermore, the danger to women's health from repeated pregnancy is not determined exclusively by the number of children who are alive at a given time, but also by such factors as the number of pregnancies irrespective of whether they resulted in births. In general, men are not subject to such irrelevant assessments when seeking a vasectomy.

Reproductive equality would bring into question restrictive abortion laws, because these laws criminalize medical procedures that only women need. Men are not subjected to criminal sanctions for procedures that are necessary for the preservation of any aspect of their health. Reproductive equality might also require that differential legal ages of marriage be changed in order to ensure that lower legal minimum ages of marriage for women do not stereotype them into childbearing and service roles.

2. The right to nondiscrimination on grounds of marital status

The right not to suffer discrimination on grounds of sex affords additional protection when women are denied opportunities on the basis of their marital status. In the laws and practices of some countries, contraceptive services are unavailable to unmarried persons. Because men can freely pass condoms among each other, but women require medical screening to determine which form of contraception is best suited for them, as well as instruction on its use, denial of services to unmarried people unduly burdens women and prejudices their reproductive self-determination.

Sexual discrimination and stereotyping support popular assumptions in sexual relationships, in and out of marriage, that responsibility to guard against pregnancy rests with the female partner. If she is adolescent or unmarried, age and marital status discrimination will compound the injustice. Sexual equality requires that men accept responsibility with women to take measures against unwanted pregnancy, and that men be socialized and equipped to be equal partners in all aspects of domestic life, reproduction, and childcare.[84]

3. The right to racial nondiscrimination

The interactions of gender, race, and class impact on reproductive self-determination in many ways, including those that are well understood and those not so well understood.[85] Health protection and health status vary by race in many countries, indicating differential access to health care, information, and education necessary for health protection. The potential for abuse of rights is often greater among ethnic minorities, which suggests that great care and sensitivity need to be applied in the delivery of services in mixed-race communities. This is particularly the case with the introduction of permanent or long-acting contraceptive methods, such as Norplant or the emerging HCG vaccine, because these can be applied without the free and informed consent necessary for other contraceptive methods.

Where the potential for abuse or neglect of rights is high among particular ethnic minorities, because of factors such as historical disadvantage, poverty, or lack of education, methods need to be explored to reduce the risk of abuse in order that all members of society can exercise reproductive self-determination equally. Approaches might include the appointment of a person from a vulnerable racial or ethnic community as a reproductive rights advocate to monitor access to reproductive health services in ways that are consistent with reproductive self-determination for members of all racial and ethnic communities.

4. The right to nondiscrimination on grounds of age

In some countries, regions, and cities of the world, high rates of adolescent pregnancy appear endemic, and in many others the

84. Sharon R. Edwards, *The Role of Men in Contraceptive Decision-Making: Current Knowledge and Future Implications*, 26 FAM. PLAN. PERSP. 77 (1994).

85. *See generally* Taunya Lovell Banks, *Women and AIDS: Racism, Sexism and Classicism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351 (1989-90); Dorothy E. Roberts, *The Future of Reproductive Choice for Poor Women and Women of Color*, 12 WOMEN'S RTS. L. REP. 59 (1990).

problem is described as epidemic.[86] Nevertheless, governments persist in denying or ignoring adolescent sexual and reproductive health needs, or discuss those needs only through moralistic platitudes and prescriptions. Laws that deny reproductive and related health services to competent individuals without parental consent on grounds of age, claimed by their supporters to promote and even achieve moral behaviour and to reinforce adolescents' respect for their parents, are liable to be upheld by courts whose judges are as unaware of the phenomenon as are members of legislatures who propose and support such laws. Laws that impose conditions on access to reproductive and other health services that adolescents find uncomfortable, obstructive, or impossible to operate will result in adolescents foregoing health care, and continuing to accept inaccurate sexual folklore from peers. Adolescents will use illegal abortion services, perhaps from unskilled practitioners, and lose opportunities for general medical and comparable treatment and counselling that would be in their health interests to receive.

Adolescents' lack of access to reproductive health care is aggravated when they are subject to sexual victimization in their communities or homes. Adolescent requests for contraceptive protection may indicate their wish not only to avoid pregnancy, but to be protected against unwanted sexual interference. It is ironic that the benign imagery of protective parents that is invoked to justify parental consent laws may place the protection of young girls in the hands of those who violate that protection. Whatever the source of interference, adolescents who are not free to seek treatment, counselling, and protection on the same terms of confidentiality as adults suffer unjust discrimination. Those to whom young people turn may, in some circumstances, be justified in informing their parents, for instance where acquaintances are sexually molesting the adolescents. The injustice arises when laws prohibit a counsellor to whom an adolescent turns for help from delivering that assistance in accordance with trained professional judgment in the circumstances of the case, and instead compel a response that accords to an abstract theory of proper conduct.

5. The right to nondiscrimination on grounds of sexual orientation

Many States that have liberalized respect for the intimacies of private life, within and beyond marriage and outside stable partnerships, define tolerated marital and nonmarital partnerships in only

86. *See generally* INTERNATIONAL PLANNED PARENTHOOD FEDERATION, UNDERSTANDING ADOLESCENTS (1994).

heterosexual terms. International human rights tribunals have condemned laws that punish same-sex relationships.[87] Few countries, however, recognize same-sex relationships to be the legal equivalent of heterosexual relationships and award same-sex partners the equivalent of spousal rights in case of death, disability, or separation. Restrictive laws compromise the rights to the equal enjoyment of private life and to security within loving relationships. Denial of equal rights has implications for children when, for instance, a parent's same-sex partner cannot legally be recognized as a step-parent to adopt or care for the child on the parent's disability or death.

D. Rights Relating to Reproductive Decisionmaking

Rights relating to reproductive decisionmaking need to be applied to ensure that the discourse on reproductive self-determination is feminized. Women need to develop their own words, language, and speech that reflects their needs, experiences, and aspirations. As Donna Greschner explains:

> Silence has not been golden nor should it be a posture of democracy. Whatever the other injustices of the silencing of women—and they include the thousands of women who die each year around the world from patriarchy's laws on abortion—the creation of the discourse by men puts into question the results of the democratic process. If what goes into a democratic process is biased against women, so too is what comes out. If representatives and officials only work with concepts and words that have been fashioned by men, from men's perspectives, no real equality or democracy is possible for women. In short, it is not good enough to tell women that they can sing along with men, even form half the chorus, if men still pick the tunes and determine what counts as music in the first place.[88]

Medical terminology is used by default because no women's language exists that adequately reflects women's experiences of reproductive self-determination.[89] Rights relating to reproductive decisionmaking need to be applied to ensure that women not only participate but create the discourse that reflects reproductive realities.

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87. *See* Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981).

88. Donna Greschner, Comment, *Abortion and Democracy for Women: A Critique of* Tremblay v. Daigle, 35 MCGILL L.J. 633, 643 (1990).

89. *Id.* at 649.

1. The right to receive and impart information

The maxim that knowledge is power has long been accepted by social leaders and institutions that, consciously or without self-awareness, want to maintain power over human reproduction. In many legal systems it has been a criminal offense, sometimes described as a crime against morality, to give information about contraceptive methods or to indicate how women might procure their own abortions. A government maintaining an abortion prohibition recently attempted to prevent circulation of information about abortion services legally available in a nearby country,[90] and unlawfully attempted to prevent a young rape victim from travelling there for the service.[91] The significance of information concerning reproductive health protection is confirmed in the Women's Convention, which explicitly requires that women have the right "to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."[92]

The right to receive and impart information regarding sexual and reproductive health is essential to reproductive decisionmaking. The people's right to know applies both to their informed choice of medical care, as well as to their self-determination in all other matters in their lives that they are able to control or influence. The attempt by public authorities, social agencies, and religious institutions to limit information regarding reproductive health services, including not only contraceptive and abortifacient methods, but also controversial means to increase the chance of having a child of a particular sex, discloses authoritarian instincts that are inimical to health protection and safety[93] and, more corrosively, to individual liberty and social freedom.[94] Laws that attempt to guard children against premature exposure to explanations or depictions of sexuality are defensible in ways that laws to preclude information from mature adults are not.

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90. *See* Open Door Counselling & Dublin Well Women Centre v. Ireland, 14 Eur. H.R. Rep. 231 (1992).

91. *See* Attorney General v. X, [1992] I.L.R.M. 401 (Ir. S.C.).

92. Women's Convention, *infra doc. biblio.*, art. 10(h).

93. *See* The Sunday Times v. United Kingdom, 2 Eur. H.R. Rep. 245 (1979).

94. *See* Lynn Freedman, *Censorship, Manipulation and Family Planning Information: An Issue of Human Rights and Women's Health, in* THE RIGHT TO KNOW: HEALTH, HUMAN RIGHTS AND FAMILY PLANNING INFORMATION (Sandra Coliver ed., forthcoming 1995).

2. The right to freedom of thought, conscience, and religion

Many if not all of the laws that regulate human reproduction and information about reproductive options reflect moral values derived from religious convictions and doctrines. Freedom of religion includes an individual's freedom from compulsion to comply with laws designed only or principally to uphold doctrines of religious faith. Religious freedom is without substance unless individuals are free to act consistently with their religious faith, and to follow their own conscience regarding doctrines of faiths they do not hold. Many laws explained on religious grounds are consistent with secular laws providing for peace, order, and good government, but laws on sexual and reproductive choice relate more to good taste than good government, and violate human rights standards when imposed on informed, mature individuals who find the religious reasons to observe them unpersuasive.

Freedom to express religious, philosophical, and social convictions regarding reproductive self-determination runs in at least two directions. On the one hand, individuals enjoy human rights of reproductive choice, but on the other hand, health professionals must be free not to participate in practices they find offensive on religious grounds, such as performing abortions and sterilizations and performing procedures relating to *in vitro* fertilization. Conscience cannot justify a health professional's refusal to participate in life-saving abortion when no other suitable person or method is available, and normally the burden of justifying conscientious objection falls on the health professional. Human rights provisions require maximum respect for, and equitable balance between, individuals' choices to avail themselves of reproductive services, and not to participate in delivery of services they consider objectionable. Nonparticipation may require, however, voluntary exclusion from employment opportunities where participation in the provision of reproductive health services is a central part of employment.

3. The right to political participation

The right to political participation underwrites all other rights to reproductive self-determination. Those who have enjoyed the power of reproductive choice have tended to be members of the historically privileged classes in their societies.[95] The purpose of human rights

95. *See* ALICE JENKINS, LAW FOR THE RICH: A PLEA FOR REFORM OF THE ABORTION LAW (1960).

is to democratize empowerment and entitle each person to claim as a right what historically the powerful could enjoy as a privilege. When individuals are empowered to participate in key political decisions affecting their reproductive lives, they can achieve reproductive self-determination within a democratic framework of decisionmaking regarding the direction and quality of their lives.

A feature of all societies remains the absence of equal political participation of women. This fact is reflected in women's inferior status in most if not all centers of public power that affect their lives. Political reforms that afford women equal significance with men in national life would equip women to serve their own reproductive self-determination as effectively as men have been able to serve theirs. Dominant obstacles are the prominent roles that military and religious institutions play in the political life of many countries, and the exclusion of women from status in their hierarchies. Even in countries that maintain properly respected democratic institutions of government, however, including equal enfranchisement of women, women's opportunities to achieve reproductive self-determination remain obstructed by restrictive laws that women's right to political participation has not yet been able to remedy effectively. Men's superior powers of reproductive self-determination reflect the reality of women's continuing *de facto* subordination.

4. The right to freedom of assembly

Freedom of assembly has emerged from being a right of religious and political freedom to being a right relevant to demonstrations regarding reproductive self-determination. Establishment of the right to free assembly now supports claims both to demonstrate and to counter-demonstrate without fear of physical violence.[96] The right to freedom of assembly protects both proponents and opponents of reproductive choice against the excesses of the other, and where opponents of reproductive choice control government, this human right is significant because it protects each person's own reproductive decisionmaking.

III. THE WAY FORWARD: DUTIES TO RESPECT HUMAN RIGHTS

By their membership in international human rights conventions, States join more than a moral community that accepts vague duties to be sensitive to high-minded principles. They accept legal duties

96. *See* Plattform "Ärtze für das Leben" v. Austria, 139 Eur. Ct. H.R. (ser. A) (1988).

that arise under international law, including being held responsible for breach of their duties and, more immediately, being amenable to international scrutiny. The requirement to account for conduct and be open to question and criticism may be more rigorous under regional human rights conventions than under universal legal regimes. States cannot invoke their sovereignty as protection against international accountability once they have freely joined human rights conventions because, through their membership in the community of States existing under law, they have no sovereign right to violate their commitments.[97]

States must measure state activities that directly and indirectly affect individual reproductive choice against international human rights protections of reproductive self-determination. States must also anticipate other States evaluating their conduct according to these protections, and be prepared to account for their protection of human rights before the international community in general and the bodies appointed to monitor state performance under specific conventions in particular. International law has evolved to be more than the law of the powerful against the weak; human rights accountability is universal. Economically, militarily, and otherwise strong countries are no less open to scrutiny of their domestic practices, and to accountability before human rights conventions' monitoring agencies.

Human rights have costs that States and their residents must bear, and that governments must organize their public institutions and resources to accommodate.[98] States that are respectful of human rights will facilitate individuals' pursuit of their reproductive choice and dignity, but may implement strategies compatible with individual rights and dignity that encourage individuals to design their families consistently with the interests of the population with which the individuals voluntarily identify themselves.

A number of strategies may be proposed that would render human rights principles of respect for reproductive self-determination more effective. Although States bear legal responsibility for protection of those within their territories, moral responsibility vests in individuals and in organizations. Nongovernmental family planning organizations have obvious interests in the contribution that respect for human rights makes to their goals, as do agencies concerned with the

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97. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 46, 1155 U.N.T.S. 331, 343.

98. *See* Velasquez Rodriquez v. Honduras, Inter-Am. C.H.R., OAS/ser. L/V/III.19, doc. 13 (1988).

welfare of families and protection of family life. At present, however, national population and family planning organizations tend not to focus budgetary and related resources on protection and promotion of human rights relating to reproductive self-determination.

International governmental and nongovernmental population and family planning organizations do little to remedy this shortcoming. There is considerable potential for initiatives to hold States to their international responsibilities to respect human rights relating to reproductive self-determination through the use of the complaints procedure under the Optional Protocol to the International Covenant on Civil and Political Rights.[99] Currently, there is no complaints procedure under the Convention on the Elimination of All Forms of Discrimination Against Women, but proposals have been made for an Optional Protocol that would fill that void.[100]

Governments could be encouraged to create independent offices of reproductive rights advocates or defenders with powers to investigate suspected violations of reproductive rights, issue periodic reports, advise governmental and other agencies, and make recommendations for improved protection and promotion of reproductive rights. Particularly where governments fail to create such offices, nongovernmental organizations could equip offices that would discharge similar functions, even without the same legal powers of investigation, and provide commentaries on governmental reports submitted to monitoring committees under international human rights conventions. Both governmental and nongovernmental offices could provide legal services through which individual and collective remedies could be sought for violations of rights, and anticipatory action could be taken to prevent rights violations.[101]

In addition, governmental bodies could require that any proposal for development of social, economic, political, or other relevant policy that is subject to legislative or executive approval be accompanied by a reproductive rights impact assessment. An office of a reproductive rights advocate could assist in the preparation of such assessments of proposals advanced by agencies in both the public and private sectors. Assessments would permit private agencies to demonstrate their respect for individual rights, and review of assessments would permit

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99. *See* Optional Protocol to International Covenant on Civil and Political Rights, *infra* app.

100. *See id.*; *see also* Carlota Bustelo, *Reproductive Health and CEDAW*, 44 AM. U. L. REV. 1145 app.

101. Maria Isabel Plata, *Reproductive Rights as Human Rights: The Colombian Case*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 515-32 (Rebecca J. Cook ed., 1994).

governments and States to demonstrate their observance of international human rights duties arising under international conventions.

Monitoring committees under such conventions could make it an expectation that States introduce procedures to review the impact of their current and prospective policies on observance of reproductive rights. These committees might condemn States whose periodic reports fail to give a satisfactory account of their vigilance in this regard, and scrutinize government statements on population policy, made at any time, for failing to implement explicit commitments to uphold individual rights of reproductive self-determination. Monitoring bodies can reinforce the principle that governments cannot use people against their will to implement public population policies. Governments are the instruments that serve individuals' needs for enlightenment and health services to satisfy their ambitions for the welfare of their families and communities, and their achievement of dignity.