

## EXPORTING CULTURE WARS

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### I. INTRODUCTION

Non-Governmental Organizations (NGOs) act as a lifeline to citizens in developing countries by providing a broad range of health care services.<sup>1</sup> Steep reductions in public spending on health have hobbled public health

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<sup>1</sup> See, e.g., URBAN HEALTH IN DEVELOPING COUNTRIES: PROGRESS AND PROSPECTS 4 (Trudy Harpham & Marcel Tanner eds., 1995) (noting that “[i]nternational Non-governmental organizations (NGOs) have an increasingly important role in urban health development”). One such U.S.-based NGO committed to international health is Project Health Opportunities for People Everywhere (HOPE), whose mission is “to achieve sustainable advances in health care around the world by implementing health education programs and providing humanitarian assistance in areas of need.” Project HOPE, Our Mission, <http://www.projhope.org/ourmission/> (last visited Oct. 7, 2006).

provisioning, making such services even more necessary.<sup>2</sup> Furthermore, NGOs are often the only providers of the reproductive health care needs of thousands of poor women, particularly in rural areas where acute shortages of doctors or medical supplies frequently occur.<sup>3</sup> In addition, unlike government health care clinics, NGOs are adaptable and flexible making their services much more readily available and accessible.<sup>4</sup> NGOs gain even greater significance because of the shift towards channeling donor funds away from governments and toward NGOs.<sup>5</sup> Donor funding also makes NGOs' services affordable. Large NGOs that operate in big third world cities often redirect payments from their city-based clients to rural populations which are often outside the formal economy.<sup>6</sup> All of these services are put at serious risk by the global gag rule—the policy endorsed by the United States, which prohibits funding to NGOs that advocate for or

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<sup>2</sup> See MEREDITH TURSHEN, *PRIVATIZING HEALTH SERVICES IN AFRICA* 14–16 (1999); Marc Epprecht, *Investing in Amnesia, or Fantasy and Forgetfulness in the World Bank's Approach to Healthcare Reform in Sub-Saharan Africa*, 1 J. DEVELOPING AREAS 337, 337–56 (1997). Compare Budget of the Government of the United States, Fiscal Year 2007, at 797, available at <http://www.gpoaccess.gov/usbudget/fy07/pdf/appendix/sta.pdf> (375 million dollars for family planning), with Budget of the Government of the United States, Fiscal Year 2006, at 1057, available at <http://www.gpoaccess.gov/usbudget/fy06/pdf/appendix/iap.pdf> (440 million dollars for family planning). The 2007 budget represents a 17% reduction in family planning funding.

<sup>3</sup> See, e.g., Mehlika Hoodbhoy et al., *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya*, 29 *FORDHAM INT'L L. J.* 1, 81–82 (2005) (discussing the importance of NGOs in Kenya and emphasizing that these organizations “often serve as the sole source of health care for poor and rural women”); Yvette Aguilar, Comment, *Gagging on a Bad Rule: The Mexico City Policy and Its Effect on Women in Developing Countries*, 5 *SCHOLAR* 37, 53 (2002) (reporting that “an estimated 25–40% of health care in rural populations [in El Salvador] is provided by NGOs”).

<sup>4</sup> International Conference on Population & Development, Cairo, Sept. 5–13, 1994, *Report of the International Conference on Population and Development* ¶ 15.2, U.N. Doc. A/CONF.171/13 (1995) (“[N]ongovernmental groups are already rightly recognized for their comparative advantage in relation to government agencies, because of innovative, flexible and responsive programme design and implementation, including grass-roots participation, and because . . . they are rooted in and interact with constituencies that are poorly served and hard to reach through government channels”).

<sup>5</sup> See, e.g., The President's Emergency Plan for AIDS Relief: Second Annual Report to Congress, at 95–96 (2006) (noting that “international NGOs are indispensable partners in PEPFAR [President's Emergency Plan for AIDS Relief] implementation, and there will always be more work to do in resource-poor setting” and emphasizing the Plan's funding to such organizations as priority); see also 22 U.S.C. § 2151u(a) (2006) (“Congress further declares that the financial resources of such [NGOs] should be supplemented by the contribution of public funds for the purpose of undertaking development activities . . .”).

<sup>6</sup> See, e.g., Prabha Kotiswaran, *Preparing for Civil Disobedience: Indian Sexworkers and the Law*, 21 *B.C. THIRD WORLD L.J.* 161, 176 (2001) (noting that additional funding for HIV prevention allowed NGOs to establish a more pervasive presence in rural populations, resulting in a richer body of knowledge about the existence of prostitution in India).

counsel about abortion services, even if such activities receive funds from sources other than the U.S.<sup>7</sup> Unfortunately, the global gag rule will have its worst effects in developing countries because of the significant role that NGOs play in providing reproductive and HIV/AIDS related care in such countries.

Consider the following events:

- A thirteen-year-old Nepalese girl is raped by an uncle.<sup>8</sup> She becomes pregnant.<sup>9</sup> Although she is an innocent rape victim, she is regarded as having brought shame and dishonor to her family and community.<sup>10</sup> After procuring an illegal abortion to avoid the social stigma of the rape, the thirteen year old is sentenced to twenty years in prison.<sup>11</sup> In the meantime, the rapist continues to enjoy his freedom.<sup>12</sup> A courageous nongovernmental organization (NGO) involved in reproductive health care, including the provision of family planning assistance, returns United States Agency for International Development (USAID) funding and lays off over 60 employees.<sup>13</sup> Subsequently, the NGO is able to campaign for changes to the outright criminalization of abortion.<sup>14</sup> Two years later, on her fifteenth birthday, the girl is set free after the NGO succeeds in persuading the Nepalese government to change the outright ban on abortion.<sup>15</sup>

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<sup>7</sup> 22 U.S.C. § 2151b(f)(1) (2006). The global gag rule provides that funding for population planning in developing countries may not “be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.” *Id.* The Mexico City policy, reasserted by the Bush administration, further restricts U.S. funding to any NGOs who support abortion, regardless of the source of the funding used to support such activities. Restoration of the Mexico City Policy, 66 Fed. Reg. 17303 (Mar. 28, 2001); Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session), Mexico, Aug. 13–16, 1984, at 4–5, available at <http://www.populationaction.org/resources/documents/MexicoCityPolicy1984.pdf> [hereinafter Mexico City Policy].

<sup>8</sup> 151 CONG. REC. S3176, S3179 (2005) (statement of Sen. Boxer).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* See also Press Release, Barbara Boxer, U.S. Senator from Cal., Senate Passes Boxer-Snowe Provision to Overturn the Global Gag Rule (Apr. 5, 2005), <http://boxer.senate.gov/news/releases/record.cfm?id=236039&&>.

- Marie Stopes International, a UK based reproductive health NGO located in Kenya, closes two comprehensive clinics serving poor women and stops supporting eighty-seven community based health workers as a direct result of losing USAID funding.<sup>16</sup> Marie Stopes International joins several other NGOs worldwide that are disabled from providing safe reproductive healthcare services, including abortion where legal, pregnancy related care, as well as services for HIV/AIDS and other sexually transmitted diseases.<sup>17</sup> Loss of USAID funding results in noticeable increases in the rates of unsafe and illegal abortions which further exacerbates the already high percentages of direct obstetric deaths.<sup>18</sup>

These events demonstrate some of the effects of the global gag rule on the operations of these NGOs discussed in this paper. The paper makes three arguments. First, I will argue that the enactment of the global gag rule in 1973,<sup>19</sup> and its expansion by the Reagan and George W. Bush's administrations,<sup>20</sup> was and continues to be a concerted effort to export the United States' culture wars, particularly insofar as those wars relate to women's freedom from patriarchy and conservative and traditional religious and moral values.<sup>21</sup> Even if one was to object that the gag rule is a not concerted effort to export the U.S.'s culture wars, its effect has essentially achieved this purpose.<sup>22</sup>

Second, I will argue that the moral absolutism of the global gag rule overlaps with the criminalization of abortion and the patriarchal customary and religious norms and practices in sub-Saharan African countries, not only to undermine access to safe and affordable reproductive health care services, but also to consolidate and legitimize gender inequality.<sup>23</sup> As a result, the intersection of the global gag rule with conservative religious, cultural, and customary norms, as well as with conservative free market reforms that have reduced public spending in health care, undermines making progress towards substantive gender equality.

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<sup>16</sup> Priscilla Smith et al., *The Global Gag Rule: A Violation of the Right to Free Speech and Democratic Participation*, HUM. RTS. MAG., Summer 2002, at 12, 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Pub. L. 93-189, § 114, 87 Stat. 714, 716 (1973) (codified as amended at 22 U.S.C. § 2151b(f)(1) (2006)).

<sup>20</sup> Mexico City Policy, *supra* note 7, at 4-5; Restoration of the Mexico City Policy, 66 Fed. Reg. 17303 (Mar. 28, 2001).

<sup>21</sup> *Infra* Part I.

<sup>22</sup> *Infra* Part V.

<sup>23</sup> *Infra* Part III.

Third, this paper will conclude that the global gag rule is a reflection of the expansive and unlimited plenary authority of the President in the exercise of foreign affairs powers.<sup>24</sup> In addition, the extraterritorial projection of the global gag rule is inconsistent with international legal norms and standards.

Part One outlines the emergence of the global gag rule by tracing its genealogical roots to the New Right's agenda from the early 1970's to date. Part Two examines how the gag rule overlaps with conservative religious and customary norms in developing societies. Part Three traces some problematic international legal problems with the global gag rule. In my conclusion, I call for a holistic and balanced approach to reproductive health care.

## II. CULTURE WARS

### A. *The Emergence of the Global Gag Rule and Other Policies Contrary to the Goals Pursued by Supporters of Reproductive Rights*

In 1973, Congress enacted the Helms Amendment, the initial legislation that led to the global gag rule.<sup>25</sup> Conservative Senator Jesse Helms of North Carolina proposed the legislation soon after the Supreme Court's decision in *Roe v. Wade*, which established the right of a woman to decide whether or not to terminate a pregnancy within the first two trimesters.<sup>26</sup> In 1974, further refinement to the Act prohibited USAID from funding "information, education, training, or communication programs that seek to promote abortion as a method of family planning."<sup>27</sup>

In 1984, President Reagan announced his Mexico City Policy, which extended the gag rule to prohibit any NGO from receiving U.S. government funding if it engaged in legal abortion, even if the NGO was using its own funding rather than the U.S.'s money.<sup>28</sup> It also prohibited any funding of NGOs that provided information or counseling on legal abortion as an option for unwanted pregnancy.<sup>29</sup> Such NGOs cannot participate in public

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<sup>24</sup> *Infra* Part IV.

<sup>25</sup> Foreign Assistance Act of 1961, Pub. L. No. 93-189, § 114, 87 Stat. 714, 716 (1973) (current version at 22 U.S.C. § 2151b(f)(1) (2004)).

<sup>26</sup> *Roe v. Wade*, 410 U.S. 113, 164 (1973).

<sup>27</sup> Family Planning and Population Assistance Activities, 48 C.F.R. § 752.7016(b)(iv) (2005).

<sup>28</sup> Mexico City Policy, *supra* note 7, at 5; *see also Planned Parenthood Fed'n, Inc. v. Agency of Int'l Dev.*, 838 F.2d 649, 651 (2d Cir. 1988) (quoting the President's statement).

<sup>29</sup> Mexico City Policy, *supra* note 7, at 4-5.

information campaigns for the legalization of abortion.<sup>30</sup>

Further reflecting this country's gradual movement away from contributing to programs promoting family planning, since the mid-1980s, the U.S. has argued "that 'good economic policies do more to reduce poverty than fertility and family planning programs.'"<sup>31</sup> In other words, the U.S. has asserted that good governance reforms, rather than comprehensive family planning and reproductive health care provisioning, will best promote health in developing countries.<sup>32</sup> This point of view is contrary to the experiences of countries in sub-Saharan Africa.<sup>33</sup>

Unlike President Clinton who suspended the gag rule while in the White House,<sup>34</sup> one of President Bush's first acts in office was to reinstate the rule.<sup>35</sup> As restored, the global gag rule expressly prohibited funding for NGOs that engaged in lobbying a government to "legalize or make available abortion as a method of family planning or...to continue the legality of abortion as a method of family planning."<sup>36</sup>

Furthermore, in 2002, the Bush administration revoked its financial backing of United Nations Population Fund (UNFPA)<sup>37</sup> (the international body that addresses reproductive health and rights, as well as population issues) due to the assumed impression that UNFPA supported coercive abortion or forced sterilization in China.<sup>38</sup> This withdrawal of support continued notwithstanding the fact that a U.S. delegation had found no evidence of UNFPA's involvement in either of the offensive practices.<sup>39</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> Kaci Bishop, Comment, *Politics Before Policy: The Bush Administration, International Family Planning, and Foreign Policy*, 29 N.C. J. INT'L L. & COM. REG. 521, 555-56 (2004) (quoting U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, FOREIGN AID IN THE NATIONAL INTEREST: PROMOTING FREEDOM, SECURITY, AND OPPORTUNITY 76 (2002), available at [http://www.usaid.gov/fani/Full\\_Report--Foreign\\_Aid\\_in\\_the\\_National\\_Interest.pdf](http://www.usaid.gov/fani/Full_Report--Foreign_Aid_in_the_National_Interest.pdf)).

<sup>32</sup> The article cited by USAID in support of this proposition framed it as but one possible view, and went on to state that: "[p]roponents of this view . . . overlooked important factors affecting a woman's ability to regulate her childbearing by using contraceptives purchased through the private market system," including lack of availability of contraception, traditional cultural oppositions to birth control, financial obstacles, as well as women's relative status to men in the developing world. Thomas W. Merrick, *Population and Poverty: New Views on an Old Controversy*, 28 INT'L FAM. PLANNING PERSP. 41, 42 (2002).

<sup>33</sup> *See infra* Part III.A.

<sup>34</sup> The Title X "Gag Rule," 58 Fed. Reg. 7455 (Jan. 22, 1993).

<sup>35</sup> Restoration of the Mexico City Policy, 66 Fed. Reg. 17303 (Mar. 28, 2001).

<sup>36</sup> *Id.*

<sup>37</sup> Presidential Determination No. 02-32 on the Transfer of Funds from International Organizations and Programs Funds to the Child Survival and Health Programs Fund, 67 Fed. Reg. 62311 (Sept. 30, 2002).

<sup>38</sup> Bishop, *supra* note 31, at 533.

<sup>39</sup> *Id.*

The administration based its decision on evidence that computers provided to Chinese authorities by UNFPA had been used to facilitate the collection of fees and penalties for violation of China's population policy.<sup>40</sup> A British fact finding team sent to China during the same time period as the U.S. delegation found no evidence of coercive abortions or forced sterilizations in the counties where UNFPA worked.<sup>41</sup> The British team concluded that UNFPA's work had a "positive effect" in the provisioning of reproductive health care services in China and that, although there remained problems in some parts of China, the Chinese government had shown willingness to address them.<sup>42</sup> Notably, since 1998, U.S. diplomatic staff, independent observers, as well as UNFPA representatives have had the Chinese government's permission to monitor its commitment to making access to reproductive health care services voluntary rather than coerced.<sup>43</sup>

A practical consequence of the US government's decision to revoke funds from UNFPA by the amount of money the organization had spent in China (the amount funded by both the U.S. and all other sources) was that it reduced UNFPA's ability to serve the other 140 countries in which it operates.<sup>44</sup> The effect of this application of the global gag rule is estimated to have disabled UNFPA from preventing "two million unwanted pregnancies, nearly 800,000 induced abortions, 4,700 maternal deaths, nearly 60,000 cases of serious maternal illness and more than 77,000 infant and child deaths."<sup>45</sup> Withdrawals or reductions in funding result in the unavailability of voluntary contraceptive and related reproductive health care services, as well as information and support for HIV/AIDS work.<sup>46</sup> This results from the integrated nature of reproductive health care programs, which means that cuts in funding affect not only abortion related services, but other services including those related to HIV/AIDS.<sup>47</sup>

In addition, the Bush administration's support of abstinence-only programs,<sup>48</sup> its reluctance to fund the Global Fund to Fight AIDS, Tuberculosis and Malaria,<sup>49</sup> as well as its equivocating position on the use of

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<sup>40</sup> *Id.* at 534. The China policy distinguished between planned and unplanned births and imposed sanctions for the former. *Id.* at 534 n. 68.

<sup>41</sup> *Id.* at 535.

<sup>42</sup> *Id.* at 535-37 (internal quotations omitted).

<sup>43</sup> *Id.* at 537.

<sup>44</sup> *Id.* at 538.

<sup>45</sup> *Id.* (quoting U.S. Pulls \$34 Million Family Fund, CNN, Jul. 23, 2002, <http://www.cnn.com/2002/WORLD/europe/07/23/un.population/index.html>)

<sup>46</sup> *Id.* at 567.

<sup>47</sup> *Id.*

<sup>48</sup> See 42 U.S.C. § 710 (2006).

<sup>49</sup> See generally The Global Fund to Fight AIDS, Tuberculosis and Malaria Homepage, <http://www.theglobalfund.org/en/> (last visited Aug. 29, 2006).

condoms<sup>50</sup> has resulted in overall reductions in support of HIV/AIDS funding.<sup>51</sup> For example, the emphasis on prevention, embraced in abstinence-only programs, has greatly reduced condom distribution,<sup>52</sup> which is a far more cost-effective method of addressing the spread of the virus than antiretroviral therapy.<sup>53</sup> Supporters of abstinence-only programs argue that condom distribution promotes promiscuity and abortions, and that condom use is inconsistent with the sanctity of human life.<sup>54</sup>

Over the last several years, the U.S. has supported extremely strong protections of pharmaceutical patents, including those of antiretroviral drugs.<sup>55</sup> In particular, the Bush administration has argued that poverty, rather than high drug prices, accounts for the overwhelming lack of access to these essential drugs, particularly for those with HIV/AIDS.<sup>56</sup> Thus, pharmaceutical company profits inform the administration's policy on making these drugs both affordable and accessible to the nearly five million people that need them in sub-Saharan Africa alone.<sup>57</sup> In recent testimony before Congress, the Health and Human Services Secretary suggested that, in order to curb a flu pandemic, the U.S. could override patents.<sup>58</sup> This is

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<sup>50</sup> James Thuo Gathii, *The Structural Power of Strong Pharmaceutical Patent Protection in U.S. Foreign Policy*, 7 J. GENDER RACE & JUST. 267, 287 (2003); Nicholas D. Kristof, *The Secret War on Condoms*, N.Y. TIMES, Jan. 10, 2003, at A3; Fifth Asian and Pacific Population Conference, Dec. 11–17, 2002, Bangkok, *Emerging Issues and Developments at the Regional Level: Poverty Reduction and Emerging Social Issues*, annex III(b)(3), U.N. Doc. E/ESCAP/1271 (Mar. 17, 2003), available at <http://unescap.org/59/e/E1271e.pdf> (setting forth United States' persistent emphasis of its preference for the traditional nuclear family and that "any promotion of the use of condoms or other method of family planning for adolescents in [the Conference's Plan of Action document] should be interpreted in the context of its continued support for, and promotion of, abstinence as the preferred, most responsible, and healthiest choice for unmarried adolescents.").

<sup>51</sup> Bishop, *supra* note 31, at 567.

<sup>52</sup> Gathii, *supra* note 50, at 287.

<sup>53</sup> See generally, Elliot Marseille et al., *HIV Prevention Before HAART in Sub-Saharan Africa*, 359 THE LANCET 1851 (2002).

<sup>54</sup> Gathii, *supra* note 50, at 287–88.

<sup>55</sup> *Id.* at 267–268.

<sup>56</sup> *Id.* at 268, 273–74.

<sup>57</sup> World Health Organization, HIV/AIDS Programme, Towards Universal Access by 2010: How WHO is Working with Countries to Scale-Up HIV Prevention, Treatment, Care and Support, 12 tbl. 1 (2006), available at [http://www.who.int/hiv/toronto2006/UAreport2006\\_en.pdf](http://www.who.int/hiv/toronto2006/UAreport2006_en.pdf).

<sup>58</sup> *Assessing the National Pandemic Flu Preparedness Plan: Hearing Before the Comm. on Energy and Commerce*, 109th Cong. 39 (2005) (statement of Michael O. Leavitt, Secretary, Department of Health and Human Services) [hereinafter *Assessing the National Pandemic Flu Preparedness Plan*] (stating that in the event of a pandemic, each country would be unlikely to achieve access to the drug beyond its own domestic supply, but that "the people in *this county* [should] know we will do everything necessary to protect them" (emphasis added)).



consistent with a proposed amendment to the TRIPS Agreement which would allow countries with the capacity to produce essential drugs to export them to countries that lack such capacity when they are experiencing a national health emergency.<sup>59</sup> The Secretary, however, argued that this option was unavailable for other countries.<sup>60</sup>

*B. "New Right" Ideologies Underlie the Global Gag Rule and Other Policies*

The foregoing reversals on funding for reproductive health care and for HIV/AIDS work largely results from the ideological commitments and goals of the New Right.<sup>61</sup> As a result of the *Roe v. Wade* decision,<sup>62</sup> as well as other influences, including the rise of feminism in the 1970's and the increase in women entering the labor force, the New Right came to regard the structure of the traditional family as being in crisis.<sup>63</sup> In addition, for a variety of other reasons, the New Right's pro-life/anti-abortion, pro-family/anti-welfare movement gained strength.<sup>64</sup>

Some of the key elements of this New Right movement are as follows. The first element involves dismantling the welfare state and reasserting the traditional male-headed family.<sup>65</sup> The premise here was that the traditional family forms the "fundamental building block and the basic unit of the society."<sup>66</sup> Thus, the New Right believes that reconstructing the family along these lines would save it from the liberal takeover of the family by the welfare state and its proponents. Implicit in this ideology is the perspective that a woman's primary role is as a mother—a proposition applied in ways that are antithetical to the goal of gaining increased access to services related to women's reproductive rights. A woman who plans, limits, and controls

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<sup>59</sup> See also Agreement on Trade-Related Intellectual Property Rights, Apr. 15, 1994, 31 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, vol. 31, 33 I.L.M. 81 (1994), available at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

<sup>60</sup> *Assessing the National Pandemic Flu Preparedness Plan*, supra note 58.

<sup>61</sup> The political focus of the "New Right" is "individual autonomy, the right to consume and governmental minimalism. This is in contrast to the "New Left," which "stresses the empowerment of minorities and a mutuality of interests among human beings and between them and their environments." MALCOLM WATERS, *GLOBALIZATION* 155-56 (2d ed. 2001).

<sup>62</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>63</sup> ZILLAH R. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY: CRISIS IN LIBERAL AMERICA* 40, 114 (1984).

<sup>64</sup> This variegated conservative coalition was also comprised of neo-conservatives who sought to revise liberalism rather than undermine its influence, as the New Right faction sought to do. *Id.* at 57-58.

<sup>65</sup> *Id.* at 42.

<sup>66</sup> *Id.* at 47.

the size of her family in order to pursue an occupation does not conform to the New Right's limited view of her role. In fact, she is supposed to reduce her reliance on welfare programs that the New Right so abhors.

Second, although committed to a view of individual rights, the New Right did not support the Equal Rights Amendment, which it perceived as an unwanted state interference with the private sphere of the family.<sup>67</sup> Thus, the New Right was, and continues to be, committed to an "ideology of equal opportunity and individual freedom coupled with a structural reality of economic, sexual, and racial inequality."<sup>68</sup> The New Right asserted "that contraception is a 'private good'" and that, therefore, policies that increase access to contraception are outside the realm of proper governance.<sup>69</sup>

Third, the New Right supported a reduction of taxes and relief for married couples because men would bring more money home to support and protect their families.<sup>70</sup> In turn, women would pursue their "natural" duties of nurturing and caring for their families.<sup>71</sup> These views are contrary to the goals of supporters of reproductive rights, as such rights encourage, rather than discourage women's economic independence from men.<sup>72</sup>

Fourth, reassertion of the traditional heterosexual marriage would, according to the New Right, control the dangerous sexual passions and freedoms that pose a threat to the "moral fiber of society."<sup>73</sup> The abstinence-only policy of the Bush administration is strikingly similar in its views of female sexuality as that of the New Right.<sup>74</sup>

U.S. foreign aid policies reflect these ideologies. The New Right supports the commitment of U.S. foreign aid to spread the moral agenda of conservative family values, even at the expense of making reproductive health care widely available. Finally, the movement's ideologies are reflected in this country's commitment towards the protection of pharmaceutical patents at all costs, even in the face of enormous disparities

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<sup>67</sup> *Id.* at 45.

<sup>68</sup> *Id.*

<sup>69</sup> Merrick, *supra* note 32, at 42.

<sup>70</sup> See Richard W. Stevenson, *Bush to Propose Broad Tax Cut In Iowa Speech*, N.Y. TIMES, Dec. 1, 1999, at A1.

<sup>71</sup> EISENSTEIN, *supra* note 63, at 46-47.

<sup>72</sup> See sources cited *infra* note 92.

<sup>73</sup> EISENSTEIN, *supra* note 63, at 55.

<sup>74</sup> See *supra* note 48, 53-54 and accompanying text (discussing the United States's abstinence-only policy); see also CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 211-13 (2005); Katha Pollitt, *Virginity or Death!*, THE NATION, May 30, 2005, available at <http://www.thenation.com/doc/20050530/pollitt> (discussing the Christian Right's opposition to new reproductive health developments, including the human papilloma virus (HPV) vaccine and emergency contraception, due to its fear that such availability would encourage premarital sex).

in access to essential drugs.<sup>75</sup>

### III. IMPLICATIONS OF THE NEW RIGHT'S VIEW OF FAMILY AND SEX

The state “participates[s] in the sexual politics of male dominance by enforcing its epistemology through law.”<sup>76</sup> When the U.S. exports and imposes policies reflecting its culture wars on developing countries, this amounts to a form of “cultural imperialism.”<sup>77</sup> This assertion proceeds from the view that international relations are composed of the “relations between people (‘women’ and ‘men’), between people and states, and between organizations and economies,” and not simply relations between states.<sup>78</sup>

#### A. *A Critical View of Exporting the U.S.’s Culture Wars*

In this section, I analyze the global gag rule in part through the lens of liberal feminism whose contemporary roots are sometimes traced to the publication of Betty Friedan’s book, *The Feminist Mystique*<sup>79</sup> as well as through critical perspectives that do not assume that western feminism should necessarily assume a ‘master discourse’ outside the West without acknowledging that is relatively well “supported by a high level of material well-being, intellectual freedom and personal mobility.”<sup>80</sup>

From these disparate perspectives, the politics of the New Right are a reflection of the patriarchal underpinnings of a male dominated system, as well as the private order of market relations that structures patriarchy.<sup>81</sup>

<sup>75</sup> See *supra* notes 55–60 and accompanying text (discussing the United States’s policy relating to pharmaceutical patents).

<sup>76</sup> CATHERINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* xi (1989).

<sup>77</sup> Deseriee A. Kennedy, *Transversal Feminism and Transcendence*, 15 S. CAL. REV. L. & WOMEN’S STUDIES 65, 71 (2005). Professor Kennedy discusses the criticism of Western feminists as cultural imperialists because of their attempts to address very localized international women’s issues, such as female genital mutilation. This criticism translates neatly to the actions and policies of the United States, in both its problematic conditioning of its international assistance given for reproductive health care and HIV/AIDS work. See Fifth Asian and Pacific Population Conference, *supra* note 50, at annex III(b)(4).

<sup>78</sup> Eleanor O’Gorman & Vivienne Jabri, *Locating Differences in Feminist International Relations*, in *WOMEN, CULTURE, AND INTERNATIONAL RELATIONS* 1, 6 (Vivienne Jabri & Eleanor O’Gorman eds., 1999), available at <http://www.ciaonet.org/book/jabri/jabri01.html>.

<sup>79</sup> Betty Friedan, *THE FEMININE MYSTIQUE* (1963). The liberal feminist commitment to equality between men and women and in particular the dissolution of traditional cultural and religious norms that are regarded as inconsistent with women’s rights is often represented as an antidote to the New Right’s assault on women’s rights.

<sup>80</sup> Rey Chow, *Violence in the Other Country: China as Crisis, Spectacle and Woman*, in *ETHICS OF FEMINISM* 81, 98 (Chandra Talpade Mohant et al. eds., 1991).

<sup>81</sup> EISENSTEIN, *supra* note 63, at 50-52; see also Martha T. McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics From The Court to the “Nanny War,”* 35

Thus, the New Right misleadingly argues that love and devotion govern traditional family relations. Further, the movement's assault on the welfare state reproduces hierarchical sexual and economic relations between men and women.<sup>82</sup> The New Right agenda does this, in part, by rejecting sexual and labor equality between men and women and instead seeking to reassert patriarchal authority, both within the traditional family as well as in sexual relations between men and women.<sup>83</sup>

The New Right's traditional family agenda regards sexual inequality as the necessary outcome of biological differences.<sup>84</sup> Sexual freedom and equality would, according to the New Right, erode and endanger procreation, thereby threatening the future of the traditional family.<sup>85</sup>

Thus, the New Right's central mission considers "how sexuality is managed, sublimated, expressed, denied and propagated."<sup>86</sup> Indeed, the very sexual constitution of patriarchy is a key insight underpinning of the New Right ideology. In effect, the New Right embraces the idea that ending patriarchy would undermine the privileged status and authority of men and that the best way to avoid this is the control of women's bodies. To this end, the New Right seeks to legislate issues of sexuality by drawing boundaries between sex and love and by outlawing sexual choice and freedom with a view to curbing the excesses of liberal feminism and sexual egalitarianism.<sup>87</sup>

The New Right emphasizes that sexual differences between men and women somehow justify unequal economic and social circumstances between individuals.<sup>88</sup> Therefore, the New Right considers interference with

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SETON HALL L. REV. 1291, 1291 (2005) (arguing that "'freemarket' economic ideology is a key hidden player on the right-wing term in the 'culture wars.'")

<sup>82</sup> EISENSTEIN, *supra* note 63, at 50–52 (arguing that "demanding equality before the law and in wages, wage earning women have begun to challenge the patriarchal organization of the market. Therein lies a major crisis for liberalism: the contradictory reality of patriarchal inequality in an ideology of (liberal) equality").

<sup>83</sup> *Id.* at 55 (noting that some new right ideologues realize that "if women's real equality were established, it would erode male privilege and the notion of masculinity as it presently exists").

<sup>84</sup> *Id.* at 53–4 (noting that one new right ideologue argues that undoing the economic privileges men have over women would lead to 'the abolition of biological differences between men and women' that are necessary to maintain the sexual superiority of women that keeps in check the economic superiority of men).

<sup>85</sup> *Id.* at 57.

<sup>86</sup> *Id.* at 53. See also, Judith E. Koons, *Motherhood, Marriage and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WISC. WOMEN'S L.J. 1 (2004); Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L., 121 (2002).

<sup>87</sup> EISENSTEIN, *supra* note 63, at 55–57.

<sup>88</sup> See *id.* at 56; see also Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647 (2005).

open competition through programs like affirmative action and aid to the poor—particularly to women of color on welfare—to be illegitimate.<sup>89</sup> The effect of the programs that *are* supported by the New Right is to promote the economic dependence of women.<sup>90</sup> That is also true of the World Bank's vision of market-centered equality.<sup>91</sup>

The global gag rule encompasses these ideologies both explicitly as well as through its practical effect—that is to make reproductive rights less accessible to women, and thereby impacting women's opportunities. Access to reproductive rights, including access to family planning methods, health care, and where legal, access to abortion, increases women's access to equal opportunities with men.<sup>92</sup>

### *B. Postcolonial and Other Views of the Global Gag Rule*

The New Right's ideologies, as imposed by the global gag rule, implicate more than a *domestic* culture war. In this section, I examine the global gag rule from critical perspectives including post- postmodern<sup>93</sup> and post-colonial feminist critiques.<sup>94</sup> One critical pragmatist states that

<sup>89</sup> EISENSTEIN, *supra* note 63, at 75.

<sup>90</sup> *Id.* at 81.

<sup>91</sup> See Kerry Rittich, *Engendering Development/Marketing Equality*, 67 ALB. L. REV. 575 (2003).

<sup>92</sup> See, e.g., SAVE THE CHILDREN, STATE OF THE WORLD'S MOTHERS 2005: THE POWER AND PROMISE OF GIRLS' EDUCATION 6–7, 11–39 (2005), available at [http://www.savethechildren.org/mothers/report\\_2005/images/SOWM\\_2005.pdf](http://www.savethechildren.org/mothers/report_2005/images/SOWM_2005.pdf); UNITED NATIONS POPULATION FUND, STATE OF THE WORLD POPULATION 2005: THE PROMISE OF EQUALITY: GENDER EQUITY, REPRODUCTIVE HEALTH, AND MILLENNIUM GOALS 41 (2005), available at [http://www.unfpa.org/swp/2005/pdf/en\\_swp05.pdf](http://www.unfpa.org/swp/2005/pdf/en_swp05.pdf) (“Family planning has proven benefits in terms of gender equality, material health, child survival, and preventing HIV. Family planning can also reduce poverty and promote economic growth by improving family well-being, raising female productivity and lowering fertility.”); WORLD HEALTH ORGANIZATION, FAMILY PLANNING AND POPULATION DIVISION OF FAMILY HEALTH, HEALTH BENEFITS OF FAMILY PLANNING (1994), available at [http://www.who.int/reproductivehealth/publications/health\\_benefits\\_family\\_planning/health\\_benefits\\_fp.pdf](http://www.who.int/reproductivehealth/publications/health_benefits_family_planning/health_benefits_fp.pdf); Ushma D. Upadhyay & Bryant Robey, *Why Family Planning Matters*, 27 POPULATION REPORTS 1, 1–2 (1999), available at <http://www.infoforhealth.org/pr/j49/j49.pdf>; United States Agency for International Development, *Family Planning Saves Women's Lives* (November 2001), [http://www.usaid.gov/our\\_work/global\\_health/pop/publications/docs/fpsaves.html](http://www.usaid.gov/our_work/global_health/pop/publications/docs/fpsaves.html).

<sup>93</sup> Postmodern feminist discourses are distinguished from other sub-disciplines of feminism most prominently on their theory that sex is socially constructed through language and therefore not determinable or natural and that there is no single cause for women's inequality. See generally JUDITH BUTLER, *GENDER TROUBLE* (1990); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992).

<sup>94</sup> Also known as “Third-World feminism,” post-colonial feminism asserts that women's experiences are not homogenous across national boundaries and that a relativist perspective is

“patriarchy operates within and across [other realms of differentiation, such as race, class, and ethnicity] to disadvantage women further.”<sup>95</sup> Such critical theorists show that in addition to the cultural traditions and histories that foster inequalities, other forces of influence, from legal institutions and from other dominant state actors, interact with culture to create and maintain disparities.<sup>96</sup>

The global gag rule does more than reflect the patriarchal discourses of the New Right. By exporting its conservative views of family and sex, it presupposes that women in developing countries are powerless victims<sup>97</sup> in need of the West’s benevolence.<sup>98</sup> From this perspective, the goals and policies of the global gag rule are both paternalistic and condescending. It presumes the inability of women in developing countries to pursue choices and opportunities consistent with their own goals and values.

The New Right’s discourse on sexuality also overlaps with the U.S.’s global economic agenda. After all, “the production and disciplining of sexuality is central to the economics of (re)production at the level of the ‘family’ (in all its variations), and at the level of the nation-state”<sup>99</sup>

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required in order to avoid ethnocentric imposition of western ideals. This movement found its early voice in writings such as TRINH T. MINH-HA, *Infinite Layers/Third World?*, in *WOMEN, NATIVE, OTHER: WRITING, POSTCOLONIALITY, AND FEMINISM* 90 (1989), reprinted in *SOCIAL THEORY: THE MULTICULTURAL AND CLASSIC READINGS*, at 543 (Charles Lemert ed., 1999); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 238 (Cary Nelson & Lawrence Grossberg eds., 1988), reprinted in *SOCIAL THEORY: THE MULTICULTURAL AND CLASSIC READINGS*, at 548 (Charles Lemert ed., 1999).

<sup>95</sup> Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 *HARV. INT’L L. J.* 381, 388 (2000); Berta Esperanza Hernández-Truyol, *Making Women Visible: Setting an Agenda for the Twenty-First Century*, 69 *ST. JOHN’S L. REV.* 231, 250 (1995) [hereinafter Hernández-Truyol, *Making Women Visible*] (noting that in studying issues of gender, “a multidimensional feminist perspective is imperative because of women’s racial, ethnic, religious, sexual and cultural diversity”).

<sup>96</sup> See Nyamu, *supra* note 95, at 382.

<sup>97</sup> Vasuki Nesiiah, *The Ground Beneath Her Feet: “Third World” Feminisms*, 4 *J. INT’L WOMEN’S STUDIES* 30, 31 (2003) [hereinafter Nesiiah, *The Ground Beneath Her Feet*]; Vasuki Nesiiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 *HARV. WOMEN’S L.J.* 189, 205 (1993) [hereinafter Nesiiah, *Toward a Feminist Internationality*]; see also R.W. Perry & L. Amede Obiora, *Bridging False Divides: Toward a Transnational Politics of Gender*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 255, 258 (Berta Esperanza Hernández-Truyol ed., 2002) (“The representation of African women as passive victims of patriarchal structures serves to naturalize its own narrative.”).

<sup>98</sup> See Sundhya Pahuja, *The Postcoloniality of International Law*, 46 *HARV. INT’L L.J.* 459, 460–61 (2005).

<sup>99</sup> Nesiiah, *The Ground Beneath Her Feet*, *supra* note 97, at 36; see also Karen Engle, *Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 *AM. J. INT’L L.*, 778, 815 (2005) (arguing that an exclusive focus on sexual violence “deflects

The global gag rule seeks to universalize a culturally-specific view of women. As such, the gag rule departs from the liberal agenda of international human rights which “aspires to be a set of universalist norms defined in contrast to culturally specific norms,”<sup>100</sup> that are supposedly found in non-western societies. In other words, while the U.S. asserts a commitment to universal human rights, the global gag rule exports programs inconsistent with sorely needed reproductive health services for women who cannot afford them. Contrary to the benevolent pretensions of U.S. aid programs, the global gag rule legitimizes and encourages practices harmful to women. Ultimately, through the global gag rule “gender identities [are] being continually reconstituted through social processes,”<sup>101</sup> that reinforce and compound the patriarchy.

#### IV. OVERLAP OF GAG RULE RESTRICTIONS AND CONSERVATIVE RELIGIOUS AND CUSTOMARY NORMS AND PRACTICES

Conservative religious and customary norms and practices in many developing societies mirror the commitments of the New Right in the U.S. I do not mean to suggest that these norms and practices in these societies are uniformly non-egalitarian,<sup>102</sup> far from that.<sup>103</sup> Rather, just like the New Right in the U.S., these norms are based on the beliefs of traditionalists who mobilize conservative traditional and religious family values, which: promote the hierarchical male-headed family; relegate the role of women to the home; deny women access to opportunities to education; legitimize repressive practices such as female genital mutilation in developing countries.<sup>104</sup>

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attention from nonsexual violence” that women also face). The classic statement on the interaction of the state, family and market is set forth in Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARVARD L. REV. 1497 (1983).

<sup>100</sup> Nesiiah, *The Ground Beneath Her Feet*, *supra* note 97, at 35.

<sup>101</sup> Nesiiah, *Toward a Feminist Internationality*, *supra* note 97, at 199.

<sup>102</sup> See Nyamu, *supra* note 95, at 404–06. See also Patricia Kameri-Mbote, *Gender Dimension of Law, Colonialism and Inheritance in East Africa: A Kenyan Women's Experiences*, 35 *Versfassung und Recht in Ubersee* 373 (2002) (using empirical evidence to demonstrate that customary land ownership norms on the ground allow women to have access and use of land but that when courts become involved they often make such rights of use and occupation harder).

<sup>103</sup> See generally James Gathii & Patricia Youngblood Reyhan, *Foreword: Globalization and Comparative Family Law: A Discussion of Pluralism, Universality and Markets*, 67 ALB. L. REV. 545 (2003)

<sup>104</sup> See, e.g., J. Oloka Onyango & Sylvia Tamale, *The Personal is Political or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691 (1995); Adrien Katherine Wing & Tyler Murray Smith, *The African Union and the New Pan-Africanism: Rushing to Organize or Timely Shift: The New*

Identifying such practices as either oppressive or not is too simplistic, as developing societies “are fraught with complexity, not simple and static lines of oppressors and victims.”<sup>105</sup> Analyzing such practices within their contextual settings is beyond the scope of this analysis.<sup>106</sup> My purpose in this article has been to examine how the ideologies of the New Right reconstitute concepts of sex and family, and how this global influence undermines localized critiques and reform of harmful cultural practices.

A. *Overlap of the New Right’s Ideologies with Inegalitarian Practices in Sub-Saharan Africa*

The underlying moral basis of the global gag rule overlaps with the criminalization of abortion and the patriarchal customary and religious norms and practices in sub-Saharan African countries. This overlap serves to deter access to safe and affordable reproductive health care services, as well as to encourage and maintain gender inequalities.<sup>107</sup>

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*African Union and Women’s Rights*, 13 *TRANSNAT’L L. & CONTEMP. PROBS.* 33, 35 (2003) (“[T]he especially strong effects of cultural barriers and low levels of economic development that pervade the African continent have a disproportionately negative effect on the conditions of African women, causing them to suffer greatly by comparison to men.”); Martha Nussbaum, *Women and Work—the Capabilities Approach*, 1 *LITTLE MAGAZINE* 2 (May 2000), available at <http://www.littlemag.com/2000/martha.htm> (“[M]any existing value systems are . . . highly paternalistic, particularly toward women. They treat them as unequal under the law, as lacking full civil capacity, as not having the property rights, associative liberties, and employment rights of males.”).

<sup>105</sup> Nesiah, *Toward a Feminist Internationality*, supra note 97, at 206.

<sup>106</sup> For some insightful analyses, see AAWORD, *A Statement on Genital Mutilation, in THIRD WORLD – SECOND SEX: WOMEN’S STRUGGLES AND NATIONAL LIBERATION* 217 (Miranda Davies ed., 1983); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 *COLUM. HUM. RTS. L. REV.* 189, 238 (1991-92); Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 *HARV. HUM. RTS. J.* 1, 31 (1995). See also Makau Mutua, *Savages, Victims, and Saviors: the Metaphor of Human Rights*, 42 *HARV. INT’L L.J.* 201 (2001) (critiquing various discourses that are revealed in the international human rights movement and noting the alienness of the movement to non-Western states).

<sup>107</sup> See generally *CTR. FOR REPRODUCTIVE LAW & POLICY, ABORTION AND THE LAW: TEN YEARS OF REFORM* (2005), available at [http://www.crlp.org/pdf/pub\\_bp\\_abortionlaws10.pdf](http://www.crlp.org/pdf/pub_bp_abortionlaws10.pdf); *CTR. FOR REPRODUCTIVE LAW & POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGLOPHONE AFRICA PROGRESS REPORT* (2001), available at [http://www.crlp.org/pub\\_bo\\_wowafrika.html](http://www.crlp.org/pub_bo_wowafrika.html) [hereinafter *CTR. FOR REPRODUCTIVE LAW & POLICY, PROGRESS REPORT*]; *CTR. FOR REPRODUCTIVE LAW & POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: ANGLOPHONE AFRICA* (1997), available at [http://www.crlp.org/pub\\_bo\\_wowafrika.html](http://www.crlp.org/pub_bo_wowafrika.html) [hereinafter *CTR. FOR REPRODUCTIVE LAW & POLICY, ANGLOPHONE AFRICA*]. One pro-choice speaker was quoted in a news report as stating that a war against women’s reproductive rights in developing countries



In most sub-Saharan African countries, abortion is a criminal offense,<sup>108</sup> although a majority of countries now have an exception if the abortion is required to save a woman's life.<sup>109</sup> Most of these laws are the product of colonial influence or enactment.<sup>110</sup> Ethiopia, Ghana, and Zimbabwe, recently amended their abortion laws to allow more liberal applications, so that when women seek and receive abortions, they are conducted in a safe manner.<sup>111</sup> South Africa has legalized the practice during the first trimester

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is fuelled by ignorance, taboo, stigma and unjust, archaic abortion laws but also more frighteningly by a deliberate and organized campaign waged in the name of religious fanaticism, stigma and personal ideology and dogma in the highest places One [sic] that has brought otherwise unlikely bed fellows together against women's right to choose.

Godwin Haruna, *Unsafe Abortion: What Role Does Research Have?*, THIS DAY (Nigeria), Apr. 2, 2006 (quoting Eunice Brookman-Amissah), available at <http://www.thisdayonline.com/nview.php?id=44464>.

<sup>108</sup> The 1920 French Law, as codified in the penal laws of Benin, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Mali, and Senegal, "states that there can be no grounds for abortion: whatever the circumstances and conditions under which the pregnancy occurred, and whatever consequences the pregnancy poses to the woman's health." CTR. FOR REPRODUCTIVE LAW & POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES: FRANCOPHONE AFRICA 186 (1999), available at [http://www.crlp.org/pub\\_bo\\_wowfr.html#pdf](http://www.crlp.org/pub_bo_wowfr.html#pdf) [hereinafter CTR. FOR REPRODUCTIVE LAW & POLICY, FRANCOPHONE AFRICA].

<sup>109</sup> See, e.g., Penal Code (2004) Cap. 63 §§ 158–160, 240 (Kenya); Crim. Code (1990) Cap. 77, §§ 228–230, 297, 309, 328 (Nigeria) (applies to southern states of Nigeria); Penal Code (1990) Cap. 345, §§ 232–235 (Nigeria) (applies to northern states of Nigeria); Penal Code (2003) Cap. 16 §§ 150–52, 230 (Tanzania).

<sup>110</sup> Haruna, *supra* note 107. A number of the sub-Saharan African countries based their abortion criminal codes upon the 1920 French Law. CTR. FOR REPRODUCTIVE LAW & POLICY, ANGLOPHONE AFRICA, *supra* note 107, at 186; see also Wing & Smith, *supra* note 104, at 38 (noting African countries have legal systems based on colonial law in addition to the countries' customary law).

<sup>111</sup> Penal Code (2005) arts. 545–552 (Ethiopia) (permitting, since 2005 amendments, abortion upon issuance of a directive from the Ministry of Health, in addition to when the life of the mother is at risk, when the pregnancy was the result of rape or incest, when it is known that the child will be born with an "incurable and serious deformity" or if its life is endangered, when the mother is mentally unfit to raise the child due to age or other deficiency, or when the abortion would avert "grave and imminent danger," and mitigating punishment when the abortion is sought due to "extreme poverty,"); Ghana Crim. Code (1999) §§ 58–59 (Ghana) (allowing, since 1985 amendments, abortion when the pregnancy is the result of rape or if the mother is mentally retarded, when the pregnancy poses a risk to the mother's life or physical or mental health, or when it is likely that the child would be born "with serious physical abnormality or disease"); Termination of Pregnancy Act 29 of 1977 (3)–(5) (Zimbabwe) (permitting abortion, subject to the written opinion of one or more medical professionals, when the mother's life or physical health are in danger, when the child is at risk of being born with a serious "physical or mental defect," or, subject to issuance of a certificate from a court magistrate, when "there is a reasonable possibility that the foetus is conceived as a result of

of the pregnancy.<sup>112</sup>

Traditional norms in many sub-Saharan African countries exacerbate problems relating to unsafe abortions and the spread of sexually transmitted diseases and HIV including: the unequal social, cultural, and religious status of women as compared to men and women's lack of empowerment; and more specifically, practices such as early marriages, multiple partners, polygamy, wife sharing, wife inheritance, widowhood practices and lack of inheritance rights, violence against women, as well as practices such as female circumcision.<sup>113</sup> While some of these traditions are more extreme in their expression than others, they largely coincide with male dominance particularly in the private and economic spheres of the market and the family. Further, to the extent that these practices are inimical to the equal rights of woman, in many ways they parallel the values promoted by the new right. In particular, these practices and the values of the New Right reject sexual and labor equality between men and women while placing a high value on the traditional male headed family.<sup>114</sup> Within the African countries,

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unlawful intercourse"); Sexual Offenses Act of 2001 (Zimbabwe) (expanding the definition of "unlawful intercourse" for the purposes of obtaining a legal abortion to include, in addition to rape, incest, and intercourse with a mentally disabled woman, intercourse or indecent acts with a minor or an "intellectually handicapped person"). Ethiopia's recent amendments also did away with the marital exemption for abduction and rape, which had allowed a perpetrator to be exempt from criminal liability for abduction and rape if he subsequently married his victim. Penal Code (2005) arts. 558–559 (Ethiopia); Equality Now--Ethiopia: Abduction and Rape—Law Reform and the Case of Woineshet Zebene Negash, Women's Action 22.4 (June 2005), [http://www.equalitynow.org/english/actions/action\\_2204\\_en.html](http://www.equalitynow.org/english/actions/action_2204_en.html). The effect of the previous law was to give incentive to men to engage in actions such as rape and abduction because the girl's family would be ashamed of the girl and therefore would consent to the marriage. *Id.*

<sup>112</sup> Choice on Termination of Pregnancy Act 92 of 1996 s. (2)(a). The Act also allows abortion after the first trimester but before the twentieth week of gestation if a medical practitioner confirms that there is risk to the mothers physical or mental health, the pregnancy is the result of rape or incest, the fetus is likely to be born with "severe physical or mental abnormality," or if the economic circumstances of the mother would be significantly affected if the pregnancy was continued. Choice on Termination of Pregnancy Act 92 of 1996 s. (2)(b). The Act further allows abortion after the twentieth week of gestation if the medical practitioner, after consulting with another medical professional, concludes that the mother's life is in danger, the fetus would be severely malformed or likely to be injured as a result of the continued pregnancy. Choice on Termination of Pregnancy Act 92 of 1996 s. (2)(c). The Act was subsequently upheld against constitutional challenges based on the "right to life" clause of the Constitution and based on the lack of any parental consent provision in the Act for application to minors. *Christian Lawyers Ass'n v. Minister of Health* 1998 (11) BCLR 1434 (T) (S. Afr.); *Christian Lawyers' Ass'n v. Nat'l Minister of Health* 2004 (10) BCLR 1086 (T) (S. Afr.).

<sup>113</sup> CTR. FOR REPRODUCTIVE LAW & POLICY, PROGRESS REPORT, *supra* note 107, at 23–28 (Ethiopia); *id.* at 40–44 (Ghana); *id.* at 59–65 (Kenya); *id.* at 80–86 (Nigeria); *id.* at 104–11 (South Africa); *id.* at 123–28 (Tanzania); *id.* at 140–47 (Zimbabwe).

<sup>114</sup> Polygamy in particular is "one of the major reasons African men have difficulty

such practices intersect with the sheer lack or denial of reproductive rights. The pre-colonial value placed on reproductive labor of women in Africa, was “controlled and exploited by men through customs such as brideprice and polygamous marriages.”<sup>115</sup> Further complicating women’s access to reproductive services in these countries is the reality that a husband may forbid a woman from receiving such services.<sup>116</sup> The practice of female circumcision has been the target of the Bush administration’s vociferous condemnation.<sup>117</sup> While such condemnation of the practice is certainly welcome, the global gag rule endorses de-funding reproductive health care programs thereby undermining the objective of consistently promoting the goals of freedom of individual choice and equality of opportunity for women.<sup>118</sup>

Another customary practice inconsistent with the rights of women is the use of women as compensation or cure.<sup>119</sup> For example, in Ghana, there exists a practice of imprisoning women in *trokosi* shrines “ostensibly to atone for sins committed by family members,”<sup>120</sup> further reflecting the propensity in particular renditions of culture to use women as means to other ends, rather than as individuals. South Africa, despite its progressive legislation legalizing abortion, still has incidents of offensive traditional practices, including virginity testing of adolescent girls and engagement in sex with such virgins as a cure for AIDS,<sup>121</sup> reflecting the explosive legacy of “racialized sexual subordination” in a patriarchal society.<sup>122</sup>

Practices which emphasize male pleasure over that of the woman

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supporting their families, placing heavier burdens on women to produce and support their children.” Wing & Smith, *supra* note 104, at 40.

<sup>115</sup> Wing & Smith, *supra* note 104, at 44 (quoting Fitnat Naa-Adjeley Adjetey, *Religious and Cultural Rights: Reclaiming the African Woman’s Individuality: The Struggle Between Women’s Reproductive Autonomy and African Society and Culture*, 44 AM. U. L. REV. 1351, 1355 (1995)).

<sup>116</sup> Wing & Smith, *supra* note 104, at 44–45.

<sup>117</sup> Fifth Asian and Pacific Population Conference, *supra* note 50, at annex III(b)(4).

<sup>118</sup> See Hope Lewis & Isabelle R. Gunning, *Cleaning Our Own House: “Exotic” and Familiar Human Rights Violations*, 4 BUFF. HUM. RTS. L. REV. 123, 134 (1998) (quoting an African feminist organization’s reaction to U.S. activists’ outrage over female genital mutilation as “failing to see the forest for the trees,” or, in other words, failing to address other inequities that contribute to the practice or exist in addition thereto (quoting Ass’n of African Women for Res. & Dev. (AAWORD), *A Statement on Genital Mutilation*, in THIRD WORLD WOMEN, SECOND SEX: WOMEN’S STRUGGLES AND NATIONAL LIBERATION: THIRD WORLD WOMEN SPEAK OUT 218 (Miranda Davies ed., 1983))).

<sup>119</sup> CTR. FOR REPRODUCTIVE LAW & POLICY, PROGRESS REPORT, *supra* note 107, at 166.

<sup>120</sup> *Id.* at 40.

<sup>121</sup> *Id.* at 104–05, 166.

<sup>122</sup> Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women’s Rights in South Africa*, 26 N.C. J. INT’L L. & COM. REG. 693, 697 (2001).

include the tradition in South Africa and Zimbabwe of preparing a woman's vagina before sex "in order to make it 'dry'" for the purpose of enhancing the male partner's pleasure; this practice being associated with increased risk of HIV and STD infection.<sup>123</sup> Arguably, the patriarchal assumptions that justify and underlie these practices parallel the patriarchal beliefs on the subordinate position of men in relation to women.<sup>124</sup>

The power and economic dynamics in the family exacerbate the increased risk of AIDS resulting from these practices. As a result of relationships based upon ideas, such as those asserted by the New Right, that it is natural and proper that women be dependent upon their husbands, women in many African countries have compromised bargaining power within their marital relationships, and therefore are often not in a position to insist their husbands use condoms.<sup>125</sup>

Practices associated with traditional labels may also become dangerous for women. Widows in Ghana may be stoned to death based on accusations of witchcraft and communities sometimes banish women labeled as witches (usually unmarried women) to the outskirts of the country.<sup>126</sup>

Economic control is yet another area where tradition persists, such as in Zimbabwe, where a man makes payments to the family of his prospective bride in a practice called *lobola*.<sup>127</sup> This tradition brings to mind the image of the male breadwinner, as endorsed by the principles of the New Right, justifying his control over his wife and his children by his economic role in the family.

Significantly, as of the year 2000, a number of northern Islamic Nigerian states adopted *Shari'ah* law as their penal code: Islamic scriptures, the legal application of which was traditionally limited to issues of personal status, such as marriage and divorce.<sup>128</sup> Amnesty International spoke out against the application of the religious laws because they violated human rights law.<sup>129</sup> The organization described the impact of the *Shari'ah* law

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<sup>123</sup> CTR. FOR REPRODUCTIVE LAW & POLICY, PROGRESS REPORT, *supra* note 107, at 104–05, 140.

<sup>124</sup> EISENSTEIN, *supra* note 63, at 55.

<sup>125</sup> Wing & Smith, *supra* note 104, at 45.

<sup>126</sup> CTR. FOR REPRODUCTIVE LAW & POLICY, PROGRESS REPORT, *supra* note 107, at 40, 124.

<sup>127</sup> *Id.* at 140; *see also* Angeline Shenje-Peyton, *Balancing Gender, Equality, and Cultural Identity: Marriage Payments in Post-Colonial Zimbabwe*, 9 HARV. HUM. RTS. J. 105, 107 (1996) (arguing that *lobola* (or marriage payments) are central to the subordination of women and that they must be abolished).

<sup>128</sup> *Id.* at 74.

<sup>129</sup> Press Release, Amnesty Int'l, Nigeria: The Death Penalty and Women under the Nigerian Penal Systems (Feb. 10, 2004), *available at* [http://news.amnesty.org/index/ENGAFR440072004/\\$FILE/newsrelease.pdf](http://news.amnesty.org/index/ENGAFR440072004/$FILE/newsrelease.pdf); Zamfara State of Nigeria, Shariah Penal Code

relating to abortion<sup>130</sup> in the words of one young woman who was given the death sentence for culpable homicide:

I had a baby but the baby died. The foetus was only eight months old. My husband had divorced me. When I was questioned at the police station I said the baby was still-born. In court, I pleaded for myself. The court asked 'Did you murder this child?', and I replied 'No'. A doctor looked at the dead baby. He said it was still-born. He told the police but was never called to court to witness. I have been in detention and prison for over 10 years.<sup>131</sup>

The *Shari'ah* Penal Code contains numerous other provisions offensive to women's rights, resulting in harsh punishments, such as an order for public flogging of a young adolescent girl for giving birth out of wedlock. In an effort to curb prostitution, the code requires all single and divorced female employees of the state to marry or lose their jobs.<sup>132</sup> A wife's infidelity in her marriage requires a punishment of death by stoning at the hands of her husband.<sup>133</sup>

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Law (2000), <http://www.zamfaraonline.com/sharia/introduction.html> (last visited Mar. 1, 2003).

<sup>130</sup> Zamfara State of Nigeria, *Shari'ah Penal Code* (2000) §§ 207–211 [hereinafter *Shari'ah Penal Code*], available at <http://www.zamfaraonline.com/sharia/>. Section 207 of the *Shari'ah* Code states:

Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with the payment of *ghorrah* [compensation], and shall also be liable to caning which any extend to ten lashes.

*Id.* § 207; see also *id.* § 56 (defining *ghorrah*). Section 210 states that:

Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth and does by such act prevent that child from being born alive or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished:

- (a) with *qisas* [retaliation]; and
- (b) if without intention with payment of *diyyah* [a hefty fine].

*Id.* § 210; see also *id.* § 59 (defining *diyyah*). *Qisas*, is specifically punishment imposed by *Shari'* (Allah), which is essentially retaliation. University of Southern California, USC-MSA Compendium of Muslim Texts, <http://www.usc.edu/dept/MSA/reference/glossary/term.QISAS.html>.

<sup>131</sup> Press Release, Amnesty Int'l, *supra* note 129.

<sup>132</sup> CTR. FOR REPRODUCTIVE LAW & POLICY, PROGRESS REPORT, *supra* note 107, at 74.

<sup>133</sup> *Shari'ah Penal Code* §§ 126–127, available at <http://www.zamfaraonline.com/sharia/chapter08.html>.

Religious influences of the New Right in the United States have also vigorously sought to limit the ability of women to make reproductive choices. The New Right often aligns itself with the “Christian Right,” and conservative Catholicism in their opposition to the growth of reproductive freedoms.<sup>134</sup> Religion, thus, is yet another influence that affects the discursive analysis of women’s rights.<sup>135</sup>

Liberal feminists would argue that slow progress of social reforms in developing societies results from conservative religious and cultural norms and the general refusal of these societies to recognize women’s contributions to the economic, social, and political spheres.<sup>136</sup> As we have seen, these norms in many ways parallel the ideologies asserted by the New Right.

Yet gender inequities do not result merely from conservative religious and cultural norms.<sup>137</sup> In addition to such norms, social influences and political institutions shape gender norms and their consequences for women.<sup>138</sup> As globalization fragments the sovereign state,<sup>139</sup> developed countries have potential to make a profound impact. Countries in the position to offer or decline funding assert tremendous power. Thus, the global gag rule serves not only to *support* traditional patriarchal customs of developing countries, but it also legitimizes, maintains, and shapes such practices.

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<sup>134</sup> See Jörg Maas & Christian Resch, *Progress in Policy-Making in Population and Reproductive Health Issues*, in UNITED NATIONS ECON. COMM’N FOR EUROPE, THE NEW DEMOGRAPHIC REGIME: POPULATION CHALLENGES AND POLICY RESPONSES 251, 264 (Miroslav Macura et al. eds., 2005) (observing that the U.S. has aligned itself with the Holy See in opposing contraception as a reproductive right).

<sup>135</sup> See Wing & Smith, *supra* note 104, at 41.

<sup>136</sup> Nyamu, *supra* note 95, at 384.

<sup>137</sup> Hernández-Truyol, *Making Women Visible*, *supra* note 95, at 253 (noting that culture may be used “as a shield to disguise women’s human rights abuses”).

<sup>138</sup> See Nyamu, *supra* note 95, at 387; Wing & Smith, *supra* note 104, at 37 (“Forces of women’s oppression operate on micro and macro levels—‘women of color may be simultaneously dominated within the context of imperialism, neocolonialism, or occupation as well as local patriarchy culture, and customs’” (quoting Adrien Katherine Wing, *Introduction: Global Critical Race Feminism for the Twenty-First Century*, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 1, 12 (Adrien Katherine Wing ed., 2000)); see also Michelle Wallace, *Negative Images: Towards A Black Feminist Cultural Criticism*, in THE CULTURAL STUDIES READER 131 (S. During ed., 1993) (in a similar context, arguing that simply canonizing previously unpublished black female authors must not simply be about revising a “once all-white, all male canon, but significantly altering ‘relations of power in higher education or relations of representation in the production of knowledge’”).

<sup>139</sup> See Berta Esparanza Hernández-Truyol, *Human Rights, Globalization, and Culture: Centering Personhood in International Narrative*, in A CRITICAL MORAL IMPERIALISM ANTHOLOGY 353 (Berta Esparanza Hernández-Truyol ed., 2002) (observing that globalization and changing notions of sovereignty have empowered transnational entities to set international norms).

*B. Overlap of New Right Ideology with Patriarchal Regimes*

At international population meetings, the U.S. has found itself in the company of countries that promote patriarchal religious and cultural practices inconsistent with equal rights for women. In the Cairo Conference on Population and Development,<sup>140</sup> as well as in the Beijing Conference on Women,<sup>141</sup> the U.S. often sided with the Vatican and countries like Syria, Iran, and Sudan in supporting positions inimical to the rights of women.

In the fifth Asian and Pacific International Conference on Population and Development (ICPD) in 2002, the U.S. reversed its prior position in support of the ICPD's 1994 Program of Action by forcefully proposing deletions of the words "reproductive rights" and "reproductive health services" because, the U.S. argued, these terms were code words for abortion.<sup>142</sup> The U.S. also sought the deletion of the word "adolescent" in the Plan because the U.S. argued that it would have resulted in encouraging underage sex.<sup>143</sup> No other country supported the U.S. in this effort.<sup>144</sup> Similarly, at the UN Special Session on Children in 2002, the US took issue with references to reproductive health information and services for adolescents.<sup>145</sup>

There is, therefore, credibility in making the claim that U.S. support for the global gag rule coincides with, reinforces, and is reinforced by conservative religious and customary practices, both on the ground, as well as in international standard and legal setting forums.<sup>146</sup> The cross-pollination of the New Right's extension of its culture wars abroad with

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<sup>140</sup> International Conference on Population & Development, Cairo, Sept. 5–13, 1994, *Report of the International Conference on Population and Development*, U.N. Doc. A/CONF.171/13 (1995).

<sup>141</sup> Fourth World Conference on Women, Beijing, Sept. 4–15, 1995, *Report of the Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 (1995). The Beijing Conference was especially notable for the participation of the women representatives of the various nation-states. MALCOLM WATERS, *GLOBALIZATION* 152 (2d ed. 2001) (noting that in previous women's conferences "women tended to argue with each other from the point of view of their own nation-states. They represented the cleavages . . . characterized by East vs. West, and North vs. South." (internal citation omitted)).

<sup>142</sup> Fifth Asian and Pacific Population Conference, *supra* note 50, at annex III(a)(b)(1); Bishop, *supra* note 31, at 540.

<sup>143</sup> Fifth Asian and Pacific Population Conference, *supra* note 50, at annex II(I); Bishop, *supra* note 31, at 541.

<sup>144</sup> Fifth Asian and Pacific Population Conference, *supra* note 50, at annex II; Bishop, *supra* note 31, at 542.

<sup>145</sup> Maas & Resch, *supra* note 134, at 264.

<sup>146</sup> *See id.* at 260. The European Council reacted to the U.S.'s Mexico City Policy via their recommendation that "the role of religion and international policy making" should be examined, EUR. PARL. ASS., *State of the World Population*, \_\_ Sess., Doc. No. 1564 (2002); Maas & Resch, *supra* note 134, at 260.

conservative customary norms and practices operates to limit and subvert progress towards the political, economic, and cultural empowerment of women. It contradicts the U.S.'s commitment to equal rights for women and may embolden the very forces that undermine the democracy and freedom that the U.S. seeks to support abroad. As a more regressive and immediate impact, the global gag rule severely hobbles and restricts the ability of NGOs to provide reproductive health care services to women around the world.

## V. INTERNATIONAL LEGAL LIMITATIONS OF THE GAG RULE

In light of our discussion so far, one may pose the question: is international law “simply a ‘cloak of legality’ thrown over the subjugation of colonized peoples by the imperial powers in a distortion of international law’s true spirit,” or as a series of “doctrines and institutions... molded by the powerful in order to serve those interests... [and] in turn facilitating practices of (neo)colonialism”?<sup>147</sup> Or to the contrary, is international law a body of universal rules that “applies to all states regardless of their specific cultures, belief systems, and political organizations”?<sup>148</sup>

The gag rule undermines the emerging right to democratic governance.<sup>149</sup> This right recognizes the rights of individuals and groups such as NGOs to participate in the affairs of their governments without inhibitions. International treaties, as well as principles of customary law, provide for freedoms of expression and association as aspects of democratic governance.<sup>150</sup> The global gag rule’s threat of withdrawal of funding to NGOs if they lobby governments for policy changes relating to abortion or if they counsel women as to their reproductive choices violates these principles.

Further, by interfering with the exercise of the right to democratic governance, the global gag rule is a non-forcible intervention into matters

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<sup>147</sup> Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT’L L. J. 459, 459 (2005) (quoting CHRISTOPHER WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW 4 (2004)).

<sup>148</sup> Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L. J. 1, 1 (1999).

<sup>149</sup> See generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992).

<sup>150</sup> *Id.* at 61; see also International Covenant on Civil and Political Rights arts. 18–19, 22, Dec. 16, 1966, 999 UNTS 171. In May 2006, the Southern District of New York held that the ‘Anti-Prostitution Pledge Requirement’ was inconsistent with the free speech rights of privately funded non-governmental organizations that participate in the federal government’s international HIV/AIDS programs. See *Alliance for Open Society International v United States Agency for International Development*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006).



that are exclusively within the domestic jurisdiction of foreign countries, inconsistent with the provisions of article 2(7) of the Charter of the United Nations.<sup>151</sup> The International Court of Justice affirmed this right of nonintervention in the Nicaragua case, holding that there existed “established and substantial” practice in support of the principle of nonintervention.<sup>152</sup>

The global gag rule is also inconsistent with accepted international health care rights and standards. In particular, the gag rule conflicts with the World Health Organization’s standard goal of providing ‘holistic’ health care.<sup>153</sup> Holistic health care addresses the obstacles women confront in gaining access to health care generally, and reproductive health specifically, as a result of cultural and economic forces, such as poverty and cultural taboos.<sup>154</sup> In fact, the many problems of poverty require “a focus upon the human person as well as upon the economic and physical environment.”<sup>155</sup> By disabling NGOs from helping women to address or overcome those obstacles, the global gag rule leaves them to fend for themselves without the kind of support necessary to change their circumstances.

The gag rule is also an extraterritorial projection of U.S. legislation to foreign jurisdictions. By requiring foreign NGOs to refrain from engaging in advocacy directed at changing abortion laws in their own countries and with their own money, and not simply with USAID funds, the gag rule is inconsistent with international comity. International comity is the respect sovereigns give each other by limiting the reach of their laws into foreign jurisdictions.<sup>156</sup> The U.S. Supreme Court has described the doctrine as such: “Comity is not just a vague political concern favoring international cooperation *when it is in our interest to do so*. Rather it is a principle...

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<sup>151</sup> U.N. Charter art. 2, para. 7. The Charter states that:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

<sup>152</sup> Military and Parliamentary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 106, 108–109 (Jun. 27); *see also* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT’L L. 1, 3 n.6 (1989).

<sup>153</sup> WORLD HEALTH ORG., REPRODUCTIVE HEALTH STRATEGY: TO ACCELERATE PROGRESS TOWARD THE ATTAINMENT OF INTERNATIONAL DEVELOPMENT GOALS AND TARGETS ¶ 30 (adopted by the World Health Assembly 2004), *available at* <http://www.who.int/reproductive-health/publications/strategy.pdf>.

<sup>154</sup> *Id.*

<sup>155</sup> Fifth Asian and Pacific Population Conference, *supra* note 50, at annex III(b)(4).

<sup>156</sup> *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993); Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist., 482 U.S. 522, 555 n.10 (U.S. 1987).

which... reflect[s] the systemic value of reciprocal tolerance and good will.”<sup>157</sup> Therefore, not only will “[p]olicies and programs conceived without consideration for local context and place... have limited impact,”<sup>158</sup> but they will also interfere with and sometimes reverse efforts to reform conditions where they are most needed. Unfortunately, most, if not all, recipients of USAID funding live in poor countries that often have little or no choice other than to accept the harsh conditions of USAID funding. The moral impact of 179 countries acceding to the Programme of Action produced by the International Conference on Population and Development should not be underestimated. The commitments of the international community to pursue population goals and the commitment of reliance on the contributions of NGOs to achieve such ends will remain unfulfilled if “[t]he comity of nations in varying degrees of shamefacedness looks the other way or impotently down at its collective shoes.”<sup>159</sup>

#### VI. CONCLUSIONS: TOWARDS A BALANCED FINANCING OF REPRODUCTIVE HEALTH CARE

U.S. tax dollars can finance reproductive health care without exporting the U.S.’s culture wars abroad. Restrictions on the right to advocate or practice abortion in circumstances such as where the life of the mother or the child are at risk, or in the case of rape or incest, especially in countries where it is permissible to do so, ought to be lifted. U.S. tax dollars would meet the federal government’s goal of supporting reproductive health care services by working to support rather than to undermine groups such as UNFPA, the Marie Stopes clinic in Kenya,<sup>160</sup> or the Nepalese NGO that declined USAID

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<sup>157</sup> *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 555 (1987) (emphasis added). Judge Story is well-known for his description of the doctrine: “The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.” *Id.* at 555 n.10 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 35 (8th ed. 1883)).

<sup>158</sup> STEPHEN A. MATTHEWS & BINA GUBHAJU, POPULATION RESEARCH INSTITUTE, CONTEXTUAL INFLUENCES ON THE USE OF ANTENATAL CARE IN NEPAL 35, *available at* <http://www.measuredhs.com/pubs/pdf/GS2/GS2.pdf>.

<sup>159</sup> Massoumeh Ebtekar, *Hope on the Horizon*, 6 FARZANEH: J. WOMEN’S STUDIES & RESEARCH IN IRAN & MUSLIM COUNTRIES 1, 2 (2003), *available at* <http://www.farzanehjournal.com/archive/Download/artiIn11.pdf> (discussing the failure of the comity of nations in addressing the plight of Afghan women).

<sup>160</sup> *See supra* notes 16–18.

funding to advocate for changes in that country's abortion restrictions.<sup>161</sup>

Definitive research demonstrates the efficacy of UNFPA around the world.<sup>162</sup> Withdrawing support for UNFPA undermines the efficacy of such programs and results in unnecessary deaths and expenditures to care for those that engage in unsafe abortions.<sup>163</sup> The existing empirical evidence strongly suggests that the consequence of the global gag rule is to undermine, rather than to support, a culture of life. Such an unbending, absolutist, and categorical commitment against abortion and condom use, without regard to empirical realities in the developing countries, also results in the inefficient allocation of tax payer dollars. Rather than using tax dollars to support a broad range of accessible reproductive health care services that would lower unsafe abortion related fatalities and complications arising from lack of access to such services, under the global gag rule the U.S. only uses its dollars to treat those with complications, thereby reducing more effective and widespread methods of prevention and care.

The global gag rule also sits uncomfortably with the U.S.'s support for building democracy and good health care services around the world.<sup>164</sup> In fact, because the U.S.'s credibility in supporting reproductive health has been undermined by the global gag rule, the European Commission announced a multimillion-dollar donor program in 2006 to support reproductive health care services the U.S. had stopped funding in 1973.<sup>165</sup> At last, the message seems to be getting across on the other side of the Atlantic that ideological politics ought to play no part in broadening access to reproductive health care in the poorest countries in the world.

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<sup>161</sup> See *supra* notes 8–15.

<sup>162</sup> See, e.g., DEP'T FOR INT'L DEV., WORKING IN PARTNERSHIP WITH THE UNITED NATIONS POPULATION FUND (UNFPA): INSTITUTIONAL STRATEGY (2005), available at <http://www.dfid.gov.uk/pubs/files/unfpa-is-final.pdf>; UNITED NATIONS POPULATION FUND, UNFPA ANNUAL REPORT 2005, available at [http://www.unfpa.org/upload/lib\\_pub\\_file/615\\_filename\\_annual-report\\_05.pdf](http://www.unfpa.org/upload/lib_pub_file/615_filename_annual-report_05.pdf).

<sup>163</sup> Susan A. Cohen, *U.S. Global Reproductive Health Policy: Isolationist Approach in an Interdependent World*, 7 GUTTMACHER REP. ON PUB. POL'Y 7, 7 (2004) (reporting the results of the global gag rule internationally, including increased maternal mortality and the lack of any reduction in the incident of abortion).

<sup>164</sup> See CTR. FOR REPRODUCTIVE RIGHTS, EUROPEAN PERSPECTIVES ON THE GLOBAL GAG RULE 2–7 (2002), available at [http://www.crlp.org/pdf/pub\\_bp\\_europerspectivesggr.pdf](http://www.crlp.org/pdf/pub_bp_europerspectivesggr.pdf).

<sup>165</sup> See *Africa: EC Adds to Global Fund Kitty*, PLUS NEWS, Aug. 2, 2006, [http://www.plusnews.org/AIDSreport.asp?ReportID=5087&SelectRegion=Southern\\_Africa&SelectCountry=AFRICA](http://www.plusnews.org/AIDSreport.asp?ReportID=5087&SelectRegion=Southern_Africa&SelectCountry=AFRICA).