ABORT THE BANS: POST-*DOBBS* UNITED STATES IS IN VIOLATION OF INTERNATIONAL LAW

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I. INTRODUCTION

In 2022, the world was taken aback by the United States Supreme Court's decision to overrule the forty-nine-year-old constitutional right to abortion in *Dobbs v. Jackson Women's Health.*[1] Since *Dobbs*, there has been a huge step backwards in reproductive justice as states legislate to the far reaches of that decision.[2] This Note will look at recent state legislation and proposed legislation in light of the Supreme Court's decision in *Dobbs*. It will inquire whether, in creating bans on abortion, states are violating international human rights law. Several states[3] have responded to the decision in *Dobbs*, and this Note will look at states' complete abortion bans as well as growing abortion restrictions.

Some states, including Alabama, Arkansas, Idaho,[4] Kentucky, Louisiana, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas,[5] West Virginia, and Wisconsin, have since banned abortions with no exceptions for rape or incest.[6] These will be described throughout the Note as the "most extreme bans." Mississippi banned abortions except in cases of rape and incest that have been reported to law enforcement.[7] In June 2023, the Indiana Supreme Court certified its original ruling upholding Indiana's ban on abortion.[8] Abortion is now prohibited in Indiana unless a "lethal fetal anomaly" is identified before twenty-two weeks of pregnancy,

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[1] *'I Underestimated the Depth of Outrage': A Year in Post-Roe America*, POLITICO (June 23, 2023, 4:30 AM), https://www.politico.com/news/magazine/2023/06/23/dobbs-roe-abortion-surprises-00103084 [https://perma.cc/U3JV-3VQ5]; *see also generally* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

[2] Raegan McDonald-Mosley*, Dobbs Fallout: Abortion Access One Year Later*, POWER TO DECIDE (June 23, 2023), https://powertodecide.org/news/dobbs-fallout-abortion-access-one-year-later [https://perma.cc/Q5M6-8HEU].

[3] Throughout the paper, there will be reference both to states within the United States as well as to nation-states. When referring to states within the United States, I will use "states," and when referring to countries, I will use "States."

[4] In 2023, the Idaho Supreme Court upheld Idaho's abortion ban in Planned Parenthood Great Northwest v. State, 522 P.3d 1132 (Idaho 2023).

[5] S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021) (The bill created a private right of actions against providers and people who assist patients who seek an abortion after six weeks of pregnancy).

[6] *Tracking Abortion Bans Across the Country,* N.Y. TIMES, (Sept. 11, 2023) [hereinafter Tracking Abortion Bans], https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/Y3F7-3SXF].

[7] *Abortion in Mississippi*, CTR. FOR REPROD. RTS., https://reproductiverights.org/case/scotus-mississippi-abortion-ban/abortion-in-mississippi [https://perma.cc/2MWH-5TPW] (last visited Sept. 12, 2023).

[8] *See generally* Members of the Med. Licensing Bd. of Ind. v. Planned Parenthood, 211 N.E.3d 957 (Ind. 2023).

and in cases of rape or incest, until twelve weeks of pregnancy.[9] Georgia set a gestational limit, banning abortions after six weeks of pregnancy[10] before a lower court held the ban unconstitutional.[11] The ban was, however, ultimately reinstated by Georgia's Supreme Court.[12] South Carolina also set a gestational limit of twelve weeks, which was upheld by its Supreme Court.[13] Other states passed gestational limits, including twelve weeks in Nebraska and North Carolina, fifteen weeks in Arizona and Florida, and eighteen weeks in Utah.[14] Other states, including Iowa, Montana, Ohio, and Wyoming implemented bans which have been blocked for now, awaiting judicial hearings.[15] Nevertheless, it is clear that abortions have been extremely limited, if not completely banned, in almost half of the United States.

The conclusions drawn in this Note are that (1) the criminalization of abortion is at odds with international law; (2) abortion bans that do not take into account danger to the health of the mother are also in violation of international law; (3) countries, including the United States, have duties regarding equal access to reproductive health; and (4) the United States has duties under the International Covenant on the Elimination of All Forms of Racial Discrimination ("ICERD") that are directly relevant here. While citizens might be able to travel to other states in the country to get abortions, and therefore one might argue that the United States is not in violation of (1) and (2), the U.S. might still be in violation of (3) and (4). That is, abortion bans in the U.S. still violate international law regardless of the freedom to travel to another state to get an abortion.

The modern system of international law has made a move from focusing solely on relations between countries to covering individual citizens as well, meaning that individuals now have a certain status and

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[9] Morgan Watkins, *After Yearlong Fight, A Near-Total Abortion Ban Is Going into Effect in Indiana*, NPR (Aug. 1, 2023, 5:00 AM), https://www.npr.org/sections/health-shots/2023/08/01/1191156197/after-yearlong-fight-a-near-total-abortion-ban-is-going-into-effect-in-indiana [https://perma.cc/TQ4B-LQ3X].

[10] *Abortion Policies in Georgia*, GUTTMACHER INST., https://states.guttmacher.org/policies/georgia/abortion-policies [https://perma.cc/64LF-7G6F].

[11] *See* ASSOCIATED PRESS, *Georgia's Highest Court Reinstates Ban on Abortions After 6 Weeks*, NPR (Nov. 23, 2022, 2:41 PM), https://www.npr.org/2022/11/23/1139039767/georgia-supreme-court-reinstates-abortion-ban [https://perma.cc/NUX4-DSHE].

[12] *Id.*

[13] *See generally* Planned Parenthood S. Atl. v. State, 440 S.C. 465 (2023).

[14] Tracking Abortion Bans, *supra* note 6.

[15] *Id.*

protection under international law.[16] Therefore, this Note is able to analyze State violations of individual rights under international law. The horrors of the Holocaust led the international community to "change the focus of international law to include governance of the way a nation treats its citizens."[17] There are two ways in which individuals possess rights and protections under international law: (1) under "universal and regional conventions" and (2) under what has come to be known as customary international law.[18] Customary international law "results from a general and consistent practice of [S]tates that they follow from a sense of legal obligation."[19] Rights that become customary international law are binding on all States.[20] Treaty-based rights are created by the State parties to the treaty and are binding on those States.[21] International human rights and freedoms have been codified in different treaties, and Europe, the Americas, and Africa also have "treaty-based regional human rights regimes."[22] Some of the obligations on the United States emerge from human rights treaties that it has ratified, and others emerge from binding customary international law. The Restatement (Third) of the Foreign Relations Law of the United States defines a rule of international law as "one that has been accepted as such by the international community of [S]tates (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world."[23] The Restatement further defines customary international law as "a general and consistent practice of [S]tates followed by them from a sense of legal obligation."[24] The treatment of reproductive rights in the Inter-American System for the Promotion and Protection of Human Rights, the U.N. Human Rights System, the U.N. General Assembly, Human Rights Council, Special

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[16] KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW 349–50 (Cambridge Uni. Press 2011).

[17] Jack Goldsmith, *International Human Rights Law & The United States Double Standard*, 1 GREEN BAG 2d 365, 365 (1998).

[18] PARLETT, *supra* note 16, at 350.

[19] *Customary International Law*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/customary_international_law [https://perma.cc/NT6C-L3JM] (last visited Sept. 17, 2023).

[20] Hannah Moscrop, *Enforcing International Human Rights Law: Problems and Prospects*, E-INT'L REL. (Apr. 29, 2014), https://www.e-ir.info/2014/04/29/enforcing-international-human-rights-law-problems-and-prospects [https://perma.cc/4FSG-NSCR].

[21] PARLETT, *supra* note 16, at 361.

[22] Goldsmith, *supra* note 17, at 366.

[23] RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 102(1)(a)–(c) (AM. L. INST. 1 1987).

[24] *Id.*

Rapporteurs Reports, the European System, and the Inter-American System all give a sense of customary international law on reproductive rights.[25]

International law resides in a grey area within the United States' domestic judicial system. While the Constitution makes clear that treaties signed by the United States are the supreme law of the land, the role of customary law is unclear.[26] The Supreme Court has been hesitant to include international law as a force in its judgments and has failed to treat customary international law as binding in domestic litigation.[27] Notably, however, whether the United States has incorporated international law into its judicial system and whether the United States is in violation of international law are two different things. Whether international law's obligations regarding abortion have been or can be implemented into the United States' domestic system is outside the scope of this Note. Rather, this Note only looks to whether the United States is in violation of international law.

Being in violation of international law has broad implications for a State. While international law does not have a centralized enforcement mechanism, it may be enforced and upheld through different processes. The strongest enforcement mechanisms are declarations and conventions on human rights, which codify and create legally binding human rights obligations.[28] The treaties oftentimes form monitoring bodies to regulate themselves. Within the United Nations, for example, there are treaty-based and charter-based bodies which "monitor implementation of the core international human rights treaties."[29] These mechanisms address complaints and ensure that "violations are prevented, stopped, investigated or that remedial action is taken."[30]

On a regional level, the Inter-American Commission on Human Rights is the body of the Organization of American States ("OAS") that promotes

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[25] Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125, 141–42, 152 (1994).

[26] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

[27] Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 477, 480–90 (Louis Henkin & John L. Hargrove eds., 1994).

[28] Moscrop, *supra* note 20.

[29] *Instruments & Mechanisms*, U.N., https://www.ohchr.org/en/instruments-and-mechanisms#:~:text=There%20are%20two%20types%20of,core%20international%20human%20rights%20treaties [https://perma.cc/9CGV-Z6TZ] (last visited Sept. 17, 2023).

[30] *Id.*

and protects human rights in the American hemisphere.[31] Its work is based on an individual petition system that "observes the general situation of human rights in the Member States," including the United States.[32] The Inter-American Court of Human Rights is also a part of the OAS, and may "issue advisory opinions on issues pertaining to the interpretation of the Inter-American instruments."[33] Although these opinions are not legally binding, they are considered "soft law" and may become customary international law.[34]

Both bodies of the OAS work together and "may issue emergency protective measures" when there is an "immediate risk of irreparable harm."[35] In addition to the treaty-based and charter-based enforcement mechanisms, States are often bound by underlying pressures. Harold Hongju Koh contends that international human rights law is enforced through a transnational legal process.[36] This process occurs through "institutional *interaction*, *interpretation* of legal norms, and attempts to *internalize* those norms into domestic legal systems."[37] These systems are obeyed, he argues, due to five possible explanations, including "*power, self-interest* or rational choice, *liberal explanations* based on rule-legitimacy or political identity, *communitarian explanations*, and *legal process explanations* at the state-to-state level" and "from the international-to-national level.[38] For example, Iraq "ultimately respect[ed] the borders of Kuwait . . . because the other nations of the world came in" and made them.[39] When it comes to international rights, South Africa, after being subjected to "tremendous external pressure and coercive mechanisms" from the international community, was able to "internaliz[e] new norms of international human rights law."[40] The reality is, States follow international

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[31] *Mandates and Functions*, OAS, https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/functions.asp [https://perma.cc/2GES-9T5Z] (last visited Sept. 25, 2023).
[32] *Id.*
[33] *Inter-American Human Rights System*, INT'L JUST. RES. CTR., https://ijrcenter.org/regional/inter-american-system [https://perma.cc/E33F-5ZLA] (last visited Mar. 19, 2023).
[34] Dinah L. Shelton, *Soft Law* in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68, 70 (David Armstrong ed. 2008).
[35] *Inter-American Human Rights System*, *supra* note 33.
[36] Harold H. Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L. J. 1397, 1399 (1998).
[37] *Id.*
[38] *Id.* at 1401.
[39] *Id.* at 1402.
[40] *Id.* at 1407.

law because it greatly impacts their popularity and legitimacy in the eyes of the international community.[41]

The United States has long acknowledged the significance of human rights and the international community's responsibility to pursue them. In 1977, President Carter stated that because the United States is free, "[it] can never be indifferent to the fate of freedom elsewhere,"[42] and that the U.S. has a "responsibility and a legal right to express [its] disapproval of violations of human rights."[43] Further, President Carter asserted that "no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when . . . unwarranted deprivation of freedom occurs in any part of the world."[44] The abortion bans, therefore, become relevant to, and a responsibility of, the international community.

This Note will analyze states' actions through an intersectional approach from the perspective of critical feminism. Reproductive justice transcends "the pro-choice/pro-life debate and has three primary principles: (1) the right *not* to have a child; (2) the right to *have* a child; and (3) the right to *parent* children in safe and healthy environments."[45] In turn, these principles call for "access to specific, community-based resources including high-quality health care, housing and education, a living wage, a healthy environment, and a safety net for times when these resources fail."[46] In applying the theory of reproductive justice, this Note goes beyond the pro-choice and pro-life debate as it pertains to abortion. It applies the bans on abortion to issues of race, class, and sexuality within international human rights. Throughout the Note, the term "women" is used when discussing abortion and abortion-care; however, it is important to recognize that abortion is not solely a women's issue and largely impacts transmen, non-binary, and gender non-conforming persons.

This Note will unfold as follows. Part II will discuss the background of international law on this topic: how individuals became subjects under international law, the history of reproductive justice in international law,

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[41] *See generally id.*

[42] Jimmy Carter, Inaugural Address (Jan. 20, 1977) (transcript available in the Yale Law School Lillian Goldman Law Library's online records).

[43] Jimmy Carter, The President's News Conference (Feb. 23, 1997) (transcript available in The American Presidency Project's online records).

[44] Jimmy Carter, Address Before the U.N. General Assembly (Mar. 17, 1977) (transcript available in the U.S. Department of State's archives).

[45] LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 9, 9 (Univ. Cal. Press 2017).

[46] *Id.*

and what kind of law governs this area of international human rights. Part II will also include a brief discussion of the history of reproductive justice in the United States. Part III goes on to address the United States' obligations in international law as well as State obligations in international law. It will then engage in a discussion of whether the concept of State sovereignty protects the United States' actions from international involvement on this issue. In Part IV, the Note will respond to Justice Kavanaugh's argument in *Dobbs* that the right to interstate travel provides a mechanism for people in the United States to get abortions. This Note will demonstrate that the right to interstate travel does not change the fact that the United States is in violation of international law. Finally, Part V addresses the question of where the United States can go from here. If the states', and therefore the United States' actions are in fact a violation of international law, what can be done about it?

II. BACKGROUND

A. INDIVIDUALS AS SUBJECTS UNDER INTERNATIONAL LAW

The idea that international law may protect people from interference in their reproductive health is a relatively new phenomenon. Traditional international law recognized nation-states as its main subjects.[47] It was only after the Second World War that individuals were recognized as subjects of international law.[48] The individual must possess a nationality in order to access international law protections.[49] By 1992, Oppenheim's treatise recognized the individual's placement in international law as a legal subject, stating,"[T]he quality of individuals . . . as subjects . . . is apparent from the fact that . . . they enter into direct legal relationships on an international plane with [S]tates and have, as such, rights and duties flowing directly from international law."[50] This new placement of individuals within international law allowed for the creation of human rights norms, many of which have since become customary international law.[51] Because individuals cannot be

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[47] Chiara Giorgetti, *Rethinking the Individual in International Law*, 22 LEWIS & CLARK L. REV. 1085, 1088 (2018).
[48] *Id.* at 1089.
[49] *Id.* at 1133 (rejecting the notion that nationality should be a prerequisite to access international law remedies).
[50] *Id.* at 1092 (quoting OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 2008).
[51] Milena Sterio, *The Evolution of International Law*, 31 B.C. INT'L & COMPAR. L. REV. 213, 252 (2008).

signatories to treaties in order to acquire rights and obligations the way States can, individuals acquire rights and obligations through a "passive process, directed primarily" by the States.[52] There are two ways for individuals to acquire rights under international law: by treaty and by customary international law. Rights conferred by treaty are created "by the [S]tate[] parties to the treaty."[53] Rights granted by customary international law are created as a "consequence of [S]tate practice[—]or at least failure of [S]tates to persistently object to the formation of a customary rule."[54] The doctrine of State responsibility "holds a [S]tate accountable for breaches of international obligations committed by or attributable to the [S]tate."[55] These breaches often occur as a violation of a treaty obligation or an obligation set by customary international law.

The protections international law offers to individuals are judicially enforceable private rights through which individuals can seek redress from domestic or international judicial bodies for violations of human rights.[56] Human rights are also imposed "by diplomatic and public persuasion, coercion, shaming, economic sanctions, isolation, and in more egregious case, by humanitarian intervention."[57] There have been a few examples in history of how these "soft" restraints in the international system have proven productive in their ability to create change. The most prominent example is the international community's response to South Africa's apartheid system. In that case, the employment of economic sanctions proved a success in pressuring the majority apartheid rule in South Africa to dissipate.[58]

International human rights law has, throughout the years, expanded to address the topic of reproductive justice. Reproductive rights were conceptualized at the International Conference on Population and Development ("ICPD") as (1) "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to

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[52] PARLETT, *supra* note 16, at 352.
[53] *Id.* at 361.
[54] *Id.*
[55] Cook, *supra* note 25, at 127.
[56] Sterio, *supra* note 51, at 231 (quoting John A. Cohan, *Sovereignty in a Postsovereign World*, 18 FLA. J. INT'L L. 907, 910 (2006)).
[57] *Id.* at 231.
[58] *See generally*, Joseph Hanlon, *Successes and Future Prospects of Sanctions Against South Africa*, 47 REV. OF AFR. POL. ECON. 84 (1990) (discussing the impact of sanctions on ending apartheid).

attain the highest standard of sexual and reproductive health,"[59] and (2) that these rights "embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents."[60] This definition implies a few things. First, deciding the number, spacing, and timing of when to have children also implies the right to decide to not have children. Second, this definition is expansive rather than limiting. It is open to include more than it states, embracing those rights that are already established in national and international laws.

B. INTERNATIONAL HUMAN RIGHTS LAW AND REPRODUCTIVE JUSTICE

The leading question for the purpose of this Note is, *What* does international human rights law protect? The follow-up is, *How* does it protect?

International human rights law started with the United Nations' Universal Declaration of Human Rights ("The Declaration") in 1948. Although The Declaration began as soft law, eventually it was adopted to be customary international law.[61] Unsurprisingly, human rights have evolved into reproductive justice in a rather self-interested way. Reproductive justice in international human rights is often referred to as "sexual and reproductive health and rights" ("SRHR").[62] The idea of SRHR first appeared in the realm of population growth as increasing population rates began to be considered a security threat among nations.[63] And thus, population control became "explicitly linked to the advancement of human rights" at the International Conference on Human Rights in 1968 because States believed a reduction in population rates would entail "greater opportunities for the enjoyment . . . and the improvement of living conditions."[64] This idea slowly developed into an understanding that "population policies should be consistent with human rights,"[65] and at the Bucharest World Conference on Population in 1974, the World Population

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[59] *Report of the Fourth World Conference on Women*, at 36, U.N. Docs. A/CONF.177/20/REV.1, U.N. Sales No. 96.IV.13 (1996) [hereinafter UN Report on Women].
[60] *Id.*
[61] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMPAR. L. 287, 289 (1996).
[62] Lucía B. Pizzarossa, *Here to Stay: The Evolution of Sexual and Reproductive Health and Rights in International Human Rights Law*, LAWS 1, 2 (2018).
[63] *Id.* at 13.
[64] *Id.* at 3 (quoting FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, at 15 U.N. Docs. A/CONF.32/41, U.N. Sales No. E.68.XIV.2 (1968)).
[65] Pizzarossa, *supra* note 62, at 3..

Plan of Action ("WPPA") was adopted, demanding that nations "[r]espect and ensure, regardless of their over-all demographic goals, the rights of persons to determine, in a free, informed and responsible manner, the number and spacing of their children."[66] The WPPA further emphasized that the "[e]qual status of men and women in the family and in society improves the overall quality of life."[67] The ICPD also introduced the definition of reproductive health:

> Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.[68]

Since then, an emerging body of treaty law, reports, and comments on reproductive rights and health has appeared in international law. A year later, the Beijing conference affirmed the commitments made in Cairo and supported the view of reproductive rights as universal.[69]

The Beijing Platform was adopted by 189 countries. Part of it called on governments around the world to "[r]ecognize and deal with the health impact of unsafe abortion as a major public health concern."[70] In 1981, the Convention on the Elimination of All Forms of Discrimination Against Women affirmed the right of women to reproductive freedom, providing a strong legal foundation for the right to reproductive choice.[71] In 1994, the International Conference on Population and Development in Cairo stated that "reproductive rights embrace certain human rights that are 'already recognized' in national laws, international laws, and international human rights documents and other consensus documents."[72]

Aside from treaties, there is customary international law on the issue of reproductive rights. To determine whether something can be considered customary international law, one can look to State practice to inquire how

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[66] REPORT OF THE UNITED NATIONS WORLD POPULATION CONFERENCE, at 11, U.N. Docs. E/CONF.60/19, U.N. Sales No. 58.XIII.4 (1974).

[67] Pizzarossa, *supra* note 62, at 4 (quoting REPORT OF THE UNITED NATIONS WORLD POPULATION CONFERENCE, *supra* note 66, at 14).

[68] Rep. of the Int'l Conf. on Population and Dev., at 43, U.N. Docs. A/CONF.171/13 (1994).

[69] Pizzarossa, *supra* note 62, at 9.

[70] UN Report on Women, *supra* note 59, at 39.

[71] G.A. Res. 34/180 (Dec. 18, 1979).

[72] Pizzarossa, *supra* note 62, at 8.

international law reacted in the past to State violations of reproductive justice.[73] In addition to practice, reports and comments can offer a sense of what customary international law is.[74] The United Nations Special Rapporteur on the Right to Health affirmed that restrictions on abortions, which are "discriminatory in nature, violate the right to health by restricting access to quality goods, services, and information."[75] Further, they "infringe human dignity by restricting the freedoms to which individuals are entitled under the right to health, particularly in respect of decision-making and bodily integrity."[76]

Unfortunately, during the past few years several States have implemented restrictions in the realm of reproductive justice, leading international actors to respond. In October 2020, Poland's Constitutional Court banned abortions.[77] In response, the U.N. issued a press release quoting international human rights experts who stated that Poland sacrificed "women's human right[s] to safe and legal health services for termination of pregnanc[ies] on account of protection of the right to life of the unborn in violation of its international human rights obligations."[78] Furthermore,in the same month, Ecuador's government vetoed the Organic Health Code.[79] The code was an effort to improve the "right to health and to advance gender equality" to end a provider's ability to deny a person an abortion or emergency contraception.[80] The U.N. Special Rapporteur on violence against women and the former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental

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[73] Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction, and Assertion*, 26 Eur. J. Int'l L. 417, 420 (2015).

[74] *Analytical Guide to the Work of the International Law Commission*, INT'L L. COMM'N, https://legal.un.org/ilc/guide/1_13.shtml [https://perma.cc/F9UD-RNWM].

[75] *Sexual and Reproductive Health Rights: Special Rapporteur on the Right to Health*, U.N., https://www.ohchr.org/en/special-procedures/sr-health/sexual-and-reproductive-health-rights [https://perma.cc/LD2F-KPN9] (last visited Sept. 17, 2023).

[76] *Id.*

[77] *Poland Has Slammed Door Shut on Legal and Safe Abortions – UN Experts*, U.N. (Oct. 27, 2020), https://www.ohchr.org/en/press-releases/2020/10/poland-has-slammed-door-shut-legal-and-safe-abortions-un-experts?LangID=E&NewsID=26434 [https://perma.cc/2PP5-JNXY].

[78] *Id.*

[79] *Ecuadorian President Vetoes Health Code Bill*, CNA (Sept. 28, 2020, 4:19 PM), https://www.catholicnewsagency.com/news/46002/ecuadorian-president-vetoes-health-code-bill [https://perma.cc/D6J8-S47R].

[80] *UN Experts Call Veto of Ecuador's Organic Health Code a Missed Opportunity to Advance Gender Equality and Health Care*, U.N. (Oct. 21, 2020), https://www.ohchr.org/en/press-releases/2020/10/un-experts-call-veto-ecuadors-organic-health-code-missed-opportunity-advance?LangID=E&NewsID=26401 [https://perma.cc/T9CQ-25CJ].

health conducted reports that encouraged the adoption of the Organic Health Code for the country to be "in line with international human rights standards."[81]

In April 2020, the U.N. published a press release urging Poland to reject "two bills before parliament one of which could be used to make sexuality education of children an offence punishable by jail and the other would further restrict access to safe and legal termination of pregnancy."[82] U.N. human rights experts wrote that this issue is "about the fundamental rights of women and girls."[83] In November 2019, United Nations human rights experts urged the international community to "[prioritize] women's rights to meet the promises and commitments on sexual and reproductive health made . . . 25 years ago."[84] They called on the international community to "reaffirm unambiguously its commitments" to reproductive rights, saying that "[criminalizing] termination of pregnancy is one of the most damaging manifestations of [instrumentalizing] women's bodies and health, subjecting them to risks to their lives or health and depriving them of autonomy in decision-making."[85] Additionally, in September 2018, the U.N. issued a press release, stating, "States across the world should act now to [decriminalize] abortion and make every effort to ensure women and girls have the right to take their own decisions about pregnancy."[86] Lastly, in August 2018, the U.N. published a press release in response to Argentina's denial of a bill that would have legalized abortion during the first fourteen weeks of pregnancy. U.N. human rights experts stated that they "deeply regret that the Argentinian Senate failed to seize this historical moment to demonstrate the country's commitment towards eliminating discrimination against women in its legislation and to advance women's and adolescents'

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[81] *Id.*

[82] *Poland Urged Not to Criminalise Sex Education or Tighten Access to Abortion,* U.N. (Apr. 16, 2020), https://www.ohchr.org/en/press-releases/2020/04/poland-urged-not-criminalise-sex-education-or-tighten-access-abortion?LangID=E&NewsID=25796 [https://perma.cc/VJT5-V22C].

[83] *Id.*

[84] *Time for World Leaders to Honour 25-Year Old Promises and Renew Their Commitments on Women's Rights, Say Human Rights Experts,* U.N. (Nov. 11, 2019), https://www.ohchr.org/en/press-releases/2019/11/time-world-leaders-honour-25-year-old-promises-and-renew-their-commitments?LangID=E&NewsID=25282 [https://perma.cc/7NM3-B3YK].

[85] *Id.*

[86] *States Must Act Now to Allow Safe, Legal Abortions for Women and Girls, Say UN Rights Experts,* U.N. (Sep. 27, 2018), https://www.ohchr.org/en/press-releases/2018/09/states-must-act-now-allow-safe-legal-abortions-women-and-girls-say-un-rights?LangID=E&NewsID=23646 [https://perma.cc/8BCP-ZCQB].

sexual and reproductive rights, in accordance with its international human rights obligations."[87]

These Special Rapporteur reports and press releases give us a sense of customary international law on this matter, which puts forth the notion that the criminalization of abortion is a violation of international human rights. It is clear that the policies outlined in reproductive justice, namely, the right not to have a child, the right to have a child, and the right to have a child in safe and healthy conditions, are recognized as human rights under international law. The major difference between the United States' abortion restrictions and the above examples is that in the United States, abortions are not federally banned, but rather, banned or restricted by specific state governments. Nevertheless, this does not change the responsibilities and obligations of the United States. States are organs of the national government, meaning that their actions are attributed to the United States.[88] Therefore, the United States as a whole will be held accountable even if the sitting executive is in disagreement with individual states.[89]

C. HISTORY OF REPRODUCTIVE JUSTICE IN THE UNITED STATES

The history of reproductive justice in the United States is important as it gives us a sense of whether the United States has been a persistent objector in the creation of customary international law on the issue of reproductive rights. The persistent objector doctrine emerged to protect States who "persistently object[] to an emerging norm" from being bound by that norm once it becomes customary international law.[90] In order to receive the title of a persistent objector, States must "object when the rule is in its nascent stage, and continue to object afterwards," and "the objection must be consistent."[91] *Roe v. Wade*, in creating a constitutionally protected right to

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[87] *Argentina: UN Rights Experts Regret Senate's Rejection of Bill to Legalise Abortion,* U.N. (Aug. 10, 2018), https://www.ohchr.org/en/press-releases/2018/08/argentina-un-rights-experts-regret-senates-rejection-bill-legalise-abortion?LangID=E&NewsID=23444 [https://perma.cc/3Y5Z-QVXP].

[88] Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994, SUP. CT. REV. 295, 298 (1994).

[89] *Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session*, 2001 Y.B. Int'l L. Comm'n, U.N. Docs. A/CN.4/SER.A/2001/Add.1, U.N. Sales No. E.04.V17.

[90] Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 150 (1996).

[91] *Id.*

abortion, was a huge celebration in the realm of reproductive rights.[92] Thus, the United States was clearly not a persistent objector as it created a constitutionally protected right in 1973 and continued to uphold that right in 1992 in *Planned Parenthood v. Casey*.[93]

Then, in 2022, came *Dobbs*, in which the Supreme Court held that there is no constitutionally protected right to abortion, and the decision of whether to protect abortions is left to the states.[94] Since then, various states have implemented laws which ban abortions, impacting both individuals and corporations, such as Walgreens, which confirmed that "it will not dispense abortion pills in several states where they remain legal."[95]

There are a few types of abortion bans. Pre-viability gestational bans prohibit abortions before viability.[96] Method bans are those that prohibit a specific method of abortion care, "most commonly dilation and extraction (D&X) procedures and dilation and evacuation (D&E) procedures."[97] Reason bans prohibit abortion "if sought or potentially sought for a particular reason."[98] The criminalization of self-managed abortions ("SMA") punishes people who "self-manage" their abortions, in other words, "end their pregnancies outside of a health care setting."[99] Lastly, SB-8 Copycats, laws modeled after Texas' SB-8,[100] ban abortions at an early gestational age and "authorize[] members of the public to sue abortion providers and people who help others access abortion care."[101]

In the middle of the spectrum, in between bans and protections of abortions, are abortion restrictions. The first type of abortion restriction is

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[92] Roe v. Wade, 410 U.S. 113 (1973). To gain insight into the impact of *Roe*, *see also* Roe v. Wade, NATION, https://www.thenation.com/article/activism/roe-v-wade [https://perma.cc/X4CC-SFEV].

[93] Planned Parenthood v. Casey, 503 U.S. 957 (1992).

[94] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

[95] Alice M. Ollstein, *Walgreens Won't Distribute Abortion Pills in States Where GOP AGs Object*, POLITICO (Mar. 2, 2023, 7:07 PM), https://www.politico.com/news/2023/03/02/walgreens-abortion-pills-00085325 [https://perma.cc/Y63J-GSN3].

[96] *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state [https://perma.cc/S5A7-DEYW] (last visited Feb. 3, 2023) ("Gestational age is counted in weeks either from the last menstrual cycle (LMP) or from fertilization.").

[97] *Id.*

[98] *Id.* (describing how laws prohibit abortion if sought for a particular reason, such as the race or sex of the fetus, even though there is no evidence that pregnant people are seeking an abortion for those reasons).

[99] *Id.*

[100] S. 8, 87th Leg., Reg. Sess. (Tex. 2021).

[101] CTR. FOR REPROD. RTS., *supra* note 96.

the Targeted Regulation of Abortion Providers ("TRAP").[102] These laws single out medical practitioners who provide abortion care and "impose various legal requirements that are different from and more burdensome than those imposed on physicians who provide comparable types of care."[103] TRAP laws may regulate the location of abortion services, qualifications of abortion providers, and reporting requirements. Parental involvement is another abortion restriction that has survived the test of time. These restrictions require that providers "notify parents or legal guardians of young peoples seeking [an] abortion prior to an abortion (parental notification) or document parents' or legal guardians' consent to a young person's abortion (parental consent)."[104] General consent laws impose a restriction on abortions by requiring pregnant people to receive "biased and often inaccurate counseling or an ultrasound prior to receiving abortion care," and at times require people to wait a certain amount of time between receiving these services and abortion care in hopes of "dissuad[ing] pregnant people from" getting the abortion.[105] The last abortion restriction, which has been in place since 1976, is the Hyde Amendment. This budget rider prohibits federal funding for abortion.[106] Although international law does not require that every place in the country have the same kind of facilities, it most definitely requires equal access to abortion.

III. THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW

A. THE UNITED STATES IS RESPONSIBLE FOR ITS STATES' ACTIONS

To begin the analysis of the United States' obligations in international law, it is first important to establish that states' actions are in and of themselves acts of the United States. There is, however, a question of whether the United States is responsible for states' actions. After all, *Dobbs* did not criminalize abortion, it only took away the constitutionally protected right to abortion, leaving that decision to the states. Nevertheless, the system of federalism does not take away the federal government's responsibility

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[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Because the Hyde Amendment is a federal action, it is outside the scope of this paper. For information on the Hyde Amendment's compatibility with international law, *see* Aly McKnight, *The Human Rights Approach to Address Black Maternal Mortality: Why Policymakers Should Listen to Black Moms*, 14 NE. U. L. REV. 679, 704 (2022).

for the actions of its states. The Inter-American Convention on Rights and Duties of States, ratified by the United States, asserts that "[t]he federal state shall constitute a sole person in the eyes of international law."[107] The United States federal government is responsible "for assuring the nation's compliance with its international obligations."[108] In *Hines v. Davidowitz*, the United States Supreme Court made it clear that the federal government, "representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with" the international system.[109] The states, therefore, are an extension of the federal government, and violations of international law by the states translate into a violation of international law by the United States.

Although the actions of states are ultimately the responsibility of the United States, state courts have a responsibility to implement international human rights law.[110] The United States Constitution pits international treaty law as the supreme law of the land, along with "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof."[111] These are to be binding on "[j]udges in every state."[112] It must be the case, then, in line with the nature of the federal system, that state courts must implement U.S. treaties or other international agreements. Otherwise, the U.S. "cannot, as a practical matter, achieve compliance with the treaty provisions to which it is party."[113]

B. UNITED STATES TREATY AND CUSTOMARY OBLIGATIONS

The United States has ratified five international human rights treaties.[114] These include the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention Against Torture. This means that the obligations created in these texts are binding on the United States

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[107] Montevideo Convention on Rights and Duties of States art. 2, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 19.
[108] Ronan Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1281 (1996).
[109] Hines v. Davidowitz, 312 U.S. 52, 63 (1941).
[110] Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006).
[111] U.S. CONST. art. VI.
[112] *Id.*
[113] Davis, *supra* note 109, at 362.
[114] *Treaties in Force*, U.S. DEP'T. OF STATE, https://www.state.gov/treaties-in-force [https://perma.cc/F76B-LDG3] (last visited Jan. 8, 2024).

as the supreme law of the land and are binding on both the federal government and state governments.

The United States is also a party to the International Covenant on Civil and Political Rights ("ICCPR"). The Human Rights Committee, which monitors this treaty, interpreted[115] the "right to life" to mean that:

> States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, and where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.[116]

Most obviously, the aforementioned states that ban abortions without exceptions for rape and incest are in violation of this. However, it is important to keep in mind that "suffering," "pain," "life," and "health" are subjective terms. Forcing a person to have a child who does not want to, is not ready to, or cannot for any reason have a child causes suffering.[117] A study conducted by Advancing New Standards in Reproductive Health showed that restricting access to abortion is linked to mental health issues.[118] In the study, people who were denied abortions "reported more anxiety symptoms and stress, lower self-esteem, and lower life satisfaction than those who received one."[119] Further, people who went forward with an unwanted pregnancy after being denied an abortion had "more physical health problems, including two who died from childbirth complications."[120] Because the Human Rights Committee interpreted "substantial pain and suffering" to include psychological, emotional, and mental pain and

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[115] *See* Gabriella Citroni, *The Human Rights Committee and Its Role in Interpreting the International Covenant on Civil and Political Rights vis-à-vis States Parties*, EJIL: TALK! (Aug. 28, 2015), https://www.ejiltalk.org/the-human-rights-committee-and-its-role-in-interpreting-the-international-covenant-on-civil-and-political-rights-vis-a-vis-states-parties [https://perma.cc/6BSD-XHSB] (Recent debates have emerged on the weight of the Human Rights Committee's interpretations of treaties. While some argue that States should decide "whether the observations and recommendations issued by the HRC are to be supported and implemented," the HRC has an "interpretative authority that prevails over that of States parties.").

[116] Hum. Rts. Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, ¶ 8, U.N. Docs. CCPR/C/GC/36 (Oct. 30, 2018).

[117] *See The Turnaway Study*, ANSIRH, https://www.ansirh.org/research/ongoing/turnaway-study [https://perma.cc/7VD3-XFSH] (last visited Mar. 22, 2023).

[118] *Id.*

[119] Zara Abrams, *The Facts about Abortion and Mental Health*, AM. PSYCH. ASS'N., https://www.apa.org/monitor/2022/09/news-facts-abortion-mental-health [https://perma.cc/S5TM-7MYG] (last updated Apr. 21, 2023),

[120] *Id.*

suffering in the case of forced pregnancy due to rape or incest, there is no reason not to include the other instances where a pregnancy can cause psychological, mental or emotional pain and suffering. After all, the right to life does not seem to have a condition to its claim. In addition to mental and emotional suffering, forcing a person in poverty to birth a child that cannot be provided for impedes the parent's ability to live and creates a life risk in the struggle for material means. Research conducted by the Guttmacher Institute showed that in 2014, 75% of abortion patients were poor or low-income, 49% live at less than the federal poverty level, and 26% live at 100 to 199 percent of the poverty level.[121]

Of course, this begs the question, What about the right to life of the fetus? To be clear, this Note is not setting out to make a scientific argument about when or how life begins. Rather, this Note intends only to look through the language of international law to decipher whether a fetus has a claim to the ICCPR's right to life, and if so, whether this claim trumps that of the mother's. The history of negotiations within the ICCPR suggests that the right to life as protected by the treaty does not implicate life before birth. During negotiations, an amendment to assert that "the right to life is inherent in the human person from the moment of conception," was largely rejected.[122] Other international treaties, including The Declaration, state that humans are "born free and equal in dignity and rights," suggesting that human rights are given by virtue of birth.[123] It therefore seems unlikely that the fetus has a claim under international law to the right to life, or at least to one that trumps the mother's.

The United States is also a party to the ICERD, which entered into force in 1969. The treaty has come to be accepted as a *jus cogens* norm which creates obligations *erga omnes*, obligations "from which no derogation is acceptable."[124] In fact, obligations *erga omnes* are so

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[121] Jenna Jerman et al., *Barriers to Abortion Care and Their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 95, 95 (2017); Shirin Ali, *Abortion Restrictions Will Disproportionately Burden Low-Income Americans*, HILL (July 6, 2022), https://thehill.com/changing-america/respect/poverty/3548067-abortion-restrictions-will-disproportionately-burden-low-income-americans [https://perma.cc/2JBK-S6LC].

[122] Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPROD. HEALTH MATTERS 120, 122 (2005) (quoting U.N. GAOR, 12th Sess., 815th mtg. at 269, U.N. Docs. A/C.3/L.644 (Nov. 20, 1957)).

[123] *Id.* at 124 (quoting G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948) [hereinafter The Declaration].

[124] Gay McDougall, *International Convention on the Elimination of All Forms of Racial Discrimination*, AUDIOVISUAL LIBR. OF INT'L L., https://legal.un.org/avl/ha/cerd/cerd.html [https://perma.cc/55BV-8HR2] (last visited Mar. 21, 2023).

important that "all States can be held to have a legal interest in their protection"[125] and therefore have legal standing in front of the International Court of Justice ("ICJ"). These obligations are owed "by any State party to all the other States parties."[126] This view extends to human rights by looking at States as "entities having a collective duty to safeguard the welfare of humanity as a whole."[127] While the ICJ has a role in adjudicating issues of racial discrimination, the Committee on the Elimination of Racial Discrimination was established under Article 8 of ICERD to examine reports from State parties on how the treaty is being implemented and to publish general recommendations on its "interpretation of the content of human rights provisions."[128] Article 1(1) of the treaty defines racial discrimination as

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[129]

The abortion bans carried out by states result in a disparate impact on Black women. The United States has "shocking" levels of maternal death, with 1,205 women dying of pregnancy-related causes in 2021.[130] The Center for Disease Control and Prevention reported that in 2020, the maternal mortality rate for non-Hispanic Black women was 55.3 deaths per 100,000 live births, compared with 19.1 deaths per 100,000 live births for non-

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[125] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase, 1970 I.C.J. 3, ¶ 33 (Feb. 5) ("In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.").

[126] *See* Application of Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. Rep. 3, ¶ 42 (Jan. 23).

[127] Pok Yin S. Chow, *On Obligations Erga Omnes Partes*, 52 GEO. J. INT'L L. 469, 482–83 (2021).

[128] *Introduction: Committee on the Elimination of Racial Discrimination*, U.N., https://www.ohchr.org/en/treaty-bodies/cerd/introduction [https://perma.cc/8FGY-CCRT] (last visited Jan. 8, 2024).

[129] G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1) (Dec. 21, 1965).

[130] *The U.S.' Shocking Levels of Maternal Death,* STARTRIBUNE (Mar. 21, 2023, 5:15 PM), https://www.startribune.com/the-u-s-shocking-levels-of-maternal-death/600260790 [https://perma.cc/9QQW-AQ32].

Hispanic white women.[131] Today, Black women are 2.6 times "likelier to die of maternity-related causes than white or Hispanic women."[132] The implications of a forced birth, then, are higher for Black women and women of color, and the banning of elective abortions has a disproportionate effect, and may be more likely to result in death, for Black women and women of color. Unfortunately, the disproportionate mortality rates in the United States are not getting any better. In fact, mortality rates in the United States have been increasing since 2000 and have spiked in recent years.[133]

The question then becomes whether ICERD addresses unintentional acts of racial discrimination as well as intentional acts. The committee, in interpreting the convention, has stated that the obligation is to "[ensure] that equality is actually enjoyed in practice," which suggests that it is not only the act itself that has to be non-discriminatory, but also the result.[134] Theodor Meron writes that the phrase "on equal footing" in Article 1(1), alongside "the exception created in Article 1(4) allowing distinctions for the purpose of affirmative action," and the "obligation imposed by Article 2(2) to take certain affirmative action," shows that the convention intended to promote racial equity rather than "color-neutral values."[135] In other words, the equality sought after by this statute is "equality of outcomes rather than merely procedural equality of opportunity."[136] The discriminating act, then, such as the case with the abortion bans, may be facially neutral, but as long as its result yields inequality, it is in violation of the treaty. Although in the United States constitutional context disparate impact does not lend to a higher scrutiny,[137] in international law, disparate impact plays a role. For example, the Inter-American Court of Human Rights published a report on the impact that structural discrimination has on citizen security, recommending that Brazil "consolidate a system to promote and protect

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[131] Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, CDC, https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm [https://perma.cc/HEU4-5G5R] (last visited Mar. 21, 2023).

[132] *The U.S.' Shocking Levels of Maternal Death*, *supra* note 130.

[133] Munira Z. Gunja et al., *The U.S. Maternal Mortality Crisis Continues to Worsen: An International Comparison*, COMMONWEALTH FUND (Dec. 1, 2022), https://www.commonwealthfund.org/blog/2022/us-maternal-mortality-crisis-continues-worsen-international-comparison [https://perma.cc/5AF9-36TJ].

[134] *Report of the Committee on the Elimination of Racial Discrimination*, 33 U.N. GAOR Supp. No. 18, at 110, U.N. Docs. A/33/18 (1978); Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 287 (1985).

[135] Meron, *supra* note 134, at 288.

[136] McDougall, *supra* note 124.

[137] Washington v. Davis, 426 U.S. 229, 248 (1976).

human rights"[138] from racially disparate impact.

The responsibility of the State is outlined in Article II of ICERD, which requires "[e]ach State Party [to] take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."[139] Furthermore, it urges that in order to comply with the obligations set in the covenant, State Parties must defend the enjoyment of "[e]conomic, social and cultural rights," specifically "[t]he right to public health [and] medical care."[140] Although several states in the U.S. have taken action to protect the right to abortion, the federal government has not. The lack of positive measures to protect this right entails a violation of ICERD.

Among these important covenants, the United Nations Charter ("The Charter") and The Declaration act as the sources of authority of international human rights law. The Charter sets out commitments to the "equal rights of men and women"[141] in "develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" and "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[142] The Declaration expands on the Charter's commitments and has come to be considered as customary law.[143] Article I states that "[a]ll human beings are born free and equal in dignity and rights."[144] Dignity here, or humans as the "bearers of dignity,"[145] provides a significant protection. In the context of abortions, dignity has been defined by the Colombian constitutional court as prohibiting the treatment of an individual "as mere means to an end," or "mere instruments of reproduction of the human species."[146] Article II states that "[e]veryone

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[138] *IACHR Publishes Report on Human Rights Situation in Brazil and Highlights Impacts of Historical Processes of Discrimination and Structural Inequality*, OAS (Mar. 11, 2021), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/050.asp [https://perma.cc/D5EK-YP2W].

[139] G.A. Res. 2106 (XX), *supra* note 128, art. 2(1)(c).

[140] *Id*. at art. 5(e),(iv).

[141] U.N. Charter pmbl.

[142] U.N. Charter, art. 1, ¶¶ 2–3.

[143] John P. Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y. L. SCH. L. REV. 31, 33 (1978).

[144] The Declaration, *supra* note 123, at art. 2.

[145] Marcela Prieto, *The Questions of Dignity*, *in* CANONS OF GLOBAL CONSTITUTIONAL LAW 12 (Sujit Choudhry et al. eds.) (forthcoming).

[146] *Id.*

is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[147]

The legal effects of The Charter and The Declaration have been controversial. Some scholars believe that the provisions of The Charter and The Declaration have been characterized as "too vague and general to be given legal effect."[148] The Supreme Court has also been hesitant to expressly use customary international law in deciding domestic disputes, though this has not always been the case. In *Thompson v. Oklahoma*, an Eighth Amendment case, Justice Stevens cited an international opinion in his plurality opinion and stated in a footnote that the Court has "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."[149] However, this position was later rejected by Justice Scalia in 1989, writing that "it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant."[150] Even so, the fact that these bans are in violation of international law is independent of how this should be incorporated domestically. While it would be a step in the right direction for courts to become more open to incorporating international law in their decisions, this does not preclude the State from being in violation of international law. To put it plainly, States cannot opt out of international law. It is binding, whether through treaty law or customary international law.

C. Does State Sovereignty Protect the States' Actions from International Involvement?

There is a question of whether international law is "entitled to override [S]tate sovereignty in the interest of protecting persons."[151] State sovereignty has been the most fundamental principle of international law

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[147] The Declaration, *supra* note 123.
[148] Oscar Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y. L. SCH. L. REV. 63, 67 (1978).
[149] Thompson v. Oklahoma, 487 U.S. 815, 830 n. 31 (1988).
[150] Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).
[151] Kelly K. Pease & Davis P. Forsythe, *Human Rights, Humanitarian Intervention, and World Politics*, 15 HUM. RTS. Q. 290, 290 (1993).

since its inception.[152] It goes hand in hand with the principle of nonintervention into particular internal affairs.[153] After all, it is the States that make up international law. Several United Nations General Assembly resolutions uphold the significance of State sovereignty.[154] The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations asserts, "All States enjoy sovereign equality."[155] Sovereign equality includes the following elements: (a) States are juridically equal; (b) each State enjoys the rights inherent in full sovereignty; (c) each State has the duty to respect the personality of other States; (d) the territorial integrity and political independence of the State are inviolable; (e) each State has the right freely to choose and develop its political, social, economic and cultural systems; (f) each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.[156]

The Holy See, an "episcopal jurisdiction of the Catholic Church of Rome,"[157] tried to argue, in response to the ICPD's confrontation with sexual health and reproductive rights, that "no nation should be forced to change or violate its own laws that prohibit or regulate abortion practices."[158] Can the United States argue that the right to ban abortions is part of its "personality" and political, social, economic, and cultural systems? Recent years have brought with them the idea that the supremacy of State sovereignty has a certain limit. Back in the days of traditional international law, any discussion that looked like an intervention in the affairs of a sovereign in the name of international human rights could constitute "a violation of sovereignty by its 'invasion' of the sovereign's *domaine resérvé*."[159] The world we live in today, however, recognizes the

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[152] *Id.* at 291 (explaining State sovereignty as the State's "ultimate legal right to say what should be done within its jurisdiction").
[153] *Id.*
[154] *See* G.A. Res. 2131 (XX) (Dec. 21, 1965) (declaring that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any other State").
[155] G.A. Res. 2625 (XXV), at 124 (Oct. 24, 1970).
[156] *Id.*
[157] *Holy See: Introduction*, GLOBALEDGE, https://globaledge.msu.edu/countries/holy-see#:~:text=The%20Holy%20See%20is%20a,is%20the%20secretary%20of%20state [https://perma.cc/XGV4-9P76] (last visited Mar. 24, 2023).
[158] Pizzarossa, *supra* note 62, at 9 (quoting James T. McHugh, Delegate, Holy See, Statement at the 32nd Session of the UN Commission on Population and Development) (Mar. 24, 1999)
[159] W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (2017).

sovereignty of the people within the sovereignty of the State.[160] In other words, international law is now concerned with the "continuing capacity of a population freely to express and effect choices about the identities and policies of the governors."[161] Everyone agrees that the State has sovereignty, but the State has sovereignty only to the point that it encroaches on the most fundamental human rights. The reason for this goes back to 1945, when the international community realized that States could do horrible things to their citizens and that there needs to be a point at which people's rights, guaranteed to them by virtue of being human, are more important to protect than the State's rights to decide its own affairs.

IV. DOBBS' PROTECTIONS: DOES THE RIGHT TO TRAVEL SOLVE THE PROBLEM OF VIOLATION OF INTERNATIONAL LAW?

In *Dobbs*, Justice Kavanaugh infamously tried to put a positive spin on the decision by arguing in his concurring opinion that people will still be able to travel to places around the United States to get abortions:

> [A]s I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional manner. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.[162]

It is a nice thought, but the implications of states' actions as a result of *Dobbs* are that there is no longer a guarantee of equal access to the right to abortion, and the lack of this guarantee has racialized implications.

Although international law does not seem to require that every medical facility within a state offer abortion services, it certainly does require that there be equal access to abortion services and reproductive health services more generally.[163] Having to travel to seek an abortion will result in "disproportionate barriers to accessing abortions for people of color."[164] The

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[160] *Id.*
[161] *Id.* at 872.
[162] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).
[163] *See* G.A. Res. 2106 (XX), *supra* note 128.
[164] Samantha Artiga et al., *What Are the Implications of the Overturning of* Roe v. Wade *for Racial Disparities?*, KFF (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities [https://perma.cc/D93S-Z6NE].

disproportionate economic barriers faced by Black women and women of color mean that travel is often infeasible. The costs that come with traveling to access abortion care can exceed the cost of the abortion itself. They include "transportation, accommodations, and childcare" and may "result in more missed work, meaning greater loss of pay."[165] A study conducted by KFF with data from the Centers for Disease Control and Prevention, American Community Survey, Behavioral Risk Factor Surveillance Survey, and Survey of Household Economics and Decisionmaking, found that Black women aged 18-49 "are over three times as likely as their [w]hite counterparts to live in a household without access to a vehicle."[166] This difference also exists between Hispanic women and white women.[167]

Apart from economic setbacks, Black women and women of color may be deterred from traveling to receive abortion care due to social barriers. Women of color may have "immigration-related fears about traveling out of state for an abortion."[168] Among women aged 18-49, 35% of Asian women, 27% of Hispanic women, and 20% of Native Hawaiian and other Pacific Islander women are not U.S. citizens. The fear of detention, deportation, or the risk of interference with one's immigration status may thus deter women of color from traveling to seek the service.

V. WHERE DO WE GO FROM HERE?

A dominant line of discourse within feminist jurisprudence maintains that "[S]tates are seldom held responsible for ignoring their international obligations to respect women's human rights."[169] International law and human rights law more specifically tend to take a gender-neutral approach. Another dominant line of thinking is that the United States' interactions in the realm of human rights is the prototype of a double standard. Namely, the United States excels at calling out individual rights violations abroad but comes short in enforcing them within its own borders. A large body of literature argues that the United States is seldom held responsible for

[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 228, 228 (Rebecca J. Cook ed., 1994).

violations of international law in the way that Third World countries are.[170] If all of this is the case, where do we go from here?

For the United States to be in compliance with international human rights law on reproductive justice, it will need to pass legislation decriminalizing abortion and ensure equal access to abortion across race, gender, and class.[171] And given the existence of the American federal system, this must mean access to abortion care is maintained in *all* states. Otherwise, the United States will continue to be in violation of international human rights law.

In the meantime, States and international organizations should take action to push the United States to comply with international law, since the bans and restrictions on abortions are a human rights issue and therefore, a concern for the entire international community.

VI. CONCLUSION

The *Dobbs* decision shook the world. It was shocking to see a global power go back in time and decimate one of the most fundamental rights of human beings—the right to autonomy and dignity. There are different things that the United States can do within its domestic system to protect abortion rights. In the meantime, it is important to label the actions of states post-*Dobbs* as violations of international law. International law is important in applying pressures and making known to the world what will be tolerated and what will not be. It can pressure nations with economic sanctions, while individuals can bring cases to the Inter-American Court of Human Rights against their government due to violations of international law.

Any laws passed within the United States that criminalize abortion are in direct violation of international law. Further, abortion bans are a danger to the health of the mother and are in violation of international law. This Note argued that States have a duty to provide equal access to health care and reproductive care more specifically, and that even though that United States has not criminalized abortions at the federal level, it nevertheless still violates international law by creating or giving way to circumstances in

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[170] *See, e.g.,* Goldsmith, *supra* note 17, at 266–69; Anna Malingdog-Uy, *Human Rights: US' Double Standards, Hypocrisy*, ASEAN POST (Apr. 17, 2022), https://theaseanpost.com/opinion/2022/apr/17/human-rights-us-double-standards-hypocrisy [https://perma.cc/262L-GD7T]; Leila Hilal & Raul C. Pangalangan, *Rethinking the Enforcement of Human Rights*, 93 AM. SOC'Y INT'L L. 243, 243 (1999).

[171] *Abortion*, OHCHR, https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf [https://perma.cc/7MSK-NFRW] (last visited Mar. 24, 2023).

which abortions are inaccessible to some. The best case for this is the International Convention on the Elimination of All Forms of Racial Discrimination, which is understood to protect discrimination in cases of disparate impact as well as in cases of intentional discrimination.[172] Since 1948, the international community has been fighting to protect the rights of citizens against their governments. Laws of other countries have "clearly established protections for the right to abortion" and this "global tide" is unlikely to change.[173] It is time for the United States to follow suit. While international law may not have historically been a source of influence within the United States, it is time to make it one.

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[172] McDougall, *supra* note 123.

[173] Risa Kaufman, Rebecca Brown, Catalina Martínez Coral, Jihan Jacob, Martin Onyango & Katrine Thomasen, *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States*, 30 SEXUAL AND REPROD. HEALTH MATTERS, 1, 3 (2022).