

LAW AND CULTURE: INTERNATIONAL LAW AND THE RIGHT TO LIFE

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Text

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Introduction

The United Nations system has assumed a major new role: world policymaker. ¹ Language formulated at UN-sponsored negotiations now shapes and solidifies international and national law. Perhaps no aspect of this development has been more hotly contested than international norms dealing with human reproduction. These newly-emerging norms are generally phrased in emotionally appealing human rights rhetoric, ² the clear meaning of which is obscured by elastic phrases - such as "access to ... reproductive health care services" ³ - and illusive legal constructs - such as "forced [*124] pregnancy." ⁴ By means of prose at turns lofty and unintelligible, and

¹ See Nafis Sadik, Reflections on the International Conference on Population and Development and the Efficacy of UN Conferences, [6 Colo. J. Int'l Envtl. L. & Pol'y 249, 253 \(1995\)](#) (noting that the UN conference cycle has "fostered the mobilization and participation of civil society and the private sector in the affairs of the international community... . This process has nurtured the growth of democracy at the national level and democratized processes at the international level, increasing their transparency and accountability").

² See, e.g., Rhonda Copelon, Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom, 18 N.Y.U. Rev. L. & Soc. Change 15, 49 (1991) [hereinafter Copelon, Losing the Negative Right of Privacy]; Rhonda Copelon, Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law, 5 Hastings Women's L.J. 243, 252-53 (1994) [hereinafter Surfacing Gender].

³ Sarah A. Ramage, Resisting the West: The Clinton Administration's Promotion of Abortion at the 1994 Cairo Conference and the Strength of the Islamic Response, [27 Cal. W. Int'l L.J. 1, 78 \(1996\)](#) (documenting U.S. advocacy of abortion as an "international human right," id. at 70). U.S. advocacy during the 1994 Cairo Conference was couched in terms of "access" to health care services: "'We're not talking about a new right; we're talking about, in our language, access. And it's access to the full range of reproductive health care services, that's what we're talking about.'" Id. at 78 (quoting State Dep't Regular Briefing (Aug. 31, 1994) (statements of Tim Wirth with Mike McCurry)).

often after somewhat incongruously disclaiming lawmaking intent,⁵ international policymakers are redefining the legal, social, moral, and ethical value of human life.

For the past nine years, and often accompanied, as here, by a talented research associate,⁶ I have been an active academic participant in this international discourse, attending numerous international negotiations where normative language related to the value of unborn human life has been formulated. The stakes are high. At issue is the ultimate scope of the "right to life" set out in Article 3 of the Universal Declaration of Human Rights;⁷ a right that, according to the Preamble, is "inalienable" and extends to "all members of the human family."⁸

This article explores the connection between international and national laws protecting unborn human life. The first Section examines the growing importance of international norms. The second Section provides a brief, first-hand account of an organized academic effort to supplant long-standing national abortion laws during the 1998 negotiation of the Rome Statute for the Creation of an International Criminal Court. In the third Section, this article surveys the current status of international reproductive rights law. The fourth Section explores how, despite the refusal of nations to create an express international abortion right, legal scholars, lawyers, and UN agencies continue to press for such a right. This unrelenting advocacy provides the background for the fifth and final Section that proclaims the need for active, coordinated, and coherent pro-life academic involvement in the international policymaking arena. The Doha Declaration, noted by a consensus resolution of the UN General Assembly at the conclusion of its special session commemorating the Tenth Anniversary of the International Year of the Family,⁹

⁴ Maria Sophia Aguirre & Ann Wolfram, *United Nations Policy and the Family: Redefining the Ties that Bind: A Study of History, Forces and Trends*, [16 BYU J. Pub. L. 113, 170 \(2002\)](#) (discussing use of "forced pregnancy" to promote abortion rights).

⁵ International conventions are often designed, not only to clarify the content of international law, but to alter national norms in identified substantive areas. Such conventions, like the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), not only establish international standards, but seek national compliance to avoid abuses that might otherwise be condoned or perpetuated by national laws. G.A. Res. 180, art. 1-30, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Sept. 18, 1979 - Jan. 7, 1980) [hereinafter CEDAW]. CEDAW obligates signatory nations "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle." *Id.* art. 2(a). But even while setting forth norms designed to govern national law, international documents may simultaneously - and somewhat inconsistently - disclaim any intent to override national policies (perhaps to encourage joinder by non-compliant nations). CEDAW's preamble, for example, formally recites that "respect for national sovereignty ... will contribute to the attainment of full equality between men and women," - even while the body of the convention rather dramatically cabins national gender policies. *Id.* Annex; see also International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Report of the International Conference on Population and Development, ch. II, Principles, at 14, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994) [hereinafter ICPD] (reciting that "the implementation of the recommendations contained in the Programme of Action is the sovereign right of each country, consistent with national laws"). Similar language formally disclaiming international lawmaking intent and retaining national sovereign power was included in the outcome documents adopted at the Fourth World Conference on Women. Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Beijing Declaration and Platform for Action, P 131, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) [hereinafter Beijing Declaration] (noting that, at least in the context of armed conflict, the platform should be applied "in accordance with ... respect for sovereignty.").

⁶ See *supra* note + + .

⁷ Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 3, U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Declaration of Human Rights].

⁸ *Id.* pmb., P 1. ("Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world").

⁹ G.A. Res. 59/111, P 1, U.N. Doc. A/RES/59/111 (Feb. 15, 2005).

demonstrates that such efforts can successfully reinforce international norms protecting the "inherent dignity of human beings ... throughout all stages of life." ¹⁰

I. International Law and National Policy

Lawmakers in present-day America - as in other countries around the world - face an unexpected reality: international norms - not national laws - may determine the ultimate legality of their official actions. A complete analysis of how international law shapes the contours of domestic policies - including the interpretation of the United States Constitution - would require numerous chapters in a fairly hefty book. ¹¹ For present purposes, this article will focus on [*126] three developments that demonstrate the growing prominence of international law.

¹⁰ Doha Int'l Conference for the Family, Nov. 29-30, 2004, Doha, Qatar, The Doha Declaration, at 4, U.N. Doc. A/59/592 (Dec. 3, 2004) (providing in the "Call for Action" section that nations are to "evaluate and reassess government policies to ensure that the inherent dignity of human beings is recognized and protected throughout all stages of life").

¹¹ Chapters of this book could profitably include an analysis of international law as it was understood at the time the U.S. Constitution was written, an analysis of the advantages and shortcomings of judicial review in the development of constitutional norms, a review of the various possible understandings of "international law" and how those understandings have changed during the Cold War and post-Cold War periods, a discussion of the means and processes by which actors in the UN system have gradually assumed policymaking authority, and a critique of the sociological and legal developments that have resulted in increasing international disdain for the sovereign authority historically exercised by independent nations.

An entire chapter (or even another book) could be devoted to tracing how early treaties establishing a European common market in the post-World War II era have resulted, step by step and treaty by treaty, in the founding of an integrated European Mega State - the European Union ("EU"). No single treaty produced the EU. Rather, the EU is the result of the inexorable "mission creep" of international treaties and agreements.

The Charter of Fundamental Rights of the European Union, approved by the Parliament, Council and Commission of the European Union in 2000, is merely one example of this process. 2000 O.J. (C 364), available at http://www.europarl.eu.int/charter/default_en.htm (last visited Feb. 5, 2006). The Preamble to the Charter asserts that its norms are derived

From the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

Id. pmb., P 5. As one commentator has aptly noted, "If [this] does not qualify as a common law of Europe, what then would?" Jan Wouters, The EU Charter of Fundamental Rights: Some Reflections on its External Dimension 3 (Inst. for Int'l Law, Working Paper No. 3, 2001), available at <http://law.kuleuven.be/ir/nl/wp/WP/WP03e.pdf>. Europe's experience in the sixty years following World War II demonstrates that successive international agreements - like the documents cited in the Preamble of the EU Charter of Human Rights - produce increased supra-national integration of functions previously controlled by national governments - such as the definition of human rights. The same international processes that produced the EU are now at work within the larger international community.

The 1948 Universal Declaration of Human Rights, for example, provided the foundation for the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights - which expanded on the language of the Universal Declaration. Paul C. Szasz, General Law-Making Processes, in 1 United Nations Legal Order 35, 47 n.18 (Oscar Schachter & Christopher C. Joyner eds., 1995). These covenants have been very influential. Other non-binding international instruments, such as model codes and guidelines, also have been precursors to later international treaties and laws enacted by nations. Id. As similar - and continually expanding - norm-setting processes continue, international inertia favoring some form of global federation may become inexorable. See, e.g., Harold Hongju Koh, Why Do Nations Obey International Law?, *106 Yale L.J.* 2599, 2646 (1997) (discussed infra note 22). But see French Say Firm "No" to EU Treaty, BBC News, May 30, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4592243.stm> (last visited Feb. 28, 2005); Dutch Say "No" to EU Constitution, BBC News, June 2, 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4601439.stm> (noting the recent rejection of the proposed Constitution for the European Union by France and the Netherlands because of concerns by voters in those nations regarding further concentration of power in a supra-national entity).

[*127] First, international treaties now deal not only with the obligations of nations, but also with the rights of individuals. Second, in addition to treaties, the UN system is generating a vast body of pliable norms - called "soft law" - that are quickly ripening into "hard law."¹² Third, a growing number of national actors - including judges in the United States - are increasingly willing to consider - and sometimes enforce - international norms in ways that would have been hard to anticipate a mere twenty years ago.

Treaty law - beginning with the Treaty of Westphalia - began as the primary fount of international law.¹³ For centuries, treaties dealt primarily with issues of war, peace, boundary disputes, navigation, and commerce - issues that were fundamental to the relationship of one nation with another.¹⁴ Indeed, the phrase "international law" **[*128]** reflects this reality: international law governed conduct between, or "inter," nations.¹⁵

The importance of treaties in establishing the form and content of international law continues unabated. Modern treaties, however, do more than settle wars, boundary questions, and resource disputes. They now govern such important issues as gender equality,¹⁶ children's rights,¹⁷ and racial discrimination.¹⁸ These issues, until quite recently, were the sole concern and prerogative of national governments.

¹² The definitions of "soft law" and "hard law" are almost self-evident: "soft law" consists of norms that "might be enforceable," but - then again - perhaps not; while "hard law" consists of norms that command a rather high level of compliance by national and international actors. See Jiri Toman, Quasi-Legal Standards and Guidelines for Protecting Human Rights, in *Guide to International Human Rights Practice* 192 (Hurst Hannum ed., 2d ed. 1992) (noting that "soft law" consists of norms not directly enforceable by formal or informal means).

But, while definitions may be more or less straightforward, the processes that produce "soft" and "hard" international law are rather difficult to describe. As one scholar put it:

International law is manifested in a large variety of different types of instruments, such as treaties, nonbinding agreements, and declarations and decisions of international organs. All of these have the characteristics of "black letter" law in that the provisions can easily be read, although their binding force is widely differentiated and certainly cannot be defined by constructing hierarchies. There are also manifestations of the collective, coordinated or merely parallel will of states that can be determined by studying their actions in the light of expressed or implied motives. Thus, in addition to the distinctions between black and increasingly gray letter law, there is the distinction between binding or "hard" law and various "softer" forms. The international legislative or norm-making process is similarly structured, and also confusing in that there is no single legislature and no single source of administrative law. Instead, there are a multitude of norm-makers at every geographic "level" (i.e., global, regional, subregional, and so on), as well as inchoate processes that create and identify international customary and perhaps even general principles of law. Furthermore, the rather clear-cut relationship that exists at the domestic level between processes and products (e.g., a legislative body produces statutes) is by no means as simple internationally, where all sorts of processes can produce, as direct outputs or as indirect by-products, various types of hard and soft, and written and unwritten law.

Szasz, *supra* note 11, at 35-36.

¹³ Treaty of Westphalia, Holy Roman Emperor-King of Fr., Oct. 24, 1648, available at <http://www.yale.edu/lawweb/avalon/westphal.htm>.

¹⁴ See Jeffrey L. Dunoff et al., *International Law: Norms, Actors, Process: A Problem-Oriented Approach* 4 (2002) (explaining that "the Aouzou Strip problem also provides an example of an international legal disagreement in its most traditional sense"); see also *id.* at 4-9 (providing a general overview of the development of international law through the nineteenth century).

¹⁵ Black's Law Dictionary 822 (7th ed. 1999). Wilhelm Grewe reminds his readers that Jeremy Bentham originally coined the phrased "international law." C. G. Roelofsen, *98 Am. J. Int'l. L.* 867, 867-68 (2000) (reviewing Wilhelm G. Grewe, *The Epochs of International Law* (Michael Byers trans., Walter de Gruyter 2000) (1984)).

¹⁶ See CEDAW, *supra* note 5, art. 11-12 (mandating that states initiate a program for maternity leave with pay, or comparable benefits, so that women do not lose jobs, and give them special protections from harm when pregnant); *id.* art. 12, cl. 1, 2 (mandating that states provide access to family planning services and free nutrition and appropriate services for pregnant women where necessary).

¹⁷ See Convention on the Rights of the Child, G.A. Res. 44/25, pmb., P 8, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/25 (Sept. 2, 1990); see also *id.* art. 6 (specifically stating that "every child has the inherent right to life" and states must

Second, in addition to promoting the rapid growth of international treaties and conventions, the modern UN system churns out soft law norms at an ever-increasing rate. Every year, hundreds of UN negotiations examine questions related to virtually every conceivable social issue.¹⁹ As a result of these negotiations - the most prominent of which are the periodic five-, ten-, and fifteen-year reviews of major UN conferences on the environment, population, [*129] women's rights, and human settlements²⁰ - various reports, platforms, agendas, and declarations are issued, updated, and expanded. Not long ago, these soft law documents were considered little more than helpful - or, perhaps, even irrelevant - suggestions.²¹ Today, they are more than mere words.

In the new Millennium, soft law norms generated at UN meetings can rapidly attain a status approximating hard law. As a result of constant negotiation, reexamination, and reformulation, various actors in the international legal system - including national governments, Non-Governmental Organizations, and legal scholars - develop expectations that these norms will be respected.²² If [*130] expectations related to enforcement are low, a norm

ensure "the survival and development of the child."); id. art. 7 (mandating that states register children "immediately after birth," and that a child shall be given "the right ... to a name, the right to acquire a nationality and, ... the right to know and be cared for by his or her parents").

¹⁸ See International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

¹⁹ A search on the UN website, UN Search, <http://www.un.org/search/>, reveals hundreds of meetings conducted by the various bodies of the UN System in 2004. For example, there were thirty-nine interagency meetings, see UN Chief Executives Board, <http://ceb.unsystem.org/calendar.htm> (follow "January" hyperlink under "2004") (last visited Feb. 5, 2006); seventy meetings by Human Rights committees, see Provisional Calendar of UN Human Rights Meetings, <http://www.ohchr.org/english/events/2004.htm> (last visited Feb. 5, 2006); and fifty-nine meetings by the Division of Public Administration and Development Management, see Calendar of Events (Apr. 13, 2004), <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan011663.pdf>. These meetings dealt with such diverse topics as an Inter-Agency Network on Women and Gender Equality, migrant workers, communications, energy, and a meeting of experts on priorities in the Mediterranean region.

²⁰ See, e.g., ICPD, *supra* note 5, Annex (setting as goals gender equality, development and peace, and constituting an agenda for empowerment of women); United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Jan. 1, 1993) [hereinafter Conference on Environment and Development]; United Nations Conference on Human Settlements (Habitat II), Istanbul, Turk., June 3-14, 1996, Report of the United Nations Conference on Human Settlements (Habitat II), U.N. Doc. A/CONF.165/14 (Aug. 7, 1996) [hereinafter Conference on Human Settlements].

²¹ Just a decade ago, scholars suggested that the norms adopted at international negotiations might have little meaning because they are often adopted merely to reach a "consensus" or to "appease popular or 'politically correct' sentiment." Neil H. Afran, *International Human Rights Law in the Twenty-First Century: Effective Municipal Implementation or Paeon to Platitudes*, 18 *Fordham Int'l L.J.* 1756, 1758 (1995). Even the "hard" law language of treaties was often disregarded in the recent past. One writer noted that, in a conversation with a Latin American lawyer-diplomat over a decade ago, he was told that treaties signed by the lawyer's country were "negotiated by the Ministry of Foreign Affairs, and when approved ... were 'locked in a cabinet and almost never looked at thereafter.'" John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 *Am. J. Int'l L.* 310, 322 n.70 (1992).

²² Harold Hongju Koh describes this process clearly:

Such a process can be viewed as having three phases. One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party's internal normative system. The aim is to "bind" that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.

Koh, *supra* note 11, at 2646 (footnotes omitted); see also Harold Hongju Koh, Address, The 1998 Frankel Lecture: Bringing International Law Home, 35 *Hous. L. Rev.* 623 (1998) (explaining that even resisting nations cannot insulate themselves from

is considered "soft." But expectations grow and norms "harden." Eventually, what begins as "soft law" is transmuted into "hard law." This occurs if and when soft law norms - crafted and elaborated in UN conference negotiations - come to be seen as evidence of customary international law.²³

At one time, customary law was formed over the course of centuries because such law was developed through the uniform, [*131] consistent practice of nations over time.²⁴ More recently, and largely because of the exploding number of international meetings, some legal scholars argue that binding international norms develop - at least in significant part - through the mere repetition of agreed language at UN conferences. As a leading international scholar has asserted, negotiated language "repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attains the status of law."²⁵

The third factor driving the expansion of international law is the willingness of an increasing number of national actors to consult, consider, and sometimes follow that law. For several decades, various influential Non-Governmental Organizations - including prominent environmental and human rights groups - argued that

the influences of the transnational interactions on particular issues); Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, [37 Colum. J. Transnat'l L. 281, 286-87 \(1999\)](#); Joseph F.C. DiMento, *Process, Norms, Compliance, and International Environmental Law*, [18 J. Envtl. L. & Litig. 251 \(2003\)](#) (discussing how the international norm-setting process impacts national policies in various social and legal spheres).

²³ International "soft law" norms are the product of significant international debate and deliberation. Hurst Hannum, *Human Rights*, in 1 *United Nations Legal Order* 319, 336 n.77 (Oscar Schachter & Christopher C. Joyner eds., 1995); see also James C.N. Paul, *The United Nations and the Creation of an International Law of Development*, [36 Harv. Int'l L.J. 307, 315 \(1995\)](#) ("Because world conferences provide potential opportunities for global popular participation, expert consultations, and, sometimes, vigorous debate, they can, in theory, become unique vehicles to elaborate norms (cast in the form of legal instruments) governing development."). As such, conference declarations are imbued with a strong expectation that members of the international community will abide by them. See sources cited supra note 22. As this expectation is justified by state practice, including activities within the UN organization, the principles of a UN document may - by custom - become binding upon a state. Hannum, *Human Rights*, supra.

The on-going international discussion and re-deliberation of "soft law" norms may be expanding, rather rapidly, the official canon of binding customary law. See, e.g., Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 99 (1989) ("Given the rapid, continued development of international human rights, the list [of customary international law norms] as now constituted ... [is] essentially open-ended... . Many other rights will be added in the course of time."); [Restatement \(Third\) of Foreign Relations Law of the United States, 702](#) cmt. a (1987) ("[A] list [of customary international law norms] is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, [25 Ga. J. Int'l & Comp. L. 1, 7 n.43 \(1995/96\)](#) (reporting that in a 1996 speech, Professor Louis Henkin, the Restatement's Chief Reporter, indicated that "if he were drafting Section 702 today he would include as customary international law rights the right to property and freedom from gender discrimination, plus the right to personal autonomy and the right to live in a democratic society") (citation omitted) (citing [Restatement \(Third\) of the Foreign Relations Law of the United States 702](#) cmts. k, l (1987)); Beth Stephens, *Litigating Customary International Human Rights Norms*, [25 Ga. J. Int'l & Comp. L. 191, 198-99 \(1995/96\)](#) (describing customary international law as a "developing concept" and predicting as likely developments "environmental protections and the right to political access (i.e., to vote) and other attributes of democracy") (footnote omitted). Commentators have argued, for example, that customary international law includes, or will soon include, rights such as freedom of thought, free choice of employment, the right to primary education, the right to form and join trade unions, and rights relating to sexual orientation. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, [110 Harv. L. Rev. 815 \(1997\)](#).

²⁴ See Richard B. Bilder, *An Overview of International Human Rights Law*, in *Guide to International Human Rights Practice* 10 (Hurst Hannum ed., 2d ed. 1992) (defining customary international law as a consistent practice in which states engage out of a sense of legal obligation).

²⁵ R. Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, in *International Law and the International System* 21-23, 25-30 (W. Butler ed., 1987), reprinted in Frederic L. Kirgis, Jr., *International Organizations in Their Legal Setting* 341 (2d ed. 1993) (quoting R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* 2 (1963)); see also Bilder, supra note 24.

international norms should influence, if not govern, domestic legal policies.²⁶ Scholars made similar arguments,²⁷ as did litigants.²⁸ These submissions, which were once considered controversial,²⁹ are now bearing fruit in surprising ways.

A good example of this is the United States Supreme Court. Until recently, it was rather unlikely that any state or federal court would [*132] enforce the terms of a treaty that had not been ratified by the United States Senate. This, however, is no longer true. On March 1, 2005, in *Roper v. Simmons*,³⁰ Justice Kennedy cited the United Nations Convention on the Rights of the Child - a treaty never ratified by the Senate - to support the conclusion of five Justices that the execution of minors is unconstitutional.³¹

As a personal matter, I oppose the execution of minors. As a constitutional scholar, however, I would have been hard pressed, before March 2005, to assert that the execution of minors was unconstitutional.³² Whatever the ultimate wisdom of executing minors, as of March 2005, there was no clear consensus that such punishment violated deeply held and widely shared constitutional values. Indeed, as the dissenting opinions pointed out, prior to *Roper* slightly more than half of the states that permitted capital punishment extended that punishment to minors.³³ The Supreme Court's decision, therefore, that there was a "constitutional consensus" invalidating the juvenile death penalty was unusual. The Supreme Court's citation of an unratified, non-binding treaty to support this

²⁶ See Women's Env't & Dev. Org., *Beijing Betrayed: Women Worldwide Report that Governments Have Failed to Turn the Platform into Action 7* (June Zeitlin et al. eds., 2005), available at http://www.wedo.org/files/gmr_pdfs/gmr2005.pdf ("[These reports] show that women advocates everywhere have stepped up their activities since Beijing using the Platform for Action and other key global policy instruments to push governments into taking action.").

²⁷ See Toman, *supra* note 12, at 192.

²⁸ See, e.g., *Ctr. for Reprod. Law & Policy v. Bush, No. 01-4986, 2001 WL 868007 (S.D.N.Y. July 31, 2001)* (dismissed for failure to show standing), *aff'd*, *304 F.3d 183, 184 (2d Cir. 2002)* (holding that the policy did not violate the Center's First Amendment rights to speech and association, party lacked standing for Fourteenth Amendment claims, and that even though party had standing with equal protection theory, the policy did not violate equal protection rights).

²⁹ See, e.g., Marc-Olivier Herman, *Fighting Homelessness: Can International Human Rights Law Make a Difference?*, 2 *Geo. J. on Fighting Poverty* 59, 71, 81 n.157 (1994) (discussing the reluctance of U.S. courts to either invoke or rely upon international norms in deciding domestic disputes).

³⁰ *125 S. Ct. 1183 (2005)*.

³¹ *Id. at 1198-1200*.

³² In *Marbury v. Madison*, Chief Justice John Marshall declared that "a written constitution" was "the greatest improvement on political institutions" flowing from the *American Revolution. 5 U.S. (1 Cranch) 137, 178 (1803)*. But despite Justice Marshall's extensive reliance upon the concept of a "written constitution," the proper judicial technique for determining the meaning of the Founders' words remains controversial. According to some, the judicial inquiry essentially involves "laying the article of the Constitution which is invoked beside the [government action] which is challenged ... to decide whether the latter squares with the former." *United States v. Butler, 297 U.S. 1, 62 (1936)*. This task, of course, is rarely as straightforward as the language of *Butler* suggests. Accordingly, constitutional interpretation has often led judges to look beyond plain constitutional text to the history and traditions of the American people. See, e.g., *Palko v. Connecticut, 302 U.S. 319, 325 (1937)* (explaining that a provision of the Bill of Rights that embodies "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" is applicable to state governments, notwithstanding express constitutional language limiting such a provision to actions of the federal government (quoting *Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)*)). Whether the meaning of the Eighth Amendment is determined by reference to its words or the "traditions and conscience" of the American people, it is hardly clear that the execution of minors was unconstitutional prior to March 2005.

³³ *Roper, 125 S. Ct. at 1206* (O'Connor, J., dissenting) (stating that the evidence fails to show conclusively that a national consensus has emerged to condemn execution of minors); see also *id. at 1218* (Scalia, J., dissenting) (noting that "18 States - or 47% of States that permit capital punishment" prohibit the execution of minors, but asserting that "words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus").

conclusion was astonishing. Roper demonstrates beyond doubt that the meaning of the United States Constitution can be altered by [*133] international norms that have been rejected by political processes both at the state level - the majority of death penalty states applied it to minors - and at the federal level - the U.S. Senate had not ratified the international treaty that the Supreme Court cited to prohibit the execution of minors.

"Soft" international law has also been found determinative in discerning the content of the Fourteenth Amendment. In *Lawrence v. Texas*,³⁴ a majority of the Supreme Court reversed its determination - announced a mere sixteen years earlier - that the United States Constitution did not afford special protection for consensual acts of homosexual sodomy.³⁵ The Court could not convincingly argue that either the words of the Constitution or the history and traditions of the American people had changed dramatically in those sixteen years.³⁶ Instead, the Justices simply suggested that sixteen years ago the Court got it wrong.³⁷ As evidence that the current majority now "had it right," the Justices cited decisions from international tribunals and a brief filed by the former UN High Commissioner of Human Rights.³⁸ Prior to their citation by the nation's highest court, these materials would have been considered by most constitutional scholars as among the "softest" of all possible soft law relevant to the meaning of the Due Process Clause. However, this is no longer the case. Soft international law has rather suddenly attained respectable constitutional stature.

Because of the foregoing factors - the growing reach of international treaties, the explosive growth of international soft law norms, and the willingness of judges and others to enforce international pronouncements - we individuals and groups interested in protecting the intrinsic value of human life must pay attention, not only to national laws, but also to international treaties, UN conference declarations, and the opinions of jurists from legal systems that have no experience with - or even an understanding of - our own legal systems.³⁹

[*134]

II. International Academic Efforts To Redefine the Value of Unborn Human Life

Given the Universal Declaration of Human Rights' unequivocal assertion that "everyone" is entitled to "life, liberty and the security of person,"⁴⁰ international hostility to the intrinsic and absolute value of human life is somewhat surprising. That is, of course, until one examines the views of the legal academy. From 1973, onward, law professors from America and around the world have heaped disproportionate and continuing praise upon the Supreme Court's decision in *Roe v. Wade*.⁴¹ The very fact that the great majority of legal scholars have embraced

³⁴ [539 U.S. 558 \(2003\)](#).

³⁵ See [Bowers v. Hardwick, 478 U.S. 186 \(1986\)](#).

³⁶ See cases cited supra note 32.

³⁷ [Lawrence, 539 U.S. at 567](#) (stating that the Court in *Bowers* "misapprehended the claim of liberty there presented to it" for not recognizing the privacy interests at stake; rejecting the claim in *Bowers* that sodomy had been illegal for a "very long time").

³⁸ [Id. at 573](#) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 40, 52 (1981)); [id. at 576-77](#).

³⁹ Indeed, developing and poorer nations must pay particular care to international legal rules: if the United States - purportedly the most powerful nation on earth - can be influenced by international norms, the impact of these rules on less-developed nations could be profound indeed.

⁴⁰ Declaration of Human Rights, supra note 7, art. 3.

⁴¹ [410 U.S. 113 \(1973\)](#); see also Question-and-Answer Session, [62 Alb. L. Rev. 1203, 1203-04 \(1999\)](#) (question directed to Professor Lynn Wardle, the single pro-life member on a five-member panel, concerning the lack of free exchange of ideas on abortion; Professor Wardle stated that "you've got a list of probably 30 or 40 [pro-life professors] on one hand and you could probably come up with 3000 or 4000 on the other side"); Richard G. Wilkins et al., *Mediating the Polar Extremes: A Guide to Post-Webster Abortion Policy*, 1991 *BYU L. Rev.* 403 (1991).

the utilitarian analysis of the case, ⁴² which values privacy (or individual autonomy) more highly than unborn life because of a presumptive inability to establish either "when life begins" or the value of unborn human life, explains, in large measure, the surprising ambivalence of international law on questions related to human life. ⁴³

[*135] Academic opinion is highly prized in the formulation of international law. Section 102(1) of the 1987 revision of the American Law Institute's Restatement of Foreign Relations Law explains that there are three major sources of international law: (1) "customary law," (2) law established by treaties or "international agreement," and (3) law derived "from general principles common to the major legal systems of the world." ⁴⁴ The views of scholars and academicians are exceptionally influential in determining the form and content of law in category (3). As stated in Article 38 of the Statute of the International Court of Justice, "judicial decisions and the teachings of the most highly qualified publicists [e.g., scholars] of the various nations" provide credible evidence regarding which "general principles" qualify as international law. ⁴⁵ Accordingly, the same academicians that praise Roe also hold a privileged status in international law: that of "quasi-lawmaker." Over the past three decades, many international scholars have taken advantage of this special status to engage in organized and effective advocacy promoting world-wide revision of domestic abortion laws.

This ongoing process is complex and has been documented elsewhere. ⁴⁶ The Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome, Italy, during the summer of 1998, provides but one example of such efforts. An understanding of the events at this discrete event may be helpful to many academicians - pro-life or otherwise - who seek to understand the pragmatic contours of the intense and often emotional struggle within the legal academy as to whether unborn children are entitled to continuing status as members of the international "human family." ⁴⁷

⁴² See, e.g., authority cited supra note 41; see also authority cited infra note 43.

⁴³ [Roe, 410 U.S. at 153, 159](#) (asserting, among other things, that it is impossible to "arrive at any consensus" regarding "the difficult question of when life begins"; accordingly, the Court concluded that a woman's interest in terminating a pregnancy outweighs the state's interest in protection of unborn life because "maternity, or additional offspring, may force upon the woman a distressful life and future"). Despite the Court's facile assertion, the question when "life begins" is not terribly complex: the life of any discrete human must begin at conception because there is no other point at which such a life can "begin." See, e.g., Wilkins et al., supra note 41, at 454 (noting that human life "is a continuum that begins at conception"); see also Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, [62 Alb. L. Rev. 853, 865 \(1999\)](#) (citing Codell Carter, *Semmelwies and His Predecessors*, 25 *Med. Hist. J.* 57 (1981) to show that people had considered life to begin at conception for many years prior to the Roe decision). The real issue in Roe was not when "life begins," but rather the constitutional value the Court would assign to human life beginning at conception and at all stages thereafter. This may well involve difficult, values-based judgments, but such judgments are unavoidable in the abortion context - even though Roe disingenuously asserted the Court was "not in a position to speculate" regarding such questions. [Roe, 410 U.S. at 159](#). Contrary to the reasoning of Roe, values-based judgments do not require any particular level of "proof" or "validation" in order to survive constitutional scrutiny. Values-based judgments - especially those favored by the Court - often rest upon little more than a less-than-perfect social presumption. See, e.g., [Roper v. Simmons, 125 S. Ct. 1183, 1195-98 \(2005\)](#) (invalidating the execution of minors, in part, because of the presumptive inability of minors to calculate or understand the consequences of planned criminal activities; Court rejects a fact-sensitive inquiry into the cognitive skills of minors on a case-by-case basis). But see [Roper, 125 S.Ct. at 1212-14](#) (O'Connor, J., dissenting) (discussing the conscious, knowing culpability of the minor involved in the case before the Court).

⁴⁴ [Restatement \(Third\) of the Foreign Relations Law of the United States 102\(1\)](#) (1987).

⁴⁵ Statute of the I.C.J., art. 38, [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstature.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm) (last visited Feb. 9, 2006).

⁴⁶ See, e.g., Aguirre & Wolfgram, supra note 4.

⁴⁷ Declaration of Human Rights, supra note 7, pmb., P 1. Interestingly enough, the Convention on the Rights of the Child ("CRC") does not exclude unborn children from the human family. Paragraph 9 of the Preamble to the CRC notes that ""the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Convention on the Rights of the Child, supra note 17, pmb., P 9 (quoting the Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19, U.N. GAOR, 14th Sess., Supp. No. 49, U.N. Doc. A/4354

[*136] The Rome Conference culminated a decades-long effort by the United Nations and the international community to establish a permanent judicial body to prosecute grave international crimes. ⁴⁸ I first became aware of the potential scope of the proposed International Criminal Court ("ICC") after reviewing a provisional draft copy of the ICC statute during the summer of 1997. Review of that document suggested that the ICC, as initially conceived, had the potential - among other things ⁴⁹ - to establish a world-wide right to abortion on demand. It did so by creating a previously unknown crime: "forced" or "enforced" pregnancy. Concerns regarding this newly-minted international "crime" prompted me to work throughout the 1997-98 academic year to prepare for the negotiation. I also cleared my calendar for June and July 1998 to permit full participation at the conference.

[*137] Together with two second-year law students, ⁵⁰ I arrived in Rome as an accredited Non-Governmental Organization ("NGO") representative of the David M. Kennedy Center for International Studies at Brigham Young University. Because of my prior preparation, I had anticipated encountering numerous law professors, as well as other academicians from study centers around the world. I had not expected, however, to find that I represented the lone academic center which actively questioned the propriety of establishing "forced" or "enforced" pregnancy as a crime against humanity.

I do not wish to over-emphasize or misrepresent the import of the foregoing. There were numerous lawyers, legal professionals, and members of civil society who worked zealously in Rome to protect the intrinsic and absolute value of human life. ⁵¹ These pro-life delegates were able and committed. But, in comparison with the scores of law professors and other academicians - including sociologists and specialists in gender studies - who urged the devaluation of unborn human life, the institutionally supported pro-life academic effort in Rome seemed insignificant indeed.

On the first day of the conference, I learned that the Caucus for Gender Justice - headquartered at the law school at the City University of New York ("CUNY") - had been instrumental in framing the debate of "forced" or "enforced"

(Nov. 20, 1959)). Interestingly, the editors of at least one modern international casebook apparently find this provision of the CRC discomfiting. A collection of international documents, distributed as a supplement to the casebook, omits this paragraph from the Preamble of the CRC with an unexplained ellipsis. Barry E. Carter, Phillip R. Trimble & Curtis A. Bradley, *International Law* 485 (2003-2004 ed.).

⁴⁸ In 1951, following the conclusion of the Nuremberg and Tokyo War Crime Tribunals, a proposal was circulated among members of the newly formed United Nations to create a permanent standing court. Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, [10 Pace Int'l L. Rev. 203, 218 \(1998\)](#). The proposed court would be responsible for prosecuting grave crimes of international concern committed in armed conflict. Nations initially balked at the idea of a permanent court because of the potential ramifications for individual state sovereignty. *Id.* The idea, however, resurfaced whenever the world was confronted with serious war-time crimes. Public pressure increased in the early 1990s as the world reacted to reported atrocities in Rwanda and the former Yugoslavia. Informal meetings on the issue, commenced early in 1990, ultimately resulted in a draft statute for the ICC. As that draft statute emerged, however, the mandate for the proposed ICC slowly but steadily expanded. Instead of dealing solely with serious and well-established war crimes, the draft text became a veritable handbook on emerging "human rights" law, weighted with countless provisions never before envisioned.

⁴⁹ In addition to abortion, there were other areas of concern. The "war crimes" and "crimes against humanity" proscribed by the draft statute were exceptionally vague. The ICC's proposed administrative structure - which required judges to possess "gender expertise" and conferred almost limitless power on the prosecutor - could result in unfair and ideologically driven prosecutions. In addition, the draft ICC statute listed "deprivation of liberty" - a legal concept capable of almost limitless expansion - as a "crime against humanity." These provisions - and others - could have ceded vast policymaking powers to the ICC. See generally Richard G. Wilkins, *The Right Thing the Wrong Way: Implications of the New International Criminal Court*, *World and I*, Oct. 2002, at 265.

⁵⁰ William O. Perry, Jr., and Marcus R. Mumford. Mr. Mumford subsequently published an article analyzing the Rome Statute. Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 *J. Int'l L. & Prac.* 151 (1999).

⁵¹ Among these was Jane Adolphe, an exceptionally bright Canadian lawyer who now serves on the faculty at Ave Maria School of Law. Other lawyers - and ordinary citizens - from throughout the world joined Professor Adolphe in Rome.

pregnancy. Various versions of the draft ICC statute listed the concept as a "war crime," or as a "crime against humanity."⁵² Professor Rhonda Copelon, [*138] Director of the Legal Secretariat for the International Women's Caucus and a Professor of Law at CUNY School of Law, was in charge of marshalling the impressive academic support for the "enforced" pregnancy debate in Rome. She was assisted by ranks of law students and law faculty drawn from throughout North America, Scandinavia, and Europe.

The purpose of the proposed "crimes" of "forced" or "enforced" pregnancy was clear: Dawn Johnsen and Marcy Wilder had written in 1989 that "forced pregnancy and childbirth certainly constitute an intolerable bodily intrusion when imposed by the state on unwilling pregnant women."⁵³ As discussed by Johnsen and Wilder, however, the phrase "unwilling pregnant women" was not limited to women who were forced by the state to become pregnant; rather, the phrase included women who were prevented from terminating unplanned and/or unwanted pregnancies.⁵⁴ Other legal scholars, prior to the 1998 conference, also equated "unwanted children" with "forced" or "enforced" pregnancy.⁵⁵

[*139] "Forced" or "enforced" pregnancy, in short, was designed to create a world-wide right to abortion on demand. Western nations, backed by ranks of law professors and other academicians, as well as hundreds of

⁵² Enforced pregnancy" initially appeared as a "war crime." U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, Report of the Preparatory Committee on the Establishment of an International Criminal Court, art. 5, War Crimes, P (p bis), U.N. Doc. A/Conf.183/2/Add.1 (Apr. 14, 1998) [hereinafter ICC Preparatory Committee Report]. During the negotiation process, however, abortion proponents succeeded in including "enforced pregnancy" as a "crime against humanity" as well. U.N. ICC, Rome, 1998, Art. 7 [5 ter], Crimes Against Humanity, P 1(g), U.N. Doc. A/Conf.183/C.1/L.76/Add.2. The terms "enforced" and "forced" pregnancy were used interchangeably during the ICC negotiation process. The original draft ICC statute proscribed "enforced pregnancy." ICC Preparatory Committee Report, supra, art. 5, War Crimes, P (p bis). The statute's "crimes against humanity" section includes "forced pregnancy." U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, Rome Statute of the International Criminal Court, art. 7, P 1(g), U.N. Doc. A/Conf.183/9. There appears to be little real linguistic or legal difference in the two terms. Compare the dictionary definition of "enforce" ("to give force or effect to (a law, etc.); to compel obedience to"), Black's Law Dictionary 569 (8th ed. 2004), with the dictionary definition of "force" ("power, violence, or pressure directed against a person or thing"), id. at 673.

⁵³ Dawn Johnsen & Marcy J. Wilder, Webster and Women's Equality, [15 Am. J.L. & Med. 178, 180 \(1989\)](#). Ms. Johnsen was the Legal Director of the National Abortion Rights Action League ("NARAL") in Washington, D.C.. Currently the organization is called NARAL Pro-Choice America and Dawn Johnsen is serving as a Professor of Law at Indiana University.

⁵⁴ Id. ("Few events, however, can more dramatically constrain a woman's opportunities in life than an unplanned child."). See also id. at 181 (advocating that the "fundamental right to choose abortion" can never be overridden by any state interest to preserve life at any time during pregnancy). There are, of course, significant differences between "unplanned" and/or "unwanted" pregnancies and pregnancies conceived through the use of force (i.e., rape or comparable sexual violence) and continued for the purpose of "ethnic cleansing" or changing the ethnic composition of a society. See, e.g., infra notes 61-62 (discussing how the final definition of "forced pregnancy" adopted in Rome limits the crime to these egregious circumstances).

⁵⁵ Seth F. Kreimer, Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die, [44 Am. U. L. Rev. 803, 849 \(1995\)](#). Kreimer states: "Requiring women to bear unwanted children threatens to lock them into a traditional and subordinate role, embodies assumptions about their inability to make autonomous moral choices, and burdens women as a group with obligations that have no counterpart in the burdens that the State demands from men." Id. The textual discussion of "unwanted children" correlates with a footnote referring to "forced pregnancy." Id. at 849 n.166. Students obviously picked up on this intended meaning of "forced pregnancy" as well. See Andrea M. Sharrin, Note, Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle, [55 Brook. L. Rev. 1359, 1402 n.199 \(1990\)](#) (characterizing another professor's language concerning the burdens imposed by laws restricting access to abortion as "forced pregnancy") (citing Donald H. Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569, 1569-70 (1979)). Furthermore, commentaries on the same Regan article show that litigators had also picked up a pro-abortion definition of "forced pregnancy" and claimed specifically that forced pregnancy was a violation of the Thirteenth Amendment's prohibition of involuntary servitude. Lynne N. Henderson, Legality and Empathy, [85 Mich. L. Rev. 1574, 1628 n.349 \(1987\)](#) (using "unwanted pregnancies" as basis for a footnote discussing "forced pregnancy" and "involuntary servitude").

NGOs, pushed for the inclusion of this new "crime" in the ICC statute. They adamantly resisted any effort either to define or limit this previously unknown offense.

My students and I, together with other pro-life advocates in Rome, prepared materials collecting academic writings related to "forced" or "enforced" pregnancy.⁵⁶ These materials explained the nature of the "crime": if a pregnancy (any pregnancy) could not be legally terminated, the pregnancy was "forced" or "enforced" and, therefore, criminal.⁵⁷ Our materials explained that, while rape and other sexual misconduct was properly subject to criminal penalty, pregnancy itself - absent extraordinary circumstances - should not be criminalized.⁵⁸ Far from constituting a "crime against humanity," pregnancy is a necessary precondition to the continuation of humanity. These materials persuaded many delegations.

The debate on "enforced" pregnancy continued off and on for nearly the entire duration of the Rome Conference. When the proponents of "enforced" pregnancy realized the considerable opposition to the inclusion of an undefined crime of "enforced" pregnancy in the Rome Statute, they resorted to questionable tactics to further the abortion agenda. For example, when debate in the Committee of the Whole on July 3, 1998, indicated that a great many nations supported deletion of "enforced" pregnancy, the Canadian Chairman of the Committee of the Whole - a staunch proponent of [*140] the new crime - suspended discussion. Thereafter, with the support of the European Union, the Canadian Chair convened a secret meeting on Sunday, July 5, at which a hand-picked group of supportive nations met to hammer out a so-called "consensus" on "enforced" pregnancy. This Canadian/European "consensus" prohibited "forced" - rather than "enforced" - pregnancy, denominating the offense not only as a "war crime," but, for the first time, as a "crime against humanity."⁵⁹ The meeting, subsequently described by the NGO press as "special" rather than "secret,"⁶⁰ had its intended effect: "enforced" pregnancy, which had appeared dead at the conclusion of debate on Friday, July 3, reappeared as a live issue on Monday, July 6, 1998.

The Chairman's "revival" of "forced" pregnancy, however, nearly backfired. When it became apparent to non-invited national delegations on Tuesday, July 7, 1998, that a purported "consensus" agreement had been reached at a secret meeting, many delegations responded angrily. The anger, directed against abortion proponents and those who organized the Sunday meeting, threatened to derail the entire conference. By Friday, July 10, some NGOs were so fearful that the "enforced pregnancy/abortion" debate would scuttle the conference that Rhonda Copelon took the unusual step of denying - in print - that "forced" pregnancy had anything to do with abortion.⁶¹ Professor

⁵⁶ See supra notes 54-55; see also infra note 62.

⁵⁷ See, e.g., *Surfacing Gender*, supra note 2, at 252-53. More than calling it criminal, Professor Copelon also gives the example of denying an abortion on "the basis of the independence and sanctity of fetal life" to help explain the complexity of "strategic issues involved in reconceptualizing intimate violence as torture in different cultural and political contexts." Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 Colum. Hum. Rts. L. Rev. 291, 300 & n.26 (1994) (emphasis added).

⁵⁸ See supra note 52 (discussing the debate surrounding the precise words to be used); see also infra notes 63-65 and accompanying text (discussing that pregnancies conceived by force and continued for the purpose of ethnic cleansing properly constitute criminal conduct).

⁵⁹ U.N. ICC, Rome, 1998, Art. 7 [5 ter], Crimes Against Humanity, P 1(g), U.N. Doc. A/Conf.183/C.1/L.76/Add.2.

⁶⁰ *Terra Viva*, a newspaper published by NGOs and highly supportive of the ICC process, reported on July 7, 1998, that Canada had taken "the lead in organising [a] special closed-door meeting on Sunday," an effort that included the distribution of a "discussion paper" designed to "develop an intricate network of compromises." *Canada Floats Compromise*, *Terra Viva*, July 7, 1998, at 1 (emphasis added).

⁶¹ *Terra Viva* accurately reported on July 10, 1998, that it was "forced pregnancy that is being left for further discussion," and added that "some delegations ... would have preferred the issue left out entirely." *On Women and Gender*, *Terra Viva*, July 10, 1998, at 7. Professor Copelon, however, asserted that "the resistance to include forced pregnancy as a crime in the Statute" was the result of "linking" enforced pregnancy, "artificially in her view, to the possibility of obtaining abortions." *Id.* Rhonda Copelon is currently a Professor of Law at City University New York Law School and is co-founder of the school's International Women's Human Rights Law Clinic, serves as an Advisory Board member of Human Rights Watch, Women's Rights Watch, and is a founder of and Legal Advisor to the Women's Caucus for Gender Justice.

Copelon did not cite or mention her own previously [*141] published articles where she made the link between "forced" pregnancy and abortion absolutely clear.⁶²

But, despite heavy opposition to the Canadian/European July 5 secret "consensus," the tactic ultimately ensured that some version of "enforced" pregnancy would be included in the ICC statute. By the morning of July 13, 1998, with the conference scheduled to end on Friday afternoon, most delegations were under extreme pressure to conclude the negotiations. With Canada and Western Europe strongly supportive of abortion rights, delegations opposing abortion determined that the best they could do was to define "forced" pregnancy in a manner that did not result in abortion on demand.

Accordingly, beginning on Monday, July 13, 1998, a series of extraordinary negotiating sessions were conducted between various interest blocs. The Islamic bloc, led by Saudi Arabia, Qatar, and the United Arab Emirates, together with the pro-family coalition, hammered out a restrictive definition of "forced" pregnancy. That definition provided that "forced" pregnancy consisted of "the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."⁶³ The definition also provided, in an excess of caution, that "this definition shall not in any way be interpreted as affecting national laws relating to pregnancy."⁶⁴

Thus, as negotiations concluded, the ICC condemned a carefully defined set of egregious circumstances as "forced" pregnancy. But this new "crime" - which required forcible impregnation of a woman, her physical detention throughout the period of the pregnancy, and evil intent to alter the ethnic composition of a targeted population during armed conflict - did not come anywhere near establishing a world-wide right to abortion on demand.⁶⁵ Abortion proponents [*142] were surprised by the loss. A director of the Women's Caucus in Rome, shortly after the conclusion of the conference, called the final definition of "forced pregnancy" a "retrogression" in the development of women's rights.⁶⁶

The "forced" pregnancy debate may be instructive on several points. First, and most obviously, academic support for abortion rights is strong, organized, and active. Law professors who support abortion rights - backed and supported by significant numbers of energetic and engaged students - came to Rome to ensure that their academic voices were heard. These members of the legal academy did not simply assume that the reasoning and persuasive power of their published scholarship regarding "forced" and "enforced" pregnancy would result in the creation of a new international crime. They came to Rome to advocate actively for the results their published work promoted.

Second, a modest, but engaged, pro-life academic effort had a substantial impact. There were exceptionally few pro-life law professors and law students engaged full-time at the conference in Rome; perhaps only three - myself

⁶² Professor Copelon had written in 1991 that "forced pregnancy is involuntary servitude and that abortion is essential to women's full personhood." Copelon, *Losing the Negative Right of Privacy*, supra note 2, at 49. See also *Surfacing Gender*, supra note 2, at 252-53.

⁶³ Rome Statute of the International Criminal Court, supra note 52, art. 7, P 2(f).

⁶⁴ *Id.*

⁶⁵ See, e.g., Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, [93 Am. J. Int'l L. 43, 53 n.63 \(1999\)](#). Mr. Robinson, Legal Officer of the United Nations, wrote at length to clarify the "considerable misunderstanding" that "forced pregnancy" creates "a universal right to abortion." *Id.* As is documented above, this misunderstanding stems from advocates such as Professor Copelon. See supra notes 58, 62. Mr. Robinson refutes these claims, noting "that 'forced pregnancy' has three elements: (1) unlawful confinement, (2) of a woman forcibly made pregnant, and (3) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law." Robinson, supra. He notes that "subparagraph 2(f) further specifies that this provision 'shall not in any way be interpreted as affecting national laws relating to pregnancy.'" *Id.* (quoting Rome Statute of the International Criminal Court, supra note 52, art. 7, P 2(f)).

⁶⁶ *Women Withhold Final Verdict*, Terra Viva, <http://www.ips.org/icc/tv180705.htm> (last visited June 13, 2005) (quoting Alda Facio, director of the Women's Caucus) (reporting on final outcome of the Rome conference).

and my two students. Fortunately, the dearth of experienced pro-life legal faculty and law students was compensated for by the presence of other able international lawyers who did not hold the title - so musical and impressive in Italian - of *Professore*. Furthermore, national delegations in Rome - aware of the important role of academic opinion in the creation of international norms - sought out and listened to pro-life academic views. As a result, while "forced pregnancy" was ultimately included in the ICC statute, the proscribed conduct was carefully limited.⁶⁷

Third, and finally, the "forced pregnancy" debate is paradigmatic of the still-ongoing international legal struggle regarding human reproduction. Abortion proponents came to Rome with high hopes, supported by extensive published scholarship which proclaimed that [*143] "enforced" or "forced pregnancy" was a crime that deserved international disapproval.⁶⁸ During the actual course of negotiations, however, those hopes, if not dashed, were significantly deflated. The tactics of the abortion proponents, furthermore, were highly questionable, involving - at various times - parliamentary evasion and procedural irregularities,⁶⁹ as well as outright disavowal of previously stated and published positions.⁷⁰

Nevertheless, despite disappointments, questionable tactics, and the need to resort to double-speak, abortion-rights proponents continue to move ahead, relentlessly. Their academic personnel, resources, and enthusiasm never seem to diminish. All are deployed in the consistent advocacy of an international right to abortion.

III. The Making of an International Right

Events similar to those in Rome have been repeated in conference after conference. Rather than "forced pregnancy," the reproductive debate has been couched in terms of "environmental preservation," "empowerment of women," "access to health care," "elimination of violence against women," and "promotion of human dignity." Whether the ostensible topic for international negotiation has been environmental protection,⁷¹ human settlements,⁷² or the education of children,⁷³ government representatives have been pressured into [*144]

⁶⁷ The crime did not - as its supporters had hoped - establish either an international right to abortion or support the broad assertion that "abortion is essential to women's full personhood." Copelon, *Losing the Negative Right of Privacy*, supra note 2, at 49.

⁶⁸ See, e.g., supra notes 4, 52-55 and accompanying text.

⁶⁹ See, e.g., supra notes 59-62 and accompanying text.

⁷⁰ See, e.g., supra notes 61-62 and accompanying text.

⁷¹ Conference on Environment and Development, supra note 20, Annex I, at 4 (according to principle 8, "states should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies"); see also [id. at 7](#) (principle 20 points out that "women have a vital role in environmental management and development").

⁷² See Richard Wilkins, *The Fight for Families at the United Nations*, *The Australian Family*, Oct. 1999, at 20 (given at The World Congress of Families II, Australian Regional Conference, Aug. 7, 1999), available at <http://www.family.org.au/journal/1999/j19991020.html>.

⁷³ At the United Nations Children's Summit, a publication was passed out that promoted "sexual activity and abortion among teens in their countries." George Archibald, *Child Sex Book Given Out at U.N. Summit: Cites Animals, Gays as Partners*, *Wash. Times*, May 10, 2002, at A1. Excerpts from the book, which had been given to delegates from Latin America, were passed out by pro-life groups, along with an accompanying workshop book, "to persuade delegates from the large Latin American bloc of countries ... to support the U.S. proposal to remove ambiguous language from the child-summit action document, which [had] been used in the past by U.N. agencies to promote abortion." *Id.* at A12. The book was a product of the Mexican government and was created in part with UNICEF funding. *Id.* The book defined "'reproductive health'" to include "'counseling on sexuality, pregnancy, methods of contraception, abortion, infertility, infections and diseases.'" *Id.* at A1 (quoting the book, the title of which translates in English to "Theoretic Elements for Working with Mothers and Pregnant Teens"). But see Carol Bellamy, *Letter to the Editor, UNICEF Removed Child Sex Book from Use*, *Wash. Times*, May 18, 2002, at A12 (publishing a letter from the executive director of UNICEF to the *Washington Times* that disassociates UNICEF from the book's teachings, but openly admits

manufacturing rhetoric that constructs and promotes a concept cherished by a significant majority of the legal academy: reproductive liberty.⁷⁴ In the legal dictionaries and indices now being compiled by international scholars on both sides of the abortion debate, such diverse concepts as environmental protection, gender equality, health [*145] care, and human dignity have begun to share one common element: unrestricted access to abortion services.⁷⁵

that it was "published in part with UNICEF-provided funds"). The World Youth Alliance also noted the advocacy for such rights by groups present at the Summit. See World Youth Alliance, Article on the World Summit for Children, May 13, 2002, at 2, <http://www.worldyouthalliance.org/news/0205.shtml> (describing the disappointment of NGOs promoting the sexual and reproductive rights of children) (last visited June 9, 2005).

⁷⁴ Though children were not the assigned topic of the meeting, the movement for children's reproductive and sexual rights was spotlighted at the Cairo+5 meetings, sponsored by the United Nations Fund for Population Activities ("UNFPA"). The World Youth Alliance reported on that conference as follows:

In March through June of 1999 the United Nations Fund for Population Activities (UNFPA) hosted the five-year follow-up meetings to the 1994 Cairo conference on Population and Development. During these meetings, held at UN headquarters in New York City, the UNFPA introduced a youth caucus - a small, well-funded group of thirty-two young people who were drawn from many different organisations [sic] throughout the world, and used by the UNFPA and the Western Countries as an excuse to push an extremely radical agenda of personal autonomy and sexual freedom at the Cairo+5 conference.

This small group claimed to speak on behalf of all three billion of the world's youth.

Their demands included sexual and reproductive health rights and services for all young people, currently defined as those ten years old and up, which included access to contraceptives, abortion, and emergency contraception without parental knowledge or consent.

They demanded mandatory comprehensive sexual education courses at all levels in the schools, which would cover, as appropriate, sexual pleasure, confidence, and freedom of sexual expression and orientation.

Moreover, they declared that youth must receive information that would allow them to make their sexual decisions in a guilt-free way. In order to reach this goal, mandatory education of religious leaders was necessary to enlighten, educate, and sensitise [sic] them to the rights of young people.

World Youth Alliance, Cairo+5 Conference on Population and Development, <http://72.14.203.104/search?q=cache:JCtPPJj3QPwJ:www.worldyouthalliance.org/unconferences/cairo5.shtml+%22This+small+group+claimed+to+spea+on+behalf+of+all+three+billion+of+the+world%E2%80%99s+youth%22&hl=en&gl=us&ct=clnk&cd=1> (last visited Mar. 13, 2006) (formerly at www.worldyouthalliance.org/unconferences/cairo5.shtml).

⁷⁵ For example,

one of the Clinton Administration's earliest foreign policy aims was to entrench the practice of abortion in both U.S. domestic law and, more broadly, in international law as an "international human right" and a "fundamental right of all women." In support of this agenda, the Clinton Administration sought to link abortion to the "empowerment" of women, ostensibly through health services and education, as a necessary part of an overlying policy of third world development.

Rumage, *supra* note 3, at 70 (footnotes omitted). Clinton appointee Tim Wirth also

acknowledged that the Clinton Administration's promotion of abortion was a dramatic change in U.S. foreign policy. He also claimed that "our commitments on population" are "top priority for everybody" in the U.S. government. He described the purpose of his mission somewhat obscurely as "to conserve what many would call God's creation," and identified high birth rates as causing problems for "our national security, population, environment, counter-narcotics, terrorism." Although Wirth did not elaborate on what each problem had to do with the other, he linked them inextricably to population control, including counter-narcotics and terrorism.

Id. at 75 (footnotes omitted) (quoting Wirth's remarks); see also Jeremy Sarkin, The Drafting of South Africa's Final Constitution from a Human-Rights Perspective, 47 Am. J. Comp. L. 67, 79 n.67 (1999) (citing Sarkin's previous articles that evidence his abortion rights advocacy and asserting that a "democratic society based on human dignity" should include an abortion rights clause in its constitution). But see Michel Rosenfeld, Comprehensive Pluralism Is Neither an Overlapping Consensus Nor a Modus Vivendi: A Reply to Professors Arato, Avineri, and Michelman, [21 Cardozo L. Rev. 1971, 1986 \(2000\)](http://www.cer.academia.edu/21CardozoLRev197119862000) (responding to the review by Andrew Arato, Shlomo Avineri, & Frank I. Michelman of his book, Michel Rosenfeld, *Just Interpretations: Law Between*

Because of the single-mindedness of the international abortion rights lobby, UN conference negotiations follow a predictable routine: academicians and abortion-rights NGOs descend on the negotiations en masse to distribute papers, sponsor lectures, and convene cocktail parties and other events where diplomats and government representatives are instructed on how and why "access to the full range of reproductive health care services" is the necessary lynchpin for environmental protection, empowerment of women, elimination of gender-based violence, and the promotion of human dignity.⁷⁶ **[*146]** Depending upon the time and resources available prior to the negotiation, the non-governmental participants - including law professors and their supporting universities - will host academic conferences analyzing the topics set for negotiation.⁷⁷

Throughout this process, the term "abortion" is rarely used. Proponents generally assert they are not promoting abortion - although the credibility of such claims often evaporates once the publications of the legal scholars involved are examined.⁷⁸ Operating within this verbal fog of double-speak and hidden meanings, a relatively small group of opposing academicians and NGOs attempt to explain to national delegations the legal, and moral, consequences of the language placed on the negotiating table each day.

The diplomatic personnel engaged in this ritual operate under incredible pressure. Tasked with crafting language to govern whatever topic has brought them together, they struggle diligently to craft language that - in the words of the Preamble to the Universal Declaration of Human Rights - will promote the "equal and inalienable rights of all members of the human family."⁷⁹ The negotiating process can be as brief as two days, or consume the better part of two months. But however long the event, the "real action" usually takes place during the final hours.

When the deadline for a negotiation's completion draws near, and often in the middle of the night, delegates - sometimes motivated primarily by exhaustion and the pragmatic need to finish - adopt language which skirts the outer perimeters of the abortion debate. They do so by including references to some aspect of "reproductive health" in various paragraphs of the negotiated document. As a result, the final document is often weighted down with amazingly complex paragraphs that defy the rules of logic as well as the comprehension skills of most ordinary readers. The entire effort rests upon the careful use of coded and purposefully vague language. The final language - to note just a few of the possibilities - can variously **[*147]** "urge," "call upon nations to provide," or "note with concern the lack" of "access to a full range of reproductive health services," "reproductive health care" or simply "reproductive health."⁸⁰ These and similar phrases are often designed to operate like magic mirrors: providing onlookers with the visions they desire most.

Ethics and Politics) (discussing the significantly distinct meaning that pro-choice and pro-life advocates attribute to "human dignity" even though both groups of advocates assert the importance of "human dignity"). But see also Kathryn Kolbert, *The Webster Amicus Curiae Briefs: Perspectives on the Abortion Controversy and the Role of the Supreme Court*, [15 Am. J.L. & Med. 153, 157 \(1989\)](#) (alluding to the litigation of "environmentalists and population groups who clarified the international ramifications of losing Roe") (footnote omitted); Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, [19 Harv. Women's L.J. 23, 24-25 \(1996\)](#) (making a connection between pollution and discrimination based on sex, and specifically emphasizing the abortion rights debate).

⁷⁶ Ramage, *supra* note 3, at 78 (quotation omitted).

⁷⁷ See *infra* notes 148-49, 153-55 and accompanying text (describing efforts of the Center for Global Women's Leadership at Rutgers University, and others).

⁷⁸ Ramage, *supra* note 3, at 78 (noting that, after the Cairo Conference, the U.S. asserted that it had not promoted abortion; rather it had merely promoted "access to the full range of reproductive health care services"). See also *supra* notes 61-62 (discussing the public testimony of Professor Copelon at the Rome ICC Conference that any "linking" between "enforced pregnancy" and abortion was "artificially" created, an assertion flatly contradicted by her prior law review articles which asserted that unwanted pregnancies were "forced" and constituted unlawful "involuntary servitude").

⁷⁹ Declaration of Human Rights, *supra* note 7, pmb., P 1.

⁸⁰ Similar language is found in numerous UN documents. See, e.g., Conference on Environment and Development, *supra* note 20, Annex II, P 3.8-3.8(j) ("Governments, with the assistance of and in cooperation with appropriate international, non-governmental and local community organizations, should establish measures that will directly or indirectly ... implement, as a matter of urgency, ... safe and effective reproductive health care and affordable, accessible services"); Fourth World

Indeed, as negotiations near their end, it often seems that diplomats, fatigued by long hours of discussion and weary of the abortion struggle, choose words that - while not establishing an international abortion right - are somewhat less than clear in precluding a contrary interpretation. There seems to be a nearly inexhaustible supply of language that encompasses the possibility of abortion without any express reference to the practice.⁸¹ This includes [*148] the ubiquitous words "reproductive health," which may sometimes appear to encompass abortion even though, as defined, they do not.⁸² [*149] As a result of these kinds of technical drafting difficulties, the final

Conference on Women, Beijing, China, Sept. 4-15, 1995, Report of the Fourth World Conference on Women, 90-91, P 206(i), U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) (contending that nations should "improve data collection on ... access to comprehensive sexual and reproductive health services") [hereinafter Fourth World Conference on Women];

To improve the health and well-being of all people throughout their life-span, ... Governments ... should ...

Develop and implement programmes [sic] to ensure universal access for women throughout their life-span to a full range of affordable health-care services, including those related to reproductive health care, which includes family planning and sexual health

Conference on Human Settlements, supra note 20, PP 136-136(f); G.A. Res S-19/2, P 30, U.N. Doc. A/RES/S-19/2 (Sept. 19, 1997) ("The current decline in population growth rates must be further promoted through ... the further expansion of ... health care, including reproductive health care, including both family planning and sexual health"); Report of the Ad Hoc Committee of the Whole of the 21st Special Session of the General Assembly, G.A. Res. S-21/5, PP 52-52(e), U.N. Doc. A/S-21/5/Add.1 (July 1, 1999) ("Governments, in collaboration with civil society, including Non-Governmental Organizations, donors and the United Nations system, should ... increase investments designed to improve the quality and availability of sexual and reproductive health services").

⁸¹ For example, "population control" and "empowerment" language crafted at the 1992 Environmental Conference in Rio de Janeiro was expanded and used to promote "reproductive freedom" two years later at the Cairo Conference on Population:

By the time of the 1994 Cairo ICPD, the population control advocates had successfully embedded much of their message into several conference documents - most particularly at the 1992 Earth Summit in Rio ("Agenda 21"), where Malthusian language of limits came to dominate rhetoric about population and development. Couched in more friendly terms of "sustainable development," the substance of the argument that population growth equals poverty had changed little, except in style and presentation.

This population argument strongly influenced the Cairo conference, which was the largest intergovernmental conference on population and development held. More than 11,000 people participated from all levels of society, with 179 nations taking part in the negotiations. The kinder and gentler approach to population control was very much present at the conference. As a UNFPA backgrounder noted, the Cairo Programme of Action ("POA") ostensibly endorsed

[A] new strategy that emphasizes the integral linkages between population and development and focuses on meeting needs of individual men and women, rather than on achieving demographic targets. The key to this new approach is empowering women and providing them with more choices through expanded access to education and health services, skill development and employment, and through their full involvement in policy-and decision-making processes at all levels.

The backgrounder assured that the empowerment of women is the "key to improving the quality of life for everyone." Another backgrounder noted that "advancing gender equality, eliminating violence against women and ensuring women's ability to control their own fertility were acknowledged as cornerstones of population and development policies." Indeed, the table of contents of the Cairo POA had the appearance of a document of the World Conference on Women: Chapter IV dealt with Gender Equality, Equity and Empowerment of Women; Chapter V was entitled "The Family, Its Roles, Composition and Structure"; Chapter VII, "Reproductive Rights, [Sexual and Reproductive Health] and Family Planning"; and almost every chapter that did not have women's issues as their main subject treated them in detail in a subsection. Thus, the conference made an explicit connection between women's rights - particularly their "reproductive rights" - and population and development.

Aguirre & Wolfgram, supra note 4, at 140-42 (footnotes omitted) (providing a thorough analysis of the movement for women's sexual and reproductive rights). Malthusian reasoning, of course, assumes that "population growth is the main cause of poverty and an obstacle to development because the more people there are in a given area the fewer resources there are to support or develop them." Id. at 122.

⁸² The 1994 International Conference on Population and Development ("ICPD") defined "reproductive health" as:

[A] state of complete physical, mental and social well-being ... in all matters relating to the reproductive system Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability

draft of a negotiated document can be opaque, creating opportunities for interpretation thereafter by scholars and intergovernmental entities in ways that are arguably inconsistent with the document's language and/or negotiating history.⁸³

Nevertheless, and despite the use of ambiguous and potentially expansive terms - such as reproductive "choice"⁸⁴ - this process, at least to date, has not produced a single negotiated document that expressly and unequivocally recognizes an international right to abortion. Indeed, because of consistent pro-life efforts, the final documents generally include language preserving national sovereignty on questions of human fertility and limiting the potentially expansive sweep of any reproductive rights language.⁸⁵ In addition, negotiations usually conclude with several nations issuing statements explaining that the final document - whatever its title or topic - does not alter national or international law related to the regulation of abortion.⁸⁶ Examples of the foregoing abound. The Cairo and Beijing Platforms for Action and the Convention on the Elimination of Discrimination Against Women ("CEDAW") provide an adequate - although hardly exhaustive - overview of how the contemporary international lawmaking process handles the intense moral, emotional, and legal debates surrounding human rights and the protection of human life.

[*150]

A. Cairo Conference on Population and Development

A powerful bloc of nations, including the United States and the European Union, made a concerted effort to establish abortion as a "fundamental human right" at the Cairo Conference on Population and Development. During preparations for the conference, the United States publicly announced that one of the major objectives of the conference would be the establishment of abortion as an international human right.⁸⁷ The United States thereafter exercised its considerable political clout to promote that result.⁸⁸

to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.

ICPD, *supra* note 5, ch. VII, P 7.2. Without careful analysis, the foregoing definition - which includes the "freedom" to "decide if, when and how often" to reproduce - could be construed as including access to abortion services. This "freedom," however, is limited to family planning methods that "are not against the law." Thus, while the Report obligates countries to provide access to reproductive health care "no later than the year 2015," access to abortion is mandated only "as specified in paragraph 8.25." *Id.* P 7.6. Paragraph 8.25, in turn, provides that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process." *Id.* P 8.25.

⁸³ See discussion *infra* notes 128-132 (discussing how the CEDAW Committee interprets the convention as mandating abortion rights, notwithstanding the views of scholars that the treaty is "neutral" on abortion, and noting that scholars, prior to the ten-year review of the Beijing Platform for Action, developed strategies to expand the platform in ways that might include an abortion right).

⁸⁴ See, e.g., Beijing Declaration, *supra* note 5, P 94.

⁸⁵ See, e.g., *infra* note 91 (discussing exclusion of abortion from the ICPDs otherwise expansive definition of "reproductive health").

⁸⁶ See discussion *infra* notes 97-102 (discussing the Beijing Platform).

⁸⁷ Gregory M. Saylin writes:

Dee Dee Meyers, Press Secretary of the Clinton Administration, told reporters that the President considered abortion to be "part of the overall approach to population control." A State Department action cable stated that assuring access to safe abortions was a priority issue for the United States and that "access to safe, legal and voluntary abortion is a fundamental right of all women."

The abortion rights proposal became one of the most - if not the most - contentious topics at the conference.⁸⁹ The U.S. effort was vigorously opposed by Catholic and Muslim nations, who received strong support from the delegation of the Roman Catholic Church - or Holy See - which holds a seat as a Permanent Observer in the UN General Assembly.⁹⁰ As a result of this opposition, and despite the [*151] pressure exerted by the United States, nothing in the Cairo Platform for Action establishes abortion as a human right. On the contrary, the plain language of the document provides that abortion lies clearly within the sovereign prerogative of national governments.⁹¹ Furthermore, many of the nations involved in the Conference clarified their understanding that the platform did not alter domestic abortion laws.⁹²

B. Beijing Conference on Women

Gregory M. Saylin, Note, The United Nations International Conference on Population and Development: Religion, Tradition, and Law in Latin America, [28 Vand. J. Transnat'l L. 1245, 1253 \(1995\)](#) (footnotes omitted) (quoting Margie Montgomery, Abortion in Foreign Nations, *Courier-J. (Louisville)*, Sept. 7, 1994, at 9A).

⁸⁸ The U.S. State Department "action cable" sent to every U.S. diplomatic post in the world specifically instructed the embassies to inform their host countries that the United States supported recognition of a new "fundamental right to abortion." John Leo, *Playing Hardball at Cairo*, *U.S. News & World Rep.*, Sept. 19, 1994, at 26. As summarized by Leo:

This was not an offer to fund abortion for poor nations that want it. It was an attempt to override laws and customs by establishing some sort of internationally recognized right that might be financially enforced in the future by the U.N. or international aid organizations.

Tim Wirth, under secretary of state and point man in the U.S. abortion lobbying effort, said that "a government which is violating basic human rights should not hide behind the defense of sovereignty." He meant that once international organizations accept abortion as a fundamental right, it can be cited to trump the laws, constitutions and sovereignty of any nation.

Id.

⁸⁹ See generally Rumage, *supra* note 3.

⁹⁰ See generally Aguirre & Wolfgram, *supra* note 4, at 170; Rumage, *supra* note 3; Saylin, *supra* note 87.

⁹¹ The Cairo Platform for Action provides that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process." ICPD, *supra* note 5, P 8.25; see also id. P 7.24 ("Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning, and in all cases provide for the humane treatment and counselling of women who have had recourse to abortion.") (emphasis added).

⁹² Many nations made oral or written reservations regarding the language of the ICPD. See ICPD, *supra* note 5, at 142 ("The Argentine Republic cannot accept the inclusion of abortion in the concept of 'reproductive health' either as a service or as a method of regulating fertility."); id. at 143 (The Dominican Republic "accepts the content of the terms 'reproductive health,' 'sexual health,' 'safe motherhood,' 'reproductive rights,' 'sexual rights,' and 'regulation of fertility' but enters an express reservation on the content of these terms and of other terms when their meaning includes the concept of abortion or interruption of pregnancy."); id. at 141 (The United Arab Emirates "do not consider abortion as a means of family planning."); id. at 139 (Nicaragua "accepts the concepts of 'family planning,' 'sexual health,' 'reproductive health,' 'reproductive rights,' and 'sexual rights' expressing an explicit reservation on these terms and any others when they include 'abortion' or 'termination of pregnancy' as a component."); id. at 144 ("Ecuador enters a reservation with respect to all terms such as 'regulation of fertility,' 'interruption of pregnancy,' 'reproductive health,' 'reproductive rights,' and 'unwanted children,' which in one way or another, ... could involve abortion."); id. at 138 (Honduras: "The concepts of 'family planning,' 'sexual health,' 'reproductive health,' 'maternity without risk,' 'regulation of fertility,' 'reproductive rights' and 'sexual rights' ... do not include 'abortion' or 'termination of pregnancy' ..."); id. at 137 (El Salvador: "As far as reproductive rights, reproductive health and family planning are concerned, ... we should never include abortion within these concepts, either as a service or as a method of regulating fertility."); id. at 140 ("Paraguay accepts all forms of family planning with full respect for life ..."); id. at 139 (Libyan Arab Jamahiriya: expressing a reservation "on the words 'unwanted pregnancies' ... because our written Constitution does not allow the State to undertake abortions unless the mother's health is in danger"). Many countries that have Islam as an official religion made a blanket statement reservation similar to Kuwait's. Id. at 138 ("We would like to put on record that our commitment to any objectives on population policies is subject to their not being in contradiction with Islamic Sharia ..."). See generally id. ch. 5.

In September 1995, world governments gathered in Beijing to hold the Fourth World Conference on Women.⁹³ The stated purpose of the event was to address constraints and obstacles which impede **[*152]** progress and perpetuate inequalities between men and women.⁹⁴ Pregnancy soon surfaced as one of the principal "inequalities" between men and women. As a result, the conference followed a pattern similar to that of Cairo: organized advocacy for abortion rights by certain governments and academicians followed by the adoption of a document that did not - in actual fact - embrace this goal.

The outcome of the fierce debate over human reproduction in Beijing is reflected in the careful wording of Paragraph 94 of the Platform for Action which discusses "reproductive health." The paragraph provides, in pertinent part:

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. Implicit in this last condition [is] the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.⁹⁵

Nuanced phraseology is the distinguishing hallmark of Paragraph 94. There is discussion of "choice" regarding "regulation of fertility," but that discussion is coupled with the strong proviso that "choice" does not extend to fertility options that are "against the law." The paragraph also asserts that "reproductive health" includes "the constellation of methods, techniques and services" that "prevent" or "solve" "reproductive health problems." But starkly missing is any reference to the modern solution for many "reproductive health problems": abortion. Accordingly, while this or that word or phrase from Paragraph 94 of the Platform for Action - as well as other possible portions of the document - might be used to argue for **[*153]** abortion rights, nothing in the Platform for Action establishes or recognizes those rights.

On the contrary, as with Cairo, the Beijing Platform expressly provides that abortion is a matter for domestic - not international - policy. Paragraph 106(k) of the Platform, echoing the identical language from the Cairo document, provides that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process."⁹⁶ The Beijing Platform for Action leaves abortion firmly within the control of national governments.

Finally, should doubt remain in any mind, the negotiating history of Beijing clarifies that the drafters of the Platform for Action did not intend to create an international abortion right. The Dominican Republic, for example, entered "an express reservation to the content of [reproductive health] terms, or any others, if they include abortion or interruption of pregnancy as a component."⁹⁷ The Government of Guatemala reserved the right to interpret the Platform for Action in express accordance with its "unconditional respect for the right to life from the moment of conception."⁹⁸ Other countries forcefully asserted that no provision of the Platform, including reproductive health provisions, would override national legislation. Tunisia stated that it would "reject any provision that is contrary to its

⁹³ Beijing Declaration, *supra* note 5, Annex I, PP 1, 2.

⁹⁴ See *id.* Annex I, PP 5, 7.

⁹⁵ *Id.* Annex II, ch. IV, P 94.

⁹⁶ *Id.* Annex II, ch. IV, P 106(k).

⁹⁷ *Id.* Annex II, ch. V, P 7 (depicting the reservations and interpretative statements on the Beijing Declaration and Platform for Action that were made during this conference session).

⁹⁸ *Id.* Annex II, ch. V, P 10(a).

fundamental laws and texts." ⁹⁹ In a direct reference to reproductive health, Paraguay explained that Paragraph 94 would be "interpreted in conformity with its national legislation," ¹⁰⁰ which protects unborn life. ¹⁰¹ The Holy See, for its part, explained that "it does not consider abortion or abortion services to be a dimension of reproductive health or reproductive health services." ¹⁰²

[*154]

C. CEDAW

The Cairo and Beijing Platforms for Action are "soft law" documents. That is, they are not formal treaties and bind nations only to the extent that UN agencies - and/or other donor nations and Non-Governmental Organizations - make compliance a condition of financial and other assistance, ¹⁰³ or to the extent that national officials voluntarily adopt and enforce the documents. ¹⁰⁴ By contrast, the Convention on the Elimination of All Forms of Discrimination Against Women, is a "hard law" treaty. Once ratified by Congress, treaties become the supreme law of the land under Article IV of the United States Constitution. ¹⁰⁵ CEDAW has never been ratified by the United States Senate. ¹⁰⁶ The convention, nevertheless, could have a profound impact on American reproductive rights law. ¹⁰⁷

The UN website describes the convention as follows:

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. ¹⁰⁸

[*155] Proponents take somewhat schizophrenic positions as to whether the treaty does - or does not - establish an international abortion right. The official UN website explains that CEDAW "is the only human rights treaty which

⁹⁹ Id. Annex II, ch. V, P 29.

¹⁰⁰ Id. Annex II, ch. V, P 25.

¹⁰¹ Constitution, Art. IV (2001) (Paraguay). Paraguay submission to the Committee on the Rights of the Child also explains the country's stance on abortion. See Convention on the Rights of the Child, supra note 17, PP 173, 287-88.

¹⁰² Beijing Declaration, supra note 5, ch. V, P 11.

¹⁰³ See, e.g., Richard G. Wilkins, The Impact of UN Conference Declarations on International and Domestic Law, at 6-9, 2001, The World Family Policy Center, <http://www.worldfamilypolicy.org/forum> 2001.html (follow "The Impact of UN Big Conference on International and Domestic Law" link).

¹⁰⁴ See supra notes 32-35 (discussing U.S. Supreme Court enforcement of international "soft law" norms).

¹⁰⁵ [U.S. Const. art. VI, cl. 2](#) ("Constitution ... and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ...").

¹⁰⁶ In the late 1980s and early 1990s, the Senate held several hearings on CEDAW, ratification of which was strongly supported by the Clinton Administration. Opposition to the treaty centered, in large measure, upon fears that CEDAW included an international right to abortion. The Senate committee studying the matter concluded, as did the Clinton Administration, that CEDAW was "abortion neutral, that is, that it does not create or reflect an international right to abortion or sanction abortion as a means of family planning." Marian Nash (Leich), Contemporary Practice of the United States Relating to International Law, [89 Am. J. Int'l L. 96, 106-07 \(1995\)](#) (providing that the author of this article was an employee within the Office of the Legal Adviser, Department of State, at the time of the Senate hearings).

¹⁰⁷ The U.S. Supreme Court has now cited unratified UN conventions on at least two occasions to determine the meaning of the Due Process and Equal Protection Clauses of the United States Constitution. See supra notes 29, 32-35.

¹⁰⁸ Division for the Advancement of Women, Text of CEDAW, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Feb. 20, 2005).

affirms the reproductive rights of women." ¹⁰⁹ Consistent with this potentially broad language, the international body charged with monitoring the convention has asserted that CEDAW affirms access to abortion in some circumstances. ¹¹⁰ By contrast, academicians who support U.S. ratification of the treaty deny that it establishes any such right. Harold Hongju Koh, Dean of Yale Law School, for example, asserts flatly that "CEDAW does not create any international right to abortion." ¹¹¹

With the UN's own website promoting a broad reproductive rights role for the treaty while scholars assert the contrary, the reach of CEDAW on abortion is difficult to determine. The language of the treaty is expansive, almost breathtakingly so. Article 1 defines "discrimination" as "any distinction ... on the basis of sex" in "any ... field." ¹¹² Article 2 requires state parties to eliminate "all discrimination against women," not just by government actors, but "by any person, organization, or enterprise." ¹¹³ Article 5, in turn, requires state parties to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of ... all ... practices which are based on ... stereotyped roles for men and women." ¹¹⁴

[*156] One can argue that these commands, sensibly applied, might promote needed social justice reforms. ¹¹⁵ But the commands themselves are exceptionally broad and reach a remarkable range of relationships, legal structures, and informal institutions. Experience, furthermore, suggests that CEDAW's dictates are not always given entirely "sensible" readings. For example, as interpreted by the UN committee charged with its enforcement, CEDAW mandates that countries engage in remedial efforts to ameliorate the apparently "harmful stereotype" of "motherhood." ¹¹⁶ Treaty provisions that are expansive enough to bring motherhood into question could well be manipulated by academicians, philosophers, lawyers, judges, and government officials to support a right to pregnancy termination. ¹¹⁷ **[*157]** Thus, while academic opinion - at least at present - appears to be that CEDAW

¹⁰⁹ Id. (emphasis added).

¹¹⁰ See *infra* notes 131, 133 (discussing decisions of the CEDAW Committee promoting the legalization of abortion to promote the "health of the mother").

¹¹¹ Harold Hongju Koh, Why America Should Ratify the Women's Rights Treaty (CEDAW), [34 Case W. Res. J. Int'l L. 263, 272 \(2002\)](#). Dean Koh refutes the claim that "CEDAW supports abortion rights" as "flatly untrue." Id. He asserts that:

There is absolutely no provision in CEDAW that mandates abortion or contraceptives on demand, sex education without parental involvement, or other controversial reproductive rights issues. CEDAW does not create any international right to abortion. To the contrary, on its face, the CEDAW treaty itself is neutral on abortion, allowing policies in this area to be set by signatory states and seeking to ensure equal access for men and women to health care services and family planning information.

Id.

¹¹² CEDAW, *supra* note 5, art. I.

¹¹³ Id. art. II(e).

¹¹⁴ Id. art. V(a).

¹¹⁵ See generally Koh, *supra* note 111, at 272.

¹¹⁶ When countries have attempted to follow the admonition in the Universal Declaration of Human Rights that motherhood - and the correlative right of childbearing - deserves special protection and care, Declaration of Human Rights, *supra* note 7, art. 25(2), the CEDAW Committee has stated that these efforts are "paternalistic," Committee on the Elimination of Discrimination Against Women, G.A. Res. 52/38, pt. 2, P 58, 16th & 17th Sess., U.N. Doc. A/52/38/Rev.1 (Jan. 1, 1997) [hereinafter Report of Comm. 1], and has asserted that encouraging motherhood discourages women from seeking (ostensibly more valuable) paid work, see Committee on the Elimination of Discrimination against Women, G.A. Res. 54/38, P 259, 21st Sess., U.N. Doc. A/54/38/Rev.1 (Jan. 1, 1999) [hereinafter Report of Comm. 2]; Report of Comm. 1, *supra*, pt. 2, PP 215-217. The Committee reports have gone so far as to tell Western European countries with below-replacement birth rates and imploding populations that their governments must do more to get women into the full-time work force and to "eradicate stereotypical attitudes." Committee on the Elimination of Discrimination Against Women, G.A. Res. 55/38, PP 311-314, 314, U.N. Doc. A/55/38 (PART I) (May 1, 2000) [hereinafter Report of Comm. 3].

does not mandate abortion on demand,¹¹⁸ the impact that the broad wording of the treaty might have on unborn life is unknown.

IV. Continued Advocacy For the Right That Isn't

The foregoing review suggests that, at present, there is no express "international human right to abortion." However, a recent international controversy regarding the original understanding of the Beijing Platform, prompted by the Platform's vague and potentially expansive wording, renders this conclusion somewhat tentative. The international right that "isn't" nevertheless "might be."

As set out above, the Cairo and Beijing documents - as understood at the time of their adoption - did not create any new international right, including access to abortion services. But various phrases repeated throughout these documents provide fertile ground for lawyers who support a pro-abortion agenda. A complaint filed in 2001 by the Center for Reproductive Law and Policy,¹¹⁹ for example, suggested that the Cairo and Beijing documents could provide a foundation for abortion rights "in order to prepare for the eventuality" that *Roe v. Wade* was "overruled by the United States Supreme Court."¹²⁰

Although the federal district court ultimately dismissed the complaint - a decision later affirmed by the court of appeals¹²¹ - the Center for Reproductive Law and Policy unquestionably has high hopes that the Cairo and Beijing platforms will ultimately establish an international abortion right. As explained in Paragraph 46 of the Center's complaint:

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During the period from 1993 to 2000, several major international conferences ... resulted in major agreements promoting women's equality including reproductive rights for women. In 1994, the International Conference on

¹¹⁷ CEDAW condemns "any distinction ... on the basis of sex." CEDAW, *supra* note 5, art. 1. As astonishing as it sounds to those without years of legal training, many of the "equality" and "discrimination" arguments made by abortion proponents rest upon the simple biological reality that only women can become pregnant. One author in particular captured the argument with remarkable clarity: "Just as no man will ever become pregnant, no man will ever need an abortion, hence be in a position to be denied one by law. On this level, only women can be disadvantaged, for a reason specific to sex, through state-mandated restrictions on abortion." Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, [100 Yale L.J. 1281, 1320 \(1991\)](#) (article as a whole gives a very thorough review of the argument) (footnote omitted); see also Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, [45 Am. U. L. Rev. 77 \(1995\)](#) (discussing the Court's recognition of the unequal burdens of procreation on men and women); Johnsen & Wilder, *supra* note 53 (arguing for the equality of women by securing the decision in *Roe*, using similar language to CEDAW); Christina L. Misner, *What if Mary Sue Wanted an Abortion Instead? The Effect of Davis v. Davis on Abortion Rights*, [3 Am. U. J. Gender & L. 265, 296 \(1995\)](#) ("Equal protection is triggered in the abortion context [because] laws regulating abortion treat women differently than men.") (footnote omitted); Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, [63 Brook. L. Rev. 1051, 1128 \(1997\)](#) (discussing inequality between males and females associated in consensual sex without assuming burden of a fetus); Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, [62 Alb. L. Rev. 1057 \(1999\)](#) (seeking to classify equal protection argument in context of harm created by fetus and "consent-to-pregnancy"). To the extent that pregnancy is seen primarily as a "distinction" on "the basis of sex," CEDAW's broad equality mandate might well encompass a right to abortion.

¹¹⁸ Koh, *supra* note 111, at 272.

¹¹⁹ [Complaint, Ctr. for Reprod. Law & Policy v. Bush, No. 01-4986, 2001 WL 868007 \(S.D.N.Y. July 31, 2001\)](#).

¹²⁰ [Id. at 21](#).

¹²¹ See, e.g., [Ctr. for Reprod. Law & Policy v. Bush, No. 01-4986, 2001 WL 868007 \(S.D.N.Y. July 31, 2001\)](#) (dismissed for failure to show standing), *aff'd*, [304 F.3d 183 \(2d Cir. 2002\)](#) (holding that policy did not violate the Center's First Amendment rights to speech and association, party lacked standing for Fourteenth Amendment claims, and even though party had standing with regard to claims founded on equal protection theory, the policy did not violate equal protection rights).

Population and Development (ICPD) was held in Cairo, Egypt. In 1995, the Fourth World Conference on Women was held in Beijing, China. Among other issues, a variety of reproductive health and rights issues were addressed at these conferences, including abortion.¹²²

The Center wisely stopped short of asserting that international discussions have already produced an international abortion right. But the thrust of the Center's argument is that - over time - international abortion rights are expanding. The Center might have a point. The recent review of the Beijing Platform for Action, concluded in March 2005, suggests that global understandings regarding reproductive rights may be somewhat more expansive now than ten years ago.

At the outset of the ten-year review process, the United States delegation submitted that the outcome document adopted by the General Assembly should include language explaining that - as all nations understood in 1995 - the Beijing Platform for Action does not establish or create an international right to abortion.¹²³ This suggested reaffirmation of the 1995 intent would halt the proliferation of spurious claims regarding the "meaning" of the Beijing Platform; claims like those set out in the complaint filed by the Center for Reproductive Law and Policy. But however understandable the U.S. request was, the action prompted a veritable firestorm.

Abortion proponents - including representatives of the ostensibly objective news media - attacked the U.S. proposal with astonishing venom.¹²⁴ Lost in the ensuing media controversy was any objective [*159] reporting of the background events supporting the wisdom of the U.S. diplomatic stance. Press reports, for example, failed to note that academic centers, law professors, and Non-Governmental Organizations had publicly announced - on the Internet - strategic plans to use the Beijing review process to expand international abortion rights.¹²⁵ In light of such public pronouncements regarding the meanings that could be ascribed to the Beijing Platform, any nation's request for reaffirmation of the original understandings would hardly have been unusual. But angry news reports ignored such details and, instead, asserted that the U.S. position was nothing more than "conservative politics at its nadir."¹²⁶

There was much more involved, of course, than "conservative politics." At issue was the legitimacy of international legal scholarship based primarily upon the "liberal politics" of expanding the meaning of the words used in the Beijing Platform for Action well beyond the original intent of the nations who negotiated and adopted the document.¹²⁷ Reaffirmation that the 1995 document did not create an abortion right could seriously undermine post-1995

¹²² Complaint, *supra* note 119, at 13-14.

¹²³ U.S. Ignites Abortion Firestorm, *Chi. Trib.*, Mar. 1, 2005, Zone C, at 5 ("The United States insisted that delegates declare that women have no right to abortion."); see also Anti-Abortion Demand Let Go, *Chi. Trib.*, Mar. 4, 2005, Zone C, at 6 (reporting that the U.S. was dropping a proposed statement clarifying "that the platform adopted at the 1995 UN women's conference in Beijing did not include a "right to abortion").

¹²⁴ In a widely published "news" article that should have been published - if at all - as political commentary, a Scripps Howard reporter attacked the United States for making "a totally unnecessary and hideously denigrating motion to roll back women's rights." Bonnie Erbe, U.S. Delegate Acted Idiotic at U.N. Women's Event, *Deseret Morning News*, Mar. 13, 2005, at AA10. In an extraordinary display of journalistic vitriol, prompted by the United States' request that the international community merely affirm its original understanding of the Beijing Platform for Action, the reporter accused the U.S. Ambassador to the Commission on the Status of Women of behaving "a bit too much like every man's nightmarish version of a woman commandeered by a PMS hissy-fit." *Id.*

¹²⁵ Academic study centers were particularly active in their promotion of reproductive rights prior to the ten-year review of the Beijing Conference. See *infra* notes 146, 148, 152-56 and accompanying text.

¹²⁶ Erbe, *supra* note 124; see also Editorial, Still Unequal, *Boston Globe*, Mar. 8, 2005, at A12 (characterizing the U.S. action as "obstructionist insistence"); Editorial, The Bush Team's Abortion Misstep, *N.Y. Times*, Mar. 5, 2005, at A12 (characterizing the U.S. delegation's work "a burst of anti-abortion zealotry," "shabby and mischievous," and also calling for an apology for the "disruption"); Colum Lynch, U.S. Drops Abortion Issue at U.N. Conference, *Wash. Post*, Mar. 5, 2005, at A13 (stating that many of the delegates and women's rights groups accused the Bush Administration of "trying to 'hijack' the conference").

scholarship which promotes national and international access to abortion by invoking the platform's language of "choice," "freedom," and "access" to "reproductive health care."¹²⁸

[*160] For example, international discussion of "a satisfying and safe sex life," including "the capability to reproduce and the freedom to decide if, when and how often to do so,"¹²⁹ may not have connoted a right to abortion in 1995. But because of the continuing redefinition of these terms by legal scholars since 1995, the same may not be true in 2005. As one writer noted in 1997, just two years after the Beijing conference:

Within the right to procreate also lies the right to terminate the pregnancy. Arguably, the same treaties that recognize the woman's right to make decisions regarding procreation should encompass the woman's right to have an abortion. The rights of individuals to decide the number and spacing of their children makes sense only if it includes the right to abort an unwanted pregnancy.¹³⁰

This reasoning, to say the least, is somewhat extraordinary: it establishes an international abortion right on the very language that was carefully crafted to preclude that right.¹³¹ Accordingly, one might have expected that at least some member nations of the UN would have supported the U.S. request to reaffirm the original understanding of the Platform for Action - if for no other reason than simply to put these sorts of "heads I win, tails you lose" arguments to rest. Reaffirmation would have clarified the following important point: the international community did not create an international abortion right in 1995 and the very language that did not establish an abortion right then does not create one now.

[*161] Numerous member nations, furthermore, might well have supported the U.S. initiative on the basis of their own national laws. According to reports filed with the committee that monitors compliance with the Convention on the Rights of the Child, a clear majority of the world's nations provide at least some level of formal legal protection for the unborn child's right to life.¹³² Not one member of the UN General Assembly, however, was apparently

¹²⁷ See Women's Rights Document OK'd After U.S. Drops Abortion Issue, Chi. Trib., Mar. 6, 2005, 1, at 9 (depicting a report by the U.S. representative to the commission, Ellen Sauerbrey, explaining that the U.S. was concerned that groups were trying to hijack the Beijing document's phrase "reproductive health services" and define it as a guarantee of abortion rights).

¹²⁸ See, e.g., Beijing Declaration, supra note 5, P 94 ("Reproductive health" is defined as including the right "to have a safe and satisfying sex life" and "the capability to reproduce and the freedom to decide if, when and how often to do so." "Reproductive health care," in turn, "is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems."). These concepts - including "a safe and satisfying sex life" and "freedom to decide if, when and how often" to reproduce - provide the foundation for many of the academic arguments supporting abortion, including the oft-used notions of "privacy" and "choice." The "privacy analysis encompasses sexual privacy" - e.g., "a satisfying and safe sex life" - while the "freedom to decide if, when and how often" to reproduce appears to be the essence of "choice." See, e.g., Thomas V. Van Flein, *The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution*, [21 Alaska L. Rev. 227, 249 \(2004\)](#) (discussing a right to abortion established under the state constitution's right to privacy); McDonagh, supra note 117, at 1057 (stating that the "right to choose to have an abortion ... was a breakthrough for women's reproductive rights"); Elizabeth A. Cavendish, *Casey Reflections*, [10 Am. U. J. Gender Soc. Pol'y & L. 305 \(2002\)](#) (discussing how a restriction on abortion is a restriction on "reproductive rights").

¹²⁹ Beijing Declaration, supra note 5, P 94.

¹³⁰ Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, [6 Minn. J. Global Trade 329, 349 \(1997\)](#) (footnotes omitted). To her credit, the author also noted that "the issue of whether a woman has an international right to have an abortion is controversial" and the "language of international agreements indicates an unwillingness to recognize this right." Id.

¹³¹ See supra notes 92, 94 and accompanying text (discussing the limited reach of "reproductive health" in both the Cairo and Beijing conference documents).

¹³² The preamble of the Convention on the Rights of the Child ("CRC") states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Convention on the Rights of the Child, supra note 17 (quoting the Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at

willing to clarify on the record the original understanding regarding the reach of reproductive rights language contained in the 1995 Platform for Action.

The actual import of this international reticence is unknown and perhaps unknowable. Reaffirmation, as the U.S. itself noted at the end of the negotiation, may have been "unnecessary" because all nations clearly understood in 1995 - and continued to assert during the negotiations in 2005 - that that the platform does not establish an international abortion right or alter national laws relating to human reproduction.¹³³ It is also possible that the U.S. negotiation strategy [*162] faltered because of the Bush Administration's current unpopularity within the UN diplomatic corps.¹³⁴ Accordingly, the international community's failure to speak regarding "original understandings" could mean little, if anything. Plausible explanations include (a) continued international adherence to the 1995 understandings and/or (b) general diplomatic grumpiness with the current American Chief Executive. But the very public and contentious abortion discussion before the UN General Assembly in 2005 may also suggest that the neutrality of the Beijing Platform for Action on abortion is now itself somewhat questionable.¹³⁵

There can be very little doubt, however, regarding the "neutrality" of CEDAW on the question of international access to abortion. Despite claims of American legal commentators that the treaty says nothing regarding abortion,¹³⁶ the UN committee that oversees compliance with the convention has not allowed nations to create and implement their own abortion policies. Instead, the committee has repeatedly demanded expansion of international abortion rights.

19, U.N. GAOR, 14th Sess., Supp. No. 49, U.N. Doc. A/4354 (Nov. 20, 1959)). The committee charged with overseeing compliance with the CRC collects periodic reports from signatory and party states. These reports give an accounting of national efforts to implement the CRC. These reports are recorded in an Internet database, <http://www.unhchr.ch/tbs/doc.nsf>. As of April 27, 2005, the UN reported having 140 signatories to the CRC and 192 parties. See Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child New York, Nov. 20, 1989 (last updated Jan. 26, 2006), <http://www.ohchr.org/english/countries/ratification/11.htm>. Review of the reports filed with the committee suggests that the great majority of the world's nations provide some form of legal protection for the unborn child's right to life. These reports demonstrate that national laws protecting unborn life range from absolute prohibitions on abortion to regulations requiring medical review before the termination of pregnancy. Reports from only a handful of countries, less than ten, report that they provide no protection to the unborn child - but, even here, it is not clear that these laws allow abortion on demand. For example, while the Former Yugoslav Republic of Macedonia grants a constitutional right to abortion, there may be limitations upon that right after twelve weeks. Committee on the Rights of the Child, Addendum Report of the Former Yugoslav Republic of Macedonia, P 142, U.N. Doc. CRC/C/8/Add.36 (June 27, 1997) (suggesting that abortion is permissible after the twelfth week only "if there are clear medical indications the termination of pregnancy can be performed even later in the pregnancy"). Papua New Guinea's report states explicitly that "the unborn has no protection under law," even though the report confusingly asserts that the country has "very strict anti-abortion laws" and abortion is in fact illegal. Committee on the Rights of the Child, Submission of Papua New Guinea, PP 85, 226, U.N. Doc. CRC/C/28/Add.20 (July 21, 2003).

¹³³ See Press Release, Econ. & Soc. Council, Comm. on Status of Women Adopts 10 Wide-Ranging Resolutions, but Fails to Conclude Current Session, at 9 (Mar. 11, 2005) (on file with the Ave Maria Law Review) (asserting that statements by various nations in response to the original U.S. proposal showed that they did not believe that the "Beijing or Beijing+5 outcome documents" do not "constitute support, endorsement, or promotion of abortion"). This explanation, although invoked by the United States, is somewhat strained. Various UN agencies (including the CEDAW Committee) are now engaged in expanding international abortion norms. See *infra* notes 137-44 and accompanying text. In the face of UN promotion of abortion, the U.S. request for clarification that international law does not favor abortion was hardly insubstantial.

¹³⁴ See, e.g., Erbe, *supra* note 124, at AA10; Niko Kyriakou, World's Women Stand Together for Equality, Africa News, Mar. 12, 2005, available at <http://www.commondreams.org/headlines05/0312-01.htm> (explaining that general disapproval of the U.S. foreign policy was evidenced when the executive director of Women's Environment Development Organization said, "what we proved here is that the United States can't bully the world when it comes to women's human rights").

¹³⁵ See *supra* note 133. In the face of UN promotion of abortion, the failure of the UN General Assembly to clarify that the Beijing Platform is indeed "neutral" on abortion rights may indeed call into question this very "neutrality."

¹³⁶ See, e.g., Koh, *supra* note 111, at 272 (asserting that CEDAW is "neutral on abortion" and allows abortion policy "to be set by signatory states").

Article 21 of CEDAW authorizes the committee to make general recommendations to signatory nations.¹³⁷ General Recommendation [*163] 24, adopted in 1999,¹³⁸ addresses the obligation of signatory states "to ensure ... access to health care services, including those related to family planning."¹³⁹ The committee's "recommendations for government action," prepared under General Recommendation 24, suggest that nations decriminalize abortion.¹⁴⁰ In nations where religious sentiment against abortion has been particularly prominent, the committee has been even more forceful. In 1999, for example, the committee criticized Ireland for the Catholic Church's influence on the issue of abortion.¹⁴¹ That same year, the committee criticized Colombia's abortion laws as "a violation of the rights of women to health and life" under the treaty.¹⁴² The CEDAW Committee has even gone so far as to characterize a doctor's conscientious objection to conduct an abortion on demand as "an infringement of women's reproductive rights."¹⁴³ As a result, the supposedly abortion-neutral [*164] CEDAW Committee "strongly recommended that the Government take steps to secure the enjoyment by women of their reproductive rights by, inter alia, guaranteeing them access to abortion services in public hospitals."¹⁴⁴

These developments - which include U.S. litigation based on international abortion norms, the recent reticence of the international community to speak clearly and unequivocally to the question of international abortion rights, and a UN agency's use of a supposedly "abortion neutral" treaty to force the liberalization of abortion laws - suggest that

¹³⁷ See U.N. Dep't of Econ. & Soc. Affairs, Div. for the Advancement of Women, General Recommendations, <http://www.un.org/womenwatch/daw/cedaw/recommendations/> (last visited May 18, 2005) (explaining the Article 21 powers of the CEDAW Committee). As of January 2004, CEDAW had adopted twenty-five general recommendations. Those adopted during the Committee's first ten years were short and modest, addressing such issues as the content of reports, reservations to the Convention, and resources. *Id.*

¹³⁸ CEDAW, *supra* note 5, P 8.

¹³⁹ *Id.* P 5.

¹⁴⁰ The Committee suggests that state parties should "prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended in order to withdraw punitive measures imposed on women who undergo abortion." *Id.* P 31(c) (emphasis added).

¹⁴¹ The Committee noted "that, although Ireland is a secular State, the influence of the Church is strongly felt not only in attitudes and stereotypes, but also in official State policy. In particular, women's right to health, including reproductive health, is compromised by this influence." Report of Comm. 2, *supra* note 116, P 180.

¹⁴² CEDAW, *supra* note 5, P 393. The Committee issued detailed suggestions for the reform and relaxation of Colombian abortion laws:

The Committee notes with great concern that abortion, which is the second cause of maternal deaths in Colombia, is punishable as an illegal act. No exceptions are made to that prohibition, including where the mother's life is in danger or to safeguard her physical or mental health or in cases where the mother has been raped. The Committee is also concerned that women who seek treatment for induced abortions, women who seek an illegal abortion and the doctors who perform them are subject to prosecution. The Committee believes that legal provisions on abortion constitute a violation of the rights of women to health and life and of article 12 of the Convention.

Id. Now the Committee's observations have become in part the basis for a Colombian lawsuit that seeks dramatic alterations in that nation's abortion laws. See Complaint at 34-35, Corte Constitucional [C.C.], 12/7/2005, "Roa v. Ciudad de Bogota / demanda de inconstitucionalidad," filed 12/12/2005 (pending) (Col.), http://www.womenslinkworldwide.org/pdf/sp_co_lat_col_lademanda2.pdf See also Women's Link Worldwide, High Impact Litigation in Colombia: The Unconstitutionality of Abortion (LAICIA), http://www.womenslinkworldwide.org/proj_laicia.html. Women's Link Worldwide also provides a complete pdf version of the complaint, in Spanish, available at http://womenslinkworldwide.org/pdf/sp_co_lat_col_lademanda.pdf.

¹⁴³ Report of Comm. 2, *supra* note 116, P 109.

¹⁴⁴ *Id.* P 117.

international law poses, at the very least, serious and growing challenges for efforts to protect unborn life around the world. International law now threatens one of civilization's most cherished values: the right to life.

V. The Need For an Academic Pro-Life Response

How has the international legal system reached the point where its norms undermine rather than support the inalienable right to life acknowledged by the Universal Declaration of Human Rights? ¹⁴⁵ At least three possible factors are involved. First, scholars who are convinced that personal choice trumps all competing values have engaged in coordinated, proactive, and strategic efforts to promote new international norms consistent with their views. Second, pro-life academicians may not have adequately understood the hopes and dreams of the men and women who created the UN system. The UN was founded to prevent the systematic disregard of fundamental values; the world should be reminded of the dangers that inhere in disregarding the intrinsic value of all human life. Third, pro-life academic efforts - particularly in comparison with those made by scholars and academic organizations that support abortion rights - have been timid and restrained. Pro-life academicians should consider each of these factors when considering the course of future possible efforts.

The redefinition and reconstruction of international norms related to the value of human life have been planned and executed, in large measure, by members of the academy. Professors at law schools around the world have taken the lead in this disturbing process. ¹⁴⁶ [*165] Post-modern legal scholars - joined by specialists in sociology, gender studies, and sexual behavior - have not been content to conduct research, send it off for publication, and thereafter discuss "this" or "that" insight with an occasional colleague. Policy-savvy professors, well aware that their opinions might be ignored in the journals but become the focus of discussion at international law-making events, ¹⁴⁷ have monitored the course of negotiations related to abortion rights, sponsored inter-disciplinary conferences on reproductive rights, mustered political support for their policy preferences, and taken active steps to promote dramatic changes in international law. Indeed, reports issued on the Internet by academic study centers openly note the need to "re-politicize our agenda" and promote discussion of "sexual rights" issues - including abortion. ¹⁴⁸ The pro-life academic community can hardly expect to make significant progress itself until it undertakes similarly active and focused efforts.

When undertaking these efforts, the lofty goals of those who founded the United Nations should be kept in mind. The UN system was fashioned at the conclusion of World War II. Following two global conflicts, the international community was well aware that great evil is possible - and perhaps inevitable - when fundamental moral values are corrupted. The United Nations was organized to combat programmatic evil and promote social responsibility, decency, and liberty. The achievement of these vital goals, however, requires recognition of and respect for the intrinsic and absolute value of human life. As eloquently explained in the Preamble to the Universal Declaration of Human Rights, "freedom, justice and peace in the world" are founded upon "the inherent dignity" of mankind and

¹⁴⁵ Declaration of Human Rights, *supra* note 7, art. 3.

¹⁴⁶ See, e.g., Beijing + 10 Review: A Feminist Strategy for 2004-05, A Working Paper for NGOs on How to Move Forward (Mar. 2004) (unpublished paper, on file with the Ave Maria Law Review) [hereinafter Beijing + 10 Review], available at <http://www.cwgl.rutgers.edu/globalcenter/policy/csw04/B10strategy-CSW04.pdf>. This monograph "emerged out of several activities held as part of a consultation process on the future of women's human rights sponsored by the [Rutgers] Center for Women's Global Leadership in 2003." *Id.* at 1.

¹⁴⁷ See *supra* notes 22-25 and accompanying text (explaining the prominent role of legal scholars in the development of international legal norms).

¹⁴⁸ Beijing + 10 Review, *supra* note 146, at 2, 3. NGO documents reporting on the discussions sponsored by Rutgers reveal further details of academic and non-governmental efforts to promote abortion rights during the Beijing + 10 process. One such document suggests "strategies" for the negotiation, including "infiltration" of "conservative groups" and the distribution of materials "that support sexual and reproductive rights." Alejandra Sarda, Global reunion about strategies for Beijing+10, at 4 (Dec. 5-8, 2004) (unpublished report, on file with the Ave Maria Law Review). The same document notes that "We will have Informative Sheets [to distribute at the Beijing review process], at least in English and in Spanish, about the most controversial topics: abortion, sexual orientation, maternal mortality, gender expression, sexuality of young women, sexual education." *Id.*

the [*166] "equal and inalienable rights of all members of the human family." ¹⁴⁹ We have an obligation to remind the international community that, when respect for the basic rights of all members of the human family wanes, "barbarous acts" that "outrage[] the conscience of mankind" ¹⁵⁰ are the inevitable result. This warning is as timely today as it was when the Universal Declaration of Human Rights was first crafted.

To ensure that the international community hears this warning, pro-life academicians must be willing to act - even when acting is not easy. Pro-life members of any university faculty understand that defense of the unborn is unpopular. Pro-life efforts are rarely viewed favorably, either by colleagues or academic administrators. Within the legal academy, moreover, any pro-life stance permanently diminishes career opportunities - particularly if future plans might include "upward mobility" within the ranks of the nation's law schools or appointment to a state or federal judicial post. ¹⁵¹

Faced with these undeniable realities, the prudent course for pro-life academicians - and particularly energetic and ambitious legal scholars - often regrettably involves laying low and staying quiet, or acting with such "moderation" that the ethical or moral contours of any position on abortion is barely discernable. All of this prudence, of course, is exercised while academic proponents of abortion rights rally support on the Internet for further "politicization" of their efforts ¹⁵² and convene world-wide summits at which legal scholars, government leaders, and NGOs plan abortion rights advocacy strategy. ¹⁵³ It is well past time for coordinated efforts by pro-life members of the academy to alter these unfortunate dynamics. A prudent, reasoned defense of human life is possible and can be [*167] successful - as demonstrated by the outcome of the Doha International Conference for the Family in 2004.

The Doha International Conference for the Family consisted of a year-long series of interlocking academic, non-governmental, and intergovernmental events organized by various non-governmental and governmental partners. ¹⁵⁴ The Doha Conference was welcomed by a December 2003 Resolution of the General Assembly and culminated in an intergovernmental meeting in Doha, Qatar, on November 29-30, 2004. ¹⁵⁵ In Doha, governmental representatives negotiated and adopted the Doha Declaration - which reaffirms long-standing legal norms related to family life. ¹⁵⁶ On December 6, 2004, the UN General Assembly adopted a consensus resolution, co-sponsored by 149 nations, taking note of the Doha Declaration. ¹⁵⁷

¹⁴⁹ Declaration of Human Rights, *supra* note 7, pmb., P 1 (emphasis added).

¹⁵⁰ [Id. P 2.](#)

¹⁵¹ A judicial nominee's views on such matters as abortion (and other constitutional rights harbored under the constitutional norm of "privacy") have become one of the key concerns when potential Supreme Court nominees are considered, as evidenced during the recent John Roberts confirmation process. See "I Come Before the Committee With No Agenda. I Have No Platform," *N.Y. Times*, Sept. 13, 2005, at A28 (Senators Specter and Feinstein announced their specific intent to address privacy rights at the outset of the meetings). See also Roberts Is Chief; Now Who's Next?, *St. Petersburg Times*, Sept. 30, 2005, at 1A (Bush calls John Roberts a "faithful guardian of the Constitution."); A New Era Begins as Roberts Takes Oath: Top Justice OK'd Despite Democratic Holdouts; Pivotal Issues Await, *The Dallas Morning News*, Sept. 30, 2005, at 1A (wherein Senator Kennedy fears that the new Chief Justice Roberts will reverse the progress of equal protection gained over the last few decades).

¹⁵² See, e.g., Beijing + 10 Review, *supra* note 146, at 2-3.

¹⁵³ *Id.*

¹⁵⁴ Various academic panels, non-governmental conferences and intergovernmental meetings were organized and conducted in Geneva, Switzerland; Stockholm, Sweden; and Kuala Lumpur, Malaysia. The Rutgers Center for Global Women's Leadership assisted with major events in Mexico City, Mexico; Cotonou, Benin; Baku, Azerbaijan; and Riga, Latvia. Declarations, papers, essays, personal statements, findings and proposals for action developed at these events were collected and two significant reports were prepared. The first, entitled *The World Unites to Protect the Family*, reports the results of over two hundred community meetings. The second, entitled *The Family in the Third Millennium*, provides an initial look at the "voluminous" global scholarship. Doha International Conference for the Family, Nov. 29-30, 2004, Report, at 4-5, U.N. Doc. A/59/599,

¹⁵⁵ G.A. Res. 58/15, P 2, U.N. GAOR, 58th Sess., 68th plen. mtg., U.N. Doc. A/RES/58/15 (Dec. 15, 2003).

¹⁵⁶ The Doha Declaration, 59th Sess., U.N. GAOR, U.N. Doc. A/59/592 (Dec. 3, 2004).

The Declaration reaffirms important commitments of the international community that have been allowed - by legal scholars and governments alike - to fall into the shadows. Among other things, ¹⁵⁸ the Declaration reaffirms "the inherent dignity of the human person," and notes "that the child, by reason of his physical and mental immaturity, needs special safeguards and care before as well as after birth." ¹⁵⁹ It proclaims that "motherhood and childhood are [*168] entitled to special care and assistance" ¹⁶⁰ and "everyone has the right to life, liberty and security of person." ¹⁶¹ The Declaration calls upon the international community, among other things, to "evaluate and reassess government policies to ensure that the inherent dignity of human beings is recognized and protected throughout all stages of life." ¹⁶²

These developments could be significant. The Doha process was built upon cooperative efforts by governments, Non-Governmental Organizations, research institutions, academicians, faith communities, and members of civil society, who joined together to protect the "inherent dignity" of human beings "before as well as after birth." ¹⁶³ As a result, the international community was provided with the opportunity to recommit itself to foundational ideas contained in documents dating back to the founding of the UN system. The Doha Declaration provides an important counter to the academic and legal rhetoric that has been invoked to undermine the value of unborn human life for the past three decades. But it will be the academic work that follows - or that ignores - the developments in Doha that will make the real difference.

Conclusion

The value of human life in the international legal system has been revised and redefined because academicians, activists, and advocates have vigorously engaged in the international lawmaking process. This still-ongoing revisionist process can be slowed, and perhaps reversed, by similar action on the part of those who believe in - and understand - that "everyone" is entitled to "life, liberty and [] security of [the] person." ¹⁶⁴ The task will be daunting, but not impossible.

The situation reminds me of a story told by my Great Uncle Joseph Gundersen. His father, my Great-Grandfather Thomas Gundersen, was a blacksmith. He knew how to make useful things out of iron: nails, hinges, wheel rims, and horse shoes - the simple things that improved the quality of ordinary life. Great-Grandpa [*169] taught Uncle Joe, who he called "Dodi Boy," how to be a blacksmith. It wasn't easy.

Uncle Joe didn't like the heat and he was afraid of the fire. He had to stand by the hot oven, take the iron out of the fire, and put it on the anvil. Then he had to strike the iron with a heavy hammer. Sparks would fly and burn his face

¹⁵⁷ G.A. Res. 59/111, P 4, U.N. Doc. A/RES/59/111 (Dec. 6, 2004).

¹⁵⁸ The Doha Declaration "reaffirms that the family is the natural and fundamental group unit of society" and "emphasizes that marriage shall be entered into only with the free and full consent of the intending spouses" and that "husband and wife should be equal partners." The Doha Declaration, *supra* note 156, P 2-3. It also "emphasizes that the family has the primary responsibility for the nurturing and protection of children from infancy to adolescence," and that "parents have a prior right to choose the kind of education that shall be given to their children and the liberty to ensure the religious and moral education of their children in conformity with their own convictions." [Id. P 5.](#)

¹⁵⁹ [Id. at 3](#) (reaffirming Declaration of Human Rights, *supra* note 7, P 1; Declaration of the Rights of the Child, *supra* note 47, P 9).

¹⁶⁰ *Id.* (reaffirming Declaration of Human Rights, *supra* note 7, art. 25(2)).

¹⁶¹ *Id.* (reaffirming Declaration of Human Rights, *supra* note 7, art. 3).

¹⁶² [Id. P 5.](#)

¹⁶³ [Id. P 3.](#)

¹⁶⁴ Declaration of Human Rights, *supra* note 7, art. 3.

and arms. The smoke would sting his eyes and the heat covered him in drenching sweat. When he would shrink from the pain, Great-Grandpa would shout, "Stand up to the fire, Dodi Boy! Stand up to the fire!"

Uncle Joe learned to stand up to the fire. When he did, when the sparks didn't frighten him and the sweat was a sign of accomplishment and not oppression, he forged useful things out of iron: nails, hinges, wheel rims, and horse shoes - the simple things that improved the quality of ordinary life.

We too must stand up to an intensely hot, global furnace. The fire of academic debate is used to forge the international laws that will increasingly govern many aspects of ordinary human life. This forge, left unguarded, will almost certainly be used to produce tools that will threaten not just the quality, but the very value, of human life. Like Uncle Joe, we may not like the heat. We might be afraid of the sparks. We could prudently wish to shrink from the effort and the sweat associated with any approach to this furnace.

But failure to stand up to this fire will almost certainly result in the forging of dangerous tools indeed. Those who cherish the right to life must forge an international legal system that respects and protects the inalienable rights of all members of the human family. If we succeed, we will have forged results stronger than iron: generations of mothers and fathers, sons and daughters, grandparents and grandchildren, who will reap the blessings of the simple things of life - marriage, motherhood, fatherhood, childhood, and faith - the simple things that make ordinary life pleasant and possible.

No task on this grand and great earth is more important.