

## CHALLENGING THE RHETORICAL GAG AND TRAP: REPRODUCTIVE CAPACITIES, RIGHTS, AND THE HELMS AMENDMENT

*Michele Goodwin*

**ABSTRACT**—This Essay argues that the battle over women’s autonomy, especially their reproductive healthcare and decision-making, has always been about much more than simply women’s health and safety. Rather, upholding patriarchy and dominion over women’s reproduction historically served political purposes and entrenched social and cultural norms that framed women’s capacities almost exclusively as service to a husband, mothering, reproducing, and sexual chattel. In turn, such social norms—often enforced by statutes and legal opinions—took root in rhetoric rather than the realities of women’s humanity, experiences, capacities, autonomy, and lived lives. As such, law created legal fictions about women and their supposed *lack* of intellectual and social capacities. Law trapped women to the destinies courts and legislatures aspired for them and continues to do so. This Essay turns to the less engaged international sphere and the copious Congressional Record to unpack how the Helms Amendment and later, the Mexico City Policy (or Global Gag Rule), emerged from this type of lawmaking. This Essay shows how these harmful dictates on women’s lives and bodies in developing nations result in a deadly rise of illegal abortions, criminal punishments, stigmatization, and sadly, deaths.

**AUTHOR**—Chancellor’s Professor and Director of the Center for Biotechnology & Global Health Policy, University of California, Irvine. I am grateful for the research assistance of Mariah Lindsay and Julia Jones. Special appreciation to the *Northwestern University Law Review* for its attention to law, society, and empirical study in law, particularly on the thirtieth anniversary of *McCleskey v. Kemp* and, for purposes of this Essay and research, the forty-fifth anniversary of the Helms Amendment.

## NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION .....	1418
I. ZIKA VIRUS: A BRIEF FOREIGN POLICY CASE STUDY .....	1425
II. FOREIGN POLICY AND REPRODUCTIVE RIGHTS: THE HELMS AMENDMENT AND THE GLOBAL GAG RULE .....	1429
A. <i>The Helms Amendment: "Limiting Use of Funds for Abortions"</i> .....	1431
B. <i>The Helms Amendment and Its Progeny: Hobbled Research</i> .....	1434
C. <i>The Mexico City Policy: Undermining Structural Developments in Women's Health</i> .....	1437
III. THE REAL-WORLD COSTS OF THE HELMS AMENDMENT AND THE GLOBAL GAG RULE .....	1444
A. <i>Aggravating the Effects of Rape, War, and Disaster</i> .....	1445
B. <i>Unsafe Abortions in the Post-Helms Era</i> .....	1448
IV. CREATING UNDUE BURDENS ABROAD .....	1450
A. <i>Undermining the Liberalization of Women's Rights and Lives</i> .....	1450
B. <i>The International Response to U.S. Foreign Aid Policy</i> .....	1454
CONCLUSION .....	1456

### INTRODUCTION

The battle over women's autonomy, especially their reproductive healthcare and decision-making, has always been about much more than simply women's health and safety. Rather, male power, control, and dominion over women's reproduction historically served political purposes and entrenched social and cultural norms that framed women's capacities almost exclusively as service to a husband,<sup>1</sup> mothering,<sup>2</sup> reproducing,<sup>3</sup> and

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<sup>1</sup> For example, tort law carved out specific remedies for husbands who suffered the loss of their wives' servitude and sex under the *loss of consortium* cause of action. The law derives from the legal premise that the husband is the master of the wife. Thus, when wives suffered a physical injury, husbands could file suit against third parties for the "loss" of their wives' servitude, companionship, and sex. *See, e.g., Hyde v. Scysson* (1620) 79 Eng. Rep. 462; *Cro. Jac.* 538; *Ohio & Miss. Ry. v. Cosby*, 107 Ind. 32, 34–35 (1886); *Birmingham S. Ry. v. Lintner*, 141 Ala. 420, 427–28 (1904). Historically, loss of consortium litigation provided economic remedies only for husbands. *See generally* Jo-Anne M. Baio, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 *FORDHAM L. REV.* 1344 (1982).

<sup>2</sup> *See, e.g., Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (affirming an Illinois statute that denied female law graduates admission to the bar because "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life").

<sup>3</sup> Black women were bounded to the realities of legalized chattel through antebellum slave laws and practices. And while not subjected to the cruelties of being physically purchased and sold, American coverture laws adopted by U.S. courts rendered all women the property of their husbands. One key aspect of their servitude was reproducing future offspring. *See* DOROTHY ROBERTS, *KILLING THE BLACK BODY* 29–31 (1997).

sexual chattel.<sup>4</sup> Even after the ratification of the Fourteenth Amendment, while legislatures recognized women's citizenship, they insisted upon denying them suffrage based on the fiction that women lacked the sophistication of mind and judgment to cast a vote.<sup>5</sup> Legislatures debated whether a woman's vote would essentially impute to her husband.<sup>6</sup> The Supreme Court deferred to state legislatures on this sophistry and solidified women's political subordination by ruling in *Minor v. Happersett* that although the Constitution granted women citizenship, it did not confer upon them a right to vote.<sup>7</sup>

These were not the norms foisted on men.<sup>8</sup> Instead, in the United States, common law granted men recovery for the losses associated with their wives' sexual unavailability and even for the debauchery of their daughters.<sup>9</sup> Women's sex and sexuality were not only the legal domains of husbands, but also the preoccupations of fathers, because the law deemed wives, daughters, slaves, and field animals the *property* or *chattel* of men.<sup>10</sup> That is, law serves

<sup>4</sup> See, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000); Michele Goodwin, *Marital Rape: The Long Arch of Sexual Violence Against Women and Girls*, 109 AM. J. INT'L L. 326, 328 (2016). Moreover, states typically vindicated the legitimacy of marital rape and courts followed suit. See, e.g., *State v. Paoletta*, 554 A.2d 702 (1989) (finding that Conn. Gen. Stat. § 53a-70(a) and § 53a-70a(a) exonerate married men from the crime of rape if the victim is his wife); see also Michael G. Walsh, Annotation, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105 (1983).

<sup>5</sup> *Minor v. Happersett*, 53 Mo. 58, 64–65 (1873).

<sup>6</sup> Eleanor Barkhorn, 'Vote No on Women's Suffrage': Bizarre Reasons for Not Letting Women Vote, ATLANTIC (Nov. 6, 2012), <https://www.theatlantic.com/sexes/archive/2012/11/vote-no-on-womens-suffrage-bizarre-reasons-for-not-letting-women-vote/264639> [https://perma.cc/Y2ME-B576] ("The stated reasons to 'vote no' include: . . . Because 80% of the women eligible to vote are married and can only double or annul their husband's votes.")

<sup>7</sup> 88 U.S. 162 (21 Wall.).

<sup>8</sup> White men in particular were spared the indignities of legal marginalization as legislatures and courts reserved and promoted special status for them. See, e.g., *Ozawa v. United States*, 260 U.S. 178, 195 (1922) ("The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified."); see also *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923) (denying citizenship to an Indian man who claimed that his Aryan lineage entitled him to the status of a *white* man in the United States: "It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either").

<sup>9</sup> See, e.g., *Parker v. Elliott*, 20 Va. (6 Munf.) 587 (1820).

<sup>10</sup> See, e.g., Hasday, *supra* note 4; Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002); Damian Corless, *When a Wife Was Her Man's Chattel*, INDEPENDENT (Jan. 4, 2015, 2:30 AM), <https://www.independent.ie/life/when-a-wife-was-her-mans-chattel-30871468.html> [https://perma.cc/QJP8-6R5F].

a profound role in the making and unmaking of persons, particularly women, and especially women of color.<sup>11</sup>

In turn, such social norms—often enforced by statutes and court rulings—were rooted in rhetoric rather than the realities of women’s autonomy, humanity, experiences, capacities, and lived lives. Courts played a profound role in conscribing women to second-class citizenship that denied them broad civic participation, including voting,<sup>12</sup> participating on juries,<sup>13</sup> and professional employment.<sup>14</sup> In *Bradwell v. Illinois*, the U.S. Supreme Court upheld a law barring women law graduates from practicing law.<sup>15</sup> Justice Joseph Bradley found that nature and law deemed it “repugnant” for a woman to adopt “a distinct and independent” civic life from her husband because by law she lacked fundamental capacities.<sup>16</sup> The subsequent ruling by the Wisconsin State Supreme Court in *In re Goodell* further illustrates the rhetoric strategically deployed by legislatures and courts to deny women personhood and autonomy over their lives:

We cannot but think the common law wise in excluding women from the profession of the law. . . . The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. . . . There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.<sup>17</sup>

Of course, such rhetoric constrained women’s abilities to use their bodies in professional labor. Most importantly, by declaring that so-called laws of nature dictate women bearing children, the Court served to trap women into lives of subordination and servitude to husbands, children, and ultimately the state, which commanded women to serve those roles. Ironically, promoting women’s safety, virtue, and protection was the legal

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<sup>11</sup> See generally COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* (2013).

<sup>12</sup> *Minor*, 53 Mo. 58 (upholding a state law denying women suffrage).

<sup>13</sup> *Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (“[W]oman is still regarded as the center of home and family life.”); see also *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

<sup>14</sup> See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140–42 (1873).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 141.

<sup>17</sup> 39 Wis. 232, 244–45 (1875) (“Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things.”).

lark that normalized this type of misogyny. It justified the subordination of women through harsh regulations and practices. Notably, however, neither legislatures nor courts were concerned about the validity of their claims on women's capacities. That is, facts and empirical truths regarding women's lives were meaningless or irrelevant.

Justice Harry Blackmun's majority opinion in *Roe v. Wade* significantly interrupted the Court's prior jurisprudence and therefore its rhetoric related to women, their autonomy, and capacities.<sup>18</sup> In that case, roughly one hundred years after the Supreme Court upheld state laws barring women from voting and entering the practice of law, the Court acknowledged the chilling impacts associated with social stereotyping and stigmatization of women. In *Roe*, which decriminalized abortion in the United States, the Court finally acknowledged the "detriment" that states had long imposed on women when it denied them choices about their reproductive destinies.<sup>19</sup> Justice Blackmun candidly acknowledged the "[s]pecific and direct harm medically diagnosable even in early pregnancy" that some women may endure by being forced by the state to bear children.<sup>20</sup>

*Roe*'s reliance on social science represented a sea change; Justice Blackmun consulted science, history, and sociology to dispel the notion that abortion had always been illegal in the United States.<sup>21</sup> For the first time, the Court clearly articulated that motherhood and childbearing could be harmful to women.<sup>22</sup> Further, to force women into those destinies violated their constitutional right to privacy. Justice Blackmun wrote:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>23</sup>

The Court explained, "we are also told . . . that abortion was practiced in Greek times as well as in the Roman Era, and that 'it was resorted to without scruple.'"<sup>24</sup> Indeed, abortion was practiced legally in the United

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<sup>18</sup> 410 U.S. 113 (1973).

<sup>19</sup> *Id.* at 153.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 130–34 (referencing Christian theology).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 153.

<sup>24</sup> *Id.* at 130 (footnote omitted) (stating that even Soranos, the "greatest of the ancient gynecologists," who personally opposed abortion, "found it necessary to think first of the life of the mother").

States for centuries prior to brutal nineteenth-century antiabortion campaigns launched by male physicians who sought to monopolize women's healthcare by driving out and criminalizing midwives and stigmatizing abortion.<sup>25</sup> Horatio Storer, a chief architect of the nineteenth century anti-abortion/anti-midwife movement, wrote, "[midwives] frequently cause abortion openly and without disguise."<sup>26</sup> Even more unsettling to him, "[t]hey claim a right to use instruments, and to decide on the necessity and consequent justifiability of any operation they may perform."<sup>27</sup> Undoubtedly, that level of expertise, autonomy, and independence among midwives, who were predominantly black, threatened the burgeoning field of gynecology, which was practiced exclusively by white men.<sup>28</sup>

Referencing aspects of this history, the Court wrote, "it is undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense."<sup>29</sup> Justice Blackmun canvassed Christian theology and canon law, finding that "[t]here was agreement . . . that prior to [quickening] the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide."<sup>30</sup> The Court noted that prior to "the anti-abortion mood" that became prevalent in the late nineteenth century, abortions were not criminalized.<sup>31</sup> In other words, "a woman enjoyed a substantially broader right to terminate a pregnancy" until the antiabortion campaigns that coincided with the abolitionist and suffrage movements in the United States.<sup>32</sup>

Today, however, *Roe*'s legacy remains uncertain. In 2018, the Trump Administration announced that it would enact new rules barring U.S. medical providers that receive Title X funding from counseling their patients on

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<sup>25</sup> See generally GERTRUDE JACINTA FRASER, *AFRICAN AMERICAN MIDWIFERY IN THE SOUTH* (1998); Sharon A. Robinson, *A Historical Development of Midwifery in the Black Community: 1600–1940*, 29 J. NURSE-MIDWIFERY 247, 247 (1984) ("By the early 19th century, the male physician had succeeded in replacing midwives among upper- and middle-class white urban American women."); Keisha La'Nesha Goode, *Birthing, Blackness, and the Body: Black Midwives and Experiential Continuities of Institutional Racism* (Oct. 1, 2014) (unpublished Ph.D. dissertation, City University of New York) (on file with author).

<sup>26</sup> See HORATIO R. STORER, *ON CRIMINAL ABORTION IN AMERICA* 56 (1860).

<sup>27</sup> *Id.*

<sup>28</sup> Michele Goodwin & Meigan Thompson, *In the Shadow of the Court: Strategic Federalism and Reproductive Rights*, 18 GEO. J. GENDER & L. 333, 343–46 (2017).

<sup>29</sup> 410 U.S. at 132 (footnotes omitted).

<sup>30</sup> *Id.* at 134.

<sup>31</sup> *Id.* at 141.

<sup>32</sup> *Id.* at 140.

abortion or making referrals for the medical treatment.<sup>33</sup> The proposed rule, if enacted, will impact four million poor Americans that receive reproductive health services under the Title X program.<sup>34</sup> In essence, the Administration is proposing a “gag rule” on American doctors, much like that imposed on foreign providers.

Campaigns to undo the hard-fought rights gained by women to govern their bodies and reproductive health now result in the closing of clinics that perform not only abortion, but also a plethora of women’s reproductive health services. Millions of poor women are trapped, living in states where only one abortion clinic remains—such as Missouri, Mississippi, North Dakota, South Dakota, and Wyoming—forced to drive hours even in life-threatening pregnancies to arrive at the nearest clinic.<sup>35</sup> Despite the promise of *Whole Woman’s Health v. Hellerstedt*,<sup>36</sup> states continue to erect serious barriers to women’s reproductive autonomy by enacting targeted regulations of abortion providers (TRAP) laws that claim to protect and promote women’s health.<sup>37</sup> Empirically, however, such laws do not promote women’s health. In the United States, a woman is fourteen times more likely to die in pregnancy or childbirth than during an abortion.<sup>38</sup>

For example, in 2017, only months after the Supreme Court struck down ambulatory surgical center requirements as a condition of a clinic’s licensure to provide abortions, Minnesota state legislators sponsored an almost identical bill before that state’s legislature.<sup>39</sup> Clearly, the bill would not pass constitutional muster, because statutes requiring ambulatory surgical center standards for abortion clinics are unconstitutional as a matter

<sup>33</sup> Julie Hirschfeld Davis & Michael D. Shear, *Trump Rule Would Bar Some Abortion Advice at Federally Funded Clinics*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/us/politics/trump-abortion-limits.html> [https://perma.cc/7Q92-NRJS].

<sup>34</sup> Marie Solis, *Here’s What the Trump Administration’s Proposed Title X Rule Would Do to Abortion Access in America*, NEWSWEEK (May 2, 2018, 12:22 PM), <http://www.newsweek.com/heres-what-trump-administrations-proposed-title-x-rule-would-do-abortion-908474> [https://perma.cc/XN9A-UVNF].

<sup>35</sup> See Esmé E. Deprez, *U.S. Abortion Rights Fight*, BLOOMBERG (published Nov. 20, 2013; updated July 7, 2016, 9:18 AM), <https://www.bloomberg.com/quicktake/abortion-and-the-decline-of-clinics> [https://perma.cc/U6WQ-WHXV].

<sup>36</sup> 136 S. Ct. 2292 (2016) (holding that the state of Texas cannot impose restrictions on abortion services that substantially burden women seeking an abortion).

<sup>37</sup> In 2017, months after the Supreme Court struck down H.B. 2, a Texas law requiring that abortion providers obtain hospital admitting privileges and surgical center requirements (among other things), Minnesota legislators proposed similar legislation. S.F. 702, H.F. 809, 90th Sess. (Minn. 2017); S.F. 704, H.F. 812, 90th Sess. (Minn. 2017).

<sup>38</sup> Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215–19 (2012), <http://www.ncbi.nlm.nih.gov/pubmed/22270271> [https://perma.cc/4ZLB-B2J3].

<sup>39</sup> S.F. 704, 90th Sess. (Minn. 2017).



of law.<sup>40</sup> However, litigating TRAP legislation exacts an enormous financial toll on women's health organizations. Furthermore, as long as unconstitutional TRAP barriers exist in a state, women are deprived of their constitutional rights.

Those most disenfranchised by recent legislative policies that criminally target abortion providers are poor women, especially women of color.<sup>41</sup> Internationally, the United States now aggressively invests in depriving and divesting women and girls of reproductive privacy, autonomy, and equality.<sup>42</sup> Not surprisingly, the rhetoric used to justify the enactment of far-reaching antiabortion (and increasingly anticontraception) laws domestically and abroad ignores science, history, sociology, and women's lived lives. When and if the Supreme Court undertakes an abortion law challenge during the Trump Administration, will the Justices heed the path of *Blackmun* or ignore empirical evidence altogether?

With *Roe*'s history as its foundation and guidepost, this Essay considers contemporary dictates on women's lives and bodies, particularly as the corruption of science and medical evidence resurge to undermine women's autonomy and equality. It draws lessons and concerns from the landmark case, *McCleskey v. Kemp*,<sup>43</sup> in which the Supreme Court upheld the death penalty based on the notion that the Eighth Amendment is not violated when purposeful racial discrimination cannot be proven despite evident disparate racial impact.<sup>44</sup> In that case, the Court not only ignored overwhelming empirical data related to race discrimination, it effectively blessed judicial reliance on rhetoric over social science.<sup>45</sup> The fear and risk are that the Court and legislatures will repeat rhetorically rooted judgements. Indeed, nearly thirty years after *McCleskey*, in *Burwell v. Hobby Lobby Stores, Inc.*, the Court responded similarly when it ignored scientific evidence and deferred to the religious claims of employers who denied contraceptive access in their insurance plans to only female employees based on the flawed and refutable notion that certain contraceptives cause abortions.<sup>46</sup> Sadly, the Court's holding lacked regard and respect for the place of science and medical evidence in reproductive health cases.

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<sup>40</sup> *Whole Woman's Health*, 136 S. Ct. at 2318.

<sup>41</sup> *Id.* at 2302.

<sup>42</sup> Policy Statement of the United States of America at the United Nations International Conference on Population, 2d Sess., Mexico City (Aug. 6–14, 1984), *reprinted in* 10 POP. & DEV. REV. 574 (1984) [hereinafter Mexico City Policy].

<sup>43</sup> 481 U.S. 279 (1987).

<sup>44</sup> *Id.* at 306–08.

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

<sup>46</sup> 134 S. Ct. 2751 (2014).



This Essay advances reproductive justice discourse by turning to the less engaged international sphere. It does so at a time in which immigration policies and international law occupy state and federal legislative attention. It argues that rhetoric and stereotype serve as legislative and political devices to undermine women's access to abortion and even gags providers from mentioning the word in foreign countries that receive aid from the United States. Part I turns to the Zika virus pandemic as a case study to examine the lingering, devastating effects of U.S. policies that harm women on the ground. Part II expounds upon that recent tragedy to demonstrate how and why the mostly overlooked Helms Amendment serves as the historical foundation for U.S.-directed antiabortion policies abroad.<sup>47</sup> It also examines subsequent legislation's effects on reproductive research, as well as the Mexico City Policy (MCP, also known as the Global Gag Rule).

Part III addresses the real-world impacts of the Helms Amendment and MCP on countries affected by endemic rape, war, and domestic violence. It also highlights the fact that while these policies have been intended to reduce the incidences of abortion, such strategies only serve to drive the services underground. Part IV makes the case that the United States' policy approach abroad negatively impacts women in developing nations and undermines the fragile rights they possess. The final part of the Essay concludes.

#### I. ZIKA VIRUS: A BRIEF FOREIGN POLICY CASE STUDY

In February 2016, Dr. Margaret Chan, director general of the World Health Organization (WHO), declared the Zika virus—a mosquito-borne disease—an “international public health emergency.”<sup>48</sup> According to public health officials, the declaration highlighted the seriousness of the disease and its potential to become a global public health threat.<sup>49</sup> Until Dr. Chan's announcement, few people had ever heard of the disease or knew anything about its origins, transmission, or symptoms.<sup>50</sup> In fact, no vaccine existed to

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<sup>47</sup> This Part explicates the legacy of Senator Jesse Helms of North Carolina, framing his opposition to abortion as part of a broader conflict on matters of race, sex, sexual orientation, and “otherness” altogether. It highlights an important, yet overlooked, part of Senator Helms's legacy related to opposition of women's rights, including the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

<sup>48</sup> Sabrina Tavernise & Donald G. McNeil, Jr., *Zika Virus a Global Health Emergency*, *W.H.O. Says*, *N.Y. TIMES* (Feb. 1, 2016), <https://www.nytimes.com/2016/02/02/health/zika-virus-world-health-organization.html> [<https://perma.cc/X6JX-CYUH>]; see also *Zika Outbreak: What You Need To Know*, *BBC* (Aug. 31, 2016), <http://www.bbc.com/news/health-35370848> [<https://perma.cc/W3WZ-R6XN>].

<sup>49</sup> Tavernise & McNeil, *supra* note 48.

<sup>50</sup> *Zika Outbreak: What You Need To Know*, *supra* note 48.

prevent the disease nor did any treatments exist to mitigate its impact or ward off its gestational spread and devastating toll in pregnant women.<sup>51</sup>

For women who contract the Zika virus, the disease can be a death sentence for themselves or their babies. News and public health reports confirmed Zika's link to "thousands of babies being born with underdeveloped brains,"<sup>52</sup> an incredibly rare condition known as microcephaly. In Brazil alone, the reported cases of microcephaly increased by over 1400% from 200 to nearly 3000 in one year.<sup>53</sup> The distinctive features of babies born with this condition are unmistakable, because Zika causes improper brain and thus skull development.<sup>54</sup> For example, microcephalic babies share the common feature of severely shrunken head size, as well as a host of other disabling conditions, such as blindness and visual impairment; seizures; inability to swallow; hearing loss; imbalance; and cognitive delays associated with learning, functioning, speech, "sitting, standing, and walking."<sup>55</sup>

In the period between Brazil's first detection of the virus in May 2015 and the WHO's delayed intervention, the scope and scale of the crisis worsened. According to a *New York Times* investigation, in just six months, the disease "moved into more than 20 countries in Latin America," including popular tourist destinations such as Jamaica and Costa Rica.<sup>56</sup> The *New York Times* portrayed Western nations neglecting an opportunity to act quickly and decisively, because within one year, Zika "spread to almost every country in the Western Hemisphere," including the United States.<sup>57</sup>

Yet the Western response to the Zika virus was not simply a public health catastrophe, but a dramatic political failure, too. For months, Zika remained out of sight and therefore seemingly extraneous to international policies, United States foreign politics, and foreign aid platforms tied to women's reproductive health. News coverage of Zika emphasized the urgency for better detection, screenings, and progress toward a vaccine—

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Arvin Paculaba, *Brazil Declares State of Emergency Amid Widespread of Zika Virus*, LATIN POST (Jan. 6, 2016, 7:16 AM), <http://www.latinpost.com/articles/106766/20160106/brazil-declares-state-emergency-amid-widespread-zika-virus.htm> [<https://perma.cc/EY9A-PZGA>].

<sup>54</sup> Donald G. McNeil, Jr. & Pam Belluck, *Extensive Brain Defects Seen in Babies of Mothers with Zika*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/health/zika-virus-baby-brain-defects.html> [<https://perma.cc/VF3Y-GD3T>].

<sup>55</sup> *Facts About Microcephaly*, CDC (December 7, 2016), <https://www.cdc.gov/ncbddd/birthdefects/microcephaly.html> [<https://perma.cc/72GK-L2XU>].

<sup>56</sup> Tavernise & McNeil, *supra* note 48.

<sup>57</sup> Donald G. McNeil, Jr., *How the Response to Zika Failed Millions*, N.Y. TIMES (Jan. 16, 2017), <https://www.nytimes.com/2017/01/16/health/zika-virus-response.html> [<http://perma.cc/4CH2-KFZ7>].

unquestionably important concerns for which answers remained elusive. However, family planning, contraception, and abortion remained conspicuously absent from news coverage.

Lurking behind this catastrophe was the rule of law and the role of political rhetoric. The Helms Amendment and the MCP, otherwise known as the Global Gag Rule, dictate not only whether U.S. funding may be spent abroad on family planning and abortion, but also how developing nations may spend foreign aid from other nations. These legal instruments shape not only women's health abroad, but also implicitly their political, economic, and social statuses. Sadly, the plight of poor women of color in Central and South America, who bore the brunt of suffering with painful rashes, fevers, headaches, spontaneous abortions, and other ailments associated with the virus, faded from political view. The misguided takeaway from Zika—that pregnant women infected by the virus were simply unfortunate to live in climates where insects fester with intensity, hatch, bite, and spread disease—ignored political realities. That is, the war on pregnant women was not about mosquitoes, but foreign policies that for decades have constrained poor women's reproductive health access and options.

Framing Zika as mosquitoes' unfortunate war on women misreads and ignores longstanding foreign and economic policies and the conditions under which foreign aid is distributed. The Zika virus tells an important racialized public health story, but it also provides a compelling lens for examining reproductive rights, including how the United States exports law and shapes foreign policy related to women's health, reproductive equality, and social empowerment. For example, in 1973, Senator Jesse Helms, notoriously revered and remembered as a vehement segregationist,<sup>58</sup> sponsored an amendment to the Foreign Assistance Act, stipulating that no foreign aid from the United States shall be used to fund abortions. This became known as the Helms Amendment.<sup>59</sup> The law remains in effect.

Years later, during the Reagan administration, the MCP<sup>60</sup> ushered in a new wave of legal restrictions, conditioning U.S. government aid on repressive women's reproductive health and rights platforms. For example, starting in 1984, the United States conditioned its aid to foreign nongovernmental organizations (NGOs) on its mandate that no funds be used to “perform or actively promote abortion as a method of family planning.”<sup>61</sup>

<sup>58</sup> See Steven A. Holmes, *Jesse Helms Dies at 86; Conservative Force in the Senate*, N.Y. TIMES (July 5, 2008), <http://www.nytimes.com/2008/07/05/us/politics/00helms.html> [<https://perma.cc/M3H3-3N2L>].

<sup>59</sup> 22 U.S.C. § 2151b(f)(1) (2012).

<sup>60</sup> Mexico City Policy, *supra* note 42.

<sup>61</sup> *Id.*

Moreover, the United States restricts any nation receiving its aid from using “non-U.S. funding to provide abortion services, information, counseling or referrals and from engaging in advocacy to promote abortion.”<sup>62</sup> NGOs are required to certify that *no funds from any source* will be used for family planning purposes so long as U.S. aid is received by the organizations.<sup>63</sup> The reproductive health impacts of this type of soft law—economically coercive rulemaking—remain underexamined.

The United States’ role in exporting hostile reproductive health and rights policies has yet to be fully explored in legal academic literature. A positive step towards correcting this is recognizing that while the United States has successfully focused on forging democracy, advancing the rule of law, and cohering constitutional principles abroad in areas ranging from investment, intellectual property, science law, bankruptcy, and competition interests, with regard to women its foreign policy has sought to undermine constitutional values related to reproductive health, privacy, and autonomy. In turn, both directly and indirectly, the United States has denied women access to the healthcare fundamental to their wellbeing and physiology. The result has been to shackle poor women in developing nations to second-class versions of citizenship.

For women, full democratic participation and citizenship fundamentally involves the ability to family plan and determine the type of family, life, and environment they want for themselves. In other words, foreign aid should uplift and result in robust participation in civic life and democracy. However, through its various abortion-based amendments and the Global Gag Rule, U.S. foreign aid undermines the possibility of forging substantively better opportunities for women.

Next, Part II turns to the conditions under which the United States grants foreign aid and explains how its policies further hobble developing nations from advancing democracies that recognize and support women as full citizens, because full participation in civic life demands a recognition of the whole person. It provides a brief but sturdy empirical account that reflects copious study of congressional records to piece together how the Helms Amendment came to represent U.S. foreign policy on reproductive rights. It excavates Senator Helms’s rhetoric on abortion policies, while also pointing out the marginal diversity of representation in Congress at the time: there were no women in the Senate and barely any men of color.

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<sup>62</sup> Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, GUTTMACHER POL’Y REV., Summer 2013, at 9, 10.

<sup>63</sup> Mexico City Policy, *supra* note 42.

## II. FOREIGN POLICY AND REPRODUCTIVE RIGHTS: THE HELMS AMENDMENT AND THE GLOBAL GAG RULE

The domestic battle over female reproductive autonomy and quality healthcare access has reopened a front abroad. Within days of taking office in 2017, President Trump reinstated the notorious Global Gag Rule.<sup>64</sup> This law disqualifies “foreign NGOs from eligibility for U.S. family planning aid entirely by virtue of their support for abortion-related activities subsidized by non-U.S. funds.”<sup>65</sup> Essentially, to qualify for U.S. aid, NGOs that serve desperate, poor women abroad are prohibited from mentioning the word *abortion* even in cases of rape and incest—hence the “gag rule.”<sup>66</sup> Moreover, the Global Gag Rule is just the latest in a series of U.S. legislative and policy enactments targeting foreign abortion provision that began in 1973 with the Helms Amendment.

President Trump’s Global Gag Rule exceeds that of any prior Republican president,<sup>67</sup> expanding the restrictions beyond the USAID funding agency to include the State Department, the Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), and the National Institutes of Health.<sup>68</sup> In many cases, nonprofit organizations that serve women and girls must agree to forego their best medical judgements. As a condition of receiving aid, they are required to withhold referrals, information, advocacy, or services related to abortion even when using their own funds or donations received from other nations.<sup>69</sup> The results and risks of the Global Gag Rule include not only the budget shortfalls for organizations previously reliant on U.S. aid—estimated at \$8.8 billion—but also unwanted pregnancies, the use of dangerous, illegal abortions, criminal punishments for illegal abortions, and the grand-scale silencing of women and their service providers.<sup>70</sup> In fact, economically,

<sup>64</sup> Casey Quackenbush, *The Impact of President’s Trump’s ‘Global Gag Rule’ on Women’s Health Is Becoming Clear*, TIME (published Feb. 1, 2018; updated Feb. 4, 2018, 8:14 PM), <http://time.com/5115887/donald-trump-global-gag-rule-women.html> [<http://perma.cc/5ZGJ-UTKX>].

<sup>65</sup> Barot, *supra* note 62, at 10.

<sup>66</sup> See, e.g., Christine Grimaldi, *Trump Unveils ‘Vicious’ Women’s Health Restrictions During ‘Women’s Health Week’*, REWIRE (May 18, 2017, 10:22 AM), <https://rewire.news/article/2017/05/18/trump-unveils-vicious-women-s-health-restrictions-during-women-s-health-week> [<https://perma.cc/5B2S-EWEP>].

<sup>67</sup> The Mexico City Policy was first ordered into law by President Ronald Reagan in 1984. President William Clinton rescinded the Executive Order. Since then, each Republican president has signed an executive order reinstating the policy and each Democratic administration has in turn, rescinded the policy. See Mexico City Policy, *supra* note 42.

<sup>68</sup> See, e.g., Grimaldi, *supra* note 66.

<sup>69</sup> See *id.*

<sup>70</sup> *Id.*

Trump's Global Gag Rule exceeds that of the prior Republican administrations by "nearly 15 times."<sup>71</sup>

The paradox of foreign versus domestic policies related to reproductive rights is highlighted by the fact that in the United States, policies related to women's reproductive privacy emerged alongside laws banning discrimination against women in education, employment, and other vital aspects of life, providing additional legal protections for girls and women. However, while access to contraception and abortion became liberalized domestically, U.S. foreign policy coercively conditioned aid on barring abortion, banning speech, and restricting medical services and referrals. The results are cruel on the ground, with girls and women suffering criminal punishments for seeking abortions, obtaining illegal and unsafe abortions, and being forced to carry unwanted pregnancies to term even in cases of rape and incest.<sup>72</sup>

In Latin America, where the United States funnels considerable aid, nations maintain a very strong grip on women's rights, including constraining reproductive healthcare rights. In Chile, for example, prior to 2017, nearly 300 cases were prosecuted each year against women for attempting an abortion or being perceived to have attempted to terminate a pregnancy.<sup>73</sup> Prior to easing their antiabortion laws, Chile prohibited all abortions, even in cases of incest and rape, as well as to save a woman's life.<sup>74</sup> In fact, Chilean law authorized criminal prosecution of healthcare practitioners (or other persons) who perform abortions,<sup>75</sup> as well as punishment of the women who "cause[] [their] abortion[s] or consent[] to another person causing it."<sup>76</sup> To overcome Chile's ban and therefore escape prosecution for procuring an abortion, women were forced to argue the

<sup>71</sup> *Id.* (quoting the Center for Reproductive Rights).

<sup>72</sup> *See, e.g.*, Cód Proc. Pen. art. 342–45 (Chile), <http://www.leychile.cl/Navegar?idNorma=1984> [<https://perma.cc/VTQ8-7YW8>]; Philip Sherwell, *El Salvador's Las 17: The Women Jailed for 30 Years for Losing Their Babies by Miscarriage*, TELEGRAPH (Feb. 17, 2015), <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/elsalvador/11412928/El-Salvadors-Las-17-the-women-jailed-for-30-years-for-losing-their-babies-by-miscarriage.html> [<https://perma.cc/8Q9C-DKFG>].

<sup>73</sup> Jen Ross, *Illegal Abortions Rampant in Latin America*, WOMEN'S E-NEWS (Nov. 28, 2004), <http://womensenews.org/story/the-world/041128/illegal-abortions-rampant-latin-america> [<http://perma.cc/LDJ3-CQEQ>].

<sup>74</sup> Cód Proc. Pen. art. 342–45 (Chile).

<sup>75</sup> *Id.* art. 342.

<sup>76</sup> *Id.* art. 344 (translated from Spanish).

necessity of their abortions.<sup>77</sup> Notwithstanding Chile's ban, an estimated 200,000 illegal abortions occur there each year.<sup>78</sup>

However, Chile represents only one slice of this problem; similar reproductive rights challenges exist throughout Latin America and the Caribbean. According to a 2017 Guttmacher Institute report, “[m]ore than 97% of women of childbearing age in Latin America and the Caribbean live in countries where abortion is restricted or banned altogether.”<sup>79</sup> In other words, “fewer than 3% of the region’s women live in countries where abortion is broadly legal—that is, permitted either without restriction as to reason or on socioeconomic grounds.”<sup>80</sup>

Thus, although abortion is a fundamental constitutional right afforded to women domestically, the Helms Amendment, similar subsequent legislation, and the MCP<sup>81</sup> substantively deny the same for poor women abroad. This explicit distinction between what U.S. law accords women domestically and the conditions established for poor women abroad deserves urgent address and is what inspires this Essay.

#### A. *The Helms Amendment: “Limiting Use of Funds for Abortions”*

In 1973, by a 52–42 vote, the U.S. Senate adopted the Helms Amendment, a law that prohibits the use of federal foreign assistance funding related to abortion research and procedures.<sup>82</sup> Congress did not hold a single hearing related to the legislation,<sup>83</sup> despite the seriousness of family planning access and women’s reproductive healthcare being at stake. Only months before, the U.S. Supreme Court ruled in *Roe v. Wade* that the right to

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<sup>77</sup> UNITED NATIONS, ABORTION POLICIES: A GLOBAL REVIEW VOLUME I, AFGHANISTAN TO FRANCE 92, 93 (2001), <http://www.un.org/esa/population/publications/abortion/profiles.htm> [<https://perma.cc/DC4V-LJXC>] (scroll to and follow “Chile” hyperlink) [hereinafter ABORTION POLICIES VOL. I].

<sup>78</sup> Ross, *supra* note 73.

<sup>79</sup> See *Abortion in Latin America and the Caribbean Fact Sheet*, GUTTMACHER INST. (Aug. 2017), <https://www.guttmacher.org/fact-sheet/abortion-latin-america-and-caribbean> [<https://perma.cc/NEY8-KQNS>].

<sup>80</sup> *Id.*

<sup>81</sup> This Essay does not take up the Hyde Amendment in detail, although it recognizes the Hyde Amendment as pivotal legislation denying abortion services to women who could least afford access to this important right. Other scholarly works take up consideration of that issue. See Goodwin & Thompson, *supra* note 28.

<sup>82</sup> Foreign Assistance Act of 1961, 22 U.S.C. § 2151b(f) (2012).

<sup>83</sup> See, e.g., LUISA BLANCHFIELD, CONG. RESEARCH SERV., R40750, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW): ISSUES IN THE U.S. RATIFICATION DEBATE 7 (2011), <https://fas.org/sgp/crs/row/R40750.pdf> [<https://perma.cc/3GBS-UARZ>].



terminate a pregnancy was a fundamental constitutional right rooted in privacy, protected under the Fourteenth Amendment's Due Process Clause.<sup>84</sup>

In dramatic contrast, the Helms Amendment effectively conditioned U.S. foreign aid policy on the antiabortion platform long advocated by the legislation's author, "the late, stridently antiabortion Sen. Jesse Helms (R-NC)."<sup>85</sup> Senator Helms, a former journalist, was a master of rhetoric. Helms claimed, "My amendment would . . . stop the use of U.S. Government funds to promote and develop ways of killing unborn children."<sup>86</sup>

Senator Helms harangued colleagues to vote for the amendment, and then did not vote for it himself, likely because of his hostility toward foreign aid altogether.<sup>87</sup> In fact, during his career in the United States Congress, Senator Helms repeatedly and aggressively asserted an unwillingness to promote or endorse legislation to advance women's reproductive and safety rights internationally.<sup>88</sup> According to Helms, treaties to protect women's rights were being "negotiated by radical feminists with the intent of enshrining their radical anti-family agenda into international law."<sup>89</sup>

Then, just as now, the Senate did not reflect population demographics in the United States; it was overwhelmingly male. At the time, no women were among its membership<sup>90</sup> and only two nonwhite members served that body: Senators Edward Brooke of Massachusetts and Joseph M. Montoya of New Mexico.<sup>91</sup> Representative Bella Abzug of New York, one of the few women in the House at the time, expressed serious concerns regarding inclusion of a restriction on abortion in USAID funding, warning that "[t]he emotional prohibition of abortion is a misuse of the legislative process and of the aid program."<sup>92</sup> She stated, "I regret that the section does seem to place us in the questionable position of imposing on women abroad a restriction

<sup>84</sup> 410 U.S. 113, 164–65 (1973).

<sup>85</sup> See, e.g., Barot, *supra* note 62, at 9.

<sup>86</sup> 119 CONG. REC. 32,292, 32,293 (1973) (statement of Sen. Helms).

<sup>87</sup> See *id.*

<sup>88</sup> BLANCHFIELD, *supra* note 83; see also S. Exec. Rep. No. 103-38, at 53–54 (1994).

<sup>89</sup> Nicholas D. Kristof, *Women's Rights: Why Not?*, N.Y. TIMES (June 18, 2002), <http://www.nytimes.com/2002/06/18/opinion/women-s-rights-why-not.html> [<https://perma.cc/VY77-BSKL>].

<sup>90</sup> See U.S. SENATE, *Women in the Senate*, [https://www.senate.gov/artandhistory/history/common/briefing/women\\_senators.htm](https://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm) [<https://perma.cc/AWU3-CTLG>].

<sup>91</sup> Several years later, the Senators Samuel I. Hayakawa (R-California), 1977–1983, and Spark M. Matsunaga (D-Hawaii), 1977–1990, would be elected and serve.

<sup>92</sup> See 119 CONG. REC. 39,316, 39,317 (1973) (statement of Rep. Abzug).

recently overturned by our Supreme Court and constitutes a serious interference with the internal affairs of other countries.”<sup>93</sup> She was right.

Even the Nixon Administration opposed the Helms Amendment. Nixon’s U.S. Agency for International Development (USAID) “issued a statement to Congress expressing its strong opposition” to the Amendment.<sup>94</sup> According to the Guttmacher Institute, “USAID protested that following an era of decolonization, this new restriction was at odds with the fundamental philosophy of U.S. population assistance policy, because of its seemingly imperialistic and hypocritical overtones.”<sup>95</sup> USAID officials urged Congress to consider the urgency and value of reproductive healthcare services to poor women and reject the Helms Amendment. USAID staffers logically feared that the policy “could amount to a form of coercion” in developing countries.<sup>96</sup> After all, the United States was forging a duplicitous double standard.<sup>97</sup> For women in the United States, abortion was at that time, and continues to be, constitutional and private.<sup>98</sup> This was not the case for poor women living in developing nations—many of which continued to struggle with repugnant vestiges of colonialism, slavery, and imperialism.

The Helms Amendment represented a fundamental shift to the Foreign Assistance Act. Helms knew that nations desperate to relieve poverty would likely concede to the coercive demands of the United States.<sup>99</sup> He said, “Foreign countries already understand that assistance is received only if they adhere to reasonable conditions,”<sup>100</sup> which include “social reform” mandated by “the host country.”<sup>101</sup> And while the United States typically engaged in

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<sup>93</sup> *Id.*; see also Lynn Lilliston, *Abortion Coalition Fighting for Right to Decide*, L.A. TIMES, June 19, 1974, at D1 (“Whether we like it or not, abortion is the most widely used method of family planning in many underdeveloped countries,” Mrs. Stengel [associate director of the Religious Coalition for Abortion Rights] said. ‘Millions of women do not have access to other methods of family planning.’ Thus, she said, the amendment places a restriction on foreign women, in countries with serious overpopulation, which was overturned by the U.S. Supreme Court.”).

<sup>94</sup> Barot, *supra* note 62, at 9.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Jasmine Garsd, *Should the U.S. Reconsider Its Stand on Foreign Aid for Abortion Clinics?*, NPR (May 2, 2016, 4:35 PM), <http://www.npr.org/sections/goatsandsoda/2016/05/02/467247415/should-the-u-s-reconsider-its-stand-on-foreign-aid-for-abortion-clinics> [<https://perma.cc/L6GU-AFYA>]; see also 119 CONG. REC. 39,620 (1973) (statement of Sen. Helms) (“In view of the fact that AID has been a major proponent of abortion and abortion-related activities, I think that it is indispensable that this list of recommendations be further broadened to include effective and practical controls to make sure that none of AID’s funds find their way into IPPF’s abortion activities.”).

<sup>98</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>99</sup> 119 CONG. REC. 32,292 (1973) (statement of Sen. Helms).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

soft law practices (economic incentives or sanctions) to advance the rule of law or forge constitutional standards similar to those adopted in the United States, the Helms Amendment and its progeny directly broke with that practice.<sup>102</sup>

The new law undermined the foundational principle of foreign aid legislation to relieve endemic conditions of poverty and aid in the promotion of the rule of law. USAID amplified these concerns, explaining that the law “explicitly acknowledges that every nation is and should be free to determine its own policies and procedures with respect to population growth and family planning.”<sup>103</sup> According to USAID officials, “the Amendment . . . [placed] restrictions on both developing country governments and individuals in the matter of free choice among the means of fertility control . . . that are legal in the U.S.”<sup>104</sup>

Finally, Senator Helms claimed that his amendment would benefit poor women in developing nations, because that is what foreign aid does. He denounced skeptics who predicted that the amendment would negatively affect U.S. relationships abroad.<sup>105</sup> As Senator Helms put it, the amendment was a limited proposal<sup>106</sup> because the United States could be even more aggressive about ending access to abortion in developing countries. He said, “We could, in fact, go far beyond the present amendment and require all abortion activities, from whatever funds, to be stopped before our assistance could be received.”<sup>107</sup> Eventually, the United States adopted that approach with the MCP during the Reagan Administration.<sup>108</sup> Given its broad expansion under the Trump Administration, the MCP now represents the most regressive foreign aid policy tied to reproductive healthcare of any developed nation.

### *B. The Helms Amendment and Its Progeny: Hobbling Research*

The birth control pill revolutionized family planning, just as long-acting contraceptives—medications to halt ovulation and prevent pregnancies—and even safe hysterectomies, did. In reality, research plays a vital role in expanding women’s reproductive healthcare options and promoting safety.

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<sup>102</sup> See Hyde Amendment, § 209, Pub. L. No. 94-439, 90 Stat. 1418 (1976); Biden Amendment, Foreign Assistance Act of 1961 § 104(f)(3), 22 U.S.C.A. 2151b(f)(3) (West 2016); Siljander Amendment, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2717 (2015).

<sup>103</sup> Barot, *supra* note 62, at 9 (citation omitted).

<sup>104</sup> *Id.* (citation omitted).

<sup>105</sup> 119 Cong. Rec. 32,293 (1973) (statement of Sen. Helms).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Mexico City Policy, *supra* note 42; *see infra* Section II.C.

Without medical research many of the advancements in women's healthcare would not exist. For example, the very existence of Plan B—one of a few medications now available in the United States that inhibit pregnancies after sex, including rape—is the result of medical research. Similarly, medication-based abortion, which can be safely performed at home through the administration of pills, reflects the progress of medical research in recent decades. Imagine, however, if these advancements did not exist due to bans on research. The Helms Amendment and its progeny now extend antiabortion restrictions beyond the procedures to include hobbling research, which ultimately negatively impacts women's health and safety.

More than forty years ago, Senator Helms's proposed ban on research related to abortion (as a condition of receiving aid from the U.S. government) failed. That provision failed to garner sufficient votes in 1973, but years later resurfaced in Senator Joe Biden's Amendment to the Foreign Assistance Act of 1961 (FAA). Like the Helms Amendment, Senator Biden's legislation also called for bans related to abortion and appears to have been added to the law for "emphasis."<sup>109</sup> Enacted in 1981, the Biden Amendment states that "U.S. funds may not be used for biomedical research related to abortion or involuntary sterilization."<sup>110</sup> The provision states:

None of the funds made available to carry out this part may be used to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.<sup>111</sup>

The Biden Amendment extends beyond the FAA and "has also been included in foreign operations appropriations acts."<sup>112</sup> In 2016, during the Obama Administration, it was included in the State-Foreign Operations Appropriations Act,<sup>113</sup> and as such "applies to all foreign assistance activities authorized by . . . [the] FAA," particularly development assistance.<sup>114</sup> Moreover, the language is broad and could be interpreted to ban research related to abortion procedures, fetal tissue research, and technologies

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<sup>109</sup> LUISA BLANCHFIELD, CONG. RESEARCH SERV., RL41360, ABORTION AND FAMILY PLANNING-RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 2 (2017), <https://fas.org/sgp/crs/row/R41360.pdf> [<http://perma.cc/69M5-DJZL>]; see also International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 302(b), 95 Stat. 1532 (codified as amended at 22 U.S.C. 2151(b) (2012)).

<sup>110</sup> BLANCHFIELD, *supra* note 109.

<sup>111</sup> International Security and Development Act of 1981 § 302(b)(3).

<sup>112</sup> BLANCHFIELD, *supra* note 109, at 5.

<sup>113</sup> *Id.*; see Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 7018, 129 Stat. 2744 (2015).

<sup>114</sup> BLANCHFIELD, *supra* note 109, at 5.

associated with ending a pregnancy. Not only do these bans target women, they also undermine the work of the scientific and medical communities.

The Biden Amendment's protective aims related to involuntary sterilizations could be lauded, because the history of forced sterilizations under U.S. policies is quite shameful and instructive. However, on close inspection, this amendment also hurts women, medical research, and ultimately society. Why? Restricting research on abortion essentially means precluding the advancement and enhancement of the medical technologies associated with the procedure, including making it the safest, least invasive, and most efficient and accessible procedure available to women.

Other subsequent amendments further constrain reproductive rights abroad. Like the Helms and Biden Amendments, Representative Mark Siljander's amendment bans the use of any federal funds for lobbying "for abortion."<sup>115</sup> Representative Siljander identified himself as part of the so-called "silent majority" supported by "morally concerned citizens who are sick of the situation" in the United States.<sup>116</sup> According to *Time Magazine*, Siljander championed "the Christian's role in American government."<sup>117</sup> True to his opposition to women's rights, he even publicly criticized President Reagan's nomination of Sandra Day O'Connor to the U.S. Supreme Court, telling reporters that he was "very angry" about her nomination because she lacked a track record on ultra-conservative values.<sup>118</sup> Subsequent amendments to the FAA include the Tiahrt Amendment (1998) and the Livingston Amendment (1986).<sup>119</sup>

The efficacy and goals of these amendments remain an important point of discussion and deserve clarification. For example, the amendments did not stop pregnancy terminations, but dangerously drove abortions underground. Data shows that women who experience violence, including in developing countries, are nearly twice as likely to have an abortion,

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<sup>115</sup> Foreign Assistance and Related Programs Appropriations Act, 1982, Pub. L. No. 97-121, § 525, 95 Stat. 1657 (1981); *see also* U.S. AGENCY FOR INT'L DEV., USAID GUIDANCE FOR IMPLEMENTING THE SILJANDER AMENDMENT (PROHIBITION ON LOBBYING FOR OR AGAINST ABORTION) 1 (2014).

<sup>116</sup> *True Believer*, TIME, May 4, 1981, at 37.

<sup>117</sup> *Id.*

<sup>118</sup> John Block, *Siljander Expresses Anger over O'Connor Nomination*, TOLEDO BLADE, July 9, 1981, at 2.

<sup>119</sup> Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 101, 112 Stat. 2681-154 (1998); H.R.J. Res 738, 99th Cong., Pub. L. No. 99-500, § 101(f), 100 Stat. 1783-217 (1986); KAISER FAMILY FOUND., THE U.S. GOVERNMENT AND INTERNATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH: STATUTORY REQUIREMENTS AND POLICIES (2017), <https://www.kff.org/global-health-policy/fact-sheet/the-u-s-government-and-international-family-planning-reproductive-health-statutory-requirements-and-policies> [https://perma.cc/FG7N-N6EJ].

regardless of the availability of safe abortions.<sup>120</sup> Adolescent girls in disaster or conflict zones face heightened risks of sexual violence because of increased exposure to coerced sex, early marriage, and forced childbearing.<sup>121</sup> Moreover, while legal abortions, particularly in the West, are very safe, roughly 55% of abortions in developing nations are unsafe, and data suggest that despite a decline in the overall abortion rate, “the proportion of unsafe abortions is on the rise, especially in developing nations.”<sup>122</sup>

### C. *The Mexico City Policy: Undermining Structural Developments in Women’s Health*

Another setback to women’s reproductive rights abroad came in the form of a presidential executive order issued by the Reagan Administration in 1984: the MCP, also known as the Global Gag Rule. This Section argues that the MCP is more than a mere temporary financial mandate or mild financial incentive invoked during Republican administrations. To the contrary, this Section shows how the MCP operates in deeply coercive ways that condition speech on cooperation with U.S. financial mandates, ultimately stripping NGOs (working on behalf of women) of speech. Second, it articulates the MCP’s longer term and more devastating effects in that it undermines women’s advancement, including erecting barriers to building infrastructure that address women’s health.

In August 1984, President Reagan announced the MCP at the Second United Nations International Conference on Population in Mexico City.<sup>123</sup> The MCP is referred to as the Global Gag Rule because, in addition to prohibiting NGOs operating in poor countries from using U.S. funds for voluntary abortion services, it prevents those organizations from using their own funds to provide advice or information on a public or private basis.<sup>124</sup>

In this way, the MCP expanded reproductive health restrictions beyond the constraints previously established and policed by the Helms

<sup>120</sup> POPULATION ACTION INT’L, NO EXCEPTIONS: HOW THE HELMS AMENDMENT HURTS WOMEN AND ENDANGERS LIVES 2 (2015), <https://pai.org/wp-content/uploads/2014/07/PAI-Helms-PIB.pdf> [<https://perma.cc/8MW5-CNZ9>] [hereinafter PAI].

<sup>121</sup> See UNITED NATIONS POPULATION FUND, ADOLESCENT GIRLS IN DISASTER & CONFLICT: INTERVENTIONS FOR IMPROVING ACCESS TO SEXUAL AND REPRODUCTIVE HEALTH SERVICES 8–10 (2016), [http://www.unfpa.org/sites/default/files/pub-pdf/UNFPA-Adolescent\\_Girls\\_in\\_Disaster\\_Conflict-Web.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/UNFPA-Adolescent_Girls_in_Disaster_Conflict-Web.pdf) [<https://perma.cc/LD4S-SAR6>] [hereinafter UNFPA].

<sup>122</sup> Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 REV. OBSTETRICS & GYNECOLOGY 122, 123 (2009).

<sup>123</sup> Mexico City Policy, *supra* note 42.

<sup>124</sup> Sneha Barot, *When Antiabortion Ideology Turns into Foreign Policy: How the Global Gag Rule Erodes Health, Ethics, and Democracy*, 20 GUTTMACHER POL’Y REV. 73, 73 (2017).

Amendment.<sup>125</sup> Previously, under Helms and its progeny, no federal dollars could be used to promote, educate about, provide information about, or fund abortions. The MCP imposes additional restrictions, tethering U.S. funds to other foreign dollars.<sup>126</sup> “While the Helms amendment limits the use of U.S. foreign aid dollars directly, the gag rule went far beyond that by disqualifying foreign NGOs from eligibility for U.S. family planning aid entirely by virtue of their support for abortion-related activities subsidized by non-U.S. funds.”<sup>127</sup> The current policy “denie[s] grants to international family-planning organizations for any purpose if they also performed abortions or promoted abortion rights.”<sup>128</sup> It mandates that NGOs certify that they will not “perform or actively promote abortion as a method of family planning” using funds from any source, as a condition for receiving funding through U.S. government.<sup>129</sup>

The MCP asserts that “[a]ttempts to use abortion, involuntary sterilization, or other coercive measures in family planning must be shunned, whether exercised against families within a society or against nations within the family of man . . . [and that] the United States does not consider abortion an acceptable element of family planning programs.”<sup>130</sup> Further, the policy restricts NGOs from use of funding that relates to:

- 1) procurement or distribution of equipment intended to be used for inducing abortions as a method of family planning;
- 2) special fees or incentives to women to coerce or motivate them to have abortions;
- 3) payments to persons to perform abortions or to solicit persons to undergo abortions;
- 4) information, education, training, or communication programs that seek to promote abortion as a method of family planning; and
- 5) lobbying for abortion.<sup>131</sup>

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<sup>125</sup> Berta Esperanza Hernández-Truyol, *On Disposable People and Human Well-Being: Health, Money and Power*, 13 U.C. DAVIS J. INT’L L. & POL’Y 35, 46–47 (2006) (distinguishing the Helms Amendment from the even harsher Mexico City Policy, arguing, “[s]ignificantly, the Helms Amendment applied only to U.S. government funds. Thus, even after the Helms Amendment went into effect, foreign NGOs receiving economic assistance from the United States could promote or perform abortions without violating the terms of the statute if they did so with separate, non-U.S. government funds”).

<sup>126</sup> Barot, *supra* note 62.

<sup>127</sup> *Id.* at 10.

<sup>128</sup> Steven Lee Myers, *A Paradox for Helms on an Abortion Issue*, N.Y. TIMES (Aug. 1, 1997), <http://www.nytimes.com/1997/08/01/us/a-paradox-for-helms-on-an-abortion-issue.html> [<https://perma.cc/KBA8-NAHU>].

<sup>129</sup> Mexico City Policy, *supra* note 42, at 575.

<sup>130</sup> *Id.* at 578.

<sup>131</sup> LARRY NOWELS, CONG. RESEARCH SERV., RL30830, INTERNATIONAL FAMILY PLANNING: THE “MEXICO CITY” POLICY 4 n.7 (2001). USAID interpreted the MCP as prohibiting funding for foreign



An analogy may help to illustrate what this means. Imagine if the federal government conditioned foreign aid to reduce or eliminate HIV/AIDS on NGOs not mentioning the words *sex*, *intercourse*, *homosexuality*, *prostitution*, or *sex work*. It would be all the more coercive and repugnant if the government went further and prohibited the use of the words *male latex contraceptives*, *vaccines*, *circumcision*, or *antiretroviral therapy (ART)*, all of which demonstrably reduce or prevent the spread of HIV/AIDS. And it would be deadly if the government forbade NGOs from using resources from other nations to provide ARTs or condoms. Or, imagine if the federal government in its contracts involving de-escalation of terrorism abroad insisted that NGOs, organizations, governments, and subcontractors never mention the words *war*, *missiles*, *terrorism*, *weapons of mass destruction*, *refugees*, *peace and reconciliation*, and the like. It would be impossible for such organizations to effectively carry out their mission. It would be even worse if the United States barred such organizations from using funds from other allied nations to advance antiterrorism efforts.

Ironically, President Reagan cited the United Nations Declaration of the Rights of the Child as the foundation for the law. He claimed that because the Declaration of the Rights of the Child “calls for legal protection for children before birth as well as after birth . . . the United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part.”<sup>132</sup> Ironically, the United States has never ratified the Convention on the Rights of the Child<sup>133</sup>—today, it remains the only nation to reject even the symbolic value of embracing a doctrine that establishes rights for living, born children. As

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NGOs that perform or actively promote abortion as a method of family planning, and applied the following definitions under the MCP:

- (i) **Abortion is a method of family planning** when it is for the purpose of spacing births. This included, but is not limited to, abortions performed for the physical or mental health of the mother but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions performed following rape or incest (since abortion under these circumstances is not a family planning act).
- (ii) **To perform abortions** means to operate a facility where abortions are performed as a method of family planning. Excluded from this definition are clinics or hospitals which do not include abortion in their family planning programs.
- (iii) **To actively promote abortion** means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

See JOHN BLANE & MATTHEW FRIEDMAN, U.S. AGENCY FOR INT’L DEV., MEXICO CITY POLICY IMPLEMENTATION STUDY, app. A(d)(13)(i)–(iii), at 36 (1990) (emphasis added) [hereinafter IMPLEMENTATION STUDY].

<sup>132</sup> See Mexico City Policy, *supra* note 42, at 578.

<sup>133</sup> Sarah Mehta, *There’s Only One Country that Hasn’t Ratified the Convention on Children’s Rights: U.S.*, ACLU (Nov. 20, 2015, 1:30 PM), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens> [<https://perma.cc/Q9M5-FNFJ>].

one commentator recently wrote, “The United States can learn from other member nations on how to reduce poverty, ensure women’s rights, improve education and educational access, and healthy living conditions, for starters.”<sup>134</sup>

Since the Reagan presidency, each Republican president has implemented the MCP through executive action, while every Democratic president, including Presidents Clinton and Obama, rescinded the policy.<sup>135</sup> Bill Clinton repealed the MCP on his first day in office. In a memorandum, he wrote that the MCP “undermined efforts to promote safe and efficacious family planning programs in foreign nations.”<sup>136</sup> President Clinton directed USAID to remove all conditions “not explicitly mandated by the Foreign Assistance Act or any other law” from current and future grants.<sup>137</sup>

Arguably, to a significant degree, women’s reproductive health in developing countries has been determined by a stroke of a pen—in *the United States*. The consequence is a dramatic and arbitrary contraction and diminution of healthcare and access at the turn of an administration. As healthcare options diminish for poor women in Africa, Asia, South America, and Central America, harmful impacts expand—not only for pregnant women, but also their children, especially with regard to rape, incest, and miscarriages.<sup>138</sup>

Indeed U.S. policy has undermined the creation of vital reproductive health infrastructures and resulted in the full-scale ban of abortion and sometimes difficulties in obtaining contraception. In some developing countries that receive U.S. foreign aid, abortion is simply illegal and criminalized even in cases of rape and incest. Not surprisingly, then, in

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<sup>134</sup> Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty> [https://perma.cc/ACE8-Y4Q9] (noting also that “[t]he U.S. is falling behind on a number of children’s rights indicators,” including poverty, maternal leave, and criminal justice).

<sup>135</sup> The MCP was instituted through legislative action for one year between October 1999 and September 2000 as part of the Consolidated Appropriations Act for Fiscal Year 2000. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 518, 113 Stat. 1501 (1999) [hereinafter CAA FY2000]; see also KAISER FAMILY FOUND., *THE MEXICO CITY POLICY: AN EXPLAINER* (2017), <http://files.kff.org/attachment/Fact-Sheet-The-Mexico-City-Policy-An-Explainer> [https://perma.cc/8EGB-7HWJ].

<sup>136</sup> Memorandum from President William J. Clinton on the Mex. City Policy to the Acting Adm’r of the U.S. Agency for Int’l Dev. (Jan. 22, 1993) [hereinafter Clinton Memorandum].

<sup>137</sup> *Id.* However, even President Clinton caved to conservative lawmakers shortly before the end of his presidency. To secure funding for nearly a billion dollars in debt owed to the United Nations, Clinton agreed not to veto the Consolidated Appropriations Act for the Fiscal Year 2000. That law included antiabortion provisions similar to the Mexico City Policy. NOWELS, *supra* note 131, at 1, 5–6.

<sup>138</sup> Tracy Wilkinson, *El Salvador Jails Women for Miscarriages and Stillbirths*, L.A. TIMES (Apr. 15, 2015), <http://www.latimes.com/world/great-reads/la-fg-c1-el-salvador-women-20150415-story.html> [https://perma.cc/38EK-PKC8].

countries like El Salvador and Nicaragua, miscarriages are treated with suspicion and can lead to arrest and incarceration.<sup>139</sup>

The *Los Angeles Times* issued a devastating report in 2015, highlighting cases of rape victims jailed in El Salvador after miscarriages and stillbirths, cruelly handcuffed to hospital beds and then carted off to jail.<sup>140</sup> The newspaper also uncovered a particularly disturbing case of a teenager sentenced to thirty years in prison after experiencing a miscarriage.<sup>141</sup> In that case, like many others, she was a rape victim.<sup>142</sup>

Just as antiabortion politics play out strategically in the United States through policies like the MCP and Helms Amendment, so too have nations come to adjust to those economic conditions by curtailing reproductive access and failing to build vital and safe infrastructure for reproductive health. The MCP is particularly pernicious as it applies to the application of non-U.S. aid. At the structural level, it imposes significant disincentives to build reproductive healthcare infrastructure. Thus, even with the revocation of the MCP, during Democratic administrations, reproductive healthcare facilities in some nations that receive U.S. foreign assistance remain woefully underdeveloped, contributing to the notion that women's healthcare rights are more illusory than real under Republican administrations.

To better understand why women's rights organizations strongly oppose U.S. foreign policy on reproductive healthcare, consider the inconstant nature of its policies. The Global Gag Rule was first revoked by President Clinton<sup>143</sup> and then reinstated by President George W. Bush.<sup>144</sup> President Bush expanded the scope of the MCP from USAID funding to all population planning assistance by any agency, bureau, or office.<sup>145</sup> President Barack Obama<sup>146</sup> rescinded the policy, and it was later reinstated by President Donald Trump almost immediately after his inauguration.<sup>147</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (noting that in one case a seventeen-year-old girl was granted a brief hearing and then sentenced to thirty years in prison).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Clinton Memorandum, *supra* note 136.

<sup>144</sup> Memorandum from President George W. Bush on Restoration of the Mex. City Policy to the Adm'r of the U.S. Agency for Int'l Dev., 66 Fed. Reg. 17,303 (Mar. 29, 2001).

<sup>145</sup> *Id.*

<sup>146</sup> Memorandum from President Barack Obama on Mex. City Policy and Assistance for Voluntary Population Planning to the Sec'y of State and the Adm'r of the U.S. Agency for Int'l Dev., 74 Fed. Reg. 4903 (Jan. 28, 2009).

<sup>147</sup> Memorandum from President Donald Trump on the Mex. City Policy to the Sec'y of State, the Sec'y of Health & Human Servs., and the Adm'r of the U.S. Agency for Int'l Dev., 82 Fed. Reg. 8495 (Jan. 25, 2017).

Furthermore, when President Trump reinstated the Global Gag Rule, his Administration expanded its scope to include “global health assistance furnished by all departments or agencies.”<sup>148</sup> Trump wrote, “I further direct the Secretary of State to take all necessary actions” to carry out the order.<sup>149</sup> This means that the Global Gag Rule “will apply to assistance provided by USAID, the Department of State, and the Department of Health and Human Services (principally the National Institutes of Health and the Centers for Disease Control and Prevention).”<sup>150</sup> As one human rights organization advocating on behalf of girls and women describes:

Foreign NGOs receiving U.S. government health assistance for family planning, maternal and child health, nutrition, HIV/AIDS (including PEPFAR), infectious diseases, malaria, tuberculosis, and neglected tropical diseases, will now be required to certify that the organization does not provide abortion services, counsel or refer for abortion, or advocate for the liberalization of abortion laws with non-U.S. funds as a condition of receiving assistance from the U.S. government.<sup>151</sup>

The monetary impact of the MCP under the Trump Administration “means that more than [sixteen] times the amount of funding may be impacted than if [the Global Gag Rule] was applied only to bilateral family planning assistance.”<sup>152</sup> In raw numbers, groups estimate that previous levels of aid amounting to roughly \$575 million could be exponentially multiplied to \$9.5 billion “for global health assistance, government-wide.”<sup>153</sup>

And, while neither President Clinton nor President Obama made any substantive changes to the MCP other than rescinding it during their terms in office, the cast was set. During both Administrations, women in developing countries where U.S. aid is distributed experienced high rates of unintended pregnancies. Some suffered and died from abortions performed under perilous and often unsanitary conditions and others endured significant rates of infant mortality.<sup>154</sup> Sadly, maternal mortality remains a glaring problem both domestically and abroad.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*; see also *With a Stroke of the Pen - Trump's Global Gag Rule Dramatically Expands Harmful Health Impacts*, PAI (last updated Jan. 26, 2017), <http://pai.org/newsletters/stroke-pen-trumps-global-gag-rule-dramatically-expands-harmful-health-impacts> [<https://perma.cc/W5BN-M2J7>].

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> WORLD HEALTH ORGANIZATION, *SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* (2d ed. 2012), [http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf) [<https://perma.cc/E8MG-M3GM>].

By imposing broad restrictions on funding for foreign NGOs, the MCP effectively forces organizations to choose to accept funding to provide essential health services with restrictions that can jeopardize the health of their patients, or reject the policy and lose a major source of financial support.<sup>155</sup> The Helms Amendment and the Global Gag Rule belie the foundational principles and values on which the rule of law is founded. In essence, the funding exacerbates inequalities, distributing and suppressing rights according to social status. Ultimately, the U.S. antiabortion campaigns abroad undermine women's autonomy as well as that of the governments and NGOs impacted by its policies.

In fact, the Center for Health and Gender Equity reports that

[d]ocumentation and analysis of the impact of the Global Gag Rule has shown that the policy restricts a basic right to speech and the right to make informed health decisions, as well as harms the health and lives of poor women by making it more difficult to access family planning services. It has also been found that the policy does not reduce abortion.<sup>156</sup>

The Trump Policy threatens women's health in far deeper and broader ways than the MCP, given its scope and scale. Under the Trump Policy, agencies and departments that receive direct appropriations for global health include:

- 1) The Department of State (including the Office of the Global AIDS Coordinator, which oversees and coordinates US Global HIV funding under the President's Emergency Plan for AIDS Relief (PEPFAR));
- 2) Two operating divisions of the Department of Health and Human Services: Centers for Disease Control (CDC), the Food and Drug Administration (FDA) and the National Institutes of Health (NIH); and
- 3) The Department of Defense (DoD).<sup>157</sup>

<sup>155</sup> PAI, ACCESS DENIED: U.S. RESTRICTIONS ON INTERNATIONAL FAMILY PLANNING: EXECUTIVE SUMMARY 2 (2003), <http://pai.org/wp-content/uploads/2016/12/Access-Denied-Executive-Summary.pdf> [<https://perma.cc/BKS4-ZW3L>].

<sup>156</sup> *Global Gag Rule*, CTR. FOR HEALTH & GENDER EQUITY, [http://www.genderhealth.org/the\\_issues/us\\_foreign\\_policy/global\\_gag\\_rule](http://www.genderhealth.org/the_issues/us_foreign_policy/global_gag_rule) [<https://perma.cc/X3Q2-DUFD>].

<sup>157</sup> See KAISER FAMILY FOUND., THE MEXICO CITY POLICY: AN EXPLAINER, *supra* note 135. For an overview of programs which receive U.S. global health funding, see KAISER FAMILY FOUND., THE U.S. GOVERNMENT ENGAGEMENT IN GLOBAL HEALTH: A PRIMER 12–15 (2017), <http://files.kff.org/attachment/report-the-u-s-government-engagement-in-global-health-a-primer> [<https://perma.cc/2FMH-W7P7>], and KAISER FAMILY FOUND., THE U.S. GOVERNMENT AND GLOBAL HEALTH (2016), <http://files.kff.org/attachment/fact-sheet-The-US-Government-and-Global-Health> [<https://perma.cc/23TC-7GG9>].

Arguably, the restriction on funding applied to subrecipients of USAID and others effectively impose similar restrictions on U.S. NGOs.<sup>158</sup> Some advocates stress that loopholes exist in the law to permit some limited consultations on abortion.<sup>159</sup> For example, they stress that where legal abortions were available pre-MCP, USAID's funding restrictions allow foreign NGOs to passively respond to a question about where a safe and legal abortion may be obtained.<sup>160</sup> Even so, there are conditions on the manner of question and status of the women.<sup>161</sup> That is, an NGO may "passively" respond if the question is asked by a woman meeting the following criteria: (a) the woman is already pregnant; (b) she clearly states she has already decided to have a legal abortion; and (c) the family planning counselor reasonably believes that the medical ethics of the country requires a response to where an abortion may be safely obtained.<sup>162</sup> In reality, however, U.S. foreign policy has contributed to nations having a negative view of abortion and, at worst, criminalizing the procedure.

### III. THE REAL-WORLD COSTS OF THE HELMS AMENDMENT AND THE GLOBAL GAG RULE

Decades after the Helms Amendment and MCP became law, unsafe, illegal abortions continue to be performed in developing countries receiving U.S. aid. In other words, the laws failed to reduce the incidence of abortion. After all, women continue to have abortions and some NGOs refuse to receive U.S. government aid in order to provide urgent care to girls and women who need it most, including in cases of rape, incest, and to save women's lives.

In many ways, however, the Helms Amendment and the MCP also represent five enormous victories for antiabortion forces in the United States. First, Congress and a succession of Republican presidents successfully politicized abortion to the degree that some nations continue to outlaw the practice, despite the safety of legal abortions. Second, abortion continues to be stigmatized in developing countries (and the United States) to such a

<sup>158</sup> KAISER FAMILY FOUND., *supra* note 157, at 12–15.

<sup>159</sup> Pontsho Pilane, *Loophole Could Protect South African Organisations from US Gag Rule on Abortions*, BHEKISISA (Nov. 16, 2017, 12:00 AM) (“[A]ctivists say there is a loophole in the policy that may offer a lifeline of sorts to local organisations that provide family planning advice.”), <http://bhekisisa.org/article/2017-11-16-00-loophole-could-protect-south-african-organisations-from-us-gag-rule-on-abortions> [<https://perma.cc/Q4XS-6RFG>].

<sup>160</sup> See USAID, STANDARD PROVISIONS FOR NON-U.S. NONGOVERNMENTAL ORGANIZATIONS 87 (Oct. 4, 2017), <https://www.usaid.gov/sites/default/files/documents/1868/303mab.pdf> [<https://perma.cc/BCS6-S5B2>].

<sup>161</sup> *See id.*

<sup>162</sup> IMPLEMENTATION STUDY, *supra* note 131, app. A(d)(13)(iii)(A)(II) at 36.

degree that even where it may be legal, women are discouraged from seeking or obtaining abortions, even in life-threatening situations. Third, NGOs that receive U.S. government funds do not offer any information, counseling, or abortion-related services. Moreover, of the NGOs that reject U.S. aid, many have been shuttered and disbanded, unable to meet the needs of women who so desperately require their services. Fourth, the United States has effectively restricted the speech of poor women of color in developing countries, even though domestically such restraints would not be acceptable under U.S. law. Fifth, the United States has succeeded in creating a culture of punishment, fear, and shame for pregnant girls and women who seek abortions. Given these effects, it is not surprising that abortion services in developing countries are primarily underground, often illegal, and often unsafe.

Parts I and II of this Essay addressed the laws that govern foreign aid policy and that dictate the ground rules for providing women's reproductive healthcare information and access. This Part unpacks the costs of these policies abroad, including maternal mortality due to unsafe, illegal abortions, criminalization of abortion, and the real-life tragedies for women and girls. It also reveals how social scientific evidence can cast light on the discriminatory effects of seemingly neutral policies.

#### *A. Aggravating the Effects of Rape, War, and Disaster*

Forced sex is one key contributing factor to high rates of unwanted pregnancies in developing nations. In some nations, rape does not exist in the vocabulary.<sup>163</sup> Moreover, where rape exists in the local nomenclature, it may only apply between strangers, but not between husband and wife. In Afghanistan, for example, the word rape lacks the significance and meaning attributed to it in many other parts of the world:

There are no words for "rape" either in Dari or in Pashto. The phrase "sexual attack" (*tajawuz-e jensi*) is used but not in the context of marital rape. To an Afghan raping one's wife is nonsense. Men do "it" whenever they feel like. It does not matter whether she likes it or not. If a wife went to court and complained, the judge would laugh and tell her not to make a fool of herself. For the same reason, Pashto and Dari have no word for "foreplay." This is because females are perceived as property and sex objects for the pleasure of men.<sup>164</sup>

Ironically, sometimes states' efforts to address ending violence against women and girls further undermine their sexual and reproductive security. Consider a 2009 Afghan law on the elimination of violence against women.

<sup>163</sup> EHSAN M. ENTEZAR, AFGHANISTAN 101: UNDERSTANDING AFGHAN CULTURE 113 (2008).

<sup>164</sup> *Id.*



The law does not clearly differentiate between rape and adultery, both of which the government considers crimes. As an unfortunate result, rape victims have actually been accused of and criminally charged for committing adultery, which is a punishable offense.<sup>165</sup> Activists and civil society organizations strive to “remove the concept of ‘adultery’ from the definition of rape”; however, these notions of female (victims’) culpability in sexual violence remain deeply entrenched in cultural, and now legal, understandings.<sup>166</sup>

The consequences of such policies speak for themselves. According to one news account, authorities in Afghanistan charged a sixteen-year-old rape victim with “‘adultery by force’—a ‘crime’ that carried a twelve-year jail sentence.”<sup>167</sup> Subsequently, the girl became pregnant and gave birth in prison.<sup>168</sup> According to a prominent NGO in the region, Women for Afghan Women (WAW),<sup>169</sup> 90% of their clients were survivors of violence.<sup>170</sup> Their “clients have been raped, sold, beaten, starved and mutilated—primarily at the hands of a family member, or in some cases, multiple family members.”<sup>171</sup> Afghanistan receives significant USAID resources, but the American government has been notoriously silent about child rape and pregnancies in Afghanistan.<sup>172</sup>

The problem for marginalized women and girls in developing nations is that local laws may not address their suffering, even when they encounter extreme sexual victimization. Women and girls may be subject to sexual

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<sup>165</sup> HUMAN RIGHTS WATCH, “WE HAVE THE PROMISES OF THE WORLD”—WOMEN’S RIGHTS IN AFGHANISTAN 46–47 (2009); Tim Craig, *An Afghan Girl’s Story of Abduction and Rape Is Testing An Incoherent Justice System*, WASH. POST (Mar. 10, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/an-afghan-girls-story-of-abduction-and-rape-tests-an-incoherent-justice-system/2016/03/10/0793e99e-d4fd-11e5-a65b-587e721fb231\\_story.html](https://www.washingtonpost.com/world/asia_pacific/an-afghan-girls-story-of-abduction-and-rape-tests-an-incoherent-justice-system/2016/03/10/0793e99e-d4fd-11e5-a65b-587e721fb231_story.html) [https://perma.cc/KDK9-EW4L] (describing the horrific tale of a kidnapped and raped girl whose abuser forced her into marriage and was set free by law enforcement); Heather Saul, *Afghan Woman Raped, Impregnated and Jailed for ‘Adultery By Force’ Marries Her Attacker*, INDEPENDENT (Apr. 8, 2015, 2:28 PM), <https://www.independent.co.uk/news/world/middle-east/afghan-woman-raped-impregnated-and-jailed-for-adultery-by-force-marries-her-attacker-10162694.html> [https://perma.cc/CLY7-3LG7].

<sup>166</sup> HUMAN RIGHTS WATCH, *supra* note 165, at 47.

<sup>167</sup> Saul, *supra* note 165.

<sup>168</sup> *Id.*

<sup>169</sup> WOMEN FOR AFGHAN WOMEN, TRANSFORMING AFGHANISTAN 2 (2016), [https://docs.wixstatic.com/ugd/50fe93\\_c3864137886e45958d7e9b66aa72b2c3.pdf](https://docs.wixstatic.com/ugd/50fe93_c3864137886e45958d7e9b66aa72b2c3.pdf) [https://perma.cc/PWU3-H66C].

<sup>170</sup> *Id.*

<sup>171</sup> Manizha Naderi, *A Law that Would Permit Afghan Men to Hurt and Rape Female Relatives*, GUARDIAN (Feb. 6, 2014, 5:11 AM), <https://www.theguardian.com/commentisfree/2014/feb/06/law-afghan-men-hurt-rape-female-relatives-karzai> [https://perma.cc/RV6F-SKS8].

<sup>172</sup> Joseph Goldstein, *U.S. Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies*, N.Y. TIMES (Sept. 20, 2015), <https://www.nytimes.com/2015/09/21/world/asia/us-soldiers-told-to-ignore-afghan-allies-abuse-of-boys.html> [https://perma.cc/4YAN-SDH6].

violence at home and in society. Sexual violence and rapes are exacerbated during conflict; rape is a horrific spoil of war—for which governments do too little to change.

Even while accurate information about the incidences of rape is especially difficult to obtain in conflict zones, researchers and aid workers confirm high occurrences.<sup>173</sup> Compelling research documents the use of rape as a weapon and tactic of war in at least thirty-six different conflicts.<sup>174</sup> Researchers and NGOs estimate that between 250,000 and 500,000 girls and women suffered rapes during the 100-day Rwandan genocide.<sup>175</sup> They report that the West Pakistan Army raped 200,000 Bangladeshi women in 1971.<sup>176</sup> Approximately 20,000 children in Rwanda and 25,000 children in Bangladesh were born as a result of the aforementioned rapes.<sup>177</sup> In the conflict between Bosnians, Croatians, and Serbians in the former Yugoslavia, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found camps “specially devoted to rape, with the aim of forcing the birth of Serbian offspring.”<sup>178</sup>

In the abstract, the concerns articulated in this Essay related to foreign women and girls may be more difficult to grasp in the United States or even in developing nations. For example, the local government’s response to a recent case in Paraguay is not atypical: “We’re totally against interrupting the pregnancy . . . . The girl is getting assistance permanently in a shelter and the pregnancy is progressing normally without a problem.”<sup>179</sup> In that case, government officials ordered the eleven-year-old to undergo a cesarean section and then placed her in a shelter for troubled and difficult youth. The victim’s stepfather had raped her. However, such cases, particularly involving rape and incest of little girls and teenagers, occur with far greater frequency than described in legal scholarship.

Ultimately, the consequences of restrictive health services can be deadly. In Latin America, girls under age sixteen suffer maternal death at a

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<sup>173</sup> GLOBAL JUSTICE CTR., THE RIGHT TO AN ABORTION FOR GIRLS AND WOMEN RAPED IN ARMED CONFLICT 2 (2011), <http://globaljusticecenter.net/documents/LegalBrief.RightToAnAbortion.February2011.pdf> [<https://perma.cc/SK3R-YUUL>].

<sup>174</sup> *Id.* at 2–3.

<sup>175</sup> *Id.* at 2.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 6.

<sup>179</sup> Elahe Izadi, *Denied an Abortion, 11-Year-Old Rape Victim in Paraguay Gives Birth*, WASH. POST (Aug. 14, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/08/14/denied-an-abortion-11-year-old-rape-victim-in-paraguay-gives-birth> [<http://perma.cc/J6P4-XCY6>] (quoting Health Minister Antonio Barrios).

rate that is “four times higher” than that of older women.<sup>180</sup> According to the United Nations, annually “an estimated 70,000 adolescents in developing countries [die] from complications related to pregnancy and childbirth.”<sup>181</sup> The European Parliament, which commissioned a study on this issue, reports that “[s]exual violence against minors is a major problem in Latin America.”<sup>182</sup> The study’s authors concluded that girls are at risk not only at home, but also at school and within the larger community.<sup>183</sup> High rates of physical and sexual violence against girls can (and often does) continue into adulthood: “46.3% of Ecuadorian and 70% of Peruvian women experience physical, sexual and/or emotional violence in their lifetime.”<sup>184</sup>

Data show that women living through such conditions are nearly twice as likely to obtain abortions, regardless of the availability of safe abortions.<sup>185</sup> Data also show that adolescent girls in disaster or conflict zones faced a heightened risk of sexual violence because of their increased exposure to coerced sex, and early and forced marriage and childbearing.<sup>186</sup> However, these conditions of war, including rape and sexual assault of girls and women, occur with such frequency that they should not escape lawmakers’ attention. If poor women who suffer such fates abroad lived in the United States, federal dollars would pay for their abortions as they arise in cases of rape. Thus, what does the United States’ silence on these issues signify to governments abroad?

### B. *Unsafe Abortions in the Post-Helms Era*

According to the WHO, a legal abortion is as safe as a penicillin shot in the United States.<sup>187</sup> The same is not true with illegal abortions, which the organization considers “unsafe.” That is, an “unsafe abortion” occurs when “terminat[ion] [of] an unintended pregnancy [is] carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both.”<sup>188</sup> Obtaining accurate data for abortions

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> DIRECTORATE-GEN. FOR EXTERNAL POLICIES, EUROPEAN PARLIAMENT, SEXUAL VIOLENCE AGAINST MINORS IN LATIN AMERICA 2 (2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578023/EXPO\\_STU\(2016\)578023\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578023/EXPO_STU(2016)578023_EN.pdf) [<https://perma.cc/2YNC-33TW>].

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 3.

<sup>185</sup> PAI, *supra* note 120.

<sup>186</sup> UNFPA, *supra* note 121.

<sup>187</sup> WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008, at 14 (6th ed. 2011), [http://apps.who.int/iris/bitstream/10665/44529/1/978924150118\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44529/1/978924150118_eng.pdf) [<https://perma.cc/42ZJ-QP27>].

<sup>188</sup> *Id.* at 2.

is challenging, even more so for unsafe abortions, and many abortions are undocumented.<sup>189</sup> However, researchers attribute 13% of worldwide maternal mortality to unsafe abortions.

In raw numbers, each year nearly 20 million unsafe abortions take place.<sup>190</sup> And while nearly 3% of abortions in Western nations are unsafe, 55% of abortions in developing nations are unsafe. Further, empirical research shows that despite a decline in the overall abortion rate, the proportion of unsafe abortions is rising, especially in developing nations.<sup>191</sup> As the United States is the largest bilateral donor for family planning and reproductive health programs globally, at the very least, the impact of the Helms Amendment is the loss of opportunity for the country to save millions of lives.<sup>192</sup>

On the one hand, the Helms Amendment and MCP result in less accessible legal abortions in developing countries that receive foreign aid from the United States. On the other hand, women in developing countries continue to terminate their pregnancies—albeit under unsafe conditions and mostly illegal circumstances, driven underground by these policies. Very likely, these policies will never end abortions, but by driving them underground, women’s lives will be at greater risk.

For example, a study of reproductive outcomes for women in Ghana between 1972 and 2007 showed that while the MCP was in effect, there was no reduction of the use of abortions in urban areas, but there was a substantially larger reduction in rural areas.<sup>193</sup> Similarly, a 2011 study of twenty countries by Bendavid, Avila, and Miller showed that in the period between 1994 and 2008, the induced abortion rate *rose* while the MCP was in effect.<sup>194</sup> Countries with high exposure to the MCP experienced sharp increases in abortions after the MCP was reinstated in 2001 during the Bush Administration.<sup>195</sup> This is very likely because NGOs that provide whole

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<sup>189</sup> Haddad & Nour, *supra* note 122, at 123.

<sup>190</sup> *Id.* at 122.

<sup>191</sup> *Id.* at 123.

<sup>192</sup> INT’L PREGNANCY ADVISORY SERVS., U.S. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS 6 (2015).

<sup>193</sup> KELLY M. JONES, INT’L FOOD POL’Y RES. INST., EVALUATING THE MEXICO CITY POLICY: HOW US FOREIGN POLICY AFFECTS FERTILITY OUTCOMES AND CHILD HEALTH IN GHANA 11–12 (2011), <http://cdm15738.contentdm.oclc.org/utills/getfile/collection/p15738coll2/id/126751/filename/126962.pdf> [<https://perma.cc/5W2P-ZFND>].

<sup>194</sup> Eran Bendavid, Patrick Avila & Grant Miller, *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*, 89 BULL. WORLD HEALTH ORG. 873 (2011), <http://www.who.int/bulletin/volumes/89/12/11-091660/en> [<https://perma.cc/2RTE-JTNC>].

<sup>195</sup> *Id.* at 874, 877 (where “high exposure” indicates that the country received a higher level of financial assistance from the United States for family planning and reproductive health between 1995 and 2000).

women's healthcare, including counseling and contraception, are negatively impacted by the Helms Amendment and the MCP, resulting in closures of facilities providing these services.

Furthermore, women living in countries with high exposure to the MCP were nearly three times as likely to have an induced abortion after the MCP was reinstated than during the period from 1994 to 2000 (when the MCP was not in effect), or than women living in less exposed countries.<sup>196</sup>

These policies also impact contraceptive use. The Bendavid et. al. study also showed that the use of contraceptives declined in high-exposure countries while the MCP was in effect.<sup>197</sup> Consistently, the data reported a lower prevalence of contraceptives usage in high-exposure countries than low-exposure countries.<sup>198</sup> In other words, the research revealed that U.S. policies produced perverse effects on reproductive health. Similarly, a 2015 study conducted by the International Food Policy Research Institute (IFPRI) demonstrated an overall reduction in the availability of contraceptives in Ghana while the MCP was in effect.<sup>199</sup> Likewise, Population Action International (PAI) reported that by 2002, family planning associations in sixteen developing countries no longer received USAID-donated contraceptives because they declined to sign the policy.<sup>200</sup>

Taken together, the Helms Amendment and the MCP place NGOs and nations in a difficult position—forego U.S. funding and cripple access to and development of urgent resources. Yet, accepting U.S. foreign aid funding, including the conditions that attach, could contribute to the unnecessary and preventable deaths of girls and women in the country. Next, Part IV considers the consequences of these policies for U.S. and international law more generally.

#### IV. CREATING UNDUE BURDENS ABROAD

##### A. *Undermining the Liberalization of Women's Rights and Lives*

The United States' foreign aid policies related to reproductive health and abortion restrain recipient nations from developing democracies that

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<sup>196</sup> *Id.* at 876. Furthermore, between 2001 and 2008, when the MCP was in effect, the study reported that women living in a country with high exposure to the MCP were 1.21 times more likely to have an induced abortion than women in the study's reference groups. *Id.* at 877.

<sup>197</sup> *Id.* at 876.

<sup>198</sup> *Id.* at 877 & fig. 3.

<sup>199</sup> Kelly M. Jones, *Contraceptive Supply and Fertility Outcomes: Evidence from Ghana*, 64 *ECON. DEV. & CULTURAL CHANGE* 31, 46–47 (2015).

<sup>200</sup> PAI, *THE GLOBAL GAG RULE & CONTRACEPTIVE SUPPLIES 2* (2017), <http://pai.org/wp-content/uploads/2016/12/The-Global-Gag-Rule-and-Contraceptive-Supplies.pdf> [<https://perma.cc/EE6B-7PDA>].

recognize and support women as full citizens because full participation in civic life demands a recognition of the whole person. To deny women access to the healthcare fundamental to their well-being and physiology is to undermine their status in society and disempower them.<sup>201</sup> When foreign aid undermines these basic principles, which cannot be adopted domestically, it disserves the women and girls it purports to help. The chilling accounts of arrests and prosecutions of women who suffer from stillbirths in Latin America underscore this point:

When Carmen Guadalupe Vasquez was rushed to hospital after giving birth to a stillborn baby boy, the doctors first treated her life-threatening bleeding and then called the police who handcuffed her to the bed.

In El Salvador, where all abortion is illegal and emergency wards are turned into crime scenes, the confused, weak and desperately ill 18-year-old maid was placed under investigation for terminating her pregnancy and driven away in a police van.<sup>202</sup>

At the most basic level, foreign aid should contribute toward the uplift of societies and lead to more robust participation in civic life and democracy. Yet, through its various abortion-based amendments and the Global Gag Rule, U.S. foreign aid constrains the possibility of forging substantively better opportunities for women. Governments will take strong signals from the United States in determining which NGOs they will certify for work in their countries as well as how they shape domestic law.<sup>203</sup> After all, foreign aid is a foreign policy tool.<sup>204</sup> In an important work on this point, Professor Alberto Alesina and David Dollar, a researcher at the World Bank, found considerable evidence that the ways in which countries govern the distribution of aid is often dictated by strategic and political considerations.<sup>205</sup> And, although their research does not focus on reproductive health per se, Alesina and Dollar found that the United States' pattern of foreign aid development is dramatically influenced by its political interests.

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<sup>201</sup> See Sherwell, *supra* note 72.

<sup>202</sup> *Id.*

<sup>203</sup> Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. ECON. GROWTH 33 (2000); see Clair Apodaca, *Foreign Aid as Foreign Policy Tool*, in OXFORD RES. ENCYCLOPEDIA POL. (2016), <http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-332> [<https://perma.cc/4DX7-BFVZ>].

<sup>204</sup> Apodaca, *supra* note 203.

<sup>205</sup> Alesina & Dollar, *supra* note 203, at 33.

As Professor Clair Apodaca writes, “[S]tates use foreign aid as a means of pursuing foreign policy objectives.”<sup>206</sup> This is obviously so, but it bears explicit reference, particularly as “[a]id can be withdrawn to create economic hardship or to destabilize an unfriendly or ideologically antagonistic regime.”<sup>207</sup> On the other hand, “aid can be provided to bolster and reward a friendly or compliant regime.”<sup>208</sup> Thus, conditioning opportunity or aid on discrimination against a segment of any society epitomizes the worst type of coercion. The key question for policymakers should be, *under what conditions can foreign aid be systemically equalizing, impartial, fair, and just?*<sup>209</sup>

In *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, Professor Marc Galanter observes, “Most analyses of the legal system start at the rules end and work down through institutional facilities to see what effect the rules have on the parties.”<sup>210</sup> Galanter smartly advocated for flipping the traditional way that law is read and interpreted—to consider the actors and institutions that drive law’s true meaning.<sup>211</sup> Galanter advocated for looking through “the other end of the telescope.”<sup>212</sup> Only by looking through the other side of the viewing glass might we consider the actors and their differences and how that impacts how systems work. I would add to Galanter’s framework that one must examine the relative power and position of the actors to have a better idea about how a legal regime truly works.

By critically examining the United States’ relationship to governments and NGOs receiving its foreign aid, and in turn women’s relationships to their government and status within their societies, one might better appreciate my view that U.S. foreign aid and its distribution abroad basically maps onto a distribution of rights. In this case, the legal system imparts rules that have negative effects on women and girls abroad. Indeed, Senator Helms’s intention was to eliminate abortion rights in the United States and in developing nations abroad. To a significant degree, he made enormous strides in achieving those goals.

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<sup>206</sup> Apodaca, *supra* note 203, at 1.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Marc Galanter framed these questions in his groundbreaking scholarship *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 95–97 (1974). Galanter was concerned about redistributive justice in civil litigation. The framework he applied in this and future work can serve as one of the models for thinking about foreign aid and social development.

<sup>210</sup> *Id.* at 97.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*



Senator Helms understood the political power commanded by economic power. Indeed, in the very same speech—and virtual paragraph of his oratory, Helms told fellow senators, “Finally, it is in the very nature of AID assistance that conditions for fiscal responsibility, social reform, and financial participation of the host country be attached. Every loan and grant has them.”<sup>213</sup> Helms alluded to an even greater threat to women’s reproductive rights (which President Reagan later adopted in the MCP) by asserting, “We could, in fact, go far beyond the present amendment and require all abortion activities, from whatever funds, to be stopped before our assistance could be received. But . . . [the Amendment] only requires that the United States does not participate in the spread of abortive practices.”<sup>214</sup>

Helms offered other justifications for the law, but clearly it was at odds with the analysis the Court offered months before in *Roe*. Indeed, the clearest reading of Senator Helms’s efforts was that they served retaliatory purposes. After all, Helms could not successfully mount national opposition to *Roe*; the carnage of illegal abortions was not only apparent, but the Court had already spoken on the issue. Thus, although his antiabortion agenda had little teeth domestically, the one place he could powerfully express his opposition and power was among poor women in developing nations.

In fact, Senator Helms was not unfamiliar with a state wielding unflinching, harmful, and even lethal control over women’s reproduction and lives.<sup>215</sup> From where and how he governed, the crude and consistent subordination of women was normalized. In particular, Senator Helms advocated domestically for the types of conditions that undermined the

<sup>213</sup> 119 Cong. Rec. 32,293 (1973) (statement of Sen. Helms).

<sup>214</sup> *Id.*

<sup>215</sup> It should also not escape serious reflection on the Helms Amendment and the Senator himself to note that curious history of the state that he represented. North Carolina had a strange and curious history with slavery, eugenics, subsequent forced sterilizations of Black women (after eugenics), and marital rape (one of the last states to abolish the male privilege to rape one’s wife). These latter points are not the focus of this Essay, but offer context related to Helms, how he located his politics, and legacy. *See, e.g.*, *State v. Mann*, 13 N.C. 263 (1829) (North Carolina Supreme Court ruling that the owner or renter of a slave is not liable for beating or killing the slave, in a case involving a slaver shooting and severely maiming a Black woman for her obstinance); ROBERTS, *supra* note 3, at 90, 92–93 (1997) (relating North Carolina’s history of forced sterilization of Black women); STATES’ LAWS ON RACE AND COLOR 329–48 (Pauli Murray ed., Univ. of Ga. Press 1997) (1951) (copiously detailing the plethora of race-based laws adopted by the North Carolina legislature, including barring interracial marriages, prohibiting integration in schools, imposing racial restrictions in cemeteries, banning the interchange of textbooks between “white and colored schools,” and imposing segregation in colleges and universities, among other racially discriminatory enactments); Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims*, WALL ST. J. (July 26, 2013), <http://www.wsj.com/articles/SB10001424127887323971204578629943220881914> [https://perma.cc/2GYQ-YFJM] (noting that in North Carolina, “[a]bout 2,000 of the 7,600 who were sterilized [under the state’s eugenics laws] were under age 18,” and many were Black).

progress of black girls and women in his state because he was an unwavering segregationist. Imposing conditions on poor women's lives abroad—most of whom were of color—may have been different, but not by far from North Carolina's notorious involvement with slavery and commitment to the conditions of Jim Crow, for which Helms was an advocate.<sup>216</sup>

*B. The International Response to U.S. Foreign Aid Policy*

The Helms Amendment and the MCP burden women and girls to such an obvious and grave degree in developing nations that the United States' own allies, as well as the United Nations, condemn both policies. There has been widespread recognition from the United Nations and NGOs that the failure to provide adequate access to services for termination of an unwanted pregnancy constitutes discrimination against women.<sup>217</sup> A 2016 joint statement issued by U.N. human rights experts asserted that restrictive legislation that denies access to safe, legal abortions is “one of the most damaging ways of instrumentalizing women's bodies.”<sup>218</sup> Authors of the statement accused nations that engage in such restrictive practices of “a grave violation of women's human rights.”<sup>219</sup> Furthermore, they urged countries to respect individual autonomy and to repeal restrictive abortion laws and policies that had a discriminatory and public health impact.<sup>220</sup>

To this end, the U.N. Security Council also passed two resolutions in 2013 supported by the United States (under the Obama Administration), which it is obligated to “accept and carry out” under Article 25 of the United Nations Charter.<sup>221</sup> Resolution 2106 urges all U.N. entities and donors to “provide non-discriminatory and comprehensive health services, including sexual and reproductive health, psychosocial, legal, and livelihood support

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<sup>216</sup> See Eric Bates, *What You Need to Know About Jesse Helms*, MOTHER JONES (May–June 1995), <http://www.motherjones.com/politics/1995/05/what-you-need-know-about-jesse-helms> [https://perma.cc/YLC8-X75S] (“[T]he recent GOP stampede has given Helms a respected position from which to trumpet his bitter opposition to abortion, gay rights, racial equality, arts funding, and aid to what he calls ‘foreign rat holes.’”); David S. Broder, *Jesse Helms, White Racist*, WASH. POST (July 7, 2008, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/06/AR2008070602321.html> [https://perma.cc/AD4B-FHW4] (“What really sets Jesse Helms apart is that he is the last prominent unabashed white racist politician in this country—a title that one hopes will now be permanently retired.”).

<sup>217</sup> OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, “UNSAFE ABORTION IS STILL KILLING TENS OF THOUSANDS WOMEN AROUND THE WORLD”—U.N. RIGHTS EXPERTS WARN (2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E> [https://perma.cc/5K8H-K92W].

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> See U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

and other multi-sectoral services for survivors of sexual violence.”<sup>222</sup> Similarly, Resolution 2122 related to “the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination.”<sup>223</sup> It is unlikely that the United States will adhere to its obligations under the U.N. resolutions during President Trump’s administration.

By stunning contrast, European governments have attempted to relieve girls and women in developing nations from the harsh impacts of rape, sexual abuse, and incest. The United Kingdom, the Netherlands, and France publicly affirmed the importance of safe abortion services for victims of rape in conflicts.<sup>224</sup> In addition, the United Kingdom and the Netherlands engaged in discussions with the United States to urge policy change with respect to the Helms Amendment restrictions.<sup>225</sup> Further, the European Parliament enacted several resolutions requiring European Union Member States to ensure that U.S. abortion restrictions do not impact their ability to ensure access to abortion for women and girls who are victims of rape in armed conflicts.<sup>226</sup>

From an international law perspective, the Helms Amendment contravenes the United States’ obligation to respect and ensure respect for the rights enumerated in the Geneva Conventions without discrimination of any kind.<sup>227</sup> The Fourth Geneva Convention states that “[p]ersons taking no active part in the hostilities” and those placed out of combat by “sickness, wounds . . . or any other cause” shall be “treated humanely, without any adverse distinction founded on . . . sex.”<sup>228</sup> Indeed, when the incidences of sexual violence against girls and women, as well as mortality from unsafe abortions in developing nations, are placed in context, the Helms Amendment and Global Gag Rule arguably constitute “inhumane treatment” and “cruel and inhuman treatment.” By forcing female rape victims to carry unwanted or risky pregnancies and undergo childbirth, and by denying them full rehabilitative medical care, including abortion,<sup>229</sup> the United States

<sup>222</sup> S.C. Res. 2106, ¶ 19 (June 24, 2013).

<sup>223</sup> S.C. Res. 2122, at 2 (Oct. 18, 2013).

<sup>224</sup> GLOBAL JUSTICE CTR., SUBMISSION TO THE U.N. HUMAN RIGHTS COUNCIL, UNIVERSAL PERIODIC REVIEW—22ND SESSION, UNITED STATES OF AMERICA ¶ 6 (2015), [www.globaljusticecenter.net/documents/GJC.US.UPR2015.CompleteSubmission.pdf](http://www.globaljusticecenter.net/documents/GJC.US.UPR2015.CompleteSubmission.pdf) [<https://perma.cc/HCX5-3R87>].

<sup>225</sup> *Id.* ¶ 7.

<sup>226</sup> *Id.* Annex C(I) ¶¶ 31, 61.

<sup>227</sup> *Id.* ¶¶ 8–12.

<sup>228</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

<sup>229</sup> GLOBAL JUSTICE CTR., *supra* note 224, ¶¶ 11–12.

creates inhumane conditions under which women and girls cannot reasonably flourish.

Indeed, the Helms Amendment also impedes the United States' ability to comply with its obligations under the International Covenant on Civil and Political Rights (ICCPR). That is, the Helms Amendment and USAID aid restrictions limit both the ability of states and individuals to "seek, receive, and impart information and ideas of all kinds," as stated in Article 19(2) of the ICCPR.<sup>230</sup> As a consequence, both the Helms Amendment and the MCP directly prevent the United States from fulfilling its obligations to respect and ensure respect to all individuals and parties to the treaty as articulated by Article 2(1).<sup>231</sup>

#### CONCLUSION

Legislative and judicial rhetoric shape women's rights to a devastating degree, placing considerable obstacles in their paths to full citizenship and social participation. Today, political and judicial rhetoric resurge to undermine women's reproductive autonomy and equality domestically and abroad. However, whereas women in the United States possess legal tools and the economic wherewithal to fight back, the arsenal is depleted or nonexistent for poor women in developing nations. The Helms Amendment and the Global Gag Rule impose brutal, economic quid pro quos. The result is to hobble health service providers, constrain reproductive medical research, limit patient advocacy, and chill free speech. Sadly, these policies are justified as promoting the health and safety of women, even when they result in unintended pregnancies, illegal abortions, criminalization, and even deaths.

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<sup>230</sup> International Covenant on Civil and Political Rights, art. 19(2), Dec. 16, 1966, 999 U.N.T.S.171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992).

<sup>231</sup> See *id.* art. 2(1); U.N. Human Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).