

# The Potential Power of CEDAW in America’s Post-*Roe* Abortion Debate Outside of its Formal Mechanisms

Hannah Grayson

## I. INTRODUCTION

In 2022, the United States Supreme Court overruled *Roe v. Wade* with the landmark decision in *Dobbs v. Jackson Women’s Health Organization*.<sup>1</sup> This ruling gives states the power to regulate abortion as long as it satisfies a rational basis, effectively outlawing abortion in most cases in much of the country.<sup>2</sup> The *Roe* decision had, for fifty years, grounded the abortion debate in America within the Constitution and the right to privacy. However, with *Dobbs*, the right to privacy, as found when piecing together the principles behind multiple amendments, is no longer a valid constitutional foundation for the right to an abortion.<sup>3</sup> With this change and the conservative Supreme Court that is likely to last decades, the abortion rights movement cannot rely on constitutional law and the right to privacy doctrine anymore.

When *Dobbs* came out, the United Nations Committee on the Elimination of Discrimination Against Women (“CEDAW Committee”) issued an “urgent call” to the United States to adhere to its convention by providing legal and safe abortions nationwide.<sup>4</sup> This is despite the fact that the United States has

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1. *Dobbs v. Jackson Women’s Health Org.*, 142 S.Ct. 2228, 2233 (2022).

2. *Id.* at 2263.

3. *Id.* at 2233.

4. U.N. Hum. Rts. Off. of the High Comm’r, *Access to safe and legal abortion: Urgent call for United States to adhere to women’s rights convention, UN committee*, (July 1, 2022), <https://www.ohchr.org/statements/2022/07/access-safe-and-legal-abortion-urgent-call-united-states-adhere-womens-rights>.

signed but never ratified the convention of the same name, so few actual legal ramifications come with this statement, at least regarding the United Nations.<sup>5</sup> However, CEDAW can still offer lessons regarding human rights outside of its legal and binding mechanisms. This is not to say that CEDAW should be used explicitly, as the lessons should be used as a tool separate from the convention itself to avoid pushback from Americans regarding international law.

This Note will explore how the principles found in CEDAW and its related jurisprudence can be a tool to reaffirm abortion rights on a federal level in the United States, even without ratification. Part I will look at how the right to privacy is no longer the best argument for an abortion right in the United States, then it will go into the provisions regarding reproductive rights in CEDAW, how the CEDAW Committee has interpreted these provisions to create an obligation to provide abortion rights, and how they have enforced these interpretations on member countries. Part II will show how the United States can implement the ideas from CEDAW as interpreted by the Committee without ratifying the treaty, with examples from other countries that have used the framework of CEDAW domestically and examples of how different American states can improve existing policies.

## II. BACKGROUND

### A. *DOBBS* FORCES THE ABORTION RIGHTS MOVEMENT TO THINK OUTSIDE OF THE RIGHT TO PRIVACY BOTH IN AND OUTSIDE OF THE COURTS.

In 1973, the Supreme Court decided *Roe v. Wade*, giving a federal right to an abortion based on the right to privacy as found in *Griswold v. Connecticut*.<sup>6</sup> In *Griswold v. Connecticut*, the Supreme Court found a right to privacy, not explicitly in a certain amendment of the United States Constitution, but in a penumbra of rights found in multiple amendments, including the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>7</sup> The right to privacy was explained as a right and a constitutional value that helps to explain the rights explicitly mentioned in the

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5. *Id.*

6. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

7. *Griswold v. Conn.*, 381 U.S. 479, 483–84 (1965).

Constitution.<sup>8</sup> This new right was used to protect the right of a married couple to use contraception.<sup>9</sup>

In *Roe v. Wade*, the Supreme Court expanded that right to privacy to the right to abortion.<sup>10</sup> The court emphasized the right to privacy as incredibly important for the doctor-patient relationship, which is inherent in the practice of abortions.<sup>11</sup> This was, however, balanced with the government's interest in protecting human life.<sup>12</sup> The balancing culminated in a trimester test that protected without reservations the right to abortion in the first trimester, allowed governments to regulate abortions in the second trimester if it is reasonably related to maternal health and allowed states to prohibit abortions in the third trimester.<sup>13</sup>

After *Roe* was decided, the federal right to an abortion was heavily dependent on and rooted in the right to privacy. *Dobbs v. Jackson Women's Health Organization* took away many legal avenues to a right to an abortion, but the most important was the dismissal of the applicability of the right to privacy.<sup>14</sup> The Supreme Court emphasized the difference between abortion and the other rights that have been protected by the right to privacy, such as the right to marry and the right to make decisions about one's children.<sup>15</sup> Abortion is different, as the court said, because there is "an unborn human being" at issue and not purely personal autonomy.<sup>16</sup> They also argue that there should be a line to where the right to privacy and autonomy ends since the right could potentially justify legal drug use and prostitution.<sup>17</sup> The court ultimately decides that abortion belongs just past the line of actions that fall under the right.<sup>18</sup>

*Dobbs* essentially means that both the Supreme Court—as it will stand for the next couple of decades—and the right to privacy are not viable avenues for the right to an abortion to be protected in all states.

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8. *Id.* at 485.

9. *Id.*

10. *Roe*, 410 U.S. at 153.

11. *Id.*

12. *Id.* at 154.

13. *Id.* at 164.

14. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2237–38 (2022).

15. *Id.* at 2259–60.

16. *Id.* at 2260.

17. *Id.*

18. *Id.*

B. WITHOUT MENTIONING ABORTION EXPLICITLY, CEDAW OFFERS A ROUTE TO ABORTION RIGHTS THROUGH ITS LANGUAGE.

The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) was adopted by the United Nations General Assembly on December 18, 1979.<sup>19</sup> CEDAW was created following pressure to have something to show for the mid-decade conference celebrating the United Nations Decade for Women starting in 1976.<sup>20</sup> CEDAW focuses on civil rights and the legal status of women, reproductive rights, and human rights for women within a cultural framework.<sup>21</sup>

CEDAW does not explicitly mention abortion, but it references reproductive rights, family planning, and pregnancy in ways that can imply the right to some sort of access to abortion.<sup>22</sup> There are multiple articles of CEDAW where one can read in a right to abortion – specifically Articles 12, 14, and 16. All such articles find an importance in autonomy in reproductive healthcare and family planning, in which abortion can be included.

Article 12 of CEDAW is where most of the foundation for abortion rights comes from. Article 12 calls for States to provide healthcare services, namely, including “family planning.”<sup>23</sup> It also calls on countries to give “appropriate” services in relation to pregnancy and post-pregnancy.<sup>24</sup>

Article 14 also references reproductive rights.<sup>25</sup> Discussing fundamental rights of rural women, it includes adequate healthcare that consists of family planning services and information.<sup>26</sup> Article 10 also briefly mentions family planning as an important part of the right to education for women.<sup>27</sup>

Article 16 is another section of CEDAW in which abortion

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19. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

20. *Short History of CEDAW Convention*, UN WOMEN, <https://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited Feb. 15, 2024).

21. CEDAW, *supra* note 19, pmb1.

22. *See, e.g., id.* art 12.

23. *Id.* art 12.

24. *Id.*

25. *Id.* art. 14.

26. *Id.*

27. *Id.* art. 10.

rights can be implied.<sup>28</sup> In discussing a woman's rights within a marriage in Article 16(1)(e), the convention expresses that States must allow a woman the right to decide how many children to have and when to have these children.<sup>29</sup> Even without committee interpretation, this article can be seen to give a right to abortion. This is evidenced by the fact that Malta decided not to make itself bound to Article 16(1)(e) when ratifying CEDAW with the specific reason of not wanting to have to make abortion legal under its obligations of the treaty.<sup>30</sup>

Though not explicit, there is a strong foundation for abortion rights found in multiple parts of CEDAW. The fact that abortion is not explicitly mentioned is not a bar on enforcement of the right to abortion. CEDAW also does not explicitly mention female genital mutilation or sexual slavery, yet many people agree that those topics fall under the provision of CEDAW, and prohibitions can be enforced under the convention.<sup>31</sup>

1. The CEDAW Committee Has, However, Explicitly Interpreted Article 12 to Provide the Right to Abortion as Intertwined with Other Human Rights.

Article 17 of CEDAW established the CEDAW Committee, which was created to make suggestions and general recommendations based on a review of member states in order to enforce and interpret the convention.<sup>32</sup> The CEDAW Committee has mainly implemented the foundation of abortion rights under CEDAW in its general recommendations and other statements interpreting the language of the convention.<sup>33</sup>

The CEDAW Committee has interpreted Article 12 to mean that lack of access to reproductive services is sex

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28. *Id.* art. 16.

29. *Id.* art. 16.

30. Sarah A. Huff, *The Abortion Crisis in Peru: Finding a Woman's Right to Obtain Safe and Legal Abortions in the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 B.C. INT'L & COMP. L. REV. 237, 245 (2007).

31. Janet Benshoof, *U.S. Ratification of CEDAW: An Opportunity to Radically Reframe the Right to Equality Accorded Women Under the U.S. Constitution*, 35 N.Y.U. REV. L. & SOC. CHANGE 103, 128 (2011).

32. CEDAW, *supra* note 19, art. 17, art. 21.

33. See Margaux J. Hall, *Using International Law to Promote Millennium Health Targets: A Role for the CEDAW Optional Protocol in Reducing Maternal Mortality*, 28 WIS. INT'L L.J. 74, 91–92 (2010).

discrimination.<sup>34</sup> In the General Recommendation that serves as the basis for abortion rights under CEDAW, the Committee explicitly states that it is discrimination to refuse reproductive services to women.<sup>35</sup> The Committee also interprets CEDAW to require the elimination of the criminalization of all abortions.<sup>36</sup>

According to the Committee, if a State targets reproductive health, that is sex-based discrimination.<sup>37</sup> The CEDAW Committee has, in addition to Article 12, interpreted Article 14(2)(b) to mean that denial of reproductive health services is discrimination based on sex.<sup>38</sup> The CEDAW Committee has additionally gone so far as to say that depriving a woman of access to abortion is sex-based violence due to the rate of maternal mortality as a result of illegal abortions in Namibia.<sup>39</sup>

A significant focus of the CEDAW Committee is the effect of illegal abortions on maternal mortality.<sup>40</sup> They are most concerned with the fact that making abortion illegal only increases death and injury due to illegal and unsafe abortions since women will always find a way.<sup>41</sup> The Committee has emphasized that it violates a woman's right to life to deprive a woman of safe, legal, and accessible abortions. It is incredibly important and pertinent to the CEDAW Committee that Member States understand that they can never stop abortion from happening, and thus, Member States must make them safe and legal to avoid harm and death to women.

The CEDAW Committee has made it clear that there is an active obligation on states to fulfill the right to an abortion.<sup>42</sup>

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34. MARSHA A. FREEMAN, ET. AL., THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 320 (2012).

35. Comm. On the Elimination of Discrimination Against Women, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1, chap. I ¶ 11 (Feb. 2, 1999) [hereinafter *Gen. Recommendation No. 24*].

36. Freeman, *supra* note 34, at 322–23.

37. Rebecca Farrar, *Women's Rights Are Human Rights: Finding The Right To Access An Abortion In International Law*, 33 N.Y. INT'L L. REV. 19, 33 (2020).

38. Freeman, *supra* note 34, at 381.

39. See Comm. on the Elimination of Discrimination Against Women, *Concluding observations on the sixth periodic report of Namibia*, U.N. Doc. CEDAW/C/NAM/CO/6 ¶ 42(a) (July 12, 2022).

40. Freeman, *supra* note 34, at 321.

41. *Id.*

42. Henriette Sinding Aasen, *Maternal Mortality and Women's Right to Health*, in WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL, AND NATIONAL LAW 310–11 (Anne Hellum & Henriette Sinding Aasen eds., 2013).

States must do more than decriminalize abortion. They must address inequities and make abortion accessible and safe for everyone so that there is a real right and not just a privilege.<sup>43</sup> Decriminalizing abortion is simply not enough if women are still being adversely affected by unsafe abortions.<sup>44</sup>

In direct contrast with the approach taken by the Supreme Court of the United States, the CEDAW Committee approaches the right to an abortion as requiring affirmative action by the state and not just a promise for rights not to be taken away.<sup>45</sup> The CEDAW Committee has called on Member States to provide certain affirmative measures regarding abortion, including monitoring hospitals to ensure compliance and making sure that, at the very least, women can get abortions in cases of rape, incest, and threats to the life of the mother or baby.<sup>46</sup>

The CEDAW Committee has also made it clear that the right to an abortion cannot be seen as a stand-alone right, such as the right to privacy.<sup>47</sup> It must be seen as a conjunction of multiple rights, including the right to health, the right to non-discrimination, and the right to privacy, among others.<sup>48</sup> The CEDAW Committee also interprets the right to abortion as being connected to the right to equality within the family.<sup>49</sup>

The CEDAW Committee has generally interpreted the convention as giving the right to an abortion to everyone, and it calls for Member States to comply with that interpretation.<sup>50</sup> Overall, the Committee has found that the multitude of rights that lead to a right to abortion, found within multiple sections of the treaty, can be used to enforce the right to abortion within

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43. *Id.*

44. *Id.*

45. Benschhof, *supra* note 31, at 104 (describing the obligation of States to take affirmative measures to eliminate gender-based inequality); Aasen, *supra* note 42, at 303–07 (describing the affirmative measures CEDAW requires regarding maternal mortality and their implications with regard to abortion).

46. Comm. on the Elimination of Discrimination Against Women, *Concluding observations on the eighth periodic report of Türkiye*, U.N. Doc. CEDAW/C/TUR/CO/8 ¶ 47(b) (July 12, 2022).

47. Hall, *supra* note 33, at 96.

48. *Id.*

49. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, U.N. Doc. A/49/38 ¶ 1 (Apr. 12, 1994).

50. *See, e.g.*, Comm. on the Elimination of Discrimination Against Women, *Concluding observations on the tenth periodic report of Portugal*, U.N. Doc. CEDAW/C/PRT/CO/10 ¶ 33(b) (July 12, 2022).

multiple frameworks.<sup>51</sup>

C. CEDAW HAS BEEN ENFORCED TO PROVIDE THE RIGHT TO LEGAL ABORTION IN PARTICIPATING COUNTRIES, BOTH SUCCESSFULLY AND UNSUCCESSFULLY.

There are many examples of the CEDAW Committee enforcing the right to abortion against State Parties to CEDAW. All State Parties are obligated to submit reports to the Committee in order to ensure compliance and allow the Committee to give specific recommendations.<sup>52</sup> There is also an Optional Protocol to CEDAW, adopted in 1999, that allows the Committee to take on an adjudicatory role.<sup>53</sup> Countries that have ratified CEDAW must separately ratify the Optional Protocol, so Member States are not obligated to participate even if they are party to the convention.<sup>54</sup> The Optional Protocol allows individuals to report a country for violations of the convention, allowing the Committee to hear real-world examples of violations and order specific remedies.<sup>55</sup> The CEDAW Committee, through these mechanisms, has reinforced the idea that a right to abortion is a right under CEDAW.

The CEDAW Committee has, in reports, called on Nepal, India, Rwanda, and others to fully decriminalize abortion.<sup>56</sup> The reasoning they gave to all these countries to decriminalize abortions was their high maternal mortality rates.<sup>57</sup> The Committee historically saw that many countries have high maternal mortality rates due to illegal and unsafe abortions, increasing the importance of the problem.<sup>58</sup> Since CEDAW's recommendation, Nepal agreed to fully decriminalize abortion, but it still has not been implemented.<sup>59</sup> The Committee also

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51. *Id.*; see also Hall, *supra* note 33, at 96.

52. CEDAW, *supra* note 19, art. 18.

53. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Oct. 6, 1999, 2131 U.N.T.S. 83.

54. *Id.*

55. *Id.* art. 2.

56. Payal K. Shah & Onyema Afulukwe, *Towards a Gender-Transformative Approach to Abortion: Legislative Perspectives from South Asia and Sub-Saharan Africa*, in INTERNATIONAL WOMEN'S RIGHTS LAW AND GENDER EQUALITY: MAKING THE LAW WORK FOR WOMEN 54, 63 (Ramona Vijayarasa ed., 2021).

57. *Id.*

58. *Id.* at 62–63.

59. *Nepal Agrees to Decriminalize Abortion and Protect SRHR*, CTR. FOR



called on the United Kingdom to decriminalize and provide abortion in Northern Ireland.<sup>60</sup> Shortly after, Northern Ireland did indeed decriminalize abortion partially due to the report by the CEDAW Committee.<sup>61</sup> However, abortion still is not as accessible as the CEDAW Committee would presumably hope.<sup>62</sup>

The mechanisms of the convention are not perfect as they do not have much enforcement power despite being internationally binding. For example, the CEDAW Committee in *Tysiac v. Poland* called on Poland to fulfill its obligations in providing abortions under the treaty.<sup>63</sup> Poland, however, has yet to comply.<sup>64</sup> A landmark decision, *L.C. v. Peru*, stated that Peru had the obligation to guarantee therapeutic abortion.<sup>65</sup> In Peru, it is legal to get an abortion when a woman's life or general health is in danger.<sup>66</sup> But in reality, Peru was not enforcing the law, and the CEDAW Committee, through Optional Protocol, called on Peru to ensure these abortions were being provided.<sup>67</sup>

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REPROD. RTS. (Aug. 4, 2021), <https://reproductiverights.org/nepal-abortion-decriminalization-un-upr/#:~:text=Key%20Milestone%20in%20Advancing%20Reproductive%20Rights%20in%20Nepal&text=In%202018%2C%20prior%20to%20the,the%20health%20of%20the%20mother.>

60. Comm. on the Elimination of Discrimination against Women, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/OP.8/GBR/1 ¶ 85 (Mar. 6, 2018).

61. Claire Pierson et al., *After a CEDAW Optional Protocol Inquiry into Abortion Law: A Conversation with Activists for Change in Northern Ireland*, 24 INT'L FEMINIST J. OF POL. 313 (2022).

62. *Id.*

63. Fareda Banda, *The United Nations Working Group on the Issue of Discrimination against Women in Law and Practice*, in WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL, AND NATIONAL LAW 62, 89 (Anne Hellum & Henriette Sinding Aasen eds., 2013).

64. *Id.*

65. Ramona Vijayarasa, *Quantifying CEDAW: Concrete Tools for Enhancing Accountability for Women's Rights*, 34 HARV. HUM. RTS. J. 37, 60–61 (2021) (citing Comm. On the Elimination of Discrimination against Women, *Communication No. 22/2009, L. C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009 ¶ 2.5, n.3 (Oct. 17, 2011)).

66. Comm. On the Elimination of Discrimination against Women, *Communication No. 22/2009, L. C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009 ¶ 2.5, n.3 (Oct. 17, 2011).

67. *Id.* ¶ 9(b)(iv).

III. ANALYSIS: ON ABORTION RIGHTS, ACTIVISTS  
IN THE UNITED STATES SHOULD LEARN  
FROM THE CEDAW FRAMEWORK

A. RATIFICATION OF CEDAW IS UNLIKELY IN THE UNITED  
STATES, SO A DIFFERENT APPROACH TO USING CEDAW  
SHOULD BE EMPLOYED.

The United States is one of six countries that has not ratified CEDAW, among Iran and Somalia.<sup>68</sup> After President Carter signed CEDAW in 1980, it was sent for review and consent in the Senate five separate times, but it has never been put up for a vote.<sup>69</sup> Part of this is due to the high burden the government must meet in ratifying a treaty (a super-majority in the Senate plus a vote from the president), which explains why the United States has only ratified five human rights treaties.<sup>70</sup> Ratification of CEDAW has become a Democratic Party issue, with Republican opposition, and the Democrats have not held two-thirds of the Senate for decades.<sup>71</sup> This is also due to the fact that many Americans and politicians feel CEDAW is not necessary as they say that women already have equal rights in the United States, and protections would be a waste of time and resources.<sup>72</sup> This is completely inaccurate, however, because, just as an example, women in the United States still make 82 percent of what men earned as of 2022.<sup>73</sup> Additionally, women are still not afforded federal paid maternity leave.<sup>74</sup> This does not even account for the problems facing women of color at much greater rates than white women.<sup>75</sup>

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68. *Ratification of 18 International Human Rights Treaties*, U.N. Hum. Rts. Off. of the High Comm'r, <https://indicators.ohchr.org/> [hereinafter *UN International Human Rights Treaties Map*].

69. Lisa Baldez, *Why Hasn't the US Ratified the UN Women's Rights Convention?*, 2011 AM. POL. SCI. ASS'N 1 (2011).

70. *Id.* at 6–7; *UN International Human Rights Treaties Map*, *supra* note 68.

71. Baldez, *supra* note 69, at 8.

72. *See id.* at 16.

73. Carolina Aragão, *Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades*, PEW RSCH. CTR. (Mar. 1, 2023), <https://www.pewresearch.org/fact-tank/2023/03/01/gender-pay-gap-facts/>.

74. *Gender Inequality Facts & Figures*, SOC. JUST. RES. CTR., <https://socialjusticeresourcecenter.org/facts-and-figures/gender-inequality/> (last visited Apr. 14, 2023).

75. *See, e.g.*, Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RSCH. CTR. (July 1, 2016),

If the Senate could not ratify CEDAW in the 1990s, it is highly unlikely the increasingly contentious Congress of today will ratify it anytime soon. Therefore, the United States will feel the effects of CEDAW through domestic movements adopting the values and rights-based approach of CEDAW and the interpretations from its committee rather than its mere ratification.

B. THE CURRENT ABORTION RIGHTS FRAMEWORK IN THE  
UNITED STATES HAS BEEN PROVEN UNWORKABLE.

Abortion rights as they are framed in the United States are heavily based on *Roe v. Wade* because that is what was previously successful in the courts.<sup>76</sup> However, with *Dobbs* and the overruling of *Roe*, this is no longer a viable strategy. The right to privacy and the subsequent right to choose are not viable strategies for abortion rights, not just because courts are now rejecting it but also because it does not truly guarantee one's right to an abortion.<sup>77</sup>

*Roe v. Wade* based its decision on the right to privacy as found in multiple amendments of the Constitution.<sup>78</sup> This informed the abortion rights movement's focus on the right to privacy in the decision to choose what one does with one's body and family.<sup>79</sup>

The *Dobbs* court rejected the right to privacy as a way to constitutionalize abortion rights.<sup>80</sup> This is only one reason that the right to privacy should be rejected as a strategy to gain abortion rights. The right to privacy leaves the government with too much freedom to do nothing regarding abortion policy. It gives the government too much of a passive role instead of giving the people an active right to abortion that is guaranteed. The right to privacy offers no "foundation" for the government to provide any "assistance or protection."<sup>81</sup> While people can

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<https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>.

76. See Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 L. & HIST. REV. 281, 330 (2009) [hereinafter Ziegler, *Framing of a Right*].

77. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2245 (2022).

78. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

79. Ziegler, *Framing of a Right*, *supra* note 76, at 330.

80. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. at 2245.

81. MARY ZIEGLER, BEYOND ABORTION: ROE V. WADE AND THE BATTLE FOR

technically get a legal abortion with the right to privacy, it does not guarantee that people have access to one. The right to choose afforded by the right to privacy assumes that people always have a choice. Many people are not afforded access to abortions, even if it is legal, due to a lack of clinics or lack of federal funding for abortions if an individual has Medicaid.<sup>82</sup> This is because the right is only to privately make the choice, not to get the abortion.

Ultimately, for these reasons, the right to privacy is not workable because it is not enough to say that people can practice a right when most people do not have the resources to exercise it.

C. ABORTION RIGHTS ACTIVISTS IN THE UNITED STATES  
MUST UTILIZE A MIXED HUMAN RIGHTS-BASED AND  
POLICY-BASED FRAMEWORK AS INSPIRED BY CEDAW.

There are multiple takeaways that abortion rights activists can get from how the CEDAW committee has interpreted the treaty. One of which is the emphasis on positive rights over negative rights.<sup>83</sup> Abortion must be a right that is fulfilled by the government through direct action rather than a passive protection of the right. Even before *Dobbs*, abortion access was difficult for many.<sup>84</sup> If people did not have a clinic near them and could not afford to travel, they may as well have not had a right to an abortion. An active obligation put on the state would assure safe, affordable, and accessible abortions instead of leaving it up to private actors. CEDAW has made it clear that it is not enough to decriminalize abortion if there is no effort to give everyone access to safe abortions.<sup>85</sup>

CEDAW also focuses on a lack of abortion rights as gender-

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PRIVACY 18 (Harv. Univ. Press 2018).

82. Am. Coll. of Obstetricians and Gynecologists Comm. on Health Care for Underserved Women, *Opinion No. 815, Increasing Access to Abortion*, 136(6) AM. J. OF OBSTETRICS AND GYNECOLOGY, e107, e110–11 (2020).

83. Aasen, *supra* note 42, at 310–11. *See generally* Nicole Ratelle, *A Positive Right to Abortion: Rethinking Roe v. Wade in the Context of Medication Abortion*, 20 GEO. J. GENDER & L. 195 (2018).

84. Isaac Maddow-Zimet & Kathryn Kost, *Even Before Roe Was Overturned, Nearly One in 10 People Obtaining an Abortion Traveled Across State Lines for Care*, GUTTMACHER INST. (July 21, 2022), <https://www.guttmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across>.

85. Aasen, *supra* note 42, at 310–11.

based discrimination.<sup>86</sup> Focusing on gender, however, is an increasingly outdated tactic that both CEDAW and the United States should move away from, as the capacity for pregnancy does not necessarily mean one is a woman.

Abortion is often thought of as simply related to physical well-being. CEDAW has made clear that reproductive health includes mental and social well-being as well as physical well-being.<sup>87</sup> So much of the focus post-*Dobbs* has been on those who are forced to give birth despite physical complications, both with baby and mother, when much of the impact of not allowing someone an abortion is overserved with mental health or social and financial repercussions.<sup>88</sup> For example, the University of California, San Francisco found in a study that women who are denied an abortion are likely to have various lasting impacts outside of the physical repercussions of being pregnant.<sup>89</sup> The repercussions for women who are turned away from an abortion include being more likely to have anxiety and self-esteem issues,<sup>90</sup> to have income below the poverty line and to receive public assistance,<sup>91</sup> and to stay in contact with a violent partner.<sup>92</sup> If these statistics were more widely known, Americans may be more likely to see access to abortion as a problem affecting the whole of a woman's life, and thus affecting the whole of society.

A significant focus of the CEDAW committee is maternal mortality that comes from either making abortion illegal or by

86. *Gen. Recommendation No. 24*, *supra* note 35, ¶ 31(c).

87. Freeman, *supra* note 34, at 315.

88. See Mariana Lenharo, *Being Denied an Abortion Has Lasting Impacts on Health and Finances*, SCI. AM. (Dec. 22, 2021), <https://www.scientificamerican.com/article/being-denied-an-abortion-has-lasting-impacts-on-health-and-finances/>.

89. *The Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, <https://www.ansirh.org/research/ongoing/turnaway-study> (last visited Apr. 13, 2023).

90. See M. Antonia Biggs, et al., *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion*, 74 JAMA PSYCHIATRY 169 (2017).

91. Diana Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 112 AM. J. PUB. HEALTH 1290, 1292–93 (2022).

92. Univ. of Cal. S.F., *The Harms of Denying a Woman a Wanted Abortion: Findings from the Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, [https://www.ansirh.org/sites/default/files/publications/files/the\\_harms\\_of\\_denying\\_a\\_woman\\_a\\_wanted\\_abortion\\_4-16-2020.pdf](https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf) (last visited Apr. 13, 2023).

not assuring there are safe abortions available.<sup>93</sup> The CEDAW committee has also emphasized that this type of maternal mortality is a form of gender-based violence.<sup>94</sup> Women are dying and becoming gravely injured and legalization and decriminalization is the only way to stop it.

A focus on deaths due to unsafe or illegal abortions could even be seen as an alternative right to life. The right to life, as detailed in another United Nations convention, The International Covenant on Civil and Political Rights, calls for states to ensure citizens are not “arbitrarily deprived” of their life.<sup>95</sup> There has been scholarship applying this to maternal mortality more generally, including unsafe, illegal abortions.<sup>96</sup> These ideas, in tandem with the CEDAW Committee’s recommendations, can be used to find a right to life for women specifically seeking abortions and turning towards dangerous, illegal means.<sup>97</sup> It can be seen as an arbitrary deprivation of life because there is a simple way of avoiding it: legalizing and increasing access to abortion. The right to a fetus’ life is a strong part of America’s anti-choice movement and having an equivalent for the pro-choice movement to counter that argument could potentially be very effective in garnering support.

This right to life could be just what abortion activists need in the United States to compete with the fetal right to life from the anti-choice movement, instead of the less empathetic and less accessible right to privacy that is currently used. On the other hand, a policy-based argument focused on maternal mortality may also be less divisive or controversial than a rights-based argument, as it is rooted in more concrete science and statistics.<sup>98</sup>

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93. Freeman, *supra* note 34, at 316.

94. *Id.*

95. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1996, 999 U.N.T.S. 171.

96. See Luisa Cabal & Morgan Stoffregen, *Calling a Spade a Spade: Maternal Mortality as a Human Rights Violation* 16 HUM. RTS. BRIEF 2, 2–3 (2009).

97. *Id.*

98. See Ziegler, *Framing of a Right*, *supra* note 76, at 304.

D. OTHER COUNTRIES SHOW THAT CEDAW CAN BE USED  
DOMESTICALLY TO MAKE PROGRESS IN WOMEN'S AND  
ABORTION RIGHTS.

Nepal and Afghanistan show that states can use the language of CEDAW and the interpretations of the committee domestically to make changes, both in reproductive rights and generally. Alternatively, there are numerous countries that have used CEDAW domestically in a smaller-scale manner in order to enforce its provisions.

As mentioned previously, the Committee in a report called on Nepal to fully decriminalize abortion as the maternal mortality rate was so high.<sup>99</sup> The Nepal Supreme Court in 2009 with *Lakshmi v. Nepal Government Office of the Prime Minister and Council of Ministers* then used the same framework as the CEDAW Committee and ordered the prime minister to ensure the right to access to safe abortions.<sup>100</sup> Nepal not only listened to the committee, but they used the rights-based framework of CEDAW to give people not just legal abortions, but safe, accessible abortions.<sup>101</sup>

In Afghanistan, the country also took the framework from CEDAW and applied it domestically, this time without direct action from the CEDAW committee in a report. After Taliban rule, in 2004, the country worked to develop a new constitution, with women as contributors.<sup>102</sup> These women both were inspired by and used the principles of CEDAW and got legal equality between men and women in the Afghanistan constitution.<sup>103</sup> Though not about abortion or reproductive rights, these women show that CEDAW can make a difference without direct enforcement by the committee. However, unfortunately due to the Taliban's reclamation of the country in 2021, this progress has been completely wiped out.<sup>104</sup> Even so, this loss does not

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99. Shah & Afulukwe, *supra* note 56, at 58–60.

100. *Supreme Court of Nepal Decision: Lakshmi v. Government of Nepal*, CTR. FOR REPROD. RTS. (July 23, 2021), <https://reproductiverights.org/nepal-supreme-court-decision-lakshmi-v-government-of-nepal/> [hereinafter *Supreme Court of Nepal Decision*]; see also *Lakshmi v. Nepal Government Office of the Prime Minister and Council of Ministers* (2009) S.C. 2066/2/6/4 B.S. (Nepal).

101. *Supreme Court of Nepal Decision*, *supra* note 100.

102. Cheshmak Farhoumand-Sims, *CEDAW and Afghanistan*, 11 BRIDGEWATER ST. U. J. INT'L WOMEN'S STUD. 136, 142 (2009).

103. *Id.*

104. *In Focus: Women in Afghanistan One Year After the Taliban Takeover*, UN WOMEN (Aug. 15, 2022), <https://www.unwomen.org/en/news-stories/in->

downplay the significance of prior wins both for Afghanistan and internationally.

There are also similar instances in which CEDAW has been used in domestic courts on case-by-case bases to enforce the convention. For example, in Uganda, there was a criminal case against a man for sexual assault in which a rule regarding witness credibility was challenged.<sup>105</sup> The rule in question instructed juries to be more wary of the witness testimony of women because they are more likely to lie.<sup>106</sup> The High Court in Uganda used provisions in CEDAW to help strike down this rule as it plainly violates the convention.<sup>107</sup> Similarly, Fiji cited CEDAW in a case in which a man was charged with rape.<sup>108</sup> In determining that the man was guilty, the court takes note of CEDAW's call for gender equality in saying that women are not the property of men and that men should be aware of CEDAW and its implications on them.<sup>109</sup> It is, however, important to note that both Uganda and Fiji have ratified CEDAW and are parties to the convention.<sup>110</sup>

Activists in the United States can take the norms and jurisprudence of CEDAW and implement them through domestic means, just as the aforementioned countries did. It is possible to make change through CEDAW even without any sort of official enforcement that comes with ratification.

#### E. HOW THE UNITED STATES CAN USE THE PRINCIPLES OF CEDAW TO EXPAND ABORTION RIGHTS IN THE COUNTRY.

The United States should use these principles in advocating legislation that would legalize abortion in every state, instead of the focus on the courts that has made up the past few decades. Social movement could be a way to move forward and to move legislatures across the country and federally to legalize and protect abortion. Ideally, this would be at the federal level, but

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focus/2022/08/in-focus-women-in-afghanistan-one-year-after-the-taliban-takeover.

105. Uganda v. Peter Matovu (2002) U.G.H.C. (Uganda), <https://ulii.org/akn/ug/judgment/ughc/2002/72/eng@2002-10-19>.

106. *Id.*

107. *Id.*

108. State v. Bechu (1999) 3 F.J.M.C. (Fiji), <http://www.paclii.org/fj/cases/FJMC/1999/3.html>.

109. *Id.*

110. *UN International Human Rights Treaties Map*, *supra* note 68.



realistically, it would likely be state by state. Social movement based on the framework of CEDAW could ideally get more Americans on board to the idea of protecting abortion and to lobby for it with stronger human rights and practical policy-based arguments.

In using these ideals, social movements need not, and should not, mention CEDAW by name. Despite being at the forefront of creating human rights standards post-World War II, the United States has always been hostile to following international law, both generally and regarding human rights, for the same reason it has not ratified CEDAW: American exceptionalism.<sup>111</sup> This likely comes from a place of power in which the United States feels it is a moral leader in the world that does not need international law and the idea that the Constitution reigns supreme.<sup>112</sup> This is all to say that, with influence from the greater American political landscape, courts are incredibly hostile towards international law.<sup>113</sup> Therefore, social movements using CEDAW should, ideally, separate the ideals taken from the convention from the convention itself. American politics would likely be unsympathetic to a human rights treaty from the United Nations and would dismiss its ideals.<sup>114</sup> If pro-choice social movements, however, took the lessons from CEDAW mentioned above outside of its scope as a human rights treaty and conformed it to the ideals of American people, these principles would likely be more palatable and successful.

In looking at specific states in America, one can see that legal and protected abortion is not enough to fulfill a real right to abortion. For example, California has some of the strongest laws on the book for abortion rights in the United States. However, women in rural areas still have a hard time accessing

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111. See generally Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005).

112. *Id.* at 13–14.

113. See e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”) (quoting *Foster v. Florida*, 537 U.S. 990, n. (2002)).

114. See Marie Wilken, *U.S. Aversion to International Human Rights Treaties*, GLOB. JUST. CTR. (June 22, 2017), <https://www.globaljusticecenter.net/u-s-aversion-to-international-human-rights-treaties/>.

an abortion.<sup>115</sup> About forty percent of California counties, as of 2017, do not have access to a clinic offering abortions.<sup>116</sup> Additionally, in 2014, one-third of patients had to travel more than 25 miles to access an abortion.<sup>117</sup> California must not just make abortion legal, they must actively make it accessible. The state must ensure that abortions are provided at most clinics and hospitals, if only to have a clinic at least in every county, in order to increase accessibility in accordance with CEDAW.

Colorado also has protections for legalized abortion and has even elevated abortion rights to the level of a fundamental right in the state.<sup>118</sup> However, there are many physical and economic barriers to abortion. As of 2017, 80 percent of counties in Colorado do not have a clinic providing abortions.<sup>119</sup> In fact, as of 2017, there are only 32 clinics in the whole state providing abortion care.<sup>120</sup> As for economic barriers, private health insurers are not required to cover abortions.<sup>121</sup> Additionally, insurance for public employees and Medicaid do not cover abortion as it is illegal for public funds to go towards the practice.<sup>122</sup> Colorado must follow the principles of the CEDAW Committee and take an active role in assuring that people can get abortions when they need it. Otherwise, people may be just as in danger of maternal mortality as if it was illegal. The state also must treat it as any other necessary medical procedure and make sure it is affordable through insurance. If the federal government will not do it, states must take an active role to assure that abortion is not just legal, but also accessible as a right both in healthcare and personal autonomy.

Additionally, there are prior examples of international human rights law being used in American social movements that

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115. See generally Nicole E. Johns, et al., *Distance Traveled for Medicaid-Covered Abortion Care in California*, 17 BMC HEALTH SERVS. RSCH. (2017).

116. *State Facts About Abortion: California*, GUTTMACHER INST. (Jun. 2022), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-california>.

117. *Id.*

118. *After Roe Fell: Abortion Laws by State: Colorado*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/state/colorado/#:~:text=Conclusion,abortion%20as%20a%20fundamental%20right> (last visited Nov. 27, 2023).

119. *State Facts About Abortion: Colorado*, GUTTMACHER INST., <https://www.guttmacher.org/sites/default/files/factsheet/sfaa-co.pdf> (last visited Nov. 27, 2023).

120. *Id.*

121. *Abortion Access in Colorado*, ACLU COLO., [https://www.aclu-co.org/sites/default/files/field\\_documents/1311\\_kyr\\_repro\\_rights\\_v3\\_digital\\_1.pdf](https://www.aclu-co.org/sites/default/files/field_documents/1311_kyr_repro_rights_v3_digital_1.pdf) (last visited Nov. 27, 2023).

122. *Id.*

can be looked to for guidance. One of the founders of Black Lives Matter in the United States, Opal Tometi, has spoken of embracing international human rights law in the movement.<sup>123</sup> Tometi has emphasized that the international human rights framework, specifically the Convention on the Elimination of All Forms of Racial Discrimination, can help fill in gaps left by national civil rights law.<sup>124</sup> While it is unclear how this has exactly been implemented in the movement in practice, this shows that major activists in the United States can take inspiration from international human rights law. Pro-choice activists in the United States should take inspiration from the principles found in CEDAW, separate the ideas from the document itself, and implement these frameworks in the movement and in politics, ideally beginning in states where abortion is already more publicly accepted.

#### IV. CONCLUSION

The United States is in a tough position in a post-*Roe* world and pro-choice activists must get more creative in fighting for human rights with *Dobbs* in the background and without the Supreme Court to back them up. Despite a lack of ratification on the United States' part, CEDAW offers guidance on how we can move forward to regain the right to abortion. CEDAW's ideas and frameworks surrounding abortion can be separated from the document itself to ensure that activists do not push both American courts and the general public away by citing to international human rights law. A human rights-based lens with a focus on practical policy in preventing maternal mortality can offer well-balanced arguments that can stir up the majority of American people that believe abortion should be legal into fighting locally, statewide, and federally to make abortion legal, safe, affordable, and accessible in a way that is palatable to American culture.

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123. U.N. Hum. Rts. Off., “*Anti-blackness is global*”: An interview with Opal Tometi, *Black Lives Matter*, MEDIUM (May 23, 2017), <https://unhumanrights.medium.com/anti-blackness-is-global-an-interview-with-opal-tometi-black-lives-matter-307e485287e6>.

124. *Id.*