

HUMAN RIGHTS DEVOLUTION: INTEGRATING INTERNATIONAL LAW INTO STATE ABORTION GOVERNANCE

INTRODUCTION

After *Dobbs v. Jackson Women's Health Organization*,¹ states and cities passed an array of laws, constitutional amendments, and ordinances regulating abortion. Recent scholarship has questioned the *Dobbs* decision's implications under treaties and customary international law as well as analyzed the avenues for international human rights in domestic advocacy.² This Note argues that U.S. abortion restrictions violate the Convention Against Torture³ (CAT) under a developing understanding of cruel, inhuman, and degrading treatment (CIDT). Shifting the discussion from obligations to *opportunities* under human rights law, this Note proposes a two-part, international law-based strategy for reproductive rights activists. First, activists should capitalize on complaint mechanisms in international human rights bodies. Second, activists should campaign for the incorporation of international law principles of harm and gender discrimination into state constitutions and legislation.

The deterioration of U.S. abortion rights has been contested domestically. But domestic law exists in an international legal context: domestic actors incorporate, borrow, and interpret international law, and the international legal system, reciprocally, concerns itself with state practices and their legal obligations.⁴ The United States, though a signatory to CAT, has updated numerous reservations, understandings, and declarations (RUDs) to limit the treaty's power.⁵ For one, the federal government implements CAT "to the extent that it exercises legislative and

¹ 142 S. Ct. 2228 (2022).

² See generally Kelly Keglovits, Note, *A Way Forward After Dobbs: Human Rights Advocacy and Self-Managed Abortion in the United States*, 18 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 73, 88–101 (2022); Benjamin G. Davis, *Sanctimonious Barbarity: The Forced Pregnancy Alito Dobbs Opinion*, 33 IND. INT'L & COMPAR. L. REV. 423, 444–53 (2023); Sydney Chong Ju Padgett, Comment, *Abortion Rights as (Inter)national Human Rights: Dobbs and the Noncompliance of U.S. Abortion Policies Under International Human Rights Law*, 27 LEWIS & CLARK L. REV. 925, 961–68 (2023).

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 108 Stat. 382, 463, 1465 U.N.T.S. 85 [hereinafter CAT] (entered into force for the United States Nov. 20, 1994).

⁴ See JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 47 (9th ed. 2019).

⁵ See Eric Chung, Note, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L.J. 170, 189–90, 203, 206 (2016).

judicial jurisdiction over the matters covered.”⁶ But to talk about national law, in contrast to international law, “is to generalize,”⁷ as state and local governments have an important role to play in the interaction between domestic and international legal systems.

Professor Sally Engle Merry labels this dynamic process of influence as “vernacularization” of the international human rights norms to national jurisprudence.⁸ Regardless of treaty ratification, international law affects social discourse through the vernacularization of human rights norms, because affected rightsholders create new sociolegal meanings of “autonomy” and “equality” through rights language.⁹ Vernacularizing these norms within state and local spheres of government can be a strong tool in advocates’ arsenal.

Part I provides background on the relevant positive law and the process of vernacularization. Part II proffers the “top-down” approach to instrumentalizing international human rights law, while Part III enumerates the “bottom-up” approach of using state and local government as a forum for vernacularization. Together, these Parts describe existing international human rights standards on abortion as articulated through quasi adjudication of individual rights violations and present a comparative analysis of other countries in which activists bridged the local and international legal planes to expand abortion rights. Part IV summarizes takeaways for U.S. activists from these findings.

I. BACKGROUND

A. *What Is CAT?*

CAT is a human rights treaty adopted by the U.N. General Assembly in 1984.¹⁰ It codifies the right to be free from torture and CIDT, a right already enumerated in multiple founding U.N. documents, including the Universal Declaration of Human Rights¹¹ and the International Covenant on Civil and Political Rights¹² (ICCPR). CAT is one of the most widely adopted human rights treaties, with 174 States Parties,¹³

⁶ 9. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Status of Treaties, Depository*, UNITED NATIONS TREATY COLLECTION [hereinafter UNTC], https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en#EndDec [https://perma.cc/EGZ3-LBXG].

⁷ CRAWFORD, *supra* note 4, at 47.

⁸ Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, WORLD BANK LEGAL REV., 2006, at 185, 188.

⁹ Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States*, 9 GLOB. NETWORKS 441, 445–47 (2009).

¹⁰ CAT, *supra* note 3.

¹¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948).

¹² International Covenant on Civil and Political Rights, art. 7, *opened for signature* Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171 (entered into force for the United States Sept. 8, 1992).

¹³ UNTC, *supra* note 6.

and states have accepted its prohibition of torture and CIDT so widely that it is customary international law.¹⁴

The United States is a signatory to and has ratified CAT; so under international law, it has a legal obligation to fulfill the provisions of the treaty.¹⁵ The United States has accepted the inquiry procedure under CAT Article 20, authorizing the jurisdiction of the CAT Committee to investigate complaints of grave violations of any of the rights set forth in CAT.¹⁶ The CAT Committee is tasked with interpreting CAT's provisions and the nature of States Parties' obligations.¹⁷ The Committee is also empowered to carry out confidential investigations on the basis of reliable indications that there are systematic violations of CAT in a State Party.¹⁸ The Committee has the discretion, in exceptional circumstances, to find a reservation (a statement by a State Party that it will not comply with certain provisions) impermissibly incompatible with CAT's purpose, and subsequently consider complaints falling within the reservation.¹⁹

The United States has appended several RUDs to the treaty that severely limit its scope.²⁰ One indicates that several "provisions of the . . . Convention are not self-executing," requiring congressional legislation to implement its provisions into domestic law.²¹ But in 1998,

¹⁴ Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 99 (July 20).

¹⁵ *What the Treaty Bodies Do*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/what-treaty-bodies-do> [<https://perma.cc/3ZW8-UXJQ>]. The United States is also a State Party to the Convention on the Elimination of All Forms of Racial Discrimination (CERD). 2. *International Convention on the Elimination of All Forms of Racial Discrimination, Status of Treaties, Depository*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=en [<https://perma.cc/3ZFJ-MG98>]. The CERD Committee commented on *Dobbs* and its "profound disparate impact on the sexual and reproductive health and rights of racial and ethnic minorities, in particular those with low incomes." Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America*, ¶ 35, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

¹⁶ UNTC, *supra* note 6.

¹⁷ Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389, 390 (2011). CAT and U.S. RUDs distinguish between torture and CIDT as separate, but grave, human rights violations. See UNTC, *supra* note 6; CAT, *supra* note 3. The RUDs do not comment on CIDT outside of the scope of constitutional analysis by the Supreme Court and do not categorically preclude abortion restrictions from consideration under a CIDT framework.

¹⁸ CAT, *supra* note 3, art. 20.

¹⁹ See Alain Pellet & Daniel Müller, *Reservations to Human Rights Treaties: Not an Absolute Evil...*, in FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 521, 526–27 (Ulrich Fastenrath et al. eds., 2011) (discussing treaty interpretation practices).

²⁰ UNTC, *supra* note 6. The *jus cogens* nature of the right to be free from torture and CIDT arguably elevates the right above U.S. RUDs as a peremptory norm that binds all States regardless of ratification. Cf. Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97, 112–14 (2004).

²¹ UNTC, *supra* note 6.

Congress passed the Foreign Affairs Reform and Restructuring Act²² (FARRA), which was codified in domestic regulations implementing CAT Article 1.²³ While another RUD defined torture without the element of discrimination found in CAT Article 1,²⁴ the regulations explicitly include the impermissible purpose of torture committed “for any reason based on discrimination of any kind.”²⁵ Moreover, while another RUD declares that the United States’s understanding of its obligations “to prevent [CIDT]” is limited to the Supreme Court’s interpretation of “the Fifth, Eighth, . . . or Fourteenth Amendments,”²⁶ scholars have argued that abortion bans violate these Amendment rights.²⁷ This issue of abortion as CIDT remains undecided by the Court, leaving space for advocates to contextualize CAT’s torture and CIDT framework to specific state laws and regulations.

CAT’s mandate recognizes a “kind of pain and suffering” that is so severe, so offensive to dignity and physical integrity, that State actions directly — or even indirectly — causing those circumstances inflict torture and CIDT.²⁸ Under CAT Article 1, torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain or suffering is inflicted . . . with the consent or acquiescence of a public official.”²⁹ CAT Article 1 distinguishes torture from “pain or suffering arising only from, inherent in or incidental to lawful sanctions” and critically elevates a human rights violation to the level of torture or CIDT when the violation is perpetrated for an impermissible purpose, such as discrimination.³⁰ CAT Articles 2 and 16 further oblige States to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under

²² Pub. L. No. 105-277, Div. G, 112 Stat. 2681-761 (1998) (codified as amended in scattered sections of 8 and 22 U.S.C.).

²³ 8 C.F.R. § 208.18(a) (1999).

²⁴ UNTC, *supra* note 6.

²⁵ 8 C.F.R. § 208.18(a)(1); *see also* David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQ. 343, 363–66 (2011) (surveying domestic statutes and regulations adopting discrimination as an impermissible purpose for ill-treatment).

²⁶ UNTC, *supra* note 6.

²⁷ *See, e.g.*, Elizabeth E. Joh, *Fourth Amendment Rights as Abortion Rights*, N.Y.U. L. REV. F. (Oct. 24, 2022), <https://www.nyulawreview.org/forum/2022/10/fourth-amendment-rights-as-abortion-rights> [<https://perma.cc/56VH-BTV8>]; Madalyn K. Wasilczuk, *Fifth Amendment Rights as Abortion Rights*, HARV. L. REV. BLOG (Apr. 11, 2023), <https://harvardlawreview.org/blog/2023/04/fifth-amendment-rights-as-abortion-rights> [<https://perma.cc/B6UL-7RHJ>]; Lauren Kuhlik, Note, *Pregnancy Behind Bars: The Constitutional Argument for Reproductive Healthcare Access in Prison*, 52 HARV. C.R.-C.L. L. REV. 501, 533 (2017).

²⁸ Alyson Zureick, Note, *(En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment*, 38 FORDHAM INT’L L.J. 99, 101 (2015); *see id.* at 107–11.

²⁹ CAT, *supra* note 3, art. 1.

³⁰ *Id.*

its jurisdiction”³¹ and to do the same for “acts of [CIDT] or punishment which do not amount to torture as defined in article 1.”³²

Feminist scholars have succeeded in persuading international human rights bodies to acknowledge that torture and CIDT can occur in “everyday settings — from public and private healthcare facilities to the home.”³³ One need only scan daily headlines describing lived experiences under abortion restrictions to recognize how this pain and suffering sits within CIDT.³⁴ Indeed, the CAT Committee has applied CAT’s prohibitions against ill-treatment to reproductive healthcare restrictions, analyzing three types: complete abortion bans, exception-based regimes, and restrictions on legal abortion.³⁵ CAT’s provisions against torture apply because abortion restrictions inevitably and detrimentally impact the health and wellbeing of people seeking reproductive healthcare.³⁶

Abortion restrictions systematically discriminate against pregnant persons.³⁷ The UN Special Rapporteur on Torture has concluded that gender-based violence against women “is inherently discriminatory” and therefore CAT Article 1’s “purpose element is always fulfilled” in such instances.³⁸ Due to social “sex and gender bias”³⁹ that undergirds the expectation that women will bear the burdens of pregnancy, childbirth, and childcare to the detriment of their wellbeing, U.S. abortion restrictions, and their impermissible impacts on women’s health, constitute ill-treatment, discrimination, and in conjunction, a violation of the right to be free from torture or CIDT.

³¹ *Id.* art. 2.

³² *Id.* art. 16.

³³ Zureick, *supra* note 28, at 101; *see also* Felice D. Gaer, *Rape as a Form of Torture: The Experience of the Committee Against Torture*, 15 CUNY L. REV. 293, 295–303 (2012).

³⁴ *See, e.g.*, Elizabeth Cohen, *One Year After Dobbs Decision, Families Describe Terror, Trauma and Putting “Pain to Purpose,”* CNN (June 22, 2023, 3:15 PM), <https://www.cnn.com/2023/06/22/health/abortion-dobbs-one-year-later-families/index.html> [<https://perma.cc/ED35-ZYRM>]; Laura Kusisto, *What a Year in Post-Roe America Reveals About Abortion*, WALL ST. J. (June 23, 2023, 5:30 AM), <https://www.wsj.com/articles/abortion-dobbs-year-after-roe-support-politics-d1ef5a5> [<https://perma.cc/3CKZ-T3XY>]; *New Abortion Laws Changed Their Lives. 8 Very Personal Stories*, NPR (June 23, 2023, 5:00 AM), <https://www.npr.org/sections/health-shots/2023/06/23/1183878942/abortion-bans-personal-stories-dobbs-anniversary> [<https://perma.cc/V62V-BC7A>].

³⁵ *See infra* section II.A, pp. 2349–2354.

³⁶ *E.g.*, Joanna N. Erdman & Rebecca J. Cook, *Decriminalization of Abortion — A Human Rights Imperative*, 62 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY 11, 13 (2020).

³⁷ *See* Rebecca J. Cook & Susannah Howard, *Accommodating Women’s Differences Under the Women’s Anti-discrimination Convention*, 56 EMORY L.J. 1039, 1048 (2007). This Note’s discussion of the impact of abortion bans on women is not intended to exclude their impact on pregnant persons of other genders but rather reflects existing international legal frameworks.

³⁸ Manfred Nowak (Special Rapporteur), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 68, U.N. Doc. A/HRC/17/13 (Jan. 15, 2008).

³⁹ Juan E. Méndez (Special Rapporteur), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 37, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

B. *What Is Vernacularization?*

The breadth of abortion restrictions in the United States likely violates legal obligations under CAT. This raises a further question about the role of international legal obligations in the context of domestic law, a role that has historically been contested in the federal courts.⁴⁰ The Court has narrowed the role of international legal obligations, holding that treaties are simultaneously international commitments giving rise to State obligations and yet, in some instances, nonbinding upon U.S. courts unless specifically enacted into law by Congress.⁴¹ However, ending the conversation there ignores the multivalent realities of how a variety of U.S. actors instrumentalize international human rights law through the process of vernacularization. In describing this local adoption of global ideas, Professor Sally Engle Merry highlights “[t]he people in the middle . . . — those who translate the discourses and practices from the arena of international law and legal institutions to specific situations of suffering and violation.”⁴² Here, the relevant “middle children” between reproductive justice in America and international law are state and local actors.

In fact, the normative underpinnings of federalism spotlight states as sites of integration of human rights standards on abortion into the U.S. legal system.⁴³ The oft-used justification for decentralized governance is the comparative advantage that states have over the federal government in regulating areas of life like social welfare and health systems⁴⁴: the exact concerns and resources that abortion regulations implicate.⁴⁵ State governments are in an apt position to integrate international standards into their own constitutional and statutory articulations of the rights to which their citizens are entitled.

State and local institutions are insulated from the pressures on their federal counterparts. The federal courts are often limited, if not barred, from directly incorporating international human rights jurisprudence due to separation of powers and foreign affairs concerns.⁴⁶ In favorable political contexts, states can directly incorporate human rights language into legislation or support use of human rights law in state jurisprudence. In less favorable contexts, advocates can push state agencies to

⁴⁰ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731–38 (2004).

⁴¹ See *Medellín v. Texas*, 552 U.S. 491, 534 (2008).

⁴² Merry, *supra* note 8, at 188.

⁴³ See Kathryn Kisska-Schulze et al., *Brute Force (Anti) Federalism*, 60 AM. BUS. L.J. 481, 483 (2023) (discussing how federalism’s dynamics particularly apply to antiabortion advocacy).

⁴⁴ Cf. Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 362, 371–72 (2006) (highlighting these areas of regulation as within the purview of states to argue state institutions should engage with international law on these topics).

⁴⁵ See, e.g., Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, U. PA. J. CONST. L. 1325, 1328 (2010).

⁴⁶ See, e.g., David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 96–97 (2013).

take human rights into account in policymaking, such as in promulgating right-to-health-focused interpretations of abortions under legal exceptions.⁴⁷ Pro-choice municipalities in conservative states can further instrumentalize “‘local option’ laws” and home rule to promulgate regulatory and policy protections for reproductive healthcare.⁴⁸

Thus, the avenues available for abortion rights activists to address state abortion restrictions through the international legal system form a sort of horseshoe: First, activists should continue to put top-down pressure on U.S. political institutions to comply with CAT’s complaint and inquiry procedures.⁴⁹ Second, advocates should perform “human rights devolution,” taking advantage of states as sites for progressive experimentation, able to reflect citizens’ increasingly positive social attitudes on abortion.⁵⁰

In practice, human rights devolution requires shifting resources and priorities away from fighting for constitutional or statutory abortion rights. Instead, advocates should focus on the opportunities presented by state and municipal elections and adjudication to reshape state legislation, constitutional frameworks, and jurisprudence with human rights law.⁵¹ In so doing, activists can vernacularize the standards promulgated by international bodies to more closely match the norms and priorities of their local communities, conducting human rights advocacy from the bottom-up.⁵²

II. “TOP-DOWN” APPROACH

The CAT Committee hears complaints and conducts inquiries into potentially systematic CAT violations, brought on behalf of individuals or groups claiming that their government violated their rights. Third parties may also submit materials in response to the Committee’s

⁴⁷ E.g., Johanna B. Fine et al., *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, 19 HEALTH & HUM. RTS. J. 69, 71 (2017).

⁴⁸ Kaitlin Ainsworth Caruso, *Abortion Localism and Preemption in a Post-Roe Era*, 27 LEWIS & CLARK L. REV. 585, 623 (2023).

⁴⁹ Cf. Risa E. Kaufman & Katy Mayall, *One Year Later: Dobbs v. Jackson Women’s Health Organization in Global Context*, AM. BAR ASS’N (July 26, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-end-of-the-rule-of-law/one-year-later-dobbs-in-global-context [<https://perma.cc/2TQN-VRVR>] (“The *Dobbs* decision and the resulting proliferation of abortion bans in the United States are counter to . . . [various] treaties ratified by the United States.”).

⁵⁰ *Where Do Americans Stand on Abortion?*, GALLUP (July 7, 2023), <https://news.gallup.com/poll/321143/americans-stand-abortion.aspx> [<https://perma.cc/3TBN-2DEM>].

⁵¹ Cf. Aaron Tang, *Lessons from Lawrence: How “History” Gave Us Dobbs — And How History Can Help Overrule It*, 133 YALE L.J.F. 65, 69 (2023) (prodding advocates to examine a broad array of constitutional arguments in support of abortion that incorporate evolving societal views).

⁵² Cf. Rebecca J. Cook, *International Protection of Women’s Reproductive Rights*, 24 N.Y.U. J. INT’L L. & POL. 645, 661–62 (1992) (surveying practice of international legal mechanisms to permit and encourage pluralistic and dynamic interpretation of human rights treaties by domestic actors).

request to highlight issues relevant to the rights claims.⁵³ While the CAT Committee has yet to directly address an individual complaint regarding U.S. state abortion restrictions, its findings with regard to other countries' laws can inform potential claims U.S. advocates might bring before the Committee.

A. *Abortion Restrictions as Torture and CIDT*

1. *Complete Abortion Bans.* — This subsection outlines the CAT Committee's findings with respect to abortion bans in El Salvador, Paraguay, and Nicaragua. Parallels with abortion bans in various U.S. states show that these state bans constitute CIDT against pregnant persons.

In its universal periodic review (UPR) of El Salvador, the CAT Committee addressed the State's ban on "all forms of recourse to voluntary interruption of pregnancy, including in cases of rape or incest," finding that it "resulted in serious harm to women, including death," and this harm implicated State obligations under CAT Articles 2 and 16 to prevent CIDT.⁵⁴ In other words, El Salvador's abortion ban rose to the level of CIDT under CAT. The ban "resulted in serious harm to women, including death," and this harm implicated State obligations under CAT Articles 2 and 16 to prevent CIDT.⁵⁵

The CAT Committee analyzed a similar case involving Paraguay's abortion ban, which "applie[d] even to cases of sexual violence, incest or when the foetus is not viable, with the sole exception of cases where the foetus dies as an indirect result of an intervention that is necessary to avert a serious threat to the life of the mother."⁵⁶ Under a section entitled "Violence against women,"⁵⁷ the CAT Committee concluded that such a ban, which contains just one nominal exception for the life of the pregnant person, causes women to be "constantly reminded of the violation committed against them," resulting in "serious traumatic stress and . . . a risk of long-lasting psychological problems."⁵⁸ The jeopardization of pregnant persons' physical and mental health "could constitute cruel and inhuman treatment."⁵⁹

The CAT Committee made nearly identical findings in Nicaragua's UPR, under a section labeled "Violence against women."⁶⁰ Prohibiting

⁵³ See Comm. Against Torture, *Guidelines on Third-Party Submissions Under Article 22 of the Convention*, ¶ 2, U.N. Doc. CAT/C/86 (July 21, 2023).

⁵⁴ See Comm. Against Torture, *Concluding Observations of the Committee Against Torture: El Salvador*, ¶ 23, U.N. Doc. CAT/C/SLV/CO/2 (Dec. 9, 2009) [hereinafter CAT El Salvador Report].

⁵⁵ *Id.*

⁵⁶ See Comm. Against Torture, *Concluding Observations of the Committee Against Torture: Paraguay*, ¶ 22, U.N. Doc. CAT/C/PRY/CO/4-6 (Dec. 14, 2011) [hereinafter CAT Paraguay Report].

⁵⁷ *Id.* at 8.

⁵⁸ *Id.* ¶ 22.

⁵⁹ *Id.*

⁶⁰ Comm. Against Torture, *Concluding Observations of the Committee Against Torture: Nicaragua*, at 4, U.N. Doc. CAT/C/NIC/CO/1 (June 10, 2009) [hereinafter CAT Nicaragua Report].

termination of “pregnancies that in many cases are the direct result of crimes of gender violence”⁶¹ violates CAT Article 2. Nicaragua’s factual circumstances are especially applicable to the U.S. context: Nicaragua repealed a “law authorizing therapeutic abortions” and subsequently implemented an abortion ban, which coincided with “several documented cases in which the death of a pregnant woman has been associated with the lack of timely medical intervention to save her life.”⁶²

The CAT Committee’s findings in these three cases apply to the “near-total” abortion bans in twelve different U.S. states, “with very limited exceptions.”⁶³ While Congress has not enacted legislation to enforce Articles 2 and 16, the Committee should review the United States’s RUD requiring adoption for incompatibility with CAT. Twelve statewide abortion bans impacting millions of persons likely constitute the requisite “exceptional circumstances”⁶⁴ given the risk of widespread CIDT. Critically, Article 16 includes “acts . . . committed by or at the instigation of or with the consent or *acquiescence* of a public official or other person acting in an official capacity.”⁶⁵ The U.S. government has failed to pass federal legislation safeguarding the right to abortion, effectively acquiescing to the proliferation of state abortion bans and implicating Article 16’s imperative to take affirmative action.⁶⁶

These bans likely violate U.S. obligations under CAT to refrain from perpetrating and also to prevent torture and CIDT of individuals because they prevent pregnant persons from accessing healthcare critical for their physical and mental health, incentivize them to self-manage their abortions clandestinely under threat of prosecution, or travel long distances to states where legal abortions are available.⁶⁷ Data shows direct correlation between maternal mortality from unsafe abortions and

⁶¹ *Id.* ¶ 16.

⁶² *Id.* Compare *id.*, with Oriana González, *Report: Mothers in States with Abortion Bans Nearly 3 Times More Likely to Die*, AXIOS (Jan. 19, 2023), <https://www.axios.com/2023/01/19/mothers-anti-abortion-bans-states-die> [<https://perma.cc/M46L-8NLL>].

⁶³ Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), <https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-to-do-so-roundup> [<https://perma.cc/D5AD-C4GY>].

⁶⁴ *Individual Communications*, OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/treaty-bodies/individual-communications> [<https://perma.cc/Q4JV-NHJM>].

⁶⁵ CAT, *supra* note 3, art. 16 (emphasis added).

⁶⁶ The lack of CIDT jurisprudence from the Court and the lack of congressional legislation explicitly criminalizing CIDT could substantiate such claims of State acquiescence. *Cf.* Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 126–29 (2011) (making an analogous argument for Bush-era torture). Other international bodies have recently addressed the issue of finding state acquiescence when there is a lack of legislation incorporating treaties or complying with treaty obligations. *See generally* Comm. on Enforced Disappearances, *Statement on Non-state Actors in the Context of the International Convention for the Protection of All Persons from Enforced Disappearances*, U.N. Doc. CED/C/10 (May 2, 2023).

⁶⁷ *See* CAT El Salvador Report, *supra* note 54, ¶ 23.

clandestinity borne from laws prohibiting abortion.⁶⁸ CAT obligates States Parties to prevent the imposition of severe physical and mental suffering on women.⁶⁹ The CAT Committee has interpreted this obligation to require that, if States decline to legalize all abortion, States *at least* ensure there are legal exceptions to abortion restrictions where one's health or life is implicated, where the pregnancy is a result of sexual violence, or where the fetus is nonviable.⁷⁰ States should also prevent "acts that put the health of women and girls at grave risk, by providing the required medical treatment, by strengthening family planning programmes and by offering better access to information and reproductive health services, including for adolescents."⁷¹

While the CAT Committee has not yet heard a complaint specifically establishing acquiescence of a federal government to subnational legislation constituting torture or CIDT,⁷² the Ninth Circuit has acknowledged the role of government acquiescence in torture, in a case concluding that the Jamaican government's prohibition of homosexual activity served as direct endorsement for ill-treatment by non-state actors.⁷³ Further, the CAT Committee has clarified that Article 2 requires heightened "[p]rotection for individuals and groups made vulnerable by discrimination or marginalization."⁷⁴ Women and girls are one such group "subject to or at risk of torture or ill-treatment" in contexts such as "medical treatment, particularly involving reproductive decisions."⁷⁵ Thus, human rights devolution can mitigate this legal uncertainty⁷⁶ by addressing the rights violations at the local level.

2. *Exception-Based Regimes.* — The Special Rapporteur has also found that certain regulatory schemes can contravene States' obligations under CAT.⁷⁷ This section analyzes cases from Ireland and Poland to argue that exception-based regimes create so much ambiguity about what types of abortion are criminalized that providers systematically

⁶⁸ Su Mon Latt et al., *Abortion Laws Reform May Reduce Maternal Mortality: An Ecological Study in 162 Countries*, BMC WOMEN'S HEALTH, Jan. 5, 2019, at 1, 1.

⁶⁹ CAT, *supra* note 3, art. 1.

⁷⁰ See CAT Paraguay Report, *supra* note 56, ¶ 22; CAT Nicaragua Report, *supra* note 60, ¶ 16. Fetal anomalies often contribute to maternal morbidity. See Tetsuya Kawakita et al., *Adverse Maternal Outcomes Associated with Major Fetal Malformations After Singleton Live Birth*, AM. J. OBSTETRICS & GYNECOLOGY, Oct. 2023, at 1, 8.

⁷¹ CAT El Salvador Report, *supra* note 54, ¶ 23.

⁷² For an analogous argument that the lack of gun control laws violates the United States's positive obligation to prevent the suffering of victims of school shootings, see Leila Nadya Sadat, *Torture in Our Schools?*, 135 HARV. L. REV. F. 512, 513–14 (2022).

⁷³ *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008).

⁷⁴ Comm. Against Torture, *General Comment No. 2 on the Implementation of Article 2 by States Parties*, at 6, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

⁷⁵ *Id.* ¶ 22.

⁷⁶ See Alice Edwards, *The "Feminizing" of Torture Under International Human Rights Law*, 19 LEIDEN J. INT'L L. 349, 374–75 (2006).

⁷⁷ See Fine et al., *supra* note 47, at 72.

deny healthcare except in extreme circumstances, a de facto complete abortion ban.

In Ireland, before the 2018 Health Act⁷⁸ legalized abortion,⁷⁹ national legislation nominally established health and life exceptions to the State's abortion ban, but contained no guidance for physicians on what circumstances met those exceptions.⁸⁰ Further, the CAT Committee highlighted the European Court of Human Rights's (ECtHR) concern regarding "the absence of an effective and accessible domestic procedure in [Ireland] for establishing whether some pregnancies pose a real and substantial medical risk to the life of the mother."⁸¹ This led to "uncertainty for women and their medical doctors, who are also at risk of criminal investigation or punishment if their advice or treatment is deemed illegal."⁸² The CAT Committee found that multiple factors jeopardized Ireland's CAT obligations: "the absence of a legal framework through which differences of opinion could be resolved," the uncertainty for doctors regarding their criminal liability, and the inadequate service provision of *legal* abortions.⁸³ Ireland had "existing case law allowing for abortion" but lacked legislation to standardize rights guaranteed under CAT, and this absence "[le]d to serious consequences in individual cases, especially affecting minors, migrant women, and women living in poverty."⁸⁴

Similarly, in Poland, the CAT Committee noted the lack of legal guidelines for regulating physicians' conscientious objection to abortion provision.⁸⁵ This enabled a de facto abortion ban where physicians could deny access to legal abortion services by simply asserting that the procedure violated their beliefs.⁸⁶ Such an oversight systematically incentivized women to seek "clandestine" and "often unsafe abortions with all the health risks they entail," because of the widespread lack of access.⁸⁷

Given these examples, states that provide health exceptions to their abortion bans may violate the United States's obligation to prevent CIDT through a lack of clarity. Several states use the language (or very

⁷⁸ Health (Regulation of Termination of Pregnancy) Act 2018 (Act No. 31).

⁷⁹ *Id.* §§ 9–12.

⁸⁰ See Protection of Life During Pregnancy Act 2013 (Act No. 35) §§ 7–9.

⁸¹ Comm. Against Torture, *Concluding Observations of the Committee Against Torture: Ireland*, ¶ 26, U.N. Doc. CAT/C/IRL/CO/1 (June 17, 2011) [hereinafter CAT Ireland Report] (summarizing A, B, & C v. Ireland, App. No. 25579/05, (Dec. 16, 2010), <https://hudoc.echr.coe.int/eng?i=001-102332> [<https://perma.cc/9ZG4-V45S>]).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Comm. Against Torture, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Poland*, ¶ 23, U.N. Doc. CAT/C/POL/CO/5-6 (Dec. 23, 2013) [hereinafter CAT Poland Report].

⁸⁶ See also Resolution on the First Anniversary of the De Facto Abortion Ban in Poland, EUR. PARL. DOC. PV 6.13 § R (2021).

⁸⁷ *Id.*

similar variations of) “serious risk of substantial and irreversible impairment of a major bodily function”⁸⁸ or “life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that . . . [poses] a serious risk of substantial impairment of a major bodily function”⁸⁹ to draw bounds for legal abortions. But these provisions fail to use specific medical definitions of the conditions that would meet those requirements, leaving it up to physicians to use their best judgment as to what legally constitutes a “major bodily function” or a “substantial impairment.”⁹⁰ In reality, this chills access to reproductive healthcare, as physicians are incentivized to deny treatment until a person’s condition deteriorates to such an extreme degree that the provision is clearly met.⁹¹ Such inaction compromises the health of the pregnant person, thus jeopardizing compliance with CAT.

Importantly, the CAT Committee interrogates actual abortion access and provision, recommending States “clarify the scope of legal abortion through statutory law and provide for adequate procedures to challenge differing medical opinions as well as adequate services for carrying out abortions.”⁹² Citing WHO guidance on safe abortion, the CAT Committee has underscored that “the exercise of conscientious objection [should] not prevent individuals from accessing services to which they are legally entitled” and that States should retain “a legal and/or policy framework that enables women to access abortion where . . . permitted under the law.”⁹³

3. *Third-Party Authorization of Legal Abortion.* — Third-party authorization laws require that another actor besides the pregnant person and their physician approve a petition or grant consent for a legal abortion.⁹⁴ The CAT Committee’s commentary on these types of laws has highlighted how the personal objections of judicial actors can obstruct abortion access, leading pregnant people to seek unsafe abortions,⁹⁵ creating effects similar to those resulting from exception-based restrictions.

For example, Bolivia criminalized abortion with exceptions that required rape survivors seeking abortions to “obtain authorization from a

⁸⁸ ARIZ. REV. STAT. ANN. § 36-2301.01(C)(2) (2024); *see also* FLA. STAT. § 390.0111(1)(a) (West 2023); OHIO REV. CODE ANN. § 2919.20(H) (West 2023); IND. CODE § 16-18-2-327.9 (West 2023).

⁸⁹ TEX. HEALTH & SAFETY CODE ANN. § 171.002(3) (West 2023).

⁹⁰ *See* Mabel Felix et al., *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF (May 18, 2023), <https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortion-bans-implications-for-the-provision-of-abortion-services> [https://perma.cc/Q4Y7-Z8HN].

⁹¹ *See, e.g.*, Plaintiffs-Appellees’ Response Brief at 1, *Texas v. Zurawski*, No. 23-0629 (Tex. Oct. 16, 2023) (describing case of patient whose condition deteriorated to point of septic shock).

⁹² CAT Ireland Report, *supra* note 81, ¶ 26.

⁹³ CAT Poland Report, *supra* note 85, ¶ 23.

⁹⁴ *See* WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 68 (2d ed. 2012).

⁹⁵ *E.g.*, Comm. Against Torture, *Concluding Observations on the Second Periodic Report of the Plurinational State of Bolivia as Approved by the Committee at Its Fiftieth Session*, ¶ 23, U.N. Doc. CAT/C/BOL/CO/2 (June 14, 2013).

judge,” and the CAT Committee found that, in denying many of these abortions, judges often used their “right to conscientious objection” to justify withholding authorization.⁹⁶ This widespread use of conscientious objection, enabled by the law, “constitute[d] an insurmountable obstacle” to legal abortion in many cases, therefore forcing women “to undergo illegal abortions.”⁹⁷ The Committee affirmed states “should do away with any unnecessary obstacle” to access to safe abortions.⁹⁸

In the United States, four states impose additional requirements, including mandatory waiting periods and counseling, pre-abortion ultrasounds, restrictions on remote abortion care, and requiring parental or judicial consent to minors’ abortions.⁹⁹ The United States’s acquiescence in the promulgation of these highly restrictive laws likely violates its treaty obligations.

B. Abortion Restrictions as Gender Discrimination

The Convention on the Elimination of All Forms of Discrimination Against Women¹⁰⁰ (CEDAW), signed but not ratified by the United States,¹⁰¹ has promulgated legal standards on issues like abortion that neither explicitly bind nor provide legal avenues for individuals.¹⁰² However, CEDAW’s Articles 1 and 12 provide useful insights to embed affirmative nondiscrimination standards in state or local abortion rights legislation. Jurisprudence from the CEDAW Committee underscores the centrality of gender-based discrimination and inequality to abortion restrictions, harmonizing with the CAT Committee.

CEDAW Article 1 defines “discrimination against women” by its effects on the “enjoyment or exercise by women” of human rights, and Article 12 imposes an obligation to “eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See NEB. REV. STAT. §§ 28-327(1)–327(4), 28-335, 71-6902 (2024); 28 PA. CODE § 29.37(b) (2024); 18 PA. CONS. STAT. §§ 3205(a)(1)–(2), 3206(a), (c) (2024); N.C. GEN. STAT. ANN. § 90-21.7 (West 2023); GA. CODE ANN. §§ 31-9A-3, 15-11-682, 15-11-684(c) (2024).

¹⁰⁰ Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁰¹ 8 *Convention on the Elimination of All Forms of Discrimination Against Women, Status of Treaties, Depository*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en [https://perma.cc/2D2R-T8X7].

¹⁰² See 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, 105 (2011) (using lack of U.S. CEDAW ratification as an example of United States’s nonenforcement of treaty rights).

related to family planning.”¹⁰³ In *L.C. v. Peru*,¹⁰⁴ where a girl was denied a legal abortion due to the unclear parameters of the Peruvian ban’s exceptions, the CEDAW Committee found that “exclusions and restrictions in access to health services [were] based on a gender stereotype that understands the exercise of a woman’s reproductive capacity as a duty rather than a right,” thereby perpetuating legal and social discrimination on the basis of the patient’s identity as a woman.¹⁰⁵ Therefore, these exceptions still violated Articles 1 and 12.

In *Alyne da Silva Pimentel Teixeira v. Brazil*,¹⁰⁶ where a woman died from lack of adequate pregnancy care, the Committee found that “[t]he lack of appropriate maternal health services . . . clearly fail[ed] to meet the specific, distinctive health needs and interests of women.”¹⁰⁷ The Committee also noted that inadequate service provision of legal abortion, specifically to protect the pregnant person’s life and wellbeing, violates CEDAW’s provisions on equality and nondiscrimination because of its differential impact on the rights of women.¹⁰⁸ The Committee continued on to highlight that women also face intersectional discrimination under laws and policies that restrict access to reproductive healthcare, including along the axes of race and socioeconomic status, and that “economic and social disparities”¹⁰⁹ can exacerbate such discrimination.

Thus, abortion restrictions compound inequalities within State provision of resources and public health governance, and such restrictions violate the nondiscrimination obligations of States by erecting barriers to a sui generis, gender-specific form of healthcare.¹¹⁰ While not imposing treaty obligations on the United States,¹¹¹ CEDAW standards are ripe for vernacularization by advocates into state and local legal frameworks regulating social welfare and public health through reproductive healthcare.

III. “BOTTOM UP” APPROACH

Advocates internationalizing the U.S. abortion movement should take part in human rights devolution, “refashion[ing] global rights agendas for local contexts and refram[ing] local grievances in terms of global

¹⁰³ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 100, arts. 1, 12.

¹⁰⁴ Comm. on the Elimination of Discrimination Against Women, Commc’n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (Nov. 4, 2011).

¹⁰⁵ *See id.* ¶¶ 2.5, 7.7.

¹⁰⁶ Comm. on the Elimination of Discrimination Against Women, Commc’n No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (Aug. 10, 2011).

¹⁰⁷ *Id.* ¶¶ 3.4, 7.6.

¹⁰⁸ *Id.* ¶ 7.6.

¹⁰⁹ *Id.* ¶ 7.7.

¹¹⁰ *See, e.g.,* Simone Cusack & Rebecca J. Cook, *Stereotyping Women in the Health Sector: Lessons from CEDAW*, 16 WASH. & LEE J. C.R. & SOC. JUST. 47, 49 (2009).

¹¹¹ *See* Benshoof, *supra* note 102, at 105.

human-rights principles and activities.”¹¹² Thankfully, incorporation of international law through the states has a longstanding history and practice. State and territorial constitutional drafting and interpretation has been influenced by international legal instruments like the Universal Declaration of Human Rights.¹¹³ Several state supreme courts have relied upon human rights treaties as persuasive authorities for their own state constitutional analysis.¹¹⁴ More recently, “human rights cities” have coalesced as local initiatives to implement treaties on a municipal level.¹¹⁵

Imbuing state and local governance with human rights language is not without cost or risk of co-optation by those countermobilizing against abortion.¹¹⁶ Indeed, vernacularization is “both powerful and vulnerable,” in pulling from international human rights institutions with morally and legally persuasive authority while risking hostile State actors deforming human rights standards or local resistance to human rights as a political project.¹¹⁷

However, several abortion rights movements have navigated these vagaries and succeeded in advancing rights through international law and vernacularization in similarly situated countries and legal contexts. This Part examines these movements to draw out lessons for internationalizing advocacy and capitalizing on the intersections of local and international law. While progress in expanding reproductive rights was not always linear, these case studies showcase the recursive process by which domestic contexts can come to reflect the international legal consensus on abortion’s direct relation to gender equality and the wellbeing of pregnant persons.

A. Mexico

In 2021, the Supreme Court of Justice of the Nation of Mexico (SCJN) ruled that the criminalization of abortion by the state of Coahuila was unconstitutional.¹¹⁸ SCJN’s reasoning primarily centered

¹¹² Merry, *supra* note 8, at 188.

¹¹³ Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 *FORDHAM L. REV.* 411, 418–19 (2008).

¹¹⁴ Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 *PENN ST. L. REV.* 1051, 1051 n.3 (2011) (reviewing California and Missouri Supreme Court cases).

¹¹⁵ Christine Hulsizer, Note, *A Proposed Future for the Progressive Realization of Economic, Social, and Cultural Rights in California*, 110 *CALIF. L. REV.* 567, 581 (2022).

¹¹⁶ See Lynn M. Morgan & Elizabeth F.S. Roberts, *Reproductive Governance in Latin America*, 19 *ANTHROPOLOGY & MED.* 241, 243 (2012).

¹¹⁷ Daniel M. Goldstein, *Whose Vernacular? Translating Human Rights in Local Contexts*, in *HUMAN RIGHTS AT THE CROSSROADS* 111, 112 (Mark Goodale ed., 2013) (quoting Merry, *supra* note 8, at 189); Merry, *supra* note 8, at 208.

¹¹⁸ Acción de Inconstitucionalidad 148/2017, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], Gaceta del Semanario Judicial de la Federación, Undécima Época, Tomo II, Junio de 2022, 148/2017, página 873, 972–73 [hereinafter SCJN 2021 Decision].

on the specific national constitutional rights state abortion laws implicated, but abortion rights jurisprudence from supranational human rights bodies like the CEDAW Committee contributed significantly to its reasoning.¹¹⁹ Further, the SCJN built on a 2019 decision invoking Mexico's obligations under treaty law to establish that precluding women from accessing abortion violates their right to health; relying on international law enabled the SCJN to legitimate both decisions outside of ideology.¹²⁰ Moreover, SCJN held that Mexican state legislatures were empowered to weigh different human rights.¹²¹

This national judicial development capped years of conversation between international human rights bodies and social organizers at the state level.¹²² The states of Oaxaca, Hidalgo, and Veracruz, along with Mexico City, had passed legislation legalizing and protecting the right to abortion.¹²³ Over the year before the decision was issued, national polls measuring social attitudes on "support for access to abortion" marked a rapid increase of twenty-nine percent to forty-eight percent in favor of legalizing abortion.¹²⁴

This expansion of rights was not without reactionary anti-abortion policies adopted in other Mexican states.¹²⁵ Dueling initiatives to decriminalize and restrict abortion took place in "sub-national legislatures . . . the principal site of abortion lawfare" in Mexico.¹²⁶ Abortion rights coalitions negotiated between different legal and political arenas within the federalist structure, integrating the legal issues of jurisdiction and state policymaking into their human rights agenda to mirror their opponents'.¹²⁷

SCJN's decision represents the potential gains borne from decentralized organizing to implement a human rights agenda. SCJN's treatment of progressive state developments was deferential, underscoring the critical role of state legislatures as sites of normative development and social

¹¹⁹ See, e.g., *id.* at 916–17; *id.* at 913–16.

¹²⁰ See Patricia del Arenal Urueta, *Amparo en Revisión 1388/2015 and the "Rights" Discourse in Mexico*, HARVARD L. PETRIE-FLOM CTR.: BILL OF HEALTH (Oct. 2, 2019), <https://blog.petrieflom.law.harvard.edu/2019/10/02/amparo-en-revision-1388-2015-and-the-rights-discourse-in-mexico/> [https://perma.cc/C3QE-CU6U].

¹²¹ See SCJN 2021 Decision, *supra* note 118, at 948, 962, 972–73.

¹²² See Caroline Beer, *Making Abortion Laws in Mexico: Salience and Autonomy in the Policymaking Process*, 50 COMPAR. POL. 41, 52–55 (2017).

¹²³ *Mexico*, IPAS, <https://www.ipas.org/where-we-work/the-americas/latin-america-and-the-caribbean/mexico/> [https://perma.cc/Q2AT-UYTT].

¹²⁴ Uki Goñi, *Argentina Legalizing Abortion Will Spur Reform in Latin America, Minister Says*, THE GUARDIAN (Jan. 14, 2021, 3:39 PM), <https://www.theguardian.com/global-development/2021/jan/14/argentina-abortion-legalized-latin-america-reform> [https://perma.cc/VC29-8GX8].

¹²⁵ See Beer, *supra* note 122, at 41.

¹²⁶ Rachel Sieder & Yacotzin Bravo Espinosa, *Abortion Lawfare in Mexico's Supreme Court: Between the Right to Health and Subnational Autonomy*, 17 DIREITO GV L. REV., Sept.–Dec. 2021, at 1, 1.

¹²⁷ See *id.* at 4–5.

change.¹²⁸ In light of the post-*Dobbs* reality of state abortion governance, the need to simultaneously instrumentalize the advantages of federalism in parallel to abortion opponents is clear.

B. Ireland

In 2018, a national referendum, by a vote of 66.4% in favor, repealed the eighth amendment banning abortion¹²⁹ and allowed the Irish government to affirmatively legalize abortion.¹³⁰

Ahead of the referendum, UN treaty bodies made more salient the health impacts of Ireland's abortion restrictions on pregnant persons and their human rights implications.¹³¹ These findings made their way into social discourse, compelling more activists and members of the Irish government to join the abortion rights movement to avoid "cultural embarrassment."¹³² Upon its universal periodic review, the Committee on Economic, Social, and Cultural Rights (CESCR) highlighted the absence of applicable treaty-based obligations and encouraged Ireland to include these rights in its national constitution.¹³³ The right to health, often directly implicated by abortion regulations, falls under the CESCR's scope.¹³⁴ Thus, the Committee strongly recommended a national referendum for the population of Ireland to democratically decide the appropriate scope of abortion restrictions in its constitution and laws.¹³⁵

Then, in *Mellet v. Ireland*,¹³⁶ the Human Rights Committee (HRC) analyzed a case in which an Irish woman was denied an abortion of a potentially nonviable fetus and was forced to travel to the United Kingdom for the procedure.¹³⁷ The HRC found Ireland had violated the woman's right to freedom from CIDT and her right to nondiscrimination.¹³⁸ The abortion restrictions also violated her right to privacy

¹²⁸ Cf. Kisska-Schulze et al., *supra* note 43, at 483, 493 (arguing that states promote legislative change as laboratories of democracy, case baiters, and policy diffusers).

¹²⁹ Henry McDonald et al., *Ireland Votes by Landslide to Legalise Abortion*, THE GUARDIAN (Dec. 18, 2019, 10:18 AM), <https://www.theguardian.com/world/2018/may/26/ireland-votes-by-landslide-to-legalise-abortion> [<https://perma.cc/U2LW-EEQP>].

¹³⁰ See Maeve Taylor et al., *The Irish Journey: Removing the Shackles of Abortion Restrictions in Ireland*, 62 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY 36, 36 (2020).

¹³¹ See, e.g., Comm. on Econ., Soc. & Cultural Rts., *Concluding Observations on the Third Periodic Report of Ireland*, ¶ 30, U.N. Doc. E/C.12/IRL/CO/3 (July 8, 2015) [hereinafter CESCR Ireland Report]; Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2324/2013*, ¶ 5.12, U.N. Doc. CCPR/C/116/D/2324/2013 (Nov. 17, 2016).

¹³² Elaine McKimmons & Louise Caffrey, *Discourse and Power in Ireland's Repeal the 8th Movement*, INTERFACE, July 2021, at 193, 218.

¹³³ CESCR Ireland Report, *supra* note 131, ¶¶ 30, 37.

¹³⁴ International Covenant on Economic, Social and Cultural Rights, art. 12(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3.

¹³⁵ CESCR Ireland Report, *supra* note 131, ¶ 30.

¹³⁶ Hum. Rts. Comm., *supra* note 131.

¹³⁷ *Id.* ¶¶ 2.1, 2.4.

¹³⁸ *Id.* ¶¶ 3.1, 3.15, 7.11.

under ICCPR Article 17,¹³⁹ which protects against “arbitrary or unlawful interference with [one’s] privacy.”¹⁴⁰ The interference must be reasonable given the particular circumstances; the potentially nonviable pregnancy, her “intense suffering” at being forced to carry to term, and that she had to travel abroad with “significant negative consequences” to terminate her pregnancy, resulted in a violation of ICCPR Article 17.¹⁴¹

Post-*Dobbs*, the constitutional right to privacy in the United States is heavily reliant on the disposition of the Court. But the HRC’s reasoning in *Mellet* — and its effects on Irish social discourse — usefully illustrates how human rights actors can vernacularize principles of autonomy and nondiscrimination to justify protecting reproductive decisionmaking analogously to privacy.¹⁴² Both *Mellet* and the CESCR recommendation brought “external pressure from international human rights bodies to bear in Ireland.”¹⁴³ Advocates “refram[ed] abortion in a manner that demanded response from the state,” justifying a national referendum.¹⁴⁴

Thus, direct democratic participation in the creation of norms, laws, and policies can effectively implement human rights objectives from the bottom up when international legal mechanisms are otherwise blocked from engaging directly with domestic law.

C. Argentina

In late 2020, Argentina passed a series of reforms legalizing abortion and expanding obstetric healthcare.¹⁴⁵ This legislative reform was a direct result of decades-long activism culminating in the “Green Wave” — an originally Argentinian and now transnational movement of feminists characterized by their green bandanas worn at protests.¹⁴⁶ These cohesive social campaigns built coalitions with movements that had similar autonomy-based agendas, like the antifemicide movement.¹⁴⁷

¹³⁹ *Id.* ¶ 3.20.

¹⁴⁰ International Covenant on Civil and Political Rights, art. 17, *opened for signature* Dec. 19, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171.

¹⁴¹ Hum. Rts. Comm., *supra* note 131, ¶ 7.8.

¹⁴² See Juliet S. Sorensen & Xiao Wang, Opinion, *Dobbs, Glass Houses and International Law*, AL JAZEERA (July 12, 2022), <https://www.aljazeera.com/opinions/2022/7/12/dobbs-glass-houses-and-international-law> [<https://perma.cc/M2L9-GLBR>].

¹⁴³ Taylor et al., *supra* note 130, at 39.

¹⁴⁴ *Id.* at 45.

¹⁴⁵ Law No. 27611, Jan. 15, 2021, [34562] B.O. 8; Law No. 27610, Jan. 15, 2021, [34562] B.O. 3.

¹⁴⁶ *The Green Wave: Marching Towards Legal Abortion in Argentina*, AMNESTY INT’L (Aug. 8, 2019), <https://www.amnesty.org/en/latest/impact/2019/08/the-green-wave> [<https://perma.cc/S9DH-JVW5>].

¹⁴⁷ See, e.g., Mariela Daby & Mason W. Moseley, *Feminist Mobilization and the Abortion Debate in Latin America: Lessons from Argentina*, 18 POL. & GENDER 359, 360 (2022).

This feminist mobilization grew amidst a backdrop of progress in the international human rights system to conceptualize a distinct set of sexual and reproductive health rights (SRHR).¹⁴⁸ Making legal claims through rights language, local activists were also able to reframe social discourse on abortion around principles of gender equality, dignity, and freedom.¹⁴⁹ Thus, the Green Wave and its feminist antecedents drew from the emerging international consensus on abortion to create responsive frames as SRHR were debated in Argentine society.

The role of the Green Wave in Argentina's liberalization of abortion is not unidimensional: feminist mobilization spurred, and state governance further enabled, expansions of SRHR like the 2002 national reproductive health law.¹⁵⁰ This interplay illustrates the iterative process of expanding abortion rights, where social organizing galvanizes national sociopolitical and judicial abortion discourse, which makes it to international forums that provide legal developments to expand SRHR. The standards enumerated in these decisions then produce both symbolic and material effects on social movements in individual countries, and those movements can adapt the standards to their specific context, pursuing constitutional and legislative reform of SRHR once more.¹⁵¹

Finally, in 2012, the Argentine Supreme Court recognized the right to abortion under several conditions, incorporating many human rights arguments *amici curiae* presented.¹⁵² By reframing the issue around safe abortion and health, the Green Wave infused political and legal debates with rights language from the bottom up.¹⁵³ This practice of human rights devolution paved the way for the 2020 abortion law.

As a transnational movement, the Green Wave continues to organize for the expansion of reproductive rights outside of Argentina.¹⁵⁴ The focus on social organizing — working outside of domestic legal systems — is a necessary element of conducting human rights devolution that abortion rights activists in the United States should not overlook.

IV. RECOMMENDATIONS

This comparative analysis raises several insights into addressing state abortion restrictions across the United States. First, legal actors

¹⁴⁸ See Alicia Ely Yamin & Agustina Ramón Michel, *Using Rights to Deepen Democracy: Making Sense of the Road to Legal Abortion in Argentina*, 46 *FORDHAM INT'L L.J.* 375, 393–94 (2023).

¹⁴⁹ See *id.* at 395.

¹⁵⁰ Law No. 25673, Nov. 22, 2002, [30032] B.O. 1; Yamin & Michel, *supra* note 148, at 397.

¹⁵¹ See Benjamin Mason Meier et al., *Advancing Human Rights Through Global Health Governance*, in *FOUNDATIONS OF GLOBAL HEALTH & HUMAN RIGHTS* 197, 197 (Lawrence O. Gostin & Benjamin Mason Meier eds., 2020).

¹⁵² Yamin & Michel, *supra* note 148, at 406–07.

¹⁵³ *Id.* at 422–23.

¹⁵⁴ See, e.g., Verónica Gago, Opinion, *What Latin American Feminists Can Teach American Women About the Abortion Fight*, *THE GUARDIAN* (June 8, 2022, 4:14 PM), <https://www.theguardian.com/commentisfree/2022/may/10/abortion-roe-v-wade-latin-america> [<https://perma.cc/55BA-QJKN>].

involved in the U.S. abortion rights movement should pursue both symbolic and material remedies through international human rights for the violations that state abortion restrictions impose on pregnant persons.¹⁵⁵ Under the CAT Committee's clear analysis of CIDT, twelve states' abortion bans are ripe for challenge.¹⁵⁶ CAT's complaint and inquiry procedures can provide authoritative international legal analysis on abortion rights. As in Ireland, securing a favorable judgment can place valuable supranational pressure on policymakers. And, as in Argentina, social organizers can adapt the principles from such a judgment to guide local initiatives to expand abortion protections.

In internationalizing the abortion fight in the United States, the movement can bring an oft-overlooked frame to bear on domestic discourse.¹⁵⁷ Further, inviting relevant U.N. mandates — such as the Working Group on Discrimination Against Women and Girls and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — to conduct official visits¹⁵⁸ can further internationalize national debate. Such engagement would “vernacularize” human rights norms by putting these officials in direct contact with local stakeholders who can both inform the findings of the subsequent U.N. reports and develop a grassroots human rights agenda in their own states.¹⁵⁹

Second, abortion rights activists should experiment with embedding international human rights standards in state constitutions, implementing the standards through legislation, and using them persuasively in state court jurisprudence. Justice Alito clinched his majority opinion in *Dobbs* with the imperative to “return the issue of abortion to the people’s elected representatives.”¹⁶⁰ In light of thirteen trigger bans on the decision, this solution was politically determinative for thousands.¹⁶¹ But while such “judicial decision-making takes place in dialogue with other stakeholders, from state courts and lawmakers to voters, social

¹⁵⁵ See Barbara Stark, *The Women’s Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL’Y 261, 291–94 (2011).

¹⁵⁶ See Nash & Guarnieri, *supra* note 63 (“As of January 9, 2023, 12 states are enforcing a near-total ban . . .”).

¹⁵⁷ Cf. CTR. FOR REPROD. RTS., STATE CONSTITUTIONS AND ABORTION RIGHTS 2 (2022) (acknowledging favorable human rights law on abortion and advocating for state-centered strategies for expanding abortion rights).

¹⁵⁸ See, e.g., Glob. Just. Ctr. et al., Letter to the UN Special Procedures on Abortion Rights in the US 1 (Mar. 2, 2023), https://www.hrw.org/sites/default/files/media_2023/03/20230301_UNSpecialProceduresLetter.docx.pdf [<https://perma.cc/WQF3-NDPK>].

¹⁵⁹ See, e.g., *id.*

¹⁶⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

¹⁶¹ See Meredith Sullivan, *Does Dobbs Put the United States in Violation of Its International Human Rights Obligations?*, BERKELEY J. INT’L L. (Mar. 9, 2023), <https://www.berkeleyjournalofinternationallaw.com/post/does-dobbs-put-the-united-states-in-violation-of-its-international-human-rights-obligations> [<https://perma.cc/CW2H-4SX8>].

movements, and political parties,”¹⁶² the cases of Mexico and Argentina exemplify how judicial decisionmaking also takes place in the context of international human rights developments.¹⁶³ International law can and should play a larger part to both push the patchwork abortion governance toward international compliance and to reflect the will of *Dobbs*’s aforementioned “people.”

In favorable political contexts, advocates should use state constitutional amendment processes to constitutionally incorporate human rights language.¹⁶⁴ An amendment could reaffirm principles of gender nondiscrimination by replicating language in CEDAW Committee jurisprudence that “requires [s]tates . . . to refrain from obstructing action taken by women in pursuit of their health goals,” and prohibits “laws that criminalize medical procedures only needed by women.”¹⁶⁵ Citing to the CIDT standards of CAT through state legislation can explicitly recognize the right to health implications of abortion denial. Article 10, for example, requires that “education and information regarding the prohibition against torture are fully included in the training of . . . medical personnel,” informing state regulations on the provision of legal abortion, even under an exceptions scheme.¹⁶⁶ Advocates should also organize referenda to adapt bans or exception-based regimes and promulgate initiatives to protect abortion at the municipal level.¹⁶⁷

Human rights devolution remains useful even under hostile state policy; in Texas, for example, post-*Dobbs* polling showed overwhelming support for an exceptions-based regime in lieu of the current ban, specifically for pregnancy resulting from rape and incest.¹⁶⁸ (An exceptions-based regime could also include pregnancy endangering health and pregnancy that would result in serious birth defects.) Informed by the norms underlying these voters’ priorities, activists can take language on abortion from CEDAW’s *Alyne* case and vernacularize these human rights standards to local concerns about the physical and mental health of pregnant persons and fetuses. Ballot initiatives can work indirectly to diffuse these norms into social, political, and legal discourse in Texas,

¹⁶² Mary Ziegler, *The History of Neutrality: Dobbs and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 188–89 (2023).

¹⁶³ Cf. Yvette Aguilar, Comment, *Gagging on a Bad Rule: The Mexico City Policy and Its Effects on Women in Developing Countries*, 5 SCHOLAR: ST. MARY’S L. REV. ON MINORITY ISSUES 37, 67–74 (2002) (analyzing state court reasoning in several cases challenging U.S. transnational foreign aid policy for reproductive healthcare).

¹⁶⁴ Cf. Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. 191, 191–92 (2023).

¹⁶⁵ Comm. on the Elimination of Discrimination Against Women, Rep. on Its Twentieth & Twenty-First Sessions, ¶ 4, U.N. Doc. A/54/38/Rev.1 (May 4, 1999).

¹⁶⁶ CAT, *supra* note 3, art. 10(1).

¹⁶⁷ See Daniel A. Cotter, *State and Electorate Mobilization: The Most Promising Path to Justice in Modern America*, 56 UIC L. REV. 579, 620 (2023).

¹⁶⁸ Eric Lau, *Abortion Should Be Permitted in Cases of Rape and Incest, Around 80% of Texas Voters Say in UT Poll*, TEX. TRIB. (Aug. 10, 2022, 4:00 PM), <https://www.texastribune.org/2022/08/10/texas-politics-project-abortion-polling/> [<https://perma.cc/B7GX-HEGD>].

cultivating a burgeoning human rights agenda for abortion in an otherwise antagonistic environment.

By continuing to integrate a human rights agenda from the bottom up in states that legislate or adjudicate against SRHR from the top down, activists can perpetuate the recursive processes between grassroots organizing and international human rights law that makes increasingly positive social attitudes on abortion more salient to policymakers. By tailoring international human rights advocacy to local contexts, advocates can use the decentralizing forces of federalist governance to serve the ends of reproductive justice.

* * *

The abortion restrictions across the United States form just one part of the global backlash against gender equality that ultimately threatens to undermine the normative authority of the entire international human rights system.¹⁶⁹ But by adopting the same decentralized strategies of abortion opponents, abortion rights activists can incorporate progressive principles on gender discrimination and harm into state and local governance. The abortion rights movement can sustainably safeguard abortion rights through a democratic and community-based, rather than a federal or Constitution-based, frame within the United States. In doing so, these local movements can contribute to the global normative consensus that reproductive justice is an essential element of realizing gender equality for all.

¹⁶⁹ See, e.g., Başak Çali & Laurence Helfer, *The Gender of Treaty Withdrawal: Lessons from the Istanbul Convention*, EJIL: TALK! (Nov. 28, 2022), <https://www.ejiltalk.org/the-gender-of-treaty-withdrawal-lessons-from-the-istanbul-convention/> [<https://perma.cc/35CN-RA4A>].