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### Population Law and Policy: From Control and Contraception to Equity and Equality

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Victoria Mikesell Mather, Population Law and Policy: From Control and Contraception to Equity and Equality, 50 *St. Mary's L. J.* 917 (2019).

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## ARTICLE

# POPULATION LAW AND POLICY: FROM CONTROL AND CONTRACEPTION TO EQUITY AND EQUALITY

VICTORIA MIKESELL MATHER\*

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## I. INTRODUCTION

As a young professor at St. Mary's University School of Law in the 1980s I had the opportunity to teach in our summer program in Innsbruck, Austria.<sup>1</sup> At the time, faculty members were required to teach an international or comparative law course, and I developed a mini-course in population law and policy. Over the last thirty years, I have had the opportunity to rethink and redevelop the course, and to teach it during fifteen summers in the beautiful Austrian Alps. Our summer program became known as the St. Mary's Institute on World Legal Problems, and my course developed into a human rights course with an emphasis on population law and policy.

My course changed, as did international law and its emphasis on national and world population concerns. This article is a reflection on those changes.

## II. POPULATION BACKGROUND

Today, the population of the world is approximately seven and a half billion people.<sup>2</sup> This is fewer than some direly predicted in the

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1. See *Innsbruck, Austria Summer Study Abroad Program*, ST. MARY'S U. SCH. L., <https://law.stmarytx.edu/academics/special-programs/austria/> [<https://perma.cc/B87N-24NE>], for information regarding the current St. Mary's Innsbruck Program.

2. POPULATION REFERENCE BUREAU, 2018 WORLD POPULATION DATA SHEET (2018), [https://www.prb.org/wp-content/uploads/2018/08/2018\\_WPDS.pdf](https://www.prb.org/wp-content/uploads/2018/08/2018_WPDS.pdf) [<https://perma.cc/9XTP-LBAH>] [hereinafter 2018 WORLD POPULATION DATA SHEET]. Most of the population data provided within this article comes from the Population Resource Bureau (PRB), particularly the annual data sheets. The PRB is a nonprofit, non-advocacy group that collects information, both in the United States and internationally, about population and related issues of migration, environment, health, and demographics. *About*, POPULATION REFERENCE BUREAU, <https://www.prb.org/about/> [<https://perma.cc/ME4M-78CP>].

1970s,<sup>3</sup> but the world population is still growing at a pace of over one hundred million persons per year.<sup>4</sup> Population growth is affected by a host of factors, including development, food supply, urbanization, birth rates, contraceptive availability, life expectancy, health care, infant mortality, etc.<sup>5</sup> How we got to a population of this size is primarily a function of the development of new medical, agricultural, and manufacturing technologies.<sup>6</sup>

### A. History

For most of our known history, the population growth rate was zero.<sup>7</sup> Humans died from exposure, disease, and starvation. The average life expectancy was low: twenty-five years for most of human history.<sup>8</sup> Children were vulnerable, and infant mortality was high. Humans lived as nomads, hunting and gathering, moving as a tribe when needed.

About ten thousand years ago, the Agricultural Revolution occurred, and humans discovered farming as well as the ability to domesticate and herd animals.<sup>9</sup> The world population started to grow from approximately five

3. See, e.g., PAUL R. EHRLICH, *THE POPULATION BOMB* 17–27 (1968) (predicting the impending and devastating effects of exponential population growth). The book—a best seller—was originally published in 1968, predicting doom and destruction worldwide by the 1980s as a result of an overpopulated Earth. Ehrlich predicted that starvation would destroy mankind since the ability to produce food to feed all of mankind would not keep up with the population growth. *Id.* at xi (“The battle to feed all of humanity is over. In the 1970s the world will undergo famines—hundreds of millions of people are going to starve to death in spite of any crash programs embarked upon now.”).

4. See, e.g., WORLDOMETERS, <http://www.worldometers.info/> (last visited Feb. 5, 2019) (acting as a population “counter” that purportedly keeps track of all births and deaths worldwide).

5. See *International Data*, POPULATION REFERENCE BUREAU, <https://www.prb.org/international/> [<https://perma.cc/494X-ZWM3>] (providing population data based on a list of international data including life expectancy, urbanization, infant mortality rate, and other population “indicators”).

6. See PAUL R. EHRLICH & ANNE H. EHRLICH, *THE POPULATION EXPLOSION* 55 (1990) (contextualizing the “population explosion” with development of farming, medical, and industrial technology).

7. See *id.* at 47–48 (“The growth rate of early human beings must have been very, very close to zero over millions of years; otherwise, there would have been a prehistoric population explosion equivalent to today’s.”); see also Diana D.M. Babor, *Population Growth and Reproductive Rights in International Human Rights Law*, 14 *CONN. J. INT’L L.* 83, 85 (1999) (“In 10,000 B.C., life expectancy was twenty years and, with the birth rate only 0.008% higher than the death rate, the potential for extinction was always present.”).

8. See Babor, *supra* note 7, at 85–88 (exploring the history of population growth and life expectancy trends).

9. See JOEL E. COHEN, *HOW MANY PEOPLE CAN THE EARTH SUPPORT?* 34 (1995) (“People began to practice agriculture roughly 10,000 to 12,000 years ago . . .”). But see EHRLICH & EHRLICH, *supra* note 6, at 51 (“Exactly when people began to control herd of herbivorous animals in order to

million to two or three hundred million by year 0 C.E./A.D.<sup>10</sup> Lifespan increased and infant mortality decreased. Humans were less likely to starve to death, and one farmer could feed more than one family, making other occupations possible. Metals could be worked into tools, while cooking and food storage improved. However, disease still limited life expectancy and population growth—the primary example being the Black Plague of the Middle Ages.<sup>11</sup> Between 1650 and 1800, the world population grew to approximately one billion.<sup>12</sup> The increase was partially due to better understanding of medicine and increased capacity for cultivation. In addition, trade increased, and new crops—suitable for different climates—were exchanged. This generated some economic advances, which in turn allowed the population to continue to grow. Infant mortality again decreased, and life expectancy started to lengthen.<sup>13</sup>

By 1900, the Industrial Revolution was underway bringing change to the developed world.<sup>14</sup> Death rates decreased dramatically due to improved understanding of hygiene and the development of modern medicine. Life expectancy grew to approximately fifty years.<sup>15</sup> Cities drew workers for the factories and modern farming techniques made it possible to feed more people with fewer farmers. Thereafter, the Green Revolution of the 1960s in farming made it possible to feed people worldwide, leading to a decrease in death rates—even in undeveloped

maintain access to steady supplies of meat, and perhaps to facilitate the animals' reproduction, isn't known.”).

10. See Babor, *supra* note 7, at 85–86 (“In 0 A.D., the world’s population had grown to 250 million due to improved mortality and the population doubling time was reduced to about 1900 years.”).

11. See Robert C. Cook, *World Population Prospects*, 27 OHIO ST. L.J. 634, 636 (1966) (“[T]he Black Plague entered Europe through Italy bringing with it a horror which shocked even a civilization accustomed to suffering . . . Still, world population growth continued . . .”).

12. See EHRLICH & EHRLICH, *supra* note 6, at 55 (“By sometime around 1800, the world population had grown to a billion.”); see also COHEN, *supra* note 9, at 42 (“Between 1650 and 1850, the human population more than doubled as its surging growth rate reached levels that were then unprecedented.”).

13. See EHRLICH & EHRLICH, *supra* note 6, at 55 (“[The changes that occurred around 1800] led to declines in death rates, especially among infants and small children.”).

14. See EDGAR R. CHASTEEN, *THE CASE FOR COMPULSORY BIRTH CONTROL* 25 (1971) (“Whereas the Agricultural Revolution had freed man from the arbitrary whims of nature, the Industrial Revolution harnessed the forces of nature. Suddenly man no longer worked and lived in direct contact with nature.”).

15. See COHEN, *supra* note 9, at 49 (“By 1900, life expectancy at birth was [forty] to [fifty] years in North America and most of northwestern Europe.”).

countries.<sup>16</sup> Soon after, the population reached three and a half billion and continued to grow to the over seven billion people of today.<sup>17</sup>

### B. *Theories of Population Growth*

Ancient philosophers—including the Chinese, the Greeks, and the Romans—all had theories about optimum population size.<sup>18</sup> For example, the Romans were interested in the greatest population size possible to facilitate military operations. Later, the developing world encouraged population growth in the seventeenth and eighteenth centuries to provide workers, soldiers, and settlers for new colonies.<sup>19</sup> However, the emphasis was on the good of the state, rather than on the individual, and the poor eventually came to be seen as a drain on state resources.<sup>20</sup>

Enter Reverend Thomas Robert Malthus, an English minister.<sup>21</sup> He was disturbed about the status of the poor, and published pamphlets advocating the withdrawal of “poor laws” designed to provide relief to the poor and the abolition of charity to those in need.<sup>22</sup> Malthus believed that the poor should die a “natural” death, leaving only those who were strong enough, physically and mentally, to support themselves. He believed that population would increase exponentially, doubling every several years, and the food supply and the standard of living of the world population would only

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16. See CHASTEEN, *supra* note 14, at 68 (suggesting the U.S. government believed strongly in the Green Revolution as a remedy to food shortage).

17. 2018 WORLD POPULATION DATA SHEET, *supra* note 2.

18. See CHASTEEN, *supra* note 14, at 53–65 (examining the range of population theories offered by ancient philosophers); see also BENJAMIN VIEL, *THE DEMOGRAPHIC EXPLOSION: THE LATIN AMERICAN EXPERIENCE* 68–78 (James Walls trans., 1976) (reviewing various theories and predictions of population growth by thinkers such as Malthus, Verhulst, and Pearl).

19. See CHASTEEN, *supra* note 14, at 55–56 (“[T]he prevailing economic doctrine of Western Europe during the seventeenth and eighteenth centuries . . . depended upon its having a large population to work its land, settle its colonies, fight its wars[,] and feed the labor force consumed by its fledgling industries.”).

20. See *id.* at 56 (analyzing the mercantilist understanding of an inverse relationship between the interest in the individual and the state).

21. Reverend Thomas Robert Malthus was born in 1766 and died in 1834. See VIEL, *supra* note 18, at 71 (“[T]he Reverend Thomas Robert Malthus earns the credit for having been the first to analyze [the phenomenon of population growth rate exceeding resources] in depth.”).

22. Malthus’s essay on population was published in the *Encyclopedia Britannica* in 1824, gaining him great fame or great notoriety, depending on the reader. See *id.* (“[Malthus’s] first essay, dated 1789, gained him sufficient reputation so that later, in 1824, the *Encyclopedia Britannica* published his famous essay on ‘Population’ which, as happens with so many famous works, very few have read in the original.”).

increase arithmetically—in a straight upward slope.<sup>23</sup> Overall, Malthus believed that the world was headed towards worldwide famine and wars over the insufficient food supply.

While the catastrophic future predicted by Malthus never materialized, he was quite influential and is still noted today in many modern writings with both admiration and criticism.<sup>24</sup> However, Malthus failed to see the possibility of increased food productivity and the eventual widespread availability of birth control, as well as the Industrial Revolution of the next century.<sup>25</sup>

The most influential population growth theory in modern times is the demographic transition theory.<sup>26</sup> This was widely accepted in the 1950s and 1960s, mainly because it reflected the experience of the developed Western World.<sup>27</sup> In general, the theory suggests that population moves in four stages:

Stage one begins in pre-industrial societies, where both birth and death rates are high, keeping the population stable. After a country achieves improved living conditions, the country moves into the second stage where death rates begin to fall, but birth rates remain high because families still require a large number of children for farm labor and old-age security for parents. . . .

[In stage three,] [a]s living conditions continue to improve, urbanization occurs, the status of women improves and the cost-benefit analysis for child

23. *Id.* (“Malthusian theory . . . basically states that human populations increase at a geometric rate while their food supplies increase arithmetically . . .”). In addition, Malthus also advocated for late marriage and abstinence from sexual relations prior to marriage to reduce birth rates.

24. *See id.* at 73 (discussing the controversial nature of Malthus’s theory, but finding his writings to contain “a solid truth”); *see also* CHASTEEN, *supra* note 14, at 58 (“A good case could be made for considering Malthus’ first *Essay on the Principles of Population* . . . as one of the half dozen or so most important books ever written.”).

25. *See* CHASTEEN, *supra* note 14, at 58–59 (“Malthus made two serious mistakes. First he failed to foresee the widespread use of contraceptives in the Western [W]orld . . . . Malthus also failed to see the greatly increasing productivity of the land.”).

26. *See, e.g.,* Reed Boland, *The Environment, Population, and Women’s Human Rights*, 27 ENVTL. L. 1137, 1163 (1997) (“Although demographers have differed on the details of [demographic transition] theory, most have concluded that, in general terms, it does account for demographic developments observed in industrialized countries.”); *see also* COHEN, *supra* note 9, at 46–47 (“Demographers organize much of their thinking about population growth during the last two centuries and the coming decades in terms of, or in opposition to, a concept called ‘the demographic transition.’”).

27. *See* Boland, *supra* note 26, at 1162 (“Most discussions of the causes of fertility decline begin with reference to the theory of ‘demographic transition,’ which gained prominence after the Second World War to explain the stabilization of population in industrialized countries between the [nineteenth] and [twentieth] centuries.”).

bearing shifts in favor of smaller families. Parents do not need large families for farm work and old-age security, but instead must educate their children, which increases the cost of raising a large family. . . .

As a country moves from stage three into stage four, birth and death rates again reach parity, and population stabilizes.<sup>28</sup>

Taking this into consideration, the four stages can be summarized as follows: 1) pre-industrial; 2) developing; 3) urbanization; and 4) stabilization.

The demographic transition occurred in the developed Western World, but the pattern was not been repeated in most still-developing countries.<sup>29</sup> Population continued to grow in the so-called “Third World,” leading to great concern by environmentalists and biologists in the 1970s and 1980s.<sup>30</sup> Two competing schools of thought emerged during this time—an alarmist view about the disastrous results of a burgeoning population, and a more optimistic approach that welcomed the human resources a larger population would bring to bear on all world problems.

Under the first view, the alarmists were variously known as neo-Malthusians, the Apocalyptics, or “Econuts.”<sup>31</sup> Most of these individuals were focused on the impact of the world’s burgeoning population on biology and ecology.<sup>32</sup> Their concerns were somewhat reminiscent of Malthus in that they believed that the Earth had a limited carrying capacity for humans. According to the alarmist view, a large

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28. Jill M. Bracken, Comment, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 IND. INT’L. & COMP. L. REV. 197, 199–200 (1995).

29. See *id.* (outlining the four stages of demographic transition theory and concluding “[m]ost of the countries in Western Europe and North America have completed this transition”); COHEN, *supra* note 9, at 47 (limiting the demographic transition pattern to “developed” countries).

30. See, e.g., EDITH EFRON, *THE APOCALYPTICS: HOW ENVIRONMENTAL POLITICS CONTROLS WHAT WE KNOW ABOUT CANCER* 33 (1984) (introducing the dire population predictions by ecologists and biologists like Paul Ehrlich and Rachel Carson); see also John W. Ratcliffe, *The Reagan Population Policy: An Error of the Third Kind*, 20 N.Y.U. J. INT’L L. & POL. 267, 270 (1987) (“Uncontrolled population growth in the Third World is seen as the underlying cause of the hunger, poverty, illiteracy, and poor health which characterize underdevelopment.”).

31. See EFRON, *supra* note 30, at 31 (“The first apocalyptic of national importance was Rachel Carson . . .”); GARRETT HARDIN, *STALKING THE WILD TABOO* 262 (3d ed., 1996) (describing the group of people “deeply concerned about population and the environment” as “Econuts”); Steven Bader, *The Perceived Conflict Between Human Rights and Environmental Protection: How Organized Religion Can Reconcile the Viewpoints and Promote Sustainable Consumption*, 13 GONZ. J. INT’L L. 3, 3 (2009–2010) (analyzing the common ground religious perspectives can provide between conflicting population theories such as Neo-Malthusians and Anti-Malthusians).

32. See, e.g., EFRON, *supra* note 30, at 31 (“[The perspective of] Rachel Carson, a biologist who worked at the Fish and Wildlife Service . . . was that formed by ecology.”).



population posed irreversible threats to the environment and the quality of human life. Further, they believed that a large population would lead to the depletion of natural resources and reduced biodiversity. Another concern shared by this group was the belief that individuals would not voluntarily reduce the number of children they have, requiring some sort of government coercion or influence.<sup>33</sup>

The alarmist view is well-represented by biologist Paul Ehrlich in his book *The Population Bomb*<sup>34</sup> and a later book, written with his wife Anne, *The Population Explosion*.<sup>35</sup> Garrett Hardin, another biologist, wrote the well-known essay *The Tragedy of the Commons*.<sup>36</sup> Both authors argue that self-interest will not lead individuals to reduce the number of children they have, concluding that additional measures are needed.<sup>37</sup> While neither Ehrlich nor Hardin advocate for the harsh measures eventually employed by China and India, both argue that some sort of agreed upon coercion is both necessary and acceptable.<sup>38</sup> For them, the focus is on the control of the population.

The second, and more optimistic, view was propounded largely by economists—most notably Julian Simon.<sup>39</sup> In general, Simon and others

33. *See id.* at 34 (“[Paul Ehrlich] compared the growth of population to cancer and demanded surgery . . . . Government, he said, had to be the surgeon.”).

34. EHRlich, *supra* note 3, at xi (“At this late date nothing can prevent a substantial increase in the world death rate, although many lives could be saved through dramatic programs to ‘stretch’ the carrying capacity of the [E]arth by increasing food production. But these programs will only provide a stay of execution unless they are accompanied by determined and successful efforts at population control.”).

35. EHRlich & EHRlich, *supra* note 6, at 57 (“Human beings now occupy and use, at one level or another, some two thirds of the planet’s land surface, and are striving to find ways to exploit the remaining inhospitable third.”).

36. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

37. *See id.* at 1245 (exploring the legislative options to require temperance); *see also* EFRON, *supra* note 30, at 34 (“Ehrlich called for the creation of a ‘powerful government agency’ which would research and impose such solutions as ‘compulsory birth regulation,’ ‘the addition of temporary sterilants to water supplies or staple food,’ ‘financial rewards and penalties designed to discourage reproduction . . . .’”).

38. *See* EHRlich & EHRlich, *supra* note 6, at 58 (viewing the impact of human population as an issue of destruction “on the environmental systems that sustain us”).

39. Simon was a professor of economics and business as well as the author of several books and articles in the area of population. *See* JULIAN L. SIMON, POPULATION MATTERS: PEOPLE, RESOURCES, ENVIRONMENT, AND IMMIGRATION 21–22 (1990) (devoting a chapter to explain that life is getting better); JULIAN L. SIMON, THE RESOURCEFUL EARTH: A RESPONSE TO GLOBAL 2000 57–63 (Julian L. Simon & Herman Kahn eds., 1984) (offering an optimistic view of population growth as subsistence continues to ease); JULIAN L. SIMON, THE ULTIMATE RESOURCE 3–4 (1981) [hereinafter SIMON, ULTIMATE RESOURCE] (providing an introduction to Simon’s population and

believed that more people would result in more *human* resources being devoted to solving human problems. More people meant more human minds at work, using their skills to solve problems—whether environmental, technical, or population-related. Another aspect of this argument, referred to as supply-side demographics, theorizes that a large population creates a greater demand for goods and services, which expands markets, leading to economic growth and greater general prosperity.<sup>40</sup> Relatedly, they expressed concern, borne out in fact, that reducing population growth leads to an aging population, resulting in workforce shortages and creating support issues for the elderly. For example, a very low population growth rate in Japan has resulted in these problems.<sup>41</sup> Finally, some were concerned about the slowing population growth in the developed parts of the world, with the corresponding decrease in white, educated, Christian, and Jewish populations.<sup>42</sup>

In the last three decades, I saw an increased emphasis on the human rights aspects of population issues. This increase is due in no small part to the draconian “one-child” policy adopted by China during the 1980s, and the techniques used to enforce it;<sup>43</sup> India’s emphasis on sterilization to control growth;<sup>44</sup> and the population growth policies imposed in Romania by the

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resource problems); see also JACQUELINE KASUN, *THE WAR AGAINST POPULATION: THE ECONOMICS AND IDEOLOGY OF THE WORLD POPULATION CONTROL* 22 (1988) (arguing the “population scare” was spurred by misunderstood and misinterpreted economics).

40. See SIMON, *ULTIMATE RESOURCE*, *supra* note 39, at 4 (“The child or immigrant will pay taxes later on, contribute energy and resources to the community, produce goods and services for the consumption of others, and make efforts to beautify and purify the environment.”).

41. See Kenneth G. Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 *IND. J. GLOBAL LEGAL STUD.* 165, 203–04 (2006) (“Japanese policy is designed to increase birth rates and address the economic problems associated with the rapidly aging population.”).

42. See MICHAEL S. TEITELBAUM & JAY M. WINTER, *THE FEAR OF POPULATION DECLINE* 4–8 (1985) (discussing the demography of population decline); BEN J. WATTENBERG, *THE BIRTH DEARTH* 112–13, 116–18 (1987) (analyzing the population demographics based on U.S. fertility rates, and noting a decrease in birth rates among citizens of Western European heritage).

43. See David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 *CUMB. L. REV.* 1, 5–7 (2010) (attributing the sex ratio imbalance in China to the country’s “population control policies”—including the “one-child policy”—and discussing how the policies were enforced); Amy Hampton, Comment, *Population Control in China: Sacrificing Human Rights for the Greater Good?*, 11 *TULSA J. COMP. & INT’L L.* 321, 330–31 (2003) (explaining how China’s “one-child policy” was enforced).

44. Dipika Jain & Natassia M. Rozario, *Between Cairo and Haryana: How Far Have Reproductive Rights Come After Twenty Years of ICPD?*, 35 *WHITTIER L. REV.* 373, 379–80 (2014) (recognizing India as “the first country in the world to make family[-]planning part of its official policy” but describing the transition of the program to “relying heavily on sterilization”).

dictator Nicolae Ceausescu during part of the same period.<sup>45</sup>

### C. *World Conferences on Population*

The theories and goals discussed in the previous section are reflected in the United Nations Conferences on Population, as well as various conferences on environmental issues and the status of women.<sup>46</sup> The three world population conferences—Bucharest in 1974, Mexico City in 1984, and Cairo in 1994—in addition to the two other population conferences—Rome in 1954 and Belgrade in 1965—focused largely on contraception and providing contraceptive access to “individuals” or “couples.”<sup>47</sup> In these early days, the belief was that if couples had access to contraception and the demographic transition was in process, then the population would stabilize.<sup>48</sup> By 1974, world leaders and environmentalists were alarmed at the rate of population growth worldwide and concerned about the environmental impact of the population reaching five billion.<sup>49</sup> The 1974 World Population Conference in Bucharest, Romania—the first intergovernmental world conference on population—resulted in a World Population Plan of Action seeking to protect the rights of couples and *individuals* to access and use contraception, while also focusing on the impact of population growth on the environment, the over consumption of world resources, and the effect of large populations on society as a whole.<sup>50</sup> Thus,

45. See Karen Breslau, *Overplanned Parenthood: Ceausescu's Cruel Law*, NEWSWEEK, Jan. 22, 1990, at 35, <http://www.skeptictank.org/hs/preg.htm> [<https://perma.cc/8RRS-QFXE>] (describing the policies Ceausescu implemented to increase the population of Romania).

46. See Babor, *supra* note 7, at 89–91, for general information on the conferences and the progression of thought. The inception of the United Nations was October 24, 1945. *United Nations Conferences on Population*, UNITED NATIONS DEPT OF ECON. & SOC. AFFAIRS, <https://www.un.org/en/development/desa/population/events/conference/index.asp> [<https://perma.cc/EBU6-E9RH>] [hereinafter *United Nations Conferences on Population*]. Since then, “three world conferences on population have been held[,]” while “[t]wo other conferences on population have been convened.” *Id.*; see also Bracken, *supra* note 28, at 197 (“[A] human right to reproductive choice exists under international customary law.”).

47. Babor, *supra* note 7, at 89, 100–01; *United Nations Conferences on Population*, *supra* note 46.

48. See Babor, *supra* note 7, at 88–89 (“Lowering the birthrate and improving social welfare in pursuit of economic growth had given rise to population policies generally characterized by demographic targets, contraceptive acceptors and the subordination of human rights to an antinatalist (and more rarely, pronatalist) control over fertility.”).

49. See Paula Abrams, *Population Control and Sustainability: It's the Same Old Song but with a Different Meaning*, 27 ENVTL. L. 1111, 1112–13, 1117 (1997) (discussing the “Bucharest World Population Conference [of] 1974” and the growing concerns of overpopulation and the potential environmental impacts).

50. Babor, *supra* note 7, at 89–90, 101; *United Nations Conferences on Population*, *supra* note 46.

the developed world's consumption of resources was scrutinized, along with the loss of culture, environmental harm, and pollution that results from rapid development.<sup>51</sup>

In 1981, the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was entered into force.<sup>52</sup> The Convention covers areas such as suffrage, education, opportunity, and legal equality for women. CEDAW also contains the classic human rights formula regarding individual procreation decisions: "The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights[.]"<sup>53</sup>

By 1984, the economics-focused supply-side demographics won some advocates, including the U.S. government. At the International Conference on Population in Mexico City, the Reagan Administration announced a new policy.<sup>54</sup> The "Mexico City Policy" prohibited the United States from providing financial support to non-governmental organizations (NGOs) that provided abortion services, abortion counseling services, education about abortion, or were engaged in lobbying for less restrictive abortion laws.<sup>55</sup> The Administration took "the position that population growth was a 'neutral phenomenon'" and that more people might lead to more benefits in the world.<sup>56</sup> In 1993, the Mexico City Policy was rescinded by the

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51. See Babor, *supra* note 7, at 89–90 ("That 'development would be the best contraceptive' became the prevailing aphorism, even though, as it is now realized, a rapid change in overall conditions can also eradicate culture, undermine the potential for an ecologically-balanced environment and generally result in increased pollution.").

52. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]; see also Abrams, *supra* note 49, at 1128–29 ("The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the most significant international treaty protecting the rights of women in matters of fertility and sexuality.").

53. CEDAW, *supra* note 52, at 20.

54. Ratcliffe, *supra* note 30, at 294; see also Allegra A. Jones, Note, *The "Mexico City Policy" and Its Effects on HIV/AIDS Services in Sub-Saharan Africa*, 24 B.C. THIRD WORLD L.J. 187, 189 (2004) ("Officially called the 'Mexico City Policy,' this condition on foreign assistance was first announced by Reagan [A]dministration officials at the United Nations (UN) International Conference on Population in Mexico City in 1984.").

55. See Jones, *supra* note 54, at 194 ("[The Mexico City Policy] prohibited organizations receiving U.S. funds from using their own money to perform abortions, to lobby foreign governments for abortion legalization, or to conduct public education campaigns regarding the benefits or availability of abortion.").

56. Babor, *supra* note 7, at 90.

Clinton Administration; however, the policy was reinstated in 2001 by the Bush Administration and continues to serve as a political football today.<sup>57</sup>

In 1992, the United Nations held an Earth Summit in Rio de Janeiro, Brazil, which was intended to focus on protecting the environment.<sup>58</sup> The watchword of this conference was sustainability—how to balance the need for a healthy environment with the need for individual freedoms in family decision making.<sup>59</sup> However, population concerns emerged as the primary issue of the Earth Summit.

In 1994, world population policy saw a dramatic change. The International Conference on Population and Development in Cairo, Egypt, moved from an emphasis on economic development to a focus on gender equality for women.<sup>60</sup> Besides contraception, the importance of education for women was emphasized as one of the essential elements needed for population stabilization or reduction.<sup>61</sup> In 1995, the Beijing World Conference on Women continued the focus on education of women, gender equality, and promotion of sexual health. This conference was steered largely by NGOs, rather than nation states.<sup>62</sup> The shift to NGOs

57. See Jones, *supra* note 54, at 192–95 (providing an overview of the history of the Mexico City Policy).

58. See generally Al Gore, *Address at Rio Earth Summit*, 59 TENN. L. REV. 645 (1992) (addressing the motivations and goals of the Rio Earth Summit).

59. See *id.* at 646 (“We must listen when those who best understand the population problem tell us that it is linked not merely to the availability of safe and effective birth control on a voluntary basis, but it is also profoundly linked to poverty, injustice, human suffering, and child mortality.”); Abrams, *supra* note 49, at 1112 (“Overpopulation is a multi-faceted problem . . . [l]ike most complex social problems, development of successful strategies to address the population problem requires consideration of conflicting values and priorities.”); Roger Martella & Kim Smaczniak, *Introduction to Rio +20: A Reflection on Progress Since the First Earth Summit and the Opportunities That Lie Ahead*, 12 SUSTAINABLE DEV. L. & POL’Y 4, 6 (2012) (“The pertinent question for Rio+20 thus becomes how to recognize and account for the achievement gap to streamline implementation in the future, in addition to what role this particular conference can play in reinforcing commitment or amplifying the effectiveness of ongoing efforts to advance sustainable development.”).

60. Babor, *supra* note 7, at 92–98; *United Nations Conferences on Population*, *supra* note 46.

61. Babor, *supra* note 7, at 93.

62. See, e.g., Athena D. Mutua, *Five Years After Beijing: A Report Card on Women’s Human Rights*, 94 AM. SOC. INT’L L. PROC. 287, 287 (2000) (discussing the Beijing Conference and the subsequent barriers to implementation five years after the conference); see also Charlotte Bunch, *Looking Back, Looking Forward: Women’s Human Rights in Global Perspective*, 38 WOMEN’S RTS. L. REP. 333, 334 (2017) (“Feminists in particular crossed these lines and worked together to bring women’s perspectives out of the shadows of ‘special interests’ and onto the world agenda.”); Elizabeth L. Larson, Comment, *United Nations Fourth World Conference on Women: Action for Equality, Development, and Peace (Beijing, China: September 1995)*, 10 EMORY INT’L L. REV. 695, 696 (1996) (acknowledging the successes and

demonstrates a change in focus from national to special interests. However, this is criticized by some authors who argue that NGOs represent their special interests in terms of human rights but may actually have goals that are political or social in nature.<sup>63</sup> Such goals might be interpreted as interference with traditional notions of family structure, including parental control over children and adolescents. In 2012, the London Summit on Family Planning found that simple access to birth control was still a problem for 222 million people, resulting in eighty million unplanned pregnancies and forty million abortions.<sup>64</sup>

### III. NATIONAL OR CULTURAL ACTIONS AFFECTING POPULATION

#### A. China

China is noted for its aggressive population control policies, particularly during the 1980s and 1990s.<sup>65</sup> When Mao Zedong came to power in 1949, he believed that population control was a “capitalist myth” and that China’s population should be as large as possible.<sup>66</sup> In this view, the advantages of

advancements of the Beijing conference in terms of women’s rights, and critiquing the implementation of the Conference to global governments).

63. See, e.g., Maria Sophia Aguirre & Ann Wolfgram, *United Nations Policy and the Family: Redefining the Ties That Bind: A Study of History, Forces and Trends*, 16 B.Y.U. J. PUB. L. 113, 119 (2002) (“The changing definition of family in [United Nations] documents has been significantly influenced by non-state actors interacting through transnational advocacy networks, with each other, with states, and with international organizations.”).

64. Jain & Rozario, *supra* note 44, at 377–78.

65. Much has been written on the subject of Chinese population policy. See Smolin, *supra* note 43, at 2 (“China’s sex-ratio imbalance is ‘often seen as an unintended consequence’ of China’s . . . extraordinary state control of procreation.”); Jennie A. Clarke, Comment, *The Chinese Population Policy: A Necessary Evil?*, 20 N.Y.U. J. INT’L L. & POL. 321, 322 (1987) (“China’s population control policy is one of the first and most stringent of its kind. . . . By Western standards, the policy is intolerably intrusive into matters of family, privacy and individual choice.” (footnote omitted)); Hampton, *supra* note 43, at 323 (critiquing the enforcement of China’s population control and providing a broad overview of the development and origins of that harsh policy); Lee Shlamowitz, Comment, *The Sun and the Scythe: Combining Climate and Population Policy to Solve the Greatest Challenges the World Has Ever Faced*, 24 TEMP. INT’L & COMP. L.J. 247, 257–65 (2010) (reviewing China’s extraordinary stance on population control and the potential infringement on civil liberties); see generally Barbara Stark, *Crazy Jane Talks with the Bishop: Abortion in China, Germany, South Africa and International Human Rights Law*, 12 TEX. J. WOMEN & L. 287, 295 (2003) (“Draconian population control measures were viewed as necessary to counter traditional preferences for large families. . . . [The] policy was enforced through a broad range of methods, including onerous fines on excess children, forced sterilizations[,] and abortions . . . .” (footnote omitted)).

66. See Clarke, *supra* note 65, at 327–28 (describing China’s population policies implemented under Mao Zedong); Hampton, *supra* note 43, at 323 (“Mao Zedong believed a person’s amount of

a large national population included laborers, soldiers, and possible survivors of a nuclear war. The policies were very successful, and the population boomed through the 1960s and early 1970s.<sup>67</sup> However, by the early 1970s, the need to slow population growth became clear: "The [g]overnment encouraged late marriage, postponement of child-bearing, families of one or two children, and spacing of four to five years between children."<sup>68</sup> The government instituted economic sanctions and incentives by 1978. Families with only one or two children—or those who signed a one-child pledge—were rewarded with salary bonuses, education benefits, housing privileges, and other benefits.<sup>69</sup> This policy worked well in cities, but not in rural areas where children were still an economic asset in an old-fashioned agricultural economy.<sup>70</sup>

In 1980, China instituted its infamous "one-child" policy.<sup>71</sup> The policy required that couples have only one child. Penalties were imposed for having a second child.<sup>72</sup> The government offered economic, health, education, and environmental rationales for the policy.<sup>73</sup> In rural areas, compliance was limited, and coercion of abortions and sterilizations was believed prevalent.<sup>74</sup> In order to help with enforcement of the one-child policy at the local level, China instituted what came to be known as "the 'granny police,' [consisting of] older women who [would] visit the women in their neighborhoods on a regular basis in order to monitor and instruct them in the use of contraceptives and to remind them to go for medical checkups."<sup>75</sup> The Chinese government officially opposed coercion;

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consumption could be less than his level of production and actually encouraged population growth by providing incentives for government workers to increase their family size.").

67. Hampton, *supra* note 43, at 323.

68. Clarke, *supra* note 65, at 329.

69. *E.g.*, Hampton, *supra* note 43, at 333 ("Couples who keep their family size to one child may receive the following benefits: monetary payment, medical and educational benefits, preferential treatment for employment, and even land allocation.").

70. *See* Smolin, *supra* note 43, at 17–18 (describing the variation in enforcement of China's population control policies); Clarke, *supra* note 65, at 341 ("The one-child policy causes economic hardship for rural dwellers since they must forego the potential increment in productivity of additional children.").

71. Stark, *supra* note 65.

72. Clarke, *supra* note 65, at 331.

73. *See id.* at 332–33 (explaining China's various "justifications for imposing the one-child policy").

74. *See id.* at 340 ("Chinese officials believe[d] that a more stringent population policy [would] overcome rural resistance and counter the substantial negative impact that rural non-compliance ha[d] on the overall results of the policy.").

75. *Id.* at 346.

however, it has been suggested that lower-level officials might have taken extreme measures (i.e., forced or coerced sterilizations and abortions) in order to meet the population goals set by higher officials.<sup>76</sup>

One of the most troubling aspects of the Chinese one-child policy was the prevalence of female infanticide.<sup>77</sup> In traditional Chinese society, males are valued more than females, and women who gave birth to first-born daughters were often abused by their families.<sup>78</sup> As a result, couples who received a prenatal screen revealing the sex of their unborn children elected to abort female fetuses. This practice of prenatal sex screening was later outlawed.<sup>79</sup> In rural communities, couples might choose to abandon female infants or possibly kill them.<sup>80</sup> By 2000, the ratio of males to females in China was out of balance. The normal ratio of male to female births is 105 to 100, but in China the ratio was 117 to 100.<sup>81</sup> China eventually relaxed some of the rules for certain couples: if two only-children married, they were permitted to have two children, certain ethnic minorities were allowed to have more than one child, etc.<sup>82</sup>

It is possible the one-child policy will lead to political and social problems in the future in China, most notably the shortage of marriageable females may create problematic sexual dynamics—women being selective, and choosing more wealthy and educated men in the cities rather than in the rural areas.<sup>83</sup> Historically, Chinese culture places relationship power in the man. Rural communities may die out in situations where available marriageable women leave, and the men either follow them or die without descendants. In addition, crime rates and military conflicts may increase due to the overly large male population. Finally, the Chinese rely on adult children to care for elderly parents, and the lack of younger family members

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76. *Id.* at 347.

77. *See id.* at 349–51 (attributing “widespread cases of female infanticide and abuse” to China’s population policy).

78. *See id.* at 342–45 (describing traditional beliefs in Chinese culture); Hampton, *supra* note 43, at 324 (“A preference for male children has endured throughout Chinese history.”).

79. Clarke, *supra* note 65, at 350–51.

80. *See* Hampton, *supra* note 43, at 326 (“The preference by couples to produce male offspring has thus created the likelihood for more occurrences of female infanticide and abandonment of girl babies.”).

81. *Id.* at 346.

82. *See* Smolin, *supra* note 43, at 16–17 (discussing “various exceptions to the one-child norm”).

83. *See* Hampton, *supra* note 43, at 347 (“With the steady increase of the male population and the decline of the female population, men will find it increasingly difficult to marry.”).



to care for the elders may lead to problems in the future.<sup>84</sup>

### B. *India*

In 1952, India established one of the first national level family-planning programs.<sup>85</sup> Initially, the focus was on the poor, but it eventually evolved into a program with an emphasis on sterilization.<sup>86</sup> In the late 1960s, India created vasectomy camps. These were aimed at men and were organized as rural festivals with cultural and political exhibits and programs, as well as celebrity appearances and performances.<sup>87</sup> Dancing, floats, and slogans abounded, as men joined the celebration and became sterilized. Incentives were provided, and as financial incentives increased, the number of vasectomies increased.<sup>88</sup> Tens of thousands of men were sterilized through the family-planning festivals.<sup>89</sup> However, the birth rate did not come down.<sup>90</sup> India's already large population continued to grow.<sup>91</sup>

From 1975 to 1977, India began a strong-arm sterilization program.<sup>92</sup> State and local level quotas were established, and state and local governments were ordered to enforce them. Couples who were not sterilized were denied food rations and government services, and couples with more than three children were subject to fines or imprisonment.<sup>93</sup>

84. See, e.g., *id.* at 349–50 (explaining the potential future implications of China's population control policies).

85. Jain & Rozario, *supra* note 44, at 379.

86. See *id.* at 379–80 (describing the shift in India's family-planning program); see also STEPHEN L. ISAACS, *Compulsory Sterilization for Demographic Reasons: The Example of India* ("Compulsory sterilization was never put into effect by the Indian government."), in *POPULATION LAW AND POLICY* 193, 193 (Stephen L. Isaacs ed., 1981).

87. M.F. Franda, *Mass Vasectomy Camps and Incentives in Indian Family Planning*, 16 *AM. U. FIELD STAFF REP.: SOUTH ASIA SERIES*, no. 7, June 1972, at 1–16, reprinted in *POPULATION LAW AND POLICY* 316, 316–17 (Stephen L. Isaacs ed., 1981).

88. *Id.* at 317.

89. See *id.* at 317–18 (providing statistics regarding how many men were sterilized at various camps).

90. BETSY HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL AND CONTRACEPTIVE CHOICE* 237 (1987).

91. See *id.* at 237–40 (asserting sterilization camps will not be the solution to India's population problem).

92. *Id.* at 237–38.

93. See *id.* ("Fines and imprisonment threatened couples who failed to be sterilized after three children, and food rations and other government services were withheld from the unsterilized."); Jain & Rozario, *supra* note 44, at 382–83 (describing state level enforcement mechanisms aimed at curtailing population growth); see also Luke T. Lee, *Compulsory Sterilization and Human Rights*, 3 *POPULI*, no. 4, 1976, at 2 ("Violation of the law would entail an imprisonment of six months to two years or a fine . . ."), reprinted in *POPULATION LAW AND POLICY* 194, 194 (Stephen L. Isaacs ed., 1981).

Forced sterilization impacted an estimated six and a half million people in the last half of 1976.<sup>94</sup> Perhaps the most interesting and surprising aspect of the policy was the failure of the international community to condemn the forced sterilizations.<sup>95</sup> Some believed that the program was a necessary evil, while some admired the strong leadership displayed by the Indian government.

After 1977, the sterilization program continued without the mandatory aspect, but coercion persisted.<sup>96</sup> The focus shifted to birth control for women—young poor women were incentivized to undergo sterilization, while elite rural women were able to use inter-uterine devices (IUDs).<sup>97</sup> Coercion also occurred in a more subtle way, with community leaders pressuring women to be sterilized after one or two children. Financial rewards were offered, which are arguably inherently coercive to the poorest of populations.<sup>98</sup>

The Indian 2000 National Population Policy established goals for universal access to birth control; information and counseling; access to health care; education for girls; and delaying marriage until after the age of twenty.<sup>99</sup> Despite repeated efforts and revisions to various programs, the population in India continues to rise and is likely to surpass the population of China in a few years.<sup>100</sup> India continues to struggle with the dual challenge of reducing population growth and preserving human rights. The persistent focus on sterilization is problematic, as is the use of camps in poor and rural communities. Access to and information about birth control is still lacking, and high maternal mortality coupled with young marriage continues.<sup>101</sup>

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94. HARTMANN, *supra* note 90, at 238.

95. *E.g., id.* (“Although the compulsory sterilization campaign received critical coverage in the foreign press, many members of the population establishment were slow to condemn it.”).

96. *See id.* at 239–40 (describing the rise and fall of India’s sterilization program).

97. *Id.* at 238–39; Jain & Rozario, *supra* note 44, at 386–87.

98. *See* Babor, *supra* note 7, at 119 (“The perception that financial incentives have ‘more to do with coercion than with choice’ in developing countries and that for the ‘desperately poor, there is no such thing as free choice’ reflects concern that the impoverished will have their decision whether to have more children foreclosed by the threat of monetary loss or the offer of monetary gain.”).

99. Jain & Rozario, *supra* note 44, at 381–82.

100. *See* 2018 WORLD POPULATION DATA SHEET, *supra* note 2, at 1 (predicting India to become the most populous country by 2050).

101. *See* Jain & Rozario, *supra* note 44, at 382–85 (identifying improvements and lingering gaps in India’s population policy).

### C. Romania

In 1966, Dictator Nicolae Ceausescu planned to drastically increase the population of his country and declared the fetus as the property of the entire society.<sup>102</sup> He outlawed abortion, contraception, and sex education, including all books on sexuality and reproduction.<sup>103</sup> Women were rounded up at work every few months and examined for signs of pregnancy. If a child did not appear at the appropriate time, the woman might be questioned and fined.<sup>104</sup>

The problem for the citizens of Romania was lack of nutrition and health care, as well as a poor economy.<sup>105</sup> Romanians smuggled in condoms and birth control pills and sought illegal abortions; it was estimated that 60% of all pregnancies ended in abortion or miscarriage during this time. Children were abandoned by impoverished parents, and by 1988, "Romanian orphanages were filled beyond capacity with children who had been abandoned."<sup>106</sup> Ceausescu was overthrown in 1989, and his policies, including the abortion ban, were rescinded.<sup>107</sup>

### D. Indonesia

Often considered a success story, Indonesia was able to successfully reduce its population growth rate during the 1970s and the 1980s, particularly in the more highly populated areas of Java and Bali.<sup>108</sup> In 1970, the government established family-planning clinics, and communities were organized into women's Acceptor Clubs, led by wives of village or local

102. Breslau, *supra* note 45.

103. See LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 57 (1990) ("Perhaps the best example of autocracy in abortion legislation has been Romania, which in 1966, in an attempt to increase population, banned all abortions for 'social reasons,' as well as all contraception."); Breslau, *supra* note 45 ("[Ceausescu] forbade sex education. Books on human sexuality and reproduction were classified as 'state secrets,' to be used only as medical textbooks.").

104. Breslau, *supra* note 45.

105. See *id.* ("At first Romania's birthrate nearly doubled. But poor nutrition and inadequate prenatal care endangered many pregnant women.").

106. TRIBE, *supra* note 103, at 58; see also Breslau, *supra* note 45 (noting "[u]nwanted survivors often ended up in orphanages").

107. See TRIBE, *supra* note 103, at 58 ("It is not surprising that one of the first acts of Romania's new government following the bloody Romanian revolution of late 1989 was the legalization of abortion."); Boland, *supra* note 26, at 1140-41 ("By the end of 1989, when the Ceausescu regime was overthrown, it became clear that the Romanian population had been subjected to one of the most highly restrictive pro-natalist population control policies ever devised.").

108. HARTMANN, *supra* note 90, at 74.

leaders, to establish relationships with the clinics.<sup>109</sup> Women were steered toward IUDs and birth control pills, since those are more reliable forms of birth control than most barrier methods. Later, rural women were urged to use IUDs, since they were more likely to stop use of pills due to lack of supply or medical supervision.<sup>110</sup>

The Indonesian system was criticized for its focus on IUDs and birth control pills as the options most strongly promoted to women.<sup>111</sup> Indonesia also established “mass IUD ‘safaris,’” with a picnic or party-like atmosphere, filled with exhortations, speeches, and small gifts for acceptors.<sup>112</sup> There was some concern that acceptors were coerced through propaganda, paternalism, and rewards for participation. The IUD is not necessarily the best form of contraception for every woman, as it may have side effects, and requires follow-up care.<sup>113</sup> However, the government defended the policies, indicating that a smaller population will benefit all in the long run.<sup>114</sup>

#### E. *Sub-Saharan Africa*

While Asian fertility is falling—sometimes even without the full economic development called for by the demographic transition theory—Sub-Saharan African countries with similar population profiles have growth rates that remain high.<sup>115</sup> The reasons are not clear, but some believe that social and cultural patterns, well-established through history, may have an

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109. *Id.* at 75.

110. *See id.* at 76–77 (“The Indonesian program pushes the so-called more effective contraceptives.”).

111. *E.g., id.* at 77 (“An article . . . revealed in 1984 how in one district in East Java, villagers complained that they were being penalized for using traditional methods rather than modern contraceptives distributed by the government.”).

112. *Id.* at 77–79.

113. *See id.* at 77 (“At the same time that the official family[-]planning program pushes the pill and IUD, adequate health infrastructure does not exist for the treatment of side effects, routine checks of women with IUDs, or long-term monitoring of hormonal contraceptive users through cervical smear tests for cancer, etc.”); *see also* Boland, *supra* note 26, at 1147–48 (providing information on various reproductive technologies and IUDs).

114. *See* HARTMANN, *supra* note 90, at 82 (“Defenders of the Indonesian program like to point out that even though community pressure is instrumental in getting individuals to practice contraception in Indonesia, in the long run those individuals benefit, through the improvements family[-]planning brings to their health and lives.”).

115. *See* John C. Caldwell & Pat Caldwell, *High Fertility in Sub-Saharan Africa*, SCI. AM., May 1990, at 118, 118 (“No independent nation of sub-Saharan Africa has shown definitive evidence of fertility decline, and in many nations population growth is accelerating.”).

impact.<sup>116</sup> Historically, the African world view is based on eternal lineage.<sup>117</sup> Ancestry and descent are key, and are reflected in notions of spirituality, as well as virtue (e.g., many children are a reward for virtue) and sin (e.g., a barren woman is being punished). Ancestor worship is a limited form of immortality for the father, and, in fact, the failure of descendants to perform certain rites is believed to doom a father's spirit to death in the afterworld.<sup>118</sup>

Socially, marriage is not particularly important, at least not in the traditional sense. Polygamy is common, and the concern with legitimacy is not the same as it is in the Western World.<sup>119</sup> Women bear and raise children, and do most of the manual work, which is agricultural in nature. Because of this, Africans believe that large families are better, and in fact do better economically.<sup>120</sup> In addition, women who are married have children who belong to the husband's lineage, so the husband's family may decide when and how many children the women will have.<sup>121</sup> There is little incentive for men to elect to reduce the number of children produced by their wives because men provide little financial support to the children, and will receive financial and other lifetime support from them, as well as the ancestor worship, after death.<sup>122</sup> Families often are not Western-style nuclear families, but rather extended families living in groups, with children raised by aunts and uncles.<sup>123</sup> Families often have communal land tenure, or clan ownership, so a larger clan makes for a more powerful family.<sup>124</sup>

116. *See id.* ("We believe the primary cause of high fertility in sub-Saharan Africa is the social and family patterns that have developed over millennia in response to conditions in the region.")

117. *See id.* at 119 ("The core of African society is its emphasis on ancestry and descent. . . . In social terms, the emphasis is reflected in the strength of ties based on the family of descent—the lineage.")

118. *See id.* at 119–20 ("If a son does not properly organize the burial rites and the pouring of libations during the ceremony as nourishment for the ancestors, then the father's spirit does not survive.")

119. *See id.* at 120 ("Typically from [twenty] to [fifty] percent of wives are in polygynous marriages, and most must be prepared for the likelihood that their husbands will acquire extra wives.")

120. *See id.* ("Women are important in the African social system not only because they bear children but also because they do most of the agricultural work.")

121. *See id.* ("In the patrilineal societies that predominate, this transfer of ownership ensures that children belong to the husband's lineage.")

122. *See id.* (recognizing "[h]usbands have little reason to restrict fertility")

123. *See id.* (noting "researchers have found up to half of all dependent children living with persons other than their own biological parents")

124. *See id.* ("The communal land tenure of the lineage social structure rewards large families.")

Economically, the soil of Africa is not suited to mass agriculture, so the Western notions of land ownership and material wealth accumulation did not rise to the same level of importance in Africa.<sup>125</sup> Western religions have not permeated African culture, so the older forms of ancestor worship and care still exist.<sup>126</sup> Health care may not be available, or is insufficient, and infant mortality is very high. The AIDS pandemic has been particularly destructive to African populations.<sup>127</sup> Women may be worried about dying without children to carry on the lineage and may have as many children as possible to reduce the risk of dying without children to carry on the family line.<sup>128</sup>

More recently, urbanization is occurring throughout the entire continent, along with individual rather than communal land ownership.<sup>129</sup> Health care is probably the key to a long-term reduction in the population growth rate in Africa—reducing infertility, saving lives of children, and introducing meaningful family-planning into the mix.<sup>130</sup>

#### F. *Western Europe and Japan*

Western Europe and Japan have the lowest birth rates in the world—well below replacement rates.<sup>131</sup> This has led to concern about workers, as well as old age security.<sup>132</sup> The most common pro-natal incentives are family allowances or payments made to families with children. Systems vary, but

125. See *id.* (discussing communal land tenure, stating: “[W]here there is no ownership of land or expensive farming equipment, the only possible investment in farming is in human beings”).

126. See *id.* at 123 (describing how “the popular religions of Eurasia” did not overtake the African social structure).

127. See Jones, *supra* note 54, at 190 (“Worldwide, the region most affected by AIDS is sub-Saharan Africa, where AIDS is the leading cause of death and has killed more than 19.4 million people.”).

128. See, e.g., Bunmi Makinwa, *The 1993 National Conference on Sustainable Solutions—Population, Consumption and Culture*, 21 B.C. ENVTL. AFF. L. REV. 291, 293 (1994) (“If one sees only a slight possibility of one out of five children surviving, then chances are that one will opt to have many children to ensure that at least a few of them survive to become adults.”).

129. See Caldwell & Caldwell, *supra* note 115, at 123 (“Meanwhile the rural conditions that gave rise to the lineage system are disappearing. The proportion of people living in the countryside is declining, and individual land ownership is becoming more common.”).

130. See *id.* at 125 (“If reduced mortality is in fact the key to lower fertility, then the best investment for population stability is in health services and family[-]planning together.”).

131. See Dau-Schmidt & Brun, *supra* note 41, at 181–84 (evaluating decreasing birth rates at a global scale).

132. See generally Sarah Harper, *Youth—A Scarce Commodity Within an Ageing World*, 21 NOTRE DAME J.L., ETHICS & PUB. POL’Y 479 (2007) (addressing the societal implications of low birth and fertility rates).

governments usually make payments to parents for each child between birth and the ages of fourteen to eighteen. Prenatal allowances and grants are also used, as are birth payments.<sup>133</sup> Sometimes benefits regarding work or housing are granted to those who have children.<sup>134</sup> Extended maternity and paternity leaves (with job security) are widely available and public day care is available for preschool-age children.<sup>135</sup>

### G. *United States*

The United States arguably is neither pro nor anti population growth in its policies.<sup>136</sup> The federal income tax arguably facilitates larger families, but it is only at the margins that this is helpful.<sup>137</sup> For example, deductions for dependents; head of household status tax rates; earned income and dependent credits; home ownership deductions; deductions for child care; shifting income and wealth to children via the Uniform Transfers to Minors Act or the Estate and Gift Tax; and public education aid to families with dependent children (and other forms of public assistance) paid with general tax funds—all tend to support larger families.<sup>138</sup> On the other hand, the United States has not used economic incentives or disincentives, such as

133. See DEPT' OF ECON. & SOC. AFFAIRS, UNITED NATIONS, MEASURES, POLICIES AND PROGRAMMES AFFECTING FERTILITY, WITH PARTICULAR REFERENCE TO NATIONAL FAMILY PLANNING PROGRAMMES 17–33 (1972) (discussing various family allowance schemes), *reprinted in* POPULATION LAW AND POLICY 326, 326–28 (Stephen L. Isaacs ed., 1981).

134. See *id.* at 328 (“In most countries some system exists whereby persons subject to income taxation are granted a reduction in the size of their tax payments if they have family responsibilities.”).

135. See STEPHEN L. ISAACS, *Incentives to Increase Population Growth: Introductory Note* (“Making motherhood more attractive by providing extended maternity leave or providing day care for young children are other kinds of nonmonetary incentives.”), *in* POPULATION LAW AND POLICY 325–26 (Stephen L. Isaacs ed., 1981).

136. See Babor, *supra* note 7, at 90 (“The United States adopted the position that population growth was a ‘neutral phenomenon,’ neither harmful nor beneficial to the environment, and that the solution should be ‘market-based.’”). Compare Ira B. Shepard, *Federal Taxation and Population Control*, 55 N.C. L. REV. 385, 388 (1977) (“Present federal tax laws encourage population growth by providing subsidies to families with children.”), with Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 22 (2007) (“To the extent that tradition [of regulating procreative choice] reflects what is and is not a fundamental right, U.S. history does not support the notion of a broad procreative right.”), and ISSACS, *supra* note 135, at 325 (“Most countries have enacted legislation to protect and strengthen the family. In fact, the United States is the only developed country without a general family allowance plan.”).

137. See Shepard, *supra* note 136, at 388 (explaining U.S. tax law “is a product of a series of decisions, discretely made, each of which has had as an unstated premise the desirability (or at least acceptance) of high birthrates”).

138. See *id.* at 388–92 (describing various favorable tax treatments).

those found in European countries, to affect population growth.<sup>139</sup> In general, many forms of birth control are easily available in the United States, along with education about the options.<sup>140</sup> Abortion is also widely available.<sup>141</sup>

#### IV. HUMAN RIGHTS AND POPULATION

##### A. *A Brief Summary of the Basics*

Human rights, as a concept, has existed for centuries. The Magna Carta in England, the Code of Hammurabi, writings of early scholars and philosophers (Aristotle, Aquinas, Grotius, Mencius) worldwide, as well as the Declaration of Independence and the French Declaration of the Rights and Duties of Man all contain human rights ideology.<sup>142</sup> Certain institutions or activities (slavery for example) were understood to be violations of international law.<sup>143</sup> However, modern human rights law came into existence after World War II, with destruction and devastation fresh in the minds of the Western World leadership.<sup>144</sup>

139. See ISSACS, *supra* note 135, at 325 (recognizing the United States does not offer family allowances).

140. See HARTMANN, *supra* note 90, at 240 (“Today sterilization is the most widely used method of birth control in the United States . . . .”); 2018 WORLD POPULATION DATA SHEET, *supra* note 2, at 10 (showing 73% of married women between the ages of fifteen and forty-nine reported using “all methods” of contraception, while 63% reported using “modern methods” of contraception); cf. Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957, 964–65 (2010) (“Only one in five married women in Africa use modern contraception, and the proportion drops to less than one in twenty women in some areas of the continent.”).

141. Cf. Gable, *supra* note 140, at 965–66 (“Access to abortion services varies significantly in different countries, ranging from complete prohibition of the practice to pregnancy termination on demand.”).

142. See Burns H. Weston, *Human Rights: Concept and Content*, ENCYCLOPEDIA BRITANNICA ONLINE (2013) (providing a historical account of the development of human rights), *reprinted in* HUMAN RIGHTS IN THE WORLD COMMUNITY 7, 7–16 (Burns H. Weston & Anna Grear eds., 4th ed. 2016).

143. See, e.g., Tom J. Farer, *The United Nations and Human Rights: More Than a Whimper Less Than a Roar*, 9 HUM. RTS. Q. 550, 553–55 (1987) (describing examples of countries, actions, and policies that violated international law).

144. See Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT’L & COMP. L. 219, 220 (2006) (“As a result of the horrors of the Second World War . . . individuals and organi[z]ations were tried for crimes under international law: crimes against peace, crimes against humanity and war crimes at the Nuremberg Trials.”); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 6 (1982) (“After the Second World War . . . a broader system of protection for human rights was established, with the expectation that it would be applied to all human beings, in large and small countries alike.”).



The United Nations was formed, and shortly thereafter the United Nations Charter<sup>145</sup> and the Universal Declaration of Human Rights<sup>146</sup> were adopted.<sup>147</sup> Both refer to human rights, with the Declaration serving as a detailed definition and interpretation of human rights listed in the Charter.<sup>148</sup> Thereafter, the United Nations Commission on Human Rights developed two covenants for adoption by member states: the International Covenant on Civil and Political Rights (ICCPR)<sup>149</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>150</sup> Both were promulgated in 1966 and entered into force in 1976.<sup>151</sup> Over time, scholars came to think of human rights in progressive categories, or generations, roughly corresponding to schools of thought.

### 1. First Generation Rights

At their earliest inception, “First Generation” rights “were essentially claims of the individual against state interference and to self-government.”<sup>152</sup> These rights are exemplified by the ICCPR.<sup>153</sup> The Covenant is focused on the rights of the individual, which it phrases as “negative rights”—freedom from, rather than freedom to.<sup>154</sup> The core values of the first generation are the protection of the individual from government interference or overreaching and the idea of government abstention rather than intervention.<sup>155</sup> The emphasis is on the maximum fulfillment of individual self-interest and the existence of a social contract, with the individual giving up some rights, but preserving

145. See U.N. Charter art. 1, ¶¶ 1–4 (setting forth the purposes of the United Nations).

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

147. See Farer, *supra* note 143, at 553–55 (recalling the creation of the United Nations).

148. *Id.* at 555–58 (detailing the contents of the Charter and the Declaration).

149. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

150. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

151. Farer, *supra* note 143, at 558 nn.39–40.

152. Engle, *supra* note 144, at 256. “The first wave of human rights in modernity is usually identified with the period of Scottish enlightenment and the age of reason (the nineteenth century), expressed in the liberal revolutions in America, France, and Latin America.” *Id.*

153. See Henry J. Steiner & Philip Alston, *Comment on the ICESCR and the Character of the Rights* (commenting on the differences between the two major UN Covenants), in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 245, 246–48 (2d ed. 2000).

154. See Engle, *supra* note 144, at 257 (“First-generation rights can be summary[z]ed, roughly, as negative civil and political rights—‘freedoms from’ rather than ‘rights to.’”); Farer, *supra* note 143, at 558–60 (elaborating on the language contained in the Covenant).

155. Engle, *supra* note 144, at 256.

others.<sup>156</sup> The rights are numerous and include: prohibition of slavery; prohibition of torture; right to a fair and public trial; right to participate in government; freedom of thought, conscience, and religion; freedom of opinion and expression; and property rights.<sup>157</sup> The notions are Western notions of “rights” and come from ideals of the United States and Europe after World War II in terms of capitalism and democracy. These rights are perhaps the most accepted worldwide and often have a privileged place in a rights “hierarchy.”<sup>158</sup>

## 2. Second Generation Rights

The so-called second generation of human rights has roots in the socialist tradition of parts of Europe.<sup>159</sup> The rights are more positive than negative, guaranteeing individuals rights that require, rather than limit, government action.<sup>160</sup> The rights are exemplified by the ICESCR.<sup>161</sup> Examples include the right to work, rest, and leisure; the right to education; the right to a standard of living needed for health and well-being; and a right to social security.<sup>162</sup> The rights are focused more on the safety and security of the individual, rather than the independence and autonomy of the individual.<sup>163</sup>

## 3. Third Generation Rights

The third generation of human rights is derived from the Third (or developing) World.<sup>164</sup> “Essentially, third-generation rights call for the

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156. See Weston, *supra* note 142, at 12 (“What is constant in this first-generation conception is the notion of liberty, a shield that safeguards the individual—alone and in association with others—against the abuse of political authority.”).

157. *Id.*

158. See *id.* (“Also included are the right to own property and the right not to be deprived of it arbitrarily—rights that were fundamental to the interests fought for in the American and French revolutions and to the rise of capitalism.”).

159. *Id.*

160. See *id.* (“Historically, economic, social, and cultural rights are a counterpoint to the first generation, civil and political rights, and are conceived more in positive terms (‘rights to’) than in negative ones (‘freedoms from’) . . .”).

161. See Steiner & Alston, *supra* note 153, at 246 (“[T]he ICESCR usually employs the formula ‘States Parties recognize the right of everyone to . . .’”).

162. See *id.* (listing examples of the rights found within Part III of the ICESCR).

163. See HUMAN RIGHTS IN THE WORLD COMMUNITY 163, 163 (Burns H. Weston & Anna Grear eds., 4th ed. 2016) (“In this chapter, we turn to a set of values—basic human needs as security rights—that concern the right of individuals and groups to expect that governments will do something positive to support their fundamental needs . . .”).

164. See Weston, *supra* note 142, at 13 (noting “[t]hree of the claimed rights reflect the emergence of nationalism in the developing world in the 1960s and ‘70s’”); see generally Christof Heyns,

redistribution of power and resources, and consider the current international system ineffective in its attempts to resolve contemporary issues.”<sup>165</sup> The rights are group rights rather than individual rights.<sup>166</sup> Personhood may be seen through the lens of group identity in this category of rights.<sup>167</sup> Historically, these nations have the challenges of economic underdevelopment and the desire for modernization and industrialization in common.<sup>168</sup> These are not part of the United Nations treaty structure, with the exception of discrimination, but are part of the African Charter on Human and People’s Rights.<sup>169</sup> Such rights are more aspirational than actual, and include: rights to economic and social development,<sup>170</sup> self-determination, peoples’ preservation of cultural traditions,<sup>171</sup> a healthy

*The African Regional Human Rights System: The African Charter*, 108 PENN. ST. L. REV. 679 (2004) (describing the ongoing “struggle for human rights on the African continent”).

165. DOUGLAS ROCHE, *THE HUMAN RIGHT TO PEACE* 122–44 (2003), reprinted in *HUMAN RIGHTS IN THE WORLD COMMUNITY* 255, 259 (Burns H. Weston & Anna Grear eds., 4th ed. 2016). “Third-generation rights include the right to political, economic, and cultural self-determination; the right to economic and social development; the right to participate in and benefit from the common heritage of mankind; the right to a healthy environment; the right to humanitarian relief, and the right to peace.” *Id.* at 259–60.

166. See Weston, *supra* note 142, at 13 (“Finally, the third generation, composed of solidarity or group rights, while drawing upon and reconceptualizing the demands associated with the first two generations of rights, is best understood as a product of both the rise and the decline of the state since the mid-twentieth century.”).

167. See *id.* (“[E]ach of them also manifests an individual dimension. For example, while it may be said to be the collective right of all countries and peoples . . . so also may it be said to be the individual right of every person to benefit from a developmental policy that is based on the satisfaction of material and nonmaterial human needs.”).

168. See Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 866–67 (2002) (contrasting how “resource constraints affect different countries differently” in the context of the right to development).

169. See Heyns, *supra* note 164, at 690 (noting “[t]he inclusion of socio-economic rights in the Charter is significant”).

170. See Isabella D. Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. U. INT’L L. REV. 1425, 1429 (2000) (“The 1948 Universal Declaration of Human Rights urges all nations to respect specified rights and freedoms. While several of these rights are in the civil and political realm, a number expressly pertain to economic concerns.”); Sengupta, *supra* note 168, at 840 (“The right to development unifies civil and political rights with economic, social and cultural rights into an indivisible and interdependent set of human rights and fundamental freedoms, to be enjoyed by all human beings . . . .”); Martin V. Totaro, *Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development*, 48 VA. J. INT’L L. 719, 737 (2008) (“The fundamental problem with according the right to participatory development status as a customary international law, however, is that there are too many unknowns with respect to what constitutes this purported right.”).

171. See Ron Merkel, *The Right to Difference*, 3 N.Y.C. L. REV. 81, 81 (1998) (“One of the most fundamental and least analyzed of all human rights is the right of individuals to their cultural identity—the right to be different.”); Shana Tabak, *Aspiring States*, 64 BUFF. L. REV. 499, 522 (2016) (“[T]he right

environment,<sup>172</sup> and a right to benefit from shared resources of mankind (including technology). For example, the right to a clean and healthy environment transcends national borders and includes: access to information, participation in decision-making, and the ability to pursue remedies.<sup>173</sup> The right to development might be defined as the right to a constant improvement in the condition and well-being of an entire population and of all individuals within it, based on participation in decision-making and fair distribution of benefits.<sup>174</sup> The right to self-determination is particularly challenging, since it applies to peoples, not minorities, and guarantees the right of every “people” to its own state, but does not include a right of secession.<sup>175</sup> These rights are different than the other generations of rights because they tend to raise worldwide equity issues in terms of the “right” to pollute or to industrialize or to urbanize the society.<sup>176</sup> The Western World is already at a fairly high level of development, but may interfere with so-called Third World rights to development.

Finally, the survival rights of indigenous peoples are probably in this category as well, linked to the preservation of certain parts of the environment and to their unique cultural traditions. Some remote tribes are

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to self-determination entitles all self-defined groups or peoples with a coherent identity and a connection to a defined territory to collectively determine their political future in a democratic fashion, and to be free from persecution and discrimination.”); see also Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 773–80 (1998) (describing the evolution of “self-determination” as a right).

172. Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT’L ENVTL. L. & POL’Y 1, 11–12 (2001) (discussing the “[s]everal attempts [that] have been made to provide substantive content to the right to environment”); Jennifer A. Downs, Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT’L L. 351, 352 (1993) (proposing “recognition of a new human right to a clean and ecologically balanced environment as a ‘third generation’ human right, necessary to facilitate fulfillment of the first and second generations of human rights which already guarantee basic rights and freedoms to all people”).

173. See Downs, *supra* note 172, at 362 (“[T]he right to a healthy environment is vital to the fulfillment of first and second generation rights; persons must have a viable, decent environment in which to live in order to provide and ensure sustenance, health, economic security, and other minimum living standards.”).

174. See Sengupta, *supra* note 168, at 841–46 (evaluating “whether the right to development can be regarded as a human right”).

175. See Hannum, *supra* note 171, at 776–79 (recognizing the right to self-determination does not include a right to secession).

176. See Sengupta, *supra* note 168, at 848 (“The nature of this process of development is centered around the concept of equity and justice . . . leading to the improvement of the well-being of the entire population.”).

threatened by destruction of native habitats and assimilation of the group into a larger society.<sup>177</sup>

#### 4. Fourth Generation Rights

The fourth generation of human rights is not an actual set of rights at this time, but some argue that they should be both recognized and protected.<sup>178</sup> This group of rights is designed to protect the future peoples of the world, rather than current populations and individuals.<sup>179</sup> Some parts of the right to a healthy environment<sup>180</sup> or a right to peace,<sup>181</sup> for example, are presented in terms of benefit to future generations, rather than the existing one.<sup>182</sup> In addition, some arguments are made for “technical rights” for

177. See CHRISTIAN BAY, HUMAN RIGHTS ON THE PERIPHERY: NO ROOM IN THE ARK FOR THE YANOMAMI? 23–41 (1984) (“Eventually, I believe, most of the now isolated or semi-isolated indigenous peoples will choose to integrate in some ways and to a degree with the larger society.”), reprinted in HUMAN RIGHTS IN THE WORLD COMMUNITY 124, 128 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992); Ingrid Washinawatok, *International Emergence: Twenty-One Years at the United Nations*, 3 N.Y.C. L. REV. 41, 57 (1998) (“Indigenous lands continue to disappear as the demands for resources—oil, coal, and forests, for example—overwhelm the rights of the nearly powerless local populations inhabiting the targeted areas.”); William Andrew Shutkin, Note, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT’L L. 479, 509 (1991) (“[I]nternational law in its present state can and should be expanded to protect the rights of indigenous peoples and the environment.”).

178. See, e.g., Weston, *supra* note 142, at 14 (“Similarly reflecting the continuing pressure for human rights evolution is a current suggestion that there exists a ‘fourth generation’ of human rights consisting of women’s and intergenerational rights (the rights of future generations, including existing children) among others.”).

179. See, e.g., Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198, 199 (1990) (“As members of the present generation, we hold the [E]arth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it.”).

180. See generally Downs, *supra* note 172 (arguing for the right to a healthy and ecologically balanced environment).

181. See generally ROCHE, *supra* note 165, at 255–62 (emphasizing the importance of “the human right to peace”); Cecilia M. Bailliet, *Untraditional Approaches to Law: Teaching the International Law of Peace*, 12 SANTA CLARA J. INT’L L. 1 (2014) (evaluating difference foundations and developments of the recognition of a right to peace); John H.E. Fried, *The United Nations’ Effort to Establish a Right of the Peoples to Peace*, 2 PACE Y.B. INT’L L. 21 (1990) (discussing the development of the United Nations recognizing a right to peace).

182. See Paul A. Barresi, *Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena*, 11 TUL. ENVTL. L.J. 59, 77–79 (1997) (“The members of future generations would stand as intended third party beneficiaries to the contract.”); Weiss, *supra* note 179, at 200 (“In practice, some generations may improve the environment, with the result that later generations will inherit a richer and more diverse natural resource base. In this case, they would be treated better than previous generations.”). *But see* Jeffrey M. Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present*

persons: a right to communication and to technology in the modern world.<sup>183</sup> These would not necessarily apply to future generations.

### 5. Women's Rights

Women's rights are in an interesting position in the rights hierarchy, since freedom from discrimination on bases other than gender is a key part of the first generation of human rights.<sup>184</sup> Women's rights came to the table later, with the adoption of CEDAW in 1979.<sup>185</sup> CEDAW defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms . . . ."<sup>186</sup> CEDAW addressed human trafficking; suffrage for women; economic, legal, and educational equality; and equality of opportunity.<sup>187</sup> This is linked, of course, to decisions regarding reproduction, as well as to decisions about when and whom to marry, and rights to divorce.<sup>188</sup>

The rights of women are fundamentally affected in certain cultures when

*Virtue*, 24 COLUM. J. ENVTL. L. 249, 258 (1999) ("Since many would conclude that we have no moral obligation to procreate to ensure the existence of future generations, it is also possible to conclude that we have no moral duty to contingent humans who may, or may not, come into existence.")

183. See Sohn, *supra* note 144, at 60 (exploring additional rights, stating "[s]ome of these rights are perhaps only a variation of other such rights as the right to an adequate standard of living, to freedom of information, or to peace" and concluding "others present intriguing new problems").

184. See generally Weston, *supra* note 142, at 11–12 (discussing the "three 'generations' of human rights advanced by the French jurist Karel Vasak").

185. CEDAW, *supra* note 52. The United States has not ratified any portion of CEDAW; however, "[I]t has made great strides in the fight against women's human rights abuses." Rebecca L. Hillock, Comment, *Establishing the Rights of Women Globally: Has the United Nations Convention on the Elimination of All Forms of Discrimination Against Women Made a Difference?*, 12 TULSA J. COMP. & INT'L L. 481, 488 (2005).

186. CEDAW, *supra* note 52, at 16.

187. *Id.* at 16–20.

188. See Gable, *supra* note 140, at 979 ("The CEDAW's description of the right to health provides a much more specific description of the content of the right to health in the context of reproductive rights and clearly imposes specific obligations on the state consistent with this right."); Margaret Plattner, *The Status of Women Under International Human Rights Law and the 1995 UN World Conference on Women, Beijing, China*, 84 KY. L.J. 1249, 1255 (1995) ("CEDAW, adopted in 1979 by the [United Nations] General Assembly, requires those nation-states agreeing to implement it to take appropriate measures to eliminate discrimination against women in government, law, education, employment, health care, business, reproductivity, and family life.")

population restrictions are attempted,<sup>189</sup> with resulting sex ratio imbalances in countries such as China, India, and South Korea.<sup>190</sup> A normal ratio for boys to girls at birth is 105–107 to 100, since more boys than girls die in childhood.<sup>191</sup> But in China, for example, the ratio might vary from 117–124 boys to 100 girls.<sup>192</sup> This is the result of selective abortion by parents when sonogram or other prenatal screening is available, as well as female infanticide, female abandonment, or simply hiding girl children from government officials, all as a result of cultural preferences for male children.<sup>193</sup>

## 6. Customary Law

Some human rights principles rise to the level of *jus cogens*, or customary law.<sup>194</sup> These are human rights that have been recognized for many years by the international community and are agreed upon and respected by civilized nations.<sup>195</sup> The custom is recognized by treaty, international agreements, and domestic laws. Enforcement is binding upon all states in the international community.<sup>196</sup> Examples normally would include a right to life, prohibition of slavery and torture, equality before the law, and freedom of thought, conscience, and religion.<sup>197</sup> These are not necessarily universal beliefs, but are part of the structure of the rules, treaties, and decisions in international human rights. For purposes of this article, it is

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189. See Sarah R. Hamilton, *The Status of Women in Chile: Violations of Human Rights and Recourse Under International Law*, 25 WOMEN'S RTS. L. REP. 111, 123 (2004) ("The results—high maternal mortality, uncontrolled population growth, widespread poverty, and impeded entry of women into the cultural, social, and economic life of the country—have been uniformly detrimental to women and to the exercise of human rights in Chile more generally.").

190. See, e.g., Smolin, *supra* note 43, at 1–5 (noting countries facing a sex ratio imbalance).

191. *Id.* at 4.

192. *Id.*

193. See *id.* at 7 (identifying "the major ways in which females might statistically disappear").

194. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 291–92 (2006) (evaluating *jus cogens* in the "debate over hierarchy of norms and sources in international law").

195. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 332 (2009) ("As some scholars have celebrated and others have lamented, the concept of *jus cogens* has been widely perceived to establish a normative hierarchy within international law, endowing certain fundamental norms such as the prohibitions against slavery and genocide with a quasi-constitutional status vis-à-vis ordinary conventional and customary norms.").

196. The U.S. Supreme Court discusses the law of custom in *The Paquete Habana*, 175 U.S. 677 (1900). See also Criddle & Fox-Decent, *supra* note 195, at 331 ("In international law, the term '*jus cogens*' (literally, 'compelling law') refers to norms that command peremptory authority, superseding conflicting treaties and custom.").

197. Criddle & Fox-Decent, *supra* note 195, at 331–32.

possible that the right to education about and access to birth control might be part of the modern customary law. Customary law is not limited to human rights law and may extend to business or economic international principles.<sup>198</sup> Customary law may only be abrogated or derogated in cases of emergency—where officially proclaimed—and then only to the extent strictly necessary.<sup>199</sup>

### B. *Critiques of Human Rights*

I mentioned earlier that the informally accepted hierarchy of human rights is subject to debate. In my class, I usually ask the students to take a look at some critiques of human rights, challenging the lens through which we view the world. For example, a Hindu author challenges the whole notion of human rights as a Western concept, assuming a universal human nature, the dignity of the individual (vs. society as a whole), and a democratic order.<sup>200</sup> Communitarianism also challenges the idea that individual rights are superior to those of a society and notes that human rights law tend to focus on rights, rather than duties.<sup>201</sup> Critical Legal Studies author Mark Tushnet offers a critique arguing that human rights are merely political constructs in that they are indeterminate, unstable, falsely convert the abstract into reality, and impede real progress.<sup>202</sup>

This is particularly true in the area of population, where religious, cultural, historical, and traditional beliefs may affect the perceived morality of efforts to affect population trends.<sup>203</sup>

198. See *id.* at 337 (recognizing the “extended debate” over various theories of jus cogens and noting the lack of a general criterion).

199. See *id.* at 364 (“Those same provisions that entitle states to declare states of emergency, however, prohibit states from derogating from norms of a jus cogens character, such as the prohibitions on arbitrary killing, slavery, and torture.”).

200. See generally R. Panikkar, *Is the Notion of Human Rights a Western Concept?*, 30 *DIAGENES*, no. 120, Dec. 1, 1982, at 75 (addressing whether human rights are universal).

201. See, e.g., Amitai Etzioni, *Communitarianism* (“Communitarianism is a social philosophy that, in contrast to theories that emphasize the centrality of the individual, emphasizes the importance of society in articulating the good.”), in *ENCYCLOPEDIA POLITICAL THOUGHT* 1, 1–4 (Michael T. Gibbons ed., 2015).

202. Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1363–65, 1370–75 (1984); see also Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401, 404–17 (1987) (providing a critique of the Critical Legal Studies view through the lens of race).

203. See ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT* 2 (1999) (“Unlike scientific knowledge, the wisdom of culture is subjective. Its most profound insights are relative, not universal laws.”), reprinted in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 376, 377 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000); Abdullahi Ahmed An-Na’im, *Human Rights in the Muslim World: Socio-*



### C. *Vulnerable Groups*

Several subgroups are particularly affected by population law and policy. First, native aboriginal peoples may be disrupted, as discussed above.<sup>204</sup> Second, refugees and migrants often drastically affect population patterns.<sup>205</sup> For example, refugees from the Middle East and Eastern Europe moving to Western Europe are changing political and social dynamics, but because of higher birth rates, those immigrants may affect cultural, religious, and other traditions in more fundamental ways in the future.<sup>206</sup> A third group is the elderly. As mentioned earlier, as population growth slows, the population ages.<sup>207</sup> An older population may have special needs in terms of health, economic and social safety nets, preservation of dignity, quality of life, and participation in society.<sup>208</sup> A population policy that results in decreasing the young population must also focus on the gaps in providing for the needs of the elderly that are a likely congruence.<sup>209</sup> Finally, in a world where men greatly outnumber—and

*Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13, 15 (1990) (arguing “human rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society”); Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT’L L.J. 51, 53 (2010) (“Human rights scholars and practitioners intuitively understand that context matters, but their models rarely take sufficient account of situations of social influence.”). See generally Dillard, *supra* note 136, for a view that argues a limitation on the procreative right.

204. See Shutkin, *supra* note 177, at 489 (“More fundamentally, claims relating to culture entail the right to exist: cultural survival.”); see also discussion *supra* Section IV.A.3.

205. See Ved P. Nanda, *International Migration: Trends, Challenges, and the Need for Cooperation Within an International Rights Framework*, 17 INT’L L. STUDENTS ASS’N J. INT’L. & COMP. L. 355, 356–58 (2011) (noting the increase in migrants worldwide); Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT’L L. 699, 716 (2014) (recognizing “complexities serve as a reminder that immigration status is not stable and that noncitizens may shift back and forth between lawful and unlawful status over time”).

206. See, e.g., Guy de Lusignan, *Global Migration and European Integration*, 2 IND. J. GLOBAL LEGAL STUD. 179, 187–88 (1994) (“The racist movements and violence in [W]estern Europe against immigrants and refugees, such as in Germany in 1993 against Turks and Vietnamese, are more than an anticipation of what could happen on a wider scale in the course of the next century should nations fall back into renewed nationalistic violence as a result of political shifts, such as those of the latest elections in Italy or Russia.”).

207. See Lawrence O. Gostin & Anna Garsia, *Governing for Health as the World Grows Older: Healthy Lifespans in Aging Societies*, 22 ELDER L.J. 111, 113 (2014) (“Across the globe, declining fertility rates, lower infant mortality, and great longevity drive population aging: people live longer because of improved nutrition, sanitation, health care, education and economic wellbeing.”).

208. Marcos Acle Mautone, *Aging in the 21st Century: Human Rights, Economic Development, and the World’s Growing Older Population*, 35 BIFOCAL, no. 3, 2014, at 63, 64.

209. See Gostin & Garsia, *supra* note 207, at 115 (arguing “[t]he goal of healthy aging is unmistakable, and benefits everyone equally in society”); Mautone, *supra* note 208, at 67 (“[A]s a human

have power over—women in many societies, it is particularly important to offer protections to children and women who are vulnerable and might be subject to coercion or sex trafficking.<sup>210</sup>

## V. SUMMARY AND CONCLUSION

In the course, I eventually came to see the issues in terms of what I called the four Es: Environment, Economics, Equality, and Equity. All are important, but at times, may be in conflict when viewed in light of a particular philosophy or policy. I also see the progression of analysis concerning world population growth in terms of these four foci. In modern times, we started with the idea of preventing harm to the environment and attempted to argue for stabilization or even reduction in population size in order to preserve human quality of life. In contrast, the economists argued that a stagnant population would harm the human quality of life in different ways: economic destabilization, lack of creativity and innovation, aging populations, lack of workers, and disproportionate burden on younger persons to care for the elderly. Later, the ideas moved to emphasize the equality of women in terms of education and access to contraception. The belief was that if women knew more about health, nutrition, hygiene, and sanitation—with access to birth control—then birth rates would go down. Finally, the later discussions focus on equity—between developed and developing parts of the world, between those with less power (as individuals and as a collective) and those with more.

With the benefit of hindsight, it appears that the wars, famines, and epidemics predicted by the alarmists have not come to pass. The world

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rights issue, population aging implies that the need to respect, protect, and promote the rights of older people increases as this group grows in relation to others.”).

210. See Aliya Haider, *Adolescents Under International Law: Autonomy as the Key to Reproductive Health*, 14 WM. & MARY J. WOMEN & L. 605, 619 (2008) (“Many adolescents face violence and coercion within their families and communities—abuses that make it impossible to exercise their basic rights to informed decision-making.”); Kathleen A. McKee & Lynne Marie Kohm, *Examining the Associations Between Sustainable Development Population Policies and Human Trafficking*, 23 MICH. ST. INT’L L. REV. 1, 7 (2014) (suggesting “the best answer to global population concerns, demographic demise, and human trafficking is family strengthening and stability that values women and children”); Amanda Misasi, *The Sexual and Reproductive Rights of Adolescents: The Implementation and Expansion of the Reproductive Rights of Adolescents Through the Convention on the Rights of the Child*, 23 U.C. DAVIS J. INT’L L. & POL’Y 221, 224 (2017) (“Underpinning sexual and reproductive rights are basic guarantees of life, health, equality, and non-discrimination.”). But see Oliver Phillips, Comment, *A Brief Introduction to the Relationship Between Sexuality and Rights*, 33 GA. J. INT’L & COMP. L. 451, 458 (2005) (“However, many sexual rights are not so unambiguously presented as universally applicable.”).

population growth rate is reduced, but still increasing overall.<sup>211</sup> Government efforts to coerce compliance with growth policies through direct interference with biological reproductive functions, including denial of access to birth control, clearly violate international principles of human rights law, and are often unsuccessful. It seems to me that the protection of the individual right to reproductive choice is critical and must be preserved. Milder forms of coercion, such as propaganda, tax breaks or subsidies, or other financial incentives or disincentives probably do not violate human rights and may have some impact. The larger issue is one of culture and belief. The peoples of many cultures will not be swayed in the near future by such actions. New, original ideas and solutions are needed. This takes me back to the economists, although I never saw myself in that camp.

The problem with the sustainability approach, with its focus on the environment, is that it can be argued that if we want to preserve the right to a clean environment or a right to a certain level of Earth quality, then we are arguing for the rights of future generations—rights of those who are not here yet. In addition, controlling pollution emissions, deforestation, toxic wastes, food sources and processing, manufacturing, building, etc. is entirely different than interfering with the decisions of the individual in terms of reproduction. Existing persons have a fundamental human right to make their own reproductive choices. We use force or strong coercion in violation of human rights at our peril and endanger future generations as well. If we believe in human rights as both international law and norm, then we need to look to the most valuable assets—the human mind and creative spirit—to further the goals of sustainability.

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211. See Babor, *supra* note 7, at 87 (“Although the total fertility rate, that is, the average number of children a woman will give birth to, assuming current birth rates remain constant throughout her lifetime, has dropped from a worldwide average of 5.3 children in 1950 to 2.96 children in 1997, the number of people born each year has doubled both because infant mortality has declined and because the base for those entering their reproductive years has expanded.”).