

# COMMISSION ON UNALIENABLE RIGHTS AND THE EFFORT TO ERASE REPRODUCTIVE RIGHTS AS HUMAN RIGHTS

Risa E. Kaufman\*

What underlies the Administration's effort to examine human rights through the State Department's newly created Commission on Unalienable Rights? And what is at stake? The asserted purpose of the Commission, as announced in July 2019 by Secretary of State Mike Pompeo, is to examine human rights in light of "foundational documents" and provide advice to the Secretary on the development of human rights principles to guide U.S. foreign policy.<sup>1</sup> Advocates have raised concern that the Commission, which includes a chair and members with well-known and extreme positions opposing reproductive rights and LGBTQI rights, is subterfuge for rolling back rights protections for women, LGBTQI people, and other marginalized and vulnerable communities.<sup>2</sup> These concerns are well-founded,

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\* Director of U.S. Human Rights at the Center for Reproductive Rights, and Lecturer-in-Law at Columbia Law School. The author is grateful to colleagues at the Center for Reproductive Rights, including Susan Inman and Rebecca Brown for their helpful comments on earlier drafts on this essay, and Carolina van der Mensbrugge for her expert research.

1. Secretary of State Michael R. Pompeo Remarks to the Press (July 8, 2019), <https://www.state.gov/secretary-of-state-michael-r-pompeo-remarks-to-the-press-3/> [<https://perma.cc/779L-2AM4>]. The Federal Register notice of intent to establish the Commission states that the Commission "will provide fresh thinking about human rights discourse where such discourse has departed from our nation's founding principles or natural law and natural rights." Department of State Commission on Unalienable Rights, 84 Fed. Reg. 25,109 (May 30, 2019), <https://www.federalregister.gov/documents/2019/05/30/2019-11300/department-of-state-commission-on-unalienable-rights> [<https://perma.cc/W84H-C53D>].

2. See, e.g., Coalition Letter to Secretary of State Mike Pompeo on the Commission on Unalienable Rights (July 23, 2019), <https://www.humanrightsfirst.org/sites/default/files/Unalienable-Rights-Commission-NGO-Ltr.pdf> [<https://perma.cc/YN8B-WCMP>] (noting that "the Commission's stated purpose" is "harmful to the global effort to protect the rights of all people and a waste of resources" and further than the Commission's makeup "lacks ideological diversity and appears to reflect a clear interest in limiting human rights"); Jayne Huckerby et al., *Trump's "Unalienable Rights" Commission Likely to*

including and particularly with respect to reproductive rights. This essay (1) highlights and counters the Administration’s assertion of confusion over the status of reproductive rights as human rights, (2) examines the Administration’s attempts to purge reproductive rights from the global discourse, and (3) explores its attacks on reproductive rights within the United States to probe an underlying interest in undermining rights, including reproductive rights, through the creation of the Commission.

#### CREATING A FALSE NARRATIVE TO UNDERMINE ESTABLISHED RIGHTS

According to Secretary of State Pompeo, the Commission on Unalienable Rights is premised on the belief that “loose talk of ‘rights’” has resulted in human rights becoming unmoored from founding principles and being granted “ad hoc” in a way that detracts from “serious efforts” to protect fundamental freedoms.<sup>3</sup> The Commission is thus needed, according to Secretary Pompeo, to determine which claims of human rights are “true.”<sup>4</sup> Such characterization wrongly suggests that international human rights law has developed in a way that is unprincipled and improvised. And it is consistent with the Administration’s purposeful attempts to undermine rights protections

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*Promote Anti-Rights Agenda*, JUST SECURITY (July 9, 2019), <https://www.justsecurity.org/64859/trumps-unalienable-rights-commission-likely-to-promote-anti-rights-agenda/> [<https://perma.cc/4AHY-UEEY>] (pointing out that the list of rights the Commission seeks to promote is pared down to what it considers “basic” rights and omits “the fundamental economic, social, and cultural rights” enshrined in core human rights treaties); Jamil Dakwar & Sonia Gill, *Pompeo’s New ‘Human Rights’ Commission is Up To No Good*, AM. CIV. LIBERTIES UNION BLOG (July 12, 2019, 3:00 PM), <https://www.aclu.org/blog/human-rights/pompeos-new-human-rights-commission-no-good> [<https://perma.cc/J7M7-2S6Q>] (arguing that the Commission is intended to “roll back decades of progress in achieving full rights for marginalized and historically oppressed communities”); Kenneth Roth, *Beware the Trump Administration’s Plans for ‘Fresh Thinking’ on Human Rights*, HUM. RTS. WATCH (July 11, 2019, 2:06 PM), <https://www.hrw.org/news/2019/07/11/beware-trump-administrations-plans-fresh-thinking-human-rights> [<https://perma.cc/52PH-6ZDP>] (stating that “there is reason to fear that this exercise in identifying ‘unalienable’ rights is a unilateral attempt to rewrite international law according to the administration’s conservative social views.”).

3. Michael R. Pompeo, Opinion, *Unalienable Rights and U.S. Foreign Policy*, WALL STREET J. (July 7, 2019, 3:07 PM), <https://www.wsj.com/articles/unalienable-rights-and-u-s-foreign-policy-11562526448> [<https://perma.cc/GZ3L-DEU5>].

4. *Id.*

by falsely claiming that certain rights, including reproductive rights, have no basis in international human rights.

Indeed, the Administration is developing a strong narrative of purported confusion over the status of reproductive rights as human rights. In 2018, the State Department justified its decision to eliminate reproductive rights from the State Department's annual human rights reports in part by suggesting that there is debate and misunderstanding about the term, its meaning, and its basis in human rights.<sup>5</sup> The following year, the State Department likewise asserted that it removed reproductive rights from its annual human rights reports in part because the term "reproductive rights" had become one "that people are ascribing their own meanings to."<sup>6</sup>

Consideration of the international human rights framework protecting reproductive rights belies any notion of confusion over the status of reproductive rights as human rights. U.N. human rights treaty bodies and independent experts have firmly established that reproductive rights are human rights, grounded in the Universal Declaration of Human Rights and the core principles underlying the human rights treaties.

The human rights treaty bodies have consistently recognized and protected reproductive rights as a component of and essential to the realization of fundamental human rights, including the rights to health, life, equality, information, education, privacy, freedom from discrimination and violence, and freedom from torture and cruel, inhuman and degrading treatment.<sup>7</sup> For example, the Human Rights

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5. Special Briefing, Michael G. Kozak, Ambassador, Bureau of Democracy, Human Rights, and Labor, Briefing on the Release of the 2017 Country Reports on Human Rights Practices (Apr. 20, 2018), <https://www.state.gov/briefing-on-the-release-of-the-2017-country-reports-on-human-rights-practices/> [<https://perma.cc/7PUJ-U2SA>]. The State Department's elimination of reproductive rights from its annual human rights reports is discussed in greater detail in Section II, *infra*.

6. Special Briefing, Ambassador Michael Kozak, Bureau of Democracy, Human Rights, and Labor on the Release of the 2018 Country Reports on Human Rights Practices (Mar. 13, 2019), <https://www.state.gov/ambassador-michael-kozak-bureau-of-democracy-human-rights-and-labor-on-the-release-of-the-2018-country-reports-on-human-rights-practices/> [<https://perma.cc/HX9Z-MMAL>].

7. See *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights*, CTR. FOR REPROD. RIGHTS (2018), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Breaking-Ground-2018.pdf> [<https://perma.cc/Z99H-LB7P>]; Council of Europe, Commissioner for Human Rights, *Women's sexual and reproductive health and rights in Europe*, Issue Paper, 47-57

Committee has repeatedly recognized that the state obligation to ensure reproductive autonomy arises from the right to privacy enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).<sup>8</sup> The Committee has also made clear that the right to life, contained in Article 6 of the ICCPR, includes the right to access safe and legal abortion without the imposition of restrictions which subject women and girls to physical or mental pain or suffering, discriminate against them or arbitrarily interfere with their privacy, or place them at risk of undertaking unsafe abortions.<sup>9</sup> This right requires states to ensure the availability of, and effective access to, quality prenatal health care for women and girls.<sup>10</sup> The committee implementing the Convention on the Elimination of Discrimination Against Women (CEDAW) has stated that the right to autonomy “requires measures to guarantee the right to decide freely and responsibly on the number and spacing of [one’s] children,”<sup>11</sup> which is reflected in Article 16 of CEDAW.<sup>12</sup> Additionally, the Committee on Economic, Social and Cultural Rights (CESCR) has clearly articulated that the right to health, enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, includes the right to sexual and reproductive health.<sup>13</sup>

The human rights treaty bodies, along with the regional human rights bodies, have developed significant jurisprudence applying legal frameworks to the issue of abortion, in particular.<sup>14</sup> For example, in 2016

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(2017), <https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead> [<https://perma.cc/2P2W-67ZK>].

8. See e.g., *K.L. v. Peru*, Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); *L.M.R. v. Argentina*, Human Rights Committee, Commc’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).

9. Human Rights Committee, Gen. Comment 36 on the Right to Life, ¶¶ 8, 26, U.N. Doc. CCPR/C/GC/36 (Oct. 31, 2018).

10. *Id.*

11. CEDAW Committee, Decision 57/II Statement by the Committee on the Elimination of Discrimination against Women on sexual and reproductive health: Beyond the 2014 review of the International Conference on Population and Development, at 85, U.N. Doc. A/69/38 (Feb. 26, 2014).

12. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, art. 16(e), 1249 U.N.T.S. 13, 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

13. CESCR, Gen. Comment No. 22: (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 11–21, U.N. Doc. E/C.12/GC/22 (2016).

14. See *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights*, CTR. FOR REPROD. RTS. (2018), <https://www.reproductiverights.org/sites/>

and 2017, the Human Rights Committee issued decisions in cases challenging Ireland's abortion restriction under the ICCPR.<sup>15</sup> Analyzing Petitioners' claims under Article 7 of the Covenant, the Committee held that laws that prohibit abortion and thereby force women to choose between continuing a pregnancy and travelling to another country to access legal abortion services can cause anguish and suffering, noting the financial, social, and health related burdens and hardships that are placed on women in such situations.<sup>16</sup> The Committee held that Ireland had subjected each woman to cruel and inhuman treatment as a result of its legal prohibition on abortion. The Committee also analyzed Petitioners' claims under Articles 17 and 26 of the Covenant, holding that Ireland violated their rights to privacy and equality before the law, as well.<sup>17</sup>

This firm and clear grounding of reproductive rights as fundamental human rights contradicts the Administration's claim of confusion or debate regarding their status. And it suggests that the Secretary's more general assertion of an "urgent need" to re-examine human rights in light of foundational principles is likewise disingenuous. Rather, this analysis suggests that, through establishing the Commission on Unalienable Rights, the Administration seeks to pick and choose which rights it will recognize and uphold as human rights, undermining and excluding those that contradict its agenda. This is simply anathema to the notion of fundamental rights.

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cr.civicaactions.net/files/documents/Breaking-Ground-2018.pdf

[<https://perma.cc/75PM-5224>]; Council of Europe, Commissioner for Human Rights, *Women's Sexual and reproductive health and rights in Europe*, Issue Paper (2017); Johanna B. Fine et al., *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, 19 HEALTH AND HUM. RTS. 69, 72 (2017).

15. See *Outcome of Irish Referendum on Abortion is a Momentous Result for Reproductive Rights*, CTR. FOR REPROD. RTS. (May 26, 2018), <https://www.reproductiverights.org/press-room/outcome-of-irish-referendum-on-abortion-is-a-momentous-result-for-reproductive-rights> [<https://perma.cc/E8BL-G9S4>].

16. *Siobhán Whelan v. Ireland*, Human Rights Committee, Commc'n No. 2425/2014, ¶¶ 7.5-7.7, U.N. Doc. CCPR/C/119/D/2425/2014 (June 12, 2017); *Amanda Jane Mellet v. Ireland*, Human Rights Committee, Commc'n No. 2324/2013, ¶¶ 7.4-7.6, U.N. Doc. CCPR/C/116/D/2324/2013 (Nov. 17, 2016).

17. See *Whelan*, Human Rights Committee, Commc'n No. 2425/2014, ¶ 8; *Mellet*, Human Rights Committee, Commc'n No. 2324/2013, ¶ 8.

ERASING SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS FROM  
GLOBAL DISCOURSE

In its effort to re-examine human rights as a guide for U.S. foreign policy, the Commission on Unalienable Rights threatens to be one more piece of a comprehensive effort by the Administration to erase sexual and reproductive health and rights from global human rights discourse. It follows a long line of actions taken by the Administration that signal a lack of recognition of human rights and an intention to undermine the U.N. human rights system.

As an opening act in this effort, in 2017, the Administration reinstated and dramatically expanded the Mexico City Policy, also known as the “Protecting Life in Global Health Assistance” (PLGHA) policy,<sup>18</sup> or the Global Gag Rule. Under this new, expansive iteration of the Global Gag Rule, nongovernmental organizations (NGOs) incorporated outside of the United States that wish to receive, or that currently receive, U.S. global assistance funds cannot use those funds, or any funds acquired from any other source, to “perform or actively promote abortion as a method of family planning.”<sup>19</sup> And U.S. NGOs that receive U.S. government funds are required to enforce the policy and cannot provide financial support to such foreign NGOs.<sup>20</sup> In March 2019, Secretary of State Pompeo announced that the rule would be expanded to deny “assistance to foreign NGOs that give financial support to other foreign groups” that provide abortion care,<sup>21</sup> though he

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18. See SEC’Y FOR HEALTH AND HUMAN SERVICES ADMIN. OF THE U.S. AGENCY FOR INT’L DEV., THE MEXICO CITY POLICY MEMORANDUM FOR THE SECRETARY OF STATE (2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-mexico-city-policy> [<https://perma.cc/H5EX-WS28>]; OFFICE OF THE SPOKESPERSON, U.S. DEPT. OF STATE, PROTECTING LIFE IN GLOBAL HEALTH ASSISTANCE FACT SHEET (2017), <https://www.state.gov/protecting-life-in-global-health-assistance-2/> [<https://perma.cc/LSU7-7PRW>].

19. USAID Standard Provisions for Non-U.S. Nongovernmental Organizations, *Protecting Life in Global Health Assistance* RAA29(a)(I)(i) (May 2017), <https://www.usaid.gov/sites/default/files/documents/t868/3o3mab.pdf> [<https://perma.cc/LGZ7-32SP>].

20. USAID Standard Provisions for U.S. Nongovernmental Organizations, *Protecting Life in Global Health Assistance* RAA28(a)(II)(i) (May 2017), <https://www.usaid.gov/sites/default/files/documents/t868/3o3maa.pdf> [<https://perma.cc/JBG8-VUME>].

21. Matthew Lee, *US expands ban on foreign aid to overseas abortion providers*, ASSOCIATED PRESS (Mar. 26, 2019), <https://www.apnews.com/5e1d44fa31c48e68cdebac26774259b>

failed to follow this announcement with actual guidance on enforcement or implementation, thus sowing further confusion.

Previous implementation of the Global Gag Rule in its unexpanded form saw devastating impacts including clinic closures, loss of family planning services, weakened HIV/AIDS prevention services, an increase in maternal deaths, and an increase in unsafe abortions.<sup>22</sup> The current expanded rule has created broad confusion about how it is applied, led to over-implementation driven by organizations' fear of losing funding, and created a chilling effect on health service delivery and civil society dialogue and advocacy.<sup>23</sup> Marie Stopes International and International Planned Parenthood Federation, two of the leading international aid organizations most impacted by the rule, estimate that they will forego a combined \$180 million dollars in aid, which they assert will result in thousands more maternal deaths, unintended pregnancies, and unsafe abortions.<sup>24</sup>

In addition to reinstating and expanding the Global Gag Rule, the U.S. State Department has eliminated reporting on reproductive rights from its annual *Country Reports on Human Rights Practices*,<sup>25</sup> failing

[<https://perma.cc/L38H-D664>] (quoting U.S. Secretary of State Michael R. Pompeo's remarks to the press at the Department of State regarding the expansion of bans on foreign aid).

22. See Seema Janan, *The Global Gag Rule: One Year Later*, UNITED NATIONS FOUND. BLOG (Jan. 23, 2018), <https://unfoundation.org/blog/post/the-global-gag-rule-one-year-later/> [<https://perma.cc/2FHE-K7LZ>].

23. *So Far, So Bad, The Wide-Ranging Impacts of the Global Gag Rule Happening Now*, POPULATION ACTION INT'L (2018), <https://pai.org/wp-content/uploads/2018/07/So-Far-So-Bad-the-wide-ranging-Impacts-of-the-GGR-revised-7-17-18.pdf> [<https://perma.cc/MCN8-4S9W>]; see also *Assessing the Global Gag Rule: Harms to Health, Communities, and Advocacy*, PLANNED PARENTHOOD GLOBAL (Jan. 23, 2019), [https://www.plannedparenthood.org/uploads/filer\\_public/81/9d/819d9000-5350-4ea3-b699-1f12d59ec67f/181231-ggr-dog.pdf](https://www.plannedparenthood.org/uploads/filer_public/81/9d/819d9000-5350-4ea3-b699-1f12d59ec67f/181231-ggr-dog.pdf) [<https://perma.cc/2KQ5-YG7W>] (noting that the global gag rule not only disrupts health services and halts national policy progress on health, but also "bolsters anti-human rights agendas.").

24. See Press Release, Trump's Global Gag Rule one year on: Marie Stopes International faces \$80 million funding gap (Jan. 19, 2018), <https://mariestopes.org/news/2018/1/global-gag-rule-anniversary/> [<https://perma.cc/294N-JJ7L>]; *Policy Briefing: The Impact of the Global Gag Rule*, INT'L PLANNED PARENTHOOD FOUND. (Jan. 2019), <https://www.ippf.org/sites/default/files/2019-01/IPPF%20GGR%20Policy%20Briefing%20-%20January%202019.pdf> [<https://perma.cc/4UAU-C4D5>].

25. Carol Morello, *State Department strikes reproductive rights, 'Occupied Territories' from human rights report*, WASH. POST (Apr. 20, 2018), <https://www.washingtonpost.com/world/national-security/state-department-strikes->

to include vital information on reproductive rights in the over 200 countries covered by these reports. Specifically, the State Department deleted the section of these reports covering reproductive rights, replacing with a section on coercion in population control that in many places failed to contain any content, and deleting mention of the availability of contraception, rates of maternal mortality, or restrictions on safe and legal abortion.<sup>26</sup>

The Administration has also withdrawn support for multilateral institutions and human rights bodies that recognize and protect reproductive rights as human rights. The Administration cut funding to the United Nations Population Fund (UNFPA), the main UN agency working to advance family planning globally, claiming that it had determined that the UNFPA “supports or participates in the management of a program of coercive abortion or involuntary sterilization,”<sup>27</sup> a claim that UNFPA has refuted as wholly

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reproductive-rights-occupied-territories-from-annual-report/2018/04/20/46ef0874-44a6-ae8-ad8f-27a8c409298b\_story.html (on file with the *Columbia Human Rights Law Review*); Amanda Klasing & Elisa Epstein, *US Again Cuts Women from State Department’s Human Rights Reports*, HUM. RTS. WATCH (March 13, 2019, 10:23 AM), <https://www.hrw.org/news/2019/03/13/us-again-cuts-women-state-departments-human-rights-reports> [https://perma.cc/K7ZZ-SJXP].

<sup>26</sup> See U.S. Dep’t of State, 2017 Country Reports on Human Rights Practices, Appendix A: Notes on Preparation of the Country Reports and Explanatory Material (Apr. 20, 2018), <https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/> [https://perma.cc/QT53-CR7R] (noting that “[a] revised subsection [in the country reports] changes the focus from ‘reproductive rights,’ which sought to cover the availability of contraceptives and maternal health issues, to cover more directly the requirement of U.S. law that we report on coercive family planning practices, such as coerced abortion and involuntary sterilization”); compare, e.g., U.S. Dep’t of State, 2016 Country Reports on Human Rights Practices: Argentina, at 15 (Apr. 26, 2017), <https://www.state.gov/wp-content/uploads/2019/01/Argentina-1.pdf> [https://perma.cc/3J53-M4E3] (“Reproductive Rights: Couples and individuals generally have the right to decide the number, spacing, and timing of their children; manage their reproductive health; and have access to the information and means to do so, free from discrimination, coercion, and violence.”), with U.S. Dep’t of State, 2018 Country Reports on Human Rights Practices: Argentina, at 17 (Mar. 13, 2019), <https://www.state.gov/wp-content/uploads/2019/03/ARGENTINA-2018.pdf> [https://perma.cc/29EH-B2PZ] (replacing the “Reproductive Rights” subsection from 2016 Country report with “Coercion in Population Control”).

<sup>27</sup> Carol Morello, *Trump administration to eliminate its funding for U.N. Population Fund over abortion*, WASH. POST (Apr. 4, 2017), [https://www.washingtonpost.com/world/national-security/trump-administration-to-eliminate-its-funding-for-un-population-fund-over-abortion/2017/04/04/d8014bco-1936-ae7-bcc2-7d1a0973e7b2\\_story.html](https://www.washingtonpost.com/world/national-security/trump-administration-to-eliminate-its-funding-for-un-population-fund-over-abortion/2017/04/04/d8014bco-1936-ae7-bcc2-7d1a0973e7b2_story.html) (on file with the *Columbia Human Rights Law Review*); see also Letter from Jackie Speier et al., Members of Congress, to Secretary



unsupported.<sup>28</sup> In March 2019, the U.S. State Department cut U.S. contributions to the Organization of the United States (OAS), stating the decision was based on the OAS' purported advocacy of abortion rights.<sup>29</sup>

And the Administration has insisted on the elimination of sexual and reproductive health and rights protections from U.N. Human Rights Council resolutions. During the voting process at the 35<sup>th</sup> Session of the Council, the U.S. delegation disassociated itself from operative paragraphs pertaining to sexual and reproductive health and rights in the Discrimination Against Women, Child, Early and Forced Marriage and Violence Against Women resolutions.<sup>30</sup> In the subsequent

of State Michael R. Pompeo (July 26, 2019), [https://lee.house.gov/imo/media/doc/2019.07.26\\_UNFPA%20letter%20FINAL.pdf](https://lee.house.gov/imo/media/doc/2019.07.26_UNFPA%20letter%20FINAL.pdf) [<https://perma.cc/BER3-BCAT>] (opposing the defunding of UNFPA for the third year, calling for an immediate reversal of the decision, and noting the lack of evidence provided to justify its serious allegations).

28. United Nations Population Fund, Statement by UNFPA on U.S. Decision to Withhold Funding (Apr. 4, 2017), <https://nepal.unfpa.org/en/news/statement-unfpa-us-decision-withhold-funding-3> [<https://perma.cc/YVS4-5GXT>] (regretting “the decision by the United States to deny any future funding ... based on the erroneous claim,” which UNFPA refutes); Statement on the United States Decision to Again Withhold Funding from UNFPA (July 15, 2019), <https://www.friendsofunfpa.org/unfpa-statement-on-us-defunding/> [<https://perma.cc/29YF-CLWA>] (noting with regret “the determination by the United States of America to withhold funds from UNFPA for the third consecutive year” and that “UNFPA has not yet seen the evidence to justify the serious claims made against its work.”).

29. Michael R. Pompeo, Secretary of State, Remarks to the Press (Mar. 26, 2019), <https://www.state.gov/remarks-to-the-press-7/> [<https://perma.cc/7HCW-98XY>].

30. *A/HRC/35/L.26 Vote Item:3 - 35th Meeting, 35th Regular Session Human Rights Council*, UN WEB TV BROADCAST (June 22, 2017), <http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/watch/ahrc35l.26-vote-item3-35th-meeting-35th-regular-session-human-rights-council/5479881908001> [<https://perma.cc/4U3P-7SVK>] (disassociating from a statement focusing on abortion in the Child, Early and Forced Marriage resolution); *A/HRC/35/L.29 Vote Item:3 - 36th Meeting, 35th Regular Session Human Rights Council*, UN WEB TV BROADCAST (June 22, 2017), <http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/watch/ahrc35l.29-vote-item3-36th-meeting-35th-regular-session-human-rights-council/5479881936001> [<https://perma.cc/3RJS-66ES>] (dissociating from operative paragraph 12 on sexual and reproductive health and rights in the Discrimination Against Women resolution); *A/HRC/35/L.15 Vote Item:3 - 34th Meeting, 35th Regular Session Human Rights Council*, UN WEB TV BROADCAST (June 22, 2017), <http://webtv.un.org/meetings-events/human-rights-council/regular-sessions/watch/ahrc35l.15-vote-item3-34th-meeting-35th-regular-session-human-rights-council/5479881890001> [<https://perma.cc/RBK4-6FUK>] (dissociating from

Council session, the U.S. voted against the resolution condemning the use of the death penalty for same-sex relationships, blasphemy, and adultery.<sup>31</sup>

This trend of U.S. hostility towards sexual and reproductive rights persists in multiple other UN fora, as well. At the General Assembly Third Committee's seventy-third session, the U.S. proposed deleting an entire operative clause of a resolution related to eliminating violence against women that referred to abortion.<sup>32</sup> In cases where the U.S. did not propose hostile amendments, it proactively disassociated itself from language referencing "sexual and reproductive health" in resolutions related to ending obstetric fistula,<sup>33</sup> eliminating female genital mutilation,<sup>34</sup> and the rights of the child to sexual and

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operative paragraph 18 on sexual and reproductive health and rights in the Violence Against Women Resolution).

31. Tom Embury-Dennis, *US votes against UN resolution condemning gay sex death penalty, joining Iraq and Saudi Arabia*, INDEPENDENT (Oct. 3, 2017, 4:52 pm), <https://www.independent.co.uk/news/world/americas/us-gay-sex-death-penalty-un-same-sex-relations-human-rights-council-saudi-arabia-iraq-nikki-haley-a7980981.html> [https://perma.cc/D4UB-ETWB].

32. The U.S. proposed the following amendments to draft resolution A/C.3/73/L.21/Rev.1, which were rejected by the committee: 1) deleting entirely operative paragraph 11 (removal of language related to sexual and reproductive health and abortion); and 2) amending operative paragraph 8 (d) to add, "member states have authority over national and educational curricula," including sexual and reproductive health. The U.S. joined the consensus on the adoption of this resolution after both amendments were rejected. *Third Committee, 52<sup>nd</sup> meeting – General Assembly, 73<sup>rd</sup> session*, UN WEB TV BROADCAST (Nov. 19, 2018), <http://webtv.un.org/search/third-committee-52nd-meeting-general-assembly-73rd-session/5969129824001/?term=%22third%20committee%22&sort=date&page=2> [https://perma.cc/YRV9-HCQL].

33. *Third Committee, 52<sup>nd</sup> meeting – General Assembly, 73<sup>rd</sup> session*, *supra* note 32 ("The United States wishes to disassociate from operative paragraphs 3 and 14m [of draft resolution Draft Resolution: A/C.3/73/L.20/Rev.1], because of our concerns that the terms 'sexual and reproductive health' and 'sexual and reproductive health services' that have accumulated connotations that suggest the promotion of abortion or a right to abortion that are unacceptable to our administration"); Meetings Coverage, General Assembly, Approving 9 Drafts, Third Committee Intensifies Fight against Fistula, Genital Mutilation, Sexual Harassment amid Debate over Peasants' Rights (Nov. 19, 2019), <https://www.un.org/press/en/2018/gashc4255.doc.htm> [https://perma.cc/MU76-YXJZ].

34. The U.S. disassociated from operative paragraphs 1 and paragraph 5 of draft resolution A/C.3/73/L.23/Rev.1, which referenced "sexual reproductive and health" and "sexual and reproductive health services" (articulating identical objections to the resolution on combatting sexual harassment). The U.S. did,

reproductive health care and education, including in situations of armed conflict,<sup>35</sup> claiming the phrase “sexual and reproductive health” has accumulated connotations that suggest promotion of or a right to abortion, which is unacceptable to the Administration.

Similar actions were taken at the Economic and Social Council’s Commission on the Status of Women. There, the U.S. delegation, led by abstinence-only sex education and anti-choice policy advisors, attempted to eliminate the word “gender” from the forum’s outcome document, though it failed to water down global commitments to the Beijing Platform for Action and its articulation of international commitments related to achieving gender equality, including sexual and reproductive rights.<sup>36</sup> At the Security Council, the U.S. pressured for the removal of references to sexual and reproductive health in a resolution on Women, Peace, and Security that purports to take a survivor-centered approach to addressing sexual violence in conflict by using an unprecedented threat to veto the entire resolution if such references remained.<sup>37</sup>

Most recently, at a meeting of the UN General Assembly, the Administration led a joint statement opposing UN policies that promote

however, join consensus on the resolution. *Third Committee, 52<sup>nd</sup> meeting – General Assembly, 73<sup>rd</sup> session, supra* note 32.

35. The U.S. joined in consensus, but disassociated from OPs 18, 22, and 49 of draft resolution A/C.3/73/L.26/Rev.1, which reference “sexual reproductive and health” and “sexual and reproductive health services” due to concern that accumulated suggestion of right to abortion (articulating identical objections to the resolution on combatting sexual harassment). *Third Committee, 55<sup>th</sup> meeting – General Assembly, 73<sup>rd</sup> session, UN WEB TV BROADCAST* (Nov. 20, 2018), <http://webtv.un.org/search/third-committee-55th-meeting-general-assembly-73rd-session/5969699616001/?term=%22third%20committee%22&sort=date&page=2> [<https://perma.cc/U8ME-Q8BH>].

36. Katelyn Burns, *Trump Administration Fails to Roll Back Support for Landmark Women’s Rights Agreement at United Nations*, REWIRE (Mar. 19, 2019, 3:58 pm), <https://rewire.news/article/2019/03/19/trump-administration-fails-to-roll-back-support-for-landmark-womens-rights-agreement-at-united-nations/> [<https://perma.cc/G3FU-ML69>].

37. Robbie Gramer & Colum Lynch, *How a U.N. Bid to Prevent Sexual Violence Turned Into a Spat Over Abortion*, FOREIGN POL’Y (Apr. 23, 2019, 12:58 pm), <https://foreignpolicy.com/2019/04/23/united-nations-bid-end-sexual-violence-rape-support-survivors-spat-trump-administration-sexual-reproductive-health-dispute-abortion-internal-state-department-cable/> [<https://perma.cc/Y39S-3ZJ3>]; Liz Ford, *UN waters down rape resolution to appease US’s hardline abortion stance*, THE GUARDIAN (Apr. 23, 2019, 3:36 pm), <https://www.theguardian.com/global-development/2019/apr/23/un-resolution-passes-trump-us-veto-threat-abortion-language-removed> [<https://perma.cc/J7BA-28EB>].

reproductive health and rights.<sup>38</sup> The statement, delivered in September 2019 by Secretary of Health and Human Services Alex Azar before a high-level UN meeting on universal health care, noted opposition to “ambiguous terms and expressions, such as sexual and reproductive health and rights” because they “can undermine the critical role of the family and promote[] practices like abortion,” incorrectly stating that the right to abortion is not protected under international law.<sup>39</sup>

#### UNDERMINING REPRODUCTIVE RIGHTS AT HOME

It should come as no surprise that the Administration seeks to erase recognition of reproductive rights as human rights through its foreign policy efforts, given its work to eviscerate reproductive rights protections within the United States and its disregard for the impact this has on marginalized communities.

President Trump has stated repeatedly that he would only nominate U.S. Supreme Court Justices who are opposed to *Roe v. Wade*,<sup>40</sup> the landmark U.S. Supreme Court ruling from 1973 that established abortion as a fundamental right. The Senate has confirmed two of President Trump’s nominees to the Supreme Court, along with other federal judges and executive branch officials with records that are explicitly opposed to reproductive rights, including abortion rights.<sup>41</sup> This poses a significant threat to reproductive rights, as states enact increasingly extreme and unconstitutional abortion bans and

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38. Alex M. Azar II, Secretary, U.S. Dep’t. of Health and Human Servs., Remarks on Universal Health Coverage at the U.N. General Assembly (Sept. 23, 2019), <https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-universal-health-coverage.html> [https://perma.cc/FBV9-BAAK].

39. *Id.*

40. Michael Tackett, *Trump Fulfills His Promises on Abortion, and to Evangelicals*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/trump-abortion-evangelicals-2020.html> [https://perma.cc/JV55-V87C].

41. See Jamila Taylor et al., *45 Ways Trump and Congress Threaten the Promise of Roe v. Wade*, CTR. FOR AM. PROGRESS (Jan. 19, 2019, 9:02 AM), <https://www.americanprogress.org/issues/women/reports/2018/01/19/445207/45-ways-trump-congress-threaten-promise-roe-v-wade/> [https://perma.cc/VHH4-gDDP]; *Report of the Center for Reproductive Rights on the Nomination of Judge Brett Kavanaugh to be Associate Justice of the United States Supreme Court*, CTR. FOR REPROD. RTS. (Aug. 30, 2018), <https://reproductiverights.org/sites/default/files/documents/PublicReportonJudgeBrettKavanaugh.pdf> [https://perma.cc/3C46-4HG7].

restrictions in an effort to ask the Supreme Court to overturn or decimate *Roe*.<sup>42</sup>

In addition, the Administration has taken numerous agency actions to curtail reproductive rights in the United States. The Administration has limited access to contraception and health care information for people who are low-income through new regulations that prohibit Title X funds from going to providers who offer information about and access to abortion. Among other things, the new regulations will result in providers needing to leave the Title X program if they separately provide abortions at the same location, or if they refer patients for abortion services elsewhere.<sup>43</sup> Because Title X funds are a substantial component of many family planning clinics' budgets, these regulations in many instances will either gag providers from even speaking about abortion or force health care providers to shut their doors.<sup>44</sup> The Administration also issued federal regulations allowing virtually any employer or university to opt out of the provision requiring coverage for contraception at no cost to plan beneficiaries, based on religious or moral objection, without requiring an alternative manner to make coverage available.<sup>45</sup> It is seeking to weaken protections against discrimination in health care by issuing proposed regulations which narrow the anti-discrimination protections of the Affordable Care Act.<sup>46</sup> And it has created an entirely separate office within the Department of Health and Human Services' Office for Civil Rights tasked with investigating and enforcing the purported right of any

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42. *What if Roe Fell?*, CTR. FOR REPROD. RTS. (September 2019).

43. HHS Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7714-7720 (Mar. 4, 2019) (codified at 42 C.F.R. pt. 59).

44. Laurie Sobel et al., *New Title X Regulations: Implications for Women and Family Planning Providers*, KAISER FAMILY FOUND. (Mar. 8, 2019), <https://www.kff.org/report-section/new-title-x-regulations-implications-for-women-and-family-planning-providers-issue-brief/> [<https://perma.cc/8C66-BB27>].

45. Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 45 C.F.R. § 147.132 (2018) (exempting nonprofit and most for-profit employers with religious objections from the ACA contraceptive coverage requirement); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 45 C.F.R. § 147.133 (2018) (exempting all non-publicly traded employers with moral objections from the ACA contraceptive coverage requirement); *see also* Laurie Sobel et al., *supra* note 44 (summarizing the changes in the contraceptive coverage regulations for objecting entities).

46. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846 (June 14, 2019) (to be codified at 42 C.F.R. pt. 92).

individual within the health care system to opt out of providing care or even information to which they have a religious or moral objection.<sup>47</sup>

The Administration has particular disregard for reproductive health and rights of immigrants. The U.S. Immigration and Customs Enforcement (ICE) officially ended its policy not to detain pregnant women absent extraordinary circumstances and removed reporting requirements about their treatment.<sup>48</sup> ICE reported that in the less than five-month period between December 14, 2017 and April 7, 2018, 590 pregnant women were in immigration detention.<sup>49</sup> At the same time, civil and human rights organizations have documented numerous cases of mistreatment of people who are pregnant and in immigration detention, including delays and denials of access to prenatal and emergency care that in several cases may have resulted in miscarriages.<sup>50</sup> It was recently reported that twenty-eight women “may have experienced a miscarriage just prior to, or while in ICE custody,”

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47. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 45 C.F.R. § 88 (2019).

48. U.S. IMMIGR. AND CUSTOMS ENF'T, ICE DIRECTIVE NO. 11032.3, IDENTIFICATION AND MONITORING OF PREGNANT DETAINEES (2017), [https://www.ice.gov/sites/default/files/documents/Document/2018/11032\\_3\\_PregnantDetainees.pdf](https://www.ice.gov/sites/default/files/documents/Document/2018/11032_3_PregnantDetainees.pdf) [<https://perma.cc/5W5X-X57K>] (eliminating the presumption that ICE should not detain pregnant women, except in extraordinary circumstances, and removing various oversight requirements of the detention system, including the deletion of a requirement to provide pregnant women with timely referrals for appropriate prenatal care).

49. Ema O'Connor & Nidhi Prakash, *Pregnant Women Say They Miscarried in Immigration Detention and Didn't Get the Care They Needed*, BUZZFEED.NEWS (July 9, 2018, 2:44 pm), <https://www.buzzfeednews.com/article/emaconnor/pregnant-migrant-women-miscarriage-cpb-ice-detention-trump> [<https://perma.cc/A2Y9-6CNW>] (citing numbers of pregnant detained women that ICE provided BuzzFeed News in July 2018).

50. See ACLU et al., Administrative Complaint, *Increasing Numbers of Pregnant Women Facing Harm in Detention*, AM. IMMIGRATION COUNCIL (Sept. 26, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/general\\_litigation/complaint\\_increasing\\_numbers\\_of\\_pregnant\\_women\\_facing\\_harm\\_in\\_detention.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf) [<https://perma.cc/CE2X-GP4L>] (highlighting case summaries demonstrating lack of quality medical care and resulting consequences for pregnant women detained by ICE; filed with the Department for Homeland Security's Office for Civil Rights and Civil Liberties, and the Office of the Inspector General); see also O'Connor & Prakash, *supra* note 49 (noting that five “women in ICE detention and Customs and Border Protection (CBP) custody while pregnant told of being ignored when they were obviously miscarrying,” and “described their CBP and ICE-contracted jailers as unwilling or unable to respond to medical emergencies.”).

between October 1, 2016 and August 31, 2018.<sup>51</sup> The federal government's attempts to block adolescent girls in immigration detention from accessing abortion have also been well-documented.<sup>52</sup>

In addition, one recent investigation found that federal agencies may be taking infants from migrants, refugees, and people seeking asylum because of the Administration's "zero-tolerance" policy and efforts to criminalize the act of seeking asylum.<sup>53</sup> Physicians and advocates have detailed instances in which people seeking asylum and in federal custody have been forced to hand over their newborn children to state authorities, with no guarantee that they will regain custody.<sup>54</sup>

Common detention practices that may constitute cruel, inhuman, and degrading treatment for all people in detention, such as harsh physical conditions, work detail, and use of shackles, pose unique and acute dangers for people who are pregnant. Federal law and ICE policies prohibit shackling of pregnant women,<sup>55</sup> but the

51. Mihir Zaveri, *Woman Delivers Stillborn Baby While in ICE Custody*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/us/mother-birth-ice-custody.html> [https://perma.cc/4EX4-7KSJ].

52. *Garza v. Hargan*, 874 F.3d 735, 746 (D.C. Cir. 2017), cert. granted and vacated by 138 S. Ct. 1790 (2017); *Garza v. Hargan*, 304 F.Supp.3d 145, 150 (D.C. Cir. 2018) (granting plaintiff's motion for class action and motion for preliminary injunction). See also Renuka Rayasam, *Trump official halts abortions among undocumented, pregnant teens*, POLITICO (Oct. 16, 2017), <https://www.politico.com/story/2017/10/16/undocumented-pregnant-girl-trump-abortion-texas-243844> [https://perma.cc/JE2X-N4LY] ("In some cases, a senior HHS official has personally visited or called pregnant teens to try to talk them out of ending their pregnancies.").

53. Tina Vasquez, *Trump Administration Separates Some Migrant Mothers From Their Newborns Before Returning Them to Detention*, REWIRE (May 28, 2019, 8:32 am), <https://rewire.news/article/2019/05/28/trump-administration-separates-pregnant-migrants-newborns-before-returning-detention/> [https://perma.cc/2MEE-SGF4]; Tina Vasquez, *Meet the Federal Agency Helping to Criminalize Pregnant Migrants*, REWIRE (May 14, 2019, 12:11pm), <https://rewire.news/article/2019/05/14/meet-the-federal-agency-helping-to-criminalize-pregnant-migrants/> [https://perma.cc/4C6H-KK8M].

54. Tina Vasquez, *Trump Administration Separates Some Migrant Mothers From Their Newborns Before Returning Them to Detention*, *supra* note 53.

55. First Step Act of 2018, 18 U.S.C. § 4322 (2018) (prohibiting the shackling of pregnant women in federal custody); see also U.S. IMMIGR. AND CUSTOMS ENFT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011-204 (revised Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> [https://perma.cc/SXC6-AHHV] (prohibiting the use of restraints on pregnant women or women in post-delivery recuperation absent "truly extraordinary

policies do not appear to be enforced. Since 2017, there have been multiple reports of pregnant women being shackled around hands, legs, and stomach when transported between facilities and within a few hours after giving birth.<sup>56</sup>

The collective impact has not escaped notice by UN Human Rights experts. For example, at the conclusion of his 2017 visit to the United States, the UN Special Rapporteur on Extreme Poverty noted concern that the U.S. has the highest maternal mortality rate among wealthy countries, with Black women being three to four times more likely to die from child birth.<sup>57</sup> He noted, too, that low-income women face legal and practical obstacles to exercising their constitutional right to access abortion services, including mandatory waiting periods and long driving distances to clinics, trapping many women in poverty.<sup>58</sup> He expressed concern that women immigrants experience higher poverty rates and have less access to social protection benefits,<sup>59</sup> and that people living in poverty, and in particular pregnant women, are disproportionately criminalized and subjected to interrogations that strip them of privacy rights.<sup>60</sup>

#### CONCLUSION

In his Wall Street Journal Op Ed justifying the creation of the Commission on Unalienable Rights, Secretary of State Pompeo states his hope that the Commission “will ground our understanding of human rights in a manner that will both inform and better protect essential freedoms.”<sup>61</sup> The Administration’s efforts to stoke false confusion over the status of reproductive rights as human rights, erase reproductive rights from global discourse, and eliminate reproductive rights protections within the United States shed light on what

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circumstances . . . as documented by a supervisor and directed by the on-site medical authority;” restraints prohibited without exception for women who are in active labor or delivery); U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 48, at 2 (holding ICE officials in charge responsible for ensuring agents are aware of “policy related to the use of restraints for pregnant detainees”).

56. See O’Connor & Prakash, *supra* note 49.

57. Philip Alston (Special Rapporteur on extreme poverty and human rights) *Report of the Mission to the United States of America*, ¶ 57, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018).

58. *Id.* ¶ 56.

59. *Id.* ¶ 59.

60. *Id.* ¶ 56.

61. Pompeo, *supra* note 1.



undergirds those hopes. They illuminate, too, the threat of the Commission to further de-prioritize and roll back internationally recognized human rights and decimate any remaining U.S. commitment to advancing the full spectrum of human rights protections, globally and within the United States.