Human Rights, Gender & the Law

THE STATE OF EQUALITY IN COMPARATIVE PERSPECTIVE

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[LAW AND THE ISSUE OF “CULTURE”]

LAW, GENDER, AND THE BURDEN OF CULTURE

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When I was asked to speak at the Human Rights, Gender and the Law: States of Equality in Comparative Perspective conference held at the Albany Law School in April, 2013 and the topic that was given me was “Law and Culture”, I was both delighted and conflicted. The topic of “culture” and its influence and interaction with law, politics and gender has been a preoccupation of mine for the past two decades. Culture appears so often in conversations about women’s status and the law that it has become a “go-to” explanation for any manner of event or belief. And culture has encompassed both religion and ethnicity at times to provide a sort of umbrella term. But just as most generalizations have limited explanatory power, when used in this way, culture is a similarly thin concept that fails to shed light on how certain choices about the law and society’s priorities are made. As such, whenever culture comes up as a rationale for legal decisions, it requires careful unpacking and scrutiny. Moreover, it requires skepticism. In the following paragraphs, I want to elaborate on three points about the use of culture. First, culture (and its religious analog) is often used as a justification for avoiding gender law reform. However, what is often hidden behind such usage is a highly particular and discreet set of political choice about how to arrange the rights and obligations within society. These choices are not determined a priori by a cultural script. Second, both those who tend to use it to justify doing nothing or doing very limited reforms as well as

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those who seek sweeping reforms view culture similarly. This mirroring of relativists and universalists is an old construction that has roots in the colonial period and this history is important in understand the present dilemmas of feminism. Finally, that mirroring dynamic also reflects a seemingly intractable oppositional tension between multiculturalist/relativists who seek to preserve culture and the universalists who seek to overcome it. This tension is very present in legal feminist thought and activism making transnational coalitions and support more complicated. While it is impossible to fully explore that tension as it manifests in the literature or its damaging effects on feminist activism and agenda-setting, I do want to examine two contexts in which it can be clearly observed: the veil context in France and the recent activism by Femen to “free” Muslim women from Islam. By grounding the theoretical observations in these two practical phenomena, I hope to show that unless the impasse is overcome, the full potential of emancipatory feminist thought and activism will never be realized.

I. Culture as an Alibi

Feminists have long had to contend with arguments against law and rights reform based on culture. The literature in almost every feminist field is replete with examples of culture used to push back on claims of equality and rights. From arguments based on tradition which demands respect for no other reason than past practice to those based on religion demanding adherence to divine commandments, those who wish to retain the status quo that subordinates women and sexual minorities give the impression that change is either undesirable, dangerous, or impossible.
For instance, domestic claims to cultural protection are often made when women demand changes to family law, inheritance and other discriminatory regulations. From U.S. history, in the 1873 case *Bradwell v. Illinois*, the stereotypes of womanhood were used to deny a female applicant admittance to the bar. In that case, the Supreme Court opined that:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The Constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.¹

The impulse to use cultural reasoning is deep-rooted across many cultures, including our own. And indeed, there is even a strain of feminism that argues for greater respect for female culture—Cultural Feminism.

More recently that impulse has been seen in attempts at changing the Muslim personal law in a number of Muslim-majority countries. Such efforts have met with resistance based on religious arguments. The rationale given is that one cannot change the divinely mandated roles of men and women. For instance, attempts at reforming the laws governing women’s right to divorce, inheritance, or attempts at regulating polygamy are resisted by some states because the rights and obligations have been set in stone by God and human laws have no place changing these relationships. An example of this is in the reservations to the Convention on the Elimination of All Forms of Discrimination

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Against Women ("CEDAW") made by a number of countries. The following comes from Egypt: In respect of article 16:

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.²

These are political choices given an alibi by culture and religion. Muslim countries vary in practice and different rules governing marriage and divorce exists and oftentimes justified by reference to religion. The pluralism in religious laws cannot be explained by culture.

As Lama Abu-Odeh demonstrates in her work on Egyptian family law, Egyptian male elites made calculated political choices with regard to modernizing family law. In both legislating new laws and adjudicating them, which rules “ought” to be passed or applied were not self-evident without a political or ideological agenda. That agenda drove the elites to split the difference with religious factions and feminists and modernize some parts of the Egyptian code. The choice to modernize some aspects of the law, to qualify traditional rules with modern requirements was not a cultural choice but a

² All countries’ reservations to CEDAW, including Egypt, can be found at the United Nations website, http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm (last visited, June 13, 2013).
political one that reveals the exigencies of a new state and the relative bargaining power of the political players (secular male elites, feminists, religious groups) in it. Naturally, broader social and cultural norms have effects on the ideological commitments of the players but to say that culture is what motivates them is to underestimate the political.

This brings me to my next point about the very nature of religion and culture as it is understood by both universalists and cultural relativists/apologists: both consider culture to be immutable. That is to say that a particular practice or belief can be claimed positively as “cultural” and also claim that it has remained unchanged over time. This view prevents arguments that get at the political decision-making behind either abandoning or preserving “cultural” practices and moves the argument onto a much less contestable terrain.

II. Relativists and Universalists and the Immutability of Culture

While the construction of culture as an unchanging set of social arrangements is usual from relativists, a mirror image argument is made by rights universalists. For instance, claims that culture or religion prohibits legal reform of gender iniquitous laws are contested precisely as though those assertions were true. An argument that religion prevents equal access to divorce is met with calls for the abandonment of any engagement with religion and a demand for a move into the culturally neutral space of universal human rights.

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Two points need to be made here. First, the concentration of efforts by universal rights activists to progress out of culture or religion or to privatize it is a well-established strategy with antecedents in the colonial civilizing mission.\(^4\) The view espoused is that but for the cultural baggage, people in these traditional societies would realize the benefits of universal human right and women’s rights. Progress is made in spite of the burdens imposed by religion and culture. Moreover, for women, culture is something to be preserved by them but not created by them. So women become victims of their culture but rarely ever viewed as agents of and within the culture.\(^5\) Yet women in the Global South—the part of the world where culture is supposedly problematic—do not necessarily experience the matrix of norms a uniformly problematic. As Saba Mahmood has shown in her work on the Egyptian piety movement, women are agents of a new form of Islamic piety that includes reading sacred texts for themselves and interpreting religion. They are not simply living out the requirements of men.\(^6\) Religion is an important part of these women’s identity and not something that can be separated out. Furthermore, progress itself is conceived of within an Islamic framework such that ideas of progress that include the shedding of religious adherence is unappealing if not incomprehensible. Even if we are skeptical of “Islamic feminism”, Muslim women are taking the initiative in theorizing and building a form of feminism that demands rights for women while remaining solidly within the religious framework of Islam. These women are availing themselves of the insight that has eluded both apologists/relativists and universalists: culture and religion are open to interpretation, contestation, and


reformulation. Just as theorists from Mary Wollstonecraft to Gloria Steinem built on liberal philosophy, expanding it and pushing society to accept gender inclusive interpretations of rights, Muslim women are doing the same with Islam.

The second point that needs to be made is that by shifting culture onto the terrain of the Global South, universalists mask the cultural content in their own articulation of women’s rights and present their own struggles as political.\(^7\) The liberal notions of human rights and women’s rights did not emerge fully formed in a vacuum. Rather they developed within the cultural and historical context of a Europe wracked by religious intolerance and warfare and saw their legal culmination in the declarations and conventions that were enacted after the genocidal violence of the Second World War. Curiously, the genocidal violence of colonialism was insufficient to create a global consensus in spite of the numerous claims by subject peoples to universal humanity and its attendant rights. The independence leaders of colonies from India to Africa and the Middle East used Liberal notions of citizenship, justice and the rule of law to demand freedom and recognition of human rights. Only Mahatma Gandhi stands out as articulating an indigenous basis for rights based not on Liberalism but Hinduism and Indian philosophy.

The point here is that universal rights may be theoretically “universal” but the way they are put into practice does involve cultural and perhaps even religious substructures. For instance, women’s rights most often attach to individual women and seek to enhance their autonomy from other humans. What is considered important is the ability to make individual decisions and to control one’s own physical being and social

and work prospects without the undue influence of others. Moreover, liberal ideas of equal rights tend to reflect Aristotelian notions of equality that require determinations of sameness and difference.

To be clear, I am not arguing that autonomy and equality are of lesser value than community and complementarity. Indeed, I am not. Women’s lack of agency and the argument that because they are deeply embedded in family structures as justifications to prevent reform is very problematic. But so are concepts that ignore the reality of embeddedness, community and substantive equality that takes seriously the differing roles and desires of women. And equally problematic are rights agendas that require women to behave as though these realities are unimportant or that require the realities to change radically before women reap any benefits afforded by rights. The point here is that universal rights have already have a cultural and political valence and this is often obscured by universalists who only talk about culture in oppositional terms and with an assumption that rights will only work in a secular framework. Moreover, they do not account for the critique that “rights” will not yield the kind of emancipation that women desire rather their acquisition may mask certain distributions of power and resources that elevate some women over others. That cultural valence, the underlying assumptions, and the distributional impact of rights matter when it comes down to practical implementation in a particular context.

Furthermore, universalists do not pay adequate attention to the contests over cultural meaning and practice that have gone on and continue to go on within various societies that allowed for law reforms to take place. For example, reproductive rights

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8 The religious valence of secularism is similarly obscured by most secularists. See, e.g., TALAL ASAD FORMATIONS OF THE SECULAR (2003).
battles that have been an ongoing source of struggle for feminists in the United States could be construed as part of a culture war. However, U.S. feminists tend to see the fight as more of a political one rather than a cultural one whereas a similar fight in Afghanistan is construed as a religious struggle rather than a political struggle.

In sum, arguments from universalists against culture mimic those of cultural relativists that assume that culture as a social construct is fixed and immutable. Moreover, universalists focus on the culture of “Others” while obscuring their own cultural commitments. Instead, a pro-universal human rights position is normalized as the neutral secular position devoid of any cultural or religious baggage. From this space, critiques of culture and religion that seem eerily familiar to post-colonial scholars are launched against women in the Global South.

III. Liberal Feminism and It’s Cultural Other: A Problematic Stalemate

As I write, a number of public battles about feminism are raging in the mainstream. Sheryl Sandberg’s book *Lean In: Women, Work, and the Will to Lead* has generated heated debate about the ways in which women assume they cannot succeed in the workplace and, therefore, pull back from giving their careers their full effort.9 *Femen* has been splashed across a number of websites and newspapers in their bare-breasted glory—ostensibly to bring attention to the plight of Muslim women.10 And more recently, *Ms.*
Magazine’s article on, recording artist, Beyoncé Knowles, questioning her feminist credentials has reinvigorated the critiques of mainstream feminism from some women of color.11 Conservative forces the world over have stepped up their efforts to foreclose opportunities for racial minorities, women, and sexual minorities, it seems an inopportune time to suffer multiple identity crises. However, these cleavages—which have been ongoing—give us yet another opportunity to reconsider how we build movements and what the goals of those movements are, whom they include, and whom they leave out in specific local contexts.

a. France, Femen, and Oppressive Freedom

By now, the veil debate is old news. However, it continues to be a source of interest for women both in majority Muslim states and those in the Europe and America with growing Muslim populations. Many a conversation with friends and colleagues reveal the deep-seated commitment to autonomy and personal rights that most liberal feminists have but their limited applicability. The conversation, which is likely familiar to many, typically goes like this:

<table>
<thead>
<tr>
<th>Liberal Feminist:</th>
<th>Women should have the right to wear whatever they want.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Muslim woman:</td>
<td>Yes, and that ought to include the veil.</td>
</tr>
<tr>
<td>LF:</td>
<td>Well, yes but the veil is an oppressive article, it connotes patriarchal oppression not freedom. Women should be free to not wear anything at all if they so desire. Covering up one’s body is hardly a celebration of freedom.</td>
</tr>
</tbody>
</table>

11 Beyonce’s Fierce Feminism, MS. MAGAZINE June, 2013.
MW: So, the choice to wear a veil is the internalization of oppression while the choice to be naked is liberation?

LF: European women can wear whatever they like. But Muslim women cannot and that’s the problem.

MW: So, European or American Muslim women who veil present no problem.

LF: Except that they are not exercising a free choice but are driven to veil by a patriarchal religion. If they weren’t, they would be wearing bikinis at the beach.

Over and again, the meaning of the veil is “settled” by Liberal feminists. Even in the context of Europe and the United States where the state laws guarantee the right to certain personal freedoms, the choice to wear a veil is seen not as a choice but as a compulsion of religion. I am not denying that for some women the choice is constrained by patriarchal norms or even external pressure. But it is far from self-evident that for all women, the choice to veil is driven by compulsion. Moreover, the equation of wearing nothing or next to nothing, of inviting the male (or female) gaze with “freedom” is bizarre. Perhaps it is felt as freedom for some women, but it may also be driven by deeply sexist norms that commodify women’s bodies and a society that demands access to female bodies. Furthermore, even a cursory examination of the porn, diet, and fashion industry throws up contradictions about “freedom” and choice. It seems as though Liberal feminists espousing these views are willing to indulge themselves in the fantasy of choice, refusing to unpack the many layers that make up subjectivity and inform choice, rather than confront the structural impediments to real freedom.

In other words, I want to suggest that there is a contradiction here that places Muslim women at the mercy of their religious norms but fails to see similar cultural constraints driven by capitalist interests on non-Muslim women. After all, is it really a
free choice to undergo brutal forms of plastic surgery to meet a societal standard of beauty? How much money is spent on fashion, beauty, and diet products and does this consumption indicated a satisfaction with women’s beings? Why is it necessary to Photoshop pictures for public consumption? I do not have simple answers. There are none. And there are certainly none to questions arising from Muslim women’s choices to veil or not either. Ultimately, the decisions—if they can even consciously be called such—are bound up in a complex web of formal laws, societal norms, and personal motivations. Moreover, context matters. It is one thing to be speaking about women in states that enforce particular dress codes (like France and Saudi Arabia where choice is constrained by state power) and another to be speaking about women in the United States who might be housewives, college students, scientists or porn stars! Without context, the discussion is flattened into stereotypes and essentialist tropes that serve only to alienate rather than liberate.

The final point that I want to make here is a link to the colonial past and Femen. Femen claims to evade the difficulties of the colonial history among Liberal European women and women in the Global South because they were also “colonized”. Yet a shared experiences cannot be abstracted from its particulars and used unproblematically to form the basis of knowledge about another group in another context, as I have been arguing. Take for example, the United States which was also once a British colony; we do not assume that this shared history somehow privileges U.S. feminists epistemically and prevents them from forging a relationship with the global south that smacks of the same tutelage relationship of British colonialism. Femen is not that different. Like some

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feminist groups in France and the United States, they have shown that they presume to
know what is wrong in women’s lives in the global south. They have understood
women’s oppression from Saudi Arabia to Senegal and it boils down to religion. And
they have also figured out how to free everyone from this oppression. Their totalizing
judgments are not restricted to simply the disease but also the cure. In other words,
Femen and their ilk not only want women to be free, they also want to be able to dictate
to women—regardless of where they are and what webs of relationships inform their
lives—how that freedom is to be experienced. For a good dose of this imperial stance,
one only needs to visit their website on which can be found the following:

Dear FEMEN friends! As you are already aware, the repressive Tunisian
Court tossed in jail our peaceful activists Pauline, Margarit and Josephine.
The three heroes, who dared to protest topless in the Islamist dictatorship,
got a prison sentence of 4 months. They helped their companion Amina
which were (sic) arrested early, and now they need our protection and
support! We are collecting donations for next immediate and urgent
actions: legal proceedings to the appeal and release the girls; visit of their
parents to meet brave daughters in jail; a permanent presence of the
official FEMEN's observer in Tunis; bring clothes and food for the four
prisoners; drive public campaign against official Tunisian authorities to
pressure and discredit Islamists, who has ignored generally accepted
norms of democracy and freedom! These four girls are early birds of
upcoming female Arab revolution, women struggling for the East liberty and civilized standards of personal freedom and human rights.\textsuperscript{13}

We may be able to write off Femen as a spectacle rather than a valid political movement but their activism underscores the tension between universal rights, liberal ideas of civilization and progress that are embedded in them, and a “regressive” culture. And it also points to the tension specifically between liberal “feminism” in its governmentalist form (we will tell you how to be free) and real women’s messy, lived experience, and alternative desires (we will articulate what it means to be free). I have written elsewhere about the willingness of some feminist organizations to partner with the state to “save” brown women. And it is important to note here the ongoing critiques of critical race feminists, material feminists, and postcolonial feminists that have continued to point up the inconsistency of an essentialized, totalizing, feminism with liberation.

\textit{b. Breaking the Stalemate: Taking Difference Seriously}

The ongoing stalemate between a universalist, liberal feminism and an immutable cultural patriarchy has led to a great deal of energy lost that might have been better served in promoting gender justice. For instance, if Femen had chosen a different approach than bearing breasts with anti-Islamic slogans on their bodies, it might have generated less conversation about what Muslim women wear on their heads; it might not have provoked a counter response with Muslim women telling Femen that they were not

in need of instruction on their emancipatory goals; and it certainly would have generated far fewer front-page media stories. If Femen had taken the time to actually talk to women’s groups working at the grassroots, they might have understood what battles were really relevant to the lives of Arab women in Tunisia, a country they have taken a particular interest in presumably because of their colleague Amina Tyler and three others who were jailed for protesting topless. If they had taken difference seriously and had not continued—as they still do—with the assumption that “we” all want the same thing and that the same forces operate in each context making the solutions simple, the stalemate might be broken. And rather than requesting donations of money to bail out their colleagues for a topless protest that most certainly increases Femen’s notoriety and benefits its activists, those resources might have gone towards a cause that improved the lives of Tunisian women.

Liberal feminism coupled with universalist rights cannot disavow its cultural content. It must compete in the marketplace of ideas alongside other articulations of women’s flourishing. If it wants to be relevant to the lives of women beyond the Westernized elite, it will have to take difference seriously and translate its ideas into those that appeal broadly. In other words, rather than falling back on culture as the excuse for its failures, it will have to compete on the terrain of politics. Indeed, during a time in which women and men have taken to the streets in the Muslim world in record numbers, this is what it is about and what it has been about all along.
The statistics are compelling. In 1900, about one in 25 Americans was 65 years of age or older. In April of 2010, there were 40 million people age 65 and older, an increase of 5.3 percent from 35 million in 2000. With the aging of the baby boomers, there are now more Americans who are senior citizens than at any other time in U.S. history. The elderly population is expected to soar to 80 million between now and the year 2050. And while it is certainly good news that people are living longer, the unfortunate truth is that chronic age-related illnesses will likely increase the number of older adults who are vulnerable to physical assault and financial crimes.

Elder Abuse is not a crime that is defined in New York State’s Penal Law. The New York County District Attorney’s Office defines it as any offense committed against a victim who is 60 years of age or older. The Office’s Elder Abuse Unit prosecutes approximately 700 cases each year. While this figure is disturbing, it only hints at the pervasiveness of the problem. Twenty years ago, Domestic Violence was commonly referred to as a “hidden crime,” which had only recently been exposed as an epidemic in

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1 The views expressed in this presentation are those of the author and do not necessarily represent the position of the New York County District Attorney’s Office.
Today, it is Elder Abuse, which is most often unrecognized and under-reported. The wounds suffered by the victim may be invisible - committed by adult children, grandchildren, friends, neighbors, home aides, lawyers, accountants and bankers. And although Domestic Violence is often portrayed in the public arena as a crime committed against young wives, girlfriends or others in intimate relationships, the elderly woman who has endured decades of beatings is rarely pictured, despite the fact that the abusers do not usually change their behavior after serving a prison term or completing a batterer intervention program.\(^4\) Cases involving older parents and grandparents at the hands of their adult children are also missing from most Domestic Violence public awareness campaigns, and yet they account for most of the elder abuse cases that are reported to law enforcement.\(^5\) Tellingly, recent data reveals that 42 percent of the homicide victims who were 60 years of age or older at the time of death were killed by their offspring.\(^6\)

The predominant form of abuse committed against older victims involves financial fraud. The New York State Elder Abuse Prevalence Study, published in 2011, confirmed that financial exploitation is the most prevalent form of adult abuse.\(^7\) The offenses are heinous, and there isn’t one pattern. Most often, there is more than one type of abuse being inflicted concurrently. Adult children who batter their older relatives are


\(^5\) *National Elder Abuse Incidence Study*, National Center on Elder Abuse (NCEA) and American Public Human Services Association (APHSA) (1998).

\(^6\) *Bureau of Justice Statistics*, National Center on Elder Abuse (Sept. 12, 2012).

usually stealing from them, as well. The need for cash is the motivation for the assault. Many adult children have substance abuse issues and simply need money for drugs. Elders who are roughed up or neglected by home aides may also be the victims of larceny, identity theft offenses or forgery. And older sexual assault victims often have personal property stolen during the attack.

Violence against seniors is a women’s issue. Research has demonstrated that female elders are abused at a higher rate than older men. In two-thirds of the reports to Adult Protective Services, the victim was an older or disabled woman. What does Elder Abuse look like, from a prosecutor’s perspective? There is no typical scenario. Recent cases handled by my Office involved the victimization of older women at home, preparing a meal, out for a run and in nursing homes. One such case involved an older nursing home resident who was paralyzed as the result of a stroke. She was unable to speak and considered “completely dependent” by the facility’s staff. The abuser was a male nursing aide, assigned to attend to the victim during the midnight shift. He was inside the victim’s room under the guise of assisting her with personal hygiene. After the female nurse on duty saw the victim’s call light come on three separate times in one evening, she entered the room and observed the aide sexually abusing the victim. Despite being non-verbal, the victim bravely testified at trial by pointing to letters on a page, read aloud by an interpreter to spell the words she could not articulate. The defendant was convicted and sentenced to state prison.

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Elder Abuse cases are among the most difficult to prosecute. It is not uncommon for older victims to pass away soon after the case is reported to law enforcement. As in domestic violence cases, mothers and grandmothers are terrified and often economically reliant on their abusers. Emotional ties persist, as well. Many cases involving parents and grandparents entail the same obstacles, and a bigger one: shame. Victims tearfully confide their belief that since they raised the abuser, they must somehow be responsible for the “problem.” Other victims are not reluctant to testify, but lack the ability to participate in the prosecution of their abuser due to physical or mental infirmities. This is likely one of the reasons why they were targeted in the first place. Other significant challenges we face in addressing elder abuse is ageism. Individuals may make false assumptions with respect to victims of a certain age and their ability to testify accurately. This is reflected in the reporting of cases, and may be an issue for judges and juries, as well. Ageism abounds—even in a society that many feel has come so far. We still disparage older adults on a regular basis. Well-meaning people laugh and say they’re having a “Senior Moment” when they’re confused or can’t remember a certain word—instead of when they are happy or reflecting about something meaningful.

Prosecutors in the Elder Abuse Unit work closely with agencies serving seniors as experience has made clear that the more support a victim receives from law enforcement, local social service providers, health care professionals, banks and others working as a team, the more likely it is that the prosecution will be a success. Toward that end, my Office founded New York City’s first Elder Fatality Review Team. This multi-disciplinary group involves members of city agencies such as Adult Protective Services,
the Office of the Chief Medical Examiner, the Department for the Aging, hospitals and others to review and evaluate elder deaths in which abuse or neglect may have played a role.

I have attempted to highlight some of the challenges we face in addressing Elder Abuse and tell you about practices we have initiated in order to address these serious issues. It has been said that a society can be judged by the respect it pays to its elderly. Given the rapid “graying” of the nation, it is more important than ever to address the needs and concerns of older women as we reflect on issues relating to human rights and the law. If we fail to do so, we will not be giving our mothers and grandmothers the dignity and consideration that they so richly deserve.
Angy Rivera’s situation illustrates both the progress and challenges in providing a viable option for women migrants subjected to violence. Ms. Rivera is a young woman who did not have a lawful immigration status. She became an advocate for other young migrants and wrote a blog offering advice to others without status. Yet, even with this background, she was unaware of the law that provided a pathway to legal status for her. She was sexually abused when she was a young girl. She cooperated with investigators and her abuser was eventually convicted. Thereby, she was eligible for a U visa, available to those who have been the victim of crimes and cooperate with authorities, but neither she nor her mother received any information about applying for the U status. Ms. Rivera found out about the existence of the U visa only when, as a young adult, she consulted with an attorney. She sought advice about her potential eligibility for Deferred Action for Childhood Arrivals, an exercise of prosecutorial discretion that did not lead to an ongoing lawful immigration status.

Women migrants confront the vulnerabilities of both gender and non-citizen status. Violence against women is grounded in a devaluation of women and failure to recognize women as full, competent and valuable human beings. In the United States

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there has been some progress in the provision of legal remedies for abused women who seek family based migration, other women without status who are subjected to violence or trafficking, and women seeking refuge. However, these laws have complications and exclusions that present challenges. Further, advocacy on behalf of these women holds the danger of presenting women subjected to violence as victims without agency, rather than as survivors of horrendous experiences with strength and endurance.

**Family based migration**

Family based migration in the United States is generally based in the legal right and control of the citizen or legal permanent resident relatives. The coverture notion was incorporated into early immigration law by giving a husband total power and control over the immigration status of his wife and thus her ability to exist in the U.S.\(^{25}\) Coverture proclaimed that a husband and wife are one and the one is the husband. The related notion of chastisement allowed the physical discipline of wives by husbands, thus sanctioning domestic violence. Immigration law allowed control over immigration status to be a vehicle for domestic abuse.

Violence against migrant women in the United States, including domestic abuse has been partially addressed in the multiple variations of the Violence Against Women Act.\(^{26}\) These changes in the law have made some progress in providing protection and options for migrant women.\(^{27}\) The view of the plight of migrant women as a women’s


issue and not just an immigration issue was essential to the legislative response and therefore the progress in the provision of remedies and options for immigrant women.

The variations of VAWA resulted in less power and control over immigration status by abusive citizen or resident relatives including spouses. Under current law abused relatives of United States citizens or legal permanent residents may start the process to becoming a legal permanent resident. An abused relative is allowed to file a petition on her own and does not need the cooperation of the citizen or resident relative. The following family members may self-petition: abused noncitizen spouses married to U.S. citizens or legal permanent residents; noncitizen parents in such a marriage whose children were abused by U.S. citizens or legal permanent residents; unmarried noncitizen children under age 21 abused by a U.S. citizen or a legal permanent resident parent; and noncitizen parents abused by U.S. citizen adult children. Also abused conditional resident spouses can remove the condition without an abusive spouse’s participation. Further, there is a special cancellation of removal procedure for certain abused relatives.

While there has been progress in providing some abused women migrants with remedies, control over immigration status by spouses and other family members is still the basis of the law, but now with some ameliorating exceptions that require meeting numerous criteria. Many of those abused have been able to achieve a lawful status. However, some abused women fall through the cracks and those who are eligible have to go through substantial application processes. The potential for control over immigration status to be used as a vehicle for abuse has not been fully removed for all migrant women.

28 The unmarried children between ages 21 and 24 who can demonstrate that abuse was the primary reason for not filing prior to age 21 are also eligible. 8 U.S.C. §204(a)(1).
29 Gordon, Mailman and Yale-Loehr, Immigration Law and Procedure § 41.05 and § 64.04[6].
Other women subjected to violence and trafficking

Women migrants also suffer the vulnerabilities associated with being considered strange in a strange land with unfamiliar culture language and ways of life. Migrants without status are particularly vulnerable, subject to constant fear and the potential of abuse and violence, including domestic abuse and trafficking.

Congressional legislation established the T and U visas. The “T” visa was created to provide immigration protection to victims of a severe form of human trafficking. The “U” nonimmigrant status, or “U” visa, is designated for victims of certain crimes who have suffered mental or physical abuse because of the crime. They must also be willing to assist law enforcement and government officials in the investigation of the criminal activity. The criteria for these visas are specific and requires sometimes difficult to obtain proof. Moreover, the 2013 version of VAWA did not include a needed increase in the number of U visas.

Further, lack of status makes migrant women more vulnerable to violence. Women without status live in the shadows of society. They are often vulnerable to sexual harassment and abuse as they are afraid to report abusive employers or co-workers. They are vulnerable to stranger and domestic violence because they are afraid that contact with the police either in preventing or reporting crime will lead to removal through referral by local law enforcement to immigration officials. Whether there will be a pathway to legal status for currently undocumented women awaits immigration reform.

Women seeking Refuge

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Women and children comprise significant portions of world refugee populations. Yet the refugee and asylum laws and policy of the United States do not explicitly protect against persecution on the basis of gender and make it more difficult for women to demonstrate persecution on other bases. This limitation is also found in international standards.\footnote{See generally Anker, Deborah E., \textit{Refugee Law, Gender, and the Human Rights Paradigm}, Harvard Human Rights Journal, Vol. 15, Spring 2002.} Unfortunately, the Refugee Convention did not explicitly recognize gender-based persecution as a basis for refuge. U.S. asylum law adopted the international standard and there has been a long struggle for recognition of domestic violence and other gender-based violence as a basis for asylum. Under international and U.S. based standards, refuge is based on demonstrating past persecution or a well founded fear of future persecution on account of political opinion, race, ethnicity, religion, or social group. Gender is absent from this list.\footnote{Karen Musalo, \textit{A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claims}, 29 REFUGEE SURV. Q. 46 (2010)}

In 1980, long after laws in the 1960’s prohibited gender as a basis for discrimination, the United States revised its refugee and asylum laws. Gender was conspicuously absent. The refugee and asylum laws protect against persecution\footnote{See Caryn L. Weisblat, \textit{Gender-Based Persecution: Does United States Law Provide Women Refugees with a Fair Chance?}, 7 Tul. L. Int’s & Comp. L. 407, 414 (1999)} on a whole myriad of grounds, but not explicitly gender or sexual orientation. There have been attempts to portray gender persecution as social group persecution, but the conceptual fit is not always successful.\footnote{See generally Thiele, Bret, \textit{Persecution on Account of Gender: A Need for Refugee Law Reform}, 11 Hastings Women’s L.J. 221, Summer 2000; Neal, David L., \textit{Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum}, 20 Colum. Hum. Rts. L. Rev. 203 (Fall 1988).}
In the case, In re R-A ³⁵, the Board of Immigration Appeals (BIA) had to determine whether a woman who was repeatedly abused by her husband could be considered a member of a particular social group. Despite the horrendous acts of abuse she suffered at the hands of her husband, including forced sex and being beaten unconscious on numerous occasions, the BIA stated that she did not fit the definition the BIA used to decide these cases. R-A bore the burden of proving that the persecution she suffered was due in part to her being a part of a protected group, that group being defined as “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”.³⁶ The BIA stated that the respondent had not shown that the victims of spouse abuse in Guatemala consider themselves to be members of a social group or that the abusers see the abused women as members of a social group. According to the BIA, R-A- did not fear abuse from all Guatemalan men, but instead only from her husband. She was found ineligible for asylum.³⁷

Attorney General Janet Reno in the Clinton administration held the case in abeyance while regulations were proposed to address gender related persecution.³⁸ The proposed gender regulations have not been finally issued.³⁹ However, in the Obama administration, the Department of Homeland Security eventually took the position in

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³⁶ See INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992) (asylum applicant has the burden of proving that the persecution suffered was due in part to her being a part of a protected group).
³⁹ The Obama Administration stated an intention to issue the proposed regulations. The Regulatory Plan, 74 Fed. Reg. 64137, 64220-21 (Dec.7, 2009) [
Matter of R-A- that women who have suffered domestic violence may establish eligibility for asylum and withholding of removal based on membership in a social group. The granting of asylum in this case by stipulation has established the possibility of asylum for others. However, the Department of Homeland Security has addressed the issue on a case-by-case basis without consistent guidelines.

Complexities and perceptions

In addition to the limitations in the law, the complexity of the law that addresses violence against migrant women undermines the practical impact of the law. Many migrant women, like Angy Rivera, do not know of the permutations of the law and their eligibility under it. Further, the law grounds remedy for women who having suffered violence in an assertion of their victimhood, rather than the strength of those surviving violence. This discourages the survivors from coming forward. Moreover, the perception of women migrants as helpless victims harms realistic policy and the potential for immigration reform. A study of media representation of migrant women describes the problem.

The dominant narrative in mainstream media portrays these women as victims who are powerless to find safety and security for themselves and their families . . . . Missing from the narrative are accounts of immigrant women as contributors to society and agents of their own destiny. . . . This picture has clear policy implications. The depiction of women immigrants as helpless victims strengthens perceptions of otherness and dependency, and tends to reinforce the belief still held by a large percentage of Americans that immigrants are a burden on our country.40

40 http://opportunityagenda.org/files/field_file/immigration_gender_0.pdf
Hopefully, immigration reform is realistic at this time. True reform requires recognition of the realities of the lives of migrant women. Legal reform holds a promise of providing increasing options for migrant women subjected to violence. In the reform effort, presenting the dignity and strength of these women will be as important as demonstrating their plight and need.
Dressing Constitutionally
Hierarchy, Sexuality, and Democracy
From our Hairstyles to our Shoes

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Introduction
From our hairstyles to our shoes, constitutional considerations both constrain and confirm our daily choices. In turn, our attire and appearance provide multilayered perspectives on the United States Constitution and its interpretations. Dress raises a plethora of constitutional concerns. In addition to the First Amendment issues of expressive speech or religion that come most immediately to mind, our apparel prompts problems of equal protection based on classifications of sex/gender and race. Moreover, our habiliments and the profits to be made from their production, trade, and consumption have motivated important constitutional revisions of both doctrine and text. The intertwining of our clothes and our Constitution raise fundamental questions of hierarchy, sexuality, and democracy.

While we most often do not think our wardrobe selections are of constitutional magnitude, the legal regulation of dress is ubiquitous. The most obvious regulations are direct ones: laws criminalizing indecent exposure; laws prescribing and proscribing military uniforms; or regulations detailing the attire of government employees, prisoners, or public school students. Less obvious are the more indirect ways in which the law constrains our apparel. Our daily choices of how to look and what to wear are circumscribed by legal doctrines that fail to protect women from sexual violence, or limit antidiscrimination laws, or allow law enforcement officers and judges wide discretion to consider our appearance. Additionally, our available options of apparel in the marketplace are the product of legal forces. All of these provoke constitutional issues.

The interaction of constitutions with all types of regulation of dress generally falls into the two major categories of constitutional concerns: rights and structures. Under the U.S. Constitution, the rights that are most often interposed against regulations of dress are the First Amendment guarantees of freedom of speech (expression) and freedom of religion. Regulations of dress may also raise issues of equal protection, introduced into the U.S. Constitution by the Fourteenth Amendment passed after the Civil War. The due process clause in the Fourteenth Amendment and Fifth Amendment both guarantee “liberty”—at least to the extent that the state and federal governments cannot deprive it without due process of law—a concept that would seem to encompass one’s choice of what to wear. But these rights have not only been asserted by individuals; they have also been advanced by private parties such as employers seeking to enforce their dress codes or labor policies. There are also important criminal procedure protections in the Constitution—including search and seizure, the right to confront witnesses, and the
Eighth Amendment’s cruel and unusual punishment that are relevant to restrictions on
dress in criminal and prison contexts.

In addition to rights, constitutions are concerned with the structures of
government. In the U.S. Constitution, this is a rather complicated affair, of both
separation of powers of the branches of the federal government and federalism as the
relationship between the federal government and the fifty states. In the constitutions of
individual states, there are also issues of separation of powers among the state branches
of government, at times including an administrative branch, as well as issues regarding
divisions of power between a state and its subdivisions, such as counties or cities.
Additionally, the United States includes territories, both as a historical and present
matter, with complex relationships and questions of authority. These issues of horizontal
and vertical power distribution raise questions about whether the government entity
regulating dress has the constitutional authority to do so. Moreover, in the United States,
the doctrine of state action embodies the notion that the Constitution is concerned only
with the actions of the government. With the notable exception of the Thirteenth
Amendment—important in the production of apparel—actions by individuals,
corporations, or other “private” entities that might infringe the constitutional rights of
others are not cognizable.

The themes of hierarchy, sexuality, and democracy animate the constitutional
concerns surrounding attire and appearance. While hierarchy is not usually
acknowledged as central to constitutionalism, the constitution itself is a document that
allocates power in hierarchal, or even anti-hierarchal balancing, fashions. Additionally,
concepts of rights essentially invoke matters of hierarchy, whether it is the hierarchy
between the state and the individual or group, or between individuals or groups with
differing claims to rights. The doctrines that develop to elaborate constitutional rights are
hierarchal ones: rights of political expression are valued more highly than rights of sexual
expression. Moreover, and more controversially, constitutional interpretation often
involves a choice between maintaining hierarchy or dismantling hierarchy.

Sexuality itself is a controversial candidate for being central to constitutionalism.
Yet constitutional quarrels in recent decades have highlighted issues of sexuality, sexual
freedom, bodily autonomy, sex, and gender. In the realm of attire and appearance,
sexuality undergirds much of the constitutional reasoning, even when it is not explicit.

Democracy is most readily recognizable as a concept at the heart of our
constitution, although it does not appear in the text of the document. Nevertheless,
democracy remains problematical whenever there is judicial review of acts passed
pursuant to democratic processes. It is also disputable whenever the democratic franchise
is partial, as before the Fifteenth Amendment (for black men), the Nineteenth
Amendment (for all women), and presently for noncitizens as well as citizen
inhabitants of territories.

Other themes emerge from the exploration of constitutionalism from the
perspective of dress. First, this examination uncovers the importance of clothing to the
constitutional text itself. The Eleventh Amendment and the Reconstruction Amendments
are traceable to controversies surrounding cloth. The Commerce Clause contemplated a
lively trade in textiles, while the slavery “compromises” in the Constitution failed to
contemplate the importance of cotton. The inclusion of the Patent Clause, despite
objections to monopolies, would influence the cotton gin and sewing machine. A
proposed sumptuary power for the federal government did not survive the Constitutional Convention but would have empowered Congress to legislate a national dress code. Arguments against inclusion of a freedom of assembly provision in the First Amendment were debated, and seemingly defeated, by reference to William Penn’s hat. Additionally, textiles were not only important to the Civil War, but also to the Revolutionary War’s creation of the nation.

Second, doctrinal incoherence, isolationism, and blurring make understanding and litigating constitutional issues of dress challenging. While these problems are not unique to matters of attire and appearance, doctrinal incoherence seems especially prominent in First Amendment disputes, whether they involve free expression or the religion clauses. The conjoined problems of doctrinal isolationism and doctrinal blurring confuse matters further. For example, courts often note that a challenge to a dress code might be raised as a First Amendment challenge or an Equal Protection challenge but then proceed as if only one is implicated, at least until a stray concept from the excluded doctrine makes its appearance. Similarly, courts determining a criminal defendant’s objection to attending trial in jail attire struggle with Sixth Amendment fair trial principles, due process fair trial principles, and even First Amendment concerns. Relatedly, there is often doctrinal asymmetry, again especially pronounced in the First Amendment area. In such instances, the government requires a certain appearance, while courts place a burden on persons resisting that mandate to prove that their deviation has a specific message other than deviation.

Third, the “common sense” of judicial and legislative actors permeates the issues, leading to an interpretative slovenliness. Perhaps because matters of dress and appearance seem so commonplace, judges quickly resort to their own understandings, despite the fact that the litigation itself demonstrates that there is not universal consensus. For example, judges have opined that a cornrow hairstyle is not indicative of African Americans (taking judicial notice of Bo Derek); that moustaches are not cultural symbols for African American men, but that goatees are; and that veils are cultural rather than religious. At times, the slovenliness of the reasoning is palpable, as when a judge opined that the high school graduation cap and gown is a “universally recognized symbol” while the significance of traditional Lakota clothing is less easily understood, even when 90 percent of the graduating class is Lakota. At other times, the slovenliness approaches the cavalier, as when a federal appellate court stated that the difference between female and male breasts, supporting mandated covering of the former but not the latter, was one of those “self-evident truths about the human condition—such as water is wet.” Courts do accept evidence regarding social facts, including “expert” testimony about the indicia of gang membership including clothing and tattoos, or the link between dancers wearing pasties and g-strings and the prevention of criminal activity like loan-sharking. Yet this evidence seems to confirm stereotypes and biases rather than providing rigorous proof.

Fourth, the mirrored themes of trivialization and fetishization loom large in many disputes. The condescension and trivialization by many courts when youth are involved is especially pronounced, from the plethora of male student hair-length cases of the 1970s to the increasing number of student gender appropriate attire cases in the courts at present. Even when a judge might ultimately find in favor of a litigant, there can be trivializing language: a judge described an argument that an ordinance criminalizing cross-dressing was unconstitutional as based on the premise that the law prevented the
person “from ‘doing his own thing’ in the vernacular of the ‘pepsi generation.”’ The concomitant fetishization of dress and grooming is evident in many of the regulations subject to constitutional challenge. Such regulations prohibit display of the “female breast below a point immediately above the top of the areola”; or sideburns from extending below the lowest part of the exterior ear opening; or skirts three inches above the knee (with the measurement to be taken when the woman is “seated with feet flat on the floor and at the highest point of the skirt; e.g., if the skirt has a slit, then the measurement would be taken at the top of the slit,” and if “the slit is in the front or side of the skirt, the measurement would be taken while seated; if the slit is in the back of the skirt, the measurement may be taken” while she is standing). Perhaps in an attempt to be objective, such regulations echo the Tudor sumptuary laws proscribing the attire for persons occupying different statuses in the hierarchal social structure, including the famous Knights of the Garter.

Fifth, and last, constitutional issues endemic to sartorial and grooming matters are steeped in history. Separation of powers and nascent rights recognition developing in Tudor constitutionalism are intertwined with the sumptuary laws. Constitutional challenges to contemporary statutes criminalizing the wearing of masks are infused by complicated legislative histories considering carnival, land disputes, and the KKK. The production of clothes is imbued with constitutional conflicts over slavery, laissez-faire, and the treaty power. The historical discourse is often superficial, inaccurate, or opportunistic. Even a matter as simple as an attorney’s being mandated to wear a “tie” in court can become fraught: the attorney’s bandanna tied above the collar was not a tie according to the judge who held him contempt, despite a reference book on nineteenth-century western wear and a dictionary to support the claim.

These themes infuse the seven chapters of Dressing Constitutionally. Briefly, the first chapter, “Dressing Historically,” begins with the Magna Carta juxtaposed with the Tudor sumptuary laws, and then considers the structural and rights issues in the English “constitution” raised by the regulation of attire and the economic interests expressed in regulations regarding wool and foreign cloth. It also examines how regulations of habiliments, hairstyles, and plaid contributed to sovereignty and nation building. The colonizers of what would become the United States brought a penchant for the regulation of apparel, including as a mark of a crime, as in The Scarlet Letter, as well as other means of badgeng, scarring, and marking criminals, the morally deviant, poor persons, and slaves. The relationship of the colonies to the wool-exporting and calico-trading mother country was an important aspect of the Revolutionary ethos. The Constitution itself was deeply affected by the trade in textiles, although the proposed sumptuary power for Congress was not included.

“Dressing Barely” begins with Thomas Paine’s observation that government, like clothes, is a necessary evil. The chapter pairs two contradictory aspects of government approaches to a lack of clothes and the constitutional ramifications of each. Forced nudity, as in strip searches or other criminal contexts, raises Fourth Amendment and Due Process Clause claims, usually unsuccessfully even if the government action was ill-founded. Chosen nudity or partial nudity, criminalized by indecent exposure statutes, raises First Amendment, as well as Due Process Clause and at times Equal Protection Clause claims. The First Amendment doctrine of obscenity is applied to nudity, even as
doctrinal exceptions for regulated media, funding schemes, and secondary effects ultimately extinguish distinctions between obscenity and nudity. The Equal Protection Clause and its limited interpretations provides little protection for nudists and for bare-breasted women.

Chapter 3, “Dressing Sexily,” centers the constitutionality of government’s major weapon in the control of sexuality: the policing of attire. This policing focuses not only on the lack of clothes, but also on the styles of clothes and other aspects of appearance such as hair, jewelry, cosmetics, shoes, and bodily enhancements or markings. One aspect of this policing is directed at the boundary between the two recognized sexes, female and male. Dressing sexily in this instance means dressing in gender appropriate ways. So-called cross-dressing—wearing clothes of a member of the “opposite” sex—may subject one to criminal sanctions, to discrimination, to interference with familial and educational relationships, and to private violence. The other aspect of this policing seeks to control sexuality, especially but not only female sexuality. Dressing sexily in this sense means dressing in a sexy, erotic, or not sufficiently unsexy manner. So-called dressing provocatively may subject one to discrimination as well as to private violence with government acquiescence, at times in service of a criminal defendant’s constitutional rights.

“Dressing Professionally,” Chapter 4, begins by examining the federal protections for dress and grooming in the private sphere, protections that are under attack for their lack of constitutional grounding. These statutory protections are uneven and incoherent, especially as they seem to exempt corporate “look policies” that seek to “brand” employees. Government branding of its employees, exemplified by the uniform, is prominent in military and paramilitary contexts. This robe may be another type of uniform, or as some would have it a “cult,” but both its use and its absence pose constitutional problems in courtrooms, as well as in academic settings.

Classrooms and protests birthed the First Amendment standard of disruption central to Chapter 5, “Dressing Disruptively.” The notion that attire is capable of disruption presupposes not only a normative style of dress but also a normative community that is capable of being disturbed merely by a person’s apparel or grooming. In schools, Confederate flag clothing and anti-gay T-shirts have prompted extended litigation about students’ First Amendment rights. The disruption standard also has relevance in the courtroom, specifically when litigants including criminal defendants as famous as William Penn refuse to doff their hats. When criminal defendants disrupt the proceedings by appearing in judicial attire, or refuse to be silent and are shackled, gagged, and bound—both of which occurred at the infamous Chicago Eight Conspiracy Trial—questions of courtroom decorum are evaluated in light of the constitutional right to a fair trial. A disruption of the wider social fabric was claimed in the case centering on the most famous outwear in First Amendment jurisprudence: Cohen’s “Fuck the Draft” jacket. The jacket’s words made the First Amendment claim more discernible than claims by those wearing saggy pants, or even those wearing masks.

Chapter 6, “Dressing Religiously,” examines “religious garb” and implicates one of the most contentious issues of constitutional adjudication. Perhaps because religion has been so historically divisive and continues to be so, the doctrines and theories governing religion are themselves subject to marked divisions, including divides between the Free Exercise Clause and the Establishment Clause, belief and practice, doctrinal and
legislative interpretations of the standard of constitutional scrutiny to be applied, and divisions between majority religions and minority religions, as well as between religion and nonbelief. The practice of tattooing and the Church of Body Modification raise constitutional issues and disparate results. The accommodation of religious attire and grooming standards in prisons under both the First Amendment and various statutes has led to anomalous results. Women’s religious dress, including Catholic habits and Muslim niqab and hijab, prompts divisiveness and little constitutional resolution.

Last, Chapter 7, “Dressing Economically,” focuses on the constitutional issues raised by the labor necessary to produce apparel. The entwinement of slavery and cotton, the laissez-faire Lochner-era struggles in sweatshops and textile mills, and the contemporary reign of international free trade have challenged and changed the constitutional contours of our attire. There are intransient constitutional problems not merely with what one wears but with how those items are produced. Just as Tudor sumptuary laws sought to regulate sartorial options to maximize economic profits, so too has U.S. constitutional doctrine reckoned with cotton, cloth, and clothes as imperative to capitalist success.

Thus, while we may casually assume that the Constitution affords us freedom to dress as we please, the Constitution cabins, channels, and constrains these choices. Moreover, our attire reflects the Constitution, including its text and controversial doctrines.
CONTRIBUTIONS OF FEMINISM TO FAMILY LAW: THE CONTINUING CHALLENGE OF VALUING WORK IN THE HOME

Twila L. Perry*

As I began to plan my remarks for this conference, I thought it might be interesting to compare the casebook I used in the Family Law course I took when I was in law school during the early-to-mid 1970’s with the casebook that I assign my Family Law class today. It occurred to me that such a comparison might provide an effective illustration of some of the ways in which family law has changed during the last four decades—years which have seen a great deal of change in the lives of women, a great deal of feminist activism and the entry of substantial numbers of women into the legal academy.

Here is what my brief examination of the two casebooks revealed. Both casebooks cover the basic doctrines of family law in the areas of marriage, divorce and custody. Both books cover the subject of adoption, although in fewer pages in the earlier book. Both cover questions of jurisdiction and procedure, although the earlier book has much more focus on these subjects. The earlier casebook devotes many pages to the issue of annulments and to the grounds for and defenses to actions for divorce. The chapters on adoption and custody are shorter and more straightforward and focus primarily on basic doctrines and procedures.

*Professor of Law and Judge Alexander T. Waugh Sr. Scholar. Rutgers University School of Law-Newark. Much of this talk is based on material from two earlier articles in which I explore intersections between race and gender in Family Law. See Twila L. Perry, Feminist Legal Theory and Critical Race Theory in Family Law: Conflict, Convergences and a Look Toward the Future, in MARTHA FINEMAN, ED., TRANSCENDING THE BOUNDARIES OF LAW (2010), and Twila L. Perry, Alimony: Race, Privilege and Dependency in the Search for a Theory, 82 GEO. L.J. 2481 (1994).
In the casebook I assign to my class today, the grounds for and defenses to divorce still receive substantial coverage, but not surprisingly, in light of no-fault divorce, the subject of annulments receives little coverage. Issues of jurisdiction and procedure are still covered, but in fewer pages. The real difference between the casebooks is in the scope of coverage. The current book covers many issues not present or present in any significant way in the earlier book. These include reproductive technology, cohabitation, surrogacy, sexual privacy, same-sex marriage, work/family issues and a variety of issues implicating private ordering. Another change is the centrality in the latter book of constitutional issues involving due process and equal protection, often in the contexts of race, gender and sexual orientation. As a result, subjects such as custody and adoption receive much more complex, indepth treatment. The current casebook also includes much more in the way of interdisciplinary materials as well as excerpts from both empirical studies and popular magazines. Just as I thought, the comparison of two family law casebooks separated by forty years reflects the changes that have taken place in the family, in social values, in science, and in the lives of women.

I decided to focus my talk today on the issue of valuing women’s work in the home. This is an issue in family law that has also undergone substantial change during the last forty or so years, but continues to present many challenges. I will focus on the subject of alimony as an example of a family law issue that has been influenced by feminism and by the entry of increased numbers of women into the legal academy. I will then provide an illustration of how the increased racial diversity among women in the legal academy has contributed to the discussion of this issue. Finally, I will identify what
I see as some of the issues concerning alimony and valuing women's work in the home that feminists will need to address as women’s lives and gender roles continue to undergo fundamental change.

There have been many changes in family law during the past four decades. These changes have come about as the result of a number of factors. Three factors include the attention to problems of social equality inspired by the civil rights movement and an upheaval of traditional values and paradigms resulting in a dramatic new focus on values such as privacy and autonomy in personal relationships.

Family law was also affected by a number of movements in legal academia that reflected these changes. During the 1970s, advocates of women’s rights had begun to turn to the court system to fight discrimination. As the number of women in law schools, law practice and law teaching began to grow, women continued to challenge the very foundations of legal rules and structures that impact women. As the Critical Legal Studies movement engaged in deep critiques of the law as a tool for maintaining class hierarchies, many women scholars in that movement also became committed to developing an analysis of the law that was responsive to issues that specifically affected the lives of women. In family law, feminist legal theorists began to examine and challenge traditional rules and doctrines which were already starting to evolve as a result of changes in women's lives and roles.

While many changes in the law were addressed to the context of women in the workplace, the changes that have taken place in family law with respect to the issue of valuing the work women perform in the home have also been far reaching.
One example is the issue of according value to that work-work sometimes referred to as “homemaker services.” Traditionally, family law devalued such services. A rule that reflected this devaluation was the “title system” in divorce law. Here, the rule was that upon divorce, the court assigned items of property accumulated during the marriage to the spouse who held title to that property. As a result of the traditional division of labor within a marriage and the often resulting power relationships, the husband was often the spouse who held title to the property. Thus, a wife who had performed homemaking services during the marriage lost out. If there was a divorce, she could receive alimony but she could not receive a share of the property. Today, the rule of equitable distribution, followed in most states, mandates that property be divided accorded to a principle of fairness which includes according value to services performed in the home.

Another example of the traditional approach to homemaker services was the refusal of most courts to enforce agreements between cohabitants to divide property in the event of the termination of their relationship. Reasons for this included the desire to punish those who lived together outside of wedlock and the assumption that the couple's sexual relationship tainted the contract. The analogy in the latter case, essentially, was to prostitution. Also central to this approach was the view that homemaking services simply had no value that could constitute consideration for a contract or that warranted compensation. Today, this situation has vastly changed—contracts between cohabitants are widely enforceable.

Despite these kinds of changes, the issue of according value to the services performed in the home, services still most often performed by women, continues to be a
challenge for feminist scholars in the area of family law. It is also an area in which feminist scholars of color have broadened the discussion to incorporate concerns that are important to women whose lives lie at the intersection of gender and race.

The number of women of color in the legal academy began to increase substantially in the mid-to-late 1980s. Many of these women became active participants in the emergence of what has come to be known as the Critical Race Theory movement. Critical race theorists were legal scholars, mostly of color, whose scholarship addressed issues that were the subject of the civil rights movement, such as voting rights, discrimination and segregation in areas such as housing and education. What was different, however, was that the focus in critical race theory was also on issues such as unconscious racism, cultural domination, the persistence of racial hierarchy and racial subordination in the face of formal equality, and a critique of the liberal concept of colorblindness.

While women of color in the legal academy were concerned about many of the same legal issues as white feminists, they also began to address issues specifically relevant to the lives of women in a way that took into account the factor of race. One of feminist legal theory’s major contributions was to unmask the persistence of gender hierarchies—a hierarchy that is a reflection of the powerful institution and ideology of patriarchy, in which power flows from the status of being a male. But feminists of color contributed the discussion of an additional issue—the issue of hierarchies among women based on race.

So, for example, in family law, women of color have sought to bring additional perspectives to the subject of homemaker services. In fact, I have addressed this subject
in my own scholarship, specifically in the context of the issue of alimony.

In the late 1980s, a number of women scholars writing in the area of family law turned to the subject of developing a theory of alimony. There definitely was a need for such an effort. What had happened is that as a result of a number of developments, including the advent of no-fault divorce and the increasing opportunities for women in the workplace, the traditional legal justifications for alimony, fault and need, began to lose their force. Critics of alimony began to argue that alimony was no longer necessary and that there was no legal or theoretical justification for requiring one individual to continue to provide financial support to another to whom there was no longer any legal tie. However, there were feminists who felt the need to defend alimony as an institution that was still necessary because of persisting gender inequality.

Scholars sought to offer justifications for alimony based on a variety of theories—contract, partnership, unemployment insurance, theories of human capital and even law and economics analysis. I became interested in exploring the question of the implications of the search for a theory of alimony for those women who seemed least likely to benefit from that effort—Black women and other women of color whose lives in relationship to men and to marriage often placed them in a different position than many white women, who, much more often, were married to men of an economic status that would lead to the prospect of them receiving alimony at the end of their marriages.

In essence, the search for a theory of alimony was based on a paradigm marriage which often embodied several elements: 1. A wife who sacrifices or at least slows down her career for many years in order to attend to the needs of her husband and children. 2. The wife does this, with the assumption that her marriage will last a lifetime and that in
her later years she will enjoy the fruits of her labors. 3. The marriage ends in divorce and the husband walks off with the most valuable asset of the marriage-his career. Since many divorcing couples have little or no property, alimony was often the only route to economic justice for a wife who finds herself in this position.

Certainly there is a need for economic justice in that context. But, what about the many women in this society whose marriages lie outside of this paradigm? Many women, especially African-American women, are married to men who earn less money than they do. Many of these women have never had the option of becoming full-time homemakers or working part-time or otherwise slowing down their careers in order to care for their homes and families. Many scholars have noted that many African-American women have grown up with the belief that it is important for them to be economically self-sufficient, whether or not they marry. As a result many women of color, including those who are married, often do not have the expectation of relying economically on a man, whether they remain married or whether they divorce. The question becomes: how does the feminist search for a theory of alimony affect these women?

While it is important to recognize that the labor of middle and upper-middle class women may be exploited during marriage, their circumstances are also often accompanied by an element of privilege. This privilege operates during marriage, where there may be an option to take time out of their careers and/or work part-time, but it also can operate upon divorce, where an award of alimony may provide a comfortable lifestyle or at least provide the women with the option to retrain for a career that has potential for advancement.
Thus, it is important to recognize that the institution of alimony privileges more advantaged women. This privileging can be seen as reinforcing hierarchies among women as being deserving or undeserving based solely upon their attachments to men.

There are troubling racial implications here. In this hierarchy, in which women who have been attached to affluent men are viewed the most sympathetically, Black women, who are the least likely to be attached to affluent men, will almost always occupy the bottom rung of the ladder.

Let me give an example. Take two women—neither of whom has held a substantial job in her adult life. One, when she was young, married a man with a promising career. The other never married, but bore three children when she was young and ended up on public assistance. Both have cared for their children at home and have been attentive, excellent mothers.

Let us assume that in the first case, the woman’s husband has now decided to end the marriage. In the second case, the government has decided to require mothers receiving public assistance to enroll in workfare programs as a condition of continuing to receive aid. (This is in fact what has happened as a result of TANF—the Temporary Assistance to Needy Families program).

The likely responses of many people in this society to these two women would be quite different. There would be substantial sympathy for the married woman—a feeling that she is deserving of continued economic support and at least should be financially supported while she trains for a job that has long term potential for financial and personal growth. On the other hand, many people would probably feel that the woman on public assistance should take any job, however low paying and dead end, even if it causes her to
lose important benefits such as medical care for herself and her children.

While some people might argue that the two situations are different because the more affluent woman's choices are being paid for privately while the public bears the cost of the poorer woman's situation, there is a deeper issue here. For many people, a woman’s economic dependency is acceptable as long as that dependency is on a man. But, if we are only willing to view sympathetically and affirm and nurture and reward women who have attached themselves to men in very traditional ways, this is a serious problem for feminist theory.

There are other troubling implications. Supporting a system that protects and rewards privileged women when they opt to stay home also reinforces a structure that values children differently. Alimony thus becomes a support for a system in which the children of well-to do men are valued more than the children of less-well-off men. The children of affluent fathers are the beneficiaries of a system in which their mothers have available to them a variety of attractive options with respect to their children’s care. The children of poor men are clearly not the beneficiaries of a similar range of options. I believe that this is also a serious problem for feminist theory.

Finally, in this talk, I would like to identify a few issues that I believe pose challenges for feminism in the area of family law as we move into the future. Certainly, the issue I have just addressed, taking into account the needs and interests of women who are diverse in terms of race and class will present an important and ongoing challenge. A theory of alimony that reinforces racial and class hierarchies must yield to approaches that are rooted in social justice and a rejection rather than a reinforcement of patriarchy.

Feminists also need to explore more deeply the relationship between gender,
socialization and the willingness of so many women to undertake roles within marriage that result in them becoming economically disabled. The need for this becomes very pressing in light of the focus today on same-sex relationships, and especially same-sex marriage. Obviously, in a same-sex relationship gender will not be a proxy for dependency or for an expectation that a particular individual in the relationship will undertake the role of homemaker. Thus, in thinking about alimony, there will be a need to isolate the issue of gender from the question of what one individual may owe another at the end of a relationship in which one party has made sacrifices that have enabled the other to thrive and advance in the workplace.

Another challenge for feminists in the area of family law is to engage in a broader consideration of the relationship between women and work. Feminists must do more to go beyond the goal of having more value accorded to homemaker services. They need to think more about the social justice issues that are implicated when upper-middle class or wealthy women who hold jobs outside of their homes must hire other women to meet their child care and homemaking needs. Currently, these women often employ poor women, often poor women of color and more and more poor women of color who are also immigrants, to perform this work. The sad reality is that the woman who is in the role of employer has an interest in paying as little as possible for this kind of work. There is an inherent conflict of interest here between employer and employee, and this conflict is no less troubling because both parties involved are women.

Finally, in continuing to think about the role of alimony, feminists need to continue to confront the challenge of thinking deeply about the institution of patriarchy. Although in recent years there has been evidence that women in this country are starting
to outstrip men in terms of college and graduate degrees, it is also clear that women have
not achieved equality in the workplace and in particular, in many of the most lucrative
professions. As a result, alimony is likely to continue to be an issue, and a need for some
women, at least for the foreseeable future.

But alimony, in most cases, is still based on a paradigm that is deeply rooted in
patriarchy. As I have already discussed, in the paradigm of the traditional marriage,
women’s economic and social status is derived from the men to whom they are attached.
The situation is hierarchical and in some ways, oppressive, but there can also be the silver
lining of a comfortable standard of living during the marriage and there may be alimony
should the marriage end. So here lurks a question: what are women willing to give up in
order to achieve gender equality? In the end, in order for women to achieve equality with
men, they will have to stop placing themselves in intimate relationships with men that
result in such a high degree of economic vulnerability. The issue of homemaker services
is one that women must continue to address not only in the context of legal struggle but
also in the context of the choices that women, especially women attached to affluent men,
continue to make.
“Deaning in a Different Voice: Not the Same Old Song”

Camille deJorna
Associate Consultant American Bar Association

Stoneman/Katz Conference
Human Rights, Gender and the Law: The State of Equality in Comparative Perspective
Albany Law School
Thursday, April 11, 2013

Questions
How many of you believe that a woman is as capable as a man?
How many of you believe in equal pay for equal work?
How many of you would vote to strike statutes that discriminated against women?
How many of you believe a woman could be president?
How many of you consider yourselves feminists?

Introduction

Today for some, feminist means ‘not feminine’ but for many feminism is about equity, the subject of this week’s conference. I’d like to begin with a definition of feminism from my mentor Gerda Lerner, the Robinson Ewards Professor Emerita of US Women’s History from the University of Wisconsin Madison. Gerda established the nation’s first graduate program in women’s history in 1972 and found the doctoral program at Madison. Her works “Black Women in White America”, and “The Creation of Feminist Consciousness” are considered classics in the field of women’s history. She died recently and I can think of no greater tribute to Gerda then to dedicate this talk to her memory.

Also, as Ruth Gordon recently wrote in her essay On Community in the Midst of Hierarchy, “I immediately understood by attending the Northeast Corridor Collective of Black Women Law Professors that I was following in the glorious footsteps of others.”
In that spirit, I would like to thank fellow panelist Twila Perry who mentored me through the law school admissions process nearly thirty years ago and who encouraged me to apply for a prestigious scholarship that I ultimately received. Left to my own devices, I would never have applied for that important honor. That support opened many doors for me in law school and created many options for me in my subsequent career in legal education.

**Definition**

"**Feminist scholarship seeks to respect individual work, while searching for collective solutions to intellectual as well as societal problems. It seeks to break down and combat artificial hierarchies, the elitism and narrow specialization so characteristic of—our profession—it seeks constantly to broaden and deepen the connectedness between thinking and committed social action.** . . . I have in this work at times stood in opposition to prevailing trends, seemingly alone, yet I have never felt myself disconnected from that rising stream of consciousness, will and force which seeks to have women realize their full human potential. . . . Let me simply say that I feel myself embedded in the collective effort and that I hope my own sometimes lonely explorations have added to its strength."

**Gerda Lerner 1979 the Majority Finds Its Past: Placing Women in History**
About two years ago, a colleague came back from the Section’s New Deans Workshop and said “there appeared to be a record number of people of color and women at this year’s workshop.”

When invited to participate in this panel, I thought the subject of deaning and identity was worth exploring as well as whether there was any truth to my colleague’s observation about the numbers. In this presentation, I will provide a snapshot of challenges these leaders face. I plan to also reveal the strength and the power of their difference. This project is based on interviews with deans and senior academic leaders in law schools and other institutions of higher education who talked about the value their race, gender or sexual orientation contributed to their leadership roles at their institutions.

**Background and History**

In 2002 in one of the earliest works on this subject, “Women Law School Deans: A Different Breed or Just One of the Boys?” Herma Hill Kay, the former dean of the law school at Berkeley and a noted scholar on the subject of gender discrimination, studied whether because of their gender, women deans experience and approach the considerable challenges of deaning any differently than their male counterparts. The article also examined “the past and present situation of women deans, the unique obstacles they face, and the opportunities that are open to them.”

Kay’s study, as an initial matter, looked at the history of women law deans. The first woman law dean in the U.S. was Ellen Spencer Mussey. With Emma Gillett she co-founded a law school in D.C. in 1898 to provide a ‘legal education for women that will
enable them to practice in the legal profession.” Mussey became the founding dean of what would eventually become, American University’s Washington College of Law. Her article concluded, “It’s too soon for a comparative evaluation on the impact of women and men deans on their individual schools or on legal education in general.” Professor Richard Neumann was skeptical as quoted in the same article and predicted “Unless there are dramatic changes in the way that law school deans are hired, the female percentage of deans may not equal the female percentage of professors “at any time in the foreseeable future.” Herma’s view was more optimistic and as it turns out, visionary. She reported that “these women deans meet regularly, and are actively encouraging other women to seek such posts, many of them had women associate deans for example. Their presence sets an example for women law students. The opportunity for mentoring exists and may have a positive impact on the numbers of women who aspire to deanships.”

**Gender Traits and Stereotypes**

Herma wrote, “It shouldn’t be surprising that the same stereotypes that have hampered the movement of women into leadership positions in politics, business, and the professions played a part in reducing women’s representation in leadership in higher education, as well as in legal education.”

“The same doubts about the ability of women to perform as well as men in such positions existed in legal education: women may not be tough enough, rigorous enough, or sufficiently inspiring to be successful at fundraising or institutional leadership. Search committees may discount the ability of women with small children to handle such a time
consuming stressful position. The burden of overcoming these stereotypes is a unique obstacle faced by women and particularly women of color who aspire to become law school deans.” Data from the time of her writing anecdotally supports this thesis.

So it was that in the fall of 2000 just before Herma began writing her piece that there were:

- 26 women law deans out of 183 decanal positions or 14%
- 11 deans of color or 6%
- 3 women of color 1.5%
- Women faculty numbers 22%

In a more recent essay, “The making of a Token”, one of a number of essays in a book entitled “Presumed Incompetent: The Intersections of Race and Class for Women in Academia”, author Yolanda Flores Niemann writes about the presumption of incompetence experienced by all women faculty, consistent with Herma Hill Kay’s work but also reported that it is experienced particularly sharply by women of color.

“There is strong documentation for the idea that a stigma of incompetence arises from the affirmative action association, especially when it carries a negative connotation in hiring.”

“These women,” wrote Flores Niemann, speaking about women of color who were her predecessors in the academy, “had borne the brunt of breaking barriers as both students and colleagues questioned their credentials and their qualifications, they were clear that while they were the first generation with opportunity, they were not the first generation of ability.” African American Professor Linda Greene who began teaching in 1978 wrote, “When we take the podium we threaten the legitimacy of an academic world
in which males, primarily white males, predominate.” She described her early experiences in the academy as “an intellectual version of a nighttime ride through the deep south countryside.”

“Men are generally characterized in terms of their leadership styles,” wrote Laura Padilla in “A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not?” as “aggressive, objective, dominant, competitive and decisive”. “These very same traits have proven to be a double-edged sword for women. When women are assertive they face negative reactions but when they’re not assertive they can’t advance. At the same time that gender specific stereotypes privilege men and harm women, women must also cope with a preference for male oriented leadership styles.”

“These stereotypes and others have been harmful for women leaders partly because if the women act out of type they may be harshly judged.”

One woman dean observed recently, that a woman dean “can’t be too much of a girl.” She reported that “a woman who was a recent dean had a very feminine and stylish dress and demeanor. She was not taken as seriously as she should have been given the quality of her ideas and the courage of her leadership. The dean I interviewed believed that a “significant measure of the lack of respect she commanded was gender based.”

Two Wings of a Bird—Ying and Yang of Leadership Styles

Dean Dorothy Wright Nelson was not authoritarian, in contrast to what might be characterized as a stereotypical male approach. She preferred to approach problems by having everyone sit around a table and talk things out over refreshments if possible.”
Lisa Kloppenberg, the former Dean at the University of Dayton School of Law (incoming dean at Santa Clara University’s School of Law) and Nelson biographer wrote, “Nelson emphasized collaboration and teamwork, forging alliances between people with common interests.” She rates Nelson’s deanship at the University of Southern California School of Law as an ‘astonishing success.’ She was a woman of the 1950’s: gracious and diplomatic and had tea and cookies at meetings. As a result, people underestimated her but she was very persistent. She was also a good mentor, a promoter of peace, an early supporter of diversity, and a servant/leader in the tradition of her Baha’i faith. She changed the nature of USC with her ‘classically feminine style.’

Today Nelson is an 80 something year old judge on the 9th circuit, who brings in a variety of judges from different backgrounds to her chambers to talk to her clerks about their perspectives at informal lunches. She still uses her power as a convener to broaden perspectives. As a Baha’i she has said her faith teaches her that men and women are equal but with different qualities like ‘two wings of a bird,’ the bird can’t fly with one wing alone.”

**Micro aggressions—Unconscious Bias—Black Tax**

One African American dean in the group I interviewed reported, “There was an unwritten sometimes overt assumption that only white males from elite law schools could run law schools.” He remembered Guido Calabrese the former Yale Law School dean saying at an AALS conference on recruiting a diverse faculty, “When hiring minority faculty you always hear faculty say, we need the most qualified person but they don’t
ever say that when hiring a tax or contracts professor. . . . Bring me a qualified tax professor.” As Chuck Lawrence and Mari Matsuda wrote “no one ever asks if a white male is qualified” or offers “I would hire a white man if he were qualified.”

This threshold question about “qualified minorities” lingers today. A woman of color dean reported recently that a board that she served on began their discussion about diversifying their ranks with wanting only those people of color who were ‘qualified and competent’ and how hard it was to find someone competent. She immediately challenged them on the seriousness of their intentions by asking “Am I the token minority?” because if so, I’m more qualified than most of you!” As a woman of color she still believes that she is presumed incompetent and she hears subtle comments and feels she must prove herself to be the best.

One woman dean of color is a dean at what she describes as a “southern school” and for her, race has been the predominant issue. As an example, she reports that she is routinely mistaken for another African American woman dean at the same school. It recently happened when they were both on the same panel and the law school dean was called by the name of the non-law school dean. The law school dean laughed but brought it up.

This phenomena and approach was the subject recently in the New York Times column, “One of a Kind.” The query came from a black woman academic who lives in a small town and is routinely mistaken for another black woman in town. “People make Id’s,” Philip Galanes wrote, “based on a few quick clues” but he also understands that those who insist on a nonexistent resemblance are telling women of color that they are interchangeable. “We resent the invisibility” the academic wrote. The columnist
recommends responding with “actually we look nothing alike, aside from skin color.”
This, he advises will reduce your anger and the likelihood that this person will make the same mistake twice.

**Transitions**

By the mid 2000’s, women and people of color in the academy were overcoming presumptions and exceeding expectations. Laura Padilla wrote “A Gendered Update on Women Law Deans: Who, Where, Why, and Why Not?” in 2007 women deans at least, were no longer tokens. They were contributing by “moving projects forward through collaboration, making the workplace more hospitable and working towards maintaining a gender positive environment.”

As it turns out a number of women deans in the interviews reported “Just being who you are changes the conversation”. One faculty colleague shared “how liberated the junior women felt with her at the front of the room.”

An openly gay provost who includes his husband in college events said, “There is a greater comfort level now with diversity. It’s less groundbreaking. The idea of a woman, a person of color or a gay or lesbian dean is no longer novel. “Those glass ceilings have been shattered in a general sense.” There’s more of an awareness of issues surrounding identity in higher education. Some of this he notes is because President Obama included in the State of the Union Address, “Selma, Seneca Falls and Stonewall” making gay and lesbian issues part of a civil rights continuum.
He said, “While there are quite a few gay provosts there are many fewer openly gay presidents.” “In fact” he reports, “there are 5 new gay presidents this year, the largest number on record for any single year (there are a total of about 40 openly gay presidents in the U.S. as of the summer of 2013). The unspoken feeling seems to be its okay if the dean or provost is black or a woman but not the president. “None of these groups have made significant strides as presidents, although white women have made some progress”, he reported. “Interestingly, Asians are the most underrepresented in presidencies but overrepresented in the academy. The recent ACE salary survey didn’t even track gay presidents,” according to the interviewee.

Sea Change

Returning to the anecdotal observations at the New Deans Workshop that I reported in the introduction - they were true. We are at the crossroads of change:

In the fall of 2012 there were:

- 55 women deans out of 201 decanal positions or 27%
- 37 deans of color 18%
- 13 women of color 6%
- Women 32% of full time faculty
- Women of color 22%
- People of color 17%
The number of women deans has more than doubled since 2000, the number of deans of color has tripled and the number of women deans of color has increased five-fold. A stunning result!

**It’s a New Day at the Law School**

A senior woman dean, now in her second deanship, reflected on the question of how her gender might make a difference now as Herma Hill Kay wondered earlier. She replied, there’s more mentoring, more structural support available and women are now succeeding women in deanships. She reported how the more experienced women deans moot job talks for colleagues and provide active mentoring for women interested in deaning. In addition, Seattle University School of Law, the University of Washington School of Law and the Society of American Law Teachers co-sponsor a conference encouraging diversity in law school deanships and the AALS has maintained a directory of women and people of color interested in law school deanships.

Other concerns and observations confronting women, people of color and LGBT deans included, the question of whether there a higher standard for their performance. If your deanship didn’t go well, would they hire another woman for example?

In a recent talk that this same dean gave on useful traits and skills that women bring to decanal duties she said, “Women tend to be better listeners, tend to ask more questions and get more information and tend to be better at building consensus in faculty governance and academic settings, to lead through a more collaborative model. These are useful leadership skills for an academic institution.
Strengths—Two Wings of a Bird

One woman dean reported that she indeed works hard at getting people to talk to each other. She doesn’t mind, for example, silences at meetings. She creates a space for others to speak. She’s more concerned with those who are less enfranchised. She’s looking for a more ‘winning strategy’ trying to be more conscious of consensus building but also has to be realistic about the pressing goals facing the institution during these very challenging times.

The openly gay provost when asked about how his identity made a difference in his students lives said that several students came to him suicidal or depressed and he was able to help them find a gay therapist and was instrumental in their lives in helping them come to terms with their identity, often in the face of family opposition, and be successful in their academic lives. They said “thank you” to him for being there. Many students in fact reported his comfort level with ‘otherness’ in terms of race, gender and class felt they could talk with him about these issues and reported that he responded with authenticity. From a ‘joyous point of view’ he reported that some former students now send him father’s day cards acknowledging his parenting of them.

Another woman dean of color reported that she believes it’s important to make a difference but to help make a critical step forward, part of the job and leadership is not just about power but has to do with relationships and conversations with students, donors and members of the community. This often comes more easily for those who have been “outsiders.”
One senior African American dean told of his own route to leadership and the importance of the pipeline with an unexpected surprise. “I was nominated for my first law deanship, he wrote and my nominator was a young African-American male assistant professor. I assumed that he had nominated me in some part because of some of the advice I had given him at a couple of AALS meetings.”

The dean said when he asked the young professor why, the professor acknowledged that the AALS advice had played some role, but that the real reason was that he remembered being in the audience as a 17 year old at a program entitled “High School Law Minority Day” sponsored by a law school when the dean was on that faculty. He gave a presentation to a group of predominantly minority high school students regarding using their potential to build their futures. That future law professor has told me since that he never forgot what I said. Today he is a full professor at a law school and has served as Associate Dean.”

He also shared the following story:
“For some strange reason there was a time when it seemed to me that the African-American males at my law school had fallen into some opposing cliques. After meeting with some friends of mine, I challenged these young men to a basketball game at a local gym. The only rule was that the students had to be ‘skins.’

The evening of the game about 15 of my friends also showed up. They were all African-American judges or lawyers from the area. Each one wore a t shirt: Some were black frat shirts: Ques, Alphas, Sigmas, Kappas; some were organizations like the Urban League or the NAACP; some wore miscellaneous t-shirts.
Before the game started I asked all the students to stand in a circle holding hands and facing outward. I asked my friends to circle the students, holding hands, facing the students. I asked the following question as only a law prof might:

Query: What is it that we all have in common?

My friends laughed, but the students were silent—except one.

He said, ‘Professor, we think you’ve made your point.’

After that, I asked everyone to form one large circle, students alternating with the elders. Someone said a prayer. After that we played a few lively games of basketball.

I can’t say that this meeting acted as some kind of magic elixir, but afterward I did notice a positive change in the interactions among African-American students at the school.

I can’t say sure that being an African-American on a majority faculty made all the difference in the scenarios I’ve shared, but I sincerely believe the experiences I brought to the table were valuable.”

Continuing Challenges

Finally, there are some continuing challenges that bear investigating. This includes for example, the number of named professorships for deans. If you analyze these by race and gender one dean said, there’d likely be a disparity.

There’s a false assumption or stereotype that ‘women are kinder’ or that the ‘other’ can’t look like us. One woman dean in a salary negotiation found that she was being paid less than her white male predecessor. The president and the provost she negotiated with were both women!
I recently negotiated for a faculty position at a law school. The dean who was in conversation with me wanted me to come on as a fully tenured professor, because of the significance of my leadership experience in legal education. This happens occasionally for judges and others who have contributed significantly to the profession, though they do not come from traditional tenure track backgrounds. However, the women faculty at the school, including women of color, opposed it because I wouldn’t have come up through the same competitive hierarchical process they came through.

It’s a New Day: Why Now?

In answer to the question, why are we experiencing these dramatic changes now: One African American dean replied, “It’s the simple reason that men have really messed things up, the ship is sinking. We were denied the opportunity before but we’re prepared now.” Kate Bartlett the former Dean at Duke Law School said, “It’s also the case that the position of dean is evolving. The job is getting less desirable. Schools are struggling to find deans, creating opportunities for women. There’s an increasing emphasis on relationships in institution building, a movement away from the intellectual leadership position.”

We are at an important crossroads in legal education. Women, people of color and members of the LGBT community are more able to emerge as leaders.

With thanks to those who participated in this project and this reminder of why it’s important to share our stories:
Lani Guinier wrote in “On Becoming Gentlemen: Women, Law School and Institutional Change”:

“Ours is a story of being imprisoned and silenced by the status quo. Our stories though are not monolithic nor are they monotone. Our stories help form a conversation in which we can define and redefine the world in terms that accommodate different perspectives and experiences.

We have a gift not a grievance. Legal education is strengthened by including those who were once left out. Our gift then is to help institutions turn silence into insight, to make a chorus of many voices contending. We can share our stories so that the rest of the world gains from our knowledge and experience. To paraphrase Nikki Giovanni, one purpose of leadership is to build more leadership. One purpose of telling our stories is to speak until those who follow gain a voice.”

As our host Dean Penny Andrews, the sponsor of this conference wrote

“Optimism is the key to excelling. The challenge is to find your place in the profession and to attempt to do the ordinary things of law, extraordinarily well.”

I’d like to end on a note of optimism with this poem shared by a dean who participated in this project.

**Sunday Poetry: A Poem from the Underground**

**Sometimes, by Anonymous**

**Sometimes**

Sometimes things don’t go, after all,
from bad to worse. Some years, muscadel
faces down frost; green thrives; the crops don’t fail.

Sometimes a man aims high, and all goes well.

A people sometimes will step back from war,
elect an honest man, decide they care
enough, that they can’t leave some stranger poor.

Some men become what they were born for.

Sometimes our best intentions do not go
amiss; sometimes we do as we meant to.

The sun will sometimes melt a field of sorrow
that seemed hard frozen; may it happen for you.

Sometimes all ends well.
Thank you for inviting me. Thank you to Dean Andrews; thank you to Mary for organizing the panel; to Tammy for making arrangements; and to Kat Evers—a wonderful student ambassador for Albany Law. I am thrilled to have opportunity to comment on perhaps the most foundational article exploring feminist interventions in int’l law. When Charlesworth, Chinkin, and Wright penned “Feminist Approaches to International Law” in 1991 for the American Journal of Int’l Law\(^1\), it was new terrain; it was groundbreaking.

The article was the first of its kind to apply feminist methodologies in a systematic way to international law. I am going to describe only a few of the most significant contributions of the article and then take stock of where we are and what remains to be done.

I am going to begin on a frustrating note. As significant and well-received as this article was, one might have expected it to pave the way for future feminist articles in the American Journal of International Law (AJIL). That has not happened. I asked my research assistant to look into the number of feminist articles in AJIL that have followed

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in the wake of “Feminist Approaches.” Using broad search terms (including feminism, feminist, woman, gender, sex, or rape) between the years 1992–2012, my Research Assistant found only 7 out of 404 substantive articles dealing with feminism/gender (excluding symposia, editorial notes, comments, memorials, etc.) and only 1 out of 104 “featured” articles focused on women’s rights. We still have a long way to go.

First, a word about methodology: The authors quote Nancy Hartsock, describing feminism: “feminism is a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of political conclusions about the oppression of women.”² The article reflects this methodological insight: it asks questions about the application of feminist thought to the world of international law. The article also reflects an implicit commitment to interdisciplinarity. The authors rely on and incorporate insights from social psychology, science, economics, law, political science, and feminist theory generally.

The authors expose the fallacy of objectivity and neutrality in international law as in other areas of law.³ They draw parallels between the search for feminist and third

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³ The authors begin with the starting point, drawing on the work of Carol Gilligan in IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982), that there is a difference between the feminine and masculine approaches to problem-solving. The feminine approach “tend[s] to invoke an ‘ethic of care’ while the masculine relies on an “ethic of rights or justice.” Traditional legal reasoning is usually generated by using the masculine abstract approach of “right and wrong” and “winners and losers” but ignores the feminine analysis of “context and relationships.” Thus, “[i]f legal reasoning simply reproduces a masculine type of reasoning, its objectivity and authority are reduced.” Id. at 615. Heeding the criticism that some have of the notion of women's “different voice,” the authors note that their “concern . . . with women's voices, however, is to identify not so much a distinctive feminine morality as distinctive women's experiences, which are factored out of the international legal process and thus prevent this discipline from having universal validity.” Id. at 616.
world voices within international law in an effort to expose the highly masculinist frames that defined international law up to the time of publication.\textsuperscript{4}

By far one of the most significant contributions of the article was its discussion of the public/private divide within international law.\textsuperscript{5}

In sum, it changed the way we think about international law. It paved the way for a massive amount of social change in a relatively short period of time. If you think about the changes that have occurred since the late 1980s/early 1990s, the pace of change has been remarkable.

The 1988 Inter-American Court decision in Velasquez-Rodriguez\textsuperscript{6} opened the door for us to think more broadly about state responsibility for human rights violations and allowed consideration of violations by private actors when the state has failed to act with due diligence to prevent or protect against those violations. Advocates were able to hold the state accountable for systemic failure to protect against domestic violence, for example, in which the perpetrator was a private actor, not a representative of the state. This decision and the decades of advocacy that followed it significantly eroded the public/private divide that Charlesworth, Chinkin and Wright wrote about in “Feminist Approaches.”

\textsuperscript{4} The authors note a difference in the approach to international law between developing and developed states. Developing states have challenged the traditional Western approach to international law as “either disadvantageous to them or inadequate to their needs,” and instead, “emphasiz[ing] decision making through negotiation and consensus.” The techniques employed by these developing states “find some parallel in the types of dispute resolution sometimes associated with the “different voice” of women.” \textit{Id.} at 616-17.

\textsuperscript{5} “One explanation feminist scholars offer for the dominance of men and the male voice in all areas of power and authority in the western liberal tradition is that a dichotomy is drawn between the public sphere and the private or domestic one. The public realm of the work place, the law, economics, politics and intellectual and cultural life, where power and authority are exercised, is regarded as the natural province of men; while the private world of the home, the hearth and children is seen as the appropriate domain of women.” \textit{Id.} at 626. Because international law traditionally only touches the public sphere, it is unable to adequately account for the concerns closest to women, including in domestic relations matters.

In the next twenty years, we saw further advancements, particularly in the area of violence against women. In 1992, we had the Committee on the Elimination of Discrimination against Women adopt General Recommendation 19, which explicitly brings violence within the purview of the women’s convention. In 1993, the United Nations General Assembly passed the Declaration on the Elimination of Violence Against Women and appointed its first Special Rapporteur on violence against women (VAW). The Vienna Conference in 1993 highlighted the importance of VAW through hundreds of testimonials from survivors of gender-based violence. The world listened and was outraged; that outrage fueled even greater activism. The 1995 UN World Conference on Women in Beijing continued the global momentum around gender based violence (GBV).

There was increased attention paid to sexual violence in armed conflict, including some high profile prosecutions for violations of international criminal law. The UN Security Council passed Resolution 1325, dealing with women and security—and a handful of subsequent resolutions—designed to improve women’s engagement in and the enjoyment of security in areas affected by armed conflict.

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8 General Recommendation No. 19 states “Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.”
10 The first Special Rapporteur on violence against women, Radhika Coomaraswamy, was appointed in 1994.
There have been major advances at the national and local levels. Many countries have passed legislation in the last twenty years specifically designed to combat domestic violence or sexual assault.\textsuperscript{15} Others have general penal code provisions that are being used (or could be used) to combat GBV.\textsuperscript{16} All of this and much, much more represents a significant advancement of women’s rights around the world. “Feminist Approaches” opened the door for much of this progress and it has been exciting to be a part of this movement.

As you all know, all too well—much remains to be done. In many jurisdictions, progressive laws have been passed but not enforced. And, as we know, if we look closely at many of the ratifications of CEDAW, we see how states have extensively and explicitly limited their responsibilities under international law.

I want to talk about where we stand now—in this historical moment—lest we bask for too long in the great successes of the global women’s movement. Here, I would like to make a plea for nuance. I draw on three aspects of the contemporary status of feminism in international law.

(1) Global Feminism and Intersectionality

We must incorporate insights from intersectionality theory into global feminist discourse. As such, we must be aware of different forms of inequality and bias that affect

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\textsuperscript{15} [Can you cite to the UN Special Rapporteur on VAW’s reports from the late 1990s and early 2000s?]

groups of women differently, depending on whether they enjoy privilege based on race, class, religion, sexual orientation, disability, and other identity factors. We need greater/better implementation of the good laws on the books—we need to be carefully tuned in to questions regarding selective implementation of the laws. Are there particular segments of the population within which there is aggressive implementation and others in which there is very little? We want implementation—but here is the nuance—we want fair and just implementation.

In my plea for nuance, I planned to talk about the India bus rape and comparisons to the Central Park Five—and I was thrilled to hear both Susan and Pat mention these examples in their lectures. There are obvious similarities: both involved brutal, horrific rape—followed by local, national, and international outrage, and intense pressure on the authorities to make arrests and prosecute.

In both cases, the public outcry was a positive development; it sent an important signal that rape would not be tolerated. In the case of the Central Park Five, what the authorities did in the face of that pressure is beyond disturbing. Pat described the ways in which the police extracted false confessions from these five kids—all kids of color, I might add. A 2012 documentary film disturbingly reveals the police tactics that led to the confessions of the accused.

Shortly after the India bus rape, five suspects were arrested after widespread protests. It may be that there is sufficient evidence that these five men perpetrated the rape. One

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17 For coverage of the India bus rape see Rama Lakshmi, *Gang rape of a woman on a bus in New Delhi raises outrage in India*, WASH. POST (Dec. 18, 2012).
18 Presentations by Susan Bazilli and Patricia Williams, Albany Law School, April 11, 2013.
has already died in prison—allegedly the result of a suicide.\textsuperscript{20} That defendant’s family alleges that he was tortured and raped in prison.\textsuperscript{21} We know enough to be wary of the rush to judgment even in the most violent crimes against women; we know that when criminal penalties are imposed too quickly/without sufficient procedural safeguards, it is often the most disempowered communities (racially or ethnically marginalized or poor communities) that suffer.

(2) I want to mention one more example. I came to women’s human rights work from a brief period of time working within the United States domestic violence community. It was a time in which mandatory arrest policies and no-drop prosecution policies had gained currency; these developments were crucial in re-thinking the state’s role in intimate partner violence (in many ways the domestic analog to the “Feminist Approaches” dismantling of the public/provide divide in international law). But activists were beginning to step back from those aggressive policies to ask “where are the voices of victims/survivors in all of this?” Some felt that aggressive no-drop prosecution policies left women very little room to exercise agency in decision-making about their own lives.\textsuperscript{22} Social scientists and psychologists offered data demonstrating that defendants’/respondents’ perception of due process was essential and actually correlated with recidivism rates, meaning

\textsuperscript{20} E.g., Harmeet Shah Sing & Holly Yan, India Rape Suspect Found Dead in Jail Cell. Police Say Suicide; Parents Allege Murder, CNN (Mar. 11, 2013), http://www.cnn.com/2013/03/10/world/asia/india-rape-suspect-suicide/.
\textsuperscript{21} See Heather Timmons, India Rape Suspect’s Family Says His Death Wasn’t Suicide, N.Y. TIMES (Mar. 11, 2013), http://www.nytimes.com/2013/03/12/world/asia/suspect-in-india-gang-rape-found-dead-in-jail.html?_r=0.
that when due process perceptions were high, recidivism rates were lower.\(^{23}\)

All of this led to an enhanced understanding and respect for women’s agency and a renewed commitment to shoring up due process rights. Again, this is the nuance that developed over time. Women and Victimhood

As a result of remarkable and tireless advocacy on the part of women around the world, feminists have made the world take notice of GBV. It took millions of women telling their stories of violence; convincing funders that they should care about GBV, convincing legislators and other leaders that they had a moral responsibility to enact legislation protecting against GBV, and raising awareness through massive media campaigns such as the posters Susan displayed yesterday, which condemned sexual violence and promoted women’s autonomy. And we are not done by any means. We have epidemic rape in the U.S. military\(^{24}\) and in South Africa\(^{25}\)—along with many other parts of the world.

Here is my second call for nuance. In all of these efforts to combat GBV, we need sufficient nuance to focus on women as: (1) victims; (2) survivors exercising agency in recovery from violence; and (3) in some cases, perpetrators of violence against women. The numbers of female perpetrators of GBV are quite small by comparison; the number of male victims is also small by comparison. This is not intended to take the analytical focus off of the wildly disproportionate number of women who are victims. But we need a model that at least contemplates women’s agency in two primary forms: (1) women as

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\(^{23}\) See [Can you please fine the appropriate cite to the work of Deborah Epstein?].

\(^{24}\) The Pentagon has announced new initiatives to curb sexual assaults in the military given startling statistics. See Panetta: Could be 19,000 military sex assaults each year, NBCNEWS.COM (Jan. 18, 2012) available at http://usnews.nbcnews.com/_news/2012/01/18/10184222-panetta-could-be-19000-military-sex-assaults-each-year?.

\(^{25}\)
active agents in their own recovery from violence and (2) women who engage in acts of violence – often in ways that perpetuate and reinforce gender-based hierarchies. For example, the women who were involved in the torture at Abu Ghraib chose methods (along with their male counterparts) which were designed in part to feminize the male detainees and valorize hypermasculinity and heteronormativity. When women commit acts of violence against women, it does not mean that it is not gender-based.

(3) Celebrity Causes and the Rescue Phenomenon --

This brings me to my third and final call for nuance. It’s what I call “celebrity causes and the Nick Kristoff rescue phenomenon”—Some of you may be familiar with Nick Kristoff’s work. He is a writer for the New York Times—publishes many articles and editorials concerning women’s human rights and is also the author of “Half the Sky” which he co-authored with his wife Sheryl WuDunn. Let me preface my comments by saying Kristoff has done incredible work to raise awareness about women’s human rights violations in other parts of the world. This is a significant and valuable contribution in its own right. But, I have some reservations about some of his work. You might guess this from my other comments—my primary critique is that it lacks nuance.

For example, he produced a documentary film based on the book. In the film, he brought in six celebrities: America Ferrera, Diane Lane, Eva Mendes, Meg Ryan, Gabrielle Union, and Olivia Wilde. He takes them on a world tour of human rights violations. The film is explicit in its intentions. At the beginning, George Clooney tells

us that Nick believes celebrities will be able to raise awareness about human rights violations. Indeed, that is true. But I want nuance. I want us to at least talk about what is lost in human rights celebrity tourism. Much of the movie is a voiceover of Kristoff himself or one of the six female celebrities. There are no male celebrities profiled. Much of the discussion and the camera’s gaze are focused on Meg Ryan’s or Eva Mendes’ emotional reaction to the very real and tragic human rights violations that they are encountering. The celebrities tell viewers that they are inspired by and transformed by the experience. I would argue, however, that a celebrity’s personal transformation is not really the change we are after. Maybe it is enough that celebrity interest will bring in more funding, but we must be vigilant to keep the women who are victims of human rights abuses front and center—as partners who set the agenda for reform. If we do that, I am ok with Diane Lane playing a “supporting role.”

In many ways my call for nuance is a marker of the success of the global women’s movement. We are now at a point when the call to action of women qua women must yield to a more complex understanding of women’s identity—one that reflects race, ethnicity, religion, class, sexual orientation and other facets of identity. The movement’s success in raising awareness about violence against women has opened the door for a more nuanced understanding of victimization, women’s agency in recovery from violence, and women’s involvement in the perpetration of GBV (although still relatively rare). Another indicator of success is that Meg Ryan and others have made women’s human rights fashionable. Who would have predicted that during the drafting of *Feminist Approaches*? Surely this is a marker of success—of sorts—although I argue for a cautious and nuanced embrace of celebrity status.
*Feminist Approaches* was one of the foundational articles in global women’s rights scholarship. Its careful attention to the public/private divide framed much of the scholarship that would follow in its wake. Its discussion of the impact of colonialism on women foreshadowed the focus on intersectional identity that would follow in the next two decades. Although our work to implement its vision is far from done, the piece continues to provide a blueprint for our activism. To Hilary—and her coauthors—thank you for your enduring and brilliant contribution to the literature.
Comparative (In)equalities: CEDAW, the Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production

Judith Resnik*

A formal model of treaty-making identifies nation-states as pivotal parties to transactions. A formal model of equality rejects distinctions treating women and men differently. Both kinds of formalisms miss practices making plain the permeable boundaries of the nation-state, the variegated texture of transnational lawmaking, and the challenges of materializing equal treatment. This essay explores these boundary-bendings by examining the affiliations with, reservations to, and antagonism generated by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), empowering discursive exchanges between the U.N.-based expert committee overseeing CEDAW’s implementation and the ratifying states. Interactions around CEDAW depart from the uniformity and universalism often associated with international law. Rather than a singular formal moment of ratification through a monovocal nation-state, the parties to CEDAW file, and some withdraw, reservations; the CEDAW Committee reviews and questions practices of party-states and episodically issues new general directives; and a few localities make CEDAW domestic law while others aim to ward off any such efforts by general bans on references to “foreign law.”

National treaty reservations and subnational internationalism join other mediating mechanisms—such as judicial doctrines providing a “margin of appreciation” or federalism discounts that permit some deviance among subunits and forms of constitutional pluralism—that reflect constrained affiliations across borders. These diverse legal postures underscore the heterogeneity found in transnational exchanges and, in addition to the positive account of the need to recognize these facets of lawmaking, the normative argument advanced is to appreciate the utilities of disaggregated internationalism that, in the context explored here, reveals the challenges of operationalizing aspirations for equality.

* Arthur Liman Professor of Law, Yale Law School. All rights reserved. October 2011. Many thanks to the symposium’s conveners, Susanna Mancini, Michel Rosenfeld, and Reva Siegel; to the participants; to my colleagues Denny Curtis, Martha Davis, Vicki Jackson, Johanna Kalb, Risa Kaufman, Karen Knop, Miguel Maduro, Frances Raday, Joanne Scott, and Angela Ward for many exchanges; and to exceptional student-colleagues, Ester Murdукhayeva, Charles Tyler, Allison Tait, Victoria Degtyareva, and Ruth Anne French-Hodson. Email: judith.resnik@yale.edu.
1. Gender, the nation-state, and the multiple means for legitimating and of contesting transnational law

Gender roles have long been bounded, as have nation-states. Yet the burdens imposed on women in the name of gender and sexuality are not circumscribed by jurisdictional lines. Rather, gender hierarchies travel—by way of Roman law, civil law, the common law, and religious systems—to impose constraints on women living under autocracies, republican democracies, and other political forms. The many laws supporting gender inequalities make plain that legal rules internal to a nation-state are often not indigenous to that polity but, instead, are shaped by cross-border influences.

Similarly, efforts to remedy inequalities know no jurisdictional bounds. In contrast to the classical model of international law as the product of state-to-state interactions, human rights movements of this and other eras are the result of diverse exchanges across jurisdictional hierarchies. Illustrative are the equality projects of earlier centuries—emancipation of slaves and equality for women—spanning oceans through networks of local religious and secular societies, communicating (before the Internet) via pamphleteering, the post, and the press, so as to demand legal reforms. During the twentieth century, those efforts continued, marked by the United Nations’ Universal Declaration of Human Rights (UDHR) and several conventions, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which came into force in 1981.69

In this essay, I explore the heterogeneity within international law that undercuts models of uniform requirements adopted, imposed, or implemented by nation-states. To do so, I provide a brief historical overview of translocal-transnational movements aimed at revising laws and practices in many jurisdictions. That history documents the intensity of identitarian claims of law as “ours” and the special purchase of “domestic law” arguments in the context of women’s rights. I then examine CEDAW’s variegated ecology, the relevance of local and national practices to the international, and the utilities of discursive inter-jurisdictional exchanges about how to accomplish meaningful equality for women and men.

Theories of how law gains legitimacy and how equality gains meaning need to attend to the contributions made by these diverse domestic and transnational routes.70 International lawyers, focused on the national level, often criticize the formal treaty process for permitting nation-states to become limited partners through “reservations, understandings, and declarations” (“RUDs”)—constraining subscription so long as the caveats imposed are not “incompatible with the object and purpose of the treaty.”71 Yet RUDs offers paths to connections that, as one can see from their later withdrawals by some countries, enable a dynamic interaction as domestic legal regimes change over time.

CEDAW’s internal processes are likewise exemplary of “living” law, as its Committee comments on national reports and issues new directives. Moreover, the

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local embrace of treaties such as CEDAW can domesticate their precepts not only as predicates to national uptake, but also as democratic mechanisms for implementation and translation of their norms. Further, the topics within conventions that evoke national dissent or opt-out by way of reservations illuminate where entrenched ideologies of sovereignty and of gender continue to have political traction.

States’ reservations to treaties are, in turn, analogous to judicial doctrines in Europe that accord a “margin of appreciation” to judgments of national courts, as well as to federalism-based divergences permitting variation from rules while subunits maintain formal affiliations with a particular regime, and to claims made by constitutional pluralists arguing for toleration of the lack of a singular and final authoritative resolution. Transnational conventions and forms of federalism enable contextualized affiliations that mediates between the poles of a cosmopolitan internationalism and an isolationism and thereby reflect what Antoine Garapon has called a “cosmo-political” stance, \(^{72}\) self-consciously incorporating national differences while opening opportunities to develop shared or overlapping legal norms. CEDAW offers one lens through which to understand how comparing (in)equalities can sharpen an appreciation for the facts and functions of disaggregated internationalism and of the challenges entailed in materializing gender equality.

2. Centuries of egalitarian translocalism and of hostility toward international law

In the United States, the debate about “foreign” law focuses on the post-World War II era, the creation of the United Nations, the promulgation of the Universal Declaration of Human Rights (UDHR), and the subsequent drafting and ratification of several conventions addressing the political, civil, and economic rights of persons, some of whom suffered discrimination based on race, ethnicity, age, or gender. A common assumption is that the American civil liberties community has only recently turned to international human rights as an important source of instruction.  

That approach misses abolition and women’s suffrage, both of which were part of global efforts in which America influenced and was affected by events abroad through what Ian Tyrrell has called a lively “reexport trade.” At the time when women were barred from the electoral process, they joined groups functioning as the original “NGOs”—nongovernmental organizations by default rather than by choice. The efforts to reconfigure the boundaries of gender often entailed appeals to authority (moral, religious, political, and legal) beyond the nation-state.

Opponents, in turn, rebuffed these attempts, claiming either that the underlying activity was itself licit or that, if problematic, a resolution could not involve interventions from jurisdictions “outside” a domain deemed to be the appropriate authority. What constituted the relevant “domestic” domain varied from the level of the family to a locality, a state within the United States, or the national

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73 See, e.g., CONG. RESEARCH SERV., REPORT NO. 96-736 HUMAN RIGHTS TREATIES: SOME ISSUES FOR U.S. RATIFICATION 4 (1996) (“The U.S. civil rights movement has been largely a domestic movement not linked to the inter- national human rights movement.”).


76 See John Markoff, Margins, Centers, and Democracy: The Paradigmatic History of Women’s Suffrage, 29 SIGNS 85 (2003).
government—all to be buffered from influences from beyond the borders delineated.\textsuperscript{77}

These nineteenth-century concerns were reiterated in the early 1950s, when Senator John Bricker proposed to amend the United States Constitution to prevent a treaty that “conflicts with the Constitution” from having any “force or effect,” because, in his view, “human rights” were for the “domestic jurisdiction” of each nation-state.\textsuperscript{78} Bricker’s target was the UDHR. Its importation, he feared, would undermine the racial and gender hierarchies then entrenched. His almost successful efforts (“the ghost of Senator Bricker”) served for decades as a limitation to ratification by the United States of human rights treaties.\textsuperscript{79} Yet, as Bricker predicted (and feared), international currents of equality and dignity affected domestic law.\textsuperscript{80}

Echoes of Bricker’s anxiety and the continuing political purchase of anti-foreign activism can be heard in contemporary debates about references in the United States of foreign law. All four of the recent Supreme Court nominees were questioned about whether they would use non-United States sources when interpreting constitutional obligations,\textsuperscript{81} and some members of the bench they joined have


\textsuperscript{78} See Duane Tananbaum, \textit{The Bricker Amendment Controversy: A Test of Eisenhower’s Political Leadership} 222 (1988).


\textsuperscript{80} Resnik, \textit{Law’s Migration}, supra note 2, at 1606–1610.

\textsuperscript{81} Chief Justice Roberts cited “democratic theory” as the basis for not doing so for constitutional interpretation, as he also opined that Congress ought not enact legislation prohibiting the use of non-United States law. \textit{Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary}, 109th Cong. 199–201 (2006). Noting the relevance of treaties to private law, Justice Alito rejected foreign law for constitutional interpretation. (“We have our own law. We have our own traditions. We have our own precedents. And we should look to that in interpreting our Constitution.”) \textit{Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary}, 109th Cong. 370 (2006). Justice Sotomayor, asked several times about the issue, stated that she shared Justice Ginsburg’s view about educational use and that “American law does not permit the use of
famously voiced hostility to doing so. 82

An anti-foreign law stance has popular political purchase, now entangled in post-9/11 hostilities. In 2010, seventy percent of Oklahoma voters supported a constitutional amendment to instruct that state’s judges not to “look to the legal precepts of other nations or cultures” and, specifically, not to consider either “international or Sharia law.” 83 Within a few months, anti-foreign law prohibitions had been introduced in several states, 84 and many have also proposed or enacted anti-immigration provisions. 85

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83 State Question Number 755/Legislative Referendum Number 355, Enr. H. J. R. No. 1056, Amending Oklahoma Constitution Art. 7, § 1 (May 25, 2010). The provision also required judges to “uphold and adhere to the law as provided” by federal and state law “and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions.” Id. See generally Martha F. Davis & Johanna Kolb, Oklahoma State Question 755 and an Analysis of Anti-International Law Initiatives, ACS Issue Brief, Jan. 2011. A Louisiana statute, also enacted in 2010, insists that no “court, administrative agency, or other adjudicative, mediation, or enforcement authority shall enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States. 2010 La. Sess. Law Serv. Act 714 (H.B. 785). See also 2010 Tenn. Laws Pub. Ch. 983 (H.B. 3768) (a similar provision).

84 Soon after enactment of the Oklahoma law, Muneer Awad, a practicing Muslim, the Executive Director of the local chapter of the Council on American-Islamic Relations, and an Oklahoma resident, asked a federal judge to enjoin the provision. His lawsuit argued that the “official condemnation” of his religion was an unconstitutional stigmatization. Complaint at 7-8, Awad v. Ziriax, Civ. 10-1186 (W.D. Okla. Nov. 04, 2010). A federal court agreed that Oklahoma had violated the First Amendment’s guarantees. Awad v. Ziriax, No. CIV-10-1186-M, 2010 WL 4814077, at *3-4 (W.D. Okla. Nov. 29, 2010, appeal docketed, No. 10-6273 (10th Cir. Dec. 2, 2010).

The “American Laws for American States” movement is itself border-crossing, propelled by translocal organizations, such as the American Public Policy Alliance, the Center for Security Policy, ACT! For America, Society of Americans for National Existence (SANE), and Stop the Islamization of America, an entity that also crosses oceans as it is related to Stop the Islamization of Europe. Like their nineteenth-century counterparts, such anti-foreign efforts often focus on women’s roles, sometimes referencing certain religious practices. In Europe, jurisdictions have, for example, banned women wearing headscarves or veils from entering public spaces or holding certain jobs. Some proponents of such provisions invoke women’s equality as a justification, yet single out Islam rather than seek to curb all religious-based sex-differentiated obligations.

In contrast to “Save Our Laws” efforts, other subnational actions welcome insights from abroad. Although the United States Senate has not exercised its constitutional authority to ratify CEDAW, the City and County of San Francisco have taken up its precepts by making it local law. In 1998, the Board of Supervisors endorsed CEDAW’s “universal definition of discrimination against women” across

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a “whole range of issues” and committed to “integrating gender equity and human rights principles into all of its operations, including policy, program and budgetary decision-making.” San Francisco’s approach is what the United Nations, the Council of Europe, and the Commonwealth Secretariat call “gender mainstreaming,” aimed at ensuring policy decisions attentive to women and men, often situated differently in practice. Yet like the “Save Our Law” movement, San Francisco’s incorporation of CEDAW is part of a translocal social movement. San Paolo, Brazil has adopted CEDAW, and Portland, Oregon has incorporated the UDHR.

The visibility of many recent local initiatives prompt some to speak of “rescaling,” thus positioning the phenomenon as an innovative alteration of the nation-state. Equality movements, however, have been locally-rooted for centuries. Because such efforts challenge hierarchies within nation-states, reformers have long engaged in jurisdictional debates that put them in critical relationships with national sovereigntism. The contemporary version falls within this pattern.

3. Contesting and embracing CEDAW

Understanding more about CEDAW is in order. In 1981, the United Nations’s CEDAW sought to limit the burdens of gender by insisting that state parties undertake “appropriate measures” ranging across “all fields” (including “the political, social,
economic, and cultural”) so as “to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.” As of 2011, this ambitious document had been ratified by 187 nations, concurring in its obligations to seek substantive equality.

Building on the model of other human rights conventions, CEDAW instructs state parties to file periodic reports detailing progress (or lack thereof) to a committee of experts empowered to comment and to issue interpretative directives. Like a number of other human rights treaties, CEDAW departs from exclusive state-to-state transactions through an “optional protocol,” entered into force in 2002, that authorizes the Committee to investigate “grave and systematic violations” and to receive petitions directly from individuals. CEDAW not only aims to redefine gender relations but also contributes to the redefinition of law by such discursive exchanges that lack the command/control enforcement capacities associated with

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92 CEDAW, supra note 1, art. 3.
93 CEDAW, id. at art. 17.
sovereign power.

CEDAW has been a resource for advocates of equality framing their arguments in both national and international regimes. Women have not only gained recognition as rights-holders; they have also changed the content of rights.96 One example is political “parité” which aims to ensure that women are in national and local parliaments in more than token numbers.97 For example, Costa Rica’s embrace of CEDAW prompted that country’s legislature to require a forty percent set-aside for women on lists of party candidates. The Costa Rican Supreme Court upheld that provision; it also ruled that the failure to put a sufficient number of women on certain boards was in-consistent with the country’s constitution and with CEDAW. The court also relied on CEDAW when rejecting a challenge to laws specifically targeting violence against women.98 An example of other innovations at the transnational level comes from the International Criminal Court (ICC), which incorporated new definitions of war crimes to include systemic rapes and sexual slavery. Its treaty not only acknowledges women as victims but also as lawmakers by requiring that gender be considered in the selection of its judges and prosecutors.99

In addition to sparking new forms of women’s rights, CEDAW has also

engendered dissent—even among those subscribing to it. Not all parties to CEDAW file the required periodic reports, and a third of its members have voiced reservations, detailing their unwillingness to subscribe to all of CEDAW’s mandates. Countries have reserved on obligations to ensure equality in “marriage and family relations,” employment, domicile, and social customs, as well as on commitments to implementation. Further, CEDAW has not gained formal acceptance in the United States. In 1979, President Jimmy Carter signed the convention but the Senate has not ratified it. Non-affiliation by the United States is not unique to CEDAW; the country has thus far not joined the ICC, the Convention on the Law of the Sea, and the Convention on the Rights of the Child.

Proponents of U.S. ratification argue that the country is a “global leader in the field of women’s rights,” and that CEDAW provides “an important framework” to “work with other governments, the international community, and individuals around the world to advance and promote the rights of women.” This posture underscores proponents’ correlative claim that CEDAW would have marginal internal effects, in part because of U.S. equality laws already in place. Furthermore, unlike

101 Cho identified sixty-two of the 186 members as imposing 108 “substantive” reservations on rights principles and 40 related to dispute resolution mechanisms in Article 29. In contrast, of the 173 members of CERD, fifty-two parties have imposed eighty reservations, of which fifty-eight were substantive limits on racial discrimination or its measurements. See Cho, supra note 28, at 8–12.
102 Were the United States a signatory to the Vienna Convention on the Law of Treaties, it would have an obligation, as a signatory, to refrain from defeating CEDAW’s effect. See Knop, supra note 20.
some countries, in the United States, treaties are generally not self-executing unless affirmatively incorporated as applicable internally by Congress. Indeed, proponents reassured the Senate in the fall of 2010 that CEDAW would not “bind us,” and further that the United States could join with reservations.

Opponents of U.S. ratification disagree about its limited impact as they underscore the variance between CEDAW and current interpretations of United States law and highlight the risks of seepage. The Supreme Court applies constitutional equal protection mandates only to intentional acts of public bodies, whereas CEDAW calls for alleviation of indirect as well as direct discrimination in public and private spheres. The Supreme Court frowns on “affirmative action”; CEDAW encourages state parties to undertake “special measures,” also known in Europe as “positive discrimination.” CEDAW calls for equal health rights for women and men, as well as specialized rights for pregnancy and maternity leaves. CEDAW evaluates wages through the lens of comparable worth, insists on equality in marriage, family, and nationality, and aims to undermine stereotypical obligations in wage work and households.

From its critics’ understanding of what a gender-family-sex nexus should produce, CEDAW is therefore “at odds” with the “social, political, cultural, legal, and

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105 See 2010 CEDAW Hearings, supra note 35 (statement of Melanne Verveer, U.S. Dep’t of State).
108 CEDAW, supra note 1, arts. 5, 11.
democratic norms in the United States.” Charging that joining CEDAW would undermine families, heterosexual marriage, and state and local authority over the law of households, one Senator opined to do so would be “surrendering American domestic matters to the norm setting of the international community.” By asserting sovereign jurisdiction and positing U.S. laws and culture as properly impermeable, such arguments foreshadowed initiatives like the 2010 ballot in Oklahoma, also seeking to shore up borders by banning judicial references to “foreign law.”

4. Translocal transnationalism

Yet, even as U.S. legal doctrine assumes that the national level has exclusive authority over international and foreign affairs, that equation does not take into account the roles that states and cities play in importing and exporting law. As noted above, San Francisco incorporated CEDAW into local law and, therefore, periodically records its progress as CEDAW requires. A 2010 report, Human Rights in Action: San Francisco’s Local Implementation of the United Nations’ Women’s Treaty (CEDAW), cited seven city departments—Public Works, Juvenile and Adult Probation, Arts, Rent, Environment, and the Department of Status of Women—that had done “gender

109 2010 CEDAW Hearings, supra note 35, at 3–4 (statement of Steven Groves, on behalf of Heritage Foundation).
111 Id. at 15.
analyses.”113 Responses to documented inequalities included, for example, the Probation Department’s creation of a Girls Unit, emergency call buttons in public toilets, and the provision of gender-specific services in juvenile detention.114

San Francisco is not alone in trying to “bring human rights home.”115 Theorists have focused on how groups seemingly without power generate a “subaltern cosmopolitan legality” through “law from below.”116 But one cannot posit that “law from below” will produce protection for those at the bottom of hierarchies for, as the United States also exemplifies, local law generativity is not limited to those deconstructing the boundaries of “otherness.” As the Oklahoma’s 2010 constitutional amendment exemplifies, some localities aim to instill an anti-cosmopolitan ethos by warding off “other legal cultures.”

CEDAW-related efforts illustrate the transnational-affiliative version. In the 1990s, a century-old organization, the General Federation of Women’s Clubs,117 teamed up with the newly founded Women’s Institute for Leadership Development for Human Rights (WILD)118 to work with many church groups, Amnesty

114 Id. at 5.
116 Sally Engle Merry, Peggy Levit, Mihaela Serban Rosen & Diana H. Yoon, Law from Below: Women’s Human Rights and Social Movements in New York City, 44 LAW & SOC’Y REV. 101, 103 (2010) (citing LAW AND GLOBALIZATION FROM BELOW (Boaventura De Sousa Santos & Cesar A. Rodriguez-Garavito eds., 2005)).
117 Founded in 1899, the Federation includes thousands of clubs in the United States and more than twenty countries. See General Federation of Women’s Clubs, http://www.gfwc.org.
118 WILD, founded after the 1995 United Nations Fourth World Conference on Women, was designed to support domestic application of human rights principles, a project supported by the Ford Foundation. See Women’s Institute for Leadership Development for Human Rights (WILD), http://www.law.berkeley.
International, and other NGOs. A coalition of about two hundred civic, religious, educational, environmental, and legal organizations provided model resolutions for localities to “recognize” equal rights, to “eschew all forms of discrimination on the basis of sex,” and to endorse efforts to obtain U.S. ratification.119 Similarly, when renewed Senate interest was anticipated after the election of President Obama, 176 organizations joined another CEDAW Task Force, organized by the Leadership Conference on Civil and Human Rights.120

Congressional hearings on ratification are one measure of impact. Another is local uptake. By 2005, forty-four cities, eighteen counties, and sixteen states had enactments relating to CEDAW.121 Most provisions were expressive, calling for ratification. But a few, like San Francisco’s, were incorporative, generating local law miming the transnational regime.122

Law’s migration is not unique to human rights. San Francisco has also looked to what European law calls “the precautionary principle”—obliging “protective measures . . . to prevent or counteract . . . damage or inconvenience with

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120 2010 CEDAW Hearings, supra note 35 (testimony of Marcia D. Greenberger, Director of the National Women’s Law Center and of the CEDAW Education Project).
121 CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN, supra note 51, at 73. Local legislation as of 2006 is on file with the Yale Law Library.
respect to human health or environment.” In 2003, the City and County mandated “a duty” (shared by government, business and community groups, and the public) “to take anticipatory action to prevent harm” by selecting the “alternative with the least potential impact on human health and the environment.” Soon thereafter, California banned “toxic toys,” made with levels of certain chemicals (phthalates) that Europe had identified as carcinogenic.

Thus far, my focus has been on NGOs, such as those populating CEDAW task forces and those supporting the anti-foreign “Save Our Law” movements. Environmental efforts bring in other kinds of actors for many of these initiatives have come from government actors linked through private national associations. As their names—the U.S. Conference of Mayors, the National Governors Association, and the National League of Cities—suggest, they derive their political capital from the identity of their members as public servants or entities. To delineate them from NGOs as well as “special interest groups” (SIGs) and “public interest groups” (PIGs) and to capture their civic facets, I call them “TOGAs”—translocal organizations of governmental actors. These organizations serve as norm entrepreneurs forging subnational alliances. Like CEDAW, these border-crossings also engender hostility from exclusive sovereigntists, objecting to “foreign” precepts’ influence on “domestic” questions of environmental and health policy.

But even as I seek to underscore the translocal-transnational activities in a

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lively import, export, and “reimport” trade, measuring the function and impact (at local, national, and transnational levels) is complex. Some efforts—such as the U.S. anti-foreign law movement—have had remarkable visibility and significant national political purchase, positioning the United States outside treaties that it has helped to draft. Yet not all local activities garner attention. As Karen Knop has detailed, subnational affiliations can be invisible at the international level where, as currently configured, localities have no formal participatory roles.  

Further, from an internal perspective, uptake can be uneven. The climate change initiatives prompted by the mayors of cities in the United States resulted in formal endorsements by more than 1,000 mayors representing more than 80 million people and served, in some respects, to “ratify Kyoto at the local level” and to influence action at various levels. In contrast, neither national nor local CEDAW efforts have made comparable inroads. CEDAW, discussed since 1979 through several national hearings and various state and local work sketched above, has not been much noticed in U.S. law reviews and cases.

Indeed, in researching this essay, I was struck by the small footprint CEDAW has left in U.S. publications. Moreover, even as I bristle at calling CEDAW the “Women’s Convention,” because it addresses women and men, as does the International Convention on Civil and Political Rights, the Convention on the Elimination of all Forms of Racial Discrimination, and the Treaty creating the International Criminal Court. Yet the persons researching and writing about

127 Knop, supra note 20. San Francisco’s own work does not invoke CEDAW provisions, and its work did not become a part of the U.S. Human Rights Council 2010 report but has been referenced by the UN Development Fund for Women. Id. at 18–20.

128 Resnik, Civin, & Frueh, Ratifying Kyoto, supra note 58, at 718.
CEDAW are more often than not women. Since 1980, some 190 U.S. law review articles have used the word CEDAW at least twenty-five times, and about 150 of them were written by women.129

Case law invoking CEDAW’s precepts is likewise sparse. Justice Ginsburg famously cited CEDAW in her concurrence in the 2003 decision about the constitutional permissibility of affirmative action in higher education.130 Otherwise, as of 2011, CEDAW can be found in fewer than a dozen published opinions by either state or federal courts. The citation record of the International Convention on Civil and Political Rights (ICCPR), which the Senate ratified in 1992, is likewise not robust, even as references to the ICCPR have become more frequent. From 1966 to 1980, the ICCPR was invoked three times in published decisions by state or federal jurists. Between 1981 and 1999, the ICCPR was cited in eighty-three published decisions and, from 2000 to March of 2011, 415 decisions reference the ICCPR.131 The citation pattern of the ICCPR makes plain the impact of the U.S. precept that international law is not self-executing but also suggests the possibility that, were CEDAW to be ratified, advocates might seek to have jurists rely upon it—which is one of the reasons that CEDAW’s critics give opposing it.132

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129 Using Westlaw, we searched for articles published between Jan. 1980 and Apr. 2011 in which the word “CEDAW” was used twenty-five times or more.
131 Using Westlaw, we searched for published cases decided between the intervals mentioned in the text in which the phrase “International Covenant on Civil and Political Rights” was used.
132 Kalb reported that the aspirational, non-binding UDHR has been cited by state courts less than the ICCPR and more than other ratified treaties and argued that invoking international conventions as persuasive rather than obligatory may invite more judges to turn to them. See Johanna Kalb, Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism after Medillín (forthcoming PENN STATE L. REV. 2011).
5. Comparative (in)equalities: A “cosmo-political” inquiry

Given the heated conflicts in the United States over “foreign” law; given that proponents of CEDAW argue its domestic legal irrelevance; given the many parties to CEDAW imposing reservations on its central aspirations; and given the other sources through which United States law could engender equality, what then are the arguments for seeking ratification by the United States? Instead of the argument pressed by CEDAW proponents that doing so would have little import domestically, reasons for U.S. ratification of CEDAW come from how it differs from U.S. law. By facing the variation between U.S. and CEDAW about what “eschew[ing] all forms of discrimination on the basis of sex” requires while acknowledging that both the U.S. and CEDAW have commitments to equality, the gaps and differences can be used to probe the complexity of the meaning of equality as well as of its instantiation.

Layering U.S. law and CEDAW would put into sharp relief the challenging questions entailed in equality among theorists understanding themselves to be committed to substantial changes in gender rights and roles. Should the focus be, as Article 3 of CEDAW states, that women gain fundamental freedoms “on a basis of equality with men” or is the category “men” insufficient, overly inclusive, or imprecise baseline? Do “special measures,” called for in Article 4 of CEDAW and aimed at “women” as the category-of-analysis, reify sex-based differential treatment or undermine it? When do criteria fall within Article 4’s prohibition on “unequal or separate standards” and when are they constructive “special
measures”? Is Article 11’s discussion of “maternity leave” without reference to paternity or parental leaves the framework for egalitarian progress? How could equality injunctions take up intersectional analyses rather than assume the terms “women” and “men” unmodified by race, age, ethnicity, and class? To illustrate the many applications of these questions, consider an initiative in Hawaii for a “Girls Court”—an institution designed to deal with the “fundamental differences between male and female juvenile offenders.  

How would either the United States Supreme Court or the CEDAW Committee evaluate that plan? Presumably a “temporary measure,” it could be seen as CEDAW-compliant and could be analogized to the affirmative action measures the United States Supreme Court approved in higher education. Yet other equality proponents could criticize a “Girls Court” if founded on “fundamental differences” between girls and boys rather than focused on undermining social structures that produce gender-based distinctions.

CEDAW’s structure offers a framework for such debates, as the process that CEDAW creates permits consideration of whether certain practices generate equality trans-temporally and transnationally and when to tailor obligations to acknowledge differential circumstances. Through periodic reports, countries enter into a dialogue with twenty-three experts, hailing from an array of nation-states that, in 2011, included Paraguay, Cuba, Kenya, Egypt, Israel, Croatia, and China. The reporting under-mines not only inequalities among women and men but also the ordinary hierarchies within international law. This diverse set of persons, hailing from poor as well as powerful countries, is positioned to interrogate high-level

officials from all 187 signatories. The formal discourse bears some resemblance to courtroom practices, obliging judges in democratic orders to treat all litigants fairly and equally through procedures that, by right, are open to public. But because the CEDAW Committee cannot impose its judgment, its procedures entail a different concept of authority: it has the competence to make demands but not to impose sanctions.

CEDAW’s dialogues are exploratory, rather than flat, applications of the Convention to different countries. After countries have filed their reports, the Committee issues a formal commentary, tailored to the particular report and, in some instances, to a country’s baseline conditions. One could chastise the Committee for inconsistent responses that vary with members and with the political status of particular countries. Alternatively, one can valorize its ability to recognize an asymmetry among states that vary dramatically in material wealth, legal structures, and practices.

Given the complex intersections of equality’s import with patterns of behavior (sometimes called “culture,” “tradition,” or “law”), exchanges among these diversely situated participants create opportunities to compare belief systems and hence self-consciously to interrogate one’s understanding. Promoting such modes, Jennifer Nedelsky writes about the desirability of contrasting such “communities of judgment.” Indeed, the effort by the “Save Our Law” movement to prohibit references to foreign

135 See Judith Resnik & Dennis Curtis, Representing Justice Invention, Controversy, and Rights in City-States and Democratic Courtrooms 288–305 (2011).
137 Jennifer Nedelsky, Communities of Judgment and Human Rights, 1 THEORETICAL INQ. L. 245 (2000).
law shares Nedelsky’s insight that comparison could lead to reevaluation but disagrees about the value of doing so.

Calibrated obligations are not unique to CEDAW but can also be found within some federations (the United Kingdom, for example) that do not treat differently situated subunits identically.\textsuperscript{138} Further, the reciprocal exchange (as countries reply to the Committee’s comments or to Optional Protocol decisions) models a joint enterprise that entails disagreement about how to instantiate equality, patience with variation, and an understanding of the many obstacles. These interactions prompted this essay’s title—denoting these processes as “comparative equalities” even if they may simultaneously be described as “comparative inequalities.”

CEDAW is also made porous through the availability of RUDs, formally limited by a provision that prohibits RUDs that are “incompatible” with CEDAW’s “object and purpose” and often decried as undermining the act of ratifying the convention.\textsuperscript{139} The CEDAW Committee has discouraged RUDs; concerned that CEDAW is more encumbered than other human rights treaties, the Committee has issued directives elaborating the import of CEDAW rights and imposed reporting guidelines requiring parties to explain the necessity of maintaining reservations.\textsuperscript{140} Further, members can object to reservations made by others as well as seek to enlist the International Court of Justice to resolve disputes about treaty obligations.\textsuperscript{141}

\textsuperscript{138} Additional examples come from \textit{Federalism, Subnational Constitutions, and Minority Rights} (G. Alan Tarr, Robert F. Williams, & Joseph Marko eds., 2004).
\textsuperscript{139} CEDAW, art. 28(2); Cho, \textit{supra} note 28, at 8.
\textsuperscript{140} Schöpp-Schilling, \textit{supra} note 32, at 13–27. \textit{See} Report of the CEDAW Committee, 19th Session, A/53/38/ Rev. 1 at 47–50 (1998). States entering nonspecific reservations or to Articles 2, 7, 9, or 16 were to report on compliance with CEDAW. \textit{See also} Results of the Fortyeth Session of the Committee on the Elimination of Discrimination against Women, 40th Session, E/CN.6/2008/1 at 8–9 (2008), Annex 1, c(3).
\textsuperscript{141} For example, Norway objected that the United Arab Emirates reservation on several articles raised “doubts” on the fullness of the country’s commitment. \textit{See} Norway, With regard to the reservations made
RUDs can thus confuse treaty obligations by muddying the nature of agreements made, as well as permit “cheap” human rights talk. Yet wholesale criticism of the practice undervalues CEDAW’s contribution to a political economy in which a formal commitment to women’s equality is seen to confer capital. What is intriguing about CEDAW is the decision by many inegalitarian political orders to state—albeit with RUDs—that their versions of legal structures fit within a women’s rights template.

Moreover, RUDs are not necessarily static; they can provide a means of beginning conversations about equality obligations. For example, in 1984, Bangladesh did not “consider as binding” certain aspects of the obligations under articles 13 (on economic and social benefits) and under article 16 (marriage and family life) to the extent that “they conflict with Sharia law based on Holy Quran and Sunna.” In 1997, Bangladesh withdrew those reservations.142 In 1992, Jordan reserved on the independence of a woman’s residence and domicile from that of her husband (article 15); in 2009 Jordan withdrew that caveat.143 Several countries (including Australia, Austria, Cook Islands, Germany, New Zealand, Switzerland, and Thailand) that initially reserved to preserve sex-based differences in the military have

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143 Id. The measure followed domestic legislative reforms eliminating several discriminatory provisions in civil status, personal status, and passport law as well as in the penal code. UNIFEM, CEDAW Success Stories, available at http://www.unifem.org/cedaw30/success_stories.
since withdrawn their caveats.\footnote{In 1996, Thailand was the first state to withdraw its reservation on military service. Austria and Australia withdrew in 2000, Germany in 2001, Switzerland in 2004 and New Zealand and the Cook Islands in 2007. See United Nations Treaty Collection, supra note 27.} Belgium’s 1985 limit that enabled it to give men “royal powers” not granted women was withdrawn in 1998; Luxembourg imposed and withdrew a similar reservation between 1989 and 2008. Cyprus and Egypt were two of several countries to reserve on women’s equal rights to confer nationality on their children. In 2000, fifteen years after subscribing, Cyprus withdrew that reservation; in 2008, twenty-seven years after signing, Egypt did as well.\footnote{Id. Other countries withdrawing from similar reservations include the Republic of Korea (in 1991), Thailand (in 1992), Jamaica (in 1995), Liechtenstein (in 1996), Fiji (in 2000) and Algeria (in 2009).}

The very choice of RUDs provides information for those within and outside a nation-state about the arenas in which women’s rights are deeply contested. The areas posing particular challenges to egalitarian aspirations and political co-venturing can be seen by examining the density of RUDs in certain areas (“family life”), the sharing of RUDs by countries from certain regions or with specific religious or political identifications, and the consistency (or not) of objections filed by other convention members to RUDs imposed when a country ratifies.\footnote{For example, one count indicated that twenty percent of CEDAW’s members are countries with Muslim majorities and that these countries represent half of the reservations to equality in family life (article 16) and to the requirement to undertake implementation measures. Cho, supra note 28, at 9–10.}

RUDs may also reflect the internal structures within nations that given subnational units critical roles relevant to implementation of equality norms. For example, RUDs proposed in the United States include a “federalism” understanding that could be read to limit national compliance in relation to matters governed by state law.\footnote{S. Exec. Rep. No. 103-38, at 51 (1994). See S. Exec. Rep. No. 107-9, at 8 (2002).} CEDAW advocates have often objected to that caveat as undercutting commitments to CEDAW. Alternatively, advocates could try instead to refashion a
federalist approach by understanding it as an opportunity to invite participation from cities and states if the national government called for and supported their input on areas of special expertise.\textsuperscript{148}

RUDs are not the only mechanism for change in CEDAW, which itself has evolved in relationship to equality movements. For example, when CEDAW was drafted in the 1970s, the role of violence in women’s subordination was not as widely appreciated as it has come to be. But, by 1992, the CEDAW Committee promulgated General Recommendation 19 identifying gender-based violence as a “form of discrimination that seriously inhibits women’s ability to enjoy the rights and freedoms on a basis of equality with men.”\textsuperscript{149}

CEDAW’s discursive practices have parallels in European law which also aspires to coordinate among sovereigns and to recognize multiple sites of law production. A term of art in Europe is the “margin of appreciation”—a doctrine employed by the European Court of Human Rights (ECtHR) to countenance deviation from the European Convention on Human Rights (ECHR). A classic example is the 1976 Handyside judgment invoking the “margin” and the “power” of appreciation to permit the United Kingdom to seize and destroy a Danish book (claimed to violate the Obscene Publications Act) over publisher’s objections based

\textsuperscript{148} For example, Martha Davis and I suggested to U.S. advocates working in 2010 that the 2002 proffered text—that the “United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the State and local governments”—could be supplemented by encouraging that “all levels of government participate in shaping appropriate measures to ensure the fulfillment of this Convention.” \textit{See also} Gerald E. Frug & David J. Barron, \textit{International Local Government Law}, 38 URB. L. 1 (2006).

on the Convention’s free expression rights. The ECtHR reasoned that a national government, acting pursuant to law, could better assess the need to protect the morals of young people than could the court. The Court of Justice of the European Union (ECJ) deploys that form of deference alongside another: it requires national courts to apply European Union law and generally relies on those courts to send it cases whenever interpretation is required.

Both European courts employ formulations based on treaties that speak of areas of shared competence and that include commitments to subsidiarity, such that member states have presumptive authority in certain areas subject to limitations. This approach has parallels in federalism doctrines in the United States. For example, the Supreme Court of the United States protects state prerogatives by declining to review judgments resting on “independent and adequate state grounds,” by immunizing state actions from certain forms of liability, and by (again, presumptively) deferring to states in specific areas, such as criminal justice, contracts, land use, and family life. Yet, as I have discussed elsewhere, those lines are neither sharp nor fixed and through interpretation of both statutes and the constitution, the U.S. Supreme Court has found state action preempted, even in those very arenas.

My argument is not that local action is always the preferred site for norm production, nor do I suggest that RUDs, reporting, margins of appreciation, immunities, and the like are solutions to deep conflicts about the meaning of rights. Further, in this discussion I have sketched the similarities in these analytics rather

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152 Resnik, Categorical Federalism, supra note 9; Resnik, Foreign as Domestic Affairs, supra note 44.
than parse their distinctions, such as when these different devices come into play, the legal institutions (legislatures, courts, localities) that promulgate or announce them, the ability to rescind or modify them, and the scope of their authority.

Moreover, the toleration of variation can be wrong—in many senses of this word. If certain RUDs become pervasively inscribed they can so encumber a convention as to rewrite its meaning. Furthermore, not all signatories are “equal” in their effects on transnational regimes. Examples of what Karen Knop has described as “empirical asymmetry” are plentiful, and American involvement in particular comes with the threat of domination. RUDs adopted by the United States—a country claiming to be a beacon of equality—could specially harm CEDAW’s import.

Likewise, margins of appreciation can reduce the meaning of rights by revising the import of the underlying norms. Recent examples that provoked sharp critiques include the ECtHR’s reliance on the margin both to permit the banning of “the Islamic headscarf while teaching” and to permit the mandatory display of crucifixes in classrooms in Italy—in both instances, the judgments came over objections that the practice constituted an infringement of the religious freedoms of non-Christians. Similar concerns about the strategic use of the margin of

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appreciation accompanied the ECtHR ruling on Ireland’s ban on abortions. That court concluded that, despite a European consensus on the right to abortion, the “moral and ethical issues” required a “broad margin of appreciation” that overcame objections that the ban undermined women’s equality, health, privacy, dignity, and autonomy.156

Yet reservations and margins provide affiliations recognizing (sometimes disquieting) distinctions among polities that nonetheless agree to share legal relatedness. These modes of mediated participation fit within a template offered by Antoine Garapon who, when addressing international criminal law, borrowed Immanuel Kant’s term “cosmo-political” to capture the idea of polities joining in commitments that both acknowledged their independent identities while imposing reciprocal obligations. These forms of transnationalism do not assume a universalism (sometimes equated with the term cosmopolitanism) that negates political differences among nation-states.157 One can also find parallels in the literature on “constitutional pluralism,” arguing multiple constitutional sources lacking a single identified locus of power trumping all others.158

Garapon’s cosmo-political approach intersects with an analysis of national sovereigntism that I have explored to understand why polities generate instructions, such as those of Oklahoma, about how legal actors are to use non-

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157 Garapon, Three Challenges, supra note 4, at 716.
158 See Miguel Poiares Maduro, Three Claims of Constitutional Pluralism, in CONSTITUTIONAL PLURALISM IN EUROPE AND BEYOND (Matej Avgelj and Jan Komárek eds., 2011).
domestic law. I delineated between two forms of sovereigntism, termed “exclusive” and “inclusive.” I already adverted to the exclusive form, exemplified by Oklahoma voters insisting that judges are not to look at “the legal precepts of other nations or cultures.” The contrasting “inclusive” sovereigntism locates a polity’s identity through requirements to consider other law. South Africa’s 1996 Constitution is one such example, obliging its judges to “consider international law” when “interpreting” its Bill of Rights and permitting them to “consider foreign law.”

Decades earlier, the 1949 Constitution of Costa Rica provided another example of inclusive sovereigntism—that “treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate.”

Unlike South Africa and Costa Rica, Oklahoma aspires to an identity bounded from outside influences. But the very law trying to do so itself evidences permeability: the state entered an international exchange even as it sought to deflect input from abroad. The text of the Oklahoma amendment was itself part of transatlantic efforts to both rebuff and to make “foreign” certain (in this instance primarily Islamic) forms of lawmaking. That movement’s leaders include individuals who are themselves multiply sited (such as one, living in Arizona and New York and licensed to practice law in Washington, D.C., California, and New York), and they are participants in one of the many translocal-transnational law reform projects.

161 CONSTITUCIÓN art. 7 (Costa Rica).
My commentary here joins several others, insistent on the proliferation, as an empirical matter, of diverse sites reconfiguring law and on their utilities, as a normative proposition. Yet gender often sits outside many such accounts. Engaging gender helps recenter discussions of internationalism by bringing to the fore inequality provisions that cross jurisdictions, as well as multiple layers of lawmaking, diverse sets and modalities of law speakers, and varying degrees of engagement with transnational norms that force textured relationships, rather than uniformity, upon co-affiliants. Further, rather than providing a court-centric account, I have focused on local and state legislatures, NGOs, and TOGAs, transversing levels of government to frame or oppose commitments to transnationalism. As a result, the majoritarian roots of transnationalism, rather than its claimed democratic deficit, come into sight, as do many untidy accommodating efforts to moderate conflicts.

The intersection of sex, gender, and transnationalism highlights the limits of the formalisms in both international law and equality doctrine. Local and international lawmaking is inevitably present within the nation-state. Although unratified, CEDAW has already placed demands on the United States to debate gender equality. Despite proponents’ arguments that CEDAW makes no difference domestically, opposition has been fierce. That vehemence, like some of the RUDs to CEDAW and the margins accorded to crucifixes but not to women’s veils, underscores the centrality of familial and religious structures to the construction of gender and of the nation-state. What RUDs in treaties, margins of appreciation, and federalism discounts offer are legislative and judicial means of surfacing and

channeling disputes by organizing conversations that explore, generate, and sometimes circumscribe the many meanings of internationalism and of equality.
TRANSFORMING OUR CULTURAL NORMS AND DECONSTRUCTING SEXUAL VIOLENCE AGAINST WOMEN

Melissa L. Breger

These remarks were delivered at the STONEMAN/KATZ Human Rights, Gender and the Law Conference: The State of Equality in Comparative Perspective, held at Albany Law School on April 11-12, 2013. The conference transcript will be assembled into a monograph, on file with Albany Law School, to memorialize the conference itself, as well as the Spring 2013 Kate Stoneman Series of Events. These remarks were part of a larger panel examining the issue of law and “culture.” I addressed culture in the United States which, though an ambiguous concept, greatly informs our world and our actions. I examined how our country at times has adopted a culture that normalizes violence towards women. I posit that while explicit gender bias is often deemed unacceptable, our society is embedded with implicit biases against women. These implicit biases contribute to a culture that is imbued with gendered norms relating to domination, over-sexualization, violation, power and control. I argue that the way to remedy these problems is to change our underlying culture in such a way that redefines gendered norms and gender equality.

In loving memory of Katheryn D. Katz.

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a1 Professor of Law, Albany Law School (J.D., The University of Michigan Law School). These remarks were made at the STONEMAN/KATZ CONFERENCE: Human Rights, Gender and the Law: The State of Equality in Comparative Perspective, held at Albany Law School on April 12, 2013. I want to thank Dean Penelope Andrews for inviting me to be a part of the first panel, Law and the Issue of Culture. I would also like to thank my co-panelists, Professor Patricia Williams, Columbia University Law School, Professor Cyra Akila Choudhury, Florida International University, and Professor Susan Bazilli, International Women’s Rights Project, University of Victoria and our moderator Professor Donna Young, Albany Law School. I also would like to thank Mary Armistead for her valuable research and assistance.

a2 Kate Stoneman was the first female graduate of Albany Law School, and the first female admitted to practice law in New York State. Though she passed the New York State Bar Exam, her application was initially denied because of her gender. She launched a campaign to amend the Code of Civil Procedure to permit the admission of qualified applicants without regard to sex or race. Each year, the school honors her memory by holding a series of events dedicated to her path-breaking activism. For more on Kate Stoneman and the yearly events dedicated to her, visit http://www.albanylaw.edu/katestoneman/Pages/default.aspx.

a3 These remarks were dedicated to the late Professor Katheryn D. Katz, Kate Stoneman Distinguished Professor of Law, Albany Law School. She was an inspiration in so many
Good morning! Thank you to Dean Andrews for inviting me to speak this morning and for hosting this tremendous conference.

There is so much to say on the issue of gender equality, and how it intersects with law and culture, as well as how such constructs affect women in our society. I am going to veer in a slightly different direction from that of my co-panelists and talk about culture from a very generalist perspective, because the definition of culture itself is quite multi-layered.

The concept of culture can be represented by a variety of ideas and contexts. There is religious and ethnic culture, institutional culture, corporate culture, subcultures, mainstream culture, pop culture—to name just a few. Many of these ideas of culture intersect with and are subsumed within each other.163

Culture is pervasive and omnipresent, yet quite amorphous and never clearly defined. And yet culture so informs our world and our daily behavior.164 Because of the ubiquity of culture itself, it is important to understand culture’s dynamic and extensive influence on our beliefs and actions.165

Professor Naomi Mezey has appropriately remarked that “[t]he notion of

ways and her feminist activism continues to have a strong influence at Albany Law School and beyond. To read about Professor Katz’s legacy and its intersection with Kate Stoneman’s legacy, see Professor Melissa Breger and Professor Mary Lynch’s upcoming article in volume 77 of the Albany Law Review (forthcoming 2014), entitled First Domestic Violence Law Seminar Taught In a United States Law School: The Legacy of Professor Katheryn D. Katz and her Impact on Albany Law School and Beyond. 163

DICTIONARY OF SOCIOLOGY 83 (Henry Pratt Fairchild ed., 1944).

164 Grouptthink and Family Courts, supra note 3, at 63 n.54; Mezey, supra note 2, at 37 (“Culture can mean so many things: collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, mass-produced popular artifacts, ritual.”). 165 See Melissa L. Breger, The (In)visibility of Motherhood in Family Court Proceedings, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 561 (2012) [hereinafter (In)visibility of Motherhood].
culture is everywhere invoked and virtually nowhere explained.”

Various definitions of culture have been offered. One way to define culture is to see culture as a set of informal norms and rules of behavior in a particular setting. The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) provides a more global definition of culture, declaring that “[c]ulture shapes all our thinking, imagining and behaviour . . . [I]t is a dynamic source for change, creativity, freedom, and the awakening of innovative opportunities. For groups and societies, culture is energy, inspiration and empowerment . . .”

I will be talking about culture in broad strokes, but in particular, I will be speaking about how in America we often claim to be “multi-cultural” and consisting of all cultures—yet in truth, a universal culture of sorts does exist in America. This American culture is not always particularly positive for women. In fact, American culture today is steeped and embedded in various gendered norms and stereotypes, which then subsequently affect women’s lives day to day. Further, because too often the worst of American culture is reproduced and replicated around the world, this so-called American culture has morphed into an international culture of sorts.

167 Melissa L. Breger, Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory, 34 LAW & PSYCHOL. REV. 55, 63 (2010) [hereinafter Groupthink and Family Courts]. See also Mezey, supra note 2, at 37.
We are all so universally interconnected through technology, and this can be quite a double-edged sword.

It is true that there has been almost explicit acceptance on paper that we need to modify cultural patterns that harm women. Yet, as I will address shortly, accepting this universally has sometimes been more of a theory rather than a reality. For example, while the United States government has signed the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), we have not ratified this treaty. Article 5 of CEDAW proclaims that State Parties shall take all appropriate measures: (a) “To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

There remains a question as to whether the signatories to CEDAW abide by its spirit, or as Professor Charlesworth noted in my Family Law class yesterday, whether the reservations to CEDAW made by a large number of its signatories swallow up the intent of CEDAW. We must ask ourselves what steps we as a

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171 CEDAW, supra note 8.
173 CEDAW, supra note 9, at art. 5.
society can take to ensure that the law affects gender norms that have become embedded in our culture. And we must question whether such a culture is capable of reversing the effects of a historically patriarchal society.

Gendered norms and the ingrained ideas of what it means to be a woman or a man in our society trickles down to our workplace, our family, our school, and all other aspects of our lives. Our society impedes true gender equality by perpetuating static, monolithic, gendered stereotypes and norms.

The deeply embedded gender norms prevalent in our society and the continued oppression of women contribute, perhaps implicitly, to the notion that domination or control of women is expected, even inevitable. Gloria Steinem quotes Olaf Palme, the Chief of the State of Sweden, who said “gender roles [are] the deepest cause of violence on earth because they normalize[] dominance and submission.” Steinem also talks about the “cult of gender” being the most difficult to challenge, because it is just “exaggerated versions of the earliest ways we may have been taught to see people as groups rather than unique individuals.” She asserts that “[g]ender domination tends to be the first way we learn it’s okay for one


177 See Gloria Steinem, Comments on Taking Stock: A Symposium Celebrating the New York State Judicial Committee on Women in the Courts, 36 N.Y.U. REV. L. & SOC. CHANGE 525 (2012); Deming et al., supra note 7, at 2.

178 Steinem, supra note 15, at 526.

179 Id.
group to eat even though they don’t cook or clean; [for one group] to be paid for working outside the home even though the other group does the important work of raising children that is mysteriously called ‘not working’. . . [and to] ignore or consider inevitable the fact that females are the objects of most violence around the globe.”

I submit that our implicit biases in the arena of gender serve as constant reinforcement for a variety of gender norms. Even though we may shun the idea of discrimination and violence against women theoretically, or explicitly, our society is embedded with implicit biases that normalize controlling and/or violent behavior against women.

Let me take a step back and talk about how society and culture can be informed by bias. First, when we talk about bias, we must recognize that there are different kinds of bias. Explicit bias is openly expressed, and is the type of bias most people think of when they consider the issue of prejudice. Explicit gender bias has largely been rejected and disavowed by American contemporary society, although it is still too often present. Implicit bias, on the other hand, though not openly expressed, nonetheless colors how we intrinsically view the world. All people harbor implicit biases, though these biases are often not conscious, intentional, or

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180 Id. (emphasis added).
182 (In)visibility of Motherhood, supra note 6, at 560-62. See also Deming et al., supra note 7, at 2.
183 Id. at 560.
184 Id.
185 Id. See also IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).
even maliciously-based.\textsuperscript{186} Because of this, implicit biases are harder to identify and eradicate than are explicit biases. Research has shown that, unlike explicit biases, implicit biases can begin to form in children as young as three years old, and then deepen over the years of development, becoming part of their concrete set of beliefs as adults.\textsuperscript{187}

Unlike explicit biases, not all implicit biases take the shape of outward animosity or hatred toward a particular group.\textsuperscript{188} One can hold beliefs stemming from seemingly innocuous gender stereotypes, which then subsequently form implicit biases.\textsuperscript{189} Because of the nature of implicit biases, these become extensive and pervasive—their effect substantial and even dangerous.\textsuperscript{190}

Therefore, while our society might concur \textit{explicitly} that women are equal and that violence against women is fundamentally wrong, we demonstrate \textit{implicitly} by our attitudes towards women that such behavior is acceptable. Arguably, this then allows the negativity towards women to fester and grow and be demonstrated repeatedly in our society.

Again, Professor Hilary Charlesworth, on Monday night at the 2013 Kate 

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\textsuperscript{186} Mark W. Bennett, \textit{Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions}, 4 HARV. L. & POL'Y REV. 149, 152 (2010); \textit{(In)visibility of Motherhood}, supra note 6, at 560.


\textsuperscript{189} \textit{(In)visibility of Motherhood}, supra note 6, at 561.

\textsuperscript{190} \textit{Id.}
\end{footnotesize}
Stoneman Visiting Professor Lecture,\textsuperscript{191} discussed with us that we can enact wonderful laws about gender equality, yet if no one is implementing or enforcing them, what is their effect? I would submit the same is true in terms of implicit or explicit bias. We can explicitly renounce gender inequality, but if we implicitly accept it as a society, what is the ultimate effect?

We cannot overlook the deep connections between all types of violence against women and children—physical, emotional, mental, sexual, financial—and the nexus to the underlying theme of power and control, as well as the underlying foundation of gendered norms.\textsuperscript{192} Of course, men and boys can be and routinely are raped and sexually abused.\textsuperscript{193} By no means can we or should we overlook these facts. Professor Catharine Mackinnnon asks: Because domestic violence and rape can happen to both sexes, does that make it any less of a gender issue?\textsuperscript{194} What about the fact that domestic violence and rape are arguably more about power and control over the victim than about the need for sex or relationships?\textsuperscript{195} Mackinnon captures the uneasiness of being a woman even in today’s modern society, when she explains we cannot ignore the ever-present fear of being raped that many women must confront and process every single day.\textsuperscript{196}

Mackinnon cites a study from 1991, which found that one third of U.S. women said they worry at least once a month about being raped and many worry

\textsuperscript{192} CATHARINE MACKINNON, SEX EQUALITY 761-62 (2\textsuperscript{nd} ed., 2007).
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 744.
An additional third said they did not expressly worry about rape, but take precautions to try to avoid it. An additional third said the fear of rape was “always there.”

She then asks: does fear of rape help keep women second-class in society? Does the mere apprehension of the possibility of sexual victimization affect and damage women as a class, beyond those who have actually been subjected to sexual violation themselves?

When discussing women as a class in our society, I would answer yes. I submit that our collective culture and society is imbued with gendered norms relating to domination, over-sexualization, violation, power and control.

Despite being recognized as a highly developed country, we have not managed to eliminate this culture of violence in America. In fact, at times, it seems as though we thrive on it. Here are a few statistics that demonstrate how violence against women remains pervasive in American culture today:

- American girls and young women between the ages of 16 and 24 experience the highest rate of intimate partner violence, at a rate almost triple the national average.
- Women in the U.S. military face a higher risk of being raped multiple times, according to research recently released by the Pentagon.
- Studies have found that 350 rapes are likely to occur every year on every American campus with a student population of 10,000.

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197 Id.
198 Id.
199 Id. (emphasis added).
200 Id.
• The United States Justice Department estimates that one in five women will experience rape or attempted rape during her college years, and that less than five percent of these rapes will be reported.204

One in five—that is an astounding number. If we do have a culture in American society, could it be that in fact, as several scholars have written about, it is a culture of rape?205

The term “rape culture” is used to describe “the casual debasement [of women]. . . . that has become such a part of our lives that it is often invisible,” according to NOW President, Terry O’Neill.206 Professor Diane Herman explains that rape culture is one in which we presume that sexual violence against women is not only a fact of life, but is as inevitable as death or taxes.207

If this is our culture, is it even possible for us to transform this culture? Is culture malleable, or is it impervious to change? Is it so overly pervasive, and further perpetuated throughout the world by our interconnectivity via technology and social media?

Studies of institutional culture show cultural malleability only if attitudes change and there is a desire by all members of a group to want to change. One might ask if we can change this rape culture on a grand scale? Or are we spiraling out of

204 Id. at 22. See also Deming et al., supra note 7 (exploring the frequency of rapes on college campuses and examining how victims interpret this experience).
207 Dianne Herman, The Rape Culture, in CHANGING OUR POWER: AN INTRODUCTION TO WOMEN STUDIES 260 (Jo Whitehorse Cochran et al. eds., 1988).
control as these attitudes and values become more and more embedded into our social mores with more willingness to perpetuate and spread these views via the anonymity of modern technology? And as a result, are our younger generations and society at large becoming increasingly exposed to and perhaps addicted to this culture?

We see evidence of society’s negative views against women and girls demonstrated everywhere we turn. We need only to watch the news to hear about the shooting of a young girl in Pakistan for merely talking about education,\(^\text{208}\) or of the acid attacks on women for not becoming a “good wife,”\(^\text{209}\) or the vilifying of a U.S. college rape victim on a school campus because the victim had the courage to call out violence against college students,\(^\text{210}\) or the gang rape of an unconscious child by high school football players in Steubenville.\(^\text{211}\)

When we hear about these atrocities; we then hear about how our society responds to such atrocities. As in the Steubenville case, the sympathy for the perpetrators was widespread, while simultaneously the victim was defiled and vilified. All of this was spread further on the internet, demonstrating our cultural over-reliance on unfiltered vehicles such as Facebook or YouTube.\(^\text{212}\) Our culture seems to glorify violence, and that violence is often directed as violence against


women.\textsuperscript{213}

What about the latest iteration of an ingrained culture of sexual violence against women, when National Public Radio broke the story this week about the culture of our military and the rampant and repeated sexual abuse of female troops?\textsuperscript{214} Major General Gary Patton, the head of the Pentagon's Sexual Assault Prevention and Response Office, responded to this epidemic in this way: “It's a complex problem because it involves a culture change. We have to see a culture change where those victims of this crime are taken seriously at their unit level by every member of their unit, so you don't see the divisiveness and the lack of support and the feeling of isolation that these victims feel.”\textsuperscript{215}

Again, the notion of a culture change is invoked. How does a culture of rape or a culture of violence against women inhibit women in all other sectors of life? How does it affect us as mothers and as family members? As teachers? As workers? As students? As human beings? Women have the constant awareness or fear of being vulnerable as females, and this undoubtedly permeates both the public and private spheres of our society.\textsuperscript{216}

Some scholars like Professor Andrew Taslitz argue that “all forms of popular and high culture, promote a female fear of sexualized violence, with rape at the apex. It is this female fear, more than the actual prevalence of rape, that matters.”\textsuperscript{217} He

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\item[\textsuperscript{213}] Deming et al., \textit{supra} note 7, at 2.
\item[\textsuperscript{214}] Quil Lawrence & Marisa Peñaloza, \textit{Off the Battlefield, Military Women Face Risks from Male Troops}, NPR.com, March 20, 2013 3:08 AM, available at \url{http://www.npr.org/2013/03/20/174756788/off-the-battlefield-military-women-face-risks-from-male-troops}.
\item[\textsuperscript{215}] Id.
\item[\textsuperscript{216}] MACKINNON, \textit{supra} note 30, at 744; Andrew E. Taslitz, \textit{Patriarchal Stories I: Cultural Rape Narratives in the Courtroom}, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 396 (1996).
\item[\textsuperscript{217}] Taslitz, \textit{supra} note 54, at 396.
\end{itemize}
writes:

One of the best recent studies on the question sought to determine the causes of differential incidences of rape among the fifty U.S. states. The factor of American cultural violence was held fairly constant. The study found that …there are higher levels of violence in states where women have lower status. This suggests a finding consistent with much cross-cultural research, that women are devalued in more violent societies. More important, the study concluded that the level of social disorganization and gender inequality are significant contributors to rape.218

And these cultural narratives indeed can affect how violence plays out in the courtroom. Taslitz contends that when we hear a particular victim’s story in the courtroom, it may be replaced with what the culture accepts as mainstream—“she asked for it, she deserved it, she could have left.”219

Violence against women is moving beyond an epidemic; it is becoming a culture—our culture.

Ending on a positive note seems near impossible in most topics I teach these days. Yet, as I was preparing my final edits last night, I was heartened to see the word culture invoked by the White House in a very positive way. The White House Advisor on Violence Against Women, Lynn Rosenthal, writes:

Every April, we recognize Sexual Assault Awareness Month. This year, with rape in the headlines nearly every day, we speak out with even greater urgency to honor survivors and prevent sexual violence. We know the devastating the statistics: 1 in 5 women and 1 in 71 men have been raped in their lifetimes. That’s 18 million women in this country who have been raped, and more than

218 Id. at 398.
219 Id. at 478. See also Deming et al., supra note 7, at 3 (discussing various rape myths and how these inform the way rape victims perceive and label their experience).
1 million rapes that occur every year. The vast majority of these assaults occur when the victims are under the age of 25, and those under 18 are at the greatest risk. These numbers are real, but they don’t tell the whole story. They don’t tell of the broken trust when the attacker is a friend, a trusted colleague, or a family member. They don’t tell of the suicidal feelings, the depression, or of the PTSD. And, they don’t tell of the courage survivors demonstrate when they struggle every day to put their lives back together. . . On March 7, 2013, President Obama signed the reauthorization of the Violence Against Women Act [“VAWA”] into law. . . Together, we are working to change the culture so that one day, we will end sexual violence.\textsuperscript{220}

Again we see the notion of a culture change being invoked—but the important question is how?

I would argue that the only way to truly unhook these issues is to work on reforming our culture from its early central connections that are deeply entwined in definitions of what gender means and what it should mean. We need to think deeply about what gender equality really looks like. When we stop excusing harmful behavior and its acceptance in the name of “culture,” and instead truly challenge and reform our culture, then and only then, can we hope for real change in the laws and their effectiveness.

Thank you for being such an attentive audience.

\textsuperscript{220} Lynn Rosenthal, \textit{Recognizing Sexual Assault Awareness Month}, \textsc{Whitehouse.gov}, April 8, 2013 at 11:26 A.M, \textit{available at} \url{http://www.whitehouse.gov/blog/2013/04/08/recognizing-sexual-assault-awareness-month}. 