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ANNA HIRSCH LECTURE

TRANSNATIONAL LAW AS A DOMESTIC RESOURCE: THOUGHTS ON THE CASE OF WOMEN'S RIGHTS

Elizabeth M. Schneider*

INTRODUCTION

International human rights treaties, human rights documents, and international and comparative legal norms are increasingly viewed as relevant sources of law for United States domestic lawmaking in a wide range of fields, including the death penalty, affirmative action and women's rights. Over the last twenty years, the connections between international human rights and domestic work on women's rights have been the subject of much activist and scholarly attention. Spurred on by the development of international human rights law, by burgeoning international women's conferences like the Beijing Conference in 1995 and Beijing Plus 5 meetings,¹ and by the proliferation of non-governmental organizations

* Rose L. Hoffer Professor of Law, Brooklyn Law School. A very early version of this essay was presented as the Anna Hirsch Lecture at New England School of Law in April 2000. I am grateful to Judith Greenberg for her support; to the women that I have worked with in South Africa and China for inspiration; to Rhonda Copelon, Nathaniel Berman and Patty Blum for thoughtful comments on an earlier draft; and to Sally Merry, Lenora Lapidus, Philippa Strum, Rangita de Silva and students in my classes at Brooklyn, Harvard and Columbia Law Schools with whom I have discussed these issues over several years. Thanks to Judges Betty Ellerin, Karla Moskowitz, Bea Ann Smith and Carolyn Temin for work with the National Association of Women Judges that has enriched my appreciation of judicial perspectives on these issues. Special thanks to Chelsea Chaffee, Rachel Braunstein and Ashley Van Valkenburgh for superb research assistance, and to the Brooklyn Law School Faculty Research Program.

1. The United Nations Fourth World Conference on Women was held in Beijing, China from September 4-15, 1995. See *The United Nations Fourth World Conference on Women*, (Sept. 1995), at <http://www.un.org/womenwatch/daw/beijing> (last visited Feb. 12,

(NGOs) both in this country and around the world that focus on international issues,² U.S. women's rights activists and scholars are now turning to transnational law as a resource for domestic law reform efforts concerning equality.³

My interest in linking international human rights to domestic law reform in women's rights grows out of international work that I have done concerning constitutional law, women's rights, and violence against women over the last several years, particularly in South Africa and China.⁴ I have seen the way in which an international human rights strategy that combines documentation, education, mobilization, advocacy and litigation has been used by women in other countries to advocate for reform within their own country, especially in South Africa, and have advocated bringing global efforts back to law reform and activism on violence in the United States. In my book, *Battered Women and Feminist Lawmaking*, I discuss the important possibilities of international human rights as a domestic resource in universalizing norms of equality, in emphasizing the importance of economic and social rights to violence against women, and in underscoring the interrelatedness of women's rights claims to be free of violence with reproductive rights, employment, child care and economic and social rights.⁵ In our law school casebook, *Battered Women and the Law*,⁶ Clare Dalton and I include a chapter on international human rights which emphasizes the importance of women's international human rights

2004). The U.N. General Assembly Special Session (Beijing +5) was held in New York City on June 5-9, 2000. See *Beijing +5, Women 2000: Gender Equality, Development and Peace for the 21st Century*, at <http://www.un.org/womenwatch/daw/followup/beijing+5.htm> (last visited Nov. 11, 2003).

2. For a list of hundreds of NGOs that focus on international issues, see the University of Minnesota Human Rights Library, available at <http://www1.umn.edu/humanrts/links/ngolinks.html> (last visited Feb. 12, 2004).

3. In this essay, I use the term "transnational law" to encompass international law, international human rights and "transnational understandings," or what Vicki Jackson has termed "transnational legal discourse." Vicki C. Jackson, *Gender and Transnational Legal Discourse*, 14 *YALE J.L. & FEMINISM* 377, 378 (2002). Sally Merry's important work on violence and human rights discusses the use of international human rights as a "resource." See generally Sally Engle Merry, *Constructing a Global Law—Violence Against Women and the Human Rights System*, 28 *LAW & SOC. INQUIRY* 941 (2003).

4. I traveled to South Africa several times in the 1990s to participate in programs on constitutional decision-making with judges from the South African Constitutional Court and to meet with lawyers and activists on women's rights and domestic violence, and have been involved in gender and law educational programs in China.

5. See generally ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 53-56 (2000) [hereinafter SCHNEIDER, *BATTERED WOMEN*].

6. See generally CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* (2001).

documents and claims as a resource for lawyers and activists on violence against women in the United States.

In this essay, I explore the use of transnational law as a resource for United States women's rights activists in two concrete contexts: first, as a basis for argumentation in domestic women's rights law reform efforts; and second, in the campaign to persuade the United States to ratify the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). With the caveat that I am not an expert in international law or international human rights, I examine these arenas of lawmaking, document recent developments, and offer some preliminary thoughts on their significance. I begin by providing a brief overview of current use of transnational legal sources by U.S. courts, and then turn to women's rights cases and to CEDAW.

I. TRANSNATIONAL LEGAL SOURCES IN UNITED STATES COURTS

In the last two terms, the United States Supreme Court has cited transnational legal sources in majority or concurring opinions in three landmark decisions. In *Atkins v. Virginia*, the Court held that executing mentally retarded defendants constituted cruel and unusual punishment and therefore violated the Eighth Amendment.⁷ The Court relied on the existence of a "national consensus" against this practice to arrive at its decision.⁸ In a footnote, the majority cited an amicus brief submitted by the European Union in a similar case which detailed the international condemnation of executing the mentally retarded:

[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. . . . Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.⁹

In *Grutter v. Bollinger*,¹⁰ the University of Michigan graduate admissions affirmative action decision, Justices Ginsburg and Breyer suggested that U.S. courts should look to transnational legal sources, and the U.S. laws that are consistent with international sources are more likely to be upheld by the Court than those that disagree. They stated that "[t]he Court's observation that race-conscious programs 'must have a logical end

7. 536 U.S. 304, 321 (2002).

8. *Id.* at 316.

9. *Id.* at 316 n.21.

10. 539 U.S. 306 (2003).

point' . . . accords with the international understanding of the office of affirmative action," and observed:

[T]he International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, endorses special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.¹¹

Finally, in *Lawrence v. Texas*, in which the Supreme Court struck down state criminal sodomy laws, Justice Kennedy's majority opinion drew on a similar case decided by the European Court of Human Rights.¹² He observed that the European Court's ruling was authoritative in all countries of the Council of Europe and suggested that the Court should rethink its analysis of the issue in light of these sources.¹³ In each of these cases, transnational sources of law had been presented in amicus briefs.¹⁴

In these decisions, Justices of the Supreme Court have "displayed a new attentiveness to legal developments in the rest of the world and to the

11. *Id.* at 342 (Ginsburg, J. and Breyer, J., concurring). In their dissent in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Michigan undergraduate admissions affirmative action case, Justices Ginsburg and Breyer drew on "contemporary human rights documents" to "distinguish between policies of oppression and measures designed to accelerate de facto equality." *Id.* at 302 (Ginsburg, J. and Breyer, J., dissenting).

12. 123 S. Ct. 2472, 2483 (2003) (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H. R. (ser. A) at 52 (1981)).

13. *Id.*

14. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the brief submitted by petitioner cited a brief that had been previously submitted by the European Union in a North Carolina case with similar facts. Brief for Petitioner, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (citing Brief of Amici Curiae European Union, at 4, *McCarver v. North Carolina*, O.T. 2001 (No. 00-8727)). The *Atkins* majority cited this European Union brief. 536 U.S. at 316. In *Grutter v. Bollinger*, 539 U.S. 306 (2003), several briefs presenting international and comparative perspectives were submitted: Brief of Amici Curiae NOWLDEF and Feminist Majority Foundation, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516); Brief of Amici Curiae Human Rights Advocates and University of Minnesota Human Rights Center, et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516); Brief of Amici Curiae National Coalition of Blacks for Reparations in America, *Grutter v. Bollinger*, 539 U.S. 306 (2002) (Nos. 02-241 and 02-516). In *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), Justice Kennedy cites the amicus brief submitted by United Nations High Commissioner for Human Rights Mary Robinson and others demonstrating that many countries have taken action consistent with affirming the protected right of homosexual adults to engage in intimate sexual conduct. 123 S. Ct. at 2483 (citing Brief of Amici Curiae Mary Robinson et al., *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102)).

Court's role in keeping the United States in step with them."¹⁵ Courts around the globe are beginning to look beyond their borders in deciding cases, particularly in the area of human rights.¹⁶ In a 1998 article, Claire L'Heureux-Dube, former Justice of the Supreme Court of Canada, observed that not only are courts becoming more receptive to consulting foreign decisions, they are also increasingly engaging in a dialogue with foreign courts:

Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being "givers" of law while others are "receivers."¹⁷

She notes a number of reasons for this increased globalization of the law, including the inherently international nature of human rights law, advances in technology, increased personal contact among judges, and the fact that many courts throughout the world are now facing similar issues.¹⁸ She criticized the Rehnquist Court for resistance to these developments, and argued that, as a result, it had "diminished impact" elsewhere.¹⁹

Although the Supreme Court has historically been resistant to global influences, the Court's recent "attentiveness" has been presaged by the comments of individual Justices, who have written and spoken about the importance of transnational principles over the last several years. In an article discussing the international human rights aspects of affirmative action, Justice Ruth Bader Ginsburg observed:

In my view, comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world.

15. Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and The Court*, N.Y. TIMES, July 1, 2003, at A1.

16. See Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 16 (1998). See generally Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

17. L'Heureux-Dube, *supra* note 16, at 17 (emphasis omitted).

18. *Id.* at 23-26.

19. *Id.* at 37.

In this reality, as well as the determination to counter it, we all share.²⁰

Justice Sandra Day O'Connor expressed a similar sentiment in a speech to the American Law Institute: "[W]hile inter-nation law and the law of other nations are rarely binding on our decisions, conclusions reached by other countries, and by the international community should at times constitute persuasive authority in American courts—what is sometimes called transjudicialism."²¹ Justice Ginsburg recognized in her article that it is not uncommon for courts in other nations to refer to international covenants and foreign court opinions, including those of the United States Supreme Court, in rendering decisions.²² ABA and National Association of Women Judges (NAWJ) meetings have held programs on international human rights, which judges from other countries have attended, NAWJ has created an International Law Committee,²³ and NAWJ members participate in the International Association of Women Judges, where they meet judges from around the globe.²⁴

Other Supreme Court Justices do not agree with this trend. Some "view international human rights law as an offshore body of law—an alien set of norms that exists out 'there,' overseas, but have little relevance 'here,' in the United States."²⁵ Justice Scalia, for example, is hostile to it.²⁶ In his

20. Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999); see also Ruth Bader Ginsburg, Sherman J. Bellwood Lecture: *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003).

21. *Justice O'Connor Predicts Greater Domestic Reliance on Norms of International Law and Praises Institute's Increasing Transnational Focus*, 24(4) ALI REPORTER 3, 6 (Summer 2002) (quotations omitted) (quoting in part, Justice O'Connor), available at <http://www.ali.org> (last visited Feb. 13, 2004) [hereinafter *Justice O'Connor Predicts*].

22. See Ginsburg & Merritt, *supra* note 20, at 281-82.

23. See National Association of Women Judges, at <http://www.nawj.org> (last visited Feb. 13, 2004). The NAWJ currently is developing a project entitled *Beyond Borders: The Impact of International Law in State and Federal Courts*, at http://www.nawj.org/education/beyond_borders.html (last visited Feb. 13, 2004).

24. See Angela Ward, *Judicial Creativity: Enhancing Judges' Role as Enforcers of International Human Rights Law*, COUNTERBALANCE INT'L: NEWSL. OF THE INT'L ASSOC. OF WOMEN JUDGES AND THE INT'L WOMEN JUDGES FOUND., Fall 2002, at 1, available at <http://www.iawj.org/newslett/vol9no1eng.pdf> (last visited Feb. 13, 2004). Professor Ward gave this address at the International Association of Women Judges Conference in Dublin in May, 2002. See *id.* See generally Judith Resnik, *Women, Meeting (Again), in and Beyond the United States*, in THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP 203 (Deborah L. Rhode ed., 2003).

25. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 258 (2001).

26. *Id.* at 257, n.51 (citing *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988))

dissent in *Lawrence*, he wrote: “The Court’s discussion of foreign news . . . is . . . meaningless dicta. Dangerous dicta, however, since ‘this Court should not impose foreign moods, fads, or fashions on America.’”²⁷

So why the difference now? Analyzing the Supreme Court’s 2002-2003 term, Linda Greenhouse observed that “webs of personal association and experience have led the Justices to see old problems in new ways.”²⁸ One of these “webs” relates to international travel and work with foreign judges:

Extensive foreign travel has made both Justice Kennedy and Justice O’Connor more alert to how their peers on other constitutional courts see similar issues. Justices have always traveled, teaching or taking part in seminars. But these are trips with a difference.

Along with Justice Ginsburg and Justice Stephen G. Breyer, Justices O’Connor and Kennedy have held extensive sessions with judges in Europe. Justice Kennedy has met with numerous Chinese judges, here and in China. Justice O’Connor has been involved in the American Bar Association’s reform initiative for Eastern Europe. With emerging democracies groping toward the rule of law, with colleagues on the federal bench volunteering for constitution-writing duties in Iraq, it is not surprising that the justices have begun to see themselves as participants in a worldwide constitution conversation.

From this perspective, Justice Kennedy’s citing of the European Court of Human Rights in his Texas opinion was a natural development. Justice O’Connor, in the Michigan case, linked affirmative action to the acquisition of “the skills needed in today’s increasingly global marketplace” and to the maintenance of integrated leadership for the military.

It is tempting to suppose that her invocation of diversity as “essential” to “the dream of our nation, indivisible,” was aimed not just at a domestic audience but at the constitution-building world in which she is a star participant.²⁹

Other commentators have observed that the Justices’ increased participation in international conferences and their increased communication with jurists from other nations are contributing to some Justices’ views. Michael Dorf calls it “the Strasbourg Effect.”³⁰ But this

(Scalia, J., dissenting); *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (Scalia, J.).

27. 123 S. Ct. 2472, 2495 (2003) (Scalia, J., dissenting).

28. Linda Greenhouse, *Ideas and Trends: Evolving Opinions; Heartfelt Voices from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, § 4, at 3.

29. *Id.*

30. Michael C. Dorf, *Findlaw Forum: The International Influence on the Supreme*

exposure also raises crucial issues of legitimacy, as Judge L'Heureux-Dube emphasized.³¹ Martha Davis argues that “[g]lobalization has now so pervaded our national culture and identities that a court that consistently ignores international precedents and experiences when considering human rights issues, even if merely for their persuasive or moral weight, risks irrelevancy.”³² Dorf notes that judges from Europe and elsewhere routinely criticize the United States for practices such as the death penalty and describes the majority in *Atkins* as “unwilling to exacerbate the worldview of the United States as a rogue nation.”³³ While the majority in this case “certainly did not rule . . . so that the Justices could avoid future awkward moments at their international cocktail parties,” Dorf argues that a few justices were influenced by international perspectives, especially Justices O'Connor and Kennedy.³⁴ The two Justices are the most “enthusiastic” participants in international conferences and changed their position on the issue in *Atkins* after upholding executions of the mentally retarded in a 1989 case.³⁵

There is certainly a complex history of United States judicial treatment of transnational law.³⁶ Although it is common to view United States courts as manifesting an “isolationist” resistance to consideration of transnational law, some scholars argue that in fact United States courts use transnational law in many different ways all the time.³⁷ There have certainly been prior historical attempts to invoke international human rights in United States domestic legal work. For example, civil rights groups made innovative use of international human rights resources in the late 1940s and 1950s. “In 1947 . . . the National Association for the Advancement of Colored People called on the United Nations to study racial discrimination in the United States and to ensure United States compliance with international

Court Decision on Executions, at <http://us.cnn.com/2002/LAW/06/columns/fl.dorf.exec.retarded.06.28/index.html> (last visited Feb. 26, 2004). “Strasbourg, France is the home of the European Court of Human Rights, or ECHR. The ECHR is the Council of Europe’s principal organ for interpreting the European Convention for the Protection of Human Rights and Personal Freedoms.” *Id.*

31. See L'Heureux-Dube, *supra* note 16, at 37.

32. Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 421 (2000).

33. Dorf, *supra* note 30.

34. *Id.*

35. *Id.* See generally *Penry v. Lynaugh*, 492 U.S. 302 (1989).

36. See generally Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619 (2001) [hereinafter Resnik, *Categorical Federalism*].

37. *Id.* at 621-22; see Davis, *supra* note 32, at 418-20; Powell, *supra* note 25, at 257-60.

standards.”³⁸ In 1951, the Civil Rights Congress (CRC) filed a petition with the United Nations entitled, “We Charge Genocide,” that charged the United States with the genocide of African Americans.³⁹ The petition “made a specific charge against the criminal, racist policies of the United States Government and the destructive impact this had on national integrity as well as its effect on world peace”⁴⁰ and included documentary evidence of harms against African Americans during the period of 1945 to 1951.⁴¹ The CRC requested that the United Nations “[f]ind and declare the guilt of the government of the United States for crimes of genocide against the Negro people and to further demand that the United States Government stop and prevent the crime of genocide.”⁴² The petition connected the treatment of African Americans in the United States to human rights injustices internationally.⁴³ This petition had no legal effect;⁴⁴ however, it has provided a model for contemporary attempts to use an international framework for domestic work.⁴⁵

Martha Davis argues that the use of transnational legal sources can be viewed as the contemporary equivalent of the introduction of social science data as an aid to judicial decision-making that began with the so-called “Brandeis brief” as submitted in *Miller v. Oregon* and now used widely by courts.⁴⁶ Over the last twenty-five years, international human rights claims have certainly been used more frequently in litigation and developed new fields of law. One example is the development of litigation under the Alien Tort Claims Act (ATCA),⁴⁷ “which allows aliens to bring in federal court

38. Dorothy Q. Thomas, *We Are Not the World: U.S. Activism and Human Rights in the Twenty-First Century*, 25 *SIGNS* 1121, 1121-22 (2000).

39. Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 *UCLA L. REV.* 1747, 1793 (2000).

40. *Id.* at 1795.

41. *Id.* at 1797.

42. *Id.* at 1798.

43. *Id.* at 1800.

44. See Leti Volpp, *Righting Wrongs*, 47 *UCLA L. REV.* 1815, 1834 (2000). Volpp observes:

Following the CRC’s petition and the 1947 petition filed by the NAACP denouncing race discrimination in the United States, the United States refused to participate in the United Nations human rights treaty system for about thirty years – fearing that such involvement would expose itself to findings of human rights violations.

Id.

45. See *id.* (discussing Hom & Yamamoto, *supra* note 39).

46. See generally Davis, *supra* note 32.

47. Alien Tort Claims Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (1994)).

claims for torts committed in violation of United States treaties or the law of nations,"⁴⁸ pioneered by lawyers at the Center for Constitutional Rights.⁴⁹ In 1980, the Second Circuit decided the landmark case of *Filartiga v. Pena-Irala*,⁵⁰ which considered a claim of wrongful death by torture committed in Paraguay by an alien against another alien, also a government official.⁵¹ In construing the ATCA the court held:

[D]eliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [the ATCA] provides federal jurisdiction.⁵²

Since *Filartiga*, claims for genocide, war crimes, rape, summary execution, forced labor, arbitrary detention, and disappearance have been widely litigated under the ATCA in United States courts.⁵³ The ATCA is now under attack, and the Supreme Court has agreed to review the Act, "[u]rged by the Bush administration to curb the growing recourse to United States courts as forums for international human rights cases."⁵⁴

48. Volpp, *supra* note 44, at 1834. See generally Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 2 (2002).

49. See Center for Constitutional Rights, at <http://www.ccr-ny.org/v2/home.asp> (last visited Mar. 16, 2004).

50. 630 F.2d 876 (2d Cir. 1980).

51. *Id.* at 879.

52. *Id.* at 878.

53. See Volpp, *supra* note 44, at 1834-35; see, e.g., *Abebe-Jira v. Negewo*, No. 1:90-02010-CV-GET (N.D.G.A. 1995), *aff'd* 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996) (addressing cruel, inhuman and degrading treatment); *Kadic v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (dismissing case for lack of subject matter jurisdiction), *rev'd and rem'd*, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996) (addressing genocide, war crimes, and rape); *Hilao v. Estate of Marcos*, 878 F.2d 1438 (9th Cir. 1989), *aff'd sub nom. In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (addressing summary execution); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (granting defendants summary judgment), *aff'd* 248 F.3d 915 (9th Cir. 2001), *rev'd in part, aff'd in part, rem'd* 2002 U.S. App. LEXIS 19263 (2002), *vacated, reh'g en banc*, 2003 U.S. App. LEXIS 2716 (2003) (addressing forced labor); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (addressing arbitrary detention); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (addressing disappearance).

54. Linda Greenhouse, *Reviewing Foreigners' Use of Federal Courts*, N.Y. TIMES, Dec. 2, 2003, at A29 (discussing Supreme Court review of *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), *cert. granted*, *Sosa v. Alvarez-Machain*, 124 S. Ct. 807 (2003), *Sosa v. Alvarez-Machain*, 124 S. Ct. 821 (2003)). See generally Stephens, *supra* note 48.

Although there are still few United States judges who appear to consider transnational legal sources in their decisions, particularly concerning constitutional issues, American lawyers are hopeful. A growing number of American lawyers are going to human rights conferences, doing international work, and becoming familiar with the ways in which courts in other countries use international law or international human rights precedents in decision-making and in the development of new constitutions.⁵⁵ Like judges, they are meeting with their global counterparts and being exposed to new ideas. These lawyers are bringing this expertise back to their domestic work and are raising international human rights arguments in a number of settings, including death penalty,⁵⁶ labor,⁵⁷ immigration,⁵⁸ affirmative action, discrimination based on sexual orientation, as well as in scholarly articles in many fields.⁵⁹ Legal organizations like the ACLU and the ABA now have conferences on international law and international human rights, such as the ACLU Human Rights at Home: International Law in U.S. Courts Conference.⁶⁰ Additionally, local networks, like the Bringing Human Rights Home

55. See generally HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000) (providing an example of one lawyer's work on constitution-drafting in Eastern Europe).

56. See, e.g., Minnesota Advocates for Human Rights, Amicus Curiae Brief in Support of Petitioner Anthony Braden Bryan, *Bryan v. Moore*, 744 So. 2d 452 (Fla. 1999), cert. dismissed, 523 U.S. 1133 (2000), available at http://supreme.courtvt.findlaw.com/supreme_court/briefs/996723/996723fo1/brief/brief01.html (arguing that imposition of the death penalty by electric chair violates the International Covenant on Civil and Political Rights, of which the United States is a signatory).

57. See generally AFL-CIO Campaign for Global Fairness (Feb. 16, 2000), at <http://www.aflcio.org/aboutaflcio/ecouncil/ec02162000.cfm> (last visited Mar. 16, 2004).

58. See, e.g., Brief of Amici Curiae Human Rights Watch, Human Rights Advocates, et al. in Support of Respondent and Affirmance, *Reno v. Ma*, 531 U.S. 924 (2000) (No. 00-38) (arguing that respondent's detention in the United States constitutes arbitrary detention in violation of international human rights standards).

59. See generally e.g., Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 SANTA CLARA L. REV. 1041 (2002) (addressing application of international law in death penalty cases); Ginsburg & Merritt, *supra* note 20 (addressing international implications on affirmative action); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002) (addressing the United States' willingness to listen to international dialogue regarding the death penalty); Volpp, *supra* note 44 (concerning civil rights); Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1 (1999) (regarding children's rights).

60. This conference was held October 9-11, 2003. For information on this conference and documents distributed there, see *Human Rights at Home: International Law in U.S. Courts*, at <http://www.aclu.org/hrc> (last visited Mar. 12, 2004).

Lawyers Network are now resources for the use of transnational arguments in domestic litigation and law reform.⁶¹ Grassroots organizations, such as the Kensington Welfare Rights Union in Philadelphia,⁶² are beginning to utilize human rights frameworks. Members of these groups are attending international meetings, issuing reports, beginning to participate as amici curiae in U.S. domestic litigation, and bringing global perspectives to shape legislation. International human rights are even beginning to influence popular culture.⁶³

Of course, growing invocation of transnational sources by lawyers and consideration by judges does not solve the vexing questions of how these laws should be integrated into our complex system of federalism and what weight they should have, if considered. Different theoretical frameworks have been suggested. Catherine Powell argues for what she calls “dialogic federalism,” which is premised on intergovernmental cooperation and dialogue between national and subnational governments.⁶⁴ She claims that this approach would be particularly useful in determining whether and how

61. See *Bringing Human Rights Home Project*, at http://www.law.columbia.edu/cl/center_program/human_rights/research_scholar/BHRH (last visited Mar. 20, 2004).

62. The Kensington Welfare Rights Union (KWRU) “is a multi-racial organization of, by, and for poor and homeless people . . . dedicated to organizing of [sic] welfare recipients, the homeless, the working poor and all people concerned with economic justice.” Kensington Welfare Rights Union, *KWRU: Frequently Asked Questions*, at <http://www.kwru.org/kwru/kwrufaq.htm> (last visited Feb. 13, 2004). The three main goals of the KWRU are to speak to the issues that directly affect the lives of poor people, to help poor people receive what they need to survive and to organize a broad based movement to end poverty. See *id.* The KWRU joined with other economic rights organizations and filed a petition before the Inter-American Commission on Human Rights against the United States Government for human rights violations against the poor caused by the 1996 Welfare Reform Act.

63. The Alvin Ailey Company performed a ballet entitled “Apex” that was “dedicated to those who stand up for human dignity and freedom” in its Winter 2002 season in New York. Roberta E. Zlokower, *Notes and Review* (Dec. 8, 2002), at <http://www.exploredance.com/ailey12802.html> (last visited Feb. 13, 2004). The ballet, choreographed by Francesca Harper, had images and words concerning asylum. See *id.* Human rights activists are also using cultural media like documentary video to shed light on human rights abuses. See Asjlynn Loder, *Caldwell Focuses Video on Human Rights Abuses*, WOMEN’S E-NEWS, Mar. 1, 2004 (interviewing Gillian Caldwell, Executive Director of WITNESS, who describes her documentary video on sex slavery “Bought and Sold”), at <http://www.womensenews.org/article.cfm/dyn/aid/1733/context/journalistofthefirstmonth> (last visited Mar. 16, 2004). Human rights advocates are also using music and music videos. See Interview by New York University School of Law Office of Development and Alumni Relations with Malika Dutt, Executive Director, Breakthrough (describing the use of culture and media as tools for education on human rights), at <http://www.law.nyu.edu/alumni/almo/interview.html> (last visited Mar. 16, 2004).

64. Powell, *supra* note 25, at 249.

to incorporate international human rights approaches into national law,⁶⁵ and “facilitates the difficult process of working out how to convert abstract international law principles into concrete, workable domestic laws, and policies with national reach.”⁶⁶ Judith Resnik’s proposal for “multi-faceted federalism” resists strict categorization of the geographical source of legal claims, recognizing that “many categories are intertwined in lawmaking enterprises and that more than one source of legal regulation is likely to apply to any set of behaviors,”⁶⁷ and that many levels of law may be relevant to lawmaking, including “transnational” laws.⁶⁸ I do not critically engage with these issues here. My focus is simply that transnational sources are relevant and worthy of consideration; my goal is to encourage further exploration of these issues.⁶⁹

II. TRANSNATIONAL SOURCES AND THE UNITED STATES WOMEN’S RIGHTS MOVEMENT

Beginning in the late 1940s with the Universal Declaration of Human Rights,⁷⁰ the international community has enacted several treaties to protect women’s rights. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁷¹ the Declaration on the Elimination of Violence Against Women,⁷² and various other regional

65. *Id.* at 249-50.

66. *Id.* at 250.

67. Resnik, *Categorical Federalism*, *supra* note 36, at 622.

68. *Id.* at 623. See generally Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).

69. I leave systematic analysis of structural issues, how these sources should be used and the weight they should carry to another day. See, e.g., Davis, *supra* note 32, at 418 (arguing that international law should be viewed as persuasive, not controlling authority).

70. See generally *United Nations Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., art. 11(1), U.N. Doc. A/810, at 71 (1948), available at <http://www.un.org/Depts/dhl/resguide/resins> (last visited Feb. 13, 2004). This declaration provides for the general human rights of all people. See *id.*

71. See generally *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/180 (1979) (entered into force on Sept. 3, 1981), available at <http://www.un.org/documents/ga/res/34/a34res180.pdf> (last visited Feb. 13, 2004). CEDAW mandates that states take measures to eliminate discrimination against women in the following areas: public and political life, participation in government, retention of nationality, access to education, employment, health care, economic life, law, marriage and family relations, and trafficking and other forms of exploitation of women. See *id.*

72. See generally *Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/104 (1993), available at <http://www.un.org/documents/ga/res/48/a48r104.htm> (last visited Feb. 13, 2004). This declaration provides a wide definition of violence against women and

agreements,⁷³ address women's rights and the problem of violence against women. In 1994, a United Nations Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, was appointed. She has issued many reports on violence against women in countries around the globe.⁷⁴

The last twenty years has witnessed a proliferation of women's organizations both in this country and abroad that have focused on international human rights work. Although a long history of feminist internationalism exists and nineteenth-century feminists in this country looked to other countries for inspiration,⁷⁵ this work has exponentially increased. A series of important international human rights meetings have brought women around the globe in closer contact with each other, and led to the rallying cry for many feminists in the United States to, as Rhonda Copelon put it, "bring Beijing home."⁷⁶ In the United States, there has been an explosion of new organizations, or new programs within established human rights organizations, that now focus on women's international human rights, such as Equality Now,⁷⁷ Amnesty International Women's Human Rights Project,⁷⁸ Human Rights Watch,⁷⁹ Center for Women's Global Leadership,⁸⁰ National Center for Human Rights Education,⁸¹

categorizes such violence as a violation of women's human rights. *See id.*

73. *See* Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995) [hereinafter Inter-American Convention]. Inter-American Convention recognizes that "[e]very woman has the right to be free from violence in both the public and private spheres, . . . is entitled to the free and full exercise of civil, political, economic, social and cultural rights," and mandates that the states take measures to pursue policies that condemn and prevent such violence and discrimination against women. *Id.* at 1535-36. A full text of the Inter-American Convention is available at <http://www1.umn.edu/humanrts/instree/brazil1994.html> (last visited Feb. 13, 2004).

74. *See* United Nations High Commissioner for Human Rights, *Women's Rights Are Human Rights: Violence Against Women*, at <http://www.unhchr.ch/women/focus-violence.html> (last visited Feb. 13, 2004).

75. Jackson, *supra* note 3, at 378. *See generally* LEILA J. RUPP, *WORLDS OF WOMEN: THE MAKING OF THE INTERNATIONAL WOMEN'S MOVEMENT* (1997).

76. Rhonda Copelon, *Introduction: Bringing Beijing Home*, 21 *BROOK. J. INT'L L.* 599, 602 (1996).

77. For more information on Equality Now, see www.equalitynow.org (last visited Mar. 14, 2004).

78. For more information on Amnesty International Women's Human Rights Project, see www.amnestyusa.org/women/index.do (last visited Mar. 14, 2004).

79. For more information on Human Rights Watch, see www.hrw.org (last visited Mar. 14, 2004).

80. For more information on Center for Women's Global Leadership, see www.cwgl.rutgers.edu (last visited Mar. 14, 2004).

81. For more information on National Center for Human Rights Education, see www.nchre.org (last visited Mar. 14, 2004).

Women's Institute for Leadership Development for Human Rights,⁸² and Women's Environment and Development Organization (WEDO).⁸³ There are international human rights clinical programs that focus on women's human rights at law schools such as the City University of New York (CUNY) and Georgetown.⁸⁴ There are law school casebooks that address women's international human rights,⁸⁵ and there is considerable legal scholarship⁸⁶ and feminist literature⁸⁷ that address issues of women's international human rights. There are human rights forums that now publish colloquia on women's human rights.⁸⁸

82. For more information on Women's Institute for Leadership Development for Human Rights, see www.wildforhumanrights.org (last visited Mar. 14, 2004).

83. For more information on Women's Environment and Development Organization (WEDO), see www.wedo.org (last visited Mar. 16, 2004).

84. For a discussion of the importance of international human rights clinical programs and a description of some programs, see Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003).

85. For a discussion of the treatment of women's rights issues in United States law school casebooks on international human rights, see Stephanie Farrior, *The Rights of Women in International Human Rights Law Textbooks: Segregation, Integration or Omission*, 12 COLUM. J. GENDER & L. 587 (2003). For a discussion regarding inclusion of international and comparative materials in United States gender and law casebooks, see Linda K. Kerber, *Writing Our Own Rare Books*, 14 YALE J.L. & FEMINISM 429, 449-50 (2002).

86. For just a sampling of the richness of legal scholarship on women's international human rights, see Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL'Y & L. 865 (2003); Jackson, *supra* note 3; Merry, *supra* note 3; Resnik, *Categorical Federalism*, *supra* note 36; Davis, *supra* note 32; Carol C. Gould, *Women's Human Rights and the U.S. Constitution, Initiating a Dialogue*, in WOMEN AND THE U.S. CONSTITUTION: HISTORY, INTERPRETATION AND PRACTICE (Sibyl A. Schwarzenbach & Patricia Smith eds., 2003) [hereinafter WOMEN AND THE U.S. CONSTITUTION]; Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). See also the collections of edited articles in WOMEN'S RIGHTS, HUMAN RIGHTS (Julie Peters & Andrea Wolper eds., 1995); 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly D. Askin & Dorean M. Koenig eds., 1998); 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Dorean M. Koenig & Kelly D. Askin eds., 2000); 3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Dorean M. Koenig & Kelly D. Askin, eds., 2001).

87. Some recent examples include *Special Issue: Development Cultures: New Environments, New Realities, New Strategies*, 29 SIGNS 291 (2004); *Special Issue: Women, War and Peace*, 21 THE WOMEN'S REVIEW OF BOOKS 1 (2004); Cynthia Enloe, *Crucial Reporting: Human Rights Reports and Why We Should All Be Reading Them*, 21 THE WOMEN'S REVIEW OF BOOKS 21 (2004).

88. See, e.g., *Violence Against Women*, HUMAN RIGHTS DIALOGUE, Ser. 2, No. 10 (Fall 2003) and *Silence Breaking: The Women's Dimension of the Human Rights Box*, HUMAN RIGHTS DIALOGUE, Ser. 2, No. 4 (Summer 2000), published by the Carnegie Council on Ethics and International Affairs, available at <http://www.cceia.org/listpublications.php/prmPubTypeID/39> (last visited Mar. 15, 2004).

Why the interest in global perspectives? First, as already suggested, activists and lawyers have an increased understanding about globalization and its impact on women everywhere. The internet, international meetings, foreign travel and increased access to legal materials around the world have facilitated global contacts, information and influences. Another reason is that U.S. women's rights activists and lawyers recognize limits to women's rights legal reform in this country. Global perspectives provide cross-country critical insights, experiences and personal affiliations, and offer an opportunity to energize the women's rights movement.⁸⁹ They contribute important comparative insights that can change the language, the strategies and advocacy terrain. Especially for younger people, global perspectives may provide a "transformative" opportunity for women's rights.⁹⁰

In the United States, there have been some important successes but also some serious problems in the development of women's rights litigation. Although I have documented these problems in greater detail elsewhere,⁹¹ I will briefly mention some aspects. Despite continuing wage and occupational discrimination in the area of women's employment rights, "first generation" problems of overt discrimination and facial exclusion on the basis of sex are rare. There are, however, serious obstacles in reforming the more complex aspects of "second generation" gender-based litigation in employment and constitutional equality.⁹² Many national legal groups that

89. See generally Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345 (2002).

90. *Id.* at 361.

91. See SCHNEIDER, BATTERED WOMEN, *supra* note 5; Elizabeth M. Schneider, *Battered Women, Feminist Lawmaking, Privacy and Equality*, in WOMEN AND THE U.S. CONSTITUTION, *supra* note 86; Regina Austin & Elizabeth M. Schneider, *Speaking Volumes: Musings on the Issues of the Day, Inspired by the Memory of Mary Joe Frug*, 12 COLUM. J. GEN. & L. 660 (2003); Karen Engle et al., *Subversive Legal Moments*, 12 TEX. J. WOMEN & L. 197 (2003); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137 (2002); Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug's "Postmodern Feminist Legal Manifesto" Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1 (2001); Elizabeth M. Schneider, *Gender Bias, Cognition and Power in the Legal Academy*, 65 BROOK. L. REV. 1125 (1999); Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998); Deborah Brake et al., *Two Decades of Intermediate Scrutiny*, 6 AM. U. J. GENDER & L. 1 (1997); Kathleen Peratis et al., *Markets and Women's International Human Rights*, 25 BROOK. J. INT'L L. 141 (1999); Elizabeth M. Schneider, *A Postscript on VMI*, 6 AM. U. J. GENDER SOC. POL'Y & L. 59 (1997).

92. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Unlike "first generation" discrimination, which involved overt exclusion, segregation of opportunities, and conscious stereotyping, Sturm argues that "second generation" discrimination is much more subtle and

focus on women's rights, such as the NOW Legal Defense and Education Fund,⁹³ the ACLU Women's Rights Project,⁹⁴ and Equal Rights Advocates,⁹⁵ deal with a range of issues from employment discrimination to Title IX, and have won some important cases, but progress is slow. At the same time, many national reproductive rights organizations, such as the Center for Reproductive Rights,⁹⁶ Planned Parenthood,⁹⁷ NARAL Pro-

involve[s] social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. . . . The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other external governmental institutions) to articulate and enforce specific, across-the-board rules.

Id. at 460-61. Even sexual harassment is now understood as a deeply contested issue. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 206 (2003).

93. See NOW Legal Defense and Education Fund, *In the Forefront of Women's Equality: Thirty Years of Defining and Defending Women's Rights*, at <http://www.nowdef.org/html/about/index.shtml> (last visited Feb. 13, 2004). The "NOW Legal Defense [and Education] Fund pursues equality for women and girls in the workplace, the schools, the family and the courts, through litigation, education, and public information programs" and "also provides technical assistance to Congress and state legislatures, employs sophisticated media strategies, distributes up-to-the-minute fact sheets, and organizes national grassroots coalitions to promote and sustain broad-based advocacy for women's equality." *Id.* The NOW Legal Defense is also involved in litigating cases in the areas of violence against women, economic justice, education, reproductive rights, family law, gender discrimination, and protecting civil and political rights. See *id.*

94. See American Civil Liberties Union, *Women's Rights*, at <http://www.aclu.org/WomensRights/WomensRightsMain.cfm> (last visited Feb. 13, 2004). The ACLU's Women's Rights Project is dedicated to the advancement of the rights and interests of women, with a particular emphasis on issues affecting low-income women and women of color. The Project has been an active participant in virtually all of the major gender discrimination litigation in the Supreme Court, in congressional and public education efforts to remedy gender discrimination, and other endeavors on behalf of women. See *id.* The ACLU Women's Rights Project is involved in litigation in the areas of criminal justice, discrimination, violence, education, employment, poverty/welfare, and pregnancy/parenting. See *id.*

95. See Equal Rights Advocates, *About ERA*, at http://www.equalrights.org/about/about_era.asp (last visited Mar. 9, 2004). ERA's "mission [is] to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy." *Id.* ERA pursues impact litigation and other strategies such as legislation and education, and has specialized Legal Advocacy Projects in the areas of retail discrimination, tradeswomen's rights, higher education, high-tech sweatshops, and restaurant discrimination. See *id.*

96. For more information on the Center for Reproductive Rights, see <http://www.crlp.org> (last visited Mar. 14, 2004).

97. For more information on Planned Parenthood, see <http://www.plannedparenthood.org> (last visited Mar. 14, 2004).

Choice America⁹⁸ and the ACLU Reproductive Rights Project,⁹⁹ focus exclusively on women's reproductive rights, which is a deeply contested issue and faces constant and serious attack. While many national and local organizations around the country address violence against women and involve themselves in state and federal law reform efforts,¹⁰⁰ pro-criminalization efforts and resistance to understanding domestic violence in the context of gender equality have undermined some of the core principles that shaped early feminist work on violence.¹⁰¹ The United States Supreme Court's decision in *United States v. Morrison*,¹⁰² which held the civil rights remedy of the Violence Against Women Act (VAWA) unconstitutional on the ground that violence against women was a "local" problem, not a national one,¹⁰³ reflected these limits. Although Laura Bush criticized the treatment of women under the Taliban,¹⁰⁴ President Bush closed the White House Office on Women's Issues, an office created by President Clinton.¹⁰⁵

Historically, U.S. national organizations addressing women's rights have tended to work separately from international organizations working on similar issues. Dorothy Thomas has suggested several reasons for this division between domestic civil rights and international human rights advocacy. Thomas argues that historical resistance in the United States to international standards and scrutiny "has effectively shut down the human rights dimension of [United States] rights advocacy,"¹⁰⁶ that this resistance is the result of "persistent tensions in domestic women's and civil rights advocacy,"¹⁰⁷ tensions that arise from the broad-based indivisibility of civil, political, economic, social, and cultural rights that shape much of human rights work in the United States, in contrast with a civil rights approach.¹⁰⁸ She observes that "[d]ecades of isolationist U.S. policy have produced a bifurcated rights reality in the United States," one that implies

98. For more information on NARAL Pro-Choice America (formerly National Abortion and Reproductive Rights Action League), see <http://www.naral.org> (last visited Mar. 14, 2004).

99. For more information on the ACLU Reproductive Rights Project, see <http://www.aclu.org/ReproductiveRights> (last visited Mar. 14, 2004).

100. See SCHNEIDER, BATTERED WOMEN, *supra* note 5.

101. See *id.* at 196-98.

102. 529 U.S. 598 (2000).

103. *Id.* at 627.

104. See Maureen Dowd, *Cleopatra: Osama*, N.Y. TIMES, Nov. 18, 2001, § 4, at 13.

105. See Judy Mann, *Bush's Conservatism Shows Little Compassion*, WASH. POST, Apr. 11, 2001, at C15.

106. Thomas, *supra* note 38, at 1121-22.

107. *Id.*

108. *Id.* at 1122-23.

that “civil rights applies to ‘us’ and human rights to ‘them.’”¹⁰⁹

However, this dichotomy is beginning to change, partially as a result of greater participation of domestic women’s rights lawyers with activists in international conferences and projects. Some national organizations even have international departments; for example, the Center for Reproductive Rights in New York has maintained separate domestic and international units for several years.¹¹⁰ The Women’s Rights Network in Boston was established specifically to provide international resources for domestic violence programs in the United States.¹¹¹ Frustration with the complex problems associated with litigating women’s rights cases in this country and incrementalism, on the one hand, and the internationalization of domestic organizations, on the other, has challenged activists and lawyers to develop new international human rights arguments. The result: an increased use of international human rights arguments in domestic women’s rights litigation and increased campaigning to urge the United States to ratify CEDAW.

It is unclear what impact the consideration or integration of international perspectives could have on domestic lawmaking. Arguing for consideration

109. *Id.* at 1123.

110. See The Center for Reproductive Rights, *The Center for Reproductive Rights Worldwide*, at <http://www.crlp.org/worldwide.html> (last visited Feb. 13, 2004) (formerly, the Center for Reproductive Law and Policy). This center

engages in international, regional, and national-level advocacy, policy analysis, legal research, public education, and international litigation with the goal of advancing women’s equality throughout the world and ensuring that all women have access to a full range of freely chosen reproductive health services. In particular, this program seeks to ensure that national-, regional-, and international-level discussions of women’s reproductive rights occur within a human rights framework.

Id.

111. See Wellesley Centers for Women, *Women’s Rights Network (WRN)*, at <http://www.wcwoonline.org/wrn/index.html> (last visited Feb. 13, 2004). The WRN

is a non-governmental, non-profit international human rights organization that works to address the root causes of intimate partner abuse in the United States through the application of human rights principles, strategies and laws. At the same time, WRN seeks to create, sustain and mobilize an international network of women and men who are working to end intimate partner abuse and related human rights violations. Our overall aim is to help build a broad-based and diverse U.S. women’s human rights movement that is geared towards effecting lasting social change in this country and that also strengthens and has ties to the global women’s movement.

Id. As of October 1, 2003, the Women’s Rights Network is no longer running active projects, although a new Gender and Justice Project will be developed. *Id.* (last visited Mar. 12, 2004).

or integration does not guarantee any particular result. Some claim that introducing international human rights arguments and perspectives into domestic law has the potential to transform the very conceptual bases of the problems and issues that are presented and could lead to the reconceptualization of the way these problems are dealt within domestic courts.¹¹² For some activists and scholars, international human rights arguments challenge the framework of domestic rights-based arguments in several ways: they present a more indivisible perspective that relates economic and social and civil rights; they present a more intersectional perspective that links race, gender, ethnicity; they recognize a positive state responsibility with “strong substantive support for non-discrimination and social welfare and affirmative action initiatives;”¹¹³ and they challenge the Rehnquist Court’s view that the United States Constitution imposes only negative and no positive obligations on government.¹¹⁴

At a minimum, international human rights has the potential to offer new perspectives to “old” issues, or issues that appear to be “old” in this country. There are many examples. Many countries around the world now have more generous family leave and child care policies than the United States, and comparative perspectives are frequently used to attempt to shame United States policymakers.¹¹⁵ A recent book looks at sexual harassment from “Capitol Hill to the Sorbonne” and draws new insights from France for the American experience.¹¹⁶ Legal treatment of workers in the Maquiladoras, the United States manufacturing export zones in northern Mexico, has received considerable human rights attention, although in the United States most people consider issues of excluding pregnant workers from jobs on the ground of reproductive hazards in the workplace settled because it was litigated and argued in the 1970s in cases like *UAW v. Johnson Controls, Inc.*¹¹⁷ or *Oil, Chem. & Atomic Workers*

112. See generally Brooks, *supra* note 89; Rhonda Copelon, *The Possibilities in International Human Rights Law*, in *WOMEN’S RIGHTS IN THEORY AND PRACTICE: EMPLOYMENT, VIOLENCE AND POVERTY* 38 (2002).

113. Copelon, *The Possibilities in International Human Rights Law*, *supra* note 112, at 38.

114. See *id.*

115. See KATHARINE T. BARTLETT ET AL., *GENDER AND LAW: THEORY, DOCTRINE AND COMMENTARY* 355-57 (2002).

116. ABIGAIL C. SAGUY, *WHAT IS SEXUAL HARASSMENT? FROM CAPITOL HILL TO THE SORBONNE* (2003); see also Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003). For a critical American perspective on the development of sexual harassment law, see Schultz, *supra* note 92.

117. 499 U.S. 187 (1991).

*Int'l Union v. Am. Cyanamid Co.*¹¹⁸ Yet little has changed here in the United States; we have not had protests, activist efforts, litigation or public education concerning reproductive hazards in the workplace for many years. International human rights perspectives on this issue provide an opportunity to revitalize this issue domestically, and thus view the problem through a different lens. Finally, international human rights concern with the “honor” defense in Muslim countries to punish, kill or control women who have violated local gender norms can be viewed in light of the long history of the “heat of passion” defense in this country. The “heat of passion” defense has a long history: only a few years ago it was the basis for a Maryland judge’s expression of empathy for a man who killed his wife after finding her in bed with another man.¹¹⁹ Put simply, the U.S. judicial system can benefit from the internationalization and universalization of these problems that international human rights arguments and perspectives provide. As Vicki Jackson notes, comparison with other laws “can illuminate paths not taken and choices made that constitute a challenge” to United States perspectives.¹²⁰

Several recent attempts have been made to encourage the Supreme Court to consider international human rights standards in women’s rights cases. In an amicus brief in *Brzonkala v. Morrison*,¹²¹ a group of international law scholars and human rights experts put forth an extensive human rights argument in support of the federal civil rights cause of action provided by the Violence Against Women Act (VAWA).¹²² The brief focused on the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, arguing that the United States was obligated under this treaty to provide remedies for victims of gender-based violence.¹²³ They emphasized that Congress is authorized by the Constitution to enact laws to implement international treaties, such as the ICCPR. In a press release announcing the filing of the brief, Rhonda Copelon, co-author of the brief and Director of the International Women’s Human Rights Law Clinic at CUNY School of Law, expressed the importance of making these arguments:

The international legal recognition of gender violence, both official and private, as among the gravest human rights violations, as well as the

118. 741 F.2d 444 (D.C. Cir. 1984).

119. See *She Strays, He Shoots, Judge Winks*, N.Y. TIMES, Oct. 22, 1994, at A22.

120. Jackson, *supra* note 3, at 391.

121. 529 U.S. 598 (2000).

122. See Brief of Amici Curiae International Law Scholars and Human Rights Experts in Support of Petitioners, *Brzonkala v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-0005 and 99-0029).

123. See *id.*

participation of eminent international law scholars and human rights experts in this *amicus* brief are very significant developments. For the Court to recognize these international arguments would be a critical step in the process of implementing human rights in the United States, an idea whose time – 50 years after the signing of the Universal Declaration of Human Rights – has finally come.¹²⁴

International human rights arguments were also made in an *amicus* brief to the Court in *Nguyen v. INS*.¹²⁵ Equality Now submitted a brief urging the Court to consider customary international law in determining the constitutionality of the federal law at issue, which imposed requirements on United States citizen fathers seeking to transmit citizenship to their foreign-born children that were not similarly imposed on citizen mothers.¹²⁶ The *amici* brief also focused on the ICCPR and argued that the federal law in question was “incompatible” with this treaty.¹²⁷ This brief also included arguments under more general norms of international law, citing numerous human rights treaties, declarations, and conferences that the United States has not endorsed, but which contribute to a body of “customary international law.”¹²⁸ It also noted that many countries have prohibited discrimination on the basis of sex in their constitutions.¹²⁹

International human rights standards are being presented in lower court cases on women’s rights as well, and sometimes judges even invoke them in their decisions. In 2002, District Judge Jack Weinstein held that the Administration of Children’s Services’ (ACS) practice of removing children from the care of battered mothers solely because of domestic violence violated the constitutional rights of both the mothers and the children.¹³⁰ In his opinion, Judge Weinstein cited numerous international treaties in support of his holding that mothers and children have a constitutionally recognized liberty interest in familial integrity:

This interest is not only a fundamental value of American society and

124. Press Release, International Women’s Human Rights Law Clinic, City University of New York School of Law, *Prominent International Law Scholars and Human Rights Experts Urge Constitutionality of VAWA in Landmark Amicus Brief* (Jan. 11, 2000) (on file with author).

125. 533 U.S. 53 (2001).

126. See Brief of Amici Curiae Equality Now and Others in Support of Petitioners, *Nguyen v. INS*, 533 U.S. 53 (2001), reprinted in 10 S. CAL. REV. L. & WOMEN’S STUD. 377 (2001).

127. *Id.* at 397.

128. *Id.* at 400-01. The brief cites the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, CEDAW, the Convention on the Rights of the Child, and the four World Conferences on Women.

129. See *id.* at 401-02.

130. See *Nicholson v. Williams*, 203 F. Supp. 153, 262 (E.D.N.Y. 2002).

constitutional law, but also is protected by international law. International law instruments, of which the United States is a party and signatory, provide that the state must use extreme care when making decisions which could threaten familial integrity.¹³¹

On appeal in *Nicholson*, an amicus brief reasserted international human rights arguments offered in Judge Weinstein's decision. The New York Legal Assistance Group argued that battered women are a protected class under international human rights standards and that ACS's policy of removing their children "clearly disregards" these standards,¹³² although the Court of Appeals decision did not reach it.

Similarly, in *Sojourner A. v. The New Jersey Dept. of Human Services*,¹³³ a challenge to the constitutionality of the Child Exclusion "family cap" provision in New Jersey's welfare program under the New Jersey Constitution, an amicus brief was submitted to the New Jersey Supreme Court by the Center for Social and Economic Rights, The International Women's Rights Clinic at CUNY Law School and the Center for Constitutional Rights—although the court rejected this argument.

In addition to making arguments in women's rights cases in courts, activist lawyers have urged domestic application of international human rights standards in other fora as well. In 1998, Rhonda Copelon testified before the United States Commission on Civil Rights in a Briefing on International Human Rights Issues.¹³⁴ She discussed the various international treaties that include gender equity as a goal and highlighted three areas of women's inequality in the United States that could be addressed by integrating international standards into domestic law: gender-based violence, prisons and police practices, and economic and social conditions.¹³⁵ The most powerful example of how domestic law would change with references to and reliance on international human rights

131. *Id.* at 234. Not surprisingly, Judge Weinstein has written about the importance of international and comparative perspectives, emphasizing that "[w]e have much to learn from foreign legal systems and from the treaties and other sources of alternative law that have an increasing effect on the United States legal system and on individuals within the United States or under the control of our government." Jack B. Weinstein, *Proselytizers for our Rule of Law*, 28 *BROOK. J. INT'L L.* 675, 676 (2003).

132. Brief Amici Curiae of New York Legal Assistance Group, *Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003). The Second Circuit Court of Appeals decided to certify certain state questions to the New York Court of Appeals. *See Nicholson v. Scoppetta*, 344 F.3d 154, 158 (2d Cir. 2003).

133. 828 A.2d 306, 336 (N.J. 2003).

134. *See* Rhonda Copelon, Testimony before the U.S. Commission on Civil Rights, *The International Human Rights Foundations of Gender Equality in the U.S.* (Oct. 16, 1998) (on file with author).

135. *See id.*

standards came in the context of the Personal Responsibility and Work Reconciliation Act of 1996:

Under international law, the fact that the termination of this [federal welfare entitlements] program overwhelmingly affects women, mothers, disproportionately women of color implicates the Civil and Political Covenant, the Race Covenant, the Women's Convention, the principle against gender discrimination, and the Child Convention as well as the Social and Economic Covenant.¹³⁶

Copelon not only argued that the United States should consider international human rights norms in dealing with domestic problems, but also that the United States is *already* obligated to do so through the ratification of several international treaties, most of which include sections focusing on the protection of women.¹³⁷

On the state legislative level, the Battered Mothers' Testimony Project was developed in Massachusetts by the international human's rights group Women's Rights Network "to document and address the injustices inflicted on battered mothers and their children during family court child custody and visitation litigation."¹³⁸ It used "human rights fact-finding, qualitative research, advocacy and community organizing," and according to its website, was the "first human rights initiative to address child custody and domestic violence issues."¹³⁹ The website refers to the United Nations Declaration on the Elimination of Violence against Women, Articles 2 and 4, and to the United Nations Convention on the Rights of the Child as international sources for these arguments.¹⁴⁰

III. THE CEDAW RATIFICATION CAMPAIGN

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the United Nations General Assembly in 1979 and has since been ratified by 175 nations.¹⁴¹ CEDAW is the only comprehensive global treaty dealing exclusively with women's rights. CEDAW defines discrimination against women and provides detailed measures for member states to address and eliminate gender-based

136. *Id.*

137. *See id.* at 82-83.

138. Wellesley Centers for Women, Women's Rights Network (WRN), at <http://www.wcwonline.org/wrn/index.html> (last visited Mar. 15, 2004).

139. *Id.*

140. *See id.*

141. As of December 10, 2003, 175 member-states of the United Nations are parties to the Convention. *See* United Nations Division for the Advancement of Women, *State Parties*, at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Feb. 13, 2004).

discrimination.¹⁴² The United States participated in the drafting of CEDAW and signed it in 1980, but has failed to ratify the treaty.

Discrimination under CEDAW is “any distinction, exclusion or restriction” based on sex, that “has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women” of “human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field” on the “basis of equality of men and women.”¹⁴³ It requires states to “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation,”¹⁴⁴ to “modify or abolish existing laws, regulations, customs and practices” that discriminate against women,¹⁴⁵ “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise,”¹⁴⁶ and “to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”¹⁴⁷ Specific provisions address political rights,¹⁴⁸ education,¹⁴⁹ employment¹⁵⁰ and marriage,¹⁵¹ among others. CEDAW also requires states to take all appropriate measures to “modify . . . social and cultural patterns of conduct . . . 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.”¹⁵²

Enforcement of CEDAW is left to individual governments. The treaty grants no enforcement authority to the United Nations or any other international body. It requires only a periodic report and review process. Countries can also express “reservations, understandings and declarations” (RUDS) where domestic laws diverge from the treaty. To consider and review progress on CEDAW and roadblocks to implementation, the treaty established a Committee on the Elimination of Discrimination Against

142. See United Nations Division for the Advancement of Women, *Convention to Eliminate All Forms of Discrimination Against Women*, at <http://www.un.org/womenwatch/daw/cedaw> (last visited Nov. 8, 2003) (providing details about CEDAW).

143. Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, 16. See generally Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49 (1997).

144. CEDAW, 1249 U.N.T.S. 13, 16 (containing art. 2(a)).

145. *Id.* (containing art. 2(f)).

146. *Id.* (containing art. 2(e)).

147. *Id.* (containing art. 2(c)).

148. *Id.* at 17 (containing art. 7).

149. *Id.* at 17-18 (containing art. 10).

150. CEDAW, 1249 U.N.T.S. 13, 16 (containing art. 11(1)).

151. *Id.* at 20 (containing art. 16).

152. *Id.* at 17 (containing art. 5(a)).

Women (CEDAW Committee), composed of twenty-three experts who are elected by those countries that have ratified the treaty.¹⁵³ Members of the Committee serve for a term of four years and may be reelected.¹⁵⁴ Though nominated by their governments, the experts serve in their individual capacities and not as delegates or representatives of their country of origin.¹⁵⁵

Although there were many practical problems and obstacles to the Committee's work in the first ten years, it has since found "an authentic voice for women in the international arena."¹⁵⁶ In 1993, the United Nations allowed CEDAW to meet once a year for three weeks. This practice changed in 1997, and currently CEDAW meets for two three-week sessions each year.¹⁵⁷ Over the years, the scope of research and analysis on women's issues available to the Committee has improved; the Committee has developed productive relationships with NGO's, specialized agencies, and other organizations concerned with women's issues.¹⁵⁸

While CEDAW's enforcement mechanisms on state-parties are limited, CEDAW should be viewed in a larger context. Sally Merry, who has spent the last several years studying CEDAW and observing its sessions, argues that CEDAW has helped develop a new "global legality" with respect to women's rights.¹⁵⁹ The CEDAW Committee regularly hears reports from different countries, which generate important documentation about sex discrimination, as well as organizing and educating within and across countries. Women's NGO's have played an important role.¹⁶⁰ Since the United States has not ratified the treaty, it does not participate in this global process.

Over the last several years, there has been a campaign within the United States to ratify CEDAW. Prominent human rights advocates have supported CEDAW,¹⁶¹ and many national and international women's rights organizations have advocated for ratification by the United States, both

153. CEDAW website, Women's International League for Peace and Freedom (WILPF), at http://www.womenstreaty.org/facts_committee.htm (last visited Feb. 8, 2004).

154. *Id.*

155. *Id.*

156. Elizabeth Evatt, *Finding a Voice for Women's Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT'L L. REV. 515, 552 (2002).

157. *Id.*

158. *Id.*

159. See generally Merry, *supra* note 3.

160. Afra Afsharipour, Note, *Empowering Ourselves: The Role of Women's NGO's in the Enforcement of the Women's Convention*, 99 COLUM. L. REV. 129 (1999).

161. Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty [CEDAW]*, 34 CASE W. RES. J. INT'L L. 263 (2002) [hereinafter Koh, *Why America Should Ratify*].

individually and collectively. More than 100 national non-governmental organizations have collaborated to form The Working Group on Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (The Working Group).¹⁶² The Working Group encompasses a wide variety of organizations, including international human rights groups,¹⁶³ national women's organizations,¹⁶⁴ women's legal organizations,¹⁶⁵ religious organizations,¹⁶⁶ and others with varying missions.¹⁶⁷ The Working Group issued a comprehensive report in 2001 outlining the history of CEDAW, its provisions, and how ratification by the United States would affect women's rights domestically and internationally.¹⁶⁸

Supporters of CEDAW have advanced two reasons why the United States needs to ratify the treaty. First, they argue that ratification would force the United States government to more seriously address areas of discrimination against women in this country.¹⁶⁹ The Working Group report gives detailed examples of how CEDAW would help women in the United States.¹⁷⁰ The report argues that in order to comply with CEDAW, the United States would have to take concrete measures to address "occupational segregation, sex-based wage disparities, and sexual

162. See LEILA RASSEKH MILANI, *HUMAN RIGHTS FOR ALL* 44, 44-46 (2001) (providing a full list of collaborating organizations), available at <http://www.amnestyusa.org/cedaw/cedawbw.pdf> (last visited Feb. 13, 2004).

163. See *id.* Some of these organizations include Amnesty International USA, Global Commission to Fund the U.N., Guatemala Human Rights Commission, Human Rights Watch, International Women Judges Foundation, Lawyers Committee for Human Rights, and the Robert F. Kennedy Memorial Center for Human Rights.

164. See *id.* Some of these organizations include Family Violence Prevention Fund, Feminist Majority Foundation, Hadassah, League of Women Voters of the U.S., National Coalition Against Domestic Violence, Planned Parenthood Federation of America, and YWCA of the U.S.A.

165. See *id.* Some of these organizations include the Center for Reproductive Rights, NOW Legal Defense and Education Fund, and Women's Legal Defense Fund.

166. See *id.* Some of these organizations include the American Jewish Committee, Baha'i's of the United States, B'nai B'rith International, Catholics for a Free Choice, Church Women United, Evangelical Lutheran Church of America, Jewish Women International, Mennonite Central Committee, and Unitarian Universalist Service Committee.

167. See *id.* Some of these organizations include the AARP, American Bar Association, Ayuda, Bread for the World, Coalition on Religion and Ecology, Earthcommunity Center, Gray Panthers, Lambda Legal Defense and Education Fund, Inc., National Association of Social Workers, National Audubon Society, National Council of Negro Women, Sierra Club, Women of Indian Nations, and World Federalist Association.

168. See generally MILANI, *supra* note 162, at 6-19.

169. See *id.* at 26.

170. See *id.*

harassment in employment.”¹⁷¹ Implementing CEDAW would address violence against women and “encourage elimination of the pattern which is embedded in American society of violent behavior against women.”¹⁷² The Working Group also focuses on the problem of equal access to health care and argues that CEDAW would encourage the government to “take a more active role in eliminating inequalities that exist in the current health care system,” such as exclusion of women from medical research and insufficient health insurance.¹⁷³ The Working Group argues that since the United States has no laws prohibiting discrimination against women in political and governmental appointments, CEDAW could be used “to create measures that advance women’s integration into politics. Such efforts, undertaken by the government, could set a standard for inclusion of women in all decision-making levels in the private sector.”¹⁷⁴

However, some organizations supporting CEDAW take the position that United States domestic laws already comply with the treaty, and ratification would not require any change in existing laws. For example, Amnesty International USA argues that “[a]lthough U.S. law is already in compliance with most provisions of the convention, ratification by the United States would bolster international advocacy for women’s most basic human rights and help hold repressive governments accountable.”¹⁷⁵ Similarly, one of the “talking points” on CEDAW identified by the Family Violence Prevention Fund is that “[r]atification does not require any change in U.S. law and would be a powerful statement of our continuing commitment to ending discrimination and violence against women worldwide.”¹⁷⁶ Some supporters of CEDAW argue that downplaying the national significance of ratification is simply a political strategy to encourage the Senate to ratify.¹⁷⁷

171. *Id.* at 23.

172. *Id.* at 26.

173. *Id.* at 29-30.

174. See MILANI, *supra* note 162, at 37.

175. Statement by Amnesty International USA, to United States Senate Foreign Relations Committee 3 (June 13, 2002), available at <http://www.womenstreaty.org/Amnestystatement.pdf> (regarding *Treaty Doc. 96-53; Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on July 17, 1980: Hearing Before the Senate Comm. on Foreign Relations, 107th Cong. 87 (2002)*) [hereinafter *CEDAW Hearings*].

176. *Sample Messages on CEDAW Ratification: Talking Points*, FAMILY VIOLENCE PREVENTION FUND, July 16, 2002, at 2.

177. Rebecca Vesely, *U.N. Women’s Treaty Molds San Francisco Government*, WOMEN’S ENEWS, July 25, 2002, at <http://www.womensenews.org/article.cfm/dyn/aid/983/context/archive> (referring to a statement by Patricia Chang, President of the San Francisco Women’s Foundation).

The second reason given in support of ratification of CEDAW is that without United States support, the treaty lacks full force and effect, and will not be taken seriously around the globe. This argument is made in The Working Group report: “Women around the world need the United States to speak loudly and clearly in support of CEDAW so that it becomes a stronger instrument in support of their struggles. Without U.S. ratification, some other governments feel free to ignore CEDAW’s mandate and their obligations under it.”¹⁷⁸ In a statement to the United States Foreign Relations Committee, Amnesty International USA emphasized the need for U.S. leadership in this area:

By ratifying, the United States will be in a position to contribute to the development of the standards and procedures for effective implementation of this treaty around the world. It also would enable the United States to utilize the internationally agreed upon standards in CEDAW to urge other governments to end violence and discriminatory practices that deny women fundamental human rights. With U.S. support, the treaty can become a stronger instrument for the millions of women around the world who desperately need international protection. Women around the world look to the United States for leadership; until the U.S. ratifies, many governments will take their commitments less seriously.¹⁷⁹

The Women’s Rights Division of Human Rights Watch cautions that the United States cannot legitimately criticize practices in other nations without having ratified CEDAW: “Having not ratified CEDAW, United States intervention in support of women’s rights may be construed as ‘cultural imperialism’ or an ‘American’ agenda, as opposed to a rights-based approach.”¹⁸⁰ The Feminist Majority has focused on women in Afghanistan in its campaign for ratification, and argues that United States ratification of CEDAW is a necessary corollary to any intervention in this country.¹⁸¹

On June 13, 2002, the United States Senate Committee on Foreign Relations held a hearing on CEDAW. Numerous members of the House of

178. MILANI, *supra* note 162, at 7.

179. *CEDAW Hearings*, *supra* note 175, at 5.

180. Statement in Support of United States Senate Ratification of CEDAW by the Women’s Rights Division of Human Rights Watch, at <http://www.humanrightswatch.org/backgrounder/wrd/cedaw-statement.pdf> (June 13, 2002); see also Madhavi Sunder, *Why We Don’t Lead the World on Women’s Rights Issues: As Shown by an Unsigned Treaty, Not Cultural Imperialism*, FINDLAW, at http://writ.newsfindlaw.com/commentary/20021010_sunder.html (Oct. 10, 2002).

181. Feminist Majority, *Ratifying the U.N. Women’s Treaty . . . Winning Women’s Rights in Afghanistan*, at <http://www.feminist.org/global/cedaw.pdf> (last visited Mar. 9, 2004).

Representatives testified,¹⁸² as well as Harold Koh, former Assistant Secretary of State for Human Rights and Yale Law School professor, Juliette C. McLennan, former United States Representative to the United Nations Commission on the Status of Women, and Jane E. Smith, Chief Executive Officer of Business and Professional Women USA. These witnesses focused on two main justifications for United States ratification of CEDAW, to improve the status of women in this country and to combat discrimination against women internationally. Jane Smith listed a number of areas where women in the United States still face discrimination, including sexual harassment in the workforce and in schools, domestic violence, wage inequities, lack of adequate health insurance, inadequate access to child care, women's exclusion from medical research, and inadequate prenatal care for pregnant teenagers.¹⁸³ Representative Carolyn B. Maloney focused on discrimination in the workplace in the United States:

In January, my colleague Representative John Dingell and I released a report based on data from the General Accounting Office that compared the salaries of U.S. men and women in management. It found that men's pay remains higher than women's in virtually every field, and that in seven fields the gap has actually gotten worse since 1995. Other studies have found that the percentage of women in newspaper newsrooms has declined recently; that women scientists earn a third less than their male counterparts; and that large majorities of American women think the glass ceiling is very strong in their companies. Men seem to think it's only women's lack of experience that keeps them out of the executive suite, or that women prefer it that way. Women know better.¹⁸⁴

Representative Juanita Millender-McDonald emphasized the effects the ratification of the treaty could have on the problem of domestic violence:

While women in the United States can access legal protections against violent attackers, the fact is that incidents of violence remain high. Every year, about three million women are physically abused by their husband or boyfriend. Ratification of the Treaty for the Rights of Women would send a signal to perpetrators and victims alike that the

182. Carolyn B. Maloney (D-NY), Juanita Millender-McDonald (D-CA), Constance A. Morella (R-MD), and Lynn C. Woolsey (D-CA).

183. See Jane E. Smith, Chief Executive Officer of Business and Professional Women/USA, Testimony Before the United States Senate Committee on Foreign Relations (June 13, 2002), at http://www.bpwusa.org/Content/Policy/LegislativePriorities/CivilRights/CEO_Testimony.htm.

184. Press Release, Congresswoman Carolyn B. Maloney, Testimony to the United States Senate Committee on Foreign Relations (June 13, 2002), at <http://www.house.gov/maloney/press/107th/20020613cedaw.html>.

United States is serious about eliminating violence at home as well as abroad.¹⁸⁵

Witnesses also discussed the impact of ratification and nonratification on the international community. Harold Koh focused on this issue:

Our nonratification has led our allies and adversaries alike to challenge our claim of moral leadership in international human rights, a devastating challenge in this post-September 11 environment. Even more troubling, I have found, our exclusion from this treaty has provided anti-American diplomatic ammunition to countries who have exhibited far worse record on human rights generally, and women's rights in particular. Persisting in the aberrant practice of nonratification will only further our diplomatic isolation and inevitably harm our other United States foreign policy interests.¹⁸⁶

Representative Constance Morella also addressed this point, stating that ratification would "give us the credibility to be taken seriously on these issues when we advocate with foreign governments on behalf of human rights."¹⁸⁷ On July 30, 2002, the United States Senate Committee on Foreign Relations approved CEDAW and sent it to the full Senate for ratification.¹⁸⁸

Organizations have also advocated for ratification of CEDAW at a local level. The Women's Institute for Leadership Development for Human Rights (WILD) is an organization that provides human rights education, engages in public advocacy, and collaborates on the adoption and implementation of international human rights standards in the United

185. Statement, Congresswoman Juanita Millender-McDonald, Testimony in Support of the Senate Ratifying CEDAW (June 13, 2002), at http://www.house.gov/apps/list/speech/ca37_millender-mcdonald/cedaw.html (internal references omitted) (last visited Feb. 13, 2004).

186. Professor Harold Hongju Koh, Statement Regarding United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women Before United States Senate Foreign Relations Committee (June 13, 2002), available at http://www.law.yale.edu/outside/html/Public_Affairs/260/KohTestimony.pdf.

187. *CEDAW Hearings*, *supra* note 167, at 23 (statement of Hon. Constance A. Morella). Representative Morella also introduced the *Global Access and Investments for New Success for Women and Girls Act of 2002* (GAINS). See H.R. 4114, 107th Cong. (2002). This legislation calls for advancements with a particular focus on international women's development, poverty and economic equality, education, health care, agriculture, human rights, violence against women, peace building, leadership and participation, and environmental concerns. *Id.* It includes a provision to ratify CEDAW at a national level, and claims that numerous states endorse ratification and over 100 organizations support ratification of the treaty. *Id.* at § 604.

188. See James Dao, *Senate Panel Approves Treaty Banning Bias Against Women*, N.Y. TIMES, July 31, 2002, at A3.

States. WILD has been particularly involved in CEDAW ratification efforts, and emphasizes the importance of local ratification. Local ratification of human rights treaties is important because:

- It demonstrates to elected federal officials and the President how critical ratification and implementation of CEDAW are to women in the United States.
- Advocating under CEDAW allows us to combine all women's issues under the umbrella of human rights.
- Implementing human rights treaties brings the weight of international human rights into our communities. Further, enforcing such standards connects us to the global women's movement and provides us with mechanisms to adopt international success strategies and best practices here in the United States.¹⁸⁹

WILD encourages local ratification to address issues such as: access to health services, education, economic development, credit, and the right to work, violence by the state, in the community, and in the home, and the obligation of the state to counter stereotypical views of gender.¹⁹⁰ The organization also emphasizes the importance of the campaign for local ratification itself, regardless of whether it is successful: "[T]he public education and awareness arising out of advocating for local implementation of rights is almost as important as the actual product because it provides the means and skills to build a community based upon respect and protection of human dignity."¹⁹¹ WILD stresses that the enactment of a local ordinance implementing CEDAW should not be the end, but rather the means to local human rights work.¹⁹² The organization developed a guide for community organizers outlining how to start and maintain a campaign for local ratification of CEDAW, including how to build partnerships with city departments and community groups and how to conduct public hearings.¹⁹³

In 1998, San Francisco became the first city to enact a city ordinance implementing the principles underlying CEDAW.¹⁹⁴ The ordinance

189. Women's Institute for Leadership Development for Human Rights, *Local Implementation of the UN Convention on the Elimination of All Forms of Discrimination Against Women (1999)*, at http://www.wildforhumanrights.org/local_implement%20paper.html (last visited Mar. 9, 2004).

190. *See id.*

191. *Id.*

192. *See id.*

193. *See id.*

194. *See* Press Release, "Mayor Signs Historic Legislation Implementing International Women's Convention Within City," Women's Institute for Leadership Development for

requires the city to take measures to eliminate discrimination against women and girls in employment and economic opportunities,¹⁹⁵ to prevent and redress sexual and domestic violence,¹⁹⁶ and to eliminate discrimination in the healthcare field to ensure access to adequate care.¹⁹⁷ The Commission on the Status of Women is required to conduct gender analyses on selected city departments and to develop an Action Plan that contains specific recommendations on how deficiencies in these departments will be rectified.¹⁹⁸ The ordinance also creates a Task Force to advise the Mayor and others about the implementation of CEDAW.¹⁹⁹ Since the enactment of this ordinance, the San Francisco Commission on the Status of Women has also advocated for national ratification of CEDAW.²⁰⁰

While few cities have enacted ordinances like that in San Francisco, many states, cities, and counties have passed resolutions urging national ratification of the treaty.²⁰¹ Los Angeles passed a resolution on March 15, 2000, which stated that “the principles of CEDAW [would] be adopted and included as a part of the city’s ongoing federal and state legislative program,”²⁰² that the city would “not discriminate against women and girls in the areas of employment practices, allocation of funding, and delivery of direct and indirect services,” and that the city urged the United States Senate to ratify CEDAW.²⁰³ In New York City, women’s rights activists

Human Rights, (April 14, 1998), at http://www.wildforhumanrights.org/cedaw_press_release.html (last visited Mar. 9, 2004).

195. See SAN FRANCISCO, CAL. ADMIN. CODE, ch. 12K.3(a)(1) (2000), at <http://www.amlegal.com/sanfran/viewcode.htm> (last visited Mar. 22, 2003). See generally SAN FRANCISCO CEDAW TASK FORCE/COMMISSION ON THE STATUS OF WOMEN, GUIDELINES FOR A GENDER ANALYSIS: HUMAN RIGHTS WITH A GENDER PERSPECTIVE, at <http://www.ci.sf.ca.us/site/uploadedfiles/cosw/cedaw/guidelines.pdf> (last visited Mar. 9, 2004).

196. See SAN FRANCISCO, CAL. ADMIN. CODE, ch. 12K.3(b)(1), at www.amlegal.com/sanfran/viewcode.htm (last visited Mar. 22, 2003).

197. See ch. 12K.3(c)(1).

198. See ch. 12K.4(b).

199. See ch. 12K.5(b).

200. See Press Release, San Francisco Commission on the Status of Women, *Statement on the U.S. Ratification of CEDAW* (June 13, 2002) at http://www.sfgov.org/site/cosw_index.asp?id=10794. (last visited Mar. 12, 2004).

201. These cities include Chicago, Louisville, Madison, Milwaukee, New York, Philadelphia, Pittsburgh, San Diego, Spokane, among others. Women’s Institute for Leadership Development for Human Rights, *CEDAW Around the U.S.*, at http://www.wildforhumanrights.org/cedaw_around_us.html (last visited Mar. 12, 2004).

202. *Id.*

203. Los Angeles City Resolution in Support of CEDAW (Mar. 15, 2000), at <http://www.ci.la.ca.us/csw/html/cswpgE3d.htm>.

and lawyers are developing a New York City Human Rights Initiative, a model ordinance that would draw on aspects of CEDAW and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).²⁰⁴ This initiative would set forth local human rights principles drawn from CERD and CEDAW as goals the city aspires to achieve, and would define processes the city would have to follow to integrate human rights principles into all of its programs, policies, and budget considerations. The ordinance would require the city to train personnel in human rights, to undertake a Local Human Rights Analysis of the operations of each department, program and entity, and to create Human Rights Action Plans. It would also present “an opportunity for community organizing and public education about human rights principles.”²⁰⁵

The CEDAW ratification campaign is significant for several reasons. First, the campaign presents an opportunity to organize around a positive vision of women’s rights. It is a treaty which, as Harold Koh puts it, “is drafted with the reality of women’s lives in mind”²⁰⁶ and “focuses particularly upon the economic, social and cultural areas in which women suffer the most.”²⁰⁷ CEDAW differs dramatically from the United States constitutional provisions concerning gender equality.²⁰⁸ CEDAW is “specific, asymmetric, extended to private action and positive rights, and culturally aspirational,”²⁰⁹ provides a vision of substantive equality that goes further than United States equality provisions,²¹⁰ and would provide an important supplement to the United States’ constitutional system.²¹¹ Advocates argue that it is not simply symbolic and is different in this regard from, for example, the federal Equal Rights Amendment. Rhonda Copelon observes that “[o]ne of the problems with the proposed federal Equal Rights Amendment was that not enough people could see something in it for themselves. For them, it was very abstract, and the coalitions that

204. Namita Luthra, Staff Attorney, ACLU Women’s Rights Project, *Description of the Proposed New York City Human Rights Initiative* (on file with author). This initiative is being coordinated by the ACLU, Amnesty International, NOW-LDEF, the Urban Justice Center, and the Women of Color Policy Network.

205. *Id.*

206. Koh, *Why America Should Ratify*, *supra* note 161, at 266.

207. *Id.*

208. Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 762 (2002).

209. *Id.* Sullivan observes that in contrast to CEDAW, “American constitutional law operates under strong conventions of constraint to general norms of formal equality, interpreted, against state rather than private action, to promote negative not positive rights, that are capable of administrable judicial enforcement.” *Id.*

210. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST THEORY* 110-13 (2d ed. 2003).

211. Sullivan, *supra* note 179, at 762.

supported it were narrow. CEDAW is not perfect but it is concrete and far-reaching.”²¹² Finally, the campaign presents an opportunity for American advocates to organize, document gender discrimination, educate about women’s rights, and link their domestic efforts to global efforts on women’s rights. It gives women’s rights activists in the United States a concrete focus—local organizing with global connections. The CEDAW documentation process in the United Nations is an important organizing and information-gathering opportunity for women’s groups around the globe to assess and measure progress on issues of gender. Joining CEDAW would provide an important opportunity for American women’s rights activists to participate in this global movement, using it to help shape legislative policy and legal strategies here.²¹³

IV. SOME FINAL THOUGHTS

The burgeoning development of a transnational framework for women’s rights, both in legal arguments and in the CEDAW campaign, provides an important supplement to ongoing women’s rights litigation and advocacy efforts in this country. By actively encouraging a broader and more universal human rights framework, women’s rights advocates have begun to think globally and act locally. Moving our thinking about law and law reform beyond our borders is an important shift in humility for American lawyers and judges generally. Women’s rights activists and lawyers in the United States are beginning to recognize that we can and should learn from other countries’ experiences and not see the United States as the center.

In the litigation and law reform context, transnational sources of law open the United States up to experiences and perspectives of the world’s communities. The process of judicial consideration and recognition of these sources as relevant is an important first step. Joining CEDAW and becoming part of a global dialogue, solidifies our link with countries around the world, and provides an important forum for the new “global legality”: the network of NGO’s, and advocates who can strategize and brainstorm internationally. Neither the use of transnational law and legal norms nor the ratification of CEDAW provides simple answers for women’s rights struggles in the United States and preordains conclusions. But these legal constructs offer an important resource for changing our thinking, educating, organizing, documenting, and yes, even changing the law.

212. Copelon, *The Possibilities in International Human Rights Law*, *supra* note 112, at 44.

213. *See generally* Merry, *supra* note 3.

