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## Theoretical Perspectives on Women's Human Rights and Strategies for Their Implementation

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# THEORETICAL PERSPECTIVES ON WOMEN'S HUMAN RIGHTS AND STRATE- GIES FOR THEIR IMPLEMENTATION

*Kathleen Mahoney\**

## I. INTRODUCTION

"No country in the world treats its women as well as its men."<sup>1</sup> Systemic and widespread inequality and discrimination, often embedded in the national laws of countries, creates double jeopardy and double standards for women from all social classes, cultures, and races, in all societies.<sup>2</sup>

What constitutes equality for women and how they can achieve it, are questions at the heart of the feminist legal project. Any attempt to use the legal system to combat inequality must begin with an evaluation and understanding of its theoretical underpinnings which address the relationship between equality and the sexual and social differences between women and men. But the voices of mainstream legal theory, for most of history, have been exclusively male voices.<sup>3</sup> For those fa-

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1. AMNESTY INTERNATIONAL, HUMAN RIGHTS ARE WOMEN'S RIGHTS 85 (1995).

2. For an analysis of the history of women's political, cultural, physical, and economic repression in the global society, see MARILYN FRENCH, THE WAR AGAINST WOMEN (1992). See generally AMNESTY INTERNATIONAL, *supra* note 1; CHARLOTTE BUNCH, BRINGING THE GLOBAL HOME: FEMINISM IN THE '80S (1985); EMPOWERMENT AND THE LAW: STRATEGIES OF THIRD WORLD WOMEN (Margaret Schuler ed., 1986); MARILYN FRENCH, BEYOND POWER: ON WOMEN, MEN, AND MORALS (1985) [hereinafter FRENCH, BEYOND POWER]; LATIN AMERICAN COMMITTEE FOR THE DEFENCE OF WOMEN'S RIGHTS, WOMEN: WATCHED AND PUNISHED (1993); MARIA MIES, PATRIARCHY AND ACCUMULATION ON A WORLD SCALE: WOMEN IN THE INTERNATIONAL DIVISION OF LABOUR (1986); SISTERHOOD IS GLOBAL (Robin Morgan ed., 1984); UNITED NATIONS, THE WORLD'S WOMEN 1970-1990: TRENDS AND STATISTICS (1991); MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS (1988).

3. For example, the list of "great law-givers" who over the centuries contributed to the growth of law in many nations include: Hammurabi (1950 B.C., Babylon); Moses (13th Century B.C., Egypt); Confucius (551-479 B.C., China); Justinian (483-565 A.D., Roman Empire); Mohammed (570-632 A.D., Arabia); Grotius (1583-1645 A.D., Holland); Napoleon (1769-1821 A.D., France); Menes (3100 B.C., Egypt); Solomon (973-933 B.C., Israel); Lycurgus (9th Century B.C., Greece); Draco (7th Century B.C., Greece); Solon (600 B.C., Greece); Augustus (63 B.C.-14 A.D., Roman Empire); St. Louis (1214-1270 A.D., France); Blackstone (1723-1780 A.D., England); John Marshall (1755-1835 A.D., U.S.A.). GERALD GALL, THE CANADIAN LEGAL SYSTEM 32-33 (3d ed. 1990).

miliar with the law, this fact is not surprising. All of the institutions of the law, whether they be law schools, legislatures, the judiciary, law enforcement agencies, or the bar, have been almost exclusively male up until the most recent times. As a result, laws have been made, interpreted, and enforced by men, and their theoretical explanations are creations of the male imagination.

The absence of female perceptions left foundational reflections on the purpose, nature, and concept of law biased, incomplete, and sometimes even inept in dealing with, explaining or comprehending the reality of life for most people. For centuries, this was unnoticed, because the dominant male view has been so complete and unremitting that it has become accepted as neutral and objective. Theories of human development are never more limited or limiting when their biases are invisible and the vital contribution feminist legal theory performs is to illuminate some of the deepest biases of all.

For the past several decades, feminist legal theorists have been attempting to address theoretical bias in the midst of the massive social, economic, and cultural changes of the twentieth century. Not surprisingly, there are a variety of explanations.<sup>4</sup> When basic societal structures previously taken for granted are themselves undergoing fundamental change, not only does rethinking the role of law in a gendered society often defy conventional legal categorization, but it is also surprising there is any consistency at all.

Feminist theories often overlap, and many are not yet fully formed or complete. Some are difficult to define, others tend to affect or alter one another. While they may differ in their analyses of power and in their suggested strategies of action, divisions are seldom exclusive. All seem cumulatively to grow and evolve as feminine awareness grows and develops.

A continuous ideological thread of feminist theory through time and across continents is the common understanding that male power is linked to the subjugation and servitude of women in the home. As a result, feminist theories share a much different definition of what is political than theories developed from the male perspective. Male theorists from Aristotle to

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4. For a thorough discussion of feminist theories and the history of their development, see ROSEMARIE TONG, *FEMINIST THOUGHT* (Routledge 1992) (1989).

Locke have always understood "political" to mean matters in the public domain. To them, the private domain, namely the home, is beyond politics.<sup>5</sup>

Feminist theorists, on the other hand, see the private realm as the heart of politics.<sup>6</sup> The most distinctive slogan of the post-1968 women's movement, "The personal is political," derives from this view.<sup>7</sup> To feminists of all stripes, there is little difference between the relationship of the citizen to government in exercising judgment and making laws, and the father and husband who govern from "natural" authority. One is every bit as political as the other. In this way, feminism has implicitly and explicitly constituted a new definition of what is political.

In Part II of this paper, four feminist theories of equality—liberal feminism, cultural feminism, radical feminism, and post-modern feminism—are explained.<sup>8</sup> Their origins, development, and relevance to women's rights as human rights are discussed. Each theory has significant value for women's fight against oppression, but some are more effective and relevant than others. It is also apparent, however, that none of the theories are the whole answer or are completely discreet from one another. There appears to be a process of evolution occurring in which the remedies and applications blend.

Decisions of the Supreme Court of Canada, which since 1982 has used feminist theory more than any other court in the world, are used to explain or exemplify how some feminist arguments and theories have been translated into law.<sup>9</sup> These decisions provide the reader with an appreciation of how feminist theories can succeed or fail in practice, how legal arguments can be made, and the strengths and weaknesses of the different approaches.

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5. Sarah Benton, *Feminism*, in IDEAS THAT SHAPE POLITICS 78, 81 (Michael Foley ed., 1994).

6. *Id.*

7. Carol Hanish was one of the first to use the term in her 1971 essay, *The Personal, is Political*. *Id.* at 81.

8. These theories were chosen because until now they appear to have had the most influence on the law. Many other theories of feminism exist which could be discussed, including Marxist feminism, Psychoanalytic feminism, Socialist feminism, Eco feminism, and Existentialist feminism. The limits of this paper, however, do not permit their coverage.

9. See *infra* notes 63, 71, 85, 97, 124, 150 and accompanying text.

Part III of the paper deals with women's rights as human rights in international law. It explains the international instruments designed to protect women's rights, problems associated with them, and recent attempts at reform. Part III demonstrates that strategies at the international level are theoretically grounded in the four theories discussed in Part II and evaluates and explains them.

## II. FEMINIST THEORIES

### A. *Liberal Feminism*

The classic formulation of liberal feminism is found in Mary Wollstonecraft's *A Vindication of the Rights of Women*<sup>10</sup> and in John Stuart Mill's *The Subjection of Women*.<sup>11</sup> The starting point of liberal feminist theory is the understanding that women are in fact the same as men, and therefore equal to men. Women are autonomous individuals who should be as free as men to choose their own life plans and have their freedom equally respected by the state. Liberal feminists say the relationship of the state to the individual must be the same for both women and men and that the root of female subordination is in customary and legal constraints that block women's entrance into and/or success in the public world. To be equal, women must have more choices.<sup>12</sup>

#### 1. The Meaning of Equality

In the legal realm, a dominant doctrinal issue discussed by early liberal feminists was how broad the scope of the equality concept should be. The legal exclusion of women from participation in public life, including in the academy, politics, and the marketplace, led liberal feminists to adopt a sex-blind posture. They believed if legislatures understood women to be similarly situated to men, they would not be able to treat women differ-

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10. MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMEN* (Prometheus 1989) (1792).

11. John Stuart Mill, *The Subjection of Women*, in JOHN STUART MILL & HARRIET TAYLOR MILL, *ESSAYS ON SEX EQUALITY* 125, 184-85 (Alice S. Rossi ed., 1970).

12. See, e.g., Mary Eberts, *Sex-Based Discrimination and the Charter*, in *EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 183 (Anne Bayefsky & Mary Eberts eds., 1985).

ently. As a result, they concentrated on dismantling legal barriers which prevented women from being treated like men in the public sphere. To accomplish this goal, they thought gender-neutral rules, providing equal opportunity to participate in the legal system and equal benefit of the law, would suffice. Known as the formal equality approach, early liberal feminists used it successfully to attain legislation granting women the right to vote, to hold public office, to participate in the professions, to hold, use, and enjoy property on the same basis as men during and outside of marriage, and to have equal custody and guardianship of their children.<sup>13</sup>

One of the most important victories for formal equality was the legal challenge Canadian feminists made to their exclusion from the Senate of Canada. The case, *Edwards v. Attorney General of Canada*,<sup>14</sup> was the last in a series of cases in Great Britain, the United States, Canada,<sup>15</sup> and Australia<sup>16</sup> which challenged the fact that women were denied the right to vote, hold office, or take part in the legal profession because such activities statutorily required participants to be "persons."<sup>17</sup> Women were excluded because the judicial interpretation of "persons" excluded women. On an appeal from Canada's highest court to the Privy Council in England, the British Court held that women could be appointed to the Senate because they were "persons" as much as men.<sup>18</sup>

Although *Edwards* was a landmark case for women's equality, equal treatment for women within existing law has its drawbacks.<sup>19</sup> Often the sex-blind postures women are required to adopt in order to demonstrate they are the same as men are contorted and unconvincing. In addition, the vocabulary, epistemology, and political theory of the status quo does not comprehend the kind of equality women really need.

13. *Id.* at 184-87.

14. [1930] 1 D.L.R. 98 (P.C.) (Can.).

15. Eberts, *supra* note 12, at 185 n.4 (citing cases from Great Britain, United States, and Canada).

16. *Re Kitson*, [1920] S.A.S.R. 230, 231-32, 236-37 (Austl.); *Re Edith Hayes*, 6 W.A.L.R. 209, 213-14 (1904) (Austl.); *Ex Parte Ogden*, 16 N.W.S.L.R. 86, 88 (1893) (Austl.).

17. *Edwards v. Attorney General of Canada*, [1930] 1 D.L.R. 98 (P.C.) (Can.).

18. *Id.* at 99.

19. Hilary Charlesworth, *What are "Women's International Human Rights"?*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 58 (Rebecca Cook ed., 1994) [hereinafter *HUMAN RIGHTS OF WOMEN*].

Like other liberal ideologies, liberal feminism emphasizes individual rights (constitutional and property-owning) as the measure of well-being. Aspects of life which cannot be ordered into these categories, such as the domain of equal opportunity, are seen as beyond the reach of the liberal philosophy of law. This means that no consideration can be given to the fact that a right to hold and use property is irrelevant if women have no economic opportunities to acquire it in the first place.<sup>20</sup> Although liberal feminism stresses that the individual woman must realize her "true self" by rejecting rigid sexual roles, the intrinsic differences between women and men are discounted. This concept has led some critics to say liberalism's preference for "abstract rights" and individual rights is really a veiled protection of male privilege.<sup>21</sup>

The emphasis on individual rights leads to the further misunderstanding that discrimination is individualized and isolated behavior. Structural injustices are not examined because the concepts supporting formal equality start from the fundamental assumption that basic institutions of society are fair. Formal equality cannot address systematic issues such as the fact that women continue to be underrepresented in the professions, in politics, and in the judiciary, that women rather than men will perform unpaid work in the home, and that child care facilities and economic opportunities outside the home are often unavailable. Similarly, the organizational structure of the labor market designed to employ women in low paying and low status occupational job ghettos while reserving better paying jobs and professional occupations for workers who do not have family responsibilities, cannot be challenged as a form of discrimination. Remedies such as rearrangements of the work week, part-time employment, affirmative programs to encourage occupational desegregation, and child rearing support that is affordable, are beyond formal equality's ability to deliver.<sup>22</sup> Blindness to institutionally structured male privilege and female disadvantage limits the usefulness and effectiveness of formal equality.

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20. Eberts, *supra* note 12, at 186.

21. Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, in *FEMINIST JURISPRUDENCE* 610, 610-19 (Patricia Smith ed., 1993).

22. Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Women*, 59 B.U. L. REV. 55, 94-103 (1979).

## 2. The Male Normative Standard

Within a male-defined jurisprudence, the principles and goals of formal equality can be thwarted. The Aristotelian principle which underlies formal equality asserts that everyone must be treated the same if they are the same. But then the question is, the same as who? This question is important because the normative standard determines the scope of any equality claims. In practice, the dominant group is the norm. In every society existing in the world today, the dominant group, regardless of race, religion or ethnicity, is a male group. In the result, male experience defines the scope of the equality principle.

When women are compared to men, their opportunity to be treated as equal is limited to the extent that they are the same as men. This standard of comparison severely limits and circumscribes women's equality claims. Issues such as pregnancy discrimination, rape, sexual harassment, wife abuse, prostitution, and pornography fall outside equality considerations because men have no comparable need. The similarly situated test is not met and thus, there is no legal basis for complaint. In other words, "[i]f men don't need it, women don't get it."<sup>23</sup> Many legally sanctioned abuses women suffer are not considered equality issues at all. In this way, the formal equality theory effectively works to obscure the systemic, historically embedded, disadvantaged status of women.

## 3. Judicial Treatment of Liberal Feminism

The problems with using sameness and difference as the test for discrimination in a male dominated legal system are exemplified in the Canadian Supreme Court's decision in *Attorney General of Canada v. Lavell*.<sup>24</sup> In this case, two aboriginal women challenged the Indian Act<sup>25</sup> for disqualifying them from their statutory Indian status when they married outside their race.<sup>26</sup> Some of the consequences of losing their

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23. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1987).

24. 1974 S.C.R. 1349 (Can.).

25. Indian Act, R.S.C., ch. I-6 (1970) (Can.).

26. The Indian Act provides: "The following persons are not entitled to be registered [as Indians], namely . . . (b) a woman who married a person who is not



status included having to leave their reserve, not being allowed to own property on the reserve, being required to dispose of any property held up to the time of their marriage, being prevented from inheriting property, and taking no further part in band business.<sup>27</sup> Because their children were not recognized as Indian, they too were denied all of the cultural and social amenities of the native community. The women could also be prevented from returning to live with their families on the reserve notwithstanding dire need, illness, widowhood, divorce, or separation.<sup>28</sup> The effects even reached beyond life since they could not be buried on the reserve with their ancestors.<sup>29</sup>

The challenge of sex discrimination was made because the legislation exempted from similar disqualification Indian males who married non-Indian women. Upon marrying non-Indian women, males not only retained their Indian status, the legislation automatically conferred full Indian rights and status on their non-Indian wives and children.<sup>30</sup> When the claim was put before the Supreme Court of Canada, it found there was no sex discrimination in the legislation.<sup>31</sup> The Court held that Indian women were not the same as Indian men and could not be compared to them.<sup>32</sup> As long as all Indian women were treated in the same way, there was no violation of "equality before the law" as guaranteed in the Canadian Bill of Rights.<sup>33</sup> The judges interpreted equality to guarantee only procedural, not substantive, equality, and the sameness test was considered procedural.<sup>34</sup>

The arbitrary use of maleness as the standard of comparison to determine the legitimacy of different treatment in the *Lavell* case demonstrates how formal equality fails as an effective tool. Its fundamental flaw is its unprincipled approach to deciding what constitutes sameness or difference. In the *Lavell*

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an Indian . . . ." *Id.* § 12(1)(b).

27. KATHLEEN JAMIESON, *INDIAN WOMEN AND THE LAW IN CANADA: CITIZENS MINUS 1* (1978).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Attorney General of Canada v. Lavell*, 1974 S.C.R. 1349, 1350 (Can.). For a detailed discussion of the *Lavell* case, see JAMIESON, *supra* note 27, at 79-88.

32. *Lavell*, 1974 S.C.R. at 1372.

33. *Id.* at 1366; see Canadian Bill of Rights, 8 & 9 Eliz. 2, ch. 44 (1960), R.S.C., App. III (1970).

34. *Lavell*, 1974 S.C.R. at 1373.

case, the mere difference of gender excluded women from the same treatment as men. No defensible rationale was provided for choosing the male standard.

A similar result occurred in a case involving sex discrimination on the basis of pregnancy. In *Bliss v. Attorney General of Canada*,<sup>35</sup> the Court was asked to consider the validity of a legislated benefit provision, the Unemployment Insurance Act.<sup>36</sup> This Act required that before an unemployed pregnant woman could qualify for maternity benefits, she must have been employed for ten weeks.<sup>37</sup> At the same time, qualifications for unemployment benefits were less demanding for men and non-pregnant women. The differential treatment of pregnant women was particularly disadvantageous because women in the fifteen weeks immediately surrounding the birth were barred from receiving ordinary benefits,<sup>38</sup> even if they were able and willing to work.

When this inequality was challenged, the Supreme Court refused to strike down the discriminatory benefits provision because it could find no breach of the equality guarantee.<sup>39</sup> Instead, the Court came to the bizarre conclusion that discriminatory treatment of pregnant women was not discrimination on the basis of sex.<sup>40</sup> A comparable application in the disability and race context would prohibit discrimination against the blind or against Sikhs, but would not prohibit discrimination against guide dogs or the wearing of turbans.<sup>41</sup> The exact words in the judgment are as follows:

Assuming the respondent to have been "discriminated against," it would not have been by reason of her sex. Section 46 applies to women, it has no application to women who are not pregnant, and it has no application, of course, to men. *If s[ection] 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.*<sup>42</sup>

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35. *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 (Can.).

36. Unemployment Insurance Act, ch. 48, 1970-1972 S.C. 981 (Can.).

37. *Id.* § 30(1).

38. *Id.* § 46.

39. *Bliss*, [1979] 1 S.C.R. at 184.

40. *Id.*

41. DALE GIBSON, *THE LAW OF THE CHARTER: EQUALITY RIGHTS* 31 (1990).

42. *Bliss*, [1979] 1 S.C.R. at 190-91 (quoting the opinion of Pratte, J., in a

The *Bliss* decision demonstrates that the male normative standard cannot take into account the specificity and differences of women's lives. Excluding pregnancy as a component of sex limits equality rights for women to the ways they are the same as men. Because men do not get pregnant, any adverse treatment a woman may receive because of her pregnancy can never qualify as discrimination. Use of the male standard further influenced the Court's decision when it said that any benefits or positive rights conferred by statute were not subject to the equality protections because the legislation<sup>43</sup> conferred a special benefit for a "voluntary" condition. Many question the assumption that pregnancy is always voluntary.<sup>44</sup>

In summary, both the *Lavell* and *Bliss* decisions are good illustrations of how the liberal feminist's formal equality solution can actually perpetuate inequality. Refusal to examine the substantive effects of the law, use of the male normative standard, and the view that equality is a mere negative right—the right to be free from something—ensures that the historically, economically, and culturally disadvantaged groups can seldom legally claim an equal share of society's benefits.

### B. Cultural Feminism

The limits of liberal feminism's effectiveness in the face of persistent inequality led feminists toward a fundamental rethinking of rights. Today, women around the world are seeking to undermine the current distribution of power in the economic, social, and political spheres.<sup>45</sup> They are demanding extensive transformations not only of existing human rights frameworks, but of other forces obstructing their rights, including

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lower court's decision in *Re Attorney-General of Canada & Bliss*, [1977] 77 D.L.R.3d 609, 613 (Fed. Ct.) (emphasis added).

43. In this case, the legislation was the Canadian Bill of Rights, 8 & 9 Eliz. 2, ch. 44 (1960), R.S.C. App. III (1970).

44. The "voluntarism" rationale is still propounded by some as a justifiable limit on the right to equal treatment. See, e.g., Thomas Flanagan, *Manufacture of Minorities*, in MINORITIES AND THE CANADIAN STATE 107, 109 (Neil Nevitte & Allan Kornberg eds., 1985). For a reply to Professor Flanagan's rationale, see Dale Gibson, *Stereotypes, Statistics and Slippery Slopes: A Reply to Professor Flanagan & Knopff and Other Critics of Human Rights Legislation*, in MINORITIES AND THE CANADIAN STATE, *supra*, at 125, 125-37.

45. For a collection of essays on the topic by an international group of feminist scholars, see OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS (Joanna Kerr ed., 1993) [hereinafter OURS BY RIGHT].

national governments, religion, culture, legal systems, international institutions, and families.<sup>46</sup> One of the theories that emerged from dissatisfaction with the sameness treatment equality was cultural feminism—a theory which started from difference.

Cultural feminists describe sexual differences in oppositional terms. They believe that women have been prevented from developing their unique female identities because of social constraints, so they challenge anything which devalues or suppresses femininity. They stress the positive aspects of female characteristics in stereotypical feminine terms. Passivity, emotion, and connectedness are affirmed as being as important and valuable as aggression, abstractness, and individuality.<sup>47</sup>

The value of cultural feminism lies in both its ability to highlight the almost total exclusion of women's experiences from the development of the law and to challenge the law's claim to neutrality and objectivity. According to cultural feminists, "reconstructive jurisprudence" should originate in a woman's distinctive existential and material state of being.<sup>48</sup> The case for women-specific rights associated with reproduction and childbirth, work in the home, literacy, and sex-based violence, for example, is made by demonstrating that current regimes lack any comprehension of women's experience.<sup>49</sup> The substantive value of cultural feminism is that it moves the discussion of women's rights beyond the non-discrimination principle,<sup>50</sup> and breaks down the public/private barrier which has kept women's needs beyond the reach of the law for so long.

### 1. The Gendered Nature of Justice and Morality

The work of child psychologist Carol Gilligan has been influential in the formation of cultural feminism. Gilligan's

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46. Joanna Kerr, *The Context and the Goal*, in OURS BY RIGHT, *supra* note 45, at 1, 6.

47. See generally Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 36 (1990).

48. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 61 (1988).

49. Noreen Burrows, *International Law and Human Rights: The Case of Women's Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 80, 97 (Tom Campbell et al. eds., 1986).

50. *Id.*

important contribution to legal theory lies in her challenge to the Freudian notion that men have a well-developed sense of justice and morality whereas women do not.<sup>51</sup> She argues that while men and women have different conceptions of morality, each is equally coherent and equally valid. While pointing out the important differences in male and female modes of thinking about moral issues, Gilligan's main point is that the universal standards developed using the male model are seriously and fundamentally underinclusive and gender-biased because they do not reflect the important divergences in women's style of moral reasoning.<sup>52</sup>

Through her empirical work, Gilligan discovered that regardless of age, social class, marital status or ethnic background, females have a conception of the self that is different from that of typical males. Whereas men tend to see themselves as autonomous, separate beings, women see themselves as interdependent beings whose identity depends on others.<sup>53</sup> These differences in self-awareness, Gilligan says, account for at least four different ways in which men and women make moral decisions.<sup>54</sup>

First, women tend to stress their connection and responsibility to others, whereas men tend to stress their formal, abstract rights.<sup>55</sup> One of the results of this difference is that unlike men, women will forsake some of their rights if they can improve relationships. Second, when making moral decisions, women tend to think of the consequences for those who will be touched by such decisions.<sup>56</sup> Men, on the other hand, espouse a non-consequentialist point of view, focusing on the principles that must be upheld. If some people get hurt in the process, then it is a necessary price to pay for the good of the principle involved. Third, women will more readily accept excuses for bad moral behavior, whereas men generally look to moral unjustifiability as a complete reason to condemn the wrongdoer.<sup>57</sup> Finally, women will usually interpret a moral choice

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51. CAROL GILLIGAN, IN *A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

52. *Id.* at 1-22.

53. *Id.* at 99.

54. *See generally id.* at 64-105.

55. *Id.* at 25-38.

56. *Id.* at 27-28.

57. *Id.* at 65, 97-104.

within the historical context of the circumstances that produced it, whereas men usually abstract choices from their particularities, analyzing them as universal, moral choices.<sup>58</sup>

Cultural feminists point out that the law predominantly reflects the male model of moral reasoning. Its hierarchical organization, adversarial format, language, imagery, and abstract methodology of resolving claims make the law an intensely male institution.<sup>59</sup> Cultural feminists assert that a woman's as well as a man's mode of expression must find its place in the legal system. They say the limited and biased representations of human experience in models of justice and moral development are unacceptable in any system of law that purports to respect equality as one of its fundamental principles.

But critics of cultural feminism see it as a potential "Uncle Tom's Cabin" for feminism.<sup>60</sup> They point out that it is difficult to determine what authentic "women's voices" are, since women have never been allowed to speak outside the structure of patriarchal societies.<sup>61</sup> To affirm qualities of caring, conciliation, and responsibility for others as essentially feminine characteristics is to accept a male vision of womanhood which has been foisted upon women. Cultural feminists respond that women's oppression and its consequences should not be celebrated because caregiving, cooperation, and an interpersonal responsibility ethic are worthy values in and of themselves. Such values can help restructure laws for a good society.<sup>62</sup>

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58. *Id.* at 31-37.

59. See, e.g., CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (1981); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39 (1985); Mary Jane Mossman, *Feminism and Legal Method: The Difference it Makes*, 3 *AUSTL. J.L. & SOC.* 30 (1986).

60. Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373, 1381 (1986). See also Frances Olsen, *Feminism and Critical Legal Theory: An American Perspective*, 18 *INT'L J. SOC. L.* 199, 204 (1990).

61. To quote Catharine MacKinnon: "For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness. . . . [W]hen you are powerless, you don't just speak differently. A lot, you don't speak." CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 39 (1987). She concludes: "Take your foot off our necks, then we will hear in what tongue women speak." *Id.* at 45.

62. Bender, *supra* note 47, at 7-8.

## 2. Cultural Feminism and the Law

Some recent case law in Canada shows the influence of cultural feminism. An example is *Brooks v. Canada Safeway Ltd.*,<sup>63</sup> a constitutional case decided by the Supreme Court of Canada under the Canadian Charter of Rights and Freedoms<sup>64</sup> (Charter). In *Brooks*, the issue of pregnancy discrimination was revisited, ten years after the *Bliss* case.<sup>65</sup> The issue, whether discrimination on the basis of pregnancy was discrimination on the basis of sex, was identical to that argued in the *Bliss* case, but the result was utterly different.<sup>66</sup>

In *Brooks*, as in *Bliss*, pregnant women workers had received unfavorable treatment. On this occasion, however, the Court held that the unfavorable treatment constituted sex discrimination.<sup>67</sup> The Court not only avoided the male normative standard, but also specifically looked to the disadvantages pregnant women suffer because of their condition, namely, their difference from men.<sup>68</sup> In order to determine whether or not discrimination on the basis of sex had occurred, the Chief Justice situated pregnant women in their own context.<sup>69</sup> Once this step was taken, the invidious nature of the disparate treatment, as well as its social costs, were obvious.

The influence of cultural feminism and its "women's voice" is evident in the words of the Chief Justice as he speaks for a unanimous Court:

Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society thereby should not be economically or socially disadvantaged, seems to bespeak the obvious. It is only women who bear

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63. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (Can.).

64. The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act, 1982, enacted as Schedule B of the Canada Act, 1982, ch. 11 (U.K.) [hereinafter Charter].

65. *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183 (Can.).

66. The Court based its decision on the arguments put forward by an intervenor in the case, the Women's Legal Education and Action Fund, (LEAF), a feminist litigation strategy group whose purpose is to create legal principles in jurisprudence which reflect women's reality and respect their rights as human rights.

67. *Brooks*, [1989] 1 S.C.R. at 1250-51.

68. *Id.* at 1243-44.

69. *Id.*

children; no man can become pregnant. As I argued earlier, it is unfair to impose all the costs of pregnancy upon one half of the population. It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex, or that restrictive statutory conditions applicable only to pregnant women did not discriminate against them as women.<sup>70</sup>

It is clear from this example that cultural feminism expands the scope of equality guarantees and exposes underlying facts and issues that were previously hidden. The case demonstrates that when women's real life experiences are put before the courts, equality rights can powerfully redress past wrongs and remove barriers impeding progress and justice for the historically disadvantaged. By going beyond the abstract principles of formal equality in favor of a context-based analysis, the Court in *Brooks* was able to reach the deeply embedded discrimination women suffer based on their unique difference from men.

Another decision seemingly influenced by principles of cultural feminism was *R. v. Lavallee*,<sup>71</sup> which raised the issue of self-defense where a woman killed her common law spouse by shooting him in the back of the head. The shooting occurred after an argument in which the accused had been physically abused and was fearful for her life as well as having been taunted with the threat that if she did not kill him first, he would kill her. She had frequently been a victim of his physical abuse.<sup>72</sup>

In assessing the accused woman's defense, the Court recognized the inequities perpetuated by the sameness-of-treatment model of equality in the common law. Using a contextual approach,<sup>73</sup> the Court found that the traditional common law self-defense was gender-biased.<sup>74</sup>

In deciding the case, the Court took into account the gender specificity of battering and the different life experiences

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70. *Brooks*, [1989] 1 S.C.R. 1219, at 1243-44.

71. [1990] 1 S.C.R. 852 (Can.).

72. *Id.* at 857.

73. The Court used the same analysis adopted in the leading Supreme Court decision on the meaning and scope of constitutional equality guarantees. See *Andrews v. Law Soc'y of British Columbia*, [1989] 1 S.C.R. 143 (Can.).

74. See *Lavallee*, [1990] 1 S.C.R. at 876.



women have in battering relationships.<sup>75</sup> In reasoning similar to that of *Brooks*,<sup>76</sup> Justice Wilson, writing for a unanimous court, questioned the male-defined concept of "reasonableness" when it is women who are attempting to use the defense:

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."<sup>77</sup>

In its conclusion, the Court determined that the law's traditional concept of self-defense evolved out of a "bar-room brawl" model that comprehends only a male concept of reasonableness.<sup>78</sup> In order to be fair to women, and (presumably) to recognize their right to equal protection and equal benefit of the law, the Court reconstructed the defense to allow women to reasonably fight back in a way different from men.<sup>79</sup>

### C. *Radical Feminism*

Where cultural feminism focuses on difference, radical feminism focuses on power. Its central premise is that women's oppression is caused by social and cultural arrangements which require women to submit to men because of their sex.<sup>80</sup> As such, gender inequality is the most fundamental form of oppression. It is deeper, more widespread, and the most difficult form of human oppression to eradicate, even in a gender neutral or classless state.<sup>81</sup> Radical feminists believe reform-

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75. *Id.* at 874.

76. *Brooks v. Cananda Safeway Ltd*, [1989] 1 S.C.R. 1219 (Can.).

77. *Lavallee*, [1990] 1 S.C.R. at 874.

78. *Id.* at 876-77.

79. *Id.* at 875.

80. MACKINNON, *supra* note 61, at 3.

81. Other fundamental premises of radical feminists include the following: 1) women were the first oppressed group; 2) women's oppression is the most widespread, existing in virtually every known society; 3) women's oppression causes the most suffering to its victims, qualitatively as well as quantitatively, although the suffering may often go unrecognized because of the sexist prejudices of both the oppressors and the victims; and 3) women's oppression provides a conceptual model for understanding all other forms of oppression. ALISON M. JAGGAR & PAULA S. ROTHENBERG, *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL AC-*

ing the legal and political structures of societies is not enough to achieve social equality for women. Gendered power, dominance, hierarchy, and competition imbued in social and cultural systems, especially the family, the church, and the academy must be changed as well.

### 1. The Meaning of Discrimination and Equality

Radical feminists agree with cultural feminists that legal thinking must connect with women's concrete reality, but argue that neither liberal feminism nor cultural feminism can achieve sex equality because both use the male yardstick as the reference point from which all discrimination is measured.<sup>82</sup> Using the male norm reinforces and perpetuates the hierarchical, gender-based social system keeping women "out and down,"<sup>83</sup> whether the remedy sought is sameness of treatment (liberal feminism) or different treatment (cultural feminism). Radical feminists criticize the central concepts of liberal thinking in particular for not speaking to women's experience.

Catharine MacKinnon, the most consistent and influential exponent of radical feminism, proposes that instead of using the male norm to decide the discrimination question, the inquiry should be whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.<sup>84</sup> The use of this test would require the law to take systematic sex subordination into account, and support freedom from it, making it a qualitatively different approach from formal equality which does not even acknowledge that sex-based subordination exists.

The closest any court in the world has come to expressly adopting the radical feminist approach to discrimination is the Supreme Court of Canada. The leading case on equality, *Andrews v. Law Society of British Columbia*,<sup>85</sup> required an interpretation of the meaning, scope, and purpose of the con-

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COUNTS OF THE RELATIONS BETWEEN MEN AND WOMEN 120-22 (3d ed. 1993).

82. MACKINNON, *supra* note 61, at 33-34.

83. *Id.* at 205.

84. MACKINNON, *supra* note 61, at 40-45.

85. *Andrews v. Law Soc'y of British Columbia*, [1989] 1 S.C.R. 143 (Can.). See also two subsequent decisions which further clarified the principles articulated in *Andrews*, namely, *Reference Re Workers' Compensation Act, 1983* (NFLD.), [1989] 1 S.C.R. 922 (Can.) and *R. v. Turpin*, [1989] 1 S.C.R. 1296 (Can.).

stitutional equality guarantee in the Charter of Rights and Freedoms. Rather than following the traditional liberal approach of the U.S. Supreme Court and earlier Canadian jurisprudence,<sup>86</sup> the Court took a whole new approach. Most importantly, it threw out the Aristotelian "similarly situated" test of discrimination in no uncertain terms, saying it was so unprincipled it could justify Hitler's Nuremberg laws.<sup>87</sup> The Court created a new test which focuses on the impact of laws rather than on intention, and on the context of the plaintiff rather than comparison to a male norm.

Similar to the test proposed by MacKinnon, the Supreme Court of Canada's test provides that if a person is a member of a persistently disadvantaged group, and can show that a distinction based on personal characteristics of the individual or group continues or worsens that disadvantage, it is discriminatory treatment regardless of intention.<sup>88</sup> Under this analysis, disadvantage is determined by examining the plaintiff's social, political, and legal reality.<sup>89</sup>

The difference between the test of "disadvantage" and the liberal "similarly situated" test is that the former requires judges to look at women and other claimants in their place in the real world and to confront the reality that the systemic abuse and deprivation of power women experience is because of their place in the sexual hierarchy. Under the new test, women can challenge male-defined structures and institutions and demonstrate that equality will only be achieved through norms based on their own needs and characteristics. In some cases, identical treatment with men will be appropriate. In other situations however, the male comparator will be irrelevant. The Canadian Supreme Court's result-oriented, contextual view of equality permits both facially neutral and gender

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86. The British Columbia Court of Appeal, whose decision was appealed to the Supreme Court of Canada, adopted the Aristotelian approach using the similarly situated test of equality. *Andrews v. Law Soc'y of British Columbia*, 2 B.C.L.R.2d 305, 311 (B.C. Ct. App. 1986).

87. *Andrews*, [1989] 1 S.C.R. at 166 (McIntyre, J., concurring in part and dissenting in part).

88. *Id.* at 174 (McIntyre, J., concurring in part and dissenting in part).

89. *Id.* at 152. Although many third parties intervened in the appeal, the court adopted the arguments put forward by the intervener, described *supra* note 67.

specific laws or policies to be questioned for a disparate impact on individual women or on women as a group.

## 2. The Social Construction of Gender

Like cultural feminists, radical feminists are concerned with the general question of how legal doctrine works in conjunction with other systemic factors to keep women oppressed. But radical feminists look more at how female sexuality is constructed and controlled by complex social practices, including the law. When the meaning of gender in terms of power allocation between the sexes is analyzed, the primary conceptual framework is the woman's body. By politicizing the female body, sexuality, child rearing, and childbearing practices, radical feminism turns abstract western political theory and western political practice on its head. Radical feminists assert that to ignore the politics of sex is to ignore that women are deprived of power over their own bodies and sexuality, and thus deprived of their humanity.

Attention is focused in two directions. First, it is focused on the ways in which women's bodies are controlled, either through violence, restrictive contraception, abortion or sterilization. Second, attention is focused on the ways men have constructed and defined female sexuality to serve male interests. Radical feminists believe overcoming the negative effects biology has had on women (and perhaps also on men),<sup>90</sup> requires social and legal strategies capable of deconstructing the way women's sexuality has been socialized and commodified.

An early idea was to promote the practice of androgyny. Adherents thought if men and women could freely explore both their feminine and masculine characteristics through practicing androgyny, they would develop a much greater and healthier sense of human wholeness and the social construction of male and female roles would be broken down.<sup>91</sup> Eventually, however, androgyny was rejected as a liberation strategy because it required women to moderate their femininity.<sup>92</sup> Women came to realize that just as biology is not the problem for

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90. See MARY O'BRIEN, *THE POLITICS OF REPRODUCTION* (1981).

91. See KATE MILLETT, *SEXUAL POLITICS* (1970) and FRENCH, *BEYOND POWER*, *supra* note 2, for two different perspectives on androgyny.

92. See, e.g., JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE* (1979).

them, neither is femininity. The real problem is the low value the masculine society assigns to female qualities of nurturance, emotion, connectedness, and responsibility to others. Some feel if the "feminine" was valued as much as the "masculine," women's oppression would disappear. Others disagree, insisting that femininity as we know it has been constructed by males for patriarchal purposes and is not authentic. They say true femininity is a concept of the future which eventually will be understood as a state of being without the need for an external male reference point. But until women are self-determining and freed from the yoke of male oppression, the content of the term "feminine," will remain unknown.<sup>93</sup>

Another strategy crucial to radical feminist theory is the empowerment of women to control and determine their own reproduction. Where at one time radical feminists understood female biology to enslave women,<sup>94</sup> most radical feminists now view women's biology, especially their reproductive capacity and the nurturing role that flows from it, as a potential source of liberating power.<sup>95</sup> Unlike non-feminist opponents, radical feminists reject the premise that there is a "natural order" of things which subordinates women to men because of their biological natures. They do see women's biology as oppressive, but only because men have used child rearing and childbearing as ways of controlling women. To achieve an equal status with men, women must be able to decide for themselves when or whether to use reproduction-controlling technologies such as contraception, abortion, and sterilization or any reproduction-aiding techniques such as artificial insemination, in-vitro fertilization, and surrogacy.<sup>96</sup>

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93. See *supra* note 32 and accompanying text. See also CAROL SMART, FEMINISM AND THE POWER OF LAW 75-76 (1989) (questioning whether women "can ever avoid the omnipotent grip of the patriarch who is in our hearts, bodies, and minds").

94. See, e.g., SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 72-104 (1970).

95. See, e.g., O'BRIEN, *supra* note 90.

96. For a discussion of reproduction-aiding technologies, see GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* (1985). See also Margrit Eichler, *Human Rights and the New Reproductive Technologies—Individual or Collective Choices?*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 875 (Kathleen E. Mahoney & Paul Mahoney eds., 1993) [hereinafter *A GLOBAL CHALLENGE*]; Renate Klein, *The Impact of Reproductive and Genetic Engineering on Women's Bodily Integrity and Human Dignity*, in *A GLOBAL CHALLENGE*, *supra*, at 889.

The understanding that women must maintain reproductive control as a central criterion of their human rights and human dignity underlies the decision of Madam Justice Bertha Wilson in the case of *R. v. Morgentaler*.<sup>97</sup> In *Morgentaler*, the Canadian legislation regulating abortion was struck down by the Supreme Court as a violation of the constitutional guarantee of "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>98</sup>

Justice Wilson, in a concurring opinion, linked the reality of being a woman with the reality of being human, leaving no doubt that women's rights are human rights even though they are different from men's rights. She rejected male-centered norms that influence the concept of liberty for the reason that the experiences of pregnancy, birth, and abortion are ones men do not and cannot experience. In explaining the dilemma women face with an unwanted pregnancy, she said the following:

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out . . . , the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has *not* been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly

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97. [1988] 1 S.C.R. 30 (Can.).

98. Charter, *supra* note 64, § 7.

perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being.<sup>99</sup>

For radical feminists, Wilson's opinion was historic and crucially important not only because it struck down the abortion laws, thereby restoring power to women to control their own bodies, it also interpreted the dispute from the perspective of the experiences and aspirations of women, making visible the problems that unwanted pregnancies present for them. Moreover, it incorporated women's reality into the supreme law of Canada and it expressly rejected the male norm as relevant to the development of women's rights. Once the law begins to respond to women's needs in this way, radical feminists believe the challenge of transforming the culture is not so impossible.

### 3. Violence Against Women

Violence against women is a major preoccupation of all contemporary feminist theory, especially radical feminism. But because of its hidden nature, this has not always been the case. Before Catharine MacKinnon's pioneering work on identifying and classifying sexual harassment as a legal wrong,<sup>100</sup> it was "just life." Most forms of sexual oppression, and violence including pornography and prostitution, are so deeply ingrained and accepted, they appear either natural or inevitable.<sup>101</sup> Radical feminism requires feminist analysts to look "for that which we have been trained not to see . . . [to identify] the invisible."<sup>102</sup>

Even when violence against women was recognized as a problem, major investigations into the status of women did not

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99. *Morgantaler*, [1988] 1 S.C.R. at 171-72 (Wilson, J., concurring) (citations omitted).

100. See CATHARINE MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

101. In Canada, very little discussion of the harm of pornography and prostitution occurred prior to the 1980's. Until that time, it was generally regarded as a moral issue. See Kathleen E. Mahoney, *Obscenity, Morals and the Law: A Feminist Critique*, 17 OTTAWA L.J. 33 (1985); COMMUNICATIONS AND PUBLIC AFFAIRS, DEPARTMENT OF JUSTICE CANADA, REPORT OF THE COMMITTEE ON SEXUAL OFFENSES AGAINST CHILDREN AND YOUTHS AND THE REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, CAN. DOC. J2-58/1985, at 9-12 (1985) [hereinafter PORNOGRAPHY REPORT].

102. Scales, *supra* note 60, at 1393.

see it as a feminist issue.<sup>103</sup> Physical, sexual, and psychological violence and coercion were regarded more as social problems than equality issues. It was not until the 1980's that its characterization changed.<sup>104</sup>

The first step was to make the violent abuse of women visible. By collecting evidence and experiences of violence against women from women, radical feminists provided a base of authentic information on the extent, interconnectedness, and conventions of violent male behavior.<sup>105</sup> The next step was to analyze how laws can be reformed to support freedom from the subordination caused by violence. This approach requires that the real injuries and harm women suffer from male violence be acknowledged and become a central part of the law reform process.

One of the most important areas for radical feminist analysis is the crime of rape. All feminist theorists agree that reform of rape laws is required, but they have different views as to why the current law is inadequate and what directions reform should take.<sup>106</sup> Liberal feminists have been responsible for much of the rape law reforms to date. Consistent with their central premise that women and men are the same, they think rape should be characterized as a gender-neutral crime of violence rather than as a gender-specific sex crime.<sup>107</sup> The Ar-

103. See generally REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA (1970).

104. An important turning point in Canada with respect to understanding rape occurred with the publication of Lorene M. G. Clarks' and Debra J. Lewis' RAPE: THE PRICE OF COERCIVE SEXUALITY (1977). The thesis of the book is that the law of rape is not conceptualized as a violation of women, indeed even as a form of gender-specific violence, but rather as a property crime against the capitalistic ownership rights of men. Quickly following this book was a proliferation of feminist analyses of laws dealing with different forms of violence against women.

105. See, e.g., FINAL REPORT OF THE CANADIAN PANEL ON VIOLENCE AGAINST WOMEN: CHANGING THE LANDSCAPE: ENDING VIOLENCE V ACHIEVING EQUALITY, CAN. DOC. SW45-1/1993E (1993). See also PORNOGRAPHY REPORT, *supra* note 101, at 18-22, which is less woman-centered, but at least acknowledges a woman's perspective on prostitution and pornography. *Id.* at 18-22.

106. Some women disagree with most feminists whose emphasis is on individual issues of consent. First Nations women, for example, see the larger, still unresolved issue of consent to an imposed legal system as more important. See Patricia A. Monture-Okanee, *The Violence We Women Do: A First Nations View*, in CHALLENGING TIMES: THE WOMEN'S MOVEMENT IN CANADA AND THE UNITED STATES 193 (Constance Blackhouse & David H. Flaherty eds., 1992) [hereinafter CHALLENGING TIMES].

107. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: To-*



istotelian approach leads them to argue that victims of rape are victims of violence, just like other victims of violent crime. It follows that sameness of treatment argues against laws that treat rape as a "special" or "different" crime. For example, wives of men who rape them should not be exempted from the protection of the law accorded to other women.<sup>108</sup>

The liberal feminist analysis and activism successfully resulted in major changes to the rape laws in most western countries. The scope of the crime was expanded to include a wider range of sex-based assaults<sup>109</sup> and the requirement for penetration was eliminated, as was the marriage exemption.<sup>110</sup> The emphasis on violence and same treatment led to evidentiary changes including making a victim's past sexual history irrelevant to consent.<sup>111</sup> The corroboration requirement was also dropped because of the insistence on equal treatment.<sup>112</sup> Moreover, as Katharine Bartlett notes, reforms stimulated by the liberal feminist critique in the 1970's "included further refinements in the grading system for sexual offenses, language changes to make the nomenclature gender-neutral, and alterations to the requirements of force and non-consent to facilitate convictions."<sup>113</sup>

But radical feminists look at rape law in terms of its impact on women as a class, and ask, have liberal-inspired reforms actually protected more women from male violence? They say that in spite of the reforms, the incidence of sexual assaults has increased and the rate of conviction has increased only slightly,<sup>114</sup> leading them to conclude that addressing

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wards *Feminist Jurisprudence*, 8 SIGNS 635, 642-43, 646-53 (1983).

108. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 15 (1975).

109. For a summary of the changes in Canadian law, see generally CHRISTINE L.M. BOYLE, *SEXUAL ASSAULT* (1984). For changes in the United States, see Patricia Searles & Ronald Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25 (1987).

110. See Searles & Berger, *supra* note 109, at 28.

111. See *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 634-36 (Can.).

112. *Seaboyer* is the leading case in Canada on this point. [1991] 2 S.C.R. 577. For a postmodern analysis of the law of rape and consent, see the dissenting opinion of L'Heureux-Dubé, *J. Id.* at 643.

113. KATHARINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 700 (1993) (citing Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously*, 11 L. & PHIL. 35, 38-39 (1992)).

114. Catharine MacKinnon, *Feminist Approaches to Sexual Assault in Canada and the United States*, in CHALLENGING TIMES, *supra* note 106, at 186, 190.

rape as a gender-neutral crime misses the point.

Catharine MacKinnon argues that feminists should revisit the liberal feminist's theory of rape.<sup>115</sup> She fundamentally disagrees with the theoretical distinction made between sex and violence, saying it does not exist.<sup>116</sup> The simple fact that women do not rape men takes rape out of the category of a gender-neutral violent crime. Moreover, the violent part of the sexual assault must be experienced as a part of the sex, otherwise violent men would just beat women up.<sup>117</sup> When sexual assault is properly understood as sexual sadism, it follows that sexual assault eroticizes and sexualizes women's subordination to men, making sex into violence and violence into sex.<sup>118</sup> In the broader context of women's inequality in the society, sexual assault is part of, and connected to, the dominance and subordination of women generally. Until reforms are rooted in the understanding that rape is an institution of inequality, changes in the law will do little to benefit women.

It follows that, for radical feminists, any law reform must start with a redefinition of the crime of rape. At present, the law in most jurisdictions defines sexual assault as intercourse or sexual activity perpetrated by force without the consent of the victim. By requiring proof of non-consent, the law places women in the position of having to disprove consent even where there is violence.<sup>119</sup> Rather than protecting women

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115. *See id.*

116. *Id.* at 190.

117. *Id.*

118. *Id.* at 190-91.

119. An example of this thinking is the decision of Justice Bollen of the Supreme Court of South Australia in the unreported case of *R. v. Johns*, where in a spousal rape case, the judge said:

[t]here is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a fine line between not agreeing, then changing the mind and consenting. You will bear that in mind when considering the totality of the evidence about each act of intercourse.

Question of Law Reserved on Acquittal Pursuant to Section 350(1A) Criminal Law Consolidation Act, No. 93/1-3896, 1993 AUST SASC LEXIS 1450, at \*14 (S. Ct. S. Austl., Ct. Crim. App. 1993) (quoting Justice Bollen in *R. v. Johns*).

On appeal, the ruling was found to be wrong in law, partly because of the suggestion to the jury that any agreement produced by "rougher than usual handling" might nevertheless constitute valid consent. *Id.*

from violence and condemning it, the law perpetuates the idea that women consent to violent sex.

Radical feminists suggest that a better way of dealing with sexual assault would be to remove the requirement of non-consent from the victim entirely.<sup>120</sup> They would redefine rape as "sex forced by physical aggression, threat, or authority, and thus a crime of sexual inequality."<sup>121</sup> The mens rea would go to force, which would take into account dimensions of social life which heighten vulnerability to sexual assault such as age, race, ethnicity, and disability.<sup>122</sup> The defendant would have the onus to show that the woman consented.<sup>123</sup>

Another dimension of violence against women which concerns radical feminists is the production, distribution, and possession of pornography. Distinguishing between erotic, consensual depictions, and violent, degrading ones, radical feminists take the position that pornography is not so much about sex per se as it is about male power exerted over females.

The Canadian case of *R. v. Butler* applies the radical feminist theory of violence to pornography.<sup>124</sup> The decision marked the first time in 500 years of common law that the highest court of any country examined pornography in its social context and from the perspective of women. In so doing, it found that pornography exists in a context of social inequality and sexual violence against women and girls. As a result, the Court held that, when pornography presents sexual representations that degrade and dehumanize the participants, subjects them to violence, or uses children, it presents a serious risk of harm to women and children and can be constitutionally limited without violating freedom of expression guarantees.<sup>125</sup> Equality-promoting legislation, such as the criminal obscenity

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120. In Canada, this approach is followed in part where the newly amended rape law requires that consent be meaningful. It does this by requiring voluntary agreement and by stipulating what is not consent, including where another person purports to consent for the woman, where she is rendered incapable of consenting, where a position of trust or authority has been abused, or where she has indicated that she has not consented. Criminal Code of Canada, R.S.C., ch. 38, § 273.1 (1992) (Can.).

121. MacKinnon, *supra* note 114, at 192.

122. *Id.*

123. *Id.*

124. See *R. v. Butler*, [1992] 1 S.C.R. 432 (Can.).

125. *Id.* at 454-55.

laws, took on constitutional significance in these circumstances because of the constitutional value of equality.

The Canadian Supreme Court's characterization of pornography as an injury to women<sup>126</sup> was an important victory for radical feminism. The Court's conclusion that pornography discriminates against women by attempting to control and define female sexuality in a harmful way<sup>127</sup> is consistent with radical feminism's analysis of male power and female subordination. In constitutionally upholding the obscenity laws for the reasons it did, the Court affirms the radical feminist analysis that equality can only be achieved by removing those policies or practices which contribute to the maintenance of the underclass of women.

Similar notions are apparent in sexual harassment jurisprudence where the Supreme Court of Canada demonstrated its understanding of the relationship between sexual harassment and the social construction of gender which subordinates women in the work place.<sup>128</sup> Chief Justice Dixon, writing for the Court, first discussed how sexual harassment has a different impact on women in terms of the gender hierarchy of the labor force and the inherent "abuse of both economic and sexual power" that harassment entails.<sup>129</sup> These factors, when combined with the social and economic realities of women, led the Court to conclude that sexual harassment is a form of sex discrimination.<sup>130</sup> As in *Butler*, the judgment confronted the social context behind sexual harassment and found it to be a deeply sexist one that objectifies women's bodies and perpetuates a male-defined image of sexual attractiveness. Consistent with the radical feminist argument, the Court found that the practice of sexual harassment cannot be separated from unequal sexual interaction that disadvantage women.<sup>131</sup>

Largely due to the efforts of radical feminists, violence against women now dominates legal agendas in many coun-

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126. *Id.* at 454.

127. *See id.* at 479.

128. *See Janzen v. Platy Enterprises*, [1989] 1 S.C.R. 1252 (Can.).

129. *Id.* at 1284.

130. *Id.* at 1253.

131. A further indication that the Court was applying radical feminist theory was the fact that Catharine MacKinnon's book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, was affirmatively cited in the decision. *Id.* at 1279-80.

tries and in the international arena. Pornography, prostitution, sexual harassment, rape, and women battering as well as *sut-tee*, *purdah*, genital mutilation, and sexual abuse of children are being uncovered and analyzed through principles of radical feminist theory.<sup>132</sup>

#### D. *Post Modern Feminism*

The roots of postmodern feminism are found in the work of Simone de Beauvoir. Her question, "why is woman the second sex?"<sup>133</sup> showed that Beauvoir understood that woman is oppressed by virtue of "otherness." Woman is the "Other" because she does not have power.<sup>134</sup> Man is the free being who defines the meaning of his existence, whereas woman has her meaning and existence defined for her. Beauvoir said woman must transcend the definitions and labels that limit her existence if she is to become self-determining.<sup>135</sup>

##### 1. The Concept of Otherness

While contemporary postmodern feminists accept that women are the "Other," they do not accept De Beauvoir's view that "otherness" is a status to be transcended. To the contrary, they say that from the position of "otherness," women can stand back and criticize the norms, values, and practices that

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132. For example, in December 1993, the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women. G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/46/49 (1993). It defined violence as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threat of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private life." *Id.* art. 1. The Declaration lists abuses that fall into the category of violence against women as: 1) physical, sexual, and psychological violence occurring in the family and in the community, including battering, sexual abuse of female children, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women; 2) non-spousal violence; 3) violence related to exploitation; 4) sexual harassment and intimidation at work, in educational institutions and elsewhere; 5) trafficking in women; 6) forced prostitution; and 7) violence perpetrated or condoned by the state. *Id.* art. 2.

133. SIMONE DE BEAUVOIR, *THE SECOND SEX* 41 (H.M. Parshley ed. & trans., First Vintage Books 1974) (1949). Her analysis of how women became separate from and inferior to men is developed in the first three chapters of the book.

134. *Id.* at xix.

135. *Id.* at 795; see also SIMONE DE BEAUVOIR, *THE PRIME OF LIFE* 291-92 (Peter Green trans., 1965).

the patriarchy seeks to impose on everyone.<sup>136</sup> Consistent with their principal insight that objectivity is a fiction, the postmodern approach is to criticize everything, including particular ideas or social injustices and the structures upon which they are based, the language in which they are thought, and the systems in which they are safeguarded.<sup>137</sup>

Postmodern feminists' rejection of traditional assumptions about truth and reality also leads them to refuse to accept universal feminist definitions or any one overarching theory providing an explanation and solution for women's oppression.<sup>138</sup> They argue that attempts to find integration and agreement within feminist theory or to establish one specifically feminist standpoint, are further instances of a "phallogocentric" way of thinking. They claim that it is typically male thinking to seek "one true, feminist story of reality."<sup>139</sup> Such a synthesis is neither feasible nor useful because of the differences in women's lives across race, class, and cultural lines. Postmodernists believe the more feminist thoughts we have, the better because women are not all the same. Some even resist the label "feminism" in the spirit of non-essentialism.<sup>140</sup>

Critics of postmodernism say, however, that overemphasizing differences may lead to a weakening and even disintegration of intellectual and political progress. If feminism has no common stand, it will become difficult to make claims based upon the general well-being of women.<sup>141</sup> They point out that societies systematically accord different power on the basis of religion, ethnicity, sexual preference, and many other grounds in addition to sex. If we are to abandon the category "women," replacing it with all the other "categories," there will be an infinite fragmentation of the feminist project which could re-

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136. See, e.g., MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 125-53 (1992).

137. *Id.*

138. See, e.g., SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986).

139. *Id.* at 28.

140. For different perspectives within postmodern feminism, see generally Judith C. Greenberg, *Introduction to Postmodern Legal Feminism*, in POSTMODERN LEGAL FEMINISM, *supra* note 136; SHERENE RAZACK, CANADIAN FEMINISM AND THE LAW (1991); Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455 (1991).

141. See Jennifer Nedelsky, *The Challenges of Multiplicity*, 89 MICH. L. REV. 1591, 1601-09 (1991) (reviewing ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988)).

sult in maintaining the status quo.<sup>142</sup> While inevitable tensions will arise between universal theories and local experience, critics caution postmodernists not "to become paralyzed to the point of total relativism . . . to insist that feminism disintegrate into a series of local or regional struggles."<sup>143</sup> The focus should rather be on areas common to all women's experience.<sup>144</sup>

## 2. The Meaning of Equality

In postmodern theory, equality is not dependent upon a single doctrinal standard. Rather, equality is sought through questioning, recontextualizing, and attempting to unsettle existing laws in a wide range of areas.<sup>145</sup> Unlike the other theories of equality, differences among women are explicitly acknowledged.<sup>146</sup> For example, differences are understood through the relationships or contexts in which they are asserted.<sup>147</sup> This method allows an exploration of specific rules or doctrines that are of importance to particular groups of women and allows for an analysis of complex social practices in which laws are used.<sup>148</sup> By invoking diverse, multiple images of women, and by taking an anti-essentialist view of women's nature and equality, postmodernists feel they have the potential to break through more rigid doctrines proposed by other theorists, and allow for shifting and evolving points of view.<sup>149</sup>

An example of the application of postmodern theory in the Canadian context is the Supreme Court of Canada's decision in the case of *Moge v. Moge*.<sup>150</sup> The case dealt with the question of spousal support where the dependent spouse was a middle-aged immigrant woman with limited English language

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142. See *id.* at 1600.

143. Hillary Charlesworth, *Alienating Oscar? Feminist Analysis of International Law*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 1, 4 (Dorinda G. Dallmeyer ed., ASIL Studies in Transnational Legal Policy No. 25, 1993).

144. *Id.*

145. Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 674 (1992).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 674-75.

150. *Moge v. Moge*, [1992] 3 S.C.R. 813 (Can.).

skills, who had been married for several years and assumed the homemaker role in the marriage.<sup>151</sup> Until the *Moge* case was decided, courts favored a "gender-neutral" approach to marriage based on the liberal feminist assumption that sexual equality as sameness of treatment should be applied to marriage and its breakdown. In awarding spousal support, the "sameness" approach translated into a "self-sufficiency" or "clean break" model, which assumed that a dependent wife, regardless of age, education, or experience, could find a job and support herself in a limited time period following the divorce. In the *Moge* decision, the Supreme Court recognized that this "equality" posture masked real differences between the lives of men and women, such as unequal opportunities for education, career options and advancement, unequal remuneration for paid work, inadequate valuation for unpaid domestic work, a double work day, and the threat of sexual, physical, and emotional violence.<sup>152</sup> The Court recognized that if the "clean break" model was applied to all women without accounting for women's social and economic disadvantage, awards would increase women's inequality and perpetuate the feminization of poverty.<sup>153</sup> The Court also made it clear that not all women's needs are the same and that decisions on spousal support must be made by identifying, understanding, and alleviating inequalities that exist for individual women in their own marriage contexts, rather than on the basis of sameness of treatment with either men or women.<sup>154</sup> The *Moge* decision affirms postmodern principles because it favors individualized decision-making and recognizes that, just as women are not the same as men, neither are they the same as other women.

### 3. Gender and Race

An issue of particular concern to postmodern feminists is the relationship between gender and race, class, ethnicity, religion and other situated experiences.<sup>155</sup> In some instances, they see the sex equality project interfering with competing

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151. *Id.* at 813.

152. *See id.*

153. *Id.*

154. *Id.* at 875.

155. *See* Martha Minow, *Feminist Reason: Getting It and Losing It*, J. LEGAL EDUC., Mar.-June 1988, at 47.



claims of cultural identity and survival.<sup>156</sup> The universal oppression of women is accepted, but with the qualification that "not all women are equally oppressed, or oppressed equally."<sup>157</sup> For feminists of all races and ethnicities, it is increasingly intolerable to separate the many forms of oppression that harm them.<sup>158</sup>

Where nineteenth century women consistently used the singular word "woman" to demonstrate their conception of the unity of the female sex, the language of the 1960's and 1970's linguistically comprehended more plural forms by speaking of the "women's movement."<sup>159</sup> Critics nevertheless say many white feminists have appropriated the category "women" to speak only about middle-class white, heterosexual, Christian, and able-bodied women and their experiences of sexism.<sup>160</sup> They say the use of these norms hides a preferred position and shields it from other possible alternatives,<sup>161</sup> just as does the use of the male norm. For example, postmodernists ask why is sexism considered worse than racism? To suggest that it is, as radical feminists do, denies the experience of women who see race as the paradigm of their disadvantage.

The opinion of many minority women and their postmodern supporters is that focusing solely on theories of sex inequality generated by Anglo-American and French feminists is imperialist, racist, Eurocentric, and exclusionary.<sup>162</sup> Much of the criticism starts with universities and the production of knowledge. For example, in her book, *Ain't I a Woman*, bell hooks criticizes the content of women's studies programs in the United States. She says:

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156. *Id.* at 51.

157. Glenda Simms, *Beyond the White Veil*, in CHALLENGING TIMES, *supra*, note 106, at 175, 179; see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989).

158. Mari Matsuda, *Crime and Punishment*, MS. MAGAZINE, Nov.-Dec. 1994, at 86.

159. NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 283 (1987).

160. Minow, *supra* note 155, at 48; see, e.g., BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981); ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* chs. 11-12 (1981); Brenda Eichelberger, *Voices on Black Feminism*, QUEST, Spring 1977, at 16.

161. Minow, *supra* note 155, at 48.

162. Arun Mukherjee, *A House Divided: Women of Colour and American Feminist Theory*, in CHALLENGING TIMES, *supra* note 106, at 165.

the hierarchial pattern of race and sex relationships already established in American society merely took a different form under "feminism": . . . the form of women's studies programs being established with all-white faculty teaching literature almost exclusively by white women about white women and frequently from racist perspectives; the form of white women writing books that purport to be about the experience of American women when in fact they concentrate solely on the experience of white women; and finally the form of endless argument and debate as to whether or not racism was a feminist issue.<sup>163</sup>

Similar criticisms are directed at Canadian programs by black women, women of color, and aboriginal women.<sup>164</sup>

Women of color further criticize white feminists for excluding them from decision-making positions or at least, doing little to help advance their careers in the academy.<sup>165</sup> They demonstrate how institutionalized discrimination embedded in hiring practices of universities, funding procedures, and the composition of editorial boards of important journals marginalizes working-class women and women of color.<sup>166</sup> Their findings suggest that the current organization of the academy perpetuates the production and distribution of knowledge that is both Anglo- and middle-class centered.<sup>167</sup>

Postmodern feminists say women in positions of power should develop strategies to ensure that minorities are hired to teach in women's studies programs, that bibliographies, course offerings, and curricula are inclusionary and diversified, and that anti-racist guidelines are developed for feminist jour-

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163. HOOKS, *supra* note 160, at 121-22.

164. See generally Patricia A. Monture-Okanee, *The Violence We Women Do: A First Nations View*, in CHALLENGING TIMES, *supra* note 106, at 193; Mukherjee, *supra* note 162; Shelina Neallani, *Women of Colour in the Legal Profession: Facing the Familiar Barriers of Race and Sex*, 5 CAN. J. WOMEN L. 148 (1992); Tarel Quandt, *Learning Exclusion: A Feminist Critique of the Law School Experience*, 4 EDUC. L.J. 279 (1993); Simms, *supra* note 157; Mary Ellen Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences*, 6 CAN. HUM. RTS. Y.B. 3 (1990).

165. See Maxine B. Zinn et al., *The Cost of Exclusionary Practices in Women's Studies*, in RECONSTRUCTING THE ACADEMY: WOMEN'S EDUCATION AND WOMEN'S STUDIES 125, 127-29 (Elizabeth Minnich et al. eds., 1988).

166. *Id.*

167. *Id.*

nals.<sup>168</sup> Work which examines and theorizes about racist and classist assumptions underlying the academy should be encouraged.<sup>169</sup> Unless such strategies are pursued, there is a real risk of further dissociation between white women, third world women, and women of color.<sup>170</sup>

North American postmodernists say, that in order to understand the interrelatedness of gender, race, and class, feminist theory must come to grips with the historical roots of racism in the slave societies.<sup>171</sup> Alliances between white women and white men on the common ground of racism as well as the privileges gained by white women over black women within patriarchal and capitalistic societies through slavery, raise a multitude of unresolved issues which create conflict between black and white women.<sup>172</sup>

A contemporary example of devaluation of black women as compared to white women was the media and public reaction to the Central Park jogger case, where a middle class white woman was brutally raped by a group of young black men. Postmodern feminist critics compare the massive publicity of the case with 28 other cases of rape, mostly of women of color which occurred in New York City during the same week.<sup>173</sup> No media attention was directed to them at all, not even to the gang rape of a black woman who suffered multiple fractures and internal injuries when she was sexually assaulted, sodomized, and thrown fifty feet off the top story of a building.<sup>174</sup> Black women say this incident typifies the sexual hierarchy existing between white women and black women that pervades Western culture and is visible at all levels, including at the level of law reform.<sup>175</sup> They say law reformers, including feminists, tend to concentrate on protecting white women

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168. See generally Marinna Valverde, *Racism and Anti-Racism in Feminist Teaching and Research*, in CHALLENGING TIMES, *supra* note 106, at 160.

169. *Id.*

170. *Id.*

171. Simms, *supra* note 157, at 178-79; BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* (1979).

172. See Hazel V. Carby, "On the Threshold of Women's Era": Lynching Empire and Sexuality in Black Feminist Theory, in "RACE," WRITING, AND DIFFERENCE 301 (Henry L. Gates, Jr. ed., 1986).

173. Kimberly Crenshaw, *The Intersection of Race and Gender in Rape Law*, in MARY JOE FRUG, *WOMEN AND THE LAW* 800, 801 (1992).

174. *Id.*

175. *Id.*

from sexism and view racism primarily in terms of inequality between men.<sup>176</sup> By erroneously assuming that racism is the same for black women as it is for black men and sexism for black women is the same as it is for white women, black women's concerns under both the gender and race categorizations are often not met.<sup>177</sup>

An example is the recent sentencing studies of rape prosecutions in the United States, the purpose of which was to look into the question of racism in the courts. The studies showed that average prison sentences given to both white and black males convicted of raping black women are much more lenient than sentences given to black men convicted of raping white women.<sup>178</sup> The studies resulted in changes to sentencing practices towards black men because of their racially discriminatory nature.<sup>179</sup> The equally discriminatory treatment of black women disclosed by the studies, however, was not mentioned.

The theme that black men are victims of laws relating to rape and racism goes back to the white culture's stereotypical casting of all black men as potential threats to the sanctity of white womanhood.<sup>180</sup> While racism may explain why black men have been targeted for both legal and extralegal violence for sexually violating white women,<sup>181</sup> postmodernists say feminist theory must look to racism and sexism to explain why black women are marginalized within the prevailing political and social science agenda.<sup>182</sup> They warn that, unless racial stratification among women is understood and eliminated, efforts to politicize violence and other forms of discrimination

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176. *See id.* at 800.

177. *Id.* at 803-04.

178. *Id.* at 803.

179. This result is not true with respect to capital punishment. In the United States, the racism evident in the proportion of people of color sentenced to death for killing whites and the overall percentage of executed criminals since 1976 (38%) has led feminists to suggest that the death penalty is an issue feminists must confront. *See Matsuda, supra* note 158, at 88.

180. *See Crenshaw, supra* note 173, at 800. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986), refers to a study which reveals that between 1930 and 1967, 89% of the men executed for rape in the United States were black. Only 2% of the defendants convicted of rape involving any other racial combination were executed. *Id.* at 1089-95.

181. *See id.*

182. *Id.* at 802.

against women will further isolate and marginalize black women, and the women's movement will be seriously weakened.

Angela Harris criticizes the radical feminist analysis of rape, saying it cannot be generalized to all women. She says, while it may tell us what rape means to white women, it has nothing to do with the experience of black women.<sup>183</sup> The experience of rape for black women is as deeply rooted in color as it is in gender and is a far more complex experience than radical feminists describe. During the times of slavery, the rape of black women by any man, white or black, was not considered to be a crime at all.<sup>184</sup> While rape laws may have operated to deny protection to white women based on what they did or failed to do, black women were denied protection based on who they were.<sup>185</sup> Harris also points out that the experience of rape for black women was often linked to racism and servitude to whites.<sup>186</sup> As domestic servants, even after emancipation, black women's vulnerability and experience of sexual abuse and rape were inextricably linked to their relationship to dominant sexist and racist whites.<sup>187</sup> Postmodernists say that the failure of feminist theories to consider the unique vulnerability of black women to rape and the lack of legal protection from it, imposes a kind of "gender essentialism."

Catharine MacKinnon disagrees that the radical feminist analysis of rape applies only to white women.<sup>188</sup> She says a distinction must be made between essentialism that says "all women are alike," and the understanding that all women experience subordination.<sup>189</sup> In other words, gender "is not a common essence but a common predicament."<sup>190</sup> The group "women," in all its variations, has a collective social history of disempowerment, exploitation, and subordination.<sup>191</sup> She says to speak of the social treatment women experience "as women"

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183. Harris, *supra* note 157, at 598.

184. *Id.* at 599.

185. Crenshaw, *supra* note 173, at 801.

186. See Harris, *supra* note 157, at 598-99.

187. *Id.* at 599.

188. Catharine A. MacKinnon, *From Practice to Theory or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991).

189. *Id.*

190. Beatrice A. Cameron, *Nametaking: A Model for Feminist Identity*, 6 WIS. WOMEN'S L.J. 141, 146 (1991).

191. MacKinnon, *supra* note 188, at 15. For a similar response, see Cameron, *supra* note 190, at 145-46.

in this sense does not invoke any homogenous, generic, or ideal type, but rather, refers to the material reality of social meanings and practices.<sup>192</sup>

Race-based, postmodern critiques of white feminist scholarship also apply to basic concepts and principles underlying civil law. For example, a postmodern critique of feminist analysis of child custody suggests that generalized ideologies of motherhood offensive to white feminists do not necessarily apply to black women.<sup>193</sup> The stereotype that mothers should stay at home with their young children is neither black women's experience nor a black woman's stereotype. They say ideologies of black female domesticity and motherhood are constructed around the expectation that black women do work outside their own homes (often as domestics and surrogate mothers to white families).<sup>194</sup> As a result, the stereotype that women's role is in the private sphere is a white woman's stereotype. Ideologies of motherhood, domesticity, and work in child custody cases would therefore operate quite differently for black women than for white women and require a more complex consideration of factors than the white feminist analysis allows.<sup>195</sup>

Another feminist "orthodoxy" that postmodernists challenge are the conclusions about reproduction and reproductive control. Whether inadequate discussion with respect to race and class issues has contributed to the conditions which make pregnancy and motherhood such unattractive alternatives for large numbers of women, is raised to question the deadlock between pro-life and pro-choice women.<sup>196</sup> Increasingly, attention is focused on the right to reproduce as well as the right not to reproduce.<sup>197</sup> At its most obvious, feminists say the right to reproduce includes the right not to be interfered with in such ways as forced sterilization, forced abortion, or coercive

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192. MacKinnon, *supra* note 188, at 16.

193. See Kline, *supra* note 157, at 132-34, where she critiques Susan Boyd's work on child custody law.

194. *See id.* at 130.

195. *Id.*

196. *See, e.g.,* M. Patricia Fernandez Kelly, *A Chill Wind Blows: Class, Ideology, and the Reproductive Dilemma*, in *CHALLENGING TIMES*, *supra* note 106, at 252.

197. *See generally* Christine Overall, *Feminist Philosophical Reflections on Reproductive Rights in Canada*, in *CHALLENGING TIMES*, *supra* note 106, at 240.

birth control programs.<sup>198</sup> Abuses are compounded by discriminatory sterilization and birth control practices visited upon minority women in both first world and developing countries.<sup>199</sup>

Reproductive technology also has created new issues and analyses in recent decades. A host of scientific techniques such as in vitro fertilization, embryo freezing, surrogate motherhood, and other mechanisms have been developed to "assist" infertile women or men to reproduce.<sup>200</sup> Although the feminist theorists have been reluctant to advocate the end of infertility research and experimentation, sexist, racist, eugenicist, and homophobic ideologies and stereotypes identified in the monopolized, male-dominated medical profession have caused concern.<sup>201</sup> In addition, increasing commercialization of reproductive technologies has created fears that some women's access to reproductive technology may require violations of other women's rights. This concern has led many postmodern and other feminists to the view that reproductive technology has minimal potential to contribute to feminist goals.<sup>202</sup>

Finally, postmodern feminists question whether drawing boundaries between the various feminist perspectives is useful. Although describing feminist thought in a number of categories may have some analytical usefulness, postmodernists say these descriptions can be both limiting and distorting.<sup>203</sup> Others disagree, saying labels can be of value because they locate

198. *Id.*

199. *Id.*

200. See generally COREA, *supra* note 96; INFERTILITY: WOMEN SPEAK OUT ABOUT THEIR EXPERIENCES OF REPRODUCTIVE MEDICINE (Renate Klein ed., 1989); RENATE KLEIN, THE EXPLOITATION OF A DESIRE: WOMEN'S EXPERIENCES WITH IN VITRO FERTILIZATION (1989); ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES (1993); Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521 (1988); Bartha M. Knoppers, *Reproductive Technology and International Mechanisms of Protection of the Human Person*, 32 MCGILL L.J. 336 (1987).

201. See generally Klein, *supra* note 96, at 889. Much of the knowledge and many of the procedures used today in modern gene and reproductive technology were developed by Nazi scientists and doctors. Heidrun Kaupen-Haas, *Experimental Obstetrics and National Socialism: The Conceptual Basis of Reproductive Technology Today*, 1 J. REPROD. & GENETIC ENGINEERING 127 (1988).

202. See generally Klein, *supra* note 96, at 901-03.

203. TONG, *supra* note 4; Kathryn Abrams, *Ideology and Women's Choices*, 20 GA. L. REV. 761 (1990).

different ideas about feminism on a spectrum of feminist thought and provide a framework within which to understand the different stages of evolution and growth of feminist theory.<sup>204</sup>

In summary, the challenge of reconciling pressures for diversity and difference on the one hand, with those of integration and solidarity on the other, makes feminist analysis difficult and evolutionary. Although each of the feminist theories discussed above has been criticized by other feminists, I would argue that all the theories are important and have a place in the early unfolding of the massive feminist project ahead. Although they are not all equally correct or effective in specific areas, the challenge is to understand which is best for the particular issue at hand. There is considerable room for growth, improvement, reconsideration, and expansion as time goes on. As Ngaire Naffine describes it, the feminist project in law is less a series of discrete interpretations than "a sort of archaeological dig"<sup>205</sup> because different techniques are appropriate at different levels of the excavation.<sup>206</sup>

In the section that follows, important issues facing the women's movement internationally are discussed in light of the different feminist perspectives discussed above. This discussion should enable the reader to appreciate how some of the theories work separately and together and to evaluate their effectiveness in the international context.

### III. WOMEN'S RIGHTS IN INTERNATIONAL LAW

#### A. *International Human Rights Instruments*

Since 1948, the United Nations has recognized the centrality of human rights to peace and harmony in the world,<sup>207</sup> and has continued for the past forty-seven years to create more detailed and comprehensive rights instruments. There are three large categories of rights in the international regime. The "first generation" of rights are civil and political rights.

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204. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 3-4 (1990); see also Nedelsky, *supra* note 141, at 1607-09.

205. NGAIRE NAFFINE, *LAW AND THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE* 2 (1990).

206. *Id.*

207. U.N. CHARTER arts. 1, 55-56.



These are rights which Western countries consider the most important to the maintenance of democracy and individualism.<sup>208</sup> "Second generation" rights are economic, social, and cultural rights, a category of rights preferred in socialist and communist regimes. The "third generation" group or peoples' rights are of greatest interest to developing countries.

For the vast majority of women in the world, the rights created are hollow. Notwithstanding the proliferation of newer and more complete legal instruments, international human rights law is largely meaningless to women because the definitions and development of the rights are built on the male experience and have not responded to women's needs or realities. Feminists from all countries agree that the same androcentricity privileging the male world view in national legal systems is imbued in international human rights law. This inequality is also true in the composition of international human rights institutions.<sup>209</sup>

There are a number of international instruments in existence which purport to protect women's rights. These include The United Nations Convention on the Political Rights of Women,<sup>210</sup> the United Nations Convention on the Nationality of Married Women,<sup>211</sup> the UNESCO Convention on Discrimi-

208. See generally Marc Bossuyt, *International Human Rights Systems: Strengths and Weaknesses*, in A GLOBAL CHALLENGE, *supra* note 96, at 47.

209. The Vienna Declaration and Programme of Action of 1993 recognized the paucity of women in decision-making posts in the U.N. Secretariat and urged the United Nations to appoint and promote women in accordance with the mandate for equality in the Charter of the United Nations. *Vienna Declaration and Programme of Action*, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., pt. II, U.N. Doc. A/CONF.157/24 (1993). In 1993, women represented only 11.3% of the decision-making positions at the United Nations. In 1991, there were two women among the eighteen members of the Economic Social and Cultural Rights Committee. Hillary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L. L. 613, 624 n.67 (1991). There was only one woman among eighteen on the Committee on the Elimination of Racial Discrimination, two among the eighteen on the Human Rights Committee, and two among the ten on the Committee Against Torture. *Id.* Moreover, there has never been a women judge on the International Court of Justice or the International Law Commission. *Id.* at 623-24. The same pattern exists in specialized agencies. In 1989, of the twenty-nine senior officials of the United Nations Children's Fund, only four were women; the Food and Agriculture Organization had none out of fifty-one; the World Health Organization had four women out of forty-two senior employees; no senior woman was employed at the International Monetary Fund; and only one woman held a senior position in the office of the United Nations High Commission for Refugees. *Id.* at 623 n.60.

210. Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 136.

211. Convention on the Nationality of Married Women, *done* Feb. 20, 1957, 309

nation in Education,<sup>212</sup> and the non-discrimination norms contained in both the International Covenant on Economic, Social and Cultural Rights (Economic Covenant) and the International Covenant on Civil and Political Rights (Civil Covenant).<sup>213</sup> All these instruments are premised on the view that to achieve equality, women should be treated the same as men.<sup>214</sup> As in domestic law, this kind of formal equality has some value, but it has been inadequate to address the deeper, more structural subordination of women world-wide for the same reasons that it does not improve the status of women in their own countries.<sup>215</sup>

In addition to the call for formal sex equality in the specific instruments listed above, the Convention on the Elimination of all Forms of Discrimination Against Women (Women's Convention), was drafted to deal with sex discrimination of all forms.<sup>216</sup> The product of thirty years of work by the United Nations Commission on the Status of Women, it is a blend of feminist theories. Although the majority of provisions require women to be treated the same as men in similar situations, read as a whole, the concept of equality in the Women's Convention clearly extends beyond formal equality.<sup>217</sup>

The Women's Convention deals with civil rights, the legal

U.N.T.S. 65.

212. Convention Against Discrimination in Education, *adopted* Dec. 14, 1960, 429 U.N.T.S. 93.

213. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter Economic Covenant]; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

214. For an overview of the instruments addressing formal equality, see MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS: INTERNATIONAL COVENANTS AS AN ALTERNATIVE TO ERA?* 18-33 (1987).

215. Exceptions would be the International Labour Organization conventions designed to protect women workers in ways that men were not protected. *See, e.g.*, Convention (No. 89) Concerning Night Work of Women Employed in Industry (Revised 1948), *adopted* July 9, 1948, 81 U.N.T.S. 147.

216. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1980) [hereinafter Women's Convention]. The Convention was adopted by the U.N. General Assembly in 1979 and ratified or acceded to by 104 countries as of January 1990. The Convention was preceded by a Declaration on the Elimination of Discrimination Against Women which was adopted unanimously by the General Assembly on November 7, 1967. G.A. Res. 2263, U.N. GAOR, 22d Sess., Supp. No. 16, at 35, U.N. Doc. A/6716 (1967).

217. One glaring omission, however, was the recognition of the role violence against women plays in their inequality with men.

status of women, reproduction, and the impact of cultural norms on gender relations. It emphasizes rights of political participation, nationality, and non-discrimination in education, employment, and economic and social activities.<sup>218</sup> It asserts equal rights and obligations of women and men with regard to choice of spouse, parenthood, personal rights, and command over property.<sup>219</sup> It states that rules intentionally or unintentionally treating women differently from men cannot be tolerated, particularly when they are based on prejudice and inaccurate generalizations about women.<sup>220</sup>

In the area of reproduction, it recognizes that equality requires legal norms to go beyond gender neutrality. The Women's Convention comes to grips with the realities of gender differences and the social and economic consequences of pregnancy by recognizing that women's equality requires states parties to guarantee a woman's right to decide on the number and spacing of pregnancies and to have access to information and the means to exercise these rights.<sup>221</sup> By demanding fully shared responsibility for child rearing on the part of both sexes, it acknowledges that gender discrimination is often caused by stereotyped sex roles. Moreover, cultural and radical feminist norms are evident in the provision that says States Parties have the responsibility to provide services that enable individuals to combine family responsibilities with work and participation in public life.<sup>222</sup> The Women's Convention thus acknowledges that maternity protection and child care are essential positive rights.

The Women's Convention identifies the generic, structural sources of inequality when it identifies the use of stereotypes, customs, and norms as potential barriers to women's enjoyment of equality.<sup>223</sup> States are exhorted to modify such customs and practices when they encourage the domination of women by men.<sup>224</sup> In other words, it obliges them to change not only negative laws, but also negative culture. In sum, it

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218. Women's Convention, *supra* note 216, arts. 2-5, 7-11, 13, 1249 U.N.T.S. at 16-19.

219. *Id.* art. 16, 1249 U.N.T.S. at 20.

220. *Id.* art. 5(a), 1249 U.N.T.S. at 17.

221. *Id.* art. 16(e), 1249 U.N.T.S. at 20.

222. *Id.* art. 11(2)(c), 1249 U.N.T.S. at 19.

223. *Id.* art. 5(a), 1249 U.N.T.S. at 17.

224. *Id.*

recognizes that in order to achieve gender equality, a multifaceted approach, similar to that advocated by postmodernists, is required. In some instances, equality requires that women not be denied opportunities and benefits enjoyed by men. In others, women must be empowered to determine their own priorities and needs. Unlike the non-interference role required for the protection of civil liberties, the Women's Convention says states have a crucial, pro-active role to play if gender equality is to be achieved. It is worth noting that the Women's Convention makes no distinction between the public and the private in its guarantees and requirements.

While considered a good idea at the time it was created, and still considered to be an accurate description of much of what causes women's subordination, the Women's Convention is now considered by many feminists to be largely responsible for the marginalization of women's human rights in international law.<sup>225</sup> Institutions created to draft and monitor women's rights continue to be notoriously underfunded. "Mainstream" human rights bodies ignore or downplay the human rights of women by referring "women's issues" to the Women's Convention. In addition, the implementation procedures and obligations in the Women's Convention are much weaker than those in other human rights instruments.<sup>226</sup>

All of these factors, combined with the widespread practice of states opting out of fundamental provisions of the Women's Convention, have rendered it ineffective where its provisions are needed the most.<sup>227</sup> Women around the world agree that

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225. Shelly Wright, *Human Right and Women's Rights: An Analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, in A GLOBAL CHALLENGE, *supra* note 96, at 75, 87.

226. See Kathleen Mahoney, *Human Rights and Canada's Foreign Policy*, 47 INT'L J. 555, 567-72 (1992).

227. Article 28(2) of the Women's Convention permits ratification subject to reservations, provided that the reservations are not "incompatible with the object." Women's Convention, *supra* note 216, art. 28(2), 1249 U.N.T.S. at 23. However, the Convention does not set out any criteria of incompatibility. As a result of this loose arrangement, over 40 of the 105 parties to the Convention have made a total of almost one hundred reservations to its terms, significantly undermining the Convention's integrity if not making a mockery of it altogether. Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281 (1991); Rebecca Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 VA. J. INT'L L. 643 (1990). For general principles governing reservations and objections to reservations to Conventions in international law, see Vienna Conven-

inequality is too deeply embedded to be removed by a mere comprehensive catalogue of women's rights which has very weak, if not non-existent, enforcement capabilities. They say reforms must move away from setting norms and toward the implementation of rights, the equal representation of women in national and international decision-making bodies,<sup>228</sup> and in structured, political change.

### *B. Feminist Theory in International Law*

In recent times, mutual vulnerability and resistance to human rights violations have mobilized women to become a potent political force in the world community. Their efforts have made women's issues a priority on the international human rights agenda, such that the Vienna Declaration and Program of Action,<sup>229</sup> which stated "the human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights,"<sup>230</sup> is now recognized as a watershed event that transformed the international human rights agenda in a fundamental way. The Fourth U.N. World Conference on Women's Rights in Beijing and its Platform of Action passed by a significant majority of the 189 countries in attendance,<sup>231</sup> indicates continuing momentum and progress.

The theoretical premises underlying the concept that women's rights are human rights are rooted in the theories discussed in the first section of this paper. Feminist analyses of the public/private distinction, in particular, are central to feminist theories of international law and have driven much of the substantive reform and other progressive developments of recent times.

The public/private analysis takes two directions. The first is that international law and human rights theories, in their

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tion on the Law of Treaties, May 23, 1969, arts. 19-23, 1155 U.N.T.S. 331, 336-38; Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide Case, 1951 I.C.J. 15 (May 28).

228. Rebecca Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. & TRANSNAT'L L. 779 (1990).

229. *Vienna Declaration and Programme of Action*, *supra* note 209.

230. *Id.* ¶ 18.

231. *The Fourth UN World Conference on Women Action for Equality, Development and Peace*, BEIJING UPDATE, Fall 1995, at 1 (Canadian update on the Fourth United Nations World Conference on Women, Beijing, China, Sept. 1995).

present form, exclude the private domain from their scope and thus are fundamentally flawed because they shut out most of the world's women. In order for human rights to be universal and include women in their scope, international law has to be reconceptualized to incorporate the private sphere.

The second and more hopeful argument has a less radical solution. Proponents of this view say that doctrinal tools are presently available to accommodate women's rights in human rights,<sup>232</sup> but international law incorrectly uses the public/private divide as a convenient tool to avoid addressing women's problems. Feminist analyses show the public/private dichotomy in international law is irrational and inconsistently applied,<sup>233</sup> and that a double standard is applied to the rights of women.

Some even say the public/private distinction is a "myth" because international law enters the private realm all the time in other areas.<sup>234</sup> They cite examples of international law regulating the rights of the family, preventing slavery, or holding states responsible for the acts of non-state actors in disappearance cases. They conclude that a state's failure to protect its members from human rights violations in the private sphere is indistinguishable from direct state action.<sup>235</sup>

The case of *Velásquez-Rodríguez v. Honduras*,<sup>236</sup> decided by the Inter-American Court of Human Rights (Inter-American Court), supports this position. In that case, a man was violently detained, tortured, and accused of committing political crimes by an unofficial death squad.<sup>237</sup> He disappeared and was never found. The Inter-American Court ignored the public/private distinction and legally imputed the crimes to the state of Honduras for the reason that the abuse committed by

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232. See, e.g., Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287 (1987); Wright, *supra* note 225, at 78-79; Charlesworth et al., *supra* note 209, at 627-29.

233. Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW, *supra* note 143, at 143, 144.

234. Eisler, *supra* note 232, at 293.

235. See Catharine A. MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, in A GLOBAL CHALLENGE, *supra* note 96, at 21, 31.

236. Case 7920, Inter-Am. C.H.R. 40, OEA/ser. L/V/II.68, doc. 8 rev. 1 (1986).

237. MacKinnon, *supra* note 235, at 29.

"private" actors was systematically tolerated by the government.<sup>238</sup>

The irrationality and unprincipled nature of the public/private distinction when it is applied inconsistently, has led to the wide acceptance of the strategy to link women's rights with human rights.<sup>239</sup> Women see some hope in the pursuit of such a strategy because at the present time, all governments are legally obliged under the United Nation's Universal Declaration of Human Rights<sup>240</sup> not to violate the human rights of their citizens.<sup>241</sup> Women argue that existing protections which protect men from violations of equality, security, liberty, integrity, and dignity, when applied to women, will strengthen the whole body of human rights because both halves of the human race will be represented in the scope of human rights. Rather than "ghettoizing" women's human rights as the Women's Convention does, the "women's rights are human rights" strategy emphasizes the ways in which women are specifically affected by any human rights issue,<sup>242</sup> and can be applied to all three "generations" of human rights.

To make the argument that women's rights are human rights involves at least three analytical steps. First, human rights must be defined from women's perceptions of what is central to their basic integrity as human beings.<sup>243</sup> Second, the violations of women's human rights must be made visible. Third, the breaches of women's rights must be analyzed through the existing human rights regimes, but in a way that takes account of women's lives.<sup>244</sup> In other words, the strategy is to use, where applicable, all of the feminist theories discussed in the first section to both undermine the public/private distinction and maximize the possibilities for women in all areas of life. Analyzing the distinctions between the public and private spheres in this way reveals the existing pervasive gen-

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238. *Id.*

239. See *Vienna Declaration and Programme of Action*, *supra* note 209.

240. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/180 (1948).

241. Charlotte Bunch, *Organizing for Women's Human Rights Globally*, in *OURS BY RIGHT*, *supra* note 45, at 141; AMNESTY INTERNATIONAL, *supra* note 1, at 5.

242. Bunch, *supra* note 241, at 143.

243. *Id.* at 141.

244. See *id.* at 144-45.

der bias in international law which, once exposed, is difficult to defend.

In the following sections, I will use examples to examine each of the three "generations" of rights to demonstrate how the women's rights as human rights strategy can be argued.

### C. *The First Generation: Civil and Political Rights*

Civil and political rights essentially create the public/private dichotomy. By definition, civil and political rights exist to prevent the public world from intruding into particular areas of private life.<sup>245</sup> By their very content, they require an examination of what "private" means. In international law, definitions of "private" include life in the home. For women, this definition is problematic for their enjoyment of rights, including the rights of citizenship and the right to bodily security.

#### 1. The Rights of Citizenship

To understand citizenship from a woman's perspective, the first step requires an examination of women's experience, or lack of it, in public life. Although most women today are entitled to vote, in many countries customarily or family constraints deny them effective political participation. Women who are forbidden the right to travel without the permission of their male relatives,<sup>246</sup> who are denied free speech rights, and whose freedom of association is curtailed by family members obstructing their ability to attend public events or political activities,<sup>247</sup> would probably define the citizenship right quite differently than men. They would likely make linkages between effective democracy in the public sphere and the need for democracy in the private sphere,<sup>248</sup> thereby demonstrating that recognition of women's human rights requires movement into the so-called "private sphere."

The second step is to make violations visible. This is accomplished by documenting facts through empirical studies,

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245. Dorothy Q. Thomas, *Holding Governments Accountable by Public Pressure*, in *OURS BY RIGHT*, *supra* note 45, at 82.

246. Bunch, *supra* note 241, at 142.

247. *Id.*

248. *Id.*



non-governmental organization (NGO) reports, and personal accounts which explain the lack of women's participation in public life. A strategy unto itself, "promoting change by reporting facts,"<sup>249</sup> is a human rights methodology based on the belief that violations are rampant partly because they remain hidden.<sup>250</sup> Known as the "human rights method,"<sup>251</sup> the reporting of abuses is effective because it has a universal language, moral authority, and a measure of accountability which can invigorate local struggles and put pressure on governments to end state-sponsored or tolerated abuse of women.<sup>252</sup> Moreover, it educates men about how human rights violations are committed against women in ways they do not experience, and how all women, regardless of culture, experience this gender gap.<sup>253</sup>

The third step, analyzing the claim through existing, but expanded human rights mechanisms, requires an examination of the elements of the right to citizenship as enshrined in international law and the meaning of effective democracy. The questions that should be asked at this stage are: Has the law been used to exclude women from the public sphere? What activities are considered to be the business of law and what are left unregulated? Why is lack of regulation of particular areas of social life significant for women? How can the law be interpreted so that gender status is not used to deprive women from exercising their citizenship rights?

The response to these questions will make it obvious that if women are to enjoy the citizenship right, they must have access to political participation and the ability to enter the public realm where human rights are defined and defended, and where they can help to change and shape the policies which affect women in their daily lives.<sup>254</sup> Democracy in the home would be an essential part of what enables women to

249. Diane F. Orentlicher, *Bearing Witness: The Art and Science of Human Rights*, 3 HARV. HUM. RTS. J. 83, 84 (1990).

250. AMNESTY INTERNATIONAL, *supra* note 1, at 3.

251. The basic steps of the method are: (a) careful documentation of alleged abuses; (b) a clear demonstration of state accountability for those abuses under international law; and (c) the development of a mechanism for effectively exposing the abuse nationally and internationally. Thomas, *supra* note 245, at 83 (citing Orentlicher, *supra* note 249).

252. Thomas, *supra* note 245, at 84.

253. *Id.*

254. Bunch, *supra* note 241, at 142-43.

have the social, economic, and political capability to exercise democracy in the public sphere. One goes hand in hand with the other.

## 2. The Right to Bodily Security

A similar analysis can be applied to the issue of violence against women. The right, designed to protect people from violence and set out in Article 6 of the Civil Covenant,<sup>255</sup> is often labeled as the "most important of all human rights."<sup>256</sup> However, the traditional interpretation of this right limits protection to individual victims of violence perpetrated by the state. The "private" sphere, where much of the risk of violence or death exists for women, is not reached by this interpretation. At the same time, empirical evidence of "private" forms of violence against women is overwhelming and undisputed.<sup>257</sup> Millions of women are victimized into forced abortion and infanticide from malnutrition from preference for males in times of food shortages, beatings by husbands, and less access to health care on the basis of sex. However, because of the narrow, gender-biased interpretation of human rights laws, they are not included within the "right" to bodily security.

The right to be free from torture, another centrally important civil and political right, is similarly interpreted.<sup>258</sup> The definition of torture requires that it take place in the public realm, "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>259</sup> Feminists argue that government inaction to prevent the torture of women committed by non-state

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255. International Covenant on Civil and Political Rights, *supra* note 213, art. 6, 999 U.N.T.S. at 174-75; *see also* Universal Declaration of Human Rights, *supra* note 240, art. 3; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222, 224.

256. Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 114 (Louis Henkin ed., 1981).

257. *See generally* U.N. CENTRE FOR SOCIAL DEVELOPMENT & HUMANITARIAN AFFAIRS, *VIOLENCE AGAINST WOMEN IN THE FAMILY*, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989).

258. *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

259. *Id.* art. 1.

actors is government "action" as much as if the state were committing the violence.<sup>260</sup> In particular, failure by states to act against sexual torture and violence represented by massive rates of rape, battering, and trafficking women, effectively condones such behavior.<sup>261</sup>

Read with even the minimal formal equality rights most states guarantee, it is clear that women are discriminated against by the state through the ways in which laws are enforced. Brazilian feminist activists, collaborating with Americas Watch on the First Women's Rights Project, have used this analysis to attack systematic acceptance of violence against women in the everyday administration of justice in Brazil.<sup>262</sup> The "legitimate defense of honor," used by judges in a routine manner to acquit men who killed their wives,<sup>263</sup> was contrasted with husband-murder, which was treated far more seriously.<sup>264</sup> By documenting a structure of discriminatory non-prosecution and sometimes overt acceptance of wife-murder, battery, and rape, they were able to demonstrate that the state denied women equal protection under the law and was in breach of its international human rights obligations. The project demonstrated that state legalized sex inequality is as serious and harmful as the state using rape as an instrumentality.<sup>265</sup>

Amnesty International and other NGO's have found that in many areas of the world, rape is used by government agents to elicit information or confessions from women held as political prisoners, to humiliate and intimidate women, and to punish them for political activity. Indeed, as Amnesty International discovered, "[s]ometimes women are raped because police officers or soldiers think they have a right to do so."<sup>266</sup> In India, hundreds of cases of police rape of women in custody have

260. MacKinnon, *supra* note 235, at 27.

261. *See id.* at 29.

262. For a description of this project, see Thomas, *supra* note 245, at 85.

263. *Id.*

264. *See* AMERICAS WATCH, CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL 35 (1991).

265. MacKinnon, *supra* note 235, at 27.

266. AMNESTY INTERNATIONAL, *supra* note 1, at 87. It has further been reported that one of two factory workers in East Java, Indonesia in January, 1993 said that the soldier who raped her had boasted: "Go ahead and report us to the commander. He's not going to do a thing. This is our right!" *Id.*

been reported, but convictions are rare.<sup>267</sup> India, however, is by no means unique in this respect.<sup>268</sup> Many other countries, such as Chile, Honduras, and the United States, have failed to investigate reports of widespread sexual abuse of women in prisons.<sup>269</sup> These cases are less about breaking down the public/private distinction than they are about blatant failure to provide equal protection of the law.

Other than the right to life and the right to be free from torture, the interpretations of other civil and political rights such as freedom of expression and privacy rights, also work against, rather than for, women's human right to be free from violence. In many countries, the distribution, manufacture, and use of pornography, which directly contributes to violence against women and girls, is protected by the freedom of expression right.<sup>270</sup> The right to free expression is considered to be a "public" realm issue, whereas the use of pornography to hurt women falls within the private sphere.<sup>271</sup>

Similar arguments are used to protect trafficking and prostitution of women and children. Governments and businesses which profit from the international sex trade in women and children argue for continued and expanded exploitation of women and children under the guise of rights.<sup>272</sup> They say that prostitution is "commercial sex work" done by women exercising their freedom of choice and labor rights.<sup>273</sup> At the same time, they lobby for and decrease the age of consent for minors to engage in sexual activity.<sup>274</sup> They say prostitution

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267. *Id.*

268. *Id.*

269. *Id.* at 87-88.

270. See *R. v. Butler*, [1992] 1 S.C.R. 432 (Can.); MACKINNON, *supra* note 61; Kathleen Mahoney, *Pornography and Violence Towards Women - Comparisons Between Europe, the United States and Canada*, in INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE 333, 333-58 (Irwin Cotler & F. Pearl Eliadis eds., 1992).

271. Catharine A. MacKinnon, *Not a Moral Issue*, in FEMINISM UNMODIFIED: DISCOURSES ON THE LAW, *supra* note 61, 146, 155.

272. For a discussion of prostitution, trafficking, and violence against women, see JANICE G. RAYMOND, REPORT TO THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN: COALITION AGAINST TRAFFICKING IN WOMEN (1995).

273. *Id.* at 10-13.

274. In August 1995, immediately preceding the Beijing Conference, the Netherlands lowered the age of consent to 12 years. At the same time, their government delegates deplored "forced prostitution" and child pornography at the conference. See Laura Lederer, *International Legal Responses to Pornography* (1995).

must be destigmatized and regulated so that the prostitutes will become more "professional" and more "dignity" will accrue to their "work."<sup>275</sup> Feminists argue the more likely result will be the dignifying of the sex trade industry and the men who buy the bodies of the women and children trapped in prostitution.<sup>276</sup>

The "regulationist" approach protects men at the expense of women by making "prostitution a [legitimate] and necessary social service performed by a separate class of women. It integrates that work into the social structure through taxation, health checks, and other administrative measures."<sup>277</sup> Not only does this characterization of "rights" serve the needs of the exploiters of women, it masks the harm of prostitution, such that its human rights dimensions are invisible.<sup>278</sup> Moreover, if countries, international banks, monetary agencies, and labor organizations are permitted to incorporate prostitution and trafficking in women into global economies, as some are proposing, then governments are much less accountable for making dignified and sustainable employment available to women.<sup>279</sup>

Civil and political rights are also used to prevent government scrutiny of cultural and religious practices which oppress women.<sup>280</sup> Alliances formed between fundamentalist religious groups and conservative political groups, which seek to destroy women's rights to sexual autonomy, sexual orientation, bodily security, and other citizenship freedoms under the guise of religious freedom, demonstrate the importance of scrutinizing the effects of "civil rights" claims on the rights of women.<sup>281</sup> Religious freedom to submit oneself to God is often interpreted by male religious leaders to mean submission to men.<sup>282</sup> A

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(unpublished, available from the Center on Speech, Equality and Harm at the University of Minnesota Law School).

275. RAYMOND, *supra* note 272, at 11.

276. *Id.*

277. *Id.* at 3.

278. *Id.* at 4, 13, 15.

279. *Id.* at 12. For a discussion of the complicity of governments in the trafficking of women, see Rehana Hakim, *Governments Part of Global Mafia on Trafficking of Women*, FORUM '95, Sept. 3, 1995, at 5.

280. See ARVIND SHARMAN, *WOMEN IN WORLD RELIGIONS* (1987).

281. Nadia Hijab, *Countering Conservatism*, FORUM '95, Sept. 3, 1995, at 2.

282. Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in HUMAN RIGHTS OF

"women's rights are human rights" analysis uncovers such discrimination in the rights balancing process.

*D. The Second Generation: Socio-Economic Rights*

At first glance, socio-economic rights appear to be more accessible to women than civil and political rights. Rights to development, health care, food, shelter, and employment protected in the Economic Covenant,<sup>283</sup> do not invoke the "individual versus state" paradigm, and are thus less tied to the public/private distinction. Yet, the "public sphere" distinction is still used to deny women access to these rights. Gender distinctions and gender bias prevail in definitions of the socio-economic rights just as they do for civil and political rights.

The Economic Covenant creates a "public sphere" by relying on the assumption that all power resides in the state.<sup>284</sup> Feminists say that in order to respect women's socio-economic rights, international law must recognize that there are many other instrumentalities of power, all male-dominated.<sup>285</sup> Defining power exclusively in terms of what the state does renders the socio-economic rights seriously underinclusive for women. When one half of the human race is subject to unjust abuses of power by the other half, it is gender biased to limit protection only to state action.<sup>286</sup>

The consequences of creating a "public sphere" defined by the exercise of state power can be seen in the Article 7 definition of the right to "just and favorable conditions of work" and "conditions of work not inferior to those enjoyed by men, with equal pay for equal work."<sup>287</sup> The Economic Covenant defines these rights as applicable only to work in the "public" sphere.<sup>288</sup> However, economic activity in the home, the fields,

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WOMEN, *supra* note 19, at 167, 177; Radhika Coomaraswamy, *To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights in Women's Human Rights*, in HUMAN RIGHTS OF WOMEN, *supra* note 19, at 39.

283. Economic Covenant, *supra* note 213.

284. Shelley Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 AUSTL. Y.B. INT'L L. 241, 248-49 (1992).

285. *Id.* at 249.

286. MacKinnon, *supra* note 235, at 27.

287. Economic Covenant, *supra* note 213, art. 7, 993 U.N.T.S. at 6.

288. Marilyn Waring, *The Exclusion of Women From "Work" and Opportunity*, in A GLOBAL CHALLENGE, *supra* note 96, at 109, 113, 116; see also Charlesworth,

and the marketplace, performed without pay, is considered the private sphere.<sup>289</sup> When the majority of the world's women work in the "private" sphere, the protections in Article 7 are meaningless.<sup>290</sup> The definition not only makes the extent and tremendous economic value of women's work invisible, it excludes women's work from any protections Article 7 provides.<sup>291</sup>

An analysis based on the principle that "women's rights are human rights" would find the definition of "work" in Article 7 discriminatory. Moreover, national accounting systems, as well as international rights that operate on the assumption that women's work is of a lesser order than that of men, could be attacked for violating equality guarantees in international law.<sup>292</sup>

### *E. Third Generation Rights*

Third generation rights are rights of groups or collective rights. Their underlying premise is that the welfare of the community is more important than the welfare of the individual. Group-based rights are usually thought to be more sensitive to the needs and priorities of women than civil and political rights because they are more centered on the family and community rather than on individuals. In practice, however, the exercise of third generation rights, such as the right to development, continue to support male economic dominance.<sup>293</sup> Similarly, the exercise of the right to self-determination, which allows "[a]ll peoples . . . [to] freely determine their political status and freely pursue their economic, social, and cultural development,"<sup>294</sup> oppresses women.

Structural adjustment programs imposed by the International Monetary Fund and the World Bank. They have caused disproportionate disadvantage to women because their theories, strategies, and solutions for development, growth, and

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*supra* note 19, at 74.

289. Waring, *supra* note 288, at 116; see also WARING, *supra*, note 1.

290. Charlesworth, *supra* note 19, at 74.

291. *Id.*; see also WARING, *supra* note 2.

292. See generally WARING, *supra* note 2.

293. Hilary Charlesworth, *The Public/Private Distinction and the Right to Development in International Law*, 12 AUSTL. Y.B. INT'L L. 190, 194 (1992).

294. Economic Covenant, *supra* note 213, art. 1(1), 993 U.N.T.S. at 5.

underdevelopment tend to ignore women and the role they fulfill in their societies. When development policies are interpreted and implemented in a gender-blind way,<sup>295</sup> women's work burden in developing countries increases while social expenditures decrease, employment creation for women is weakened, and institutional gender inequality in the formal and informal sectors of national economics goes unnoticed.<sup>296</sup> The financing conditions of international lending institutions further compromise women's economic and social progress by suppressing wages, undermining the contributions and livelihoods of small producers, undermining trade unions, and placing social services, particularly health care and education, out of their reach.<sup>297</sup>

If development and self-determination rights were understood to include women in their scope, the World Bank and the International Monetary Fund would be legally obligated to avoid structural development policies which discriminate against women.<sup>298</sup> As international actors in breach of international law, they would be confronted by NGO's and state governments to ensure women share equally in the benefits of their loans.

#### *F. The Challenge of Cultural Relativism*

One of the difficulties the "women's rights are human rights" strategy presents is the accusation that women's rights will result in cultural destruction. Many governments breach human rights treaties with impunity, using the argument that human rights must be subject to the interests of national security, economic strategy, and local traditions.<sup>299</sup> While feminists accept the view that diversity and difference

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295. Sény Daigne, *Defending Women's Rights: Facts and Challenges in Francophone Africa*, in OURS BY RIGHT, *supra* note 45, at 43.

296. See generally Report of the Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities in the Realization of Economic, Social and Cultural Rights, U.N. ESCOR, 44th Sess., Agenda Item 11, ¶¶ 139-69, U.N. Doc E/CN.4/Sub.2/1992/16 (1992).

297. *The Copenhagen Alternative Declaration*, LIVING DIFFERENTLY, COPENHAGEN 95, Concluding Issue 1995, at 4.

298. See, e.g., Akua Kuenyehia, *The Impact of Structural Adjustment Programs on Women's International Human Rights: The Example of Ghana*, in HUMAN RIGHTS OF WOMEN, *supra* note 19, at 422.

299. AMNESTY INTERNATIONAL, *supra* note 1, at 5-6.



must be respected, they insist upon universality of basic rights. They argue that rejection of the universality principle endangers not just women's rights, but also rights of men and children. Once individual governments begin to define what fundamental human rights are, or who may enjoy those rights, the whole international and domestic system of human rights is jeopardized.

Amnesty International, which recently took up the cause for women's human rights, asks, "Would the woman who is raped and murdered in Indonesia for standing up for workers' rights consider this a justifiable price to pay for a nation's 'right' to interpret human rights according to local economic conditions?"<sup>300</sup> Others argue that harmful customs such as child marriage, genital mutilation, and inferior education and nutrition for girl children cannot be legitimately passed off as "cultural."<sup>301</sup> Such practices are more accurately characterized as discriminatory and harmful human rights abuses.

Not all cases, however, are so easily analyzed. Muslim women, for example, argue that modernization, urbanization, and other 20th century developments have motivated women to look for security in tradition.<sup>302</sup> They say if they accept Western ways and products, they will be forced to give up their traditions. The delicate task is to avoid homogenizing universalism on the one hand and the paralysis of cultural relativism on the other.<sup>303</sup> An inevitable tension within feminist theory comes from the understanding that diversity is the norm and there are no monolithic categories, and the recognition of the need to work in solidarity with common causes, commitments, and approaches.

Respecting culture while promoting the universality and indivisibility of human rights requires sensitivity to both the

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300. *Id.* at 6.

301. Veronika Sarkany, *Child Marriage: An Evil Custom*, FORUM '95, Sept. 5, 1995, at 14; Bernadette Cole, *Thomas Speaks on Female Circumcision in Africa*, FORUM '95, Sept. 3, 1995, at 10; Veronika Sarkany, *Girl Child in S. Asia, Victims of Abuse*, FORUM '95, Sept. 3, 1993, at 14.

302. Rashida Patel, *Challenging Tracing Women in Pakistan*, in OURS BY RIGHT, *supra* note 45, at 32, 36; Marie Aimée Hélie-Lucas, *Women Living Under Muslim Laws*, in OURS BY RIGHT, *supra* note 45, at 52, 53.

303. Coomaraswamy, *supra* note 282, at 39.

process and substance of strategies employed. Feminist analyses of law in one type of society cannot be imported wholesale into other types of societies or into the international human rights system. The means chosen to combat discrimination or inequality may need to be varied according to particular contexts but the ultimate result can be the same.

For example, the public/private analysis used above could potentially create a problem when applied to some social and legal systems. In Western culture, the distinction is drawn between matters outside the home, of a public nature, with which the law is concerned, and matters in the home, of a private nature, which generally fall outside the scope of the law. The analysis is intended to show that women are more vulnerable to abuses in the private sphere because their rights are unprotected there.

In other cultures, however, the public/private dichotomy may be factually different.<sup>304</sup> What is private in one society may well be public in another. Sometimes the public distinction may be used to illuminate areas of oppression otherwise unobserved. These problems can be resolved without abandoning the public/private analysis and its exposure of women's human rights violations. Perhaps better language could be used in the international context to examine "the women's domain," which is consistently devalued in most cultures, whether it is in the "public" or "private" sectors.

Another trap to be avoided is dividing the world into bipolar categories.<sup>305</sup> For example, Western feminists cannot assume that the West is always progressive on women's rights or that the East is backward.<sup>306</sup> Feminists in the East must be equally cautious not to subscribe to the reverse notion that the East is superior to the West.<sup>307</sup> The reality is that in both areas of the world, traditions exist in both legislative and customary regimes which are harmful to women. There are instances where traditional laws have been more progressive

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304. Charlesworth, *supra* note 19, at 58.

305. Coomaraswamy, *supra* note 282, at 40.

306. *Id.*

307. *Id.*

than modern legislation and the colonial encounter actually robbed women of pre-existing rights.<sup>308</sup>

In summary, the accusation that human rights activists are out to destroy the culture can be a powerful tool in the hands of those who wish to maintain the status quo of female subordination. Yet, in any society, unless women's rights have sufficient legitimacy within the culture they will not be respected. It must be recognized that the foundation for a civil society must be laid according to its particular context so that it will strike a responsive chord in the general public consciousness.<sup>309</sup> But the competing idea that there has to be standards by which one can hold individuals and states accountable, must also play a role in any complete analysis.

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308. *Id.*

309. ASHIS NANDY, *AT THE EDGE OF PSYCHOLOGY* 40 (1980).