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HUMAN RIGHTS QUARTERLY

Human Rights: A Feminist Perspective

*Gayle Binion**

ABSTRACT

This paper explores the ways in which human rights might be understood if women's experience were the foundation for the theorizing and enforcement. The argument is not that there is but *one* feminist perspective—indeed the title suggests that there might be many. Rather, it is argued that, if one works from the life experiences most common to women, the principles of human rights that would emerge would not necessarily reflect the universe of such rights as they are commonly understood by liberal nation states. While the prototypic "human rights" case involves the individual political activist imprisoned for the expression of his views or political organizing, forms of oppression that do not fit the Bill of Rights model of liberty are rarely recognized in international understandings or national asylum laws. These forms would include, *inter alia*, issues related to marriage, procreation, labor, property ownership, sexual repression, and other manifestations of unequal citizenship that are routinely viewed as private, nongovernmental, and reflective of cultural difference.

FEMINISM AND LAW IN CONTEXT

Perhaps the most profound intellectual stimulant to jurisprudence in the past generation has been the development of feminist approaches to the study of law. Whereas a decade ago, significant obstacles were encountered in the process of accessing this literature,[1] by the mid-1980s feminism

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1. Standard reference sources and indexes in law did not have *feminism* as a category until just a few years ago. While women and the law has been a category for at least the past twenty years, this did not capture the breadth of the feminist enterprise that had already

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became as deeply rooted in legal scholarship as it had earlier become in several of the humanities and social sciences. The myriad questions asked and approaches employed under the feminist rubric have generated a dialogue that raises fundamental questions about the nature of law: whom the system(s) serves, the social conditions it both reflects and impacts, and the possibilities for its transformation.

Virtually all areas of law have felt feminism's influence. Although those of most immediate material concern to women, such as family law, employment discrimination, and reproductive rights, were the first to be analyzed from feminist perspectives,[2] other less obviously gendered subjects, such as torts, criminal law, and constitutional law, have similarly been viewed through feminist eyes.[3] Interwoven with these doctrinal analyses have been perhaps the most challenging critiques which address the law as an inherently gendered *system* and suggest that its processes and principles resonate with only male experience.[4]

Feminist developments in law did not, of course, occur in intellectual isolation. As is commonly the case in sociopolitical scholarly movements, law-oriented insights about the role and function of gender as a socially constructed and constructive variable drew heavily upon the research and literature in the fields of psychology and sociology. Landmark works like Gilligan's *In A Different Voice*,[5] Chodorow's *The Reproduction of Mothering*,[6] and Epstein's *Deceptive Distinctions*[7] addressed not only the status of

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grown in the field. Consequently, the vehicles necessary to build a self-referential and communicative dialogue were nonexistent during the most formative years of the enterprise.

2. *See, e.g.*, MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9 (1986); Herma H. Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).
3. *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. OF LEGAL EDUC. 3 (1988); Kenneth Karst, *Woman's Constitution*, 1984 DUKE L. J. 447; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U.L. REV. 589 (1986); Gayle Binion, *Toward a Feminist Regrounding of Constitutional Law*, 72 SOC. SCI. Q. 207 (1991); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). The literature to which I refer herein is all English language, including largely American, British, Australian, and Canadian theorists.
4. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CAROL SMART, FEMINISM AND THE POWER OF LAW (1989); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).
5. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).
6. NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978).
7. CYNTHIA F. EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER (1988).

women within (US) society, but attempted to explain the underpinnings of this "different" life experience. The application of insights such as these and myriad others of the 1970s and 1980s provided important foundations for feminist theorizing in law.[8]

FEMINIST STUDIES AND JURISPRUDENCE: THE FOCUS OF CONCERN

Feminist jurisprudence has certain defining characteristics that are shared with feminist studies generally. These include a focus on women's experience, especially the disempowerment that has been ubiquitous. In a world in which women perform two-thirds of the hourly labor and receive 10 percent of the income and hold barely 1 percent of the property,[9] disempowerment is clearly economic. In a world in which women are more than 51 percent of the population, fewer than 5 percent of the heads of government, and fewer than 10 percent of the (lower house) parliamentarians,[10] disempowerment is clearly political. In a world in which it is acceptable, *inter alia*, for women to be raped by their husbands; for female detainees to be raped by the police; for women to be educated at half the level and literacy of men; for women to have no access to birth control or abortion; and for women to have no unilateral freedom of movement domestically or internationally, disempowerment is clearly social. To these indicia of societal inequity might also be added the practices of dowry murder, the aborting of female fetuses, the murder of female babies, and nationality laws that are male determinative.[11] The breadth and depth of the critical problems addressed in feminist studies suggest that the undertaking

8. Two caveats are important here. First is that the views of the sources of feminist theorizing in law were and are very diverse. For example, while Gilligan clearly addressed perceived differences in how men and women conceptualize moral issues and dilemmas and Chodorow sought to explain identity and empathy as reflective of gender-based rearing patterns, Epstein cautioned against making too much of "difference" and suggested that what men and women have in common far outdistances perceived gender-distinctive characteristics. The second, and related, caveat is that the theorizing in law, while influenced by developments in the social sciences and humanities, is not entirely derivative. A legal scholarship of feminism took root in the 1970s and has flourished as a cross-fertilized but also independent enterprise.
9. United Nations, The World's Women 1970–1990: Trends and Statistics at 30 (1991). It might also be noted that in the United States women are fewer than 1 percent of the CEOs of the 500 largest corporations.
10. United Nations Office at Vienna Centre for Social Development and Humanitarian Affairs, Women in Politics and Decision-Making in the Late Twentieth Century at 10, 58 (1992).
11. For analyses of these issues, see, e.g., Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 Colum. J.L. & Soc. Probs. 597 (1991); Lisa C. Stratton, *Note: The Right to Have Rights*, 77 Minn. L. Rev. 195 (1992); Gráinne De Búrca, *Fundamental Human Rights and the Reach of EC Law*, 13 Oxford J. Legal Stud. 283 (1993).

need demonstrate no further that there are academically worthy questions to be asked about gendered economic, political, and social systems. Feminist jurisprudence, which includes a broad field of theorizing, asks questions about where *the law* fits within women's experience, what is its role in perpetuating these gendered systems, and how might law be a vehicle for change.

FEMINIST STUDIES: METHODOLOGY AND ORIENTATION

Feminist studies have more in common than the subject they study; there are a variety of other relatively common features. Feminist analysis tends to be *contextual, experiential,* and *inductive.* Whereas much social theory is hierarchical, abstract, and deductive, the feminist starting point is from *actual human experience* and the implications of that experience. In a significant sense, it is more anthropological than philosophical,[12] and it is marked by what Bartlett calls "practical reasoning."[13] Because real life experience is the source and the focus of the theorizing and incorporating the *diversity* of women's lives is highly valued, grand theory is largely eschewed, and absolutes are distinctly suspect.[14] This renders feminist theorizing necessarily *self-consciously limited, tentative,* and *provisional.*[15] A final unifying feature of feminist theory is that it is inextricably intertwined with contemporaneous social, political, and economic movements. In the law this is an especially prominent feature of the scholarship that has paralleled, influenced, and been influenced by, the movements for legal equality of women since the late 1960s. The interactive realms of scholar and political activist, often practiced but rarely openly respected in some quarters of academia, form, in the world of feminism, a natural liaison. While to some such interaction raises questions about the "objectivity" of the scholarship, to many feminists the larger question is whether the failure

12. I do not mean to suggest that feminist studies is therefore difficult or impossible in philosophy. Quite the contrary, in these respects, feminists have written some of the most provocative philosophical work in recent years, work which challenges the presumptions of the field. *See, e.g.,* Nancy C.M. Hartsock, Money, Sex and Power: Toward a Feminist Historical Materialism (1983); Beyond Self-Interest (Mansbridge ed., 1990); Susan M. Okin, Justice, Gender and the Family (1989); Carole Pateman, The Sexual Contract (1988) (all extrapolating from actual experience).
13. Bartlett, *supra* note 4, at 887.
14. In a very stimulating analysis, Smart, *supra* note 4, at 68, 71, has suggested that these features of feminist jurisprudence have rendered the law—which is hierarchical and which values grand theorizing and deductive analysis—an inhospitable environment for women.
15. *See,* Bartlett, *supra* note 4, at 857.

to engage the application of scholarship suggests an absence of responsibility.[16]

HUMAN RIGHTS IN FEMINIST RELIEF

Feminist jurisprudence provides very substantial challenges to human rights law as it is institutionally understood. These include both fundamental questions about the processes by which human rights are defined, adjudicated, and enforced, as well as questions about the substance of what is thereby "protected." And, while the focus of analysis is on women's experience, a feminist approach might have immediate implications for the rights of all disempowered peoples and raise questions about social organization generally. If it were necessary to offer one word to capture the essence of feminist jurisprudence, in general and in its significance for human rights analysis, it is *inclusion*. The enterprise critiques the experience of women as persons *excluded* from legal protection and from proportionate political and economic power.

Feminist critics of legal institutions question whether these institutions are capable of protecting women. Legal institutions are viewed as hierarchical, adversarial, exclusionary, and unlikely to respect claims made by women.[17] In apparently stark contrast, exponents of the protection of human rights argue that human rights *must* be seen as a *legal* phenomenon. If principles of justice are not *legalized*, then they are subject to the unilateral control of nation states, and their abuse can be subjected to nothing more than the *ad hoc* expression of moral outrage by those who disagree with the challenged behavior. While the domestic or international codification of policy, like conventional or common law, provides no guarantee that the law will be respected, human rights advocates maintain nevertheless that "law" is a critically important arrow in their quiver. Even in situations in which litigation is either impossible or impractical, this view rests on the assumption that most states do not even want to *appear* to be in violation of

16. It must be noted of course that this debate about the appropriateness of involvement in the practical consequences of one's academic work is limited almost exclusively to only some of the social sciences. In academic medicine, as in business and law schools, as well as, for example, in departments of archeology, music, dance, theater, or engineering, to be involved in such activity is mainstream and expected.

17. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Smart, *supra* note 4. I might have added overwhelmingly "male," but this is not true in all societies. While in the United States and Great Britain women are fewer than 10 percent of the judiciary, in continental countries and Scandinavia this is not the case.

international law.[18] Despite the widely held view that all international law is simply international politics, being able to portray a claim as having the backing of "law" removes the dialogue from the realm of being nothing more than self-interested negotiation. A feminist analysis, in contrast, might well argue from experience that human rights law has been a miserable failure in protecting peoples from oppression.

Despite this immediately apparent conflict over whether law is important in the protection of human rights, in a sense, the feminist concern and the classic human rights perspective may not be in fundamental disagreement over the question of *reliance* on law. This is because the major concern expressed by feminist critics of legal institutions, preeminently by Carole Smart, is that *litigation as a process* does not serve women.[19] Human rights advocates also know only too well that litigation is an extremely limited tool in this endeavor.[20] Thus, while women's experience would suggest that reliance on courts, judges, and lawyers to transform society is folly, feminists and traditional human rights activists are both able to appreciate, and perhaps agree, that developing *law as principle and rule* is not an enterprise to be jettisoned. The points of disagreement that are far more fundamental reflect on the political power that is represented in the process of defining these "legal" rights, the limitations on "rights" analysis, and the life experience that should underlie the substantive principles of human rights law to which the world ought to be committed. Where human rights advocates spar with the governmental powers-that-be largely over how they are treating political dissidents, feminist critics maintain that the diameter of the circle of *inclusion* in the realm of human rights law is entirely too narrow.

WORKING FROM "WOMEN'S EXPERIENCE"

In an attempt to visualize how human rights would be understood if women's experience were the foundation for such policymaking, Charlotte

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18. Leslie J. Calman, *Are Women's Rights "Human Rights" in* WOMEN IN INT'L DEV., at 12 (Michigan State Univ. Working Paper No. 146, 1987).
19. I do not read Smart's critique, *supra* note 4, as necessarily condemnatory of public policy per se.
20. While the European Court of Justice and the European Court of Human Rights, as well as other similar regional international bodies, have developed some significant human rights law, albeit far more readily for men than for women (*see*, Marie Provine, The Human Rights of Women: A Feminist Analysis (on file with the author); Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. TRANSNAT'L L. 779 (1990)), the minimal volume of output, as well as the classic

Bunch has asked what is basic to women's view of their humanity.[21] While this endeavor of defining human rights from the experience of women is a first step to integrating women into the process of operationalizing and protecting human rights, the outcomes are not entirely women-specific. As suggested above, a feminist perspective on human rights has implications for *all* human rights, not just those of women. For example, if because of women's experience with respect to reproductive policy and nonenforcement of rape laws, such a perspective highly values bodily integrity, this has application as well to issues such as capital punishment and military conscription, governmental practices with which women as a group have not been significantly associated. Similarly, if a feminist perspective is especially sensitive to hierarchy and inequity of power, the implications for all people at the bottom of the social order is significant. Having perhaps the broadest implications for human rights theory and practice is the feminist challenge to the assumption that only government ought to be accountable for human rights violations. If, in women's experience, deprivations of (traditionally understood *principles* of) human rights come most predictably from the nongovernmental sphere, it would then be asked whether men's rights are not similarly most often threatened by actors and conditions that are not necessarily clothed with officialdom.

In sum, feminist approaches lead us to ask particular questions and to challenge certain institutional arrangements, suggesting pragmatic and inductive methodologies in seeking answers. The consequences of this analysis and the alternative visions of society that it engenders might be quite profound and ultimately as relevant to men as to women.

CHALLENGING THE PUBLIC-PRIVATE DISTINCTION

Perhaps no question is more immediately and regularly addressed in a feminist critique of human rights theory than is the assumption of the separate worlds of the "public" and "private," a distinction that roughly corresponds to the governmental and the nongovernmental in contemporary parlance. This dichotomy is largely a product of classical western

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limitations of states as defendants or, in the case of the International Court of Justice, states as litigants, has rendered the "litigation" process of minimal significance in protecting human rights.

21. Charlotte Bunch, *Organizing for Women's Human Rights Globally, in* OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS 141 (Joanna Kerr ed., 1993) [hereinafter OURS BY RIGHT].

liberal thought[22] in which, *inter alia,* John Locke sought to deny the legitimacy of the divine right of kings without challenging patriarchal familial structure. To dispute the analogy employed by royalty between their authority over society and the father's authority over the family, Locke argued that the two spheres were separate and distinct. Whereas patriarchal authority was deemed to be divine, political power was deemed to emanate from the governed. The consequences for women of this dichotomous perspective are fundamental and profound. A separate spheres approach has relegated women to the home, away from the political institutions that make policy[23] and away from a substantial role as well in other "public" institutions that determine the nature and quality of life in a community.[24] The Lockean separate spheres approach has also rendered women subject to the control of patriarchal familial authorities—fathers, brothers, and husbands—with the understanding that familial matters are "private" and, therefore, beyond the scope of governmental authority and intervention. Physical and sexual abuse of wives and children, ubiquitous throughout the world, has, consequently, faced little formal challenge within a two-spheres understanding of the social order.[25]

Overcoming the international institutionalization of the public-private dichotomy is one of feminism's greatest hurdles in creating an *inclusionary* approach to human rights and in incorporating the diverse everyday life experiences of women into its models.[26] Feminists find little political support for their movement to scale the presumptive wall between state and family and to implicate parties other than the government for human rights violations. Whether it is the malnutrition and mortality of female children,

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22. Nancy Kim has suggested that it is western liberal thought that has treated the "public" as "political" and the "private" as "cultural." Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism,* 25 Colum. Hum. Rts. L. Rev. 49, 66–74 (1993).
23. Carole Pateman's brilliant analysis of *The Sexual Contract, supra,* note 12, demonstrates that in liberal theory women are not parties to the social contract. They are brought into the contract much the way slaves are.
24. One of the many great fallacies associated with the "two-spheres" approach to societal structure is the assumption that there are *only* two spheres: government and family. This approach draws attention away from other loci of great power and potential oppression in society, away from what some social scientists call "mediating institutions." These would include, *inter alia,* corporations, religious organizations, educational institutions, cultural and public interest organizations.
25. Human rights concerns aside, despite overwhelming evidence of the negative social consequences of child abuse, Sweden's outlawing of spanking continues to draw derisive commentary. Similarly, women who accuse their fathers of incest are assumed to be "suffering" from "false memory syndrome."
26. *See* Adelaide H. Villmoare, *Women, Differences and Rights as Practices: An Interpretative Essay and a Proposal,* 25 Law & Soc. Rev. 385 (1991) (discussing the importance of everyday life experience in the operationalization of a feminist view of rights).

spousal rape, beatings and murder, or the institution of *purdah* (in which women are essentially imprisoned in their homes), the world's actors are not inclined to see these allegedly nongovernmentally perpetrated sexual inequities as human rights issues.[27] While women collectively can argue that *their* experience of oppressive power that denies them moral autonomy, human dignity, and physical security occurs more readily in the home than in the town jail, there appears to be little support outside of the feminist movement for broadening human rights principles to include a wider locus of abuse and a wider range of abusers. There are numerous explanations for this inability to see human rights in broader relief and for the reluctance to model the notion of the international citizen upon the lives of women.

First, perhaps ironically, is the interest of the state in retaining its preeminence in the international world. While it is of questionable notoriety to be viewed as the *only* source of violations of fundamental principles of justice and freedom, states might, nevertheless, value the autonomy over their citizenry that this stance implies. By being seen as uniquely oppressive, they simultaneously retain a hegemony over their people and insulate institutions allegedly *beyond* their control from external purview.

Second, the state might promote the dichotomization of public and private to maintain a chasm between the two out of a concern that much can be learned about the political world from an understanding of familial life, and these insights might be destabilizing to the system. Okin and Pateman have both suggested that attention to the patriarchal power structures in family life might heighten citizens' understanding of the hierarchical power that controls the political system.[28] Ironically, whereas Locke, not inclined to challenge paternal authority, saw the conceptual cojoining of state and family as reinforcing political autocracy, feminists, who do challenge familial patriarchy, see the association of the two as having precisely the opposite impact.

It might be argued that the state is not the only powerful actor that wants to limit the reach of human rights to only the "public" domain. The pressure to do so might come as well from the "private" realm. Religious institutions and corporations, for example, have much to gain in the preservation of their autonomy from the illusion of invisibility that the two-spheres theory provides. If human rights concerns are focused solely on the state because of a theory of the insulation of the family as "private," the false illusion of a

27. *See* Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 72–73 (1993) (suggesting that, despite the right to life and freedom from torture that are incorporated within *jus cogens* in international human rights law, *jus cogens* ignores the spheres in which these rights of women are most often jeopardized).

28. PATEMAN, *supra* note 12; OKIN, *supra* note 12, at 110–33.

dual-institution society is reinforced. Exceptionally powerful bodies beyond the familial patriarchy thereby escape scrutiny. Employers (of women and men) who pay unconscionably low wages for work under inhumane conditions would be unlikely to want international human rights law brought to bear against them. Religious orders with gender, race, or caste disqualification policies would similarly not welcome such attention. Under the two-spheres theory of society these institutions do not exist, and their practices are effectively shielded from international human rights review. Were women's experience the focus of human rights law, attention to the nongovernmental sphere would be heightened, and patterns of social organization and practices that are exploitative, not just of women and not just by familial patriarchs, but also by other powerful bodies, would be brought into bold relief.[29]

The denial of the existence of a "private" realm of human rights violations is not limited to those with an apparent vested interest in the status quo. Human rights theorists, such as Alston, not uncommonly fear the dilution of human rights principles if the realms are expanded beyond the traditional.[30] Activist friends of human rights, such as Amnesty International, slow to view women as victims of denials of human rights, have held firm in their view that government must be seen as the perpetrator of the violations in order for their organization to act.[31] Prominent feminist theorists often have argued for only a very circumscribed realm of *private* human rights abuses.[32] The standard Anglo-American Bill of Rights view of government as the uniquely powerful potential evil-doer is as endemic in the traditional human rights nongovernmental (NGO) community as it is among governments themselves.

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29. As a related matter, some states and, no doubt, many nonstate interests oppose the International Covenant on Economic, Social and Cultural Rights because of its *material* quality, guaranteeing, *inter alia*, an adequate standard of living, free compulsory primary education, and paid childbearing leave for women. The last provision is one of the reasons why the United States, the only industrial democracy *not* to provide paid maternity leave, has not yet ratified the treaty, which has been in effect since 1976.
30. Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 Am. J. Int'l L. 607 (1984).
31. See Amnesty International Publications, Women in the Front Line (1991), which clearly states throughout the introductory section that Amnesty International's mandate is to free prisoners of conscience and that its only focus is on state action. It was only in 1989 that Human Rights Watch, an organization with a self-consciously broader mandate than Amnesty International, first set up a Women's Rights Project. *See* Dorothy Q. Thomas, *Holding Governments Accountable by Public Pressure*, *in* Ours by Right, *supra* note 21, at 83.
32. For example, Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 Hum. Rts. Q. 36, 43 (1993), while arguing for the inclusion of such violence within the purview of human rights concerns, would do so only where it could be demonstrated that the state's nonenforcement of its laws against violence was gender-based and, therefore, an *official* act of sex discrimination.

PUBLIC-PRIVATE DICHOTOMY: A FALSE DICHOTOMY?

In contrast to the dual-spheres perspective and international respect for familial autonomy, reiterated in the International Covenant on Economic, Social and Cultural Rights, ecofeminist Riane Eisler has observed that "the principle of noninterference with 'family autonomy' is in actuality nowhere fully accepted. On the contrary, a universally established principle is that family relations are subject to both legal regulation and outside scrutiny."[33] Therein lies the major conceptional difficulty with the two-spheres approach to society and to human rights policy. To the extent that the family, or for that matter any societal institution, is separate or autonomous from government, it is *at the sufferance of the state.* Governments worldwide have not endowed "family" with any significant degree of autonomy. The framework for family is everywhere within a collective policy arena. Rules about who may marry, at what age, and with what rights and duties are made by the state (or its functional equivalent). Rules governing divorce, child custody, and inheritance are likewise a matter of "public policy." It is thus unpersuasive to suggest that human rights abuses within family life are *sui generis.* Battery, rape, imprisonment, intimidation from voting, and murder are not different from the crimes that they appear to be just because they are perpetrated by a family member.[34]

To the extent that these acts are ignored by the state, there is a failure of official responsibility, not an inability to police the environment. In a feminist analysis, the state's choice to overlook such criminal acts is as abusive of human rights as a refusal to interfere with slave trade. Documenting the state's *responsibility* for the perpetuation of such systems of abuse is an easy undertaking, but a feminist analysis would go a significant step further. While the state's failure to act makes *it* legally liable, the abusers are themselves also directly guilty of a denial of human rights.[35] The assumption that the private *person,* like the *familial milieu,* is outside the purview of human rights law is regularly challenged within feminist jurisprudence.

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33. Riane Eisler, *Human Rights: Toward an Integrated Theory for Action,* 9 HUM. RTS. Q. 287, 293 (1987).
34. It should be noted, of course, that while imprisonment and intimidation of a voter are recognized human rights problems because of their close connection to the liberal model of the free citizen, rape and battery, common *dehumanizing* experiences of women, are not so defined by the international community, unless directly linked to political acts of the *state,* such as war. *See* Anna H. Phelan, *The Latest Political Weapon in Haiti: Military Rapes of Women and Girls,* L.A. TIMES, 5 June 1994, at M4; *see also Rape was Weapon of Serbs, U.N. Says,* N.Y. TIMES, 20 Oct. 1993, at A1.
35. This approach to human rights, holding the private perpetrator directly responsible, is one of the most difficult reforms to initiate within a system bent on the nation state as defendant. There are, however, models of human rights that emerge from the Treaty of Rome and European court decisions, which do include "private," albeit nonfamilial, defendants.

To argue that family is distinct and "private" also ignores its powerful influence in socializing its members, especially the next generation. Bunch and Okin have noted that the patterns of behavior observed and experienced within the family seriously affect whether, and the way in which, its members function in the "public" world. These include such issues as whether the family encourages democratic participatory values[36] and whether its members are encouraged and supported in their desire to become involved in the political processes of the state.[37] Given the commitment of international human rights policies to *political democracy*,[38] attention to the institution of the family is not only ethically appropriate but also empirically sound. The United Nations seems to be aware of the family as the laboratory of democracy; its declaration of 1994 as the Year of the Family sports the slogan, "Building the smallest democracy at the heart of society."[39]

In sum, the notion that the family is uniquely separable from the larger society and from the human rights issues therein generated is indeed questionable. But again, to reiterate a thematic concern, it is not family alone that needs to be added to government as a potential locus of abuse; it is the proposition that women's experience draws immediate attention to the instruments of repression and disempowerment that exist due to imbalances in power. This mode of analysis, while targeting family structures as perhaps the most ubiquitous source of "unofficial" abuse, is also not necessarily *sui generis*. Similar analyses are then invited with respect to the power of employers, religious and educational institutions, corporate policymakers, etc. and the various ways in which they are capable of locking people into forms of deprivation and degradation equal in severity and often kind to those for which we regularly condemn governments.

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36. Okin, *supra* note 12.
37. Bunch has argued that family life is a key factor in determining whether women will be able to be involved in the public life of the community. The lack of spousal support for this activity, the fear of violence or abandonment, all function to keep women from involvement in the "public" world of policy making, the world in which, *inter alia*, decisions are made which define and enforce principles of rights. Bunch, *supra* note 21, at 142.
38. What is especially interesting about international law is that, despite a world in which open democratic politics exist in only a minority of societies, the conventions are all premised on the principle that this is not only the norm, but is essential. *See, e.g.*, the Universal Declaration of Human Rights, *signed* 10 Dec. 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948); the International Covenant on Political and Civil Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966); and the International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966).
39. Bunch, *supra* note 21, at 142.

THE QUESTION OF "CULTURE"

Closely associated with the public-private distinction, in which the international order largely immunizes from its purview nongovernmental sources of human rights abuses, is the question of *culture*. In a nutshell, the ongoing debate in this arena is whether human rights values are *universal* or whether *cultural relativism* legitimately is factored into international human rights policies. While some have made significant strides in deconstructing the dichotomy and suggesting the ways in which the gap might be bridged in part,[40] feminist scholars have asked why *culture* appears to be a defense only in regard to gender roles and to the governmental and nongovernmental denials of fundamental rights to women. As Hélie-Lucas points out, while such practices as maiming and corporal punishment regularly elicit international voices of outrage, genital mutilation of women is attributed to "culture."[41] Freeman notes that, under principles of "custom," in many societies women are deprived of custody of their children left destitute by divorce or killed by their husbands who face no sanctions for this act.[42] One also must wonder why racially based slavery and apartheid are so roundly condemned despite their entrenchment in *culture*, while women who live under *purdah*—the denial of the right to vote, travel, work, drive, own property, or control their own fertility—are seen as voluntary participants in their "cultures." Ironically, highlighted within the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is an obligation assumed by governments to "take on" cultural traditions, familial and otherwise, and to rid their societies of sexism.[43] It is significant that this provision has been the subject of few "reservations" by signatory states.[44] Perhaps this simply indicates that expressions of principle, even within

40. See in this regard, Annie Bunting, *Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies*, 20 J.L. & Soc'y 6 (1993); Kim, *supra* note 22; Alison D. Renteln, *The Concept of Human Rights*, 83 Anthropos 343 (1988); *A Cross-Cultural Approach to Validating International Human Rights: The Case of Retribution Tied to Proportionality*, *in* Human Rights: Theory and Measurement 7 (David L. Cingranelli ed., 1988).
41. Marie-Aimeé Hélie-Lucas, *Women Living Under Muslim Laws*, *in* Ours by Right, *supra* note 21, at 61. One might add to Hélie-Lucas' examples of international concern about human rights within the context of alleged cultural difference the recent flogging in Singapore of an American teenager convicted of vandalism.
42. Marsha A. Freeman, *Women, Development and Justice: Using the International Convention on Women's Rights*, *in* Ours by Right, *supra* note 21, at 100.
43. Convention on the Elimination of All Forms of Discrimination against Women, *adopted* 18 Dec. 1979, art. 5, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. (No. 46), U.N. Doc. A/34/46 (1979).
44. Freeman, *supra* note 42.

presumptively binding conventions, might be largely irrelevant to the actual experience of the disempowered.[45]

The manifesto of the UN-sponsored convention on human rights which met in June 1993 in Vienna, while expressing "respect" for cultural and religious diversity, strongly reaffirmed the principle of the universality of human rights as well as the impossibility of divorcing political rights from economic and social rights. There is little doubt that the significant feminist presence at this meeting, a presence which captured worldwide media attention, was largely responsible for this commitment to principles of universality and unity of rights. This represented, I would argue, not western cultural hegemony, as is often maintained by the ruling elites in nondemocratic, nonegalitarian societies,[46] but rather, a reflection of the experience of women worldwide who very distinctly understand the close interweaving of the various forms of political, economic, and social disempowerment.

Despite women's concerns about respecting cultural diversity, including the diversity of women within societies, women's experience, as it is now being documented in Barbara Nelson and Najma Chowdhury's ambitious study of women in forty-three countries, reflects four unifying themes and concerns. These include eradicating male violence; developing equalizing strategies with respect to education, financial resources, etc.; pursuit of reproductive rights including access to birth control, abortion, infertility services, and maternal and child health care; and effecting political and legal change to the advantage of women.[47] The facts and conditions of cultural diversity among societies cannot, from a feminist perspective, justify a failure to rectify the conditions in which women live worldwide. Women's experience demonstrates one of the ramifications of arguing from "culture"; to argue from culture is to prove too much. All social order, values, and power can be understood as culture. The decision that is thus made covertly, and should be made overtly, is which manifestations of "culture," whether unique to one society or ubiquitous worldwide, are unacceptable to the human family. That is the decision that has been made with respect to slavery since the nineteenth century and should be

45. This phenomenon reminds me of a discussion with a feminist activist in Nepal who commented that her government "signs everything; does nothing." See discussion below on feminism's concern with actual experience and the consequences of behavior which may be counterposed to expressions of principle.

46. Indeed, western states, including the United States, often fight the failure to distinguish rights that are "political" from those which are "economic and social." While the United States has recently ratified the International Covenant on Civil and Political Rights (in 1992), it has yet to act on the International Covenant on Economic, Social and Cultural Rights, which opened for signature nearly thirty years ago (in 1966).

47. WOMEN AND POLITICS WORLDWIDE (Barbara J. Nelson & Najma Chowdhury eds., 1994).

similarly applied to the conditions of disempowerment under which women live. Women's organizations, products of indigenous experience, wherever not forcefully silenced, argue for more equitable social, economic, and political systems, for an end to patriarchy. Cultural relativists misunderstand or betray their own credo when they dismiss gender issues as "cultural." To do so is to argue that only men create and sustain culture. Freeman has suggested the development of a principle of *prisoner of culture* that, consistent with CEDAW, would acknowledge that "custom and culture . . . should be respected as a living expression of community norms [,] but must not be allowed to be used as a rationale for denial of human rights."[48] Until women's experience is incorporated within the purview of human rights analysis, it is folly to dismiss it as simply a product of culture.[49]

SOME MODEST PROPOSALS

A feminist approach to human rights thus asks questions not generally addressed within human rights dialogues, questions generated by the experience of women. That there have been some steps forward in

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48. Freeman, *supra* note 42, at 101.

49. It is also important to emphasize that, despite variations among societies as to the nature and extent of the disempowerment, the disempowerment of women is everywhere. It is not a useful activity to create hierarchies of "blame" in which one can simply cite the worst cases, while overlooking the usual. In this respect Hélie-Lucas argues that the common practice of attacking Islam as women's major problem may be misguided. Hélie-Lucas, *supra* note 41, at 52–56. While she documents the very serious setbacks to women's rights in many Islamic countries during the 1980s, she also notes that Islamic societies vary greatly as to their practices and traditions in which, for example, glaring differences exist between the neighboring countries of Algeria and Tunisia (*Id.*), and female genital mutilation, while practiced by Muslims, Christians, and others in Africa, is unknown in Muslim cultures elsewhere. *Id.* at 53. Implicit in her argument is that politics, not religion *per se*, explains the ways in which religion can be used as a source of women's oppression. *See e.g., Id.* at 53. She further suggests that some of the practices now common in Islamic countries, such as the mandatory adoption of a husband's surname, were products of colonialization. *Id.* at 54. Cook echoes the theme by demonstrating that the European human rights courts have upheld western European policies of requiring women to change their surnames to those of their husbands, as well as policies restricting women's rights to custody of their children, to abortion, and to national identity. Cook, *supra* note 20. *See also* Stratton, *supra* note 11; Elizabeth Spalin, *Abortion, Speech and the European Community*, 1992 J. Soc. Welfare & Fam. L. 17 (1992). The practical problems associated with "targeting" a particular source of oppression are also formidable. An attempt within the United Nations less than one decade ago to investigate human rights abuses of women within Islamic countries was precipitously cut off by the General Assembly. Thus, experience suggests not only that Islam is hardly unique in its controls over women—controls often not very different from those in Christian, Hindu, Jewish, or Buddhist societies—but that targeting a particular cluster of societies may be impossible as a matter of strategy, at least within existing international fora.

furthering the agenda of women's rights through a human rights model is clear in recent years. CEDAW has been passed and ratified by 121 states. NGOs, such as Amnesty International and Human Rights Watch, have finally set up committees to study and publicize abuses against women. Women's organizations are active all over the world both as domestic and international forces, despite the ostracism and threats to their safety that this might entail. In 1992 women's groups submitted 150,000 signatures from 115 countries demanding that women's rights be on the agenda at the 1993 Human Rights Convention in Vienna.[50] At a more microcosmic level, since 1989, the US government has included within its annual "country reports" data on violence against women.[51] But the status of women has not improved because *actual policy* has not been altered with respect to, *inter alia,* nationality policies, the franchise, economic disenfranchisement, illiteracy, or violence. And debates rage over how best to address social change.

While the formalistic front of written documents and political procedures does not seem especially utile, there are good reasons for making certain that these flanks are not abandoned. If for no other reason than that of symbolic importance, it is critical that CEDAW enforcement processes be raised to those attached by the United Nations to other human rights protocols.[52] It is similarly important that principles governing asylum be revised by nations to recognize women as a social group subject to persecution and that nongovernmental actors and issues of violence be "legalized."[53] Despite serious feminist concerns about formalism, about statism, and about the function of law in general, because women do not set the agenda and are not in the position to design their arenas, the legal front and the diplomatic front cannot be eschewed. This does not mean, however, that their engagement cannot be reconceptualized and a new approach to human rights incorporated.

A RESPONSIBILITY MODEL

One of the most interesting aspects of the debates within feminist jurisprudence is the question of whether rights analysis, domestically or internation-

50. Bunch, *supra* note 21, at 147. In the longer view, it may turn out that this event, this very successful worldwide organizing effort, will constitute a watershed in the international women's rights movement, and that the multiple strategies used successfully and the liaisons formed will have unexpected consequences.
51. Thomas, *supra* note 31, at 84.
52. *See, e.g.,* Kim, *supra* note 22, at 82.
53. *See, e.g.,* Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights,* 12 HUM. RTS. Q. 486 (1990); Rebecca J. Cook, *Women's International*

ally, is useful. Gilligan first highlighted this question effectively in her findings that (US) women were more prone to see themselves within a web of community to which they had responsibilities, rather than in contradistinction to a society against which they had rights; the latter was a more characteristic male model.[54] Feminist legal theorists have wondered whether the dichotomous and adversarial character of "rights" is not alien to women's experience.[55] If this approach of "responsibility" were applied to the human rights arena, it might be significant in allowing a broader and more open range of action with respect to human rights issues. Key elements of such an approach would be a concern with *impact* rather than *intent* by powerful social actors, governmental and otherwise. It would similarly reconceptualize human rights as human *needs* and would measure the acceptability of the status quo by the extent to which human needs are being met. The goal would be to effect change and not to "blame." These ideas are not entirely new; if one scans international "human rights" documents of the past half century there is much language that speaks to "rights" in the kind of positivistic and material language that not only transcends the politically procedural, but also transcends the nation state[56] in addressing human needs. Most critically, one would challenge the traditional methodology of human rights which catalogues the abuses committed by "guilty governments." In its place one would ask a very different question: to wit, what are the conditions of human freedom, dignity, health, and safety that are fundamental to an experientially meaningful theory of "rights?" The purpose thereof would be to pursue the avenues necessary to further this state of affairs. Identifying the source or causes of the deprivations would thus become second-order and for the purpose of designing strategies for change, not for ensuring that it is *government* that is the perpetrator.

If human rights were subjected to these suggested conceptualizations, decisions on policy would be made that place a priority on meeting the needs of the disempowered.[57] Working from any of the existing, and generally beautifully crafted, human rights documents,[58] one would ask in

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Human Rights Law: The Way Forward, 15 HUM. RTS. Q. 230 (1993); M. Forde, *Non-Governmental Interferences With Human Rights*, 56 BRIT. Y.B. INT'L L. 253 (1985).

54. GILLIGAN, *supra* note 5, at 54.
55. *See, e.g.*, Sherry, *supra* note 3, at 582, 604; Schneider, *supra* note 3, at 593–97.
56. One is regularly reminded that the UN Charter itself speaks to a covenant among "peoples," not states.
57. The vast majority of human rights principles are in fact already oriented to protecting the (politically, socially, and economically) disempowered. Capitalist principles such as the rights of property holders, while extremely well protected by the existing world order, are distinctly second-order within twentieth-century human rights discourse.
58. For example, CEDAW, the International Covenant on Civil and Political Rights, or the International Covenant on Economic, Social and Cultural Rights.

each situation about each allegation of denial of human rights: Does this fit the model of a legitimate human needs concern? How can this state of affairs be rectified or improved? Absent would be the questions of "governmental involvement," of "guilt," and of "tradition." This approach would therefore alter debates on strategies by asking very different questions and making outcome, *actual experience*, the major focus. It would simultaneously recognize that not all "abuses" of human rights *are* by design; that, for example, the failure of poor nations to provide health care might reflect only on their poverty. At the same time, under the proposed model, the *need* for that health care to be provided would not be vitiated by the absence of a malevolent offender. While it might be only that one begins to think more in terms of positive incentives to change and a worldwide responsibility for the human condition than in terms of punishment and shame for offenders, it also might be that women's needs for social reordering will fare better under a model of this type. This is a voice that has been largely relegated to the realm of "charity" and "relief work," not politics, and not human rights politics. Research suggests that this might be substantially the female voice.