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OUT OF THE SHADOWS: TRAVERSING THE IMAGINARY
OF SAMENESS, DIFFERENCE, AND RELATIONALISM –
A HUMAN RIGHTS PROPOSAL

Berta Esperanza Hernández-Truyol*

I. Introduction

Throughout history different visions of men and women have evolved; from Aristotle to Aquinas, they have been deemed to exist in "separate spheres." These different images are deeply embedded in our psychology. They define our expectations about appropriate behavior of and locations for men and women in law and civil society. One author captures this "different worlds" paradigm by suggesting that men are from Mars and women are from Venus.

In the separate spheres worldview, laws were made by men, for men, about male things – public matters such as government and governance. Women, on the other hand, were objects to be cared for and protected by men. There was no pretense that equality constituted a desirable societal goal. Rather, there was an acceptance of gendered inequality. In those days – and as this essay will suggest, even still today – both natural law and positive law were deemed to confirm the propriety of the separate spheres outcome.

Ample evidence exists of the embeddedness of the separate spheres ideology in law. The Supreme Court, in its 1873 Bradwell v. Illinois decision, was particularly forthcoming about embracing difference as a matter of law. Quoting the state court decision, the Court plainly accepts the separate spheres ideology:

That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an axiomatic truth... In view of these facts, we are certainly warranted in saying, that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women.

* Levin, Mabie & Levin Professor of Law, University of Florida, Levin College of Law. Many thanks to Jane Larson, Christy Gleason, Sharon Rush, Claire Moore Dickerson, and Christopher Slobogin for comments on early drafts, and to Shelbi Day (UF2002) and Rebecca Di Concilio (UF2002) for excellent research assistance. Muchisimas gracias to Cindy Zimmerman, computer wizard and editor extraordinaire.

2. JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIP (1992).
3. In re Bradwell, 55 Ill. 535, 539 (1869).
The Court then proceeds to provide its own endorsement of men's and women's separate and unequal geographies.

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.4

The acceptance of the legal propriety of these separate spheres endures in our imagination and everyday life in the early twenty-first century.5 Psychology helps elucidate both the social acceptance and the firm roots of these divergent and socially constructed gendered geographies. Dr. Martin Heesacker cleverly manipulates empirical data to emphasize society's blind adherence to and approval of socially designated gender roles. He uses National Hurricane Center data6 that show Atlantic hurricanes with male monikers have caused four times

5. See United States v. Virginia, 116 S.Ct. 2264, 2284 (1996) (holding that exclusion of women from military college without existence of separate comparable program for women effects denial of equal protection and noting that "'[I]nhertent differences' between men and women, we have come to appreciate, remain cause for celebration but not for denigration of the members of either sex . . ."); see also id. (Scalia, J., dissenting) (lamenting the decision because "as to history; it counts for nothing the long tradition, enduring down to the present, of men's military colleges supported by both states and the federal government"); Rostker v. Goldberg, 453 U.S. 57 (1981) (rejecting Due Process challenge by men to the Military Selective Service Act requiring men but not women to register because Congress could exclude women from combat and thus men and women were not similarly situated); see also Sharon E. Rush, Diversity: The Red Herring of Equal Protection, 6 AM. U. J. GENDER SOC. POL'y & L. 43-54 (1997) (discussing that gender classifications may legally be structured as "separate but equal").
6. Martin Heesacker, Address at the University of Florida Levin College of Law (Oct. 5, 2001) [hereinafter Heesacker Address]. Dr. Heesacker is the chair of the Department of Psychology at the University of Florida, and set out those figures in a slide presentation to the Law Faculty entitled "Gender and Emotion: Beliefs and
as much damage as hurricanes with female names – $53 billion for the six costliest male storms, compared to $13 billion for the six costliest female storms\(^7\) – to “prove” that boys hit harder than girls. He uses similar data to “prove” that males kill more than females: since 1979, 5 storms with male names left more than 11,800 people dead, while the 58 hurricanes with female names killed fewer than 100 persons.\(^8\) Only an already gendered world perception could render such data credible evidence of real sex differences.

Leaving the meteorological data behind, and turning to data obtained from psychological studies,\(^9\) Heesacker shows that men and women are not from different planets. Contrary to widely held stereotypical sex-based beliefs about men’s and women’s differences in emotional expressions, which consequently accounts for the credibility and acceptability of the absurd use of data about storms to “prove” sex differences, the empirical data derived from behavioral studies reveals that men and women have no statistically significant sex-based differences in emotional expression. This reality notwithstanding, studies show that college students, rape counselors, crisis counselors, and psychologists in accredited counseling center doctoral training sites all show “alpha bias” – the overestimation of sex differences.\(^10\) Thus, even trained professionals appear to internalize the socially constructed, gendered, separate spheres.

Heesacker’s conclusions could be interpreted as both contradicting and confirming feminist discourses, particularly relationalism, which as first articulated by Carol Gilligan\(^11\) challenged the universality of male-based theories of moral development and life cycle models. Gilligan debunked male normativity in moral development by identifying the different axes on which men and women balance their moral compass. She found that while men reach decisions in a linear manner, with individual autonomy as a foremost consideration, women form their decisions in a relational manner – in the context of the social institutions that are affected, including school and family.\(^12\)

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\(^{7}\) Id. (citing Gainesville Sun, Mar. 8, 2000).


\(^{9}\) Martin Heesacker et al., Gender-Based Emotional Stereotyping, 46 J. Counseling Psychol. 483 (1999) (reporting on findings from six follow-up studies to previous studies conducted in 1999).

\(^{10}\) Heesacker Address, supra note 6 (“Research... suggests that people dramatically overestimate the magnitude of emotional differences between men and women, just as they often overestimate the magnitude of other sex differences, such as differences in math and language ability.”).

\(^{11}\) Carol Gilligan, In a Different Voice: Psychological Theory & Women’s Development (1993). Like Heesacker, Gilligan is a psychologist.

\(^{12}\) See id. at 21-22; see also Jane C. Ollenburger & Helen A. Moore, A Sociology of Women 17, 24-35 (1992) (“Most women [and some men] construct know-
These differences could be viewed as at odds with Heesacker’s finding of sameness of emotional expression. Yet, they comport with the idea of an ingrained alpha bias.

Gilligan’s work locates women in an “ethic of care” space in which women focus on human interactions and relationships. With this outlook, “the moral dilemma changes from how to exercise one’s rights without interfering with the rights of others to how ‘to lead a moral life which includes obligations to [one’s] family and people in general.’” This “ethic of care” contrasts with men’s “ethic of rights,” which comports with the classical autonomous individual glorified in the liberal republican model.

While [a male] subject worries about people interfering with each other’s rights, [a] woman worries about ‘the possibility of omission, of [her] not helping others when [she] could help them’. . . . Whereas the rights conception of morality that informs Kohlberg’s principled level . . . is geared to arriving at an objectively fair or just resolution to moral dilemmas upon which all rational persons could agree, the responsibility conception focuses instead on the limitations of any particular resolution and describes the conflicts that remain. . . . [W]omen’s process insist[s] [on] contextual relativism. . . . [It has a] greater orientation toward relationships and interdependence [and] implies a more contextual mode of judgment and a different moral understanding.

It then becomes a challenge to reconcile Gilligan’s conclusion that men and women are different with Heesacker’s empirical work that seems to reveal sameness. Significantly, and arguably lending support to the separate ethic spheres addressed in Gilligan’s work, Heesacker observes that, when sex-based differences do occur in the studies, they conform to the social stereotypes—“unjustifiable, fixed,

edge and decisions by integrating ‘separate’ [e.g., linear, authority-based] ways of knowing with ‘connected’ [e.g., empathic, person-based] modes.”

13. GILLIGAN, supra note 11, at 62 (“An ideal of care is thus an activity of relationship, of seeing and responding to need, taking care of the world by sustaining the web of connection so that no one is left alone.”).

14. Id. at 21.

15. To be sure, feminists have long critiqued the liberal model and even have suggested that “to sign on to [a whole network of liberal concepts – rights, interests, contracts, individualism, representative government, negative liberty] may be to obscure rather than to illuminate a vision of politics, citizenship, and ‘the good life’.” Mary G. Dietz, Context Is All: Feminism and Theories of Citizenship, DAEDALUS, Fall 1987, at 4-5.

16. GILLIGAN, supra note 11, at 21-22. Kohlberg was a psychologist who early on worked on moral development. In the research from which he derives his theory, females are non-existent. The six stages in which he describes the “development of moral judgment from childhood to adulthood are based empirically on a study of eighty-four boys. . . .” Id. at 18. Yet Kohlberg nevertheless “claims universality for his stage sequence.” Id. The “principled level” includes stages five and six which are “geared to arriving at an objectively fair or just resolution to moral dilemmas.” Id. at 21-22.
usually standardized mental picture[s]" of sex differences – of what proper conduct for men and women is. Thus, one explanation of men's and women's differences is alpha bias: the socially created and constructed assumptions concerning gendered variances. Simply stated, these separate spheres differences are socially imagined and imposed. While stereotypes can be both positive and negative, they all "have harmful repercussions when used to predict, judge, or understand human behavior." One stereotype, which Heesacker reports can be read as consistent with Gilligan's "ethic of care," is the "'global stereotype [that] implies that females experience and express more emotion, more frequently, and with less self-control than males do.' This stereotype about emotionality may result in harm for both genders just as stereotypes have harmed individuals from various cultures, races and sexual orientations. The conformity of the differences to the socially constructed gendered behavioral norms does not confirm sex differences as a reality; it simply "demonstrates the power these stereotypes have to shape behavior." Significantly, both assumptions of difference and of sameness have had deleterious consequences for women in the legal system. Gender-stereotypical behaviors are rooted in culturally sanctioned definitions and expectations of appropriate gender behavior which permeate life and law. Stereotyping, deprivation of rights, and imposition of private burdens without correlative benefits comprise, of course, the complex that casts on women's existence the long shadow of the law – a male-created, male-idealized, male-enforced normative

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17. Heesacker et al., supra note 9, at 483.
18. Id.
19. Id.
22. Heesacker et al., supra note 9, at 483.
23. GILLIGAN, supra note 11, at 62-63.
24. Heesacker et al., supra note 9, at 483 (quoting R.A. Fabes & C.L. Martin, Gender and Age Stereotypes of Emotionality, 1991 PERSONALITY & PSYCHOL. BULL. 532, 532).
25. Id. at 484.
structure. As Heesacker's alpha bias reveals, highly trained psychologists – experts in the study of human behavior – are, notwithstanding such training, imbued with, and unable to eschew, the biases effected by social construction of gender. It then stands to reason that the judges, legislators, arbitrators, mediators, and lawyers (whose sensitivity to, understanding or awareness of, and caring about human behavior is not officially within their field of expertise) will be similarly imbued with and unable to eschew gender bias.

These biases in law parallel what in psychology is called a "destructive therapeutic paradox" and which I will call in law a "destructive in/justice paradox." The paradox is grounded in the inherent gendered nature and processes of the legal system which permit the anomalous and abhorrent case outcomes that Victoria Nourse has described and call for the policy adjustments about which Mary Becker has written. But more than that, the destructive in/justice paradox has put the brakes on all attempts at articulating a cohesive, coherent, and universal feminist theory that could result in women's full personhood. The United Nations, no bastion of sex equality, has acknowledged women's subordinated status in the home and at work, in society and in government, at church and at school, regardless of where in the world they are located. This inequality is social, political, and economic. Global equality has been, and continues to be, an elusive goal.

This work seeks to develop a methodology that serves a women's anti-subordination project. To achieve this goal, Part II sets out the theoretical background of feminist theory (II.A) and three waves of


28. Heesacker, supra note 9, at 492. Heesacker explains, with regards to an examination of studies on stereotypes of women, that

[i]t may be that these stereotypical beliefs regarding men's emotions both reinforce and actually create limitations in people's functioning at the same time mental health practitioners work to increase peoples functioning. . . .

[T]here is [then] a potential for a 'destructive therapeutic paradox' because individuals who do not conform to the perceived norm for their gender's emotional behavior may actually be perceived by their counselors as more psychopathological.

Id. (citation omitted).


30. Becker, supra note 27; see also Mary Becker, Care and Feminists, 17 Wis. Women's L.J. 57, 63, 109 (2002).


32. Id. at 1 (noting that "the continuing exclusion of women from many economic and political opportunities is a continuing indictment of modern progress").
feminism (II.B). Part II.C articulates the feminist revelations about law these analytical frameworks have engendered. These developments have failed to effect equality, but rather have exposed the destructive in/justice paradox. For example, sameness feminism is grounded on the male normative, and has succeeded solely in granting women the rights men already have, only when women can show they are the same as men. This is the feminism that has been the tiny bitter pill of equality that the United States Supreme Court has managed to swallow, although taking this route has opened no floodgate of rights. On the other hand, difference feminism focuses on men’s and women’s differences and suggests that those differences be accommodated and that equal outcomes be nevertheless available. This approach has not been embraced by courts, even though it makes incontestable sense, especially if one considers, for example, men’s and women’s differences in reproductive functions (which have led to vastly disparate productive market remunerations). Thus, regardless of the viability of Heesacker’s sameness or Gilligan’s difference paradigms, women have remained unequal to men.

In light of this depressing reality, my interest lies in redefining equality from a woman-centered perspective. This endeavor is necessary because we all—men and women alike, from most cultures, of all races and abilities, colors and sexual orientations—exist in a world in which our various and varied societies have fashioned images of what is gender-appropriate behavior. This project sets out to craft a methodology that can assist the goal of full personhood for women.

Women’s full personhood is a substantive concept that, as detailed in Part III, I ground on international human rights notions of fundamental rights—rights that we have, or ought to have, because we are human beings. Part III explores the breadth of the “rights concept” in the human rights model which includes social, economic, and cultural rights as well as civil and political rights. This is significant because the human rights model affords us a broader spectrum than does our domestic liberal model of what is fundamentally appropriate and necessary for thriving as human beings—the essentials for the fulfillment of the human spirit. Even the so-called civil and political rights protections of the human rights paradigm are much more generous than the particular rights recognized in our local realm, such as nondiscrimination on the basis of race, sex, and color. The human rights version also protects rights ranging from language to social origin, from political beliefs to culture, from the individual to the family.

But beyond civil and political rights, human rights norms include protection of economic rights of significance to women’s full personhood. Thus, it allows me to urge the re-imaging of our local rights to include, as fundamental, the right to work and to shelter, the right to our families and their protection, the right to fair wages and healthy working conditions—whether we are in the productive (market) or reproductive phase of our lives. These rights will not all be
present in full all at once perhaps, but they can be embraced as fundamental and progressively developed.

It is imperative to consider the economic location of women in evaluating whether they are enjoying full personhood. That analysis recognizes the violence of economic deprivation, its gendered origins, and its disabling, devastating consequences.

In Part IV, to develop the methodology that aspires to full personhood for women, I draw from two theoretical models about international law-making: the communication theory, also known as the New Haven School, and the legitimacy theory. Both theoretical frameworks are of great utility in this equality project. To be sure, in their original articulation, the concern of these theories is international lawmaking. In Part IV, I take liberties with this original context and adapt the frameworks to a reconceptualization of law for women. Thus, as Parts III and IV set forth, this project draws from international law for both process and substance.

In conclusion, this work suggests the first step towards women’s full personhood is to redesign our box, or better yet break out of it, and eschew the “your rights/my rights” conceptualization of the liberal tradition that has decimated women — the law that says pregnancy is not sex related or insists that race and sex are divisible categories. In its stead, we can adopt the basic premise of human rights ideology that the plethora of rights recognized as fundamental to our thriving as persons, necessary for our human dignity, are indivisible, interdependent, and inviolable. In this regard, we move beyond the “either/or” zero sum game approach to rights that drives the liberal model, to a more communitarian, pluralistic approach that embraces equality in difference.

II. WOMEN IN THE LAW

A. Theoretical Background

The historically and legally sanctioned “separate spheres” ideology has mandated that women spend their lives in the private sphere of domestic life — home-making and childrearing — and is identified with the family. In this system, women are assumed to be more rela-

34. See infra Part IV.A.
35. See infra Part IV.B.
38. OKIN, supra note 1.
39. Id. at 10; see also RADHIKA MOHANRAM, BLACK BODY 59 (1999) (“[W]ithin the discourse of the nation, the woman is always configured only within the family.”).
tional and men more individualistic. Yet, "all of our modern legal theory... constitute 'the separation thesis', the assumption that human beings, are definitionally distinct from each other." One feminist critic has observed the irony in the law's atomistic approach given that law in essence is about interactions between or among persons: "It would also seem obvious that relational reasoning is law's soul, that law's duty is to enhance, rather than to ignore, the rich diversity of life."42

Because law regulates many activities in the public sphere but traditionally leaves the private sphere to individual control, much of women's lives has been outside the scope of protection of the legal rules that govern the public sphere of men's existence. Given such structural inequalities, the liberal state, offering its citizenry a panoply of negative rights – rights to be free from government interference – is unable to effect gender equality because it leaves intact the status quo.43 Liberal jurisprudence44 created this equality trap by advocating law which "masks the truth of gender stratification."45

Feminist theory asked the "woman question"46 which interrogates how sex has influenced the development of societal structures and

40. Hilary Charlesworth, What are "Women's International Human Rights?", in HUMAN RIGHTS OF WOMEN 65 (Rebecca J. Cook ed., 1994) (noting that the legal system in the United States, and the legal systems worldwide, "privilege[] a male view of the universe... The language and the imagery of the law underscore its maleness: it lays claim to rationality, objectivity, abstraction, characteristics traditionally associated with men, and is defined in sharp contrast to emotion, subjectivity, and contextualised thinking, the province of women.").

41. Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 2 (1988) (bolstering her theory of relationalism by claiming that "[w]omen are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly 'connected' to another human life when pregnant...").


43. DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 122-23 (1999) ("The structure of abstinence, more traditionally called negative liberty, could only be legitimate if it were true that the genders were actually equal. The social inequality of women means that the state must 'positively' intervene to wipe out the gender hierarchy.").

44. Id. at 122 (paraphrasing CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, 161-62 (1989)) ("[Ironically,] the liberal state, with its system of rights, serves as the ideology that now justifies the perpetuation of the social inequality it has purportedly overcome. The truth is the continuation of social inequality; the ideology is that such inequality, if it exists at all, is marginal because it has been legally erased.").

45. CORNELL, supra note 43, at 122.

46. See AUGUST BEBEL, Woman and Socialism, in Woman: Past, Present and Future (Meta L. Stern trans., 1918), reprinted in HUMAN RIGHTS IN WESTERN CIVILIZATION 1600-PRESENT 86, 87 (John A. Maxwell & James J. Friedberg eds., 1994) ("[T]he woman question demands our special consideration. What the position of woman has been in ancient society, what her position is to-day and what it will be in the coming social order, are questions that deeply concern at least one half of humanity.").
norms and what impact the gendered nature of those developments has had on women. Feminist legal inquiry has revealed that gender bias is not an accident in the law and its structures, but rather a central force in its development.\textsuperscript{47} In the international context, feminist legal theory is used to analyze the structures – both substantive and procedural norms as well as institutions – that exist in the international realm and how those structures have marginalized women within the international legal system.\textsuperscript{48}

Although feminist legal theory, like feminist theory, embraces varying approaches and focal points, it underscores the deep schism that exists between the law and the reality of women’s lives. Domestically and internationally, this disconnect serves to explain why women worldwide – regardless of race, class, ethnicity, nationality, religion, marital status, color, ability, or social origin – exist at the margins of society. In the twenty-first century, women are still viewed as wombs – primarily in their reproductive roles, as second-class citizens, as victims, and as in need of protection in both times of war and peace.

Contrary to the reality of women’s global inequality,\textsuperscript{49} the legal norm worldwide is one of sex equality.\textsuperscript{50} Based upon this divide between legal rules and women’s realities, feminist legal theory analyzes how the law is complicit in women’s subordination by masking gendered norms as neutral and entrenching the status quo.\textsuperscript{51} Feminist legal scholars focus on the reformation of law and legal structures; unearth the locations that effect or preserve women’s subordinated status; question why they are persistent across time and cultures; and work to change these manifestations in society, the law, and legal systems.\textsuperscript{52}

\textsuperscript{47} Martha Chamallas, Introduction to Feminist Legal Theory 2 (1999) ("[G]ender bias constitutes a pervasive feature of our law, rather than merely representing isolated instances of abuse of law . . . hav[ing] dissected legal doctrines and the language of court opinions and statutes to find hidden mechanisms of discrimination and uncover the implicit hierarchies that are contained within a body of law.").

\textsuperscript{48} Hilary Charlesworth et al., Feminist Approaches to International Law, 85 Am. J. Int’l L. 613 (1991). Significantly, feminist legal theory is a very young discipline, dating only to the early 1970s. In the international realm, the feminist legal critique did not emerge until 1991 with this Charlesworth, Chinkin, and Wright article.

\textsuperscript{49} See Part III.C. infra.

\textsuperscript{50} See infra notes 136, 155-65 and accompanying text.

\textsuperscript{51} Chamallas, supra note 47, at 15 (suggesting and noting “male bias in rules, standards, and concepts that appear neutral or objective on their face. . . . [such i]mplicit male bias can be revealed by examining the real life impact of laws on women as a class, paying particular attention to how even noncontroversial legal concepts and standards tend to disadvantage women” and that the “technique of tracing out the gender implications of a social practice or rule is sometimes referred to as asking ‘the woman question’ because it places women at the center of the inquiry, even when the rule or practice in question appears to have little to do with gender”).

\textsuperscript{52} See, e.g., Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkeley Women’s L.J. 1, 1-2 (1987-88) (defining feminism as “the range of committed inquiry and activity dedicated first, to describing women’s subordination – exploring its nature and extent; dedicated second, to asking both how –
In the domestic sphere, the quest for transformation reaches substantive areas that range from economics (women's unpaid homemaking or underpaid labor) to sex (sexuality or sexual exploitation such as prostitution, rape, sexual harassment and domestic violence), from motherhood and reproduction to welfare reform, abortion, and single motherhood.53 Domestic concerns also reach women's invisibility in legal institutions in which law-making, law-interpreting, and law-enforcing takes place. Similarly, in the international sphere, the considerations range from the absence of women in international institutions to their absence in the "vocabulary of international law."54

B. Three Waves of Feminism

Feminist legal theory has experienced three waves: the sameness or equality stage, the differences stage, and the anti-essentialism stage.55 As the analysis below shows, the three waves of feminism are identified with various feminist models.

1. The First Wave

The first wave of feminism, the prevalent form of feminism in the 1960s and 1970s, was an “equality” stage.56 Also known as egalitarian or bourgeois feminism, the theory “is grounded in the claims of the classical liberal philosophy developed by Locke, Rousseau, Bentham and Mill for equal rights, individualism, liberty and justice.”57

through what mechanisms, and why – for what complex and interwoven reasons – women continue to occupy that position; and dedicated third, to change”).

53. See Chamallas, supra note 47, chs. 7-9.

Digging further down, many apparently 'neutral' principles and rules of international law can be seen to operate differently with respect to women and men. Another, deeper, layer of the excavation reveals the gendered and sexed nature of the basic concepts of international law, for example, 'states', 'security', 'order' and 'conflict'. Permeating all stages of the dig is a silence from and exclusion of women. This phenomenon does not emerge as a simple gap or vacuum that weakens the edifice of international law and that might be remedied by some rapid construction work. It is rather an integral part of the structure of the international legal order, a critical element of its stability. The silences of the discipline are as important as its positive rules and rhetorical structures.

Id.

55. Chamallas, supra note 47, at 23, 85-112 (calling the third wave a diversity stage); Patricia Cain, Feminist Jurisprudence: Grounding the Theories, in Feminist Legal Theory: Foundations, supra note 27, at 359-62 (calling the third wave a postmodernist stage).
56. Ollenburger & Moore, supra note 12.
57. Sonya Andermahr et al., A Concise Glossary of Feminist Theory 123 (1997); see also Ollenburger & Moore, supra note 12, at 17 (“[T]he social groundwork for this theory arose during the French Revolution and the Enlightenment in Western Europe. These massive social changes provided both political and moral arguments for the ideas of 'progress, contract, nature, and reason' that broke tradi-
The liberal-feminist tradition dates to 1779 when Mary Wollstonecraft published *A Vindication of Rights of Women* positing, contrary to the prevailing (male) liberal philosophers, "that women also ha[ve] the capacity to reason and, therefore, should have equal rights with men." This approach identifies the root of women's second-class citizenship as their lack of opportunity. Consequently, the goal of liberal feminism was to obtain equality for women by seeking equal treatment in public life.

Liberal feminist jurisprudence focuses on the autonomy of the individual and insists that women, like men, are entitled to the freedoms at the core of liberal theory such as "[r]ationality, individual choice, equal rights and equal opportunity." Rather than challenge existing social, economic, and political rules and structures of democratic societies, liberal feminists argue that women, just like men, ought to have access to the protection of the rules and membership in the structures. The principal aspiration of legal liberal feminists is to obtain equality of men and women in the public sphere — an appropriate goal if Heesacker's sameness analysis is correct. This includes

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59. Ollenburger & Moore, supra note 12, at 17 (observing that "the cause of women's oppression is identified as their individual or group lack of opportunity and education").

60. Judith Lorber, Gender Inequality: Feminist Theories and Politics 19 (1998); see also Ollenburger & Moore, supra note 12, at 17 ("[T]he solution for change is for women to gain opportunities primarily through the institutions of education and economics. . .").

61. Becker, supra note 27. Liberal feminism, also known as egalitarian or bourgeois feminism, "is grounded in the claims of the classical liberal philosophy developed by Locke, Rousseau, Bentham and Mill for equal rights, individualism, liberty and justice." Berta E. Hernández-Truyol, Crossing Borderlands of Inequality with International Legal Methodologies - A Plea for Multiple Feminisms, in German Yearbook of International Law (forthcoming 2002) (quoting Andermahr et al., supra note 57, at 123). See also Ollenburger & Moore, supra note 12, at 17; note 58 supra.

62. Patricia A. Cain, Feminism and the Limits of Equality, in Feminist Legal Theory: Foundations, supra note 27, at 237; see also Patricia Smith, Feminist Jurisprudence and the Nature of Law, in Feminist Jurisprudence 3, 4-5 (Patricia Smith ed., 1993) ("The view of liberal feminists, whether classical or modern, is still that the solution to the oppression of women is to provide equal opportunity for all."); Charlesworth & Chinkin, supra note 54, at 38-39.

63. Capitalist Patriarchy and the Case for Socialist Feminism xx (Zillah R. Eisenstein ed., 1979) [hereinafter Capitalist Patriarchy] (suggesting flaw in idea "that women's liberation can be fully achieved without any major alterations to the economic and political structures of contemporary capitalist democracies").

64. Chamallas, supra note 47, at 25; Charlesworth & Chinkin, supra note 54, at 38-39.
equal opportunity to participate in, be represented in, and be a representative in politics as well as equal market access to jobs, services, and education.\textsuperscript{65}

A limitation of liberal feminist legal theory is its emphasis on similarities between men and women. Under such a paradigm, women are only deemed to be entitled to rights if they are "similarly situated" to men,\textsuperscript{66} which requires women "to conform to a male-defined world" if they want to obtain rights.\textsuperscript{67} Notwithstanding this limitation, the equality model is the one that courts in the United States\textsuperscript{68} and Europe\textsuperscript{69} have embraced in analyzing sex discrimination claims. In contrast, Canada has taken an approach that considers inequality,\textsuperscript{70} and South Africa's new constitution also appears to take gender inequalities into consideration, focusing on unfairness rather than sameness.\textsuperscript{71} Notwithstanding the limitations of liberal feminism, both domestically and internationally, it has facilitated women's advancement when their location — educationally or experientially — has allowed them to be favorably compared to men.

2. The Second Wave

The second wave of feminism, in the vein of the Gilligan model discussed earlier, focused on the differences between men and women.\textsuperscript{72} As de Beauvoir had done three decades earlier,\textsuperscript{73} Catharine MacKinnon powerfully articulated the idea behind difference legal

\textsuperscript{65}. CHARLESWORTH \& CHINKIN, supra note 54, at 39 (noting, about legal liberal feminists, that "[t]heir primary goal is to achieve equality of treatment between women and men in public areas such as political participation and representation and equal access to and equality within paid employment, market services and education"); CHIMALLAs, supra note 47, at 23, 31-46; Cain, supra note 55, at 359-60.

\textsuperscript{66}. Cain, supra note 62, at 238 ("If members of the dominant gender [men] enjoy rights that members of the nondominant gender [women] want, then the only way for women to obtain these rights under existing equal protection doctrine is to argue that, as to the right in question, women are similarly situated to men."); see also Mary Becker, Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships, 23 STETSON L. REV. 701, 704 (1994).

\textsuperscript{67}. CHARLESWORTH \& CHINKIN, supra note 54, at 39.

\textsuperscript{68}. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (concluding that gender-based differential regarding legal age for drinking beer is denial of equal protection).

\textsuperscript{69}. CATHARINE MACKINNON, SEX EQUALITY 35-37 (2001).

\textsuperscript{70}. Id. at 24-26; see e.g., R. v. Butler, [1992] S.C.R. 452 (Can.).

\textsuperscript{71}. MACKINNON, supra note 69, at 41.

\textsuperscript{72}. CHIMALLAs, supra note 47, at 23, 47-62; Cain, supra note 55, at 360-62; Cain, supra note 62, at 239 (noting that difference feminism emphasizes the differences between men and women); ANDERMARH ET AL., supra note 57, at 39.

\textsuperscript{73}. Simone de Beauvoir described women as the "other" and provided a comprehensive account of the location of women in society in the western world. Thus humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being. . . . She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – She is the Other.
feminism: the maleness of norms that pose as neutral. MacKinnon observed that

virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men’s physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other – their wars and rulerships – defines history, their image defines god, and their genitals define sex.74

Difference feminism, which emerged in the 1970s,75 emphasizes that gendered oppression is structural,76 and that structural gendered ordering is socially constructed and not naturally or biologically preordained. Difference feminism reveals that existing biased norms and institutions simply serve to perpetuate the status quo and to entrench the existing inequalities.77

Simone de Beauvoir, The Second Sex xviii-xix (Knopf ed., 1993) (1953). Octavio Paz, the 1990 winner of the Nobel Prize in Literature, presenting the Mexican man’s conception of “woman,” provides a similar sentiment: “the Mexican considers woman as an instrument of male desires and of the ends assigned to her by morality, society, and the law. . . . In a world made in man’s image, woman is only a reflection of masculine will and desire. . . . Womanhood, unlike manhood, is never an end in itself.” Octavio Paz, El Laberinto de la Soledad y Otras Obras [The Labyrinth of Solitude and Other Works] 57 (1993). De Beauvoir’s social critique unveiled norms and values that are far from neutral, and are male-defined. Men’s dominance and women’s subordination became understood as a social construction and not biological determinism. Lorber, supra note 60, at 3; see also de Beauvoir, supra, at xix.

74. MacKinnon, supra note 27 (citation omitted).

75. Capitalist Patriarchy, supra note 63, at xx (holding “that gender oppression is the oldest and most profound form of exploitation, which predates and underlies all other forms including those of race and class” and sexuality as well as other oppressions); Andermahr et al., supra note 57, at 182 (noting “[t]hat male oppression has primacy over all other oppressions, for which indeed it provided the template”). See also Lorber, supra note 60, at 65 (noting that this feminist outlook addresses “a system of men’s oppression of women (patriarchy) that goes beyond discrimination [and includes] men’s violence and control of women through rape, battering and murder”); Ollenburger & Moore, supra note 12, at 21; Andermahr et al., supra note 57, at 182 (“[W]omen are oppressed as women and that their oppressors are men. Male power had to be recognized and understood, and was not to be reduced to anything else, for example, the power of capital over labour.”).

76. Lorber, supra note 60, at 65 (focusing on “legitimation of women’s oppression in law, medicine, religion, and other social institutions[; the] objectification of women’s bodies in advertisements, mass media, and cultural productions[; and the] sexual exploitation in pornography and prostitution”).

77. See Becker, supra note 66, at 708 (describing MacKinnon’s critique of formal equality in Catharine A. MacKinnon, Sexual Harassment of Working Women 101-41 (1979)) (noting that while “formal equality may look gender-neutral, . . . in application it is androcentric, centered on male needs and male-defined standards because it only applies when women look like men (thus similarly situated) and even then only entitles these women to the rules and practices worked out by men for men”).
Difference feminism recognizes that, in some respects, women and men are not similarly situated, most notably in their reproductive functions. A pregnant woman can never be equally positioned to a nonexistent pregnant man. Thus, absent a difference standard, a pregnant woman’s rights can be denied because of the male normativity of rules and standards.\textsuperscript{78} Beyond reproductive capacity, the discussions on women’s real differences within the legal system have centered on “the feminization of poverty, the gender gap in politics, the ‘glass ceiling,’ and other phenomena which made it clear that, in many ways that mattered, men and women were different.”\textsuperscript{79}

Much like Gilligan’s model, in the legal realm cultural or relational feminism critiques the maleness of law.\textsuperscript{80} It “articulates the ways women often tend[ ] to approach problems, view the world, and construct their identity.”\textsuperscript{81} Cultural feminism seeks to debunk sex roles and gendered social and legal assumptions in order for law to reflect women’s realities,\textsuperscript{82} to confront the gendered social order, and to turn patriarchy on its head by reclaiming the devalued feminine traits

\begin{thebibliography}{9}
\bibitem{78} Cain, \textit{supra} note 55, at 360 (“Once women began to be treated like men, people began to notice that women really are not like men. Women are most noticeably not like men when they are pregnant.”).
\bibitem{79} Chamallas, \textit{supra} note 47, at 25.
\bibitem{80} Charlesworth & Chinkin, \textit{supra} note 54, at 40-41.
\bibitem{81} [L]aw privileges a male view of the universe and that law is part of the structure of male domination. The hierarchical organisation of law, its adversarial format and its aim of the abstract resolution of competing rights, makes the law an intensely patriarchal institution. Law thus represents a very limited aspect of human experience. The language and imagery of the law underscore its maleness; it lays claim to rationality, objectivity and abstractness, characteristics traditionally associated with men, and is defined in contrast to emotion, subjectivity and contextualised thinking – the province of women.
\bibitem{82} Chamallas, \textit{supra} note 47, at 27; Cain, \textit{supra} note 62, at 241. Interestingly, in legal theory, as contrasted to the social sciences, cultural feminists ignore the lesbian experience. See also Cain, \textit{supra} note 55, at 361.
\end{thebibliography}
as positive and desirable.\textsuperscript{83} Because cultural feminism focuses on womanhood,\textsuperscript{84} it has been criticized as essentialist.\textsuperscript{85}

Relationalism reveals the structural nature of "targeted inequalities":
1. Cultural overvaluation of masculine qualities and undervaluation of feminine qualities. 2. Cultural focus on men and male needs with the tendency not to see women as fully human and to be oblivious to women's needs. 3. Insistence that men and women are essentially different and that men play masculine roles and women play feminine roles.\textsuperscript{86}

Professor Becker's "approach challenges cultural values that generate inequalities."\textsuperscript{87} She posits that valuable traits ought to be valued regardless of their being denominated male or female and regardless of who displays the traits.\textsuperscript{88} Ultimately, she urges that "community, relationships, and traditionally feminine qualities should be valued more and traditionally male qualities should be valued less."\textsuperscript{89} Thus, relational feminism specifically focuses on the premise that men and women should have equal opportunities for human happiness and fulfillment,\textsuperscript{90} conforming with what I call in this work the goal of full personhood for women. Pursuant to such an approach, women's values and approaches will be accepted and valued in public life and civil society.

3. The Third Wave

The third wave centrally critiques gender essentialism\textsuperscript{91} – "the idea that there is some common, underlying attribute or experience

\textsuperscript{83} Andermahr et al., supra note 57, at 38 (explaining that this desirable women's culture includes "mothering;... spirituality;... language;... lesbianism and 'woman-relatedness';... moral reasoning;... the Greenham Common women's peace movement;... male violence against women;... pornography;... [and] utopian literature").
\textsuperscript{84} Id. at 39.
\textsuperscript{85} Id.; see id. at 82 (quoting Teresa de Laurentis, The Essence of the Triangle, or Taking the Risk of Essentialism Seriously: Feminist Theory, in Italy, the U.S. and Britain, in Differences: A Journal of Feminist Cultural Studies 1, 2, 9-37 (Naomi Schor & Elizabeth Weed eds., 1989)) (defining essentialism as "...the indispensable and necessary attributes of a thing as opposed to those which it may have or not").
\textsuperscript{86} Becker, supra note 27, at 46-49, tbl. A.
\textsuperscript{87} Id.
\textsuperscript{88} See also Andermahr et al., supra note 57, at 182 ("[T]he whole gender order in which people, things and behaviour are classified in terms of the distinction between masculine and feminine is socially constructed and has no basis in natural differences between the sexes. A common goal was 'the annihilation of sex-roles'..."); see id. at 39 (origins of phrase "annihilation of sex-roles").
\textsuperscript{89} Becker, supra note 27, at 46-49, tbl. A.
\textsuperscript{90} Id.
\textsuperscript{91} Katharine T. Bartlett & Angela P. Harris, Gender and the Law: Theory, Doctrine, Commentary 1007 (1998).

Gender essentialism has been identified as more than one thing, as a grab bag of different, sometimes overlapping problems. One is the problem of
shared by all women, independent of race, class, sexual orientation, or other aspects of their particular situation." This wave rejects general and universal categorizations of women as falsely and inappropriately homogenizing. For example, women of color within predominantly white societies, and lesbians within predominantly heterosexual societies, expose the flaw of essentialism: the impossible task of separating integral parts of identity — race and sex, gender, and sexuality. Hence, anti-essentialists propose a both/and rather than an either/or approach. Nonessentialist feminisms include third world or development feminism, women of color feminism, and postmodern feminism.

Third world or development feminism focuses on the impact on women of economic development in postcolonial societies. It shows false universalism, in which the unstated sometimes unconscious assumption that for purposes of feminism ‘women’ are white, middle-class, heterosexual, able-bodied, and otherwise privileged. A second problem has to do with the applicability of Western feminism to other cultures.

Other essentialisms include reductivism by which the world is viewed through a single lens that reduces social relations to those aspects that support one ‘grand’ theory. Selecting out only one possible source of a woman’s identity — such as her gender, race, class, or sexual preference — and treating it as severable from the rest of her being: the ‘naturalist’ error that assume[s] the existence of certain inherent or ‘natural’ facts, rather than socially constructed ones, on which the law is or should be based; the problem of categorization; in a world in which every category is inevitably underinclusive or overinclusive; and a seventh connotation of the term ‘essentialism’ points toward ‘postmodernism’ [which] challenges the notion that there is any objective reality ‘out there’ in the world that can be perceived apart from our expectations and our past experiences.

Other forms of gender essentialism [are] ‘gender imperialism’ or ‘gender primacy’ [and it] makes the mistake of according too much weight to gender oppression, minimizing the impact of oppression based on race, class, or sexual orientation.

Third world feminism uses theories of colonial underdevelopment and post-colonial development, as well as Marxist and socialist feminist theories, to analyze the position of women in the global economy, with particular emphasis on newly industrializing countries.
that economic exploitation of women in developing states, particularly as exacerbated by globalization, is "greater than in developed economies." Development feminism also engages the issue of women’s rights and cultural traditions, such as child marriage, female genital cutting, dowry, and bride killing. This conflict raises the issue of the relativism versus universality of rights – interrogating whether the condemnation of cultural practices that are harmful to women is an imperialistic western move that eviscerates minority cultural traditions.

Women of color feminism, or multiracial feminism, emphasizes the multidimensional nature of discrimination. Furthermore, it reveals how, notwithstanding the reality that across groups women are always more disadvantaged than men, multiple otherness – being not only a woman but also belonging to an ethnic, sexual, racial, gender, and/or class minority – effects and exacerbates the marginalization and subordination of women. Women of color feminisms are varied, reflecting the diverse political, cultural, intellectual, and economic struggles that the different groups and individuals within those groups’ experience. But there are commonalities as these multiracial feminisms all focus on the interlocking multiple systems of domination that render the categories of “man” and “woman” insufficient

96. Id. For example, women are paid less than men whether they work in factories or are paid for work done in the home, continuing the gendered division of labor that resulted from colonization, while still being expected to care for families and the home. Id. at 53-54.

Development feminism equates women’s status with their contribution to their family’s economy and their control of economic resources. . . . Development feminism’s theory is that in any society, if the food or income women produce is the main way the family is fed, and women also control the distribution of any surplus they produce, women have power and prestige. . . . When a woman is able to own the means of production [land, a store, a business] like a man, she has the chance to be economically independent. If her income is barely above subsistence level because her choices are low-waged work in a factory, piece work in a sweatshop, or sex work as a prostitute, then the fact that she has a job does not give her a very high social status, especially if much of the money she earns is sent back home to her family.


99. See Hernández-Truyol, supra note 97; LORBER, supra note 60, at 134; see generally CRITICAL RACE FEMINISM (Adrien K. Wing ed., 1997).

100. See generally GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien K. Wing ed., 2000) [hereinafter GLOBAL]; see also LORBER, supra note 60, at 136 (excerpt from Maxine B. Zinn & Bonnie T. Dill, Theorizing Differences from Multiracial Feminism, 22 FEMINIST STUD. 321 (1996)).
to evaluate the condition of women of color.\textsuperscript{101} The focus of these discourses includes cultural differences, eradication of poverty, globalization, and, in the international context, the differential concerns between poor and rich nations.

Postmodern feminism\textsuperscript{102} contests the existence of any objective reality\textsuperscript{103} and rejects that “categorical, abstract theories derived through reason and assumptions about the essence of human nature can serve as the foundation of knowledge.”\textsuperscript{104} To postmodernists, there can be no single truth;\textsuperscript{105} rather, all truths are linked to and bound by a person’s experience, which is wholly dependent upon that person’s position in the world.\textsuperscript{106} Consequently, the liberal and difference feminist inquiries about the issues of sameness or difference are irrelevant to the postmodern feminist inquiry because these dichoto-

\textbf{101.} Lorber, \textit{supra} note 60, at 138-39. Lorber noted distinguishing characteristics of multiracial feminism:

First, multiracial feminism asserts that gender is constructed by a range of interlocking inequalities, what Patricia Hill Collins calls a ‘matrix of domination’... Second, multiracial feminism emphasizes the intersectional nature of hierarchies at all levels of social life. Class, race, gender, and sexuality are components of both social structure and social interaction.... Third, multiracial feminism highlights the relational nature of dominance and subordination. Power is the cornerstone of women’s differences.... Fourth, multiracial feminism explores the interplay of social structure and women’s agency. Within the constraints of race, class, and gender oppression, women create viable lives for themselves, their families, and their communities.... Fifth, multiracial feminism encompasses wide-ranging methodological approaches, and like other branches of feminist thought, relies on varied theoretical tools as well.... Sixth, multiracial feminism brings together understandings drawn from the lived experiences of diverse and continuously changing groups of women. Among Asian Americans, Native Americans, Latinas, and Blacks are many different national cultural and ethnic groups. Each one is engaged in the process of testing, refining, and reshaping these broader categories in its own image.

\textit{Id.} (citations omitted).

\textbf{102.} Andermahr \textit{et al.}, \textit{supra} note 57, at 170 (noting that “[i]t is not easy to attach the postmodernist label with any degree of confidence to feminist thinkers”).

\textbf{103.} Katharine T. Bartlett, \textit{Gender Law}, 1 DuKE J. GENDER L. & POL’Y 1, 14 (1994). The postmodern view of the individual or the ‘legal subject’ opposes the Enlightenment view of the stable, coherent, and rational self with a more complicated view of the individual as ‘constituted’ from multiple institutional and ideological forces that, in various ways, overlap, intersect and even contradict each other. Although these forces join to produce a reality that the individual subject experiences as real or true, it is in fact a reality or truth that is ‘constituted’.

\textit{Id.}

\textbf{104.} Smith, \textit{supra} note 62, at 6.

\textbf{105.} \textit{Id.} at 5 (noting that “for postmodern feminists there is no single solution and no single oppression of women, but only solutions tailored to the concrete experience of actual people”).

\textbf{106.} Cain, \textit{supra} note 62, at 242 (“Postmodern feminists eschew the idea of unitary truth, of objective reality. They readily admit that categories, especially gender categories, are merely social constructs. Equality, too, is a social construct.”).
mies "are illusions caused by the flawed structural frameworks that generate them."107

The postmodern perspective of asking a complex "woman question" in a nonuniversalized and nonessentialized manner – a philosophy that it shares with the third world feminists and feminists of color – recognizes the reality that

... does not operate in a monolithic way to oppress women and advantage men. There are many different voices and experiences and realities unreflected in the law. ... Post-modern feminism is concerned with the specific operation of the law and the particular contexts of women. This approach emphasizes the utility of action at the micro-political level rather than the uncertain path of law reform.108

In sum, as the existence of the various and varied feminisms discussed above suggests, no one system can be constructed nor one theory crafted that can address all structural gender deficiencies of the existing social and legal systems. Thus, as this work also suggests, asking the "woman question"109 requires a more complex analytical construct that can accommodate different women's lived realities. Perhaps today, we should more appropriately call this process the asking of the "human question."

C. Feminist Revelations: Openings Towards Full Personhood

Feminists have exposed the law as created by and constructed from a masculine viewpoint.110 Yet, in order to maintain its legitimacy

107. Smith, supra note 62, at 8.
108. CHARLESWORTH & CHINKIN, supra note 54, at 45; see generally CRITICAL RACE FEMINISM, supra note 99; GLOBAL, supra note 100; Building Bridges, supra note 98 (noting the multidimensionality of multiple others).
109. See AUGUST BEBEL, supra note 46; Hernández-Truyol, supra notes 26, 94, 97; Building Bridges, supra note 98; Berta E. Hernández-Truyol, Latinas, Culture and Human Rights: A Model for Making Change, Saving Soul, 23 WOMEN'S RTS. L. REP. 21 (2001); see also Cain, supra note 62, at 243.
110. MACKINNON, supra note 44, at 161-62.

The state is male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender – through its legitimating norms, forms, relation to society, and substantive policies. The state's formal norms recapitulate the male point of view on the level of design.

Id.; see also CORNELL, supra note 43, at 122.

We no longer see the so-called objective perspective as the one legitimated because it is the expression of masculinity. To enforce law, as currently defined, then, is to reinforce the male viewpoint, in spite of law's claim to do the exact opposite. The so-called liberal state is only the rule of men, but now even more dangerous to feminist politics because it is disguised as the rule of law, with its legitimate claim on all of us, because it supposedly offers us equal respect for persons. Better to recognize the struggle, the politics, that this rule of law seems to make invisible.
and its universality, the law must deny that such a "hierarchical stratification between the genders" exists.\textsuperscript{111} The law is "lying" when it claims to have erased gender inequality.\textsuperscript{112} While the erasure may have taken place in books, women's reality is one of inequality.

In this system, based on individualism (sameness) and gendered separate spheres (difference), when women cannot be the same as men, they are unable to enjoy equality. In the real world, the individualistic, atomistic rights-based model is male normative and does not reflect women's experiences of interaction, communication, contextualization, and relationship. Feminist theories critique these outcomes.

The male-normativity of the law itself constitutes the idea (and ideal) of citizenship. The law's objects – the "reasonable men"\textsuperscript{113} – are the norm; thus, generating the idea of the citizen as gendered male.\textsuperscript{114} The legal person that has emerged in this liberal tradition is both male and male-identified.\textsuperscript{115}

The maleness of the law obscures women;\textsuperscript{116} it effects a loss of agency and a devaluation of their natural characteristics.\textsuperscript{117} A woman's different voice – her different approach to and resolution of moral dilemmas – is typically, but erroneously, characterized as naive and immature,\textsuperscript{118} as contrasted to the more evolved linear (male) process.

Part of the difficulty in criticizing our current law as masculine is the problematic of men's and women's realities. To be sure, in some

\textsuperscript{Id.}

\textsuperscript{111.} Cornell, supra note 43, at 121.

\textsuperscript{112.} Id.

\textsuperscript{113.} Joanne Conaghan, Tort Law and the Feminist Critique of Reason, in Feminist Perspectives on the Foundational Subjects of Law 47, 55 (Anne Bottomley et al. eds., 1996) [hereinafter Feminist Perspectives] (noting that, considering Carol Gilligan's work, "the standard implicit in the reasonable man test, with its emphasis on abstract cost benefit calculations, corresponds more closely with the 'male' than the 'female' voice" (citation omitted)); see also Stephanie Palmer, Critical Perspectives on Women's Rights: The European Convention on Human Rights and Fundamental Freedoms, in Feminist Perspectives, supra, at 223, 225 ("[Other f]eminists have also convincingly illustrated that the ostensibly universal category of 'individual' suggested by liberal theorists is constructed on the basis of male attributes. The liberal legal world ignores the gender inequalities which are built into the very definition of the system. Men and women cannot compete if the gender neutral rules are established to suit the apparent interests and needs of a man's world." (citation omitted)).

\textsuperscript{114.} Mohanram, supra note 39, at 58.

\textsuperscript{115.} Cornell, supra note 43, at 121.

\textsuperscript{116.} Mohanram, supra note 39, at 83 ("[T]he woman's body functions as a mediator for the male citizens to experience the landscape and the nation as nurturing, comforting and familiar. Given that her body functions to mediate the connection between the male citizen and nation, a female citizen cannot experience the national landscape in an identical way to her male counterpart, in that her body functions to nurture him.").

\textsuperscript{117.} Id. at 59 (noting that woman's "role is marginalized in that she is located as devoid of agency as a 'woman within the nation', though she might gain access into the nation from within the context of race, class, sexuality, age, etc.").

\textsuperscript{118.} Gilligan, supra note 11, at 17-23; see also Okin, supra note 1.
contexts – such as humanity and intellect for example – women can be compared to men. That is, men and women are, or can be, the “same.”

Yet, there are contexts in which men and women are different. The quintessential example is reproductive capacity and function. Moreover, not all women are the same; “women” is not a homogeneous category. Rather, ethnic, racial, sexual, class, linguistic, religious, and other differences render the category of women a complex, heterogeneous one. The challenge in the framework of women’s lives of real, rather than imagined or fabricated, differences is to create a structure so that all women can enjoy full personhood, even in light of such inter- and intra-gender variances.

It is noteworthy, however, that the model of men’s and women’s equality that has been adopted by the Supreme Court is the sameness model. Under this view of equality, the problem is defined primarily in terms of discrimination but within an accepted male-dominated context. The discrimination standard demands a comparison of the victim’s treatment with the normal, that is, male, standard. There is no avenue for challenging the accepted criteria; the successful argument is based on assimilation, on equality with men. Disadvantages suffered by women are redressed by equal treatment and the value of any specifically female life experiences is inevitably marginalised. The difficulty is that equality is promised only to those women who can conform to a male model. This approach . . . assumes ‘a world of autonomous individuals starting a race or making free choices [which] has no cutting edge against the fact that men and women are simply running different races’.

Heesacker’s studies in psychology as well as postmodern feminists suggest that, other than in the biological differences context, male and female differences are largely socially constructed. Thus, Heesacker’s findings suggest that, once society can rid itself of its al-

119. See supra notes 56-71 and accompanying text for discussion of “sameness” feminist theory.

120. See supra notes 72-90 and accompanying text for discussion of “difference feminism.”

121. CORNELL, supra note 43, at 137 (the current Supreme Court thinks of equality as women being like men, “the empirical demonstration that we are the same as they are for purposes of a particular case”).


123. See supra note 9 and accompanying text.

124. See supra notes 102-08 and accompanying text (setting forth notions of postmodern feminism); see also CORNELL, supra note 43, at 137 (“The wrong in sex discrimination under this view of equality is that a universal, female identity is being wrongly imposed on women to whom it does not directly apply. All women are assumed to be alike and, then, different from men. The wrong of discrimination, in other words, is the imposition of the universal on the particular, on an individual who does not fit the generalization.”).
pha biases, this outcome would accommodate some feminist critics. For example, Gilligan's "ethic of care" suggests that "[w]omen think in relational terms because [their] existence is defined in relation to men." Thus, once women's existence is not derivative, sameness equality notions may provide the necessary protections for attainment of full personhood for women. However, it would not satisfy critics of both the sameness and difference approaches, who note that both are male-centered and thus privilege the male values and power that have served to define womanhood.

After many years of theorizing, it is plain that no single model has succeeded in advancing women's lot in society, family, work, or law. This is not difficult to explain really. At times, women can be evaluated on the basis of a sameness norm, such as work criteria, and do fine; yet at other times, a sameness model is inadequate because women, such as in matters related to pregnancy or in matters concerning multiple others, are not, and cannot be, the "same" as the normative male. While some differences are real, many are imaginary, grounded in socially constructed views and expectations of outcomes -- based on stereotypes. These constructed differences, however, have served in

125. See supra note 10 and accompanying text.
126. See Kirstein Amundsen, The Silenced Majority 142 (1971) ("The personality characteristics associated with proper femininity and manliness are arbitrarily assigned to each sex without regard to the very complex and wide-ranging differences inherent in the members of both. There are men who find it very difficult to be strong, independent, and aggressive, just as there are women who develop such attributes with comparative ease."). For more information on gender differences in moral reasoning, see Cornell, supra note 43, at 135.
128. See, e.g., Cornell, supra note 43, at 126.
For MacKinnon, the celebration of female difference is part of the same old story and therefore, not about difference at all. Women may value relations of care more than men; they may be less oriented to rights rhetoric; they may be more emphatic. But if they are, MacKinnon would insist that they are so as an expression of what men have made them to be. Very simply put, what has been shoved down our throats cannot be valued because this is the way women are, which is not to say that MacKinnon does not recognize that there might be a purportedly 'independent' ethical argument for these values that are associated with women's reality. But such an argument would have to justify these values independently of empirical claims about what women are. What we are is oppressed, our 'values,' a reflection of that oppression.

Id. at 133 (observing that "[f]or MacKinnon, what women desire now under patriarchy is by definition false consciousness. So we think that we want love and intimacy? For MacKinnon, we only think that way because that's how they want and need us to think so that we will continue to be available to them. Women's expressed desire is only an ideology."). The danger in this is the "implicit privileging of "masculine" identified values -- for example, freedom over love and the desire for intimacy -- and a masculine concept of the self." Id. at 132.
129. See Heesacker, supra note 9, at 483, n.17 (explaining stereotypes).
family and law, in church and state to prevent women from enjoying full personhood.

III. HUMAN RIGHTS NORMS

A. Historical Background

In the wake of World War II, internationalism was dramatically transformed. After the Nazi war atrocities, human beings who up until then had merely been objects of international law were recognized as subjects of international law. The human rights regime that emerged from this tragedy is a rich and complex one. Significantly, in reaching beyond the state and looking at individuals and their rights, regardless of where they might be located, human rights law redefined the concept of sovereignty. Formerly, sovereignty constituted an omnipotent power of the state to do as it wished vis-à-vis its subjects everywhere, and with respect to everyone within its territorial borders. Today, human rights norms form a break in the wall of states' sovereignty. The idea of personhood, unbounded by territorial lines or citizenship ties, originated as a reaction against sovereign abuse of unfettered power.

The recent Pinochet case, like its Nuremberg precedent, confirms the human rights based notion of personhood: human beings, their bodily integrity and their dignity, are supra sovereign and deserve universal protection. Human rights law protects the personhood of Pinochet's Chilean (and other) victims against torture by him or his regime even if the torture occurred in Chile while he was the head of state. How a state treats persons within its borders is no longer a purely local, domestic, internal matter; it is an international concern.

Notwithstanding these broad protections, the human rights model ought not be romanticized. The thriving international system reflects the contradictions of liberalism's roots in the late eighteenth century's political and social uprisings. These sought to identify impermissible governmental intrusions into individual rights, but ironically coexisted with the institution of slavery—an institution that included enslavement of both sexes—and with women's status as mere chattel.

Moreover, the crafting of the human rights framework was constituted by the voices and positions of a few powerful states claiming to

130. The Nuremberg and Tokyo tribunals were created to address human rights atrocities committed during the war, and to punish violators. The Nuremberg court pointed out that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The Nuremberg Trial, 6 F.R.D. 69, 110 (1946); see also Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 Am. U. L. Rev. 1, 9-10 (1982); see generally Louis B. Sohn, Cases on United Nations Law 898-967 (1956).
speak for all states in promulgating universal, and universally binding, norms. The construct, thus, reflects the deficiencies of liberal thinking and its origins with respect to sex, race, class, and community hierarchy. Consequently, "the language used to enact, enforce, describe or analyze [human rights] is not transparent, innocent, ahistorical or simply instrumental."\textsuperscript{133} There are Western assumptions, evaluations, and even institutional divisions operating within human rights norms.\textsuperscript{134} In addition, beyond being plagued by contradictions that result from its ideological origins,\textsuperscript{135} the human rights system is fraught with stresses that emerge from the diversity of the cultures, languages, and religions around the world.

These realities suggest the need to develop, expand, and transform the human rights model into a more inclusive one if it is to be of utility to feminists. A critical revision of the internationalism legacy, however, can influence in a positive way the rethinking, reconstructing, and reconstituting of normative standards to attain the goal of full personhood for women. Human rights principles clearly set out rich rights and entitlements of persons qua human beings. The system includes express protections for both individuals and groups, recognizing that personhood – human flourishing – requires thriving both as an individual and as a member of larger communities.\textsuperscript{136}

B. Human Rights: Equality as a Universally Accepted Principle

Human rights norms further a humanitarian conception of personhood that transcend the limitations of current equality doctrine and theory. The human rights framework is of great utility in a feminist liberation project because it helps move the discourse beyond a comparativistic sameness or difference approach to embrace nonessentialism. It goes beyond the narrow parameters of a legal equality paradigm rooted in sameness, and moves the discourse towards a full personhood perspective.

Thus, the formal human rights documents provide the foundation for the full personhood model. The Universal Declaration incorporates civil and political rights as well as social, economic, and cultural rights.\textsuperscript{137} These entitlements have been reiterated in trea-
ties\textsuperscript{138} as well as in numerous conference documents.\textsuperscript{139} Specifically, human rights norms embrace the condition of human beings as free and equal in dignity and rights; they confirm that freedoms are to be enjoyed without discrimination on the bases of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.\textsuperscript{140} Life, liberty, and security of the person are assured,\textsuperscript{141} as are freedom of thought, conscience, and religion and freedom of opinion and expression.\textsuperscript{142} Moreover, the human needs for rest and leisure,\textsuperscript{143} the right to work,\textsuperscript{144} health care,\textsuperscript{145} adequate standard of living including food and shelter,\textsuperscript{146} and social security\textsuperscript{147}, are expressly recognized, much as they were in Franklin D. Roosevelt's Four Freedoms Speech.\textsuperscript{148} Finally, human rights norms also acknowledge the human need for community and express the right to participate freely in cultural life.\textsuperscript{149} This translates to an embrace of sameness, difference, and nonessentialism.

In the human rights model, the plethora of articulated rights of persons are inalienable, indivisible, and interdependent.\textsuperscript{150} As such, the human rights idea starkly contrasts with the United States' domestic atomistic approach to the evaluation of equality; rather, it is concerned with whether someone is attaining dignity, integrity, and full

\begin{itemize}
  \item 140. See, e.g., Universal Declaration, \textit{supra} note 136; ICCPR, \textit{supra} note 136; Economic Covenant, \textit{supra} note 138.
  \item 141. Universal Declaration, \textit{supra} note 136; ICCPR, \textit{supra} note 136.
  \item 142. Universal Declaration, \textit{supra} note 136; ICCPR, \textit{supra} note 136.
  \item 143. Economic Covenant, \textit{supra} note 138, at art. 7(d).
  \item 144. \textit{Id.} at art. 6, para. 1.
  \item 145. \textit{Id.} at art. 12.
  \item 146. \textit{Id.} at art. 11, para. 1.
  \item 147. \textit{Id.} at art. 9.
  \item 149. ICCPR, \textit{supra} note 136.
\end{itemize}
citizenship. In this regard, the human rights system's broad protections, such as color, national origin, social origin, property, birth, language, culture, and family life, go far beyond the local protections available in the United States.

It is noteworthy that the formal notion of sex equality as a core international tenet dates only to 1945 when the U.N. Charter stated its intention to "reaffirm . . . the equal rights of men and women." The U.N. Charter further stated that one of its purposes was to achieve international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to . . . sex . . . ." Following the U.N. Charter's lead, the Universal Declaration of Human Rights, the ICCPR, and the Economic Covenant all expressly have protected equality based on "sex." These documents provide that "[e]veryone is entitled to all the rights and freedoms . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Moreover, the thematic and regional human rights instruments that have expanded and strengthened the human rights regime also expressly provide for sex/gender equality. For instance, the three regional instruments aimed at the protection of human rights (the Eu-

152. Universal Declaration, supra note 136; ICCPR, supra note 136; Economic Covenant, supra note 138; CERD, supra note 138; CEDAW, supra note 138.
153. ICCPR, supra note 136.
154. Universal Declaration, supra note 136; ICCPR, supra note 136.
155. U.N. CHARTER pmbl.
156. Id. at art. 1, para. 3.
158. ICCPR, supra note 136, at art. 2, para. 1.
159. Economic Covenant, supra note 138, at art. 2, para. 2.
160. Universal Declaration, supra note 136, at art. 2 (emphasis added). Similarly, the ICCPR provides that:
[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCP, supra note 136, at art. 2, para. 1 (emphasis added). In addition, in Article 26, the ICCPR provides that, with the respect to the nondiscrimination provisions, "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . sex . . . ." Id. at art. 26 (emphasis added). Finally, the Economic Covenant also provides for non-discrimination on the basis of sex. Economic Covenant supra note 138, at art. 2, para. 2. In addition, the Economic Covenant provides that parties will "ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights" that are articulated in that treaty. Id. at art. 3.
European Convention,161 the American Convention,162 and the Banjul Charter169 all explicitly incorporate the right to sex equality, as do other international human rights instruments. Significantly, the "[e]qual enjoyment of human rights by women and men is a universally accepted principle."164 The international community has recognized the multidimensional nature of this principle to include:

- Equal access to basic social services, including education and health;
- Equal opportunities for participation in political and economic decision-making;
- Equal reward for equal work;
- Equal protection under the law;
- Elimination of discrimination by gender and violence against women; and
- Equal rights of citizens in all areas of life, both public – such as the workplace – and private – such as the home.165

To be sure, these aspirations and pronouncements have not uniformly translated to structural changes from human rights' liberal origins. For example, "the European Convention [on Human Rights and Fundamental Freedoms] embodies the classical liberal position of the individual and there is an assumption that human rights discourse is gender-neutral"166 – a position that operates to isolate women in anything but a gender-neutral way. Although "Article 5 of Protocol No. 7 of the European Convention extends to spouses equal rights and responsibilities in their relations with their children and in regard to marriage, its dissolution and property,"167 the European Convention has been criticized for its "role of non-interference rather than a positive guarantee by the State to promote equality. Article 14 [of the European Convention] does nothing to empower women and may even filter out women's experiences of subordination."168

Some changes, however, are beginning to emerge. In contrast to the United States' and the European approaches, the Canadian government has embraced a positive guarantee of gender equality.169

165. Id. It should be noted that the "equal pay for equal work" concept is grounded on a sameness model that provides women should receive equal remuneration when they perform the same work as men.
167. Id. at 233.
168. Id. at 235.
169. CAN. CONST. (Constitution Act, 1982) pt.I (Canadian Charter of Rights and Freedoms), § 15; see also Palmer, supra note 113, at 235 (citing Andrews v. Law Society of
Moreover, the human rights rules afford an impressive array of rights (beyond those listed above) which include protection of rights to privacy, health, equality, and nondiscrimination. Various rights pertinent and central to the protection of women’s full personhood contained in the various instruments are the rights to education; religion; travel; family life; decision-making regarding the number of children and their spacing; information; life, liberty, and security of the person; integrity of the person; freedom from torture; freedom from slavery; political participation; free assembly and association; work; enjoyment of the benefits of scientific progress; development; environment; peace; democracy; self-determination; and solidarity.170

C. Persistent Gendered Inequality

Notwithstanding the international community’s recognition of women’s subordinate location and the need to better it, gendered inequality is a persistent reality. In reviewing the conditions of women’s lives worldwide, two distressing facts surface. First, the rules have been, at best, inadequate to effect women’s equality. This is due, at least in part, to the male nature of the domestic and international legal systems.171 For example, the public/private dichotomy in international law, as in the domestic sphere, neglects the socioeconomic structures in which women’s subordination occurs. It is primarily women who take care of children and assume responsibility for domestic duties and that inevitably affects their economic, social and political status. The emphasis placed on the protection of individuals in the public sphere sidesteps the fact that many women spend all, or at least part, of their lives within the non-political private sphere, the realm of the family and domestic life. Traditionally, this area of private life is considered inappropriate for human rights and civil liberties protection.

... As the private sphere and the family play a central role in maintaining sexual inequality, any system of human rights must avoid conferring legitimacy on the right of men to freedom at the ex-

170. See Hernández-Truyol, supra note 97, at 624-28 (listing rights and sources thereof).

171. CHARLESWORTH & CHINKIN, supra note 54, at 40-41.
pense of the oppression of women in the forgotten domestic sphere.172

Second, locally and globally women simply do not enjoy the universal human rights to which they are legally entitled. This is as true in the West as it is in the East, and in the North as in the South.173 The condition of women, as evidenced by the tragedies in Bosnia,174 Haiti,175 and Rwanda,176 where women have been pillaged and raped as instruments or prizes of war,177 and Afghanistan, where women have


173. See generally The World's Women 2000: Trends and Statistics, U.N. Doc. ST/ESA/Stat/Ser.K/16 (2000) (noting that there is a persistent gender gap in education; that women's lives are formed by reproductive capacity and choices; that women remain underrepresented in international and local governance, remaining a minuscule number of public representatives; that women's form of work is unpaid, underpaid, and unrecognized; and that women continue to be victims of physical and sexual abuse and violence which is underreported, a reality exacerbated in the refugee population, a group of which women and girls comprise 50%). See also UNHDR 1995, supra note 31, at 2.

174. See Letter from the International Women's Human Rights Law Clinic (IWHRLC) at City University of New York School of Law to the Secretary-General, Organization of American States, The Member States and the General Assembly 1 (June 1994) (on file with author) [hereinafter IWHRLC Letter] (“On March 23, the UN/OAS Observer Mission reported . . . that 12 women and girls had been raped in Port-au-Prince and concluded that it appeared that rape was being used as an instrument of terror against the female population of Haiti who were suspected or designated as opponents of the illegal regime.”). The IWHRLC demanded effective investigation, publicization and prosecution of crimes. Id. at 2. See also Karen Knop, Re/Statements: Feminism and State Sovereignty, in 3 INTERNATIONAL LAW, TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS 293, 294 n.4 (1993) (citing Donna E. Arzt, Genocidal Rape in Bosnia-Hercegovina and Croatia and the Role of International Law (1993) (unpublished manuscript)); Rhonda Copelon, Gendered War Crimes: Reconceptualizing Rape in Time of War, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 197 (Julie Peters & Andrea Wolper eds., 1995) [hereinafter WOMEN'S RIGHTS] (commenting on mass rape of women in former Yugoslavia); Jasmine Kuzmanovic, Legacies of Invisibility: Past Silence, Present Violence Against Women in the Former Yugoslavia, in WOMEN'S RIGHTS, supra, at 57 (for accounts of rape in Bosnia).

175. See IWHRLC Letter, supra note 174.


177. See Copelon, supra note 174, at 204 (discussing rape of women as “booty” of war). Rape was not treated as a crime for which the Japanese Commander would be separately charged at the Judgment of the Military Tribunal in Tokyo. Id. at 197. There existed the systematic rapes in both World Wars, including the “rape of German women by the conquering Russian army and the enslavement on the battlefields of 200,000-400,000 ‘comfort women’ by the Japanese army.” Id. at 197. See Vienna Declaration and Programme of Action, supra note 139, at 204, which coincided with the revelation of the mass rapes in Bosnia-Hercegovina, including a general condemnation of gender violence as well as making specific mention of “‘systemic rape, sexual slavery and forced pregnancy’ in armed conflict.” Copelon, supra note 174, at 198 (citing Report of the Drafting Committee, Addendum, Final Outcome of the World
been erased from public life, illustrates that women are a long way from being full citizens who are universally respected or heard, let alone safe.

Significantly, this is not a woman’s reality solely in times of war. One need not travel to Bosnia or Rwanda or even contemplate a state of war to observe evidence of women’s inequality. One need only look at the realities of everyday life. The United Nations, with its own ranks plagued by inequality, confirms the persistent and prevailing gender disparities in its description of women as the “world’s largest excluded group.”

The United Nations’ 1993 Human Development Report labeled women as a “non-participating majority” because, despite the fact that women constitute a majority of the world’s population, they “receive only a small share of developmental opportunities.” This sad truth of women’s subordinate status is borne out regardless of which statistics are considered: employment, economics, personal autonomy, education, political participation, health, or personal security (i.e., freedom from violence) – all mat-
ters that are critical to women’s enjoyment of their international rights and freedoms. Notwithstanding the existing “paper rights,” the universal fact is that women, simply because of their sex, are routinely subjected to torture, starvation, terrorism, humiliation, mutilation, rape, close and multiple births and other preventable maternity-related health risks, economic duress, and sexual exploitation.181

Recurrently, numerous practices are inflicted on women simply because of their sex and are justified or explained by culture and tradition: genital mutilation; female infanticide; bride burning; foot-binding; slavery; veiling; wife-beating; honor-killing; forced pregnancy; forced abortion; and multiple, early, and closely spaced child-bearing and birthing, to name but a few.182 It is inconceivable that these practices, which some accept without protest because they are based on sex, would be justified if they were instead predicated upon another protected classification such as race (although until recently, culture and tradition were used to justify racial discrimination, including apartheid and slavery).183 Yet not all of these practices, individually and collectively, interfere with women’s general well-being and perpetuate women’s second-class status and condition.

In fact, the United States Department of State (another male-dominated institution) recognizes “the problem of rampant discrimination against women”184 and the resulting myriad human rights violations women suffer simply because of their sex.185 Women

heterosexual or lesbian; laws that criminalize rape in marriage and so on. Abusing women physically maintains this territorial domination and is sometimes accompanied by other forms of human rights abuse such as slavery [forced prostitution], sexual terrorism [rape], or imprisonment [confine-ment to the home].

182. Id. at 634-37.
184. See DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, xvi (1994) [hereinafter COUNTRY REPORTS 1993].
185. Basically, the Department of State agrees with and confirms the United Nation’s evaluation concerning the status of women worldwide. The State Department reports that there exists the problem of rampant discrimination against women. Physical abuse is the most obvious example. In many African countries, the practice of female genital mutilation continued. In Pakistan, many women in police custody are subjected to sexual or physical violence. On several continents, women and girls are sold into prostitution. In many Gulf countries, domestic servants from Southeast Asia are forced to work excessively long hours and are sometimes physically and sexually abused. In Bangladesh and India, dowry
worldwide are rendered invisible and silenced by being killed, \textsuperscript{186} physically abused into submission, \textsuperscript{187} and even starved. \textsuperscript{188}

In sum, women's rights and freedoms are imperiled by the systematic denial of their political, \textsuperscript{189} economic, \textsuperscript{190} social, \textsuperscript{191} civil, \textsuperscript{192} and

...
other legal rights which purportedly ensure women’s full participation in the cultural and political life of the state. In today’s world, some women are still silenced by exclusion from such basic activities as voting, traveling, and testifying in court. In addition, women are shut out of economic discourse by being forbidden to inherit and own property and being routinely denied access to education, remu-

73(d), 82 (employment), 1, 2, 3, 6, 9, 26(e), 26(g), 56(c) (economic resources). Much of the discourse in Beijing surrounded women’s much-needed access to economic resources including the issue of women’s non-remunerated employment. Beijing Declaration, supra note 139, at 62, 158, 167, 209, 212 (access to resources), 60, 163, 180 (access to employment in terms of eliminating gender differences in salary and available jobs); see also Nadia H. Youssef, Women’s Access to Productive Resources: The Need for Legal Instruments to Protect Women’s Development Rights, in WOMEN’S RIGHTS, supra note 174, at 279, 279-84 (noting that land reform laws and resettlement programs in particular discriminate against women who also experience discrimination in access to livestock and credit). Youssef explained that:

Excluding women from the bases of rural productivity has been achieved by:
(1) denying women rights to land ownership; (2) stipulating 'exceptions' for women in cases where full ownership of land is granted irrespective of sex; and, most important, (3) 'masculinizing' the head of household concept on the premise that all families contain an adult male economically responsible for maintaining women and children.

Id. at 281.

191. See, e.g., Economic Covenant, supra note 138, passim; CEDAW, supra note 138, passim (economic, social and cultural rights of persons).
192. See, e.g., ICCPR, supra note 136, passim; CEDAW, supra note 138, passim (for recognized civil rights of persons).
193. See, e.g., ICCPR, supra note 136; Economic Covenant, supra note 138; CEDAW, supra note 138, passim.
194. See COUNTRY REPORTS 1993, supra note 184, at xvi (noting that women throughout world are denied the right to vote); id. at 1231 (Kuwaiti women are denied the right to vote).
195. UNHDR 1995, supra note 31, at 43 (“In some Arab countries, a husband’s consent is necessary for a wife to obtain a passport, but not vice versa.”). In Iran, married women may not travel abroad without written permission from their husbands or fathers. See id. (“Women cannot leave the country without their husband’s permission in Iran.”); Akram Mirhosseini, After the Revolution: Violations of Women’s Human Rights in Iran, in WOMEN’S RIGHTS, supra note 174, at 72. This is also the case in Saudi Arabia, and in Nigeria, where a married woman cannot obtain a passport without her husband’s permission. See generally Marsha A. Freeman, The Human Rights of Women in the Family: Issues and Recommendations for Implementation of the Women’s Convention, in WOMEN’S RIGHTS, supra note 174, at 149, 151.
196. See COUNTRY REPORTS 1993, supra note 184, at 1220-21 (under Shar’ia law in Jordan, a woman’s court testimony equals half that of a man).
197. Under Islamic inheritance laws in Kuwait, a Muslim woman may receive only half of what male heirs receive, and “[u]nder customary law in Africa . . . where [there] is communal or clan [real] property, a woman has no right to exercise ownership rights over it.” Julie Mertus, State Discriminatory Family Law and Customary Abuses, in WOMEN’S RIGHTS, supra note 174, at 135, 142. Also, in many countries law and/or tradition dictates that the husband has exclusive control over marital property. Freeman, supra note 195, at 151, 158-59. For example, “[m]arried women are under the permanent guardianship of their husbands and have no right to manage property in Botswana, Chile, Lesotho, Namibia and Swaziland.” UNHDR 1995, supra note 31, at 43.
nerated employment, and health care. Some girls and women have their nutritional needs and food denied because of their sex. In a cruel twist, women are even denied custody of the children they have borne, simply because of their sex. Thus, regardless of a universal sex-equality norm, women's reality is one of gross inequality.

198. Since the Islamic Revolution in Iran, women have been excluded from 79 out of 157 courses of study in the university; 55 courses out of 84 in technology and mathematics, 7 out of 40 in natural sciences, and 17 out of the remaining 33. Only 50% of the women who passed the entrance examination in medicine have been allowed to attend. Women have been banned from all four fields of agriculture. In the faculties of letters and humanities, only 10 of 35 courses are available to women, and women are not allowed to study archaeology, the restoration of historic monuments, handicrafts, graphics, visual communications or cinematography. They are banned from the central Art Institute. In industrial design, there is the maximum quota of 20 percent women. In most fields, women are denied scholarships and not allowed to leave Iran for postgraduate study.

199. Moreover, Rebecca Cook has noted that:
[...]

200. See Rebecca J. Cook, International Human Rights and Women's Reproductive Health, in WOMEN’S RIGHTS, supra note 174, at 256 (noting historical lack of protection of women's reproductive health rights); COOK, supra note 199; UNITED NATIONS, WOMEN: CHALLENGES TO THE YEAR 2000, 23 (1991) [hereinafter CHALLENGES] (women’s health needs “are almost everywhere inadequately addressed”).

201. In Bangladesh, girls have a seventy percent higher mortality rate than boys. Girls are more likely to receive less access to health care than boys in many countries, and in the developing world girls are more than four times as likely as boys to be malnourished. See CHALLENGES, supra note 200, at 23. A shocking example of discriminatory health practices is revealed in a picture of a Pakistani woman holding her two small twins. The boy, who was breast-fed, is plump and healthy-looking. The girl, who was bottle-fed, is less than half her brother's size and obviously near death from malnourishment. The woman’s mother-in-law told her that she did not have enough breast milk for both children, so only the boy was breast fed. The twin sister died the day after the photo was taken. Id.; see also UNHDR 1995, supra note 31, at 35.

202. For example, Qatari women rarely obtain custody of children after a divorce, and non-Muslim women never do. See COUNTRY REPORTS 1994, supra note 176, at 1163. In Iran, women only obtain custody of children if both the father and grandfather of the children are dead. See Mirhosseini, supra note 195, at 73; see also Mertus, supra note 197, at 135, 141 (noting that under shar'ia, women lose custody of their
D. Full Personhood

In looking at full personhood for women, I am on a quest for a new civility in this global society – an environment which would harmonize women’s realities with their legal rights. Women’s flourishing requires humanity, dignity, and access to basic survival habiliments. Personhood, thus, constitutes the proverbial bundle of sticks that belongs to persons because they are human beings. Personhood is both individualistic and relational; it engages the reality that human thriving and dignity are indivisibly connected not only to individual fulfillment, but also to membership and participation in our varied and various communities. These communities include political communities as well as economic and social locations such as the family, religious affiliations, and place(s) of employment.

In order for women to attain full personhood, it is imperative to eschew the notion that liberal individualistic visions are irreconcilable with communitarian traditions. Rather, they must be embraced as interdependent dimensions of human existence – coexisting, overlapping modalities. Given the complexity of the elements necessary for human flourishing, it is more useful and constructive to move away from dichotomizing rights or paradigms and towards a complementary approach. In the context of feminism, we should not contemplate sameness or difference. Rather, especially in light of Heesacker’s and Gilligan’s findings, we should embrace sameness and difference in a nonessentialist manner.

As history has shown, a blueprint premised solely on one side of the equation is structurally defective and is not useful over time or across varied geographies. Human lives are constituted by interlocking communities – ranging from the world, our countries, and our local communities to our work, religion, family, nationality, language, and ethnicity. The oppositional stance that views these complementary locations in juxtaposition to, rather than in tandem with, each other ignores the reality and context within which people exist in society.

Exploring the universality and relativism dyad by looking at the culture of power and the power of culture also exposes the weakness of dichotomization. Indeed, the culture of power universally imposes the visions of a few on everyone all of the time. As the feminist critiques of law discussed in Part II above show, this is not right. Universality should not mean someone’s culture is imposed on everyone else; it should not mean that legal theories, structures, and systems are created only by men and only for men. To the contrary,

children when boys are seven (or reach puberty) and girls are nine (or of marriageable age).

203. For a more detailed analysis of the universalism-relativism dyad, see Guyora Binder, Cultural Relativism and Cultural Imperialism in Human Rights Law, 5 BUFF. HUM. RTS. L. REV. 211, 211 (1999).
universality should be a vehicle used for building consensus, pluralism, and democracy, not one deployed to effect gendered erasures from law. Attaining full personhood requires that we be both liberals and relationalists.

This human rights construct is useful for a feminist anti-subordination project. It is a promising starting point for designing a model that will enable women’s attainment of full personhood. The human rights model seeks to enable women’s full personhood in the home and in the streets, in the family and in the workplace, at labor and at play. Accordingly, the following section presents two models of international lawmaking: communications theory and legitimacy theory. I then utilize the principles presented in those models to create the foundation of a methodology that aims at creating an analytical framework that will promote the goal of attaining women’s full personhood.

IV. Making Change: The Basic Models

In the previous section, this essay showed how use of the human rights framework assists the feminist anti-subordination project by expanding the foundation of what constitutes fundamental human rights predicate to full personhood. Significantly, that foundation includes civil and political as well as social, economic, and cultural rights. The construct views rights in these categories as inalienable, indivisible, and interdependent. In this section, two models are used as the foundation of a methodology for feminist inquiry that will promote the realization of full personhood for women.

The two models that this work utilizes were developed in recognition that theory concerning the formation of international law is inadequate to analyze modern concerns and the proper location of such concerns is in the spectrum of international law. One model, the “communications theory,” also known as the New Haven School, espouses a policy orientation in law-making. The other, Professor Thomas Franck’s legitimacy theory, scrutinizes the elements that render norms legitimate and thus result in norm compliance.

The proposed use of the models to further a feminist project both expands and transcends the models’ original focus on law-making. I apply these models to develop a methodology that is appropriate to any interrogation of justice – be it law or other norm formation, its interpretation, or its enforcement. The methodology contextualizes problems to reveal internal or structural biases, unearths inconsistencies in theory and practice, and serves to unveil the schisms between the myth of equality and the reality of inequality in women’s lives.

A. Communications Theory

The New Haven School takes a “policy oriented” approach to law. It recognizes that international law – as is the case for any legal disci-
pline — is not, and cannot be, a static process. Rather, it "is a continuing process through which the common interest of the members of the world community are clarified and secured. . . . The ultimate goal [of the process is] the establishment of a world community of human dignity." The establishment of such a global community necessitates the attainment of full personhood for women.

The crafters, led by Myres McDougal and Harold Laswell, designed this policy perspective when they recognized the weaknesses of rule orientation, including the problematics of viewing norms as independent of society. Communication theorists articulated six flaws inherent in the realists' rule orientation:

- It is mired in the limitations of positivism; whereas, the heart of jurisprudence is to engage decision-makers, to elucidate their goals, and to contextualize the problems.
- It rendered invisible, if not irrelevant, the various processes and stages of legal application and focused only on the rule and the court.
- Focusing on "rules," it failed to relate them to the social and political values that provided context for the rules.
- It failed to consider power in the equation of decision making — a critically important and sometimes outcome determinative element.
- It failed to comprehend that the legal "institutions and structures" are fluid and ever-changing — they are "the products of an ongoing constitutive process."
- Finally, it focused exclusively on the local, thereby ignoring the impact of the global in the local and the local in the global.

In response to these shortcomings of realism, the New Haven School adopted a policy-oriented approach to "provide a constructive

204. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 4 (1989).
205. Id. at 14-15.
207. Reisman, supra note 206, at 936; CHEN, supra note 204, at 11.
208. Reisman, supra note 206, at 936; CHEN, supra note 204, at 11.
209. Reisman, supra note 206, at 936.
210. Id. at 937.
211. Id. at 937; on the local and global interaction, see Boaventura de Sousa Santos, Toward a Multicultural Conception of Human Rights, in MORAL IMPERIALISM: A CRITICAL ANTHOLOGY (Berta E. Hernández-Truyol ed., forthcoming 2002).
As a contemporary New Haven theorist puts it, "The Copernican Revolution in McDougal's jurisprudence was in unseating rules as the mechanism of decision and installing the human being – all human beings, to varying degrees – as deciders. . . . McDougal committed himself to developing a theory about law that could establish and sustain a free society. . . ." 213

Significantly, the weaknesses of deeming norms in a vacuum as independent of society are also plainly revealed in the various feminist critiques of law. Thus, it is not surprising that the various feminist critiques of the male-orientation in law parallel the six-point New Haven critique of the rule orientation of positivism. First, the liberal individualistic and atomistic conceptualization of law, specifically equality norms, failed to provide context for the different gendered social realities. Second, it rendered women invisible and effected their erasure from legal structures. Third, it failed to relate norms to the human interactions that provide the context for the norms. Fourth, it failed to consider power in the equation of decision-making. Fifth, it failed to recognize the structural gendered biases in legal institutions and structures. Lastly, it focused solely on the individual ignoring the reality of the impact of social institutions – family, school, church, work – on the individual and the individual's existence in constant relation to these institutions.

Moreover, the communication theoretical framework, particularly its acknowledgment of the importance and significance of context and the centering of the human subject in law, is a useful tool for a feminist project which has suffered from a simplistic approach to the complex problem of equality. A discursive approach – a communications process – facilitates not only the unearthing and debunking of the male perspective inherent in legal norms, structures, and institutions that has stalled women's gains but also the inclusion of women's voices in a reconstruction phase. Such an approach recognizes that decision making involves consideration of more than "black letter" law, it also includes consideration – and likely reconsideration – of the policies and purposes behind the laws.

Indeed, Harold Laswell, one of the original proponents of the communications theory, recognized the inability of law alone to have an effect on human behavior. 214 Thus, he grounded the policy approach, which he deemed to be a functional approach 215 to lawmak-

212. CHEN, supra note 204, at 14.
213. Reisman, supra note 206, at 937.
215. Id. at 107.
ing, in a process of communication.\textsuperscript{216} To facilitate the necessary communications, a series of questions was crafted to guide analysis.\textsuperscript{217}

Moreover, communications theorists acknowledged the importance of perspective, recognizing the subjectivity inherent in any one person’s analysis:

The function of the responsible jurist, advisor or decisionmaker, who is a part of that process, is to develop an appropriate observational standpoint, clarify community goals, identify and then perform the intellectual tasks that will enable him or her to assist those who seek legal or policy advice in clarifying goals, and in implementing them in ways compatible with the common interests of the most inclusive community.\textsuperscript{218}

To make a decision, alternatives must be considered; various and varied sets of values must be investigated, taken into account, and weighed. This is precisely what feminists have been asking of law: the rejection of the destructive in/justice paradox. We would strongly agree with the New Haven School observation that “[d]ivorced from policy and context, rules are skeletons without body and soul.”\textsuperscript{219}

Beyond “the normative ambiguity involved in rules, rules are commonly phrased in general and abstract ways. . . . (Thus rigid rules cannot be relied on automatically to resolve a controversy without consideration of context and function.)”\textsuperscript{220} Again, these pronouncements are fully compatible with the feminist critique of the maleness of law that perpetuates the status quo under the guise of neutrality.

New Haven theorists also rejected the necessity or advisability of a precedent-bound system of analysis that imbues rule orientation because it hinders creativity in searching for solutions to new and complex problems.\textsuperscript{221} For example, policy orientation also requires that articulation of public order objectives be clear and specific.\textsuperscript{222} It recognizes that considerations will vary

from context to context. In groups in which there is a high sense of collective purpose, and common interests have been internalized in the personalities of politically relevant members, authority signals alone may be sufficient to create prescriptive expectations. In aggregates in which inclusive identifications and perceptions of com-

\begin{itemize}
  \item \textsuperscript{216} \textit{Id.} at 105.
  \item \textsuperscript{217} \textit{Id.} at 105 (articulating the questions of “Who? Says What? In Which channel? To Whom? With What Effect?”).
  \item \textsuperscript{219} Chen, \textit{supra} note 204, at 12.
  \item \textsuperscript{220} \textit{Id.} at 13.
  \item \textsuperscript{221} \textit{Id.} at 13 (noting that “inherent in . . . preoccupation with past decisions is the assumption, conscious or unconscious, that what has been done in the past will, and should be, repeated in the future”).
  \item \textsuperscript{222} \textit{Id.} at 15, 19-20.
\end{itemize}
mon interest are low or merely rhetorical, the communication of control intention may be most important. 223

The discursive approach to norms’ considerations, the recognition of complexity in society, and the goal of a free society are useful tools for a feminist liberation project. Indeed, the lack of creativity the communications model has identified in the stare decisis approach is part and parcel of what has stunted law’s development in a feminist model.

These basic premises assist the feminist project of placing women at the center, rather than in the shadows, of the law. Concepts centered on the notion of communications and context, as well as on the centrality of humanness in norms, will well serve women whose diverse interests and locations have not been uniformly advanced by any one of the feminist theories or by international rules mandating gender equality. Feminist inquiry requires a holistic (contextual) analytical framework. As Becker acknowledges, “part of the problem is the failure of feminists, particularly feminists working for legal change, to look at the big picture. . . .” 224 A contextual analysis presents a structurally deficient space for the attainment of full personhood by women.

B. Legitimacy Theory

The second theoretical model that this work uses to propose a methodology that will promote women’s full personhood is Professor Thomas Franck’s legitimacy theory. This theory was developed in the context of rule legitimacy in the community of states. It is the analytical structure that Franck crafted to analyze why, in a community in which there is no coercive power because every actor is a sovereign, states nevertheless obey laws. The thesis was that “in a community organized around rules, compliance is secured – to whatever degree it is – at least in part by [the] perception of a rule as legitimate by those to whom it is addressed.” 225 The idea of

[1]legitimacy is used . . . to mean that quality of a rule which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process. Right process includes the notion of valid sources but also encompasses literary, socio-anthropological and philosophical insights. 226

Thus, this too is an approach that makes context relevant.

Franck identifies four elements as “indicators of rule legitimacy in the community of states[:] . . . determinacy, symbolic validation, co-

223. Reisman, supra note 214, at 112.
226. Id.
herence and adherence (to a normative hierarchy).” 227 He found that when “rules exhibit these properties, they appear to exert a strong pull on states to comply with their commands.” 228 As will be shown below, these factors assist in unearthing the reasons for the failure of equality norms to end women’s subordination. Differently stated, and bringing Laswell’s observations to bear, legitimacy theory provides a perspective – a lens through which to analyze women’s conditions – and serves to confirm and transform the law’s inability to change culturally entrenched and reinforced behavior about women’s subordinated social position. 229

Legitimacy theory's four elements assist in my undertaking to develop a methodology to identify, expose, and eradicate the locations at which the law and legal system operate to perpetuate and entrench women's disadvantaged, unequal status – in the civil, political, social, economic, and cultural realms. I deploy the idea of legitimacy to evaluate whether rules, in particular equality norms, can be legitimate as articulated or as applied if they have sorely and severely failed to achieve the anticipated outcome of equality for women. As I structure it, the utility of the legitimacy theory in the women’s context is the identification of the failures of long-standing rules, norms, and processes to enable women’s full citizenship and personhood when the articulated purpose – legally mandated – of those rules, norms, and processes is to achieve women’s equality. That is, I go to the reality of women’s lives and move backwards through the legal maze to ascertain the location of failure, and hence the illegitimacy, of the norm. I will illustrate this by going through each of the identified elements requisite to legitimacy and analyzing the equality notions we have today.

1. Determinacy

Textual determinacy, “the ability of [a] text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning,” 230 is “the most self-evident of all characteristics making for legitimacy. . . .” 231 “[D]eterminacy is the linguistic or literary-structural component of" legitimacy. 232 While indeterminacy may allow for flexibility, it has costs because “[i]ndeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance.” 233 Franck, quoting Wittgenstein, notes that while
no ‘course of action could be determined by a rule because every course of action can be made out to accord with the rule’ some rules are less malleable, less open to manipulation. . . . To be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds.\textsuperscript{234}

Franck’s study concludes that “[a] high degree of textual determinacy goes together with a high degree of rule-conforming state behavior.”\textsuperscript{235} However, he cautions that “‘clarity’ is far from identical with simplicity.”\textsuperscript{236} A rule that is simple will nonetheless not satisfy the legitimacy standard if “it does not send a clear message as to its meaning in such a way as to promote compliance.”\textsuperscript{237} The balance between “simplicity of text [which] is an invitation to \textit{reductio ad absurdum}, which undermines the determinacy of a rule, and . . . complexity [which] imposes an elasticity that deprives it of determinate meaning” is attained by “attention to detail and, in particular, to content.”\textsuperscript{238} Thus, a simple rule will have a high degree of determinacy if it guides behavior that is properly judged in an either/or context.\textsuperscript{239}

However, when the judgment requires a decision between more than two options, that is, when the question constitutes a complex problematic as is the case of women in local and global societies, simple rules fail to satisfy the textual legitimacy standard. On the other hand,

[a] rule finely calibrated to reflect complex considerations, embodying a textured system of regulatory and exculpatory principles, may suffer legitimacy costs because it invites disputes as to its applicability in any particular case. These costs however, can be reduced by introducing a forum in which ambiguity can be resolved case by case.\textsuperscript{240}

For example, in scrutinizing the United States’ constitutional equality norm, its low degree of legitimacy becomes evident. Not that equality is not a desired and desirable goal both domestically and globally. Rather, it is that the very complex notion of equality – including notions of sameness, of claims to impossible objections of difference, and of essentialisms conveyed by that “simple” word standing alone – does not and cannot provide the necessary guidance to the creation of norms, articulation of context, or the application of an equality concept. There exists no clearly articulated set of guidelines to influence the meaning of equality. If equality were sameness, say in the reproductive function context or in average physical characteristics context (such as height or weight), then equality for men and

\textsuperscript{234} Id. at 715-16.  
\textsuperscript{235} Id. at 719.  
\textsuperscript{236} Id. at 721.  
\textsuperscript{237} Id.  
\textsuperscript{238} Id. at 722.  
\textsuperscript{239} Id.  
\textsuperscript{240} Id. at 724.
women may well be an unattainable idea—a manifestation of the destructive in/justice paradox. As such, local and global laws mandating equality are at best deviant rhetorical tropes that maintain the status quo and keep women in subordinated positions.

On the other hand, if equality means equal opportunity, full citizenship, equal access to rights and benefits, and full personhood, then the term equality, standing alone, fails to provide sufficient guidance to its signification. Thus, the indeterminacy of the idea of legal equality permits the rule-maker or the decision-maker to ensure equality only when s/he sees it (or only when s/he sees it as appropriate based on her or his alpha biases). Such an indeterminate standard leaves the door open to inequality based on the perceptions and internal biases of the one making the judgment—perceptions and biases confirmed in the alpha bias unveiled in Heesacker’s work as well as in feminist critiques of law.

The challenges that the feminist legal community has faced with respect to just what is the “right” theoretical construct to attain equality is evidence of the indeterminacy of the equality norm: Should it be sameness? Should it be difference? Should it be relations? Should it be power? The reality is that, depending on context, it could be sameness, it could be difference, it could be relations, or it could be power. In this regard, it is plain that an appropriate rule to achieve equality requires more than just the statement or goal of equality. There is a need to articulate, in more detail, what equality means. Equality, as it is presently understood, is too indeterminate a concept to constitute a legitimate rule.

2. Symbolic Validation

Symbolic validation, ritual and pedigree provide legitimacy’s cultural and anthropological dimension. . . . [T]he legitimacy of the rule . . . is to be examined in the light of its ability to communicate its authority: the authority of a rule, the authority of the originator of a validating communication and, at times, the authority bestowed on the recipient of the communication. The communication of authority, moreover, is symbolic rather than literal. 241

241. Id. at 725 (“[Significantly, t]hese three concepts—symbolic validation, ritual and pedigree—are related, but not identical. The symbolic validation of a rule, or a rule-making process or institution, occurs when a signal is used as a cue to elicit compliance with a command.”).

Ritual is a specialized form of symbolic validation marked by ceremonies, often—but not necessarily—mystical, that provide unenunciated reasons or cues for eliciting compliance with the commands of persons or institutions. . . . All ritual is a form of symbolic validation, but the converse is not necessarily true. Pedigree is a different subset of cues that seek to enhance the compliance pull of rules or rule-making institutions by emphasizing their historical origins, their cultural or anthropological deep-rootedness.

Id. at 726.
Rules of long standing may invite compliance. New rules, however, also invite compliance if they are widely supported. Religious, political, and cultural beliefs may create the foundation for symbolic validation. Significantly, however, a bad law does not become a good one for having been anointed by parliamentary ritual and having received the blessing of pedigreed authority. When decisions to comply or defy are made by those to whom a command is addressed, such cues, with their symbolic validation of its legitimacy, may tip the scales on the side of obedience.

Symbolic validations serve to legitimize principles, institutions, and rules; to ensure rule compliance; and to validate exercise of power. In the equality context, lineage is short for it is only in recent times that the idea of gender equality has been embraced. The Bradwell v. Illinois Court, ruling that women could be refused admission to the practice of law, provided rich confirmation of the acceptance of inequality—women's and men's separate spheres. At that stage of jurisprudential development, the Fourteenth Amendment to the United States Constitution had already been adopted. However, the Fourteenth Amendment, in which sex/gender equality rights are now grounded, was intended to eliminate race, not sex, discrimination; so it originally did not provide women any equality rights.

At present, the relative universality, in theory, of the acceptance of a norm of gender equality would tend to legitimize it. Yet, the reality of gender inequality worldwide works against such a conclusion. Given the universal reality of women's subordinated status, it seems that in the equality context symbolic validation is, at best, sporadically given; at worst, wholly absent. For example, in the United States, there have been laws passed reinforcing the basic idea of equality, such as the equal employment laws. However, even there, dissent from the equality norm is ample. One example was the need to specifically recognize that pregnancy is sex-related, meaning female-related (something that happened in the legislative framework but

242. Id. at 726-27.
243. Id. at 727.
244. Id. at 728.
245. Id. at 730.
246. See supra notes 184-202 and accompanying text.
247. 83 U.S. 130 (1872). See supra notes 3-4 and accompanying text (quoting the Court's language embracing the separate spheres ideology).
248. See, e.g., Minor v. Happersett, 88 U.S. 162 (1874) (holding that the Fourteenth Amendment did not grant women the right to vote).
249. See generally Universal Declaration, supra note 136; ICCPR, supra note 136; CEDAW, supra note 138.
250. See supra Part III.C. (discussing inequality of women).
has not yet become a reality in the constitutional one).\textsuperscript{252} Another example is the rejection of comparable worth strategies that would have translated the values of skill levels from highly-paid “male” jobs to low-paid “female” jobs in an attempt to level the field of earning potential of the sexes. Instead, the system continues to rely on a marketplace made by men, for men, and in men’s image to justify women’s lesser worth.\textsuperscript{253} And even in the constitutional context, sex equality has yet to become a fundamental right, the denial of which is subject to the strictest of scrutiny.\textsuperscript{254} Rather, it is still relegated to the toothless standard of some indeterminate ephemeral middle tier\textsuperscript{255} creating determinacy as well as validation problems. As far as symbolic validation goes, this lesser standard confirms that sex equality is clearly not as legally important as the truly important rights.\textsuperscript{256}

Moreover, beyond the formal rules, civil society continues to invalidate the “equality” – meaning anti-subordination – goals of feminism, both symbolically and actually. Society as a whole still clings to the separate spheres ideology.

Religion, via its leaders, is complicit in locating women in a different and inferior space and, at times, in actively holding them down. Interestingly, religion, like society as a whole, uses family as a reason or pretext for the continuing inequality of women. In the recent apostolic letter \textit{On the Dignity of Women}, Pope John Paul II echoed the socially (and legally) dictated roles for women.\textsuperscript{257} Referring to women’s special capacity to care for others, the Pontiff justified the confinement of women to their role as mothers or, in the alternative, a life of celibacy.\textsuperscript{258}

Similarly, and even more recently, in June 1998, the Southern Baptist Convention in Salt Lake City adopted a statement, based on a supposed biblically-based hierarchy for the family, providing that

\begin{itemize}
  \item[252.] Geduldig, 417 U.S. at 484.
  \item[254.] The \textit{Frontiero} plurality voted for strict scrutiny. \textit{Frontiero} v. \textit{Richardson}, 411 U.S. 677 (1973); \textit{see also} United States v. Virginia, 518 U.S. at 531 (holding that, to justify gender-based government action, the government must demonstrate “exceedingly persuasive justification” for that action while noting that it was not “equating gender classifications, for all purposes, to classifications based on race or national origin”); \textit{but see} Craig v. Boren, 429 U.S. 190 (1976).
  \item[255.] Rush, supra note 5, at 45.
  \item[256.] \textit{See Craig}, 429 U.S. at 197 (establishing an intermediate level of scrutiny for classifications based on gender); \textit{see also} Califano v. Goldfarb, 430 U.S. 199 (1977); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982).
  \item[258.] Id.
\end{itemize}
wives are subordinate to their husbands and are their husband’s helpers. The statement expressly provides that

[a husband] has the God-given responsibility to provide for, to protect and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband. . . . [She] has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.

Embracing the so-called traditional, meaning gendered, family structure, the statement said marriage had to be not only monogamous but also heterosexual. Moreover, it narrowly defined the family structure to exclude widows, widowers, and single persons. Reaching beyond matters directly connected to the family, but nevertheless using family as pretext, the statement rejected women in combat because it goes against the “gender-based designation established by God and undermines the ‘male headship’ in the family.”

These examples show that the symbolic validation of the equality norm in the United States can be said to range from very low to nonexistent. This applies in the legal, formal rule-making, rule-enforcing, rule-interpreting system as well as in civil society. Such a reality supports the illegitimacy of the equality norm as currently understood and deployed in law.

3. Coherence

Coherence . . . must be understood in part as defined by factors derived from a notion of community. Rules become coherent when they are applied so as to preclude capricious checkerboarding. They preclude caprice when they are applied consistently or, if inconsistently applied, when they make distinctions based on underlying general principles that connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system.

Thus, when standards or rules are applied “to some but not others equally entitled, or when the standards cease to be connected to principles of general applicability,” they are incoherent and thus illegitimate.

260. Id.
261. Id.
262. Id.
264. Franck, supra note 225, at 750.
265. Id. at 738.
There are three ways in which incoherence may lead to illegitimacy. Coherence means that similarly situated cases are treated similarly. In the case of equality, coherence "undermines the standard, rules and processes bestowing status or validity." Coherence exists "when the rule relates in a principled fashion to other rules of the same system." Incoherence, on the other hand, "produces a checkerboard result."

As was shown in the discussion on symbolic validation, the application of equality norms has resulted, at best, in an incoherent checkerboard. Sometimes women, particularly if they are similarly situated to men, may be treated the same as men. One example is the apparent prohibition of discrimination in employment. Yet other times, women, even if situated similarly to men, are nonetheless not treated the same as men simply because of their sex. One example, which could also be located in the context of employment, is the exclusion of women from combat even if they are equally able to serve based on their ability to command, to run, to shoot, or simply to survive in a foxhole. Moreover, as the data in the prior sections plainly reveal, there exists a significant disjuncture between rules mandating women's equality and women's reality of subordination and inequality. Hence, coherence is lacking in the contemporary equality discourse in norm formation, norm enforcement, and norm interpretation.

4. Adherence

Adherence "mean[s] the vertical nexus between a single primary rule of obligation . . . and a pyramid of secondary rules about how rules are made, interpreted and applied: rules, in other words, about rules." In essence, "[a] rule . . . is more likely to obligate if it is made within the procedural and institutional framework of an organized community."

In the equality context, the adherence concept takes a twist. While technically the primary rules as well as the secondary rules about rules may have been followed, the crafters, articulators, and in-

266. Id. at 741 ("First, incoherence nullifies the flawed act of validating or withholding validation. Second, it undermines the standards, rules and processes for bestowing status or validity. Third, it derogates from the legitimacy of the institution that is charged with validating.").
267. Id.
268. Id.
269. Id.
272. Franck, supra note 225, at 752.
273. Id.
terpreters of the rules have not been representative of the community. Just looking at the composition of the original drafters, the legislature and the judiciary, it is patent that women's voices have been absent. Thus, while the community is developed in relation to the structure that produces the rules, the structure has been gendered and thus has not been representative of the community. This consequently raises questions about its legitimacy.

In sum, the legitimacy approach, which interrogates the legitimacy of an established norm, combined with the discursive movement\textsuperscript{274} of the New Haven School, which asks us to take a policy-oriented approach to norm formation, provides the foundation for developing a methodology that will pave the way for attaining women's full personhood. As the legitimacy construct cautions, the methodology is complex. Yet, its intricacy is required for the complex interrogation that is needed for the articulation of a construct that will enable women's full personhood; full citizenship; and equal status, rights and participation in society.

V. THE APPLICATION - TAKING CONTROL: BREAKING CYCLES OF INEQUALITY

This model creates a complex framework; it demands that the human question be part of the foundational data at every stage of any process. This interrogation has been historically referred to as the "woman question" which demanded the inclusion of women's voices, concerns, needs, desires, and perspectives (varied as they may be). Recognizing the multidimensional nature of women and women's lives, asking the "human question" requires that there be a nonessentialist, multidimensional evaluation of the impact of the scrutinized process on any and all women. Such multidimensionality demands that the interrogation indeed consider intersections with race, class, religion, national or social origin, ethnicity, descent, color, class, gender, and sexuality. This inquiry deconstructs the conflation of sex/gender and all other aspects of a woman's personhood; it recognizes and embraces the indivisibility and interdependence of women's identities. The emphasis on the various components will be dependent upon the context of the inquiry.

The inquiries must be considered separate from, but in the context of, interdependent with, and indivisible from the other pertinent inquiries. Each query interrogates whether there are gender-specific implications of the norm or proposed norm – particularly when it appears to be neutral or objective. Such analysis will ensure that identified causal links between gender and a particular outcome are accurate and relevant to the issue being considered. The analysis will

\textsuperscript{274} See Juergen Habermas, Communication and the Evolution of Society 178-79 (T. McCarthy trans., 1979) (emphasizing the role of discursive validation of law).
ascertain whether the elements requisite to legitimate norm creation exist. It will account for the multiplicity of coexisting factors that reflect the multidimensionality of women’s lives.

The common thread of each inquiry, of course, is to make women visible and raise their voices so that their needs are met and their rights are respected and fulfilled worldwide. In this regard, there has to be an acceptance that in order to raise women’s voices a discursive process of communication that includes women is necessary. Regardless of who the ultimate decision-maker is, the process must include and integrate the views of those who are the subjects and the objects of the process, from whom expectations are being generated by the process. Women’s perspectives must be part of the deliberations. The ultimate legitimacy of the process itself will depend upon the consent of the people and the recognition and acceptance of the opinion of the people. The people include women.

This leads to the logical need for women’s participation in any process, participation that must be holistic. Women must participate as both the inquired about and the inquirers, permitting discourse on the translations and interpretations from women’s perspectives. Only with women’s presence and perspectives in, for example, the processes of government and governing will women’s concerns and issues become an integral part of, and incorporated into, the human rights processes and the global rights agenda. Many of the gendered shortcomings of the human rights model can be attributed to the exclusion of women from participation in the global processes and institutions.

With respect to any factor that can be a tool of imperialism or of gender oppression under the guise of neutrality, a balancing test is in order. Culture is one such factor; social normativity is another. To evaluate any perceived or claimed conflict between a cultural practice or social norm and a right, one must first obtain information about the cultural practice/social norm from both an insider’s (a proponent of the practice/norm) and an outsider’s (one claiming the practice/norm effects a deprivation of rights) perspective. Similarly, the claimed human rights deprivation must be examined from an insider and an outsider perspective.

In this regard, particular attention to cultural practices/social norms is necessary so that they may be carefully protected from the improper imposition of outsiders’ ideologies. On the other hand, neither culture nor social normativity should be allowed as a pretext to shield practices/norms that perpetuate women’s subordination. In examining a cultural practice or social norm that appears to disadvantage only women, or to have a disproportionately burdensome or deleterious impact on women, the harms of violating the human rights norm must be weighed against the benefit of the cultural practice/social norm. Several useful inquiries to guide in creation of legitimate
equality norms and to assist in the evaluation of existing ones include the following which assist in detailing gendered consequences:

- What is the origin and value of the cultural practice/social norm?
- What is the nature of the practice/norm being challenged?
- Is there a uniform interpretation of the source and nature of the practice/norm?
- Who is challenging the practice/norm (an insider? an outsider? an oppressed person within the insider community whose status renders her an "other")?
- What are the challenger's motives in opposing the practice/norm?
- What are the claimed harmful outcomes of the practice/norm?
- What is the level of significance of the practice/norm within the community?
- What is the level of intrusion of the practice/norm on protected individual/group rights?
- What is the level of significance of the protected right to the community?

It is beyond dispute that a broad range of cultural practices and social norms exist that may interfere with women's attainment of full personhood. The proposed methodology is one in which all perspectives are represented and considered in the conversations about rights. Women's participation and representation will safeguard against the "tyranny of the majority" – ensure that the powerful, meaning male, entities do not use culture or other accepted social norms as a sword to eviscerate harmless (even if gendered) cultural/social traditions and that such traditions are not used as a shield against accountability for negating women's full complement of rights. This is particularly significant because all women live in a world where gendered cultural prejudices have constituted the formulation of law.

The proposed blueprint for analysis should be useful in any context that has an impact on women – whether it be gathering or interpreting data; creating, applying or interpreting norms; designing programs or projects; or drafting documents. The developed model effects much needed reform to render women full citizens of their global and local communities. The new paradigm seeks to remedy the gendered (and racialized) deficiencies in the existing policies, rules, and social contexts, as well as to bridge the schism between women's realities and the nondiscrimination and substantive entitlement rules.

VI. CONCLUSION

A process that embraces the discursive approach and analyzes norms and practices (or proposed norms and practices) to ascertain their legitimacy develops a feminist methodology to fit the complex

275. See supra notes 173-177, 180-182, and accompanying text.
location of women in society around the world. As this essay has shown, no one feminist theory has succeeded in creating a paradigm that can serve to eradicate women's subordinated status in all their myriad locations in law and life. At first blush, application of the legitimacy model offered as an explanation for the failure of any single theoretical model's success that the word "equality" is insufficient to attain full personhood for women. The legitimacy analysis did, however, reveal that the policy of equality can be embraced in society as it has been in law on paper. In order to evaluate what an adequate policy of equality might be, legitimacy theory, combined with communication theory, tells us to engage in a complex series of inquiries to ascertain the source of and reason for women's second-class citizenship – a location often justified by traditional and cultural constructions of gender roles.

Because of the complexity of the concept of equality, there can be no simple solution, no one-size-fits-all theoretical model. It is not sufficient to have the answer pot all ready and then simply add sex and stir. Rather, a complex interrogation of the contextual framework is the only approach that can eventually lead to a legitimate – multidimensional and culturally sensitive – perspective. These questions will pave the path for legitimate norms – norms that are determinate because they have input from and thus consent of those governed by the rules, which will, in turn, result in adherence to the norms. More importantly, the norms themselves will have considered women's voices, their locations, their needs, their strengths, and their weaknesses because, notwithstanding their differences – be they real or imagined – from the normative male model, women are still entitled to full citizenship.

A legitimate concept of equality will allow the transformation of women's position. Following this inclusive methodology, one that specifically articulates points of inquiry concerning locations of subordination and reveals the illegitimacy of the existing approaches, provides the starting point to ensure that women attain full personhood.